

STATE OF NEVADA
DEPARTMENT OF EDUCATION

In the Matter of	DECISION
STUDENT ¹ , by and through the Parent(s),	State Review Officer: Beatriz A. Diaz-Pollack
Appellants,	Representatives:
v.	Appellants: Michelle Bumgarner, Esq.
SCHOOL DISTRICT,	Respondent: Paul J. Anderson, Esq.
Respondent.	

I. BACKGROUND

On December 22, 2020 the Nevada Department of Education received *Petitioners' Notice of Appeal from the Hearing Officer Decision Dated December 10, 2020* (Petitioners' Appeal) in the above-captioned case. The undersigned was appointed as the state Review Officer (SRO or Review Officer) on December 28, 2020 and a decision was due on January 21, 2021.

At the time of appointment, the Review Officer also received *Respondent School District's Motion to Dismiss Petitioners' Notice of Appeal from the Hearing Officer's Decision dated December 10, 2020* (Motion to Dismiss), which had been submitted by Respondent on December 28, 2020. The Motion to Dismiss sought dismissal of the Petitioners' Appeal based upon the position that the December 10, 2020 Decision of the Hearing Officer (IHO), was not a final and appealable decision because the underlying due process proceeding had been "bifurcated" into a two-part proceeding with the second part still pending for hearing on January 14 and 15, 2021, and, therefore, an appeal for review of this decision was premature and should be dismissed.

On December 29, 2020, the Review Officer issued introductory correspondence to the Parties and a *Scheduling Order* setting forth a briefing schedule on Respondent's

¹Personally-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].

Motion to Dismiss. On December 31, 2020, the Parties advised the Review Officer via electronic mail that Petitioners had withdrawn the remaining issues in the underlying due process proceeding and provided a copy the *Order of Withdrawal* entered by the IHO on December 31, 2020. Also, on December 31, 2020, the School District submitted *Respondent School District's Notice of Voluntary Withdrawal of Motion to Dismiss Petitioners' Notice of Appeal from the Hearing Officer Decision Dated December 10, 2020*.

The Review Officer then set a Status Conference in the matter for January 5, 2021. Consistent with the discussion held at Status Conference and following receipt and consideration of Appellants' *Motion for Continuance of Hearing Deadline and Briefing Schedule* and Respondent's *Notice of Non-Opposition to Motion for Continuance*, the Review Officer determined, based upon good cause found, that a continuance was appropriate and issued a *Continuance and Scheduling Order* on January 8, 2021. The *Continuance and Scheduling Order* memorialized Appellants' confirmation that the instant appeal challenged the substantive determinations made by the Hearing Officer and clarified that no procedural issues with regards to the conduct of the hearing were alleged². In addition, consistent with NAC 388.315, the *Continuance and Scheduling Order* granted leave to Parties' for submission of written arguments in support of, and opposition to, Petitioners' Appeal, set forth a briefing schedule for the same, and entered a continuance of the decision deadline in this matter to March 9, 2021.

Appellants timely submitted *Appellants' Memorandum* on February 2, 2021. The School District subsequently requested via electronic correspondence a one-week extension on the deadline for submission of its written argument to February 23, 2021. Appellants did not object to the requested extension. The Review Officer granted the requested extension via electronic correspondence on February 11, 2021. The School District timely submitted *School District's Response to Appellants' Memorandum* on February 23, 2021. Together with the full administrative record in the underlying matter, the Parties written arguments were duly considered in rendering this Decision.

At the time of the hearing, the Student was 12 years old and attending seventh grade at a Middle School in the School District. Student was previously identified as a

² In its Response to Appellant's Memorandum, Respondent argues that Appellants waived the right to raise procedural issues in this matter. However, the intent of this clarification in the January 8, 2021 *Continuance and Scheduling Order* was to clarify that no procedural issues were alleged with regards to the conduct of the hearing. In raising this issue, Respondent also provided responses to procedural issues raised by Appellants, accordingly, to the extent that there was any misapprehension of the meaning behind the *Continuance and Scheduling Order*, there was no prejudice to the Respondent in presenting its response to the instant appeal.

student with a disability under the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §1400 et seq., and eligible for services under the category of specific learning disabilities (SLD). On January 24, 2019, following a three-year reevaluation, the Student was found to no longer be eligible under IDEA and exited from special education services. The Student's eligibility was considered, and the Student determined ineligible, at three subsequent eligibility meetings on August 26, 2019, November 12, 2019 and June 22, 2020.

Petitioners' request for due process was filed by the Parents (also referred to in this decision as "Petitioners" or "Appellants"), through counsel, on March 16, 2020. After recusal by the Hearing Officer originally appointed, a second Hearing Officer was appointed on April 3, 2020. Parents subsequently filed a first amended request for due process on May 18, 2020 and a second amended request for due process on August 24, 2020. Following the prehearing conference in the matter, the Parties agreed to bifurcate the proceeding, moving forward with a hearing first on the sole issue of Student's eligibility for special education services, with a second set of hearing dates to be set for consideration of Parents' remaining issues. Accordingly, the following was the sole issue presented for determination by the Hearing Officer at the hearing in question:

Commencing January 2019, through the present, was Student eligible to receive special services and programs?

The due process hearing was held November 2, 3, and 4, 2020. Following the conclusion of the hearing the Parties submitted closing briefs on November 30, 2020. On December 10, 2021, the Hearing Officer ruled in favor of the School District, determining that the Student was not eligible to receive special education services and had been properly exited from special education on January 24, 2019. This appeal ensued.

II. PROCEDURE AND STANDARD OF REVIEW

Pursuant to NAC 388.315(b) the Review Officer must ensure that the procedures of the Hearing Officer below were consistent with the requirements of due process. As indicated above, neither party on appeal challenges the procedures below, nor were there any procedural errors in the conduct of the hearing found by this Review Officer after a review of the record.

The Review Officer 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 three volumes that comprise the hearing

transcript, all exhibits entered into evidence³, and the memoranda submitted by the Parties on the issues on appeal.

Appellants argue that the applicable standard of review further requires that a Review Officer should give deference to a Hearing Officer's factual findings, but that a Review Officer is "not so bound by a Hearing Officer's legal conclusions." *Capistrano Unified School District v. Wartenberg*, 59 F.3d 884, 891 (9th Cir. 1995). However, this Review Officer is more persuaded by the argument advanced by the School District based upon the standard of review language articulated in *Carlisle Area Sch. Dist. v. Scott P.*, 62 F. 3d 520, 23 IDELR 293 (3d Cr. 1995). Though not expressly adopted by the Ninth Circuit, the standard articulated by the *Carlisle* Court pertained specifically to a two-tier system under IDEA, indicating that in such a system the Review Officer must exercise "plenary review" to make the independent decision IDEA requires. *Id. Carlisle* further held that in exercising such plenary review, a Review Officer should give deference to a Hearing Officer's credibility determinations and findings 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. *Id. See also, Amanda J., et al. v. Clark County School District*, 267 F. 3d 877, 103 LRP 33278 (9th Cir. 1995), *citing and impliedly approving the 3^d Circuit's approach in Carlisle*. Accordingly, this is the standard of review that this Hearing Officer applies in rendering this decision.

III. ISSUE

As discussed in the Background, above, at Status Conference, Petitioners confirmed that the instant appeal challenges the IHO's substantive decision as to the Student's eligibility for special education service. Accordingly, this review is limited to the following issue:

Whether the Hearing Officer substantively erred in determining that the Student was properly exited from special education on January 24, 2019 and was not eligible to receive special education services during the period at issue in the underlying due process proceeding.

IV. FINDINGS OF FACT

³ The certified administrative record of the proceeding included Petitioner's Hearing Exhibit Nos. P1 – P52; Respondent's Hearing Exhibits Nos. 1-109; and Petitioner's Exhibit Nos. P54-P56. For purposes of this appeal, the Review Officer considered only those Exhibits which were entered into evidence at hearing, and those which were admitted into evidence by stipulation of the Parties following the hearing.

The Hearing Officer's Findings of Fact (IHO FOF) as stated in the Decision (IHO Decision pp. 5-13) are incorporated by reference as though fully set forth herein, with the exception of the following: IHO FOFs 14, 15, 24, and 28; and supplemented as follows.

1. The Student was enrolled in fifth grade at the Elementary School in the 2018-2019 school year. Student had a "great fall semester," producing work and looking like a typical fifth-grade student participating in general education with no significant behavioral issues. (Respondent's Exh. 26; Tr. Vol., II, pp. 601-606)
2. The Student's December 18, 2018 IEP indicated eligibility for special education services under the category of SLD, with identified disabilities in the areas of Mathematical Calculation, Mathematical Problem Solving, Written Expression, Basic Reading Skill, Reading Fluency Skills and Reading Comprehension. (Respondent's Exh. 26)
3. The Student's December 18, 2018 IEP was internally inconsistent in that it calls for the Student to be placed in the "Regular Education Environment" 100% of their⁴ school day, and simultaneously calls for the Student to receive 40 minutes of Specially Designed Instruction in Social/Emotional/Behavioral Well-being in "Special Ed" as the location of services. Testimonial evidence presented at hearing, and deemed credible by the Hearing Officer, and documents in evidence establish that the Student was placed in the general education setting full-time and received specialized instruction through a collaboration between the resource teacher and the Student's general education teachers in the general education classroom. (Respondent's Exh. 26; Respondent's Exh. 32; Tr. Vol. I, p. 87, pp. 106-107)
4. During their fifth-grade year, prior to their exit from special education services, the Student was allowed, and sometimes sent, to the special education resource room for a quiet place to complete work or talk about what was bothering them when demonstrating noncompliant behavior in the general education classroom. The Student was then generally able to complete work. (Tr. Vol. I, pp. 31-32)

⁴ The Student is referred to in this Decision by the gender-neutral pronouns "they," "their," "them" to further safeguard their personally-identifiable information.

5. In conducting the psycho-educational evaluation considered at the January 24, 2019 eligibility team meeting, School Psychologist No. 1 (Referred to by the IHO as Doctor No. 1) considered the following: Review of Previous Assessments and School Records; Student Input; Parent Input; Teacher Reports and Observation; Assessment of Performance in Current Educational Setting; Cognitive Assessment; Academic Achievement Assessment; and Social/Emotional Condition Assessment. School Psychologist No. 1 determined the Student was making “good growth” over the three-year period prior to the evaluation. In addition, though a discrepancy model is not utilized by the School District in determining SLD, based upon assessments conducted in the course of the triennial reevaluation, School Psychologist No. 1 concluded that the Student’s cognitive skills and academic achievement were each in the average range, suggesting that the Student was performing at full capacity based on their cognitive skills. School Psychologist No. 1 discussed various measures considered in arriving at a measure of the Student’s academic achievement, including the Measures of Academic Progress (MAP), Nevada Criteria Referenced Test (CRT), and Kaufman Tests of Educational Achievement, 3d Edition (KTEA-3). School Psychologist No. 1 determined that the MAP and CRT, while placing the Student below grade-level still, demonstrated growth year over year. Further, the KTEA-3, which she had administered, and which she believed to demonstrate validity, placed the Student well within the average range for academic performance based on their age and grade-level. School Psychologist No. 1. (Respondent’s Exh. 32; Tr. Vol. I, pp. 129-131, 154-159)
6. Student’s fifth-grade teachers were aware of the Student’s earlier clinical diagnosis of Attention Deficit Hyperactivity Disorder (ADHD); however, they did not see attention problems in the classroom that rose to the level of interfering with the Student’s learning. The Student was able to attend appropriately to the conversation and assessments conducted by School Psychologist No. 1. School Psychologist No. 1 did not see the work resistance behaviors the Student exhibited as typical of a Student with ADHD. (Respondent’s Exh. 32; Tr. Vol. 1 p.137)
7. Teacher and Parent rating scales on the Clinical Assessment of Behavior (CAB-T) were collected and analyzed by School Psychologist No. 1 for the Student’s triennial evaluation. According to the general education teachers’ responses, Student scored in the mild clinical risk range in areas of anxiety, depression and learning disability. According to the Parents’ responses, Student is in the mild clinical risk range in the areas of anxiety, depression, Autism Spectrum

- behavior, and learning disability. In the classroom, the Student was occasionally observed to be "mopey or sad," but, often after a conversation with a teacher to share what was upsetting them, the Student could move through those feelings and complete schoolwork. (Respondent's Exh. 32; Tr. Vol. 1 p. 34; pp. 114-115)
8. The Student's fifth-grade teachers and Elementary School Principal reported that, when on-task, the Student could complete grade-level work satisfactorily. The teachers further reported that negative classroom behaviors stemmed from the Student's attempts at work avoidance, that the Student could often complete work after given the opportunity to express their negative feelings to an adult, and would more readily complete work if it was interesting to the Student or hands-on, like a hands-on science activity. One example of extreme work refusal was an occasion in which the Student refused to complete work for two school days following an incident where inappropriate behavior during a school fire drill caused the Student's class to lose recess. (Respondent's Exh. 32; Tr. Vol. II, pp. 601-606)
 9. The eligibility team that met January 24, 2019 was appropriately constituted to consider the Student's eligibility under the disability category of SLD. The eligibility team concluded that the Student did not meet the NAC criteria for SLD and was not eligible for special education services. The team discussed whether any other disability categories should be considered given the Student's ADHD diagnosis and the results of School Psychologist No. 1's evaluation, but concluded, as a team, that consideration of other categories was not necessary because the Student was meeting age-appropriate, grade-level standards and did not require specialized instruction. The January 24, 2019 team did not include a school nurse. (Respondent's Exh. 33, 34; Tr. Vol. I, pp. 174-176)
 10. The Student's work completion issues worsened, and the student resisted participating in their check-in/check-out routine, following a school break in approximately February or March of their fifth-grade year. (Tr. Vol. I, pp. 77-78, pp. 102-103; Tr. Vol. II, pp. 599, 606-607)
 11. The Student's 2018-2019 fifth-grade report card reflects the following in their main academic subjects for Week-12, Week-24 and Week-36, respectively: Language Arts - C, F, C; Mathematics - C, F, D; Reading - W, D, D; Science - C, F, D; Social Studies - B, F, D; Spelling - B, F, B. (Petitioners' Exh. P51)

12. The 5th Grade Language Arts Teacher expressed concerns regarding the Student's work completion and Student coming to class "upset or angry" and needing time to work through "moods." Based upon the 5th Grade Language Arts Teacher's experience the Student could access the general education curriculum without modification if they were in the mindset to work. Further, this teacher observed that the Student showed great growth over the school year in language arts, including an 18-point growth on the MAPs assessment from Fall to Spring testing, placing them "very much in the ballpark" for fifth grade. This Teacher attended the January 24, 2019 eligibility team meeting and concurred in the team conclusion that the Student did not require specially designed instruction to access their education. (Tr. Vol. I, pp. 199-202, p. 215)
13. Following the 2018-2019 school year, the Student enrolled in Middle School for sixth grade in the 2019-2020 school year. (Tr. Vol. I, pp.268-269; Respondent's Exh. 77; Respondent's Exh. 78)
14. In response to concerns regarding the Student's academic performance in the Spring of 2019, the School District agreed to conduct Speech and Language (SL), Occupational Therapy (OT) and Functional Behavior Analysis (FBA) evaluations to get a complete picture of the Student. The results of these evaluations were shared with the Parents at an eligibility team meeting convened on August 26, 2019. (Tr. Vol. I, pp. 247-248, pp. 279-282; Statement of Stipulated Facts (SF) No. 13)
15. The FBA was completed through a collaboration of two Certified Behavior Analysts employed by the School District, Board Certified Behavior Analyst (BCBA) No. 1 (referred to by the IHO as Independent Evaluator No. 1) and BCBA No. 2 (referred to by the IHO as Independent Evaluator No. 2). The FBA included 19.5 hours of observation of the Student in both the Elementary School and Middle School settings. The problem behavior of non-compliance was not directly observed. Off-task behaviors, which could be redirected by teachers, were observed. BCBA No. 2 testified that the off-task behaviors observed had the primary function of avoiding academics and secondary function of gaining attention from peers. (Tr. Vol. I, p. 305; Respondent's Exh. 79; SF No. 13)
16. BCBA No. 2 concluded the Student did not require a positive behavior intervention plan due to the Student's low-level of off-task behaviors and the

ease with which the Student could be redirected with universally available supports in the classroom. (Tr. Vol. I, pp. 306-307; Respondent's Exh. 79)

17. The FBA was reviewed with the Parent at the August 26, 2019 eligibility meeting. (Tr. Vol. I, pp. 309; Respondent's Exh. 79)

18. Independent Educational Evaluation (IEE) No. 1 was funded by the School District following an IEE request by the Parents and completed by Licensed Psychologist (referred to in the IHO's Decision as Doctor No. 2). The IEE No. 1 was a full neuropsychological assessment completed based upon an initial consultation with the Student and Parents, three separate testing sessions with the Student, a feedback session with the Parents and a review of records. Licensed Psychologist did not observe the Student in the school setting or speak directly with any of the Student's teachers. The exact date of transmittal of the final IEE No. 1 Report to the School District is unknown but would likely have been sometime in the month following the feedback session with the Parents which took place on July 25, 2019. (Tr. Vol. III, pp. 731-732; Respondent's Exh. 76)

19. The intellectual functioning assessments conducted during IEE No. 1 yielded results that were roughly consistent with the intellectual functioning assessments conducted by the School District in the December 2019 triennial reevaluation. The one exception was in the area of reading skills. There, IEE No. 1 data placed the Student in the Average range on basic reading skills, which was consistent with the triennial reevaluation, but placed the student in the Low range on reading fluency (combination of rate and accuracy) and reading comprehension. Licensed Psychologist explained this by clarifying the School District had not previously assessed reading fluency, so there was no earlier rating to compare to, and School District had assessed reading comprehension in a different manner which had allowed the Student to refer back to the text read in order to answer comprehension questions. The manner utilized to assess reading comprehension in the IEE required the Student to answer the comprehension questions without referring back to the text, thus demonstrating that the Student's comprehension is at age-appropriate levels when the text is present, but significantly worse when the Student does not have the text. (Tr. Vol. III, pp. 1024; Respondent's Exh. 76, pp. 2-3)

20. The Licensed Psychologist diagnosed Student with Disruptive Mood Dysregulation Disorder (DMDD), Major Depressive Disorder (MDD), ADHD, SLD

– impairment in reading mild severity, and Enuresis. Licensed Psychologist conceded her diagnosis were clinical in nature rather than educational and that they should be exhibited across setting, i.e., home, school, etc. (Tr. Vol. III, pp. 773-774; Respondent's Exh. 76, pp. 3-4)

21. Licensed Psychologist summarized the results of the IEE indicating the following:

“In summary, [Student] presents with strengths in intellectual ability, verbal and visual memory and mathematics and written expression. These strengths are negatively impacted by marked and pervasive emotional distress, including sadness, anger, irritability, and anxiety. [Student] also exhibits deficits in reading fluency and reading comprehension. Additionally, marked inattention, impulsivity and executive functioning deficits negatively impact on [Student's] ability to engage fully in [their] environment. These symptoms combine to impact negatively across behavioral, social and academic domains. Survey results provide further evidence of the depth and breadth of impairment. Specifically, six of six raters reported elevated concerns indicating they view [Student] as exhibiting marked and pervasive levels of functional impairment, including struggling to successfully engage in appropriate behavior across a variety of situations including interactions with others, performing age appropriate (sic.) tasks, regulating mood and performing school related tasks.” (Respondent's Exh. 76, p. 4)

22. Licensed Psychologist described moderate ADHD as characterized by marked and pervasive deficits in the ability to regulate movement and impulsivity and effectively direct attention. (Respondent's Exh. 76)

23. Discussing the diagnosis of DMDD, Licensed Psychologist indicated this impairment is characterized by marked and pervasive and persistent irritability present nearly every day for at least a year. In addition, DMDD is characterized by either verbal or physical temper outbursts that are “grossly out of proportion to the triggering event and inconsistent with age.” (Tr. Vol. III, pp. 738-739)

24. Licensed Psychologist No. 1 described MDD as characterized by feelings of sadness, depression, isolation and loneliness that persist for at least two weeks. She also noted that the Student reported feelings of worthlessness, feelings of shame and guilt and diminished ability to think and concentrate. Further, the anxious distress modifier was indicated for this diagnosis because, while the

Student did not meet the criteria for an anxiety disorder, they presented as very anxious and worried – including very worried about feeling hated by their teachers and other students. (Tr. Vol. III, pp. 738-743)

25. The November 12, 2019 eligibility team meeting was led by School Psychologist No. 2 (referred to in the IHO's Decision as Doctor No. 3). School Psychologist No. 2 did not meet or observe Student, she reviewed the IEE conducted by Independent Psychologist No. 1. (Tr. Vol. II, pp. 547-548)
26. The November 12, 2019 eligibility team discussed the Student's potential eligibility under the disability categories of SLD and ED and found Student ineligible under both categories. The team did not consider HI because no nurse was present. (Tr. Vol. II, pp. 558, 571-572; Respondent's Exh. 91, 92, 93, 95)
27. School Psychologist No. 2 testified that when the Parent requested an IEE on FBA and OT, Parents also agreed to consider HI when the additional IEEs were completed. (Tr. Vol. II, pp. 558; Respondent's Exh. 91, 95)
28. The 6th Grade General Education Teacher was the Student's teacher for four courses in Fall of the 2019-2020 school year and two in Spring of the same year. 6th Grade General Education Teacher repeatedly expressed a belief that the Student was capable of doing the work assigned but often chose not to work and that the Student did not return work sent home. (Tr. Vol. II, pp. 352-353; 356; 362)
29. The 6th Grade General Education Teacher is not a special education teacher and could not describe characteristics of the impairments with which Student was diagnosed but understood that the Student had a §504 plan to address ADHD and that the Student's accommodations needed to be provided. (Tr. Vol. II, pp. 387, 391, 407, 412)
30. The 6th Grade General Education Teacher further indicated that the Student's behavior fluctuated constantly, and incentives worked only inconsistently. She observed the Student engaging in work avoidance and calling themselves "stupid" in a manner that she found typical of other sixth-grade students based upon her 18 years of experience in teaching. Further, she noted it was a "funny thing" that the Student would still be listening, even when seemingly

disengaged, and be able to identify what they were supposed to do. (Tr. Vol. II, pp. 388-389, 400, 405-406)

31. The 6th Grade General Education Teacher attended the November 12, 2019 eligibility team meeting and agreed with the determination that the Student was ineligible under the categories of SLP and ED because they did not require modification of curriculum and were willfully resistant to doing the work. (Tr. Vol. II, pp. 386-387)
32. IEE No. 2, a FBA, was conducted by Licensed Behavior Analyst (referred to in IHO's Decision as Independent Evaluator No. 5). Licensed Behavior Analyst has a Ph.D. in Applied Behavior Science and a BCBA. IEE No. 2 was conducted to address questions surrounding the Student's abilities in the school setting and consisted of a records review to determine previous supports and services received, a questionnaire "Questions about Behavior Function" given to school staff and parents, and four separate observations of the Student in the school setting. The evaluation was completed in the second semester of Student's sixth grade school year, with the observations conducted in February of 2020. (Tr. Vol. III, p. 924; Respondent's Exh. 98)
33. The IEE No. 2 identified different behaviors of concern for the Student's teachers and the Student's Mother. Of concern for the teachers were "work refusal" and "blurting." Of concern for the Student's Mother were "freaking out" and "negative statements." The behaviors of concern identified by the teachers were observed during the school observations. The behaviors of concern identified by Student's Mother were not observed during the school observations. (Respondent's Exh. 98)
34. The IEE No. 2 did not look at the Student's curriculum or how they were performing on assignments. The Independent FBA did note that some of the Student's teachers did not send homework home with the Student "because it does not get completed or returned." (Tr. Vol. III, p. 983; Respondent's Exh. 98)
35. The IEE No. 2 concluded its recommendations stating, "As with any behavior change procedure, it is recommended that protocols be in place across all environments to best support [Student's] growth and learning. This is extremely imperative for [the Student] to increase [their] work completion, improve [their] behaviors and have school success. These changes may be supported by parental stress questionnaires to help indicate what the family

and school can do together to best support [the Student] in achieving [their] goals so [they] can lead [their] best possible life.” (Respondent’s Exh. 98)

36. Student’s Mother indicated that since the Student’s exit from special education, the Student has not consistently passed their courses and described the Student’s grades while on §504 plans as “very, very, very poor.” Student’s Mother observed that while on an IEP, the Student’s grades and performance levels were good, and off the IEP they went down and were much worse. (Tr. Vol. III, p. 799-800)
37. The Student’s 2019-2020 sixth-grade grades are reported as follows for the 1st and 2nd Semester, respectively: English 6 – D, P; Mathematics – D, P; Social Studies – C, P; Science – F, F; Computer Science/Art – B, F; PE/Drama – C, F. (Respondents’ Exh. 100, Exh. 104)
38. School Psychologist No. 3 conducted a thorough review of the Neuropsychological and FBA IEEs and participated in the discussion of the same at the June 22, 2020 eligibility team meeting. (Tr. Vol. II, p. 51; Respondent’s Exh. 104)
39. School Psychologist No. 3 noted that the Licensed Psychologist did not observe the Student in the school setting and noted a reliance on behaviors exhibited at home in reaching the serious clinical diagnoses expressed in the IEE Report. School Psychologist No. 3 further found that the diagnoses and characteristics described in the IEE No. 1 “did not mesh” with Middle School educators’ experience with the Student, especially on the behavioral issues, noting the Student had no more than “two or three” referrals, meaning disciplinary referrals and no history in the classroom of the severe behaviors described in the IEE. (Tr. Vol. II, pp. 493-496; Respondent’s Exh. 104)
40. Relying upon data generated in the neuropsychological IEE, School Psychologist No. 3 indicated that the Student’s academic scores were higher than their cognitive scores would suggest. She further noted that the Student’s grades were low, likely as an effect of a number of zeroes and missing assignments, but that on standardized achievement testing the Student was not scoring significantly below expectation for their age and grade-level. Further, in discussing the principal academic deficit area identified in the IEE, reading, and specifically reading fluency, School Psychologist No. 3 indicated that many factors could affect the fluency score, including whether a Student

was reticent to read aloud in front of someone, or the passage was unfamiliar or contained unfamiliar vocabulary, and that this was not a skill frequently utilized in middle school. (Tr. Vol. II, pp. 505-507; Respondent's Exh. 104)

41. On June 22, 2020 an eligibility team met to consider the Student's eligibility for special education services under the disability categories of SLD, ED and HI. All team members required for consideration of these three eligibility categories were present, and the team included the Student's Parents, an educational advocate, and the Licensed Behavior Analyst. The meeting lasted approximately 4 ½ hours during which time efforts were made for each team member to have an opportunity to share their viewpoints. (Tr. Vol. II, p. 513; Respondent's Exh. 103, 105, 107)
42. School Psychologist No. 3 conducted the June 22, 2020 eligibility team meeting considering the Student's eligibility in each of the eligibility categories discussed, applying a three-pronged test that she described as follows: 1) whether the Student has a disability; 2) whether the disability prohibits the Student from accessing the general education environment; and 3) whether the Student requires specially-designed instruction to access their education. (Tr. Vol. II, p. 499)
43. The eligibility team's discussion of Student eligibility under the category of ED was brief. The team looked at the criteria for ED together and quickly determined by consensus that these criteria did not describe the Student. (Tr. Vol. II, pp. 517-518; Respondent's Exh. 105)
44. The eligibility team found the Student ineligible in each of the disability categories considered at the June 22, 2020 meeting: SLD, ED and HI. The team further determined that the Student could benefit from a positive behavior plan and social/emotional learning and that the recommendations and data from the Independent FBA into consideration in updating the Student's FBA. (Tr. Vol. II, p. 521; Respondent's Exh. 103, 105, 106, 107)

V. APPLICABLE LAW

This matter arises under the IDEA, 20 U.S.C. §1400 et seq., and implementing state laws and regulations, Nevada Revised Statutes (NRS) Chapter 388 and Nevada Administrative Code (NAC) Chapter 388. IDEA requires that all states receiving federal education funding establish policies and procedures to ensure that a free appropriate

public education (FAPE) is made available to all eligible students with disabilities. 20 U.S.C. §1412(a)(1)(A). An eligible student, or “child with a disability” is a student who, having been evaluated in accordance with the requirements of 34 C.F.R. §§300.304 through 300.311, is determined to have one or more qualifying disabilities *and* who, by reason of the same, needs special education and related services. 34 C.F.R. §300.8 (emphasis added). In conducting an evaluation, a school district must use a variety of tools and strategies to determine whether a student is eligible. 34 C.F.R. §304(b)(1); NAC 388.340(1). That evaluation must be sufficiently comprehensive and assess the student in all areas related to the suspected disability. 34 C.F.R. §300.304(c)(4) and (6); NAC 388.340(4)(b). Nevada law further requires that prior to placing a student in a special program for pupils with disabilities, a consultation must be held with the child’s parents or guardians and an examination must be conducted in accordance with standards prescribed by the State Board of Education. NRS 388.433. The NAC sets out the standards prescribed for considering a student’s eligibility for special education programs by disability categories. NAC 388.387-425. A disability is suspected and must, therefore, be assessed when the school district “has notice that the [student] has displayed symptoms of the disability.” *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F. 3d 1105 (9th Cir. 2016).

The IDEA and NAC further require that school districts reevaluate eligible students at least once every three years, unless the parent and district agree that a reevaluation is not necessary. 34 C.F.R. §300.304; NAC 388.440. Prior to determining that a student is no longer a student with a disability, school districts must evaluate that student pursuant to NAC 388.330 to 388.440. NAC 388.340(9).

The instant appeal raises issues relative to eligibility determinations made under the eligibility categories of SLD, HI, ED and speech and language impairment (SLI). Definitions and eligibility criteria for each of these relevant eligibility categories are as follows.

Specific Learning Disabilities (SLD)

SLD is defined as “a disorder in one or more of the basic psychological processes involved in understanding or using spoken or written language which is not primarily the result of a visual, hearing or motor impairment, mental retardation, serious emotional disturbance, or an environmental, cultural or economic disadvantage.” The disorder may

manifest itself in an imperfect ability to listen, think, speak, read, write, spell or perform mathematical calculations. The disorder includes, without limitation, such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia and developmental apraxia.” NAC 388.117. To find a student eligible for special education services under the disability category of SLD, an eligibility team is required to conclude that: a) the student has a specific learning disability and, by reason thereof, needs special education and related services; b) the student does not achieve adequately for their age or meet the state-approved grade level standards when provided with learning experiences and instruction appropriate for the age of the student or the state-approved grade level standards in one of the identified academic areas; c) the student does not make sufficient progress to meet the age appropriate standards or the state-approved grade level standards in one or more of the academic areas identified when using a process based on the student’s response to scientific, research-based intervention or exhibits a pattern of strengths and weaknesses in performance or achievement, or both, relative to their age and grade level standards or intellectual development, that is not determined by the team to be relevant to the identification of a specific learning disability using appropriate assessments; d) the findings of the team are not primarily the result of other factors identified in the regulation; e) the interventions implemented in general education classrooms have not remedied any identified underachievement; *and* f) any identified underachievement or severe discrepancy between achievement and intellectual ability is not correctable without special education services. See NAC 388.420(1)(a)-(f) (emphasis added).

Health Impairment other than Orthopedic Impairment (HI)

HI is defined as an impairment that limits the strength, vitality or alertness of the student, including, without limitation, a heightened alertness to environmental stimuli which results in limited alertness with respect to the educational environment and which: 1) is caused by chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, childhood disintegrative disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, Rett’s disorder, sickle-cell anemia and Tourette syndrome, *and* 2) adversely affects the educational performance of the student. NAC 388.105 (emphasis added). To find a student eligible under the category of HI, an eligibility team must consider whether the student is a student with an HI other than an orthopedic impairment which could reasonably be interpreted as adversely affecting the educational performance of a pupil and, by reason thereof, needs special education and related services. NAC 388.402(1) The term “adversely affecting the educational performance of a pupil” is defined as

including, without limitation, difficulty concentrating, chronic fatigue and impulsiveness which interfere with a student's ability to be educated. NAC 388.402(2)

Emotional Disturbance (ED)

With regards to the disability category of ED, that term is defined as: a severe emotional disorder that: 1) is exhibited by a person for at least 3 months; 2) adversely affects academic performance, *and* 3) includes one or more of the following: a) an inability to learn that is not caused by an intellectual, sensory or health factor; b) an inability to engage in or maintain interpersonal relationships with peers and teachers; c) inappropriate behavior or feelings; d) a general and pervasive mood of unhappiness or depression; e) a physical symptom associated with a personal or academic problem; or f) the expression of fears regarding personal or academic problems. NAC 388.105 (emphasis added). In order for an eligibility team to find a student eligible for special services and programs of instruction under this disability category, that team must find that: a) the student has an emotional disturbance and, by reason thereof, needs special education and related services; b) the student exhibits at least one of a number of specifically enumerated characteristics described in the regulation; c) the characteristics have been evidence for at least 3 months; d) the characteristics adversely affect the ability of the pupil to perform developmental tasks appropriate to the pupil's age, and – in the education setting – this is so despite the provision of intervention strategies; *and* e) special education support is required to alleviate these adverse effects. Section (1)(b) of this eligibility determination is satisfied by a finding of consistent manifestation of any of the following characteristics: a) the student's inability to build or maintain satisfactory interpersonal relationships within the school environment; b) inappropriate behavior or feelings under normal circumstances, including *atypical* behavior such as outbursts of anger, crying or head banging, without apparent cause or reason; c) a pervasive mood of unhappiness or depression; or d) fears or a tendency to develop physical symptoms associated with personal or school problems. NAC 388.415(1) (*emphasis added*).

Speech and Language Impairment (SLI)

A SLI means a disorder relating to language, articulation, fluency or the use of the voice which: 1) is outside the range of acceptable variation in a given environment; 2) is inconsistent with the chronological or mental age of the person with the disability;

or 3) affects the emotional, social or education adjustment of the person with the disability. NAC 388.125. In order to find a student eligible for special education services under the disability category of speech and language impairment, an eligibility team must conclude that: a) the student has a speech and language impairment and, by reason thereof, needs special education and related services; b) the student has demonstrated the ability to profit from speech and language therapy; *and* c) the pupil requires a program of instruction, because of the nature or severity of the pupil's impairment, which is not feasible in the current education setting of the pupil for one of three enumerated reasons. NAC 388.115, 388.405(1).

The appropriateness of a school district's determination regarding a student's eligibility is assessed in terms of the appropriateness at the time the student is evaluated and not "from the perspective of a later time with the benefit of hindsight." *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996(9th Cir. 2017), *citing Adams v. Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). In reviewing the appropriateness of a school district's eligibility determination, reviewing courts apply a "snapshot" rule that looks at the appropriateness of the determination on the basis of the information reasonably available at the time of the IEP meeting where the determination was reached. *Id.*

VI. ANALYSIS AND CONCLUSIONS

The issue presented in the instant appeal asks whether the Hearing Officer substantively erred in determining that the Student was properly exited from special education on January 24, 2019 and was subsequently not eligible to receive special education services during the period at issue in the underlying due process proceeding. The arguments presented by each Party on appeal closely mirror those raised throughout the hearing process, including in the Parties' extensive closing briefs. All arguments raised by Parties were duly considered in conducting this review, and, to the extent that they are not specifically referenced in the Analysis and Conclusions below, it is an indication that this Review Officer found them to be extraneous to the analysis compelled by applicable law.

Appellants' primary assertion is that the Hearing Officer erred in ruling that the Student was properly exited from special education. Petitioners advance two principal arguments in support of this assertion. The first is that the Hearing Officer ignored legal authority, as well as documentary and testimonial evidence, to conclude that the School District had appropriately assessed the Student prior to terminating their eligibility based "upon the information the team had" because, in addition to SLD, the Student's eligibility

under the disability categories of HI and ED should have been considered. The second, is that the Hearing Officer committed reversible error in finding that the January 24, 2019 eligibility team was appropriately comprised and devoid of procedural defects because the team did not include a nurse, which is required for consideration of eligibility under the disability category of HI and that this procedural defect is not "harmless error," but rather is significant in that it led to the eligibility team having insufficient information to consider a disability it was on notice of.

Additionally, Appellants argue that the Hearing Officer erred in concluding that the Student did not require specially-designed instruction and was therefore ineligible for special education and related services. In advancing this argument, Appellants further take the position that the Hearing Officer erred in concluding the Student's academic performance was not attributable to their disabilities. Finally, Appellants argue that a §504 plan cannot substitute for the special education services to which the Student should be entitled.

The School District takes the position that the Student was properly exited from special education services in that they were assessed in all suspected areas of disability prior to the January 24, 2019 eligibility team meeting, and those assessments were considered by an eligibility team that met all requisite procedural requirements. The School District further argues that consistent with the requirements of IDEA, the eligibility team appropriately arrived at the conclusion that the Student was not eligible for continued special education services under the category of SLD because the Student did not require specialized designed instruction in order to meet age or grade level standards. With respect to assessment in all suspected areas of disability, the School District argues simultaneously that it was only required to assess the student in the disability category in which they were currently identified because the IDEA regulations use of the term "such disability" references only the existing disability the child presents at the time of the triennial review, and that, to the extent the eligibility team was required to consider other suspected disabilities, they complied with that requirement by engaging in discussion of other potential disabling conditions, including HI and ED.

Finally, the School District argues that Appellants' arguments alleging an attempted substitution of a §504 plan for special education services is misplaced because the Student's §504 plans were not intended as an alternative way to provide specially-designed instruction, nor as a substitute for an IEP.

Each Party acknowledges and argues for slightly different applications of the "snapshot" rule articulated above, which compels the review of each eligibility

determination based upon the information available at the moment in time when the determination was made. Moreover, the arguments each Party advances, and indeed the Hearing Officer's Decision, frequently intermingle facts and arguments in a manner that tends to conflate rather than elucidate those facts and allegations necessary to conduct the requisite legal analysis for each eligibility determination made in the applicable time period. Consistent with controlling precedent, this Review Officer reviews each eligibility determination made by the School District during the time period at issue in turn, considering Party's arguments as they are relevant to each determination. Consideration of the eligibility determinations made begins at the January 24, 2019 determination that found the Student ineligible for special education services and follows with the three subsequent determinations made August 26, 2019; November 12, 2019; and June 22, 2020. *Id.* (IHO FOFs 15, 26, 32, 43).

a. Did the Hearing Officer err in ruling that the Student was properly exited from special education on January 24, 2019?

While the administrative record demonstrates the IHO reached certain erroneous factual conclusions in considering the propriety of the School District's January 24, 2019 decision to exit the Student from special education, and neither Party's legal arguments on this issue are without flaws, an independent review of the entire record of the hearing below, with deference to the Hearing Officer's credibility determinations and findings in all areas except those IHO FOFs which were excluded and those determinations noted below where a complete review of the evidence compels a contrary conclusion, supports the Hearing Officer's conclusion by a preponderance of the evidence that the Student was properly exited from special education services on January 24, 2019.

The January 24, 2019 eligibility team meeting was convened to review the Student's triennial reevaluation and ongoing eligibility for special education services. (IHO FOFs 11, 13; FOF 5). At the time of this meeting, the Student was eligible for special education services under the category of specific learning disabilities with identified disabilities in the areas of mathematical calculation, mathematical problem solving, written expression, basic reading skill, reading fluency skills and reading comprehension. (FOF 2).

Parents received notice of and participated in the January 24, 2019 eligibility team meeting. (IHO FOF 11). The eligibility team was properly constituted to consider the Student's eligibility under the disability category of SLD. (FOF 9). The School District utilized a variety of tools and strategies to consider whether the Student remained eligible

under the category of SLD, and the team engaged in a robust discussion of the Student's continuing need for special education services. (FOFs 5, 6, 7, 8).

Based upon the evaluation completed and discussion held at the eligibility team meeting, the Student was found ineligible for special education services because they were no longer in need of specially designed instruction to complete age-appropriate, grade-level work. (FOF 9). This conclusion is supported by a preponderance of the evidence in the administrative record. While certain errors were found in the evaluation report considered by the eligibility team, and these errors understandably eroded the Parents' confidence in the report itself, the assessment data contained and testimony, deemed credible by the Hearing Officer and supported by the record, demonstrate by a preponderance of the evidence that the eligibility team considered the appropriate factors and reached an appropriate conclusion that, based upon the information available at the time of this meeting, the Student no longer required special education services. (FOFs 5, 6, 7, 8, 9, 11, 12).

Indeed, Parents' Appeal raises no compelling challenge to the eligibility team's January 24, 2019 determination on SLD eligibility. Rather, Parents argue that the Student was inappropriately exited from special education services because HI and ED were not properly considered.

In arguments presented on appeal, Parents focus on, and challenge, the IHO's FOF No. 15 which states as follows:

15. At the January 24, 2019, team eligibility meeting, the team considered SLD and determined that Student was not eligible and did not meet NAC criteria for SLD. (Respondent Exhibit 33) The team also considered HI and Emotional Disturbance, but with respect to each disability category, the team concluded that Student did not need specially designed instruction to meet age or grade level standards. (Hearing Transcript Vol. 1, p. 165-166, 174, 176-177) Because a school nurse was not present at this eligibility team meeting the team could not address HI, but it was considered at a future eligibility team meeting at which Student was found ineligible under that category. (Hearing Transcript Vol.1, p. 176-177) (IHO Dec. p. 7:3-12).

As addressed above, the underlying record, and applicable law, support the first assertion, that the team considered SLD and determined the Student was not eligible, and did not meet NAC criteria for SLD. (FOF 9). However, the assertions set forth in the following two sentences are not supported by the underlying record. Rather than

“considering” HI and ED, the testimony at hearing and documents suggest that this eligibility team discussed HI and ED as two other eligibility categories which might be formally considered, but ultimately decided, based upon the triennial evaluation completed, that it was not necessary to consider HI or ED at this time because the Student was able to access and produce age and grade-level appropriate work without specially designed instruction. (FOFs 5, 6, 7, 8, 9, 10, 11, 12). Thus, the record, read in its entirety, compels a different conclusion on this factual finding. *See Carlisle*, 62 F.3d 520. However, this alternate conclusion does not compel a finding that the eligibility team erred at the January 24, 2019 meeting.

The arguments presented on appeal, the administrative record, and a full review of the record indicate that the crux of Parents’ arguments regarding the propriety of the eligibility team’s determinations center on the School District’s awareness of the Student’s prior diagnosis of ADHD and the Student’s behavioral issues. The Student’s primary behavioral issue during this timeframe was that Student was often work-avoidant in the classroom and at home. (FOFs 6, 7, 8, 12). In addition, the data and discussions from the Student’s triennial evaluation indicated that the Student demonstrated some struggle with emotional problems. (FOFs 7). However, in advancing these arguments, the Parents essentially offer a false equivalency between a student with a clinical diagnosis of a health impairment and/or a student demonstrating emotional problems with the definitions and eligibility categories of HI and ED set forth by the NAC. NAC 388.05, 388.105, 388.402, 388.415.

Although the record establishes, and in fact neither Party contests, the fact that the Student had a prior clinical of diagnosis of ADHD, ADHD in and of itself is not a disability category recognized by the IDEA or NAC. (FOF 6). Nevada students may be found eligible as a student with a disability based, in part, on a diagnosis such as ADHD under the category of HI. NAC 388.402. As articulated in the Applicable Law section set forth above, HI has a specific definition set forth in the NAC and requires that a student not only have a health impairment, but that that health impairment limit the strength, vitality, or alertness of the student, including without limitation, a heightened alertness to environmental stimuli which results in limited alertness with respect to the educational environment which is caused by an acute health problem and adversely affects the educational performance of the student. NAC 388.046. Based upon these definitions, the record does not support a determination that the District was on notice of HI as a suspected disability on January 24, 2019. And, given this conclusion, the District was not obligated to convene an eligibility team that included a school nurse in order to consider HI.

In support of the argument that the School District was required to have considered the disability category of ED prior to exiting the Student from special education services, Parents repeatedly restate the position that the January 24, 2019 eligibility team should have considered both HI and ED in addition to SLD, but advance only vague criticisms of the scope of the triennial reevaluation and of the eligibility team's statements that the Student's team discussed Student's need for ongoing accommodations to support this position. In critique of the scope of the triennial evaluation, the Parents argue that School Psychologist No. 1 – being a neuropsychologist – could have assessed or gathered more data to determine "ineligibility under all suspected and potential categories." (Appellants' Brief, p. 3). However, Parents do not advance, nor does an independent review of the record provide, any specific evidence that the School District was on notice that the Student demonstrated a condition meeting the definition of ED in January of 2019. More specifically, the evidence does not support any conclusion that at this time Student demonstrated any severe emotional disorder that was adversely affecting academic performance. NAC 388.105(2). In fact, although the Mother, Grandfather, and school staff participating on the January 24, 2019 eligibility team acknowledged that the Student required support and redirection to complete work, the team overall agreed at the time of the eligibility determination that the Student was able to demonstrate age and grade-level appropriate academic performance. (IHO FOF 16; FOFs 6, 7, 8).

Further, and presumably relating to their arguments regarding both HI and ED, Parents attempt to rely on the Hearing Officer's FOFs No. 18 and No. 44, to evidence that the student required ongoing specially designed instruction and, therefore, that the January 24, 2019 eligibility team, and subsequently the Hearing Officer, erred in determining that the Student did not require such ongoing special education. The evidence establishes otherwise. Hearing Officer's FOF No. 18, the finding, which restates Parties Stipulated Fact (SF) No. 10, merely states that the January 24, 2019 eligibility team "discussed the Student's continued need for accommodations." (IHO FOF 18). While accommodations can certainly be a part of a student's special education services, the mere consideration of "accommodations," in context with the evidence in this matter, does not meet the definition of specially-designed instruction. 34 C.F.R. 300.39(b)(3). Moreover, Hearing Officer's FOF No. 44, which restates the Parties' SF No. 21, memorialized the position taken by the *June 22, 2020* eligibility team that the Student would "benefit from a Positive Behavior Plan that is revisited... and that Student would benefit from direct instruction of Social Emotional Learning." (IHO FOF 44, SF 21). Accordingly, this latter fact is not relevant to review of the January 24, 2019 decision. As stated by the court in *L.J.*, "We judge the eligibility decision on the basis of whether it took the relevant information into account, not on whether or not it worked." *L.J. v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996, 1004 (9th Cir. 2017). Taken together with the

balance of the evidence regarding the Student's academic achievement as of January 24, 2019, this statement alone does not compel a reversal of the Hearing Officer's determination that the Student did not require specially designed instruction and was appropriately exited from special education services.

In fact, the eligibility team's conclusion that the Student did not require ongoing specially designed instruction to access their education justified its conclusion that they could be properly exited from special education services at that time. *See Hood v. Encenitas Union Sch. Dist.*, 486 F. 3d 1099 (9th Cir. 2007). The Student's teachers, triennial reevaluation data, and academic achievement data including first trimester grades at the time of the eligibility meeting all support this conclusion. (FOFs 5, 6, 8, 9, 11, 12).

Thus, the Hearing Officer's decision as to the propriety of the January 24, 2019 eligibility determination is upheld.

b. Did the Hearing Officer err in upholding the School District's determination that the Student was not eligible for services on August 26, 2019?

The School District held a second eligibility team meeting regarding the Student on August 26, 2019 after the Student had enrolled in Middle School for sixth grade. (IHO FOF 27; FOF 13). This eligibility team considered the Student's eligibility for special education services under the category of SLI and found the Student ineligible. (IHO FOF 27). In addition, at this eligibility team meeting, School District staff shared the results of SL, OT and FBA evaluations conducted by School District staff in response to requests made by the Parent in the prior school year. (FOFs 14, 15, 17). Following the triennial evaluation completed by the School District, Parents had also requested, and the School District granted an independent neuropsychological evaluation – IEE No. 1. (FOF 18). The IEE No. 1 request was granted, and the evaluation was completed over the Spring and Summer of 2019. (FOF 18). While IEE Report is referred to as being dated July 25, 2019 this appears to be the date on which the independent evaluator conducted the feedback session with the Parents. (IHO FOF 20; FOF 18). The administrative record is unclear as to when the IEE Report was received by the School District and Parents; but the evidence supports the conclusion that it had not been received at the time the School District convened the August 26, 2019 eligibility team meeting. (IHO FOF 21; FOF 18).

Parents' Appeal does not raise allegations specific to this eligibility determination other than to generally argue that the Student should have been eligible for special education services at all times following the initial exit determination. A review of the

administrative record relative to this eligibility determination indicates that, following a request by the Parents, a Speech and Language Evaluation Report was completed by a Speech Language Pathologist employed by the School District. (IHO FOF 23⁵). This Report was considered at the August 26, 2019 eligibility team meeting. (IHO FOF 27; FOF 14). The eligibility team, consistent with relevant provision of the NAC regarding speech language impairments found the Student ineligible for special education services under the category of SLI because the Student did not demonstrate such an impairment. NAC 388.405. The Student's Mother agreed with this determination. (IHO FOF 27).

This independent review of the evidence supports the conclusion that the Student did not demonstrate a speech and language impairment comporting with the definition set forth in the NAC at the time the eligibility team considered this disability category. *Id.* (IHO FOF 23). Failing this first, and foundational, prong of the eligibility criteria for SLI, it is unnecessary to consider the criteria required for such eligibility.

Thus, the Hearing Officer's determination as to the propriety of the School District's ongoing position that the student was ineligible for special education services, as it relates to the August 26, 2019 eligibility determination, is upheld.

c. Did the Hearing Officer err in upholding the School District's determination that the Student was not eligible for services on November 12, 2019?

On November 12, 2019 the School District convened an eligibility team meeting to consider the IEE No. 1 conducted by Licensed Psychologist. (IHO FOFs 31, 32; FOFs 25, 26). Parents attended this meeting accompanied by their education advocate and allege that the IEE was not properly reviewed at this meeting. The Hearing Officer determined, based in part on a credibility determination regarding the Mother's testimony, that the IEE No. 1 Report had been reviewed at this meeting. While certain inconsistencies were observed in the underlying record regarding the depth and breadth of the review conducted by the eligibility team, neither non-testimonial, extrinsic evidence nor the record read in its entirety justify a contrary conclusion, thus the finding of the Hearing Officer that the IEE No. 1 was reviewed is granted deference. (IHO FOFs 33, 49).

⁵ Respondent offered the May 23, 2019 Speech/Language Evaluation Report as Respondent's Exhibit 67 and the IHO references it as such in IHO FOF 23. However, during the testimony of the Speech-Language Pathologist who completed the Report, it was determined that District's copy was incomplete, but a complete copy was available in Petitioners' hearing exhibits as Petitioners' Exhibit P15. Petitioners' Exh. P15 was the Speech/Language Evaluation Report admitted to the Administrative Record of the matter. See Tr. Vol. I, pp. 252-254. Accordingly, IHO FOF 23 is factually accurate, but erroneously attributed to the extent that it references an exhibit not in the administrative record. The correct citation is Petitioners' Exh. P15.

Moreover, while this procedural issue is discussed in the administrative record and IHO decision, Parents' arguments regarding this determination ultimately center on substantive allegations that the determination of ongoing ineligibility was improper because the eligibility teams were simultaneously misapprehending the role of the Student's willfulness in their academic performance and inappropriately determining that the Student was ineligible for special education services because they could receive the support they needed through a §504 plan.

The uncontested evidence establishes that IEE No. 1 identified the following diagnoses: DMDD, MDD, ADHD, SLD with impairment in reading, and Enuresis. (IHO FOF 33; FOF 20). Upon review of IEE No. 1, and after hearing the perspective of the Student's current teachers on the Student's academic performance, the November 12, 2019 eligibility team considered the Student's eligibility under the disability categories of SLD and ED. (IHO FOF 32; FOF 26). The decision to consider these disability categories was arrived at through the discussion of the team. (FOF 26)

In considering the Student's eligibility under the disability category of SLD, the November 12, 2019 eligibility team discussed the findings and recommendations of IEE No. 1 which included a diagnosis of SLD with impairment in reading based upon reading comprehension and fluency. (FOF 19). Following that discussion, and over the disagreement of the Student's Mother and educational advocate, the eligibility team determined that this diagnosis alone did not compel a finding that the Student was eligible under the category of SLD, primarily because the Student did not require specially designed instruction. (FOF 26). This determination was principally based upon the team's review of the Student's latest academic achievement, indicating that the Student was demonstrating academic growth and upon the testimony of the Student's current teachers, including their General Education English Teacher, who testified competently to her belief – based upon having the Student in her English class and three others in this semester of sixth grade – that the Student was able to access the general education curriculum without modifications. (FOF 19).

As set forth in the Applicable Law section, above, in order to be eligible under the disability category of SLD, a Student must demonstrate a SLD as defined by the NAC and, by reason thereof, need special education and related services. NAC 388.117; NAC 388.420. Thus, based upon a review of the evidence in the administrative record on these required factors, it was appropriate for the team to conclude, and the IHO to affirm, that even if the SLD diagnosis in IEE No. 1 met the definition of an SLD as defined by the NAC, and as required by criteria (a), the Student did not meet criteria (b) or (c) for eligibility under this category. *Id.* Given this, it is unnecessary to consider the balance of

the criteria for this category. A review of the administrative record on this matter supports the conclusion reached by the eligibility team on November 12, 2019 with regards to the Student's ineligibility under the disability category of SLD because the Student did not require special education services.

As with the analysis of the team's discussion regarding SLD, the November 12, 2019 eligibility team meeting reviewed IEE No. 1 and heard input from the Student's teachers and Parent in considering the Student's eligibility under the category of ED. (FOFs 26, 28, 29, 30). Most relevant to the consideration of the Student's eligibility under this category were the new clinical diagnoses of DMDD and MDD contained in this Report. Id. Evidence in the administrative record demonstrates that while the eligibility team reviewed these diagnoses, in light of the discussion held, including the perspectives shared by the teachers in daily contact with the Student in the school setting, a preponderance of the evidence supports the conclusion that, irrespective of the propriety of the clinical diagnoses made by Licensed Psychologist, the Student's school behaviors did not comport with the definition of ED set forth by the NAC. NAC 388. 105; (FOFs 23, 24, 28, 30, 31). Even to the extent that the Student demonstrated ongoing behavioral issues, 6th Grade General Education Teacher and Middle School Principal testified that those ongoing work completion/work avoidance issues and moodiness issues Student demonstrated were typical of same-age peers and could be addressed with general interventions and positive behavior supports universally available in the classroom; therefore, the Student did not require special education services. (FOFs 23, 24, 28, 30, 31). Accordingly, a review of the administrative record supports the conclusion reached by the eligibility team that the student was ineligible because they did not require special education services.

Consistent with the above, the evidence supports a conclusion that the eligibility team's determination, affirmed by the IHO, that the Student was ineligible for special education services under the disability categories of SLD and ED considered on November 12, 2019 was consistent with applicable legal standards. The Parents further advanced an allegation of procedural error with regards to this meeting in that, given Student's ADHD diagnosis, the Student's eligibility under the disability category of HI should have been considered, and it was not because a school nurse was not present at the November 12, 2019 team meeting. The Hearing Officer determined this argument to be without merit, finding that the eligibility team agreed that HI would be considered at a later meeting when the "parent-requested IEE FBA and OT are complete or following a parent or team member request for a new eligibility determination..." (citations omitted) and that when this disability category was ultimately considered the team found the Student ineligible for special education. (IHO Dec. p. 15). Parents argue that they had no choice

on this course of action because the District had failed to convene the appropriate eligibility team to consider this disability category, and that this failure constituted a reversible error.

The record indicates the eligibility team discussed consideration of HI and School Psychologist No. 2 conceded that HI was not fully considered at this meeting because the team did not include a school nurse as would have been required by the NAC. (FOF 26); NAC 388.402(3). As noted by the IHO, rather than consider that disability category at this meeting, the eligibility team then noted in the PWN issued to Parents following the meeting that HI would be considered at a later date when the most recent IEE requested by Parents had been completed and when a nurse was present. (FOF 27). The Hearing Officer determined that this approach was appropriate because the team agreed to it so IEEs could be conducted.

The propriety of this course of action would generally turn on whether or not the School District was required to consider HI at the time of the November 12, 2019 diagnosis. However, in this instance the eligibility team appears to have conceded that HI could be considered, and the reason that consideration did not move forward was because a nurse was not present at the eligibility team meeting. Thus, failing to discuss the Student's eligibility under the category of HI at the November 12, 2019 team meeting was a procedural violation of the IDEA. However, the Ninth circuit has held that procedural violations do not constitute a denial of a free appropriate public education (FAPE) if the violation does not result in a loss of educational opportunity. *See R.B. v. Napa Valley Unified School District*, 496 F.3d. 932 (9th 2007)(internal citations omitted). The R.B. court further found that "A child ineligible for IDEA opportunities in the first instance cannot lose those opportunities merely because a procedural violation takes place." *Id.* at 942. Such is the case in this matter. Given that a preponderance of the evidence supports the determination reached by this eligibility team that the Student did not require specially-designed instruction to access their education, consideration of whether or not the Student met the definitional eligibility criteria of HI would not have changed the overall outcome, which was that the Student was not eligible for special education services at this time. Accordingly, this procedural violation does not rise to the level of a denial of FAPE.

Thus, the Hearing Officer's determination as to the propriety of the School District's ongoing position that the student was ineligible for special education services, as it relates to the November 12, 2019 eligibility determination is upheld.

d. Did the Hearing Officer err in upholding the School District's determination that the Student was not eligible for services on June 22, 2020?

The final eligibility determination conducted for the Student during the time period at issue in the instant appeal took place June 22, 2020. At this meeting, the eligibility team considered the Student's eligibility under the disability categories of SLD, ED and HI. (FOF 41).

The June 22, 2020 eligibility team was properly constituted to consider each of the disability categories discussed, with Parents, their educational advocate, and the Licensed Behavior Analyst who completed IEE No. 2 participating. (FOF 41). Following a discussion that took place over approximately 4 ½ hours, the Student was found ineligible under each of the disability categories considered and a Statement of Eligibility was issued for each of the considered categories. (FOFs 41, 44). The School District subsequently issued a Parental Prior Written Notice memorializing the determinations reached and indicating that the team members agreed that [the Student] would benefit from a "Positive Behavior Plan that is revisited constantly and takes [Licensed Behavior Analyst's] recommendations into account and that [the Student] would also benefit from direct instruction of Social Emotional Learning." (FOF 44). The PWN further stated that the team would reconvene the Student's §504 team to include those items. (FOF 44).

With regards to the determination regarding ED, the eligibility team considered the diagnoses made in IEE No. 1 and behaviors described in IEE No.2 and the criteria set forth by the applicable law and reached the conclusion that these criteria did not "describe the Student." (FOF 43). That is to say, the team determined that, even taking into consideration the clinical diagnoses made by the Licensed Psychologist, the Student's behavior did not comport to the definition of ED. NAC 388.105. This conclusion is supported by the administrative record in that no evidence was reviewed which suggested the Student's behaviors in school demonstrated the severity or pervasiveness required for eligibility under the category of ED.

In considering the disability category of SLD, the June 22, 2020 eligibility team again discussed IEE No. 1, particularly the diagnosis of SLD – impairment in reading and IEE No. 2 and determined that the Student did not qualify for special education under this disability category because they were able to complete age and grade level appropriate work in the general education setting and, therefore, did not require specially-designed instruction. (FOF 43). This determination is supported by the administrative record which corroborates the eligibility team's determination and the IHO's findings. (FOFs 31, 39, 40). While the Parents argue that the Student's inconsistency in completing

work and poor grades demonstrate the Student's inability to access their education, the conclusion reached by the eligibility team, and affirmed by the IHO, that the Student's motivation and mood – both of which were not atypical vis-à-vis other students in this age and grade-level – are driving their work performance is also entirely plausible. (FOF 30). And it is this latter conclusion that the IHO reached based upon his assessment of the credibility of the evidence presented. The review of the administrative record does not compel any contrary conclusion. Rather, the evidence supports the eligibility team's determination.

The eligibility team further considered the Student's eligibility under the disability category of HI. Upon consideration of IEE No. 1, IEE No. 2, and the perspectives shared by the eligibility team members, the team determined that the Student had diagnoses that could meet the definition of health impairment. (FOFs 41, 44). However, the team members disagreed as to whether the Student required specially-designed instruction in order to address such an impairment. (FOF 44). The School District takes the position, affirmed by the IHO's decision, that the Student's performance evidences their ability to access their education without need of specially-designed instruction, and, therefore, the Student is not eligible for special education services. Parents' Appeal contests this determination and the findings by the IHO that the Student's work completion issues were within the Student's control.

The School District's determination is supported by the evidence in the administrative record and applicable law. As discussed above, in order to be eligible for special education services under the disability category of SLD, a student must be determined to have a SLD *and*, by reason thereof, need special education and related services. NAC 388.420 (emphasis added). The IHO relies on the matter of *TB, Jr. by TB, Sr. v. Prince George's County Board of Education*, 897 F.3d 566 (4th Circ. 2018) for the proposition that "Not every student who falters academically owes [their] difficulties to a disability." Parents argue this case is distinguishable given that the Student in *TB* was found capable of performing satisfactory work but was failing due to an unwillingness to take his education seriously as demonstrated by excessive absence and extreme behaviors, while the Student in this matter experiences work completion issues that Parents argue are driven by their disability. *Id.* Despite this difference in the facts presented in each matter, the reliance on this case by the IHO is not inappropriate. The underlying record demonstrates that the Student is able to access their education and perform at grade-level when motivated to do so. (FOFs 19, 28, 30, 40).

Parents further argue that the eligibility determinations reached by the School District, and affirmed by the IHO, are inappropriate in that they attempt to substitute the

offer of services pursuant to a §504 Plan for the Student's right to special education services. Relying on *LJ v. Pittsburg Unified Sch. Dist.*, 850 F.3d 996 (9th Cir. 2016), Parents argue that the School District cannot offer specialized instruction in the form of a §504 Plan to avoid providing the Student their required special education services. While the evidence establishes that the eligibility team did conclude that the Student would benefit from a review of the accommodations provided under a §504 Plan and intended to convene the Student's §504 Plan team to discuss this further and consider modification of the §504 Plan consistent with the recommendations of the IEE providers, this conclusion was reached following an appropriate consideration of Student's eligibility for special education services. (FOF 44). No evidence in the record supports the conclusion that discussing available accommodations through a §504 Plan was offered as a substitute for special education services for a Student who otherwise would have been eligible for special education.

Consistent with the foregoing, the Hearing Officer's determination as to the propriety of the School District's ongoing position that the student was ineligible for special education services, as it relates to the June 22, 2020 eligibility determination is upheld.

VII. DECISION AND ORDER

For all the reasons stated in this decision, the Hearing Officer's decision is AFFIRMED.

It is so ordered.

DATED: March 9, 2021

/s/ Beatriz A. Diaz-Pollack

Beatriz A. Diaz-Pollack, Review Officer

NOTICE OF APPEAL RIGHTS

The decision of the state Review Officer is final unless a party appeals the decision. A party may appeal from the decision of the state Review Officer by initiating a civil action in a court of competent jurisdiction within 90 days after receipt of the decision. NAC §388.315.