STATE OF NEVADA
DEPARTMENT OF EDUCATION
DUE PROCESS HEARING
IN THE MATTER OF

STUDENT, by and through her Parents,	)	
	)	
	)	
Petitioner,	)	Nilsine Hansen
	)	Impartial Hearing Officer
vs.	)	
	)	
CLARK COUNTY SCHOOL DISTRICT,	)	
	)	
Respondent,	)	
_____	)	

Hearing conducted on:
June 13, 14 and 15, 2011

Hearing conducted at:
Vegas PBS
3050 East Flamingo Road
Las Vegas, NV 89121

Petitioner represented by:
Parent

Respondent represented by:
Phoebe Redmond, Esq.

Personally identifiable information is included in Appendix A.

DECISION AND ORDER

INTRODUCTION

On November 23, 20120, the Ps of the Student in this matter filed a due process request with the Superintendent of the Clark County School District. This Hearing Officer was appointed on November 24, 2010. This due process was filed under the Individuals with Disabilities Education Act (hereinafter IDEA) Title 34 C.F.R. Sections 300.508 through 300.518 inclusive and the Nevada Administrative Code (hereinafter NAC) Chapter 388, Section 388.310.

PROCEDURAL BACKGROUND

Both Petitioner and Respondent were notified on November 24, 2010, of the Hearing Officer's appointment. The Hearing Officer requested a status conference call on January 14, 2011. The Parents' native language is Spanish. All conference calls with the Petitioner and the Respondent were held with the services of an interpreter and all written communications were provided in the Parents' native language. The conference call was held on January 24, 2011. Dates for a hearing were set for April 4 through 8, 2011. The Parent requested an extension of 60 days in order to hire an attorney. That request was granted over the objection of the District. A follow-up conference call was set for February 14, 2011. (H 4a-d)

During the conference call held on February 14, 2011, the Father informed the Hearing Officer that he had been unable to find an attorney to take his case and he would proceed without those services. Permission was granted for the Hearing Officer to contact the Autism Consultant who has been working with the family to determine whether or not she would be assisting the family with the due process. Attempts to contact the consultant were made but were unsuccessful. (H 5 a-f and H 6 a-b)

Attempts to contact the Parents by phone and U.S. mail in order to arrange for a pre-hearing conference call on either the 21st of March or the 28th of March 2011 went unanswered. The hearing dates of April 4 through 8, 2011, were vacated. (H 8 a-g)

The Father initiated contact with the Hearing Officer on April 1, 2011, and a pre-hearing conference call was held on April 18, 2011. Hearing dates were set for June 13 through 17, 2011. (H 10 a-d)

A conference call was held with the parties on May 2, 2011. The Father was requested to send a list of the District employees whom he would like to have as witnesses in this due process by May 10, 2011, so that the District could check on the availability of those witnesses since the hearing is to be held after the end of the school year. Several requests were made for this information. Following a conference call on May 24, 2011, the list was received. (H 11 a-j; H 12 a-d; H 13 a-e)

The Father requested an accommodation during the conference call on May 24, 2011, to hold the hearing on only Tuesday and Wednesday to fit with his days off. After discussion, the Father decided that he would take time off from work to accomplish the hearing on successive days. (H 14 a-d)

The District suggested that the Father might avail himself of the State Complaint procedure in order to lessen the burden of his preparation for the hearing. On May 31, 2011, the Father declined to utilize the State Complaint procedure and decided to go forward with the due process hearing. (H 15 a-m)

The Hearing Officer was made aware for the first time of two previous due process requests filed on behalf of Petitioner when, on June 1, 2011, the District requested clarification of the issues which had previously been addressed through those two prior due processes. The issues were with regard to prior written notice to the Parents in their native language (Spanish), the time frame for the provision of assistive technology services, the alleged failure to have a required member of the IEP team in attendance at the November 15, 2010, IEP meeting, and the alleged failure of the District to provide an updated Behavior Intervention Plan. The District and the Parents had entered into resolution agreement on July 2, 2009, and February 16, 2010, which addressed Prior Written Notices in Spanish, the participation of the family in the IEP process, and the appropriateness of the Student's program. Issues addressed by the Resolution Agreements signed by the Parents and the District were modified to reflect the time lines reflected in the agreements. (H 18 a-d; H 19 a-z)

A witness-scheduling conference call was held on June 8, 2011. A summary of that discussion may be found in the Hearing Officer's file HO 25a-k.

Petitioner did not call any witnesses in corroboration of statements made by Petitioner that the Parents were not allowed to ask questions during the Multidisciplinary Team meeting on September 3, 2010, or the IEP meetings that occurred in April of 2010 and November of 2010.

The Father was allowed to submit his documents on behalf of Petitioner on June 8, 2011, rather than June 7, 2011. The documents were numbered during the hearing with the assistance of the Hearing Officer. The documents were not formally admitted during the hearing and the record was re-opened for the sole purpose of considering admission of these records. The Respondent (District) was given an opportunity to object to such admission. Respondent made no objection and Petitioner's documents numbered P 1 through P 127 were admitted as submitted. The Petitioner asked to submit documents on Friday, June 11, 2011, consisting of notes to the teachers from the Parents. Those documents were not admitted.

ISSUES

The issues in this case are as follows:

a. Was the Student's placement for the 2010-2011 school year appropriate and based on the Student's needs?

b. Were the Parents provided an opportunity to participate in the eligibility determination on September 3, 2010?

c. Was the change in eligibility from Autism to Multiple Handicapped on September 3, 2010, appropriate?

d. Did the Clark County School District provide the Parents with the required Prior Written Notices in Spanish?

e. Did the Clark County School District provide the appropriate Assistive Technology services to the Student during the 2010-2011 school year?

f. Did the Clark County School District have the required members of the IEP team available at the November 15, 2010, IEP meeting?

g. Did Clark County School District provide appropriate behavioral interventions during the 2010-2011 school year?

The relief requested is as follows:

a. Provision of appropriate Spanish language documentation to the family regarding Special Education services, rights and needs of the Student;

b. Reinstatement of the eligibility of autism;

c. Placement in an autism specific program that is available in the Clark County School District;

d. Hiring of a national expert on Assistive Technology (AT) and Alternative Augmentative Communication (AAC) in order to:

1) Evaluate the Student for appropriate AT and AAC devices and services;

2) Determine an appropriate match between the Student's strengths and weaknesses and an appropriate device;

3) Assist the school team and the Parents in implementing the appropriate AAC device; and

4) Provide follow-up services to the school educational team and family.

e. Provide training to the Parents in their native language regarding the appropriate procedures for implementing Assistive Technology and Alternative Augmentative Communication for the Student;

f. Develop a Behavior Intervention Plan as a part of the IEP with the assistance of the Parent's autism consultant and qualified personnel with expertise and Autism and self-injurious behaviors; and

g. Compensatory education for the time the Student was removed from the autism specific program and placed in the MCS/DD program.

h.

APPLICABLE LAW

In determining the educational placement of a child with a disability…each public agency must ensure that—

(a) The placement decision
    1. Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
    2. Is made in conformity with the LRE provisions of this subpart, including Sec. 300.114 through 300.118;

(b) The child's placement
    1. Is determined at least annually;
    2. Is based on the child's IEP; and
    3. Is as close as possible to the child's home. *(34 CFR § 300.116)*

The determination of a free appropriate public education or FAPE means special education and related services that—

(a) Are provided at public expense, under public supervision and direction, and without charge;
(b) Meet the standards of the SEA [State Education Agency], including the requirements of this part;
(c) Include an appropriate pre-school, elementary school, or secondary school education in the State involved; and
(d) Are provided in conformity with an individualized education program (IEP) that meets the requirements of 34 CFR §§300.320 through 300.324. (34 CFR 300.17)

The Supreme Court of the United States in its decision in Hendrick Hudson Central School District v. Rowley *(553 IDELR 656, U.S. 1982)* cites a two-part test that courts should use to decide appropriateness:

1. Has the state complied with the procedures set forth in the IDEA?
2. Is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits?

In *Rowley* the Supreme Court held that when this two-part test is satisfied, the state has complied with the obligation imposed by Congress and the courts can require no more. Districts are not required to maximize a student's educational performance. The Supreme Court termed the state's obligation as being the provision of a "basic floor of opportunity." *(Rowley, 553 IDELR 656, 1982)*

The Ninth Circuit Court in its decision in Gregory K. v. Longview found that the District's placement of a student must be upheld "if it was reasonably calculated to provide [the Student] with educational benefits. *(Gregory K. v. Longview School District, 558 IDELR 284, Ninth Circuit, 86-3938)*

The Ninth Circuit Court in County of San Diego v. California S.E. Hearing Office found that the placement must also include "educational instruction specially designed to meet the unique needs of the

handicapped child, supported by such services as are necessary to permit the child 'to benefit' from the instruction." The Court goes on to stated that the correct standard for measuring education benefit under the IDEA is not merely whether the placement is "reasonably calculated to provide the child with educational benefits" but rather, whether the child makes progress toward the goals set forth in her IEP." (*County of San Diego v. California Special Education Hearing Office, 24 IDELR 756, (Ninth Circuit, 1996)*

The Education Department emphasized in the 2006 IDEA Part B regulations that: "In all cases, placement decisions must be individually determined on the basis of each child's abilities and needs and each child's IEP, and not solely on factors such as category of disability, severity of disability, availability of special education and related services, configuration of the service delivery system, availability of space, or administrative convenience." *(71 Fed. Reg. 46588 (2006))*

The required members of the IEP team are:

1. The parents of the child;
2. Not less than one general education teacher of the child or, where appropriate, not less than one special education provider of the child;
3. A District representative;
4. An individual who can interpret the instructional implications of the evaluation results;
5. At the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
6. Whenever appropriate, the child. *(34 CFR § 300.321(a))*

The Office of Special Education Programs in its Letter to Faustini clearly states that the "IEP meeting serves as a communication vehicle between parents and school personnel….Parents are considered equal partners with school personnel in making these decisions, and the IEP team must consider the parents' concerns and the information that they provide regarding their child in developing, reviewing, and revising IEPs." The letter goes on to state that "the IEP team should work toward consensus, but the public agency has ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive FAPE." (Citing *34 CFR § 300.343(c)(2)(iii) and 34 CFR § 300.346(a)(1)(i) and (b*) and *Letter to Faustini 32 IDELR 206)*)

The public agency must take whatever action is necessary to ensure that the parent understands the proceedings of the IEP team meeting, including arranging for an interpreter for parents with deafness or whose native language is other than English. *(34 CFR § 300.322(d))*

In interpreting evaluation data for the purpose of determining if a child is a child with a disability under 34 CFR § 300.8 and the educational needs of the child, each public agency must:

1. Draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior, and

2. Ensure that information obtained from all of these sources is documented and carefully considered.

NAC 388.028 defines autism as a "spectrum disorder that 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 routine and responding to sensory experiences in an unusual manner." Nevada Administrative Code 388.387 sets forth the eligibility requirements for a student with autism. The student's health and medical status, cognitive abilities, social and emotional condition in multiple settings; academic achievement, adaptive skills and speech, language and other communication skills must be assessed. Additionally the team must consider the student's sensory regulation, self-help and independent living skills, behavior problems, symbolic and imaginative play, activities and special interests and motor skills.

The requirements for eligibility of a student with mental retardation are found in NAC 388.410. They include the requirements of a determination that a student may be eligible as a student with severe mental retardation if the student's measured cognitive abilities are at least four standard deviations below the mean score for that test; the adaptive skills of the pupil, in comparison with those of members of the pupil's chronological peer group, indicate that the pupil has extensively lower capabilities; and that the developmental functioning of the pupil is generally consistent with the cognitive abilities and adaptive skills of the pupil.

A student may be found eligible as a pupil with multiple impairments if the pupil meets the requirements for eligibility set forth in NAC 388.410 for pupils with mental retardation and that the pupil meets the requirements for eligibility for any additional disabling condition, other than a specific learning disability, developmental delay or a speech and language impairment, set forth in NAC 388.330 to 388.440, inclusive.

A District must provide parents with "prior written notice" whenever it proposes or refuses to initiate or change the identification, evaluation or education placement of the child or the provision of FAPE to the child. (*334 CFR 300.503 (a)(1) through (2))* and further that "the notice must be written in language understandable to the general public and provided in the native language of the parent." (*34 CFR 300.504(c))*

The public agency must ensure that the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. (*34 CFR 300.304(c)(4))*

As part of the program development process, the IEP team must consider whether the child needs assistive technology devices and services. *(34 CFR § 300.324(a)(2)(v))* Districts are required to provide assistive technology devices or services to a student with a disability if the participants on the student's IEP team determine that the student needs such a device or service in order to receive a free appropriate public education (hereinafter FAPE).

The IEP team must, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior. *(34 CFR § 300.324)*

FINDINGS OF FACT

1. Petitioner is a resident of Clark County, Nevada, within the boundaries of Clark County School District. She is seven years and three months old. She has received Special Education Services in the Clark County School District since September 19, 2007. (D 28)
2. The Individualized Education Program (IEP) written on March 25, 2010, and April 16, 2010 sets forth the following present levels of performance;
    a. The Student is not yet initiating communication or making requests using pointing, pictures or signing to get her wants and needs met;
    b. The Student demonstrates inappropriate behaviors such as hitting herself in the head, licking or wringing her hands and spitting;
    c. The Student requires hand-over-hand prompting for many tasks which are requested during the school day;
    d. The Student is ambulatory within the school environment with adult hand-held assistance and close supervision for safety;
    e. The Student demonstrates difficulty attending to tasks and requires verbal prompts and physical assistance to remain engaged with classroom activities;
    f. The Student does not hold writing instruments or scissors at this time and required adult hand-over-hand assistance to participate in these types of classroom activities;
    g. The Student is dependent upon adults for self-help skills during her school day. She does not indicate her toileting needs although she participates with the daily toileting routine. The Student requires full assistance to manage her clothing for toileting as well as washing and drying her hands following toileting;
    h. The Student uses a raking motion to grasp and pick up finger foods. She requires hand-over-hand assistance to maintain grasp of a feeding utensil, to pierce or scoop food and to bring it to her mouth. The student uses a cup with a built-in straw at school and demonstrates adequate oral motor skill to drink from a straw although she requires physical assistance to bring her hands to the cup and does not maintain contact with the cup when drinking;
    i. The Student has limited attention to tasks and does not always provide the proper eye gaze required to complete a task;
    j. The Student is continuing to work on matching objects that are the same;
    k. The Student prefers interacting with adults rather than her peers;
    l. The Student is currently working on reciprocal play skills; and

m. It is unclear whether her health status is adversely affecting her learning and the school team recommends a genetic evaluation to determine if there may be a condition that could be further impacting her education. Some signs that the team has noted are: small head circumference, decreased height and weight, decreased muscle tone, repeated hand movements (blows to the head) and spitting, communication dysfunction and cognitive delays. (D 422 – 433)

3. The IEP written on March 25, 2010, and April 16, 2010 sets as annual goals the following functional skills:
    a. In the school environment, the Student will independently pull her pants down in order to complete the toileting routine achieving criteria of 80%.
    b. In the school environment, the Student will improve self-feeding skills achieving criteria of 80%.
    c. In the school setting, the Student will purposefully engage with cause and effect toys upon presentation, achieving criteria of 80%.
    d. In the special education class, the Student will use augmentative communication device to request desired object achieving a criteria of 80%. (D 435 - 436)
4. The April 15, 2010, IEP provides for specially designed instruction as follows:
    a. self-help, direct, 460 minutes a week in a self-contained classroom;
    b. fine motor skills, direct service, 460 minutes per week in a self contained classroom;
    c. communication, direct service, 460 minutes per week in a self-contained classroom; and
    d. behavioral/social skills, direct, 475 minutes per week in a self-contained classroom.
    e. extended school year services are to be provided for 1855 minutes per week when required.
    f. speech/language therapy will be provided as a direct related service for 240 minutes per month in a self-contained classroom; and
    g. occupational therapy will be provided as a direct service for 20 minutes a week in a self-contained classroom.
    h. speech/language therapy will be provided for 30 minutes per week during ESY placement in a self-contained classroom.
    i. transportation will be provided 10 times per week. (D 447-441)
5. The Coordinator found the Student to be nonresponsive to the world around her thus requiring significant prompting to participate in the classroom and low functioning in her cognitive ability. (Testimony of the Coordinator, LIDT)
6. Deliberation report prepared by a sub-group of the Low Incidence Team made several recommendations:
    a. That the staff focus on a few goals that the Student could actually accomplish;

b. That the staff needs to focus on functional skills;
c. A referral to Low Incidence Disabilities should be made because the Student has needs which must be addressed systematically and consistently and to provide support for the school team;
d. The home program should be discontinued over a period four months from April through July 2010.

7. 7. Parents signed referrals to Genetic and Neurologic Clinics on May 25, 2010. (D 149 and D 191))
8. Parent notified school that she was unable to keep the appointment for the Neurologic Clinic on November 17, 2010. (D 151)
9. The Area 3 Coordinator stated that he had observed the Student in both schools (2009-2010 and 2010-2011 school year placements). In his opinion the Student's greatest need was for the development of functional skills such as basic survival skills. (Testimony of the Coordinator)
10. The IEP completed on November 15, 2010, retained the four goals set in the April 16, 2010, IEP and added two new ones:
    a. The Student will explore the basic concepts/elements of simple objective movement skills, achieving criteria of 3 out of 5 trials.
    b. The Student will follow receptive instructions with hands-down achieving criteria of 4 out of 5 trials. (The instructions are to "come here," "sit down," and "hands down.") (D 507)
11. The IEP program services to be provided were modified by the November 15, 2010, as follows:
    a. Self-help skills, direct service, 235 minutes/week; self-contained class
    b. Fine-motor skills, direct service, 205 minutes/week; self-contained class
    c. Communication skills, direct service, 290 min./week; self-contained class
    d. Behavioral/social skills, direct service, 375 min./week; self-contained class
    e. Self-help skills, direct service, 200 minutes/week; general education
    f. Behavioral/social skills, direct service, 180 min./week; general education
    g. Communication skills, direct service, 370 min./week; general education
    h. Physical education, direct service, 200 min./month; PE setting
    i. Physical education, consultative service, 20 min./month; PE setting (D 508)
12. The November 15, 2010, IEP provided for the following related services:
    a. Speech/language therapy, direct service, 240 min./month; self-contained class
    b. Occupational therapy, direct service, 20 min./week; self-contained class
    c. Transportation; direct service; 10 times per week; curb to curb. (D 509)
13. Modifications, accommodations and support were to be provided as follows:

a. Monitoring of materials that the Student has access to in order to prevent her putting non-food items in her mouth;
b. Use of equipment provided by the Occupational Therapist as needed;
c. Implementation of the Student's Behavior Implementation Plan;
d. Adult supervision for self-help skills, transitions, to implement the BIP, and the development of fine motor skills.
e. Daily communication by note between the home and school;
f. Physical education modified in rules/distance/equipment as necessary; additional trials/prompts/cues as necessary; continual supervision.
g. Provision of visual cues to support transition and classroom activities. (D 511)

14. The Special Education Teacher Facilitator stated that the program at Bass Elementary School (2010-2011 school year) was appropriate for the Student because the curriculum focused on needed functional, self-help skills for the Student. Decisions for programming were based on the skills that the Student already had and skills that the Student needed to develop in order to function in society. The staff provided opportunities to develop skills that were immediately useful and required across environments—school, home and community. (Testimony of the Special Education Teacher Facilitator)
15. There were six students in the Student's class during the 2010-2011 SY. There were at least three adults in the classroom at all times. At some times, there were more adults than students in the room when Related Services personnel were also in the room. (Testimony of Special Education Teacher B)
16. The Student participated in a regular physical education class with 100% needed assistance with throwing a ball, catching a ball and sit-ups. She has made progress with her balance and steadiness on her feet. (Testimony of the Physical Education Teacher)
17. During the 2010-2011 school year, progress has been observed in her emotional responses. Frustration episodes have decreased in response to consistency in structure and the adults working with her getting to know her and her needs. (Testimony of Special Education Teacher B)
18. The Student had begun to use a helmet toward the end of the school year thus allowing staff to encourage her independence of movement. Prior to this, major efforts were directed toward stopping her self-injurious behaviors. (Testimony of Special Education Teacher B)
19. The Student was appropriately placed during the school year 2010-2011 because the staff was able to implement the IEP and to work on functional skills. (Testimony of Special Education Teacher B)
20. The teacher and the assistants in the new program had autism training. (Testimony of the Area 3 Director)

21. A teaching assistant was moved with the Student from the prior school and assistants in the new school were also trained to work with the Student. (Testimony of the Area 3 Director.)
22. Staff was trained on how to block the Student to keep her from hitting herself in the head. (Testimony of Area 3 Director)
23. A functional approach was most appropriate for the Student. (Testimony of the Area 3 Director)
24. The Student's Special Education Teacher completed a referral for a three-year re-evaluation on April 13, 2010. (202)
25. Permission to Evaluate was obtained from the Parents on May 25, 2010. (D 229)
26. Prior Written Notice of the Intent to re-evaluate and the Meeting to discuss the evaluation and continued eligibility for special education services was sent in both English and Spanish. These notices were sent multiple times for each meeting. (D 220 – D 237)
27. The results of the evaluation were discussed at a meeting of the Multidisciplinary Evaluation Team (MDTeam) on September 3, 2010. Those in attendance were a General Education Teacher, both Parents, the Special Education Teacher, the School Psychologist, the Speech Pathologist, the School Nurse, a Bilingual Psychologist, the Zone 3 Instructional Coordinator, the Assistant Principal and a Spanish language Interpreter. (D 219)
28. The School Nurse went over the results of her assessment of the Student at the MDTeam meeting on September 3, 2010, with the assistance of the interpreter. (Testimony of School Nurse A)
29. An interpreter was present at the MDTeam meeting on September 3, 2010, and the Parents asked many questions during the meeting. An advocate for the Parents was also present. (Testimony of the Assistant Principal.)
30. The District provided a bilingual psychologist at the MDTeam Meeting on September 3, 2010. The Parents also were provided with an interpreter and brought with them a bilingual advocate. (Testimony of the Bilingual Psychologist)
31. The Parents asked for information regarding the source of the data regarding their daughter's performance. It was explained that much of the information came from the rating scales that they had completed with the assistance of a bilingual school psychologist. (Testimony of the Bilingual Psychologist)
32. The criteria for the eligibility were explained to the Parents. (Testimony of the Bilingual Psychologist)
33. Staff from both schools explained the MDTeam findings and questions were asked through their Spanish-speaking advocate. One of the questions that the family asked was how the school was going to fix the problem of the Student dragging her leg. The staff replied that that problem would be addressed in the IEP meeting. (Testimony of the Assistant Principal)

34. The Parents were provided with a Spanish-speaking interpreter and a bilingual psychologist. A Spanish-speaking advocate also accompanied them. The District believes the Parents did participate in the meeting and signed in agreement with the change in eligibility. (Testimony of the Assistant Principal)
35. Speech Pathologist A presented her findings at the September 3, 2010, MDTeam meeting. There were three people who were able to assist them with interpretation and they could get the information that they needed. (Testimony of Speech/Language Pathologist A)
36. The Parents were not told at any time they could not ask questions. (Testimony of the Speech/Language Pathologist A)
37. The MDTeam found her to be mentally challenged as the primary handicapping condition with autism as a secondary. It was clearly stated at the meeting. (Testimony of the Speech/Language Pathologist A)
38. The school arranged for meetings to occur when the father had the day off so that both Parents could participate. The Parents were always served by an interpreter and were able to give their opinions and comments regarding their child. (Testimony of the Special Education Teacher B)
39. During the September 3, 2010, MDTeam meeting, the Parents were provided with a Spanish-language interpreter, a bilingual psychologist was present and the Parents had an advocate who also spoke Spanish. The School Psychologist expressed the belief that she had answered the family's questions and concerns at the meeting. (Testimony of the School Psychologist)
40. The Parents reported that the Student displays no social connection; that she does not really look at people, her visual tracking is inconsistent and does not visually inspect objects. The Parents also reported that she needs help to grasp objects and that she will not grasp things independently. Parents report that she hits herself when she is frustrated or needs help. She does not follow routine commands or mimic vocal play at home. The Student leans in closer when asked for a kiss at home; puts her arms around family members for a hug and will squeeze. This information obtained from the Parents was used when making the eligibility determination. (D 211; D 214; D 216)
41. The father testified that had he known what the change was he would not have signed the eligibility statement. (Testimony of the Father)
42. The mother testified that they were not allowed to ask questions but told to "just listen" at the eligibility meeting (Testimony of the Mother)
43. A statement of eligibility was signed by the members of the MDTeam stating that the Student was eligible under NAC 388.410 and 388.425 as a Student with Mental Retardation/Multiple Disabilities as the primary disability. The Student was found eligible as severely mentally retarded. The Parent signed in agreement with this finding. (D 250-251)

44. A statement of eligibility was signed by the members of the MDTeam stating that the Student was eligible under NAC 388.387 as a student with autism as the secondary disability. The Parent signed in agreement with this finding. (D 252)
45. A MDTeam Report was completed on September 3, 2010. (D 203 – 219)
46. The MDTeam Report of September 3, 2010, was translated into Spanish and given to the Parents. (D 239 – 248)
47. As a part of this evaluation, the combined members of the Student's IEP team and Eligibility Team had the opportunity to review existing data and on the basis of that review, along with input from the Parents, identify what additional data if any were needed to complete the evaluation. (D 203)
48. The three-year re-evaluation was conducted in accordance with the requirements of IDEA and the Nevada Administrative Code. It was a comprehensive evaluation. Concerns from other agencies were noted regarding the possibility of mental retardation. NAC requires that the level of retardation be specified when the designation of multiple handicaps is considered. (Testimony of the School psychologist)
49. The assessment included all components of a comprehensive evaluation required by state regulations, including:
    a. Information provided by the Student's Parents;
    b. Information regarding the Student's current classroom performance; and
    c. Observations of her teachers and other providers of instructional or educational services. (D 204)
50. The health assessment provides the following information:
    a. The Student takes Risperdal at home each day;
    b. The Student's vision and hearing were unable to be formally assessed and a hearing referral was given to the Parents to follow up with CCSD audiology services. The Parents stated that she has had a baseline vision exam; and
    c. It is unclear whether her health status is adversely affecting her learning and the school team is recommending a genetic and neurological evaluation to determine if there may be a condition that could be further impacting her education. (D 204)
51. Attempts were made over a two-year time span to have the Student tested at both the Genetic and Neurologic Clinics provided by the Clark County School District. The mother said in November 2010, she could not keep the appointment with the Clinic. The family later rescinded consent for the evaluations. (Testimony of School Nurse A; testimony of School Nurse B)
52. The Student exhibited signs not typically associated with autism: microcephaly, unsteady gait, licking of objects, wringing of hands, and hitting of self. The Student is nonverbal and does not understand commands. (Testimony of School Nurse B)

53. Autism alone does not describe the extent of this Student's needs. (Testimony of the School Psychologist)
54. The Developmental Profile 3 was completed by the Bilingual School Psychologist with the Parents. The results of these scales were used to obtain information regarding the Student's IQ. The Student obtained a raw score of 3 on the cognitive scale, which corresponds to a standard score of below 50, which is considered to be in the delayed range. The age equivalent is three months. (D 207)
55. The Vineland Adaptive Behavior Scales were completed by the Bilingual School Psychologist with the Parents. These scales assess what a person does rather than what a person is able to do. The Student's composite score of 38 summarizes her overall level of adaptive functioning. Her percentile rank is <1 in communication skill, <1 in daily living skills, <1 in socialization and <1 in motor skills. The School Psychologist obtained comparable results from the Student's classroom teacher. (D 209- 210)
56. The Bilingual School Psychologist completed the Gilliam Autism Rating Scale with the Parents. The Student received an Autism Index score of 115 indicating a probability of autism that is very likely. (D 211)
57. The Gilliam Autism Rating Scale was completed with the Student's Teacher. The Student received an Autism index score of 96 indicating that a probability of autism is very likely. (D 212)
58. The Speech/Language Pathologist completed a comprehensive speech/language evaluation. A Functional Communication Profile was completed with the Parents and the assistance of the Bilingual Psychologist. With regard to sensory motor development, the Student was found to have limited eye contact with objects and people; no apparent social connection; limited gross motor imitation and no fine motor imitation. The Student often engages in inappropriate behavior; demonstrated verbal aggression; physical aggression and crying and tantruming when she appears frustrated. The Student presents with a poor attention span both at school and at home. The Student's primary language at home is Spanish. Her Parents speak Spanish to her, her siblings speak both Spanish and English and her therapy at home is done in English. The Student needs physical prompts to follow simple requests. She does not mimic vocal play at home or school. The Student is nonverbal. She will express pleasure by laughing or smiling. She expresses displeasure, frustration or discomfort by crying. (D 212 – 216)
59. A review of an assessment completed at Touro University in July and August of 2008 reveals that this assessment resulted in a diagnosis of autism as well as mental retardation. (D 205 – 206)
60. The School Psychologist reports that the Student appears to be functioning in the severely mentally retarded range, based on her cognitive age equivalent score of three months,

adaptive skill standard scores more than three standard deviations below the mean, and functional communication skills in the profoundly delayed range. (D 216)

61. The Student exhibited signs not typically associated with autism: microcephaly, unsteady gait, licking of objects, wringing of hands, hitting self, non-verbal and does not understand commands. (Testimony of School Nurse B)
62. The Parents asked for information regarding the source of the data regarding their daughter's performance. It was explained that much of the information came from the rating scales that they had completed with the assistance of a bilingual school psychologist. (Testimony of the Bilingual Psychologist)
63. The criteria for the eligibility were explained to the Parents. (Testimony of the Bilingual Psychologist)
64. The objectives set by Touro University set a goal of 25% for attainment of the objective. That level of accomplishment indicates a low functional ability. (Testimony of the Speech/Language Pathologist A; D 628)
65. Autistic children without mental retardation respond relatively quickly to the intensive intervention services. (Testimony off the Director, Area 3)
66. The Coordinator described her observation of the Student as not responsive to the world around her requiring significant prompting to participate in the classroom and appearing to be low functioning in her cognitive ability. (Testimony of the Coordinator, LIDT)
67. Even with the home program of 60 hours per month in addition to her school program the Student was still not able to follow simple directions such as "Put in…" and was not engaging in play. (Testimony of the Coordinator, LIDT)
68. The Coordinator was concerned that she might have a disorder that would cause her to regress in school. (Testimony of the Coordinator, LIDT)
69. Deliberation report prepared by a sub-group of the Low Incidence Team made several recommendations:
    a. That the staff focus on a few goals that the Student could actually accomplish;
    b. Need to focus on functional skills;
    c. Referral to Low Incidence Disabilities because the Student has needs which must be addressed systematically and consistently and to provide support for the school team;
    d. Discontinue the home program over four months. (Testimony of the Coordinator, LIDT)
70. In an addendum to the report, there was little to no progress being made. The student was unable to imitate simple non-verbal actions. The recommendation again was to discontinue the intensive intervention program over a four-month period. (Testimony of the Coordinator, LIDT)

71. Those participating in the determination of eligibility included a General Education Teacher, both Parents, the Special Education Teacher, the School Psychologist, the Speech Pathologist, two school nurses, a Bilingual School Psychologist, an Instructional Coordinator, the Assistant Principal and an Interpreter. (D 219)
72. Resolution agreements signed by the Parties and dated July 2, 2009, and February 16, 2010, require compliance with this provision of the law with regard to the sending of a Prior Written Notice in both English and Spanish. (HO 19 f-g and HO 19 r-u)
73. Notice of Intent to Implement the IEP of April 16, 2010, was sent to Parents in both English and Spanish. (D 419 and 451)
74. Prior Written Notices were sent in both English and Spanish regarding the proposed re-evaluation of the Student. (D 220 – 228 and D 230 – 237)
75. Written permission for the re-evaluation was given in both English and Spanish. (D 229 and D 238)
76. Prior Written Notice was sent to the Parents in English on October 21, 2010, regarding the District's refusal to re-evaluate the Student subsequent to the September 3, 2010, determination of eligibility and handicapping condition. (D 253)
77. A Prior Written Notice that was partially translated was sent to the Parents on October 21, 2010, regarding the District's refusal to re-evaluate subsequent to the September 3, 2010, determination of eligibility. The form itself was translated into Spanish but the information to be supplied by the District in each of the statements was in English. (D 254)
78. Notice of Intent to Implement the IEP of November 15, 2010, was sent to Parents in both English and Spanish on November 15, 2010. (D 483-484)
79. The Parents were given copies of their child's special rights in both Spanish and English on September 3, 2010, and October 5, 2010. (D 18; D 22)
80. A copy of the Multidisciplinary Team Report was sent for translation into Spanish on September 3, 2010. (D 19)
81. The Assistive Technology loan form for the "Big Mac" was sent home in both English and Spanish on October 27, 2010.
82. On November 15, 2010, the translated Multidisciplinary Team Report was placed in the Student's folder and was given to the Parents. (D 24)
83. Intent to Implement notice for the November 15, 2010, IEP was sent for translation into Spanish on November 19, 2010. (D 26)
84. Intent to Implement notice for the November 15, 2010, IEP was sent in both English and Spanish on November 22, 2010. This notice also contains the District's reasons for refusing to conduct a re-evaluation subsequent to the September 3, 2010, MDTeam determination that the Student had Multiple Impairments. (D 483 – 484)

85. Assistive Technology delivered the following items to the classroom in which the Student was enrolled on October 5, 2010: One-step (Little Mac); Cheap Talk 4; Step by Step with levels; Jelly Bean Switch and a Saucer Dome (toy). (D 50)

86. The IEP of April 16, 2010, notes that "The SLP and staff have been teaching [the Student] how to use a 'One-Step' assistive technology device since 3/10/10 to initiate another bite during breakfast when eating yogurt." The Student's responses ranged from hand-over-hand assistance of 84% the first time it was used, on 3/22/10 she initiated trials 73% of the time and on 4/12/10 she initiated trials 57% of the time. (D 433)

87. The Student's Present Levels of Performance on the August 22, 2009, IEP state that the Student hits the AAC device randomly with an open palm. (D 304)

88. The Speech Pathologist's logbook for September through November, 2010 shows consistent use of Assistive Technology. The Student's task was to use the device to request the use of a desired non-food item. She began with a rate of 3/10 trials (September, 2010) and increased to 5/8 trials (November, 2010.) (D 126-129)

89. Data regarding the use of the Assistive Technology devices was available for the months of November, December and January. Data was taken on the Student's use of Assistive Technology to request a desired object independently. All trials involved requesting food. The food item was often paired with a significantly dissimilar object (i.e. pencil, glue, key, scissors, and eraser.)

On November 5 she appropriately used the device 32% of the time,
on the 8th, 71% and 55%,
on the 9th 60% and 70%,
the 10th 58%,
the 15th 43% and 88%,
the 16th 88%,
the 17th 55%,
the 18th 20%,
the 22nd 64%,
the 23rd 58%,
the 24th 100%,
the 29th 52%,
the 30th 65%,
December 1st 90%,
the 2nd 94%,
the 3rd 85%,
the 6th 60%,
the 7th 71% and 80%,

the 9th 84%,
the 10th 100%,
the 13th 50% and 71%,
the 14th 100%,
the 16th 66% and 100%,
the 17th 50%,
January 3rd 100%,
the 4th 40%, 16% and 100%,
the 5th 71%,
the 6th 88%,
the 6th 100%,
the 7th 67% and 83%,
the 10th 78%,
the 11th 65%,
the 12th 68% and 70%,
the 13th 76%,
the 14th 42%,
the 18th 80%,
the 19th 78%,
the 20th 80%,
the 21st 72% and
the 24th 76%. (D 584 – 588)

90. The parent stated that he had not signed the required consent form to take the Assistive Technology device home because of the financial responsibility if the device were to be broken or lost. (Testimony)
91. The Student was being prompted to use an Assistive Technology device (the Big Mac) to request food items; to request a preferred item; to request to use the bathroom and to request to take a break. She was very inconsistent in her responses. It was difficult to tell whether or not she understood cause and effect. (Testimony of the Speech/Language Pathologist A)
92. The Student made limited progress regarding consistency of response. Both verbal and physical cues were used to prompt responses. (Testimony of the Speech/Language Pathologist A)
93. The Student used Assistive Technology devices during the 2010-2011 school year, throughout the school day since the beginning of the school year. She demonstrates some success in the use of these devices, particularly at meal times. (Testimony of the Special Education Teacher A)

94. The Student was non-verbal; she made babbling noises; she was not requesting verbally or by pointing; and she required maximum support while eating, going to the bathroom and playing with others. (Testimony of Speech/Language Pathologist A)

95. Both the Big Mac (cause/effect relationship) and the One Step (to request an item) were used with the Student. (Testimony of the Speech/Language Pathologist A)

96. Nevada Administrative Code 388.321(2)(a-h), (3), and (5)(a-c) requires an IEP be developed by a committee which includes at least one representative of the public agency, one regular education teacher who teacher the pupil, one special education teacher who teaches the pupil, one or both of the pupil's parents, and if not otherwise a member of the committee, a person who is familiar with the tests and other assessments performed on or by the pupil and the parents or their representative may ask such other persons who have knowledge or special expertise concerning the pupil or who provide related services to the pupil. Related service personnel are invited members of the committee not required members.

97. The Speech/Language Pathologist stated that she was at two of the three meetings required to complete the November 15, 2010, IEP. She attended the October 4 and October 25, 2010, IEP meetings. She was unable to attend the November 15, 2010, meeting because her daughter became ill at school and she had leave school in order to take her daughter home. (Testimony of the Speech/Language Pathologist B)

98. The present levels of performance in speech and language as well as the goals and benchmarks required to achieve them are present in the November 15, 2010, IEP. (Testimony of the Speech/Language Pathologist B; D 495; D 506)

99. The only request regarding speech/language services raised at the November 15, 2010, IEP meeting was that the amount of time to be spent providing speech/language services be changed from 240 minutes per month to 60 minutes per week which the IEP team declined to do on November 15, 2010, in the absence of the Speech/Language Pathologist. (Testimony of the Speech/Language Pathologist B)

100. The Speech/Language Pathologist was not in attendance at the November 15, 2010, IEP meeting. No change was made by the IEP team in the designation of time from monthly to weekly due to her absence. (D 25)

101. The school staff was instructed to review the Behavior Intervention Plan that was created with the Low Incidence Disabilities Team input to ensure that all staff is systematically and consistently implementing the plan as it was laid out. The plan is to be reviewed and revised as needed. (D 409)

102. The April 16, 2010, IEP contains a Positive Behavior Intervention Support Plan which is dated April 16, 2010, and is incorporated by reference in the November 15, 2010, IEP. It provides for a plan for both eliminating the behavior (hitting herself on the head) as well as teaching her other replacement activities for keeping her engaged. She is to be taught to

request desired items/activities/attention through the use of pointing to the item, to a picture that represents the item, or by accessing an alternative augmentative communication device. The Student will have assignments and tasks chunked into smaller parts and provided with reinforcement. (D 444 – 445)

103. Data was provided on attempts to provide the Student with alternative behaviors and strategies that would engage her. (D 574 – 581)

104. Data was taken with regard to the frequency of the student's self-injurious behaviors. The Student hit herself 48 times in 30 minutes on September 24, 2010, and substantially reduced the behavior over a period of two months, achieving several periods of less than 10 (either hits or attempts to hit) in November, 2010. (D 591-594)

105. Both verbal and physical cues were used to prompt responses. The Student has been more consistent in her responses since Spring Break. There has been a decrease in self-abusive behaviors since she has been wearing a helmet to school. (Testimony of the Speech/Language Pathologist B)

106. This plan was implemented daily during the 2010-2011 school year in accordance with the directions provided by the Low Incidence Staff. Low Incidence staff members came to instruct the Special Education Teacher at Bass Elementary School as well as the rest of the teaching staff involved with the Student as to what the Parents preferred to have happen with regard to dealing with her self-injurious behaviors. The LIDT strategies included: 1) Tell the Student "Hands down"; 2) Staff to put hands around head to keep her from hitting her head; 3) When transferring from place to place, the staff was to keep their hands around her head. She would still manage to hit herself. One of the most helpful strategies was to anticipate what her frustration was coming from. (Testimony of Special Education Teacher B; D 444-445)

ANALYSIS AND CONCLUSIONS OF LAW

a. Was the Student's placement for the 2010-2011 school year appropriate and based on the Student's needs?

34 CFR § 300.116 of the IDEA regulations requires that the placement decision is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options and is made in conformity with the LRE provisions of this subpart. The placement is to be determined at least annually, based on the child's IEP and is as close as possible to the child's home. The IEP team developed IEPs on both April 16, 2010, and November 15, 2010, based on the Student's needs and which addressed those needs with goals and benchmarks in the areas of communication, self-help skills, fine-motor skills and social and behavioral

skills. The IEP of November 15, 2010, included two additional goals in the areas basic movement and receptive language. The IEP team also made the placement recommendation which was for a placement in a self-contained classroom citing her need for a functional curriculum in which the deficits which she exhibits in fine-motor skills, social skills, communication and self-help skills can be addressed. The placement recommendation took into consideration the effect of the Student's removal from the general education population including her inability to communicate effectively which significantly impacts her ability to function in a less restrictive setting. The program developed for this Student affords multiple opportunities for functional skills and concepts to be taught and reviewed on a daily basis. She requires extensive adult assistance and monitoring throughout the day which cannot be effectively provided in the general education classroom.

No procedural errors were brought forward with regard to the development of these IEPs thus meeting the first step in the Supreme Court's decision in *Rowley (553 IDELR 656)* and there is no dispute regarding the least restrictive environment (LRE). The District provided an interpreter at all IEP meetings in order to satisfy the requirements of 34 CFR § 300.322(d). The second part of the *Rowley* standard is also met because the Student's IEP is based upon her demonstrated needs, includes goals and benchmarks designed to develop those functional skills which she needs and is reasonably calculated to enable the Student to receive educational benefit. In addition to the daily classroom emphasis on the development of self-help, fine motor, communication and behavioral skills, the Student receives related services in the areas of speech/language and occupational therapy.

In its *Letter to Faustini*, the Office of Special Education Programs states that the "IEP team should work toward consensus, but the public agency has the ultimate responsibility to ensure that the IEP includes the services that the child needs in order to receive a free appropriate public education." The Parents signed in disagreement with both the April 16, 2010, IEP and the November 15, 2010, IEP. The District stated its intent to implement both IEPs in notices sent to the Parents on April 16, 2010, and May 10, 2010, and November 15, 2010. A placement was made based on the April 16, 2010, IEP.

The placement recommendation made by the team was individually determined based on the individual Student's abilities and needs. The placement was appropriate in that it provided a place in the LRE in which the Student could develop skills identified in the IEP and was made by a group of persons who were knowledgeable about the child, the meaning of the data and the placement options. (FOF 1 – 23, FOF 80 AND FOF 74)

Held: For the District.

b. Was the Parent provided an opportunity to participate in the eligibility determination on September 3, 2010?

The father signed permission for the three-year re-evaluation on May 25, 2010. The original date for the meeting was changed from May 24, 2010, to May 25, 2010, to accommodate the father's work

schedule. Multiple written notices were sent in both English and Spanish for the meetings on May 25, 2010, and September 3, 2010. All required members of the eligibility team for each handicapping condition being considered were present. The Parents invited two advocates of their choosing to the meeting on May 25, 2010. A Spanish-language interpreter was present at both meetings as was a bilingual School Psychologist.

The requirements for interpreting evaluation data are found at 34 CFR § 300.8. The evaluation team did, as required under this regulation, draw upon information from a variety of sources, including aptitude and achievement tests, parent input and teacher recommendations, as well as information about the child's physical condition, social or cultural background and adaptive behavior. That information has been documented in the MDTeam report dated September 3, 2010.

Information obtained by the team members from the Parents was critical in determining the Student's strengths and weaknesses. The Student is non-verbal and cannot complete many of the more common diagnostic instruments and scales. The information had to come from those who know her best—the Parents and the staff who works with her.

Observations by the school psychologists participating in the evaluation, the speech/language pathologists and the special education teachers all contributed to an understanding of the Student's abilities.

The Parents acknowledged a conversation about multiple impairments and did have an opportunity to participate in the evaluation, both at the meeting, through the interpreter and their advocates, and in the meeting on May 25, 2010, in which a review of the documents was conducted and a decision made to complete a comprehensive re-evaluation.

In the determination of eligibility, the MDTeam, including the Parents, relied on a variety of data including parent reports and responses to an individually administered Developmental Profile 3 for information regarding cognitive functioning, the Vineland II Survey Interview Form in Spanish with regard to adaptive behavior, the Gilliam Rating Scale parent interview and Parent comments about behaviors which they have noticed in the home.

The Parents signed in agreement with the findings of the Multidisciplinary Evaluation Team that the Student was a child with Multiple Impairments (mental retardation and one other handicapping condition of a severe nature) and a child with Autism.

The Parents had ample opportunity to ask questions and provide input (both as part of the formal assessment procedures and the meetings themselves). The Multidisciplinary Report was translated into Spanish for the Parents. (FOF 24 – 47 and FOF 62)

Held: For the District

c. Was the change in eligibility from Autism to Multiple Handicapped on September 3, 2010, appropriate?

Concerns from other agencies as well as the findings of the MDTeam were taken into account. An evaluation by Touro University conducted in July and August of 2008 resulted in a determination that the Student was both Autistic and Mentally Retarded. The CCSD staff has observed that the Student exhibits signs not typically associated with autism such as microcephaly, an unsteady gait, the licking of objects and hitting of self. The School Psychologist does not believe that Autism alone describes the Student's needs. Attempts were to secure both a genetic and neurologic evaluation through the School District in order to determine whether or not additional medical or genetic information would lead to a better understanding of the Student and whether or not she had a disorder which would cause her to regress in school. Those efforts are ongoing and the Parents have agreed to follow through with those appointments.

The Student does exhibit characteristics consistent with the requirements of Nevada Administrative Code 388.410(3) for eligibility as a pupil with severe mental retardation in that her measured cognitive abilities are at least four standard deviations below the mean; her adaptive skills, in comparison with those of members of her chronological peer group, indicate that the Student has extensively lower capabilities; and the developmental functioning of the Student is generally consistent with her cognitive abilities and adaptive skills.

The MDTeam did determine that the Student also continues to meet the eligibility criteria for autism in Nevada Administrative Code 388.387; including her lack of social and communication skills and her response to her environment in an unusual manner. (Nevada Administrative Code 388.028)

A student is eligible as a student with multiple impairments if the student meets the eligibility requirements for mental retardation and an additional disabling condition that includes autism. The Student's level of functioning as a pupil with severe mental retardation combined with autism qualifies her as a pupil with multiple impairments as stated in Nevada Administrative Code 388.425 and the change in eligibility on September 3, 2010, was appropriate. (FOF 48 – 71)

Held: For the District

d. Did the Clark County School District provide the Parents with the required Prior Written Notices in Spanish?

Written notice to parents is required by Nevada Administrative Code 388.300(7-9) to be provided whenever a District proposes or refuses to "initiate or change the identification, evaluation or educational placement of the child or the provision of FAPE to the child." The public agency must give such notice in the native language of the parent unless that is clearly not feasible and is to include a description of the action proposed or refused by the public agency and the reasons for the proposal or refusal.

As delineated in the Findings of Fact, the District did provide copies of its notice in both English and Spanish at the following required junctures:

a. The Intent to Implement the IEPs of April 16, 2010, and November 15, 2010;

b. The re-evaluation of the Student that included meetings on May 25, 2010, and September 3, 2010.

At each of these required notice junctures, notice was provided of the action that the District either proposed or refused to take; the reasons for the proposal or refusal; a description of the other options the public agency considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record or report upon which the action is based; a description of the factors which are relevant to the public agency's proposal or refusal; a statement that the parents have rights in the matter; and sources for parents to contact to obtain assistance in understanding the provisions of state and federal law relating to special education. Each of these required components was present in the notices sent to the Parents.

On October 12, 2010, the Parents requested that the District re-consider the determination made on September 3, 2010. The District refused that request.

a. The District sent a notice of its refusal in English on October 21, 2010.

b. The District, on October 21, 2010, sent notice of its refusal to re-evaluate. The form itself was translated into Spanish but the Student-specific contents were not.

c. A second notice regarding the refusal to conduct a re-evaluation was sent to the Parents on November 22, 2010. This notice sent in both English and Spanish and contained the reasons for the District's refusal to change the primary eligibility to Autism because the Student had been determined to be a Student with Multiple Impairments on September 3, 2010, with full participation of the Parents.

The failure to provide all of the mandatory contents of the Prior Written Notice in the Parents' native language in response to the Parents' October 12, 2010, proposal was a procedural violation. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a FAPE only if the procedural inadequacies impeded the child's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision making process regarding the provision of a FAPE to the parent's child or cause a deprivation of educational benefit. (34 CFR § 300.513)

The required notices to the Parents were sent in both English and Spanish at all required junctures. The Parents were at the eligibility meeting on September 3, 2010 and participated in the deliberations, including the discussion of the reason why the District refused to change the primary eligibility to Autism. Neither the ability of the Parents to participate nor the delivery of an appropriate education for the Student was affected by the partial translation of the November 15, 2010, refusal to reevaluate. The Parents received that information in Spanish in a timely fashion and were, in fact, able to act upon that information. (FOF 72 - 84)

Held: For the District

e. Did the Clark County School District provide the appropriate Assistive Technology services to the Student during the 2010-2011 school year?

The regulations in the IDEA require that the IEP team must consider whether the Student needs assistive technology devices and services. *(34 CFR § 300.324)* Districts are required to provide assistive technology devices or services to a student if the IEP team determines that the student needs such a device or service. The Student's IEP team determined that the Student required an Assistive Technology device. However, the District did not assess in this area. The statement by the Speech/Language Pathologist that the staff had been using a "One-Step" device to initiate "another bite" during breakfast is contained in the Present Levels of Performance on the April 16, 2010, IEP. Other than that one comment, the IEP team does make any statements, either in the April 16, 2010, IEP or the November 15, 2010, regarding the process that it used to determine that the Student required an Assistive Technology device nor the supporting information used to make that determination.

In its Letter to Fisher, OSEP states that "each public agency must ensure that, as part of its Part B educational evaluation when warranted by the child's suspected disability, it assesses, in accordance with the evaluation requirements of 34 CFR § 300.532, the student's functional capabilities and whether they may be increased, maintained, or improved through the use of assistive technology devices or services… The evaluation should provide sufficient information to permit the IEP team to determine whether the student requires assistive technology devices or services in order to receive FAPE. *(Letter to Fisher, 23 IDELR 565, OSEP, 1995)*

The Office of Special Education Programs' (OSEP) subsequent Letter to Anonymous states that if the child is determined to need assistive technology devices or services, "the specific devices and/or services must be identified in the child's IEP" (*Letter to Anonymous, 24 IDELR 854, OSEP, 1996)*

The IEP of April 16, 2010, provides for supportive equipment recommended by the OT or Assistive Technology and that of November 15, 2010, provides for equipment recommended by OT without stating the type of device to be used and when it is to be used.

The IEP of April 16, 2010, sets an annual goal for the Student of using an "augmentative communication device to request a desired object achieving a criteria of 80% as measured by observation and documentation as implemented by the Special Education Teaching Staff/Staff supported by SLP. The IEP of November 15, 2010, set an annual goal for the Student of using an "augmentative communication device to make choices achieving a criteria of 80% as measured by observation and documentation as implemented by Teaching Staff supported by SLP. The goals and benchmarks from April to November remain essentially the same and are without substantive change.

The Student is non-verbal with limited intellectual capacity. The District made available for the Student's use both a "Big Mac" (to give meaning to cause and effect) and a "One Step" device that may be used to request an item. Both were utilized with the Student by the Special Education Teacher and the Speech/Language Pathologist in the classroom and in other settings within the school. The Student

has demonstrated some success with these devices, particularly at meal times when requesting food items. Data was collected on the use of the device to request food over a period of three months with the results ranging from a low of 20% to scattered highs of 100%. The data indicates some degree of success; however, that success is inconsistent.

The Rowley standard for determination of a free appropriate public education utilizes a two-prong test:

1. Has the state complied with the procedures set forth in the IDEA?
2. Is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? (*Hendrick Hudson School District v. Rowley, 553 IDELR 656, U.S., 1982)*

In the instant case, the District fails on the first prong; it did not do an assessment prior to providing the Student with an Assistive Technology device as required by 34 CFR § 300.304(c)(4). That being said, the District might have prevailed on educational benefit to the Student if it had demonstrated some degree of consistency in skill acquisition through the use of this device and the District was able to show educational benefit even without the required evaluation. It has not. Statements by the District's own personnel describe the Student's response to the device as "inconsistent" and the data available supports that conclusion.

Therefore, it is the finding of this Hearing Officer that the educational benefit demonstrated is minimal and that the District has not provided the appropriate assistive technology services during the 2010-2011 school year. (FOF 85 – 95)

Held: For the Parents

f. Did the Clark County School District have the required members of the IEP team available at the November 15, 2010, IEP meeting?

As stated in the Applicable Law and Findings of Fact, the required members for an IEP team meeting are the Parents, a General Education Teacher of the Student, a Special Education Teacher of the Student, a representative of the Local Education Agency, an individual who can interpret the instructional implications of the evaluation results and, wherever appropriate, the child. (*34 CFR § 300.321(a))* The District did in fact have those individuals available at the November 15, 2010, IEP meeting.

Related service personnel are not required members of the IEP team. The Speech/Language Pathologist was not the Student's Special Education Teacher; she was providing a related service.

The Federal Register states that "[w]e do not believe it is necessary to require consent or a written agreement between the parent and the public agency to excuse individuals who are invited to attend IEP Team meetings at the discretion of the parent or the public agency because such individuals are not required members of an IEP Team." (*Federal Register, Vol. 71, No. 156, August 14, 2006, Rules and Regulations/46675)*

The District did have the required members of the IEP Team present at the November 15, 2010, IEP meeting. (FOF 96 – 100)

Held: For the District

g. Did Clark County School District provide appropriate behavioral interventions during the 2010-2011 school year?

The April 16, 2010, IEP contains a Behavior Intervention Plan (BIP) that is incorporated by reference in the November 15, 2010, IEP. The BIP was implemented daily in accordance with instructions provided by the Low Incidence Team. The BIP focused on the elimination of self-abusive behavior that the Student exhibits, more particularly hitting herself with either a closed or open hand on the head.

An assessment of functional behavior is guided by the requirements contained in Nevada Administrative Code 388.386. This section of the code mandates systematic observation of the occurrence of the targeted behavior for an "accurate definition and description of the frequency, duration and intensity of the behavior." The District conducted multiple observations of the Student in a variety of settings, which led the members of the Low Incidence Disability Team, in conjunction with school staff, to state that they believed possible functions of the behavior were: 1) communication of a need or want; 2) release of frustration; or 3) self-stimulatory behavior. The antecedents of the behavior were postulated to be: 1) unstructured times; 2) the Student being tired; and 3) the Student not being directly engaged. The possible antecedents of the behavior were identified as: 1) gaining adult attention or reaction; 2) self-stimulatory behavior; 3) escape/avoidance; or 4) access to desired objects.

The BIP provided that upon hitting herself with a closed or open hand on the head, the Student was to be taught to use replacement behaviors such as requesting desired items/activities/attention through the use of pointing to the item, to a picture that represent the item, or by accessing an AAC device. The Student was also to be taught play skills for the purpose of keeping her actively engaged in the activity.

The staff consistently reinforced the concept of "calm" hands in their efforts to reduce the behavior. Staff also implemented strategies in order to prevent her from hitting herself such as restraining her hands or surrounding her head with their hands when transitioning from one activity to another. One of the most helpful strategies was to anticipate what might be frustrating to her.

Data was taken with regard to the frequency of the student's self-injurious behaviors. The Student hit herself 48 times in 30 minutes on September 24, 2010, and substantially reduced the behavior over a period of two months, achieving several periods of less than 10 (either hits or attempts to hit) in November, 2010

Both verbal and physical cues were used to prompt responses. The Student has been more consistent in her responses since Spring Break. There has been a decrease in self-abusive behaviors since she has been wearing a helmet to school.

The District has complied with the Rowley Standard in that it followed appropriate procedures in developing this part of the IEP by conducting multiple observations of the Student, determining possible functions and antecedents of the behavior, and strategies designed to reduce the behavior and replace it with functional behaviors. The behavior intervention services developed were reasonably calculated to enable the child to receive educational benefits. In County of San Diego v. California SEHO, the Ninth Circuit further extended the standard to include not merely whether the placement is "reasonably calculated to provide the child with educational benefits" but rather, "whether the child makes progress toward the goals set forth in her IEP." Through data collected and anecdotal teacher testimony, the Student was making progress with regard to the goal of refraining from hitting herself on the head. The Student derived educational benefit as shown by a reduction in the number of occurrences of the target behavior.

The District did provide the appropriate behavioral interventions to the Student during the 2010-2011 school year. (FOF 101-106)

Held: for the District

DECISION AND ORDER

Based on the Findings of Fact and the applicable law, it has been shown by a preponderance of the evidence that the District did provide the an appropriate placement based on the needs of the Student for the 2010-2011 school year.

Held for the District on Issue a.

Based on the Findings of Fact and the applicable law, it has been shown that the Parents were provided an opportunity to participate in the eligibility determination on September 3, 2010.

Held for the District on Issue b.

Based on the Findings of Fact and the applicable law, it has been shown that the change in eligibility from Autism to Multiple Handicaps on September 3, 2010, is appropriate.

Held for the District on Issue c.

Based on the Findings of Fact and the applicable law, it has been shown that the District did provide the Parents with the appropriate notices in their native language.

Held for the District on Issue d.

Based on the Findings of Fact and the applicable law, it has been shown that the District did not provide the appropriate Assistive Technology to the Student during the 2010-2011 school year.

Held for the District on issue e.

Based on the Findings of Fact and the applicable law, it has been shown that the District did have the required members of the IEP team at the November 15, 2010, IEP meeting.

Held for the District on issue f.

Based on the Findings of Fact and the applicable law, it has been shown that the District provided appropriate behavioral interventions during the 2010-2011 school year.

Held for the District on Issue g.

The Hearing Officer finds for the District on issues a, b, c, d, f, and g; no further action is required.

The Hearing Officer finds for the Parents on issue e., the provision of the appropriate assistive technology.

The following relief is hereby granted:

1. The District will obtain the services of an expert (hereinafter the Expert) on Assistive Technology and Alternative Augmentative Communication in order to evaluate the Student for appropriate AT and AAC devices and services by August 15th, 2011;
2. The District will obtain the Parent's permission for the evaluation by the Expert within 10 school days after this individual has been identified;
3. The Expert will determine an appropriate match between the Student's strength and weaknesses and an appropriate AT or AAC device within 30 days from the date that the Parents give permission for the evaluation;
4. The District will obtain the device(s) within 20 school days of its(their) identification by the Expert; and
5. The Expert will provide follow-up services to the school educational team and the family regarding the appropriate procedures for implementing any AT and/or AAC devices and services in the amount of ten hours of contact time with the Student, staff and family. The family requires instruction in Spanish.
6. The recommendations for any device or services will be made part of the Student's IEP.

IT IS SO ORDERED.

Dated this 8th day of July, 2011.

Nilsine Hansen, Impartial Hearing Officer

NOTICE OF APPEAL RIGHTS

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to Nevada Administrative Code 388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. Since this decision is being delivered in both electronic and hard copy, receipt of a copy of this Decision and Order will be determined by either the date of actual delivery or the date of the first attempt to deliver by the U.S. Postal Service.

STATE OF NEVADA
DEPARTMENT OF EDUCATION
DUE PROCESS HEARING
IN THE MATTER OF

STUDENT, by and through her Parents,	)	
	)	
	)	
Petitioner,	)	Nilsine Hansen
	)	Impartial Hearing Officer
vs.	)	
	)	
CLARK COUNTY SCHOOL DISTRICT,	)	
	)	
Respondent,	)	
_____	)	

Hearing conducted on:
June 13, 14 and 15, 2011

Hearing conducted at:
Vegas PBS
3050 East Flamingo Road
Las Vegas, NV 89121

Petitioner represented by:
Parent

Respondent represented by:
Phoebe Redmond, Esq.

ERRATA

Line 36, page 29 of the English version of this decision should read:

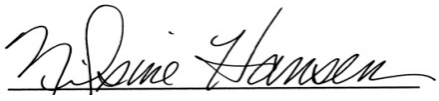
Held for the Parents on issue e.

Line 27, page 32 of the Spanish translation of this decision should read:

Held for the Parents on issue e.

The date of delivery of the decision will be as of the date delivery was either first attempted or was made by the U.S. Postal Service.

Dated: July 21, 2011



1 Nilsine Hansen, Hearing Officer
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