

**IMPARTIAL DUE PROCESS HEARING  
BEFORE THE HEARING OFFICER  
APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS  
STATE OF NEVADA**

In the Matter of

STUDENT<sup>1</sup>, by and through  
Parent

Petitioners,

v.

SCHOOL DISTRICT

Respondent

**DECISION OF THE HEARING  
OFFICER**

**Date:** June 21, 2022

**Representatives:**

Amanda Laub, Esq., on behalf of  
Petitioner

Daniel Ebihara, Esq., on behalf of  
School District, Respondent

**Hearing Officer:**  
Lucinda L. Coumou

**I.  
INTRODUCTION**

The Petitioner filed a Due Process Complaint on April 6, 2022 (*HO Ex. 1*). The Due Process Complaint was received by the School District on April 6, 2022, (*HO Ex. 2*), and by the Nevada Department of Education on April 13, 2022 (*HO Ex. 3*). The Nevada Department of Education appointed the undersigned to serve as hearing officer by letter, dated April 13, 2022 (*HO Ex. 4*). This Hearing Officer received the School District's Response to the Due Process Complaint on April 29, 2022 (*HO Ex. 5*).

The undersigned Hearing Officer's jurisdiction to render this Decision, following a Due Process Hearing addressing the Petitioner's Due Process Complaint, arises pursuant to the *Individuals with Disabilities Education Improvement Act* (IDEA) (20 U.S.C. §1400 et. seq.), Part

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<sup>1</sup> Personally identifiable information is attached as Appendix A to this Decision and must be removed prior to public distribution. See *Letter to Chad* (FPCO 12/23/04)

B, Title 34 C.F.R. Part 300 (Part B); *Nevada Revised Statutes 388.417-5243*; and the *Nevada Administrative Codes 388.001-488*.

Pursuant to *Nevada Revised Statute 388.467*, whenever a Due Process Hearing is held pursuant to the *Individuals with Disabilities Education Act, 20 U.S.C. §1400 et. Seq.*, and a School District is a party, the School District has the burden of proof and burden of production concerning all issues.

## **II. PROCEDURAL BACKGROUND**

On April 20, 2022, this Hearing Officer sent a Notice of Status Conference and Agenda to the parties (*HO Ex. 6*), and a Preliminary Order (*HO Ex. 7*), along with Hearing Process Guidelines (*HO Ex. 8*) and Rights of Parties Related to Hearings (*HO Ex. 9*). The parties engaged in a 30-day resolution process, so the 45-day timeline began after the 30-day resolution period.

The Status Conference in this case was originally scheduled for April 25, 2022, but was ultimately held on April 29, 2022. This Hearing Officer sent out an Amended Notice of Status Conference, with an additional Agenda for the parties' convenience (*HO Ex. 11*). This Hearing Officer issued a Status Conference Report and Order on May 3, 2022 (*HO Ex. 12*). It was initially decided that three days would be needed for the Hearing, so the parties agreed to the dates of June 8, 9, and 10, 2022.

A Notice of Pre-Hearing Conference was issued on May 11, 2022, wherein the expectations for the meeting were outlined (*HO Ex 13*). The Pre-Hearing Conference in this matter was held on May 18, 2022. The issues raised in the Due Process Complaint were discussed. Petitioner expressed concern about the applicability of the "Stay-Put" doctrine. It was decided that the parties would need only two days for the Hearing and it was scheduled for the dates of June 8 and 9, 2022. The possibility of holding the Hearing virtually was discussed. The date for the 5-business-day disclosure of proposed exhibits and witness lists was set for June 1, 2022. A copy of the proposed exhibits was to be provided to this Hearing Officer. The parties also decided that a second Pre-Hearing Conference would be held on June 2, 2022.

On May 24, 2022, this Hearing Officer sent a letter to the parties requesting briefing on the "Stay-Put" issue, along with recommendations as to the appropriate remedy. The School District responded on May 27, 2022, with an email indicating that the IEP team developed an IEP, which was agreed to by the Petitioner and therefore this IEP is the "Stay-Put" placement. (Both letter and email response can be found at *HO Ex. 18*).

This Hearing Officer Issued a Pre-Hearing Report and Order on May 26, 2022, wherein the four issues that were to be the subjects of the Due Process Hearing were identified (*HO Ex. 14*). (Those issues are stated in Section IV of this Decision.). Pre-Hearing Report and Order also stated that if either party believed that this Hearing Officer had overlooked or misstated any item, that party was to advise this Hearing Officer of the omission or misstatement by 10:00 a.m.

on May 31, 2022. No objections to the Pre-Hearing Report and Order were received by this Hearing Officer prior to the Due Process Hearing.

The School District submitted its disclosure of potential witnesses and copies of potential exhibits at 9:44 a.m. on June 1, 2022 (Notice of shared folder via Google Drive - *HO Ex. 15*). On June 2, 2022, the School District submitted an Amended Witness List (Email of transmittal - *HO Ex. 16*), to which Petitioner did not object. On June 2, 2022, at 4:21 p.m., Petitioner submitted her disclosure of potential witnesses and copies of potential exhibits, **one day after** the deadline to do so (Link to Zip Drive – *HO Ex. 17*). The School District did not object to the late disclosure.

A second Pre-Hearing Conference was held on June 2, 2022, wherein the details of the Hearing were finalized. There were no other issues raised by the parties at this time.

The Due Process Hearing in this matter was held virtually, on June 8 and 9, 2022. Petitioner was represented by Amanda Laub, Esq., and the School District was represented by Daniel Ebihara, Esq., and his co-counsel was Yasnai Rodriguez-Zaman, Esq. This Hearing Officer made an Opening Statement that included a recitation of the four issues to be decided. The Hearing was closed to the public and witnesses were excluded, with the exception of Student’s mother and the School District’s Compliance Monitor, assisting Mr. Ebihara. Testimony was taken and documentary evidence was admitted over the following two days. At the conclusion of testimony on June 9, 2022, it was decided that closing arguments would be submitted in writing to this Hearing Officer, no later than 5:00 p.m. on June 13, 2022, at which time the record would be closed.

On June 16, 2022, having discovered that the decision deadline in this matter had been miscalculated, this Hearing Officer sent to the parties a Notice of Amended Decision Deadline (*HO Ex. 19*). The correct deadline for the Decision is June 21, 2022.

### **III. PRELIMINARY MATTERS**

#### **A. UNINTENDED DISCLOSURE OF THE SUBSTANCE OF SETTLEMENT NEGOTIATIONS BY COUNSEL FOR PETITIONER.**

At the beginning of the Due Process Hearing, (hereinafter referred to as “Hearing”), the School District’s counsel raised the issue of Petitioner’s counsel’s accidental disclosure of the substance of the parties’ settlement negotiations. The School District’s counsel was referring to an email that Petitioner’s counsel sent to him on June 7, 2022, that was mistakenly also sent to this Hearing Officer. It is important to note that Petitioner’s counsel sent another email shortly after the original one, acknowledging that she had sent the previous email in error (*HO Ex. 19*). The email at issue addressed details of settlement negotiations and the School District’s counsel indicated that it also contained an attached document. The School District’s counsel wanted to make sure that the items discussed in the email did not affect this Hearing Officer’s decision, because not all items discussed were related to the Due Process Complaint and Counsel did not want these discussions to be construed as an admission by the School District. This Hearing

Officer acknowledged receiving the email and stated that upon scanning it, she knew right away that it pertained to settlement negotiations between the parties. Consequently, this Hearing Officer did not focus on the substance of the communication. Additionally, this Hearing Officer made clear that she did not open and/or read any documents that may have been attached to the email. This Hearing Officer assured the parties that she would not take into consideration the existence of settlement discussions, or a potential settlement agreement, when rendering her decision in this matter, and it would not affect her ability to be fair and impartial. This Hearing Officer then asked the School District's counsel if he was comfortable with her ability to be a fair and impartial hearing officer in this matter, to which he responded affirmatively. Petitioner's counsel had no objections to this Hearing Officer continuing to preside over this matter, either.

#### **B. COUNSEL FOR PETITIONER'S FAILURE TO MOVE FOR THE ADMISSION OF 26 PROPOSED EXHIBITS DURING PETITIONER'S CASE-IN-CHIEF.**

Petitioner's counsel disclosed Petitioner's Hearing Witness List and Petitioner's Exhibit List (*HO Ex. 21*) on June 2, 2022. The Exhibit List contained columns next to each exhibit entitled "Marked," "Offered," and "Admitted." There were 29 proposed exhibits on the Exhibit List. During the course of the Hearing, Petitioner's counsel introduced and sought admission of only one of her proposed exhibits: **P13** – Email from Parent to [Assistant Principal]. The School District's Counsel introduced and sought admission of two of Petitioner's exhibits: **P3** – Academic History and **P20** – Parental Consent for Evaluation Form. Only three of Petitioner's exhibits were offered and admitted into evidence during the Hearing. After Petitioner's counsel rested her case and before moving to a discussion of closing arguments, this Hearing Officer raised the issue of the Exhibits that Petitioner's counsel did not offer or seek to have admitted during witness' testimony. Petitioner's counsel then moved to have all 26 exhibits admitted into evidence.

The School District's Counsel objected to the admission of these exhibits because they had not been formally offered during witness testimony. The Petitioner's counsel failed to lay foundation for these exhibits. Therefore, the School District's Counsel was prevented from examining/cross-examining the witnesses about these documents. Further, the School District's Counsel may have had objections to these documents which were never made, because they were never offered into evidence. Petitioner's counsel argued that the exhibits should be admitted because the School District's Counsel had not formally objected to them prior to the hearing. Petitioner's counsel was referring to the Pre-Hearing Report and Order, wherein it stated in paragraph 6(a) that if either party wished to raise objections to documents, such objections must be in writing and submitted to this Hearing Officer no later than June 3, 2022, (*HO Ex. 14*).

After entertaining arguments from both parties, this Hearing Officer ruled that the 26 exhibits that Petitioner's counsel never offered into evidence, nor moved to have admitted during her case-in-chief, would **not** now be admitted. The reasons for this ruling are listed below:

1. The section of the Pre-Hearing Report and Order that allowed for written objections to documents prior to the Hearing is akin to a pre-trial *motion in limine*, which is a more formal vehicle for an evidentiary challenge (*HO Ex. 14*). Simply put, the lack of objections to documents **prior** to a trial or hearing, whether intentional or not, does not

preclude an objection to that document **during** the trial or hearing. The lack of objections prior to a trial or hearing also does not relieve an attorney of his or her obligation to formally offer, and then move for admission, any proposed exhibits during the trial or hearing. The two evidentiary procedures are complimentary, not mutually exclusive.

2. The Petitioner's own Exhibit List contained columns next to each proposed exhibit to allow for notation when that exhibit had been marked, and offered and ultimately admitted, indicating counsel's knowledge of the necessary procedure for admission of documentary evidence at the Hearing.
3. During the course of the Hearing, Petitioner's counsel did in fact offer, and move to have admitted, one of her exhibits, indicating her familiarity with this procedure.
4. The Notice of Pre-Hearing Conference stated in paragraph 7(c) that "a document is not necessarily 'admitted' into evidence merely because it is exchanged and submitted in accordance with the 5-business-day rule." (*HO Ex. 13.*)
5. The Hearing Process Guidelines, which was distributed to the parties, states in part in paragraph 3, that each party should be "prepared regarding the witnesses they will call, the questions they will ask them, **and the exhibits or documents they want to discuss with the witnesses and have the Hearing Officer consider.**" (emphasis added) (*HO Ex. 8.*)
6. Petitioner's counsel was late disclosing her witness and exhibit list. As stated in the Rights of the Parties Related to Hearings, paragraph 5, any "party has the right to prohibit the introduction of any evidence at the hearing that was not disclosed to that party at least five business days before the hearing . . ." (*HO Ex. 9.*) The School District's Counsel did not object to Petitioner's late disclosure, although it could have. Counsel for the School District's objection to the admission of 26 exhibits that were not offered into evidence during the course of the hearing was certainly merited, particularly in light of the decision not to object to Petitioner's late disclosure.
7. This Hearing Officer addressed the issue of documentary evidence in the Opening Statement, wherein she stated that documents will be introduced into evidence by the witnesses and must be formally submitted into evidence after the testimony of the witness. Objections to any evidence should be made at the time of the attempted submission.

**C. THE NEED TO ENSURE THAT TESTIMONY DURING THE HEARING WAS RELEVANT TO THE ISSUES BEFORE THIS HEARING OFFICER.**

During the Hearing, Petitioner’s counsel questioned the witnesses about many subject areas that were not relevant to the issues before this Hearing Officer – issues that had been specifically identified in the Pre-Hearing Order and had been reiterated at the beginning of the Hearing. The School District made numerous objections based upon relevancy and this Hearing Officer sustained most of these objections. Petitioner’s counsel was questioning witnesses in the areas of bullying, safety plans and the substance and appropriateness of an IEP that was developed for Student in May of 2022, and approved by Parent. Petitioner’s counsel argued that these areas were relevant to the issue at hand.

Petitioner’s Counsel argued that the issue of bullying and a safety plan related to the Parent’s meaningful participation as addressed in Issue #3. Student had been involved in a verbal and physical fight on January 21, 2022, wherein Student hit another student. As a result, there was a Required Parent Conference and Student was suspended for two days. On February 1, 2022, when Student returned to school, Student was involved in another fight and the school police were summoned. There was to be another Required Parent Conference and Student was to be suspended for two days, but Student’s Mother withdrew Student from the School after the fight. It is important to note that the Due Process Complaint does mention the January 21, 2022, incident but it makes only one reference to Student’s safety at the School being jeopardized and there is no use of the word “bullying” at any point in the ten-page Complaint.

Petitioner’s Counsel cited to a Second Circuit case to support her position that bullying and a safety plan were relevant to the issue of Student’s Mother’s meaningful participation – *T.K. and S.K. v. New York City Dept. of Educ.*, 810 F.3d 869 (2016). This Hearing Officer found that this case was factually distinct from the instant matter because it involved a parent’s specific requests to discuss bullying concerns during two separate meetings and the school officials’ refusal to engage in that discussion. Again, Petitioner had not raised the issue of bullying in her Due Process Complaint and it was not addressed in any of the four issues that are before this Hearing Officer.

Student’s Mother’s concerns about Student’s safety were relevant to explain the reason why she withdrew Student from the School. But an attempt to have an extended conversation with multiple witnesses about bullying and the existence of a safety plan was not appropriate, because those subjects were **not relevant** to the issues as identified in the Pre-Hearing Report and Order and reiterated at the beginning of the Hearing.

Another area which Petitioner’s Counsel tried to explore in great detail with the witnesses at the Hearing, was the substance of the new IEP that had just been developed on May 23, 2022. Specifically, Petitioner’s Counsel insisted on questioning witnesses about ADHD and autism, clearly trying to establish a record to support an argument that these were areas of suspected disability that should have been explored during the process of developing the new IEP. This Hearing Officer explained on several occasions when ruling on the School District’s relevancy objections, that the appropriateness of the new IEP was not an issue in this Hearing.

Petitioner’s Due Process Complaint was dated April 6, 2022, and it addressed issues related to Student’s out-of-state IEP and the School District’s alleged failure to implement it or

timely develop a new one during the 2021-2022 school year. All four of the issues before this Hearing Officer relate to either the implementation of Student's out-of-state IEP, and the provision of comparable services, or the development of a new IEP – actions which arguably should have taken place at the beginning the school year. Issues surrounding the development of the new IEP in late May of 2022, and with which Parent had agreed, post-date the Due Process Complaint in this case and could very well be the subject of a new Due Process Complaint but are not appropriately a part of the Complaint that is the subject of this Hearing.

**IV.  
STATEMENT OF THE ISSUES**

**Issue #1**

Whether CCSD conducted a timely and appropriate evaluation of the Student transferring from out-of-state in the summer of 2021, specifically:

- a. Timely evaluating the Student after the Student's Parent referred the Student in June 2021;
- b. Timely conducting an evaluation in all areas of suspected disability: intellectual disability, autism, and other health impairment or other category of disability due to the Student's attention deficit disorder and oppositional defiant disorder; and,
- c. Timely conducting the following assessments: psychoeducational, mental health, speech and language, assistive technology and health.

**Issue #2**

Whether CCSD provided the Student a Free Appropriate Public Education (FAPE) from the commencement of the 2021/2022 school year, specifically whether CCSD was obligated to develop and implement a new IEP or provide comparable services to Student's out-of-state IEP, until a new evaluation was conducted?

**Issue #3**

Whether CCSD denied the Parent meaningful participation in the determination of the Student's placement in general education, and/or the development of the Student's IEP, and/or implementation of the Student's out-of-state IEP?

**Issue #4**

Whether CCSD provided a prior written notice of its determination of Student's educational placement in general education, and/or its refusal to assess Student pursuant to Parent's request, and/or its refusal to implement Student's out-of-state IEP, and if so, did it significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE or cause a deprivation of the educational benefit?

**V.**

## **EXHIBITS**

### **Hearing Officer Exhibits**

- HO Ex. 1 - Due Process Complaint
- HO Ex. 2 - Notice to the School District of the Due Process Complaint
- HO Ex. 3 - Notice to the Nevada Department of Education of the Due Process Complaint
- HO Ex. 4 - Appointment of Lucinda Coumou as Hearing Officer in this matter
- HO Ex. 5 - School District response to the Due Process Complaint
- HO Ex. 6 - Notice of Status Conference and Agenda
- HO Ex. 7 - Preliminary Order
- HO Ex. 8 - Hearing Process Guidelines
- HO Ex. 9 - Rights of Parties Related to Hearings
- HO Ex. 10 - Email sending Preliminary Order, Notice of Status Conference, Hearing Guidelines and Rights of Parties Related to Hearings
- HO Ex. 11 - Amended Notice of Status Conference
- HO Ex. 12 - Status Conference Report and Order
- HO Ex. 13 - Notice of Pre-Hearing Conference
- HO Ex. 14 - Pre-Hearing Report and Order
- HO Ex. 15 - School District's Disclosure of Potential Witnesses and Exhibits
- HO Ex. 16 - School District email regarding Amended Witness List
- HO Ex. 17 - Petitioner's Disclosure of Potential Witnesses and Exhibits
- HO Ex. 18 - Letter to the parties regarding the Stay-Put issue and the School District's Response
- HO Ex. 19 - Notice of Amended Decision Deadline
- HO Ex. 20 - Email disclosing settlement negotiations
- HO Ex. 21 - Petitioner's Exhibit List
- HO Ex. 22 - Emails
- HO Ex. 23 – School District's Closing Argument
- HO Ex. 24 – Petitioner's Closing Argument

### **School District Exhibits**

- D- 1 - School Calendars 2021-2022 School Year
- D- 2 - Attendance Log 2021-2022 School Year
- D- 3 - Enrollment History 2021-2022 School Year
- D- 4 - Status Records
- D- 5 - Out-of-State MDT Report 2-13-19
- D- 6 - Out-of-State Eligibility 2-22-19
- D- 7 - School District MDT Report 5-23-22
- D- 8 - School District Eligibility Report 5-23-22
- D- 9 - Out-of-State IEP 1-26-21
- D-10 - School District IEP 5-23-22
- D-11 - Behavior Report 2021-2022 School Year



D-12 - Emails

**Petitioner's Exhibits**

P- 3 - Culm-Academic History-SR

P-13 - Email from Parent to Assistant Principal - PR

P-20 - Culm-Parental Consent for Evaluation Form-SR

**VI.  
FINDINGS OF FACT**

After considering all the evidence, this Hearing Officer finds the following facts:

1. On June 25, 2021, Student's Mother enrolled Student in a public high school in Respondent's School District, (hereinafter referred to as "the School"). Student, who had an IEP in the previous district, moved from another state. (*Testimony of Student's Mother*).
2. On June 25, 2021, Student's Mother submitted the Student's Out-of-State IEP paperwork to the School's IEP mailbox, for the School's review. On August 26, 2021, Student's Mother sent an email to the Special Education Instructional Facilitator, thanking the Special Education Instructional Facilitator for "reaching out and looking into this" for her. Student's Mother resent a copy of Student's out-of-state IEP, as well. (*Testimony of Student's Mother, Ex. D-12, pg. 2*).
3. On August 10, 2021, which was the beginning of the 2021-2022 school year, Student began attending the School and was placed in general education classes. Student was not receiving any special education classes and pursuant to an IEP at this time. (*Ex. D-3, Testimony of Student's Mother, Testimony of Assistant Principal*).
4. The Special Education Instructional Facilitator for the School provides support for students, families, teachers and administrators in implementing IEPs and following compliance requirements. The Special Education Instructional Facilitator reviews and evaluates an existing IEP to see if it can be implemented in the School's setting (*Testimony of Special Education Instructional Facilitator*).
5. On September 8, 2021, the Special Education Instructional Facilitator met with both Student and Student's Mother to review the Out-of-State IEP. Student's Mother signed the form agreeing to temporary services and the Parental Consent for Special Education Evaluation Form. When a new Student has an out-of-state IEP, the Special Education Instructional Facilitator has the Parent sign a Parental Consent for Evaluation Form, agreeing upon the disability indicated in that out-of-state IEP and to allow an assessment. In that Consent Form, it is stated in part that:

Your child has been referred to Student Services to be evaluated based on concerns in the following areas:

Health and Sensory/Motor Functioning, Academic Performance/Achievement, General Intelligence, Speech/Language/Communication, Social and Emotional Condition/Adaptive Behavior Skills/Behavior.

**Authorization for Evaluation**

I hereby authorize for Clark County School District to assess my child in all areas of suspected disability consistent with the reasons states above. . .

...

[signature of Parent, dated September 8, 2021]

*(Ex. D-4, pg. 3, Ex. P-20 and testimony of Special Education Instructional Facilitator).*

6. The Special Education Instructional Facilitator determined that the Student’s out-of-state IEP could be implemented at the School. Student was receiving a minimum of 90 minutes of Specially Designed Instruction (SDI), 5 times a week, in Math, Academic Skills, Language Arts and Community Based Instruction. Student’s Transcript indicates the classes she had that fulfilled the required SDI – Special Education classes: English 3, Personal Finance, Principles of Physical Science and the Study of U.S. History (*Ex. P-3 and Testimony of the Special Education Instructional Facilitator*).

Student was also receiving additional accommodations/modifications per the out-of-state IEP: For each class, Student would have extended time to take tests, access to having tests read aloud, and Student could test in a separate room or small group (*Ex. D-9, pgs. 10-12 and Testimony of the Special Education Instructional Facilitator*).

7. On September 10, 2021, the Special Education Instructional Facilitator sent an email to relevant School personnel telling them that Student was new to the School, having transferred from out-of-state, and that Student’s Mother had signed the Parental Consent for Special Education Evaluation Form. The Special Education Instructional Facilitator also indicated in this email that the out-of-state IEP document had been uploaded into the School’s database system. Further, the Special Education Instructional Facilitator informed these email recipients that the MDT was due on November 17, 2021, the new IEP was due December 17, 2021 (*Ex. D-12, pg. 4*).
8. On September 13, 2021, an email was sent to the Special Education Instruction Facilitator, informing her of Student’s placement in the STAR Program (Social/Emotional Teaching and Reinforcement), with the Case Management Student Placement Form attached. Said Form noted that this was an “Out of District” placement. (*Ex. D-12, pgs. 6 and 7.*)
9. By September 13, 2021, the School was implementing the Student’s Out-of-State IEP in its entirety. The Student’s Out-of-State IEP was effective from January 27, 2021, to January 25, 2022. In 2019, the Student’s Out-of-State Initial Eligibility Determination was for Serious Emotional Disability (*Ex. D-6*). Areas in which the Student needed

Specially Designed Instruction were determined to be Reading Comprehension, Math Computation, Math Reasoning, Written Expression, and Behavior. Student was to be given the following accommodations for her disability: 50% more additional time to complete assignments; tests or assignments could be read to Student; Student would be provided a separate location for testing with no more than 12 students; and, Student would receive a copy of the teacher's notes or Power Points to supplement Student's own notes. (*Ex. D-9 and Testimony of the Special Education Instructional Facilitator*).

10. As of September 14, 2021, the Special Education Instructional Facilitator sent an email to relevant staff, the Case Manager being one recipient, informing the Case Manager that Student had been placed in the STAR Program (Social/Emotional Teaching and Reinforcement) and that Case Manager would be managing Student's case. Further, the Special Education Instructional Facilitator told the Case Manager that Student's Mother and the Special Education Instructional Facilitator decided to leave Student in her current general education classes until the next quarter, because it would be a major upheaval to Student's schedule to move her into STAR Program classes at that time (*Ex. D-12, pg. 5*). When a Student with an IEP is in a general education class, there is both a regular, general education teacher, and a special education teacher (*testimony of Special Education Instructional Facilitator*).
11. On September 20, 2021, Student's Mother sent an email to the Special Education Instructional Facilitator, and she began by saying, "I want to thank you for advocating and supporting [Student] with her educational plan." Student's Mother then communicated to the Special Education Instructional Facilitator her doubts about Student going into the STAR Program and she questioned whether a 504 accommodation in regular/general education might be better. The Special Education Instructional Facilitator indicated that she had spoken with Student that day and had encouraged Student to see if Student would benefit from the supports available in the STAR Program. Student's Mother responded by explaining that she told Student that if she did not need to be in the special education classes, then Student should prove it by doing her work and doing it well. Student's Mother then thanked the Special Education Instructional Facilitator, who then responded, "Awesome! We're on the same page!" (*Ex. D-12, pg. 8, Testimony of School Psychologist, Testimony of Student's Mother*).
12. The Multidisciplinary Evaluation Team Report (MDT), summarizing the evaluations conducted and determining special education eligibility, was due on November 17, 2021 (*Ex. D-12, pg. 4, Testimony of Special Education Instructional Facilitator*).
13. The School Psychologist tried to pull Student from class to give the testing required for the MDT on ten different occasions: 9/20/21, 10/18/21, 10/25/21, 11/1/21, 11/8/21, 11/22/21, 11/29/21, 12/6/21, 1/24/22 and 1/31/22. The School Psychologist was unable to locate Student for the testing because Student was absent from class (*Ex. D-4, pg. 4 and testimony of School Psychologist*).
14. The MDT was not done by November 17, 2021, because Student was never available for the required testing when the School Psychologist tried to find Student because Student

was absent from class. The School is very large with approximately 3,000 to 4,000 students. The School Psychologist never tried to contact Student's Mother about Student being absent on the occasions that the School Psychologist tried to remove Student from class for the required testing and the School Psychologist could not remember if she asked her assistant to contact Student's Mother (*Testimony of Special Education Instructional Facilitator, Testimony of School Psychologist, Ex. D-4, pgs. 3-4*).

15. In November 2021, Student's Mother attended a truancy meeting with school personnel because Student had eight or more unexcused absences and school personnel told Student's Mother that was why Student was failing (*Testimony of Student's Mother*).
16. According to Student's school transcript, as of February 25, 2022, Student had 15.5 credits. 23 credits are needed to graduate. If Student attends another year of school, it would be possible for Student to graduate at the end of the 2022-2023 school year, upon successful completion of her classes (*Ex. P-3 and Testimony of Assistant Principal*).
17. On January 21, 2022, Student was involved in a verbal and physical fight at School during lunch, wherein Student hit another student. As a result, there was a Required Parent Conference and Student was suspended for two days (*Ex. D-11*).
18. On February 1, 2022, Student returned to School. Student's mother had already decided to withdraw Student from the School. Student was involved in another fight at School and the School police were summoned. There was to be a Required Parent Conference and Student was to be suspended for two days. Student's Mother withdrew Student from the School that day on February 1, 2022 (*Ex. D-11 and testimony of Student's Mother*).
19. Special Education Teacher (hereinafter referred to as "Teacher") had Student in his Principles of Physical Science and Personal Finance classes. Student began attending these two classes with the Teacher on September 10, 2021, during the first quarter of the school year. When Student was placed in the Teacher's classes, the Teacher had access to Student's out-of-state IEP through the school's Infinite Campus computer program. The Teacher implemented Student's out-of-state IEP. The Teacher exhibited familiarity with the goals contained in Student's out-of-state IEP. Student's out-of-state IEP contained behavior goals for Student: 1. If given a directive, Student would respond appropriately and follow the directive in class on four out of five trials; and 2. If given an assignment with clear directions, Student will complete the task with no more than one additional verbal prompt.

Regarding behavior goal number 1—The Teacher would work on this goal with Student by asking Student to do an assignment. Sometimes Student would respond appropriately, agreeing to work on the assignment and sometimes Student would tell Teacher that Student did not want to work on the assignment at that time. Teacher would then speak

to Student and explain the reasons to Student why it would be beneficial for Student to work on and complete the assignment.

Regarding behavior goal number 2—Teacher would track how many times teacher would have to ask Student to complete a task. Usually with Student, it would take three or four times of Teacher prompting Student before Student might begin the task.

There were two goals related to math for Student: 1. Given instructional level two step equations, Student would solve for the correct answer on four out of five trials; and 2. Given instructional level math word problems, Student will identify key words to set up Student's problems correctly on four out of five trials. Student's instructional level was about fourth or fifth grade math ability. The Teacher would give basic word and algebraic problems to Student that required a minimum of two steps to solve.

Teacher implemented the accommodations for Student that were delineated in Student's out-of-state IEP: extended time to complete assignments and testing in a separate room or small group.

Student had not met these goals during the time Student spent in Teacher's classes. It was not uncommon for Student to be very late or absent from his classes (*Ex. D-9, Testimony of Special Education Teacher.*)

20. Student is enrolled in the credit retrieval program this summer. This is a program that allows students with an IEP to enroll in summer school to make up credits they are missing due to failing a class. Students can receive up to two half credits, for a total of one full credit. There are two sessions: from June 23, 2022, to July 6, 2022, and from July 7, 2022, to July 19, 2022. Student will be an online student in a general education class with a special education teacher, a general education teacher and a support staff individual. Student will participate in the Apex program which provides additional resources and supplemental materials to support a student with an IEP. Student and Student's mother should be receiving notification of Student's enrollment in this credit retrieval program by mail in a few days. (*Testimony of the Director of Alternative Instructional Arrangements, Extended School Year and Case Management Department.*)
21. The Multidisciplinary Evaluation Team Report (MDT) was completed on May 23, 2022, and a copy was emailed to Student's Mother that day. The members of the MDT team were the School Psychologist, Special Education Teacher, General Education Teacher and Student's Mother (*Ex. D-7*).

22. Student was found to be eligible for special education under the category of serious emotional disturbance and a Statement of Eligibility was issued on May 23, 2022 (*Ex. D-8*).
23. A new IEP was developed on May 23, 2022, and Student's Mother participated in the IEP team meeting. A Notice of Intent to Implement IEP was given to Student's Mother on May 23, 2022 (*Ex. D-10*).

## VII. CONCLUSIONS OF LAW

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

### Issue #1

**Whether the School District conducted a timely and appropriate evaluation of the Student transferring from out-of-state in the summer of 2021, specifically:**

- a. **Timely evaluating the Student after the Student's Parent referred the Student in June 2021;**
- b. **Timely conducting an evaluation in all areas of suspected disability: intellectual disability, autism, and other health impairment or other category of disability due to the Student's attention deficit disorder and oppositional defiant disorder; and,**
- c. **Timely conducting the following assessments: psychoeducational, mental health, speech and language, assistive technology and health.**

*Nevada Administrative Code 388.337(1)(a)*, provides deadlines for conducting initial evaluations and requires that when a public agency determines that good cause exists to evaluate a student, it shall conduct the initial evaluation within forty-five (45) school days after the parent provides informed written consent. This deadline does not apply to a public agency if the parent of the student repeatedly fails or refuses to deliver the student for the evaluation. *NAC 388.337(3)(b)*.

In this case, the School District obtained written consent to evaluate from Student's mother on September 8, 2021, and the forty-five (45) day deadline to evaluate was November 17, 2021 (*Findings of Fact 4 and 8*). The School District did **not** meet this deadline (*Findings of Fact 10*). The only exception to this forty-five (45) day requirement to evaluate, is if the parent of the student repeatedly fails or refuses to deliver the student for the evaluation. There is evidence that the Student's Mother was aware of Student's attendance issues because there was a truancy meeting in November of 2021 (*Findings of Fact 12*). However, there is also evidence that the School District never communicated to Student's Mother that they had made 10 attempts to assess Student without success, because Student was absent on those occasions (*Findings of Fact 14*). Therefore, the exception to the forty-five (45) day requirement to evaluate does not apply here.

Based upon the foregoing, this Hearing Officer finds that the School District failed to conduct a timely evaluation of Student as required by *NAC 388.337(1)(a)*.

## Issue #2

**Whether CCSD provided the Student a Free Appropriate Public Education (FAPE) from the commencement of the 2021/2022 school year, specifically whether CCSD was obligated to develop and implement a new IEP or provide comparable services to Student’s out-of-state IEP, until a new evaluation was conducted?**

*Code of Federal Regulations, Title 34, part 300.323*, defines when IEPs must be in effect and states that if a student with a disability, who had an IEP in effect in a previous local education agency (LEA) in another state, transfers to an LEA in a new state, and enrolls in a new school **within the same school year**, the new LEA must provide the student with a Free Appropriate Public Education (FAPE), including services comparable to those described in the student’s IEP from the previous LEA, until the new LEA conducts an evaluation, if determined necessary, develops, adopts and implements a new IEP, if appropriate, that is consistent with Federal and State law. See also *NAC 388.263(2)*. The Student in this case transferred from out-of-state **prior** to the commencement of the school year, however, so these requirements would not apply (*Findings of Fact 1, 2 and 3*). Pursuant to *NAC 388.337(1)(a)*, the School District was obligated to develop and implement a new IEP for Student. An IEP is required to be in effect at the beginning of each school year. *NAC 388.283(1), 34 C.F.R. 300.323(a)*; (*See also Letter to Siegel from OSEP, 74 IDELR 23.*)

The Student in this case transferred from out-of-state **prior** to the commencement of the school year, so requirements set forth in *34 C.F.R. 300.323* and *NAC 388.263(2)* would not apply (*Findings of Fact 1, 2 and 3*). This Hearing Officer has already found that the School District did not conduct a timely evaluation of Student as required by *NAC 388.337(1)(a)*. Although an analysis of whether or not the School District provided comparable services is appropriate when a student transfers **during** a school year, we can engage in such analysis here within the context of assessing whether the School District was providing Student FAPE, prior to conducting an evaluation and developing a new IEP.

The U.S. District Court in Nevada addressed the issue of whether a school district provided a student with FAPE through the provision of comparable services to those in the IEP from the original state, pursuant to *NAC 388.263(2)*.<sup>2</sup> *Sterling v. Washoe County School District*, 51 IDELR 152 (2008). “Where the meaning of a statute is plain and unambiguous, the clear language of the statute controls.” *Id.* (citing *United States v. Maria-Gonzalez*, 268 F.3d 664, 668 (9<sup>th</sup> Cir. 2001) (citing *Aragon-Ayon v. I.N.S.*, 206 F.3d 847, 851 (9<sup>th</sup> Cir. 2000))). Additionally, courts defer to the interpretation of the Office of Special Education Programs of the Department of Education (“OSEP”). *Id.* (citations omitted). OSEP has noted that the department interprets “comparable” to have the plain meaning of the word, which is “similar” or “equivalent.” 71 Fed. Reg. 46540, 46681 (Aug. 14, 2006). Therefore, when a student transfers from another state, the new school can determine to provide services that are similar or

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<sup>2</sup> The court noted that the applicable Nevada state law, *NAC 388.263(2)*, mirrors the relevant federal statute.

equivalent to those described in the out-of-state IEP. The new school is not obligated to adopt the out-of-state IEP in its **exact** form. *Id.*

In *Sterling*, the student had a cochlear implant to remedy profound hearing loss. In the previous state, as part of the IEP, the student received deaf and hard-of-hearing services and speech and language services at his home. After the student's family move to Reno, Nevada, personnel at the new school determined to provide student with speech and language services at the student's new school – so the primary difference was the location of the services to be provided. The student's parents challenged this decision, arguing that the services provided at the new school were substantially different than the services provided at home in the previous school. The parents also argued that the school setting is inappropriate for this type of therapy. The court upheld the administrative decisions below that found the services at the new Nevada school to be comparable to the previous services provided in California. *Id.* The court also noted that the IDEA does not require a school to provide the best available or optimal educational setting, but instead the school must provide a “floor of opportunity” to give educational benefits to the disabled student. *Id.* The court also acknowledged the deference due to local and state officials' educational policy determinations. *Id.*

In determining whether the School District was providing Student with FAPE during the time period of August 10, 2021, which was when Student began attending the School at the beginning of the school year, until February 1, 2022, when Student left the School, we must look to whether the School District was obligated to develop and implement a new IEP or provide comparable services to Student's out-of-state IEP. In this case, Student had an IEP from the previous state in which she lived, before moving to Nevada. This Hearing Officer has already found that the School District failed to conduct a timely evaluation of Student as required by Nevada law. *NAC 388.337(1)(a)*. The School District did not issue an Interim IEP but instead chose to implement Student's out-of-state IEP. In so doing, was the School District providing Student with services comparable to the ones contained in her out-of-state IEP?

Although in a scenario where a student transfers to a new school from out-of-state, that school is not obligated to adopt the out-of-state IEP in its exact form, here it appears that the School did just that. The School's Special Education Instructional Facilitator determined that the Student's out-of-state IEP could be implemented at the School. The Special Education Instructional Facilitator downloaded the document to the School's database and let relevant school personnel know about it. (*Findings of Fact 7.*)

Pursuant to the out-of-state IEP, Student was receiving a minimum of 90 minutes of Specially Designed Instruction (SDI) 5 times per week in Math, Academic Skills, Language Arts and Community-Based Instruction. Student's transcript indicates the classes she had that fulfilled the required SDI were special education classes in English, Personal Finance, Principles of Physical Science and the Study of U.S. History. Student was also receiving additional accommodations/modifications pursuant to the out-of-state IEP. For each class, Student would have extended time to take tests, Student would have access to having tests read aloud, and Student could take tests in a separate room or in a small group. (*Findings of Fact 6.*)



One of Student's Special Education teachers was very knowledgeable about Student's out-of-state IEP and provided much detail as to how it was being implemented. The Special Education Teacher was very familiar with the goals contained in Student's out-of-state IEP and he described how he worked with Student on Student's behavior goals: He would ask Student to do an assignment and if Student did not respond appropriately, he would discuss with Student the reasons why it would be beneficial for Student to work on and eventually complete that assignment. The Special Education Teacher tracked how many times he would have to ask Student to complete a task. Usually, it would take three or four times of prompting to get Student to begin a task. The Special Education Teacher worked with Student on Student's goals for math. He also implemented the accommodations for Student that were delineated in the out-of-state IEP. (*Findings of Fact 19.*)

Student started attending the School on August 10, 2021. The Student's out-of-state IEP was not uploaded to the School's database until September 10, 2021, however. The Special Education Instructional facilitator indicated that Student's out-of-state IEP was not fully implemented until September 13, 2021 – 22 school days after Student began attending the School. Student and her mother were questioning whether or not Student wanted to remain in the STAR Program as of September 20, 2021 (*Findings of Fact 11*). At that point, Student's Mother wondered in an email communication with the Special Education Instructional Facilitator, whether a 504 accommodation in regular, general education classes would be better (*Findings of Fact 11*). This delay in the implementation of Student's out-of-state IEP appears harmless, and after careful review of the testimony and documentary evidence in this case, this Hearing Officer finds that the School District did provide Student comparable services to Student's out-of-state IEP.

With respect to the School District's implementation of Student's out-of-state IEP and this Hearing Officer's finding that the School District did provide Student services comparable to those required in the out-of-state IEP, the second and final inquiry is whether the School District provided Student FAPE. There must be a determination as to whether the IEP was reasonably calculated to enable Student to receive educational benefits. *Sterling, supra*. Although Congress enacted IDEA to ensure that children with disabilities have access to FAPE, an "appropriate education does not mean the absolutely best or potential-maximizing education for the individual child." *Sterling, supra*, (citing *Union Sch. Dist. V. Smith*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994) (citations omitted). A school district provides a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from the instruction." *Sterling, supra*, (citing *Westchester County v. Rowley*, 458 U.S. 176, 102 S.Ct. 3034 (1982)).

Student was receiving personalized instruction as it related to the goals of Student's out-of-state IEP. There was sufficient support provided to Student to allow Student to benefit educationally from the instruction. It is important to note that Student's excessive absenteeism certainly did not help Student's ability to meet the academic and behavior goals outlined in the out-of-state IEP, nor Student's academic progress, either. (*Findings of Fact 13, 15, 19.*) This Hearing Officer finds that the School District did provide Student FAPE.

Based upon the foregoing, this Hearing Officer finds that the School District provided Student a Free Appropriate Public Education from the commencement of the 2021-2022 school year and the School District did provide Student with services comparable to Student's out-of-state IEP.

### Issue 3#

#### **Whether CCSD denied the Parent meaningful participation in the determination of the Student's placement in general education, and/or the development of the Student's IEP, and/or implementation of the Student's out-of-state IEP?**

Parents of a child with a disability must be afforded an opportunity to participate in meetings with respect to the identification, evaluation and educational placement of the child, and the provision of FAPE to the child. *34 C.F.R. 300.501(b)*. A parent of a child with a disability must be a member of any group which makes decisions on the educational placement of the child. *34 C.F.R. 300.501(c)*. Educational placement decisions of a child with a disability must be made by a group of persons, including the parents, who are knowledgeable about the child. *34 C.F.R. 300.116(a)*. A public agency must ensure that the parent of a child with a disability is included in the IEP team. *34 C.F.R. 300.321(a)*. The IEP for a child with a disability must be developed, reviewed and revised by a committee that includes one or both of the child's parents. *NAC 388.281(2)(d)*.

In this case, Petitioner alleges that Student's Mother was denied any meaningful participation in the implementation of Student's out-of-state IEP and the development of Student's new IEP. The evidence in this case demonstrates a willingness on the part of School personnel to communicate with and address Student's Mother's concerns. On August 26, 2021, Student's Mother sent an email to the Special Education Instructional Facilitator and there appeared to be a friendly back-and-forth email exchange between them (*Findings of Fact 2*). On September 20, 2021, Student's Mother sent an email to the Special Education Instructional Facilitator, thanking her "for advocating and supporting [Student] with her educational plan." (*Findings of Fact 11*.) Student's Mother then expressed concerns she had about Student going into the STAR program and she questioned whether a 504 accommodation in regular/general education might be better. The Special Education Instructional Facilitator explained that she had spoken with Student that day and the Special Education Instructional Facilitator had encouraged Student to see if Student would benefit from the supports available in the STAR program. Student's Mother then thanked the Special Education Instructional Facilitator, who then responded, "Awesome! We're on the same page!" (*Findings of Fact 11*.)

On May 23, 2022, a new IEP was developed and Student's Mother participated in the IEP team meeting. A Notice of Intent to Implement IEP was given to Student's Mother on that date, as well.

The email communications between Student's Mother and the Special Education Instructional Facilitator evidence a friendly relationship between the two and also show that the Special Education Instructional Facilitator was responsive to Student's Mother's concerns. The evidence in this case does not support a finding that the School District prevented Student's

Mother from meaningfully participating in the implementation of Student's out-of-state IEP, nor in the eventual development of the new IEP.

Based upon the foregoing, this Hearing Officer finds that the School District did not deny Student's Mother meaningful participation in the determination of Student's placement in general education or the implementation of Student's out-of-state IEP, or the development of Student's new IEP.

#### **Issue #4**

**Whether CCSD provided a prior written notice of its determination of Student's educational placement in general education, and/or its refusal to assess Student pursuant to Parent's request, and/or its refusal to implement Student's out-of-state IEP, and if so, did it significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of FAPE or cause a deprivation of the educational benefit?**

Written notice must be given to the parents of a student with a disability before the public agency proposes to initiate or change the identification, evaluation or educational placement of the student or the provision of FAPE to the student. *34 C.F.R. 300.503*. A procedural violation may be found if the public agency impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process or caused a deprivation of educational benefit. *34 C.F.R. 300.513(a)* and *NAC 388.310(11)*. Informed, written consent must be obtained from the parents of a student before conducting an initial evaluation, additional assessments and before special education and related services are initially provided to a student with a disability. *NAC 388.300(1)*.

Here, there is no evidence that the School District ever made a formal determination to place Student in general education classes to the exclusion of, or instead of, special education classes. There is no evidence that the School District refused to assess Student – in fact the School Psychologist tried no fewer than 10 times to pull Student from class, in order to conduct the MDT assessment (*Findings of Fact 13*). There was communication between Student's Mother and the Special Education Instructional Facilitator that indicated an ongoing dialogue and evidenced that school personnel were responsive to Student's Mother's concerns (*Findings of Fact 11, 2*). Also, there was a meeting between the Special Education Instructional Facilitator and Student and Student's Mother on September 8, 2021, the purpose of which was to review the out-of-state IEP and have Student's Mother sign the Parental Consent for Special Education Evaluation Form (*Findings of Fact 5*).

Based upon the foregoing, this Hearing Officer finds that the School District did not fail to provide notice of determination of Student's educational placement in general education because it did not make such a determination; the School District did not refuse to assess Student; the School District did not refuse to implement Student's out-of-state IEP. Therefore, the School District did not significantly impede Student's Mother's opportunity to participate in the decision-making regarding the provision of FAPE, nor did the School District cause a deprivation of the educational benefit for Student.

**VIII.  
ORDER**

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered:

This Hearing Officer has found only a procedural violation for the School District's failure to timely assess Student pursuant to *NAC 388.337(1)(a)*. Therefore, this Hearing Officer orders the following:

The MDT was originally due to be completed by November 17, 2021. There are 36 school days from November 17, 2021, to February 1, 2022, when Student's Mother withdrew Student from the School. As compensation for the School District's failure to timely evaluate Student, and any resulting loss of educational benefit, it is hereby ordered that the School District provide 36 hours of compensatory education – one hour for each of the aforementioned 36 school days.

**IX.  
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 Superintendent from a list of officers maintained by the Department shall conduct an impartial review of the hearing pursuant to NAC 388.315. [At the parties' request, this decision is being delivered to the parties both by e-mail and U.S. Postal Service. Receipt 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.]

Date: June 21, 2022

  
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LUCINDA L. COUMOU  
Hearing Officer  
*Coumou Law Group*  
10470 W. Cheyenne Avenue  
Suite 115 - #320  
Las Vegas, Nevada

[*contact information*]