STATE OF NEVADA DEPARTMENT OF EDUCATION

REVIEW OFFICER DECISION

In the matter of

STUDENT by and through his[1] parent, PARENT[2]
Petitioner-Appellant,

v.

Perry A. Zirkel, State Review Officer

CLARK COUNTY SCHOOL DISTRICT,
Respondent-Appellee.

I. PROCEDURAL BACKGROUND[3]

On July 13, 2020, the Parent filed the complaint[4] in this matter under the Individuals with Disabilities Education Act (IDEA)[5] and Nevada's corresponding state statute and regulations.[6] Citing the pandemic-related changes in services, the complaint started by reciting the Parent's request to the Student's elementary school principal earlier on that day requesting revision of his individualized education program (IEP), only to be informed that the earliest availability for an IEP meeting would be almost a month later.[7] The complaint claimed at its outset that the IEP needed revision to appropriately address the Student's needs.[8] Citing the

[1] The term "his" or "he" is used generically herein instead of designating the actual gender of Student or the Parent.

[2] "Parent" is also used generically herein without differentiation as to father and/or mother.

[3] The record in this matter includes two volumes of exhibits and other documents, such as hearing officer orders, referred to herein by volume, tab (and, where applicable, the attachment, abbreviated "Att." within the tab), and page number(s). The record also includes a transcript consisting of two volumes corresponding to the hearing sessions, cited herein as "Tr. I" and "Tr. II," respectively, followed by the page number(s).

[4] Vol. I-Tab 1-Att. 3, at 4–6.

[5] 20 U.S.C. §§ 1401 *et seq*. (2018); 34 C.F.R. §§ 300.1 *et seq*. (2019).

[6] NEV. REV. STAT. §§ 388.419 *et seq*. (2018); NEV. ADMIN. CODE §§ 388.460 *et seq*. (2019). This decision refers to this corollary state statute and administrative code only to the limited extent that they add in relevant respect to the IDEA legislation and regulations.

[7] Vol. I-Tab 1-Att. 3, at 4.

[8] *Id*. at 4.

U.S. Department of Education March 2020 pandemic-related guidance[9] and the Supreme Court's most recent decision specific to the IDEA's requirement for "free appropriate public education" (FAPE),[10] the complaint went on to assert that the distance learning that the District had provided to the Student during the pandemic had amounted to a denial of FAPE for him.[11] Reporting that the Parent had arranged for private in-person tutoring for the Student three times per week for the period period, the complaint's proposed resolution was to revise the IEP to include in-person delivery, with the contingent remedy being compensatory services.[12]

On August 24, 2020, after conducting a series of written communications and prehearing conferences with the parties,[13] which included narrowing of the issues to the period starting with the Parent's request for an IEP revision for the present school year,[14] the first hearing officer recused herself before deciding the District's motion for dismissal.[15]

On October 5, 2020, after conducting a series of written communications and prehearing conferences with the parties,[16] the promptly appointed second impartial hearing officer (hereinafter referred to as "the IHO") issued a decision dismissing the Parent's complaint "[t]o the extent that [it] deals with the provision of FAPE under the Governor mandated COVID-19

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[9] *Id*., citing https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf (see Vol. I-Tab 17).

[10] Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017).

[11] Vol. I-Tab 1-Att. 3, at 5–6.

[12] *Id*. at 6.

[13] *E.g*., Vol. I-Tab 1-Atts. 6–11.

[14] Vol. I-Tab 1-Att. 10. In eliminating the previous period that included the services to the child under the November 2019 IEP during the pandemic period, the hearing officer recognized the Parent's right to raise the issues of the prior period in a subsequent filing. *Id*. at 1–2.

[15] Vol. I-Tab 1-Att. 16.

[16] *E.g*., Vol. I-Tabs 3–11. The October 1, 2020 prehearing report and order set forth this flowchart-like set of issues:

> A. Whether the Hearing Officer has jurisdiction to hear this matter given the current decisions of the School District relative to distance learning, hybrid learning and in person learning.
> B. If so, whether the School District is required, under the IDEA, to implement the services in the Student's IEP in person when the District is providing only distance learning to all Students ….
> C. If so, does the failure to provide in-person services to the Student under the November 2019, IEP result in a denial of FAPE?
> C. If it does result in a denial of FAPE to the Student, what are the remedies?

I-Tab 11, at 2. In addition to minor lettering and punctuation errors, this order omits the issue of the revised IEP.

rules … through July 28, 2020" but denying to do so on jurisdictional grounds for the 2020–21 school year.[17]

On October 23, 2020, after conducting hearing sessions on October 15 and 16, the IHO issued a final decision that dismissed the case.[18] The decision recited the aforementioned[19] four sequential issues, adding the following as number 5: "Whether the School District is required to prepare a new IEP for the Student?"[20] For the IHO's dismissal of this issue #5, the stated basis was mootness in light of the intervening issuance of an IEP on September 25. For the rest, the IHO appeared to conflate #2 into the jurisdictional scope of issue #1 in concluding that "This IEP [sic] hearing officer does not have jurisdiction over [the District's] across the board decision to implement distance learning at the start of the 2020–21 school year], and cannot under these circumstances order the School District to provide in person teaching."[21] The cited basis for this conclusion was a federal district court decision in the COVID-19 context that relied on an earlier Ninth Circuit decision concerning Hawaii's systemwide "furlough-Friday" action in response to an economic crisis.[22]

On November 23, 2020, the state superintendent received the Parent's appeal of the IHO's decision.

On November 24, the state superintendent appointed me as the state review officer (SRO) for this appeal, specifying a due date of December 23 for my decision.

On November 30, I held a status conference with the parties via Zoom. The primary

[17] Vol. I-Tab 3-Att. 12, at 8–9.
[18] Vol. I-Tab 3-Att. 13.
[19] *See supra* note 16.
[20] I-Att. 13, at 2–3.
[21] *Id*. at 8.
[22] J.C. v. Fernandez, 77 IDELR ¶ 15 (D. Guam 2020) (citing N.D. v. Haw. Dep't of Educ., 600 F.3d 1104 (9th Cir. 2010)).

result, as summarized in a written report to the parties the next day[23] and explained in the "Legal Conclusions" section of this decision, was that the IHO's formulation of the issues did not square with the due process complaint and subsequent prehearing communications between the parties and the two successive hearing officers.[24] Consequently, the order scheduled oral arguments on December 8, again via Zoom, to address the following three issues and whether remand was appropriate for addressing question B and/or question C if the answer to question A were yes:

A. Whether the hearing officer had jurisdiction for this matter?

B. If so, whether the 9/25/20 IEP met the applicable standards for FAPE?

C. If not, what shall the remedy be?[25]

On December 9, 2020, the parties provided their oral arguments for these three issues.[26] During this session, they both requested that, if my decision were to answer the first question affirmatively, I proceed to address question B and, if that answer were yes, to also answer question C rather than remanding either of these two questions to the IHO.[27]

II. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record.[28] The SRO finds persuasive the interpretation of the Third Circuit

[23] SRO Exhibit 1.

[24] The parties also agreed with my conclusion that there was no need for additional evidence. *Id.*

[25] *Id.*

[26] Although the report omitted the remedy issue upon confirming that the scope should include any arguments and authority on remand, the oral arguments session expressly allowed and included the remand discussion.

[27] Their stated reasons for this shared recommendation focused on judicial economy in terms of the IDEA's finality principle), thus minimizing transaction costs for both parties, subject to the option of judicial appeal. 34 C.F.R. § 300.514(d) (2019).

[28] *Id.* §§ 300.514(b)(2)(i) and 300.514(b)(2)(v) (2019).

in *Carlisle Area School District v. Scott P.,*[29] requiring "plenary review" with one narrow exception: "[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion."[30]

III. ISSUES[31]

As a threshold matter, the scope of this SRO decision is limited to answering these three questions:

1. Did the IHO's decision as to jurisdiction err as a matter of law?
2. If so, did the 9/25/20 IEP meet the applicable standards for FAPE?
3. If not, what shall the remedy be?

IV. FINDINGS OF FACT

Having attended the same elementary school since kindergarten, the Student is currently a second grader. His IDEA eligibility classification is intellectual disabilities.[32] He has a diagnosis of apraxia, which affects his speech and fine motor skills.[33] As a result of his individual needs, the recognized critical elements of appropriate instruction included gaining his attention, chunking instruction, modifying assignments (e.g., highlighting a response for him to

[29] 62 F.3d 520 (3d Cir. 1995).

[30] *Id*. at 529. The Third Circuit explained that "beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute's language about 'independent' decisions effect, the [SRO] must have much more leeway in reviewing other non-credibility based findings of the hearing officer." *Id*. at 528–29 (citing Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeal Panel,* 3 WIDENER J. PUB. L. 871, 892 (1994). The Ninth Circuit indirectly appeared to approve of this approach. Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 888–89 (9th Cir. 2001).

[31] These three issues, which are within the aforementioned notice to the parties (*supra* text accompanying note 24), are based on the general duties of the SRO (NEV. ADMIN. CODE § 388.315(1). The discussion of the first issue, *infra* notes 64–79 and accompanying text, includes the explanation of the IHO's error in his statement of the issues.

[32] Tr. I, at 158.

[33] *Id*. at 162–63; Tr. II, at 15.

trace), and teacher proximity to avoid distractions.[34] He also struggles upon asked to work independently.[35] Finally, he needs instruction that includes tactile reinforcement, social interaction, and physical presence.[36]

During the pandemic period of the previous school year, the understanding of the Student's general education teacher for distance instruction was not to teach any new material.[37] Moreover, during those three months, the special education instruction was for limited periods and not on a daily basis.[38]

The 2020 extended school year (ESY) program for the Student was less extensive and, individualized than that for the previous summer due to the change from in-person to distance learning.[39]

The District's 2020–21 school year began on August 24.[40] Per the Governor's June 9, 2020 Emergency Directive, which required all school districts to develop plans for the 2020–21 that provided for distance education, in-person instruction with strict social distance protocols, or a combination of distance and in-person instruction,[41] the District opted for distance education for all students.[42] The distance learning consisted of both synchronous and asynchronous instruction, with the difference being availability for interaction with the teacher.[43] The IEP team did not consider any other modality of instruction, such as in-person

[34] Tr. I, at 51, 54–56; Vol. II, Tab 4, at 14–15 of 88.
[35] Tr. I, at 124–25.
[36] *E.g.,* Tr. I, at 23, 66, and 181; Tr. II, at 68 and 73.
[37] Tr. II, at 62.
[38] *E.g.*, *id*. at 76; Vol. II, Tabs 3, 5, and 11. The Student's special education resource room teacher remained with him from kindergarten through grade 2. Tr. II, at 74.
[39] *E.g.,* Tr. II, at 49 and 54.
[40] Tr. I, at 23.
[41] Emergency Directive 022 (June 9, 2020), https://gov.nv.gov/News/Emergency_Orders/Emergency_Orders/.
[42] Vol. II, Tabs 20–21.
[43] *E.g.,* Tr. I, at 121. More specifically, asynchronous learning, not being in real time, requires independent learning. *Id*. at 133.

delivery via private contractors, for the Student.[44]

At the start of the 2020–21 school year, the Student's reading and math achievement on standardized tests were well below average.[45] Although his percentiles remained at a very low same level, he had made some progress compared to his mid-year scores for 2019–20.[46]

During the first month of the 2020-21 school year, the synchronous resource-room instruction consisted of separate 15-minute segments for math, reading, and writing followed by a 10-minute session for math/ELA.[47] He was the only one in these special education sessions.[48] The special education teacher occasionally noted that he was inattentive, requiring prompts to focus on the instruction, particularly for math.[49]

Due to both parents' work necessitating them being at their offices during the synchronous distance learning, they hired a tutor to sit with the Student during these sessions, but she was not at all effective in keeping him focused, leading to her termination after the first two weeks.[50] Thereafter, the Student's sibling, who is a high-performing ninth grader, helped keep him stay on task, which necessitated constant re-direction.[51] The Parent also hired two tutors to maintain his progress, with one providing 1:1 instruction for two hours in the morning and the other for two hours in the afternoon for four days per week.[52] They arranged for gymnastics for the fifth day to assist with his hand-eye coordination.[53]

During this same first month, the District did not provide the 30 minutes per week of

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[44] *E.g.*, *id*. at 41.
[45] *Id*. at 84–85; Vol. II, Tab 4, at 68–70 of 88.
[46] *E.g.*, Tr. I, at 97–98; Vol. II, Tab 17, at 36–37 of 46.
[47] Vol. II, Tab. 19.
[48] Tr. I, at 80.
[49] Vol. II, Tab. 19.
[50] Tr. II, at 64.
[51] *E.g., id*. at 62, 69, 71 The Student's frustration was particularly evident during the math sessions. *See, e.g., id*. at 71.
[52] *Id*. at 66–67.
[53] *Id*. at 67.

occupational (OT) specified in the Student's IEP.[54] The reason was the individual service provider's ethical concerns about a parent or adult not being in the home at the scheduled time.[55] Although duly notified, the District did nothing to resolve the situation.[56]

On or about September 18, the District provided the Parent with a draft IEP for 2020–21, which left blank the number of minutes for the specially designed instruction and related services.[57]

On September 25, the District held the IEP meeting for the Student, which started with distribution of the previous draft but with the minutes filled in for the specially designed instruction,[58] with the proposed amounts for synchronous and asynchronous distance delivery per a District directive.[59] These allocations per week represented a notable reduction from the corresponding amounts in the previous IEP,[60] causing a change from 49% to 32% of his time in special as compared with general education.[61] The other team members rejected the Parent's protestations[s] even though these reductions were based on cross-the-board limits for distance learning rather than the individualized needs of the Student.[62]

In the limited time on the record since the issuance of the new IEP, the aforementioned[63] lack of OT services has continued despite the unchanged IEP specification of 30 minutes per

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[54] The OT service was in support of the writing component of the Student's IEP in light of his apraxia-related needs specific to fine motor skills. *E.g., id*. at 9 and 15.

[55] *E.g*., *id.* at 28–29. This service provider is an independent contractor. *Id*. at 31.

[56] *E.g*., *id.* at 30 and 32–33.

[57] *See, e.g.,* Tr. I, at 125.

[58] *Id*. at 127.

[59] *See, e.g., id.* at 128.

[60] The specific reductions were as follows:

- reading: from 250 min. to 100 min. synchronous+100 min. asynchronous
- math: from 250 min. to 100 min. synchronous+100 min. asynchronous
- writing: from 200 min. to 80 min. synchronous+40 min. asynchronous
- social-emotional: from 150 min. to 15 min. synchronous+15 min. asynchronous

Id. at 129–30 and 135–36.

[61] *Id*. at 147–48.

[62] *See, e.g., id.* at 128, 134–35, 144, and 149.

[63] *See supra* note 54 and accompanying text.

week.

V. CONCLUSIONS OF LAW

Jurisdiction

Addressing the issues for this decision,[64] the threshold conclusion is that the IHO erred as a matter of law in concluding that the complaint failed for lack of subject matter jurisdiction. As the IHO recognized, the subject matter jurisdiction for due process hearings under the IDEA is broad and clearly includes the central obligation of FAPE.[65] Any reasonable reading of the Parent's complaint ineluctably reveals that it concerns FAPE under the Student's IEP.[66] Indeed, even the District's letters upon confirming receipt of the complaint and in transmitting it to the state superintendent both characterized the complaint as concerning "[t]he alleged failure of the . . . District to provide the [S]tudent a . . . FAPE."[67]

The first of the IHO's errors was to confuse the proposed remedy with, and give it superseding effect over, the indisputable gravamen of the complaint. The IHO misconstrued the Parent's proposed remedy as necessitating the provision of in-person instruction at school as compared with other potentially safe settings and excluding other forms of relief, such as compensatory education. But even if that were the Parent's request, the IDEA's requirement for the complaint to include "a proposed resolution of the problem to the extent known and available to the party at the time"[68] does not preclude the IHO's subject matter jurisdiction for a FAPE complaint. By in effect putting the cart before the horse, the IHO confused the perceived

[64] *See supra* text accompanying note 31.

[65] 20 U.S.C. § 1415(b)(6)(A) (2018) ("any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a [FAPE] to [the] child"). For the centrality of this obligation, see, e.g., Sytsema v. Acad. Sch. Dist., 538 F.3d 1306, 1312 (10th Cir. 2008) (characterizing FAPE as the "central pillar of the IDEA"). For the related role of the IEP, see, e.g., Murray v. Montrose Cnty. Sch. Dist. RE-1J, 51 F.3d 921, 923 n.3 (10th Cir. 1995) (referring to the IEP as the "cornerstone" of this central pillar).

[66] *See supra* notes 4–12 and accompanying text.

[67] Vol. I, Tab. 1, Att. A, at 1 and 10.

[68] 20 U.S.C. § 1415(b)(7)(A)(ii)(IV) (2018).

limit of his remedial authority with the broad scope of his subject matter jurisdiction. By way of analogy, the prevailing weight of judicial authority requires the exhaustion of the impartial hearing process upon a parent's IDEA claim for money damages despite the unavailability of this remedy under the IDEA.[69] The primary reason for rejecting the futility exeption is that IHOs have broad equitably remedial authority, which includes reimbursement, compensatory education, and prospective relief, thus not allowing the parents' requested relief to preempt the hearing officer's subject matter jurisdiction.[70]

Moreover, for the pandemic period, neither Congress nor, in its more limited capacity, the U.S. Department of Education has provided any jurisdictional or FAPE exception for the pandemic period. The IHO has not cited, and I do not know of any, adjudicative authority that has provided such an exception.[71] Instead, the IHO relied on a federal court decision in Guam based on the Ninth Circuit's pre-pandemic ruling in *N.D. v. Hawaii Department of Education*.[72] The problems with this reliance are (1) these courts, as more recently the federal district court in Nevada did in its unpublished denial of preliminary injunctive relief in response to a class action,[73] directly addressed the plaintiff's stay-put claim rather than denying subject matter jurisdiction. Moreover, the Ninth Circuit's *N.D.* denial of preliminary relief under the stay-put class action claim expressly preserved the right of individual parents to have the merits of their

[69] *E.g*., K.D. v. Unified Sch. Dist., 816 F. App'x 222, 224 (9th Cir. 2020); McMillen v. New Caney Indep. Sch. Dist., 939 F.3d 640, 647–48 (5th Cir. 2019); Nelson v. Charles City Sch. Dist., 900 F.3d 587, 594 (8th Cir. 2018); Z.G. v. Pamlico Cnty. Bd. of Educ. Bd. of Educ., 744 F. App'x 769, 777 & n.14 (4th Cir. 2018); J.L. v. Wyo. Valley W. Sch. Dist., 722 F. App'x 190, 194 (3d Cir. 2018).

[70] *Id*.

[71] To the contrary, in addition to the court decision *infra* note 104, various hearing and review officers have addressed FAPE claims as a result of district decisions to change from in-person to distance instruction as a result of the pandemic. *E.g*., Ringwood Bd. of Educ., 120 LRP 36926 (N.J. SEA Nov. 19, 2020); Long Beach Unified Sch. Dist., 120 LRP 33840 (Cal. SEA Nov. 18, 2020); Long Beach Unified Sch. Dist., 120 LRP 33840 (Cal. SEA Oct. 12, 2020); Watertown Bd. of Educ., 120 LRP 36379 (Oct. 8, 2020); D.C. Pub. Sch., 120 LRP 33836 (D.C. SEA Sept. 28, 2020); N.Y.C. Dep't of Educ., 77 IDELR ¶ 237 (N.Y. SEA Sept. 17, 2020); Norris Sch. Dist., 120 LRP 30203 (Cal. SEA Sept. 2, 2020); L.A. Unified Sch. Dist., 77 IDELR ¶ 116 (Aug. 24, 2020); Blue Hills Reg'l Tech. High Sch., 77 IDELR ¶ 83 (Mass. SEA July 6, 2020).

[72] *See supra* note 22 and accompanying text.

[73] C.M. v. Jara, No. 2:20-CV-1562 JCM (BNW) (D. Nev. Nov. 19, 2020) (SRO Exhibit 2).

FAPE claims addressed,[74] which some of them subsequently did.[75] Finally, in the COVID-19 context, a federal court in New York in the specific context of the pandemic similarly rejected a preliminary injunctive relief for a class action stay-put claim but preserved jurisdiction for individual FAPE claims.[76]

The second jurisdictional error of the IHO was one of omission rather than commission. As the parties stipulated during the status conference for this review,[77] the IHO failed to identify their mutually agreed upon FAPE issue for the September 25, 2020 IEP. The IHO's report and order for that status conference explained, in relation to the IHO's five-part formulation,[78] that "the [IHO's] issue #2 focused on a remedy rather than FAPE; issues ##3–4 focused on the 11/12/19 IEP, which was specific to the period dismissed in the hearing officer's 10/5/20 order; and issue #5 focused on the preparation of the IEP, which had already taken place, rather than the issue of its appropriateness."[79]

Having resolved the jurisdictional issue, which is separable from the ultimate merits of the FAPE issue, I proceed per the parties' shared recommendation to decide the rest of the case without remand.[80] For the next question, the FAPE analysis in this case is limited to the

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[74] N.D. v. Haw. Dep't of Educ., 900 F.3d at 1117.

[75] *E.g.*, Noah D. v. Haw. Dep't of Educ., 61 IDELR ¶ 243 (D. Haw. Aug. 20, 2013); M.D. v. Haw. Dep't of Educ., 864 F. Supp. 2d 993 (D. Haw. 2012); Haw. Dep't of Educ. v. N.D., 58 IDELR ¶ 76 (Dec. 14, 2011).

[76] J.T. v. de Blasio, 77 IDELR ¶ 252, at *43 (S.D.N.Y. Nov. 13, 2020).

[77] SRO Exhibit 1. Indeed, if that IEP were not at issue in this case, the earlier dismissal without prejudice, which is traceable to the first hearing officer's deliberations, left the IHO's only issue on the merits, which is #3, devoid of any meaning. Obviously, upon postponing the proceedings until the after the issuance of the September 25, 2020 IEP, the IHO needed to update the focus of the Parent's unchanged concern to this IEP. If not, the result of the three months of this dispute resolution process, which was from the July 13 filing to the October 5 decision, would be nothing more than requiring a repeat of the process. To have her unchanged FAPE concern resolved, the Parent would have to re-file the original complaint with cosmetic changes to differentiate the periods before and after September 25 for confirmed coverage. The parties made clear in the status conference that this exercise in futility was not their shared intent during the prehearing communications with the IHO and was not in either one's interest for resolution of this matter.

[78] *See supra* notes 19–20 and accompanying text.

[79] SRO Exhibit 1, at 1.

[80] *See supra* note 27. For reinforcing authority, see Muth v. Cent. Bucks Sch. Dist., 839 F.2d 113, 124–26 (3d Cir. 1988), *rev'd on other grounds sub nom. Dellmuth v. Muth*, 491 U.S. 223 (1989). In this case the Third

September 25 IEP. The consideration here of the prior period here is only as background for that FAPE determination. Although the prior ten-month period would seem to have been not only part and parcel of the Parent's complaint but also well within the range of the IDEA's statute of limitations for many FAPE adjudications, the IHO dismissed it without prejudice.[81] Since the dismissal was not part of the Parent's appeal, it is not addressed here.

FAPE

As the preface to this analysis, the District's repeated arguments at the IHO and SRO levels in this case warrant the reminder from the federal and state administering agencies of the IDEA: "If State and local decisions require schools to limit or not provide in-person instruction due to health and safety concerns, [they] are not relieved of their obligation to provide FAPE to each child with a disability under IDEA."[82] Alternatively stated in response to the District's repeated argument, "'impossibility' is not a defense that relieves the District of its obligation to provide the Student FAPE."[83] That is not to say that the unprecedented emergency is not to be taken into consideration, particularly in the equitable balancing at the remedial stage, but it is not—based on the cumulative applicable authority to date—a waiver of the FAPE obligation. The pandemic-necessitated health and safety concerns provide the outer boundaries for the provision of both services and remedies without preempting either one.

The FAPE analysis for the September 25 IEP starts with the procedural dimension that the Supreme Court first established in *Board of Education of Hendrick Hudson Central School*

Circuit ruled that the finality requirement prohibited remands from the review officer to the hearing officer level based on "the importance . . . of prompt resolution of disputes" under the IDEA. *Id*. at 125.

[81] *See supra* note 17 and accompanying text. Indeed, this ruling retraced the first hearing officer's earlier action. *See supra* note 14 and accompanying text.

[82] U.S. Office of Special Education Programs, COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services, 77 IDELR ¶ 138 (Sept. 28, 2020); Nevada Department of Education, COVID-19 and Students with Disabilities (Nov. 10, 2020), http://www.doe.nv.gov/home/COVID_Resources/.

[83] Lake Stevens Sch. Dist., 77 IDELR ¶ 207, at *14 (Wash. SEA Aug. 5, 2020).

District v. Rowley[84] and that Congress subsequently refined in the two-step test in the 2004 amendments of the IDEA.[85]

Here, the prejudicial procedural violation was predetermination. When preponderantly proven, predetermnation the two requisite steps: (1) by violating the requirements for "meaningful" parental participation in the formulation of the IEP,[86] and, consequently, (2) by significantly impeding the parents' opportunity for participation in the FAPE decision making process.[87] Although parents' perceptions of predetermination often do not translate to fulfill the requisite evidentiary standard upon impartial adjudication,[88] here the record rather clearly does so based on the combination of (a) the District's draft IEP lacking specification of the amount of specially designed instruction and, yet, the same items being filled in unilaterally before the meeting started, so that the Parent did not have the opportunity to consider them beforehand with the rest of the draft or fill in such entries in collaboration with the other members of the team at the meeting[89]; and (b) the establishing of these amounts based on the District's prior cross-the-board determinations for synchronous and asynchronous learning without careful consideration of and customization to the Student's individualized needs.[90]

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[84] 458 U.S. 176 (1982).

[85] 20 U.S.C. § 1415(f)(3)(E)(ii) (requiring resultant specified harm to the student or parent); *see also id*. § 1415(f)(3)(E)(iii)) (providing in the absence of such loss that hearing officers still have authority to order prospective procedural relief). For the residual prospective authority, see, e.g., *Dawn G. v. Mabank Indep. Sch. Dist*., 63 IDELR ¶ 63 (N.D. Tex. 2014); *see generally* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 29 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2020).

[86] *E.g.,* H.B. v. Las Virgenes Unified Sch. Dist., 239 F. App'x 342, 344 (9th Cir. 2007), *further proceedings sub nom. Berry v. Las Virgenes Unified Sch. Dist*., 370 F. App'x 843 (9th Cir. 2010); *see also* R.L. v. Miami Dade Cnty. Sch. Bd., 757 F.3d 1173 (11th Cir. 2014); E.H. v. N.Y.C. Dep't of Educ., 164 F. Supp. 3d 539 (S.D.N.Y. 2016); D.B. v. Gloucester Twp. Sch. Dist., 751 F. Supp. 2d 764 (D.N.J. 2010), *aff'd*, 489 F. App'x 564 (3d Cir. 2012); B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio 2011).

[87] 20 U.S.C. § 1415(f)(3)(E)(ii)(II).

[88] *E.g.*, J.G. v. Dep't of Educ., Haw., 772 F. App'x 567, 768 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 957 (2020); Oliver C. v. Dep't of Educ., 762 F. App'x 413, 416 (9th Cir. 2019); J.K. v. Missoula Cnty. Pub. Sch., 713 F. App'x 666, 668 (9th Cir. 2018); R.A. v. W. Contra Costa Unified Sch. Dist., 696 F. App'x 171, 172 (9th Cir. 2017); L.A.S. v. Dep't of Educ., Haw., 692 F. App'x 842, 843 (9th Cir. 2017); S.H. v. Tustin Unified Sch. Dep't, 682 F. App'x 559, 561 (9th Cir. 2017).

[89] *See supra* text accompanying notes 57–58.

[90] *See supra* text accompanying notes 59 and 62.

Second and separately, the proof amply established denial of FAPE upon application of the substantive standard for FAPE to the September 25th IEP's amounts of specially designed instruction. In the wake of the preceding sporadic and generally unproductive services during (a) the previous school year's pandemic period, (b) its ESY program for the Student, and (c) the first month of the 2020–21 school year,[91] the cross-the-board reduction of specially designed instruction in all four areas of the Student's identified needs cannot be said to be "reasonably calculated to enable a child to make *progress appropriate in light of the child's circumstances*."[92] At the time of the meeting, the participants had reason to know that the Student had made at the most "some" progress[93] and, yet, the applicable standard is "markedly more demanding" than that.[94] Moreover, the child's circumstances integrally include his individual disability-related profile, which clearly were contrary to the heavy proportion of asynchronous instruction.[95] Taking into consideration the unusual circumstances of the pandemic, it cannot be said that the District made "every effort" to meet its substantive FAPE obligations to the Student.[96]

Finally, although the period is limited for implementation of the September 25 IEP, the

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[91] *See supra* text accompanying 38–39 and 47–49.

[92] *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,* 137 S. Ct. at 999 and 1002 (emphasis added).

[93] *See supra* text accompanying notes 45–46. Moreover, even if not reasonably known to the District during the previous year, the Parent's July 13, 2020 complaint expressly put it on notice of the three-times-per-week private tutoring that needed to be taken into consideration in assessing the rate and source of the child's progress. These determinations are difficult but relevant as part of "the child's circumstances." Although not essential to this FAPE ruling, in light of the particular procedural posture of the case, the burdens of production and persuasion would appear to be on the District. NEV. REV. STAT. § 388.467 (2019).

[94] *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1,* 137 S. Ct. at 1000.

[95] *See supra* text accompanying notes 32–36.

[96] U.S. Department of Education, Questions and Answers on Providing Services to Students with Disabilities during the Coronavirus 2019 Outbreak 2 (March 2020), https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.pdf); *see also* U.S. Office of Special Education Programs, COVID-19 Questions & Answers: Implementation of IDEA Part B Provision of Services, 77 IDELR ¶ 138 (Sept. 28, 2020) (repeating the reminder that school districts "must make every effort to continue to provide children with disabilities with the special education and related services appropriate to their needs"); Nevada Department of Education, COVID-19 and Students with Disabilities (Nov. 10, 2020), http://www.doe.nv.gov/home/COVID_Resources/ ("any reduction . . . of the determined services in the student's IEP . . . must be due to the unique needs of the student, notwithstanding the pandemic and resultant school closure").

evidence is clear that the District failed to implement the specified OT services.[97] This complete failure amounted to a denial of FAPE based on the standard that the Ninth Circuit established before the pandemic[98] and also the guidance that the U.S. Department of Education issued for the pandemic.[99] More specifically, in light of its role to support the writing component of the IEP,[100] it amounted to a significant provision of the September 25 IEP that was not at all implemented.[101] Additionally, the District's failure to make any problem-solving efforts, such as arranging for a different OT provider,[102] did not "ensure . . . to the greatest extent possible" that the Student receive the services identified in his IEP.[103]

Remedy

Finally, returning to the remedy issue, which overlaps with but is separable from the jurisdictional issue, the equitable authority of IHOs, which is derived from and equivalent to that of courts under the IDEA,[104] is undeniably broad.[105] In the COVID-19 context, specific examples of remedial orders for school districts that were providing, within the boundaries of state directives, distance education have included (1) in-person instruction from a school district

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[97] *See supra* text accompanying note 63.

[98] Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 821–22 (9th Cir. 2007) (adopting the materiality standard for alleged failures to implement the IEP based on the Fifth Circuit's focus on "significant" or substantial" EIP provisions and the Eighth Circuit's similar focus on "essential" IEP provisions).

[99] *See supra* note 96.

[100] *See supra* note 54.

[101] In its corresponding application of the standard, the Ninth Circuit agreed with the hearing officer that the defendant district's notable but less than complete shortfall in the child's math services constituted a material implementation failure. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d at 823.

[102] The District also failed to prove that it explored the alternatives of changing the place or the time, thus not even ruling out whether any of these options was a mutually reasonable solution.

[103] U.S. Department of Education, *supra* note 96, at 2.

[104] 20 U.S.C. § 1415(i)(1)(C) (2018) (providing that the reviewing court "shall grant such relief as the court determines is appropriate"). For the corresponding connection to hearing and review officers, see*, e.g.*, Cocores v. Portsmouth*,* 779 F. Supp. 203, 205 (D.N.H. 1991); Ivan P. v. Westport Bd. of Educ., 865 F. Supp. 74, 80 (D. Conn. 1994); Letter to Kohn, 17 IDELR 522 (OSEP 1991). The marginal exception, because it extends beyond the traditional meaning of remedies, is the exclusive authority of courts to award attorneys' fees under the IDEA. *E.g.*, Mr. B. v. E. Granby Bd. of Educ., 201 F. App'x 834, 837 (2d Cir. 2006); Mathern v. Campbell Cnty. Children's Ctr., 674 F. Supp. 816, 818 (D. Wyo. 1987).

[105] *See, e.g.,* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: The Latest Update*, 37 J. NAT'L ASS'N ADMIN. L. JUDICIARY 505 (2018).

that was exclusively providing distance learning[106]; (2) in-person delivery of related services[107]; and (3) various forms of tailored, including in-person, compensatory education.[108]

Based on the aforementioned denials of FAPE, with due consideration to state safety directives,[109] the balance of equities in this case,[110] and the flexible nature of compensatory education in the Ninth Circuit,[111] the remedies in this case are as follows:

- for the foregoing[112] procedural denial of FAPE: The District shall promptly, but no later than January 30, arrange for an IEP team meeting guided by an IEP facilitator, appointed by the state education department, so as to provide for meaningful collaborative participation to revise the September 25 IEP.[113]

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[106] Hernandez v. Grisham, 77 IDELR ¶ 185, at *68–69 (D.N.M. Oct. 14 2020) (ordering in-person placement, where not prohibited by state safety policies, in the wake of a district's failure, per its choice of distance learning, to meet the *Endrew F.* standard).

[107] L.V. v. N.Y.C. Dep't of Educ., 77 IDELR ¶ 13 (S.D.N.Y. July 17, 2020) (ordering in-person delivery of related services within safety guidelines).

[108] Springfield Pub. Sch., 120 LRP 34532 (Nov. 10, 2020) (awarding one-hour of related services for at least two weeks commensurate with the implementation failure); Watertown Bd. of Educ., 120 LRP 36379 (Oct. 8, 2020) (awarding 48 hours of related services for procedural and substantive denials of FAPE); N.Y.C. Dep't of Educ., 77 IDELR ¶ 237 (N.Y. SEA Sept. 17, 2020) (reversing hearing officer by extending the direct payment award for denied special education services to the pandemic period); Norris Sch. Dist., 120 LRP 30203 (Cal. SEA Sept. 2, 2020) (awarding compensatory services for implementation failure in addition to prospective relief for procedural violations); L.A. Unified Sch. Dist., 77 IDELR ¶ 116 (Aug. 24, 2020) (awarding 40 hours of a specified related service rather than parent's proposed remedy for denial of FAPE during distance instruction).

[109] *E.g.,* Emergency Directive 028 (July 28, 2020, https://gov.nv.gov/News/Emergency_ Orders/Emergency_Orders/ (permitting districts to provide a hybrid approach with IEP consideration of whether the child needs in-person instruction)

[110] The conduct of both the District and the Parents were in good faith, although the Parents' absolute fixation on in-person instruction and the District's cramped understanding of what in-person instruction meant along with its lockstep approach to distance learning for all students, including those with disabilities, contributed to the failure to resolve this matter prior to this hearing and review process.

[111] For the overall approach, see Parents of Student W. v. Puyallup Sch. Dist. No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994) (providing for "a fact-specific analysis . . . . [with] no obligation to provide a day-for-day compensation for time missed . . . [and] designed to ensure that the student is appropriately educated within the meaning of the IDEA"). For its application, see Park v. Anaheim Union Sch. Dist., 464 F.3d 1025, 1034 (9th Cir. 2006) (upholding a compensatory education award of training for the child's teachers); Everett v. Santa Barbara Sch. Dist., 32 IDELR ¶ 175 (C.D. Cal. Mar. 7, 2000), *aff'd*, 28 F. App'x 683 (9th Cir. 2002) (upholding a compensatory award of reimbursement for private services plus the prospective funding of such services for another year).

[112] *See supra* notes 86–90 and accompanying text.

[113] Conducting this IEP meeting virtually is certainly permissible based on the feasibility of doing so, as evidenced by the September 25, 2020 IEP meeting..

- for the foregoing[114] substantive denial of FAPE: The District shall reimburse the Parent for the 16 hours per week of tutoring services, upon the submission of reasonable documentation,[115] for the period from September 25 to the implementation date of the new IEP.
- for the foregoing[116] implementation denial of FAPE: The District shall provide direct payment for the cumulative total of 30-minute sessions missed between September 25 and the implementation date of the new IEP, with the Parent making her own arrangements for a licensed occupational therapist and the District's outlay limited to the prevailing rate that the District pays its contractual OT providers.

IV. DECISION AND ORDER

The hearing officer's decision is reversed. The September 25, 2020 IEP amounted to a denial of FAPE. Unless the parties agree in writing to an enforceable agreement that otherwise resolves this matter, the remedial orders are for the District to conduct a prompt facilitated IEP meeting, reimburse the Parent for the identified expenses, and provide direct funding for the missing OT services per the abovementioned specifications.[117]

Dated: December 18, 2020 Perry A. Zirkel, State Review Officer

[114] *See supra* notes 91–96 and accompanying text.

[115] Reasonable documentation would be a copy of the bills specifying the dates and duration of the services from the provider and the receipts for payment of these bills or any reasonable equivalent according to standard business practice.

[116] *See supra* notes 97–103 and accompanying text

[117] *See supra* notes 112–15 and accompanying text.

NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless a party appeals the decision. A party may appeal from the decision of this SRO by initiating a civil action in a court of competent jurisdiction within ninety (90) days after receipt of this decision (NAC § 388.315).