

**STATE OF NEVADA DEPARTMENT OF EDUCATION**

In the matter of

STUDENT<sup>1</sup> by and through his parent(s), PARENT,  
Petitioner-Appellant,

v.

John V. Robinson,  
State Review Officer (SRO)

CLARK COUNTY SCHOOL DISTRICT,  
Respondent-Appellee.

**REVIEW OFFICER DECISION**

**BACKGROUND:**

The Student was born in 2006 and is eligible to receive special education services under the eligibility category of Specific Learning Disability (“SLD”) pursuant to the Individuals with Disabilities Education Act (as amended, the “IDEA”), 20 U.S.C. § 1400 et seq., the Nevada Revised Statutes (the “NRS”), Chapter 388, and the Nevada Administrative Code (the “NAC”), Chapter 388.

By due process complaint dated and filed July 9, 2021, the Student, by and through the Parent, filed a due process complaint against Clark County School District (“CCSD”) raising various issues pertaining the Student's rights under the IDEA, the provision of a free appropriate public education (“FAPE”) to the Student and the appropriateness of Student's Individualized Education Programs (“IEP(s)”) dated February 14, 2019, February 10, 2020, September 23, 2020, April 8, 2021, and April 27, 2021. Each of the school years at issue, 2019-20 and 2020-21, must be analyzed separately and distinctly for purposes of the FAPE analysis.

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<sup>1</sup> The Student is referred to generically to preserve privacy – See Appendix A for generic designations

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Pursuant to NAC 388.306(10), on July 19, 2021, the Nevada Department of Education (the “SEA” or “NDE”) appointed David A. Stephens as the due process hearing officer (the “IHO).

**ISSUES:**

The delineated issues for the hearing were:

- A. Whether for the 2019-2020 and 2020-2021 school years the school district failed to appropriately assess the behavioral problems of the Petitioner, and if so, whether that failure amounted to a denial of FAPE?
- B. Whether for the 2019-2020 and 2020-2021 school years the school district failed to assess the petitioner’s needs for supplementary educational aids and one on one personal assistance, and if so, whether that failure amounted to a denial of FAPE?
- C. Whether for the 2019-2020 and 2020-2021 school years there was a failure to design Individualized Educational Programs, (“IEP”), for the IEP dated February 14, 2019, IEP dated February 10, 2020, IEP dated September 23, 2020, IEP dated April 8, 2021, and IEP dated April 27, 2021, such that they were reasonably calculated to enable the Petitioner to make progress appropriate to the Petitioner’s circumstances, and if so, whether that failure amounted to a denial of FAPE?
- D. Whether for the 2019-2020 and 2020-2021 school years the Petitioner’s parent was denied the opportunity to meaningfully participate in the formulation of the IEP dated February 14, 2019, IEP dated February 10, 2020, IEP dated September 23, 2020, IEP dated April 8, 2021, and IEP dated April 27, 2021, and if so, whether that denial amounted to a denial of FAPE?
- E. Whether for the 2019-2020 and 2020-2021 school years the school district failed to implement the IEP dated February 14, 2019, IEP dated February 10, 2020, IEP dated September 23, 2020, IEP dated April 8, 2021, and IEP dated April 27, 2021, as drafted, and if so, whether that failure amounted to a denial of FAPE?
- F. Whether for the 2019-2020 and 2020-2021 school years the IEP dated February 14, 2019, IEP dated February 10, 2020, IEP dated September 23, 2020, IEP dated April 8, 2021, and IEP dated April 27, 2021, contained vague and immeasurable goals such that the IEP denied FAPE?

*See*, Prehearing Report and Order, December 29, 2021 and IHO Decision at 3-4.

The parties, by counsel, also agreed that these were the issues for the review. *See*, Review Decision & Status Report dated June 16, 2022.

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### **HEARING & HEARING DECISION:**

The due process hearing was held over a two-day period on January 19 and 20, 2022. The Parent was present at the hearing and was represented by his counsel of record, Robert Sweetin, Esq. The District was represented by its counsel, Daniel Ebihara, Esq.

The District called the following 4 individuals as witnesses: Assistant Principal of High School; High School Special Education Teacher; CCSD Social Worker; and Middle School Special Education Teacher. The Parent also called 4 witnesses, comprised of himself, the Student, CCSD Police Officer and the Parent's significant other (the "Partner").

A decision was rendered on February 4, 2022 (the "IHO Decision")<sup>2</sup>. Concerning Issue A above, the IHO decided that the IEPs dated February 14, 2019 and February 10, 2020 "appropriately assessed the behavioral problems of the Petitioner."

However, the IHO decided that the IEPs dated September 23, 2020, April 8, 2021 and April 27, 2021, failed to appropriately assess the Petitioner's behavioral problems as these IEPs "did not have strategies to help Petitioner learn self-control and deal with frustration, and it had no measurable goals to determine Petitioner's progress."

Concerning Issue B, the IHO determined that each and every IEP "contained appropriate Supplemental Aids for petitioner" and that while the District denied Petitioner's "request for a one-on-one paraprofessional for Petitioner, it was denied because the IEP team believed Petitioner did not need a paraprofessional one-on-one aide."

Concerning Issue C, the IHO determined that each IEP was appropriate.

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<sup>2</sup> The IHO Decision is dated February 3, typewritten, in the caption, and handwritten February 4, above the signature on page 25 – the SHRO adopts February 4 as the appropriate date.

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Concerning Issue D, the IHO decided that the Parent meaningfully participated in formulating all of the subject IEPs, except the IEP dated September 23, 2020. Concerning the IEP dated December 23, 2020, the IHO provided the following analysis:

“18. For the IEP dated September 23, 2020, the Parent was denied the opportunity to meaningfully participate in the formulation of the IEP. He was notified of the IEP meeting, but he did not attend. He was provided a notice of intent to implement the September 23, 2019 IEP but Parent did not raise any objection to this IEP.

19. A school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification. *Ms. S. ex rel. G. v. Vashon Island School Dist.*, 337 F.3d 1115 (9th Cir. 2003).

20. A procedural violation under the IDEA is a denial of FAPE if the Petitioner alleges a procedural violation of the IDEA; the violation significantly impeded the Parent’s opportunity to participate in the decision-making process; and, the child did not receive FAPE as a result of the procedural violation. 20 USC 1415(f)(3)(E)(ii)(II).

21. This failure to allow the Parent is a procedural violation. It did not significantly impede Parent’s opportunity to participate in that he did not object to the September 23, 2021 IEP, and when Parent had other problems with IEP the school District scheduled and IEP Meeting, and Petitioner did not suffer a denial of FAPE as a result of the procedural violation.

22. Thus, the violation does not amount to a denial of FAPE to Petitioner.”  
IHO Decision at 22.

Concerning Issue E, with the exception of the IEP dated September 23, 2020, the IHO decided that all of the subject IEPs were “implemented as drafted and approved.” Regarding the IEP, dated September 23, 2020, the IHO determined that the IEP “was **not** implemented as drafted and approved” (emphasis added) as the school failed to get the Petitioner the necessary training to succeed in distance learning. The IHO further concluded that this “failure amounted to a denial of FAPE for the Petitioner”

Concerning Issue F, the IHO determined that the subject, IEPs, “did not contain vague and immeasurable goals for the Petitioner.”

Based on the IHO’s findings and conclusions of law, the IHO ordered that the Petitioner was entitled to some relief from the District:

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IT IS HEREBY ORDERED that the Petitioner is entitled to compensatory education for a total of 60 hours. The compensatory education shall be divided as follows, 12 hours of reading, 12 hours of written expression, 12 hours of mathematics, 12 hours of Prevocational skills, writing and 12 hours of social/independent living skills.<sup>3</sup>

IT IS FURTHER ORDERED that these hours of compensatory education shall be focused on the area of need outlined in the April 27, 2021 IEP.

IT IS FURTHER ORDERED that the compensatory education shall be completed within five months of the date of this order.

IHO Decision at 24-25.

**REVIEW:**

The State Review Officer (“SRO”) was appointed to this due process appeal of the student on March 11, 2022. The request for appeal was faxed by counsel for the student to the SEA on March 9, 2022. Unless a continuance is warranted for good cause, the SEA must ensure that not later than 30 days after the receipt of a request for review, a final decision is reached in the review. 34 C.F.R. §300.515(b)(1) & (c). Accordingly, initially, a final decision concerning this administrative review was required by April 8, 2022.

The SRO and the parties, by counsel, participated in a conference call on Friday, April 1, 2022, at 1:00 pm. The parties discussed the statement of issues for the review and other matters salient to the review, including the items in NAC §388.315.

The parties, by counsel, informed the SRO that no additional evidence is required for the review. In response to the SRO’s specific query regarding the parent’s challenge to the amount of compensatory education awarded, the parent’s attorney stated his belief that the administrative record evidence to date is sufficient.

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<sup>3</sup> The IHO explained that these hours were calculated based upon the hours of synchronous learning missed by Petitioner in the first quarter of the 2020-2021 school year and divided by the percentage of time in each area where Petitioner was entitled to synchronous education.

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**CONTINUANCE:**

The parties jointly moved for a continuance to allow them time for ongoing settlement efforts. The hearing officer found that a continuance was warranted for good cause and the parties agreed on the briefing schedule specified in the SRO's Decision Concerning Continuance & Status Report entered April 8, 2022, incorporated herein by this reference.

Pursuant to this April 8, 2022, Decision, the Student, by counsel, was to file with the hearing officer and submit to opposing counsel the opening brief by 5 pm on Friday, April 29, 2022.

The parties, by counsel, agreed that email alone is an acceptable means of communication, unless other means are required by applicable law.

**DECISION ON STUDENT'S MOTION FOR SECOND CONTINUANCE:**

By email of May 9, 2022, sometime after the deadline for the opening brief had already run, the student, by counsel, moved for a second continuance to permit further settlement negotiations. By email of May 16, 2022, the School District, by counsel, stated that it agreed to a 30-day extension from the date of the student's opening brief, provided that the School District was given a corresponding amount of time to file its answering brief. By email of May 16, 2022, that same day, counsel for the Student responded, "No objection."

Accordingly, the SRO granted the requested second continuance for good cause and the deadlines were reformulated proportionately as evidenced by the SRO's Decision Concerning Motion for Second Continuance & Status Report of May 25, 2022, incorporated herein by this reference.

Pursuant to this May 25, 2022 Decision, amongst other things, the student, by counsel,

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was to file with the SRO and submit to opposing counsel the opening brief by 5 pm on Tuesday, May 31, 2022.

The School District, by counsel, was to file with the SRO and submit to opposing counsel the response brief by 5 pm on Thursday, June 30, 2022.

The SRO must render and renders his decision on Friday, July 29, 2022.

In the May 25, 2022, Decision, the SRO commended the parties' efforts to achieve a global settlement of the case and encouraged their continued efforts to achieve a resolution. However, the SRO also stressed and reminded the parties of the tight time constraints at the administrative level in IDEA cases. Accordingly, beyond this second continuance, the parties were cautioned by the SRO that they would need to proceed on 2 parallel tracks, simultaneously participating in this review and in their settlement efforts. The SRO emphasized that this course of proceeding would achieve the dual goals of focusing the settlement efforts and bringing the administrative review to a timely conclusion.

On June 16, 2022, the SRO entered a Decision & Status Report which provided, amongst other things:

“To date, the student has not filed any opening brief. The office of the SRO sent an email to the parties on June 6, 2022, requesting the scheduling of “a status conference call as soon as possible, preferably [that] week.” The School District responded with available dates and times on June 6, 2022, that same day. To date, the student has not responded. Accordingly, the School District has until 5 pm June 30, 2022, to file with the SRO and submit to opposing counsel any brief and then the SRO will decide the case on review.”

Neither an opening brief nor any further communication was received from the Student.

On June 24, 2022, the School District timely filed its Brief in Response to the State Review Officer's Order dated June 16, 2022.

Pursuant to NAC 388.315(b), the SRO must ensure that the procedures of the hearing officer below were consistent with the requirements of due process. Neither party on appeal

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challenged the procedures of the hearing officer below, nor did this SRO find any inconsistencies. The SRO must render and renders his decision on Friday, July 29, 2022.

### **STANDARD OF REVIEW:**

With respect to the standard of review, the SRO is required to make an independent decision, reviewing the entire record of the hearing below. (20 U.S.C. § 1415(g); NAC 388.315(f).) This review officer has done so here, having reviewed the decision of the hearing officer, the transcript, the exhibits, the certified record and any memoranda submitted by the parties on the issues on appeal.<sup>4</sup>

Though not expressly adopted by the Ninth Circuit, this SRO finds persuasive the standard of review language articulated in *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 23 IDELR 293 (3d Cir. 1995), cert. denied, 517 U.S. 1135, 109 LRP 34841 (1996). The Court there noted that in two-tier systems under the IDEA, the review officer must exercise "plenary review" to make the independent decision the IDEA requires. However, in doing so, it held a review officer should defer to the hearing officer's credibility determinations, unless the non-testimonial, extrinsic evidence in the record will justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. Accordingly, this is the standard of review that this SRO uses. *See also, Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877, 103 LRP 33278 (9th Cir. 2001) (impliedly approving the Third Circuit's approach in *Carlisle*).

### **FINDINGS OF FACT:**

1. The following Hearing Officer's Findings of Fact (IHO FOF), as stated in the IHO Decision,

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<sup>4</sup> References to the verbatim transcript of the IDEA hearing held on January 19-20, 2022 are cited as "Tr. <page number>." References to the District's Opening Brief are cited in the following format: "DOB<page number>". References to the parties exhibits are to the designations at the hearing e.g., "SD <Exhibit Number>" and "PE <Exhibit Number>".



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are incorporated herein by reference: 3-27, 29-47, 49-53. The IHO FOFs are supplemented as follows.

2. To the extent these Findings of Fact contain conclusions of law, or the Conclusions of Law are findings of fact, they should be considered without regard to their given labels.
3. The Student was born in 2006 and is eligible to receive special education services under the eligibility category of Specific Learning Disability (“SLD”).
4. Student has been enrolled in CCSD since Kindergarten and has qualified for special education services since first grade.
5. For the period relevant to this decision (the “Period”), the Student’s last Multidisciplinary Team Report (“MDT”) is dated February 23, 2016 and indicates that the Student qualified for special education services in the areas of reading, written language, mathematics, and behavioral/social skills. SD 11. *See also*, SD 6, 7, 8, 9 and 10.
6. At that time, assessments showed that the Student was able to decode consonant and vowel sounds, write consonant-vowel-consonant words, and compute single-digit addition. SD 10 at 5.
7. During the Period, the Student now in high school, still could not read. Tr. 64
8. The Student’s inability to read proved to be a major impediment to his benefiting from distance learning necessitated by the COVID-19 pandemic. Tr. 64
9. From the time distance education was put in place, the Student’s father repeatedly reported concerns that the Student’s inability to read was denying him access to his education.
10. Digital online platforms such as Clever, Canvas, and Google Meets were utilized to give instructions, lessons, assignments and assessments.

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11. The District expected that students would access email, read and follow instructions, navigate technology, and participate in virtual lessons and complete assignments.
12. However, the District was on notice that the Student could not access these digital platforms as, for example, evidenced by excerpts of his September 23, 2020. IEP (SD 8): a) “Teacher was unable to test the student as he was not able to use school email;” b) “[Student] is not able to log in Canvas or Google Meets;” c) “[Student] neither attended any Google Meet for his Math class nor completed and Math assignments in canvas yet;” d) “Teacher emailed questions to [Student]...Teacher did not receive any reply;” and e) “[Student’s] father expressed a concern prior to the IEP meeting about [Student] not able to read computer screen.” SB 8; Tr.64
13. Despite clear notice, the IEP team failed to request an Assistive Technology Evaluation to consider whether providing the Student with assistive technology devices and services would improve his functional ability and access to education in the context of distance learning. Tr. 64.
14. The most recent assessment of the Student’s English proficiency was a World Class Instructional Design and Assessment (“WIDA”) Test that was conducted on February 20, 2020.
15. This test rates a student’s English proficiency and is designed to measure a student’s progress in English language development.
16. In 2020, the Student scored an overall 1.8 on the WIDA, which is considered to be in the entering stage of development.
17. The Student’s April 8 and April 25, 2021 IEPs refer to a Kaufman Test of Educational Achievement (KTEA-3) administered in February of 2020, but the Parent claims he has

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never received a report regarding the Student's results.

18. For the Period, no other assessments were made to measure the Student's present levels of academic achievement and functional performance (the "PLAAFP"). The District's failure to provide the Parent with material information about the Student's achievement on IEP goals and in the general education curriculum, including assessments data to establish annual baselines for his IEP, prevented meaningful parent participation in educational decisions, and denied the Student meaningful educational benefit and a FAPE for each of school years 2019-20 and 2020-21. Tr. 68-9; 79-80.
19. Teacher observations and input in the Student's IEP dated September 23, 2020, state, "Teacher was unable to test the student as he is not able to use school email" (SD 8 at 4) and, "Student is not able to log in Canvas or Google Meets. Therefore, previous scores and teacher observations are used to determine present levels." (SD 8 at 4-5); Tr. 68-9.
20. For baselines in Written Expressions, the Student's teacher used two emails she assumed the Student had written to analyze his writing skills. However, those emails were dictated by the Student through a talk-to-text computer program which do not reflect the Student's writing ability at the time. Tr. 285-6
21. Concerning school years 2019-20 and 2020-21, the District's failure to provide accurate baseline information prevented meaningful parent participation in the IEP process and educational decisions for the Student, and therefore denied the Student meaningful educational benefit and a FAPE.
22. Concerning the 2019-20 school year, without accurate up to date assessments needed to establish reliable baselines for the PLAAFPs in the applicable IEPs, it was impossible for the IEP Teams to address each of the Student's unique disability-based needs in the PLAAFP,

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and to develop meaningful and appropriate measurable annual goals, including academic and functional goals.

23. Concerning the 2020-21 school year, without accurate up to date assessments needed to establish reliable baselines for the PLAAFPs in the applicable IEPs, it was impossible for the IEP Teams to address each of the Student's unique disability-based needs in the PLAAFP, and to develop meaningful and appropriate measurable annual goals, including academic and functional goals.

24. [ ]. *See, e.g.*, SB 3.

25. In early 2020, a court ordered Psychological Evaluation revealed that the Student's IQ is 62, which is in the intellectually disabled range at the 1st percentile. PE D at 2.

26. The Student's knowledge of how to act in hypothetical social situations and his ability to use common sense in similar situations was also tested. His score was the lowest score one can receive which suggests his common-sense judgment is highly impaired. PE D at 3.

27. CCSD's School's Behavior Detail Reports [ ] SD 3.

28. During the 2019-20 school year, in early 2020, [ ]. SD 3 at 3; Tr. 267-9

29. [ ]. *See also*, Tr. 289-92

30. The Student's February 2020 Behavior Intervention Plan ("BIP") acknowledged the bullying, which was pervasive and continuous. *See, e. g.*, SB 5 at 3.

31. Despite the documented events, including suspensions, CCSD did not conduct a comprehensive behavioral evaluation or an evaluation of other suspected disabilities to identify the Student's needs related to the bullying and whether his escalating behavior had been an obstacle to his education.

32. In this regard, the Parent had also provided CCSD with a May 30, 2017 diagnosis for

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Attention-deficit/hyperactive disorder, Combined presentation (“ADHD”). PE E; Tr. 276

33. The Student’s cumulative file is also replete with teacher observations indicative of ADHD.

*See, e.g.*, “[Student’s] difficulty staying on task without behavioral distractions causes him to have difficulty independently completing assignments in reading, written expression, and math in the 8th grade curriculum” (SD 7 at 7); “Student’s difficulty staying on task without distractions causes him to have difficulty independently completing assignments” (SD 8 at 6). *See also*, SB 9 at 7, SD 3 and 5; PE B and D.

34. The Parent frequently added his concerns, “Per telephone call on 1/24/ 2020, parent stated that his concern was [Student’s] on task behavior in his general education classes.” SB 7 at 8.

35. Despite an increase in emotional and behavioral difficulties, the Student was never referred for a re-evaluation by CCPS, including to consider whether or not he met the criteria for services under another eligibility classification, namely Health Impairment (“HI”) for his diagnosed ADHD. During the Period, CCSD has never evaluated or assessed the Student in this area.

36. The District’s failure to assess the Student in all areas of suspected disability denied him of a FAPE for each of school years 2019-20 and 2020-21 and denied the Parent meaningful participation in the development of the Student’s 2019-20 and 2020-21 IEPs, thereby causing a deprivation of FAPE.

37. [ ]

38. [ ]

39. [ ] Tr. 289-4

40. [ ]

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41. [ ] PE 9.

42. [ ]

43. [ ], CCSD neither referred the Student for a re-evaluation by CCPS, including to consider whether or not he met the criteria for services under another eligibility classification nor did they request or complete a Functional Behavioral Assessment (“FBA”).

44. Over the years, CCSD has consistently recognized that the Student’s behavior impedes the Student’s learning and/or the learning of others. SB 6, 7, 8, 9, 10. The District acknowledged this crucial fact in each of the IEPs at issue in this proceeding. *Id.*

45. Accordingly, CCSD acknowledged its legal obligation and responsibility to address such behavior in each IEP during the Period: “... IEP committee **must provide** positive behavioral strategies, supports and interventions, or other strategies, supports and interventions to address that behavior.” (Emphasis in original). *See, e. g.*, SD 10 at 8.

46. The IEP dated February 14th, 2019, stated that it would “Follow BIP”, “Across all settings”, “Throughout the day.” SD 6 at 11 and SD 5.

47. The 2 Student Behavior Intervention Plans (“BIP(s)”) which pertain to the 2019-20 school year, generally focus on the Student maintaining self-control by reducing stress and making good choices. SD 5.

48. The BIPs recognize the need for regular periodic review and possible modification: “Team will meet to review the effectiveness of the BIP every quarter. Frequency data will be collected on the replacement behavior and the problem behavior.” SD 5 at 2; *see, also*, SD 5 at 5.

49. With the advent of distance learning, from the High School’s viewpoint, updating the Student’s BIP, and the mandated behavior/social goals, behavioral supports, etc. in his

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following IEPs, starting with the September 23, 2020 IEP, simply fell away.

50. For example, the IEP dated September 23, 2020 states, “Teacher was not able to update the behavior plan due to Distance Education and [Student] not attending the Google Meets.” SD 8 at 6.

51. Essentially, CCSD omitted the behavior plan altogether, even though it was mandated by the express terms of each of the successive IEPs for school year 2020- 21. SD 8, 9 & 10.

52. The IHO made no express credibility findings.

### **ADDITIONAL FINDINGS, ANALYSIS & CONCLUSIONS OF LAW:**

An evaluation is the initial step in the provision of special education and related services to a student with a disability. The IDEA sets forth several procedures that school districts must adopt to ensure a legally compliant evaluation process. *See* 34 C.F.R. §§ 300.304 - 300.311. A full and individual initial evaluation, in accordance with 34 C.F.R. §§ 300.305 and 306, is required before the initial provision of special education and related services to a student with a disability. 34 C.F.R. § 300.301(a). The purpose of the evaluation is to detect the existence of the student's disability (or disabilities) and the nature and extent of the special education and related services that the student needs. 34 C.F.R. § 330.15.

An evaluation means procedures used in accordance with §§ 300.304 through 300.311. 34 C.F.R. § 300.15. In conducting the evaluation, the school district must use a variety of tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, to determine whether the student is eligible and, if so, the content of the student's IEP. 34 C.F.R. § 300.304(b)(1); NAC 388.340(1).

The evaluation must be sufficiently comprehensive (34 C.F.R. § 300.304(c)(6)) and assess

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the student in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, motor abilities and adaptive behavior (34 C.F.R. § 300.304(c)(4); NAC 388.340(4)(b); NAC 388.284(2)(b) & (3)(b)(2)).

Courts have found that this procedural requirement is the first step to providing a student with a FAPE. *Millburn Twp. Bd. of Educ. v. A.C.S.O*, 64 IDELR229 (D.N.J. 2014).

The school district cannot use any single measure or assessment as the sole criterion for determining whether a student is a student with a disability and for determining an appropriate educational program for the student. 34 C.F.R. § 300.304(b)(2); NAC 388.340(2). See also *Avila v. Spokane Sch. Dist.* 81, 686 F. App'x 384, 69 IDELR 204 (9th Cir. 2017) (unpublished) (finding that a school district's broad assessment of a student intended to detect specific disabilities or behaviors associated with such disabilities can meet the requirements of 34 C.F.R. § 300.304(c)(4)).

The evaluation must identify all of the student's special education and related services needs, whether or not commonly linked to the disability category. 34 C.F.R. § 300.304(c)(6).

In addition, the evaluation process includes the review of existing evaluation data, including evaluations and information provided by the student's parent, as part of an initial evaluation (if appropriate) to identify what additional data is needed, if any, to determine eligibility and the educational needs of the student. 34 C.F.R. § 300.305(a).

A disability is suspected and, therefore, must be assessed by the school district, when the school district "has notice that the [student] has displayed symptoms of that disability." *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 67 IDELR 227 (9th Cir. 2016). The requirement to assess may be triggered by the informed suspicions of the parent or outside



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experts. *See Pasatiempo v. Aizawa*, 103 F.3d 796, 25 IDELR 64 (9th Cir. 1996); *N.B. v. Hellgate Elementary Sch. Dist.*, 541 F.3d, 1202, 50 IDELR 241 (9th Cir. 2008).

While an FBA is referenced in the applicable regulations especially and specifically in the context of discipline, the law is also clear that an FBA and testing can be necessary to address FAPE concerns outside of the discipline context. *See* NAC 388.284(2)(b) & (3)(b)(2)).

Review of a FAPE denial claim under the IDEA is twofold. First, has the school district complied with the procedures set forth in the IDEA? And second, is the IEP developed through the IDEA's procedures reasonably calculated to enable the student to receive educational benefit? *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001) *citing Bd. of Educ. of the Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982).

As the U. S. Supreme Court has stated:

**[W]e think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process ... as it did upon the measurement of the resulting IEP against a substantive standard.**

*Board of Educ. v. Rowley*, 458 U.S. 176, 205-206 (1982).

In the Ninth Circuit, it is unnecessary to address the second inquiry if the procedural inadequacies that result in the loss of educational opportunity, or seriously infringe on the parent's opportunity to participate in the IEP formulation process, or that caused a deprivation of educational benefits clearly result in the denial of FAPE. *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047 (9th Cir. 2012) *citing Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001); *Cf. W.G. v. Bd. of Trustee of Target Range Sch. Dist. No. 23*, 960 F.2d 1479 (9th Cir. 1992); *M.L. v. Federal Way Sch. Dist.*, 387 F. 3d 1101 (9th Cir. 2004); *Van Duyn v. Baker School District*, 502 F. 3d 811 (9th Cir. 2007); 20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R.

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300.513(a)(2); see also 20 U.S.C. § 1415 (f)(3)(E)(ii); 34 C.F.R.300.513(a)(2) (in matters alleging a procedural violation, IDEA instructs that a hearing officer may find that a student did not receive FAPE only if the procedural inadequacies impeded the student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefit).

Concerning the second inquiry, the United States Supreme Court, in *Andrew F. v. Douglas County School District RE-1*, 137 S. Ct. 988, 69 IDELR 174 (U.S. Mar. 22, 2017), held that the educational benefit must be more than *de minimis*. *Id.* To meet its substantive obligation under the IDEA, "a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id.* The analysis must focus on the adequacy of the school district's program. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307, 1314 (9th Cir. 1987). If a school district's program addresses the student's unique needs, provides educational benefit, and comports with the IEP, then the school district has offered FAPE even if the parent prefers something other than what was offered, and such would likely result in greater educational benefit. *Id.* There is no requirement under the IDEA that the school district provide the best possible education for eligible students. *Dep't of Educ. v. Katherine D.*, 727 F.2d 809, 555 IDELR 276 (9th Cir. 1985), *cert. denied*, 471 U.S. 1117 (1985).

When disagreements arise between parents and schools over the provision of FAPE, “[b]y the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement.” *Andrew F.*, 137 S.Ct. at 1001. Therefore, the Court empowered any reviewing court to “fairly expect” the school district “to be able to offer a cogent and responsive explanation for their decisions that

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shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.*

When a school district fails to offer a “cogent and responsive explanation,” it is not entitled to deference. *Gaston v. Dist. of Columbia*, 2019 WL 3557246 (D.C. August 5, 2019) (finding the “preponderance of the evidence available at the time shows that the IEP was not reasonably calculated to enable [the student] to make progress appropriate in light of her circumstances”); see also *Smith v. Dist. of Columbia*, 2018 WL 4680208 (D.C. Sept. 28, 2018).

The burden of proof in this case is on CCSD to prove upon a preponderance of the evidence that it has provided a FAPE to the Student.<sup>5</sup> Here, the District simply has not provided a cogent and responsive explanation as to why, in view of all the circumstances described above, it did not appropriately assess, in each of the 2019-20 and 2020-21 school years, the behavioral problems of the Student by conducting a FBA, evaluating for other disabilities, etc., when such remediation was clearly warranted by the background and circumstances. This failure, particularly in view of the waiver of the triennial reevaluation and the ADHD diagnosis, significantly impeded the decision-making process regarding the formulation of the subject IEPs, the provision of a FAPE to the Student and seriously infringed on the Parent’s opportunity to participate in the IEP formation, thus denying the Student a FAPE.

The IEP is the backbone of the Student’s special education program. “Participation in the IEP and educational placement process is critical to the organization of the IDEA.” *Doug C. v. Hawaii Dept. of Educ.*, 720 F.3d 1038, 1043 (9th Cir. 2013) (citations omitted).

Similarly, the procedural violations described in finding paragraphs 18-23 and 31-

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<sup>5</sup> NRS 388.647 provides that “... the school district has the **burden of proof and** the burden of production.” (Emphasis added). The SRO understands this to mean the burden of persuasion and production.

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36 represent material, serious procedural inadequacies which impeded the Student's right to a FAPE, significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or caused a deprivation of educational benefits clearly resulting in a denial of FAPE.

The SRO does not address the second inquiry concerning the FAPE analysis because, in the Ninth Circuit, it is unnecessary if, as the SRO decides, the procedural inadequacies resulting in the loss of educational opportunity, or seriously infringing on the parent's opportunity to participate in the IEP formulation process or causing a deprivation of educational benefits clearly result in the denial of FAPE. *Anchorage Sch. Dist. v. M.P.*, 689 F.3d 1047 (9th Cir. 2012) citing *Amanda J. v. Clark County Sch. Dist.*, 267 F.3d 877 (9th Cir. 2001). See also, the recent *O.A. v. Orcutt Union Sch. Dist.*, 122 LRP 23661 (C. D. Cal. 5/7/22), which the SRO finds very persuasive.

#### **COMPENSATORY EDUCATION SERVICES:**

Compensatory education is an equitable remedy available to a hearing officer, exercising his authority to "grant such relief as the court determines appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii); 34 C.F.R. § 300.516(0(3)), when a child with a disability has previously been denied FAPE. See *Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 105 S. Ct. 1996 (1985); *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005); *Letter to Kohn*, 17 IDELR 522 (OSEP 1991); See also *Letter to Riffel*, 34 IDELR 292 (OSERS 2000).

Compensatory education effectuates a child's ability to receive FAPE by providing the FAPE by which the child was originally entitled to receive. *Letter to Kohn*, 17 IDELR 522 (OSEP 1991). "Under the theory of 'compensatory education,' courts and hearing officers may award 'educational services ... to be provided prospectively to compensate for a past deficient program.' *Reid*, 401 F.3d 516 (D.C. Cir. 2005) citing *G. ex rd. RG v. Fort Bragg Dependent Schs.*, 343 F.3d

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295, 308 (4th Cir. 2003).

An award of compensatory education "must be reasonably calculated to provide the educational benefits that likely would have accrued." *Reid*, 401 F.3d at 524. "This standard 'carries a qualitative rather than quantitative focus,' and must be applied with '[f]lexibility rather than rigidity.'" *Mary McLeod Bethune Day Academy Pub. Charter Sch. v. Bland*, 555 F. Supp. 2d 130 (D.D.C. 2008) (quoting *Reid*, 401 F.3d at 524).

In crafting the remedy, the undersigned SRO is charged with the responsibility of engaging in "a fact-intensive analysis that includes individualized assessments of the student so that the ultimate award is tailored to the student's unique needs." *Mary McLeod*, 555 F. Supp. 2d 130 (citing *Reid*, 401 F.3d at 524). For some students, the compensatory education services can be short, and others may require extended programs. *Id.*

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*Reid* rejects a "cookie-cutter approach," i.e., an hour of compensatory instruction for each hour that FAPE was denied. *Reid* 401 F.3d at 523. However, while there is no obligation, and it might not be appropriate, to craft an hour for hour remedy, an "award constructed with the aid of a

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formula is not per se invalid." *Friendship Edison Pub. Charter Sch. Collegiate Campus v. Nesbitt*, 532 F. Supp. 2d 121, 124 (D.D.C. 2008). Again, the inquiry is whether the "formula-based award ... represents an individually-tailored approach to meet the student's unique needs, as opposed to a backwards-looking calculation of educational units denied to a student." *Id.*

The SRO has decided that the Student was denied a FAPE by CCSD for school years 2019-20 and 2020-21. The Assistant Principal of High School testified there were 182 school days in the school year. Tr. 26. The High School special education teacher testified that there were nine weeks in a school quarter. Tr. 86. That would constitute approximately 45 school days. The SRO counted the school days shown on the Clark County School District 2019-2020 School Calendar for Students for school year August 2019- May 2020. SD 1. The SRO counted 181 school days. Next, the SRO counted the school days shown on the Clark County School District 2020-2021 School Calendar for Students for school year August 2020- May 2021. The SRO counted 172 school days for a total of 353 school days.

The Student clearly made his best educational gains with the Middle School special education teacher, who spent significant time working one-on-one with the Student. Tr. 299. Accordingly, the SRO decides that the compensatory education should take the form of one-on-one instruction for an equitable amount of time. To start his analysis, the SRO awards one hour of one-on-one compensatory instruction for each school day in the 2019-20 school year and 2020-21 school year, reduced as follows.

I further find that the Parent bears some responsibility in the Student going without appropriate services for the period of distance learning. The schools closed on March 16, 2020 and it was extremely difficult for CCSD to communicate and coordinate with the Parent throughout this period, some of this difficulty being no fault of the Parent. There is no question that CCSD cannot

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abdicate its responsibility to provide a FAPE to all children residing in the State, including children with disabilities who have been upended by the pandemic. See 34 C.F.R. §300.101 (a).

However, when seeking an equitable remedy, the Parent's own conduct should also be considered when deciding whether the award is justified. *See e.g., Burlington Sch. Comm. v. Massachusetts Dept. of Educ.*, 105 S. Ct. 1996 (1985). "[C]ompensatory education is not a contractual remedy, but an equitable remedy." *Reid*, 401 F.3d 516, *citing Parents of Student W. v. Puyallup Sch. Dist.*, No. 3, 31 F.3d 1489, 1497 (9th Cir. 1994). "'[T]he essence of equity jurisdiction' is to do equity and to mould each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it." *Reid*, 401 F.3d 516, *citing Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944). Accordingly, the SRO reduces the award by 45 hours (roughly one hour for each school day in a school quarter).

Additionally, the Parent was effusive in his praise for all of the extraordinary efforts of the Middle School special education teacher on behalf of the Student. *See, e.g., Tr.* 183-5, 211-214 & 299. Again, for his extraordinary efforts on behalf of, and to the benefit of, the school district, the SRO reduces the award by an additional 45 hours (roughly one hour for each school day in a school quarter). Accordingly, 263 hours are still owed (353 - 90).

The compensatory education shall be divided as follows, 60 hours of reading, 60 hours of written expression, 60 hours of mathematics, 43 hours of Prevocational skills, writing and 40 hours of social/independent living skills.

**ORDER:**

IT IS HEREBY ORDERED that Student is entitled to the compensatory education services described above.

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IT IS FURTHER ORDERED that CCSD shall conduct a comprehensive evaluation of the Student in all areas of suspected disability, including but not limited to SLD, ID, and HI related to ADHD, and a Functional Behavioral Assessment (FBA) by a Board-Certified Behavior Analyst (BCBA), an assistive technology (AT) assessment, a mental health assessment, and any additional assessments deemed necessary.

IT IS FURTHER ORDERED that CCSD should convene an IEP meeting within 30 days of the completed IEE assessment.

**NOTICE OF APPEAL RIGHTS:**

The decision of this SRO is final unless a party appeals the decision. A party may appeal from the decision of this SRO by initiating a civil action in a court of competent jurisdiction within ninety (90) days after receipt of this decision (NAC § 388.315).

ENTER: 7/29/2022

*John Robinson*

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John V. Robinson, Hearing Officer

cc: Persons on the Attached Distribution List (by e-mail)