

IMPARTIAL DUE PROCESS HEARING
BEFORE THE IHO
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS

STATE OF NEVADA

In the Matter of

STUDENT¹, by and through The Parents,
The Parents

v.

SCHOOL DISTRICT,
The District.

DECISION OF THE IHO

Date: September 1, 2023

The Parents: The Parents Pro Per.

Also present for the Parents, Kathern
Beasley, Advocate.

The District: Daniel Ebihara, Esq., on
behalf of the School District. Also
present for the District, Kimberly
Caris, Compliance Monitor, Matthew
Rogers, Paralegal, Joseph Fragiadakis,
Compliance Monitor

Victoria T. Oldenburg,
Impartial Hearing Officer (IHO)

INTRODUCTION AND PRELIMINARY MATTERS

1. The parties to the present matter are the Student, by and through the Parent, and the School District (“District”). The Student did not have legal counsel and was represented by the Parent, with the assistance of advocate Kathern Beasley.²
2. On June 29, 2023 the Parent filed a Request for Due Process (“RPD”) under the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §1400 et. seq., and its implementing regulations, 34 CFR §300 et seq., Chapter 388 of the Nevada Revised Statutes (NRS), and Chapter

¹ Personally identifiable information is included in the Appendix to the final decision in this matter and will be removed prior to public distribution. *See Letter to Chad*, 105 LRP 4754 (December 23, 2004).

² All pre-hearing documents referenced herein were provided electronically. Where noted, the Parent mailed a CD to the IHO of certain documents already produced electronically.

388 of the Nevada Administrative Code (NAC).³

3. On July 12, 2023 the Nevada Department of Education (NDE) Superintendent of Public Instruction appointed the undersigned IHO, Victoria T. Oldenburg, to this matter.

4. On July 12, 2023 the District filed a Notice and Response to the RPD.⁴

5. On July 21, 2023 the IHO issued a Preliminary Order setting forth the statutory time periods applicable to the proceeding as established in 34 C.F.R. §§300.510-300.515. The IHO also issued a Notice of Status Conference setting the telephonic Status Conference for July 27, 2023 at 9:00 a.m. and issued the Rights of the Parties.⁵ The primary purpose of the Status Conference was to set the dates for the Pre-Hearing Conference and hearing in the event the parties were unable to resolve the issues in the RDP.

6. On July 21, 2022 the Parent submitted a *Response Regarding Status Call Set For Thursday July 27, 2023 at 9:00 a.m.* stating the Parent was unavailable at the time set for the Status Conference, and raising issues regarding who would be present at the Resolution Meeting.⁶ The matters concerning the Resolution Meeting were not addressed by the IHO since the IHO does not have jurisdiction over the participants at the Resolution Meeting. At the Parent's request, on July 24, 2023 the IHO issued a *Second Notice of Status Conference* rescheduling the Status Conference for July 27, 2023 at 2:00 p.m.⁷

7. At the Status Conference the parties reported that they held the Resolution Meeting on July 24, 2023 and were unable to resolve the issues.

³ IHO Exhibit (HO) 1. At the time of appointment the IHO was provided with 5 pages of the RDP. At the Pre-Hearing Conference on August 1, 2023 it was discovered that the IHO had not been provided with the entire RDP. That day the NDE provided the IHO, via electronic mail, a true and correct copy of the forty-one (41) page RDP.

⁴ HO 2

⁵ HO 3, 4 and 5.

⁶ HO 6

⁷ HO 7

8. On July 27, 2023 the Parent submitted an *Early Case Conference List of Witnesses and Document Production (Pursuant to Fed. R. Civ. P. 26(a)(1) and NRCP 16.1)*.⁸ This document listed 12 witnesses including the District’s attorneys, Daniel Ebihara, Esq. and Yasni Rodriguez-Zaman, Esq. The document also requested the production of certain documents.

9. On August 1, 2023 the IHO issued an Order After Status Conference setting the telephonic Pre-Hearing Conference for August 10, 2023 and the hearing for August 22, 2023 and August 28, 2023 in the event the parties were not able to resolve the issues in the RDP.⁹ The dates were set based upon the Parent and the District’s availability and were agreed to by the parties.

10. On August 1, 2023, because the parties had not resolved the issues in the RDP, the IHO issued a Notice of Pre-Hearing Conference to, among other things, determine the precise issues to be addressed at the hearing, discuss whether pre-hearing motions or briefs were anticipated, inform the parties of the deadlines for subpoenas (August 4, 2023) and for the exchange of witness lists and documents, and confirm the date and time for the hearing and of any additional pre-hearing conferences.¹⁰

11. On August 3, 2023 the Parent submitted a letter entitled *Response to IHO Reply to Petitioners’ Early Case Conference Disclosures and Witness and Documents* “the Response”).¹¹ The Response concerned an email the IHO had issued to the Parties on August 3, 2023 which stated: “I am in receipt of the Petitioners’ "Early Case Conference List of Witnesses and Document Production. This is a reminder that neither the State nor the Federal Rules of Civil

⁸ HO 8

⁹ HO 9

¹⁰ HO 10

¹¹ HO 11

Procedure apply to these proceedings so please refrain from submitting pleadings under those rules. Please refer to the Notice of Prehearing Conference previously provided to the parties for instructions on the submission of witness and document disclosures.”¹² The Response also objected to Mr. Daniel Ebihara, Esq. appearing as a legal representative of the District, alleging a conflict of interest because Mr. Ebihara served as legal counsel for the District and as Executive Director for the Office of Compliance and Monitoring. The Response also included a request for bates-stamped records from the District, and the Parent’s list of witnesses.

12. On August 7, 2023 the Parent submitted a letter to the IHO and Mr. Daniel Ebihara, Esq., providing a *Declaration of Petitioners in Support of Petitioners Rights in the Pre-Hearing Conference Set for August 10, 2023, and Petitioners Prehearing Conference and Statement of Facts*.¹³ In this letter the Parent submitted a Statement of Issues and a Reservation of Rights, and again requested records from the District. The Parent again objected to attorney Daniel Ebihara’s appearance as legal representative for the District on the grounds Mr. Ebihara had a conflict of interest, specifically stating “[District] is a recipient of grant funds to which Daniel Ebihara, Esq. has made an appearance as [District] legal counsel, while serving in his official capacity of the Executive Director for its’ office of compliance and monitoring.”

13. On August 7, 2023 the District submitted a *Motion in Limine to Preclude the Testimony of Daniel Ebihara, Esq., Yasnai Rodriguez-Zaman and Lyann Materna as Petitioner’s Witnesses*.¹⁴

¹² HO 37 (e-mails from IHO to parties dated August 3, 2023).

¹³ HO 12

¹⁴ HO 13

14. On August 7, 2023 the Parent submitted a *Notice of Intent to Serve Subpoena Duces Tecum Upon the Custodian of Records for Clark County School District*.¹⁵ The Notice was a request to issue a subpoena duces tecum to Lynann Materna, Compliance Monitor for the Office of Special Education, a demand for her appearance to testify as custodian of records, and a demand to bring with her to the hearing the entire educational file of the Student and any other records which refer to the Student.

15. On August 8, 2023 the Parent submitted a *First Supplement to List of Witnesses and Document*.¹⁶ The Supplement included a list of witnesses, a reservation of rights, a renewed document request, and the Parent's exhibits P-1 through P-3, P-5 through P-14, and P-24 through P-38. The Supplement and documents were also provided to the IHO on a CD sent via certified mail.

16. On August 9, 2023, the IHO issued an order addressing the Parent's submissions: (i) July 27, 2023 *Early Case Conference List of Witnesses and Document Production (Pursuant to Fed.R.Civ.P. 26(a)(1) and N.R.C.P. 16.1)*; (ii) August 3, 2023 *Response to IHO Reply to Petitioners Early Case Conference Disclosures and Witness and Documents*; (iii) August 7, 2023 letter from the Parent with *Declaration of Petitioners in Support of Petitioners Rights in the Pre-Hearing Conference Set for August 10, 2023 and Petitioners Prehearing Conference and Statement of Facts*, and; August 7, 2023 *Petitioners Notice of Intent to Serve Subpoena Duces Tecum Upon the Custodian of Records for Clark County School District*.¹⁷ The Order also addressed the District's *Motion in Limine to Preclude the Testimony of Daniel Ebihara, Esq.*,

¹⁵ HO 14

¹⁶ HO 15

¹⁷ The District did not submit responses to these submissions.

*Yasna Rodriguez-Zaman, Esq., and Lynann Materna as The Parents' Witnesses.*¹⁸

17. With regards to the *Early Case Conference List of Witnesses and Document Production*, the August 9, 2023 Order stated that to the extent this was the Parent's disclosure of witnesses, on August 3, 2023 the IHO had sent an email to the parties requesting that the District let the Parent know which witnesses on the Parent's list that the District would be producing at the hearing and extending the deadline for subpoena requests to August 7, 2023. The Parent was informed that if they had other witnesses that the District was not producing at the hearing (and which would not appear voluntarily) then the Parent needed to submit a subpoena request as directed in the Notice of Pre-Hearing Conference.¹⁹ The Order also noted that the Parent did not include any documents in the July 27, 2023 submission as disclosures under the guidelines of the Notice of Pre-Hearing Conference.

18. With regards to the August 3, 2023 letter entitled *Response to IHO Reply to Petitioners Early Case Conference Disclosures and Witness and Documents*, the August 9, 2023 Order addressed the portion of the Response wherein the Parent stated the IHO did not provide the Parent with her prescribed methods for receiving the witness nor for the Parent's list of witnesses. In the Order the IHO again directed the Parent to the Notice of Pre-Hearing Conference instructions on the submission of witnesses and document disclosures. In the Response the Parent also requested bates stamped records to be produced by the District. In the Order the IHO stated that in an email dated August 7, 2023 the District informed the Parent that the bates stamped educational records of the Student were ready to be picked up, and stated the documents were not their disclosures pursuant to the Notice of Pre-Hearing Conference, which were not due until

¹⁸ HO 16

¹⁹ HO 37, August 3, 2023 email from the IHO to the parties. HO 10.

August 14, 2023.²⁰

19. With regards to the August 7, 2023 letter from the Parent with *Declaration of Petitioners in Support of Petitioners Rights in the Pre-Hearing Conference Set for August 10, 2023* and *Petitioners Prehearing Conference and Statement of Facts*, the August 9, 2023 Order found there were no legal or factual grounds to support that Mr. Ebihara, Esq. had a conflict of interest therefore the IHO denied the Parent's objection to Mr. Ebihara serving as the District's legal representative. With regards to the Parent's *Statement of Complaint Issues Before the IHO* contained in the letter, the IHO directed the Parent to the allegations in the RDP and found that based on the RPD the only issue before the IHO under the IDEA was whether the District was required to identify and evaluate the Student for IDEA eligibility, and that no other issues would be heard.²¹ The Order informed the Parent that if they wanted to file an amended complaint to include the additional issues listed in the letter the IHO would discuss this at the Prehearing Conference. The Order further stated that the Parent's reservation of rights in the letter did not require a response and that the Parent was previously provided with the Rights of the Parties, the Hearing Guidelines, and the Notice of Pre-Hearing Conference, all which address the Parent's rights. With regards to the Parent's renewed request for records, the Order informed the Parent that to the extent any records were not provided to the Parent on August 7, 2023, the Parent would

²⁰ HO 37, August 7, 2023 email from the District to the Parent.

²¹ Those issues were stated as (i) public school benefits from government grants and funding; (ii) whether the District used a balanced assessment system, including an interim assessment system, to analyze student achievement data to guide and inform instruction; (iii) whether the District enforced the implementation of the District's K-12 Literacy Plan; (iv) whether the District is responsible for maintaining complete records for a student's Read by Grade Three Student Literacy Performance Plans (SLLP); (v) whether the District monitors a student's progress completely and with fidelity; (vi) whether the District met its obligations to implement a full day of instructional planning and instruction for the Parents' student's academic success, and (vii) claims of discrimination. See 34 CFR 300.511(d) (party may not raise issues at the due process hearing that were not raised in the due process complaint unless the other party agrees). While claims of discrimination were alleged in the RDP the IHO does not have jurisdiction over discrimination claims.

be expected to identify which record(s) they had not received at the August 10, 2023 Pre-Hearing Conference.

20. With regards to the August 7, 2023 *Petitioners Notice of Intent to Serve Subpoena Duces Tecum Upon the Custodian of Records for Clark County School District*, in the August 9, 2023 the IHO denied the request, finding that the Parent has not identified why the testimony of Ms. Materna was relevant to the sole issue before the IHO, which is whether the District was required to identify and evaluate the Student for IDEA eligibility.²² The Order stated that if the Parent questioned the authenticity of the educational record, and/or the disclosures the District provides to the Parent then the Parent can object to the admission of such document(s) at the hearing and the IHO will rule on the objection.

21. The final matter addressed in the August 9, 2023 Order was the District's *Motion in Limine to Preclude the Testimony of Daniel Ebihara, Esq., Yasna Rodriguez-Zaman, Esq., and Lynann Materna as The Parents' Witnesses*. The IHO granted the Motion finding that the Parent has not established why the testimony of Ms. Materna was relevant to the sole issue before the IHO. With regards to the testimony of Mr. Ebihara, Esq., and Ms. Zaman-Rodriguez, Esq., the IHO found that they are the legal representatives of the District and did not participate in the Student's education or any decisions by the District relative to the process of identifying and evaluating the Student for IDEA eligibility. In addition, the Parent had not identified why such evidence could not be obtained by other witnesses including school staff.

22. On August 10, 2023, at 11:02 a.m. (during the beginning of the Pre-Hearing Conference) the Parent submitted an *Objection and Motion for Review and Relief of Order Dated August 9*,

²² Prior to August 10, 2023 the portion of the RDP received by the IHO indicated that the sole issue was whether the District failed to evaluate the Student for IDEA eligibility.

2023 Pursuant to LR 1B 3-1 and FRCP 60.²³ The Objection and Motion were not reviewed by the IHO until after the Pre-Hearing Conference.

23. During the initial Pre-Hearing Conference on August 10, 2023 the Parent stated objections to the August 9, 2023 Order including the portion of the Order excluding the issues the Parent listed in the *Statement of Complaint Issues Before the IHO* set out in the Parent's August 7, 2023 letter (*See fn. 19*) and the fact the IHO granted the Motion in Limine without providing the Parent with an opportunity to respond to the Motion. During the discussion the Parent stated it would be filing a Motion to Disqualify the IHO on the grounds the IHO had engaged in inappropriate conduct, displayed bias and prejudice, was denying the Parent due process, and had participated in a previous due process hearing where she had deliberately provided the Parent with misinformation regarding legal issues and would not address fraudulent documents from the District or issues under FERPA. The IHO requested that the Parent submit the Motion to Disqualify by close of business on August 11, 2023, and that if the District wanted to submit a response it was to do so by close of business on August 15, 2023 – the parties agreed to those deadlines.

24. During the initial Pre-Hearing Conference the Parent again stated he had not received all of the documents he had requested from the District. In an effort to efficiently resolve this issue, this IHO requested that the Parents provide the list of documents they had not received to the District by close of business on August 10, 2023. The IHO also requested that the District provide a response to the Parent on the status of the document request including whether the particular

²³ HO 17. The Parent also sent, via U.S. Regular Mail, a CD of the Objections and Motion as well as other documents which were already part of the record.

documents were available to the District, the status of providing the documents to the Parent, and any objection to the documents requested, on or before close of business August 11, 2023. The parties agreed to these deadlines.

25. During the initial Pre-Hearing Conference it was discovered that the IHO only had 5 pages of the RDP, and not the 41-page RDP submitted by the Parent to The District.²⁴ This was of concern to the IHO so she decided to continue the Pre-Hearing Conference once she received the full RDP. Due to the schedule of the parties the Second Pre-Hearing Conference could not be held until August 16, 2023.

26. Based upon matters discussed at the August 10, 2023 Pre-Hearing Conference, on August 11, 2023 the IHO issued an *Order After Prehearing Conference, Modifications to August 9, 2023 Order of the IHO, Order Setting Continued Prehearing Conference*.²⁵ The August 11, 2023 Order set the briefing schedule for the Motion to Disqualify and the document request. The August 11, 2023 Order also made modifications to the August 9, 2023 Order, including striking language that the sole issue before the IHO was whether the District was required to identify and evaluate the Student for eligibility – the Order provided that the IHO would analyze the 41 page RPD and provide a preliminary statement to the parties of any additional issues under the IDEA.²⁶ In addition, the IHO found good cause to rescind the portion of the August 9, 2023 Order which granted the Motion in Limine because she had not had the full RDP when she made her determination and the partial RDP formed a portion of the basis for granting the Motion in

²⁴ Those pages were a one-page RDP, a Certificate of Service, a copy of an unreadable document, a copy of a CD entitled “Due Process Complaint – Evaluation,” and a picture of a certified mail envelope with the tracking information sent by the Parent to the District.

²⁵ HO 18

²⁶ As set forth in the Issues section herein, the identified issues were augmented but were not materially changed from the issue initially identified in the partial RDP.

Limine. The August 11, 2023 Order provided that the Parent would have until close of business on August 15, 2023 to submit their response to the Motion in Limine. Finally, the August 11, 2023 Order set the second Pre-Hearing Conference during which time the IHO would announce her decision on the Motion to Disqualify and, if granted, the matter would be assigned to a new IHO and, if denied, the Prehearing Conference would continue pursuant to the Notice of Pre-Hearing Conference.

27. On August 11, 2023, the Parent filed a *Motion to Disqualify Impartial IHO Victoria Oldenburg and Statement of Facts*.²⁷ In summary, the Parent alleged the following grounds regarding the IHO: (i) inappropriate comportment, unethical practices, personal bias, and prejudice concerning the Parents; (ii) not allowing the Parents equal access to the Due Process Hearing process in violation of their Fourteenth Amendment rights by allowing the District to violate the IDEA and NAC regarding records requests and by not addressing and enforcing the Parent's records requests; (iii) not requiring the District to share their witness list; (iv) the Notice of Pre-Hearing Conference and order was vague, complex and indecipherable to the average parent and gave the District an unfair advantage over the Parent which prevents them from obtaining relevant disclosures from the District; (v) the IHO did not mandate that the parties meet and confer regarding document disclosures, and set a date for the document exchange prior to the disclosure ending date which prevented the Parent from having any reasonable opportunity to review all documents that the District intends to use for its disclosures in violation of IDEA and NAC laws; (vi) in a prior due process hearing with the Parent, the IHO deliberately provided the Parent with misinformation concerning legal issues

³¹ HO 23

known to her and omitted information in the first due process proceeding concerning receiving and reviewing records which resulted in the Parent not having the evidence needed to support their claims; (vii) the Nevada Department of Education (NDE) provided the Parent (on two occasions) with the opportunity to express a preference in the selection of one of three qualified IHOs including the IHO and the Parent selected “none of the above” and were denied their opportunity to select a IHO; (viii) the District’s Motion in Limine to prevent the testimony of the District’s staff attorneys, Daniel Ebihara and Yasni Zaman-Rodriguez, and compliance monitor Lynann Materna, was granted without giving the Parent a right to respond which denied the Parent their right to due process; (ix) the IHO improperly denied the Parents request that a subpoena be issued to the District’s compliance monitor Lynann Materna; (x) at the August 10, 2023 Pre-Hearing Conference the IHO made biased comments and indicated she was predisposed to rule against the Parent, and; (xi) the IHO erred in applying IDEA legal standards.²⁸

28. On August 11, 2023, the District submitted its *Response to Petitioners’ First Set of Request for Production*.²⁹

29. On August 13, 2023 the Parent submitted their *Reply to the District’s Response to First Set of Requests for Productions to the Districts Clark County School District*.³⁰

30. On August 13, 2023 the Parent submitted their *Errata to Petitioner’s First Supplement to His List of Witnesses and Document*.³¹

31. On August 14, 2023 the Parent submitted their *Opposition/Reply/Objection to the*

²⁸ The Parent alleged the IHO ignored the fact the District submitted a response to the Due Process Complaint on July 12, 2023 which the Parents argued was untimely.

²⁹ HO 20

³⁰ HO 21

³¹ HO 23

*District's Motion in Limine to Preclude the Testimony of Daniel Ebihara, Esq., Yasnai Rodriguez-Zaman, Esq., and Lynann Materna as the Parent's Witnesses.*³²

32. On August 14, 2023 the Parent submitted their reply in response to the District's opposition to the Motion to Disqualify which was titled *Opposition to the Petitioners Motion to Disqualify Impartial IHO Victoria Oldenburg and Statement of Facts.*³³

33. On August 14, 2023 the IHO issued her *Order Regarding Petitioners' Document Requests.*³⁴ Upon review of the District's *Response to the Parent's First Set of Request for Production* and the Parent's *Reply to the District's Response to First Set of Requests for Productions to the Districts Clark County School District* the IHO stated that the Parent had not specifically identified any existing educational records under 34 CFR 300.613 that were not provided to the Parent and therefore found that the Parent had been provided with all existing documents that are part of the Student's educational record that was collected, maintained, or used by the agency in accordance with 34 CFR 300.613.

34. On August 14, 2023 the Parent submitted a letter to the IHO and Daniel Ebihara, Esq., and *Declaration of the Parent in Support of the Petitioners Document Exchanges for the August 14, 2023 Deadline.*³⁵

35. On August 14, 2023 the District sent a letter to the IHO and to the Parent transmitting their disclosures and witness list.³⁶

36. On August 15, 2023 the District submitted an *Opposition to Petitioner's Motion to*

³² HO 23

³³ HO 36

³⁴ HO 24

³⁵ HO 25

³⁶ HO 14

*Disqualify Impartial IHO Victoria Oldenburg and Statement of Facts.*³⁷

37. On August 15, 2023 the IHO issued a *Preliminary Statement of Issues* in the RPD for discussion at the second Pre-Hearing Conference.³⁸

38. On August 16, 2023 a Second Prehearing Conference was held. During the conference the Parent disagreed with the *Preliminary Statement of Issues* in that the issues in the Parent's RPD, and in the *Statement of Complaint Issues Before the IHO* submitted on August 7, 2023³⁹ were not included in the *Preliminary Statement of Issues*. The IHO informed the parties that her jurisdiction was limited to alleged violations of the IDEA law and regulations, 20 U.S.C. §1400, et. seq., 34 CFR Part 300, NRS Chapter 388 and NAC Chapter 388. Therefore the IHO determined she did not have jurisdiction over the additional issues identified by the Parent. The IHO overruled the Parent's objection to those issues not being included as issues for the hearing.⁴⁰ The parties agreed to the issues set forth in the *Preliminary Statement of Issues*.

39. On August 16, 2023 the IHO issued an *Order Denying Motion to Disqualify IHO*.⁴¹ With regards to allegations of a conflict of interest, the IHO found (i) the Parent did not set forth any colorable evidence to support any claim that the IHO did not meet the statutory requirements or have the personal qualifications to serve as the IHO; (ii) the Parent did not set forth any facts to support the claim that the IHO could not be objective or render an impartial decision, or that the IHO had a personal prejudice against the Parent; (iii) the fact that the IHO ruled in favor of the District in a previous matter with the Parent does not establish a conflict of interest, and; (iv) while the Parent stated the IHO is an employee of NDE, the IHO is not an employee but is an

³⁷ HO 27

³⁸ HO 35

³⁹ See fn. 19; RDP.

⁴⁰ See also HO 32.

⁴¹ HO 28

independent contractor for the NDE for due process complaints.

With regard to claims of bias, the IHO found (i) the Parent did not set forth any colorable evidence to support a claim of bias and that the IHO has applied the law equally to both parties; (ii) the Notice of Pre-Hearing Conference was prepared on a standard form which was developed in accordance with the requirements of the IDEA and Nevada law; (iii) the record established that the District and the Parent's disclosures were submitted timely and that the District provided the Parent with the Student's education records in accordance with 34 CFR §300.613; (iii) the 5-day disclosure rule is a matter of IDEA and Nevada law and there is no requirement to provide the disclosures sooner than 5 business days prior to the hearing, and while the IHO encourages the parties to confer on their witness lists and document disclosures, an IHO has no authority to order the parties to meet and confer.⁴²

With regards to bias for comments the Parent alleged were made by the IHO during the August 10, 2023 Pre-Hearing Conference, the IHO stated she believed the Parent misconstrued the discussions; however, assuming, for arguments sake, the comments were made such comments did not establish bias on the part of the IHO. With regards to bias based on a prior due process hearing with the Parent and allegations that the IHO deliberately provided the Parent with misinformation concerning legal issues known to her and omitted information in the first

⁴² With regards to the Parent's claim that the District submitted its response to the RDP untimely, the IHO found that because the District provided the Parent, on April 14, 2023, with a *Parental Prior Notice of District Refusal* to perform a comprehensive evaluation of the Student which is the subject matter of the Parent's Due Process Complaint, pursuant to 34 CFR §508(e) the District was not required to submit a response to the Due Process Complaint. The Parent had also alleged in the Motion to Disqualify that their rights in the selection of the IHO were violated. In the August 16, 2023 Order the IHO reference the requirements of NRS 388.463 in the selection of a qualified IHO. As the Parent stated in the Motion, the Parent responded "none of the above" upon receipt of the list from the NDE. Because the Parent did not exercise their opportunity to list their preferences for the 3 names provided, the IHO found NDE was within their authority to select the IHO in the absence of preferences provided by the Parent and it was not grounds for recusal of the IHO.

due process proceeding concerning receiving and reviewing records which resulted in the Parent not having the evidence needed to support their claims, the IHO found that the Parent did not provide any specific facts to support this claim.

40. During the second Pre-Hearing Conference the Parent requested an audio and written transcript of the hearing.⁴³ The IHO was not sure if the Parent was entitled to both, and, after additional research, on August 17, 2023 the IHO informed the Parent that pursuant to 34 CFR §300.512(a)(5) the Parent could receive an audio or a written transcript, but not both, and requested that the Parent inform her by close of business as to whether the Parent wanted an audio recording or a written transcript as she would need to let the court reporter know ahead of time.⁴⁴ Thereafter, on August 17, 2023 the Parent submitted a *Response Regarding Audio and Written Transcripts for Hearing* objecting to the IHO's request that the Parent select either an audio or a written transcript; the Parent reaffirmed the request for both and restated the request for records from the District. On August 18, 2023 the IHO issued an *Order Regarding the Petitioner's Transcript Request*.⁴⁵ The IHO found that because the Parent did not indicate whether they wanted an audio or a written record of the hearing it was the decision of the IHO to provide the Parent with a written record of the hearing.⁴⁶

41. On August 18, 2023 the IHO issued an *Order Granting Motion in Limine*.⁴⁷ In the Parent's

⁴³ On August 18, 2023 the IHO issued a Pre-Hearing Conference Report and Order. HO 32

⁴⁴ HO 37, August 17, 2023 e-mail from the IHO to the parties.

⁴⁵ HO 30

⁴⁶ The Hearing Office ordered that the Parent would be emailed a PDF of the written decision and would be mailed a written copy of the decision. On the first day of the Hearing the IHO clarified the present interpretation of 34 CFR §300.512(a)(5) and informed the parties that the court reporter did not have the ability to provide a certified audio recording of the Zoom hearing. Due to confusion about an audio recording, at the hearing the IHO decided to provide the Parent with a paper copy of the transcript mailed to the home as well as an electronic PDF version of the transcript emailed to the Parent.

⁴⁷ HO 31

Opposition to the Motion in Limine, the Parent asserted previous claims concerning the Parent's request for documents, stating that Mr. Ebihara, Esq., Ms. Yasnai Rodriguez-Zaman, Esq. and Ms. Materna should be produced as witnesses to address their document request and the documents produced, or not produced, to the Parent. The Parent alleged Mr. Ebihara had a conflict of interest with regards to his control of student records which gave the District an unfair advantage over the Parent and that Mr. Ebihara should be called to testify as to the District's records. The Parent alleged Ms. Materna had "knowledge of events that are connected to facts regarding circumstances surrounding the Districts' evaluation process, evaluation requirements, and other particulars that form (s) the basis of this litigation action" and can offer relevant testimony "to the subject matter of this action, which can be reasonably calculated to lead to the discovery of omitted evidence that otherwise might have been admissible." The Parent requested that Yasnai Rodriguez-Zaman appear as a witness to confirm whether the District is the Custodian of Records for certain documents requested by the Parent, and to confirm that the District has disclosed all documents requested by the Parent. In granting the Motion in Limine the IHO found that nowhere in the Opposition did the Parent provide specific facts to establish that the testimony of Mr. Ebihara, Ms. Yasnai Rodriguez-Zaman, or Ms. Materna was relevant to the issues in the RPD before the IHO and that there was no indication, even slight, that Mr. Ebihara, Ms. Yasnai Rodriguez-Zaman, or Ms. Materna were personally involved in the Student's education or in the April 14, 2023 *Parental Prior Notice of District Refusal* by the District to not perform a comprehensive evaluation of the Student.⁴⁸

42. On August 18, 2023 the IHO issued a Pre-Hearing Conference Report and Order which,

⁴⁸ The Parents' also request that the IHO not consider the District's witness lists or disclosures. That request was denied.

among other things, identified the issues to be heard and the issues that would not be heard as they did not fall within the IHO's jurisdiction under the IDEA, set forth rules for the virtual hearing, and confirmed that the Parent would be provided with a written record of the hearing.⁴⁹

43. The due process hearing was held on August 22, 2023 and August 28, 2023. Pursuant to stipulation between the parties, the hearing was held via simultaneous electronic audio/visual means ("Zoom"). The Parent opted for the hearing to be open to the public and acknowledged and agreed that as a result of the due process hearing being open to the public that the Parent was waiving the Student's right to confidentiality since personally identified information will be shared during the hearing by the parties and the witnesses. The Student attended the first day of the hearing but did not testify.

At the hearing, IHO Exhibits 1 through 38 were admitted, District Exhibits R-1 through R-4, R-6 through R-14, R-15 pages 1-5, 14-17, and 50-64, R-16, and R-18 were admitted, and Parent's Exhibits P-3, P-5, P-12, P-13, P-27, P-30 through P-32, P-34, and P-37 were admitted.⁵⁰ The decision in this matter is due September 12, 2023. No extensions to the due date were requested.

ISSUES

As set forth in the Pre-Hearing Conference Report and Order, the issues to be decided by the IHO are:

1. Did the District comply with the IDEA (including its implementing regulations), Chapter 388 of the Nevada Revised Statutes (NRS), and Chapter 388 of the Nevada

⁴⁹ HO 32

⁵⁰ At the end of the hearing while the IHO was reviewing exhibits that had been admitted, R-6, *State Complaint CL04253 Result*, was incorrectly referenced as R-5. As established in the transcript of the hearing, R-6 was admitted but not R-5.

Administrative Code (NAC) when it refused to conduct an initial evaluation of the Student for IDEA eligibility in all areas of disability pursuant to the Parents' March 20, 2023 Request for an Evaluation? Specifically, did the District follow the required procedures and apply the legal standards under the IDEA, NRS, and NAC in making its determination to not conduct an initial evaluation of the Student for special education and related services under the IDEA because it did not suspect the Student was a child with a disability? If not, did the failure to conduct an initial evaluation result in a denial of FAPE?

2. Were the Parents required to participate in the District's MDT meeting which was convened to review the Student's educational record and any other data provided to the Team to determine whether the District suspected the Student had a disability and was in need of special education and related services when an initial evaluation had not yet been performed?

FINDINGS OF FACT

After considering all the evidence, this IHO's Findings of Facts are as follows:

1. The Student is in 2nd grade at Elementary School. (R-3) At the time the RDP was filed the Student was a 1st grade pupil at Elementary School. (R-3)
2. On March 20, 2023 the Parent wrote to the District expressing concerns about the Student's learning and inattention to his home and school work; that the Student's behavior made it difficult for the Student to focus on one task and the Student is pulled in different directions and not independently able to complete the task at hand; that the Parent was informed that the Student's behaviors have led to problems with the Student finishing school work, and the Student is missing key information in class because the Student is distracted by seemingly unimportant details or sounds in the room and; as of March 8, 2023 the Student's teacher expressed concerns with the Student's language/arts skills and stated the Student is not progressing and has a 65.17 (D) in

language/arts. The Parent requested a comprehensive special education evaluation for the Student in all areas of suspected disability. (R-4)

3. On March 23, 2023 the District sent the Parent an email asking if the Parent was available to meet on March 31, 2023. (R-15, page 1) The Parent responded stating that the District's demand that the Parent participate in a "Pre" Multidisciplinary Meeting (MTD) is a violation of federal law, the IDEA, and State law. The Parent reiterated the request for an evaluation in all areas of suspected disability and included a request for a psycho-educational evaluation in 7 developmental domains. The Parent stated that they were under no obligation to attend the MDT meeting and requested that the District send prior notices, meeting arrangements and a form to initiate the evaluation process. (R-15, page 3)

4. On March 27, 2023 the District's Coordinator of Psychological Services sent an email to the Parent stating that in order to address the Parent's request for an evaluation the District's procedures were to convene the MDT team to meet, review data, and determine the best next steps for the Student. Attached to the email were the Special Education Rights of the Parents and Children, and the Parental Prior Notice of District Proposal, and a Parental Prior Notice-Proposed Meeting Arrangements form. (R-15, page 5). The Notice was generated in response to the Parent's March 20, 2023 request for evaluation and informed the Parent of the proposed action which was to meet to address the Parent's request. The Parental Prior Notice-Proposed Meeting Arrangements form provided for a tentative meeting date of March 31, 2023. (R-14, P-5)

5. From a procedural perspective, the District sends out the CCF-563 and CCF-564 District forms when a parent requests an evaluation; parental consent is not required to have a meeting to discuss the parent's request for an evaluation and to review existing student data. The CCF-555 form is only used when the District makes a determination to evaluate the Student for a suspected

disability; in that case parental consent is required. (R-14) (Testimony of School Psychologist)

6. On March 27, 2023 the Parent replied to the District again stating disagreement with holding an MDT meeting, that the Parent was not legally obligated to agree with the MDT meeting, that it was unnecessary and unlawful to hold a meeting prior to administering assessments of the Student and requesting the law the District's relied on in deciding to hold a MDT meeting prior to the completion of an MTD report. (R-15, pages 16-17)

7. A second Parental Prior Notice of District Proposal was sent to the Parent on March 30, 2023 with the same the Parental Prior Notice-Proposed Meeting Arrangements form. (R-14, P-5)

8. On April 4, 2023 the District's Psychological Services Provider sent an email to the Parent to reschedule the MDT meeting to April 14, 2023. The Psychological Services Provider addressed the Parent's request that the District provide the law it relied on in deciding to hold a MDT meeting. The District referred to the District's procedures for when a parent requests an evaluation, specifically procedure 5.2.3 which provides that when a parent requests an initial evaluation the MDT must decide whether an evaluation is warranted and if not a refusal (to evaluate) must be completed and provided to the parents. If the MDT decides an evaluation is warranted then the team proceeds with the procedures for an initial evaluation including sending a written prior notice. (R-15, pages 60-61, R-18).

9. On April 4, 2023 the District sent the Parent a third the Parental Prior Notice of District Proposal and the Parental Prior Notice-Proposed Meeting Arrangements which provided for a meeting date of April 14, 2023. (R-14, P-5)

10. On April 5, 2023 the Parent sent the District an email stating that the Parent would not be attending the MDT meeting set for April 14, 2023 and continued to disagree with the District's procedures regarding a MDT meeting to determine whether an evaluation was warranted. (R-15,

pages 52-58)

11. On April 6, 2023 the Principal sent an email to the Parent stating they were sorry the Parent would not be joining them at the April 14, 2023 meeting, hoping that the Parent would reconsider.

(R-15, page 51)

12. On April 7, 2023 the Parent sent an email to the District again stating disagreement with the MDT meeting on multiple grounds. (R-15 pages 63-64)

13. On April 13, 2023 a fourth the Parental Prior Notice of District Proposal and the Parental Prior Notice-Proposed Meeting Arrangements form was sent to the Parent which provided for a tentative meeting date of April 14, 2023. (R-14)

14. On April 14, 2023 the MDT issued the Parent a Parental Prior Notice of District Refusal to evaluate the Student stating that the refusal was based upon a review of the 13 eligibility categories in the NAC relative to all available Student data and that each person on the MDT agreed that based on the data there was no suspected disability and no need for individualized services. The Parent was also provided with the Procedural Safeguards. (P-31)

15. The District never demanded that the Parent attend the MDT meeting nor was the Parent required to attend. (Testimony of Coordinator of Psychological Services)

16. In Kindergarten the Student was administered the Brigance assessment and scored 93.5 out of 100. (P-34) There was no reason to suspect the Student had a disability. (Testimony of Kindergarten Teacher)

17. The Student's Report Card for the first semester of the 2022-2023 school year showed that the Student received a D in language, an A in math, a B in reading, an A in social studies, an A in speaking and listening, a C in writing, an A in science, and an A in health. In Special Subjects the Student had satisfactory progress in art, humanities, library and PE, and exceptional progress in

music. In Successful Learning Behaviors the Student had satisfactory progress in observing school rules, following classroom rules, following directions, accepting responsibility, working independently, working cooperatively, and quality of work; the Student had exceptional progress in completing and returning homework in on time. (R-12).

18. The Student's Report Card for the second semester of the 2022-2023 school year showed that the Student received a C in language, a B in math, a B in reading, an A in social studies, an A in speaking and listening, a C in writing, and A in science, and an A in health. In Special Subjects the Student had satisfactory progress in art, humanities, and PE, and exceptional progress in library and music. In Successful Learning Behaviors the Student had satisfactory progress in observing school rules, following classroom rules, following directions, accepting responsibility, working independently, working cooperatively, and quality of work; the Student had exceptional progress in completing and returning homework in on time. (R-12)

19. On March 8, 2023 the Student received a Report of Student Unsatisfactory Progress stating the Student was not progressing academically in language, with a 65.17% (D) current grade, and had one late/missing assignment. The Report indicated the Student could improve the current grade by submitting late assignments and practice writing in a journal at home using correct punctuation. (R-13) The grade improved to a C because the Student started taking more time, working harder, studying more, and writing more carefully - sentences were more complete with periods at the end and a better use of adjectives. (Testimony of 1st Grade Teacher)

20. At the April 23, 2023 MDT meeting the team reviewed the Student's educational data and work samples which included the Student's spring 2023 Measure of Academic Progress (MAP) assessment showing high average growth in math and reading (R-7), and the Student's *1st grade Addition Assessments Facts to 10* done in September and November, 2022, and January, March

and May, 2023 (R-8), and the Student's *Math Numbers Operations and Algebra 1_1* for December 10, 2022 and April 12, 2023 (R-9), which all showed that the Student was on track for math and was making growth and above average in algebra. (Testimony of Coordinator of Psychological Services, 1st Grade Teacher) The MDT also reviewed the *easyCBM* reading report for the 2022-2023 school year which assesses reading fluency and showed the Student received above-average scores (R-10) and the *Words Their Way* spelling inventory from August, 2022 and April, 2023 (R-11) which showed the Student was above average from other students in his class. (Testimony of School Principal, 1st Grade Teacher) The Student's passage reading fluency for 1st grade indicated the Student was progressing (R-10). (Testimony of Coordinator of Psychological Services) The MDT also received input on observations of the Student by the Teacher and the Special Education Instructional Facilitator. (Testimony of Coordinator of Psychological Services, Special Education Instructional Facilitator)

21. The Student Literacy Performance Plan for the 2022-2023 school year shows the Student was not at risk, indicated the Student's strengths, and did not indicate any weaknesses or make any recommendations for the Student. (P-37, Testimony of *Read by Grade 3* Strategist)

22. The Student has average focus, can pay attention and answer questions on topic, and demonstrated good behavior in class. While it was observed the Student could be chatty and social at times, any inability to maintain focus and stay on task was typical for students that age and if needed the Student was easily redirected, which minimal redirection was being given to all students in the classroom. Any inattentiveness or work completion issues were typical for what is seen in first graders. The Student is happy, social and has good relationships in the classroom and does not have signs of anxiety or depression. (Testimony of Coordinator of Psychological Services, 1st Grade Teacher, Special Education Instructional Facilitator) The Student had normal

behavior for the Student's age and the Student's behavior did not impede any of his learning based upon the Student's existing educational assessments. (Testimony of School Principal)

23. Using the educational and observational data provided at the meeting the MDT went through the eligibility criteria in the NAC including NAC 388.390 (hearing impairment); NAC 388.395 (visual impairment); NAC 388.400 (orthopedic impairment); NAC 388.402 (health impairment other than orthopedic impairment); NAC 388.405 (speech and language impairment); NAC 388.410 (intellectual disability); NAC 388.415 (emotional disturbance); NAC 388.420 (specific learning disorders); NAC 388.425 (multiple impairments) and; NAC 388.427 (deaf-blindness), in addition to any exclusionary criteria. Based upon the existing data the MDT had no reason to suspect the Student had a disability. (Testimony of Coordinator of Psychological Services, School Principal, Special Education Instructional Facilitator) The existing data did not support a need for interventions as the Student was responding well to Tier 1 instruction and was average to above average.⁵¹ (Testimony of Coordinator of Psychological Services, Special Education Instructional Facilitator) The Parent did not provide the MDT with any factual information supporting the existence of a disability under the IDEA or Nevada law. (Testimony of Coordinator of Psychological Services)

CONCLUSIONS OF LAW

Based upon the above Findings of Fact, the Conclusions of Law of this IHO are as follows:

The Individuals with Disabilities Education Act ("IDEA") requires that public schools provide children with disabilities a "free appropriate public education" ("FAPE"). 20 U.S.C.

⁵¹ Tier 1 is the curriculum, instruction and assessments given to all students in a grade level. (Testimony of Coordinator of Psychological Services). The Pre-MDT consisted of the School Principal, the Special Education Instructional Facilitator, the 1st Grade Teacher, and the Coordinator of Psychological Services. The Parent did not attend the meeting.

§1412(a)(1)(A). A school district has an affirmative obligation to locate, identify, and evaluate all children who have disabilities and who are suspected of having disabilities and are in need of special education and related services. *See* 34 CFR §§ 300.128 and 300.220. The IDEA requires that every State have procedures in place that are designed to identify children who may need special education services. *Timothy O. v. Paso Robles Sch. Dist.*, 822 F.3d 1005, 1119-20 (9th Cir. 2016); §1412(a)(3)(A) (Child Find). Child Find captures the duty of a school district to assess whether a child is eligible for special education once the district is on notice of a suspected disability; a disability is “suspected” and therefore must be assessed by a school district when the district is on notice that the child has displayed symptoms of that disability. *Id.* The IDEA does not require that a district test all children from whom evaluations are requested. However, when a parent suspects a disability and requests an evaluation, any action or inaction by the District brings the matter within the IDEA. *Pasatiempo v. Aizawa*, 103 F.3d 796 (9th Cir. 1996).

School districts must give parents written prior notice that meets the requirements of 34 CFR §300.505 a reasonable time before the agency *proposes or refuses* to initiate an evaluation of the child. *See* 34 CFR §300.504(a). If the school district refuses the parents' request to conduct an evaluation, the school district must provide the parents with a written prior notice of its refusal, including a full explanation of applicable procedural safeguards and due process rights, as well as an explanation of why the agency is refusing to take the action requested by the parent. *See* 34 CFR §300.505(a)(1)-(2). If a parent disagrees with the school district's refusal to evaluate the child, the parent may request a due process hearing under 34 CFR §§ 300.506-300.508.

The District has implemented procedures for a request for an initial evaluation. When a Parent requests an initial evaluation, the District must respond formally and the MDT must determine whether an evaluation is warranted. If the District determines an evaluation is not

warranted then a refusal to evaluate (District form CCF 567) must be completed and sent to the Parent, which was the case here.⁵² This is in contrast to when District personnel request an initial evaluation, for example if District personnel suspect a disability; in that case the steps in Section 5.2.4 must be followed which includes obtaining parental consent for an evaluation.

In the Parent's request for an evaluation of the Student, the Parent expressed concerns about the Student's learning and inattention to his home and school work stating the Student that the Student's behavior made it difficult for the Student to focus on one task and the Student is pulled in different directions and not independently able to complete the task at hand; that the Parent was informed that the Student's behaviors have led to problems with the Student finishing school work, and the Student is missing key information in class because the Student is distracted by seemingly unimportant details or sounds in the room and; as of March 8, 2023 the Student's teacher expressed concerns with the Student's language/arts skills and stated the Student is not progressing and has a 65.17 (D) in language/arts. The Parent did not identify a suspected disability nor did the Parent provide any health or other data on a suspected disability. Rather, the Parent wanted the Student evaluated in all areas of suspected disability set forth in the NAC.

There was no evidence the District did not follow the IDEA, NRS, NAC, or District procedures when the Parent requested an evaluation of the Student. The District promptly responded to the Parent's request for an evaluation and provided the Parent with notice that the MDT would meet to address the Parent's request. The District provided the Parental Prior Notice of District Refusal and provided the Parent with the Procedural Safeguards.

The credible evidence established that the District was not on notice of a suspected

⁵² See District Special Education Procedures Manual Section 5.2.3.

disability. The MDT reviewed all relevant educational records of the Student which established that the Student exhibited behavior typical of first graders and had average focus, could pay attention and answer questions on topic, and demonstrated good behavior in class. The Student was happy and social and displayed good relationships in the classroom. Any inability of the Student to maintain focus and stay on task was typical for first graders and the Student was easily redirected when required, and any inattentiveness or work completions issues were typical of students that age. In addition, the Student's grades were in the average to above range in the core areas, and assessments given to the Student for math, reading, and spelling show the Student was average to mostly above average and was on track and making growth. The only incident of below average performance was the March 8, 2023 Report of Student Unsatisfactory Progress for language which was remedied when the Student took more time with assignments, worked harder, studied, and wrote more carefully. In Successful Learning Behaviors the Student had satisfactory progress in observing school rules, following classroom rules, following directions, accepting responsibility, working independently, working cooperatively, and quality of work, and had exceptional progress in completing and returning homework in on time.

With regards to the Parent's claim they were required to participate in the MDT meeting when an initial evaluation had not been performed, the law does not require their participation in the April 14, 2023 meeting. The credible evidence established that the District did not mandate that the Parent attend the meeting but rather encouraged the Parent to attend for purposes of discussing their concerns about the Student for the MDT's consideration.

Based upon the evidence presented the District met its burden in showing it complied with the IDEA (including its implementing regulations), NRS Chapter 388, and NAC Chapter 388 when it refused to conduct an initial evaluation of the Student for IDEA eligibility in all areas of

disability pursuant to the Parent's March 20, 2023 Request for an Evaluation. There was no evidence to put the District on notice of a suspected disability of the Student which required specialized individual instruction or related services.

NOTICE OF RIGHT TO APPEAL

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this decision pursuant to NAC §388.315. A party to the hearing may file a cross-appeal within ten (10) days after receiving notice of the initial appeal. If there is an appeal, a state review officer appointed by the District Superintendent from a list of officers maintained by the Nevada Department of Education shall conduct an impartial review of the hearing pursuant to NAC §388.315.



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