

MAR 21 2025

BEFORE THE STATE BOARD OF EDUCATION
STATE OF NEBRASKA

NEBRASKA DEPARTMENT
OF EDUCATION

[REDACTED]

CASE NO. 24-03 SE

PETITIONER,

v.

HEARING OFFICER'S
FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND DECISION

OMAHA PUBLIC SCHOOLS, FOREST
STATION ELEMENTARY SCHOOL,
SHELLY BURGHARDT, and LINDSEY
THOMPSON,
3215 Cuming Street
Omaha, NE 68131

RESPONDENTS.

Following a formal hearing in this case occurring December 18, 2024, in Omaha, Nebraska, before the undersigned hearing officer, this decision provides my findings of facts and conclusions of law in this case.

I. Statement of the Case

[REDACTED] was enrolled as a third-grade student in the Alternate Curriculum Program of the Omaha Public Schools' Forest Station Elementary School this past school year of 2023-2024. The staff in [REDACTED]'s classroom included her ACP teacher, Michelle Richards, and other educators. During the school year, [REDACTED] was attending school under her Individualized Education Program (IEP). On April 3, 2024, [REDACTED]'s hair was cut, apparently by another student. [REDACTED]'s IEP education team made changes to her program to address a concern that the incident would never happen again.

Petitioner D [REDACTED]'s mother, insisted [REDACTED] receive one-to-one support in future educational services. The IEP team did not agree with that recommendation. The educational team believed there was insufficient data to show the level of such support was required and believed it could actually impede the progress [REDACTED] was making toward her IEP goals.

The Petitioner now seeks a determination that Respondents have violated the Individuals with Disabilities in Education Act (IDEA). This action followed.

II. Procedural Background

A hearing was convened on December 18, 2024, in Omaha, Nebraska, presided over by the undersigned hearing officer. Petitioner [REDACTED] appeared and represented both herself and her daughter. Respondents Omaha Public Schools, Forest Station Elementary School, Shelly Burghardt and Lindsey Thompson were represented by attorneys Allison D. Balus and Kiley Schmidt. This hearing was recorded by Great Plains Reporting, through the services of Victoria Elliott, a certified court reporter.

Six witnesses provided sworn testimony at this hearing as follows: [REDACTED] Kyle Hesser, Michelle Richards, Shelly Burghardt, Lindsey Thompson, and Kara Saldierna. Petitioner offered into evidence Exhibits 1 through 23, inclusive, which were received. Respondents offered into evidence Exhibits 101 through 138, inclusive, which were received.

The case was adjourned on the evening of December 18, 2024, after all parties rested and the case was thereafter taken under advisement following final arguments presented through written briefs of the parties, which briefing process concluded February 25, 2025.

Jurisdiction in this case is premised upon Title 92, Ch 55 of the Nebraska Administrative Code, and the Nebraska Special Education Act, Neb. Rev. Stat § 79-110 et seq, and the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. §1400 et seq.

III. Issues Presented

Through the Petitioner's filing of September 4, 2024, and the Respondent's Answer, the following issues for determination are now before me:

1. Whether Respondents denied [REDACTED] a free and appropriate education (FAPE) by failing to provide her one-to-one support, whether through a personal assistant or additional staff support, or an assigned professional.

2. Whether the Respondents violated any IDEA procedural requirement, and if so, whether any procedural violation was actionable under IDEA.

IV. Findings of Fact

1. Petitioner [REDACTED] is the mother of [REDACTED] who resides with the Petitioner within the boundaries of Omaha Public Schools (OPS). [REDACTED] is currently [REDACTED] years old and was enrolled in the [REDACTED] grade at Forest Station Elementary School.

2. Omaha Public Schools (OPS) is a public school district in the state of Nebraska and is the Local Education Agency (LEA) for [REDACTED]. Shelly Burghardt is an OPS employee and the principal at Forest Station Elementary School. Lindsey Thompson is an OPS employee, with the title of Special Education Teaching Learning Consultant (SETLC), and Forest Station is one of the OPS schools to which she is assigned.

3. [REDACTED] has been diagnosed with autism spectrum disorder (ASD) and has been certified by OPS as a child with a disability who is eligible for special education under the category of autism. [REDACTED] may not be totally dependent on another person at all times, but she is primarily non-verbal and requires assistance with toileting needs and other activities of daily living. [REDACTED] is able to remove her coat and backpack without assistance, but she continues to require assistance from the school officials and nursing staff. [REDACTED] is primarily non-verbal and she uses a communication device which she can navigate fairly accurately.

4. [REDACTED] attended Forest Station for her [REDACTED] grade year, and Michelle Richards, a special education teacher, was [REDACTED]'s [REDACTED] grade ACP teacher.

5. [REDACTED] entered her [REDACTED] grade year in the fall of 2023 with an IEP that had been established on April 24, 2023, while she was a [REDACTED] grade student. Since approximately May of 2022, [REDACTED] has received instruction which utilizes the Nebraska Alternate Standards with extended indicators for students with significant disabilities (Exhibit 1).

6. The Alternative Curriculum Program at OPS is a program which provides special educational services focused on specific academic, functional and behavioral needs within a students' IEP requirements. All students in ACP classrooms operate on IEP Programs.

7. [REDACTED]'s ACP classroom, during the 2023-2024 school year, was comprised of 12 students and was staffed by Richards, two additional paraprofessionals and a nurse, for a ratio of approximately 3 students to one adult supervisor.

8. Similar to [REDACTED] most of the other students in her ACP classroom were also diagnosed with autism and most students needed

assistance with toileting, while some students also used assistive communication devices.

9. The nurse in the ACP classroom with ██████ assisted in the classroom addressing students' toileting needs as well as other medical needs, given that two students were using feeding tubes.

10. Before ██████ began the 2023-2024 school year, Richards had reviewed ██████'s IEP plan from her prior school year, dated April 24, 2023, so that plan could be followed until it was time for the next annual IEP in 2024.

11. ██████'s special need behaviors included things as jumping, putting things in her mouth which were not edible, occasionally hitting herself or grabbing her hands to put on her head, and hiding her bookbag.

12. In addition to addressing ██████'s behaviors, Richards testified that ACP staff provided ██████ assistance with activities of daily living, such as toileting, opening food items, and helping her remove her coat and backpack. Richards was not overly concerned about ██████ hurting herself because such behaviors did not involve "big motions" or apparent risk of injury. Nevertheless, Richards was monitoring ██████ regarding any potential self-harming behavior at all times.

13. During the first three quarters of the 2023-2024 school year, Richards described ██████'s behavior in reviews with the Petitioner, and Petitioner did not request any specific changes in those discussions. ██████'s progress report from the second and third quarters indicated she was making adequate progress in meeting her annual goals.

14. On April 3, 2024, ██████'s hair was cut while she was in the ACP classroom. Apart from the hair being cut, ██████ was not otherwise physically injured. When her mother came to retrieve ██████ from school, Richards informed her of the incident. Richards also informed Shelly Burghardt of the incident, and Burghardt called Petitioner that same day to "talk through the incident". Burghardt recalled that Petitioner was understandably upset about ██████'s hair being cut. Petitioner inquired how this could happen if ██████ had adequate supervision at all times.

15. Petitioner expressed to Burghardt a belief that ██████'s April 23, IEP required a level of one-to-one supervision, but Burghardt advised Petitioner that there is "nothing stated" in the IEP that showed ██████ should receive one-to-one supervision.

16. On April 5, 2024, the petitioner, Burghardt, Thompson and Richards met to review the IEP to be assured that the IEP was appropriate for

█'s needs. During this meeting, Petitioner raised "some concerns" and asked that the school psychologist, John Gallo, reach out to her to discuss with her any additional testing or screening.

17. During the April 5 meeting, Thompson provided a copy of the current IEP to Petitioner. Respondents amended the educational needs in █'s IEP to "add recommendation for referral to BCCT team and to add accommodation for █ to be with an adult during all parts of the school day".

18. Petitioner was advised that a full IEP meeting was being scheduled to update █'s plan and the school psychologist would be reaching out to █'s mother, the Petitioner, to determine if there is any need for updated testing.

19. The BCCT is a group that meets and reviews referrals it receives and provides a response, either by providing suggestions to the team, requesting more information, or finding that the team would assign a member to support. After reviewing █'s referral, the BCCT group suggested to the team to add a behavioral intervention plan to the IEP for gathering additional data on █.

20. After the April 5 meeting, Thompson received a doctor's letter dated April 4, 2024, stating in part, █ is diagnosed with autism, speech and developmental delay. Due to her diagnosis and developmental needs, she requires 24/7 one-to-one supervision" (Exhibit 137). That note was placed on Thompson's desk and was apparently the first physician's note Thompson received indicating an opinion that █ required one-to-one supervision.

21. Burghardt called Petitioner on April 15, 2024, reminding Petitioner about an April 19, 2024 IEP meeting concerning █.

22. At Petitioner request, because she did not desire to personally attend the meeting, Petitioner attended the April 19, 2024, IEP meeting virtually and other members of █'s IEP team attended virtually. During this meeting, the team reviewed IEP documents, including █'s present level of achievement, goals and objectives, as well as her educational needs. With respect to █'s educational needs, the team discussed █'s bathroom support during the school day, proximity to an adult with supervision throughout the school day, and other needs. Petitioner had the opportunity to ask questions, provide input, and to make comments concerning the educational support system.

23. The April 2023-2024 report also addressed Petitioner's questions regarding one-to-one supervision, explaining that the language to clarify that [REDACTED] will have proximity to an adult and to be with an adult in school spaces was added into the amendment of the April 5, 2024, IEP plan, and also included the most recent IEP written for April 19, 2024 (Exhibit 30).

24. Richards testified that adding a one-to-one requirement to [REDACTED]'s IEP could constitute a more restrictive setting, and that not enough data had been gathered to implement such a requirement.

25. Thompson testified that assigning one-to-one support for [REDACTED] without proper data could be counterproductive (Exhibit 101).

26. According to Richards, no students in her thirteen years as a special education teacher, required a one-to-one paraprofessional support system. None of [REDACTED]'s classmates in her school had IEP's which provided one-to-one support system.

27. Thompson testified that she has experienced a single situation where a one-to-one paraprofessional support was required and that was a case involving a nurse for individualized medical needs required by a student.

28. As of the date of the hearing, [REDACTED] was enrolled at Forest Station Elementary School, but [REDACTED] has not returned to attend school since April 3, 2024.

29. On April 17, 2024, Petitioner filed her Petition with the Nebraska Department of Education.

30. Respondent OPS responded to the Petition and issued an investigative report and findings regarding Petitioner's Complaint in a letter dated July 18, 2024 (Exhibit 109).

31. After their investigation and preliminary findings, NDE found that Respondents implemented the requirements of the Nebraska Administrative Code and state law and found that no corrective action was required in this case (Exhibit 109).

V. Conclusions of Law

A. **Burden of proof:** The Petitioner bears the burden of proof in this proceeding challenging the IEP and the evidentiary burden is properly placed upon the party seeking relief *School Board v. Renollett*, 440 F.3d 1007 (8th Cir. 2006).

B. **Applicable Legal Standards:** the primary purpose of the Individuals with Disabilities Education Act (IDEA) is to ensure all students with disabilities have available to them a free appropriate public education (FAPE). The legal requirements of the Act are fulfilled if:

1. A school district complies with the appropriate law in developing an IEP, and

2. The resulting IEP is reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances *Independent School District No. 284 v. AC ex rel. C.C.*, 258 F.3d 769, 773 (8th Cir. 2001).

C. A school district is not required to provide an optimal experience for a student with a disability. Rather, the school must provide the student with a FAPE consistent with the IEP. *Kaas v. Western Dubuque Community School District*, 101 F. 4th 562 (8th Cir. 2024).

VI. Analysis and Decision

In assessing the evidence presented relative to the issues before me in this case, I first address the question of whether Respondents denied ██████████ a free and appropriate education by failing to provide her one-to-one support. In that regard, my analysis is somewhat complicated by the fact that Petitioner elected to not return ██████████ to the classroom after April 2024, so there is no clear record of how ██████████ progressed under the changes in her IEP. That said, however, it does not appear to me that Petitioner has proven a case of the school district failing to provide an appropriate education under the relevant standards of state and federal law.

The incident involving ██████████'s hair was followed by changes in her IEP, meetings with the affected parties and professionals, including Petitioner, and discussion of appropriate monitoring of behavior in the classroom. However, because of an apparently sincerely-held belief of the Petitioner that only one-to-one supervision would be appropriate in this case, the parties were not able to reach a level of trust that allowed ██████████ to return to the classroom. At the same time, it was apparent to me that the school officials involved in this case were very responsive

to [REDACTED]'s needs and responded appropriately to the matters involving [REDACTED]'s hair.

From the testimony provided by the Respondents, together with the other evidence concerning appropriate standards of behavior and care, I do not believe that Petitioner met her burden of proof regarding the issue of denial of educational opportunity to her daughter by reason of any actions or omissions of the Respondents.

Turning next to the question of whether Respondents violated any procedural requirements sufficient to find a violation of IDEA. I again find that Petitioner has not met her burden to prove such a violation by clear and convincing evidence. The Respondents' reaction to the student's concerns in this case were consistent with the federal decisional law of the Eighth Circuit, establishing that while a school district may not provide an optimal experience for a student with a disability, the question is whether the school district must provide an education consistent with a properly developed IEP. I find no violation occurred in this case from the evidence presented to me. The school district provided [REDACTED] a FAPE consistent with her IEP.

Therefore, I will deny the Petitioner's claims and dismiss this Petition accordingly.

DATE: March 21, 2025.



Robert F. Bartle
Hearing Officer

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the recommended findings was served on counsel of the record by sending same by electronic mail on this 21st day of March, 2025, addressed as follows:



Ms. Allison D. Balus &
Ms Kiley Schmidt
BairdHolm LLP
1700 Farnam Street
Suite 1500
Omaha, NE 68102
abalus@bairdholm.com
kschmidt@bairdholm.com

Mr. Troy Hawk
Legal Counsel
Commissioner's Office
Nebraska Department of Education
500 South 84th Street
Lincoln, NE 68510
troy.hawk@nebraska.gov

A handwritten signature in cursive script, appearing to read "Robert F. Bartle".

Robert F. Bartle
Hearing Officer