

**STATE DEPARTMENT OF EDUCATION
DUE PROCESS PROCEEDING
STATE OF OKLAHOMA**

[Parents])	
on behalf of [student])	
)	
)	
Petitioners,)	
)	
vs.)	Due Process Hearing No. 2098
)	
[School District])	
)	
Respondent.)	

FINAL APPELLATE ADMINISTRATIVE ORDER

APPEARANCES:

[School District Attorneys]

-and-

[Parent Attorneys]

Protective Order

An Appeal was filed by [School District] on August 30, 2016. Thereafter, on September 1, 2016, the Parents of [student], [Parents], filed an Appeal as well. As such, an appeal and cross appeal is pending before this tribunal.

In order to provide confidentiality and ensure privacy, throughout this Order, the Appellant/Cross Appellee shall be referred to as “School,” “District” “Appellant,” or “Cross-Appellee.” The Appellee/Cross Appellant shall be referenced as “Parents(s), “Appellee,” or “Cross-Appellant.” The minor child who is the subject of this action has been referenced as “Child” or “Student.”

As part of this Final Administrative Order, a protective order is hereby entered. No party

to these proceedings shall publish to any third-party the name or identity of the student. All documents pertaining to these proceedings shall be sealed and any copy of any documents made pursuant to a legal request of a third party shall be redacted as to names, birthdates, and other private or sensitive information.

Federal Law Applicable to Case

The Individuals with Disabilities Education Act (IDEA) is the federal statute for the education of children with disabilities. 20 U.S.C. §1400 *et seq.* Oklahoma receives federal funding under the Act, which sets out the principles under which special education and related services are to be provided. The requirements are detailed and replete with special definitions and acronyms.

Every individual independent school district in Oklahoma must make available a free and appropriate public education (FAPE) to all children with disabilities, generally between the ages of three to twenty-one. 20 U.S.C. §1401. States and school districts identify, locate, and evaluate all children with disabilities, regardless of the severity of their disability, to determine which children are eligible for special education related services. All children with a disability, as defined by 34 C.F.R. § 300.8, must be educated in the least restrictive environment.

See 34 C.F.R. § 300.114.

Each Child receiving services has an individual education program (IEP) spelling out the specific special education and related services to be provided to meet his or her needs. The IEP must include a statement of the child's present level of academic achievement and functional performance; a statement of measurable annual goals; a description of how these goals are to be met; a statement of the special education and related services to be provided; and an explanation of the extent to which the child is to be educated with children without disabilities. The parent must be a partner in planning and overseeing the child's special education and related services as

a member of the IEP team. *See* C.F.R. § 300.116. “To the maximum extent appropriate,” children with disabilities must be educated with children who are not disabled. The substantive adequacy of an IEP is determined by a standard articulated by the Supreme Court: the IEP must be “reasonably calculated to enable the child to receive educational benefit.” *Bd. Of Educ. v. Rowley*, 458 U.S. 176, 207 (1982). Oklahoma school districts must provide procedural safeguards to children with disabilities and their parents, including a right to a due process hearing and right to appeal.

Procedural History of Appeal

A due process hearing decision was issued in this case on August 2, 2016 pursuant to 20 U.S.C. § 1415(f)(10)(A) et seq. In what is labelled in the Due Process Hearing Decisions as the “Decision,” the hearing officer provides directives to the District, but appears to have made no legal decision/conclusion. This is perplexing, at best. In a sub-section of the Due Process Hearing Decision entitled “FAPE,” the Hearing Officer states, “I agree with the Parents that a 30 minute observation proves nothing. Likewise, I am not convinced that the District has met its obligation to provide related services.” Yet, no legal conclusion is made by the hearing officer as to FAPE.

Indeed, the Hearing Officer states that his “Decision” is: (1) the District conduct independent evaluations for Physical Therapy, Occupational therapy, and Speech-Language Pathology. In this regard, the Parents are directed to sign all necessary consent forms to both conduct the evaluation and provide them to the District. (2) The District incorporate the findings of the independent evaluations into the Student’s IEP. (3) The District conduct an[] FBA on the Student and prepare a BIP as agreed to in the Student’s IEP. (4) The student be returned to full days. (5) The Student entitlement to related services provided by the District will be extended for

two years, contingent upon the findings of the independent evaluations and upon a continuing need for the services. 6) If related services are determined to be appropriate, an additional three months of ESY eligibility will be added to the Student entitlement. Again, this is contingent upon the Student's need.

Both the District and the Parents timely request an appeal hearing pursuant to 20 U.S.C. § 1415(g)(1) & (2).

Findings of Fact

In addition to any findings of fact specifically set forth in this Order, the Findings of Fact set forth in the Hearing Officer's decision are adopted as Findings of Fact for purpose[s] of this appeal. If there is any conflict with a specific Finding of Fact set forth herein and those adopted by the Hearing Officer, the findings(s) of Fact set in this Order shall prevail.

Issues on Appeal

The issues before the hearing officer which resulted in the August 2, 2016 Due Process Hearing were: (1) Were the Student's IEPs for the 2013-2014, 2014-2015, and 2015-2016 school years appropriate? (Concerns relating to related services actually fall under this issue). (2) Was Student's behavior appropriately addressed in the various IEPs? (3) Was Student's placement appropriate? (4) Were end of school year (ESY) services considered and/or appropriate?

From the August 2, 2016 Due Process Hearing Decision, the District appeals raising the following issues: (1) Whether the hearing officer erred in denying the School District's Motion to Dismiss on the basis that Petitioners were not residents of the district, thereby no[t] requiring the district to provide FAPE; (2) Whether the Hearing Officer erred in finding that Petitioners were entitled to a due process hearing pursuant to the IDEA on the basis of equity; and (3)

whether the hearing officer committed error in his decision by stating that “I am not convinced that the District has met its obligation to provide related services” as rising to the conclusion that FAPE was denied that that services could be ordered. All three of these issues are appropriate and preserved for appellate review.

Likewise, the Parent/Cross-Appellants appeal from the Due Process Decision, raising the following request initially for review: (1) Whether the hearing officer determined that FAPE had been denied by the District, and to that end, that the Due Process Hearing Decision is ambiguous, internally inconsistent and ignore large portions of the Parents’ claims.. (2) Whether the hearing officer erred in denying the Parents’ request for residential placement. (This was a remedy/outcome requested by parents but denied by the hearing officer.) (3). Whether the hearing officer erred in denying the Parents’ claim that the District failed to provide FAPE in the least restrictive environment for the Student. (This along with Parents contention (1) both are addressed as a denial of FAPE contention.) (3) Whether the hearing officer erred in finding that the Respondent did not have to reimburse the Petitioners’ for cost of Student’s communication device. (4) Whether the hearing officer erred in applying the law and failing to apply a standard of opportunity for the Student. (5) Whether the hearing officer erred in failing to order compensatory services for the student. (6) Whether the hearing officer erred in failing to address all matters raised by the Parents. (7) Whether the hearing officer was truly independent or biased toward the District. (8) Whether the hearing officer erred in failing to address whether the multitude of procedural violations of the IDEA constituted a denial of FAPE, individually or cumulatively. (9) Whether the hearing officer erring in failing to order compensator[y] related services to Parents. (10) Whether the hearing officer erred in ignoring Petitioners’ claims that the District gave up on Student, harbored hostility towards the Parents, and the District never has

and never will provide FAPE to the Student.

Interestingly, the Parents/Cross-Appellants, when given an opportunity to fully brief their position, then changed their contentions, or only briefed and argued their contentions as follows:

(1) The Appeal Officer should enter an order clarifying that [Student] did not receive FAPE because the District failed to provide related services. (2) The hearing officer improperly delegated his authority to fashion a remedy for the District's violation of the IDEA. (3) The hearing officer erred in rejecting the Parent's request for residential placement at district expense. (4) The hearing officer failed to consider the Parents' claim of multiple procedural violations of the IDEA. (5) The hearing officer erred in finding that Student's named teacher was a certified special education teacher. (6) The hearing officer improperly rejected the IDEA's guaranty that a student will receive an academic education even if the student has a severe disability.

It should be noted that it is the Appellate Hearing Officer's decision that several of the Parents' contention were not properly preserved for appeal or raised appropriate for the first time on appeal. Nonetheless, each contention was considered. In the end, the issue as to whether this student received FAPE is the over-riding consideration of this Appellate Officer and is the sole consideration on appeal from which the Decision is rendered and compensatory services are awarded.

Conclusions of Law

IDEA obligates District personnel to provide children, including this Parent's child, with a free appropriate public education (FAPE). 20 U.S.C. § 1412(a)(1). The burden of proof in this administrative hearing was placed on the Parent as the party seeking relief. *See Schaffer v. Weast*, 546 U.S. 49 (2005). A Hearing Officer may find that a child did not receive FAPE only

if the procedural inadequacies:(1) impeded the child's right to a free appropriate public Education; (2) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a free and appropriate public education to the parents' child; or (3) cause a deprivation of educational benefit. *See* 20 U.S.C. § 1425(f)(3)(E).

The Tenth Circuit court of Appeals has previously explained that in enacting IDEA, Congress explicitly mandated, through the least restrictive environment requirement, a specific mandate that disabled children be educated in the regular classroom to the maximum extent possible. 20 U.S.C. § 1412 (a)(5)(A). *Logue v. Shawnee Mission Pub. Sch. Unified Dist. No. 512*, 959 F. Supp., 1351 (D. Kan. 1997), *aff'd* 153 F.3d 727 (1998). The IDEA does not require a public school to maximize a child's potential or to provide the best possible education or psychological program. *Johnson v. Independent Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022, 1028-29 (citing *Board of Educ. v. Rowley*, 485 197 n.21). Under the IDEA, school districts have a legal affirmative obligation to identify all student with disabilities within the district. *See* 20 U.S.C. §1412(a)(3). If a child suspected of having a disability, the school must evaluate the child in **all** areas of suspected needs. *See* 20 U.S.C. §1414(b); *see also Wisenberg v. Board of Educ.*, 181 F. Supp. 1307, 1311 (D. Utah 2002).

Standard of Review

The hearing officer's factual findings based on strict credibility judgments are deferred to unless the non-testimonial evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. *See O'Toole v. Olathe*, 144 F.3d 692, 699 (10th Cir. 1998). Further the scope of review applied on appeal is enunciated in *Carlisle Area School District v. Scott P.*, 62 F.2d 520 (3rd Cir. 1995), with the court's holding that:

We thus hold that appeals panels reviewing the fact finding of hearing officers... should defer to the hearing officer's findings based upon 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.

In making Findings of Fact, the impartial hearing officer weighed all the evidence and assessed the credibility of the witnesses by taking into account the appropriate factors for judging credibility, including, but not limited to: the demeanor of the witnesses; any interests, bias, or prejudice the witness may have; the opportunity of the witness to see, hear, know, or remember the facts or occurrences about the witness testified; whether the testimony of the witness is reasonable; and whether the testimony is consistent with all believable evidence in the case.

Because the Hearing Officer considered the entire record and enumerated the undisputed facts, there is no reason to set aside any of his Findings of Fact based upon the records as a whole or credibility judgments.

Therefore, this review is limited to the application of legal concepts and requirements. The Parents did attempt to introduce new evidence in this appeal. That attempt is rejected. The evidence attempted to be introduced post-dates the due process filing or the hearing. It doesn't appear that any solid reason for seeking to introduce new evidence is justified. The Parents also attempted to reopen testimony and the hearing for further exploration of residential care for Student. As the evidence that would be presented on re-opening the hearing could have been presented at the original hearing, this attempt is also rejected.

Discussion

Before this Appellate Review Officer is a child diagnosed with Rett Syndrome.¹

¹ Rett Syndrome, originally termed cerebrotrophic hypermmonemia, is a rare genetic postnatal neurological disorder of the grey matter of the brain that most exclusively affects females but has also been found in male patients. The clinical features include small hands and feet and a deceleration of the rate of head growth.

The child has pervasive communication, mobility, and learning issues and is on an IEP. To properly consider all issues raised on appeal, the Appellate Review Officer will first consider the District's contentions, followed by Parents' contentions.

District's Contentions on Appeal

First, as to the District's contentions/issues raised on appeal, namely: (1) Whether the hearing officer erred in denying the School District's Motion to Dismiss on the basis that Petitioners were not residents of the District, thereby nor requiring the District to provide FAPE; (2) Whether the Hearing Officer erred in finding that Petitioners were entitled to a due process hearing pursuant to the IDEA on the basis of equity; and (3) Whether the hearing officer committed error in his decision by stating that "I am not convinced that the District has met its obligation to provide related services" as rising to the conclusion that FAPE was denied and that services could be ordered, the Appellate Review Officer finds as follows:

District's Contention 1. The hearing officer did not err in denying the District's request to dismiss this action.

The Student and her siblings have attended the District for over ten (10) years. The Student has been enrolled in the District since 2005. Not until a request for due process was filed was there any challenge from the District that the child was not properly enrolled. Indeed, the child has received special education services from the District for most, if not all, of her education. The Student's father testified at the hearing that the District was aware of the residence in the District as well as another property about two and one-half miles from the residence where members of the family also resided. (R: Volume I: Pages 162-163).

"Rett's Syndrome affects multiple domains of functioning. In fact, probably all domains of functioning. Physical abilities, mobility. So gross abilities. It affects social/communication skills as across all developmental domains. We see delays and challenges in all these areas." Dr. Bonnie McBride. (R Vol. I, P 17; 4-12).

The District's argument that this matter be dismissed because the child is not in the district is disingenuous at best. The District has benefitted from members of the Student's family playing sports for the District. The District's superintendent, as well as his wife, has visited the Student's home to determine if the child was in the District as far back as 2005. (R: Volume I: Page 163: Lines 9-25). While it an enormous financial burden on the District to properly educate a child such as Student with her disabilities, waiting until her Parents stand up for her and demand that she receive the education that she is entitled to under federal law before the District challenged the Child's enrollment in the District is, frankly, understated as unconscionable. The Student was properly enrolled in the District as a resident for over ten (10) years, and the District had an obligation to education her under federal and state law.

As such, the hearing officer did not err as to determining that the child was properly enrolled in the District as a resident of the District.

District's Contention 2. As to the District's second contention on appeal, whether the Hearing Officer erred in finding that Petitioners were entitled to a due process hearing pursuant to the IDEA on the basis of equity, the Appellate Review Officer finds that there is no need to an equitable determination, as the Student was enrolled in the District and she and her parents were residents of the District.

If somehow the child was not a resident of the District, an equitable determination may be necessary after over ten (10) years of enrollment of the Student in the district, and the Appellate Review Officer understands why the hearing officer broached the equity theory, though finds it unnecessary based upon affirming the hearing officer's decision under District's Contention 1 *supra*. It should be noted, however, that the fundamental problem with the ruling in equity by the hearing officer, as with most of the hearing officer's Due Process Hearing Decision, is that the hearing officer appears afraid to take a position and make findings and conclusions necessary that are supported in the record. There was no need to rule on an equitable theory when the child

and her parents are residents of the District.

In the event that the Student was not a resident properly enrolled in the District under law, then an equitable theory of having attended the District for over ten (10) years, been visited by both the Superintendent and his wife on several occasions, having had no challenge to residency before the request for due process was filed, and having received services, regardless of the nature, for most if not all of the last ten (10) years, certainly would still warrant that the District must educate this Student.

The hearing officer did not err in finding Petitioners were entitled to a due process hearing on the basis of equity, even though the equitable determination – if examined with the facts in the record- is wholly unnecessary.

District's Contention 3. The hearing officer erred in failing to conclude whether or not FAPE was denied to the Student.

A hearing officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child's right to a free and appropriate public education; (2) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free and appropriate public education to the parents' child; or (3) caused a deprivation of educational benefit. See 20 U.S.C. §1415 (f)(3)(E).

The district is correct that the hearing officer failed to take a position as to FAPE.

Here, this Appellate Review Officer finds unequivocally that the District failed to provide FAPE to Student. More discussion and legal analysis as to failure to provide FAPE are found, below, *infra.*, under the Parents' Contentions on Appeal.

Parent's Contentions on Appeal

Second, as to Parents/Cross-Appellants contentions on appeal, including: (1) Whether the hearing officer determined that FAPE had been denied by the District, and to that end, that the

Due Process Hearing Decision is ambiguous, internally inconsistent and ignores large portions of the Parents' claims. To this end, Parents also allege that the District failed to provide FAPE in the least restrictive environment for the Student. (2) Whether the hearing officer erred in denying the Parents' request for residential placement. (3) Whether the hearing officer erred in finding that the Respondent did not have to reimburse the Petitioners' for the cost of Student's communication device. (4) Whether the hearing officer erred in applying the law and failing to apply a standard of opportunity for the Student. (5) Whether the hearing officer erred in failing to order compensatory services for the student. (6) Whether the hearing officer erred in failing to address all matters raised by the Parents. (7) Whether the hearing officer was truly independent or biased toward the District. (8) Whether the hearing officer erred in failing to address whether the multitude of procedural violations of the IDEA constituted a denial of FAPE, individually or cumulatively. (9) Whether the hearing officer erred in failing to order compensator[y] related services to Parents. (10) Whether the hearing officer erred in ignoring Petitioners' claims that the District gave up on Student, harbored hostility towards Parents, and the District never has and never will provide FAPE to the Student, some of the contentions can be combined and examined together.

Following a briefing schedule being entered by the Appellate Review Officer, the Parents changed their contentions, or only briefed and argued their contentions, as follows: (1) The Appeal Officer should enter an order clarifying that [Student] did not receive FAPE because the District failed to provide related services. (2) The hearing officer improperly delegated his authority to fashion a remedy for the District's violation of the IDEA. (3) The hearing officer erred in rejecting the Parents' request for residential placement at district expense. (4) The hearing officer failed to consider the Parents' claims of multiple procedural violations of the

IDEA. (5) The hearing officer erred in finding that Student's named teacher was a certified special education teacher. (6) The hearing officer improperly rejected the IDEA's guaranty that a student will receive an academic education even if the student has a severe disability.

Parents' Contention 1. The hearing officer erred in failing to conclude whether or not FAPE was denied to the Student.

A very cursory discussion was started above under the District's contentions, *supra*.

The Individuals with Disabilities Act (IDEA) imposes obligations on the local educational agencies, namely the District, to provide Student with FAPE in the least restrictive environment. 20 U.S.C. § 1412 (a)(1). FAPE include special education and related services that (a) have been provided at public expense, under public supervision and direction, and without charge; (b) meet the standards of the State educational agency; (c) include an appropriate preschool, elementary school, or secondary school education in the State involved; and (d) are provided in conformity with the individualized education program (IEP) required under § 1414(d). 20 U.S.C. § 1401(9).

FAPE is ensure for each child in development and implementation of an IEP. *Andrew F. ex rel. Joseph F. v. Douglas Cnty., Sch. Dist. RE-1*, 798 F.3d 1329, 1332 (10th Cir. 2015).

Indeed, the Act details procedural requirements by which a child's IEP must be created and maintained. *Id.* The Act does not require substantive levels of achievement for an appropriate education. Rather, the IEP must meet the Rowley standard and be "reasonably calculated to enable the child to receive an educational benefit." Rowley 485 U.S. at 207.

The hearing officer failed to determine if FAPE was provided by the District, or if FAPE was denied by the District. The Appellate Review Officer finds that FAPE was denied by the District. And, as such, the District violated the IDEA.

Testimony at the hearing suggested that the Student has basically made no educational progress over the last two years. While Rett's Syndrome is a progressive disease, this Student has made progress, even if slow, in her private therapies.

District Exhibit 8 has a current speech-language evaluation that concludes, "At this time, her behaviors are significantly impeding "...[the] ability to participate in most age[-]appropriate activities.". The physical therapy evaluation and occupational therapy evaluation, District Exhibits 9 and 10, find that the Student is either an unwilling participant or cannot tolerate the therapy. The Student's private therapist all are able to work with her and make some progress, even if slow with set-backs. (R. Vol. I: Pages 227-228; Vol. II: Page 282, 305).

The Special Education Director for the District testified that the goals on the IEP, even if the same or similar from year to year, are appropriate, yet the student has made zero to almost zero progress. The related services on the IEP are far from adequate. There is zero evidence on any of the relevant IEP's that related services were considered. A paraprofessional is the only "related service" provided to this Student. The hearing officer did make a conclusion that "I cannot but believe that related services are needed for providing some educational benefit." (Due Process Hearing Decision at Page 4). The hearing officer further notes that:

The District would have me believe that related services are not necessary because the student has the basic skills the services would provide. Strange position when the student cannot communicate, cannot walk without someone next to her to keep her on track and to prevent falls, and cannot use her hands without the active intervention of an aide.

(Due Process Hearing Decision at Page 4).

The hearing officer fails to make the legal conclusion therefrom and states that he agrees with the Parents and is not convinced that the District has met its obligation." (Due Process Hearing Decision at Page 12).

The Appellate Review Officer finds based on the weight of the overwhelming evidence,

including a full review of the admitted exhibits at hearing and the transcript from the hearing, that the District failed under the IDEA to meet the most basic educational needs of this student and provide her with FAPE.

Parents Contention 2. The hearing officer erred in denying the Parents' request for residential placement.

Parents allege that the hearing officer erred in denying the request that Student receive residential placement. Parents contend that the correct framework for ordering residential placement includes that the District failed to provide FAPE; that the private placement requested or utilized is a state –accredited elementary or secondary school, that the private placement provides special education; and that the private placement provides additional services that qualify as “related services.” *See Jefferson County Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B*, 702 F.3d 1227, 1236 (10th Cir. 2012). This case also notes that the private placement would provide additional services beyond special designed instruction to meet the child’s unique needs and would have to be related services to be reimbursable. *See id.* The Student certainly deserves an IEP that works for and with her to provide FAPE. She deserves some educational benefit that is more than “de minimus.” *See Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Circ. 1996).

Following a full review of the record, the Appellate Review Officer finds that the hearing officer did not err in denying requested residential placement. Indeed, a review of the record shows that the only testimony obtained on the subject of residential placement, in this instance Heartspring, was from Bonnie McBride, Parents’ expert who testified that the Student could be educated in public school, (Vol. I; Page 148; Lines 12-18). There was no other mention of residential placement, and no other evidence presented. In their request for appellate review,

Parents wanted to reopen the record to present testimony from Heartspring officials; however this testimony could have been presented during the hearing. This was not new evidence previously unavailable. Moreover, the Parents, during pendency of this action moved the child to another district. The Student is no longer educated in the District. Further Parent's requested relief is that the hearing officer, and now the Appellate Review Offer, provide a referral to the residential facility of Heartspring, which is not an appropriate remedy.

The hearing officer appropriately denied residential placement as a remedy.

Parents' Contention 3. The hearing officer erred in denying the Parent's reimbursement for Students communication device.

The request for reimbursement of the communication device would not be a truly appropriate appellate contention, and perhaps this I why it is not briefed. This may be a remedy awarded ultimately upon a finding of lack of FAPE, with other considerations.

Parents' Contention 4. The hearing officer erred in applying the law and failing to apply a standard of opportunity for the Student.

This contention is also a FAPE argument. As counsel is well aware, the Tenth Circuit Court of Appeals has upheld that "some educational benefit" is the standard for review of FAPE and not a "meaningful educational benefit." See *Thompson R2-J Sch. Dist. V. Luke P. et al.*, 540 F.3d 1143, 1149 (10th Cir. 2008). The opportunity requested can be no larger than a free appropriate public education providing some educational benefit. The FAPE discussion has already been addressed above.

Parents' Contention 5. The hearing officer erred in failing to order compensatory services for the student.

As this, again, is a remedy, it will be addressed in the decision below.

Parents' Contention 6. The hearing officer erred in failing to address all matters raised by the Parents.

This is a non-briefed issue. But, even if it was briefed, the Parents, through their attorneys, appear to have a tactic of attempting to raise as many contentions as possible without organization of thought or duplicated effort. The Appellate Review Officer finds that the hearing officer thoughtfully considered all issues present to him, narrowed the issues, and formulated his decisions. Nothing indicates from the record that the hearing officer did anything but provide thoughtful consideration and review. This contention is denied.

Parents Contention 7. The hearing office[r] was truly independent or biased toward the District.

Again, as above with contention six (6), this is a non-briefed issue. But, even if it was briefed, the Parents, through their attorneys, appear to again, have a tactic of attempting to raise as many contentions as possible without organization of thought or duplicated effort. There is no argument made supported by fact that the hearing officer was anything but impartial and fair. The outcome may not have been what the Parents wanted; however, such a brazen and bold accusation should not be thrown out lightly without a supported argument in fact. This argument is without merit.

Parents' Contention 8. The hearing officer erred in applying the law and failing to apply a standard of opportunity.

Again, as above with contention six (6) and seven (7), this is a non-briefed issue. There is no argument made supported by fact. The hearing officer does not have an obligation to apply a standard of opportunity under federal law. This contention is without merit.

Parents Contention 9. The hearing officer erred in in failing to address whether the multitude of procedural violations of the IDEA constituted a denial of FAPE, individually or cumulatively.

Again, as above with contention six (6), seven (7) and eight (8), this is a non-briefed argument. The reality of this appellate review is that due to the statute of limitations, the

applicable time frame for review by both the hearing officer and on appeal is the 2013-2014, 2014-2015, and 2015-2016 school year. The alleged multitude of procedural violations cannot be considered beyond the statute of limitations, and were certainly not preserved for appeal. Indeed, the Parents' brief on appeal made zero mention of procedural violations. This Appellate Review Officer certainly had made a finding related to FAPE and will make other findings therefrom in her decision below. This Contention is without merit.

Parents' Contention 10. The hearing officer erred in ignoring Petitioners' claims that the District gave up on Student, harbored hostility towards the Parents, and the District never has and never will provide FAPE to the Student.

Again as above with contentions six (6), seven (7), eight (8), and nine (9), this is a non-briefed argument. The reality of this appellate review is that due to the statute of limitations, the applicable time frame for review by both the hearing officer and on appeal is the 2013-2014, 2014-2015, and 2015-2016 school year. The allegation that the district never has and never will provide FAPE is inflammatory and not relevant to this discussion. The relevant time period is set by federal law. The allegation that the district gave up on the Student is also not briefed or substantiated by the record. This contention is without merit.

Parents' Contention 11. The Appeal Officer should enter an order clarifying that [Student] did not receive FAPE because the District failed to provide related services.

Parents' contention that the hearing officer improperly delegated his authority to fashion a remedy for the District's violation of the IDEA is denied. Parents cite to *M.S. ex rel. J.S. v. Utah Schools for Deaf and Blind*, 822 F.3d 1128 (10th Cir. 2016) is stating that the District should not be allowed to remedy the violation for denying FAPE. In this case, the hearing officer did not leave the remedy solely to the District; rather, the hearing officer's decision[] was:

- 1) The District conduct independent evaluations for Physical Therapy, Occupational Therapy, and Speech-Language Pathology. In this regard, the Parents are directed to

- sign all necessary consent forms to both conduct the evaluation and provide them to the District.
- 2) The district incorporate the findings of the independent evaluations into the Student's IEP.
 - 3) The District Conduct an FBA on the Student and prepare a BIP as agreed to in the Student's IEP.
 - 4) The Student be returned to full days.
 - 5) The Student entitlement to related services provided by the District will be extended for two years, contingent upon findings of the independent evaluations and upon a continuing need for the services.
 - 6) If related services are determined to be appropriate, an additional three months of ESY eligibility will be added to the Student entitlement. Again, this is contingent upon the Student's need.

This is not a dereliction of the hearing officer's role or job. The contention is without merit.

Parents' Contention 13. The hearing officer erred in rejecting the Parents' request for residential placement at district expense.

The legal analysis as to residential placement is found above under Contention Two (2).

Parents' Contention 14. The hearing officer failed to consider the Parents' claims of multiple procedural violations of the IDEA.

The hearing officer was required to consider the claims made by Parents within the statutory time period authorized by federal law. No evidence has been presented to show that the hearing officer failed to make these considerations and weigh[] this evidence.. As such, the contention is denied.

Parents' Contention 15. The hearing [officer] erred in finding that Student's named teacher was a certified special education teacher.

This contention was not raised in the original due process complaint or in the original appeal notice. Nonetheless, Parents now argue that Student's teacher for the 2015-2016 school year was not a certified special education teacher, as she only received her certificate for mild-moderate disabilities in February of 2016.

First, even if it had not been properly raised, the reality is that there was a teacher in the

classroom who was allowed to instruct in that classroom under Oklahoma Law. She may have been in the process of obtaining her certification, but that does not summarily disqualify her from teaching if the State Department of Education has provided her with a provisional license or other documentation. Even more importantly, whether this individual was or was not trained has little to do with what was going on in the classroom. The reality is that there was an IEP, which IEP did not meet this Student's individual needs on the most minimal level, and FAPE was denied. This contention is denied, as the certification of the individual is an exercise in futility when federal law has been violated.

Second, and more importantly, as this issue was not properly raised or preserved, it is denied.

Parents' Contention 16. The hearing [officer] improperly rejected the IDEA's guaranty that a student will receive an academic education even if the student has a severe disability.

The FAPE legal analysis i[s] found above under Parents' Contention One (1).

Decision

The August 2, 2016 decision of the hearing officer is reversed and replaced in part with the following Decision and Findings in lieu of the hearing officers' Decision as found on page fourteen (14) of the August 2, 2016 Due Process Hearing Decision. In examining [] the four issues addressed at hearing, as determined by the hearing officer in pre-hearing conferences and not objected to by counsel for the parties,² the district denied FAPE and failed in devising and implementing an appropriate IEP for Student. Moreover, the Student's IEP has not resulted in even a minimal educational benefit to this Student. The Student's behavior was not

² (1) Were the Student's IEPs for the 2013-2014, 2014-2015, and the 2015-2016 school years appropriate? (Concerns relating to related services actually fall under this issue). (2) Was Student's Behavior appropriately addressed in the various IEPs? (3) Was Student's placement appropriate? (4) Were end of school year (ESY) services considered and/or appropriate?

appropriately addressed in the relevant IEPs under the statute of limitations. Indeed, this Appellate Review Officer finds that the behavior of Student was very poorly handled by the District. The Student's placement is questionable in light of the fact that there appears to have been no educational benefit to the Student, although some of this is due to extremely poorly drafted IEPs and lack of related services for this Student. Finally, though ESY services may have been discussed, they were not appropriately considered for this Student.

The hearing officer's decision as to deny the request to dismiss as urged by the District is affirmed.

As to additional issues raised on appeal, the Appellate Review Officer has ruled on each contention in the Discussion portion of this opinion, *supra*.

Having made the Findings and Decision herein, the Appellate Review Officer hereby Orders, as compensatory services for the District's failure to provide FAPE, that:

- 1) The District will retain the services of Dr. B.M., Associate Professor at the [name] to complete a full independent educational evaluation (IEE) at the District's expense.
- 2) The District shall pay for independent speech, occupational therapy, and physical therapy evaluation of Student with evaluators agreed upon by the Parents. If the district cannot propose someone the Parents agree to, Dr. B.M. or someone designated by her in writing with notice to Parents, will have the final say as to who will conduct the evaluations.
- 3) If the results of that evaluations determine this Student is in need of speech, occupational, and/or physical therapy, which based on her diagnosis of Rett Syndrome and her past needs will likely be the result, then the District is Ordered to use therapists

that the District has not used in the past. Indeed, it is urged that the District use the Student's already in-place private therapists for therapy at school. If that is not possible for some reason, the parents are to agree to the therapists used. In the event that the District cannot propose someone that Parents agree to, Dr. B.M. or her designee will have the final say as to who will conduct the evaluations. The District's therapists are to attend Students private therapy sessions at least five times each per discipline within six months of finalization of Dr. B.M.'s IEE and the new IEP being instituted.

[4] The therapists paid for by the District as outlines above are to communicate after every six sessions with the private therapist used by Parents for Student to ensure therapist are working on the same skills and towards the same goals. Also, this communication is to discuss strategies in working with the Student.

[5] Parents are to sign HIPAA releases for all therapists involved to communicate with all other therapists about Student.

[6] The Student is not to be restrained or put in a mask to avoid spitting. Instead, Dr. B.M. or her designee is to establish or name a professional to establish a behavior intervention plan (BIP) to work on Student's negative behaviors, including consultation with the Student Private therapists and how they deal with this behavior.

[7] The Student's IEP is to be updated to include all Orders of this tribunal and all recommendations of Dr. B.M. and/or her designee(s) after she finishes her evaluation and provides her assessment.

8] Dr. B.M. is to be part of the IEP team meeting and development of the IEP. She is to be used as a consultant for the remainder of the Student's public school education, and is to be a part of the IEP process at least once per year, though she should be consulted

more frequently, with recommendation of a minimum quarterly.

[9] The Student is to have a full-time paraprofessional assigned to her. This person is not to be someone that the Student has worked with before who has restrained her or caused her to wear a mask. It needs to be a fresh start for the Student's own emotional well-being. The paraprofessional is to meet with Dr. B.M. or her designee at least one time per month to discuss behavioral strategies and working with the Student until Dr. B.M. or her designee feels that the paraprofessional is proficient. Logs should be kept by the paraprofessional on behalf of the District as to all discussion with Dr. B.M. or her designee.

[10] The IEP developed is to have measurable goals that this Student is capable of achieving or working towards. The IEP is also to use technology for communication. A full range of related services are to be considered and discussed with Dr. B.M. a part of that meeting.

[11] The District is to reimburse Parents for the Student's most-recently purchased communication device.

[12] The Parents are to sign all necessary consent forms and provide them to therapists, and/or Dr. B.M. or her designee, as appropriate, in order that the District may comply with this Order.

[13] The Student is to attend school full days.

[14] If related services are deemed to be appropriate, as this Appellate Review Officer believes they will be, the entitlement for related services will be extended for two years beyond the date of discontinuation of services or graduation, at the District's expense.

[15] If related services are deemed to be appropriate, an additional six months of ESY

eligibility will be added to the Student's entitlement, to be provided prior to graduation.

[16] The teacher working with Student as classroom teacher, along with any teacher that has any instructional input as to student and the paraprofessional working with Student, are all to have training each year for 40 hours each semester through the State Department of Education or through the MESA project. It is preferable that the training be done based upon Dr. B.M.'s recommendation.

[17] Failure of the District to implement this Order timely and without delay may result in reconsideration of the residential placement request by Parents upon presentment of another due process complaint.

[18] As all Order herein are compensatory in nature and all payments for evaluations, therapy, training, and related services are to be borne solely by the district.

Notice of Appeal Rights

Pursuant to 20 U.S.C. § 1415 (g) and (i) and 34 C.F.R. § 300.516, the decision of the Appeal Review Officer is final except that any party involved in such hearing who feels aggrieved by the findings and decision made shall have the right to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within ninety (90) day[s] of receipt of this Order.

Signature _____
Catherine Welsh
Appellate Review Officer

CERTIFICATE OF MAILING

[Attorneys for Parents]
[Contact information]

[Attorneys for School District]
[Contact information]

[Special Education Resolution Center]
[Contact information]

[Oklahoma State Department of Education]
[Contact information]

Catherine Welsh Signature