



1 decided were determined and a schedule for filing optional briefs (i.e., written  
2 statements of either party's position) was ordered. [SRO Exhibit 2] Parent filed an  
3 "Affidavit of Fact" with four attachments [SRO Exhibit 4]; Clark County School District  
4 (CCSD) did not file a responsive brief.

5 At the status conference, parent indicated that he wanted to offer additional  
6 evidence and was given instructions for the offer and parameters of acceptance by the  
7 review officer. One of the attachments to parent's appeal affidavit of fact (parent's  
8 refusal to sign the IEP) is already in evidence as hearing exhibit D-4 (p. 16 of 16).  
9 Another attachment (notice of intent to implement the 3/24/2017 IEP) is also already in  
10 evidence as hearing exhibit D-4 (p. 1 of 21). Another exhibit, a response from the school  
11 principal dated November 14, 2016 to a "Public Concerns" raised by Mother addresses  
12 issues *unrelated to the incident in this case* and beyond the review officer's jurisdiction, i.e.,  
13 alleged wrongful questioning of student by staff and alleged retaliation. In addition, the  
14 parent failed to follow the review officer's directions for requesting the submission of  
15 this additional evidence. It is excluded from the review officer's consideration in this  
16 decision on the basis that it is irrelevant to the issues before this hearing officer, but will  
17 be made part of the review officer's record in the event of an appeal. A final attachment,  
18 a guidance letter from the United States Department of Education addressing behavioral  
19 supports to ensure that children with disabilities are best able to access and benefit from  
20 instruction is not evidence per se but rather in the nature of legal argument and has been  
21 reviewed by the review officer. [See SRO Exhibit 4]  
22

23  
24 The case was taken under submission and this decision rendered.

25 **II. STANDARD OF REVIEW AND BURDEN OF PROOF**

26 **A. Standard of Review**

27 The state review officer is required to make an independent decision after  
28

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

### 15 **A. Burden of Proof**

16 Under the IDEA the party bearing the burden of proof at hearing must meet the  
17 preponderance of the evidence standard.<sup>3</sup> Under Nevada Revised Statutes, it is the  
18 school district that must meet that burden. NRS § 388.467. A preponderance of the  
19 evidence is defined, in relevant part, as "[e]vidence which is of greater weight or *more*  
20 *convincing than the evidence which is offered in opposition to it*; that is, evidence which as a  
21 whole shows that the fact sought to be proved *is more probable than not*." Black's Law  
22 Dictionary, 9<sup>th</sup> 2009. [Emphasis added] The "law requires nothing to be conclusively  
23 proven." *Silver Mining Company v. Fall*, 6 Nev. 116, 1870 WL 2418, p. 5 (Nev. 1870).  
24

25 In weighing the evidence, a hearing officer does not just determine who has the  
26 most evidence on a given issue, but must make determinations as to the credibility of  
27

---

28 <sup>3</sup> See 34 C.F.R. § 300.516(b)(3), a burden logically applied to the administrative due process hearings as well as subsequent court proceedings.

1 that evidence.

2 Having reviewed the entire record, including the hearing officers decision,  
3 including findings of fact, credibility determinations and conclusions of law; the  
4 transcripts of the hearing and exhibits submitted therein; and the parent's written  
5 submission, the review officer decides this appeal as follows.

### 6 III. THE STUDENT AND THE PRECIPITATING INCIDENT

7  
8 Student is a high school student who receives special education from CCSD  
9 pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et*  
10 *seq.*, and Nevada Revised Statutes, Chapter 388 and the respective governing  
11 regulations. Student is eligible for special education as a student with other health  
12 impairments and a secondary eligibility category of specific learning disability.  
13 Student's health impairments include attention deficit hyperactivity disorder (ADHD),  
14 oppositional defiance disorder (ODD), a mood disorder, and colitis. The behaviors  
15 which interfere with Student's educational performance include truancy and elopements  
16 from class, disregard of school rules and insubordination, hyperactivity, oppositional  
17 behaviors, impulsivity, short attention span, inability to concentrate, being easily  
18 distracted and not easily redirected. [Hearing Decision p.1-2, Hearing exhibit D-4]

19 On April 6, 2017 Student was charged with a disciplinary violation, specifically  
20 battery and robbery of a cell phone from another student. [Hearing exhibits P-9 and D-9]  
21 A manifestation determination review (MDR) was conducted and after review of  
22 relevant information the team determined the incident was not caused by and did not  
23 have a direct and substantial relationship to Student's disability, and was not caused by  
24 the failure of the district to implement the Individualized Educational Program (IEP).  
25 [Hearing exhibit D-5] The MDR team recommended suspension, and subsequently  
26 recommended placement of Student in a district behavioral school for nine to eighteen  
27 weeks. [Hearing Decision p.2; Tr. I, 12-182, *passim*]

28 Parents disagreed with the findings and decision of the MDR team and filed for a

1 hearing, the decision of which is the subject of this appeal.

#### 2 3 **IV. ISSUES ON APPEAL**

- 4 1. Did the hearing officer err by concluding that the incident was not caused by or had a  
5 direct and substantial relationship to the child's disability?  
6 2. Did the hearing officer err by concluding that the child's conduct was not a direct  
7 result of the district's failure to implement the student's IEP?  
8 3. Did the hearing officer demonstrate bias against appellees, affecting the substantive  
9 decision and thereby denying parent due process?

#### 10 **V. APPLICABLE LAW**

11 The MDR is a review of relevant information in the student's file to determine  
12 whether that conduct is a manifestation of the child's disability. It must be performed  
13 when a district proposes disciplinary measures that will result in a change of placement  
14 for a child with a disability. 34 C.F.R. § 300.530(e). The MDR analysis must be performed  
15 within 10 school days of "any decision to change the placement of a child with a  
16 disability because of a violation of a code of student conduct." 34 C.F.R. § 300.530(e). A  
17 change in placement occurs when, in relevant part, the removal is for more than 10  
18 consecutive school days. 34 C.F.R. § 300.536.

19  
20 The MDR is conducted by the district, the parent and relevant members of the IEP  
21 team as determined by the parent and the district. 34 C.F.R. § 300.530(e). It involves a  
22 review of all the relevant information in the child's file, including the child's IEP, any  
23 teach observations, and any relevant information provided by the parents. 34 C.F.R. §  
24 300.530(e). Parents have the right to invite additional participants in the MDR, they do  
25 not have the right to veto the district's choice of team members. *Fitzgerald v. Fairfax*  
26 *County Sch. Bd.*, 50 IDELR 165 (E.D. Va. 2008).  
27

28 Pursuant to 34 C.F.R. § 300.530(e)(1), conduct must be found to be a manifestation

1 of the child's disability if the conduct in question was caused by or had a direct and  
2 substantial relationship to the child's disability; or the conduct in question was the direct  
3 result of the district's failure to implement the IEP. If the district determines that the  
4 misconduct was not related to the child's disability or a result of a failure to implement  
5 the IEP, the child may be subject to the same discipline as a child without a disability,  
6 except that the child must continue to receive education services to enable him to  
7 participate in the general education curriculum, although in another setting, and to  
8 progress toward meeting the goals of his IEP. 34 C.F.R. § 300.530(d)(1).

## 9 VI. FINDINGS OF FACT

10 The review officer hereby adopts the findings of the hearing officer as set forth on  
11 pages 4 through 8 of her decision, as though fully set forth here. In addition, the review  
12 officer finds that the district implemented the relevant portions of the IEP as more  
13 thoroughly discussed below.<sup>4</sup>

## 15 VII. ANALYSIS AND CONCLUSIONS

16 The review officer hereby adopts the analysis and conclusions of law of the  
17 hearing officer as set forth on pages 9 through 14<sup>5</sup> of her decision as though fully set  
18 forth here. The review officer adds the following to address parent's contentions on  
19 appeal.

20 *Did the hearing officer err by concluding that the incident was not caused by or had a direct and*  
21 *substantial relationship to the child's disability?*

22  
23 A review of the entire record supports the hearing officer's conclusion, by a  
24 preponderance of the evidence, that the MDR team correctly determined that the

25 \_\_\_\_\_  
26 <sup>4</sup> In her findings of fact, the hearing officer found that "The *petitioners* did not provide evidence indicating  
27 that any provision of the IEP of the student's controlling IEP was not implemented...or that the conduct  
28 was not the direct result of a failure by the district to implement any portion of the IEP." [Emphasis  
added, Decision, p. 8] In this section she did not include a finding that the district did implement the IEP.  
See issue two for further discussion.

<sup>5</sup> See footnote 7 regarding p. 15 of the hearing officer's analysis and conclusions.

1 incident was not caused by or had a direct and substantial relationship to Student's  
2 disability. [Tr.I, 12-182 *passim*]

3 Parent argues that Student is a vulnerable person, regardless of age, and during  
4 the hearing expressed concern that Student will have difficulties throughout his life.  
5 [SRO Exhibit 4; Tr.I, 266:24-273:16] The IDEA, however, does not excuse a student's  
6 misconduct merely because a student is disabled. If the misconduct is not caused by and  
7 does not have a direct and substantial relationship to the disability (and the IEP was  
8 implemented) a student may be disciplined. In this case, after a thorough review, the  
9 MDR public team members determined that Student's conduct was deliberate and  
10 premeditated and not related to Student's history of impulsivity or other disabilities and  
11 behaviors. [See Hearing Decision, pp. 10-11, 13; Tr. I, 12-182 *passim* ] The hearing officer  
12 upheld the MDR team's determination, and this review officer affirms the hearing  
13 officer's conclusions.  
14

15 *Did the hearing officer err by concluding that the child's conduct was not a direct result of the*  
16 *district's failure to implement the student's IEP?*

17 In her analysis and conclusion section the hearing officer included additional  
18 findings of CCSD's implementation of the IEP, specifically noting that CCS met its  
19 burden of proof on this issue<sup>6</sup> and concluding that the misconduct was not a result of the  
20 failure to implement the IEP. [Hearing Decision, p. 13-14] The hearing officer's findings  
21 are supported by the record. [Tr. I, 56-182 *passim*; Hearing exhibit D-15] The review  
22 officer affirms the hearing officer's conclusions on this issue.

23 Parents' counsel at the hearing spent considerable time eliciting testimony  
24 regarding the alleged inadequacies of the behavioral intervention plan and other  
25 strategies in the IEP, which were included to address Student's behaviors. In addition,  
26 she elicited testimony in an attempt to establish the need for counseling and a behavioral  
27

---

28 <sup>6</sup> See footnote 4, above.

1 aide, not included in the Student's then-current IEP. Parents' testimony suggests that  
2 they believe the IEP and behavioral intervention plan are inadequate to meet Student's  
3 needs. [Tr. I, 183-Tr.II 311] On appeal and at hearing, Parent alleged that he did not  
4 receive various notices, did not agree with the IEP and that neither he nor a psychologist  
5 participated in the development of the behavioral plan. Like the hearing officer, the  
6 review officer is sympathetic to the parents' concerns. But also like the hearing officer,  
7 the review officer notes that the *appropriateness* of the then-current IEP (including  
8 procedural compliance in its development) was not, and is not, at issue in a hearing to  
9 determine the correctness of a manifestation determination. The sole question regarding  
10 the IEP that the hearing officer and review officer may determine is whether the conduct  
11 was a direct result of the district's *failure* to implement the Student's IEP. Parent is not  
12 precluded from challenging the appropriateness of the IEP and behavioral plan in a  
13 subsequent, separate hearing.<sup>7</sup>

15 *Did the hearing officer demonstrate bias against appellees, affecting the substantive decision and*  
16 *thereby denying parent due process?*

17 Pursuant to NAC 388.315, the review officer must review the entire record, in part  
18 to ensure that the procedures at the hearing were consistent with the requirements of  
19 due process. Parent has alleged that the hearing officer was "biased when it came to  
20 testimony concerning hearsay." Specifically, parent alleges that Assistant Principal I was  
21 permitted to testify as to what the nurse had reported as injuries, and what Assistant  
22 Principal II said and did when he located Student on the bus. [Tr. I, 17-18, 39-41 and see  
23 264] Special education hearings are not governed by technical rules of evidence and  
24 hearsay is often permitted and given the weight it is due. In this case, the two alleged  
25 improper admissions of "hearsay" were harmless, as they did not address the two issues

---

26 <sup>7</sup> The hearing officer's gratuitous discussion of the evidence concerning whether an aide could have  
27 prevented Student from leaving campus and whether counseling would benefit the Student since Student  
28 refused to speak to the counselor is not binding in any subsequent hearing since these were not issues  
over which the hearing officer had jurisdiction in this case.



1 in this case (relationship of the conduct to the disability and the implementation of the  
2 IEP) and were not determinative of the hearing officer's final conclusions.

3 The review officer has found no evidence of hearing officer bias in the record.

4 **DECISION AND ORDER**

5 The review officer affirms the hearing officer's decision that: the finding of the  
6 MDR team that the incident was not caused by or had a direct and substantial  
7 relationship to the child's disability; and was not the direct result of the district's failure  
8 to implement the IEP shall be upheld.

9 It is so ordered.

10  
11  
12  
13  
14 Date: August 17, 2017

  
Joyce O. Eckrem, State Review Officer

15  
16 **NOTICE OF APPEAL RIGHTS**

17 The decision of the review officer is final unless a party appeals the decision. A  
18 party may appeal from the decision of the review officer by initiating a civil action in a  
19 court of competent jurisdiction within 90 days after receipt of the decision. NAC 388.315.  
20  
21  
22  
23  
24  
25  
26  
27  
28