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**STATE OF NEVADA
DEPARTMENT OF EDUCATION**

In the matter of

CLARK COUNTY SCHOOL
DISTRICT,

Appellant,

v.

STUDENT¹ by and through her²
parents,

Appellees.

DECISION ON APPEAL TO THE SRO

State Review Officer: Joyce O. Eckrem

Representatives:

Phoebe Redmond, Esq., Assistant
General Counsel, for Appellant

Hillary D. Freeman, Esq., Freeman Law
Offices, LLC, for Appellees

I. PROCEDURAL BACKGROUND

Clark County School District (CCSD/District) has appealed the decision of the hearing officer rendered on November 14, 2016, following a four-day hearing, pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415 and Nevada Administrative Code 388.310. The appeal was received by the Nevada Department of Education on December 12, 2016. The undersigned state review officer (SRO) was

¹ Personally identifiable information is attached as Appendix A to this summary and order and must be removed for public distribution.

² The pronouns “her” or “she” are used generally and not intended to denote the gender of the Student.

1 appointed on that date and the decision was due on January 11, 2017. The SRO granted
2 two continuances for good cause and the final date for decision was set for March 10,
3 2017. [SRO Exhibits] After a review of the record below, the SRO determined that the
4 hearing officer erred by precluding the testimony of two District witnesses. Pursuant to
5 the SRO's duties and authority under NAC 388.315 subparagraphs 1 b and c, additional
6 testimony from these excluded witnesses was ordered and taken on February 6, 2017.
7 Exhibit D-7, previously exchanged, was introduced by District at the hearing with no
8 objection. [SRO Exhibits, SRO Tr.I] Appellees noted their objections orally to the taking
9 of additional testimony. Although given the opportunity to submit written objections,
10 appellees chose not to do so. District filed its statement of the issues on appeal and its
11 arguments on February 13, 2017. The appellees filed their response on February 27, the
12 record was closed, and the matter was submitted for decision. [SRO Exhibits]

13 II. STANDARD OF REVIEW AND BURDEN OF PROOF

14 A. Standard of Review

15 The state review officer is required to make an independent decision after
16 reviewing the entire record of the hearing below. 20 U.S.C. § 1415 (g); NAC §388.315 (f).
17 Though not articulated by the Ninth Circuit, this review officer finds persuasive the
18 language of *Carlisle Area Sch. Dist. v. Scott P.*, 22 IDELR 13 (3rd Cir. 1995). The Court
19 there noted that in two-tier systems under the IDEA the review officer must exercise
20 "plenary review" to make the "independent decision" IDEA requires. However, in doing
21 so, it held a review officer should give deference to a local hearing officer's findings
22 based on credibility judgments, unless the non-testimonial, intrinsic evidence in the
23 record will justify a contrary conclusion or unless the record read in its entirety would
24 compel a contrary conclusion. "The amount of deference accorded to the hearing
25 officer's findings increases when they are thorough and careful." *Capistrano Unified*
26 *School District v. Wartenberg*, 59 F. 3d 884, 891 (9th Cir. 1995). Accordingly, this is the
27 standard of review that this review officer uses in rendering this decision. *See also*,
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1 *Amanda J., et al v. Clark County Sch. Dist.*, 35 IDELR 65 (9th Cir. 2001), citing, discussing,
2 and impliedly approving the 3rd Circuit's approach in *Carlisle*.

3 **A. Burden of Proof**

4 Under the IDEA the party bearing the burden of proof at hearing must meet the
5 preponderance of the evidence standard.³ Under Nevada Revised Statutes, it is the
6 school district that must meet that burden. NRS § 388.467. A preponderance of the
7 evidence is defined, in relevant part, as “[e]vidence which is of greater weight or *more*
8 *convincing than the evidence which is offered in opposition to it*; that is, evidence which as a
9 whole shows that the fact sought to be proved *is more probable than not*.” Black’s Law
10 Dictionary, 9th 2009. [Emphasis added]⁴ The “law requires nothing to be conclusively
11 proven.” *Silver Mining Company v. Fall*, 6 Nev. 116, 1870 WL 2418, p. 5 (Nev. 1870).
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13 In weighing the evidence, a hearing officer does not just determine who has the
14 most evidence on a given issue, but must make determinations as to the credibility of
15 that evidence.

16 **III. STUDENT’S EDUCATIONAL BACKGROUND**⁵

17 Student was 13 years old (about one month short of 14 years of age) at the time of
18 the hearing, attending Private School 1, presumably at the eighth grade level.⁶ Student
19 presents with a history of hydrocephalus at birth and multiple developmental delays.
20 She was first evaluated for eligibility for special education by the District on or about
21 October 2007 when she was five years old. [J-2:1-11] At that time she was attending a
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23 ³ See 34 C.F.R. § 300.516(b)(3), a burden logically applied to the administrative due process hearings as
24 well as subsequent court proceedings.

25 ⁴ The review officer notes that at hearing appellees chose to call only one witness. The review officer
26 acknowledges that appellees did not have the burden of proof, but if they chose to rely upon their
27 apparent assumption that district did not meet its burden and that the hearing officer or review officer
28 would agree with them, they did so at their own risk. *Hanson v. Republic R-III School District*, 632 F.3d 1024
(8th Cir. 2011)

⁵ Much of the following discussion is quoted directly from the evaluations without quotation marks.

⁶ The prior school year, 2015-16, she was in the seventh grade and this presumption is made on the basis
that Student has been progressing from grade to grade each year during the history on record. [J-14:1, J-
15:1, J-16:1]

1 private preschool program. [J-1:1, J-2:1]⁷

2 The District's initial evaluation (Multidisciplinary Team or MDT report) of
3 Student when she was five years old indicates that Student was born with
4 hydrocephalus and heart problems that required surgery. During her first five years, she
5 participated in a wide variety of therapies to address motor, speech and language, and
6 cognitive delays. It was reported by her pre-school staff that she was easily distracted,
7 lacked focus, sometimes did not respond when spoken to, and though usually she
8 played by herself she was just starting to interact. She was described by her parent as
9 inattentive, fidgety, easily distracted. At this time it was reported that she had tantrums
10 for no apparent reason and would hit, bite, pinch and scream. The parent also expressed
11 concerns regarding her fine and gross motor skills and balance. The health component of
12 the evaluation indicated that due to her significant health history of hydrocephalus,
13 Student was at risk for incurring delays with cognitive and physical development. In
14 addition to the health assessment, the MDT report included the results of assessments of
15 intellectual ability, pre-academic skills, adaptive behavior, behavior and social skills,
16 and speech and language. Generally, the report found that her verbal and non-verbal
17 cognition fell in the average range, but that her spatial skills fell significantly below
18 average. Her General Conceptual Ability score fell into the low average when compared
19 to other 5 year-olds. Her basic academic skills fell within the average range and it was
20 noted that she dealt well with rote information, guided choices or anything involving
21 concrete answers, but struggled with open-ended questions. She was observed to
22 process information and respond to questions slowly, and to be highly impulsive and
23 had difficulty sitting still. In the area of behavior and social skills, Student measured in
24 the at risk range for aggression, adaptability, social skills and functional communication.
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28 ⁷ Whether this was a district sponsored early childhood education program or purely a private placement
is unclear from the record, but it was a "private school."

1 She measured in the clinically significant range for hyperactivity, atypicality,
2 withdrawal and attention problems. The speech and language evaluation indicated that
3 she was generally performing within age-appropriate parameters, noting specifically
4 that, at this time,⁸ she understood non-literal and idiomatic language, drew meaning
5 from context and comprehended verbal statements without clues being provided; she
6 processed information and followed complex directions involving abstract concepts and
7 that her lexicon was at age expectancy.

8 Following this evaluation, the MDT found Student eligible for special education
9 under the category of Other Health Impaired. [J-2 and 3]

10 Though no IEP was entered into evidence for this period, from the record it
11 appears that she attended a self-contained program offered by the District for about
12 three or four months (with “excessive absences”) after the eligibility determination. On
13 or about April 23, 2008, parent informed the District that Student would not be returning
14 and would “continue attending private school.” At the time of the withdrawal, no notice
15 was provided to the District of the intent to seek reimbursement for the private
16 placement or disagreement with the public placement or program. After notice to the
17 parents, District conducted its six-month review of Student’s progress, though parents
18 did not attend, recommended a specialized kindergarten program (presumably for the
19 2008-09 school year) and sent the parents a letter of intent to implement. [J-1:1-2]

20 Between April or May 2008 and the hearing conducted in October 2016, Student
21 has not been enrolled in public school and has been attending Private Schools 1, 2 and 3,
22 as well as a private summer program, at parents’ expense. [J-10:1-2]

23 In December 2009 parents obtained an independent evaluation by Pettigru

24 ⁸ She was only 5, and problems with, e.g., idiomatic language, were not noted in evaluations until she was
25 older, and language expectations became presumably more complex. It should also be noted that,
26 probably due to her young age and level of academic instruction at this time, later concerns such as
27 dyslexia, autism, nonverbal learning disorders or other learning disabilities were not presented as
28 evaluation concerns by either the parents, pre-school staff or District evaluators.

1 Counseling Associates, Inc. [J-12:1-28] While the parents reported that Student
2 performed well in many areas of school, they perceived that she had learning challenges
3 that may not have been appropriately addressed at the private school. There were
4 concerns expressed over her erratic learning abilities, attention skills and following
5 directions in class. Parents requested that she be evaluated to assess symptoms for
6 Attention-Deficit/Hyperactivity Disorder (ADHD) and to assess her social/emotional
7 profile.

8 At the time of this evaluation, Student was seven years old and placed in first
9 grade at Private School 1. The Woodcock Johnson Tests of Achievement revealed scores
10 of grade equivalency ranging from a low of K.0 to as high as 2.6. Checklists completed
11 by the private school personnel and parents were reflective of attentional difficulties
12 with respect to inattention, distractibility, some impulsivity, processing and learning
13 differences and lack of academic achievement. At this time, her strengths were in math
14 operations and math reasoning, and weaknesses in language-based areas. The evaluator
15 noted that Student exhibited symptoms of ADHD, Inattentive type and a Nonverbal
16 Learning Disorder, exhibiting difficulty with synthesizing visual-spatial information,
17 lack of coordination and discrimination and recognition of visual detail in visual
18 relationships, and social concerns. The evaluator included 34 specific recommendations
19 for the private school staff to consider. Relevant to this dispute were (1) the
20 recommendation to utilize a reading approach using a highly structured multisensory
21 approach such as VAKT (simultaneous Visual-Auditory-Kinesthetic-Tactile), and (2) the
22 suggestion to use verbal cues, structure, limits and boundaries to address her nonverbal
23 learning disorder. [J-12]

24 There is no evidence that this independent evaluation report was shared with the
25 District at the time or that parents requested an IEP or public school placement from the
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1 District. Instead, Student continued in Private School 1 through the 4th grade, when once
2 again parents obtained an independent evaluation from Pettigru Counseling Associates,
3 Inc. which was conducted in March 2013. [J-13:1-30] ⁹

4 This second independent evaluation was requested by the parents to reassess
5 Student's learning profile, to assess for learning disabilities, and to assess the extent of
6 symptoms of ADHD. Parents reported that while Student had made academic and
7 social/emotional progress, learning and behavioral issues persisted. The evaluator noted
8 relative strengths in verbal reasoning abilities with significant variance in nonverbal
9 reasoning abilities. Difficulty with spatial perceptions, spatial relations, organization and
10 synthesis of visual-spatial information was noted and the evaluator suggested that
11 Student may have difficulty organizing visual-spatial fields, adapting to new or novel
12 situations, and accurately reading nonverbal signals and cues. Written production skills
13 had improved, reflective of her strong verbal reasoning abilities. She exhibited delays
14 with phonological awareness and fluency, consistent with her diagnosis of dyslexia. She
15 exhibited difficulty with reading discourse comprehension, i.e., interpreting beyond the
16 sentence level, and retaining facts or ideas read earlier in a passage. She exhibited
17 problems with phonological encoding, related to difficulties with spelling and written
18 production. The evaluator noted that many of the issues presented pointed to global
19 processing difficulties, especially in language-based areas, with significant concerns
20 noted with respect to auditory processing and auditory memory function, putting
21 Student at risk for academic difficulties. As in the previous evaluation, the evaluator
22 made a strong recommendation for multimodality teaching/VAKT. Student also
23 demonstrated difficulty with saliency determinations, i.e., discriminating between
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27 ⁹ It appears that during her fourth grade year at Private School 1, parents were concerned about her lack
28 of progress, and she attended Private School 2 on the East Coast for approximately four months until she
was accepted into Private School 3 in California, where she attended from October through June of the
2013/2014 school year. [J-15:1]

1 important and unimportant information. Unlike the prior evaluation where math was
2 noted as a strength, the evaluator noted delays in math operations and math reasoning
3 skills. Student continued to exhibit significant symptoms of ADHD, exhibiting impaired
4 response inhibition and inadequate impulse control. She had difficulty delaying
5 gratification and her ability to sustain attention or persistent effort on tasks was not
6 adequate. She also had difficulty with memory, and concerns were expressed with her
7 alertness and mental effort, indicating trouble with concentration and challenges with
8 listening without feeling too bored.

9 The evaluator indicated the Student's affect was bright during the evaluation and
10 that she appeared to put forth her best effort. Her comments and other test observations
11 led the evaluator to suggest that Student can be insightful, ambitious and constructive.
12 The evaluator noted that Student can be generous and kind but also strong-willed and
13 independent. The evaluator noted that the latter traits could make life more challenging
14 as she has trouble navigating her strong desire to succeed and to be independent with
15 her learning challenges that are formidable and need significant intervention. The
16 evaluator also noted maturity beyond her years and conversely, comments that were
17 reflective of immaturity. The evaluator explained that this emotional variance is
18 common in students with attentional difficulties, and more heightened in Student who
19 presents significant discrepancies in her learning profile. The achievement testing
20 demonstrated growth from the 2009 evaluation, ranging from grade equivalencies with
21 a low of 1.1 (spelling of sounds) to a high of 5.8 (story recall). Broad reading skills and
22 broad written language included some of her higher scores, with math,
23 phoneme/grapheme knowledge, sound awareness and listening comprehension
24 showing delays. The evaluator particularly noted the Student's math skills were not
25 reflecting sufficient progress since her last evaluation and a multisensory approach for
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1 math instruction was recommended. Again the evaluator concluded with a series of
2 recommendations for the parents and private school to consider in approaching
3 Student's instruction.

4 This second independent evaluation was not shared with the District until on or
5 about January 2014 when parents again requested that Student be re-evaluated by
6 District for eligibility for special education in a District program. Parents made a request
7 to meet with the District to discuss Student's profile and determine what the District
8 would offer by way of an IEP. Student was then in 5th grade. At this time, parents
9 informed the District that Student had been receiving Orton-Gillingham (OG)
10 methodologies at Private School 2 for 5 months, and then was moved in October 2013 to
11 Private school 3 where she also received "OG methodologies to address her learning
12 needs" and after school tutoring in math utilizing "Singapore Math with OG
13 methodologies." [J-10:1-2]
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15 Based on this parent referral, the District conducted an evaluation of the Student
16 between January 31, 2014 and March 3, 2014 and prepared an MDT report on March 11,
17 2014. [J-4:7] Members of the MDT included the parents, school psychologist, speech
18 therapist, school nurse, and a district special education teacher.

19 District produced a comprehensive 32-page MDT report, including a review of
20 the two Pettigru evaluations and reports from Private School 1. [J-4] At the time of MDT
21 report in March of 2014, Student was attending Private School 3 in California as a fifth
22 grade student. [J-4:6,13]
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24 The District evaluation, in addition to the review of the outside reports and the
25 Pettigru evaluations, included a medical/health assessment, communication assessment,
26 achievement testing, behavior/social emotional assessments, adaptive behavior scales,
27 and parent and teacher rating scales. Because of parent concerns, Student was also
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1 assessed on the Gilliam Autism Rating Scale and the criteria for Specific Learning
2 Disability under the IDEA.¹⁰

3 Ruling out the eligibility categories of autism and specific learning disabilities, the
4 MDT found Student eligible under the category of other health impairment. [J-4: 9-10, 17
5 23-24, and 24-32]

6 In evaluating her educational needs, the report found that in that in the area of
7 language, her language delays interfered with her ability to communicate and had an
8 adverse social, emotional and academic affect. Her overall composite scores of below
9 average suggested an overall difficulty with language, with large discrepancies between
10 listening comprehension and oral expression. Listening comprehension represented a
11 strength with oral expression representing a weakness. Significant to this decision, the
12 District evaluator specifically noted a weakness in responding to idioms, inference,
13 double meanings, indirect requests and verbal reasoning, and noted that the deficiency
14 with idioms “as she moves into the more social world of adolescence will cause
15 confusion on her part and misunderstanding of phrases typically used by adolescents.”

16 [J-4:10] Other specific areas of concern included, but were not limited to:

- 17 • While able to identify the key message, Student did not use a more
18 analytical approach necessary to obtain detailed information
- 19 • She lacked understanding and integration of the concepts and the ability to
20 follow directions
- 21 • She was not able to prioritize information she was given

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25 ¹⁰ Consistent with 34 C.F.R. §§ 300.8, 300.15, 300.122, and 300.304-311 the district conducted this evaluation
26 to determine if the Student had a disability within the meaning of the IDEA, which would qualify her for
27 special education, and to determine Student’s need for special education. [J-4:6] Unlike clinical
28 evaluations, such as the three conducted in this case as independent evaluations, district educational
evaluations focus less on diagnostic labels and causes of deficiencies and rather emphasize educational
strengths and weaknesses as a vehicle for the IEP team to then develop an IEP that meets the student’s
unique educational needs. [See, e.g., *G.I. v. Lewisville Independent School District*, 61 IDELR 298 (D.C.
E.D.Texas, 2013) [discussing labels versus needs.]

- She did not display good predictive skills, misinterpreted some conceptual meanings and did not attend to all the details presented in the story

[J-4:10]

Student's two prior psychological assessments from Pettigru (above) were reviewed in some detail noting, in addition to other deficits, that language processing difficulties, symptoms of a nonverbal learning disorder and distractibility were impacting Student's learning. [J-4:13-14]

Achievement tests were administered, the results being fairly consistent, considering the passage of time, with those performed by Pettigru. [Cf. J-4:15 and J-13:14-15] Student's Broad Reading scores fell in the low average range as compared to her same age peers, writing in the average range, and math significantly in the very low range. Her adaptive behaviors and social-emotional status were also evaluated through reporting scales from parent, pupil and teachers. Both daily living skills and socialization skills fell in the moderately low range. [J-4:18] Based upon parent rating, Student's functional communication scales measured in the clinically significant range and the following scales were measured in the at-risk range: hyperactivity, atypicality, withdrawal, attention problems, adaptability, leadership and activities of daily living. [J-4:20; *see also* teacher reporting, J-4:22 and 23]

Parent acknowledged receipt of the report but stated that she did not believe it was fully comprehensive of Student's present levels of performance. [J-4:29] Student was once again determined eligible for special education as a student with health impairments [J-5] and an IEP was developed with parents in attendance. Parents noted their disagreement with the IEP and noticed district of their intent to continue private placement. [J-7:13-49]

In August of 2015, when Student was 12 years old, parents again obtained an

1 independent evaluation, this time from Morris Psychological Group. [J-15] At this time
2 Student was again attending Private School 1, where for the 2015/16 school year Private
3 School 1 trained a teacher in the OG methodology and Student received “pullout”
4 support for OG instruction. [J-15:1-2]

5 The Morris Group report indicates that Student “was seen for comprehensive
6 neuropsychological and educational assessment at the request of her parents in order to
7 assess current neuropsychological and educational functioning and to assist in
8 diagnosis, and education and treatment planning.” [J-15:1] Recognizing that Student’s
9 history had been extensively documented, the evaluator briefly summarized previous
10 reports [J-5:1], including the Pettigru reports and District MDT reports discussed above.
11 [J-15:2-5] He stated that “all sources appeared to be accurate and reliable.” [J-15:1]
12 Student was seen over a period of two days, and a battery of testing instruments was
13 used, providing results in the areas of: (1) attention, processing and executive
14 functioning; (2) language functioning; (3) sensorimotor and visuospatial functions; (4)
15 memory functions; (5) intellectual functions; (6) achievement screening; and (7)
16 behavioral/ psychological screening. [J-15:6-22] In terms of Student’s educational history,
17 interventions and progress, the evaluator relied heavily upon parent reporting. [See J-15:
18 1,2 and *passim*; Tr. III, 555:19-557:11]

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20 The report notes that Student’s general intellectual functioning was in the
21 extremely low range, marked by and perhaps reflective of a highly variable profile. [J-
22 15:16] Attention and executive functioning revealed multiple areas of concern: working
23 memory and focused attention in the auditory and visual modalities; sustained attention
24 and concentration in the visual modality were notably impaired. Impulsivity and
25 inattention were noted in particular situations. Significant deficiencies in working
26 memory, planning and organization, and initiation were noted. In terms of core
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1 language functioning, Student exhibited severe deficiency in phonological processing,
2 though auditory-based comprehension and semantic fluency rose to the normal range.
3 Verbal memory was in the low average range. Sensorimotor functioning was relatively
4 intact, while visual-motor precision was marked by mild slowing and inaccuracy.
5 Student's achievement testing in math reasoning, computation and fluency all fell in the
6 low range. Basic reading comprehension was average and she fell in the lower end of
7 average in terms of her oral language, total reading and basic reading. Written
8 expression was weaker and in the below average range. He noted significant difficulties
9 with reading accuracy, fluency and comprehension. In the psychological and behavioral
10 area, while noting a few concerns, the evaluator concluded there was no evidence of
11 emerging problematic personality features at that time. [J-15:16-18]
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13 The evaluator then summarized his diagnostic impressions noting: significant
14 deficiencies in focused and sustained attention in both the auditory and visual
15 modalities; significant impairments in output modulation, self-monitoring, inhibition
16 and cognitive flexibility. He noted that her deductive reasoning was adversely impacted
17 and that there was significant behavioral evidence of inattention and impaired
18 executive-based functions. With regard to her attention, he stated that she clearly met
19 the clinical criteria for ADHD-Predominantly Inattentive. He also found that her
20 language functioning was consistent with developmental dyslexia, though also noted
21 that her achievement battery did not indicate the presence of dyslexia.¹¹ He noted a
22 "prominent right hemisphere disorder" impacting sensory motor / graphomotor
23 processing, visuospatial and visual integration abilities and recall, and indicated that her
24 visual learning and storage was relatively intact. He also noted the presence of a
25 "disorder" in reading comprehension and a profound "math disability." Finally he
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28 ¹¹ He stated that this indication was "likely a testament to the rigorous and consistent remedial work that she has been provided." [J-15:18]

1 noted that the right hemisphere disorder affected her nonverbal processing abilities
2 which “likely” exacerbates difficulties with spatial organization, time management and
3 processing efficiency, and even social functioning. In the latter area, he noted that the
4 deficiencies could impact her ability to appreciate nuance in social communication,
5 introducing the risk for anxiety and even social withdrawal as social communication
6 demands become increasingly complex into mid-and late adolescence, and that social
7 interactions may become quite challenging to interpret thereby producing confusion and
8 misunderstanding. [J-15:18-19]

9 The report concludes with a series of 14 recommendations, including, as relevant
10 to the primary issue in this dispute: “[Student] will continue to require intensive multi-
11 modal, research-based learning programs for reading comprehension and math.” [J-
12 15:19-21, *and see* p. 20, number 8]

13 In February of 2016, parents’ attorney forwarded a copy of this August 15, 2015
14 report from the Morris Psychological Group and requested an IEP meeting “to discuss
15 [the] report.” [P-26:1] Three meetings were properly noticed, scheduled and conducted
16 by the District between April and June, 2016. [J-8:1-16] Parents attended two of the
17 meetings, the last attended on or about May 11, 2016. On May 12, 2016, parents’ attorney
18 wrote to the District’s attorney complaining of alleged delays and stating that “if my
19 clients are forced to make this placement unilaterally, they reserve all rights to seek
20 reimbursement for all costs” of the unilateral placement. Subsequently, parents’ attorney
21 requested that the District simply forward a draft of the final IEP to the parents when
22 completed, in that parents could not be expected to take more time off work. [P-29:2]
23 When the IEP meeting was conducted on June 8 to finalize the IEP that had been worked
24 on in two prior meetings, parents did not attend and subsequently filed for the hearing,
25 which was conducted in this matter challenging the 2014 and 2016 IEPs.
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IV. SUMMARY OF THE HEARING ISSUES AND HEARING DECISION

As recorded in the hearing officer’s prehearing report and revised order and stated on the record, the properly noticed issues to be heard were:

1. Whether the May 27, 2014 IEP offered Student a FAPE: specifically, with regard to a reading program whether CCSD’s failure to provide the Orton-Gillingham Approach or similar reading instruction program impaired the Student’s right to a FAPE;

2. Whether the June 8, 2016 IEP offered Student a FAPE, specifically:

a. Whether the IEP addressed Student’s psychological/ social needs

(i) providing smaller teacher-student ratio and individualized attention and (ii) providing access to age peers to expose her to appropriate role models;

b. Whether the IEP addressed Student’s visuomotor needs;

c. Whether the IEP addressed Student’s (i) social pragmatic language skills and (ii) core language functioning;

d. Whether the IEP addressed Student’s (i) reading comprehension and (ii) math needs.

3. Whether there were procedural violations in the development of:

a. The May 27, 2014 IEP, specifically

(i) Whether the IEP Team failed to acquire the Student’s reading needs during the formation of the May 27, 2014 IEP;

(ii) Whether the IEP Team failed to give due weight to evaluative information provided by the Student’s Parents, specifically the testing results from [Private School 2] in the formation of the May

1 27, 2014 IEP;

2 (iii) Whether the IEP Team failed to meaningfully consider the
3 Parents' input as members of the IEP team regarding [Student's]
4 disabilities as to her reading, which was provided to the District via
5 correspondence, parent interviews, assessment checklists,
6 evaluations and IEP meetings in May 2014;

7 b. June 8, 2016 IEP, specifically:

8 (i) Whether the...IEP failed to included Specially Designed
9 Instruction that was based on scientific research or evidence to
10 properly address all of [Student's] disabilities, including her
11 diagnosis of Dyslexia, Nonverbal Learning Disorder, Anxiety and
12 [ADHD];

13 (ii) Whether the District failed to give due weight to credible
14 evaluative information and recommendations regarding [Student's]
15 education disabilities, including but not limited to (aa) records
16 obtained from [Private School 1], (bb) the [two Pettigru evaluations]
17 and (cc) the [Morris Group evaluation];

18 c. Whether the IEP team failed to promulgate an IEP on May 27,
19 2014 [all goals] and June 8, 2016 [excluding 4 specified goals] that
20 included measurable goals and objectives

21 (d) Whether District failed to convene the 2016 IEP meeting in a
22 timely fashion.

23 [Hearing Officer Exhibits 20 and 21; Tr. I, 8:2-11:2]
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1 The hearing officer concluded that the 2014 IEP was inappropriate because it did
2 not name the OG approach or similar reading program, stating that in this case it was
3 incumbent upon the District to follow the recommendations of the 2013 Pettigru
4 assessment and parents' input, and that the District did not consider these in any
5 meaningful way. [HO Dec. pp.20-22] She concluded that though the IEP team acquired
6 Student's reading needs, the team "did not consider Parents' concerns for enhancing the
7 education of their child." She also concluded that the IEP team failed to give due weight
8 to the evaluative information provided by the parents and that the District failed to
9 "meaningfully consider" the parents' input as members of the IEP team because the IEP
10 does not reflect the parents concern for including OG or other specific methodology.
11 [HO Dec. pp. 25-26] She also concluded that the 2014 IEP was "predetermined, that is,
12 the *policy not to name a methodology* that was known to work with the student
13 predetermined the contents of the IEP...." [Emphasis added; HO Dec. p. 21] The hearing
14 officer found three benchmarks and/or objectives in reading that she determined were
15 contrary to the Pettigru report and thus concluded that the District failed to promulgate
16 an IEP that contained appropriate goals and objectives. [HO Dec. p.26] Though this IEP
17 was developed in 2014, *she based her decision*, in part, regarding its inappropriateness *on*
18 *the Neuropsychologist's testimony* that he recommended against teaching Student with
19 visual cues, *who did not evaluate Student or provide a report until 2015*. [HO Dec. p. 26]

21 As to the 2016 IEP, with regard to Student's psychological/social needs, the
22 hearing officer found the IEP was not appropriate because it did not provide for an aide
23 to accompany the Student to specials (general education classes such as art, music or
24 PE), even though the need for an aide was never put at issue by the
25 petitioners/appellees. [HO Dec. p. 23] She found two benchmarks inappropriate,
26 concluding that they relied upon visual supports, contrary to the Neuropsychologist's
27
28

1 testimony. [HO Dec. p. 23] Again, she found the 2016 IEP inappropriate because it did
2 not utilize the OG method.¹² [HO Dec. p. 23-24] She generally concluded that the IEP
3 failed to include Specially Designed Instruction, without specifying what SDI was
4 lacking other than the fact that District did not include OG in the IEP. [HO Dec. p. 27]
5 Reaching beyond the issue of the case, which was the measurability of goals and
6 benchmarks and/or objectives, she found that the 2016 IEP contained tasks that were not
7 within the Student's ability. [HO Dec. p. 29]

8 The hearing officer awarded parents' reimbursement for three consecutive school
9 years because of her conclusions of inappropriateness of the IEPs: 2014-15 (based on her
10 conclusion that the May 2014 IEP was inappropriate), 2015-16 (presumably based on her
11 determination that District had a duty to review the May 2014 IEP in the 2015-16 school
12 year and failed to do so),¹³ and the 2016-17 school year due to her finding that the June,
13 2016 IEP was inappropriate. [HO Dec. 30] She denied reimbursement for a summer
14 program that she concluded the parents' did not demonstrate was appropriate at
15 hearing.
16

17 After a thorough review of the entire record, the review officer concludes that the
18 hearing officer erred in her decision. She ignored relevant and persuasive testimony and
19 evidence from the District, placed undue weight on *the one* witness presented by the
20 appellees at hearing, misapplied the law governing the District's duty to provide FAPE,
21 determined the private schools were appropriate based on scant evidence, reached
22 beyond the noticed issues in her decision, and demonstrated little knowledge of the
23 IDEA, its requirements—how it is to be applied by school districts and how it is to be
24 applied to the issues in a due process hearing.
25

26 _____
27 ¹² Here her conclusion did not allow for "other similar methodology", relying upon the
28 Neuropsychologist's testimony that he had sufficient data to recommend OG. [HO Dec. p.23]

¹³ Failure of the District to review the 2014 IEP was never at issue and therefore there was no evidence
presented at hearing to support this finding/conclusion of the hearing officer.

V. ISSUES PRESENTED FOR REVIEW

1
2 1. Whether the hearing officer erred by denying District's Motion to Dismiss
3 based on appellee's failure to file their request for hearing on the head of the public
4 agency, Pat Skorkowsky, Superintendent of the Clark County School District.

5 2. Whether the hearing officer erred by denying District's Motion to Dismiss
6 claims barred by the IDEA two-year statute of limitations.

7 3. Whether the hearing officer erred by failing to render a decision that is
8 thorough and careful.

9 a. Whether the hearing officer failed to consider the preponderance
10 of the evidence supporting District's case.

11 b. Whether the hearing officer erred by failing to analyze the
12 applicable legal precedent.
13

14 4. Whether the hearing officer erred in rendering her evidentiary and
15 admissibility determinations thereby violating the District's due process rights under the
16 IDEA and NAC.

17 5. Whether the hearing officer erred when she concluded there was sufficient
18 evidence before the IEP teams of 2014 and 2016 to support the inclusion of OG
19 methodology programs in the IEP and the District predetermined not to include OG
20 methodologies.

21 6. Whether the hearing officer erred by concluding that the IEP team did not
22 meaningfully consider the appellee's independent evaluations.
23

24 7. Whether the hearing officer erred by allotting undue deference to the opinions
25 and recommendations of the neuropsychologist, which were provided outside his field
26 of expertise.

27 8. Whether the hearing officer erred in awarding appellees reimbursement for
28

1 private school transportation.

2
3 **VI. APPLICABLE LAW AND APPROACH TO ANALYSIS ON REVIEW**

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

9 As to the first part of the test, Rowley acknowledged that the IDEA is essentially a
10 law of procedures and that if there was procedural compliance, much, if not all, of what
11 was required in terms of substance would be met. The Ninth Circuit Court of Appeals
12 has held that while not all violations of procedural safeguards are significant, those
13 procedural violations that result in a loss of educational opportunity or seriously
14 infringe on the parent's opportunity to participate in the IEP formulation process may
15 result in a denial of a free appropriate public education. *W.G. v. Bd. of Trustees of Target*
16 *Range Sch. Dist.*, 960 F.2d 1479, 1483 (9th Cir. 1992). See also *R.B., ex rel. F.B. v. Napa*
17 *Valley Unified Sch. Dist.*, 496 F.3d 932, 938 (9th Cir. 2006); *Amanda J. v. Clark Co. Sch. Dist.*,
18 35 IDELR 65 (9th Cir. 2001); *M.L. v. Federal Way Sch. Dist.*, 387 F. 3d 1101 (9th Cir. 2004);
19 *Van Duyn v. Baker School District*, 502 F. 3d 811 (9th Cir. 2007). The 2004 amendments to
20 the IDEA require that a hearing officer determine a case on *substantive* grounds, and
21 address procedural compliance as follows:
22
23

24 In matters alleging a procedural violation, a hearing officer may find that a
25 child did not receive a free appropriate public education only if the
26 procedural inadequacies—
27 (I) impeded the child's right to a free appropriate public education;
28 (II) significantly impeded the parents' opportunity to participate in the
decision-making process regarding the provision of a free appropriate
public education to the parents' child; or

1 (III) caused a deprivation of educational benefits.
2 20 U.S.C. § 1415 (f)(3)(E)(ii).

3 As to the second part of the *Rowley* test—substantive educational benefit—the
4 analysis must focus on the adequacy of the district’s program. *Gregory K. v. Longview Sch.*
5 *Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). If a district’s program addresses the student’s
6 unique needs, provides educational benefit, and comports with the IEP, then the district
7 has offered a free appropriate public education even if the parents prefer another
8 program and even if the parent’s preferred program would likely result in greater
9 educational benefit. *Id* at 1314. Moreover, "once a court determines that the requirements
10 of the Act have been met" neither parents nor courts have a right to compel a school
11 district to employ a specific methodology in educating a student. *Bd. of Educ. v. Rowley*,
12 [458 U.S. 176](#), 208, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). In addition, when reviewing
13 district decisions, courts, hearing officers and review officers must apply the so-called
14 “snapshot rule” to determine the sufficiency of the IEP. The “snapshot rule” prevents
15 reviewing officials from determining the appropriateness of an IEP and/or *district*
16 actions based on hindsight. *J. W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F. 3d 421,
17 349 (9th Cir. 2010); *Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). The
18 appropriateness of a district’s determination is judged on the basis of information
19 reasonably *available* to the parties at the time. The rule was designed to guide the courts
20 to look at whether the relevant information was taken into account by the district in
21 formulating its IEP, not whether it worked. Thus, if an IEP “(1) addresses the child’s
22 unique needs; (2) provides adequate support services so the child can take advantage of
23 the educational opportunities, and (3) comport[s] with the goals and objectives on the
24 student’s individualized education program” the IEP provides FAPE. *Capistrano, supra*,
25 59 F.3d at 889.
26
27

28 Since appellants’ issues involve a combination of alleged procedural errors and

1 FAPE issues, often overlapping, the state review officer, under the above law, analyzes
2 the appeal issues as follows:¹⁴

3 1. Did the District violate one of more of the applicable procedural requirements?

4 a) If so, did the violation significantly impede the parent's opportunity to
5 participate in the decision-making process regarding the provision of FAPE to the child;

6 b) Was the result of the violation an impediment to the receipt of FAPE and/or a
7 loss of education benefit?

8 2. Were the IEPs substantively appropriate?

9 a. What are the individual needs of the child?

10 b. Were the IEPs tailored to meet the child's needs and reasonably calculated to
11 confer educational benefit?

12 c. Was the IEP capable of implementation?¹⁵

14 VII. ANALYSIS AND CONCLUSIONS

15 A. Preliminary Jurisdictional Issues¹⁶

16 **Whether the hearing officer erred by denying District's Motion to Dismiss
17 based on appellee's failure to file their request for hearing on the head of the public
18 agency, Pat Skorkowsky, Superintendent of the Clark County School District.**

19 **Whether the hearing officer erred by denying District's Motion to Dismiss
20 claims barred by the IDEA two-year statute of limitations.**

21 The District appeals the determinations of the hearing officer where she held that
22 the original complaint was properly served and filed by petitioners/appellees in
23 accordance with NAC 388.306 and that the issues related to the 2014 IEP were not barred

24 ¹⁴ The compliance prong often turns on whether there was a substantive denial of FAPE and courts have
25 been slow, if not reluctant, in accepting a violation as a *per se* denial of FAPE. Compare, *L.M. v. Capistrano*
26 *Unified Sch. Dist.*, 556 F.3d 900 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 90 (2009) (prevailing two-step approach)
27 *with J.T. v. Dep't of Educ.*, 59 IDELR 4 (D. Hawaii 2012) [*per se* denial.]

28 ¹⁵ The *Capistrano* tests ask whether the education received comports with the goals and objectives of the
IEP. Since this IEP was never implemented, the SRO believes that some level of review of the *capability* of
the district to implement the IEP is necessary, since the hearing officer allowed one witness to put this at
issue and concluded that the District could not, based on the testimony of this one witness.

¹⁶ Section V, Issues Nos. 1 and 2

1 by the applicable statute of limitations. 34 C.F.R. §507 (A)(2). Without further discussion,
2 the SRO adopts the findings and conclusions of the hearing officer on these preliminary
3 matters as though fully set forth herein. [Hearing Officer Exhibits 19 and 25]

4 For logical flow of this decision under applicable law, the remaining issues
5 decided are reordered in the following analysis.

6 **B. Procedural Violations by District**

7 **Whether the hearing officer erred by concluding that the IEP team did not**
8 **meaningfully consider the appellee’s independent evaluations.**¹⁷

9 In addition to the specific and comprehensive requirements for conducting
10 educational evaluations under the IDEA (*see* 34 C.F.R. §§300.301-300.304) the IEP team
11 and other qualified individuals must review, *inter alia*, existing data including
12 evaluations and information provided by the parents, and on the basis of that review
13 determine what additional information is needed to determine whether the child has a
14 disability within the meaning of the IDEA, and the educational needs of the child. 34
15 C.F.R. § 300.305 (a), (b) and (c). (*See also* 34 C.F.R. §300.306 (a)).

16 The operative word in the regulations is “consider” (34 C.F.R. §300.502
17 (c))and the governing law on procedural questions is, under the first prong of *Rowley*,
18 whether a failure to consider independent evaluations provided by the parent:
19

- 20 (I) impeded the child’s right to a free appropriate public education;
- 21 (II) significantly impeded the parents’ opportunity to participate in the
- 22 decision-making process regarding the provision of a free appropriate
- 23 public education to the parents’ child; or
- 24 (III) caused a deprivation of educational benefits.

25 20 U.S.C. § 1415 (f)(3)(E)(ii).

26 For purposes of this discussion, the SRO focuses on the impediment to the
27 parent’s opportunity to participate in the decision making process. Whether the
28 deprivation impeded the Student’s right to a FAPE or caused deprivation of educational

¹⁷ Section V, Issue No. 6

1 benefits will be discussed later under the substantive educational benefit prong of
2 *Rowley*, i.e., whether the District's IEPs offered FAPE. (See Section C, below.)

3 Parent's have extensive rights of participation in the evaluation, IEP development
4 and placement decisions for their children; however a parent's right to participate is not
5 boundless. *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). A parent's right to participate is not
6 equivalent to the right to have all his or her requests adopted by an IEP team; it does not
7 include the right to compel a district to adopt any particular educational program or to
8 hold veto power over the public members of the IEP team. *W.G. v. Bd of Trs. of Target*
9 *Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1993), see also, *Lachman v. Illinois St. Bd. of*
10 *Educ.*, 852 F.2d 290, 297 (7th Cir. 1988), *Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d
11 115, 1129 (9th Cir. 2003) superseded on other grounds.

12
13 The SRO now examines the evidence supporting the District's fulfillment of the
14 procedural requirements of the IDEA.

15
16 *2014 IEP*

17 Following a request from the parents for a re-evaluation of Student, District
18 noticed and conducted an evaluation. [Section III, above] It is evident from the referral
19 form that the District had already taken note of the Pettigru evaluation and diagnoses,
20 and parent concerns. [J-4:1 re parent concerns and other factors affecting performance;
21 Cf. J-13:25-26, Diagnostic Impressions, and Recommendations #2] Throughout the
22 evaluation and IEP process, the documentary evidence is overwhelming that District
23 made exceptional efforts to obtain relevant information from the private schools in order
24 to assist the IEP team in making appropriate educational decisions *and* to include the
25 parents in those deliberations and determinations . [J-1:4-13; see also J-7:1-7] The MDT
26 prepared a comprehensive report after conducting District evaluations, which included
27
28

1 a review of the 2009 and 2013 Pettigru reports, as well as parent and teacher input. [See
2 Section III, above; J-4, *passim* and specifically, J-4:13-15, 18-20, 22-14] It is significant that
3 the independent evaluator from the Morris Group later reviewed this MDT report [J-
4 15:3] and concluded that it “appeared to be accurate and reliable.” [J-15:1]

5 The resulting IEP, in the section covering present levels of academic achievement
6 and functional performance, included a comprehensive summary of the MDT report
7 (i.e., assessment/evaluation results) including the effect of the assessment/evaluation
8 results on Student’s involvement and progress in the general education curriculum. [J-
9 7:16-29] There is no requirement under the law that the IEP restate every evaluation
10 report. Rather, the IEP team must develop a “statement of the child’s present levels of
11 academic performance, including how the child’s disability affects the child’s
12 involvement and progress in the general curriculum...” 34 C.F.R. §300.320 (a)(1). Specific
13 to the concerns raised in this case, this section of the IEP covered, *inter alia*, Student’s
14 language, reading, mathematic and social/emotional and behavioral levels, noting
15 specifically her strengths and weaknesses; and included such details as Student’s
16 problems with idioms and inattention, anxiety and hyperactivity. That this section
17 appears to rely on the wording of District’s own assessments is no evidence that it did
18 not accurately reflect the pertinent results of the Pettigru report. Though the evaluation
19 instruments and report formats may have differed between the MDT educational
20 evaluation and the clinical Pettigru evaluation, there is no evidence that the *results*
21 differed in any *educationally* significant manner, and as previously noted, the subsequent
22 independent evaluator from Morris Group stated that both the Pettigru reports and the
23 MDT reports that he reviewed “appeared to be accurate and reliable.” [J-15:1]¹⁸ In fact,
24
25

26
27 ¹⁸ The SRO also notes the difference between educational evaluations under the IDEA and independent
28 clinical evaluations. A comparison of the MDT reports and the three independent evaluations indicates
that MDT evaluations focus on the disability “label” for the sole purpose of determining eligibility under
the IDEA. The evaluators then determine the child’s educational needs, and clinical diagnosis/labels such

1 this section of the IEP contains concerns raised by *both* evaluation reports.

2 The remaining portions of the IEP also indicate that the IEP team paid significant
3 attention to the independent evaluation by Pettigru and the parents concerns. Based
4 directly on the Present Levels of Academic Achievement and Functional Performance,
5 i.e., assessment results, the IEP contained 13 annual goals, and 49 benchmarks or short
6 term objectives related to language, reading comprehension, math skills,
7 organizational/study skills, classroom/learning behaviors, social skills, coping skills to
8 deal with frustration and anxiety, and the development of social language skills to
9 increase her linguistic control of her environment. [J-7:31-37] All of these areas were
10 covered by both evaluation reports.[Cf. J-4 and J-13]

11 The supplementary aids and services portion of the IEP then included a number
12 of modifications, accommodations and supports, such as the use of computers for
13 writing assignments, the use of graphs, extra time for reading assignments that were
14 specifically recommended in the Pettigru report. [Cf. J-7:42 and J:13:27] Most significant
15 to this dispute, this section of the IEP calls for a multi-sensory approach to teaching
16 throughout the day. [Cf. J-7:43 and J-13:26] It also provides for educational settings (self-
17 contained class, resource room), and supervision on campus that accommodate her
18 need, as expressed in the Pettigru report for close adult supervision. [Cf. J-7:41-49 and J-

19 _____
20 as ADHD, NonVerbal Learning Disabilities, Executive Functioning Disorders, Dyslexia, ADHD become
21 less important than the actual and demonstrated performance of the student for purposes of then
22 addressing the child's unique needs in an IEP. This is consistent with 34 C.F.R. §300.15 and related
23 regulations. [See, e.g. Tr I, 56:6-59:5; 155:12-157:5; IV, 722:8-723:14] The three clinical evaluations, in
24 contrast, cover in detail the causes and DSM labels within which a child fits, and recommendations often
25 flow from not only what is observed through actual evaluation of the child but what *might be expected* of a
26 child with such clinical diagnosis. [See, e.g. J-13:19, 21] In addition, the clinical evaluations include specific
27 and detailed recommendations for interventions, whereas under the IDEA, it is the IEP team that must
28 determine the extent and nature of the interventions in *later* sections of the IEP (e.g., goals and objectives,
specially designed instruction, accommodations and modifications.) While the SRO recognizes that both
types of evaluations, clinical and educational, have their place and contribute valuable information to the
IEP team, the SRO is left with the distinct impression that the hearing officer put undue emphasis on the
independent clinical evaluations, ignoring the similarity of the MDT report, and throughout her decision,
found fault with the District for not including specific portions of the independent clinical reports in the
IEP.[See, e.g., HO Dec., FOF##3, 4, 5, 6, 7, 8, 9, 19, 20; the only reference by the hearing officer to the MDT
report is a small section of the speech and language evaluation, FOF #16]

13:27].

1 The IEP also adopts many of the accommodations specified in the Private School
2 1 Modifications and Accommodations Plan (MAP), including, but not limited to,
3 multisensory instruction, preferential seating, the use of a computer, graph paper and
4 charts, not penalizing Student for spelling errors. [Cf. J-16 and J-7]

5 After the parents noted their dissent to the IEP, the District sent out the required
6 prior notice of intent to implement and their refusal¹⁹ to specifically include OG in the
7 IEP, noting that the IEP included the salient components of OG by requiring a
8 multisensory approach. The notice of proposal / refusal specifically noted that the
9 District considered the Pettigru reports in making its decision. [J-7:49]

10 Thus, the *documentary evidence* overwhelmingly supports a finding by this SRO
11 that the District met its obligation to *consider* the independent evaluations and other
12 records available to them from outside sources during the development of the 2014 IEP.

13 Testimonial evidence also supports this finding. [Tr. I, 34:15-35:12, 36:12-20, 43:24-
14 45:11, 47:21-48:18, 53:2-54:13, 114:22; 137:25-138:3, 177:6-181:13, 195:18-196:8, 233:8-235;
15 243:20-244:4, 246:24-247:12; Tr. II, 359:13-25, 393:4-395:19, 397:1-398:10, 399:10-17, 402:5-6;
16 404:19-405:4, 415:13-416:2, 465:18-470:1]

21 2016 IEP

22 Again, the documentary evidence supports that the District considered the results
23 of the Morris Group independent evaluation submitted by the parents (*see* P-22), the
24 District's MDT report from 2014 (which as noted above, included review of the two prior
25 Pettigru evaluations), and input and records from the private schools in developing the
26 Student's present levels of achievement and functional performance section of the IEP.

27
28 ¹⁹ Known as the notice of proposal / refusal in educational parlance.

1 [J-8:21-34] Based upon the needs of the Student from this section of the IEP, the IEP team
2 developed 10 annual goals and 38 benchmarks or short-term objectives in Student's
3 areas of need, including language, reading comprehension and reading skills, math,
4 sequential problem solving, social interaction, coping strategies, appropriate social
5 language skills, and writing. [J-8:36-40] Specialized settings to accommodate her need
6 for close supervision and instruction were proposed and direct speech and language
7 therapy provided. [J-8:41-42] A comprehensive list of accommodations and
8 modifications were offered, again reflective of the various evaluations and reports the
9 IEP team had available to them. [See J-13,15, 16, 17, 18]

10
11 The *documentary evidence* overwhelmingly supports a finding by this SRO that the
12 District met its obligation to *consider* the independent evaluations and other records
13 available to them from outside sources during the development of the 2016 IEP.

14 Testimonial evidence also supports the fact that the IEP team considered the
15 outside evaluations and other materials from outside sources available to the IEP team.
16 [Tr. II, 288:15-289:10, 290:15-291:21; III, 604:6-605:3, 608:2-10, 609:25-613:14, 618:3-619:24,
17 620:23-621:25, 624:14, 637:3-638:2, 638:10-25; and see Tr. IV, 718 -745, *passim* and see
18 734:15-735:1-24]

19 Parents attended all of the IEP meetings except the final meeting on June 8, 2016,
20 by which time the parents had already filed for a due process hearing. [Hearing officer's
21 decision, p. 1; P-26, 27, 29, 30; Tr. III, 642:13-25] It should be noted that by the time of the
22 2016 IEP, the attorneys for both parties were involved and attended some or parts of the
23 IEP team meetings. Again, there is no evidence that parents were precluded from
24 participation in the IEP meeting, to the contrary, the record supports that they did
25 participate when in attendance, and chose not to participate in the finalization of the
26
27
28

1 2016 IEP on June 8, 2016.²⁰

2 *The hearing decision and SRO conclusions*

3 As to the May 2014 IEP, the hearing officer concluded:

4 The IEP team failed to give due weight to evaluative information
5 provided by the Parents, specifically the testing results from the
6 Private School 1 and the Pettigru Assessments in the formation of
7 the May 27, 2014 IEP. See FOFs, Paragraphs 4-20....As the child had
8 not been in the District since Kindergarten, the [Pettigru]
9 Assessments were the most recent evaluations for the District to rely
upon, and yet they did not.

9 [HO Dec., p. 25]

10 The IEP team failed to consider the Parents (*sic*) input as members of
11 the IEP team regarding the needs as to the [Student] (*sic*) reading,
12 which was provided to the District via correspondence, parent
13 interviews, assessment checklists, evaluations and at IEP meetings
14 in May 2014. FOFs #4-20. The District had the Pettigru Assessments
15 from 2009; (*sic*) 2013...and yet the IEP that was developed does not
16 reflect the Parents concerns but [*sic*] including the Orton-Gillingham
Methodology or any specific research based methodology. In
accordance with 34 C.F.R. 300.324 (a)(1)(ii), the IEP Team was
required to consider the concerns of the parents for enhancing the
education of their child, but they did not.

16 [HO Dec., p. 26]

17 The hearing officer relied on her Finding of Facts (FOF) # 4-20 [HO Dec., pp.7-20]
18 to support her conclusion that outside evaluation(s) and other input was not considered
19 by the IEP team. She never did any analysis of how these FOFs affected her conclusion
20 that the IEP team did not consider these evaluations. It *appears*,²¹ *without any reference to*
21 *the District's MDT report (see, e.g., FOF # 19, 20) and no mention of all the same or similar*
22 *data provided in the MDT report), she had an expectation that simply because*
23 *something was recommended or stated in an independent evaluation it therefore had to*
24 *appear verbatim in the IEP. [See, e.g., FOF #4, 5, 6] With reference to FOF # 7, the hearing*
25 *officer failed to give any consideration to the components of the IEP accommodations*

26 _____
27 ²⁰ See fn 22.

28 ²¹ The SRO must here try to guess at what the hearing officer found as deficiencies in the IEP team's consideration of the evaluations, since she did no analysis of the 20 findings, only noting that the failure to include OG was fatal.

1 and modifications, including small class size allowing for adult supervision and using
2 written sequences or lists of activities and assignments to provide structure—all
3 addressing recommendations and comments from independent assessments and other
4 outside information. With reference to FOF # 8, it is clear that the IEP recognized the
5 Student’s weaknesses with idioms and figurative language and developed goals and
6 benchmarks to address these weaknesses.²² With respect to FOF #9, the IEP as noted
7 above included goals and short-term objectives to address Student’s social and
8 emotional needs. FOF #10, paragraph A demonstrates that the IEP team recognized a
9 Student need/ weakness and addressed it through the goals and short-term objectives.²³
10 Paragraph B of this finding is misleading in that the IEP called for a multimodal
11 approach to *all* instruction, and *did not exclude* reading. Paragraphs E and F of FOF #10
12 simply verify that the IEP team did hear parents concerns regarding OG, but disagreed.
13 Paragraph G simply supports the SRO’s findings that the IEP team did consider all
14 relevant information. FOF #11 again supports the SROs conclusion that outside
15 evaluations and information *were* considered by members of the IEP team, and the
16 hearing officer’s “finding” that the teacher failed to give them due weight is conclusory,
17 without any explanation of how the hearing officer made this determination. Similarly,
18 FOFs #12-17 generally support the SROs conclusion that all relevant information was
19 considered—as well as demonstrating that they disagreed with the parents’ desire to
20 specify OG in the IEP.

21 FOFs #15 and 18 demonstrate a misunderstanding by the hearing officer of the
22 types of additional information that the witnesses thought would be useful. As the
23 hearing officer did note, when a child first enters a district program, the team must rely
24 heavily on outside data. [HO Dec. p.9, FOF #12] While standard scores on achievement
25 tests and other diagnostic instruments are helpful, when a student has attended a district
26

27 ²² The “appropriateness” of the goal and short-term objectives will be discussed under the second-prong
of *Rowley*.

28 ²³ See fn 22.

1 program, data demonstrating progress, or lack thereof, on specific goals and objectives,
2 and other classroom record keeping on the student, are typically available and can
3 provide more precise information about the student's classroom functioning, providing
4 clearer baselines to formulate goals and objectives and educational needs than do
5 standardized scores. This more specific type of information was not included in the
6 Pettigru reports and the private school reports available were general in nature. That
7 these witnesses wanted more information of specific educational performance levels
8 does not damage their credibility, nor does it go to the question of whether they
9 considered the independent evaluations or other information.²⁴ [Tr.I, 120:25-121:13,
10 218:14-25; IV, 738:12-739:20]

11 The hearing officer's only *clearly stated reason* for determining that the District
12 violated the IDEA was that because OG or other specific methodology was not included
13 in the IEP it "does not reflect the Parents [sic] concerns."

14 This is not the law. A district is not required to include every parent
15 request/concern in an IEP. The law allows for disagreements. The law only requires that
16 outside evaluations be considered, and that parents be IEP team participants and
17 included in the deliberations. 34 C.F.R. §§300.321 (a)(1) and 300.322. The IEP team had
18 no obligation to adopt an evaluator's recommendations. *See, e.g., T.S. v. Board of Educ. of*
19 *the Town of Ridgefield*, 20 IDELR 889 (2d Cir 1993).

20 The documentary and testimonial evidence cited above overwhelmingly supports
21 the SRO's conclusion that District considered the independent evaluations submitted by
22 the parents in the development of the 2014 IEP. There was, therefore, no procedural
23 violation in developing the 2014 IEP that impeded the parents' ability to meaningfully

24 _____
25 ²⁴ See also Tr II, 273:4-21, 279:4-20 re the 2016 IEP, which demonstrates the types of performance
26 information that educators prefer to standard scores when developing IEPs. This testimony also indicates
27 why multidisciplinary teams are required, and that the IDEA does not require or expect any single
28 member of the IEP team to understand the significance of all reports, but to rely on the expertise of others.
A reading of the entire transcript suggests to this SRO that not only did parents' counsel pose questions to
District witnesses beyond their area of expertise, but that the hearing officer failed to understand the
varying roles of IEP team members and appeared to be misled by the cross-examination and statements of
the witnesses.

1 participate in the IEP.

2 As to the 2016 IEP, the hearing officer concluded:

3 The IEP team failed to give due weight to the credible evaluative
4 information and recommendations that were available to consider
5 in developing the 2016 IEP...FOFs 24, 35 (*sic*),²⁵ 30, 31 and 32....[T]he
6 IEP team was required to consider the results of the initial or most
7 recent evaluation of the child (*sic*) His Assessment was consistent
8 with the Pettigru Assessments of 2009 and 2013...therefore the
District failed to give due weight to the credible evaluative
information and recommendations regarding the Student's
educational needs....

9 [HO Dec., p. 28]

10 The hearing officer's FOF #24 quotes the District's policy with respect to
11 including instructional strategies and methodology in an IEP. It demonstrates that the
12 District's policy is compliant with existing law—that methodology may be required to
13 be specified in the IEP when the methodology is necessary to meet a student's unique
14 needs. FOF # 25 is a mischaracterization of the testimony. [Tr. I, 252:10-254:8, 291:22-
15 292:10, Tr. II, *passim*; Tr. III, 638:15-639:3, 678:14-685:18] A fair and *complete* reading of the
16 testimony indicates that the public members of the IEP team did not feel there was
17 sufficient evidence to support a conclusion that OG was the only methodology that
18 would meet the Student's needs.²⁶ [Tr. II, 306:2-307:20, 360:1-8, 430:3-433:25, 451:3-14]

19 The hearing officer's FOF #30 merely recites a portion of the evaluation report by
20
21

22 ²⁵ Here it appears that the hearing officer meant FOF #25.

23 ²⁶ There is only one witness who stated / implied that *she* would not put methodology in any IEP in spite of
24 a child's needs. Tr. II, 308:16-309:13. This is offset by her previous statement that it was a *team decision* to
25 include a multisensory approach rather than to specifically require OG. So, even assuming she was
26 misguided on District policy, her possible misperception was not controlling of the IEP team. In addition,
27 the SRO has reviewed her complete testimony *several* times, due to the hearing officer's finding that her
28 testimony with regard to OG was not credible. It is the SROs impression that this witness was subjected to
rigorous cross-examination by parents counsel—often leading, argumentative, repetitive and just plain
confusing questions—which appeared to confuse the witness. It also seemed to confuse the hearing
officer. For example, counsel for parents led the witness to state that she was testifying (partially) on
behalf of the entire IEP team. The hearing officer, ignoring other witness testimony that accurately reflects
District policy on methodology, seemed to have used this one witness-statement as a reflection of “pre-
determination” by the *entire* IEP team. This is not supported by the entire record.

1 Morris Group . The hearing officer failed to point out how this “finding” demonstrates
2 that the IEP team failed to consider this evaluation. As noted above, the IEP includes a
3 comprehensive section on Student’s educational needs. [J-8:21-34] Her attention deficits
4 are noted several times as are her oral and written language deficits and reading
5 deficiencies. That the *exact* Morris report language is not used is not evidence that the
6 IEP team did not consider it. FOF #31 also fails to support the hearing officer’s
7 conclusion that the IEP team did not consider the Morris Group evaluation report.
8 Again, the hearing officer ignores the portions of the IEP that meet the recommendation
9 for peer interaction, and *assumes* that the IEP services offered would be unsupervised
10 and unguided because an aide to accompany her to gym, music or art was not included
11 in the IEP. First, the SRO notes that the need for an aide was not raised by the
12 petitioners/ appellees as a hearing issue. More importantly, these classes are not
13 unsupervised, there is a teacher present, whose duty is to meet Student’s needs.

15 With respect to FOF # 32, that the IEP team refused to include the specific
16 methodology of OG and opted for “multisensory instruction” is not evidence that they
17 did not meet their requirement to *consider* the independent evaluation. The evidence is
18 simply that the public members of the IEP team disagreed with parents’ request for the
19 inclusion of OG, and maintained that a multisensory approach was sufficient to meet
20 Student’s needs.²⁷

22 As noted above for the 2014 IEP, the law only requires that an IEP team consider
23 the results of independent evaluations. The documentary and testimonial evidence cited
24 above overwhelmingly supports the SRO’s conclusion that District considered the

25
26 ²⁷ The “appropriateness” of the IEP, i.e., whether Student required OG methodology in order to meet her
27 unique needs and receive educational benefit, as well as the hearing officer’s rulings on other specifics of
28 the IEP that were not put at issue by petitioners/ appellees, will be discussed later under the second-prong
of *Rowley*. For purposes of compliance at this point the reader is reminded that we ask, under the first-
prong, whether the IEP team considered the evaluations and if they did *not*, did this preclude the parents’
participation.

1 independent evaluations submitted by the parents in the development of the 2016 IEP.

2 There was, therefore, no procedural violation in developing the 2016 IEP that impeded
3 the parents' ability to meaningfully participate in the development IEP.

4 The parents participated as team members [J-7:13] and discussions ensued. [J-1:7 and 13,
5 *and see* testimonial evidence cited above] There is no evidence that parents were not
6 active participants in the IEP team deliberations and did not have their voices heard.

7 Appellees argue:

8 In *R.L. v. Miami-Dade County School Board*, 63 IDELR 182 (11th Cir. 2014), the 11th
9 U.S. Circuit Court of Appeals held that parental participation in the IEP process
10 means more than having an opportunity to speak. The court explained that a
11 district must show that it came to the meeting with an open mind and was
12 "receptive and responsive" to the parents' position at all stages, rather than
13 cutting the conversation short when parents express their concerns.

14 [Appellees memorandum in support of HO decision, p.4]

15
16 The evidence supports that district met its burden. The testimony cited above
17 indicates that there were discussions during the IEP team meetings. In addition,
18 witnesses testified that they attempted to research OG in advance of the meetings and
19 that private school personnel were contacted and invited to participate in the meetings.
20 There was no evidence that the District members of the IEP team were not receptive or
21 responsive on the matter of OG. They simply *disagreed with the parent*, and the record is
22 clear that the District members *believed their staff and programs could meet the unique needs*
23 *of Student*.

24
25 A preponderance of the evidence means, in part, that evidence which is of greater
26 weight or more convincing *than the evidence which is offered in opposition to it*. Parents
27 chose not to testify at the hearing, and there is no evidence on the record that the District
28

1 IEP members were neither receptive nor responsive to parents' concerns or that they
2 relied on an unofficial policy of refusing to ever put OG in an IEP. *See, e.g., W.G. v. Board*
3 *of Trustees of Target Range School Dist. No.23*, 960 F.2d 1479 (9th Cir. 1992).

4 The SRO now turns to the second-prong of *Rowley* to determine if the IEPs offered
5 FAPE.

7 **C. Substantive FAPE**

8 **Whether the hearing officer erred when she concluded there was sufficient**
9 **evidence before the IEP teams of 2014 and 2016 to support the inclusion of OG**
10 **methodology programs in the IEP and the District predetermined not to include OG**
11 **methodologies.**²⁸

12 **Whether the hearing officer erred by allotting undue deference to the opinions**
13 **and recommendations of the neuropsychologist, which were [allegedly] provided**
14 **outside his field of expertise.**²⁹

15 With the exception of a few, most of the issues raised by petitioners/ appellees at
16 hearing related to the District's refusal to include OG or other similar methodology in
17 the IEP. Most of the hearing officer's rulings against the District are based on this refusal
18 [HO Dec. *passim*], the petitioners' / appellees' primary complaint was the District refusal
19 [Tr. I, 19:11-28:20], and a substantial portion of the hearing addressed this refusal [Tr.
20 *passim*]. Thus, the question here is whether the Student's needs *required* the naming of a
21 methodology like OG in the IEP to tailor the IEP to her needs and to confer educational
22 benefit.

23 *What are the individual needs of the Student?*

24 As discussed in detail above, Student has been thoroughly evaluated on two
25 occasions by the District MDT and has had three comprehensive independent

26 ²⁸ Section V, Issue No. 5

27 ²⁹ Section V, Issue No. 7. Since the deference given by the hearing officer to the neuropsychologist's
28 testimony goes to the substantive appropriateness of the IEP, including whether the record compels a
conclusion that the District erred by not providing OG methodology in the IEP, issue number 7 will be
included in this discussion and not as a separate issue.

1 evaluations between 2007 and 2015. There is no dispute that Student has a constellation
2 of disorders that affect learning, particularly, for purposes of this discussion, reading
3 and math. According to the Pettigru reports, due to Student's global processing
4 difficulties, Student "will respond best to programs that provided simultaneous,
5 multisensory instruction" that are "systematic and cumulative." [J-12:22, J-13:6] Under
6 "Recommendations," the Morris Group report advises that Student "will continue to
7 require intensive multimodal, research-based learning programs for reading and math."

8 The dispute is not over whether Student needs a multisensory approach to
9 instruction, but whether it must be OG or, as petitioners/appellees oft repeated, a
10 similar program.

11 *Were the IEPs tailored to meet the child's needs and reasonably calculated to confer*
12 *educational benefit?*

13
14 The 2014 and 2016 IEPs each requires the use of a multisensory approach to
15 teaching. [J-7:43, J-8:44] The 2016 IEP explicitly includes instruction that is systematic,
16 sequential and cumulative, and requires intensive, highly concentrated instruction,
17 methods and materials. [J-8:46, 47] On the face of these IEPs, they meet Student's need
18 for multisensory instruction recommended by the independent evaluations.

19 None of the independent evaluations specifically recommend OG as the required,
20 or only, methodology to meet Student's need.³⁰ Thus, we look to what the District knew
21 at the time of developing the IEPs. *See Adams, supra.*

22
23 When the 2013 Pettigru evaluation was conducted, which provided guidance to
24 the 2014 IEP team, student was attending Private School 1, was in fourth grade, and had
25 not received OG-based instruction. [J-13] Subsequently (though the record is not clear), it

26 ³⁰ The Morris Group evaluator merely noted, *based upon parent reporting* of Student's history, that "it was
27 initially indicated that [Student] could benefit from an Orton-based reading program" and that after
28 Private School 1 trained a teacher in the OG method, she received OG-based instruction via pullout
support, and, again, as reported by parent, her transition to the local program (Private School 1) was "very
successful." [J-15:1-2]

1 appears she received a “Slingerland Prep for Reading” during 5th grade (beginning in
2 October 2013) at Private School 3, which from the record is based on, part of, or similar
3 to the OG method; and—at least as reported by her attorney—Student may have
4 received OG in Private School 2 from May to October 2013, before transferring to Private
5 School 3. [P-15, P-16]

6 By the time the IEP team met in the spring of 2014, the public members of the
7 team were aware that Student was receiving Slingerland/OG methodologies at Private
8 School 3 for reading (Slingerland) and in an after-hours tutoring program for math (“OG
9 methodologies”). [P16] No pre- and post-data on the effects of this instruction were
10 available to the IEP team.³¹ Though the achievement testing performed by Pettigru
11 demonstrates very limited progress in the four years prior to Student being exposed to
12 these methodologies [Cf. J-12:12-3 and J-13:14-15], no data was provided by Private
13 Schools 2 or 3 demonstrating how Student was responding to any instructional
14 methodologies and whether her achievement levels were changing significantly from
15 the most recent Pettigru evaluation as a result of the methodologies.³² Staff from Private
16 School 3 did not attend the IEP meetings [P-13:7] nor was the District MDT able to
17 observe the Student in her *educational setting* due to her placement out of state.³³ The
18 information the IEP team had at the time of the 2014 IEP meeting, that Student had had
19 “success,” were statements from parents’ attorney and parents. [J-10, P16]
20
21

22 Thus, the SRO finds and concludes that, under the *Adams* snap-shot rule, *supra*, at

23
24 ³¹ See e.g., J-4:17, addressing the MDT’s assessment of Student for “eligibility” as a student with a Specific
25 Learning Disability under IDEA. The district uses the Response to Intervention Method (RTI) for
26 determining such eligibility in accordance with NAC 388.325, but noted that there was no documentation
27 that interventions were based upon scientific educational research or that the intervention was
28 implemented with integrity, and that no documentation meeting District standards was obtained from the
private school.

³² Note again the Pettigru evaluation was conducted when Student was still at Private School 1, before
attending the out-of-state private programs that offered some level of Slingerland/OG methodology. [J-
13:1]

³³ General observations of student were done during the MDT testing. [J-4, *passim*]

1 the time the 2014 IEP was developed the District neither knew, nor should have known,
2 that OG or similar methodology was required in order for the Student to receive
3 educational benefit. It was sufficient that they recognized her need for a multisensory
4 approach to instruction and included that in the IEP. A District is not required to
5 provide the best education, nor obligated to fulfill every parent desire. *Rowley, supra*;
6 *Gregory K., supra*.

7 With respect to the 2016 IEP, the record is similar to the events surrounding the
8 development of the 2014 IEP. In addition to the information noted above, the IEP team
9 now had the Morris Group evaluation, recommending an intensive multimodal
10 researched-based learning program for reading comprehension and math, without
11 reference to any *specific* methodology. [J-15:20] Student was now back at Private School
12 1, where one teacher had been trained in OG methodology, and Student was receiving
13 OG instruction on pull-out basis three times a week (presumably for reading), with an
14 undefined amount of multimodal teaching (VAKT), presumably in her other classroom
15 instruction. [J-16:3 and see J-16:2] While Private School 1's Modifications and
16 Accommodations Plan (MAP) states that Student responds "best" to the OG program,
17 the IEP team had no *specific data* from Private School 1 demonstrating how Student
18 responded to the methodology. Though Private School 1 personnel participated in two
19 of the 2016 IEP meetings, their participation was minimal. [Tr. III, 621:8-622:11]

20
21 The most recent achievement testing by Morris Group, conducted approximately
22 two-and-a half years after the last Pettigru achievement testing, demonstrates some
23 substantial gains, particularly in the areas of oral expression and reading fluency, but
24 she continued to function well-below expectations in math; and other areas (e.g.,
25 Listening Comprehension) seemed to reflect an expected growth of two years in grade-
26 level equivalent scores or other steady, but slow progress, leaving her still
27
28

1 underperforming for her age in some areas. [Cf. J-13:14-15 and J-15:12-13 *and see* Tr.
2 III:546:1-23]³⁴ The neuropsychologist from Morris Group, who performed the 2015
3 evaluation, testified at hearing regarding the noted progress:

4 [A]ll other things being equal, the major intervening component has
5 been...the instruction that she received in between. [Student has] been
6 receiving the Orton-based method. The logical assumption...controlling
7 the other variables is that she's one of those kids who's showing a clear
8 benefit from that instruction modality....

9 [T]his is the interesting part, that despite the underlying neurocognitive
10 findings...we now have a kid who's reading, decoding and spelling at age
11 appropriate levels, which is phenomenal, and you would never predict
12 that without there being some intervention. In my opinion it's really quite
13 remarkable.

14 [Tr. III, 546:1-547:23]

15 The hearing officer, in determining that the District should have included
16 methodology such as OG in the IEP, relied heavily on this statement by the
17 neuropsychologist. [See, e.g., HO Dec., FOF #38 J] The problems with this reliance are
18 several. First, his report, available to the IEP team, does not state that it his opinion that
19 her progress should be attributed to OG. Even assuming that the District should have
20 known his opinion, they did rely on his more general recommendation in the report
21 (and the prior Pettigru evaluations) to use a multisensory approach to instruction by
22 putting it in the IEP. Second, while the SRO does not doubt his educated speculation
23 that Student's progress was attributable to instructional intervention, he did not state
24 that OG was the *only* program that would benefit Student. Third, he does not recognize,
25 in his report or testimony, that Student had received math tutoring, purportedly using
26 "OG" methodologies and was not responding. Third, the neuropsychologist never
27 observed Student in Private School 1, he never received any pre- and post-test

28 ³⁴ Other than the neuropsychologist's testimony that test selection is simply a matter of the administrator's preference, there was no testimony as to the validity of a direct comparison of the two different achievement testing instruments used by Pettigru and Morris Group.

1 educational data demonstrating how she responded to various methodologies, including
2 OG, nor is it clear that he even knew what methodologies had been used by Private
3 School 1 during the four years when she appeared to make little progress, but rather
4 relied on parent's statements. [Vol. III, 555:19-557:11] Giving him his due and contrary to
5 the hearing officer's apparent application of his testimony, the neuropsychologist *never*
6 *stated* that OG was the one and only method that would meet Student's unique needs
7 and confer educational benefit. [See, e.g., Tr.III, 599:11-23] Rather he emphasized, in his
8 report and throughout his testimony, a multisensory researched-based program that
9 would be implemented systematically, sequentially and with fidelity.

10
11 Again, with respect to the 2016 IEP, the SRO finds and concludes that,
12 under the *Adams* snap-shot rule, *supra*, at the time the 2016 IEP was developed the
13 District neither knew, nor should have known, that OG or similar methodology was
14 required in order for the Student to receive educational benefit. It was sufficient that
15 they recognized her need for a multisensory approach to instruction and included that
16 in the IEP. A District is not required to provide the best education, nor obligated to fulfill
17 every parent desire. *Rowleys, supra; Gregory K., supra.*

18 The SRO concludes, with respect to both the 2014 and 2016 IEPs, that the
19 inclusion of a multisensory approach in the IEP was consistent with the evaluations and
20 other materials and information available to the IEP teams at the time of their
21 formulation and that no report or other information then available compelled them to
22 conclude that only OG would meet Student's needs and confer educational benefit. The
23 inclusion of a multisensory approach in both IEPs was reasonably calculated to confer
24 educational benefit.

25
26 ///

1 *Were the IEPs capable of implementation?*

2 Erroneously dismissing two witnesses offered by the district that may have shed
3 light on the district's ability to implement the IEP,³⁵ the hearing officer relied on the
4 speculation of the sole witness for appellee, the neuropsychologist from the Morris
5 Group, to assume that the district was offering a "mish-mash" rather than a coherent,
6 systematic and researched based program of instruction to meet the Student's unique
7 needs. [HO Dec. p. 23-24] The hearing officer also found that the neuropsychologist had
8 sufficient data to *recommend* the OG methodology for Student. The assumptions and
9 findings on this point were in error.

10 The neuropsychologist testified that the District's inclusion of a multisensory
11 approach in Student's IEP was appropriate. [Tr. III, 537:14-22] Admitting that he was
12 not an expert in developing IEPs [Tr. III, 538:9-11], he proceeded to testify essentially
13 that one would have to identify "what technique is going to be used so that the
14 instructors are all on board." He then was allowed to proceed to testify at length about
15 programs he had observed in unidentified schools, concluding that in some classes that
16 are "smooth and efficient" and the child knows the proper the responses "it's really
17 really neat to watch the interplay between a well-trained teacher and a classroom of kids
18 who know what is happening." He contrasted that with classrooms which were
19 sporadic and where teachers admitted to using a "little bit of this and a little of that,"
20 and stated that where there was a lack of consistency he didn't see the kids as engaged
21 in learning. [Tr. III, 537:11-544:8] He further testified that he had seen some teachers
22 using multisensory approaches that were not part of an identified program such as OG,
23 as he termed them, a "mishmash" of techniques. He stated that he would *not*
24 characterize such as *not* being a methodology, but concluded that the benefit to the child
25
26
27

28 ³⁵ Corrected by the SRO by taking additional testimony on review, see Procedural Background, above.

1 goes back to “consistency.”³⁶ He concluded that learning would be effective when there
2 is repetition and consistency and frequency. [Tr. III, 549:19-551:11] He also stressed
3 fidelity to a program stating that programs such as Lindamood Bell and OG have an
4 underlying philosophy and have been “honed and strengthened” over the years, so one
5 “doesn’t have to go out and create a program, they exist.” [Tr.III, 551:12-13, 557:22-
6 561:24] He was then permitted to suggest, over the objection of District’s counsel, that
7 the District’s IEP calling for a multisensory approach means that there is no unifying
8 theory of methodology and therefore lacks the important components of fidelity and
9 consistency. [Tr. III, 569:4-571:19.

10 Ignoring the cumulative and consistent testimony from District witnesses that
11 teachers should be permitted to select the specific methodology to follow in
12 implementing the multisensory approach called for in the IEP, and based *solely* on
13 neuropsychologist’s speculative testimony above, the hearing officer seems to have
14 simply assumed that the programs selected by the teachers would just be a mishmash of
15 techniques and implemented without fidelity or consistency to any underlying
16 philosophy. This was not a proper assumption. The neuropsychologist was not familiar
17 with programs available in the District [Tr. III, 554:24-555:9]. His expertise does not
18 extend to the selection of educational materials. He is not an educator and does not
19 implement instructional programs. [Tr. III, p. 582:3-17] His observations of other
20 programs in other schools were no evidence of District’s inability to implement the IEP.
21 The hearing officer erred by giving his testimony undue weight over the District
22 witnesses.
23
24

25 Even assuming that the neuropsychologist did recommend the use of OG and
26 was qualified as an expert in educational materials,³⁷ contrary to the hearing officer’s

27 _____
28 ³⁶ There is no evidence that any of these observations were in District classrooms or anywhere in Nevada.

³⁷ On a few occasions he distanced himself from recommending a specific program. [Tr. III_]The essence

1 conclusion he did not have definitive or sufficient data to recommend that OG was the
2 *only* program that would meet Student’s needs. Nor did he do so. He was under the
3 assumption that she was receiving OG math instruction, yet she was making little
4 progress in math. While he attributed her reading progress to good instruction, and
5 mentioned that she was receiving OG for reading, he never observed her in her Private
6 School 1 program receiving such instruction [Tr. III, 554:3-5], nor did he receive any
7 specific pre- or post-test data regarding the implementation of that OG program. [Tr. III,
8 555:19-557:11] Again, giving him his due, he was careful in his attribution of progress to
9 clarify that this was a “logical assumption,” and that it would not be expected without
10 “*some* intervention.” [Emphasis added, see Tr. III, 546:1-547:23, quoted above]

11
12 One District witnesses testified before the SRO, during the taking of additional
13 testimony, regarding reading and math programs that *could* have been used to
14 implement the 2014 IEP.³⁸ They are “methodologies,” i.e., they have a “philosophy” of
15 instruction and particular skills they are designed to target. Neither excludes the use of
16 multisensory instruction. [SRO Tr. I, 10-68] Contrary to the neuropsychologist’s
17 testimony that a component of one of the programs would have her working alone
18 during two-thirds of the program (again, merely assumption on his part), the evidence is
19 otherwise. The witness testified that the staffing in the classroom would allow for direct
20 adult supervision when Student was engaged, e.g., in the computer components of the
21 program. SRO Tr. I, 57:11-58:11] This witness also demonstrated how District programs
22 are built on systematic instruction, building sequentially on skills, and implemented
23 with fidelity. [SRO Tr. I, 17:1-18, 51:7-14, *passim*]

24
25 _____
26 of his testimony was that whatever program, Student requires implementation with consistency and
27 fidelity.

28 ³⁸ Appellees’ counsel asserts that the two witnesses testifying before the SRO contradicted one another on
programs within the District that would be appropriate. This is inaccurate. The first witness testified as to
programs that would be appropriate during the 2014-15 school year. Having reviewed the subsequent
Morris Group report and noting Student’s progress in reading, the second witness testified that for the
2016-17 school year, other programs would be more appropriate.

1 The second witness testifying before the SRO during the taking of additional
2 testimony, Director of Professional Development, is a highly qualified educator [SRO Tr.
3 I, 71:3-79:7]³⁹ Her testimony was persuasive that the District is capable of, and has the
4 methodology for, addressing Student's needs. Her testimony was persuasive, as an
5 experienced educator, that Student had surpassed the skill-focus of the OG program and
6 that other programs and materials would better meet her current needs. Her testimony
7 was consistent with testimony from other witnesses throughout the hearing that
8 multisensory teaching is good teaching and not within the sole purview of OG. Her
9 testimony was also persuasive that based on simply the reading scores available to her,
10 she could not definitively attribute Student's reading progress to OG. [SRO Tr. I, 79:5-
11 128:19]
12

13 Curiously absent from the record is any adequate testimony as to what OG is or
14 what might even make it unique. Neither the parents who were advocating for its use,
15 nor the Private School 1 teacher who was allegedly trained in the procedure testified
16 about the program. The neuropsychologist made only general statements about OG,
17 mostly pointing out that it is a program with a philosophy that must be implemented
18 with fidelity. What we can glean from the records is that it is a packaged commercial
19 program, based upon a multisensory approach with sequential materials and activities
20 for the teacher and student to use. [Tr. and SRO TR., *passim*] The evidence establishes
21 that District has programs that could meet Student's educational needs,⁴⁰ and there is no
22 evidence that these programs would not be implemented consistently, sequentially, and
23

24
25 ³⁹ In addition to not be allowed to testify and rebut the assumptions made by the neuropsychologist about
26 what type of programs District might provide, the hearing officer would not qualify this witness as an
27 "expert." Her testimony and background, however, demonstrates her expertise in: educational
28 methodology and programs, the research base for such methodologies and programs, teacher training,
and implementation of IEPs as well as the skills necessary to implement IEPs. [SRO Tr.I, 71-128:9]

⁴⁰ The Director of Professional Development, qualified to testify about educational programs, who had reviewed Student's evaluations, indicated that at this time, OG addressed skills other than those needed by Student. [SRO Tr. I, 115:7-116:1, 118:5-119:1]

1 with fidelity.⁴¹ District was not required to prove that OG was inappropriate. Its burden
2 was to prove that it offered FAPE. As noted above, a preponderance of the evidence
3 assumes that there is evidence offered in opposition. Appellees chose not to introduce
4 any credible evidence as to what OG is, let alone why they believe it is the only program
5 that would meet Student's need.⁴² The District met its burden. See, e.g., *Roland M. v.*
6 *Concord Sch. Comm.*, 910 F.2d 983, 998 (1st Cir. 1990).

7 The law is clear. A district is not required to identify a specific methodology in an
8 IEP unless it is necessary in order for a child to receive FAPE. *J.L and M.L. v Mercer*
9 *Island*, 575 F.3d 1025 (9th Cir. 2009), *see also* Fed. Reg. Vol. 71, No. 156, August 14, 2006,
10 p.46665. There is no evidence that OG is the one and only program that would allow
11 Student to benefit from her education, nor is there credible evidence that District does
12 *not* have programs that could meet her needs. And, importantly, as previously noted in
13 this decision, a district is not required to guarantee success.
14

15 As previously found, above, the District carefully considered the evaluations and
16 other information available to them in developing the IEP and recognized in the IEP
17 Student's need for a multisensory approach. They simply did not agree with the parent
18 that OG or any other specific methodology needed to be included in the IEP. Both
19 procedurally and substantively, District met the requirements of FAPE.
20

21 *Other FAPE issues*

22 Appellant did not specifically address, in its memorandum in opposing the
23 hearing officer's decision, the goals, benchmarks or short-term objectives that the
24

25 ⁴¹ The neuropsychologist's rebuttal testimony before this SRO that one District program would leave the
26 Student without the needed supervision was again speculation or assumption on his part. Student would
27 be receiving the instruction in her special education class where the student-teacher ratio is small and an
28 aide is present. There was no evidence that Student would be left alone during the computer portions of
the instruction.

⁴² While appellees argued from time to time throughout the hearing procedures that they were not
requesting OG but would accept other similar programs, a careful reading of the entire record suggests
otherwise.

1 hearing officer also found contributed to her ruling that the District failed to offer FAPE.
2 [SRO Exhibits] In order to render a complete and final decision, the SRO must do so,
3 under the authority of NAC 388.315 paragraphs a, b and f.

4 In her decision, the hearing officer stated:

5 [I]n the course of the hearing it became clear that a distinction had to be
6 drawn as to “measurable goals and objectives.” It was not the
7 “measurability” of the goals and objectives but the *appropriateness* of goals
8 and objectives that were the issues.”

9 [Emphasis added, HO Dec., p. 28]

10 Petitioners’ / Appellees’ original complaint does not address the appropriateness
11 of any specific goal, objective or benchmark. The most specific issues raised in the
12 original complaint addressed the District’s consideration of the independent
13 assessments and failure to include a reading methodology. [HO Exhibit 1] During the
14 pre-hearing conferences the issues were clarified and the measurability of the goals was
15 specified as an issue. At a pre-hearing conference the hearing officer ordered the
16 clarification of which specific goals, objectives or benchmarks were being challenged as
17 to their “measurability.” [HO Exhibits 20 and 21] Although it may have become clear to
18 the hearing officer “in the course of the hearing” that petitioners/appellees were
19 challenging the appropriateness of some of the goals, objectives or benchmarks, the
20 transcript does not include any discussion or statement by the hearing officer indicating
21 to the parties that she would be deciding the appropriateness of any goals, short-term
22 objectives or benchmarks—or which goals, objectives or benchmarks were being called
23 into question. A review of the record indicates that District’s counsel proceeded on the
24 assumption that “measurability” was at issue. [Tr. I, 88:8-91:4, 230:16-232:1; II, 405:7-20]

25
26 Amendments to IDEA regulations made in 2006 added significant due process
27 *notice* requirements, requiring the party requesting a hearing to provide “a description of
28

1 the nature of the problem...relating to the proposal or refusal...including facts relating
2 to the problem.” The filing party may only amend the complaint with the written
3 consent of the other party, or if the hearing officer grants permission no later than five
4 days before the hearing commences. The regulations specifically prohibit the party
5 requesting the hearing from raising issues *at* the due process hearing that were not
6 raised in the complaint, without the consent of the other party. 34 C.F.R. §§300.508 (b)
7 and (d)(3) and 300.511(d). Comments to the regulations indicate that unrepresented
8 parents filing are held to the same standards of sufficiency of the notice as attorneys
9 filing on their behalf. Fed. Reg. Vol. 71, No. 156, August 14, 2006, 46698-46699.⁴³

10 The hearing officer never decided the presented issue of whether the goals were
11 measurable. Instead, as to the 2014 IEP, she found that three benchmarks or short-term
12 objectives relating to reading comprehension were substantively inappropriate, resulting
13 in a denial of FAPE. [HO Dec., FOF # 10, and pp. 28-29] While a very creative and broad
14 reading of the 2014 IEP issues might have provided the hearing officer the authority to
15 address these reading benchmarks or short-term objectives,⁴⁴ the hearing officer
16 admitted in her decision that she only realized during the hearing that
17 petitioners/appellees were challenging specific goals and short-term objectives.

18
19 Regarding the 2016 IEP, the hearing officer addressed the appropriateness of
20 several goals, short-term objectives or benchmarks in the areas of language and social
21 skills. [Hearing Decision, FOFs Nos. 38-D,E, F, G, and pp. 23, 28-29] Again, while a very
22 creative and broad reading of the 2016 IEP issues might have provided the hearing
23 officer the authority to address the language and social goals, short-term objectives or
24

25
26 _____
27 ⁴³ In this case, parent filed the original complaint herself, but her counsel had been involved during the
28 2016 IEP deliberations and was put on notice by District counsel of the requirements for practicing law in
Nevada. [D-5:1-4]

⁴⁴ The issues raised by petitioners/appellees with respect to the 2014 IEP were limited to reading. Hearing
decision, pp. 1-2, see paragraphs 1 (A) and (C)(a) (*sic*) and page 28.

1 benchmarks,⁴⁵ the hearing officer admitted in her decision that she only realized during
2 the hearing that petitioners/appellees were challenging specific goals and short-term
3 objectives.

4 The IDEA regulations are quite clear: a party may not raise new issues at hearing
5 without the consent of the other party. There is no comparable IDEA rule to the Federal
6 Rule of Civil Procedure that would permit such issues to be heard over the objection of a
7 party or if there is “implied” consent. Fed. Rule Civ. P. 15. Notice and the opportunity to
8 be heard are fundamental to due process. The District was denied due process on these
9 FAPE issues by the hearing officer’s after-the-fact determination that the
10 appropriateness, not measurability, of the goals, short-term objectives or benchmarks
11 was at issue.

12
13 Even assuming that the hearing officer had the authority to decide the
14 appropriateness of these goals, short-term objectives or benchmarks, she erred in her
15 determinations.

16 With respect to the 2014 IEP, the hearing found that three benchmarks or short-
17 term objectives “require” Student to: (1) be able to fill-in the correct word to complete a
18 sentence after reading a short passage, (2) answer True/False questions about the text
19 Student has read, and (3) answer questions about the text Student has read. She found
20 them inappropriate because “all three are contrary to Pettigru recommendations. [HO
21 Dec., pp. 8-9] ⁴⁶ There are no contrary recommendations in the Pettigru report. Indeed, a
22 careful reading of the report would indicate that Student has weaknesses with reading
23 comprehension. But this is exactly what an IEP is supposed to do—address a student’s
24 needs or weaknesses. The IEP does not “require” Student to do these things without

26 ⁴⁵ The issues raised by petitioners/appellees with respect to the 2016 IEP included whether the IEP
27 addressed Student’s social needs by providing smaller class size and access to age appropriate peers, her
28 visumotor needs and social pragmatic language skills and core language functioning. Hearing Decision,
p.2.

⁴⁶ The hearing officer cites to the incorrect page of the Pettigru report.

1 instruction. The goals are directing classroom staff to *teach* her these things. These
2 benchmarks are appropriate.

3 With respect to the 2016 IEP, the hearing officer found that four short-term
4 objectives or benchmarks addressing the use of figurative language (idioms, proverbs,
5 contextual cues) and ambiguous language to be contrary to the Pettigru and Morris
6 Group evaluations. As early as the *first District* MDT evaluation in 2009, Student's use of
7 figurative language was noted as a deficiency and continued to be in the subsequent
8 independent evaluations. The hearing officer quoted the neuropsychologist as stating
9 that Student cannot "learn vis-à-vis idioms." Assuming this is what he said, he did not
10 say that she could not or should not be *taught* to understand idioms or other ambiguous
11 language when she encounters it. He stated that these deficiencies significantly impact
12 the Student's learning and that she is very vulnerable to missing communication and
13 that is a significant concern for her interaction with teachers and her age peers. [Tr. III,
14 522:12-21, and see 579:22-16] Again, Student is not being required or expected to "learn
15 through" the use of ambiguous language, she is being *taught* to use it. Clearly, the IEP
16 appropriately addresses a significant area of need and is appropriate.
17

18 Addressing three of the 2016 social skills benchmarks designed to teach Student
19 to join in ongoing games and activities and small group discussion, the hearing officer
20 found these to be inappropriate based solely on the neuropsychologist's testimony that
21 Student's interactions should be supervised, and the hearing officer's *erroneous*
22 interpretation of the evidence that simply because there would be no aide in middle
23 school (in general education where these goals might be implemented) she would not be
24 supervised and guided.⁴⁷ The neuropsychologist only stated that there needs to be "good
25 supervision of interactions even in those special classes [i.e., general education for PE,
26

27 _____
28 ⁴⁷ It should also be noted that these benchmarks were to be implemented both by the general education
teacher and the special education teacher, the latter of which has additional staff.

1 art and music].” [Tr. Vol. III, 577:20-580:25] The assumption by the hearing officer that
2 Student could not receive good supervision from the available classroom staff was just
3 that, an assumption, based on no evidence.⁴⁸ The goal, short-term objectives or
4 benchmarks are appropriate.

5 Finally, the hearing officer found the two benchmarks in the 2016 IEP designed to
6 teach student to initiate tasks in small and large group settings with “visual supports” to
7 be inappropriate based upon her interpretation of the neuropsychologists testimony that
8 Student cannot learn with visual cues.⁴⁹ What the neuropsychologist stated was that
9 *Student will not be able to escape the visual world* and that visual needs to be paired with
10 explicit verbal instruction. [Tr. III, p. 576:7-16] Obviously, learning how to deal with the
11 visual world is a critical unique need of this Student. Here again, the hearing officer
12 seems to confuse goals, short-term objectives and benchmarks with the instruction that
13 will take place to achieve those goals. Student is not being expected to simply use visual
14 cues, they are part of the benchmark and she will be taught to use them. The
15 benchmarks are appropriate.⁵⁰

17 The hearing officer’s findings and conclusions on these goals, short-term
18 objectives or benchmarks were based solely on the testimony of the neuropsychologist,
19 and in most cases, very selective parts of his testimony, often misinterpreted by the
20

21 ⁴⁸ Most troublesome to this SRO is that the end result of the hearing officer’s ruling was that Student
22 needed a one-on-one aide. This was never clarified as an issue for hearing and her conclusion was not only
23 in error but a serious over-reach of her authority.

24 ⁴⁹ In her decision, the hearing officer incorrectly cites the benchmarks as numbers two and three on p.40 of
25 J-8. In fact, the benchmarks she objected to were three and four on that page of the exhibit.

26 ⁵⁰ Based on this line of testimony from the neuropsychologist, the hearing officer also finds fault with the
27 District for including the use of visual materials such as charts and graphs as accommodations in the IEP.
28 While it appears that she used this finding to determine that the District did not consider the results of the
evaluations and thereby this affected the substantive appropriateness of the IEP, the SRO disagrees with
her apparent conclusion. The use of such materials was recommended in the Pettigru evaluation; and
Private School 1, which the hearing officer also accused the District of ignoring, also included such
materials as appropriate accommodations in its MAP. All the evidence at the time the IEPs were written
supported that such materials were appropriate, and the neuropsychologist’s after-the-fact testimony at
hearing, a witness who had never observed Student using these materials in Private School I, does not
persuade this SRO that the District erred.

1 hearing officer. Where the neuropsychologist was led into responding that a particular
2 short-term objective was inappropriate, his opinions appeared to be based on the same
3 misconceptions as the hearing officer regarding the purpose of such short-term
4 objectives in the IEP, that goals, short-term objectives and benchmarks somehow require
5 a student to perform without instruction. His apparent assumption that Student would
6 not get good supervision while implementing her social goals, or his apparent
7 assumption that Student would be expected to use visual cues without being taught
8 through appropriate interventions by the teacher to do so, were just that—assumptions
9 and not reliable testimony as to the inappropriateness of the IEP. He was not a qualified
10 expert in the legal contents of an IEP, nor was he qualified as an expert in the
11 development or implementation of IEPs. The hearing officer erred by placing undue
12 emphasis on her interpretations of his testimony in coming to her conclusions that the
13 IEP was inappropriate.
14

15 *Summary of SRO substantive FAPE findings and conclusions*

16 No district can guarantee that an IEP will be successful. *Rowley*, 458 U.S. at 192;
17 *Board of Educ. v. Steven L.*, 898 F.Supp. 1252, 1261 (N.D. Ill. 1995), *vacated as moot*, 89 F.3d
18 464 (7th Cir. 1996), *cert. denied*, 520 U.S. 1198 (1997). The fact that another plan might
19 work as well or even better does not mean that District has failed to provide Student a
20 FAPE. It need only develop “a plan of instruction under which educational progress is
21 likely.” *Polk v. Central Susquehanna Intermediate Unit*, 853 F.2d 171, 183 (3d Cir. 1988).
22 District has done what is required by providing personalized instruction with sufficient
23 support services to permit Student to benefit educationally from that instruction. *Rowley*,
24 458 U.S. at 203.
25

26 The SRO finds that District met its burden to establish that its IEPs were
27 appropriate.
28

1 **D. Hearing Officer Evidentiary and Other Errors**

2 The hearing officer’s errors have been discussed under the previous issues, but
3 are summarized under the following two issues to address appellant’s claims.

4 **Whether the hearing officer erred in rendering her evidentiary and**
5 **admissibility determinations thereby violating the District’s due process rights under**
6 **the IDEA and NAC.**⁵¹

7 As noted in Section I, Procedural Background, the hearing office erred by
8 excluding the testimony of two District witnesses. The hearing officer permitted
9 appellees’ sole witness to testify outside of his expertise as to his assumptions about the
10 ability of the District to implement the IEP as written, and his misconceptions about the
11 purpose of the IEP components and how goals, short-term objectives or benchmarks
12 would be implemented—yet excluded District’s proffered testimony to counter his
13 assumptions and misconceptions. The SRO corrected this to some extent by the taking of
14 additional testimony. However, the SRO is concerned that not only did the hearing
15 officer permit this witness to testify outside of his area of expertise, but that she relied
16 almost exclusively on his testimony in rendering her conclusions as to the
17 appropriateness of the IEP. She expanded the issues beyond those which were clearly
18 noticed in the original complaint and required proof from the District—but not allowing
19 that proof—beyond that which legal precedent would require to prove that the District
20 offered FAPE.⁵²
21
22
23

24 _____
25 ⁵¹ Section V, Issue No. 4

26 ⁵² For example, the ability of the District to implement a multidisciplinary approach with consistency,
27 sequentially and fidelity should never have been at issue (and was not raised as an issue), and should not
28 have been heard during these proceedings. The Student had not been in a District program so there was
no evidence that District had failed in the past, and speculating that it would fail in the future was beyond
the authority of the hearing officer. A District is only required to prove that its IEP is based on the child’s
needs, contains appropriate goals, instruction and services to meet those needs and is *reasonably calculated*
to confer educational benefit.

1 **Whether the hearing officer erred by failing to render a decision that is**
2 **thorough and careful.**

3 **a. Whether the hearing officer failed to consider the**
4 **preponderance of the evidence supporting District’s case.**

5 **b. Whether the hearing officer erred by failing to analyze the**
6 **applicable legal precedent.⁵³**

7 The hearing officer made several errors in applying the burden of proof and
8 applying legal precedent, and was not thorough and careful.

9 In determining that the District had failed to consider the results of the
10 independent evaluations or other information available to them from outside sources,
11 she failed to even note the District’s comprehensive MDT reports and note their
12 similarity to the independent evaluations. She did not analyze or refer to the translations
13 of these assessments into the Present Levels of Academic Achievement and Functional
14 Performance sections of the IEP, or note or understand how these translated into goals,
15 objectives, services and/or modifications and accommodations. Rather, sometimes
16 without even noting what was missing, she found that they didn’t contain *all* of the
17 recommendations of the independent evaluation reports. She erroneously concluded
18 that District did not take note of Private School 1’s MAP, when a careful comparison of
19 the MAP and District’s IEP indicates that many of the accommodations and
20 modifications were identical to those of the MAP. The law does not require a district to
21 include every word or recommendation of independent evaluations or other outside
22 materials. The law requires that the IEP team identify a student’s unique needs and
23 provide goals, objectives, services and accommodations to meet those needs.

24 As to the parent’s participation in the IEP meetings, she failed to note that they
25 got the required notices both before and after the IEP meetings, they attended the IEP
26 meetings—sometimes with counsel—and that their desires with respect to OG were
27 heard. The fact that the district disagreed with parent is simply no evidence—and a

28 ⁵³ Section V, Issue No. 3

1 misapplication of the law—that parents were denied meaningful participation in the
2 development of the IEP meeting.

3 Her conclusions that the IEP was substantively inappropriate were based
4 exclusively on the opinions of the neuropsychologist’s testimony based upon his
5 assumptions and speculation. She ignored or misunderstood the testimony of the
6 District witnesses, who were not only qualified educators, but who had substantial
7 experience with the development and implementation of IEPs.

8 Her credibility findings against District staff were conclusory, without
9 explanation, or misguided. For example, she found one witness not credible because she
10 testified that she did not know where the Student was attending school when the
11 referral came in, though on cross-examination it was pointed out that at the time of the
12 referral she had the independent evaluation stating *where Student was attending school at*
13 *the time of the evaluation*. What the hearing officer failed to consider was that there was a
14 considerable *gap in time between when the evaluation was conducted and when it was given to*
15 *the District*. The witness was not wrong in *not* relying on the evaluation in determining
16 where the child was attending school at the time she received the report. [Tr.III,
17 647:2-648:3]
18

19 The hearing officer also ignored the burden of proof when determining that the
20 private school was appropriate. In order to award tuition reimbursement for unilateral
21 private placements, a hearing officer must find, *inter alia*, that the school district did not
22 offer / provide FAPE and that the private placement is appropriate under the Act. 20
23 U.S.C. § 1415(f)(E)(ii); *Burlington School Committee of the Town of Burlington v. Department*
24 *of Education*, 105 S. Ct 1996 (1985); *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009). A
25 district is not required to prove that the private school was inappropriate. Rather the
26 parents seeking reimbursement must offer evidence to establish that the private school is
27
28

1 appropriate. Without any analysis the hearing officer merely concluded that the private
2 school was appropriate based upon the MAP from Private School 1 that was entered into
3 evidence. The MAP is much less comprehensive than the District's IEP and is subject to
4 the same concerns that the hearing officer had with the District's IEP, e.g., it includes the
5 use of visual aids. No private school personnel testified. Parents did not testify. There is
6 no evidence that the MAP was implemented, and certainly no evidence that it was
7 implemented with consistency, sequentially or with fidelity, which the hearing officer
8 found so important in determining that District did not offer FAPE. While there is
9 evidence that Student made reading gains during her attendance at Private School 1, her
10 math scores remained deficient, and as District's witness testified, children make
11 progress for many reasons. The hearing officer erred in determining that the private
12 school was appropriate by implicitly requiring no proof from appellees that this was so.

13
14 An SRO, like the courts, must give deference to a hearing officer's findings when
15 they are thorough and careful. *Capistrano, supra*. Having reviewed the entire record,
16 compared the testimonial evidence to the documentary evidence, and struggled with the
17 hearing officer's decision, the SRO concludes that the hearing officer was neither
18 thorough nor careful, and that her decision does not require deference by this SRO.

19
20 **Whether the hearing officer erred in awarding appellees reimbursement for private**
21 **school transportation.**⁵⁴

22 Because the SRO has overturned the decision, she does not reach this issue.

23 ///

24 ///

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⁵⁴ Section V, Issue No. 8

1 (Appeal Issues 1 and 2)

2 2. District considered the results of the independent evaluations and other
3 information in developing the 2014 and 2016 IEPs. (Appeal Issue 6)

4 3. Parent's were not denied meaningful participation in the development of the
5 2014 or 2016 IEPs. (Appeal Issues 5 and 6)

6 4. The District's 2014 and 2016 IEPs were designed to meet Student's unique
7 needs and reasonably calculated to confer educational benefit and were not
8 predetermined. (Appeal Issues 5, 7)

9 5. The hearing officer erred in some evidentiary and admissibility determinations
10 thereby violating the District's due process rights under the IDEA and NAC. (Appeal
11 Issue 4)

12 6. The hearing officer failed to consider a preponderance of the evidence and to
13 properly apply legal precedent, rendering a decision that was neither thorough nor
14 careful. (Appeal Issue 3)

15
16
17 Except with respect to the motions to dismiss, the decision of the hearing officer is
18 hereby overturned and appellees are denied all reimbursement for the private school
19 placements.

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21 It is so ordered.

22
23 Date: March 8, 2017

24 
25 Joyce O. Eckrem, State Review Officer

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27 **NOTICE OF APPEAL RIGHTS**

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NOTICE OF APPEAL RIGHTS

The decision of the review officer is final unless a party appeals the decision. A party may appeal from the decision of the review officer by initiating a civil action in a court of competent jurisdiction within 90 days after receipt of the decision. NAC 388.315. In this case, the date for appeal of the review officer’s interim order to take additional evidence will also be counted from the date of receipt of the final decision herein.