

**COMPLAINT INVESTIGATION  
CLARK COUNTY SCHOOL DISTRICT  
(#CL072219)  
Report Issued on October 30, 2019**

**INTRODUCTION**

On July 22, 2019, the Nevada Superintendent of Public Instruction received a Complaint from a Parent alleging violations by the Clark County School District (CCSD) in a student's special education program. The allegations in the Complaint were that CCSD failed to comply with the Individuals with Disabilities Education Act (IDEA) and the Nevada Administrative Code (NAC) with regard to timely conducting the student's annual IEP review; providing notice and obtaining the Parent's consent prior to obtaining a copy of an Independent Educational Evaluation; and appointing a qualified and impartial Hearing Officer upon the receipt of the April 17, 2019 Due Process Complaint, specifically with regard to parental participation in the appointment process.

The procedural history with regard to this Complaint is complicated given the Parent filed multiple hearing proceedings that involved the same parties and related issues:

- There was a Due Process Complaint filed and withdrawn in April 2019; and
- There was a Due Process Complaint filed on April 23, 2019 and open at the time the Parent filed this instant Complaint. This Due Process Complaint was decided on August 31, 2019 and subsequently appealed to a State Review Officer.

In accordance with the Individuals with Disabilities Education Act (IDEA), 34 C.F.R. §300.152(c), if a written State Complaint is received that is also the subject of a due process hearing or contains multiple issues of which one or more are part of that hearing, the State must set aside any part of the State Complaint that is being addressed in the due process hearing until the conclusion of the hearing. However, any issue in the State Complaint that is not a part of the due process action must be resolved using the State Complaint time limit and procedures.

After the careful review of the open Due Process Complaint and the July 22, 2019 State Complaint, the Nevada Department of Education (NDE) determined that all three issues were either specifically raised in the Due Process Complaint or so intertwined with the conduct of the pending hearing that they were part of the hearing. As such, all three issues in the State Complaint were set aside by the NDE for investigation until the Due Process Complaint was closed by the appointed Hearing Officer. Upon the closure of the related hearing case by the issuance of the Hearing Officer's decision on August 31, 2019, the 60-day timeline for the investigation of the State Complaint recommenced. The timeline for the conclusion of the investigation and issuance of the decision in this State Complaint is October 30, 2019.

## **COMPLAINT ISSUES**

The allegations in the Complaint that were under the jurisdiction of the NDE to investigate through the special education complaint process raised the following issues for investigation:

### **Issue One:**

Whether the CCSD complied with the IDEA and NAC with regard to timely conducting the student's annual IEP review in the 2018/2019 school year.

### **Issue Two:**

Whether the IDEA and NAC required the CCSD to provide notice to the Parent and obtain parental consent in January 2019 prior to obtaining a copy of an Independent Educational Evaluation performed by an examiner who was not employed by the CCSD.

### **Issue Three:**

Whether the CCSD complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to the CCSD's responsibilities in the appointment of a qualified and impartial Hearing Officer upon receiving the Parent's Due Process Complaint dated April 17, 2019, specifically with regard to parental participation in the appointment process.

## **Hearing Decision Binding**

Pursuant to the IDEA, 34 C.F.R. §300.152(c), if an issue raised in a State Complaint has previously been decided in a due process hearing involving the same parties, the due process hearing decision is binding on that issue. As set forth in the Hearing Officer's August 31, 2019 hearing decision, the issues determined in the hearing decision were:

"Whether the District committed a procedural violation by failing to obtain the Parent's written consent for the release of the IEE report to the District, including any supporting documentation utilized in the preparation of the report such as the Student's medical records, prior to the release of the report to the Parent, and whether such procedural violation seriously impeded the Student's right to a free appropriate public education ("FAPE") by significantly impeding the Parent's opportunity to participate in the individual educational plan ("IEP") decision making process, or caused a deprivation of an educational benefit to the Student; and whether the District committed a substantive violation which deprived the Student of a FAPE by failing to prepare a new IEP for 122 days, the time which elapsed between the January 15, 2019 date of the IEE report, and May 17, 2019, the date of the Student's current IEP."

The NDE analyzed the August 31, 2019 hearing decision to determine if Issues One, Two and/or Three in the Complaint were decided in the due process hearing, including whether the legal and factual issues were identical. Upon a comprehensive analysis of the Findings of Fact and Conclusions of Law in the hearing decision, as compared to the issues in this Complaint, the NDE determined that Issues One and Two were decided in the due process hearing, and, therefore, the Hearing Officer's decision is binding on the NDE. Accordingly, this determination precluded the investigation of Issue One or Issue Two in this Complaint. However, Issue Three

regarding the appointment of the Hearing Officer was not decided in the due process hearing and the investigation proceeded with regard to this sole issue. The NDE notified the Parent and the CCSD of these determinations in a letter dated September 6, 2019.

As noted previously, during the course of this investigation, the Parent appealed the August 31, 2019 hearing decision in its entirety to a State Review Officer pursuant to NAC §388.315. In the event, the State Review Officer reverses or modifies the Hearing Officer's determination on Issue One or Two, that result would not alter the fact that the matter was decided through the hearing/appeal process; is binding with regard to this Complaint; and an investigation is precluded. While the appeal request asserted the Hearing Officer's decision is biased and predetermined, the Parent did not raise Issue Three of this Complaint in the appeal of the hearing decision and, as such, it is not part of the due process action and must be resolved using the State Complaint time limit and procedures pursuant to the IDEA, 34 C.F.R. §300.152(c).

In the August 2, 2019 Issue letter, the Parent was informed that the NDE did not have jurisdiction in the State Complaint process to investigate the ethics and conduct of a private individual; the conduct of the independent Hearing Officer in the hearing proceeding; and that "punitive damages for personal injury awards" were not available through the State Complaint system. With regard to the conduct of the Hearing Officer, the Parent was informed that pursuant to NAC §388.315 and the IDEA, 34 C.F.R. §300.515, a party's allegations with regard to the conduct of the hearing and the procedures at hearing are subject to review in the event a party appeals the final due process hearing decision.

### **Response to the Complaint**

In the September 6, 2019 letter to the CCSD, the NDE requested additional documents and information in order to timely investigate the remaining issue in this State Complaint. The CCSD was notified in that same communication that if the CCSD disputed the allegations of noncompliance in the Complaint, the submitted documents and information must include specifically referenced content relevant to that denial and that a failure to timely do so would be considered a concession of noncompliance for purposes of the investigation of the State Complaint. The CCSD submitted some documents in response to the Complaint, but did not timely dispute the allegations of noncompliance in the Complaint. By failing to do so, in accordance with the notice to the CCSD it was determined to be a concession of noncompliance for purposes of this State Complaint. Thereafter, the CCSD expressly denied the allegation of noncompliance in writing.

While the CCSD's failure to timely dispute the allegation in this Complaint and its subsequent explicit denial after the determined concession of noncompliance was bewildering, the Complaint Investigation Team determined the impact of this inconsistency would be decided after an application of the IDEA and Nevada law to the facts of this case. The IDEA and/or Nevada law remain controlling on the authority/responsibility of the CCSD or any local educational agency with regard to the appointment of a Hearing Officer to a case to which they are a party, even in light of a contrary position held by the agency. See related discussion in the Conclusions of Law.

The State Complaint, including all attachments, and all documents and information submitted by the CCSD and the Parent in response to the Complaint were reviewed and considered in their entirety in the investigation of this Complaint. The Findings of Fact cite the source of the information determined necessary to resolve the issues in this Complaint and the original source document, where available, was relied upon.

## **FINDINGS OF FACT**

1. The student's Parent filed a Due Process Complaint dated April 17, 2019 on April 23, 2019 for a non-expedited hearing and the hearing decision was issued on August 31, 2019. (Hearing Decision, Due Process Complaint)
2. By letter dated April 23, 2019, the CCSD requested the NDE Superintendent of Public Instruction (Superintendent) appoint a Hearing Officer to hear the issues set forth in the Parent's Due Process Complaint. The CCSD indicated that this request was in "keeping with hearing procedures." (April 23, 2019 Request to Appoint)
3. On April 23, 2019, the CCSD also sent a letter to the Parents of the student advising them that the CCSD had forwarded a request for an Impartial Hearing Officer to the Superintendent; that the Superintendent would appoint a Hearing Officer to hear the case; and the Parents would be notified of the time, place, and date set for the hearing as soon as possible. (April 23, 2019 CCSD Letter to Parents)
4. By Memorandum dated April 23, 2019, the Superintendent notified the Parent of the opportunity to designate the order of preference with regard to the appointment of three Hearing Officers selected on a rotational basis, including geographic proximity consideration. The notice described the process and timeline for the Parent to designate, in order of preference, which of the three Hearing Officers on the attached list he wanted to preside over the due process hearing. The letter also explained that if the Parent chose not to return the list; the return was untimely; or the petitioner's preferred Hearing Officer was unavailable, the next available qualified Hearing Officer would be appointed. (NDE April 23, 2019 Memorandum to the Parent)
5. By letter dated April 25, 2019, the Parent responded to the NDE Memorandum. The Parent did not place the names of the three designated Hearing Officers in order of preference, but rather requested an updated list of Hearing Officers with special education and special education law backgrounds and submitted a list of choices with three Nevada State Review Officers who were not in the cadre of Hearing Officers. (April 25, 2019 Parent Letter to the NDE)
6. The NDE responded to the Parent on April 26, 2019 with further explanation of the petitioner preference process in Nevada law; provided the list again in the event the Parent wanted to submit the list of Hearing Officers in order of preference; and informed the Parent that the petitioner preference form was due by close of business April 29, 2019. (April 26, 2019 NDE Email Communication to Parent)

7. On April 29, 2019, the Parent resent the Parent's list of choices with three State Review Officers who were not in the cadre of Hearing Officers. On April 30, 2019, the NDE notified parties of the appointment of one of the three Hearing Officers on the list previously sent to the Parent. (April 29, 2019 Fax from Parent to the NDE, April 30, 2019 NDE Letter to the Parent)

## **CONCLUSIONS OF LAW**

### **Issue:**

Whether the CCSD complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to the CCSD's responsibilities in the appointment of a qualified and impartial Hearing Officer upon receiving the Parent's Due Process Complaint dated April 17, 2019, specifically with regard to parental participation in the appointment process.

Both the IDEA, 34 C.F.R. §300.511(c) and the NAC 388.310(15) require Hearing Officers to possess specific knowledge and ability and to be impartial. Pursuant to NRS §388.463 and NAC §388.310(16), the NDE is the public agency responsible for conducting the due process hearing and is required to keep a list of the persons who serve as Hearing Officers. Nevada law also provides the manner in which the Superintendent must appoint an impartial Hearing Officer to a particular request for a due process hearing.

Pursuant to NAC §388.306(10), within five days after receiving or filing a Due Process Complaint, the head of the involved local educational agency must request that the Superintendent appoint a Hearing Officer. In this case, the CSSD requested the Superintendent appoint a Hearing Officer to hear the issues set forth in the Parent's Due Process Complaint on the same day the Due Process Complaint was received. The CCSD also sent a letter to the Parents of the student on that same day advising them that the request for an Impartial Hearing Officer had been forwarded to the Superintendent; the Superintendent would appoint a Hearing Officer to hear the case; and the Parents would be notified of the time, place, and date set for the hearing as soon as possible. (Finding of Fact (FOF) #2, #3)

Relevant to this instant Complaint, NRS §388.463 provides the process for the Superintendent to appoint a Hearing Officer who is on the list of qualified Hearing Officers and an opportunity for the party requesting the Due Process Complaint (the petitioner) to participate in the appointment process for non-expedited Due Process Complaints in a specifically mandated manner. Importantly, a respondent local educational agency is not involved in the Hearing Officer appointment process, except to request the Superintendent appoint a Hearing Officer after receiving or filing a Due Process Complaint pursuant to NAC §388.306(10).

Both parties have the right to an impartial due process hearing pursuant to the IDEA, 34 C.F.R. §300.511(a). By elevating the appointment process to the NDE, the public agency responsible for conducting the due process hearing, rather than the involved educational agency who will

be a party to the action, both parties' right to an impartial due process hearing, including the appointment of an impartial Hearing Officer is protected.

As described previously, the CCSD requested the Superintendent appoint a Hearing Officer as required, and that is all the law requires and authorizes them to do with regard to the appointment of a Hearing Officer. Since it would be contrary to the IDEA and Nevada law for the CCSD to implement or influence the appointment process for impartial Hearing Officers that is statutorily assigned to the Superintendent, the IDEA and Nevada law is controlling in this investigation, notwithstanding the CCSD's failure to timely deny the Parent's allegations.

*Therefore, the CCSD complied with the requirements of the IDEA and the NAC, Chapter 388, with regard to the CCSD's responsibilities in the appointment of a qualified and impartial Hearing Officer upon receiving the Parent's Due Process Complaint dated April 17, 2019, specifically the CCSD did not have a responsibility or authority with regard to parental participation in the appointment process.*

### **NDE Petitioner Preference Process**

Given the Parent's allegation of noncompliance at issue in this Complaint was limited to CCSD as the named educational agency and it has been determined that the CCSD neither had the responsibility or the right to participate in or influence the Hearing Officer appointment process, it is unnecessary to address the petitioner preference process at the State level. However, since the Parent seems to be of the belief that the law affords a petitioner a right to select a Hearing Officer without limitation and the likelihood of a persistent controversy, the following further rationale is provided regarding the right of a petitioner who files a Due Process Complaint to participate in the Hearing Officer appointment process.

The opportunity for a petitioner in a Due Process Complaint to participate in the appointment process for non-expedited Due Process Complaints is specifically prescribed in NRS §388.463:

- Prior to providing the petitioner an opportunity to participate in the appointment process, the Superintendent selects three Hearing Officers from the list of qualified Hearing Officers maintained by the NDE on a random, rotational or other impartial basis and, in a school district in which more than 50,000 pupils are enrolled, the place of business of the Hearing Officer is required, to the extent practicable, to be located in the school district.
- The Superintendent then provides the names of the selected three Hearing Officers to the petitioner in the case and requests the petitioner return the list to the Superintendent placing the three provided names in the petitioner's order of preference within two days.
- If the petitioner timely returns the list, the Superintendent is required to request the first Hearing Officer on the list in order of preference to preside over the hearing and if he or she is unavailable, the next person, until there are no more Hearing Officers on the list.
- If the petitioner does not return the provided list within two days, the Superintendent must appoint a Hearing Officer and may determine the order in which to request a Hearing Officer to preside over the hearing.

The Due Process Complaint in this case was non-expedited. Accordingly, by Memorandum dated April 23, 2019, the Superintendent notified the Parent of the opportunity to designate the order

of preference with regard to the appointment of three Hearing Officers selected on a rotational basis, including geographic proximity consideration. The notice described the process and timeline for the Parent to designate, in order of preference, which of the three Hearing Officers on the attached list he wanted to preside over the due process hearing. The letter also explained that if the Parent chose not to return the list; the return was untimely; or the petitioner's preferred Hearing Officer was unavailable, the next available qualified Hearing Officer would be appointed. (FOF #4) The Parent timely responded to the NDE Memorandum. However, the Parent did not place the names of the three designated Hearing Officers in order of preference, but rather requested an updated list of Hearing Officers with special education and special education law backgrounds and submitted a list of choices with three Nevada State Review Officers who were not in the cadre of Hearing Officers. (FOF #5)

The NDE responded to the Parent's request for an updated list and the Parent's preference for individuals not on NDE's list of Hearing Officers with further explanation of the petitioner preference process in Nevada law. The NDE provided the list again in the event the Parent wanted to submit the list of Hearing Officers in order of preference and informed the Parent that the petitioner preference form was due by close of business April 29, 2019. (FOF #6) In response, the Parent resent the prior list of choices with three Nevada State Review Officers who were not in the cadre of Hearing Officers. (FOF #7)

On April 30, 2019, the NDE notified the parties of the appointment of one of the three Hearing Officers on the list previously sent to the Parent. (FOF #7) Given the Parent did not return the list in the manner prescribed by law by placing the three names of the three Hearing Officers on the list in the petitioner's order of preference, the Parent essentially forfeited the right to participate in the appointment process as set forth in NRS §388.463. The Superintendent had the responsibility to appoint a Hearing Officer to the case, and did so in accordance with NRS §388.463 and NAC §388.310(16).