

**STATE OF NEVADA DEPARTMENT OF EDUCATION**

**DUE PROCESS REVIEW**

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In the matter of

STUDENT by and through  
his parent, PARENT<sup>1</sup>

Petitioner-Appellant,

Lyn Beekman, State Review Officer

v.

CLARK COUNTY SCHOOL DISTRICT,

Respondent-Appellee.

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**STATE REVIEW OFFICER DECISION**

**I. PROCEDURAL BACKGROUND**

Student is now 9 years old. He is eligible for special education programs and related services under the category of emotional disturbance in accordance with the provisions of the Individuals with Disabilities Education Act (IDEA), the Nevada Revised Statute (NRS), Chapter 388, and their respective regulations. (HO-1 at 8.)<sup>2</sup>

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

<sup>2</sup> The record in this matter includes a transcript of the hearing held on October 23, 24 and 25, 2017, references to which will be “T” followed by the page number. In addition, the record contains two types of exhibits. First, the exhibits of the Hearing Officer, which will be referred

By a letter dated March 20, 2017, to the Superintendent of the District, the Student, by and through Parent (hereinafter referred to as “Petitioner”), requested this hearing. (HO-C.) After the first Hearing Officer appointed by the Nevada Department of Education (NDE) to serve as the impartial due process hearing officer resigned, Elizabeth S. Ashley was appointed. (HO-B.) Thereafter, an amended request for hearing was filed on April 17, 2017. (HO-D.) In her Final Prehearing Report and Order dated October 11, 2017, Hearing Officer Ashley certified the following issues to be determined by hearing:

1. Whether the District failed to implement the 1/13/17 and 3/13/17 IEPs [individualized educational programs] by failing to provide the Student with a one to one aide in classes and on the bus; and,
2. Whether the District failed to provide the appropriate placement for the Student in the least restrictive environment in a self-contained classroom, with resources, as opposed to a special school. (HO-L.)

A hearing was conducted on October 23, 24, and 25, 2017. On December 1, 2017, the Hearing Officer rendered her Decision and found –

that the provisions of the student’s January 13, 2017 and March 13, 2017 IEPs were implemented by the District. However, the student was not available to benefit educationally from the services provided to him due to

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to as “HO” followed by the exhibit letter. Inasmuch as there were two hearing officers below, documents in the record of the first hearing officer are all a part of HO-A which has a numbered index of documents. References to this portion of the record below will be “HO-A” followed by designated number in the index. Second, the exhibits of this State Review Officer (SRO), which are hereby admitted shall be referred to as “SRO” followed by the exhibit number.

his overriding severe emotional and behavioral challenge.... Even with close supervision, and extensive and increasing supports and modifications, due to the student's unpredictable and violent behavior, he cannot receive FAPE [free appropriate public education] on a comprehensive campus, even in a self-contained class with resource support, such as the SEC [Severely Emotionally Challenged] program. Therefore, a special school designed to address the student's unique needs is appropriate, and the LRE [least restrictive environment] for the student.

(HO-U at p.14.)

By a letter dated December 27, 2017, Petitioner requested this appeal pursuant to the provisions of the Nevada Administrative Code (NAC § 388.315).

(SRO-1.) On January 18, 2018, the Nevada Superintendent of Public Instruction

appointed this State Review Officer. (SRO-2.) On January 25, 2018, this SRO

held a telephone conference call with the parties, which was recorded. (SRO-11.)

During the call, among other things, some grounds for appeal were clarified and

the parties were directed to address certain issues in their written arguments. The

parties also opted to jointly request an extension of the 30-day deadline for

decision until February 18, 2018, to allow them time to submit written arguments

by February 8, 2018, and this SRO time to review the arguments and render a

decision. Good cause being found, the request was granted. (SRO-10,11.) Both

parties submitted written arguments. (SRO-15, 17.)

## **II. PROCEDURE AND STANDARD OF REVIEW**

Pursuant to NAC § 388.315, this SRO must ensure that the procedures of the hearing below were consistent with the requirements of due process. The

Petitioner on appeal challenged the process below based on her inability to secure an attorney and an alleged evidentiary ruling of Hearing Officer Ashley, both of which will be addressed below. (SRO-1.) This SRO did not find any other procedures or rulings as being inconsistent with the requirements of due process after review of the record.

With respect to the standard of review, under both IDEA and NAC, this SRO is required to make an “independent decision” reviewing the entire record of the hearing below. (34 C.F.R. § 300.514(b)(2)(v); NAC § 388.315(f).) This SRO has done so here.

This SRO finds persuasive the reasoning and approach of the Third Circuit in *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 22 IDELR 13 (3d Cir. 1995). The Court noted that in two-tier systems under IDEA, the SRO must exercise “plenary review” to make the “independent decision” IDEA requires. However, in doing so, it held a SRO should defer to a hearing officer’s findings based on credibility judgments, unless the non-testimonial, intrinsic evidence in the record will justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. Accordingly, this is the standard of review that this SRO will use in rendering this decision.<sup>3</sup>

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<sup>3</sup> See also *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 103 LRP 33278 (9th Cir. 2001) (impliedly approving the Third Circuit’s approach in *Carlisle*).

### III. ISSUES<sup>4</sup>

Did the hearing officer err in –

1. proceeding with the hearing when the Petitioner was not able to secure representation by an attorney, which she alleges resulted in her not understanding the proceedings or process?
2. allegedly not allowing Petitioner to provide evidence that showed the school's delay in providing adult assistance?
3. not addressing the District's alleged failure to conduct a functional behavioral assessment after suspensions and a manifestation review?
4. not addressing the District allegedly making a change of placement by placing him [Student] in an isolated room without students or a certified teacher without calling an IEP meeting?

### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After having completely reviewed the record below and the written arguments submitted by the parties on appeal, this SRO affirms the decision of the Hearing Officer below. The Decision of the Hearing Officer below is well stated, with the Findings of Fact being clearly supported by a preponderance of the evidence on the record, and the Conclusions of Law being legally sound and

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<sup>4</sup> SRO-1

correct. (HO-U at 2-15.) The record read in its entirety does not compel a contrary conclusion. Accordingly, the Findings of Fact, Conclusions of Law and Order<sup>5</sup> of the Hearing Officer below are adopted as this SRO's own "independent decision."

To address the issues raised by Petitioner on appeal, this SRO makes the following Findings of Fact and Conclusions of Law.

**1. Did the Hearing Officer below err in proceeding with the hearing when the Petitioner was not able to secure representation by an attorney, which Petitioner alleges resulted in her not understanding the proceedings or process?**

IDEA grants parties the right to be represented by legal counsel in a due process hearing.<sup>6</sup> But, IDEA does not provide a parent legal counsel or the funds to hire counsel. Rather, parents may either retain counsel with their own funds or seek free or low cost legal services. IDEA requires districts to notify parents of such services available in the area.<sup>7</sup>

Here, the District provided the Petitioner with notice of such services more than once. (HO-A at 2,17.) And, Petitioner had legal assistance in this matter twice. Initially, she had assistance from the Nevada Disability Advocacy & Law Center in drafting her request for a hearing (HO-A at 1.) and amended request for hearing. (HO-A at 10.) But, that assistance was only through the end of the

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<sup>5</sup> The Order of the Hearing Officer below is clarified as follows: her ruling "that the student's placement in a district special school is the least restrictive environment" refers to the Student's March 13, 2017, IEP.

<sup>6</sup> 34 C.F.R. § 300.512(a)(1).

<sup>7</sup> 34 C.F.R. § 300.507(b).

resolution period on May 16, 2017. (HO-A at 12, 17.) At a status conference on May 17, 2017, Petitioner stated she did not want a continuance of the decision deadline but was attempting to retain counsel.<sup>8</sup> (HO-A at 17.) Thereafter, on May 25, 2017, a prehearing conference was held at which Petitioner advised she had not retained an attorney but wanted more time to do so. She did not however request a continuance. District's counsel affirmed he had provided the Petitioner with information on free and low cost legal services but offered to provide it again and the Hearing Officer directed him to do so. And, the Hearing Officer implored the Petitioner to get counsel. (HO-A at 17.) On June 6, 2017, Petitioner obtained counsel. (HO-A at 20.) But, on July 12, 2017, the Hearing Officer initially appointed resigned (HO-A at 26.)

On August 29, 2017, the new Hearing Officer held a prehearing conference at which Petitioner requested an extension to concentrate on mediating the matter, which was granted over the District's objection to the extension. (HO-I.) Then on September 22, 2017, Petitioner's counsel withdrew. (HO-K.) During a status conference held on September 28, 2017, and a prehearing conference held on October 10, 2017, Petitioner told the Hearing Officer:

While...she is still considering the retention of counsel prior to the hearing, she also stated that she will proceed with the hearing regardless of whether

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<sup>8</sup> Petitioner requested an interpreter and the District arranged for an interpreter to participate in each status call, prehearing conference call and hearing session held by the hearing officers below, as well as the conference call held during this appeal.

she is represented by counsel or not. The Petitioner specifically stated that she does not want the hearing rescheduled for any reason.

(HO-L.)

Though Petitioner did not have legal counsel for the hearing, she was provided the information regarding free and low cost legal services and had counsel during portions of the process. What prompted her last counsel to withdraw is not reflected in the record. But most importantly, thereafter, as the hearing approached a month away, she clearly indicated to the Hearing Officer below a strong desire to proceed with the hearing without counsel rather than request a continuance for additional time to try to retain new counsel. Under the above circumstances, neither Petitioner's rights under IDEA nor her right to due process were violated.

Petitioner's assertion that she did not understand the proceedings or the process must also be addressed. No doubt for most parents to represent their child in an IDEA hearing is a tremendous challenge and understandably so.<sup>9</sup> The situation also presents probably the biggest challenge hearing officers face in fulfilling their role and responsibilities during the hearing process. IDEA sets forth the specific rights accorded to any party in a due process hearing, most notably the

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<sup>9</sup> Petitioner's challenge was even greater here given her limited understanding of spoken English necessitating the use of an interpreter.



right to present evidence and cross-examine witnesses.<sup>10</sup> A hearing officer is charged with the specific responsibility “to accord each party a meaningful opportunity to exercise these rights during the course of the hearing.” In this regard, apart from the hearing rights set forth in IDEA, “decisions regarding the conduct of due process hearings are left to the discretion of the hearing officer.”<sup>11</sup>

Here, the Hearing Officer below started to assist the Petitioner to understand the process at the prehearing stage by providing her with “Hearing Process Guidelines” explaining expected and appropriate demeanor and contacts, as well as other matters. (HO-G at 5-6.) In addition, at the prehearing conference, the Hearing Officer explained in detail to Petitioner the various procedural aspects of the process and when and how Petitioner should do them. (HO-H.) However, when the Petitioner missed the 5-day deadline for disclosing to the District the witnesses she intended to call and exhibits she intended to admit, the Hearing Officer extended the deadline without objection from the District so Petitioner would not be foreclosed from presenting her evidence. In doing so the Hearing Officer carefully explained to Petitioner why the disclosure was an important part of the process. (HO-N.)

Once the hearing commenced the Hearing Officer quickly adjusted the process by directing the District to alter the presentation of its case to

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<sup>10</sup> 34 C.F.R. § 300.512.

<sup>11</sup> *Letter to Anonymous*, 23 IDELR 1073 (OSEP 1995).

accommodate Petitioner's sensitive perceptions as to how her child had been treated and served by the District. (T-36-37.) During the course of the hearing, the Hearing Officer often helped Petitioner frame appropriate questions (T-53-55, 57, 70, 135, 275, 368, 377) and sometimes suggested Petitioner write down her questions she wanted to later ask a witness or overnight write down questions for the next day (T-93, 103-104, 161, 288, 374). The Hearing Officer allowed Petitioner to even write down the answers to the questions she was going to ask herself. (T-393.) Repeatedly, throughout the hearing, the Hearing Officer helped Petitioner understand the process. (T-121-123, 129, 133-134, 143-144, 180, 187, 192-194, 276-277, 295-296, 300-301, 360-361, 364-365, 383-384, 385-387.) At one point in the hearing, the District objected to the Hearing Officer facilitating Petitioner's presentation and in overruling the objection the Hearing Officer carefully explained her authority to do so and why. (T-135-136.) At the beginning of the second day of hearing, the Hearing Officer asked Petitioner how the proceeding was going, including if she was satisfied with the interpreter. Petitioner responded she was "very satisfied with the process and what you are doing." (T-168.)

Assuring that any parent understands the hearing process is a difficult task for any hearing officer. But, here, by continuously explaining the process to Petitioner and assisting Petitioner in handling the various steps of the process, as

well as the presentation of her evidence, the Hearing Officer made an exceptional effort to provide Petitioner with “a meaningful opportunity to exercise [her] rights during the course of the hearing.”<sup>12</sup> If Petitioner did not understand the process, it was not the fault of the Hearing Officer who did about as much as any hearing officer could do under the circumstances and still maintain her impartiality. The requirements of due process were met.

**2. Did the Hearing Officer below err in allegedly not allowing Petitioner to provide evidence that showed the school’s delay in providing adult assistance?**

No, because the record reflects Petitioner had the opportunity to provide such evidence on many occasions but did not do so. First, after Petitioner on October 18, 2017, provided the Hearing Officer with her Statement of Evidence, i.e., a listing of bulleted items she intended to make at the hearing, (Attachment to HO-P.), the Hearing Officer identified those items she deemed relevant to the issues to be determined. Included among those items the Hearing Officer ruled relevant were: “The school district does not follow his [the Student’s] IEP” and “Where was his [the Student’s] adult assistance when the incident occurred?” (HO-P.) To confirm what evidence would be relevant, the Hearing Officer went over these items with Petitioner again at the start of the hearing. (T-27-30.) During this SRO’s telephone call with the parties, in an effort to clarify this ground for appeal,

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<sup>12</sup> *Letter to Anonymous, supra.*

this SRO asked Petitioner whether by using the words “the delay in providing the adult assistance” she was referring, in part, to her claim that the District had failed to implement the two IEPs. Petitioner said she was. Therefore, Petitioner was twice made aware that evidence “showing the school’s delay in providing adult assistance” was relevant and would be received.

Second, after Petitioner missed the 5-day deadline to disclose witnesses she intended to call, the Hearing Officer extended the deadline to allow the Petitioner another opportunity to present evidence, including “the school’s delay in providing adult assistance.” (HO-N.) However, at the start of the hearing Petitioner advised she would not be calling any witnesses. (T-17.)

Finally, early on in the hearing, the District in its questioning of a witness, specifically addressed the question of whether the District provided adult assistance every day to Student. (T-39.) Petitioner had numerous opportunities to produce evidence regarding any delay by the district in providing adult assistance by cross-examining several of the District’s witnesses but failed to do so. (T-53, 57-59, 138, 210, 285-286, 294, 328, 371, 390.)

For all the above reasons the Hearing Officer below did not err for Petitioner was allowed to present evidence that showed the District’s delay in providing adult assistance.

- 3. Did the Hearing Officer below err in not addressing the District's alleged failure to conduct a functional behavioral assessment after suspensions and a manifestation review?**
- 4. Did the Hearing Office below err in not addressing the District allegedly making a change of placement by placing him [the Student] in an isolated room without students or a certified teacher without calling an IEP meeting?**

Generally, arguments not raised in front of a hearing officer cannot be raised for the first time on appeal. To avoid waiver, an issue may be raised as evidence of a claim of a denial of a FAPE rather than a separate claim for relief. But, the issue still must somehow be raised at the administrative level as evidence in support of an argument or otherwise.<sup>13</sup>

Here, on March 20, 2017, Petitioner filed a request for hearing which raised several issues. (HO-C.) Thereafter, Petitioner on April 17, 2017, filed an amended request for hearing which raised in detail additional issues, arguably including the District's alleged failure to conduct a functional behavioral assessment after suspensions and a manifestation determination. But, the issue alleging the District made a change of placement without calling an IEP meeting by placing the Student in an isolated room without students or a certified teacher is not set forth. (HO-D.) At prehearing conferences held on July 27, 2017 and August 29, 2017, the Hearing Officer addressed with the parties which issues would be considered at the due

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<sup>13</sup> *C.B. and N.B. v. State of Hawaii Dept. of Educ.*, 55 IDELR 287 (D. Haw. 2010); *R.G. v. Clovis Unif. Sch. Dist.*, 56 IDELR 123 (E.D. Cal. 2011).

process hearing and provided a summary restatement of them. (HO-H, J.) After Petitioner’s counsel had withdrawn, on September 28, 2017, a status conference was held at which time Petitioner advised the Hearing Officer that the only two issues she wished to pursue at the hearing were items numbered 6 and 7 under the heading “Allegations of Substantive Violations” set forth in the Hearing Officer’s restatement of issues. (HO-J.)<sup>14</sup> Then at the final prehearing conference held on October 10, 2017, the Hearing Officer’s Report and Order reflects the Hearing Officer discussed with Petitioner in some detail exactly what the Petitioner wanted decided, what she was contending, and what she sought as a remedy. As a result of that discussion, the Hearing Officer slightly restated the issues using more of the terminology of Petitioner. The parties then agreed the issues to be decided should be framed as follows:

Whether the District failed to implement the 1/13/17 and 3/13/17 IEPs by failing to provide the Student with the one to one aide in classes and on the bus; and whether the District failed to provide the appropriate placement for the Student in the least restrictive environment in a self-contained classroom, with resources, as opposed to a special school.

(HO-L at 2.)

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<sup>14</sup> Item 6 read: “Whether the district failed to implement the IEPs by failing to provide the student with the one to one aide in classes and on the bus as provided for in the 1/13/17 and 2/13/17 IEPs.” Item 7 read: “Whether the district failed to provide an appropriate placement for the Student, in the least restrictive environment, in a resource room as opposed to a self-contained classroom.”

At the end of the prehearing Order, both parties were advised they would be held to the matters agreed upon in the Order and if they believed the Hearing Officer had overlooked or misstated any item, they were directed to advise the Hearing Officer in writing before the disclosure date of October 16, 2017. (HO-L at 5-6.) Neither party brought any proposed correction of the Order to the Hearing Officer's attention.

At the commencement of the hearing, the Hearing Officer again reviewed what evidence from the list of evidence Petitioner had previously presented was relevant (HO-P). That the District allegedly did not do a functional behavioral assessment after manifestation determinations was on Petitioner's list of evidence but had been ruled irrelevant to the two issues to be decided was specifically discussed. When asked if she agreed with the review of what evidence was relevant to the two issues to be decided the Petitioner had no objection. (T-25-30.)


A careful review of the hearing record reflects neither party introduced any evidence regarding whether the District failed to conduct a functional behavioral assessment after suspensions and manifestation reviews. Nor did either party introduce any evidence regarding whether the District placed the Student in an isolated room without students or a certified teacher, and if so, whether it amounted to a change of placement without calling an IEP meeting.

Here, at the status and prehearing conferences weeks prior to the start of the hearing, Petitioner, after a detailed discussion with the Hearing Officer, chose to narrow the issues to be decided to two, which were agreed upon by the parties. And, thereafter, at the hearing, neither of the issues raised by Petitioner as grounds 3 and 4 on appeal was raised by either party as evidence of an argument or otherwise. Under these circumstances Petitioner is found to have waived the issues raised as grounds 3 and 4 on appeal.

#### **IV. DECISION AND ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is the independent decision of this SRO that the Decision of the Hearing Officer below dated December 1, 2018, is hereby affirmed. It is, therefore, ordered that all relief requested by Petitioner is denied.

Dated: February 16 , 2018

A handwritten signature in blue ink, reading "Lyn Beekman", is written over a horizontal line.

Lyn Beekman, State Review Officer

#### **NOTICE OF APPEAL RIGHTS**

The decision of this SRO is final unless a party appeals the decision. A party may appeal from the decision of this SRO by initiating a civil action in a



court of competent jurisdiction within ninety (90) days after receipt of this decision. NAC § 388.315.