

STATE OF NEVADA
DEPARTMENT OF EDUCATION

In the Matter of)	DECISION
)	
STUDENT ¹ , by and through the)	State Review Officer: Beatriz A.
Parent(s),)	Diaz-Pollack
)	
Appellants,)	Representatives:
)	
v.)	Appellants: Marianne C. Lanuti, Esq.
)	
SCHOOL DISTRICT,)	Respondent: Daniel Ebihara, Esq.
)	
Respondent.)	

I. BACKGROUND

On November 4, 2019 the Nevada Department of Education received Petitioner’s Partial Appeal of the hearing officer’s (HO’s) decision in the above-captioned case. The undersigned was appointed as the state review officer (SRO or review officer) on November 5, 2019 and a decision was due on December 4, 2019.

Following appointment, this review officer communicated with Parties via electronic mail to schedule a Status Conference; however, Parents’ counsel was not available for a telephonic Status Conference during the timeframe identified by the SRO due to being out of the country. Given the 30-day decision timeline in this matter, the SRO followed up with written communication setting out the issues to be decided in the instant appeal and granting both Parties the opportunity to state any objection to the stated issues by November 15, 2019. The SRO further provided the Parties the opportunity to submit written arguments, consistent with NAC §388.315, by November 20, 2019. Neither Party submitted any objection to the issues as stated by this SRO or any further written argument.

¹Personally-identifiable information is attached as Attachment A to this Decision and must be removed prior to public distribution. See *Letter to Chad* [FPCO 12/23/04].

At the time of the hearing, the Student was 9 years old and attending fourth grade in the School District. Student was identified as a student with a disability under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 *et seq.*, and eligible for services under the category of autism spectrum disorder. Petitioners' due process complaint was filed by the Parents, through counsel, on July 10, 2019. The following issues were agreed upon for determination by the hearing officer:

- (1) Whether the child was substantively denied a free appropriate public education during the 2017-2018 and/or 2018-2019 school years as evidenced by allegedly inadequate goals and/or progress towards those goals in behavioral, social, or academic areas;
- (2) Whether the child was substantively denied a free appropriate public education during the 2017-2018 and/or 2018-2019 school years by alleged incident(s) concerning the child's safety that occurred during transportation;
- (3) Whether there was a procedural violation of the IDEA that resulted in a substantive violation of the child's right to a free appropriate public education because the parent was significantly impeded from participating in the IEP process due to a lack of information about incidents affecting the child's behavior that occurred during school hours, and/or the IEP team failed to act on information it received regarding those incidents; and
- (4) Whether Angel Sense is required as a supplemental aide or service or assistive technology in order for the child to receive a free appropriate public education. [HO Decision, dated 10/29/2019 (HO Dec.), pp. 3-4]

The due process hearing was held October 7, 8, 9, 10 and 11, 2019, and the HO decision was issued on October 29, 2019. With regards to hearing issue number 4, the HO found that Angel Sense was not required in order for the student to receive a free appropriate public education (FAPE). [HO Dec., p. 53] With regards to hearing issues 1, 2 and 3, the HO found that the Student was denied a FAPE "independent of but also resulting from various procedural violations, during the **2018-2019 school year.**" [HO Dec., p. 65, *emphasis added*]

The instant partial appeal of the HO decision raises issues specific to the remedy granted, which are set out in Section III, below.

II. PROCEDURE AND STANDARD OF REVIEW

Pursuant to NAC §388.315(b) the review officer must ensure that the procedures of the hearing officer below 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 review of the record.

The 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)] This review officer has done so here, having reviewed five volumes of the hearing transcript and all exhibits entered into evidence².

Though not expressly adopted by the Ninth Circuit, this review officer finds persuasive the standard of review language articulated in *Carlisle Area Sch. Dist. v. Scott P.*, 62 F. 3d 520, 23 IDELR 293 (3d Cr. 1995), which is referenced in Petitioner's Partial Appeal of IHO Decision. The Court in *Carlisle* noted that in a two-tier system under IDEA, the review officer must exercise "plenary review" to make the independent decision IDEA requires. However, in so doing, it held a review officer should give deference to a hearing officer's credibility determinations and findings unless the non-testimonial, extrinsic evidence in 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 hearing officer applies in rendering this decision³.

III. ISSUES

Petitioners' appeal expressly presents as a partial appeal of the HO Decision, challenging not the HO's factual determinations, but rather disputing four areas where Parents argue the HO, as a matter of law and based on the underlying factual determinations, should have granted further equitable relief for past educational harm. Accordingly, this review is limited to the following four issues:

Whether the Hearing Officer erred in failing to grant adequate relief for past educational loss resulting from:

² The record includes Joint Exhibit 23, a video of a May 2, 2019 school bus incident. The transcript reflects that the hearing officer and parties viewed an unredacted copy of this video in closed session during the hearing (Tr., Vol. III, pp. 437-441). This review officer viewed a redacted copy of the May 2, 2019 video where the Student and bus driver are visible and the faces of other students on the bus appear pixelated, or, blurred. The underlying record reflects, and Petitioner-Appellants' appeal restates Parents' argument that the May 2, 2019 video shown at hearing was altered from that which was originally viewed by Parents; however, the authenticity of the video is not at issue in the instant appeal and therefore not reached in this SRO decision.

³ See also, *Amanda J., et al. v. Clark County School District*, 267 F. 3d 877, 103 LRP 33278 (9th Cir. 1995), citing and impliedly approving the 3rd Circuit's approach in *Carlisle*.

- (1) a delay in evaluation of the student;
- (2) excessive student absences;
- (3) a lack of updates to the student's Behavioral Intervention Plan; and
- (4) limiting compensatory education in speech/language services to the duration of a few weeks in May of 2019 following one bus incident.

IV. FINDINGS OF FACT

The HO's Findings of Fact (FOF) (HO Dec., pp. 4-49), confirmed by the SRO upon review of the record as thorough, complete, and accurate, are adopted as stated by the HO and incorporated by reference as though fully set forth herein.

V. APPLICABLE LAW

This matter arises under the IDEA, 20 U.S.C. §1400 *et seq.*, and implementing state laws and regulations, NRS Chapter 388 and NAC Chapter 388. While the issues raised in the instant appeal present a narrow question regarding the hearing officer's consideration and award of compensatory education, the foundational elements of the hearing officer's decision on the issue of whether the student was denied a FAPE in the 2017-2018 and 2018-2019 school years is considered, in order to arrive at analysis of the hearing officer's award of compensatory education.

The U.S. Supreme Court in *Bd. of Educ. v. Rowley*, 458 U.S. 176, 103 LRP 53214 (1982) articulated a two-prong test to determine whether a school district has offered a student a free appropriate public education: (1) has the school district complied with the procedures set forth in IDEA; and, (2) was the student's IEP reasonably calculated to receive educational benefit? [*Id.*]

With regard to the first prong of *Rowley*, concerning procedural safeguards, the 9th Circuit Court of Appeals has held that while not all procedural violations 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 FAPE. [See *W.G. v. Bd. of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479 (9th Cir. 1992); See also *Amanda J.*, 35 IDELR 65 (9th Cir. 1992)]

With regard to the second prong of *Rowley*, the U.S. Supreme Court, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988, 69 IDELR 174 (2017), held that for a school district to meet its substantive obligations under IDEA, the educational

program offered to a student “must be reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” [Id.]

Upon determining that a violation of FAPE has occurred, it is well-settled that compensatory education is available as an equitable remedy. [See *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F. 3d 1489, 21 IDELR 723 (9th Cir. 1994)] In this case which is controlling in the Ninth Circuit, the *Puyallup* Court determined that compensatory education is “not a contractual remedy, but an equitable remedy, part of the court’s resources in crafting ‘appropriate relief.’” [Id.] The *Puyallup* Court indicated that cases arising in other judicial circuits which apply a more quantitative approach to determining compensatory education do not contradict a court’s power to consider the equitable remedy of compensatory education by applying a “fact-specific” analysis to determine a remedy. [Id.] The *Puyallup* Court further stated that, “Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” [Id.]

VI. ANALYSIS AND CONCLUSIONS

Issues presented on appeal: Whether the Hearing Officer erred in failing to grant adequate relief for past educational loss resulting from:

- (1) a delay in evaluation of the student;
- (2) excessive student absences;
- (3) a lack of updates to the student’s Behavioral Intervention Plan; and
- (4) limiting compensatory education in speech/language services to the duration of a few weeks in May of 2019 following one bus incident.

At the outset of this analysis it is noted that while Petitioners’ appeal addresses four separate areas, articulated above, where the hearing officer’s compensatory education award is allegedly deficient as a matter of law, the hearing officer’s decision speaks to these areas individually, but ultimately considers their collective implications in arriving at the conclusion that procedural and substantive violations led to a denial of FAPE to the Student in the 2018-2019 school year and determining a remedy. [HO Dec., pp. 65-71, pp. 79-82] Accordingly, the analysis presented below addresses the four issues on appeal collectively, addressing each individually as necessary when setting out the analysis.

Petitioners’ appeal correctly reflects that the hearing officer found procedural and substantive violations relating to the four issues under consideration in this appeal

which rose to the level of a denial of FAPE; however, the appeal misstates or misapprehends several components of the hearing officer decision's legal analysis and grant of relief.

While the issues presented at hearing encompassed both the 2017-2018 and 2018-2019 school years, and Petitioners' appeal references IDEA's two-year statute of limitations period in arguing that additional compensatory education should have been granted, the HO decision, supported by the underlying record, specifically found the denial of FAPE occurred during the 2018-2019 school year and found that the weight of the evidence, including testimony from the Parents, indicated that District and Parents agreed that although the Student missed significant days of school two years in a row, the Student made appropriate progress in the 2017-2018 school year. [HO FOF #43, HO Dec. p. 66] This conclusion is supported by the testimony and exhibits admitted into the evidence. The Student attended different elementary schools in 2017-2018 and 2018-2019, referred to in the HO decision as "Elementary School 2" and "Elementary School 3," respectively, owing to the fact that the Student advanced to the next grade level, and that next grade level program was at a different school. [HO FOF #2, #3; Joint Exh. 2] In testimony which the HO found credible, the Student's former Special Education Teacher (Former SET) testified the Student was making progress in the 2017-2018 school year, prior to an extended absence of approximately five weeks at the end of that year [Tr. Vol. 1, pp. 217-223; Joint Exh. 3] The HO decision also indicates that the HO found persuasive the testimony from Student's Father, who stated that from his perspective the Student was happy and doing fine in Elementary School 2 during the 2017-2018 school year. [HO FOF #66; Tr. Vol. V, p. 1025] Accordingly, the grant of relief, supported by the underlying record, was clearly intended to address a denial of FAPE in the 2018-2019 school year. [HO Dec., p. 79]

In a conclusion, reached after appropriate application of the legal standard for provision of FAPE articulated in *Rowley* and *Andrew*, and which is partially quoted in Petitioners' appeal, the HO Decision states as follows:

The four areas of error resulted in substantive violations of the IDEA individually, but their collective effect was far more damning. A vicious cycle ensued where Student continued to suffer from constipation, contributed to by the behavioral plan. Student had limited verbal ability and could not communicate toileting needs, and that fact was amplified by the significant amount of school and especially speech services student missed, along with an IEP goal relating to toileting that failed to address either communication or constipation issues.

The remedies to all this are set forth below. Some immediate changes need to be made to the IEP, as the current version does not address these concerns and the collective mistrust between the parties suggests leaving it to them to agree on what changes are needed will only continue the loss of education benefits. [HO Dec., p. 71]

The four "areas of error" referenced in this conclusion include: (1) a delayed evaluation which, even when belatedly conducted, was found inaccurate in its assessment of how health affected the Student's ability to receive educational services; (2) substantively deficient IEPs written and implemented in 2018-2019 which repeated a general toileting goal which Student had not completed for years; (3) the failure of the IEP team to consider the Student's significant absences; and, (4) the failure to review the Student's behavior plan as required by applicable law. [HO Dec., pp. 65-71] Three of the four areas for which relief is sought in the instant appeal are expressly represented in this excerpt from the HO Decision. Specifically, the delay in conducting Student's required re-evaluation, the IEP team's failure to consider the Student's excessive absences, and the failure to timely review the Student's behavior plan. The fourth area, relating to the amount of speech/language services that should have been awarded as compensatory education, is impliedly represented in the four areas of error articulated by the hearing officer's decision in that the speech/language services were missed as a result of the Student's absences which the IEP team failed to consider or address. [HO Dec., p. 81].

Petitioners' appeal does not challenge the conclusions of the HO Decision, articulated above, that these errors on the part of the District resulted in substantive violations of FAPE, but rather, this appeal challenges the relief granted by the HO, specifically, the compensatory education granted, and argues the HO failed to grant appropriate relief as a matter of law.

Upon a finding of a violation of FAPE, and as articulated in Section V, above, a hearing officer is tasked with ordering appropriate relief to the Student, and appropriate relief, according to applicable law in this judicial circuit, is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA. [See *Puyallup*, 31 F. 3d 1489] Petitioners' appeal cites to *Puyallup*, noting that it is controlling authority in the Ninth Circuit, for the proposition that when FAPE has been denied, absent exceptional circumstances, relief should be granted [*Id.*] This is something of an oversimplification of the Court's holding in that matter. In fact, the *Puyallup* Court expressly stated that compensatory education is an equitable remedy and it is within a court's, which in this instance is applied to extend to a hearing officer's, power to apply

a fact-specific analysis rather than make a generalized award of compensatory education. [*Id.*] A review of the underlying record in this matter, conducted according to the Standard of Review articulated in Section II, above, indicates that the Hearing Officer engaged in just such fact-specific analysis⁴ as was required by law and supported by the record as further set out below.

The hearing officer did not fail to provide adequate relief for the District's delay in evaluation of the Student, failure to consider excessive absences and/or failure to timely review the Student's behavioral intervention plan.

Upon finding a denial of FAPE, the HO decision set out remedies, which the Petitioners' appeal itself characterized as 'equitable and creative,' which are generally summarized as follows:

- The IEP team was required to meet to reformulate Student's toileting goal, ensuring that a dedicated paraprofessional is assigned to assist in the implementation of toileting and to developing Student's communication around toileting issues;
- An accommodation was required to be added to Student's current IEP to ensure positive reinforcements for Student will be focused on non-food items preferred by the Student, such as bubbles, Ipad, or music;
- The IEP team was required to further address additional topics including:
 - (1) Receiving updated and correct health information regarding the Student by offering the Student's general physician and psychiatrist the opportunity to attend and provide health information regarding the Student at the District's expense;
 - (2) Discussing Student absences and formulating a plan, accommodation and/or goal to be included in the IEP if certain thresholds of absence, as determined by the HO, are crossed; and
 - (3) Ensuring attendance of a director-level employee from the District's transportation department to discuss current transportation needs and whether transportation safety is affecting education or behavior and considering the need for specific accommodations on the bus.
- Compensatory education was awarded in the amount of 14 hours of speech services and communication. [HO Dec., pp. 72-82]

⁴ It is noted that the Hearing Officer specifically, and accurately, addressed the legal authority that would be applied to any consideration of remedies in an Addendum to Prehearing Conference Order, dated September 16, 2019 (HO Exh. 9).

In determining these remedies for the denial of FAPE caused by District's delay in evaluation of the Student, failure to consider excessive absences and failure to timely review the Student's behavioral intervention plan, the hearing officer provided a detailed analysis of the balancing of equities, supported by the underlying record, in which he engaged to arrive at the awarded remedies. [HO Dec., pp 78-82] In contesting the award, Petitioners' appeal notes certain FOFs, which are not contested, but which the appeal indicates should have led to a higher compensatory education award. Petitioner-Appellants' argument misapplies the directive of *Puyallup* which expressly states that compensatory education is not a "contractual remedy" and does not require "day-for-day compensation for time missed." [31 F.3d. 1489]

Certain specific arguments raised by Petitioner-Appellant not only misapply applicable law, but, in fact, misstate either the HO's conclusions or the underlying evidence as demonstrated by the record. With regard to the consideration of excessive absences, Petitioners' appeal argues that testimony regarding a prolonged absence outside of the period under review in the due process was "attempted to be exploited by Respondent and to intentionally confuse the IHO." [Parent's Appeal, pp. 4-5] However, the underlying record indicated more than one prolonged absence by the Student, including an absence of approximately five-weeks at the end of the 2017-2018 school year, which was a school year under review in the matter. [Joint Exh. 3, Joint Exh. 4]. Furthermore, there was no indication that the HO was confused by this evidence, rather the HO Decision demonstrated the HO's clear appraisal of the Student's attendance issues and conclusions, supported by the underlying record, of how those attendance issues affected the Student's education. [See, e.g., HO FOF #40, #41, #42]

Petitioners' appeal goes on to argue that the HO erred in consideration of the Parents' rejection of ESY and in making reference to the Father's testimony that the Student may have benefited from medication in managing anxiety. [Parent's Appeal, pp. 7-8] While Parent argues, without legal authority, that the HO's consideration of Parents' rejection of ESY is improper to consider and "should never be used as a weapon against the [P]arent," the HO's Decision merely utilizes the fact of Parents' decline of ESY services as a factor in weighing the equities in this matter, a factor which in fact was considered, without controversy, by the Court in *Puyallup*. [31 F. 3d 1489; HO Dec., p. 80] Petitioners' appeal further argues that the HO's reference to the Student taking medicine is contrary to the law. IDEA, through the regulation cited in Appellant's brief, specifically states that districts may not condition school attendance,

evaluation, or receipt of services on Parents' agreement to obtain medication for their child. [34 C.F.R. §300.174] However, the HO's brief reference to Parents' testimony that Student's anxiety has improved, which may be, at least in part, a function of medication the Student is taking does not run afoul of this regulatory prohibition. [HO Dec., p. 63]

The hearing officer did not limit compensatory education in speech/language services to the duration of a few weeks in May of 2019 following one bus incident.

As indicated above, the hearing officer's award of 14 hours of speech services and communication - roughly reflecting the difference between 1360 speech service minutes owed and 540 speech service minutes received in 2018-2019 - to be provided by a Speech and Language Pathologist, or trained and supervised staff member and focused on advancing Student's communication skill regarding self-care, or advancing Student's PECS usage to a higher master level of Phase 4 or advancing to Phases 5 or 6, were reached after a fact-specific analysis intended to fashion an appropriate equitable relief. [HO Dec., p. 39, pp. 78-82] This analysis, and the calculations considered by the hearing officer, while not required to be a one-to-one compensation for time missed, are nonetheless supported by the underlying evidence and demonstrate appropriate consideration of equitable factors. [Joint Exh. 19]

Petitioners' appeal articulates this issue as an error on the hearing officer's part in that it may represent compensation for a procedural violation following the May 10, 2019 or may only represent an award for service minute loss following a bus incident in May of 2019; however, the minutes awarded do not reflect any such limitation. [Petitioner's Appeal, pp. 6-7] Rather, the hearing officer's reasoning and calculation of minutes awarded reflects an intent to fashion equitable compensation for speech service minutes missed as a result of Student's absences and the denial of FAPE in the 2018-2019 school year. [HO FOF #58]

Further evidence of HO's appropriate consideration and balancing of the equities in arriving at the relief awarded is provided by following statement:

Additional compensatory education has been considered and rejected. First off, this order already put in place a detailed toileting plan to some degree it is anticipate that plan will serve a compensatory purpose of advancing Student's self-care skills. Second, while evidence concerning academic areas was at time conflicting, those conflicts are resolved to find the Student has made at least some basic progress in math, reading, and writing. [HO Dec., p. 82]

In light of the foregoing, no error is found in the award of compensatory education that warrants reversal of the HO decision. Petitioner-Appellants' disagreement with the amount of compensatory education awarded does not create such error.

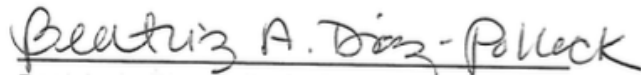
As stated by the Court in *Puyallup* when considering a factually supported and carefully crafted decision where compensatory education was at issue, "To hold that the district court abused its discretion in denying compensatory relief would be to destroy the equitable nature of the district court's charge to fashion appropriate relief." [31 F.3d. 1489] In the instant matter, the hearing officer did not, in fact, deny compensatory education, but granted remedies, including an award of compensatory education, consistent with this charge to fashion appropriate relief.

VII. DECISION AND ORDER

For all the reasons stated in this decision, the impartial hearing officer's decision is upheld, all relief for Appellants is denied.

It is so ordered.

DATED: December 4, 2019


Beatriz A. Diaz-Pollack, Review Officer

NOTICE OF APPEAL RIGHTS

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