

IMPARTIAL DUE PROCESS HEARING  
BEFORE THE HEARING OFFICER  
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS  
STATE OF NEVADA  
DECISION AND ORDER OF THE HEARING OFFICER

In the Matter of

DECISION AND ORDER OF THE HEARING OFFICER

SCHOOL DISTRICT,

Decision Date: June 6, 2023

Petitioner,

**Hearing Officer:** Kevin P. Ryan, Esq.

v.

**Parties and Representatives:**

STUDENT', by and through their Parent<sup>2</sup>,

Daniel D. Ebihara, Esq.

Respondent.

and Yasnai Rodriguez-Zaman, Esq.,  
appeared on behalf of Petitioner.

Parent appeared on behalf of Respondent

**I.**

**INTRODUCTION**

1. The parties to the present action are Petitioner, School District and Respondent, Student. Petitioner is represented by Daniel D. Ebihara, Esq. and Yasnai Rodriguez-Zaman, Esq. Respondent did not have legal counsel, and was represented by Parent. The presiding hearing officer is Kevin P. Ryan, Esq. ("IHO").

2. Petitioner's Request for Due Process Hearing was received by Respondent and the IHO on March 23, 2023 ("RDP").<sup>1</sup> The IHO was appointed to this matter the same day.

3. On or about March 24, 2023, Respondent filed their Response to RDP.

4. On March 27, 2023, the IHO entered the Preliminary Order.<sup>3</sup> The primary focus of this Order was to set the telephonic status conference.

<sup>1</sup> Personally identifiable information is attached as Appendix A to this Order and must be removed prior to public distribution.

<sup>2</sup> Personally identifiable information is attached as Appendix A to this Order and must be removed prior to public distribution.

<sup>3</sup> The Preliminary Order and Amended Preliminary Order include an incorrect decision deadline. The proper decision deadline, June 6, 2023, appears in the April 17, 2023, Status Conference Report and Order; Briefing Schedule, and in all further orders that reference the decision deadline.

5. On March 29, 2023, the IHO entered the Amended Preliminary Order. Based upon the parties' calendar conflicts, in this Order the IHO reset the Status Conference for a later date.

6. On April 14, 2023, a telephonic Status Conference occurred. Legal counsel for Petitioner, and Parent for Respondent attended.

7. On April 15, 2023, Respondent filed their Motion to Deny [Attorney] Appearance as Legal Counsel for [School District], Respondent's Motion to Dismiss and/or Strike Parts of [School District] Complaint, and Respondent's Witness List. Of relevance, Respondent named Petitioner's lead attorney as their witness.

8. On April 17, 2023, the Status Conference Report and Order; Briefing Schedule was entered.

9. On April 17, 2023, the Notice of Pre-Hearing Conference was also entered.

10. On April 19, 2023, Petitioner filed [School District's] Motion in Limine to Preclude the Testimony of [Attorney] as Respondent's Witness.<sup>4</sup>

11. On April 20, 2023, the IHO entered the Briefing Schedule regarding Petitioner's Motion in Limine.

12. On April 20, 2023, Respondent filed Respondent's Opposition/Reply/Objection to [School District] Motion in Limine to Preclude the Testimony of [Attorney] as Respondent's Witness.

13. On April 22, 2023, Respondent filed Respondent's Motion for Order Shortening Time for All Pending Motions and to Hear All Pending Motions Before the Pre-Hearing Conference.

14. On April 24, 2023, Respondent filed [Respondent's] Early Case Conference List of Witnesses and Document Production (Pursuant to FED.R.CIV.P. 26(a)(1) and N.R.C.P 16.1).

15. On April 25, 2023, the IHO entered its Order Regarding Respondent's Motion for Order Shortening Time. The Motion was denied because there was plenty of time to allow Petitioner sufficient time to oppose the Motions filed by Respondent before the Pre-Hearing Conference.

16. On April 28, 2023, Petitioner filed Petitioner, [School District's], Opposition to Respondent's Motion to [Attorney's] Appearance as Legal Counsel for [School District] and Opposition to Motion to Dismiss and/or Strike Parts of [School District] Complaint.

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<sup>4</sup>The Motion is not dated, nor is the certificate of mailing. The IHO is relying on the attached email correspondence for the date of this Motion.

17. On May 3, 2023, Respondent filed Respondent's Reply to Opposition "Petitioner [School District] Opposition to Respondent's Motion to Deny [Attorney] Appearance as Legal Counsel for [School District] and Motion to Dismiss and or Strike Parts of [School District's] Complaint".<sup>5</sup>

18. On May 3, 2023, Respondent filed First Supplement to [Respondent's] Initial List of Witnesses and Document Production (Pursuant to Fed. R. Civ. P.26 (a)(1) and N.R.C.P. 16.1).

19. On May 11, 2023, Respondent filed Second Supplement to [Respondent's] Initial List of Witnesses and Document Production (Pursuant to Fed. R. Civ. P.26 (a)(1) and N.R.C.P. 16.1).

20. On May 12, 2023, the IHO received Petitioner's Witness List, and hearing exhibits.

21. On May 15, 2023, the IHO entered the Order Addressing Pending Motions. The motions and the associated rulings are addressed below.

22. On May 15, 2023, the IHO received Petitioner's and Respondent's witness lists and hearing exhibits.

23. On May 15, 2023, the Pre-Hearing Conference was held. The Pre-Hearing Conference Report and Order was entered on May 16, 2023.

24. On May 16, 2023, Respondent filed Respondent's Objections and Motion for Review and Relief of the Pre-Hearing Conference Report and Order dated May 16, 2023, in Pursuant to LR IB 3-1 and FRCP 60.

25. On May 18, 2023, the IHO entered its Order Regarding Respondent's Objections and Motion for Review and Relief of the Pre-Hearing Conference Report and Order dated May 16, 2023, in Pursuant to LR IB 3-1 and FRCP 60.

26. On May 18, 2023, the IHO entered the Amended Pre-Hearing Conference Report and Order.

27. On May 18, 2023, Respondent filed Respondent's Objections and Motion for Review and Relief of the Amended Pre-Hearing Conference Report and Order dated May 18, 2023, in Pursuant to LR IB 3-1 and FRCP 60.

28. On May 19, 2023, the IHO entered its Order Regarding Respondent's Objections and

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<sup>5</sup>Page one of this document includes the date April 20, 2023. However, the document was signed and mailed on May 3, 2023.

Motion for Review and Relief of the Pre-Hearing Conference Report and Order dated May 18, 2023, in Pursuant to LR IB 3-1 and FRCP 60.

29. The 2 day hearing in this matter was held on May 22, 2023, and May 23, 2023. Pursuant to stipulation between the parties, the hearing was held via simultaneous electronic audio / visual means ("Zoom"). As set forth in the May 18, 2023, Amended Pre-Hearing Conference Report and Order, Student's Parent opted for an open hearing, elected an electronic record of the hearing, and a written decision. In addition, Student attended the hearing, but did not testify. The due process hearing was held, and a decision in this matter is being rendered pursuant to the Individuals with Disabilities Education Act (hereinafter, "IDEA"), 20 U.S.C. § 1400 et seq., and its implementing regulations, 34 C.F.R. § 300 et seq., the Nevada Revised Statutes (NRS) Chapter 388, and the Nevada Administrative Code (NAC) Chapter 388.

## II.

### BACKGROUND PRELIMINARY MATTERS

Based upon Petitioner's March 23, 2023, Request for Due Process Hearing, the decision deadline is June 6, 2023.

On April 14, 2023, at the initial Status Conference, the parties confirmed that they had participated in their initial resolution meeting with no resolution reached. In addition, during the Status Conference Respondent questioned the IHO about his qualifications to be a hearing officer. In response, the IHO indicated that he has been a hearing officer since approximately 2011, and has had handled numerous cases. Upon further inquiry by Respondent, the IHO confirmed that he had read the RDP<sup>6</sup> and the Response to RDP, before participating in the Status Conference. The IHO further confirmed that he understood the hearing issue, and that Respondent was challenging whether Petitioner's lead attorney could participate as legal counsel for Petitioner. Thereafter, Respondent indicated that they would be filing a motion to disqualify Petitioner's attorney.

On April 15, 2023, Respondent also filed Respondent's Motion to Dismiss and/or Strike Parts of [School District] Complaint ("Motion 1"). In summary, Respondent argued that Petitioner's reference in the RDP to NAC 88.400 was objectionable and irrelevant. Thereafter, Respondent objected to Petitioner's claims that their obligation to evaluate has been satisfied, and that Petitioner's

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<sup>6</sup>As noted above, RDP refers to the Petitioner's Request for Due Process.

evaluation of Student met the standards set forth in NAC 388.028 and NAC 388.046. In conclusion, Respondent did not agree that Student's MDT evaluation was properly performed, whereby Petitioner's denial of Respondent's request for IEE was improper.

On April 15, 2023, Respondent filed their Motion to Deny [Attorney] Appearance as Legal Counsel for [School District] ("Motion 2"). In summary, Respondent sought to exclude Petitioner's lead counsel as attorney for School District arguing that attorney's appearance as legal counsel was a conflict of interest because the attorney knew the relevant MDT evaluation was out of compliance and because the attorney is a director of Petitioner's Office of Compliance and Monitoring. Respondent further argued that the MDT evaluation was not proper, and that the attorney had an unfair advantage that was prejudicial to Respondent. Respondent further argued that the attorney was involved in a prior hearing involving Respondent, and that it was objectionable to serve a dual role as attorney and executive director for Petitioner. Finally, Respondent argued that the attorney's representation of Petitioner would violate Respondent's right to due process and that the attorney should serve only as a witness in his role as executive director. In conclusion, Respondent argued that unless the attorney was removed as counsel, Respondent would not receive a fair hearing, would be denied equal access to the justice system and would be prejudiced.

On April 19, 2023, the IHO received Petitioner's Motion in Limine to Preclude Testimony by [the attorney] ("Motion 3"). In summary, Petitioner argued that despite being listed as a witness for Respondent, the attorney should not be compelled to testify at the upcoming hearing. Petitioner explained that the attorney was legal counsel for Petitioner, as well as its Executive Director for the Office of Compliance and Monitoring for School District. Petitioner then argued that the attorney has no relevant testimony to offer pertaining to Student's education or evaluation, and that regarding the sole issue before the IHO, the appropriateness of the MDT reevaluation, the attorney did not participate in the reevaluation process and he possessed no outside or unique knowledge regarding Student's reevaluation. In addition, Petitioner argued that the attorney's potential testimony was irrelevant and privileged.

On May 15, 2023, the IHO entered the Order Addressing Pending Motions. Regarding Motion 1, it was granted in part and denied in part. Petitioner's reference to NAC 88.400 in its RDP was stricken as irrelevant. However, the remainder of Motion 1 was denied. The IHO determined that the

issue regarding Petitioner's denial of Respondent's request for an IEE was squarely before the IHO and that the RDP included the information required by NAC 388.306(3). In addition, the filing of the RDP by Petitioner was consistent with NAC 388.450. And, as argued by Petitioner, Respondent may make its arguments regarding the sufficiency of the MDT reevaluation at the hearing.

Regarding Motion 2, it was denied. The IHO agreed with Petitioner that despite pages of allegations and claims by Respondent, there were no specific facts to support the relief requested. First, having reviewed Nevada Rules of Professional Conduct ("NRPC"), 1.7-1.10, the IHO found that nothing alleged by Respondent constituted a conflict of interest for the attorney. Respondent is not a current or former client. Moreover, pursuant to NRPC 1.10, there was no basis to impute a conflict of interest. Additionally, consistent with Respondent's argument, the attorney as legal counsel for Petitioner had taken the position that the relevant MDT reevaluation was appropriate. However, the IHO found that this was not a basis to strike the attorney as legal counsel. The attorney was advocating the client's position, and as Petitioner's counsel the attorney had the burden to prove that the evaluation was appropriate. Further, the IHO found no support for Respondent's argument that the attorney's dual role gave Petitioner an unfair advantage whereby Respondent was prejudiced. And, the fact that the attorney was involved in a prior hearing involving Respondent was of no consequence in that once again, the attorney was not representing Respondent. Finally, the IHO noted that the attorney had no control over the hearing process and that Respondent would receive a fair and impartial hearing.

Regarding Motion 3, it was taken under advisement. The IHO was concerned about Respondent's allegation in Motion 3 that, "[The attorney] was actively involved in the matters discussed herein." Because the IHO sought to ensure that both parties received a fair hearing, and so that the IHO could rely on sworn testimony when ruling on Motion 3, the IHO requested to hear testimony from Petitioner's witnesses regarding what, if any, involvement the attorney had in Student's MDT reevaluation and the reevaluation process. In addition, the IHO requested that Respondent also seek to elicit testimony that supported Respondent's claim that the attorney was actively involved in matters relevant to the hearing. At the hearing, both sides asked appropriate questions on this subject. However, at no time during Respondent's case did Respondent ask to call the attorney as a witness. And, at the conclusion of the hearing, both sides confirmed that they had no further evidence or witness

testimony to offer. Based upon Respondent's decision not to call the attorney as a witness, the IHO did not rule on Motion 3 because the issue was moot.

On May 16, 2023, the Pre-Hearing Conference Report and Order was issued. The same day, Respondent filed "Respondent's Objections and Motion for Review and Relief of the Pre-Hearing Conference Report and Order dated May 16, 2023, in Pursuant to LR IB 3-1 and FRCP 60." In this paper Respondent objected to a number of items. Of relevance, they objected to the phrasing of the hearing issue and argued that they were entitled to both an electronic and written record of the hearing.

On May 18, 2023, the IHO entered its Order Regarding Respondent's Objections and Motion for Review and Relief of the Pre-Hearing Conference Report and Order dated May 16, 2023, in Pursuant to LR IB 3-1 and FRCP 60. In the order, the IHO granted Respondent's motion pertaining to the phrasing of the issue, but denied Respondent's request for both an electronic and written record of the hearing. Thereafter, also on May 18, 2023, the IHO entered the Amended Pre-Hearing Conference Report and Order which included the re-phrased hearing issue.

Respondent filed "Respondent's Objections and Motion for Review and Relief of the Amended Pre-Hearing Conference Report and Order dated May 18, 2023, in Pursuant to LR IB 3-1 and FRCP 60", on May 18, 2023.

On May 19, 2023, the IHO entered its Order Regarding Respondent's Objections and Motion for Review and Relief of the Pre-Hearing Conference Report and Order dated May 18, 2023, in Pursuant to LR IB 3-1 and FRCP 60. The substantive / repetitive requests made by Respondent were denied. In addition, the IHO confirmed that the "Relief Request" in Petitioner's RDP would not be modified, that based upon the IHO's receipt of both parties' hearing exhibits the Petitioner's exhibits would be designated with the alpha "D" followed by consecutive numbers and Respondent's exhibits will be designated with the alpha "R" followed by consecutive numbers, and finally the IHO again confirmed that Respondent was not entitled to both an electronic and written record of the hearing.

### **III.**

#### **HEARING ISSUE**

As set forth in the May 18, 2023, Amended Pre-Hearing Conference Report and Order, the single issue to be decided by the IHO at the due process hearing was:

1. Whether Petitioner's denial of Respondent's request for an IEE at public expense, based upon Petitioner's 2023 MDT evaluation dated February 17, 2023, was consistent with controlling law."

The relief requested by Petitioner was a determination that it had no responsibility to fund the IEE requested by Respondent.

#### IV. FINDINGS OF FACT

After considering all the evidence, this Hearing Officer's Findings of Fact are as follows:

1. Student is a 6<sup>th</sup> grade pupil at Middle School. (EX D3, p. 37) Student has been receiving special education supports and services ("SPED") since 2014 (EX R36). Initially, Student received SPED under the classification of Autism Spectrum Disorder. Following a reevaluation in November 2016, Student received SPED under the classification of Hearing Impairment. (EX D3)

2. On January 12, 2019, a non-school district, independent evaluator ("PhD") completed an Independent Educational Evaluation ("IEE") of Student. (EX R34)<sup>8</sup> PhD is a licensed psychologist specializing in pediatric neuropsychology. (EX R34) Student was referred for assessment to PhD by Student's Parent because they disagreed with the services Student was receiving under the current Individualized Education Plan ("IEP"). (EX R34) At the conclusion of the report, although PhD's DSM 5<sup>9</sup> diagnosis for Student was "Autism Spectrum Disorder and Attention-Deficit / Hyperactivity Disorder", PhD did not recommend any modifications to Student's IEP. (EX R34, pp. 110-113) This IEE was approved by Middle School's Director for Psychological Services, and was provided to Parent at School District's expense.

On November 8, 2019, a Multidisciplinary Team ("MDT") evaluation ("2019 Reevaluation") was completed with regard to Student. Pursuant to same, the team determined that **Student qualified for SPED** under the eligibility classification of Hearing Impairment. (EX D2) Parent

<sup>7</sup>Pursuant to NAC § 388.450 and 34 C.F.R. § 300.502 require that Petitioner prove that its reevaluation was "appropriate."

<sup>8</sup>The report includes a report date of 1-12-18 which is an error based upon the "dates evaluated" and School District's receipt date of January 16, 2019.

<sup>9</sup>"Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition."



signed the 2019 Reevaluation on November 8, 2019, and wrote in the document, "I am not in agreement with this report, nor prior notices sent to me from the District, and I choose to have this matter resolved in Due Process. That means I am making my request for my [Student] to continue in [their] previous existing program until this issue is resolved." (EX D2) No evidence was presented at the hearing regarding whether Parent participated in a due process hearing at this juncture.

4. Student's most recent IEP is dated May 18, 2022. (EX R11) According to the IEP, Student's "anticipated 3-year reevaluation date" was November 7, 2022. (EX R11)

5. On November 1, 2022, Student's IEP team met and all required participants were in attendance, including Parent. Parent's advocate also attended the meeting. (EX D1, p. 66) At the meeting Student's grades and class progress were discussed, concerns regarding Student's understanding of directions were addressed, the ways in which Student was being supported in class were discussed, and it was suggested that potential new accommodations be considered at an IEP revision meeting. (EX D1, pp. 66-70)

6. On November 2, 2022, School Psychologist testified that they attempted to contact Student's Parents by telephone to discuss the reevaluation process and possible waiver. (See also EX D1, p. 23) At that time, School Psychologist was unable to speak to either Parent. (See also EX D1, p. 23)

7. On November 4, 2022, in response to Middle School's request for consent for Student's reevaluation, Parent sent a letter to School Psychologist indicating that Student had already had "sufficient reevaluations" and that reevaluation was unnecessary. Parent agreed that Student should continue to receive SPED based upon the eligibility classification of Hearing Impairment. (EX D1, pp. 69-70)

8. On November 14, 2022, after Middle School emailed Parent to follow up on Parent's decision to waive Student's 3 year reevaluation, Parent responded via email and indicated that they changed their mind and no longer desired to waive Student's reevaluation. (EX D1, p. 23)

9. On November 18, 2022, School District responded to Parent's letter dated November 16, 2022, and wrote among other information that if Parent disagreed with Student's reevaluation, Parent reserved the right to request a School District funded IEE. (EX R9, pp. 61-62)

10. On November 30, 2022, Parent signed a Parental Consent for Evaluation Form. (EX R8) This consent form provides that with regard to Student's MDT reevaluation, the potential "Assessment Areas" included, "health and sensory / motor functioning (including audiological examination), academic performance / achievement, general intelligence, speech / language / communication, social and emotional condition / adaptive skills / behavior, evaluation under the eligibility categories of Hearing Impairment, Autism Spectrum Disorder and/or Health Impairment." Among the potential assessment methods listed on the consent form were, "vision, hearing, developmental and neurological screening, classroom observations, Reynolds Intellectual Assessment Scales ("RATS"), functional behavior assessment, and Behavior Assessment System for Children - 11 ("BASC"). (EX R8)

11. On December 2, 2022, Middle School received Parent's signed Consent for Evaluation Form. In addition, Parent had agreed to attend a meeting with Student's IEP team in advance of the MDT reevaluation. This meeting was scheduled to take place on December 7, 2022. (EX D1, p. 22)

12. On December 7, 2022, the agreed upon MDT reevaluation meeting occurred. All necessary team members, including Parent were in attendance. Parent's advocate was also present. (EX D1, pp. 21, 25) After the meeting, Parent prepared a letter to School Psychologist and others setting forth Parent's recollection of the "Meeting Topics/Discussion." (EX D1, p. 25) Among the topics recounted by Parent from this meeting included, "(5) the categories of disability areas that will be tested for the 3-year evaluation / reevaluation Hearing Impairment (HI), Autism Spectrum Disorder (ASD), Health Impairment (HI), and Attention Deficit Hyperactivity Disorder (ADHD)...." (EX D1, p. 25)

13. On February 17, 2023, the complete MDT reevaluation team had in-person meeting.<sup>10</sup> Parent, Parent's advocate and Student were in attendance together with the MDT reevaluation team. (EX D1, p. 7; EX D1, p. 8) At the meeting, the draft MDT reevaluation ("2023 Reevaluation") was

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<sup>10</sup>An audiologist and teacher for the deaf and hard-of-hearing appeared via Google meet. (EX D1,

P.7) provided to team members. The 2023 Reevaluation components were reviewed in detail and the team members discussed the 3 areas of eligibility that had

been considered; Hearing Impairment, Health Impairment and Autism Spectrum Disorder. The 2023 Reevaluation, including the modifications made at the meeting, and statements of eligibility were provided to Parent at that time. (EX D1, p. 7) In addition, at the MDT meeting, Parent's advocate indicated that an IEE would be requested. Middle School received Parent's request for IEE on February 17, 2023. (EX D1, p. 7)

14. Student's 2023 Reevaluation is dated February 17, 2023." (EX D-3). As set forth in the 2023 Reevaluation, the team determined that Student continued to be eligible for SPED under the classification of Hearing Impairment. According to a February 17, 2023, Statement of Eligibility, Parent agreed with this eligibility classification for Student and signed the Statement of Eligibility. (EX D4, pp. 1-2)

15. As part of the 2023 Reevaluation, and consistent with the Consent for Evaluation Form, the team also assessed Student for Health Impairment<sup>12</sup> and Autism Spectrum Disorder. (EX D4, pp. 3-6) Student was found to be **ineligible** for SPED based upon both eligibility classifications. Parent disagreed with these determinations. (EX D4, pp. 3-6)

Regarding some of the assessments performed as a part of the 2023 Reevaluation, and consistent with the Consent for Evaluation Form, the RAIS test was administered. The results indicated Student's global intelligence measured in the moderately below average range, and Student's memory and processing scores fell into the average range. According to the BASC, all areas reported by Student fell in the average range. In addition, 2 of Student's teachers reported no characteristics of ADHD were observed. Regarding Autism Spectrum Disorder, Student was assessed using the ASIEP 3 (Autism Screening Instrument for Education Planning). According to Parent's and 3 of Student's teachers' rating scales, the probability of Student having an Autism Spectrum Disorder was "unlikely." (EX D3) In addition, Parent and 2 of Student's teachers completed Autism Spectrum Rating Scales (ASRS) with regard to Student. Based on Parent's rating, Student scored in the "elevated" range.

"Of note, the 2023 Reevaluation included a review of the IEE prepared by PhD in 2019. (EX D3)

<sup>12</sup>Regarding Student's Statement of Eligibility for Health Impairment, a hand written note provides, "external diagnosis of ADHD, educational evaluation not significant for ADHD within educational setting. (EX D4, p. 3)

However, both teacher ratings for Student fell in the "average" range. (EX D3) Overall, the 2023 Reevaluation included a variety of appropriate assessments that were properly administered by appropriate individuals. Ultimately, Student met the criteria from Hearing Impairment pursuant to NAC 388.390. However, Student did not meet the eligibility criteria for Autism Spectrum Disorder or Health Impairment. (EX D3)

17. Following Parent's February 17, 2023, request for a publically funded IEE, on March 6, 2023, School District sent Parent a letter formally denying Parent's request. (EX D5) The letter was sent by Director for Psychological Services. This witness testified that part of their job description is to review requests for IEEs and make recommendations regarding whether to approve said requests.

18. On March 8, 2023, a separate page containing limited medical information regarding Student was added to Student's 2023 Reevaluation. (EX D1, p. 4) This information was attached to the 2023 Reevaluation at Parent's request. (Testimony of "School Nurse") Thereafter, on March 10, 2023, at Student's IEP team meeting, Parent was provided with a copy of the 2023 Reevaluation with the additional medical information attached. (EX D1, p. 2)

19. Consistent with NAC 388.387 (2) and NAC 388.402(2), the team that completed Student's 2023 Reevaluation was properly comprised. (EX D3, p. 39; EX D1, p. 21) On this subject the Director for Psychological Services, who is a licensed school psychologist, confirmed that with regard to preparation of the 2023 Reevaluation, the team was properly composed and all of the right teachers and other required personnel were present for the assessments and the preparation Student's 2023 Reevaluation. This witness, who's testimony was not contradicted, confirmed that all assessments were done correctly regarding all 3 potential eligibility classifications for SPED.

In addition, Director for Psychological Services confirmed that the team did consider the IEE prepared by PhD. He further testified that the team who prepared the 2023 Reevaluation ruled out other Health Impairment and Autism Spectrum Disorder even though Student was diagnosed with both by PhD. The witness confirmed that just because there is a medical or clinical diagnosis for other eligibility classifications, it does not necessarily mean that a student qualifies for SPED under the IDEA.

20. Student's 2023 Reevaluation was "appropriate." Regarding this issue, Director for Psychological Services testified that all of the assessments used in creating the 2023 Reevaluation were appropriate for the eligibility classifications being considered. He further indicated that none of the assessments were developed by School District, but instead were national, standardized tests that were administered on an individual basis to Student. During Respondent's cross-examination of this witness, Director for Psychological Services confirmed that when the team does an evaluation they start by reviewing what already exists in a student's educational record and then include parental comment and input as well as observational data. Thereafter, the team decides what else is needed to properly assess a student, then they gather additional information based upon those needs.

Upon further cross-examination, Director for Psychological Services agreed with Respondent that Middle School must give parents information about what they intend to do as part of a reevaluation, but they are not required to tell parents in advance the actual assessments they will use. This witness indicated that a school is only required to give "examples". Regarding notice, the witness testified that there are 2 pieces to the inquiry, the school gives prior notice, then it gets informed consent. In addition, regarding Respondent's questions about a functional behavior assessment, this witness confirmed that the team did not perform one on Student. However, the witness testified that other assessments regarding Autism Spectrum Disorder were conducted. The witness also confirmed that Student's MDT reevaluation dated October 16, 2014,<sup>13</sup> and PhD.'s IEE were considered by the team who conducted the 2023 Reevaluation.

Student's Speech Pathologist, further confirmed the appropriateness of the 2023 Reevaluation. This witness conducted a speech and language assessment on Student in which they evaluated Student's communication skills, sounds, language, voice skills, and fluency of speech to see if Student had a need for on-going special education services. Moreover, the witness clarified that the assessment was also a part of Student's Autism Spectrum Disorder evaluation. Speech Pathologist explained that when the assessment considered Student's receptive and expressive skills, as well as Student's social language skills, it was also part of the Autism Spectrum Disorder evaluation. Student fell within the average range on receptive and expressive skills, and had a slight issue in social language. Otherwise

the witness testified that there were no significant findings and Student did not qualify under this eligibility category. This witness also confirmed that the actual tests used were standardized assessments, that are nationally recognized and not prepared by School District.

School Psychologist was also an important / credible witness regarding the appropriateness of the 2023 Reevaluation. This witness testified, that on December 7, 2022, she and the other team members met with Parent to determine the scope of Student's evaluation. All participants, including Parent, agreed that the team would assess Student for Health Impairment, Hearing Impairment and Autism Spectrum Disorder. School Psychologist also confirmed that when they do evaluations they consider prior MDT evaluations as they did in the present case. This witness also confirmed that the 2023 Reevaluation referenced PhD.'s IEE, but that it was important to note that PhD.'s diagnosis was a clinical diagnosis which is not the same as an educational evaluation. Furthermore, School Psychologist confirmed that they drafted the 2023 Reevaluation. The witness noted that Student was assessed for Autism Spectrum Disorder and that Student was administered the Reynolds Test, which is an IQ test. The witness indicated that the team also considered Student's academic, social /emotional, adaptive, sensory, motor and behavior skills. All of those assessments were completed as part of the 2023 Reevaluation. Moreover, the witness testified that with regard to most categories, Student was found to be in appropriate ranges. And, the witness confirmed that all of the assessments used on Student were nationally recognized.

On cross-examination by Respondent, School Psychologist answered questions regarding the Consent for Evaluation Form (EX R8). The witness confirmed that this document gives a parent notice of areas of potential assessments and it provides examples of what may occur. Regarding the present case, the witness confirmed that some of the methods referenced in the Consent for Evaluation Form were used when assessing Student, including the BASC and the RAIS. Moreover, the team also did other autism assessments that were individualized to Student and which were conducted "one on one" with Student. The witness further noted that while the assessments are norm based, they were all standard, nationally recognized tests. Finally, School Psychologist confirmed that the team did not conduct a Functional Behavior Assessment on Student because it was not required and is not indicative

of autism. In summary, the witness noted that all of the tests were administered to Student one on one, and that the team conducted 2 days worth of assessments.

21. Respondent was unable to rebut the overwhelming evidence that the 2023 Reevaluation was appropriate. During Respondent's case and through cross-examination, Respondent established that the 2023 Reevaluation did not occur on or before the "anticipated 3 year reevaluation" date (November 7, 2022). (EX R11) School Principal confirmed this fact during Respondent's direct examination. Respondent further established that Respondent was not given reasonable advance notice of Student's reevaluation in advance of the "anticipated 3 year reevaluation" date. However, there was no evidence presented that these facts adversely effected Student, or that they were relevant to the issue before the IHO.

Respondent also established that School District's attorney did meet with and prepare School District witnesses for the due process hearing.<sup>14</sup> However, Respondent did not establish that there was anything inappropriate about the witness preparation sessions, or that Respondent was prejudiced thereby.

Respondent also established that despite being mentioned in the Consent for Evaluation Form as a potential assessment, the 2023 Reevaluation team did not perform a Functional Behavior Assessment ("FBA") on Student. However, although an FBA was listed in the consent form as a tool that "may" be used, the un-contradicted evidence was that it was unnecessary as a result of other assessments that were completed. Moreover, despite objection Respondent was able to enter into evidence a letter from the United States Department of Education dated May 2, 2019. (EX R35) The letter correctly included relevant citations from 34 C.F.R. § 300.502, but the information did not change the outcome of the due process hearing.

Further, Respondent did establish that subsequent to the MDT meeting on February 17, 2023, and after he received a copy of the 2023 Reevaluation, Student's medical information was attached thereto. (EX D3, p. 40) However, School Nurse testified that Respondent was aware of and agreed that this information be included in Student's 2023 Reevaluation. And, because this evidence was not

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<sup>14</sup>Most witnesses testified that the attorney and a colleague met with the witnesses in advance of the due process hearing.

contradicted by any of Respondent's witnesses, this fact did not affect the IHO's decision. Moreover, certain witnesses, including School Principal, testified that the body of the 2023 Reevaluation was not modified after it was provided to Parent on February 17, 2023.

Finally, neither of the Student's Parents testified at the due process hearing and Respondent offered no evidence to contradict the team's conclusions contained in the 2023 Reevaluation. Moreover, Respondent did not present any evidence to demonstrate how Student's IEP would have changed if Student would have been found eligible for SPED under either Autism Spectrum Disorder or Health Impairment.

## V.

### CONCLUSIONS OF LAW AND DISCUSSION

Based upon the above Findings of Fact, the Conclusions of Law of this Hearing Officer are as follows:

1. NRS § 388.467 provides that whenever a due process hearing is held pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. 1400 et seq. ("IDEA"), and a school district is a party, the school district has the burden of proof and the burden of production.

2. Subject to certain limitations, a parent has the right to request an IEE<sup>15</sup> at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502 (a), (b)). A parent, however, is only entitled to one IEE at public expense "each time the public agency conducts an evaluation with which the parent disagrees." (34 C.F.R. § 300.502 (b)(5); *R.L.*, 363 F.Supp. 2d at 234-35). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502 (b)(2)(i)(ii); *Evans v. District No. 17*, 841 F.2d 824, 830 (8th Cir. 1988); NAC § 388.306 (1)). If a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502 (b)(3)). If a parent continues to desire an additional evaluation, they have a right to secure an IEE at their own expense and, if it meets agency criteria, to

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<sup>15</sup>An IEE is an evaluation conducted by a qualified examiner not employed by the school district responsible for the child's education. (34 C.F.R. § 300.502 (a)(3)(i)).



have it considered by the school district in making educational decisions regarding a student. (34 C.F.R. § 300.502 ( c ); NAC § 388.450(6)).

3. The eligibility factors and eligibility team requirements for a pupil with Autism Spectrum Disorder may be found at NAC § 388.387. The eligibility factors and eligibility team requirements for a pupil with Health Impairment may be found at NAC § 388.402.

Overall, Petitioner's actions with regard to Student's 2023 Reevaluation were appropriate. Although it is uncontested that the 2023 Reevaluation did not occur on or before November 7, 2022, the "anticipated 3 year reevaluation date", this fact was not persuasive or determinative of the issue before the IHO. Student's IEP team, including Parent, met on November 1, 2022, and among other actions discussed potential new accommodations for Student. (Factual Finding 5) Then, on November 2, 2022, Middle School attempted to contact Parent about Student's reevaluation and the potential waiver of same. (Factual Finding 6) Initially, Parent was willing to waive Student's 3 year reevaluation. They indicated that Student should continue to receive SPED under the eligibility category, Hearing Impairment. (Factual Finding 7) Thereafter, Parent changed their mind regarding Student's reevaluation and Middle School sent Parent a comprehensive Consent for Evaluation Form that included potential assessment areas and potential assessment methods the team may use when considering Student's eligibility for SPED. (Factual Finding 10) Next, on December 7, 2022, in advance of the commencement of Student's MDT reevaluation, Parent met with Student's IEP team to discuss the scope of same. (Factual Finding 12) Parent memorialized the December 7, 2022, meeting in a letter addressed to School Psychologist. Upon review of the letter it is evident that Parent was in agreement with the scope of the MDT reevaluation and that Parent wanted the team to consider the eligibility categories, Hearing Impairment, Health Impairment and Autism Spectrum Disorder. (Factual Finding 12)

At the due process hearing, Petitioner met its burden of proof and production. (NRS § 388.467) Consistent with 34 C.F.R. § 300.502 (b)(2)(i)(ii) and NAC § 388.306 (1), Student's 2023 Reevaluation was appropriate. The evidence indicates that the team who conducted the MDT reevaluation was properly staffed consistent with the Nevada Administrative Code, Chapter 388. (Factual Finding 19) The team did determine that Student remained eligible for SPED under the category of Hearing Impairment. (Factual Finding 14) However, after appropriate assessments were

conducted using nationally recognized tests that were administered by qualified individuals, Student did not meet the criteria to be found eligible for SPED under the categories of Health Impairment or Autism Spectrum Disorder. (Factual Finding 16) The overwhelming evidence was that the 2023 Reevaluation was appropriate. And, no evidence was presented to contradict this finding. (Factual Findings 20, 21) In addition, no evidence was presented by Respondent to explain how Student's IEP would be any different if she had been found eligible for SPED under additional categories.

Thereafter, following the February 17, 2023, MDT reevaluation meeting at which Parent received the 2023 Reevaluation (Factual Findings 13), consistent with their right Parent requested an IEE at public expense. On March 6, 2023, Petitioner sent Parent a letter denying their request for a publically funded IEE. (Factual Finding 17) Then, and without undue delay, on or about March 23, 2023,<sup>16</sup> Petitioner filed its RDP seeking a determination that it properly denied Respondent's IEE request. Based upon the foregoing, the IHO finds that Student's 2023 Reevaluation was appropriate.

## **VI.**

### **ORDER**

Based upon the above Findings of Fact and Conclusions of Law, and good cause appearing, it is hereby ordered:

1. Student's 2023 Reevaluation was appropriate. Petitioner has no obligation to provide Student with an IEE at public expense.

## **VII.**

### **NOTICE OF RIGHT TO APPEAL**

Any party aggrieved by the hearing officer's decision may appeal it by filing with the Superintendent a notice of appeal which identifies the specific findings and conclusions being appealed and forwarding a copy of the notice of appeal to the other parties within 30 days after receiving the decision. A party to the hearing may file a cross appeal by filing a notice of cross appeal with the

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<sup>16</sup>The RDP is dated March 20, 2023. It was received by Respondent and the IHO on March 23, 2023.

Superintendent which identifies the specific findings and conclusions being appealed and forwarding a copy of the notice of cross appeal to the other parties within 10 days after receiving notice of the initial appeal. If an appeal is filed, a state review officer appointed by the Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing. NAC 388.315(1).

DATED this 6<sup>th</sup> day of JUNE, 2023.

  
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