STATE OF NEVADA DEPARTMENT OF EDUCATION

REVIEW OFFICER DECISION

In the matter of

STUDENT by and through his[1] PARENTS,[2]

Petitioner-Appellant

v. Perry A. Zirkel, State Review Officer

DISTRICT,

Respondent-Appellee

I. GLOSSARY OF ACRONYMS

As a prefatory matter, the acronyms that appear in this decision are as follows: ASD = autism spectrum disorder; AD/HD= attention deficit/hyperactivity disorder; DSM = Diagnostic and Statistical Manual of Mental Disorders; FAPE = free appropriate public education; HI = hearing impairment; IDEA = Individuals with Disabilities Education Act; IEE = independent educational evaluation; IEP = individualized education program; IHO = impartial hearing officer; MDT = multi-disciplinary team; OHI = other health impairment[3]; PWN = prior written notice; SLI = speech or language impairment; and SRO = state review officer. Moreover, for clarity, this decision uses "District" in place of "Petitioner" and "Parents" in place of "Respondent" not only due to the more direct meaning of District and Parent but also the exchanged roles of Petitioner and Respondent upon the appeal.

II. PROCEDURAL BACKGROUND[4]

On March 20, 2023, upon denying the Parents' request for an IEE at public expense, the District filed the complaint in this matter under the IDEA[5] and Nevada's corresponding state statute and regulations.[6] After several status and prehearing conferences,[7] the impartial hearing officer (IHO) conducted two consecutive hearing sessions on May 22 and 23, 2023. The agreed upon issue was as follows: "Whether [District's] denial of [Parents'] request for an IEE at public expense, based upon [District's] 2023 MDT evaluation dated February 17, 2023, was consistent with controlling law." (Tr. at 8).

On June 6, 2023, the IHO issued a final decision that ruled in favor of the District, concluding as follows: "Student's 2023 Reevaluation was appropriate. [District] has no obligation to provide Student with an IEE at public expense." (SRO-1).

On June 15, 2023, the state superintendent received the Parents' appeal of the IHO's decision (SRO-2A&B) and appointed me as the SRO for it, erroneously specifying the due date as August 19, 2023. (SRO-3A).[8]

On June 16, 2023, I sent the parties an email with a schedule for the steps leading to a decision with the originally specified deadline. (SRO-4, at 1). On the same day, I received a what might be interpreted as a motion for recusal from the Parents. (SRO-5).[9]

On June 17, 2023, the Parents responded to my proposed schedule with an email alleging that it was a "misleading misrepresentation" of the applicable regulations. (SRO-4, at 9). I promptly sent a reply email (a) explaining the applicable regulations and, upon discovering the appointment notice's error in the applicable 30-day deadline for my final decision, (b) providing a revised schedule, which included a target date of June 21, 2023 for my order in response to the recusal motion and a corrected deadline of July 10, 2023 for the parties' written arguments and July 15, 2023 for my final decision. (*Id*. at 7–8).

On June 21, 2023, after receiving no further written arguments from either party concerning the Parents' motion, I issued my order denying recusal. (*Id*. at 11; SRO-6). Immediate receipt of another in a continuing lines of needless and overly contentious messages from the Parents caused issuance of the following notice later that day: "I shall not respond to any future emails that raise issues … not necessary to completion of my duties as specified in NAC 388.315(a)–(g)." (SRO-4, at 13).

On June 23, 2023, the Parents submitted a document that might be discerned to amount to a request for reconsideration (SRO-7).[10]

On June 26, 2023, after a careful review, I notified the parties that that this document did not provide any justification or basis for reconsideration and, thus, would only become part of the record of the case. (SRO-4, at 16). Later on the same day, I sent the parties a recap of the status of the review and reminding the parties of the deadline for written arguments, which was July 10, 2023. (SRO-4, at 17–18).

On the deadline date of July 10, 2023, the Parents (SRO-8) and the District (SRO-9) timely submitted their respective written arguments.

III. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record.[11] The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.,* 62 F.3d 520 (3d Cir. 1995), requiring "plenary review" with one narrow exception: "[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." (*Id*. at 529).[12]

IV. ISSUE

The issue in this case is whether the IHO's decision that the Parents are not entitled to the requested IEE at public expense was or was not in accord with applicable law.[13]

V. FINDINGS OF FACT[14]

During the school year of 2014–2015, when the Student was in pre-kindergarten, the MDT determined, pursuant to an October 6, 2014 initial evaluation (R-36), that the Student qualified for services under the classification of ASD.

On November 14, 2016, the MDT determined, pursuant to a reevaluation, that the Student was eligible for services under the category of HI, but not ASD. (Tr. at 89).

On January 12, 2019 (grade 2), upon the District's affirmative response to the Parents' request for an IEE at public expense (Tr. at 8), a licensed psychologist issued the IEE report that included a DSM diagnoses of ASD and AD/HD and recommendations for continuation of the IEP's SLT and OT servicers and ther Parents' private individual therapy in child behavior modification and family treatment. (R-34).[15]

During the 2019–2020 school year (grade 3), the MDT determined, pursuant to a reevaluation on November 8, 2019 (D-2), that the Student continued to be eligible under HI. The report was limited to the existing data, including the IEE, because the Parents' refused consent for the proposed assessment, including AD/HD and ASD. (D-2, at 1).

The Student's May 18, 2022 IEP for the Student's upcoming grade 6 included an anticipated reevaluation date of November 7, 2022. (R-11, at 1.)

On or about November 2, 2022, the District's school psychologist first attempted to notify the Parents for the reevaluation process. (Tr. at 199; D-1, at 39)

On November 4, 2022, the Parents appeared to assert their right to waive the Student's

scheduled reevaluation. (D-1, at 69–70).

However, on November 14, 2022, after documented non-responsiveness during the interim, the Parents emailed the school psychologist that they did not consent to a reevaluation waiver and requesting an IEE at public expense. (D-1, at 23).

On November 18, 2022, the District's director of psychological services, responded to questions that the Parents had sent to him two days earlier about the proposed evaluation (R-8). His responses included the clarification that the Parents' concerns about the Student's eligibility under the additional classifications of ASD and OHI warranted their consent rather than waiver. (*Id*. at 1).

On November 30, 2022, the Parents signed consent for the reevaluation. (R-8). It identified the assessment areas and illustrative methods, including standardized tests and norm-referenced rating scales, with the focus being the classifications of HI, ASD, and OHI. (*Id*.).

On December 2, 2022, the District received the Parents' signed consent form. (D-1, at 22).

On December 7, 2022, after further emails from the Parents, including a request for further clarification, the MDT met to discuss the proposed reevaluation. (*Id*. at 20, 25, & 27).

On February 17, 2023, the MDT met and issued the reevaluation report. (D-1, at 7). The report comprehensively included existing information, such as the January 12, 2019 IEE, as well as the results of a variety of assessment tools, such as norm-referenced instruments, parent information, student interview, and classroom observations aligned with the aforementioned signed consent. (D-3). The recommendation was that the student continued to qualify for special education services as HI but not as ASD or OHI. (*Id*. at 37–38).[16] The Parents indicated their disagreement with the reevaluation report. (*Id.* at 41). They also disagreed with the

MDT's determination that the child was eligible as HI but not ASD or OHI. (D-4).

On February 17, 2023, at the end of or after the MDT meeting, the Parents requested an IEE at public expense. (D-1, at 7).

On March 6, 2023, the District issued a PWN to the Parents denying their request, and providing an accompanying procedural safeguards notice. (D-5).

At an IEP meeting on March 10, 2023, the Parents received a copy of the reevaluation report that, per their request (Tr. at 156 & 181–82), removed an example of an ADHD rating scale and added a limited health section (D-1, at 2, 4; D-3, at 39). However, the Parents refused to continue or reschedule the IEP meeting, invoking stay-put even though neither party had then filed for a hearing. (D-1, at 2 & 4).

As aforementioned, the District filed for the due process hearing on March 20, 2023.

VI. CONCLUSIONS OF LAW[17]

In light of the Parents' pro se status, I shall construe their appeal liberally based on their 28-page initial brief of June 12, 2023 (SRO-2B) and 11-page written arguments of July 10, 2023 (SRO-8).

Procedural Fairness

First, because the prescribed scope for SROs includes "[e]nsur[ing] that the procedures at the hearing were consistent with the requirements of due process,"[18] I address the Parents' prefatory question in their initial brief: "Whether the [Parents] were prejudiced by the IHO determination in favor of the [District] because IHO does not have formal education, knowledge, and/or background in special education and/or IDEA law?" (SRO-2B, at 2). This question is couched in two parts, akin to the general two-part analysis required for alleged procedural violations.[19] The SRO must answer this question with "No" aligned with these two

parts. First, the Parents have failed to identify, and the record does not reveal, any violation of of the IHO's legally required competency.[20] Second, even if there were such a violation, there was no showing of any resulting harm in the IHO's legal ruling specific to the issue of an IEE at public expense.[21] The applicable case law, which the Parents failed to cite, similarly and consistently has rejected competency claims that lack the requisite specific foundation and harm.[22]

Arguably fitting in this same procedural fairness category,[23] the Parents posed the following question: "Whether the [District] had an unfair advantage over the [Parents] at the time of hearing because no independent expert witness was available to provide a sense of objectivity and credibility to the [District] witnesses [sic] testimonies?" (SRO-2B, at 2). As the basis for this purported requirement, the Parents' appeal (*id*. at 23), as their opening statement at the hearing did (Tr. at 18), entirely relied on the Supreme Court's decision in *Schaffer v. Weast*, 546 U.S. 49 (2005). Fatal to their contention is that the *Schaffer* decision is specific to the burden of persuasion in IDEA impartial hearings. Rather than require school districts or IHOs to provide parents with an expert witness, the *Schaffer* Court's only relevant reference was part of its rationale for its holding, or ruling, that the burden of persuasion is on the filing party. Recognizing that the parents are the filing party in most IDEA impartial hearings, the Court reasoned that in such cases the IDEA provides parents with various procedural safeguards to counter school districts' "'natural advantage' in … expertise." (*Id*. at 60–61). One of the several procedural safeguards that the Court identified was an IEE, which under the IDEA may be available at public expense if the parents' in specified circumstances and, alternatively, must be considered if the parents obtain it at their own expense.[24] Thus, the Court observed that the IDEA potentially provides the parent with "an expert with the firepower to match the

opposition." (*Id*. at 61).

The fatal problem is that the Parents' have misconstrued the applicable law. Indeed, even the partial rationale in *Schaffer* does not apply the in this case, because it fits in the limited, mandatory exception of the general promise; the District, as the filing party, has the burden of persuasion.[25] Ultimately, neither the ruling in *Schaffer* nor any other provision in the IDEA, corollary Nevada legislation and regulations, or applicable judicial rulings requires the District to provide the Parents with an independent expert to justify the denial of an IEE at public expense. Such logic turns the applicable regulatory requirement on its head. Similarly, the Parents' alternate version of the argument is without any legal basis: "The District has failed to name the independent expert as its witness. Therefore, [the District] . . . must be required to pay the [Parents'] IEE." (Tr. at 18).

The Parents' July 10, 2023 brief did not add any other cognizable claims of procedural defects "at the hearing."[26] More specifically, the brief's legal arguments section did not contain any such claims, and the prefatory background section recited various accusations against the District, not the IHO. To whatever extent that thse claims indirectly implicated the IHO, the SRO finds that the IHO was abundantly fair in his conduct of the hearing, including the extensive prehearing interactions with the parties and the respectful, reasonable response to the Parents' repetitive motions and needless digressions. Moreover, within this background section, the only legal authority the Parents proferred was off point. Specifically, the Parents asserted that "the IHO determination . . . does not meet the procedural standards of §§ 300.507, 300.508, and 300.510." (SRO-8, at 7). However, these three IDEA regulations respectively address the complaint filing, the complaint contents, and the resolution process rather than the hearing.[27]

In the separate subsequent section after the background and legal arguments, the Parents

claimed a violation of these same regulatory standards based on the SRO's allegedly deficient legal qualifications. First, these regulatory standards are even more off-point for the SRO level. Second, the SRO's status is clearly beyond the boundaries of the aforementioned hearing-fairness prescription.[28] Finally and most significantly, like the Parents' related contentions addressed in the response to their recusal motion (SRO-5), their latest and additional claim for disqualification is without legal basis. Specifically, Parents contend that the SRO represented to the public that he is admitted to practice law in Nevada. However, neither the regulations of the IDEA and its corollary Nevada law nor the applicable case law require that SROs be members of the Nevada Bar. Moreover, to whatever extent the Nevada Bar's Rules of Professional Conduct apply to SROs, the Parents failed to cite any evidence of any such representation on my part. For example, the summary of my qualifications that the Parents received with the notice of my appointment contains no such representation. (SRO-3B).[29]

The Merits

Regrettably, the same confusion regarding the applicable law characterizes the merits of the Parents' position at both the IHO and SRO levels. Neither their initial appeal brief nor their final written arguments specifically address the specific contents of the applicable IDEA regulation and related case law. Other than citing this pivotal IDEA regulation for IEEs at public expense (34 C.F.R. § 300.502(b)), the Parents' only stated basis for their asserted entitlement is an agency guidance letter (SRO-2B, at 4). To whatever extent the cited letter (R-35) has any legal force as persuasive, it does not support the Parents' asserted entitlement, because the question was specific to a child determined ineligible for special education. The agency's interpretation was that entitlement under the requirements of § 300.502(b) applies to an ineligible child just as its does for children defensibly determined to be eligible for special

education under the IDEA. That said, the requirements still apply to the Student, who is in the eligible group that was not the focus of the agency interpretation.

For these regulation's requirements, Parents recognized that their right to an IEE at public expense is "qualified," or conditional. (SRO-8, at 10). However, they misconstrued this regulation as having only one qualifier, or condition. For example, their opening statement at the IHO level contended that "[the Parents] have a qualified right to obtain the [IEE] at the public expense because we disagree with the [the District's] evaluation." (Tr. at 16).

Instead, an appropriately careful examination of the relevant regulation reveals a flowchart-like set of qualifying conditions.[30] The two procedural antecedents are undisputed in this case: the Parents to disagreed with the reevaluation and for the District filed for an impartial hearing (34 C.F.R. § 300.502(b)(1)–(2)). Instead, the crux of this case is the central requirement, which is for the District to prove at the hearing that its reevaluation was appropriate (*id*. § 300.502(b)(2)(i)).[31]

For appropriateness, the first consideration is the IDEA set of core criteria for evaluations, such as using a variety of assessment measures and assessing all areas of suspected disability. (*Id*. § 300.304(b)–(c)). On its face, the 40-page reevaluation at issue met these criteria, and the Parents have not identified a material nonconformity with any one or more of these specified requirements. Instead, the Parents emphasize two points that are beyond these criteria and are not otherwise required by the IDEA or Nevada's corollary laws: "A functional behavioral assessment ("FBA") is necessary … in determining whether a student has Autism," and "Standardized tests are not definitive and can vary in accuracy and applicability." (SRO-2B, at 22). Both of these assertions may fit within the broad range of professional norms, but they lack a basis in the applicable legal requirements.[32] For FBAs, the only IDEA requirement is in

connection with manifestation determinations upon a disciplinary change in placement (34 C.F.R. § 300.530(d)–(f)), and the only addition in Nevada's corollary law is in connection with limited circumstances in the repeated use of physical or mechanical restraints (NEV. REV. STAT. §§ 388.501(5), 388.503(5)). The applicable case law confirms rather than expands this narrow coverage,[33] which obviously does not apply in this case. For standardized tests, the Parents do not cite, and I do not know of, any provision in the IDEA or corollary Nevada law or the related case law that invalidates an evaluation under the IDEA for the use of standardized tests among a variety of other measures. Indeed, if there were such a requirement, almost all IDEA evaluations would be invalidated.

Second, the only other material assertion regarding the criteria-related appropriateness of the reevaluation, which is scattered in the Parents' broad-based arguments, is the reevaluation's failure to conclude that the Student was not eligible under the additional classifications of ASD and OHI (SRO-2B, at 20 & 24–25; Tr. at 19 & 368). However, once again, the argument is contrary to the applicable requirements of the IDEA and Nevada's corollary laws. For autism, contrary to the DSM criteria of the four-year-old IEE, the IDEA requires significant adverse effects in verbal communication, nonverbal communication, and social interaction on the child's educational performance (34 C.F.R. § 300.1(c)(1)) and a resulting need for special education (*id*. § 300.8(a)(1)).[34] Similarly, for OHI, a clinical diagnosis of AD/HD is insufficient for eligibility, because the IDEA also requires an adverse effect on educational performance that results in the need for special education (34 C.F.R. §§ 300.1(a)(1) & 300.1(c)(9)).[35] Moreover, for both ASD and AD/HD, the clinical diagnosis here was four years old, and the reevaluation's recognized instruments found the lack of required support for the classroom context, which with due regard for the home environment is the primary determinant for the requisite effect on

educational performance.[36] In any event, the evidence in the record was preponderant as to the ultimate essential eligibility criterion of the causally connected need for special education. Thus, this key, albeit not clearly articulated,[37] concern of the Parents does not, after careful consideration, render the reevaluation inappropriate.[38]

Third, the final consideration are the various other IDEA and Nevada regulatory criteria for evaluations generically and reevaluations specifically (e.g., 34 C.F.R. §§ 300.303 & 300.305). Aside from the Parents' broad citations to laws inapplicable to the jurisdiction of the IHO and SRO, such as the the America Disability Act [sic] (Tr. at 366), "No Child Left Behind Act" (*id*. at 15 & 370), and "Section 504 of the IDEA [sic]" (*id*. at 367) and their scattered procedural contentions that are either off-point or without legal basis, the only identified or otherwise reasonably detectable violation of the District's evaluation was its lateness. It is undisputed that the due date for this triennial reevaluation was November 7, 2022 and that, instead, the District issued it on February 23, 2023. This delay, although attributable in limited part to the Parents, is primarily due to the District's admittedly very late start in initiating the requisite consent process (Tr. at 71 & 162), which was five days before the due date for its completion (D-1, at 23). This discrepancy is more than de minimis and amounts to a procedural violation; however, the record lacks the requisite second-step loss to the Student or the Parents.[39] The reason in this case is because the immediate filing for the hearing automatically froze the previously agreed-upon IEP, and the Parents refused to move ahead with the IEP process. The stay-put provision did not justify this refusal because (1) it expressly allows for the parents and district to agree otherwise (20 U.S.C. § 1415(j)); (2) the Parents' invokes this provision in the absence of any concomitant filing for due process; and (3) the stay-put provision does not excuse parents from "their obligation to cooperate and assist in the

formulation in of an IEP."[40]

In closing, the SRO emphasizes that he does not question the sincerity of the Parents' subjective perceptions of what in the past was referred to as "the Establishment" or of what the law should be. Instead, the SRO only has the reponsibility and authority to provide an informed and impartial decision based on the record of the case and an objective assessment of what the applicable law is.

DECISION AND ORDER

The IHO's decision is affirmed.

Dated: July 15, 2023 Perry A. Zirkel, 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 receipt of this decision (NAC § 388.315).

Endnotes

[1] The terms "he," "his," and "him" are used generically herein instead of designating the actual gender of Student or the Parent.

[2] "Parents" is also used generically herein and, except when necessary for clarity, without differentiation as to father and/or mother and, thus, as to singular or plural.

[3] The use here of the acronym OHI is based on the IDEA classification of other health impairment, because the Nevada regulations' corresponding classification of "health impairment other than orthopedic impairment" generates either an awkwardly long acronym of HIOOI or the shortened acronym of HI, which causes confusion with hearing impairment.

[4] The record in this matter includes two volumes of exhibits along other documents, such as the IHO's decision and the emails to and from the parties during the 30-day SRO stage. The exhibits are labelled herein as "D" for those of the District-Petitioner, "R" for those of the Respondent-Parents, "SRO" for those of the undersigned state review hearing officer. The record also includes a transcript consisting of two volumes corresponding to the hearing sessions. Because the pagination is consecutive across the two volumes of the transcript, the citations are to "Tr." generically, followed by the page number(s). Cross references in this decision are, per legal citation style, via "*supra*" (above) or *infra* (below) to identified footnotes or parts of the text.

[5] 20 U.S.C. §§ 1401 *et seq*. (2020); 34 C.F.R. §§ 300.1 *et seq*. (2021). Specifically, the District's filing was pursuant to the regulatory requirement to file for a hearing upon denying public payment for an IEE. 34 C.F.R. § 300.502(b)(2)(i),

[6] NEV. REV. STAT. §§ 388.419 *et seq*. (2020); NEV. ADMIN. CODE §§ 388.001 *et seq*. (2021). This decision refers to this corollary state statute and administrative code only to the limited extent that they add in relevant respect to the IDEA legislation and regulations. The regulation specific to IEEs is NEV. ADMIN. CODE § 388.450

[7] The immoderate prehearing activity was largely attributable to what the IHO cited and summarized as the Parents' "repetitive requests" (SRO-1, at 7), which included questioning the qualifications of the IHO and claiming conflict of interest of the District's attorney (*id*. at 4–7). The IHO's certification of the record includes almost 500 pages specific to the pleadings and correspondence between the appointment of the IHO and the start of the hearing sessions.

[8] On the same date, the state superintendent sent notice of my appointment to each party, including a one-page summary of my qualifications. (SRO-3B).

[9] The document, which the Parents titled "Respondents Objections and Appeal of Perry A. Zirkel's Appointment as State Review Officer ('SRO') and Motion to Reassign Case Herein to Another SRO," was only indirectly, if at all, a motion for recusal.

[10] The Parents titled this document, which basically repeated the contents of the original recusal motion, "Objections, Strikes, and Motions for Relief of the Review Officer Order Re Recusal Dated June 21, 2023, in Pursuant to LR 1B 3-1 and FRCP 60, Rule 5.5(1)(2) (I)(II)(III), NRS 7.285, NAC 388.315 (1), under Part B of the IDEA 34 CFR §§ 300.500 through 300.536."

[11] 34 C.F.R. §§ 300.514(b)(2)(i) & 300.514(b)(2)(v).

[12] In this decision, the Third Circuit explained that "beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute's language about 'independent' decisions effect, the [SRO] must have much more leeway in reviewing other non-credibility based findings of the hearing officer." 62 F.3d at 528–29 (citing Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeal Panel,* 3 WIDENER J. PUB. L. 871, 892 (1994). The Ninth Circuit indirectly appeared to approve of this approach. Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 888–89 (9th Cir. 2001).

[13] In addition to this issue on the merits, this decision also addresses "the procedures of the hearing," which is the only aspect of the SRO's regulatory remit that either party put at issue. NEV. ADMIN. CODE § 388.315(1)(b). Although the Parents' appeals brief and written arguments levied a broad bevy of charges that extended to the SRO level, the applicable focus here is required to be the procedures at the IHO level.

[14] Based on the applicable review standard, these factual findings are independent of those of the IHO, although largely squaring with them and affording the prescribed deference to those based on credibility.

[15] The recommendations also included social skills training and extra time to complete tasks, although the strength and specificity of these recommendations was unclear in relation to the Student's IEP. R-34, at 20–21.

[16] The overall reason specified for non-eligibility under these two classifications respectively were lack of significant deficiencies in verbal, nonverbal, and social skills and and resulting requisite adverse effect (ASD) and lack of adverse effect requiring special education (OHI). D-3, at 37; *cf.* D-4, at 3–6 (eligibility determination).

[17] Because these legal conclusions are based on the SRO's fact-finding upon reviewing the entire record of this case, the focus here is on the applicable legal analysis.

[18] NEV. ADMIN. CODE § 388.315(1) (repeating without relevant addition 34 C.F.R. § 300.514(b)(2)).

[19] *Id.* § 388.310(11) (repeating without relevant addition 20 U.S.C. § 1415(f)(3)(E)(ii)).

[20] *See, e.g.,* Ford v. Long Beach Unified Sch. Dist., 291 F.3d 1086, 1090 (9th Cir. 2002) ("The parents do not present any evidence that the [IHO] lacked an understanding of special education law ….") Moreover, unlike the Parents' contention, the legally required corresponding IHO competency is not a specific formal education or background, but instead "knowledge and ability to understand the provisions of the [IDEA], the federal and state regulations pertaining to the [IDEA] and legal interpretations of the [IDEA] by federal and state courts." *Id.* § 388.310(15)(b) (repeating without relevant addition 20 U.S.C. § 1415(f)(3)(A)(ii).

[21] The instant decision, via independent review of the legal conclusions, affirms the IHO's ruling. *Infra* notes 31–413 and accompanying text.

[22] *E.g.*, A.C. v. W. Windsor Plainsboro Reg'l Bd. of Educ., 81 IDELR ¶ 19 (D.N.J. 2022); M.V. v. Conroe Indep. Sch. Dist., 75 IDELR ¶ 134 (S.D. Tex. 2019); Reyes v. Bd. of Educ. of Prince George's Cnty. Pub. Schs., 80 IDELR ¶ 286 (D. Md. 2020); Bohn v. Cedar Rapids Cmty. Sch. Dist., 69 IDELR ¶ 8 (N.D. Iowa 2016).

[23] Alternatively, if this contention fits under "the Merits" subheading *infra*, the legal conclusion is the same.

[24] 34 C.F.R. § 300.502(b)-(c)).

[25] Alternatively to the extent that *Schaffer* did not address state law, Nevada's law puts the burden of proof on the District. NEV. REV. STAT. § 388.467.

[26] *Supra* note 18 and accompanying text.

[27] Moreover, the only role for the IHO during those earlier steps is for the sufficiency of the complaint under the second of these three regulations. To whatever extent, if any, the sufficiency step fits within the boundaries of the hearing in the context of this SRO-specified procedural review, the record does not contain the required timely notice of insufficiency, thus effectively amounting to waiver of the present claim. C.F.R. § 300.508(d)(1). Even if the record were to reveal such notice, an IHO's adverse ruling, and a timely Parents' objection, there is no showing of a prejudicial effect in relation to the IHO's final decision in this case.

[28] *Supra* note 18 and accompanying text.

[29] Oddly instead the Parents make the following convoluted and contradictory assertion with regard to the SRO's appointment: "NDE has omitted fact concerning Zirkel's qualifications, it represented or held out to the public that Zirkel is a lawyer admitted to practice law in this jurisdiction." SRO-8, at 7.

[30] The content of the regulation establishes this sequence of requirements: (1) the parents must disagree, (2) the school district must file for a hearing, (3) the school district must prove at the hearing the appropriateness of the evaluation, and, if reached and at issue, (4) the IEE must meet agency criteria. 34 C.F.R. § 300.502. For an overall analysis, including the case law for the successive steps, see Perry A. Zirkel, *Independent Educational Evaluations at Public Expense,* 402 EDUC. L. REP. 23 (2022).

[31] The fourth step is not at issue in this case, because the posture of the case is prospective, i.e., authorization for a publicly paid IEE, rather than retrospective, i.e., reimbursement for an IEE. Id.

[32] For the distinction, see, for example, Lauryn Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. POSITIVE BEHAV. INTERVENTIONS 180 (2017).

[33] *E.g.*, Butte Sch. Dist. No. 1 v. C.S., 817 F. App'x 321, 326 (9th Cir. 2020); A.G. v. Paso Robles Joint Unified Sch. Dist., 561 F. App'x 642, 644 (9th Cir. 2014)

[34] The corresponding Nevada regulation only adds specifications for the team and scope, not the criteria. NEV. ADMIN. CODE § 388.387.

[35] Again, the corresponding Nevada regulation only adds specifications for the team and scope. *Id*. § 388.402.

[36] *See, e.g.*, Q.W. v. Bd. of Educ. of Fayette Cnty., 630 F. App'x 580, 583 (6th Cir. 2015).

[37] The Parents' arguments do not pinpoint the support in the January 12, 2019 IEE, instead couching the claim as a child find violation. (SRO-2B, at 20). This characterization is off-point because reasonable suspicion of ASD and OHI was not at issue. Nevertheless, this analysis continues to construe the Parents' arguments liberally in light of their pro se status.

[38] For related case law, see O.P. v. Weslaco Indep. Sch. Dist., 81 IDELR ¶ 187 (S.D. Tex. 2022); M.P. v. Aransas Pass Indep. Sch. Dist., 67 IDELR ¶ 58 (S.D. Tex. 2016); Maus v. Wappingers Cent. Sch. Dist., 688 F. Supp. 2d 282, 296–98 (S.D.N.Y. 2010); Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547, 558–59 (N.D. Ohio 2009).

[39] *Supra* note 15 (requiring either a substantive denial of FAPE to the child or significant interference with the parental opportunity for participation in the IEP process). *See, e.g.*, Miller v. Charlotte-Mecklenburg Schs. Bd. of Educ., 64 F.4th 569, 576 (4th Cir. 2023); P.P. v. W. Chester Area Sch. Dist., 585 F.3d 727, 738 (3d Cir. 2009).

[40] C.H. v. Cape Henlopen Sch. Dist., 606 F.3d 59, 72 (3d Cir. 2010). According to nonbinding agency guidance, this obligation is mutual. Letter to Watson, 48 IDELR ¶ 284 (OSEP 2007). If the parties had in good faith conducted the IEP process and reached an impasse, the situation would be been distinguishable. CP v. Leon Cnty. Sch. Bd., 483 F.3d 1151, 1158 (11th Cir. 2007).