

1 **IMPARTIAL DUE PROCESS HEARING**
2 **BEFORE THE HEARING OFFICER**
3 **APPOINTED BY THE STATE SUPERINTENDENT OF PUBLIC SCHOOLS**

4 **STATE OF NEVADA**

5 In the Matter of
6 STUDENT¹, by and through Parent

**DECISION OF THE HEARING
OFFICER**

Hearing Dates: November 2-4, 2020

8 Petitioner,

Hearing Officer

9 v.

Kevin P. Ryan, Esq.

10 DOUGLAS COUNTY SCHOOL DISTRICT

Parties and Representatives:

11 Respondent.

Michelle Bumgarner, Esq., on behalf of
Petitioner.

13 Paul J. Anderson, Esq., on behalf of
14 Respondent.

15 **I.**

16 **INTRODUCTION**

17 The parties to the present action are Petitioner, and Respondent, Douglas County School
18 District. Petitioner is represented by Michelle Bumgarner, Esq. Respondent is represented by
19 Paul J. Anderson, Esq. The presiding hearing officer is Kevin P. Ryan, Esq. ("IHO").
20

21 Petitioner's Request for Due Process ("RDP") was received on March 16, 2020. After
22 recusal of the initial hearing officer, the IHO was appointed on April 3, 2020. On April 13,
23 2020, the District's Response to the RDP was received. On May 12, 2020, a telephonic Status
24 Conference occurred. During the Status Conference, the parties stipulated that Petitioner would
25
26

27 _____
28 1 Personally identifiable information is attached as Appendix A to this Order and must be removed prior
to public distribution.

1 file an Amended RDP. As a result, the May 18, 2020, hearing was vacated. However pending
2 receipt of the Amended RDP the decision deadline remained May 30, 2020.

3 Petitioner's First Amended RDP was received by the IHO on May 18, 2020.² Thereafter,
4 an Amended Preliminary Order was entered the same day. Pursuant to this order, the parties
5 were scheduled for a telephonic Status Conference to occur on June 2, 2020, and based upon the
6 parties' joint request and stipulation, the decision deadline was set for July 29, 2020.
7

8 On May 26, 2020, Respondent's Response to Amended RDP was received by the IHO.

9 On June 2, 2020, a telephonic Status Conference occurred. An Order After Telephonic
10 Status Conference was issued on June 3, 2020, whereby the initial Pre-Hearing Conference
11 ("PHC") was scheduled to occur on June 18, 2020. In addition, the parties' 5 day hearing was
12 set to commence on July 6, 2020, and conclude on July 10, 2020.
13

14 On June 18, 2020, this matter came on for a PHC. At the PHC the parties indicated they
15 had settled the case and they jointly requested that the PHC be continued until June 23, 2020.
16 On June 23, 2020, the parties appeared telephonically for the continued PHC. The formal PHC
17 did not go forward, and instead the parties participated in a Status Conference. During same,
18 the IHO was informed that the matter had not settled. Moreover, the parties agreed that for a
19 variety of reasons they were not prepared to go forward with the hearing on July 6, 2020.
20

21 On June 25, 2020, an Order After Telephonic Status Conference was issued and as a
22 result of a stipulation between the parties and a demonstration of good cause, the July 6, 2020,
23 hearing was continued to September 1, 2, 3, 4 and 8, 2020, the PHC was continued to August
24 11, 2020, and the decision deadline was extended to September 21, 2020. On August 3, 2020,
25 an Order Amending Hearing Dates was issued and upon agreement of the parties and good
26

27 _____
28 ²As a result of the filing of the Amended RDP, all time-lines started anew. (34 C.F.R. 300.508(d)(4)).

1 cause shown, the parties' 5 day hearing was reset to commence on August 31, 2020 and
2 conclude September 4, 2020.

3 On August 24, 2020, pursuant to stipulation between the parties, and after Petitioner
4 obtained new legal counsel, Petitioner filed a Second Amended RDP.³ On September 2, 2020, a
5 telephonic Status Conference was held. Also on September 2, 2020, a Status Conference Order
6 and Report was issued. Pursuant to same, a PHC was set to occur on October 13, 2020, the
7 parties' 5 day hearing was continued to November 2, through November 6, 2020, and based
8 upon good cause, the decision deadline was extended from September 21, 2020, to November
9 23, 2020.

11 On September 8, 2020, Respondent filed its Response to Petitioner's Second Amended
12 RDP.

14 On October 13, 2020, this matter came on for a PHC. During the PHC, the issue of
15 bifurcating the hearing was discussed. At that time, there was tentative agreement to do so.
16 However, both sides requested additional time to discuss the concept with their clients. The
17 parties then stipulated to continue the PHC until October 14, 2020. On October 14, 2020, the
18 continued PHC occurred. Thereafter, on October 15, 2020, a Pre-Hearing Conference Report
19 and Order was issued. Pursuant to this Report and Order, the parties' agreement to bifurcate the
20 hearing was memorialized. The single issue to be determined at the November 2, 2020, hearing
21 was "eligibility" ("Eligibility Hearing"). The parties further agreed that subsequent to issuance
22 of the eligibility decision, the remaining issues would be adjudicated at a subsequent hearing.⁴

24 On October 28, 2020, the IHO received the parties' Stipulated Statement of Facts.

25 _____
26 ³As a result of the filing of the Second Amended RDP, all time-lines started anew. (34 C.F.R.
300.508(d)(4)).

27 ⁴The Second Amended RDP included additional claims for procedural violations at the
28 November 12, 2019, IEP meeting, and for failing to design an appropriate IEP for Student.

1 The due process Eligibility Hearing was conducted on November 2nd, November 3rd and
2 November 4th, 2020, in Minden, Nevada. At the hearing, Petitioner was represented by
3 Michelle Bumgarner, Esq. Parent, step-father,⁵ was present on behalf of Petitioner. Paul J.
4 Anderson, Esq., appeared on behalf of Respondent. Respondent's Representatives No. 1 and
5 No. 2 were also present for the hearing. The hearing itself was a hybrid of "in-person" and
6 simultaneous audio / visual communication. The IHO, the parties' attorneys and
7 representatives, and the court reporter appeared in person with proper social distancing. Some
8 witnesses testified in person, others testified via simultaneous audio / visual communication. At
9 the conclusion of the hearing, the attorneys for the parties requested that they be allowed to file
10 closing briefs following receipt of the written hearing transcript. The IHO agreed to this
11 procedure and further indicated that the specifics could be discussed at a Status Conference after
12 the hearing.
13
14

15 Pursuant to stipulation between the parties, a telephonic Status Conference was held on
16 November 9, 2020. Also, on November 9, 2020, an Order After Telephonic Status Conference
17 was issued. Pursuant to stipulation between the parties and a finding of good cause, it was
18 ordered that: (1) on or before November 30, 2020, the parties would deliver their closing briefs
19 to the IHO and each other; (2) the deadline for the IHO's written decision adjudicating the
20 eligibility issue is December 13, 2020; (3) a Status Conference is scheduled to occur on
21 December 22, 2020; (4) the continued hearing dates are January 14th and January 15th 2021;
22 and, (5) based upon the parties' decision to bifurcate this matter, their desire to be in possession
23 of the hearing transcript before drafting closing arguments, the dates scheduled to finish the
24

25
26 ⁵Step-father was unable to personally attend the entire hearing as a result of a potential exposure to
27 COVID-19. After the IHO was made aware of the potential exposure, step-father immediately left the
28 hearing venue and did not return. He and Student's mother thereafter participated in the hearing via
electronic means. It was confirmed after the hearing had concluded that step-father was tested and he did
not have COVID-19.

1 hearing, the fact that determination of the eligibility issue does not resolve all issues in this
2 case,⁶ and good cause having been demonstrated, the final due process hearing decision deadline
3 was extended to January 29, 2021.

4 On November 25, 2020, the IHO received an email from Respondent regarding the
5 parties' stipulation to admit 3 additional exhibits into the hearing record. Also, on November
6 25, 2020, after the close of business, the IHO received an email from Petitioner confirming the
7 parties' agreement. On November 30, 2020, the IHO issued its Order Regarding Hearing
8 Evidence in which Respondent's exhibits 1, 40 and 66 were admitted into evidence as a part of
9 the hearing record.
10

11 The basis for jurisdiction in this matter is the Individuals with Disabilities Education Act
12 ("IDEA"), 20 U.S.C §1400 et seq., 34 C.F.R. 300.100 et seq., and Chapters 388 of the Nevada
13 Revised Statutes ("NRS") and Nevada Administrative Code ("NAC").
14

15 II.

16 PRELIMINARY MATTERS

17 All "matters" were covered in Section I of this Decision and Order.

18 III.

19 ISSUES

20 As set forth in the October 14, 2020, Pre-Hearing Conference Report and Order, the
21 issue to be determined at the due process Eligibility Hearing was as follows:
22

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

25 IV.

26
27 _____
28 ⁶The Second Amended RDP included additional claims for procedural violations at the November 12,
2019, IEP meeting, and for failing to design an appropriate IEP for Student.

1 **FINDINGS OF FACT**

2 The factual findings that include the citation “SF” were stipulated to by the parties on
3 October 28, 2020. Said factual findings, with certain corrections as agreed to by the parties at
4 the Eligibility Hearing,⁷ were read into the record on November 2, 2020, before witness
5 testimony commenced. The remaining factual findings were made by the IHO based upon the
6 evidence presented by the parties.
7

8 1. Student is a 7th grade student who attends Middle School, a school within the
9 jurisdiction of the Douglas County School District (“DCSD” or “District”). (SF)

10 2. Student lives with his natural mother, and step-father (“Parents” or “Petitioners”),
11 as well as siblings, in Douglas County, Nevada. (SF)

12 3. DCSD is a political subdivision of the State of Nevada pursuant to NRS 386.010.(SF)

13 4. Student came to the DCSD as a second grade student in the fall of 2015 and was
14 Placed on an IEP under the qualifying disability of Specific Learning Disabilities, based on the
15 report of his parents that Student qualified for special education while living in the state of New
16 Jersey. (SF)
17

18 5. On December 10, 2018, Prior Written Notice (“PWN”) of Student’s upcoming IEP
19 meeting was sent to Mother. (Respondent Exhibit 21)

20 6. On December 12, 2018 an annual IEP meeting was held for Student. (SF)

21 7. Mother and Grandfather participated in the December 12, 2018, IEP meeting.
22 (Respondent Exhibit 26)

23 8. Pursuant to Student’s December 12, 2018, IEP Student continued to require special
24 education and related services in the areas of reading, math, writing, and behavior. When
25
26

27 _____
28 ⁷The corrections agreed to at the Eligibility Hearing include citations to the written transcript from that hearing. Additionally the IHO removed personally identifiable information.

1 provided, all services took place in the general education classroom. (Respondent Exhibit 26)

2 9. At the December 12, 2018, IEP meeting, it was explained to Mother and Grandfather
3 that Student's continued eligibility for special education would be determined at the January 24,
4 2019, eligibility meeting. (Hearing Transcript Vol. 1, p. 56)

5 10. During the December 12, 2018 annual IEP meeting, and thereafter, the DCSD Case
6 Manager, discussed with Student's Mother and Grandfather, that Student's three-year
7 reevaluation would be conducted the following month, January, 2019. (SF)

8 11. On January 10, 2019, PWN notice of the January 24, 2019, eligibility team meeting
9 was provided to Mother. (Respondent Exhibit 30)

10 12. Doctor No. 1, a neuropsychologist employed by the DCSD prepared a psycho-
11 educational evaluation of Student beginning on December 6, 2018 and completing the same on
12 January 23, 2019. (SF)

13 13. Doctor No. 1's report was first presented to Student's Mother at the January 24,
14 2019 three-year eligibility team meeting. Student's Grandfather was in attendance over the
15 telephone. (SF)

16 14. At the time of the January 24, 2019, eligibility team meeting, Student's
17 Qualifying disability was a Specific Learning Disability, and Student was receiving 100% of the
18 services in a general education classroom. (Hearing Transcript Vol. 1, p. 31)(Respondent's
19 Exhibit 26) To the extent Student had a learning disability, it was in reading and writing.
20 (Hearing Transcript Vol. 1, p. 33)

21 15. At the January 24, 2019, team eligibility meeting, the team considered SLD and
22 determined that Student was not eligible and did not meet NAC criteria for SLD. (Respondent
23 Exhibit 33) The team also considered OHI and Emotional Disturbance, but with respect to each
24 disability category, the team concluded that Student did not need specially designed instruction
25
26
27
28

1 to meet age or grade level standards (Hearing Transcript Vol. 1, p. 165-166, 174, 176-177)
2 Because a school nurse was not present at this eligibility team meeting the team could not
3 address OHI, but it was considered at a future eligibility team meeting at which Student was
4 found ineligible under that category. (Hearing Transcript Vol. 1, p. 176-177)
5

6 16. At the January 24, 2019, eligibility team meeting all participants including Mother
7 and Grandfather agreed that Student did not qualify for special education under the category of
8 SLD. (Respondent Exhibit 33)

9 17. Student was determined ineligible for special education under the category of SLD
10 at the January 24, 2019 eligibility team meeting. (SF)

11 18. At the January 24, 2019 eligibility team meeting the team also discussed Student's
12 continued need for accommodations. (SF)

13 19. Petitioners requested additional evaluations of Student as well as an independent
14 educational evaluation ("IEE") challenging the report prepared by Doctor No. 1, that was
15 presented at the January 24, 2019 eligibility team meeting. (SF)

16 20. DCSD granted the request for an IEE and funded a neuropsychological
17 evaluation of Student through Doctor No. 2, which was completed July 25, 2019. (SF)

18 21. Doctor No. 2's report was not provided to DCSD until after the August 26, 2019,
19 eligibility team meeting. (Hearing Transcript Vol. I, 309 - 310)(Respondent Exhibit 76)

20 22. DCSD also provided additional assessments of Student in the areas of
21 speech/language, occupational therapy ("OT") and functional behavior analysis ("FBA").

22 Independent Evaluator No. 1, completed the speech language evaluation, Independent
23 Evaluator No. 2, completed the OT evaluation and Independent Evaluator No. 3, and
24 Independent Evaluator No. 4, completed the FBA. (SF)

25 23. On May 22, 2019, a speech and language evaluation was conducted on Student.
26
27
28

1 (Respondent Exhibit 67) The report indicates that Student demonstrated language skills that
2 were average for his age. (Respondent Exhibit 67)

3 24. Regarding Student's OT evaluation, it was conducted in May and August, 2019,
4 by Independent Evaluator No. 2. The report is dated August 26, 2019, and said report was given
5 to Mother the same day. The report provides in part, "Overall Student has been observed by his
6 teachers, and per his report, to have Some Problems with areas of sensory processing which can
7 be addressed utilizing school wide positive behavior programs and universal classroom
8 supports. As well, Student has been given supports through a 504 plan." (Respondent Exhibit
9 81)

11 25. Regarding Student's FBA, the report is dated August 26, 2019. Mother received
12 The report on August 26, 2019. The report provides in part, "Student is currently benefitting
13 from universal classroom supports which are designed to prevent problem behaviors. These
14 preventative, proactive practices are available to all students in the general education
15 environment. Therefore a positive Behavior Intervention Plan is not indicated at this time."
16 (Respondent Exhibit 79)

18 26. An eligibility team meeting was properly noticed and held on August 26, 2019, to
19 consider the results of the DCSD evaluations identified [above]. At that meeting, the team only
20 considered eligibility under Speech and Language Disorder and Student was found not eligible
21 under the qualifying category of speech language disorder. (SF)

23 27. According to the August 26, 2019, Statement of Eligibility, Student was not
24 eligible for special education under the category of speech and language impairment. Mother
25 agreed with this finding. (Respondent Exhibit 80)

26 28. After the August 26, 2019, eligibility team meeting Mother made another request
27 for IEE as evidenced by PWN dated October 11, 2019. (Respondent Exhibit 79)

28

1 29. Petitioners requested an IEE to address the FBA completed by the DCSD which
2 The DCSD agreed to fund. Independent Evaluator No. 5, was retained for purposes of
3 conducting the IEE and completed her report on or about February 28, 2020. (SF)

4 30. In the FBA, Independent Evaluator No. 5 wrote, “at this point it is unclear what
5 Skills are weak in Student’s academic repertoire and which ones of these would be help him
6 achieve his goals. It is recommended that a skills assessment such as a PEAK Assessment be
7 conducted....” (Respondent Exhibit 98) Under cross examination at the Eligibility Hearing,
8 Independent Evaluator No. 5 confirmed that: (1) regarding the 3 skills based assessments she
9 recommended for Student, they could be completed on any child whether in special education,
10 on a 504 plan, or in general education; (2) regarding her recommendation for a positive support
11 plan it could be provided to Student through a 504 plan; (3) a general education student or a
12 student with a 504 plan can have a “behavior plan”; and, (4) many of the recommendations
13 made in her report are just good teaching practices that teachers may implement with any
14 student. (Hearing Transcript Vol. III, pp. 968-993)

15 31. On October 30, 2019, DCSD sent out PWN regarding an eligibility team meeting
16 To occur on November 12, 2019. (Respondent Exhibit 87)

17 32. An eligibility team meeting was properly noticed and held on November 12, 2019
18 To consider the results of Doctor No. 2's IEE and to determine whether Student qualified for
19 special education under the qualifying categories of Specific Learning Disabilities and Serious
20 Emotional Disturbance. At the conclusion of that meeting the eligibility team found Student did
21 not qualify under either category, with his Mother, Grandfather and Student Advocate,
22 disagreeing with the District members of the team. (SF)

23 33. Contrary to the testimony by Mother, Doctor No. 2's IEE was reviewed and
24 Considered at the November 12, 2019, eligibility team meeting. (Hearing Transcript Vol. II, pp.
25 26

1 356-357, 435-436, 560) According to Doctor No. 2's report, Student meets criteria for
2 Disruptive Mood Dysregulation Disorder (DMDD)Major Depressive Disorder (MDD), ADHD,
3 and Specific Learning Disorder with impairment in reading, and Enuresis. As a part of Doctor
4 No. 2's treatment plan, she recommended that Student have an IEP. (Respondent Exhibit 76)

5
6 34. Despite having the opportunity to do so, Doctor No. 2 did not attend the
7 November 12, 2019, eligibility team meeting. (Hearing Transcript Vol. II, p. 560)

8 35. On November 14, 2019, Doctor No. 3, the school psychologist who conducted'
9 the November 12, 2019 eligibility team meeting issued a prior written notice ("PWN"),
10 summarizing the findings of the November 12, 2019 eligibility team meeting, and stating that
11 the team would meet again to consider whether Student qualified under the category of other
12 health impaired ("OHI") once Independent Evaluator No. 5 completed the IEE addressing the
13 FBA. (SF)

14
15 36. Regarding the subsequent meeting, the PWN specifically provided the meeting
16 Would occur when the "parent -requested IEE FBA and OT are complete or following a parent
17 or team member request for a new eligibility determination..." (Respondent Exhibit 91)

18 37. In both PWNs, it was noted that the team did review the recent IEE. (Respondent
19 Exhibits 91, 95)

20
21 38. On or about March 15, 2020, the Governor of the State of Nevada shut down all
22 of the public and private schools based on the COVID-19 pandemic. (SF)

23 39. Independent Evaluator No. 5's IEE was received by the DCSD on April 22, 2020.
24 (SF)(Hearing Transcript, Vol. 1, p. 17)

25 40. An eligibility team meeting was properly noticed and held on June 22, 2020, by
26 virtual means with Independent Evaluator No. 6, chairing the meeting. Independent Evaluator
27 No. 6 prepared a report summarizing the IEEs completed by Doctor No. 2 and Independent
28

1 Evaluator No. 5 as well as Student’s most recent academic and behavioral testing and presented
2 that information to the eligibility team. (SF)

3 41. On June 20, 2020, the Confidential Review of Outside Evaluations for Eligibility
4 Was sent to Mother. (Respondent Exhibit 104)

5 42. The eligibility team found Student did not qualify for special education under the
6 categories of Specific Learning Disabilities, SED and OHI. Mother, Student Advocate, and
7 Independent Evaluator No. 5, disagreed with the team’s finding that Student did not qualify
8 under any of the three categories. Special Education Representative was present at the meeting
9 as the special education representative necessary for the meeting and she disagreed with the
10 team’s finding under the OHI category. (SF) (Hearing Transcript, Vol. 1, p. 18)

11 43. Pursuant to the Statement of Eligibility dated June 22, 2020, it was determined
12 Student was not eligible for special education under the category SED. (Respondent Exhibit
13 105) However, contrary to a portion of Stipulated Fact 42, Mother and Student Advocate agreed
14 with this finding. (Respondent Exhibit 105)

15 44. Independent Evaluator No. 6, issued a PWN on June 22, 2020, summarizing the
16 findings of the eligibility team meeting, and indicating the unanimous position of the team that
17 Student would benefit from a Positive Behavior Plan that is revisited and takes Independent
18 Evaluator No. 5’s data and recommendations into account, and that Student would benefit from
19 direct instruction of Social Emotional Learning. The PWN concluded that Student’s §504 team
20 would reconvene to include the eligibility team's recommendations, above. (SF)

21 45. Student remains on a §504 plan. (SF)

22 46. Consistent with the uniform testimony of DCSD witnesses / staff, Student has the
23 Ability to complete the general education curriculum, but chooses not to do the work. (Hearing
24 Transcript Vol. 1, p. 34, 39-40,136-137, 204-205; Vol. II, p. 353) Independent Evaluator No. 5

1 testified on direct examination that during her observations of Student, it was unclear to her if
2 Student was engaging in work refusal because Student chose not to do the work versus not
3 having the ability to do the work. (Hearing Transcript Vol. III, p. 962) When interested in the
4 subject, or after having received positive encouragement / accommodations, Student can
5 complete the grade level curriculum without specially designed instruction. (Respondent's
6 Exhibit 108, p. 365)(Hearing Transcript Vol. 1, p. 100-101, 111,138, 144-145)
7

8 47. After Student was exited from special education in January 2019, Student did well
9 in his classes for a period of time (Hearing Transcript Vol. 1, p. 109-110)

10 48. According to the report and testimony of Doctor No. 1, Student's academic
11 achievement was at an expected level for his age and grade, and Student was making adequate
12 progress to meet age and grade level standards in reading, writing and math. Doctor No. 1
13 further indicated that although eligibility can only be determined by the eligibility team, she did
14 not believe Student needed specially designed instruction to meet age or grade level standards
15 of performance. (Respondent's Exhibit 32)(Hearing Transcript Vol. 1, p. 151, 154 - 156)
16

17 49. Mother's testimony was inconsistent, she did not appear credible. Regarding the
18 January, 2019, eligibility team meeting, Mother agreed that she received the PWN dated
19 October 3, 2018, and that she understood it pertained to an "eligibility meeting." (Respondent's
20 Exhibit 15) Mother further acknowledged that she gave written consent for Doctor No. 1 to test
21 Student for reevaluation in advance of the January 24, 2019, eligibility team meeting, and that
22 she understood the meeting pertained to Student's "eligibility." When asked about whether
23 Doctor No. 1's report was reviewed at the eligibility meeting, Mother indicated that it did not
24 happen and that nothing in the report was gone over. But, Mother later testified that the
25 eligibility team showed her where Student was presently at with his grades, and that he was
26 almost at grade level. Mother further claimed that she asked for Doctor No. 1's report before the
27
28

1 eligibility meeting to go over it and prepare, but that **she did not receive it before or at the**
2 **eligibility meeting.** Yet, the hearing Exhibit that includes the “Determination Summary” from
3 Doctor No. 1's report was signed and dated by Mother, and provides in part, “I have reviewed
4 this report and received a copy”. (Respondent Exhibit 32, p. 124) Mother claims that she was
5 only shown the one page that she signed, and that the complete report was emailed to her later,
6 within a week. Mother further testified that upon receiving Doctor No. 1's report, the report she
7 had been waiting for since before the January 2019, eligibility meeting, after she saw one error
8 in the opening paragraph, “she didn’t even care to read the rest of the report.” (Hearing
9 Transcript, Vol. III, commencing at p. 674)
10

11 50. Additionally, Mother claimed that she and Grandfather were rushed at the January
12 2019, eligibility meeting. Yet, after Grandfather was mentioning other areas that should be
13 looked at for Student, she signed the eligibility form anyway. Mother further testified that
14 although she did not have the Eligibility Statement at the meeting, she remembers signing it and
15 circling “agree”. However, regarding this same meeting, Mother testified that she did not
16 understand that Student would no longer be on an IEP, but did understand that he would have a
17 504 Plan. Mother later testified that she did understand that Student would not be on an IEP
18 because she was told that it “would hold Student back.” Thereafter, Mother testified that she
19 understood that for Student moving into 6th grade, an IEP was going to restrict him, in his ability
20 to succeed. (Hearing Transcript, Vol. III, commencing at p. 674) However, Mother claimed not
21 to “entirely” understand the difference between an IEP and a 504 Plan. (Hearing Transcript,
22

23 Vol.
24
25 III, commencing at p. 674)

26 **V.**

27 **CONCLUSIONS OF LAW / ANALYSIS**

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

3 1. NRS 388.467 provides that whenever a due process hearing is held pursuant to the
4 IDEA, 20 U.S.C. 1400 et seq., and a school district is a party, the school district has the burden
5 of proof and the burden of production.
6

7 2. 34 C.F.R. 300.8(a)(1) provides a child with a disability means a child evaluated in
8 accordance with 300.304 through 300.311 as having a disability... and who, by reason thereof,
9 needs special education and related services.

10 3. Regarding eligibility reevaluations, although 34 CFR 300.305(a)(2)(i)(B) uses the
11 phrase "such a disability" when discussing a reevaluation, 34 CFR 300.304(c)(6) provides that
12 the evaluation of a student must be "sufficiently comprehensive to identify all of the child's
13 special education and related service needs.....". Moreover, 34 CFR 300.303 pertaining to
14 reevaluations provides that the reevaluation must meet all the requirements of 300.304 in
15 addition to others. 20 USC 1414(b)(3)(B), provides that a child will be assessed "in all areas of
16 suspected disability". NAC 388.340(4)(b) provides that the pupil is to be assessed in "all areas
17 of suspected disability". (*See also Timothy O. v. Paso Robles Unified School Dist.*, 822 F.3d
18 1105 (9th Cir. 2016). However, the appropriateness of the child's eligibility should be assessed
19 in terms of appropriateness at the time of the child's evaluation, not with benefit of hindsight.
20 *Adams v. Oregon*, 195 F.3d 1141 (9th Cir. 1999).
21

22 DCSD is a party in this case and it bears the burden of proof and production. DCSD met
23 these burdens. With Mother's advance consent and knowledge that Student's eligibility for
24 special education was to be considered, an eligibility team meeting was scheduled for January
25 24, 2019. This meeting was properly noticed and the eligibility team was properly comprised.
26 Mother and Grandfather were present and they had the opportunity to be heard. The team
27
28

1 considered Student’s current eligibility category and discussed others. However, the eligibility
2 team had no reason to suspect any other disability when it reevaluated Student and determined
3 ineligibility. There were no procedural defects with regard to this eligibility meeting, and
4 Student was properly exited from special education based upon the information the eligibility
5 team had before it at the meeting. Both Mother and Grandfather, together with the rest of the
6 eligibility team agreed with this finding, and further agreed that a 504 Plan was an appropriate
7 educational accommodation for Student. Student’s eligibility was assessed appropriately at the
8 time of the eligibility team meeting based upon the information the team had.
9

10 Subsequent to the January 2019, eligibility meeting, at the request of Mother a variety of
11 other IEEs were performed on Student. And, 3 additional eligibility team meetings were
12 conducted. DCSD consistently and timely responded to Mother’s requests for Student
13 evaluations. Each of these additional eligibility team meetings were properly noticed and each
14 eligibility team was properly comprised for the disability categories that were being considered.
15 At each of these meetings Mother and/or Grandfather or Student’s Advocate had the
16 opportunity to be heard. Regarding Mother’s argument that there was a procedural error at the
17 November 12, 2019, eligibility team meeting at which OHI was not considered because a school
18 nurse was not in attendance, it is without merit. The eligibility team agreed that the OHI
19 category could be considered at a later meeting when the “parent -requested IEE FBA and OT
20 are complete or following a parent or team member request for a new eligibility
21 determination...” (Respondent Exhibit 91) Thereafter, at the June 22, 2020, eligibility team
22 meeting, the team considered OHI and once again determined that Student was not eligible for
23 special education. There were no procedural defects with regard to any of these eligibility
24 meetings.
25
26

27 Although Student may have a disability, the evidence demonstrated that Student does not
28

1 require specially designed instruction to perform at grade level. Independent Evaluator No. 5, a
2 witness called by Mother, confirmed that regarding the 3 skills based assessments she
3 recommended for Student, they could be completed on any child whether in special education,
4 on a 504 plan, or in general education, that regarding her recommendation for a positive support
5 plan it could be provided to Student through a 504 plan, that a general education student or a
6 student with a 504 plan can have a “behavior plan” and that many of the recommendations made
7 in her report are just good teaching practices that teachers may implement with any student.
8

9 Furthermore, the overwhelming evidence indicated that when Student is interested in a
10 subject (ie. Robotics), or Student’s attitude is positive, or Student’s teachers gave Student some
11 encouragement, Student could complete the school work without modifications to the
12 curriculum. Despite having the ability to do the school work, Student consistently and
13 intentionally chose not to. “Not every student who falters academically owes [their] difficulties
14 to a disability. Academic challenges may reflect personal losses, family stressors or
15 unwillingness to accept responsibility on the part of the student.” *T.B., Jr. by T.B., Sr. v. Prince*
16 *George’s County Board of Education*, 897 F.3d 566 (2018). Similar to the facts in the present
17 case, in *T.B.*, the court noted that, “virtually every teacher ... testified that Student was capable
18 of performing satisfactory work but that his frequent absences and failure to do assignments
19 necessarily led to poor or failing grades.” *T.B.*, 897 F.3d at 576. In affirming the ALJ and
20 district court, the court of appeals concluded that the student did not require special education.
21 “Poor motivation and poor performance do not always and invariably lie at the feet of teachers
22 and schools. Students themselves must try.” *Id.* at 578. (*See also Hood v. Encinitas Union*
23 *School District*, 486 F.3d 1099 (9th Cir. 2007)(The appellate court affirmed the district court and
24 the hearing officer’s decision that the student was not entitled to special education services
25 because her needs could be met by appropriate accommodations in the regular education
26
27
28

1 environment; school district determined that a Section 504 Plan would be sufficient to serve
2 student's needs)⁸ In the present case, Student does not require specially designed education and
3 related services.
4

5
6
7
8 **VI.**


9 **ORDER**

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

11 Consistent with the findings of the DCSD eligibility teams, Student is not eligible to
12 receive special education services. Student was properly exited from special education on
13 January 24, 2019. FGG

14 Regarding Petitioner's remaining claims as set forth in the Second Amended RDP, the 2-day hearing has
15 been scheduled for January 14th and January 15th, 2021.

16 **Dated:** December 10, 2020.

17
18 
19 _____
20 Hearing Officer
21 Kevin P. Ryan, Esq.
22 232 Court Street
23 Reno, Nevada 89501
24 (775) 322-5000
25 trialryan@aol.com
26

27 _____
28 ⁸*C.M. v. Department of Education, State of Hawaii*, 58 IDELR 151, 476 F.Appx 674 (9th Cir. 2012)(Unpublished)(Student did not require special education services, student's needs could be met through a 504 plan).