

**IMPARTIAL DUE PROCESS HEARING
BEFORE THE HEARING OFFICER
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS**

STATE OF NEVADA

In the Matter of

STUDENT¹, by and through Parents,

Petitioners,

v.

SCHOOL DISTRICT,

Respondent.

**DECISION OF THE
HEARING OFFICER**

Date: December 23, 2018

Petitioners: Parents Pro Per. Also present for Parents, Monir Doumato.

Respondents: Daniel Ebihara, Esq., on behalf of the Clark County School District. Also present for Respondent, Michael Harley, Esq., Compliance Officer, Amanda Kappel, Compliance Monitor, Lyn Materna, Compliance Monitor, and Kellie Scheiner, Compliance Monitor.

Victoria T. Oldenburg
Hearing Officer

INTRODUCTION AND PRELIMINARY MATTERS

On October 10, 2018, the Parents filed a due process complaint ("Complaint") on behalf of the above-captioned Student against the School District ("the District") alleging: 1) the Student was being denied a free appropriate public education ("FAPE"); and (2) the District failed to identify, evaluate, and properly place the Student under the IDEA and Nevada law. The Nevada Department of Education Superintendent of Public Instruction appointed the undersigned Hearing Officer, Victoria T. Oldenburg, as the Hearing Officer for the case on October 19, 2018. The Hearing Officer issued a Preliminary Order on October 23, 2018 setting forth the statutory

¹ Personally identifiable information is included in the Appendix to the final decision in this matter and will be removed prior to public distribution. *See Letter to Schad*, 105 LRP 4754 (December 23, 2004).

time periods applicable to the proceeding as established in 34 C.F.R. §§300.510-300.515. The District responded to the Complaint on November 2, 2018. The parties were unable to resolve the issues during the resolution period. Therefore, pursuant to notice duly given, the Hearing Officer convened a Pre-Hearing Conference on November 20, 2018 to, among other things, determine the precise issues to be addressed at the hearing, discuss whether pre-hearing motions or briefs were anticipated, establish deadlines for subpoenas and the exchange of documents, and confirm the date and time for the hearing and of any additional pre-hearing conferences.

At the November 20, 2018 Pre-Hearing Conference the parties agreed the following issues were unresolved: 1) whether the Student was appropriately evaluated by the District in the Multi-Disciplinary Team (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) whether the 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 loss, a.k.a Hearing Impairment and; 3) whether the Student was denied a FAPE during the 2017-2018 school year, specifically with regard to whether the Student required direct services in the 2017-2018 IEP in the areas of reading, math and writing in order to be provided an educational benefit.²

On November 29, 2018, a second Pre-Hearing Conference was held. At the second Pre-Hearing Conference the Parent made a request to add an additional issue to be considered at the

² Additional issues were raised in the Complaint concerning the 2018-2019 school year. During the first Pre-Hearing Conference the parties agreed those issues would not be heard as they were working towards a resolution. *See* Hearing Officer Exhibit 15, testimony of Parent, testimony of Mr. Ebihara. However, evidence as to the Student's progress in the 2018-2019 school year was offered and has been considered by the Hearing Officer as potentially relevant to the issues of whether the Student was denied a FAPE in 2017-2018 school year. The Student was on the 2017-2018 IEP at the time of the filing of the Complaint thus the annual IEP due on November 3, 2018 was held in abeyance.

hearing. Shortly after the second Pre-Hearing Conference, on November 29, 2018, the Parent submitted an Addendum to the Complaint setting forth the new issue.³ With no objection by the District, on December 2, 2018, the Hearing Officer issued a Second Pre-Hearing Report and Order adding the new issue of whether the District provided the Parents with prior written notice (PWN) of their rights and the procedural safeguards prior to the time of the November 2016 reevaluation.

Pursuant to 34 C.F.R §300.507 and NRS §388.463, the Hearing Officer has jurisdiction to hear the unresolved issues in the Complaint and Addendum. However, the Hearing Officer does not have jurisdiction to hear the Parents' Rehabilitation Act and ADA claims.

The hearing was originally scheduled for December 10-12, 2018. However, due to witness scheduling issues the hearing was rescheduled to December 5-7, 2018. The Hearing Officer convened and presided over the hearing on December 5-6, 2018. Present at the hearing was one of the Parents, and present on behalf of the District were: Daniel Ebihara, Esq., Director; Michael Harley, Esq., Compliance Officer; Amanda Kappel, Compliance Monitor; Lyn Materna, Compliance Monitor and; Kellie Scheiner, Compliance Monitor.

At the hearing, Hearing Officer Exhibits 1 through 19 were admitted, District Exhibits 1-8, 10-11, 15, 18-19, 22-26, 28 (H) and 28(I), and 29-30 were admitted, and Parents' Exhibit 7, pages 7, 11-14, Exhibit 10, page 18, and Exhibit 16, pages 8-13, were admitted. The decision in

³ Also discussed during the Second Pre-Hearing Conference were issues raised by the Parents concerning the District's document disclosures, and the Parents' subpoena request for the protocols used for assessments. It was explained to the Parents that the protocols were copyright protected but that they could view them at the District office; therefore, the subpoena was denied. The Parents were further informed that certain document issues they raised arose under the Family Educational Rights and Privacy Act of 1974 (FERPA) and were not within the Hearing Officer's jurisdiction, and that other objections to District documents would be ruled upon at the hearing. The Parents also requested a subpoena of a witness to appear and testify at the hearing, which was objected to by the District. The subpoena was denied because the Parents were not able to identify the relevancy of the testimony. *See* Hearing Officer Exhibit 19.

this matter is due December 24, 2018. No extensions to the due date were requested.

ISSUES

The issues to be determined, which were agreed to by the parties at the Pre-Hearing Conferences and again at the beginning of the due process hearing, are as follows: 1) whether the 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) whether the 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) whether the student was denied a FAPE in the 2017-2018 school year, specifically with regard to whether the student required direct services in the 2017-2018 IEP in the areas of reading, math and writing in order to be provided an educational benefit, and; 4) whether the District provided the Parents with prior written notice (PWN) of their rights and the procedural safeguards prior to the time of the November 2016 reevaluation. Pursuant to Nevada law, the District has the burden of proof to show the District did not violate the IDEA or Nevada law. NRS §388.467.

FINDINGS OF FACT

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

1. The Student was born on July 30, 2011.
2. The Student was first enrolled as a Student in the District in the fall of 2014, and has attended pre-K, kindergarten, first and second grade in the District. (District Exhibit 2, testimony of Principal).
3. The Student was on an IEP in kindergarten and first grade. The Student is in second

grade and is currently on the 2017-2018 IEP.⁴ District Exhibit 28 (H) and (I).

4. Prior to kindergarten the Student, through the District's Child Find Department, was deemed eligible for early intervention services under the category of Autism Spectrum Disorder as at that time the Student was exhibiting some signs of the disorder. Child Find had an hour or two to evaluate the Student and to make an eligibility determination. There were some confounds within the evaluation process; the Student could not hear very well, was still learning English, and was from a cultural background that might present differently. The Student was not responding to the Student's name, which could have been due to hearing loss or learning English. The two rating scales done for Autism Spectrum Disorder were based on parental report. No other evaluations were provided which diagnosed the Student as having Autism Spectrum Disorder. The team made the best decision they could for the Student so that the Student could start receiving early intervention services. Within the next two years of early intervention services 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. (Testimony of School Psychologist).

5. The Student has always been in a general education classroom. Since kindergarten the same resource teacher (a.k.a. special education teacher) has worked with the Student and the Student's accommodations, monitored the Student's progress, and worked with each general education teacher and the Student's hearing itinerant specialist on the Student's IEP. The Resource Teacher gives the Student's teachers copies of the IEP and goes through the IEP with each teacher. (Testimony of Resource Teacher).

6. Since kindergarten, the Student's audiologist has provided assistance to each teacher by

⁴ See footnote no. 2.

obtaining the Student's ear level hearing equipment, programming the equipment, in-servicing the teacher's equipment, in-servicing anyone else that works with the Student, and providing direct services to the Student. The Student uses hearing aids with a wireless receiver and the teacher wears a microphone; the wireless receiver picks up the teacher's voice which goes directly into the hearing aids so that the Student is hearing as if the teacher is standing right in front of the Student. (Testimony of Audiologist).

7. Since kindergarten, the Speech Language Pathologist has provided the required speech therapy (testimony of Speech Language Pathologist), and the Teacher for the Deaf and Hard of Hearing has provided individualized instruction to the Student in the area of language. (Testimony of Teacher for the Deaf and Hard of Hearing).

8. In September, 2016, when the Student was starting kindergarten, the Parents submitted an audiological evaluation to the District which indicated the Student was presenting with hearing loss, and the Parents requested the Student be evaluated for hearing loss. The District suspected the Student may qualify for special education services under the eligibility category of Hearing Impairment thus the District proceeded to complete a reevaluation. The Parent was provided with prior written notice (PWN) of the intent to reevaluate for the Student's special education needs and continued eligibility for special education services. (Testimony of School Psychologist, District Exhibit 10).

9. When doing a reevaluation the MDT evaluates to determine whether the Student (i) is no longer exhibiting characteristics of a disability; (ii) has overcome the disability or; (iii) the Student's disability profile has changed in some respect. It is standard practice when a parent requests an evaluation on a suspected disability to reevaluate existing disabilities. (Testimony of Resource Teacher).

10. The Parent consented to the reevaluation of the Student in the assessment areas of health and sensory/motor functioning, academic performance and achievement, general intelligence, speech, language, communication, social and emotional condition/adaptive skills, and behavior for all areas of suspected disability. The School Psychologist discussed with the Parent the consent form including the assessment areas, that school staff was not seeing signs of Autism Spectrum Disorder in the school setting, and that they would be evaluating for Autism Spectrum Disorder and Hearing Impairment. (District Exhibit 10, Testimony of School Psychologist).

11. After reviewing the Student's history, performing several assessments and obtaining results including scores under the ASRS (Autism Spectrum Rating Scales), and considering reports from the teacher and the Parents, the School Psychologist concluded that in the school setting the Student was not demonstrating signs of Autism Spectrum Disorder and that Hearing Impairment appeared to be the most appropriate eligibility category; therefore, the School Psychologist recommended the eligibility category of Autism Spectrum Disorder be removed and the Student be deemed eligible under the category of Hearing Impairment. (District Exhibit 15, testimony of School Psychologist). Autism can be misdiagnosed if there is an unidentified hearing loss, and at the time of the 2014 MDT Report the MDT did not know the Student had a specifically identified hearing loss as the audiological report had not been conducted. (Testimony of School Psychologist, testimony of Audiologist).

12. The November 14, 2016 MDT Report contained one incorrect reference to "Christian" and some typographical errors which were recently corrected when pointed out by the Parents. The MDT Report was a valid representation of the Student's functioning and the assessments that were done in the fall of 2016. (Testimony of School Psychologist).

13. The Parents received prior written notice of the November 14, 2016 MDT meeting, and

that the purpose of the meeting would be to determine eligibility for special education programming. (District Exhibit 11, testimony of School Psychologist).

14. When the MDT reevaluated the Student it considered the Student's bilateral sensory neural hearing loss and Autism Spectrum Disorder. Two additional rating scales relative to Autism Spectrum Disorder were done, one with the Parents and one with the school team including the teacher. The two rating scales came back showing the Student was not exhibiting characteristics consistent with Autism Spectrum Disorder. Based upon the rating scales, the audiology report, and all other evidence, including that the Student has solid social skills, a good vocabulary, was outgoing and interacted well with peers and adults, developed friendships, was communicative and inquisitive, and was not overly shy, aggressive, or withdrawn, the MDT, which included the Parents, the School Psychologist, the Resource Teacher, the Kindergarten Teacher, the Teacher of the Deaf and Hard of Hearing, the Audiologist, and the Speech Language Pathologist, agreed with the results of the MDT Report including removal of the eligibility category of Autism Spectrum Disorder, and agreed with the determination of eligibility under the category of Hearing Impairment. (Testimony of Resource Teacher, testimony of Psychological Services Coordinator ("Coordinator"), District Exhibit 15, District Exhibit 18).

15. At the November 14, 2016 meeting the procedural safeguards booklet was provided to the Parents and the rights were reviewed with the Parents. (Testimony of Resource Teacher, testimony of School Psychologist, District Exhibit 5).

16. On November 14, 2016, an IEP under the eligibility category of Hearing Impairment was developed; the Parent participated in the IEP team meeting and acknowledged receipt of the procedural safeguards. (District Exhibit 28(H)).

17. The IEP team, which included the Parent, Student, District Representative, Resource Teacher, Kindergarten Teacher, School Psychologist, Speech Language Pathologist, Teacher of the Deaf and Hard of Hearing, and Audiologist developed measurable annual goals and short term objectives in the areas of (i) language (specifically answering "wh" questions, labeling basic concepts, using plural pronouns, letters and sizing, and audition - being able to recognize differences in sounds); (ii) written language (pausing to change line direction when forming letters and numbers, forming letters and numbers without overrunning beginning and end points, legibly printing upper and lower case letters with correct form and spacing, determining a reasonable spelling of simple CVC words using the Student's knowledge of letter names and sounds, legibly and accurately copying words and short sentences with appropriate spacing) and; (iii) audition (demonstrating the ability to identify and discriminate between the six LING sounds (ah, ee, oo, m, sh, s), discriminating between 2-3 syllables/words that vary in respect to syllabification, duration, stress, intonation, or consonants or vowels, demonstrating the ability to discriminate between simple words that rhyme, and demonstrating the ability to discriminate between sentences differing only in the duration of key words). (District Exhibit 28(H)).

18. The 2016-2017 IEP included specially designed instruction in written language for 30 minutes per week and instruction with a teacher of the deaf/hard of hearing for 60 minutes per week, and provided supplemental aids including (i) gaining the Student's attention before giving direction/instructions; (ii) allowing the extra time to process information to think about answers and questions; (iii) using ELL strategies and techniques to help with understanding new concepts and vocabulary development; (iv) teacher to make frequent checks on the Student to see if the Student understands assignments or needs help; (v) repeat instructions to the Student to have the Student restate or paraphrase to ensure comprehension, and avoid yes or no questions; (vi)

hearing assistive technology and; (vii) closed captioning when available.⁵ The Student also received related services of 120 minutes per month in speech and 10 minutes per week in transportation to and from the school.⁶ The Parents agreed with the components of the IEP. (District Exhibit 28(H)).

19. The 2016-2017 IEP progress reports showed satisfactory progress for all IEP goals. (District Exhibit 8, Testimony of Resource Teacher).

20. At the end of the 2016-2017 school year the Student received an overall grade of meets standards in the content areas of language, mathematics, reading, social studies, speaking and listening, writing, science and health. In the area of special subjects - art, library, music and PE - the Student made satisfactory progress. In the area of successful learner behaviors the Student made exceptional progress in the areas of observing school rules, following classroom rules, following directions, accepting responsibility, working cooperatively, completing and returning homework on time, and quality of work. The Student made satisfactory progress in working independently and the Student transitioned to first grade. (District Exhibit 23, testimony of Principal). At the end of kindergarten the Student was reading at the first-grade level. (Testimony of Kindergarten Teacher).

21. On November 3, 2017, the 2017-2018 IEP for first grade was developed under the eligibility category of Hearing Impairment; the Parents participated in the IEP team meeting and acknowledged receipt of the procedural safeguards. (District Exhibit 28(I)).

22. The IEP team, which included the Parents, Student, District Representative, Resource

⁵ Although the IEP states "0" minutes in the categories of Supplementary Education Services, it is because the software system did not allow input of the amount of time. However, the Student was receiving these services throughout the school day. (Testimony of Resource Teacher).

⁶ See District Exhibit 29, documenting speech therapy with the Student.

Teacher, First Grade Teacher, and Speech Language Pathologist, based upon current available assessments, developed measurable annual goals and short-term objectives in the areas of (i) spelling (say words aloud to phonemically segment words to identify individual letters and sounds prior to spelling a word, consistently identify beginning, middle and end sounds within words, determine a reasonable spelling of words, apply phonetic knowledge of letter-sound relationships); (ii) written language (correctly forming letters and numbers without overrunning beginning and end points, accurately and legibly copying written material with appropriate letter size and spacing, beginning every sentence with a capital letter and ending punctuation, orally stating a simple complete sentence related to a topic that the Student wants to write, orally stating and then legibly writing a simple, complete sentence with a subject and predicate); (iii) language (independently answering "wh" questions - who, what, where, when and why, labeling basic concepts, spatial, temporal sequencing with 2-3 word utterances, using plural pronouns – we, they, them, labeling categories and providing 3-5 items for each category) and; (iv) audition (demonstrating the ability to identify and discriminate between the six LING sounds (ah, ee, oo, m, sh, s), discriminating between 2-3 syllables/words that vary in respect to syllabification, duration, stress, intonation, or consonants or vowels, demonstrating the ability to discriminate between simple words that rhyme, and demonstrating the ability to discriminate between sentences differing only in the duration of key words – 1 to 3 key words). (District Exhibit 28(I)).

23. The 2017-2018 IEP included specially designed instruction in written language for 30 minutes per week and instruction with a teacher of the deaf/hard of hearing for 60 minutes per week, and provided supplemental aids including (i) gaining the Student's attention before giving direction/instructions; (ii) repeat direction/instructions and have the Student restate or paraphrase

to ensure comprehension; (iii) allow extra time to process information to think about answers and questions; (iv) teacher to make frequent checks on the Student to see if the Student understands assignments or needs help; (v) Student to have hearing aids in the classroom; (vi) use of ELL strategies and techniques including visual cues, pictures, diagrams, realistic objects, hands on materials to aid understanding and vocabulary development; (vii) use of Classroom Auditory Distribution System (CAD) to be provided and maintained by the school district during all classroom instruction and; (viii) closed captioning when available. The Student also received related services of 120 minutes per month in speech and 10 minutes per week in transportation to and from school.⁷ The Parents agreed with the components of the IEP. (District Exhibit 28(I)). The Student also works with the teacher for the deaf and hard of hearing on the language goal in the IEP. (District Exhibit 28(I), Exhibit 30, testimony of Teacher for the Deaf and Hard of Hearing).

24. The Student's AIMSweb test scores for the 2017-2018 school year were above average in reading, average in mathematics, and average in fluency. (Parents' Exhibit 16, pages 9-11). The STAR assessment scores for the Student were normal, and even though the scores went down during the second testing, that is how students at that age typically perform on the tests, and the Student was making good progress. (Parents' Exhibit 16, pages 12-13, testimony of First Grade Teacher).

25. The Student's first semester grades were: C in language; B in mathematics; A in reading; A in social studies; B in speaking and listening; B in writing; A in science and; A in health. The Student received an "S" (satisfactory) in art, humanities, music, and PE, and an "E" (exceptional) in library. The Student's second semester grades were: C in language; C in mathematics; B in

⁷ See District Exhibit 29, documenting speech therapy with the Student.

reading; A in social studies; B in speaking and listening; B in writing; B in science and; A in health. The Student received an S in art, humanities, music, and PE, and an E in Library. The Student's overall grades in the area of Successful Learner Behaviors were S in observing school rules, following classroom rules, following directions, working cooperatively, and quality of work, and E in library, accepting responsibility, working independently, and completing and returning homework on time. (District Exhibit 23, testimony of Principal).

26. The Student made progress during first grade. The Student had some focus issues because the Student was interested in what was going on with the other students in the classroom and asked lots of questions. (Testimony of Resource Teacher).

27. During first grade the Student made satisfactory progress in all of the IEP goals, as noted in the Student's quarterly IEP progress reports. (District Exhibit 8, testimony of Resource Teacher).

28. The Student made typical first grade growth and was ready to transition to the second grade. While the Parent expressed concern that the Student's second semester grades had gone down in the areas of math, reading and writing, the grading is heavier in the second semester. (Testimony of First Grade Teacher).

29. Although the Parent expressed concern to the First Grade Teacher regarding the Student's lack of focus at home, the Student's speech and writing, and with the Student not completing homework, and expressed to the Teacher that the Student was autistic, Parents' Exhibit 7 pages 11-14(b), the Teacher did not see a lot of problems focusing in class, and felt the Student was doing very well. In addition, the Teacher did not observe any symptoms of Autism Spectrum Disorder; if a Parent is trying to report a disability the Teacher always sends them to someone in the office. Parents' Exhibit 8 at page 3.A, testimony of First Grade Teacher). The Student was

progressing in speech and received all required services. (Testimony of Speech Language Pathologist).

30. The Student's AIMSweb test scores for the 2018-2019 school year (second grade) were above average in reading, and average in mathematics. (District Exhibit 22, pages 5-6).

31. During the 2018-2019 school year pseudo progress reports are issued bi-weekly pertaining to the Student's progress. A progress report based upon work done at the beginning of the school year, August 31, 2018, shows a C in reading, an A in language, and an F in math.⁸ A progress report generated on October 11, 2108 shows a C in reading, a B in speaking and listening, a C in language, a B- in writing, a B in mathematics, a B in social studies, and an S in PE. A progress report generated on October 29, 2018 shows a D in reading, a B in speaking and listening, a C in language, a B- in writing, a C in mathematics, a B in social studies, and an S in PE. (District Exhibit 23, testimony of Principal, Parent's Exhibit 16.8).

32. Progress report grades are based upon the assignments the Student turns in or the assessments (quizzes) taken in the classroom and can be negatively affected by even one assignment or assessment. As for the Student's progress report of October 29, 2018, wherein the Student received a D in reading, the Student is not the only one who received a D, and the Student's grade was likely lower because of the Student's assessments in the classroom; because assessments are quizzes the teacher cannot provide support to students as the teacher can with assignments. (Testimony of Second Grade Teacher).

33. The Student is achieving what is expected of a second-grade student and doing better than expected in reading despite having a D on one progress report– the Student was reading

⁸ The math grade was based on a BOY MCOMP test where the Student received a 75% out of a possible 100%, and a 50% out of 100% on a NAT 1 test. (Parent's Exhibit 16, page 8, testimony of First Grade Teacher).

fluency at an average of 120 words per minute exceeding the typical 108 words per minute. While the D in reading is below what the Resource Teacher would like to see the Student doing, as students are progressing through the grade levels the material the students must master becomes more difficult, and it is not unusual for students who can read well to sometimes struggle, not get their work done, or not put in the effort. If the Student is consistently struggling the school will look at revising the IEP; however, the Student is performing at a level commensurate with the Student's classroom peers and capable of doing the work. If it gets to the point where the Student is really struggling and cannot maintain grades the school will revise the IEP. (Testimony of Resource Teacher).

34. The October 12, 2018 IEP progress report shows the Student is working towards the Student's goals and making satisfactory progress. (District Exhibit 8, Testimony of Resource Teacher).

35. The Student's Second Grade Teacher uses a color system (rainbow chart) that reflects the Student's daily classroom behavior. The Student is described as kind, respectful, friendly and talkative; the Student gets off task from time-to-time and the Teacher will redirect the Student. Overall the Teacher has no complaints about the Student's behavior. The Student is not observed as socially aloof or distant and has friends. (District Exhibit 4, testimony of Second Grade Teacher.)

36. The Second Grade Teacher communicates with the Parents through an electronic mail system called Class Dojo. (District Exhibit 6, testimony of Second Grade Teacher). The teacher communicated with the Parents about the concerns the Parents had because the Student was getting greens on the rainbow chart, which means the Student was ready to learn, instead of blues, which means the student did well in class; the Teacher explained to the Parents that the

Teacher had no concerns with the Student's academic progress, and the Student was getting greens because she had been talking more, not minding her business, and had some lack of focus. (District Exhibit 4, Exhibit 7, testimony of Second Grade Teacher.)

37. The Parent expressed concern to the Second Grade Teacher about the Student focusing on the Teacher's computer and requested the Teacher not use the computer in front of the Student. The Teacher had meetings with the Student about focusing on assignments rather than on what others in the class are doing, and after the meetings the Student was no longer focusing on the computer. (Parents' Exhibit 7 at page 7, testimony of Second Grade Teacher).

38. The Teacher reteaches all students when they do not understand the curriculum, have not showed progress, or have not scored a passing grade. If the Teacher has concerns with a student's progress the Teacher will collaborate with other teachers and the Resource Teacher to determine other ways to teach the lesson. (Testimony of Second Grade Teacher).

CONCLUSIONS OF LAW

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

A. General requirements of the IDEA.

The Individuals with Disabilities Education Act ("IDEA") requires that public schools provide children with disabilities a "free appropriate public education" ("FAPE"). 20 U.S.C. §1412(a)(1)(A). A child receives a FAPE if the educational program addresses the child's unique needs, provides adequate support services so that the student can take advantage of educational opportunities, and is in accord with an individualized education plan (IEP) for that student. *L.J. by and through Hudson v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1003 (9th Cir. 2017), 20 U.S.C. §1401(9).

An IEP must be prepared and reviewed at least annually by school officials. *Board of Education of the Hendrick Hudson Central School District, Westchester County, et.al. v. Rowley*, 458 U.S. 176, 182 (1982), 20 U.S.C. §1414(a)(5). The IEP is prepared at a team meeting among a qualified representative of the school who is qualified to provide or supervise the provision of specifically designed instruction to meet the unique needs of children with disabilities and be knowledgeable about the general curriculum and the availability of resources of the school, the child's teacher, the special education teacher, an individual who can interpret the instructional implications of evaluation results, and the child's parents. *J.W. ex. Rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432 (9th Cir. 2010), 34 C.F.R. §300.321, NAC §388.281(2)(a). The IEP should document the child's current levels of academic achievement, specify measurable annual goals so that the child can make progress in the general education curriculum, and list the special education and related services to be provided so that the child can advance appropriately towards the goals. *Fry v. Napoleon Cmty. Sch.*, 137 S.Ct. 743, 749 (2017), 20 U.S.C. §§1414(d)(1)(A)(i)(I) and (II), (IV)(aa). The IEP must also include a description of how the child's progress towards meeting the IEP's stated goals will be assessed, *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988, 994 (2017), and when periodic reports on the progress of the child will be provided. 34 C.F.R. §300.320(a)(3)(ii). A child with an IEP must be reevaluated at least once every three years and can be reevaluated sooner if the school or parent requests a reevaluation. 34 C.F.R §300.303.

If it is alleged a school denied a student a FAPE, the tribunal will look to (1) whether the school complied with the procedures set forth in the IDEA, and (2) whether the IEP was reasonably calculated to enable the student to make progress appropriate in light of the student's circumstances. *Board of Education of the Hendrick Hudson Central School District*,

Westchester County, et.al. v. Rowley, 458 U.S. 176 (1982). The IDEA requires that a due process decision be based upon substantive grounds when determining whether a child has received a FAPE, unless a procedural violation impedes the child's right to a FAPE, significantly impedes the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to their child or causes a deprivation of educational benefits. 20 U.S.C. §1415(f)(3), *Rowley, supra*, 458 U.S. at 206-207. Procedural violations which do not result in a loss of educational opportunity or which do not constitute a serious infringement of the parents' opportunity to participate in the IEP process are insufficient to support a finding that a student has been denied a FAPE. *W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23*, 960 F.2d 1479, 1482 (9th Cir. 1992).

B. The Student was appropriately evaluated by the District in the Multi-Disciplinary Team (MDT) Reevaluation Report of November 14, 2016, specifically with regards to assessing the Student in all areas of suspected disability including Autism Spectrum Disorder.

This issue concerns 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.

Pursuant to 34 C.F.R. §300.305 (a), as part of any reevaluation of a child with a disability, the IEP team and other qualified individuals must review existing evaluation data on the child including evaluations and information provided by the parents, current classroom-based assessments and observations, and observations by teachers and related services providers. The IEP team must determine whether the child continues to have a disability, whether the child continues to need special education and related services, and whether any additions or modifications to the special education and related services are needed to enable the child to meet

the measurable annual goals set out in the IEP of the child and to afford participation in the general education curriculum 34 C.F.R. §300.305(a)(2)(ii)(B), and (iv). When doing a reevaluation, the District's MDT looks at whether a student is no longer exhibiting a characteristic of an existing disability, has overcome a disability, and whether the disability profile has changed in some respect. It is standard practice of the District to reevaluate existing disabilities when a parent requests an evaluation on a suspected disability.

The Parent argues the District was outside of its authority to reevaluate the Student under the existing disability category of Autism Spectrum Disorder. However, the law requires that the MDT, in performing its reevaluation, evaluate data on the Student's then existing eligibility category and whether the Student continued to need special education services under that category. The MDT's standard practice in doing so was in accordance with the law. Therefore, the District has met its burden in showing it did not commit a procedural violation of the IDEA or Nevada law by reevaluating the Student in the area of Autism Spectrum Disorder when the Parents requested a reevaluation for Hearing Impairment.

C. The 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.

This issue concerns whether the District committed a procedural violation of the IDEA by determining that the Student was no longer eligible under the category of Autism Spectrum Disorder but was eligible under the category of Hearing Impairment. The Parents argue that the eligibility category of Autism Spectrum Disorder should not have been removed and that the Student should be receiving direct services under that category.

Pursuant to NRS §388.440(6), a pupil with a disability means a child who deviates either

educationally, physically, socially or emotionally so markedly from normal patterns that the person cannot progress effectively in a regular school program and therefore needs special instruction or special services. Autism is defined as a spectrum disorder which significantly affects the verbal and nonverbal communication and social skills of a person and is often characterized by repetitive activities and stereotyped movements, resistance to changes in environment or daily routines, and responding to sensory experience in an unusual manner. NAC §388.028.

The School Psychologist's conclusion and recommendation that the Student was no longer eligible in the category of Autism Spectrum Disorder was based on credible evidence including ASRS scores, reports from the teachers and Parents, and assessments in areas of academic performance, social and emotional conditions, adaptive skills, and behavior.⁹ In addition, the School Psychologist properly concluded, based upon the audiology report and other factors, that the Student was eligible under the category of Hearing Impairment.¹⁰ Most importantly, the MDT which included the Parents, properly concluded the Student was not exhibiting signs of Autism Spectrum Disorder; the Student was not deviating markedly from normal patterns of social or emotional behavior, had good social skills, a good vocabulary, was outgoing and interacted well with peers and adults, developed friendships, was communicative and inquisitive, and was not overly shy, aggressive or withdrawn. The Parents expressly agreed with the removal of Autism Spectrum Disorder as the Student's eligibility category.

Therefore, the District has met its burden in showing it did not commit a procedural

⁹ 34 C.F.R. §300.304 sets out the criteria for evaluation procedures. Of note, the Parents do not dispute the assessment tools, strategies, and instruments used in the reevaluation.

¹⁰ The Parent does not dispute that the Student is eligible under the category of Hearing Impairment.

violation of the IDEA or Nevada law when it determined the Student was no longer eligible in the category of Autism Spectrum Disorder.

D. The Student was not denied a FAPE in 2017-2018 school year, including an educational benefit, because the Student did not receive direct services in the 2017-2018 IEP in the areas of reading, math and writing.

This issue concerns whether the Student was denied a FAPE and an educational benefit because the Student's 2017-2018 IEP did not include direct services in the areas of reading, math and writing.

At the end of the Student's kindergarten year, the Student received "meets standards" in the areas of reading, math and writing. When the Student exited kindergarten the Student was reading at first-grade level. The Student's AIMSweb test scores for the 2017-2018 school year were above average in reading and average in mathematics, and the Student's STAR assessment scores for reading were normal. The Student's first semester grades were an A in reading, a B in math, and a B in writing. The Student's second semester grades were a B in reading, a C in math, and a B in writing. While the Parents expressed concern that the second semester grades had gone down in the areas of reading and math, grading is heavier in the second semester, the Student was achieving passing grades, and there were no concerns with the Student's academic progress. There is simply no evidence the Student needed direct services in the areas of reading, math, or writing under the eligibility category of Hearing Impairment.

The Student's AIMSweb test scores for the 2018-2019 school year were above average in reading and average in math. The Parents point to bi-weekly progress reports during the 2018-2019 school year in support of their argument the Student needed direct services in the areas of reading and math. However, while one progress report shows a D in reading, that one score is not unusual for a second grader and is not indicative of the Student's actual progress as other

progress reports show a C in reading, and the Student is reading fluency at an average of 120 words per minute which exceeds the typical 108 words per minute. Further, while one progress report shows an "F" in math, the math score was the result of one test where the Student received a 50% out of 100%, and the subsequent progress reports show a B and a C in math. The Student's progress reports show a B- in writing. The teachers have no concerns and feel the Student is achieving what is expected of a second-grade student, is performing at a level commensurate with the Student's classroom peers and is capable of doing the work. While the Parents appear to argue the Student is not progressing in math, reading and writing due to Autism Spectrum Disorder, which argument is in conjunction with their position that Autism Spectrum Disorder should not have been removed as a disability category, there is no evidence to support their argument.

The IDEA does not promise any particular educational outcome; while the IEP must be reasonable there is no requirement that it provide what is best or ideal. *Andrew F. v. Douglas County School District RE-1*, 137 S.Ct. 988 (2017). For a child fully integrated in the regular classroom an IEP should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. *Id.* Here, in first grade the Student achieved higher than passing grades in all areas. The Student was able to advance from first to second grade, is achieving what is expected of a second-grade student and is performing at a level commensurate with the Student's classroom peers. Therefore, the District met its burden in showing the Student was not denied a FAPE, including an educational benefit, because the 2017-2018 IEP did not provide for direct services in the areas of math, reading and writing.

E. The District provided the Parents with prior written notice (PWN) of their rights and the procedural safeguards prior to the time of the November 2016 reevaluation.

This issue concerns whether the District violated the procedural safeguards of the IDEA and Nevada law. Essentially, the Parents argue they were not put on proper notice that the District's 2016 reevaluation would include a reevaluation of the Student's existing disability category of Autism Spectrum Disorder.

Prior written notice (PWN) must be provided to the parents of a child with a disability before the school proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a FAPE to the child. 34 C.F.R. §300-503. Informed parental consent must be obtained prior to a reevaluation of the child. 34 C.F.R. §300.300, 34 C.F.R. §300.9. Informed consent under the IDEA does not require a parent's full, in-depth understanding of the reevaluation, it merely requires the parent to have a general understanding of the activity he or she is consenting to, i.e. a reevaluation. 56 IDELR 51, 110 LRP 73644, *Letter to Johnson* (June 3, 2010). Notice of the procedural safeguards established by the IDEA must also be provided to the parent, 34 F.F.R. 300.504(a), which must include a full explanation of those procedural safeguards. 34 C.F.R. §300.504(c). A school must take steps to ensure that the parent understands the content of the notice, and that there is written evidence the parent received and understood the information. 34 C.F.R. §300.503(d)(ii)(iii).

Although the Hearing Officer understands the Parents' argument that the PWN and Parental Consent form did not expressly state the Student would be reevaluated for the disability category of Autism Spectrum Disorder, the law and evidence do not support the Parents' position. The Parents were provided with PWN of the reevaluation and the PWN states that the Student's special education needs and continued eligibility for special education services will be reevaluated. In addition, the Parental Consent form, which was signed by the Parents, informs

the Parents that the Student will be assessed in the areas of health and sensory/motor function, academic performance and achievement, general intelligence, speech/language communication, and social and emotional condition, adaptive skills and behavior. The School Psychologist informed the Parents the Student was not exhibiting signs of Autism Spectrum Disorder and that the District would be evaluating for Autism Spectrum Disorder and Hearing Impairment. Finally, there is written evidence the Parents received and understood the PWN. Therefore, the Parents were on legal and actual notice the Student would be reevaluated for Autism Spectrum Disorder and Hearing Impairment and provided informed consent for the reevaluation.

Accordingly, the District has met its burden in showing it provided the Parents with PWN and the procedural safeguards prior to the November 2016 reevaluation.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to NAC §388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. If there is an appeal, a state review officer appointed by the District Superintendent from a list of officers maintained by the Nevada Department of Education shall conduct an impartial review of the hearing pursuant to NAC §388.315.



Victoria T. Oldenburg, Hearing Officer
P.O. Box 17422
Reno, NV 89511
vtoldenburg@sbcglobal.net