STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
[Student] by and through his parents [Father] and [Mother], Petitioners, VS. **CHEYENNE MOUNTAIN SCHOOL DISTRICT 12,** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **EA 2014-0018**

DECISION

Petitioners allege that Cheyenne Mountain School District 12 (School District) denied their son, [Student], a free appropriate public education in violation of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 to 1482. A due process hearing, convened in accordance with 20 U.S.C. § 1415(f) and its implementing regulation, 34 CFR § 300.511, was held before Administrative Law Judge (ALJ) Robert Spencer at the School District's offices at 1775 LaClede Street, Colorado Springs, Colorado on September 17, 2014.[1] [Student]'s mother, [Mother], was present but Petitioners were not represented by counsel. W. Kelly Dude, Esq., Anderson, Dude & Lebel, PC, represented the School District.

Case Summary

Petitioners' [age] year old son, [Student], enrolled in kindergarten at [Charter School] for the 2013/2014 school year. [Charter School] is a public charter school within the School District. Although [Student] resides in a different school district, he was accepted at [Charter School] pursuant to Colorado's "School Choice" law, §§ 22-36-101 to 106, C.R.S.

[Student] has an autism spectrum disorder and is eligible to receive special education and related services pursuant to the IDEA. As required by the IDEA, [Student] had an Individualized Education Program (IEP) developed in his home school district while in preschool, but the plan was revised at [Charter School] on November 7, 2013 to provide services lacking in the original plan. The revised plan included a "Service Delivery Statement" that identified, among other things, a need for [Student] to receive "intensive support for instruction and supervision for safety through his day which will be provided by special education staff and/or paraprofessional on an

[1] Per Petitioners' request and 34 CFR § 300.512(c)(2), the hearing was open to the public.

individual and small group basis."

Petitioners allege that in March 2014, [Charter School] unilaterally decided to re-evaluate [Student]'s need for paraprofessional services and assess his ability to function independently. Specifically, Petitioners allege that on March 12, 2014, [Student]'s mother attended a meeting with [Charter School] and District staff at which [Charter School] [Principal] stated that [Charter School] could not continue to provide the level of paraprofessional support [Student] needed, and that over the ensuing six weeks the school would "fade" the existing paraprofessional support to see if [Student] could function independently. Thereafter, another IEP team meeting would be convened to reconsider [Student]'s needs. According to Petitioners, [Mother] was told that if [Student] could not function independently he would not be allowed to re-enroll at [Charter School] the following year. On March 18, 2014, [Mother] sent [Principal] an e-mail objecting to the plan "to fade [Student]'s individual support" and expressing concern that withdrawal of that support would adversely impact her son's academic progress and safety at school.

On May 1, 2014, the IEP was revised but the level of paraprofessional support was not reduced from the November IEP, and [Student] continued to require "intensive one-on-one paraprofessional support for academic instruction, transitions, and to ensure his safety throughout the entire day." On May 22, 2014, [Charter School] [Executive Director] sent Petitioners a letter advising them that [Charter School] did not have the staff necessary to support [Student]'s IEP in the first grade, and therefore his request for enrollment at [Charter School] for the 2014/2015 school year was denied.

On July 16, 2014, Petitioners filed a due process complaint with the Colorado Department of Education (CDE). In that complaint, Petitioners claimed the following four IDEA violations:

1. Failure to Appropriately Evaluate: Petitioners alleged that, at the IEP meeting of November 7, 2013, the School District failed to adequately assess and evaluate [Student]'s disabilities or adequately consider his need for physical therapy and ABA therapy.

2. Failure to Appropriately Supervise: Petitioners alleged that the School District failed to provide the level of supervision required by the IEP, resulting in [Student] being "trapped" in a bathroom, being unable to participate in field trips, and becoming "prompt dependent."

3. Failure to Provide Appropriate Goals and Assessments: Petitioners alleged that [Student]'s IEP failed to include appropriate goals to address identified concerns. The goals that were established allegedly failed to meet CDE standards and proper methodology was not employed to meet the goals. Furthermore, Petitioners alleged that the School District failed to inform them of [Student]'s progress in these goals as required by the IEP, and that several goals were subsequently eliminated without explanation. Finally, they alleged that the IEP was deficient because it did not explain why [Student] could not participate in regular assessments given to his classmates, but instead provided unjustified

accommodations in mode and duration of assessment.

4. Inappropriate Re-evaluation Leading to Denial of Enrollment: Finally, Petitioners claimed that [Charter School] decided to re-evaluate [Student] in March 2014 without providing the legally required prior written notice and without their informed consent. In a footnote to this portion of their complaint, Petitioners stated that they were not raising in this due process complaint [Charter School]'s refusal to readmit [Student] to [Charter School] for the 2014/2015 school year, or the School District and [Charter School]'s refusal to provide paraprofessional services in the 2014/2015 school year required by the May 2014 IEP. The issue was therefore limited to the alleged procedural violations associated with the March 12, 2014 meeting and whether any decisions made at that meeting caused [Student] to suffer a deprivation of educational benefit.

On August 4, 2014, Petitioners filed a motion for preliminary injunction seeking a "stay put" order directing the School District to fund a private placement for [Student] pending the outcome of their complaint. The ALJ denied that request by order dated August 8, 2014.

On August 1, 2014, the School District filed a notice of insufficiency and alternative motion to dismiss the complaint as unsupported by the evidence. On August 6, 2014, the ALJ issued an order finding the complaint facially sufficient to meet the requirements of 34 CFR § 300.508, but reserving judgment on the motion to dismiss. On August 19, 2014, the ALJ issued an order finding no genuine issue of material fact to support Petitioners' first three allegations, and therefore granting summary judgment as to those issues. The scope of the hearing was therefore limited to Petitioners' fourth allegation.

At the hearing on September 17, 2014, the School District moved for judgment in its favor at the conclusion of Petitioners' case. For reasons explained below, the motion was granted.

Preliminary Issues

A telephone conference was held on September 16, 2014 to address the following last minute motions filed by the parties:

Petitioners' Motion to Continue

Petitioner [Mother] filed a motion to continue the hearing due to illness. [Mother] supported her motion with two notes from her doctor. The first note stated that [Mother] "has a head cold that is causing inner ear issues and troubles with her balance," and asked that she be excused "from school" until 9/15/2014. The second note asked that she be excused "from school" until 9/19/2014. Respondent objected to the continuance and attached a note from the same doctor stating that when he wrote the first two notes he had not been aware [Mother] was asking to be excused from attending a legal proceeding. Although the doctor declined to discuss [Mother]'s medical condition, he stated "I can confidently say that her condition would not in my professional opinion

exclude her from taking part in any planned court proceedings."

At the telephone conference, [Mother] explained that she was willing to attend the hearing as scheduled and did not need a continuance if she could be allowed to take breaks when necessary. The ALJ agreed to that request and on that basis denied the motion to continue as moot.

Respondent's Motion to Endorse Additional Witness

The School District moved to amend its prehearing statement to endorse [Mother] as a witness. As grounds therefor the School District claimed that it was surprised when [Mother] did not endorse herself as a witness in her prehearing statement, and it wished to endorse [Mother] so that it could impeach her credibility. [Mother] objected to the motion.

To avoid unfair prejudice to the opposing party, the ALJ will generally allow a party to call a witness not endorsed in the party's prehearing statement only if the need to do so was not reasonably foreseeable at the time the prehearing statement was filed. Because the School District's "need" to call [Mother] as a witness was entirely foreseeable, the motion to amend was denied. Witnesses called for purposes of impeachment need not be endorsed in a prehearing statement, but [Mother]'s credibility was not in issue and therefore she was not subject to impeachment unless she testified in her own case. Because she did not testify in her own case, there was nothing to impeach.

Respondent's Motion to Strike Witnesses and Exhibits

The School District moved to strike Petitioners' endorsement of certain witnesses and exhibits on the grounds that those exhibits and the endorsed testimony of those witnesses were not relevant to the issue on appeal. The ALJ agreed, in part, and struck the endorsement of [Witness] and portions of the endorsed testimony of [Executive Director] as this testimony related to issues not within the scope of the appeal. For the same reason, the ALJ struck exhibits 1 - 9, 19, 21, 29, and 30, as listed on Petitioners' prehearing statement.[2]

Findings of Fact

The following findings of fact are based upon the testimony of the witnesses called and exhibits admitted in Petitioners' case-in-chief.

[Student]'s Attendance at [Charter School]

1. [Student] is a [age] year old boy with an autism spectrum disorder and a Significant Reading Deficiency (SRD).

2. [Student] and his family live in [City], Colorado, which is within Falcon

[2] Several of these exhibits were offered at the hearing as Petitioners' exhibits A – H, and N. They were not admitted as evidence but are included in the record.

School District 49.

3. Because of his autism spectrum disorder and SRD, [Student] is a child with a disability entitled to the protections of the IDEA. Accordingly, Falcon School District 49 developed an IEP for [Student] while he was in preschool in the Falcon 49 district.

4. Colorado has a School Choice law that allows parents to seek enrollment of their child at a Colorado public school that is not within the school district of their residence.[3]

5. In 2013, Petitioners sought to enroll [Student] in kindergarten at [Charter School], a public charter school within Cheyenne Mountain School District 12. [Charter School] accepted [Student] for the 2013/2014 school year.

6. When [Student] was accepted by [Charter School], [Charter School] and the School District were aware that [Student] had an IEP developed at Falcon 49. However, shortly after the school year began, [Charter School] staff found that the IEP developed for [Student]'s preschool education was not adequate to meet his educational needs in kindergarten. Therefore, with Petitioners' consent, the School District and [Charter School] re-evaluated [Student] and developed a new IEP that, among other things, contained a behavioral intervention plan appropriate to [Student]'s needs. That IEP is dated November 7, 2013 and will be referred to herein as the "November IEP." Ex. 1.

7. A key provision of the November IEP related to [Student]'s need for "intensive support for instruction and supervision for safety throughout his day which will be provided by special education staff and/or paraprofessional on an individual and small group basis." Ex. 1, p. 15.

8. Although [Charter School] was not normally staffed to provide this level of support to a student and under the School Choice law was not obligated to accept a student it could not support, it nevertheless agreed to provide the staff support required by the November IEP throughout [Student]'s kindergarten year.

9. As the administrative unit of attendance, the School District was obligated by the IDEA to see that [Student] received a free appropriate public education during the time he was enrolled in the district.

10. In early 2014, [Charter School] administrators began to assess [Charter School]'s staffing needs for the following school year. In connection with that assessment, [Charter School] [Principal] and others at [Charter School] had concerns about whether [Student] would be able to function with sufficient independence in first grade that [Charter School] would not need to hire additional staff, or whether he would continue to require intensive one-on-one support. If the latter condition proved to be true, then [Charter School] might not accept [Student] for enrollment in the first grade because it would not be adequately staffed to provide the support he needed. Under

[3] Sections 22-36-101 to 106, C.R.S.

[Principal]'s interpretation of the School Choice law, [Charter School] was not required to re-enroll a student that it was not staffed to support.

11. To address this issue, [Principal] called a meeting to be attended by [Student]'s special education teacher, [Special Education Teacher]; [Student]'s mother, [Mother]; and the School District's Director of Special Education, [Director].

12. [Special Education Teacher] arranged the meeting. On February 28, 2014 he sent [Mother] an e-mail inviting her to the meeting. [Special Education Teacher] explained that the purpose of the meeting was to "discuss the next at steps in preparation for [Student]'s first grade year." Ex. 3.

13. The meeting was held March 12, 2014. In addition to [Principal], [Special Education Teacher], [Mother], and [Director], [Student]'s kindergarten teacher, [Kindergarten Teacher], also attended the meeting. Although some or all of these people were members of [Student]'s IEP Team, other members of the team were not invited and did not participate.

14. In addition to staffing concerns, [Student]'s teachers and support staff were concerned that [Student] was becoming overly dependent upon the prompting provided by his support team. For example, rather than listen to and respond to [Kindergarten Teacher]'s directions to the class as a whole, [Student] would rely upon his paraprofessional or other staff to repeat and interpret [Kindergarten Teacher]'s instructions. His teachers and support staff felt this was counterproductive and created an unacceptable level of dependence.

15. As explained by [Principal] at the meeting and recorded in minutes prepared by [Special Education Teacher], [Charter School] intended to implement a plan to "decrease the level of adult prompting to see if [Student] could more independently access the general setting and remain safe." Ex. 4. [Student]'s mother was "assured that the level of support would remain the same, but that an attempt would be made to decrease the level of prompting." *Id.* Data would be collected "to see if the level of prompting needed could be decreased," and then an IEP Team meeting would be scheduled for later April or early May 2014 to review the data and determine what level of support [Student] would require in first grade. *Id.* [Principal] also explained that if it appeared that [Student] would continue to need a high level of prompting support, [Charter School] may not be able to re-enroll him for first grade as the school did not have the staffing necessary to provide that support.

16. In the unanimous opinion of [Principal], [Special Education Teacher], [Kindergarten Teacher], and [Director], the March 12, 2014 meeting was not an IEP Team meeting, and therefore no formal "prior written notice" to Petitioners was required. In fact, although [Mother] received an e-mail inviting her to the meeting and she did attend, formal prior written notice was not provided. Although Petitioners' complaint alleges that the meeting was the functional equivalent of an IEP Team meeting, neither Petitioner testified at the hearing and Petitioners offered no testimony or other evidence to prove that it was.

17. During the meeting, [Mother] did not voice any objection to the plan to taper or "fade" the level of prompting given to [Student], nor did she contend that the meeting was an IEP Team that required prior written notice and the presence of all IEP Team members. However, at the close of the meeting, [Mother] did voice a concern that [Charter School]'s plan would result in [Student] being denied enrollment at [Charter School] in the following school year.

18. On March 18, 2014, [Mother] sent [Principal] and [Director] an e-mail objecting to "[Charter School]'s unilateral decision to withdraw the support called for in [Student]'s IEP." Ex. O.

19. The following day, [Director] sent [Mother] an e-mail explaining that "we have and will continue to ensure that [Student] has the supports detailed in his Individualized Education Program (IEP) . . . As we indicated when [Principal], [Special Education Teacher], and myself met with you on March 12, 2014, the staff support that is being provided is not being decreased. We are trying to ascertain in a very purposeful way the extent to which [Student] can increase his independence in the classroom by decreasing the frequency of prompting the staff person provides and her physical proximity to [Student]." Ex. 5. [Director] went on to reiterate, "We are not 'unilaterally' withdrawing support, we are attempting to decrease prompting. We may find that we are not able to decrease the level of prompting currently being provided. In that case, the current level of prompting will be maintained." *Id.*

20. On March 20, 2014, [Director] called [Mother] to ensure that she had received and understood her [Director]'s e-mail. [Mother] said she had not yet read the e-mail, so [Director] explained it verbally. According to [Director], [Mother] expressed satisfaction with the explanation. Although [Director] offered to meet with [Mother] to discuss the matter further, [Mother] did not follow up on that request. Because [Mother] did not testify at the hearing, [Director]'s account of this conversation is unrebutted.

21. The plan to fade [Student]'s level of prompting began sometime after March 19th. According to the plan, [Student]'s paraprofessional would delay prompting to see if [Student] would respond to his teacher's directions independently. If he did not, the paraprofessional would provide the necessary prompting.

22. It quickly became apparent that [Student] could not listen and respond to his teacher's instructions without significant prompting from his paraprofessional or other adult staff, and therefore further attempts to fade his level of prompting were discontinued.

23. At no time during the execution of the fading plan was [Student]'s one-on-one paraprofessional support ever withdrawn, and there is no evidence that [Student] suffered any loss of educational benefit as the result of the fading plan.

24. [Director] testified, without contradiction, that the level of prompting given to a student is an instructional strategy. Because it is a teaching technique, it may be modified without prior written notice or an amendment to the IEP. Her testimony is consistent with the November IEP which requires intensive paraprofessional support

and supervision, but does not specify the manner in which that support and supervision must be provided.

25. [Student]'s next IEP Team meeting was held May 1, 2014. At that meeting, which included [Mother], the IEP Team discussed the results of the fading plan, including the fact that [Student] continued to require intensive one-on-one paraprofessional support. The IEP developed at that meeting (the "May IEP") reflected this need, as follows:

> In order to access the general education curriculum, [Student] requires continual redirection/prompting and frequent breaks to support sustained attention to academic tasks. [Student] requires intensive one-on-one paraprofessional support for academic instruction, transitions, and to ensure his safety throughout the entire day.

Ex. 2, p. 18.

26. [Student] received services consistent with the May IEP throughout the remainder of the school year.

27. Although [Student] did not achieve all of his November IEP goals, he made significant progress toward those goals, both socially and academically. This fact was confirmed by [Student]'s May 2014 IEP (Ex. 2, p. 20 -"[Student] made progress on or met his IEP goals"); and by the testimony of [Principal], [Kindergarten Teacher], and [Special Education Teacher].

28. During the summer of 2014, [Student] received extended school year services (ESY) at [Charter School] that were intended to prevent regression of the progress he had made toward his goals during the school year.

29. Petitioners sought to re-enroll [Student] at [Charter School] for his first grade year. However, on May 22, 2014, [Charter School]'s [Executive Director], sent Petitioners a letter denying the request. [Executive Director] cited as authority Colorado's School Choice law which permits a school to deny admission of an out-of-district resident if the school does not have the staff to support that student. According to [Executive Director], [Charter School] would need to hire additional staff to meet [Student]'s needs as stated in the May IEP, and therefore it would not accept [Student]'s enrollment for the 2014/2015 school year. Ex. K.

30. Petitioners filed their due process complaint with the Colorado Department of Education on July 18, 2014 and served the School District with a copy on the same day. Although the complaint alleged several violations of the IDEA, the complaint specifically excluded any issue relating to [Charter School]'s decision to refuse [Student]'s re-enrollment. Specifically, in a footnote, Petitioners stated:

> The instant complaint does not seek to resolve any issue pertaining to [Charter School] and District 12's decision to refuse, starting in first grade, to provide [Student] with the paraprofessional called for in his May 1, 2014 IEP. Nor does it seek to resolve any issue pertaining to [Charter School]'s decision to refuse readmission to our disabled son

(though these issues may certainly come up in a future due process hearing.

Complaint, p. 3, n. 1.

Discussion and Conclusions of Law

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." *See also Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d 1143, 1148 (10th Cir. 2008) ("The burden of proof . . . rests with the party claiming a deficiency in the school district's efforts.") Petitioners therefore bear the burden of proving that the School District violated its obligations under IDEA and failed to provide [Student] with a free appropriate public education.

Legal Standard for Judgment at Close of Petitioners' Case

In conducting due process hearings, the ALJ applies the Colorado Rules of Civil Procedure "to the extent practicable." Section 24-4-105(4), C.R.S., 1 CCR 104-1, Rule 15. Rule 41(b) of the civil rules permit the defendant in a case where the judge is the trier of fact to move for dismissal at the close of the plaintiff's case on the ground that "upon the facts and the law the plaintiff has shown no right to relief." C.R.C.P. 41(b)(1). Under C.R.C.P. 41(b)(1), the standard is not whether the plaintiff established a *prima facie* case, but whether judgment in favor of defendant is justified on the evidence presented. *City of Aurora ex rel. Util. Enter. v. Colo. State Eng'r,* 105 P.3d 595, 614 (Colo. 2005). Thus, in ruling upon a Rule 41(b) motion, the ALJ decides whether Petitioners' have proven a right to relief as a matter of fact and law.

The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an Individual Education Plan (IEP) calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). When a student is enrolled in a public charter school, the local school district through which the school is chartered bears this responsibility. 20 U.S.C. § 1413(a)(5).

A school district satisfies the requirement for FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). The school district is not required to maximize the potential of the disabled child, but must provide "some educational benefit." *Id.* at 199-200. Although the benefit must be more than *de minimus, Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 726-27

(10th Cir. 1996), “some progress” toward the student’s educational goals is all the IDEA requires. *Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d at 1150-52.

Where the complaint involves alleged procedural violations, 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 FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of a FAPE, or (3) caused a deprivation of educational benefit. 34 CFR § 300.513(a)(2); *C.H. by Hayes v. Cape Henlopen Sch. Dist.,* 606 F.3d 59, 66 (3rd Cir. 2010) ("[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.”)

Were There Procedural Violations Related to the March 12, 2014 Meeting?

Petitioners contend that the March 12, 2014 meeting was an IEP Team meeting that required prior written notice, and that the fading plan announced at that meeting was an “evaluation” of [Student] that required prior written notice and Petitioners’ consent.

Prior notice must be given to parents of a disabled child in advance of every IEP Team meeting. This notice must include the purpose, time, and location of the meeting; and a list of those who will be in attendance. 34 CFR § 300.322(b). Required members of the IEP Team must be in attendance at every meeting, unless excused in accordance with the provisions of 34 CFR § 300.321(e).

In addition, prior written notice must be given to the parents of a disabled child whenever a school district proposes to initiate an evaluation or re-evaluation of the child. 34 CFR §§ 300.304(a) and 300.503(a). That notice must include a description of the proposed evaluation, an explanation of why the evaluation is being proposed, a description of the evidentiary basis for the evaluation, and a description of copy of the parents’ procedural safeguards, among other things. 34 CFR § 300.503(b). Evaluations and re-evaluations also require a parent’s informed consent before the evaluation may be conducted. 34 CFR § 300.300.

There is no dispute that [Special Education Teacher] sent [Mother] an invitation by e-mail to attend the March 12th meeting, and briefly mentioned the purpose of the meeting. However, there is also no dispute that [Charter School] did not give [Mother] notice that the March 12th meeting was an IEP meeting, nor is there any dispute that not all the required members of [Student]’s IEP Team were in attendance at the March 12th meeting. Furthermore, there is no dispute that [Mother] was given no prior written notice that [Charter School] was proposing to conduct an evaluation of [Student], or that she gave her informed consent to an evaluation. What is in dispute is (1) whether the March 12th meeting was an IEP Team meeting requiring prior written notice; and (2) whether the fading plan was an evaluation requiring prior notice and parental consent? The answer in each case is “no.”

As to the first issue, Petitioners presented no convincing evidence that the

March 12, 2014 meeting was intended to be, or was, an IEP Team meeting. To the contrary, all the persons who attended the meeting, with the exception of [Mother], testified that it was not. [Mother] did not testify, so the testimony of all the other meeting participants stands unrebutted. Moreover, their testimony is consistent with the fact that no changes to [Student]'s November 2013 IEP were discussed at the meeting and none were implemented.

As to the second issue, the answer turns upon whether the plan to fade the level of prompting to see if [Student] could function in the general education classroom with a degree of independence amounts to an "evaluation." 34 CFR § 300.15 defines an "evaluation" as the "procedures used . . . to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." Arguably, [Charter School]'s plan to fade [Student]'s level of prompting amounted to an "evaluation" because the goal was to see if his related services, i.e. the intensity of his paraprofessional support, could be modified in a way that would permit him to access the general education curriculum with a degree of independence.

On the other hand, 34 CFR § 300.302 states that screening of a student "to determine appropriate instructional strategies for curriculum implementation shall not be considered to be an evaluation."[4] The School District argues that because prompting is an instructional strategy and not a related service, its plan to fade the level of prompting was not an evaluation requiring prior notice or parental consent. The argument is supported by [Director]'s testimony that prompting is an instructional strategy that may be modified to fit the needs of the student, and therefore does not require prior written notice or an amendment to the IEP. The argument is also consistent with the language of the November IEP, that requires "intensive support for instruction and supervision for safety throughout [[Student]'s] day which will be provided by special education staff and/or paraprofessional on an individual and small group basis," but does specify the manner in which that instruction and supervision will be delivered.

Petitioners bear the burden of proof. Because they presented no evidence to rebut [Director]'s testimony that the fading plan involved only the instructional strategy used to implement [Student]'s IEP, and not an evaluation of his eligibility for special education or related services, the ALJ concludes that prior written notice and parental consent were not required.

Was There Otherwise a Denial of FAPE?

Despite [Charter School]'s decision to hold the March 12, 2014 meeting without formal prior written notice and despite its decision to fade [Student]'s level of prompting without parental consent, there is no convincing evidence that any of these actions impeded [Student]'s right to FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of FAPE, or caused a

[4] *See generally, West-Linn Wilsonville Sch. Dist. V. Student,* 114 LRP 33597 (D. Ore. 2014) (discussing the application of 34 CFR § 300.302 and rejecting the hearing officer's conclusion that the school district's functional behavior assessment was an evaluation requiring parental notice and consent.)

deprivation of educational benefit. 34 CFR § 300.513(a)(2).

The undisputed evidence is that Petitioners were aware of the March 12, 2014 meeting and [Mother] did attend the meeting and participated in it. Furthermore, although [Mother] objected, after the meeting, to [Charter School]'s fading plan, [Director] went to lengths to explain that the plan would not result in the reduction of services to [Student]. [Director]'s unrebutted testimony was that [Mother] accepted this explanation and made no further objection. It is also undisputed that [Mother] was given prior written notice of and did participate in both the November 2013 and May 2014 IEP Team meetings at which the level of [Student]'s services were discussed and decided. That being the case, there is no evidence that any alleged procedural violation impeded Petitioners' rights to participate in the decision making process regarding [Student]'s receipt of FAPE.[5]

Moreover, the undisputed evidence presented during Petitioners' case was that [Student] was never denied the paraprofessional support required by his IEP, that he suffered no loss of educational benefit as a result of the fading plan, and that he did make significant progress during his kindergarten year both socially and academically. In the absence of any evidence that [Student] was denied FAPE, Petitioners' complaint cannot succeed.

Decision

Petitioners' complaint is dismissed

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

Done and Signed
September 23, 2014

ROBERT N. SPENCER
Administrative Law Judge

[5] Again, it is important to note that, as framed by Petitioners' complaint, the scope of this hearing does not include [Charter School]'s unilateral decision to deny [Student]'s application to enroll in first grade.