



The student's health impairments include attention deficit hyperactivity disorder ("ADHD"), oppositional defiance disorder, a mood disorder, combination type, and colitis. The student's behaviors which interfere with the educational process include truancy and elopements from class resulting in missed class periods, disregard of school rules and insubordination, hyperactivity, oppositional behaviors, impulsivity, short attention span, inability to concentrate, being easily distracted, off task, and not easily redirected.<sup>3</sup>

On April 6, 2017, the student was charged with a disciplinary violation, specifically battery and robbery of a cell phone from a fellow student.<sup>4</sup> On April 25, 2017, a Manifestation Determination Review ("MDR") Team decided that the student's conduct in the subject incident was not caused by or had a direct and substantial relationship to his disability, and was not caused by the failure of the district to implement the student's Individualized Educational Program ("IEP"). Specifically, the MDR Team found that the incident "was not the result of impulsivity, oppositional deviance or hyperactivity" and that "the infraction was calculated and premeditated." The MDR Team also found that the district "ensured that the IEP was being followed as written." In the report, the MDR Team recommended that the student be suspended.<sup>5</sup> In testimony at the expedited due process hearing, the assistant principal ("assistant principal") indicated that the MDR Team recommended placement of the student in a district behavioral school for nine to eighteen weeks, with the length of time dependent on the student's grades, behavior and attendance, and the student thereafter returning to a comprehensive campus other than his prior high school.<sup>6</sup> The parents/petitioners disagreed with the findings of the MDR Team, and filed the subject expedited due process complaint.

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<sup>3</sup> Exhibit D4, March 24, 2017 Individualized Educational Program

<sup>4</sup> Exhibits P9 Voluntary Incident Report and D9 Precipitating Incident Summary Report

<sup>5</sup> Exhibit D5 Manifest Determination Summary

<sup>6</sup> Transcript of testimony of assistant principal

**II.**  
**PROCEDURAL HISTORY AND EXHIBITS INTRODUCED AT HEARING**

On May 3, 2017, Petitioners filed an expedited due process complaint seeking review of the MDR decision. Pursuant to statute, the hearing was to be held by June 1, 2017, and a decision rendered within ten school days after the hearing. The hearing was held on May 30<sup>th</sup> and 31<sup>st</sup> and the last day of the district's school year was June 8<sup>th</sup>, the decision is being provided without delay in consideration of the importance of the matter to the parties.

A pre-hearing conference was held on May 15, 2017, and lists of witnesses and copies of documentary evidence were timely exchanged between the parties. Counsel for both parties stipulated to the foundation and admissibility of all of the exhibits exchanged prior to the hearing, and the hearing officer admitted into evidence petitioner's exhibits P1-9, inclusive, and district's exhibits D1-15, inclusive. An additional exhibit, petitioner's exhibit P10, was offered by petitioners at the hearing. Two witnesses for the district testified that their individual observations of the inception of the incident, and the decision later reached through the MDR process, were supported by still photographs taken from campus surveillance video which depicted the initial stages of the incident. The petitioners produced and offered into evidence at the hearing six still photographs from the video. The district's counsel did not object to the admission of the photographs on the grounds the exhibits were not timely exchanged between the parties, but did object that the decision of the MDR Team was not based on the photographs. The hearing officer admitted the photographs into evidence over the objection of the district because the rules of evidence are not to be strictly enforced at hearings to prevent the admission of relevant evidence, and on the grounds that the district opened the door to the introduction of the photographs through the testimony by two district witnesses as to their reliance, in part, upon the photographs in reaching conclusions as to whether the incident was related to the student's disability, or not.

**III.  
ISSUE AND APPLICABLE LAW**

The only issue to be decided by the hearing officer is whether, pursuant to 34 C.F.R. Section 300.530, the student's conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; and/or if the conduct in question was the direct result of the district's failure to implement the student's Individualized Educational Program ("IEP").

**IV.  
FINDINGS OF FACT**

After considering all the evidence, this hearing officer's findings of fact are as follows:

Petitioner is a high school student who receives special education services based on a primary eligibility category of health impairment, and a secondary eligibility category of specific learning disability.<sup>7</sup>

The student's health impairments include ADHD, oppositional defiance disorder, a mood disorder, combination type, and colitis. The student's behaviors which interfere with the educational process include truancy and elopements from class resulting in missed class periods, disregard of school rules and insubordination, hyperactivity, oppositional behaviors, impulsivity, short attention span, inability to concentrate, being easily distracted, off task, and not easily redirected.<sup>8</sup>

The student's March 24, 2017 IEP was in effect at the time of the incident, and provides for the following special education services: extended year schooling, written expression, social/behavioral skills, social studies (behavioral skills) and math. The following supplementary aids were to be provided: student will have access to trusted staff member when feeling frustrated, student will be seated away from distractions, general education and special education will

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<sup>7</sup> Exhibit D4, March 24, 2017 IEP

<sup>8</sup> *Id.*

determine grades, a behavior intervention plan (“BIP”), and use of calculator. The following related service was provided: curb to curb transportation.<sup>9</sup>

The student’s BIP dated March 24, 2017, provides the following summary of behaviors: nonattendance of 4<sup>th</sup> period for the entire school year, elopement from campus 23 times since 1/24/17, refusal to complete assignments even when given choices, verbal and physical aggression in response to direction by staff members, damage to property, and intentionally trashing his assigned area 14 times. The student was described as seeking attention and control.<sup>10</sup> The BIP provides that the student will be taught skills of self-control, including to stop and think about choices, to stay in class and talk to a trusted adult; and regarding on task behavior, by listening to instructors, choosing to do the assignment, considering the result of doing the assignment, and beginning the assignment within one minute. The replacement behaviors were to be taught through a combination of direct instruction, modeling, practicing, verbal cues and positive reinforcers.<sup>11</sup> The BIP provided the following proactive strategies and supports to limit the occurrence of problem behavior: the teacher setting clear expectations, encouragement to exhibit positive behaviors, positive verbal feedback, classroom rewards for positive behavior, email/text or call home with positive feedback, a seat close to instruction and away from distractions, and the ability to leave the class to go to the teacher of record, trusted staff member or counselor.<sup>12</sup>

On April 6, 2017, the student arrived at school at 6:40 a.m. and was “shadowed” by his teacher as he left the bus and walked to his classroom. After the student assumed his seat, the teacher heard a noise from the student’s phone, and then saw the student look down at his phone. In response to receiving a presumed text message, the student left the classroom, indicating that he was going to the office of the special education facilitator, (“facilitator”), which he could do under the terms of his IEP/Behavior Intervention Plan.<sup>13</sup>

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<sup>9</sup> *Id.*

<sup>10</sup> Exhibit D7 Behavior Intervention Plan dated March 24, 2017

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* and transcript of testimony of teacher

The teacher immediately left the classroom and followed the student, intending to “shadow” him to the facilitator’s office. The student attempted to evade her by going into the first of the two-way entries into the facilitator’s office, proceeding into the next room, only to then exit the office by way of the second door as the teacher was notifying the facilitator of the student’s presence in the facilitator’s office. As the teacher exited the facilitator’s office, she observed the student also leaving the office out the other door, and proceeding up a stairway.<sup>14</sup>

As the teacher followed the student to the stairs, he began to run. The bell then rang indicating the start of the school day at 7:00 a.m., and the teacher lost visual contact with the student. The teacher then alerted campus security. In a further effort to locate the student, the teacher went toward the bus drop off area, and observed the student “with three of his friends” just off campus, at a nearby intersection. As the second bell rang, the teacher observed the student and the three others starting to walk off campus towards an apartment complex across the street from the school. The teacher then emailed the student’s parents to let them know he had left campus.<sup>15</sup>

The precipitating incident summary report indicates that the student and three other individuals beat up and robbed another student of his cell phone in the school parking lot.<sup>16</sup>

The MDR Team was shown several photographs depicting the four alleged perpetrators chasing the alleged victim (“victim”) through the P.E. locker room, ultimately catching the victim in the school parking lot.<sup>17</sup>

The victim reported the incident to the assistant principal, (“assistant principal”), and prepared a voluntary incident report.<sup>18</sup> The victim stated that the incident occurred sometime between 9:00 a.m. and 9:40 a.m., and began when he was chased by four assailants, including the student, from a park area adjacent to campus into the school’s parking lot. The student struck the

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<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> Exhibit P9 precipitating incident summary report

<sup>17</sup> Transcripts of testimony of teacher and facilitator and exhibit P10, photographic stills from surveillance video

<sup>18</sup> Exhibit P9, voluntary incident report

victim, removed the victim's cell phone from the victim's pants pocket, and handed it to one of the other students involved in the incident.<sup>19</sup>

Following the incident, the victim had visible signs of injury to his face, and was referred to the school nurse for first aid treatment.<sup>20</sup>

The student left campus after the incident and during 4<sup>th</sup> period, but timely returned to campus to catch his bus home.<sup>21</sup>

The student was removed from the bus by school personnel, and a search of his person and backpack failed to locate the stolen phone.<sup>22</sup>

In the voluntary incident report and his verbal report of the incident, the victim initially misrepresented the location of the incident as occurring in the P.E. locker room or bathroom. The victim subsequently informed the assistant principal that this misrepresentation was made to avoid his mother learning that he had left campus, and that the incident occurred when he should have been in class.<sup>23</sup>

While the victim's failure to accurately provide the location of the incident made it difficult to identify the surveillance camera which captured video of the incident, when the video was located and reduced to still photographs, the teacher and assistant principal reviewed the photos and determined that the photos depicted the student and three other individuals chasing the victim in the school parking lot, assaulting him, and taking his phone. The video also reportedly corroborated the timeline of the incident provided by the victim in his written statement as occurring between 9:00 a.m. and 9:40 a.m. The indication in the record that the incident occurred at 11:00 a.m. was due to a clerical error by the assistant principal.<sup>24</sup>

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<sup>19</sup> *Id.*

<sup>20</sup> Transcript of testimony of assistant principal

<sup>21</sup> Exhibit D9 precipitating incident summary report

<sup>22</sup> Transcript of testimony of assistant principal

<sup>23</sup> Exhibit P9, voluntary incident report and transcript of testimony of assistant principal

<sup>24</sup> Exhibit P9 voluntary incident report, exhibit D9 precipitating incident summary report, and transcript of testimony of assistant principal.

The MDR Team meeting took place by agreement of the team members and the parents on April 25, 2017, following the spring break from school. Input was received from the parents as well as district employees who were members of the team, including both the teacher and the facilitator.<sup>25</sup>

The MDR Team considered the specific facts and circumstances of the incident and the nature of the student's disabilities to attempt to determine why the student was involved in the incident, including substantial "back and forth" communication between the facilitator and the student's father regarding the facts of the incident and the student's disabilities, indicating a detailed review of the matter was undertaken by the team.<sup>26</sup>

Substantial evidence was offered by petitioners at the hearing regarding a prior MDR Team's review of a prior incident wherein the student assaulted another student and a school aide in February of 2016. Regarding that incident, the prior MDR Team found the assault was related to the student's disability.<sup>27</sup>

The MDR Team which reviewed the prior incident concluded that incident was related to the student's disability because it was impulsive, happened very quickly, and was not intentional or thought out; unlike the subject incident, which was not the result of impulsivity on the part of the student.<sup>28</sup>

Following his presumed receipt of a text on his phone, the student was allowed to leave the classroom with the stated intention of going to the facilitator's office.<sup>29</sup>

The petitioners did not provide evidence indicating that any provision of the student's controlling IEP was not implemented by the district, or that the conduct of the student was the direct result of a failure by the district to implement any portion of the controlling IEP.

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<sup>25</sup> Exhibit D5 Manifest Determination Summary

<sup>26</sup> Transcript of testimony of facilitator and student's mother

<sup>27</sup> Exhibit D2 Manifestation Determination Summary

<sup>28</sup> Transcript of testimony of teacher and facilitator, Exhibits D5 and D2 Manifestation Determination Summaries

<sup>29</sup> Transcript of testimony of teacher and facilitator

**V.**  
**ANALYSIS AND CONCLUSIONS OF LAW**

Based upon the above findings of fact, the conclusions of law of this hearing officer are as follows: as to the first factor, whether the student's conduct in the subject incident was caused by or had a direct and substantial relationship to the child's disability, the hearing officer finds that it did not. There is no evidence that the incident was related to, or caused by, the student's ADHD, oppositional defiance disorder, insubordination, mood disorder, colitis, short attention span, inability to concentrate, agitation, verbal and physical aggression, being off task and not easily redirected, impulsivity or inattention. While the incident occurred following an elopement from campus, there is no indication that the student's disability caused the elopement, or that in this instance the elopement was relevant to the occurrence of the incident. Rather, the student made a conscious decision to chase the victim back onto campus and to punch the victim to obtain the cell phone.<sup>30</sup>

The case of *Bristol Twp. Sch. Dist. v. Z.B. by K.B. and R.B.*, 116 LRP 1736 (E.D. Pa. 2016) provides<sup>31</sup> that the MDR Team must consider the specific circumstances of the incident and the alleged conduct of the student when deciding whether a teenager's ADHD played any role in his alleged physical assault of a teacher. The U.S. Department of Education endorsed language indicating that the MDR team should "analyze the child's behavior as demonstrated across settings and across time when determining whether the conduct in question is a direct result of the disability." 71 Fed. Reg. 46720 (August 14, 2006). The MDR team which evaluated the April 6, 2017 incident found that the student's conduct was markedly different from any of the student's prior, extensively documented conduct and behaviors, including the prior assault involving the student which occurred in February of 2016. Previously, the student's conduct had been uniformly characterized as impulsive, and arising from agitation. However, in the subject case, the evidence

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<sup>30</sup> Exhibit D5 Manifestation Determination Summary, transcripts of testimony of teacher and facilitator

<sup>31</sup> There are no binding, relevant judicial decisions and, therefore, the hearing officer relies on cited cases from other jurisdictions for their persuasive weight only.

indicated the student's conduct was intentional, deliberate and took place over a significant period of time, and was not the result of an automatic reaction to agitation.

In the subject case, as in the case of *Danny K. v. DOE State of Hawaii*, 57 IDELR 185 (D.Haw. 2011), the student's conduct was planned and carried out with determination and attention to detail. In *Danny K.*, the U.S. District Court affirmed a hearing officer's determination that the student's conduct in setting off a firework/bomb was unrelated to his ADHD as the "lighting of the fuse was not an impulsive act which the student could not control" and, further, that the act of setting off an explosive at school is a planned activity which required sustained attention and follow through with directions. *Id.* In the subject case, the student was in full control of his actions, and elected to engage in the chase, assault and theft of the cell phone, thus supporting the findings of the MDR Team.

The subject incident commenced with the student's receipt of a text. While the student chose to leave the classroom in response to receiving the text, there was no evidence to indicate the text was hostile or aggressive, or that the student left the class impulsively. Rather, after the student left the classroom, he engaged in a deliberate course of action designed to prevent the teacher from following him as he met up with the other three students involved in the incident. First, the student falsely stated that he intended to go to the facilitator's office, then he exited the second door of the office and ran up a stairway, thus strategically utilizing the terms of his BIP to carry out a premeditated plan to coordinate with the other three students. This conduct by the student indicates deliberation on his part, and not impulsivity.

After the student joined the three other individuals involved in the incident, the student acted in concert with the others to chase and assault the victim, and take his cell phone. As documented by the testimony of the teacher regarding when the student left her classroom, the victim's incident report and the videotape, the incident took place over approximately two to three hours from the time the teacher "shadowed" the student from arrival on campus to the classroom, to when the victim reported the incident to the assistant principal, which indicates the incident

was premeditated and was not impulsive. The fact that the student removed the phone from the victim's pocket but gave it to one of the other participants in the assault also shows that he was not operating out of impulsive self-interest. Despite the radio transmissions between school staff attempting to locate the assailants, the student succeeded in evading capture by leaving the campus, only to timely return to campus to catch his bus home. This again shows deliberation on the part of the student to evade the consequences of the incident, or planning rather than impulse. The evidence indicates that the student's conduct was not caused by, or had a direct and substantial relationship to, the child's disability.

The student's special education teacher ("teacher") has a master's degree in special education, in addition to a bachelor's degree in social science. She has worked for the district for nine years, and has been a licensed teacher, with a special education endorsement, since August of 2012. Critical to an evaluation of the teacher's basis of knowledge regarding the student is that that she teaches him daily, for four out of the six class periods, in the specialized, severally emotionally challenged program, and has been the student's teacher for the past two school years. The teacher has known the student since March of 2014, when she began to provide the student with compensatory education services. She had known and worked with the student and his family for over three years prior to the subject incident.<sup>32</sup> The hearing officer finds the teacher to be a credible witness. The facilitator, like the teacher, had a significant prior relationship with the student due to also providing the student with compensatory education hours during the summer. The petitioners think so highly of the facilitator's expertise in special education, which includes multiple educational degrees, including a Ph.D. in emotional disturbance, that they requested a zone variance to allow the student to attend the high school where the facilitator is employed, rather than the student's neighborhood school.<sup>33</sup>

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<sup>32</sup> *Id.*

<sup>33</sup> Transcript of testimony of facilitator and student's father

Petitioners' counsel attempted to dispute whether the incident occurred as reported and witnessed, and focused on alleged variations in the victim's report of the location, as well as the time of the incident. The victim admitted that he initially misrepresented the location of the incident because he did not want to get in trouble with his mother by revealing that he had left campus, resulting in his tardy arrival back on campus when he was assaulted and robbed approximately two hours after the start of classes. However, the assistant principal testified that any discrepancy as to the time of the incident was due to a clerical error in the preparation of the victim's incident report, and that the victim was consistent in his report regarding the time the incident occurred. While the assistant principal's testimony was limited, as she had no first-hand knowledge of the incident and was not a member of the MDR Team, the hearing officer finds her to be a credible witness regarding the preparation of the precipitating incident report, including receipt of the victim's verbal and written incident reports, as to the recording of the incident on campus surveillance video cameras, and as to what occurred when the student elected to return to campus to catch his bus home and was questioned regarding the incident. The assistant principal was requested by the parents to "be the disciplinarian for the student" which establishes her credibility with the parents.<sup>34</sup>

Petitioner's counsel asserted that if the victim was not credible as to the location of the incident, he was not to be believed as to the facts of the incident. Counsel claimed that because the victim knew the student's name, the student and the victim were friends, and that the student and the victim may have had a falling out while they were off campus, to which the student responded impulsively by battering the victim. This speculation as to what might have happened between the student and the victim to cause the incident cannot be given weight. There is no evidence to support a finding that the subject incident was like the prior disciplinary action, and was caused by the student's impulsivity. The fact that the incident was two pronged, and involved

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<sup>34</sup> Transcript of testimony of assistant principal

a battery and a theft, supports a finding that the incident was in no way related to the student's history of impulsivity or any of his other disabilities and behaviors. While the petitioners put forward a theory that the assault may have been impulsive, no evidence was offered to support such theory. Further, there was no theory asserted as to how the subsequent robbery of the cell phone was the product of any of the student's disabilities or behaviors, and was not, rather, a premeditated offense. The finding that the incident was deliberate is supported by testimony by the petitioner's mother that the student had his own phone, and by the fact that the student did not keep the victim's phone.

The ruling in *Farrin v. Maine Sch. Admin. Dist. No. 59*, 165 F.Supp.2d 37, 35 IDELR 189 (D.Me. 2001) is an example of the proposition that if a behavior involves sufficient time, motor planning, and opportunity for thought, it cannot be considered impulsive, and thus related to ADHD. This decision reinforces that it is important for MDR teams to analyze a student's behavior in terms of the time involved, and degree of planning required. An argument that the student's behavior was impulsive is only effective where the behavior in question is impulsive on its face. If the behavior involves a significant degree of planning, steps, or time, the argument rarely succeeds. Based on the evidence presented at the hearing, the hearing office upholds the MDR Team's evaluation of the facts and their determination that the subject incident was not caused by, or had a direct and substantial relationship to, the student's disability.

The hearing officer finds that the district upheld its burden of proof as to the implementation of the student's IEP by the production of evidence at the hearing that the student was encouraged to make better choices and to stay in class, and was allowed to take breaks, walk in the hallway and have access to a trusted staff member when feeling frustrated. The hearing included lengthy testimony by district staff as to their daily observations and preparation of written reports regarding the student's behaviors and conduct, and their substantial efforts to carry out the IEP and BIP, including modeling and attempting to teach the student skills of self-control, to stop and think about choices, to stay in class, on task behavior, listening to instructors,

choosing to do assignments, considering the result of doing the assignment, providing verbal cues, setting clear expectations, encouragement to exhibit positive behaviors, positive verbal feedback, classroom rewards for positive behavior, emails/texts or calls home with positive feedback, and the regarding the student's ability to leave the class to go to the teacher of record, trusted staff member or counselor.<sup>35</sup> As to the second factor, whether the conduct in question was the direct result of the district's failure to implement the student's IEP, the hearing officer concludes that there was no failure to implement the student's IEP in effect at the time of the incident.

The hearing officer is sympathetic to the parents' concerns that the IEP and related BIP may be inadequate to meet the student's unique needs.<sup>36</sup> However, this issue is not before the hearing officer in this expedited due process matter, and therefore the hearing officer may not consider such evidence in ruling on the issue to be determined in this case. In connection with the second factor, an expedited due process complaint and hearing is confined to an examination of whether the incident which is the basis for the disciplinary conduct was caused by the failure of the district to implement the IEP in effect at the time of the incident. In this case, there was no evidence introduced to indicate that there was any failure to implement any aspect of the controlling March 24, 2017 IEP. While there was significant testimony that the student's conduct could, perhaps, have been prevented by additional services or a more restrictive environment, such concerns must be raised through the filing of a regular due process complaint. The hearing office is not aware of any legal authority which allows the hearing officer to consider whether an IEP with different provisions would have prevented the occurrence of the subject incident. Further, there was no evidence that the district failed to implement any aspect of the IEP or BIP, let alone any allegation that the district's failure to implement the provisions of the effective IEP in any way related to the occurrence of the subject incident.

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<sup>35</sup> Transcript of testimony of teacher, assistant principal, facilitator and Exhibit D15, which consists of 213 pages of data collection, behavioral tracking plan and daily reports regarding the student's behaviors and conduct.

<sup>36</sup> Transcript of testimony of father and mother

Although the issue of the adequacy of the effective IEP is not before the hearing officer, sensitivity for the concerns of the parents as expressed in their testimony leads the hearing officer to respond briefly to their allegation that the continuance of services in place at the time of the prior, February 2016 IEP in the controlling March 2017 IEP may have prevented the student's participation in the incident. The evidence established that resumption of the services of a one-on-one aide would not have prevented the student from leaving campus, or the occurrence of the subject incident, as the teacher essentially acted in the same capacity as the aide by "shadowing" the student from the classroom to the facilitator's office, to the bus area, and then notifying campus police and the petitioners when the student left campus. The aide could not have done anything more or different that the teacher did on the day of the incident to attempt to prevent the student's participation in the incident. Similarly, there was no evidence that the student would have participated in counseling had it been included in the effective IEP. Rather, the evidence established that the student refused to even speak to the counselor, let alone participate in the counseling provided for in the prior IEP.

## **VI. DECISION AND ORDER**

Based upon the above findings of fact and conclusions of law, it is hereby decided that the finding of the MDR Team that the incident was not caused by or had a direct and substantial relationship to the child's disability; and was not the direct result of the district's failure to implement the student's IEP shall be upheld.

## **VII. NOTICE OF APPEAL RIGHTS**

Any party aggrieved by this Decision has the right to appeal within thirty (30) days of the receipt of this Decision pursuant to Nevada Administrative Code Section 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 superintendent from a list of officers maintained by the Nevada Department of Education shall conduct an impartial review of the

hearing pursuant to Nevada Administrative Code Section 388.315. Since this Decision is being delivered in both electronic and hard copy, receipt of a copy of this Decision and Order will be determined by either the date of actual delivery, or the date of the first attempt to deliver by the U.S. Postal Service.

Dated: June 22, 2017



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