IN THE OFFICE OF ADMINISTRATIVE HEARINGS

J.B., Student, by and through Parent, L.B., Petitioners, v. KYRENE ELEMENTARY School District, Respondent.	**No. 14C-DP-066-ADE-REM** **No. 16C-DP-026-ADE** **ADMINISTRATIVE LAW JUDGE DECISION**

HEARING: The hearing convened on December 8, 2020. [1]

APPEARANCES: Richard J. Murphy, Esq. for Petitioners. Erin H. Walz, Esq. and Heather R. Pierson, Esq. for Respondent.

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

FINDINGS OF FACT

GENERAL BACKGROUND

1. On June 25, 2014, Petitioners filed a request for due process ("Complaint"). The Complaint was designated as Case No. 14C-DP-066-ADE.

2. On February 6, 2015, Petitioners filed a 40-page amended complaint ("Amended Complaint").

3. After a change in Petitioner's legal representation in September of 2015, the due process hearing sessions began on November 4, 2015, regarding the Amended Complaint. Over the course of two months in nine hearing sessions, the Administrative Law Judge heard the testimony of 17 witnesses and admitted approximately 180 exhibits.

4. On December 22, 2015, prior to the completion of the due process hearing sessions in Case No. 14C-DP-066-ADE, Petitioners filed a new request for due process against the District. This new complaint ("New Complaint") was designated as Case No. 16C-DP-026-ADE.

[1] The hearing convened after 5 continuances. The parties requested post-hearing written legal argument after which the Tribunal had a review period; the hearing record review concluded on March 1, 2021. The court reporter's transcript is the official record of the hearing proceeding.

5. In the New Complaint, Petitioners indicated it had been filed specifically to "preserve Petitioners' claims" regarding the "District's decision not to conduct further evaluations of [Student] or offer an [IEP] *on December 19, 2013 and thereafter* to the extent this issue is not specifically addressed based on the pleadings in [14C-DP-066-ADE.]"[2]

6. The parties did not request that the two matters be consolidated.

7. On January 13, 2016, Respondent requested that Case No. 16C-DP-026-ADE be stayed until the Decision was issued in Case No. 14C-DP-066-ADE.[3] On January 21, 2016, Petitioners indicated that they had no objection to a stay for that purpose.[4]

8. After extended review, on August 1, 2017, the ALJ issued a 130-page Decision in Case 14C-DP-066-ADE ("ALJ Decision"). The ALJ Decision analyzed the evidence, testimony, issues, and applicable law as to each claim brought in the Amended Complaint by the Petitioner.

9. The ALJ Decision found in favor of Respondent on all addressed counts.

10. Petitioner appealed to the U.S. District Court for the District of Arizona ("Court").

REMAND BACKGROUND re: Case No. 14C-DP-066-ADE

11. In Petitioners' appeal to the Court of the ALJ Decision in Case No. 14C-DP-066-ADE, Parent's first issue was stated as follows:

> The District denied [Student] FAPE when it refused to complete evaluations or offer FAPE on December 19, 2013 and after until [Student] re-enrolled in the District.[5]

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[2] Emphasis added.

[3] At that time, Respondent argued that the issues, claims, and proposed remedies that were pled in the New Complaint had been included in Case No. 14C-DP-066-ADE.

[4] In their January 21, 2016 response to Respondent's stay request, Petitioners explained that the New Complaint had been filed "in the event that this issue was not properly plead in [Case No. 14C-DP-066-ADE] and to the extent the decision in [Case No. 14C-DP-066-ADE] does not address this issue." Further, in their March 7, 2016 Opening post-hearing legal memorandum in Case No. 14C-DP-066-ADE, in Footnote 211, Petitioners noted that the issue [whether Respondent had failed to provide FAPE by refusing to develop an IEP based on [Student's] present levels in December 19, 2013" was "directly plead" in the New Complaint.

[5] The Court noted that this particular issue, among other of Petitioners' issues, was "argued specifically and distinctly" in the appellate proceeding, citing *California v. Azar*, 911 F.3d 558, 573, n.1. (9th Cir. 2018) (quoting *Greenwood v. FAA*, 28 F.3d 971, 977 (9th Cir. 1994)).

12. The Court reversed the Administrative Law Judge's finding that the parties had not properly raised the issue of whether Respondent had obligations to evaluate Student and to offer FAPE after December 19, 2013.[6] The Court found that Petitioners had raised that issue in the due process hearing, found that the Administrative Law Judge should have addressed it, and remanded the matter to the Tribunal on that issue.

13. Relying on its 2017 decision in *Hack v. Deer Valley Unified School District*, the Court reiterated the principle that a public school district in which a child with a disability lives is required to *offer* the child FAPE "upon request of Parents."[7] Therefore, the "issue" of a requirement, or no requirement, and the impact thereof, regarding re-enrolling Student was determined and settled by the Court in Petitioners' appeal of 14C-DP-066-ADE.

14. However, the Court found that, based on the record on appeal, it was unable to conclude that Respondent had denied FAPE to Student *after December 19, 2013*, and the Court remanded the matter "for consideration of the first issue Parent raised in [District] Court."[8]

15. As the basis for doing so, the Court found that the appellate record did not provide enough information "to resolve" the tension between the requirement that a district offer and provide FAPE when a student resides in the district and whether a parent "makes clear his or her intention to keep the child enrolled" in an out-of-district private school[9] or "refuses to allow testing."[10] The Court stated "[t]he record also lacks information as to what steps Parent took *after* December 19, 2013 to request FAPE."[11]

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[6] *L.B. v. Kyrene Elementary District No. 28*, No. CV-17-03316-PHX-SMB (September 2019) [Document 41], referencing the Administrative Law Judge Decision in Case No. 14C-DP-066-ADE at 103-106, 124-125 (August 22, 2017). The Court also cautioned that facts in the instant case and *Hack* were very different because "the school in *Hack* had not made an offer of FAPE that was rejected nor had it met with the parents multiple times in IEP meetings." *L.B.* at 9.

[7] *Hack*, 2017 WL 2991970, at *6 (D. Ariz. 2017)(citing *J.W. ex rel J.E.W. v. Fresno Unif. Sch. District*, 626 F.3d 431,459 (9th Cir 2010)). Based on *Hack*, reenrollment cannot be the prerequisite for an offer of FAPE to a child with a disability residing in the district.

[8] *L.B.* at 18.

[9] *Id.* at 10; *see also Assistance to States for the Educ. of Children with Disabilities and Preschool Grants for Children with Disabilities*, 71 Fed. Reg. 46540-01, 46593, 2006 WL 2332118, (Aug. 14, 2006).

[10] *Id.; see also Gregory K v. Longview Sch. Dist.*, 811 F.2d 1307, 1315 (9th Cir. 1987) ("If the parents want [Student] to receive special education under the Act, they are obliged to permit such testing.").

[11] *L.B.* at 10 (emphasis added).

16. Specifically, the Court remanded the case for findings of fact and conclusions of law regarding the following four points:

1. Whether Parent made clear she had no intention of re-enrolling Student at the District.
2. Whether Parent's rejection of District's attempted evaluations relieved the District of its IDEA obligations.
3. Whether Parent's rejection of the final FAPE offer, in December 2013, relieved the District of further obligations under IDEA.
4. Whether Parent made any attempts after December 19, 2013 to request FAPE.

17. In November of 2019, Petitioners sought clarification from the Court regarding the scope of the remand order.[12] On January 29, 2020, the Court clarified as follows:

> Plaintiff asserts that there is some confusion from the order as to whether the Court accepted the ALJ's findings that the Parent rejected KESD's 'attempted evaluations' that had already been offered prior to December 19, 2013 or having rejected the KESD's final FAPE offer on December 19, 2013. Although the Court finds Plaintiff's reading of the Court's order surprising, the Court clarifies that the ALJ's finding that the Parent rejected KESD's attempted evaluations prior to December 19, 2013 is supported by a preponderance of the evidence and is accepted. The Court further clarifies that the ALJ's finding that the Parent rejected the KESD's final FAPE offer on December 19, 2013 was also supported by a preponderance of the evidence and is accepted.[13]

REMAND HEARING

18. The Remand Hearing issue was limited to Parent's first issue on the appeal: "[Whether] the District denied [Student] FAPE when it refused to complete evaluations or offer FAPE ***on December 19, 2013 and after*** until [Student] re-enrolled in the District."[14] The Court specified the need for findings of fact and conclusions of law on four points. Thus, the Court's indication of the need for a factual hearing record as to Points #1 and #4 were the focus of the Remand Hearing determination.

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[12] The Tribunal did not receive a copy of the Petitioner's motion to the Court; however, when asking for the remand case to be reset for hearing, Respondent provided a copy of the Court's "clarification" Order.

[13] *L.B. v. Kyrene Elementary District No. 28*, No. CV-17-03316-PHX-SMB (January 31, 2020) [Document 50]. Finally, the Court further indicated that the case on appeal was stayed pending the remand determination.

[14] Emphasis added.

19. The issue raised in 16C-DP-026-ADE is the very issue to be determined on remand. By ORDER dated November 7, 2019, the Tribunal indicated that no other issues would be heard or determined in the Remand Hearing.

20. The Tribunal made every effort to limit the Remand Hearing evidence to the particular points noted by the Court for which the Court found the appellate record did not have "enough information" to make a determination.[15] In setting forth Point #1 and Point #4, the Court invited reexamination of, and additional, facts regarding: (a) whether, on or after December 19, 2013, Parent made clear her intention to not reenroll Student in Respondent's school district; and, (b) whether, after December 19, 2013, Parent made any attempts to request FAPE from Respondent.

21. The Remand Hearing record included prior witness testimony (*i.e.*, applicable transcript portions) and exhibits from Case No. 14C-DP-066-ADE that are directly related to the remand issue and to the four points noted by the District Court.[16] The "transcript" and audio recording of the December 19, 2013 meeting were included in the exhibits from the due process hearing in Case No. 14C-DP-066-ADE.[17]

22. The District Court did not reject the ALJ Decision's finding that Parent had rejected Respondent's "attempted evaluations" that Respondent had offered prior to December 19, 2013, or the ALJ Decision's finding that Parent had rejected Respondent's

[15] The Administrative Law Judge has read and considered each page of each admitted exhibit, even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if the witness is not specifically mentioned in this Decision.

[16] The Remand Hearing record includes: Joint Exhibits 1-12; Joint Transcript Excerpts from Vol. I, Vol. III, Vol. IV, Vol. V, Vol. VII, Vol. VIII, and Vol. IX of Case No. 16C-DP-066-ADE hearing record; Respondent's Exhibits A, B, and C; Petitioners' Exhibits 13, 16, 19, 20, 21, 22, 23, 24, 25, 27, 28, 32, 33, 34, and 35; and Petitioners' Supplemental Transcript Excerpts regarding Scholarship testimony from Vol. IV, Vol. V, and Vol. VI of Case No. 16C-DP-066-ADE hearing record.

[17] Remand Hearing Joint ("RHJ") Exhibits 8 and 9 respectively. An unknown person prepared the transcript of the December 19, 2013 meeting; Parent's Advocate made the arrangements. Parent then reviewed that transcript for what she had said. Parent testified that she looked at it "to see if any of the ones that were for somebody else [were] something that I said." Remand Hearing December 8, 2020 Transcript (RHTR) at 162. Parent indicated that she did not utilize the meeting audio for comparison. *Id.* Because the Administrative Law Judge would be unable to identify any of the participants' voices, the meeting audio was not utilized in review of the hearing record.

"final FAPE offer" on December 19, 2013.[18] Therefore, those factual determinations are not re-examined herein.[19]

23. Unless otherwise noted, the Findings of Fact, Conclusions of Law, and Order set forth in the ALJ Decision are incorporated by reference as if fully set forth herein.

REMAND POINT #1 AND REMAND POINT #4

24. The hearing record demonstrates that Parent did not re-enroll Student in any of Respondent District's schools, including [redacted] ([redacted]), after Parent had privately placed Student at [redacted].

25. Through various communications between the parties, Respondent had developed a transition plan for Student to return to Respondent's District.[20]

26. On December 3, 2013, Parent's Advocate had contacted Respondent with a list of 17 statements of allegations, issues, and questions for Respondent regarding Student and the parties' interactions and communications.[21]

27. Item #3 in Parent's December 3, 2013 document stated: "[Parent] has revoked consent for the District to conduct any observations or have any communication with [Student] or the employees at [redacted] regarding [Student]."[22]

28. The December 5, 2013 PWN indicated the results from the parties' December 3, 2013 meeting in continued preparation for Student's transition back to the District.[23] The PWN stated:

> The district has put together a plan, which was communicated via emails dated 10/3/13 and 10/4/13, to transition [Student] to Kyrene from his parentally place private school setting and would like to move forward with that plan. However, [Parent] indicated she is not willing to move forward with any portions of the plan, particularly prohibiting the communication with or visitation to his private school.

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[18] Such clarification did not prevent Petitioners from continuing to argue in the Remand Hearing that Parent had not rejected either the proposed evaluations or Respondent's "final FAPE offer" of December 19, 2013.
[19] Presumably, Petitioners are preserving arguments for possible future appeals.
[20] *See* RH Exhibit A and RH Exhibit B; *see also* RHJ Exhibit 1.
[21] *See* RHJ Exhibit 5 at 9-10; *see also* Petitioners' Closing Brief at 13 (lines 9-10 for the date).
[22] Because Student was no longer enrolled in the district at that time, the "consent" referred to as being revoked through this document was not clearly identifiable; however, the backdrop for such a statement appeared to be related to the October/November transition plan, which set forth proposed observations at [redacted]. *See* RHJ Exhibit A; *see also* RHJ Exhibit 1.
[23] *See* RHJ Exhibit 1.

29. In a December 6, 2013 email from [redacted], Parent requested more time, specifically until the end of January 2014, for Student to remain at [redacted].[24]

30. Respondent's Director of Exceptional Student Services, [redacted], determined to continue to cooperatively "work with" Parent and, on December 18, 2013, [redacted] proposed an agreement to allow Student to continue to attend [redacted] as a private placement, not as a District placement, with Respondent reimbursing Parent for tuition and transportation for January 6, 2014, through January 31, 2014.[25]

31. Respondent's December 18, 2013 proposed agreement contained seven provisions, the first of which was to enroll Student no later than December 20, 2013, the last day of Respondent's Fall semester in academic year 2013-2014.[26] Other provisions called for Parent to provide written consent, and make Student available, for "any additional testing determined by the [review of existing data ("RED")] team" to be done during January 2014 and for Parent to "allow for at least two observations to take place at [redacted]" by specified individuals prior to January 22, 2014.[27] The proposed agreement had indicated that a MET and IEP meeting would take place no later than January 29, 2014.

32. At the December 19, 2013 RED meeting, the RED Team determined that academic assessment information was missing and that additional information was needed to proceed with an evaluation process, specifying: "additional academic testing (KTEA), curriculum based measurements/information on current academic performance, observation in educational environment, additional speech/language testing (CASL), and language sample."[28]

33. The educational environment observation piece was identified by the RED Team to be a key component to be able to move forward with the evaluation process.

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[24] *See* RHJ Exhibit 5 at 6-7 and remand hearing ("RH") Exhibit B at KESD-03342
[25] *Id.*
[26] *Id.* at 6.
[27] *Id.*
[28] *Id.* at 3.

However, Parent did not agree to allow anyone from Respondent to observe Student at [redacted] indicating she feared it would cause Student emotional distress, instead proposing to have Student's 4-hour [redacted] day be videotaped for review by Respondent. While Respondent's Team members agreed "to attempt to gain the needed information" from such a video, they also discussed their reservations and the challenges that such a video would present to an evaluation process.

34. At the end of the December 19, 2013 RED meeting, Parent's Advocate presented Respondent's representative with what was indicated to be the "written agreement" signed by Parent.[29] The District representative inquired of Parent whether she was comfortable with having executed the written agreement without meeting with [redacted]; Parent's Advocate responded for Parent that Parent was.[30]

35. The "written agreement" that Parent's Advocate gave to Respondent's representative was not Respondent's proposed agreement, but was a different agreement that Parent had developed.[31]

36. Parent had developed an agreement that indicated several refusals and several demands, among which were the following:[32]

a. Parent would not agree to allow testing "because at this point, no testing has been proposed."

b. Parent indicated that "[o]nce evaluations are proposed" she would consider such and then notify Respondent "if she will offer permission and consent for testing within 5 business days. [Parent] is not expected to provide consent for evaluations that have not been discussed or proposed."

c. Parent indicated that she would "discuss options for [Respondent's] employees to conduct observations and that such discussions would take place at

[29] RHJ Exhibit 8 at 36.
[30] *Id.*
[31] RHJ Exhibit 5 at 3-4 (the PWN page 2 of 3 is incorrectly/inaccurately numbered); *see also Id.* at 7-8.
[32] Parent had obviously prepared her "agreement" after receiving Respondent's proposal but before the meeting began. Therefore, it would be a true statement, but only on the paper on which it was written, that no testing or evaluations been proposed at that time. However, by the end of the meeting, testing and evaluations had been discussed and, yet, Parent proceeded to present her "agreement." Such action is appropriately considered to be a rejection of Respondent's proposed agreement.

an IEP meeting sometime before January 29, 2014. Parent further indicated that observations would only take place if [redacted] recommended that "observations are appropriate and will not cause emotional trauma to [Student]." Parent noted that [redacted] would determine how observations would occur and what her own role would be.

d. Parent indicated she would provide a video recording of two hours of Student's educational instruction at [redacted] only if [redacted] personnel gave consent for the recording.

37. On December 19, 2013, after the RED meeting ended, Parent signed two Permission to Exchange Information forms. However, on both of them Parent restricted the exchange of information from "any and all . . . health, psychological [nature]" to "communication between professionals related to audiological, speech and language or educational nature concerning [Student]."[33] Parent further noted thereon "I do not authorize the release of records."

38. On December 19, 2013, after the RED meeting, Parent and Parent's Advocate had a discussion with [redacted], the Principal at [redacted].[34] In their post-hearing memorandum, Petitioners wrote that Parent had indicated to [redacted] that Student would not be coming to [redacted] immediately after the winter break because the "plan" was for Student to remain at [redacted] "for at least the month of January."[35]

39. Parent testified that she was "open to returning [Student] to [redacted] *ultimately*."[36] Parent recalled that [redacted] was "confused" during their conversation because he thought the enrollment forms had needed to be turned in by December 20, 2013.[37]

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[33] RHJ Exhibit 2 at KESD-00612 and KESD-00613.

[34] The RED meeting took place at [redacted].

[35] Petitioners' Closing Brief at 15. However, even at the time of the conversation, Parent was well aware that Respondent's proposed agreement was that she was to re-enroll Student no later than December 20, 2013, and [redacted] could not have been aware of Parent's revised "agreement."

[36] RHTR at 126 (emphasis added).

[37] The December 20, 2013 date would be a reference both to the transition plan and to Respondent's December 18, 2013 proposed agreement, of which [redacted] must have been aware. There is no indication in the remand hearing record that [redacted] was at the December 19, 2013 RED meeting. It is noted that Parent further testified that she did take the enrollment forms from [redacted] and she stated "I still have them actually." RHTR at 127.

40. [redacted] testified that [redacted] called her on December 19, 2013 and, in discussing his conversation that day with Parent, [redacted] had indicated that Parent had told him she would not be enrolling Student at [redacted].[38]

41. Parent testified that she did not "not consent" to evaluations but that, during the RED meeting, she did not know what evaluations had "already" been done and she "needed" to check on that.[39] However, Parent also inconsistently testified that "most of them we had already done . . . if there was something they had more questions on, then they could certainly ask the person that did it."[40]

42. Given that the purpose of the RED meeting was gathering all of the assessments and evaluations that were available at that time, it is more likely than not that it was readily apparent what evaluations the Team was requesting had not "already" been done.

43. On December 20, 2013 at 1:01 a.m., Parent sent an email to [redacted] with the subject line "Request for Independent Educational Evaluation for [Student]."[41] In that email, Parent stated that "[M]y son [Student] is a student in your school."[42] Parent further stated that she disagreed with the "functional behavioral assessment [FBA] completed in December and January 2013" which Parent stated "was the basis for the behavior support plan that was adopted as part of [Student's] January 2013 IEP."

44. On December 20, 2013, at 8:37 a.m., [redacted] responded to Parent indicating that she would provide a copy of the IEE procedures.[43]

45. On December 20, 2013, Respondent issued a PWN refusing the request for an IEE.[44] As to the refusal, the PWN stated:

> The student was withdrawn from District and parentally placed at a Special Day School in October. The parent was to re-enter student at [redacted] [redacted] to begin January 6, 2014. The parent indicated verbally

[38] RHTR at 14 and 45.
[39] RHTR at 116.
[40] RHTR at 119.
[41] RHJ Exhibit 11.
[42] However, effective October 14, 2013, Student was no longer a student in Respondent's district; Student had been officially withdrawn by KESD due to his "transfer to another school." Tribunal review of prior hearing record - Exhibit Q, PWN dated November 8, 2013.
[43] RHJ Exhibit 11.
[44] RHJ Exhibit 5 at 5.

to principal of [redacted] on 12/19/2013 that she will not enroll student at [redacted].

As to options, the PWN stated:

> The District considered the request to conduct an IEE but after checking enrollment status of student in a District school determined that student is not enrolled and District is not obligated to provide an IEE.
>
> . . . .
>
> The District is willing to consider the IEE request if the student is enrolled in a school in the District.

46. On December 20, 2013, [redacted] emailed Parent providing the following documents: a December 20, 2013 PWN; a December 19, 2013 PWN; Respondent's proposed agreement; Parent's revised "agreement;" "Allegations/Questions from Parent's Advocate;" Respondent's response to those allegations/questions; behavior data; and, Procedural Safeguards.[45] In her email, [redacted] further stated:

> If you have questions about the documents provided, please contact me. As always, I am willing to meet with you or discuss your questions or concerns.

47. Parent's December 20, 2013 1:10 a.m. email to [redacted] was the last contact Parent made with Respondent regarding Student prior to filing the June 25, 2014 Complaint. Parent testified that she never contacted Respondent again, stating, "No, because she made it clear not to contact her."[46]

48. In Respondent's "response" to the December 3, 2013 allegations/questions, [redacted] mentioned a "transition plan up to December 20" and further indicated that no observations had been conducted; while one had been attempted, it had not resulted in an observation.[47]

49. Parent never re-enrolled Student in the District.

50. After December 19, 2013, Parent made no attempt to request FAPE from Respondent.

CONCLUSIONS OF LAW

[45] *Id.* at 2.
[46] RHTR at 151.
[47] *Id.* at 11.

1. Based on the remand hearing record, the Administrative Law Judge concludes that Parent, on December 19, 2013, had no intention to re-enroll Student at a District school. Despite Student having been officially withdrawn from the District and having been privately placed by Parent at , as a part of a good faith transition plan, Respondent had offered to fund the parental private placement through December 20, 2013.[48] The December 20, 2013 date was reiterated in Respondent's December 18, 2013 proposed agreement to continue to work with Parent to transition Student back into the District. According to the October/November transition plan, Parent was to enroll Student in the District no later than December 20, 2013. December 6, 2013 request for Student to remain at until the end of January came a few days after a December 3, 2013 team meeting and one day after the December 5, 2013 PWN was issued.

2. Respondent again made a good faith offer to Parent through the December 18, 2013 proposed agreement to continue to fund the private placement until January 29, 2014. In that proposed agreement, Respondent reiterated that Parent should re-enroll Student in the District no later than December 20, 2013.

3. At the December 19, 2013 RED meeting, Parent countered each of the Team's requests for testing and evaluations with various conditions, parameters, or delays in the evaluation process. At the end of that meeting, Petitioners proceeded to present Parent's "agreement" which, at that moment and unbeknownst to Respondent, set forth conditions and parameters, some of which Parent and Parent's Advocate had expressed during the meeting. As to an evaluation process, with the exception of agreeing to have a team meeting no later than January 29, 2014, Parent: (a) disagreed with the proposed upcoming enrollment, testing, and evaluation dates; (b) refused to give consent, or set one-sided conditions, for testing, evaluations, or observations; and, (c) demanded special education services be provided to Student at beginning on January 6, 2014. As a whole, these refusals and demands shall appropriately be considered to demonstrate Parent's lack of intention to re-enroll Student in the District in

[48] RHJ Exhibit 1.

order to access special education services from Respondent. Additionally, when Parent told on December 19, 2013, that she was not going to enroll Student, whether she meant that day or ever, the end result was that Parent did not take any action to re-enroll Student in the District on December 19, 2013, or by December 20, 2013, the good faith date set by Respondent, because she had no intention of re-enrolling Student in Respondent's District.

4. Parent's argument in the Closing Memorandum to couch her actions in not enrolling Student on December 19, 2013, to be based on "everyone's understanding" or agreement of a "plan" from the RED meeting was disingenuous given that she had nearly completely rewritten Respondent's proposed agreement and her revised "agreement" that was given to Respondent after the RED meeting ended did not accurately reflect the discussions and determinations from the December 19, 2013 meeting.[49] Petitioners' characterization of Parent's action of taking with her the enrollment forms as being indicative of her intent to enroll Student was not credible. At the remand hearing in 2020, nearly 7 years after the disputed conversation, Parent testified she still had those enrollment forms. Therefore, the Administrative Law Judge concludes that any question of whether she intended to re-enroll Student in the District must be answered in the negative.

5. Petitioner vigorously argued that all of Parent's efforts and communications, in the Fall of 2013, and in her December 19, 2013 revised "agreement," along with her December 20, 2013 FBA IEE request (she argued, to continue having MET or IEP meetings and to discuss Student's particular needs), must be construed to be Parent's request for FAPE, an offer for which she argued that Respondent subsequently failed to provide. Similarly, Petitioner vigorously argued that the December 18, 2013 proposed agreement from Respondent could not be considered to be an offer of FAPE and, further, that Petitioner had not "rejected" that offer. However, the Court affirmed the ALJ

[49] Petitioners' Closing Memorandum at 15.

Decision's finding that Parent had rejected Respondent's final FAPE offer in December 2013; the Court's determination is not under review or reconsideration at the Tribunal.[50]

6. The Court remanded the question of whether "after" December 19, 2013, Petitioner had ever requested FAPE. The remand hearing record failed to demonstrate any contact by Parent with Respondent after December 19, 2013, requesting an offer of FAPE. Parent's December 20, 2013 request for an FBA IEE was, as stated at that time and in that document, due to Parent's disagreement with some prior evaluation. Therefore, the Administrative Law Judge concludes that Parent made no attempt after December 19, 2013 to make a request for an offer of FAPE from Respondent.

7. Student was no longer enrolled in District effective October 14, 2013. The parties were continuing to have communication as to Student's return to the District and, as a part of those efforts, some evaluations and observations were proposed and/or scheduled. In the communication dated December 3, 2013, Parent specifically revoked consent for observations and communications with/at [redacted]. With her revised December 19, 2013 "agreement" rejecting the District's testing and evaluation requests set forth in the Respondent's final FAPE offer, and in setting forth limitations on when and how assessments would be conducted, Parent effectively refused to provide consent for Student's evaluation in and after December 19, 2013. With her specific restrictions and limitations to the consent forms she signed on December 19, 2013, Parent refused to allow District personnel to obtain existing evaluative assessment records of Student.

8. To re-evaluate a student, 34 C.F.R. § 300.300(c)(1)(i) requires that a parent must give informed consent. 34 C.F.R. § 300.300(c)(1)(ii) provides that when a parent refuses consent, the school district is not required to pursue the re-evaluation.[51] 34 C.F.R. § 300.300(c)(1)(iii) provides that the school district does not violate the IDEA child

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[50] The substantive issue of the IEE request was addressed in the ALJ Decision. Here, regarding the timing of the IEE request, Petitioners argued that the District would have been required to have an IEP meeting to discuss the results of an IEE and, therefore, the IEE request demonstrated that Parent was continuing to request IEP meetings (*i.e.*, continuing to request FAPE) with the District.

[51] See *Student R.A. v. West Contra Costa Unified School District*, 2015 WL 4914795 (N.D. Cal 2015), aff'd 696 F. App'x. 171 (9th Cir. 2017). There, the 9th Circuit Court of Appeals found that parental conditions or restrictions on the conduct of assessments were unreasonable and effectively acted to void consent; in that case, the parent would not produce the student for the assessments unless she was permitted to fully observe the administration of the assessments.

find or evaluation obligations if it declines to pursue reevaluation when a parent refuses consent.

9. The Administrative Law Judge concludes that Parent's rejection of the proposed evaluations and rejection of the final FAPE offer relieved Respondent of further obligations under the IDEA. Therefore, in the absence of a further request after December 19, 2013 to offer a FAPE to Student, Respondent had no further IDEA obligation to Student.

10. Because the evidentiary record did not demonstrate a violation of the IDEA by Respondent and, therefore, no remedies would be fashioned, the Administrative Law Judge does not address Petitioners' requested remedies.

RULING

Based on the findings and conclusions above,

IT IS ORDERED that Petitioners' New Complaint is dismissed in its entirety.

IT IS FURTHER ORDERED that because Petitioners failed to demonstrate Parent intended to re-enroll Student in the District, the remanded issue from Petitioners' Amended Complaint is dismissed.

IT IS FURTHER ORDERED that because Petitioners failed to demonstrate that, after December 19, 2013, Parent made any effort to request from Respondent an offer of FAPE, the remanded issue from Petitioners' Amended Complaint is dismissed.

IT IS FURTHER ORDERED that all other issues in Petitioner's Amended Complaint, as were determined in the ALJ Decision, remain dismissed.

ORDERED this day, March 26, 2021.

/s/ Kay A. Abramsohn
Administrative Law Judge

RIGHT TO SEEK JUDICIAL REVIEW

Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this Decision and Order is the final decision at the administrative level. Furthermore, any party aggrieved by the findings and decisions made

herein has the right to bring a civil action, with respect to the complaint presented, in any State court of competent jurisdiction or in a court of the United States. Pursuant to Arizona Administrative Code § R7-2-405(H)(8), any party may appeal the decision to a court of competent jurisdiction within thirty-five (35) days of receipt of the decision.

Copy e-mailed March 26, 2021 to:

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