STATE OF NEVADA DEPARTMENT OF EDUCATION

REVIEW OFFICER DECISION

In the matter of

STUDENT by and through his[1] parent, PARENT[2]

Petitioner-Appellant,

v.

CLARK COUNTY SCHOOL DISTRICT,

Respondent-Appellee.

Perry A. Zirkel, State Review Officer

I. PROCEDURAL BACKGROUND[3]

On April 13, 2021, the Parent filed the complaint[4] in this matter under the Individuals with Disabilities Education Act (IDEA)[5] and Nevada's corresponding state statute and regulations.[6] On May 17, 2021, upon receiving notice that the parties were unable to resolve the matter during the resolution period, the impartial hearing officer (IHO) convening a prehearing conference call for agreement as to the issues and scheduling of the next steps.[7] On June 2, the IHO held another prehearing call to discuss the Parent's three requests relating to

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[1] The term "his" or "he" is used generically herein instead of designating the actual gender of Student or the Parent.

[2] "Parent" is also used generically herein without differentiation as to father and/or mother.

[3] The record in this matter includes two volumes of exhibits along other documents, such as the hearing officer's decision). The record also includes a transcript consisting of three volumes corresponding to the hearing sessions. Because the pagination is consecutive across the three volumes, the citations are to "Tr." generically, followed by the page number(s). Cross references in the footnotes are, per legal citation style, via "*supra*" (above) or *infra* (below).

[4] IHO Exhibit 1.

[5] 20 U.S.C. §§ 1401 *et seq*. (2018); 34 C.F.R. §§ 300.1 *et seq*. (2019).

[6] NEV. REV. STAT. §§ 388.419 *et seq*. (2018); NEV. ADMIN. CODE §§ 388.460 *et seq*. (2019). 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.

[7] The agreed upon issues were: "(1) whether the IEP for the 2020-2021 school year was appropriately developed, tailored to the Student's unique individual needs, and reasonably calculated to enable the Student to receive educational benefits in the least restrictive environment, specifically by placing the Student in a self-contained public school for educational services with the exception of the Student's reading class, which was provided through distance learning at a comprehensive campus, and (2) whether the IEP for the 2020-2021 school year was properly implemented, specifically in the area of reading, science and math instruction." IHO Exhibit 9.

evidence for the hearing: (1) in response to the request to disallow any evidence for the earlier than the two-year period prior to the filing date, the IHO reserved the admissibility determination for the hearing based on relevance to the identified issues; (2) for a requested subpoena of the school psychologist who prepared the reevaluation report, the IHO ruled that such eligibility testimony would not be relevant to the identified FAPE issues; and (3) the IHO also denied the requested subpoena of a teacher at the Student's private school based on the Parent's failure to respond to the request for a showing of relevance.[8] The District agreed to the Parent's additional requests of the Student's former special education teacher to serve as a witness and for an interpreter during the hearing.[9]

On June 3, 2021, the Parent sent an *ex parte* e-mail to the IHO requesting that the District not contact the private school's principal. In response to the IHO's sharing of this e-mail, the District objected to its *ex parte* nature and justified its intended actions based in part on the transfer or enrollment exception of the Family Educational Rights and Privacy Act (FERPA). On June 4, 2021, after considering the Parent's counter-argument, the IHO asserted lack of jurisdiction to determine FERPA issues.[10]

On June 26, 2021, after conducting hearing sessions via Zoom on June 14, 15, and 16,[11]

[8] IHO Exhibit 12. Nevertheless, a teacher from the private school did testify. Tr. at 191–99.

[9] *Id.* The District provided an interpreter for the Parent for these prehearing conference calls, but the Parent did not request translation for any written documents or communications.

[10] *Id*. The IHO also sent an e-mail reminder to the Parent that all written communications must be copied to the other party. IHO Exhibit 13 (June 3, 2021 e-mail from IHO). Yet, not seeing any cc on a series of e-mails received from the Parent during the hearing, the IHO shared them with the District representative on June 16, 2021 including the one in which the Parent asserted "I have a learning disability . . . [but] do not need to have accommodations." *Id*. (June 15, 2021 e-mail from Parent).

[11] Due to technical difficulties with the connections for the interpreter who participated only telephonically at the first session, the opening session was limited to opening statements and other introductory matters. Tr. at 1–50. The testimonial evidence was delayed until the second and third sessions, when the District arranged for a replacement qualified interpreter who was available via video as well as audio. The Parent did not request translation of any exhibits, and for the third session the Parent submitted written questions and closing arguments in English that the IHO read into the record at the Parent's request.

the IHO issued a final decision for the two agreed-upon issues in this case.[12] Citing the applicable judicial precedents, the IHO ruled that (1) the 2020–21 IEP met the substantive standard for free appropriate public education (FAPE)[13] in the least restrictive environment (LRE)[14]; and (2) the District met the applicable standard for implementing this IEP in the specified areas of reading, science and math instruction.[15]

On July 20, 2021, the state superintendent received the Parent's appeal of the IHO's decision.[16] For the first issue, which concerned FAPE in the LRE, the appeal contended:

> The data supplied by the school showed that [the Student] acted appropriately in the 2020-2021 school year. He was not allowed to leave the special school and he did not receive his services due to the school's inability to create an individualized schedule to meet his needs.

For the second issue, the Parent contended that "My son clearly did not get the services in the IEP, but the [IHO] refused to acknowledge the missed services." Finally, as a matter of procedural fairness, the Parent generally asserted that "English is not my first language and I let the [IHO] know that I was having difficulty with the emails and handouts" and specifically claimed that the IHO had engaged in the following six purported reversible errors:

- Admitted evidence by the district that was older than the two years (2017 IEP)
- Did not allow evidence that I requested to be admitted.
- Did not allow witnesses that I requested testify.

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[12] *Supra* note 7.
[13] Hearing Officer Decision at 15 (citing Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 137 S. Ct. 988 (2017)).
[14] *Id*. at 15–16 (citing Sacramento City Unified Sch. Dist. v. Rachel H., 14 F.3d 1398 (9th Cir. 1994))
[15] *Id*. at 17 (citing Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 (9th Cir. 2007)).
[16] SRO Exhibit 1.

- Did not allow evidence that all of the teachers were not licensed.
- Any questions that I asked, the hearing officer denied my questions.
- I was treated poorly during this hearing.[17]

On July 21, 2021, the state superintendent appointed me as the state review officer (SRO) for this appeal, specifying a due date of August 19 for my decision.[18]

On July 28, 2021, after a series of e-mails with the parties, I provided them with a chronological compilation of these e-mails, with all of those to the Parent translated into the Parent's native language, culminating in a firm deadline of August 11 for written arguments.[19]

On August 11, 2021, per this deadline, the parties submitted their written arguments.[20]

II. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record.[21] The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.,*[22] 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

[17] *Id*.

[18] SRO Exhibit 2. The Superintendent's corresponding notice to the Parent of this appointment, which included specification of the SRO's legal duties, was both in English and, via translation, in the Parent's native language. SRO 3.

[19] SRO Exhibit 4 (status report and order). My first e-mail (July 21) provided the parties with my tentative determination to proceed via written communications translated into the Parent's native language and an opportunity for alternative suggestions or further questions. The District's response (July 23) was to request this procedure. The Parent's *ex parte* response (July 26) was to provide her arguments, warranting my replies for her to "cc" the District's representative for all written communications and to address my question regarding translated communications, postponing arguments for the appropriate designated time. On July 27, after another reminder, the Parent requested translation services. *Id.* On July 28, after arranging for the translation by a recommended service, I sent the parties said compilation along with the prescribed deadline. *Id.*

[20] SRO Exhibit 5.

[21] 34 C.F.R. §§ 300.514(b)(2)(i) and 300.514(b)(2)(v) (2019).

[22] 62 F.3d 520 (3d Cir. 1995).

conclusion or unless the record read in its entirety would compel a contrary conclusion."[23]

III. ISSUES

As a threshold matter, the scope of this SRO decision extends to answering these three questions even though the Parent's appeal only focused on the first one:[24]

1. Was the hearing conducted fairly?[25]
2. Did the 2020–21 IEP meet the applicable standards for FAPE in the LRE?[26]
3. Did the District meet the applicable standard for implementing the 2020–21 IEP?[27]

IV. FINDINGS OF FACT

During the 2014-15 school year, when the Student was in grade 1, the District's initial evaluation determined that the Student was eligible for special education under the category of emotional disturbance (ED).[28]

The Student continued in the District, with a series of individualized education programs (IEPs), through school year 2017–18 (grade 4).[29]

For the 2018–19 (grade 5) and 2019–20 (grade 6) school years, the Parent enrolled the

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[23] *Id*. at 529. 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." *Id*. 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).

[24] *Supra* text accompanying note 17. The Parent's written arguments were limited to elaboration of the six identified points for the first issue. *Supra* note 20. As identified *infra* notes 26–27, the second and third questions represent the IHO's rulings on the merits of the original issues in this case.

[25] This generic issue conforms to the SRO's duty to "[e]nsure that the procedures at the hearing were consistent with the requirements of due process" (NEV. ADMIN. CODE § 388.315(1)(b)) and encompasses the Parent's aforementioned assertions specific to fairness (*supra* note 17 and accompanying text).

[26] *Supra* notes 7 and 13–14.

[27] *Supra* notes 7 and 15.

[28] District Exhibit 16 at 1 (2/9/15 eligibility).

[29] E.g., District Exhibit 16 (revision to grade 3 IEP for 3/14/17–5/10/17).

Student in a local private school, which is for students with learning differences who struggle in a typical academic setting.[30] In grade 5, which was a self-contained class of 7 students and a full-time aide, the Student performed well academically and satisfactorily in behavior.[31] However, in grade 6, when the private school generally changes students from a single teacher to different teachers for different classes, the Student remained in the former self-contained arrangement due to behavioral difficulties.[32] The Student's grades were almost all A's in grade 5, but considerably lower in grade 6 until the change in the last quarter to distance learning.[33] Starting in the spring of 2020, when the private school changed to distance learning due to the pandemic, the Student's behavior improved significantly, especially for 1:1 instruction, but the interaction with other students was negligible.[34]

Yet, the private school would not agree to the Student's continued enrollment for 2020–21 unless a registered behavior technician (RBT) accompanied him during the entire school day.[35]

During the summer of 2020, the Parent enrolled the Student in the District, agreeing to a temporary placement at a specialized school within the District for middle-school students with IEPs with behavioral and social-emotional needs, pending an IEP team meeting.[36] However, the Parent refused the District's request for permission to obtain the Student's records from the

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[30] Tr. at 62–63 (private school principal's testimony). The Student started in the private school in November 2018. *Id*. at 60.

[31] *Id*. at 191–98 (private school grade 5 teacher's testimony).

[32] *Id*. at 64–65. According to the private school's principal, the Student's impulsive behavior caused his own safety problems via provoking other students and learning problems in settling down. *Id*. at 65, 74, and 78–79. Even the opportunity for interaction with other students during lunch and recess did not work until the Parent volunteered to come in and monitor the Student. *Id*. at 66.

[33] District Exhibit 16.

[34] Tr. at 67.

[35] *Id*. at 68–69, 71, 76, and 80.

[36] IHO Exhibit 5 at 7 of 10; IHO Exhibit 6; Tr. at 89-90 (testimony of special school's interim assistant principal). The school serves approximately 50–60 students. *Id.* This temporary placement was based on the last IEP, which was for 2017–18 and which was upheld in a prior hearing officer decision (Dec. 1, 2017) and review officer appeal (Feb. 16, 2018). Hearing Officer Decision at 8 n.22 (taking judicial notice of these two publicly posted decisions).

private school.[37] The 2020–21 school year began on August 24 via distance learning, with the Student's special school self-contained class consisting of 4–5 students.[38]

On September 9, 2020, the District held the first IEP meeting. The Parent disagreed with the proposed IEP's continued placement at the District's special school, seeking instead the private school placement at public expense.[39]

On October 1, 2020, the District issued the reevaluation report, concluding that based on its available knowledge of his behavior, which was largely during the recent weeks in distance learning, that he is eligible for services in the category of other health impairment rather than ED.[40] The accompanying duly revised IEP placed the Student in the aforementioned District special school.[41] The other members of the team did not agree with the Parent's preference for placement at one of the District's comprehensive middle schools, explaining that the available data did not show the requisite the social-behavioral readiness for such a placement.[42] The Student's teachers at this school were duly licensed in the State of Nevada.[43]

On February 22, 2021, the IEP team met and agreed to revise the IEP to have the Student attend one class per day from a comprehensive campus through distance learning.[44] This class was in a self-contained special education class in reading.[45] The typical attendance

[37] IHO Exhibit 5 at 8 of 10; Tr. at 152 (testimony of the school's special education instructional facilitator).

[38] District Exhibit 1; Tr. at 150. The Parent arranged for virtual tutoring services in late afternoons to assist the Student with the online assignments. E.g., IHO Exhibit 13 at 20.

[39] District Exhibit 5 at 9 of 10.

[40] IHO Exhibit 11.

[41] *Supra* note 35 and accompanying text.

[42] E.g., Tr. at 92 (testimony of special school's interim assistant principal). At the time, the District did not have the private school data for the Student's performance during in-person instruction for the previous two years. *Id*. at 172 (testimony of District's special education instructional coordinator). The usual practice was to have a reasonable period of documented positive data to serve as the basis for a change to a placement to a comprehensive school. *Id.* at 158 and 176.

[43] *Id*. at 104.

[44] *Id*.; IHO Exhibit 7.

[45] E.g., Tr. at 134 and 178–79.

was 1–2 students, and the Student did not have any interaction with any other attendees.[46]

On February 25, 2021, the District received part of the Student's private school record.[47]

On March 23, 2021, the IEP team met again and revised the IEP to remove the latest provision due to implementation problems of scheduling and stress.[48] For the missed sessions, the District provided compensatory instruction.[49]

Soon thereafter, when the District opened for hybrid instruction, the Parent chose to continue the full distance-learning option.[50]

On April 13, 2021, the Parent filed the hearing request, resulting in the above-mentioned decision and appeal.[51]

V. CONCLUSIONS OF LAW

1. Fair Proceeding

This first overall issue of the review encompasses the six points identified in the Parent's appeal and addressed in the Parent's written arguments.[52] Due to their significant overlap as evidentiary issues, the first four points will be addressed together under the first of the two subheadings.

Evidentiary claims. The Parent's first claim was that the IHO's admission of the 2017 IEP exceeded the IDEA's two-year statute of limitations. The first problem with this claim is that it incorrectly assumes that the IDEA's limitations period is predicated on a "look back"

[46] *Id*. at 135–38 and 182.
[47] IHO Exhibit 5 at 4–5 of 10.
[48] IHO Exhibit 5 at 3 of 10; IHO Exhibit 9; Tr. at 159 (testimony of the school's special education instructional facilitator).
[49] Tr. at 155, 160, and 163.
[50] *Id*. at 92, 157, and 180. Similarly, the Parent did not elect to have the Student participate in the June acceleration program for social-emotional and academic progress as a result of the previous COVID-19 limitations. *Id*. at 92 and 110.
[51] *Supra* notes 4–17 and accompanying text.
[52] *Supra* notes 17, 24 and accompanying text; *see also* SRO 5.

from the date of filing for the due process hearing. Instead, the IDEA expressly uses as the starting point the date that the Parent "knew or should have known" (KOSHK) of the actions underlying alleged violation(s).[53] Thus, the actions underlying either or both of the FAPE issues in this case may well have been earlier than the two-year period.[54] Regardless of this nuance, the second and ultimately fatal problem with the Parent's claim is that IHOs have broad discretion in the application of the limitations period,[55] clearly permitting the evidence of the events prior to this period as contextual or foundational information.[56] Thus, the admission of the 2017 IEP was not reversible error.

Similarly, in response to the second and third claims,[57] the case law is well-established that IHOs have broad discretion in the management of the hearing within the applicable 45-day timeline, including determining the scope of evidence to be admitted.[58] In this case, the IHO's determinations clearly were not an abuse of discretion. For example, the IHO's identification and application of relevance to the identified issues as the standard for the evidentiary

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[53] 20 U.S.C. §§ 1415(b)(6)(B) and 1415(f)(3)(c) (2018); Avila v. Spokane Sch. Dist., 852 F.3d 936 (9th Cir. 2017).

[54] *E.g.*, Indep. Sch. Dist. No. 413 v. H.M.J., 123 F. Supp. 3d 1100, 1113 (D. Minn. 2015).

[55] *E.g.*, 71 Fed. Reg. 46,540, 46,706 (Aug. 14, 2006) (listing compliance with the statute of limitations as one of the examples of the IHO's broad discretion).

[56] *E.g.*, Haw. Dep't of Educ. v. E.B. *ex rel.* J.B., 45 IDELR ¶ 249 (D. Haw. 2006) (consistent with [the] statute of limitations, the [IHO] was permitted to consider . . . prior events for other purposes, such as to provide context"); *see also* Phyllene W. v. Huntsville City Bd. of Educ., 630 F. App'x 917, 925–26 (11th Cir. 2015) ("[S]tatutes of limitations operate to bar *claims* that mature outside the applicable limitations period. . . . But, *evidence* that is relevant to establish claims maturing within this limitations period is admissible."); M.S. v. Randolph Bd. of Educ., 75 IDELR ¶ 103 (D.N.J. 2019) ("a statute of limitations will not preclude the introduction of evidence that predates the start of the limitations period if it is relevant to events that give rise to a timely claim."); J.Y. *ex rel.* E.Y. v. Dothan City Bd. of Educ., 63 IDELR ¶ 33 (M.D. Ala. 2014) ("Statutes of limitations operate only to bar claims that accrue outside the applicable limitations period; evidence that is relevant to establish claims that accrued within the limitations period is generally admissible.").

[57] These two overlapping claims concern non-allowance of the Parent's requested evidence and witnesses. *Supra* text accompanying note 17.

[58] *E.g.*, O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); Jalloh *ex rel.* R.H. v. District of Columbia, 535 F. Supp. 2d 13, 22 (D.D.C. 2008); *see also* D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712, 721 (Pa. Commw. Ct. 2010); *cf.* 71 Fed. Reg. 46,706 (Aug. 14, 2006) ("The specific application of [the general regulatory] procedures to particular cases generally should be left to the discretion of hearing officers who have the knowledge and ability to conduct hearings in accordance with standard legal practice.").

determinations in response to the Parent's requests was clearly reasonable.[59] In the written arguments for the appeal, the Parent did not identify any specific exhibit that she proffered and that the hearing officer rejected. Although her written arguments identified three witnesses whom she claimed the IHO prejudicially disallowed, [60] the first one testified at the hearing, the IHO did not disallow the second one, and the Parent did not provide the requisite relevance for the third.

The Parent's fourth claim, with regard to the Parent's questions as to whether the Student's teachers had state certification, is a closer call. Contrary to the IHO's position in this matter,[61] teacher certification may well be relevant in FAPE cases. The IDEA's definition of FAPE includes "meet[ing] the standards of the state education agency."[62] Teacher licensing is clearly one of the standards allocated to the superintendent of Nevada's state education agency.[63] Moreover, it clearly may be relevant to the issue of FAPE,[64] especially in light of the two separable dimensions of FAPE at issue in this case.[65] However, in this case, this error was harmless because the testimony revealed that Student's teachers were certified.[66]

In her written arguments for the appeal, the Parent alleged that the IHO denied admission of public documents that the Student's teachers lacked certification.[67] However,

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[59] *Supra* note 8 and accompanying text.

[60] SRO 5, at *1.

[61] E.g., Tr. at 103.

[62] 20 U.S.C. § 1402(9)(B) (2018).

[63] NEV. REV. STAT. §§ 391.009 *et seq*. (2018).

[64] *E.g*., Evanston Cmty. Consol. Sch. Dist. No. 65 v. Michael M., 356 F.3d 798 (7th Cir. 2004); Damien J. v. Sch. Dist. of Phila., 49 IDELR ¶ 161 (E.D. Pa. 2008).

[65] *Supra* note 13–15 and accompanying text. Even if the implementation issue was limited exclusively to scheduling, which is not necessarily the case upon close consideration, the *Endrew F*. issue certainly encompasses, in the potential scope of its reasonable calculation, compliance with state standards for teacher certification.

[66] *Supra* note 43 and accompanying text. Additionally, it is not clear whether, in the absence of any showing of reasonable suspicion of absence of certification, the IHO's position was an abuse of discretion. Finally, even if one or more of the Student's teachers lacked appropriate licensing, it would not necessarily have changed the outcome; it does not amount to a per se denial of FAPE. *E.g.*, B.M. v. N.Y.C. Dep't of Educ., 61 IDELR ¶ 68 (S.D.N.Y. 2013).

[67] SRO 5, at *2.

again, her allegation lacks specific support in the record of this case. Neither in the extensive prehearing documentation nor in the transcript is there any proffer of such purported public documentation.

IHO treatment. The final pair of points in the Parent's appeal specifically claimed that the IHO denied her questions and generally claimed that the IHO treated her poorly. Quite the contrary, an objective review reveals that the IHO notably accommodated the Parent's pro se status. For example, the IHO allowed the Parent's witnesses despite her lack of complying with the five-day rule[68] and not only independently asked questions of the District's witnesses[69] but also agreed to read aloud the Parent's questions.[70] Moreover, the IHO allowed consideration of the Parent's request for a witness subpoena that was beyond the clearly communicated deadline[71] and patiently reminded the Parent of the prohibition against *ex parte* emails.[72] Similarly in relation to the Parent's English language status, the IHO postponed the hearing until subsequent sessions so as to provide effective translation services[73] and—as the Parent acknowledged[74]—continued such diligence at those sessions.[75]

In her written arguments for the appeal, the Parent claims that the IHO exhibited "bias" and served as a "bad example of how parents are treated when they advocate for their children to have a [FAPE]."[76] Although undoubtedly this characterization is the Parent's sincere individual perception, an objective review of the record reveals that the IHO's conduct of the

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[68] *E.g.,* Tr. at 120. Moreover, in light of not only the IHO's reminders of this rule (IHO Exhibit 1 at 11; IHO Exhibit 5 at 1; IHO Exhibit 8 at 3) but also the Parent's prior experience at representing herself (*supra* note 36), she may not successfully argue that she did not know or have reason to know of this applicable rule.

[69] E.g., Tr. at 70–71 and 133–34.

[70] E.g., *id.* at 160–61.

[71] IHO Exhibit 12 at 3; IHO Exhibit 9 at 2.

[72] *Supra* note 19; *see also* IHO Exhibit 13 at 29 and 58.

[73] E.g., Tr. at 40–41.

[74] E.g., *id*. at 57 ("I understand you are trying to help me.").

[75] E.g., *id*. at 109.

[76] SRO Exhibit 5, at *2

hearing, including her treatment of both parties, was well within the legal standards of impartiality,[77] and this case unfortunately is a good example of the difficulties of pro se parental representation in adjudicative proceedings.[78]

2. Substantive FAPE and LRE

Although the IHO properly cited and applied the controlling legal standards for FAPE in the LRE,[79] review of the record reveals that the gist of the Parent's complaint was the placement of the Student in a special school rather than a self-contained class in a comprehensive middle school. Yet, the relevant background of this case includes not only prior decisions upholding a special school placement for the Student but also, even without access to the Student's private school records, the private school's decisions based on the Student's behaviors that placed his own safety at risk and that impeded his academic progress, to (1) place him in a self-contained sixth grade class unlike its prevailing model for that grade, and (2) disallow his reenrollment at the school absent the outside provision of a full-time RBT.[80] Analyzed alternatively without this contextual information,[81] the IEP team, based on the applicable snapshot rule,[82] lacked the requisite information of reasonably sustained positive behavioral information to establish readiness for the Parent's requested placement change to the comprehensive middle school.[83]

Oddly placed within the written arguments for the appeal specific to the first point,

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[77] *E.g., Perry A. Zirkel, The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update*, 21 PEPPERDINE DISP. RESOL. L.J. 257 (2021).

[78] *E.g*., Perry A. Zirkel, *Are the Outcomes of Hearing (and Review) Officer Decisions Different for* Pro Se *and Represented Parents?* 34 J. NAT'L ASS'N ADMIN. L. JUDICIARY 263 (2015).

[79] *Supra* notes 13–14 and accompanying text.

[80] *Supra* notes 32–34 and accompanying text.

[81] Due to the Parent's efforts, the IEP team did not have available at that time the records from the private school. *Supra* note 42.

[82] Adams v. State of Oregon, 195 F.3d 1141, 1149 (9th Cir. 1999) ("[An IEP] is a snapshot, not a retrospective. In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted.").

[83] *Supra* note 42 and accompanying text. The only positive behavioral information was for the period of remote instruction, when the Student did not have interaction, much less in-person interaction, with peers. *Supra* note 46.

which concerned admission of the 2017 IEP, the Parent relied on a recent hearing officer decision that purportedly demonstrated a systemic violation of LRE at the special school that the challenged IEP provided.[84] However, this decision was specific to the individual circumstances of the child in that case that—unlike the circumstances of the present case—the child's special education teacher and special education instructional facilitator supported placement in the self-contained class at a comprehensive secondary school and the student presented compelling testimony of maturity and motivation.[85]

3. IEP Implementation

The alleged denial of FAPE regarding implementation of the IEP was limited to the missing instruction in math from the special school due to the scheduling problems within the one-month of reading instruction in the special education class at the comprehensive middle school.[86] It is unlikely that this limited shortfall met the applicable "material failure" failure standard for denial of FAPE.[87] This determination need not be definitive. The reason, as the IHO correctly concluded,[88] is that assuming arguendo that the shortfall in this case met the materiality standard, the District's make-up services effectively resolved the matter.[89]

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[84] SRO Exhibit 5 at *2.

[85] Student v. District, No. CL073021 (hearing officer Jamie Resch, July 30, 2021), at *24–25 (attachment within SRO Exhibit 5). Although there were some similarities, additional distinguishing factual features of that case included that (1) the student had opportunities to interact with other students during remote instruction (*id.* at *8); (2) the record also included evidence of multiple positive in-person interactions with other students (*id*. at *10); (3) the IEP team members were "somewhat inconsistent" in their reason for the special school placement (*id.* at *11); and (4) the team did not consider partial placement at the self-contained class of a comprehensive secondary school (*id.* at *10–11).

[86] *Supra* text accompanying notes 44–46 and 48.

[87] Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811, 822 (9th Cir. 2007) ("A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services required by the child's IEP.").

[88] Hearing Officer Decision at 17.

[89] *Supra* note 49 and accompanying text. The *Van Duyn* court similarly found that the defendant-district's compensatory action, although ordered by a hearing officer rather than being proactive, corrected the shortfall. *Van Duyn v. Baker Sch. Dist. 5J*, 502 F.3d at 825. Again tucked within the first, limitations-period point of her written arguments for the appeal, Parent alleged that the District did not make up any of the shortfall (SRO 5 at *1), but she did not provide any evidence in the record rebutting or even questioning the testimony of the more than one District witness that served as the requisite basis for the factual finding that the District had done so.

IV. DECISION AND ORDER

The hearing officer's decision is affirmed.

Dated: August 16, 2021 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 after receipt of this decision (NAC § 388.315).