# STATE OF NEVADA

# DEPARTMENT OF EDUCATION

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| In the Matter of<br><br>STUDENT[1], by and through the Parent(s),<br><br>Appellants,<br><br>v.<br><br>CLARK COUNTY SCHOOL DISTRICT,<br><br>Appellee. | DECISION<br><br>State Review Officer: Joyce O. Eckrem<br><br>Representatives:<br><br>Appellants: Father, parent in pro per<br><br>Appellee: Daniel Ebihara, Esq. |

## I. BACKGOUND

On January 6, 2019 the Nevada Department of Education received an appeal of the hearing officer's decision in the above-captioned case. The undersigned was appointed as the review officer on January 7, 2019 and a decision was due on February 5, 2019. A telephonic status conference was scheduled and conducted by the review officer and attended by both parties at which time appellants indicated that they were appealing all four issues decided by the hearing officer. A schedule for submitting written arguments was established and both parties filed their arguments in a timely fashion.

[1] Personally identifiable information is attached as Attachment A to this Decision.

At the time of the hearing Student was 7 years old and had attended Clark County School District programs since the fall of 2014, including pre-kindergarten, kindergarten, first and second grade. Student was identified as a child with a disability prior to kindergarten and deemed eligible for early intervention services under the category of Autism Spectrum Disorder. Student has since been enrolled in a general education classroom with an Individualized Education Program (IEP), with supportive services to the classroom teacher and Student in the form of a resource teacher, a hearing itinerant specialist, Student's audiologist, a teacher for the deaf and hard of hearing, and a speech and language pathologist.

In September 2016 parents gave the District an audiological evaluation indicating that Student had a hearing loss and requested that the Student be evaluated for a hearing impairment. The District, with consent of the parent, conducted an evaluation and a Multidisciplinary Team (MDT) meeting was conducted on November 14, 2016 at which time the Student was determined eligible for services as a student with a hearing impairment. The MDT also determined that Student was no longer eligible as a student on the Autism spectrum. The parents were members of the MDT and attended the MDT meeting.

On October 18, 2018 the parents filed a due process hearing request, challenging the 2016 evaluation, substantively and procedurally, and the provision of a free appropriate public education (FAPE) during 2017-2018 school year,[2] including services in the areas of reading, math and writing. The hearing officer ruled in favor of the District on all issues and this appeal followed.

## II. PROCEDURE AND STANDARD OF REVIEW

Pursuant to NAC §388.15 (b) the review officer must ensure that that procedures of the hearing officer were consistent with the requirements of due process. Neither party on appeal challenges the procedures below, nor were there any procedural errors found by this review officer after a complete review of the record.

[2] The issue of denial of FAPE did not include the 2018-19 school year, though evidence was considered by the hearing officer as relevant to the issue of whether Student was denied FAPE during the 2017-18 school year. See HO Exhibit 15; Hearing decision p. 2, FN 2.

The state review officer is required to make an independent decision, reviewing the entire record of the hearing below. 20 U.S.C. §1415 (g); NAC §388.315 (f). Though not articulated by the Ninth Circuit Court of Appeals, this review officer finds persuasive the language of *Carlisle Area Sch Dist v. Scott P.*, 22 IDELR 13 (3rd Cir. 1995). The Court there noted that in a two-tier system under the Individuals with Disabilities Education Act (IDEA) the review officer must exercise "plenary review" to make the "independent decision" IDEA requires. However, in doing so, it held a review officer should give deference to a hearing officer's findings unless the non-testimonial, intrinsic evidence of the record will justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. Accordingly, this is the standard of review that this review officer uses in rendering this decision. *See also, Amanda J., et al. v. Clark County School District*, 35 IDELR 65 at pp. 256-257 (9th Cir. 2001), citing, discussing and implied approving the 3rd Circuits approach in *Carlisle*.

Having reviewed the entire record of the hearing officer and the parties' written submissions on appeal, the review officer herein upholds the decision of the hearing officer.

## III. ISSUES

1. Did the hearing officer err by concluding that Student was appropriately evaluated by the District in the MDT Reevaluation Report of November 14, 2016, specifically with regard to assessing the Student in all areas of suspected disability including Autism Spectrum Disorder?
2. Did the hearing officer err by concluding Student's November 14, 2016 eligibility determination was appropriate, specifically with regard to the MDT's determination that the Student's category of disability be changed from Autism Spectrum Disorder to Hearing Impairment?
3. Did the hearing officer err by concluding that Student was not denied FAPE in the 2017-18 school year, specifically with regard to finding that Student did not require direct services in the 2017-18 IEP in the areas of reading, math and writing in order to receive educational benefit?
4. Did the hearing officer err by concluding that District provided the parents with prior written notice (PWN) of their rights and procedural safeguard prior to the November 2016 reevaluation.

## IV. FINDINGS OF FACT

The hearing officer's Findings of Fact (HO Decision pp. 4-16), confirmed by the review officer upon review of the record as thorough complete and accurate, are adopted as stated by the hearing officer and incorporated by reference as though fully set forth herein.

## V. APPLICABLE LAW

This case arises under the IDEA, 20 U.S.C. §1400 *et seq*., and implementing state law and regulations, NRS Chapter 388 and NAC Chapter 388.

The U.S. Supreme Court, in *Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982) established a two-pronged test to determine whether a school district has offered a student a free appropriate public education: (1) has the district complied with the procedures set forth in the Act, and (2) was the IEP reasonably calculated to enable the student to receive educational benefit? Id at 206-207.

As to the first part of the test, compliance, the Ninth Circuit Court of Appeals has held that while not all violations of procedural safeguards are significant, those procedural violations that result in a loss of educational opportunity or seriously infringe on the parent's opportunity to participate in the IEP formulation process may result in a denial of a free appropriate public education. *W.G. v. Bd. of Trustees of Target Range Sch. Dist*., 960 F.2d 1479, 1483 (9th Cir. 1992). See also *Amanda J. v. Clark Co. Sch. Dist*., 35 IDELR 65 (9th Cir. 2001); *M.L. v. Federal Way Sch. Dist.*, 387 F. 3d 1101 (9th Cir. 2004); *Van Duyn v. Baker School District*, 502 F. 3d 811 (9th Cir. 2007). The 2004 amendments to the IDEA require that a hearing officer determine a case on substantive grounds, and address procedural compliance as follows:

> In matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate public education only if the procedural inadequacies—
> (I) impeded the child's right to a free appropriate public

education;

(II) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a free appropriate public education to the parents' child; or

(III) caused a deprivation of educational benefits.

20 U.S.C. § 1415 (f)(3)(E)(ii).

As to the second part of the *Rowley* test—substantive educational benefit—the analysis must focus on the adequacy of the district's program. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). If a district's program addresses the student's unique needs, provides educational benefit, and comports with the IEP, then the district has offered a free appropriate public education even if the parents prefer another program and even if the parent's preferred program would likely result in greater educational benefit. Id at 1314; *L.J. by and through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1003 (9th Cir. 2017)

## VI. ANALYSIS AND CONCLUSIONS

*Issue No. 1 Did the hearing officer err by concluding that Student was appropriately evaluated by the District in the MDT Reevaluation Report of November 14, 2016, specifically with regard to assessing the Student in all areas of suspected disability including Autism Spectrum Disorder?*

As the hearing officer correctly stated, this issue is whether the District committed a procedural violation of the IDEA by reevaluating the Student in the area of Autism Spectrum Disorder when the parents requested a reevaluation for Hearing Impairment. HO Decision, p. 18. Parent argues that consent for the reevaluation did not include consent to reevaluate Student's continuing eligibility under the category of Autism Spectrum Disorder. Parents' Facts Concerning Issues, p.1. District argued that an appropriate reevaluation necessarily involves a look at prior disability designations.

34 C.F.R. §300.303 governs the conduct of reevaluations, requiring in paragraph (a) that the evaluation procedures in sections 300.304 through 300.311, generally applicable to initial evaluations, be followed. Section 300.304 (c)(4) requires that a child be assessed in all areas related to a suspected disability, and section 300.305(e) requires that all the evaluation

conditions of 300.304 through 300.311 be met before a termination of eligibility occurs.

The review officer finds the language of the Eleventh Circuit persuasive. In *Phyllene W. v. Huntsville City Board of Education*, 630 F. App'x 917 (11th Cir. 2015) unpublished, the Court noted that 20 U.S.C. § 1414 (a)(2)(A) requires that a reevaluation be conducted "if the local educational agency determines that the educational or related services needs…of the child warrant a reevaluation and that the requirement to assess in all areas of suspected disability places on the school district a "continuing obligation…to identify and evaluate all students who are reasonably suspected of having a disability…."[*Citing P.P ex rel. Michael P v. Chester Area Sch. Dist.*, 585 F.3d 727, 738 (3rd Cir. 2009.] Particularly relevant to this discussion is the Court's conclusion that the fact that the parent did not request an evaluation did not absolve the district of its independent responsibility to evaluate, regardless of whether the parent sought such an evaluation.

Although the *Phyllene W.* case involved a district's failure to evaluate for a suspected hearing impairment, not at issue here, the underlying principles are the same. A district is required to reevaluate if the agency determines that the *educational or related services* needs of a child warrant such. 34 C.F.R. §300.303 (a)(1) and 34 C.F.R. §300.304 (c)(6). It is properly identifying these needs, not the label *per se*, that compels evaluation and reevaluation.

As the hearing officer found, and the record supports, Student in this case entered pre-school and was determined eligible for early intervention services under the category of Autism Spectrum Disorder. It was also noted at that time that Student could not hear very well, was still learning English and was from a cultural background that might present differently. In addition, the initial evaluation involved only an hour or two, and was based upon the parents' report.[3] [Tr. Vol. II, pp 280, line 22 through 284, line 17] The hearing officer found that:

> The team made the best decision they could…so that Student could start receiving early intervention services. Within the next two years…the team got to know the Student very well and to understand the Student's profile better. The Student received hearing aids, was exposed to English, exposed to good early interventions and made excellent growth and progress.

[3] The initial evaluation from 2014 was not entered into the record by either party.

HO Decision, p.5, Finding # 4 [Tr. Vol. I, pp 281, line 14 through 284, line 17]

Given the passage of time and the Student's observed profile at the time of the reevaluation, the District had an obligation to do a comprehensive evaluation, including in the area of Autism Spectrum Disorder, in order to appropriately determine Student's educational needs. [Tr. Vol. II, pp 292-306] The evaluation was properly noticed. [Ex.D-10 and see Issue No. 4 below] Upholding the hearing officer's conclusion, the review officer concludes that the District did not commit a procedural violation by reevaluating the Student in the area of Autism Spectrum Disorder when the parents requested an evaluation for Hearing Impairment.

*Issue No. 2 Did the hearing officer err by concluding Student's November 14, 2016 eligibility determination was appropriate, specifically with regard to the MDT's determination that the Student's category of disability be changed from Autism Spectrum Disorder to Hearing Impairment?*[4]

Although the hearing officer characterized this issue as involving an alleged "procedural violation of the IDEA," she decided it on the basis of the substantive evidence and the record supports that at hearing it was presented as a substantive issue. Quite simply, the issue is whether the District was correct when it determined that Student was no longer eligible as a child within the Autism Spectrum.

The evidence supports the MDT's conclusion that Student did not demonstrate signs of autism. See NAC §388.387. [Tr. Vol. I, pp 107, line 4, though 127, line 6, and pp. 205 line 8 through 206, line 8]

The initial evaluation finding Student eligible as a child with Autism Spectrum Disorder was not entered into evidence. However, the testimony

[4] The review officer notes that the parties agreed to conduct an independent educational evaluation (IEE) during the course of the prehearing procedures below to determine Student's status as a child with ADHD and Autism Spectrum Disorder. The parties however agreed to proceed with the hearing on this issue, absent the results of the IEE. The parties reported to the review officer during the status conference that the IEE had been completed though the results of the evaluation were not revealed. The review officer makes no representations as to the accuracy of the District's reassessment in view of the subsequently conducted IEE and this decision is based solely on the record presented to the hearing officer and not binding on any subsequent hearing officer who may hear a dispute over the results of the IEE.

at hearing was consistent and persuasive that at the time of that evaluation Student was very young, the audiological information on Student was inconclusive, the evaluation relied upon the Parent's input with regard to symptoms of autism and that Student had not attended school long enough for staff to become fully aware of her educational needs. Other than the two parent rating scales for Autism Spectrum Disorder completed by the parents, no other evaluations were provided which diagnosed Student as having Autism Spectrum Disorder. An accurate diagnosis at that early age was complicated by the facts that it appeared Student did not hear well, was still learning English and was from a cultural background that could have resulted in Student presenting differently. No one disputed that Student had some learning problems and the goal at that time was to get Student early intervention services.

With the passage of time, school staff got to know Student and understand Student's profile. By the time the reevaluation was conducted, Student had received hearing aids and other classroom amplification services, had been exposed to English, and had received other IEP interventions. Student had made growth and progress.

The testimony was consistent that Student was not presenting as a child with autism in the classroom. And the comprehensive evaluation conducted in 2014 supports staff observations of Student. [Ex. D-15; Tr. Vol. I, pp. 105-122, line 15] Therefore, the MDT appropriately concluded that Student was no longer eligible as a student with Autism Spectrum Disorder, but was eligible as a student with a hearing impairment. See HO Decision, Findings of Fact, p. 8, no. 14

*Issue No 3 Did the hearing officer err by concluding that Student was not denied FAPE in the 2017-18 school year, specifically with regard to finding that Student did not require direct services in the 2017-18 IEP in the areas of reading, math and writing in order to receive educational benefit?*

The review officer first notes the Student's IEP includes goals and objectives in the areas of language, written language (which included writing) and audition; and the evidence supports that Student received direct instruction on these goals and objectives. [Ex. D-28; Transcript, *passim*] In addition, the evidence and testimony were consistent and persuasive that Student made satisfactory progress on all her IEP goals.

Student was in the regular education classroom 95% of the time and received instruction in reading, math and writing. In all areas Student performed satisfactorily and at grade level. [D-28, pp. 4-5]

At the status conference with the review officer, parent was unable to specify what "direct services" he was seeking for Student in the areas of reading, math and writing instruction beyond what was already being offered in the IEP and/or through the regular classroom curriculum.

Although parent argues on appeal that Student's academics have declined, the evidence is to the contrary. Parent appeared particularly concerned about a few bi-weekly progress reports where Student received letter grades of F and D in math and reading. However, the testimony was persuasive that these short-term reports are based on assignments and quizzes and can be negatively affected by one missed assignment or poor performance one day on a quiz. [Tr. Vol I, pp.72, line 19 through 73] Overall, given that material gets progressively more difficult as a child advances from grade to grade and through the curriculum in any given year, the record supports that Student was achieving at the level expected of a second-grade student. [Tr. Vol I, pp 48, 74-88, 159-176, 210-215, 225-232; Vol II, pp 382-385, line 6]

Thus, the review officer finds that the IEP goals supporting Student's identified needs and the instruction provided, met Student's needs and provided educational benefit and that Student did not need further services in the areas of reading, math and writing. See *Rowley*, supra; *Endrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988(2017) [the IEP for a child fully integrated should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade, and that there is no requirement that an IEP provide what is best or ideal.]

*Issue No. 4 Did the hearing officer err by concluding that District provided the parents with prior written notice (PWN) of their rights and procedural safeguard prior to the November 2016 reevaluation.*

A district is required to give notice to a parent describing any evaluation procedures it proposes to conduct. 34 C.F.R. §300.304 (a). The evidence is clear that parent was given PWN. However, the parent argues that the notice was insufficient in that it did not include a *specific* statement that District would reevaluate Student's status as a child with Autism Spectrum Disorder, whereas the notice did specifically state that Student would be evaluated for a hearing impairment.

The review officer carefully reviewed the PWN and parent consent form and finds that they were complete, meeting the requirements of 34 C.F.R.§300.503, indicating a variety of evaluation techniques and tools that could be used, the reason for the proposed evaluation, other options considered and why they were rejected, and the information relied on in proposing the reevaluation of Student. [Ex. D-10, pp. 2-3]

One option considered and rejected by the District was to "Continue [Student's] current eligibility" i.e., Autism Spectrum Disorder, and the reason for rejecting this option was stated as "Parent submitted audiological evaluation indicating Student is presenting with a hearing loss" and that the team suspected Student may qualify under the category of hearing impairment. [Ex. D-10. p.2]

One can see how a parent could be confused. However, the statement that District would be evaluating because of the concern regarding a suspected hearing impairment was in response to the parents' request for such an evaluation and did not limit the District's comprehensive reevaluation plan. The stated reasons for the reevaluation were not stated as only parent concerns, but also health and teacher concerns. If the evaluation revealed, or the members of the MDT team saw, other concerns, e.g., the lack of autism characteristics, District would have been remiss in ignoring those results or concerns. HO Decision, Finding of Facts, pp. 7 and 8, Nos. 11 and 14. The testimony was persuasive that the school psychologist discussed the consent form with the Parents and informed them verbally that since staff did not see signs of autism within the school setting the reevaluation would include evaluating Student for autism as well as a hearing impairment.

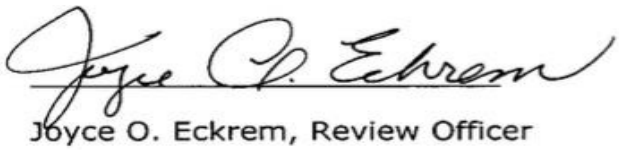
The evidence is persuasive that Parents' did receive proper PWN that met the requirements of the law and regulations. [ Ex. D-5, pp. 6-7; Tr. Vol. I, pp. 101, line 11 through 107, line 2]

## VII. Order

Having upheld the hearing officer's decision, all relief for Appellants is denied.

It is so ordered.

February 4, 2019



Joyce O. Eckrem, Review Officer

NOTICE OF APPEAL RIGHTS

The decision of the review officer is final unless a party appeals the decision. A party may appeal from the decision of the review officer by initiating a civil action in a court of competent jurisdiction with 90 days after receipt of the decision. NAC §388.315.