

**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 Parents

DECISION OF THE HEARING OFFICER-  
revised

Petitioners,  
v.

DATE: August 18, 2022

Representatives:

SCHOOL DISTRICT

Petitioners: Parents

Respondent: Yasmin Rodriguez Zaman,  
Esq.

Respondent

Hearing Officer: Audrey J. Beeson

**Introduction and Procedural History**

On June 3, 2022 School District (hereinafter “District” or “Respondent”) received *Petitioner’s Due Process Complaint*. In accordance with the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1415(f)(1); CFR §300.507; NAC §388.310; and NRS §388.463 the undersigned was appointed as the Hearing Officer on June 8, 2022.

On June 10, 2022 the Hearing Officer issued a *Notice of Status Conference* scheduling a status conference for June 24, 2022 and enclosing the following: *Agenda, Preliminary Order, Appendix A, Hearing Process Guidelines, and Rights of Parties*. On June 14, 2022, District notified the Hearing Officer that Jason Bach, Esq., of The Bach Law Firm was representing Petitioners in this matter. On June 14, 2022, the Hearing Officer issued an *Amended Notice of Status Conference* scheduling a status conference for June 27, 2022, and enclosing the following: *Amended Agenda, Amended Preliminary Order, Appendix A, Hearing Process Guidelines, and Rights of Parties*. District’s *Notice and Response to Due Process Request for Due Process* was sent to Petitioners on June 14, 2022.

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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)

A status conference was held on June 27, 2022. The Hearing Officer was informed that the resolution meeting was held on June 8, 2022, and the parties needed the full 30-day resolution period. At the status conference, Respondent stated an intention to file a motion to dismiss, at least in part, based on jurisdictional grounds. The Hearing Officer gave Respondent until the close of business on July 8, 2022, to file said motion, and Petitioners until the close of business on July 18, 2022, to file an opposition. The dates of the due process hearing were set along with the pre-hearing conference.

On June 27, 2022, the Hearing Officer issued a *Status Conference Report and Order and Notice of Pre-Hearing Conference* scheduling the pre-hearing conference for July 21, 2022.

On July 7, 2022, Respondent filed *Respondent, School District's Motion to Dismiss Petitioner's Claims Related to the Enrollment in a Magnet School*. On July 18, 2022, Petitioners, by and through their counsel, filed *Opposition to School District's Motion to Dismiss*. On July 20, 2022, the Hearing Officer issued an *Order Denying Respondent's Motion to Dismiss*.

On July 20, 2022, Petitioners' Counsel submitted a *Request for Subpoena* to the Hearing Officer. On July 21, 2022, the Hearing Officer issued a *Determination on Petitioners' Request for a Subpoena* granting the request.

Prior to the pre-hearing conference held on July 21, 2022, counsel for Petitioners submitted an email to streamline the pre-hearing conference and submitted issues and relief sought by Petitioners.

The pre-hearing conference was held on July 21, 2022 at which time Petitioners' counsel notified Respondent and the Hearing Officer that Petitioners would be representing themselves at the hearing.

On July 22, 2022, the Hearing Officer issued a *Pre-Hearing Report and Order*, that addressed the relief requested in the email from Petitioners' counsel as being outside the scope of the hearing because the IEP contents were not challenged in Petitioners' due process complaint. In the *Pre-Hearing Report and Order* the parties were advised that pursuant to NAC 388.306(6), a party may amend its due process complaint if (a) The party receiving the due process complaint consents in writing to the amendment and is given an opportunity to resolve the problems identified in the due process complaint through a resolution meeting held pursuant to NAC 388.307; or (b) The hearing officer grants permission not less than 5 days before the hearing. Thereafter, District did not consent in writing to any amendments and therefore was not given an opportunity to resolve the same, and Petitioners did not file a motion to amend the due process complaint. The parties were placed on notice that they would be held to the matters agreed upon, ordered, or otherwise set forth in the *Pre-Hearing Report and Order*, and that if either party believed this Hearing Officer overlooked or misstated any item, the party must advise this Hearing Officer of the omission or misstatement within three (3) business days of July 22, 2022. The Hearing Officer did not receive a notification from either party and therefore the parties were held to the July 22, 2022 *Pre-Hearing Report and Order* at the time of the hearing.

Five-business day disclosures were due July 25, 2022. On that date Respondent requested and subsequently received an additional day to provide its disclosures. Petitioners timely submitted *Petitioners' Proposed Exhibit and Witness List*. On July 26, 2022, Respondent provided its final *Respondent's Disclosures and Witness List*, objected to one of Petitioners' proposed witnesses and informed Petitioners that two of their proposed witnesses, the School Psychologist and General Education Teacher, could not be secured for the hearing. On July 27, 2022, Respondent's Counsel provided an *Amended Witness List* to correct the title of a witness.

The hearing was held virtually on August 1, 2022, and August 2, 2022. Present at the hearing were Petitioners, representing themselves, and the School District (hereinafter "Respondent" or "District") represented by their attorneys, Yasmin Rodriguez-Zaman, Esq, and Daniel Ebihara, Esq.

After the opening statement by the Hearing Officer, Respondent's objection to one of the Petitioners' proposed witnesses was addressed and sustained. Before proceeding, the Hearing Officer asked Petitioners if they intended to move forward with the hearing based on the unavailability of the School Psychologist and General Education Teacher, and Petitioners chose to move forward.

The following witnesses testified: Psychological Services Coordinator; Magnet Schools Director; Student's M.D.; Special Education Teacher; Special Education Instructional Facilitator; High School 3 Principal; Region 1 School Associate Superintendent; Junior High School Principal; District SSD Representative; Parent 1 and Parent 2. District objected to Parent 1 testifying based on the fact that during the pre-hearing conference Parent 1 advised that they would not be testifying at, or be present for the hearing. The Hearing Officer overruled the objection, noting for the record that Parent 1 was listed on *Petitioners' Witness List* provided to District on July 25, 2022 and no objection was made in response to Parent 1 being listed as a witness.

The following exhibits were admitted into evidence by stipulation of the parties: Respondent's exhibits 1-16; Petitioners' exhibits 1-7, 10-17 and 19; and Hearing Officer's exhibits 1-12. The record was closed on August 2, 2022. A decision is due August 17, 2022.

### **ISSUE**

The issue to be determined is as follows: Whether the April 22, 2022 Individualized Educational Program (hereinafter "IEP") for the 2022-2023 school year requires the educational program provided by High School 3 in order for Student to receive a FAPE.

### **FINDINGS OF FACT**

After considering all the evidence, this Hearing Officer's Findings of Fact are as follows:

## ***Background***

1. Student was the victim of historical incidents of bullying on November 30, 2018, and January 8, 2019, in previous school settings while attending a District school in the fifth grade. An additional incident also occurred on December 14, 2018. (R's Ex 5; P's Ex 3; P's Ex 10) Student was administratively transferred to Junior High School as a result. Student and Student's family informed Junior High School Principal that the anxiety Student was facing prevented Student from following traditional in-person school on a day-to-day basis. (Junior High School Principal's testimony) Student was and still is in the process of transitioning and has vacillated during that process. (Special Education Teacher's testimony)
2. Student's M.D. completed an initial Homebound Instructional Services Application on October 9, 2020 recommending: home instruction; modifications for one on one instruction, large assignments broken down into smaller assignments, and close coordination with family for adjustment based on level of anxiety based on Student's depression, anxiety, and need to limit school exposure. (P's Ex 5) The goals and treatment were intended to reduce Student's elevated risk of harm to self and to prevent and avoid a psychiatric hospitalization. (Student M.D.'s testimony) Student was approved for homebound instruction on October 19, 2020 through May 26, 2021 and again on November 29, 2021 through the end of the 2021-2022 school year. (R's Ex 3, pg. 3)
3. Between October 19, 2020, and April 8, 2022, long-term improvements were made in Student's care and mental health status, there was a reduced frequency of self-injurious behavior and suicidal thoughts, and the next step was to help Student rejoin typical social activities. Generally, it is challenging for children and adolescents to rejoin social and academic milieu after they have been away for a while, in addition, Student is at a high risk for trauma by returning to in-person school if Student re-experiences distressing emotional states as a result of a bullying incident or if a bullying-like situation occurs, possibly triggering a worsening mood or worsening psychiatric symptoms. Ideally there would be as many positive factors to support Student transitioning back to a traditional school setting as possible. (Student M.D.'s testimony)
4. Student's M.D. wrote correspondence to "Administration and Admissions Committee of High School 3" on April 8, 2022 (hereinafter "April correspondence"). to notify High School 3 that Student's condition improved over the course of treatment and that attendance in a traditional school setting for the next academic year was reasonable and in Student's best academic and medical interest. Student's M.D. noted "specific social factors and peer factors at Student's home zone school [High School 1], that led Student's M.D. to believe it is not in Student's best interest to attend that school." (P's Ex 10)
5. Student's M.D recommended High School 3 as a preferred placement for Student based on the following: Student would be able to benefit from the rich art and academics offered there; Student's sibling attends High School 3 and having a supportive family member to facilitate a shared connection both at school, whether in passing or during lunch, and prior to and after school, can help facilitate Student's transition; and having supportive family

supports could enhance Student's ability to respond in a mature manner to either a minor conflict or something greater such as bullying. In terms of class size, if possible, Student is recommended to attend either a smaller class size or one with a higher teacher to student ratio. Student will perform better in a situation where there is a higher degree of oversight by teachers such that a responsible adult could intervene and give support as needed. While Student M.D. suggested High School 3 as a preferred placement, Student M.D. acknowledged it is not the only placement for Student. Student's M.D. considered, and ruled out, specialized schools geared towards emotional disturbance based on personal experience with the same through involvement in Treatment Team Meetings. Student M.D. also considered, and ruled out, the Social/Emotional Teaching And Reinforcement (STAR) program based on a general working knowledge of the same. Student's M.D. did not consider High School 2, a comprehensive traditional high school out of Student's zone. Student's M.D. did not have any direct participation in Student's IEP Team meetings. (Student M.D.'s testimony)

### ***2021-2022 School Year***

6. The last time Student was enrolled in a comprehensive campus was August 9, 2021. (R's Ex 3) Student was enrolled in the eighth grade and received homebound instruction at Junior High School for the 2021-2022 school year beginning November 29, 2021. (HO Ex 1, pg. 14) (R's Ex 8, pg. 4)

### ***Eligibility Determination & Development of IEP***

7. On January 4, 2022, District received a parent request dated January 3, 2022, for an evaluation for special education services with concerns/deficits including anxiety, depression, fears related to attending school, and mathematics. On January 10, 2022, Parent 1 went to Junior High School in person for a pre-Multidisciplinary Team (hereinafter "MDT") meeting and discussed the scope of the evaluation for emotional disturbance. On March 15, 2022, Parent 1 emailed the School Psychologist to schedule the date for the MDT Evaluation. (P's Ex 7; R's Ex 4, pg 4; R's Ex 8) A Parental Prior Notice of District Proposal, to develop an Initial/Annual IEP and educational placement was given via telephone on March 22, 2022, and written notice 1 was sent on March 23, 2022. The proposed action was to develop an Initial/Annual Individualized Education Program and educational placement due to: academic concerns; evaluation/reevaluation results; parent/guardian concerns; and behavior concerns. (R's Ex 11, pg. 6) School Psychologist emailed Parent 1 the draft copy of the MDT report. (R's Ex 4) Student's MDT Evaluation was completed on March 31, 2022, and Student was deemed eligible for an IEP under the category of emotional disturbance. (R's Ex 8) (Psychological Services Coordinator's testimony)
8. The IEP Team was comprised of: LEA Representative, General Education Teacher, Special Education Teacher, School Psychologist, Nevada Pep Rep, Parent 1, Parent 2 and Student. Meetings were held on March 31, 2022, April 6, 2022, and April 22, 2022. (R's Ex 4)

9. An initial draft of the IEP was sent to Parent 1 who, along with Nevada Prep Rep, contributed a great deal of input to the IEP. With the exception of the March 31, 2022 meeting when Nevada Prep Rep attended, Petitioners did not bring anyone else to participate in the IEP Team meetings. A lot of the discussion centered around Student's present levels of performance. No documentation was provided by Petitioners during the IEP Team meetings. The April Correspondence was provided to School Psychologist to determine how to use the information in the MDT report. It is School Psychologist's normal procedure to review attendance reports and report cards. (Special Education Teacher's testimony) Parent 1 asked School Psychologist to review information about trauma after a child leaves a school due to bullying, and as a result, School Psychologist purchased the book Parent 1 suggested. Parent 1 was not concerned about Student's ability to do math, or that Student did not understand, but believed the issue was solely due to Student being behind in the work. Parent 1 asked that the IEP list the transition plan and High School 3 as Student's school and believed that without those requests the IEP did not meet Student's needs. (Parent 1's testimony)
10. An Initial IEP was developed on April 22, 2022 for Student, but not implemented. (R's Ex 11, pgs. 7-22)
11. The April 22, 2022 IEP contains three goals: (1) Student will display productive school behavior on a daily basis with 80% frequency 3 out of 5 trials as measured by special education teacher; (2) Student will identify and manage feelings (i.e., anger, anxiety, stress, frustration) on a daily basis with 80% frequency as measured by special education teacher; and (3) Student will increase the ability to select and apply mathematical operations in a variety of contexts to 80% as measured by state scoring guide, teacher survey, performance assessments, and supported by special education teacher. (R's Ex 11, pgs. 17-18)
12. The IEP eligibility category listed is emotional disturbance. (R's Ex 11, pg. 7) The IEP Team determined that Student's behavior impedes Student's learning or the learning of others. (R's Ex 11, pg. 15) The IEP addresses positive behavioral strategies, supports and interventions, or other strategies, supports and interventions by allowing the following modifications, accommodations or support: (1) allow use of a calculator to check work when not being assessed on content; (2) allowed small group setting for testing/quizzes; (3) allow additional time to complete assignments/tests/quizzes; (4) use of a calculator during math/science tests/quizzes; (5) teachers will check for understanding; (6) the use of a pressure pass, walk-about, visit to designated staff member when anxiety impedes ability to focus/work during times of anxiety/frustration during class; (7) teacher will inform Student of any changes in class routine, schedule or assignments prior to event to lessen possible anxiety issues; (8) Student can show mastery of content area versus number of completed assignments; (9) reducing assignments when anxiety impacts attendance; (10) not penalizing Student for attendance based on current mental health needs; and (11) allowing attendance on a reduced schedule as needed based on current mental health needs; and. The location of services is the general education setting. The IEP provides a related service of transportation so that Student can attend a school other than Student's zoned school. (R's Ex 11, pg. 19) Student will spend 87% of the day in the regular education

environment and the remainder of the day in a special education (resource) room. (R's Ex 11, pg. 22)

13. Proposed IEP accommodations were initially drafted by Special Education Teacher and sent to Parent 1. Parent 1 then the proposed accommodations with the Nevada Pep Rep, sent changes to Special Education Teacher, and combined efforts were utilized to make changes to the accommodations listed in the IEP. The IEP accommodations were not written with a specific school in mind. Petitioners requested that the IEP be implemented at a specific school location, High School 3, for the following reasons: Student's sibling attends High School 3 and would provide Student with a support system to help with anxiety; the Student's zoned school had Student's previous bully/bullies and Petitioners did not want Student to be exposed to the bully or bullies; and the zoned school has administration that was at the previous school where Student was bullied. (Special Education Teacher's testimony; Parent 1's testimony)
14. Special Education Teacher informed Petitioners that a specific school could not be listed in the IEP and that the IEP Team can only determine the type of services a student receives, where those services are available and the least restrictive environment for a student. Junior High School Principal was part of the final meeting to discuss the term location versus the term placement. (Special Education Teacher's testimony) (Junior High School Principal's testimony) (R's Ex 4) Parents were informed that the transition plan is not part of the IEP but is in conjunction with the bullying policy. (R's Ex 4) The IEP Team, with the exception of Petitioners, agreed with the IEP as written. Petitioners wanted the IEP to include a school location. (Special Education Teacher's testimony) The Notice of Intent to Implement IEP was issued on April 26, 2022 with a proposed implementation date of May 6, 2022. Petitioners rejected the IEP because they wanted written into the IEP "that due to previous bullying incidents, ongoing litigation, current administration at zoned high school and the need to be with sibling for support, [Student] would benefit from being at High School 3 to receive special education services." District refused Petitioners' request because "location of services is not an appropriate or allowable action within the IEP, only the specially designed instruction and location can be dictated with the IEP (ex: Math-Resource, Math-Gen Ed)." (P's Ex 11; R's Ex 10)

### ***High School 3 Application***

15. Magnet schools in District are public schools that require students to apply and be accepted to the magnet school through the application process. If a student applies to a magnet school and is not accepted, then the student attends the school for which they are zoned. The application process involves an open application period that begins in the month of September and closes the second week in January for the following academic school year. A lottery is held to select students to attend the magnet school programs and then the late application period is opened for students that were selected during the on-time process or were unable to apply during the on-time period. While magnet schools are available for students in kindergarten through the twelfth grade, magnet schools typically only take applications through the tenth grade and for some programs through the eleventh grade. (Magnet Schools Director's testimony)

16. High School 3 is a public magnet school offering a visual and performing arts program for grades nine through twelve. High School 3's application process is different than other magnet schools in that it has an audition process in addition to the application process. After applying, a student makes an appointment to audition, is given information about what to prepare and what is needed for the audition, then goes before a panel of teachers who give the student a score for the audition. Once a score is received, the score is provided to the magnet department, entered into the system and becomes part of the lottery selection process. Director of Magnet Schools does not have any influence on the admissions practices of a particular school and is only able to provide guidance on the admissions practices and procedures which are reviewed each year by a team of teachers and administrators to ensure that magnet schools are using the most equitable practices. Director of Magnet Schools does not have any influence on which students go to a particular magnet school. (Magnet Schools Director's testimony)
17. Student submitted an on-time application to a magnet school for the 2022-2023 school year. Student's on-time first choice selection was for High School 3 Visual Arts – 2D Design/Visual Design. Student's audition appointment was January 29, 2022. (P's Ex 16) Student applied and listed Student's sibling on the application. Although Parent 1 and Student electronically initialed the application's *agreement of understanding and acknowledgment of conditions*, and condition #6 states, "As part of the application process, for first choice selections, a percentage of open seats are given preference based on geographic area, siblings, and feeder school alignment. Second and third choice selections do not receive preferences." (R's Ex 13), this Hearing Officer finds Parent 1's testimony credible that Parent 1 did not realize that second and third choice selections do not receive the sibling preference. Had Parent 1 known that information at the time the application was completed, the order of preference would have been changed for Student. (Parent 1's testimony)
18. An email was sent to Petitioners on March 8, 2022, responding to Student's on-time first choice lottery application. It informed Petitioners that Student did not qualify for the High School 3 visual arts/visual design program which is the most competitive program. (R's Ex 14; R's Ex 16) (High School 3 Principal's testimony) Student subsequently applied for the High School 3 theater tech program through the late application process and qualified but was not accepted because there were no available seats. (R's Ex 13, pg. 2) (Magnet Schools Director's testimony) (High School 3 Principal's testimony) As a result, Student was waitlisted. Initially there were twenty-seven (27) available seats for the theater tech program. There are no current open seats available in the High School 3 theater tech program. (Magnet Schools Director's testimony)
19. On April 1, 2022, late auditions were held, and Student auditioned. Student was not selected as part of the late lottery. For the performing arts program students auditioning receive a score of 1-5, with 1 being the highest score and 5 assigned to students that do not show up. Student received a score of 2 for the theater tech program. Not all students waitlisted are accepted into High School 3 because only available seats are filled. High School 3 is not able to increase enrollment numbers for a specific student or able to



circumvent the lottery process to enroll a specific student. High School 3 cannot modify or increase the enrollment numbers for a specific student because it would not be in line with the policies and regulations that the magnet schools are provided by District. As of Friday, July 29, 2022, there were 7 students on the waitlist. Students in the alternate pool are given preference in order of their numerical scores, 1 being chosen first. Currently, there are no students in the alternate pool that received a score of 1. There are three or four students in the alternate pool that received a score of 2. Schools can fill any available seats up until the second Friday of school, or August 19, 2022, for this school year. Students are encouraged to apply for the following school year if not chosen in the lottery process. (Magnet Schools Director's testimony)

20. Had Student chose theater tech as first choice, instead of visual arts/visual design, Student would have been more likely to enroll at High School 3. (High School 3 Principal's testimony)
21. On April 27, 2022, Petitioners spoke to Director of Magnet Schools about their questions and concerns pertaining to Student's entrance or attendance. Director of Magnet Schools shared District's policy in what guides the magnet school application and lottery selection process with Petitioners as well as District's Regulation 5112 regarding a change of school assignment (hereinafter "R-5112"). (R's Ex 12, pg. 1) (Magnet Schools Director's testimony) (R's Ex 7) Petitioners reached out to see if there was any change in the alternate pool status, how many seats were available in the program that Student applied to late, with the most recent communication on July 28, 2022. Magnet Schools Director's testimony)
22. R-5112, II, A 1-7 provides reasons for which a student may attend a school outside of the attendance zone in which the student resides. One reason a student does not go to their zoned school is if they are accepted into a magnet school (under R-5112, II, A, 3) while R-5112, II, A, 4 allows a student to be placed in a school that the student is not zoned for to meet the accommodations listed in a student's IEP. A student, through a change of school assignment, cannot be assigned to a magnet school. Students are not assigned to a magnet school and cannot be assigned to a magnet school through an administrative assignment because the magnet schools follow separate policies and procedures. (Magnet Schools Director's testimony)
23. In comparison to a comprehensive school, High School 3's only differences are that it offers a comprehensive art program, it does not offer the same extracurricular activities and it does not have the same type of self-contained classrooms. High School 3 follows the general education curriculum of all other schools. Applicants are required to choose only one program that they want to audition for at High School 3. High School 3 has between 460-465 entering freshman students for the 2022-2023 school year. The number of students in each art program varies based on the unique skill taught and whether the program requires workstations in the class setting. High School 3 has students with IEPs that are required to follow the same audition process as all other students. High School 3 is not able to increase enrollment for a specific student because that would be favoritism. Students enrolled at High School 3 qualified in order to attend. Although High School 3 does not have the same issue with bullying that other schools have, kids still find a way to bully

others. There is no preclusion for a freshman student to interact with a student that is in another grade level. (High School 3 Principal's testimony).

***Whether the April 22, 2022 IEP for the 2022-2023 school year requires the educational program provided by High School 3 in order for Student to receive a FAPE?***

24. Petitioners argue that the April 22, 2022 IEP for the 2022-2023 school year requires the education program provided at High School 3 in order for Student to receive a FAPE because High School 3 has small class sizes, Student's sibling attends High School 3 and Student would receive stronger emotional support.
25. It is Respondent's position that the April 22, 2022 IEP as written provides Student a FAPE.
26. The accommodations and goals listed in the April 22, 2022 IEP can be accommodated at any district comprehensive school campus. There are no accommodations that can only be met by High School 3. (Special Education Teacher's testimony)
27. IEP Teams do not suggest a specific school, that is a role for case management. IEP Teams discuss what a student needs by looking at information provided to them and considering the evaluation completed at the time of eligibility. (Psychological Services Coordinator's testimony)
28. Special Education Instructional Facilitator for High School 2 will ensure that accommodations will be made for Student transitioning from homebound instruction to the traditional school setting by working closely with the case manager and a social worker. Accommodations are necessary to ensure that Student has someone to go to if overwhelmed or uncomfortable and to make sure Student is successful. The case manager will work with Student on behaviors, interactions with the social worker and together they will support Student's emotional needs based on the recommendations of the psychologist and social worker. (Special Education Instructional Facilitator's testimony)
29. High School 2 has art and theater programs and classes including beginner, immediate and advanced theater tech classes. To enroll in the theater tech classes, a student speaks to their counselor and the counselor tries to help the student enroll. High School 2 also has an after-school theater program. High School 2 is able to meet all of Student's IEP accommodations with the exception of one phrase, "walk about." Instead of allowing Student to roam the entire campus or "walk about," High School 2 will give Student a designated area where Student can walk, and a staff member will know the location of Student. A designated area is used so that if there is a situation on campus Student's location is known, otherwise it could create a safety issue. (Special Education Instructional Facilitator's testimony)
30. Student's IEP goals can be implemented at High School 2. High School 2 works with students with unique and diverse needs. High School 2 along with its special education department are committed to every student with an IEP both as an individual and as a student. High School 2's resource classes contain about 14 students with a licensed teacher and an instructional assistant. A general education class can have up to 40 students. The

average incoming freshman class is between 300-500 students. (Special Education Instructional Facilitator's testimony)

31. Region 1 School Associate Superintendent (hereinafter "Superintendent") received an email from Parent 1 on May 27, 2022, that stated Student was choosing to attend High School 2 "as of right now." (R's Ex 12, pg. 13) Parent 1 made the choice because Superintendent told Parent 1 a comprehensive campus had to be chosen. At that time, Parent 1 and Parent 2 were registering their other child for school and they wanted to have a backup if High School 3 did not work out. They chose High School 2 because it was close to them and they know someone that works there, but it was not their first choice because they had concerns based on data they reviewed about bullying, school violence, class sizes and the possibility that either Student's bully or the faculty member whom they believed failed to properly oversee the prior bullying incident could end up at that school and Student would once again have to move schools. Parent 1 was however, aware that any other comprehensive school was an option. (Parent 1's testimony)
32. On May 31, 2022, Superintendent responded to Parent 1 letting Parent 1 know that Superintendent would reach out to High School 2's principal to make placement the following day. Superintendent confirmed that Student's prior bully was not attending High School 2. Parent 1 requested that transportation for Student be arranged, and that Student be assigned a specific School Counselor at High School 2. Superintendent confirmed transportation was in place and contacted School Counselor and asked School Counselor to follow up with Parent 1 to help get Student set up. (Region 1 School Associate Superintendent's testimony)

### **CONCLUSIONS OF LAW**

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

Pursuant to the *Due Process Complaint* and the *Pre-Hearing Report and Order*, the sole issue before this hearing officer is whether the April 22, 2022 IEP requires the educational program at High School 3 in order to provide Student with a FAPE. While Petitioners contend that only High School 3 can provide Student with a FAPE, this Hearing Officer's determination is that Student's April 22, 2022 IEP as written provides Student with a FAPE.

Although an educational agency is not required to accede to parents' desired placement, it must maintain an open mind about placement decisions and be willing to consider a placement proposed by the parents, as well as its own proposed placement. *H.B. v. Las Virgenes Unified School District*, 48 IDELR 31 (9th Cir. 2007). A school district violates the IDEA if it predetermines placement for a student before the IEP is developed or steers the IEP to the predetermined placement. The terms "placement," "educational program" and "location" can be confusing. In reviewing and clarifying these terms, this hearing officer looked to the following authoritative law regarding the term "location":

### ***Federal Law***

The location of the student's services must be included in a student's IEP. 20 USC § 1413 (g)(2) – the state educational agency may provide special education and related services under paragraph (1) in such manner and at such locations as the State educational agency considers appropriate. An IEP must include the anticipated frequency, location and duration of services and modifications. 20 USC §1414 (d)(1)(A)(i)(VI).

### ***Assistance to States for the Education of Children With Disabilities and Preschool Grants for Children With Disabilities; August 14, 2006 Federal Register, Vol. 1, No. 56, Page 46588***

*Comment:* One commenter requested clarifying the difference, if any, between “placement” and “location.” One commenter recommended requiring the child's IEP to include a detailed explanation of why a child's educational needs cannot be met in the location requested by the parent when the school district opposes the parent's request for services to be provided to the child in the school that the child would attend if the child did not have a disability.

*Discussion:* Historically, we have referred to “placement” as points along the continuum of placement options available for a child with a disability, and “location” as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. Public agencies are strongly encouraged to place a child with a disability in the school and classroom the child would attend if the child did not have a disability. However, a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement. It also should be noted that, under section 615(b)(3) of the Act, a parent must be given written prior notice that meets the requirements of § 300.503 a reasonable time before a public agency implements a proposal or refusal to initiate or change the identification, evaluation, or educational placement of the child, or the provision of FAPE to the child. Consistent with this notice requirement, parents of children with disabilities must be informed that the public agency is required to have a full continuum of placement options, as well as about the placement options that were actually considered and the reasons why those options were rejected. While public agencies have an obligation under the Act to notify parents regarding placement decisions, there is nothing in the Act that requires a detailed explanation in children's IEPs of why their educational needs or educational placements cannot be met in the location the parents' request. We believe including such a provision would be overly burdensome for school administrators and diminish their flexibility to appropriately assign a child to a particular school or classroom, provided that the assignment is made consistent with the child's IEP and the decision of the group determining placement.

*Changes:* None.

### ***State Law***

NAC 388.245 provides that a pupil must be placed in a public or private institution or other care facility that is the least restrictive environment.

### ***Relevant Case Law***

In *Rachel H. v. Department of Educ., State of Hawaii*, 70 IDELR 169, Pgs. 3-4, PDF Special Ed Connect (9<sup>th</sup> Cir. 2017), the Ninth U.S. Circuit Court of Appeals affirmed a District Court's ruling at 63 IDELR 155 that the location of a student's services generally refers to the type

of placement as opposed to a particular school. The Ninth Circuit delved into the term “location,” concluding that the USDOEA’s understanding of the term “location” as meaning “type of environment that is the appropriate place for provision of a special education service.” In doing so, they reviewed the legislative history of “location requirement” and cited the following two reasons for their definition of location: “(1) The location where special education and related services will be provided to a child influences decisions about the nature and amount of these services and when they should be provided to a child. For example, the appropriate place for the related service may be the regular classroom, so that the child does not have to choose between a needed service and the regular educational program. For this reason, in the bill the committee has added ‘location’ to the provision in the IEP that includes ‘the projected date for the beginning of services and modifications, and the anticipated frequency, location, and duration of those services’ and (2) the USDOE’s interpretation is consistent with other IDEA provisions. When a student transfers to a new school district within the same academic year, the new district may use the old IEP until the new district ‘adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law.’ 20 U.S.C. § 1414(d)(2)(C)(i)(I).” *Id.* at 4-5. The IDEA’s transfer procedures allow a new district to adopt an old IEP without changes which supports the USDOE’s interpretation of “location” as the appropriate environment for delivery of a special education service. “Otherwise, this subsection would suggest that a new school district could adopt an IEP without changing the previously designated school, which might well be outside the new district and over which the local educational agency lacks authority.” *Id.*

“The USDOE’s interpretation of location concerns the environment in which a particular special education service will be provided. See 64 Fed. Reg. at 12,594. Conversely, the term ‘placement’ means the ‘general educational program of the student.’ *N.D. ex rel. Parents Acting As Guardians Ad Litem v. Haw. Dep’t of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010). In other words, the term ‘location’ is narrower. For example, the educational placement of a student might be regular classes with a one-on-one aide and modified testing. See 34 C.F.R. § 300.115(b)(1). Conversely, the location of a special education service, such as modified testing, might be in a teacher’s office. One need not interpret ‘location’ as meaning an anticipated school for there to be a difference between it and the term “placement.” *Id.* at 5.

“An educational agency does not commit a per se violation of the IDEA by not specifying the anticipated school where special education services will be delivered within a child’s IEP. This does not mean ‘school districts have carte blanche to assign a child to a school that cannot satisfy the IEP’s requirements.’ *T.Y.*, 584 F.3d at 420. Nor does it mean that not identifying a school can never result in a denial of a FAPE, especially when a child’s disability demands delivery of special education services at a particular facility. We hold only that the IDEA does not procedurally require every IEP to identify the anticipated school where special education services will be delivered.” *Id.* at 6.

“Knowledge of a particular school, classroom, or teacher may well be relevant to allowing parents to participate meaningfully in the IEP process. *See, e.g., A.K.*, 484 F.3d at 681. Parents may need this information, for example, to evaluate whether a proposed IEP satisfies the IDEA because of a particular special education need caused by a child’s disability. *See, e.g., Smith*, 15 F.3d at 1525 (holding the absence of other autistic children and the lack of training for teachers on working with autistic children, among other deficiencies, made a particular school inappropriate). In such circumstances, a local educational agency’s failure to specify a school may violate the IDEA. Furthermore, even where the IDEA may not require identification of a particular school, it may still be wise to do so in the IEP, especially when providing this information would advance

the essential purpose of this important law. Nothing in our holding is meant to suggest otherwise. *See A.K.*, 484 F.3d at 680-82.”

### ***Analysis***

Here, Petitioners are asking District to identify a particular school in Student’s IEP, however they are not simply requesting a particular public school, but High School 3, which is a magnet public school. Magnet public schools require students to apply and gain acceptance through the magnet application process, unlike other public schools. High School 3 also has an audition requirement wherein applicants are scored by a panel of teachers and placed into the lottery selection process. Students with IEPs are no exception to the application and audition process at High School 3. High School 3 is not able to increase its enrollment numbers for any particular student. Student is qualified and is currently in the alternate waiting pool and could possibly be selected in the lottery process within the first two weeks of school should another student decide not to attend High School 3. Otherwise, Student is encouraged to reapply for the 2023-2024 school year. Therefore, High School 3 cannot be listed as the specific school where special education services will be delivered within Student’s IEP.

While High School 3 may be a preferred placement for Student, it is not the only possible placement. While this Hearing Officer is aware that Student’s M.D. was describing the ideal situation for Student, District is required to provide Student with a FAPE, it is not however required to provide Student the ideal situation. Student M.D.’s testimony was not given a substantial amount of weight due to the following reasons: Student M.D. did not directly participate in Student’s IEP Team meetings to help create the IEP goals and accommodations; Student M.D.’s knowledge about High School 3 was general knowledge, not the specific knowledge of an administrator or teacher at High School 3; although Student’s M.D. considered High School 1 and determined it was not in Student’s best interest to attend said school based on the information provided by Petitioners, High School 2 was not considered at all.

Student has been administratively placed at High School 2 which also has a theater arts program, can implement Student’s April 22, 2022 IEP, and employs a counselor that “has a great relationship” with Student. Student’s IEP goals and accommodations can be met by High School 2. High School 2 is willing and able to ensure that accommodations will be made for Student transitioning from homebound instruction to the traditional school setting by working closely with the case manager and a social worker. High School 2 will ensure that Student has someone to go to if overwhelmed or uncomfortable and to make sure Student is successful. The additional support of home and parents’ oversights is not limited to Student attending High School 3, as Petitioners are committed to Student’s educational, emotional and physical wellbeing as they have demonstrated over the last four years. Further, it was confirmed that Student’s bully is not enrolled at High School 2 and that the administrative staff personnel Student and Petitioners are concerned about is not working at High School 2. High School 2 and Student’s April 22, 2022 IEP provide Student with a FAPE.

## ORDER

Based upon the above Findings of Fact and Conclusions of Law, it is hereby ordered that Student shall be enrolled at High School 2 for the 2022-2023 school year where Student's IEP can be fully implemented until or unless the IEP is revised.

### 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: August 18, 2022

/s/ Audrey J. Beeson

Hearing Officer

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