

**BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1213-39**

**HEARING OFFICER'S
MEMORANDUM DECISION AND ORDER**

THIS MATTER arises on the Petitioners' Due Process Hearing Notice (Due Process Request), filed with the State of New Mexico Public Education Department on April 3, 2103. Due Process Hearing Notice, April 3, 2013 (noted received by Department of Education, Special Education Bureau on April 3, 2013). The Petitioners' Request for Due Process is granted in part.

PROCEDURAL BACKGROUND

The Respondent LEA responded to Petitioners' Due Process Request on April 12, 2013. [LEA's] Answer to Due Process Hearing Notice, April 12, 2013 (Response). On April 29, 2013 the Respondent filed its Amended Answer to Due Process Hearing Notice. Amended Answer to Due Process Hearing Notice, April 29, 2013 (Amended Response).

The parties timely filed their statement of issues for the due process hearing on August 13, 2013. *See* Joint Statement of Issues, August 13, 2013. A statement of stipulated facts was filed on September 10, 2013. *Stipulated Facts*, September 10, 2013. The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibit List, September 10, 2013; Petitioners' Witness List, September 11, 2013; Respondent's Witness List, September 11, 2013; and Respondent's Exhibit List, September 9, 2013.

The due process hearing commenced on September 16, 2013, and concluded on September 20, 2013. *Tr.*, pp. 1 — 1526. Both parties were well-represented by their respective trial counsel - Jacquelyn Archuleta-Staehlin and Karen Kilgore for the Respondent, and Debra Poulin and Tara Ford for the Petitioners. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on October 25,

2013. Tr. 1523. The parties jointly requested an extension for issuance of the hearing officer's decision, which was granted, for filing of his decision to on or before November 22, 2013. Tr. 1523. Subsequently two extensions were granted for the parties to file their Proposed Findings of Fact and Conclusions of Law, with written argument. *See* Letter Order, October 18, 2013, and Extension Order, October 30, 2013.

The Respondent filed its proposed Findings of Fact and Conclusions of Law, as well as a written argument brief, on November 1, 2013. [LEA's] Findings of Fact and Conclusions of Law, November 1, 2013, and [LEA's] Brief in Chief, November 1, 2013. The Petitioners filed proposed Findings of Fact and Conclusions of Law, as well as a written argument brief, on November 1, 2013. Petitioners' Proposed Findings of Fact and Conclusions of Law, November 1, 2013, and Petitioners' Closing Argument and Memorandum of Law, November 1, 2013.

This decision is due on or before November 22, 2013. Tr. 1523.

ISSUES AS INITIALLY PRESENTED BY THE PARTIES

1. Whether the LEA failed to provide Petitioners with copies of the 2008 evaluations until April 2011, whether it failed to convene a meeting to review the Student's evaluations to determine his eligibility after the 2008 evaluations, whether it failed to provide Petitioners with notice of IDEA procedural safeguards in connection with the 2008 evaluations and, if so, whether these alleged failures violated requirements of the IDEA and significantly impeded the Petitioners' opportunity to participate in the decision-making process regarding FAPE, causing a deprivation of educational benefit to the Student and/or denied him a FAPE.

2. Whether the LEA failed to develop appropriate IEPs to address the Student's needs arising from his disabilities, including the need for direct, specially designed instruction, related services, and accommodations and modifications, and, if so, whether this resulted in a denial of a FAPE.

3. Whether the LEA failed to implement the Student's IEPs, including a failure to provide special education, related services, accommodations, modifications, and assistive technology required by the IEP, and, if so, whether these failures were material to the provision of FAPE and/or constituted deprivation of a FAPE.

4. Whether the LEA failed to conduct an assistive technology evaluation and, if so, whether this failure violated the requirements of the IDEA and significantly impeded Petitioners' opportunity to participate in the decision-making process regarding FAPE, causing a deprivation of educational benefit to the Student and/or denied him a FAPE.

5. Whether the LEA failed to conduct an adequate evaluation or assessment of the Student's behavior, and, if so, whether this failure violated the requirements of the IDEA and significantly impeded Petitioners' opportunity to participate in the decision-making process regarding a FAPE, causing a deprivation of educational benefit to the Student and/or denied him a FAPE.

6. Whether the LEA's alleged refusal to provide an independent functional behavior assessment violated the requirements of the IDEA and, if so, whether this alleged refusal significantly impeded the parents' opportunity to participate in the decision-making process regarding FAPE, causing a deprivation of educational benefit to the Student and/or denied him a FAPE.

7. Whether the LEA failed to provide positive behavioral interventions and supports, and other strategies, including an appropriate program of academic instruction, to address behaviors impeding the Student's learning and, if so, whether this failure violated the requirements of the IDEA and denied the Student a FAPE.

8. Whether the LEA failed to provide teachers with training to ensure they understand the Student's disabilities and the need to provide him with special education services with accommodations and modifications to ensure the Student's successful participation in the regular education curriculum and, if so, whether this failure violated the requirements of the IDEA and denied the Student a FAPE.

9. Whether the LEA failed to conduct an adequate transition assessment of the Student and, if so, whether this failure violated the requirements of the IDEA and significantly impeded the parents' opportunity to participate in the decision-making process regarding a FAPE, causing a deprivation of educational benefits the Student and/or denied him a FAPE.

10. Whether the LEA failed to develop and implement an appropriate transition plan for the Student and, if so, Whether this failure violated the requirements of the IDEA and denied him a FAPE.

11. Whether the LEA denied Petitioners a meaningful opportunity to participate in the IEP process for the Student and/or retaliated against Petitioners and the Student by, among other things, attempting to chill their advocacy of the Student by securing the attendance of legal counsel at IEP meetings where Petitioners were not represented and obtaining a baseless restraining order against Petitioners in response to attempts to seek advocacy and help for the Student.

12. Whether an award of equitable relief to Petitioners is appropriate, including ordering that the LEA arrange, pay for, and cooperate in an independent functional behavioral assessment of the Student by an evaluator of Petitioners' choice and retain the evaluator to train/collaborate with staff and parents on an IEP to address the Student's behaviors, with reimbursement for a private evaluation, and compensatory education services including direct, specialized reading instruction by an expert in instructing students with dyslexia, and an order for an IEP meeting which includes attendance of the private evaluators at the LEA's expense.

13. Whether the DPHO has jurisdiction over any claims other than IDEA claims.

14. Whether any or all of the claims asserted by the Petitioners which are beyond the two-year statute of limitations are time barred.

15. Whether there was a requirement to conduct evaluations of the Student which fall inside the time period which is within the statute of limitations.

16. Whether there was any request or recommendation to conduct an assistive technology evaluation by either parent or the IEP team; if there was any indication that there may be an assistive technology need.

17. Whether there was an adequate request made for an independent evaluation by Petitioners.

18. Whether the evaluations and/or assessments of the Student's behavior conducted by the District were within the generally accepted scope of evaluative instruments.

19. Whether there was a need for a functional behavior assessment and whether the steps taken by the District were adequate to address any behavioral issues.

20. Whether there is a specific “training” requirement in the IDEA applicable to the claims raised in this matter.

21. Whether parental interference impeded the LEA’s ability to meet the Student’s special education needs.

See Joint Statement of Issues, August 13, 2013.

The issues noted above were clarified through the proposed Findings of Fact and Conclusions of Law submitted by the parties post-hearing; therefore, those matters contained in the joint issues by the parties which are not preserved through the proposed Findings of Fact and Conclusions of Law submitted by the parties are deemed abandoned.

LEGAL OVERVIEW

A due process complaint must allege a violation which occurred not more than two years before the date the parent (or public agency) knew or should have known about the alleged action which forms the basis for the complaint, unless the State provides for another limitation period. 34 C.F.R. § 300.507(a)(2). New Mexico retains the two-year limitation period. § 6.31.2.13(I)(18)(b) NMAC. Exceptions to the two-year limitation arise for a parent to file a due process complaint if the parent was prevented from requesting the hearing, which was: (1) due to specific misrepresentations by the LEA that it had resolved the problem which formed the basis for the due process complaint, or (2) due to the LEA’s withholding of information from the parent required “under this part to be provided to the parent.” 34 C.F.R. § 300.511(f)(1)&(2). § 6.31.2.13(I)(18)(c)(i)&(ii) NMAC. In computing time periods, the “day of the act, event or default from which the designated period of time begins to run shall not be included,” with the last day of the period included unless it falls

on a Saturday, Sunday or legal holiday, at which time it will be next business day. § 6.31.2.13(M)(1) NMAC.

Persuasive guidance regarding limitation interpretation is found in the Third Circuit of Appeals opinion in *D.K., et al., v. Abington Sch. Dist.*, 696 F.3d 233, 59 IDELR 271 (3rd Cir. 2012). The Circuit Court concluded that the first step for a determination as to whether exceptions to the limitation period apply is whether the parent was prevented from requesting a due process hearing due to one of the alleged two claimed exceptions. *Id.*, 59 IDELR 271, p. 12. It concluded the terms “prevented from” and “due to” create a causation requirement. *Id.* “Thus, where the evidence shows, for example, that parents were already fully aware of their procedural options, they cannot excuse a late filing by pointing to the school’s failure to formally notify them of safeguards.” *Id.*, at pp. 12-13. If this threshold is met, then the parent must prove either (1) the specific misrepresentation exception (demanding that the school must have “intentionally misled” or “knowingly deceived” the parents), or (2) the withholding information exception (demanding that the withheld information means only statutorily mandated disclosures, such written notice, explanation, or other forms specifically required to be disclosed under the IDEA). *Id.*, at p. 12.

The burden of proof rests with the party challenging the IEP. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990). In this action, the burden rests, therefore, with the Petitioners (the Student).

Exhaustion of administrative measures counsels that parents first turn to educational professionals to remedy disputes regarding a child’s education. *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1065-66 (10th Cir. 2002)(student must first assert right to be evaluated for IDEA eligibility before making demand for hearings and

procedures to address IDEA claim). During the pendency of the administrative due process proceeding, the child must remain (stay-put) in his then-current educational placement. 34 C.F.R. § 300.518.

All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a)(i). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. 34 C.F.R. §300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. §6.31.2.10(D)(1)(a)&(b) NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenbergs v. Bd. of Educ. Of Salt Lake City Sch. Dist.*, 181 F. Supp. 1307 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See id.* at 1311 (quoting *W.B. v. Matual*, 67 F.3d 848, 501 (3rd Cir. 1995)). That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. *See Reg'l Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). A LEA's failure to meet its "child find" obligation is a cognizable claim. *See Compton Unified Sch. Dist. v. Addison, et al*, 598 F.3d 1181 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024 (8th Cir. 2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150 (1st Cir. 2004)). A school district is absolved of an assessment duty for provisions of services if the student or parents refuse to consent for which the LEA requested consent. 20 U.S.C. §

1414(a)(1)(D)(ii)(III)(aa). *See D.A. v. Fairfield-Suisun Unified Sch. Dist., et al*, 62 IDELR 17 (D.C., E.D. Cal., 2:11-cv-01174-TLN-KJN)(parents did not consent to testing, thus, thus no assessment made, and school district absolved from assessment duty).

A “child with a disability” is defined as a child evaluated and determined to be eligible for, among other things, other health impairment and specific learning disabilities. 34 C.F.R. § 300.8(a). To be qualified, the child must be in need of special education and related services because of the other health impairment. *Id.*

An “other health impairment” definition of child with a disability requires “limited strength, vitality, or alertness, including heightened alertness to environmental stimuli” resulting in “limited alertness with respect to the educational environment” and which is due to chronic or acute health problems including, among other things, attention deficit disorder or attention deficit hyperactivity disorder. 34 C.F.R. § 300.8(c)(9). The chronic or acute health problem must adversely impact the child’s educational performance. *Id.* at § 300.8(c)(9)(ii).

An adverse impact on education performance does not require the impact to be substantial, significant, or marked. *See Mr. I. v. Maine Sch. Admin. Dist.*, No. 55, 480 F.3d 1, 11-12 (1st Cir. 2007). Although taken in part from Maine’s educational regulatory scheme, nonetheless, in *Mr. I. v. Maine Sch. Admin. Dist.*, *id.*, educational performance was found to be based on the underlying notions that children are qualified for services to target all their special needs, be they academic, physical, emotional and social. *Id.* at 12 (quoting *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir. 1993)). Academic progress does not become the sole measure of FAPE. *See Alleyne v. New York State Educ. Dept.*, 691 F. Supp. 2d 322, 344 (N.D.N.Y. 2010)(citing First, Second and Seventh Circuit cases considering

impact on social and other behaviors). California's educational scheme, however, primarily gauges educational performance through academic measures. *See R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir. 2007). As noted, New Mexico does not have a definition of educational performance. *See* 6.31.2.1, *et seq.* NMAC. Thus, the New Mexico regulations are in accord with the Federal Regulations in their lack of definition of educational performance. *See* 34 C.F.R. 300.1 *et seq.* According to the federal Office of Special Education Programs (OSEP), the IDEA and federal regulations "clearly establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance." *Letter to Clarke*, 48 IDELR 77, 107 LRP 13115 (OSEP March 8, 2007)(eligibility for speech and language impairment if adversely affecting educational performance). "It remains the Department's position that the term "educational performance" as used in the IDEA and its implementing regulations is not limited to academic performance." *Id.* Each case is to be evaluated independently. *Id.*

A "specific learning disability" is defined as "a disorder in one or more of the psychological processes involved in understanding or using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations, including conditions such as . . . dyslexia." 34 C.F.R. § 300.8(c)(10). "Dyslexia" is defined in New Mexico as "a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in

reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.” §6.31.2.7(B)(6) NMAC.

When a student is suspected of having a specific learning disability then the determination is made by a team including the student’s parents and a regular teacher, or, if no regular teacher, a regular classroom teacher qualified to teach a student of the student’s age group and at least one person who is qualified to conduct individual diagnostic examinations of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher. 34 C.F.R. § 300.308.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program (IEP) developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. “The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the ‘free appropriate public education’ mandated by the Act.” *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. *See CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 638 (8th Cir. 2003) (persuasive, citing *Rowley*, 458 U.S. at 202). Meaningful educational benefit is to be provided to the child, although that means neither maximizing

the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). Some benefit and meaningful benefit are similar, although not synonymous. See *Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)((distinguishing *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008)(stating that the test is some benefit as compared with meaningful benefit)). See also *Meza v. Bd. of Educ. of the Portales Mun. Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide "some educational benefit").

Pursuant to 20 U.S.C. § 1415(b)(3), "a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's education." *Murray*, 51 F.3d at 925. As a result, a "parent wishing to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency." *Id.*

Various steps must be followed not only to design an IEP, but to implement it as well. See *Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). An IEP is to be in place at the beginning of each school year. See 34 C.F.R. § 300.323(a). The IEP team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; ii) is knowledgeable about the general education curriculum; and iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional

implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. *See* 34 C.F.R. § 300.321. This is a list of individuals who must participate in designing an IEP – an expert on the child’s specific disability is not required. *See R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1122 (9th Cir. 2011).

Related services include transportation and psychological services. *See* 34 C.F.R. § 300.24(a).

An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *See* 34 C.F.R. § 300.324 (a)(2)(iv)&(v).

A child’s unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray*, 51 F.3d at 926. Mainstreaming to the maximum extent possible should take place if the child cannot be educated full-time in a regular education classroom with supplementary aids and services. *See L.B. v. Nebo*, 379 F.3d 966, 976-978 (10th Cir. 2004). Parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208. Methodology issues may arise only if the appropriateness of the methodologies is questioned. *See, e.g., Y.S., et al, v. New*

York City Dept. of Edu., 113 LRP 42717 (D.C. S.D.N.Y., 12 Civ. 2590 WHP, Sept. 24, 2013), at p. 6 (TEACCH methodology made issue by school).

Written notice is required regarding issues for the identification, evaluation or placement of a child. See 34 C.F.R. § 300.503; § 6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. See 34 § C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. See *Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. See *Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). See also *Tenn. Dept. of Mental Health and Mental Retardation v. Paul B., et al*, 88 F.3d 1466 (6th Cir. 1996) (failure to provide notice of “stay-put” not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. See *Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004). Misinformation provided to parents may prevent them from meaningfully participating in the IEP process. *Bell v. Bd. of Educ. of Albuquerque Pub. Schs.*, 52 IDELR 161 (D.N.M. 2008).

Among other things, when the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 C.F.R. §300.24(a)(2)(I); §6.31.2.11(F)(1) NMAC. The New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBSs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. §6.31.2.11(F)(1) NMAC. The use of the FBA/BIP is, however, an encouragement – they are not required components of the IEP. *See* 34 C.F.R. §300.320. The IEP team makes the determination of whether a behavioral intervention or support is required, rather than a regulatory requirement. *See In re: Student with a Disability*, 110 LRP 34262 (New Mexico SEA Co809-29)(citing Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46683(2006)). A student may be removed from his regular classroom if necessary to protect his or her safety or the safety of other students. *See* 20 U.S.C. § 1412(a)(5); *Rowley*, 458 U.S. at 181, n.4.

Transition services are to be part of the IEP. 34 C.F.R. §300.320(b). The IEP must include: (1) appropriate measurable post-secondary goals based on age appropriate transition assessments which are related to training, education and employment, and, when appropriate, independent living skills; and (2) transition services, including study courses, needed to assist the student to reach those goals. *Id.* An alleged failure of the transition component of the IEP is a procedural violation. *See Bd. Of Educ. v. Ross*, 486 F.3d 267, 276 (7th Cir. 2007). Broad vision statements, such as attending college and working with computers, are not appropriate, measurable annual goals developed under timely transition

assessments. *Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of the Mass. Dep't of Elementary and Secondary Educ., et al.*, 737 F. Supp. 2d 35 (D.C. Mass. 2010).

The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.323(c)(2). “The Court concludes that a claim that the school district has failed to fully implement an IEP should be considered under the material failure standard adopted by the Fourth, Fifth, Eighth, and Ninth Circuit Courts of Appeals. Under this standard, when the discrepancy between the services the school district provides and the student’s IEP is material, and the student suffers harm, or receives only a trivial educational benefit, the school district has denied the student a FAPE and violated IDEA.” *Gallegos v. Albuquerque Public Sch., et al*, Proposed Findings and Recommended Disposition, February 28, 2013, adopted by Order Adopting Magistrate Judge’s Proposed Findings and Recommended Disposition, April 5, 2013 (D.N.M. CV 12-30 MV/CEG), p. 16.

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Bell*, 53 IDELR at 161.

A hearing officer’s determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child’s right to a free appropriate public education, (2) significantly impeded the parent’s opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural

defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, comprised the student's right to an appropriate education, or caused a deprivation of educational benefits. *O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008). State educational guidelines and frameworks, not a part of the regulatory framework, are simply guides for educators, and are not mandatory requirements under the IDEA. *See D.A. v. Fairfield-Suisun Unified Sch. Dist., et al*, 62 IDELR 17 (D.C., E.D. Cal., 2:11-cv-01174-TLN-KJN).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence Cnty. Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005); *Meza*, D.N.M. Nos. 10-0963, 10-0964. There must be evidence to allow an accounting or explanation to tie a compensatory education

award to past violations. *See Meza, id.* That is, a compensatory award determination must consider the student's unique educational needs, which include consideration of present educational services, as well as the specific educational deficits which result from the LEA's denial of a FAPE. *Gallegos v. Albuquerque Pub. Schs., et al.*, Proposed Findings and Recommended Disposition, February 28, 2013, adopted by Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, April 5, 2013 (D.N.M. CV 12-30 MV/CEG), p. 30. Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the in the student's education. *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). A hearing officer is without jurisdiction to award costs or attorney's fees. *See* 34 C.F.R. § 300.517(court award for fees and costs).

FINDINGS OF FACT

1. The Student was born on November 14, 1996. He is 16 years old. Stipulated Facts, September 10, 2013.

2. The Student is identified as a student with a disability eligible for receipt of special education under the IDEA on the basis of Specific Learning Disabilities and Other Health Impairment (ADHD). *Id.*

3. The Student currently attends the tenth grade at an LEA high school, WLVHS. *Id.*

4. The LEA is responsible for the Student's education. *Id.*

5. The LEA developed an initial IEP for the Student on April 27, 2011. *Id.*

6. The LEA completed a psychological evaluation of the Student in September 2011.

Id.

7. The LEA completed a psychoeducational evaluation of the Student in December 2011. *Id.*

8. On January 11, 2012, the LEA conducted an annual review MDT/IEP meeting at which the Student was identified as eligible for special education services under OHI for ADHD and that he had academic needs in reading, math and written language. *Id.*

9. In April 2012, the LEA obtained a psychoeducational reevaluation of the Student, which concluded that the Student met criteria for identification as having Specific Learning Disabilities in math and written expression. *Id.*

10. In April 2012, the LEA conducted a psychological reevaluation of the Student, which concluded that the Student did not meet eligibility criteria for Emotional Disturbance or Other Health Impairment (due to improvements in behavior caused by medication for ADHD). *Id.*

11. At a May 21, 2012 Multi-Disciplinary Team meeting, the team determined that the Student was eligible for special education as a student with Specific Learning Disability in math and written language. *Id.*

12. In October 2012, the Student was evaluated by a private neuropsychologist, who concluded that the Student had a Specific Learning Disability in reading which the neuropsychologist determined was Dyslexia and that the Student had significant weaknesses in aspect of attention and executive functioning. *Id.*

13. Student was adopted by Petitioner Teresa Weathers' parents, Lee and Margie Atencio. Joint Exhibit ("JE") KK, p. 2.

14. Student has lived with Petitioners (acting parents), his adoptive godparents since he was about two years old. They have cared for him on a daily basis since that time, including providing food, housing and medical care. Petitioners consider Student to be their son and he has been raised as their son. Transcript ("TR") 731, 1153-1157 (J. Weathers); TR 977, 987, 1001-1002 (T. Weathers).

15. Petitioners have made educational decisions for Student since he was in elementary school and have been his "Parents" as that term is defined by the IDEA. *See e.g.*, Petitioners' Exhibit ("PE") 29, pp. 7, 11 ("now lives with uncle and aunt"). In addition, Student's adoptive father, Lee Atencio, has provided Petitioners with documentation allowing them to make educational decisions for Student. TR 1153-1157 (J. Weathers)

16. The West Las Vegas School District has acknowledged Petitioners as "Parents" for educational purposes at all material times. *See e.g.* PE 29, pp. 11, 18.

17. Student has attended the West Las Vegas Elementary Schools since elementary school with the exception of one year when he was home schooled from approximately October 2009 to May 2010. TR 738-741 (J. Weathers).

18. On September 10, 2007, the District documented that Student was significantly below grade level in reading, written language and math and that there was a plan for testing. PE 29, pp. 8, 11.

19. In October 2007, the District conducted a SAT meeting with Petitioner Teresa Weathers and her father, Lee Atencio, in attendance. Both Mrs. Weathers and Mr. Atencio signed SAT documentation as Parents for Student. *See* PE 29, p. 7.

20. In January 2008, the District prepared a form to secure parental consent for special education evaluation of Student to include achievement, adaptive behavior, perceptual/motor tests and psychological testing. RE G, pp. 1-2. The form was not provided to or signed by Petitioners.

21. On April 16, 2008, the District conducted a follow-up SAT meeting for Student. Petitioners Julian and Teresa Weathers attended as Student's Parents. PE 29, p. 18. Mr. Atencio was not in attendance at this meeting. *Id.* The team again discussed the special education evaluation of Student, which had not been started yet. *Id.*

22. The District did not provide Petitioners with notice of IDEA procedural safeguards at that time or any time during that school year. TR 979-980 (T. Weathers).

23. The District produced a parental consent form for evaluation that it claims was signed by Mr. Atencio on April 18, 2008, which was two days after Petitioners had acted as Student's Parents at the April 16, 2008 SAT meeting. Respondent's Exhibit ("RE") G, p. 3.

24. The District did not obtain Petitioners' written consent for evaluation, although they agreed with the SAT team recommendation that Student needed evaluation.

25. The District conducted an educational diagnostic evaluation of Student by a District diagnostician in May 2008. PE 21. At the time of the evaluation, the District called Petitioner Teresa Weathers to come sit with Student during the evaluation due to concerns about his inattention. Mrs. Weathers sat in on the evaluation with Student. TR 977 (T. Weathers).

26. The District diagnostician issued an evaluation report dated May 28, 2008. PE 21.

27. Julianne Hancock testified as an expert in special education, evaluation, and reading. TR 539. She holds a license as a School Psychologist, Level 2 with the State of New Mexico and she is nationally certified as a School Psychologist. She is also licensed in the State of New Mexico as an Educational Diagnostician and in Elementary Education, Special Education. PE 18. Her testimony was credible and reliable.

28. The District conducted a psychological evaluation of Student in May 2008, but the evaluation report was not completed until months later, in early August 2008. PE 22.

29. The District psychologist reported/concluded among other things that Student might have benefitted from a neurological evaluation and that he might have been frustrated with his school work. PE 22, p. 9.

30. The District psychologist recommended that Student might meet the criteria for identification as eligible for special education on the basis of Emotional Disturbance. PE 22, p. 9.

31. The District did not provide Petitioners with a copy of the educational diagnostic evaluation report or psychological evaluation report when they were completed. The District did not provide this evaluation report to Petitioners until around April 27, 2011. TR 745, 755, 1020 (J. Weathers).

32. At the beginning of the 2008-2009 school year, Student was in the 5th grade at Tony Serna Elementary School. Mrs. Weathers asked Student's school principal about the evaluations of Student and was advised that if the District had said nothing to her, then everything must have been okay.

33. The District did not convene a meeting with Petitioners to determine Student's eligibility for special education after its 2008 evaluations were completed. TR 983 (T. Weathers); TR 745, 755, 1020 (J. Weathers).

34. In the 2009-2010 school year, Student attended the 6th grade at the District's Middle School for approximately one month. Student had serious academic and behavioral difficulties at school. The District called Petitioners on a regular basis to take Student home from school. TR 740 (J. Weathers).

35. In late September or early October 2009, Petitioners were advised by the School Principal that they should take Student out of school and home school him because of the problems that he was having in school. Petitioners were not provided with any information about any other option for Student and again were not provided with notice of IDEA procedural safeguards. Petitioners disenrolled Student and home schooled him for the remainder of that school year. TR 740-741 (J. Weathers).

36. In August of 2010, Petitioners returned Student to the District's school because of concern about his isolation in a home school program. TR 741-743 (J. Weathers).

37. Early in 2011, Petitioners took Student to his regularly scheduled doctor's appointment and explained their concerns about how Student was doing at school. His physician provided forms for teachers to fill out and Petitioners distributed those forms to the teachers. TR 745-747 (J. Weathers).

38. In April 2011, Petitioners obtained a medical diagnosis of Attention Hyperactivity Deficit Disorder, Combined Type, from Student's primary care physician and promptly provided this information to the District. TR 745-746 (J. Weathers).

39. After Petitioners provided the medical diagnosis the District took steps to address Student's special education needs. At that time, the District convened an IEP team meeting for Student on April 27, 2011 and determined that he was eligible for special education on the basis of Other Health Impairment (OHI). JE AA, p. 1. At this meeting, the District provided Petitioners with a copy of IDEA procedural safeguards notice for the first time. TR 747 (J. Weathers).

40. At the April 2011 IEP meeting, the District provided Petitioners with the 2008 evaluations for the first time. TR 755 (J. Weathers).

41. On April 27, 2011, The District proposed to evaluate the Student and Parents signed the consent form for evaluations prepared by the District. JE AA, p. 26; TR 1429 (Rubin); TR 1458 (J. Weathers).

42. The District did not complete the evaluations of Student within 60 days or "prior to or at the beginning of" the next school year, as set forth in the 2011 IEP prior written notice. *See* JE AA, p. 26.

43. The District did not conduct or complete the psychological evaluation of Student until September 27, 2011 and did not conduct or complete the educational diagnostic evaluation of Student until December 11, 2011. *See* JE KK; JE LL. The psychological evaluation did not assess Student's cognitive abilities or achievement. JE KK.

44. The District did not advise Petitioners that it did not believe that the 2008 evaluation of Student by the District diagnostician was valid until there was an IEP on November 11, 2011. *See* JE BB; TR 1019 (J. Weathers).

45. The District's December 11, 2011 educational diagnostician evaluation did not any assessment of intellectual functioning or consideration of whether Student had specific

learning disabilities. *See* JE LL; TR 564 (Hancock); TR 1332 (no cognitive testing done) (Rubin).

46. The District's current Special Education Director, Jeannie Rubin, who conducted the December 11, 2011 evaluation of Student, testified that she limited her testing because Petitioners had not checked the intellectual functioning box on the consent form. TR 1327, 1332, 1354 (Rubin). However, the consent form was prepared by the District and signed by Mr. Weathers as presented to him by the District. TR 1450, 1451 (J. Weathers). Ms. Rubin did not discuss the issue of whether additional cognitive assessment should be completed to evaluate Student for Specific Learning Disabilities. TR 1429 (Rubin).

47. Ms. Rubin is the District's Special Education Director and has been in that position since October 2, 2012. TR 1302. Her duties include oversight of approximately 220 IEPs for students who have been identified with disabilities. She supervises at least ten caseload teachers as well as ancillary staff, including one school psychologist, three speech pathologists, two social workers, one diagnosticians and one occupational therapist (8 people). She also trains and meets with her three designees. TR1303-05.

48. Ms. Rubin graduated from NMHU in 1999 with a bachelor's degree with an emphasis in elementary education and a minor with a TESL endorsement. She received a Master's degree from the College of Santa Fe in 2002 in counseling with a focus in at-risk youth. She did a two-year postgraduate program at NMHU in Administration and a two-year program at College of the Southwest in Educational Diagnostics. She holds four Level 3 licenses with the State of New Mexico: Level 3-B Administrative license, Level 3-A instructional leader teaching license, with an endorsement in reading and TESL, Level 3-A counselor license and a Level 3-A diagnostic license. TR 1306-08.

49. Ms. Rubin has worked as a teacher, a counselor and as a diagnostician for seven years, conducting 25 to 30 evaluations per year. TR 1313, 1318. For two years she was a full-time diagnostician with High Plains Regional Education Cooperative servicing five northeastern, rural New Mexico school districts. TR 1308.

50. Ms. Rubin is familiar with the Student's curriculum in the eighth grade (Exhibit AAA) because she reviewed the files while working as a diagnostician and in the ninth grade (Exhibit BBB) because she has been the Special Education Director since October 2012. TR 1321, 1338.

51. In December 2011, at the Student's godparents' request, Ms. Rubin conducted a three-year reevaluation diagnostic evaluation of Student. (Exhibit LL); TR 1340. A diagnostic evaluation consists of the diagnostic piece (academics) and the cognitive assessments piece (IQ, including verbal comprehension, processing and working memory processing). TR 1326.

52. Ms. Rubin learned from Student's records that he had been diagnosed with ADHD. TR 1329. According to Ms. Rubin's evaluation, Student's scores were not consistent, meaning he has the skill, but has a performance deficit. TR 1347. This is consistent with ADHD, which is tied to performance measures. TR 1348. The Student earned a standard score within normal limits. TR 1355-57.

53. Thus, Ms. Rubin's understanding in TEAM, is that the Student should not be identified with OHI and SLD as concomitant exceptionalities, as these are both primary disabilities that are not found together on the Multiple Disabilities Category in the NM-TEAM manual. TR 1364.

54. Nonetheless, it is found that one could be primary and the other secondary.

55. In her diagnostic evaluation of Student, Ms. Rubin administered the Woodcock-Johnson achievement test for achievement proficiency in reading, writing, math, listening comprehension and oral expression. TR 1337.

56. Ms. Rubin also reviewed the Woodcock-Johnson which had been administered three years earlier and those scores are noted in her diagnostic evaluation of Student. (Exhibit J-LL, p. 2.)

57. Ms. Rubin also reviewed Student's Standards Based Assessments from Spring 2011 and C.A. scored at the beginning step in reading and math and nearing proficiency in writing and science. TR 1341, 1348-50.

58. Ms. Rubin also reviewed and interpreted Student's MAP scores, which are short-cycle assessments. TR 1342.

59. Ms. Rubin also reviewed the evaluation by school psychologist Ana Gonzales. TR 1350.

60. The Student came into the testing session very shy and reserved and became less reserved and more talkative. The testing results were valid. TR 1352.

61. Student's oral language and listening comprehension scores fell in the average range. A student with dyslexia will have scores in the significantly impaired range and C.A. did not have scores in that low range. TR 1354.

62. Student's areas of need, according to Ms. Rubin's assessment, are reading, math and written language. TR 1354, 1358.

63. From the data Ms. Rubin reviewed, she found that Students's problems in school are due to his ADHD and thus, he continued to qualify under OHI and needed specially designed instruction. TR 1359. As a result, based on her review of the then-existing data

she did not suspect that cognitive testing for a specific learning disability was needed, and thus the box for cognitive testing was not completed by her, and there is no evidence that the Petitioners otherwise asked that cognitive testing be provided.

64. Ms. Rubin's recommendations were to implement the Tier 3 special education interventions, including systematic, small group, targeted instruction, meaning following the curriculum the way it is intended to be delivered with fidelity: lay the foundation, scaffold (building on skills) and reteach. TR 1360. Reading First-Teachers have been trained to use the scientific researched based Core Curriculum. Read 180 was used by his Title I teacher. Collaboration time is done among teachers on a regular basis.

65. On March 16, 2012 the District held another IEP meeting. Parents continued to express concerns about Student's math, reading and writing skills and lack of supports being provided to assist Student. JE DD, p. 6.

66. Ms. Martinez issued an evaluation report dated April 20, 2012. In her report, Ms. Martinez concluded that the IEP Team should give specific consideration to whether Student was eligible as a student with Specific Learning Disability in the areas of math and written language. She noted that Student's phonological awareness scores were in the poor range when compared to age level peers. JE MM, p. 8.

67. Petitioners were provided with Ms. Martinez's report on May 21, 2012. This was the first time that Petitioners had been provided with information indicating that Student had Specific Learning Disabilities. JE EE; *see also* JE MM.

68. On May 21, 2012, the District convened an IEP meeting for Student and he was identified as a student with Specific Learning Disabilities in math and written language. *See* JE EE, pp. 1, 6; JE MM.

69. In August 2012, the District provided an independent psychological evaluation of Student. This was because of a mediated agreement. PE 23; JE OO. This evaluation confirmed Student's identification as a student with Specific Learning Disabilities and ADHD. It also identified that Student's "learning disabilities and his anticipated performance in school may trigger anxious behaviors or reactions[.]" JE OO, p. 16. The report's recommendations focused on positive behavioral support and structure.

70. The District convened a Facilitated IEP meeting on September 6, 2012 with NMPED assigned Facilitator Trisha Bergin Lytton. It was at this September 6, 2012 meeting that Student was identified as having Specific Learning Disabilities in math and written language. He was not identified as a student with a Specific Learning Disability in reading. JE FF.

71. Petitioners obtained a neuropsychological evaluation of Student from Dr. Lauren Parks in October 2012. Petitioners used Student's insurance to pay for the evaluation and the District paid for Petitioners' travel expenses in obtaining the evaluation. *See* JE GG.

72. Dr. Parks is an expert in pediatric neuropsychology. TR 133-134. She has an extensive background working with children with learning disabilities, most of whom attend public schools. PE 34. Her testimony was credible and reliable.

73. Dr. Parks is a presently clinical neuropsychologist at the University of New Mexico Hospital. PE 34.

74. She is published and is a conference presenter, with clinical training, research experience, a predoctoral internship, a PhD in Clinical Psychology from the University of New Mexico, and a post-doctoral fellowship in pediatric neuropsychology from Brown University. PE 34.

75. Having had the opportunity to observe Dr. Parks during her testimony, it is found she is credible and weight is given to her opinions over those presented by the District's assessment witnesses.

76. Dr. Parks confirmed Student's identification as a student with ADHD. She also identified Student as a Student with a Reading Disorder, specifically Dyslexia and with a Disorder of Written Expression and Mathematics Disorder. JE PP, p. 8.

77. Dr. Parks also noted that Student experiences anxiety. She recommended external support to assist Student in approaching academic tasks and stressed the importance of understanding that he is not choosing not to do work. She also recommended cognitive behavioral therapy to support him in developing problem-solving skills related to his anxiety. JE PP, p. 9.

78. Dr. Parks recommended special education services, including reading instruction and specific focus on fluency training and instruction in learning strategies related to comprehension. JE PP, p. 10.

79. On November 20, 2012, the District had an IEP meeting at which time Dr. Parks' evaluation was reviewed.

80. At the November 20, 2012 meeting, the District did identify Student with Specific Learning Disability in the areas of Math, Reading and Written Language. However, the District did not ensure that Student's identification on the basis of dyslexia was discussed or determined. JE HH.

81. Dyslexia has instructional implications. Because students with dyslexia have poor spelling and decoding abilities, they often guess at words, they can be very frustrated

by academic tasks and have difficulty with reading fluency. TR 681-681, 702-703 (Monnheimer).

82. At the due process hearing, District Special Education Director Ms. Rubin testified that she did not believe that Student has Specific Learning Disabilities. *See* TR 1334-1336, 1419.

83. In 1980, Ana Gonzales received a master's degree in agency counseling and psychology, with an emphasis in psychology and is a Licensed School Psychologist licensed with NMPED and a Licensed Clinical Therapist licensed with the New Mexico Therapy and Counseling Board. TR 1229-30.

84. As the school psychologist, Ms. Gonzales' duties include testing, individual therapy and counseling and assisting with behavior intervention plans. She performs testing to determine eligibility under the exceptionality of Emotionally Disturbed. Her current caseload is 23 students to whom she provides direct psychology services. TR1230-31.

85. Ms. Gonzales tested Student in 2008 and began providing services to him in January 2012 pursuant to his IEP. Ms. Gonzales saw Student five times and then Student said that his godfather Julian Weathers did not want her to see him until after the Due Process Hearing. Since it is in Student's IEP, Ms. Gonzales continues to attempt to pull him out of class to see him. Last year Student refused to meet with Ms. Gonzales. This school year Student has not been in school when Ms. Gonzales has tried to meet with him. TR 1231.

86. Ms. Gonzales works closely with the clinical social worker and testifies that they are both concerned that Student does not come to school regularly.

87. The District presented testimony which controverts the dyslexia diagnosis. TR 1334-36, 1354. Ms. Rubin, however, is not a pediatric neuropsychologist, as is Dr. Parks. Similarly, although she acts as a school psychologist, Ms. Gonzales, similarly, is not specialist pediatric neuropsychology. To the extent there is conflicting testimony regarding the Student's diagnosis of specific learning disabled, dyslexia, and in context of reading, it is found that the testimony of Dr. Parks is given weight over the testimony of Ms. Rubin and Ms. Gonzales.

88. Student has Specific Learning Disabilities in math, reading and written language. He has dyslexia. TR 155-156 (Parks); JE PP.

89. Student has Attention Deficit Hyperactivity Disorder, Combined Type. He has executive functioning deficits including deficit in the following areas: "(1) processing information at the same rate as his peers, (2) sustaining his attention over a long period of time, (3) attending to verbal and visual details, (4) holding information in working memory, (5) being flexible in his thinking, and (6) integrating information that was not organized for him." JE PP, p. 7; TR 149-152 (Parks). *See also* JE LL; JE MM.

90. Throughout Student's school day, when he is being put in a position to do tasks that involve reading, writing or math, he is at a frustration level. TR 568 (Hancock); JE MM, p. 5.

91. Student has needed, and continues to need, direct, specialized instruction in a small group to address the impact of his Specific Learning Disabilities, dyslexia and executive functioning deficits. TR 191-192, 203-204 (Parks); JE PP; JE LL; JE MM. He needs small group (no more than 3 to 5 students) direct, specialized instruction in a segregated setting for one hour a day, five days a week. TR 574, 595-600 (Hancock). He also

requires systematic reading instruction with a curriculum designed to address the specific skill deficits he has as a result of dyslexia. TR 601 (Hancock). *See also* TR 191-192, 203-204 (Parks); JE PP; JE MM, pp. 6-7.

92. Student needs explicit instruction in decoding and phonological awareness. TR 570 (Hancock); JE MM, p. 6. He needs instruction in reading fluency, reading accuracy, and decoding. TR 146, 164-167 (Parks); TR 560-561 (Hancock); JE PP. Student's need for reading instruction is critical and must be a priority relative to Student's available instructional time. TR 566 (Hancock).

93. Student requires direct instruction in math based on his current math skills, with such instruction to be provided in a one to one, segregated setting. TR 602 (Hancock); TR 169 (Parks); JE MM, p. 5.

94. At the time that the District identified Student as eligible for special education in April 2011 and for the remainder of time that Student attended the District's Middle School, the District did not have direct, specialized small group instruction in special education settings available to its middle school students. TR 401-402, 416-417, 424-425 (Lucero).

95. The only placement that the District discussed with the IEP team was instruction in the general education environment. TR 416-417, 424-425 (Lucero).

96. The District did not orally advise Petitioners of requirements for Least Restrictive Environment (LRE) determinations. Nonetheless, LRE was discussed in writing in the IEP, as noted. TR 416-417, 424-425 (Lucero); TR 1026 (J. Weathers).

97. Student's first IEP was dated April 27, 2011. JE AA. That IEP was developed without any current evaluation. The team did discuss the District's three year old 2008

evaluation. JE AA, pp. 26, 29; *see also* JE BB, p. 23.

98. The April 27, 2011 IEP contains information about present levels of performance in only one area of need – math - for Student. The IEP provides that Student currently has a 23% in his 7th grade CMP Math class and was in the beginning steps in math in the NWEA/MAPs testing. JE AA, p. 6.

99. The April 27, 2011 IEP states that Student “clearly has a need for additional supports in the areas of mathematics,” yet there was no plan to provide Student with any specialized instruction in math to address this area of need. *See* JE AA, pp. 6, 21.

100. The only special education support for Student in the April 27, 2011 IEP was a requirement that Student be provided with 15 hours per week of special education staff support in regular education classes and accommodations and modifications. The April 27, 2011 IEP was without any time in a special education setting where he could receive the small group direct specialized instruction that he needed. JE AA.

101. Student’s next IEP was dated November 8, 2011. At that time, Student was in the 7th grade and had been retained one time so should have been in the 8th grade. The November 8, 2011 IEP was developed without information from any current evaluation of Student’s intelligence and achievement. *See* JE BB, pp. 4-5.

102. The one area that was addressed in the present levels of performance was math. The District reported that according to a Brigance assessment administered on 9/1/11, Student tested at the 2nd grade level with 50% accuracy in math, had a hard time borrowing and carrying over and did not know his multiplication facts. The one academic goal in the IEP was for Student to work toward performing arithmetic operations and their inverses (*e.g.*, addition/subtraction, multiplication/division, square roots of perfect

squares, cube roots of perfect cubes) on real numbers and the criteria for mastery was set at 3rd grade level with 50% accuracy. JE BB, p. 13.

103. At the November 8, 2011 IEP and in her September 27, 2011 psychological evaluation report, the District psychologist reported that Student “did not do well academically last year and is not doing well this year.” JE KK, p. 2. She recommended that Student “should be taught at his level” and “he may require tutoring and or extra help to help him with his academic difficulties.” *Id.* at p. 11.

104. The only special education support in academic classes for Student in the November 8, 2011 IEP was a requirement that Student be provided with 15 hours per week of special education staff support in regular education classes and accommodations and modifications. JE BB, p. 17. The November 8, 2011 IEP did not contain any plan to provide Student with the direct, specialized small group instruction that he needed. *See* JE BB.

105. Student’s next IEP was conducted on January 11, 2012, after Ms. Rubin’s evaluation of Student. In her December 11, 2011 evaluation report, Ms. Rubin specifically reported that Student’s “educational needs cannot be met exclusively through the general education setting” and that his “academic abilities in math, reading and written language remain below those of grade level peers.” JE LL, p. 8. She specifically recommended, among other things, that Student be provided with (1) Tier III Response to Interventions including systematic, small group, targets instruction, (2) reading, language arts and math curriculum that were scientific researched-based programs and instruction delivered in an explicit, consistent, direct manner while maintaining fidelity to the program, (3) reading and language arts interventions that are scientific researched-based programs and instruction deliver in an explicit, consistent, direct manner while maintaining fidelity to the program.

Id.

106. In the January 11, 2012 IEP, the District reported that in a Brigance assessment in math administered on 12/13/11, Student tested at the 2nd grade level with 25% accuracy, thus indicating regression from the September 2011 Brigance assessment results. JE CC, p. 6. The IEP continued the same math goal and objective for Student that was in the November 8, 2011 IEP. JE CC, pp. 16-17.

107. The January 11, 2012 IEP was the first IEP for Student that contained any information about identified areas of academic need other than math. JE CC.

108. For reading, the District reported Brigance assessment results on 12/13/11 indicating that Student was at the 5th grade level in Word Recognition, Reading Orally and Comprehension and that his standard score in the Broad Written Language Cluster of the Woodcock Johnson Tests of Achievement was a 73, in the low range. JE CC, p. 7. In addition, the District reported that Student was at the beginning steps in reading on his NWEA/MAPs tests. JE CC, p. 2.

109. For written language, the District reported Brigance assessment results indicating Student was at the 5th grade level in spelling and sentence writing, that he did not use punctuation marks and that his standard score in the Broad Written Language Cluster of the Woodcock Johnson Tests of Achievement was a 69, in the very low range. JE CC, p. 7.

110. The IEP contained one goal for reading and written language that was added to the IEP at some unknown time. JE CC, p. 31. That goal was that Student “will work toward increasing fluency, comprehension and insight through meaningful and comprehensive reading instruction.” *Id.* The criteria for mastery was that “Student will get

4 out of 5 correct answers at the 6th grade level.” *Id.* There was no plan on the IEP for Student to actually be provided with the “meaningful and comprehensive reading instruction” required by this annual goal. *See* JE CC.

111. In the January 11, 2011 IEP, the District had reduced the number of required hours of special education staff support in the regular education classroom from 15 hours per week to 11.25 hours per week. JE CC, p. 21.

112. In a March 2, 2012 Mediated Settlement, the District agreed that “[a] Special Education Support staff will be assigned to [Student] and will work with him daily in Spanish and Reading classes.” PE 23, p. 4. It also agreed that “[m]ath instruction will include a minimum of 15 minutes daily on arithmetic basics. Arithmetic lessons will be part of Conrad’s math portfolio and will be provided to the guardian to review upon request.” *Id.* These requirements were subsequently added to Student’s IEP on March 16, 2012. JE DD, pp. 2-3, 10.

113. The March 16, 2012 was identical to the January 11, 2012 IEP in terms of information about present levels of academic achievement. JE DD, pp. 6-7. The IEP, however, contains only one academic goal in math and does not contain any goal for reading or written language. JE DD, pp. 18-19.

114. The District subsequently assigned an Educational Assistant to provide some support to Student. TR 1047-1048 (J. Weathers).

115. In April 2012 the District conducted a psychological reevaluation of C.A. which again concluded that Student did not meet the eligibility criteria for Emotional Disturbances and, because of improvements in Student’s behavior due to ADHD medication, also concluded that Student did not meet the OHI criteria. (Exhibit J-MM)

Student was taking ADHD in April 2011 and stopped the medication sometime in 2012. TR 1009-10.

116. In April 2012 the District obtained a psycho-educational reevaluation of Student which concluded that Student met the criteria of Special Learning Disabilities in math and written expression. (Exhibit J-MM)

117. In her April 20, 2012 evaluation report, Ms. Martinez concluded that as of the time of her evaluation, Student's achievement levels in math were as follows: Broad Math 2.6 grade level, calculation 2.5 grade level, math fluency 2.8 grade level and applied problems 2.7 grade level. She concluded that Student's achievement levels in reading were as follows: Broad Reading 5 grade level, letter-word identification 4.6 grade level, reading fluency 5.7 grade level, passage comprehension 5.1 grade level. She concluded that Student's achievement levels in written language were as follows: 4.6 grade level, spelling 2.9 grade level, writing samples 6.6 grade level and writing fluency 6 grade level. JE MM, p. 5. In all but writing samples, Student was at the frustration level in achievement, meaning that he was frustrated on a daily basis whenever he was presented with tasks that required reading or math. JE MM, p. 5; TR 568 (Hancock).

118. Ms. Martinez specifically recommended that Student be provided with reading instruction within the 4th to 5th grade range, math instruction presented within the middle 2nd grade to early 3rd grade level and writing instruction within the late 3rd grade to 4th grade level. JE MM, pp. 12-13.

119. On May 21, 2012, Student's IEP team met again. However, the IEP meeting was tabled before an IEP could be completed. The District proposed to table the IEP and provide Petitioners with a draft IEP by May 25, 2012 and to reconvene the IEP prior to the

beginning of the fall semester of the 2012-2013 school year or within the first 13 days of school. JE EE, p. 27; JE CCC; TR 1088 (J. Weathers).

120. The draft May 21, 2012 IEP again required that Student be provided with 11.25 hours of special education staff support in regular education classes and did not contain any plan for the provision of direct, specialized instruction to Student or to address Ms. Martinez's recommendations for the specialized instruction that Student needed. JE EE, p. 21.

121. Between April 27, 2011 and the Student's completion of the 8th grade, the District did not provide Student with any direct, specialized instruction in a small group setting. TR 401, 416- 417 (Lucero). There was no schedule for providing specialized instruction and support in a small group setting to students in the middle school. TR 401, 416- 417 (Lucero).

122. Student was in a Title 1 regular education reading class in the 8th grade in the 2011-2012 school year. Student received a D in the class in the fall of 2011 and a B in the class in the spring of 2012. JE AAA. The teacher provided general English core curriculum. The Special Education Director testified that the curriculum used in Student's reading class could be considered a Tier 1 or Tier 2 intervention. TR 1443, 1439 (Rubin). He was not provided with any Tier 3 direct, specialized reading instruction during the 8th grade. *Id.*

123. Student was in a regular education math class during the 2011-2012 school year. Student received a B in that class at the end of both semesters. JE AAA. Student's grades for regular education classes were based on "class assignments and class participation when modifications have been met." JE DD, p. 17.

124. Student testified that he took a regular education Read 180 class in eighth grade

with six or seven other students with Ms. Pacheco. TR 857-858 (Student).

125. After the April 27, 2011 IEP and through the end of the 2011-2012 school year, the District did not provide Student with the special education staff support in regular education classes that was required by his IEPs. Student testified that Mr. Canone, the special education teacher assigned to assist him in general education, could not help him very much in his math class because there were thirty or more students and other students needed help in the class. TR 857 (Student). The only other special education staff support was the limited educational assistant support that Student was provided for a short time after the March 2, 2012 mediated agreement. *See* Petitioners' Proposed Finding of Fact (PPFF), ¶ 117 *supra*.

126. On the MAPs tests given in the 8th grade, Student was at the beginning steps in reading at all times during the school year. JE EE, p. 4. Student did not show any progress but regressed between the fall and winter tests, when his score dropped from 210 to 197 and showed some further regression between the winter and spring test when his score decreased to 182. RE C, p. 1.

127. Also, on the MAPs tests given that year, Student was at the beginning steps in math at all times during the school year. JE EE, p. 4. Student did not show any progress between the fall and winter tests, when his score remained 206. RE C, p. 1. Between the winter and spring tests, Student's score increased to 211; however, this 5 point increase did not take Student out of the beginning steps in math abilities and he remained years behind grade level. RE C, p. 1.

128. Student did not progress in critical academic areas of math, reading and written language during the period of April 27, 2011 through the 2011-2012 school year.

129. On May 21, 2012, the District agreed to provide Student with Extended School Year (ESY) services. The services were to start on June 11, 2012 and end on July 26, 2012 and consist of 2 hours per day, 4 days per week of math and written language and technical assistance with an iPad. JE CC. p. 1. The District did not have transportation available for Student and offered to provide mileage reimbursement to Petitioners for one round trip per day. *Id.* The services were to be at the District's high school. TR 1085-1086 (J. Weathers).

130. The Student's godparents were unable to provide the transportation for ESY, yet despite attempted contact with the District, transportation was not provided. Student did not participate in the Extended School Year services in the summer of 2012. TR 1081-1086 (J. Weathers).

131. Mr. Weathers could not go onto school property because a restraining order had been issued against him District staff. He had to meet with the school psychologist about confidential matters about Student in an alley and public library. TR 1091. Subsequently, Mr. Weathers filed a complaint with the United States Department of Education, Office of Civil Rights, regarding, among other things his inability to go onto school property. TR 1094-1095 (J. Weathers); PE 27, p. 7-8. After Mr. Weathers filed this complaint, a protocol was developed to allow him access to school property. PE 27, p. 11; PE 28.

132. When Student began to attend the District's High School in the fall of 2012, his last completed IEP was the March 16, 2012 IEP. When Student began attending the high school, the District deviated from his IEP without an IEP team meeting and placed Student in a special education resource lab class for one period per school day. JE DD; TR 1372-1373 (Lucero).

133. A new IEP was developed for Student on September 6, 2012. JE FF. At this

time, Student was identified as having Specific Learning Disabilities in math and written language for the first time. *Id*; The District acknowledged that Student was functioning two to three grade levels below in the areas of math and written language. RE A, p. 1.

134. The September 6, 2012 IEP again provided that Student would receive 11.25 hours of special education staff support in the regular education setting. JE FF.

135. In the September 6, 2012 IEP, the District reported that in a Brigance assessment in math administered on 8/21/12, Student was tested at the higher 2nd grade lower 3rd grade level with 60% accuracy and had a hard time with fractions, borrowing and carrying over and did not know his multiplication facts. JE FF, p. 7. The District also reported that according to the diagnostic report, Student had a need in math because he scored 47, in the very low range. Assessment results, *Id*. Criteria for mastery was 3rd grade level with 50% accuracy - that was in the November 8, 2011 and January 11, 2012 IEPs. JE FF, pp. 17-18.

136. For reading, the District reported Brigance assessment results on 8/21/12 indicating that Student was at the 5th grade level in Reading Orally and 9th grade level in Word Recognition. JE FF, p. 7. There was no report of a present level of academic achievement in Reading Comprehension. *Id*. The District also reported that according to the diagnostic report, Student had a standard score of 81 in the "Reading Cluster" and was in the low range. *Id*.

137. For written language, the District reported Brigance assessment results indicating Student was at the 5th grade level in spelling and 6th grade level in sentence writing, that he still did not use punctuation marks and that his standard score in the Broad Written Language Cluster of the Woodcock Johnson Tests of Achievement was a 70, which

was in the low range. JE FF, p. 8. There was one goal for writing, which was that Student “will work towards increasing his writing skills from the present level of 6th grade level to 7th grade level (through writing activities in the English classes and remedial activities in the Resource Lab).” *Id.* at p. 18. The criteria for mastery for this goal was “[i]ncreasing his writing skill with 60% accuracy at the 7th grade level.” *Id.* at p. 19.

138. Special education support included providing Student with a planner and the case load teacher running weekly progress reports. TR 1367-1368 (Rubin). The case load teacher was responsible for meeting the requirements for special education in the IEP by supporting the student in the general education setting. TR 416 (Lucero).

139. On November 20, 2012, the District conducted another IEP meeting for Student. It was at this IEP that the District, for the first time, identified Student as having a Specific Learning Disability in reading. JE HH, p. 1.

140. At the time of the November 20, 2012 IEP meeting, the District had been provided with Dr. Parks’ October 30, 2012 neuropsychological evaluation which, among other things, concluded that Student had dyslexia. JE PP, p. 8. In her evaluation report, Dr. Parks recommended, among other things, that Student be provided with specialized reading instruction. *Id.* at p. 10.

141. Identification with dyslexia is important because of instructional implications. As a student with dyslexia, Student needs a specialized reading program that is designed to assist him with building foundational reading skills. TR 572-575 (Hancock).

142. The November 20, 2012 IEP contains information about present levels of academic achievement identical to that contained in the September 6, 2012 IEP. JE HH, p. 8. The IEP did contain a complete math goal which was identical to the goal in the

November 8, 2001 and January 11, 2012 IEPs. *Id.* at p. 18. The IEP contained the same goal for written language as in the September 6, 2012 IEP, with the same criteria for mastery. *Id.* at p. 19. The IEP lumped a reading goal in with the written language goal; that goal was that "Student will work toward increasing his reading ability from 5th grade level to 6th grade level, through remedial activities." *Id.* at p. 18. There was no criteria for mastery identified for the reading goal. *Id.*

143. In 9th grade Student went to the special education resource lab for 90 minutes a day with Ms. Garcia for the first semester. 1372-1373 (Garcia).

144. Student worked on his general education homework in Ms. Garcia's class. TR 767 (Garcia). When Student did not have homework, Ms. Garcia worked on SRA reading with Student. TR 768 (Garcia). She worked with him on reading possibly twenty minutes, three times a week in a group of 7 or 8 students who were all at different reading levels. TR 770, 772-773, 847 (Garcia). Ms. Garcia did not know the SRA recommendations for how frequently or how long SRA reading was to be taught in order to teach the program with fidelity. TR 775-776 (Garcia). Ms. Garcia testified that she focused on reading comprehension by summarizing books for students. TR 800 (Garcia). She did not work on any phonemic awareness. TR 803 (Garcia). The only short cycle assessment of Student in reading done by Ms. Garcia was the Brigance, which was not a short cycle assessment that was part of the SRA reading program. TR 771 (Garcia).

145. Student testified that he played games on the computer in Ms. Garcia's class and that sometimes he would work on math, using a calculator. TR 858 (Student). Student was not provided with the direct, specialized instruction that he required in the special education resource lab.

146. In the fall of 2012, Student was assigned to a general education IMP Math class. TR 306 (Bustos). He received a D for the first grading period and an F for the semester. JE BBB, pp. 1, 2. The math teacher for the IMP class reported that the number of special education student in his class prevented students from receiving the special education support that they needed. *See* JE PP, p. 23; *see also* TR 141 (Parks).

147. At the end of the first semester, in January 2013, Petitioners and Student were advised that Student could no longer attend the special education resource lab as part of his normal daily school schedule. This change of removing that special education support from Student's IEP was not a decision made by an IEP team or with Petitioners' input but was instead due to District policy that students were only able to enroll in the resource room for one semester during the year. TR 785-786 (Garcia).

148. Student was assigned to a regular education English class in the spring of 2013. As of March 13, 2013, Student's grade in the English class was a D. JE BBB, p. 1.

149. Student was again assigned to a general education IMP math class in the spring semester. He received an F in IMP Math 1 during the first semester. JE BBB, p. 2. In the spring, Student was again assigned to a general education IMP Math class. However, because Student was failing that class, he was later moved into a general education Algebra 1 class for the second semester. TR 307-309 (Bustos).

150. During the 2012-2012 school year, Student's MAPs scores in math dropped from 192 in Fall to 187 in Winter. RE C, p. 1. His reading score dropped from 206 to 203 during that same period. *Id.*

151. From the beginning of the 2012 school year through April 2, 2013, the District did not provide Student with the direct, specialized small group instruction that he needed.

Nor did the District provide Student with the special education staff support in regular education classes that was required by his IEPs.

152. The special education staff support in regular education classes was a key and material element of the plan for Student in the period between August 2012 and April 2, 2013. The failure to provide Student with the special education support in regular education classes as required by his IEPs was a material implementation failure, leaving Student without even the minimal floor of educational opportunity required by his IEPs.

153. Student did not progress in critical academic areas of math, reading and written language during the period of August 2012 through April 2, 2013.

154. Student's disabilities impact his ability to take notes. He has required, and continues to require, assistance with note-taking. TR 170 (Parks).

155. Student's IEPs required the accommodation of being provided with hard copies of notes for classes. JE AA, p. 14 and JE BB, p. 12 (give Student outline of notes to minimize distractions); JE CC, p. 15 and JE DD, p. 17 (give student a hard copy of notes, prior to the lesson, that are coming off chalkboard); JE FF, p. 16 and JE HH, p. 17 (Teachers provide class notes to Student, preferably before class).

156. The purpose of this accommodation was to eliminate frustration and to minimize Student's distraction and ability to focus on the lecture by the teacher, and it was recommended by his IEP team and several evaluators who evaluated Student. *See, e.g.*, JE MM, p. 12 (Ms. Martinez recommended providing compensatory aids including lecture notes to address short term memory deficits and to limit copying activities); JE OO, p. 16 (Dr. Rodriguez recommended providing notes ahead of time to minimize frustration); JE PP, p. 12 (Dr. Parks recommended copies of teachers' notes to minimize negative impact

that attention has on his ability to learn from lecture-based classes).

157. The District did not ensure that its staff provided Student with hard copies of notes as required by his IEP. TR 1128 (J. Weathers). Petitioners repeatedly complained about the failure to ensure that staff were providing Student with this accommodation. Parent requested copies of notes that should have been provided to Student, but never received any such notes. TR 1040-1041 (J. Weathers).

158. Even after agreeing, in a March 2, 2012 Mediated Agreement, that each teacher would provide Student with a hard copy of notes on a daily basis and not require Student to copy notes from the board, the District still did not ensure that Student was provided with copies of notes by teachers on a daily basis. PE 23, p. 3; PE 31, p. 14 (NMPED cites District for failure to implement the Interim Academic Plan and accommodations for Student). Furthermore, teachers continued to require Student to copy notes from the board. TR 1040 (J. Weathers).

159. In October 2012, after an extended period with District staff not providing Student with the important accommodation of providing classroom notes, the District acknowledged that this “directive” to Student’s teachers was not working. JE GG, p. 2. At that time, the District proposed that Student would use his iPad to take photos of notes on the board. *Id.* At that time, Mr. Weathers expressed concern that although Student knew how to use the camera on the iPad, he would need practice on how to take pictures so that he could actually read the notes. *Id.* The District agreed to provide one iPad training for Student on how to use the camera. *Id.*

160. Student subsequently tried to take photos of notes on the board, but he could not read the pictures of notes. TR 1110. (J. Weathers). The District did nothing to ensure

that his iPad could be effectively used to provide Student with access to class notes as required and needed, although assistive technology devices and training are available that would give Student independence in taking photos of notes and reading those notes on his iPad. *See* PE 1, p. 7.

161. Student's IEPs also required that Student be provided with the accommodation of being allowed to record classroom instructions by teachers with a digital recorder provided by the District for this purpose. JE FF, p. 16; JE HH, p. 17.

162. The purpose of this accommodation was to ensure that Student had access to instructions and understood instructions, which was a clear need related to his disabilities. *See* JE MM, p. 12 (Ms. Martinez recommended ensuring that directions are understood, provide for review and repetition); JE OO, p. 16 (Dr. Rodriguez recommended that instructions should be given in a clear and concise brief description and all assignments should be provided orally and in writing with examples of work he was to complete); JE PP, p. 12 (Dr. Rodriguez recommended that teachers should clarify instructions and expectations as often as possible).

163. Petitioners met with all of Student's teachers to talk about Student's use of the digital recorder, but the District did not provide teachers with any training. TR 1062, 1114 (J. Weathers).

164. Student's IEP for the 2011-2012 school year required that he be provided with the accommodation of daily use of a planner by teachers. JE BB, p. 12; JE CC, p. 16; JE DD, p. 17.

165. Student was known to have organizational difficulties for which he needed support. The purpose of this accommodation was to help keep Student on task and

organized and to facilitate communication between Petitioners and teachers. JE BB, p. 12; JE CC, p. 16; JE DD, p. 17; JE KK, p. 9; JE LL, p. 6; JE MM, p. 12 (short term memory deficits), JE PP, pp. 5, 12-13.

166. Even after agreeing, in a March 2, 2012 Mediated Agreement, that Student would be provided with an enlarged planner which would be filled out by the teachers on a daily basis, the District still did not ensure that Student was provided with this accommodation or that the teachers used the planner as required. PE 23, p. 3; TR 1042-1043 (J. Weathers); PE 31, p. 14 (NMPED cites District for failure to implement the Interim Academic Plan and accommodations for Student). Subsequently, after Petitioners complained about the ongoing lack of provision of this accommodation, the District no longer included this accommodation in Student's IEPs. *See, e.g.*, JE FF, p. 17.

167. The accommodations in Student's IEPs were an important part of his educational program, especially given the lack of any plan for direct, specialized instruction and District's own reliance upon limited special education staff support in regular education with accommodations and modifications as the plan for Student. *See* JE PP, pp. 12-14.

168. The failure to provide Student with these needed and required accommodations denied him of critical supports in his IEP and was a material failure to implement the IEP.

169. Patty Weigand testified as an expert in behavior intervention. Ms. Weigand is a Board Certified Behavior Analyst, which requires national certification. The goal of the behavioral analysis approach is to apply scientific approaches to behavior change to improve the quality of life for individuals. TR 894-895 (Weigand). She works for the Santa

Fe Public Schools and has worked in schools as a behavioral analyst since 2001. TR 896-897; PE 19. Ms. Weigand's expert testimony was helpful and credible.

170. On May 17, 2011, the District placed Student on an "alternative home school for the rest of the year" because of behaviors and the fact that due to the number of referrals, Student would not be allowed to participate in any end-of-year school activities. JE RR, p. 11.

171. In the September 2011 District psychological evaluation, the District psychologist reported that Student had significant behaviors based on information obtained from Petitioners and teachers from the previous school year. JE KK, p. 9. She recommended that Student's IEP team consider providing him with a Functional Behavior Assessment and Behavior Intervention Plan. JE KK, p. 11.

172. Resulting from the November 8, 2011 IEP meeting District indicated on the IEP that Student did not exhibit any behaviors that impeded his learning. JE BB, p. 4.

173. Student continued to exhibit behaviors that interfered with his learning during the 2011-2012 school year. He was disciplined for some of these behavioral issues, including making inappropriate noises, inappropriately touching other students, not doing work and using profanity. JE TT. In addition to behavior reflected in disciplinary referrals, Student began to exhibit attendance problems. JE VV; JE XX. Throughout the school year, the District called Petitioners on a weekly basis to complain about Student's behaviors. TR 1036-1037 (J. Weathers). On one occasion, the School Principal advised Mr. Weathers to come pick up Student because Principal did not feel like "babysitting" Student. TR 1045 (J. Weathers); JE TT, p. 4. The School Principal also advised Mr. Weathers that he did not believe in ADHD. TR 415 (Lucero).

174. Petitioners complained about the lack of any plan to constructively address Student's behavior. PE 30, p. 2. On March 2, 2012, the District agreed that an independent educational diagnostician agreed to by the parties would conduct a comprehensive Functional Behavior Assessment of Student and make recommendations regarding a Behavior Intervention Plan. PE 23, p. 2.

175. The March 16, 2012 IEP acknowledges that Student was exhibiting behaviors that impeded his learning or the learning of others and provided that a Functional Behavior Assessment needed to be conducted and would be conducted by the "independent contracted diagnostician." JE DD, p. 5.

176. The District did not ensure that an independent diagnostician conducted a Functional Behavior Assessment of Student as part of her April 20, 2012 evaluation. *See* JE MM. Instead of providing the independent Functional Behavior Assessment agreed upon, the District had the District school psychologist create an Addendum to her Psychological Evaluation Report. In that report, the District psychologist concluded, among other things, that Student's main problem appears to be ADHD and that ADHD "is not a disability and in most cases the symptoms of this disorder can be corrected with medication." JE NN, p. 6. She concluded that Student, who was taking medication for ADHD at that time, was not having any behavioral difficulties. *Id.* at p. 5.

177. The May 4, 2011 Addendum to the Psychological Report was not based on an adequate Functional Behavior Assessment of Student that met applicable state standards for such an assessment. Among other things, the District psychologist based her conclusions on inadequate observations of Student, did not ensure complete or accurate

Behavior Assessment Scale results from teachers and ignored at-risk and clinically significant ratings by Student and Petitioners. JE NN, p. 3.

178. Ms. Gonzales stated on that Student's BASC shows at-risk problems with self-reliance, meaning he sometimes has no control over things he has to do or his behavior. TR 1256-57.

179. Ms. Gonzales noted that one of Student's teachers reported at-risk problems with conduct and social skills but she also noted it should be read with some caution because this teacher's BASC was invalid because of inconsistent answers. TR 1257.

180. As part of the psychological evaluation, Ms. Gonzales spoke with Student's godparents and reviewed Student's disciplinary records. She was aware that Student was suspended for making noise and that he accidentally pushed a football in another student's face. She is aware that Student was suspended for three days but does not know the reason. She was aware that he was suspended for trying to use a digital voice recorder in Ms. Pacheco's class. TR1258-60.

181. At the time of the psychological evaluation, Ms. Gonzales thought Student was doing well. Although he had problems with one teacher, none of the other teachers had any problems with C.A. TR1260.

182. Ms. Gonzales attended the November 8, 2011 IEP at which the September 2, 2011 psychological evaluation was addressed and all were to refer to recommendations to maintain appropriate behavior. (Exhibit J-BB p. 23) Further, since Student did not meet the criteria for Emotionally Disturbed, Ms. Gonzales believed that no FBA was to completed. TR 1266-67.

183. On May 21, 2012, Petitioners again requested the independent Functional Behavior Assessment be done as previously agreed and disagreed that the District Addendum to the Psychological Evaluation was an adequate assessment of Student's behavioral needs and issues. JE EE, p. 27. The District rejected Petitioners' request for an independent Functional Behavior Assessment without providing Petitioners with information about where an independent Functional Behavior Assessment could be obtained. TR 1060 (J. Weathers).

184. In the September 6, 2012 IEP, the District documented that Student did not exhibit behaviors which impeded his learning or that of others and documented that a Functional Behavior Assessment did not need to be conducted. JE FF, p. 6.

185. On August 16, 2012 Trisha Bergin-Lytton was assigned by NMPED as a mediator in this matter. After discussion with the District and the family on August 20, 2012 she was reassigned to conduct an IEP facilitation because there was already a mediated agreement in place. TR 1481-82.

186. At the preparation team teleconference on August 24, 2012 (the team conference included Cathy Lucero, John Bustos, Linda Montoya, Karen Archuleta, Pam Spaulding, George Luna and Herman Gallegos), a discussion was held about an FBA because it was part of the mediated agreement. As the IEP facilitator, it was Ms. Bergin-Lytton's job to make sure that all items in the mediated agreement are covered and addressed at the IEP meeting. The mediated agreement was used as a structure for the items that needed to be drafted and prepared for the IEP and discussed at the IEP meeting. The FBA and who was going to be doing it was discussed. Also discussed was the Transition plan, goals and objectives, an independent psychological evaluation, sports involvement,

NMAA criteria, scheduling services, resource room, how they were documenting Student's skills, whether his schedule could be changed from writing class to woodwork. TR 1483-84.

187. Ms. Bergin-Lytton did not collect any data herself but collected a compilation of data regarding an FBA. TR 1485.

188. At the facilitated IEP meeting on September 6, 2012 whether an FBA would be done was discussed. TR 1483.

189. It was determined that the current behaviors did not indicate a need for a behavioral intervention plan. The FBA team looked at disciplinary records, school references and observations across multiple settings and it was believed that Student not display behaviors needing a BIP. The FBA team looked at the A-B-Cs: antecedent, behavior and consequence. TR 1274-76.

190. The Functional Behavior Assessment completed by the District on September 6, 2012 was not adequate and did not meet applicable New Mexico standards for such assessments. TR 914-915, 938-939, 950 (Weigand); PE 12; JE UU. Among other things, the District personnel conducting the assessment did not revise any information provided by Petitioners, conduct any interviews of Petitioners, review all diagnostic reports for Student, interview other professionals regarding Student, obtain any current or valid behavior rating scales, review Student's assessment scores, nor review his discipline or attendance records. JE UU, p. 1.

191. The September 6, 2012 Functional Behavior Assessment was not presented to Student's IEP team or Petitioners for review at the IEP meeting that day. The IEP provided that a Functional Behavior Assessment was not needed. JE EE, p. 6. Petitioners did not agree and continued to request an independent Functional Behavior Assessment.

192. In the November 20, 2012 IEP, however, the District documented that “[p]er the mediated settlement agreement dated March 2, 2012, a Functional Behavior Assessment was required and completed dated 9/6/12.” JE HH, p. 7. This was a change from the District’s previously asserted position that the May 4, 2012 Addendum to the Psychological Evaluation was the Functional Behavior Assessment.

193. The District never provided Petitioners with a copy of this assessment and the first time that they saw this assessment was when it was shown to them by their legal counsel in preparation for the hearing. TR 1102 (J. Weathers).

194. Student continued to exhibit behaviors that impeded his learning from August 2012 through April 2, 2012. He was disciplined for incidents that included disruption, talking back, throwing objects, injuring another student and skipping class and truancy. JE YY. These behaviors were considered serious by District administrators. *Id.* Teachers continued to raise concerns about Student’s behavior to the principal. TR 105-106, 333, 344 (Bustos). Student was not able to participate in track, an extracurricular activity, due to his behavior referrals. TR 852 (Student); TR 1063(J. Weathers).

195. In addition to the formal disciplinary incidents, Student continued to have problems related to attendance in class, including being tardy and being disruptive. TR 346 (Bustos). Petitioners continued to receive frequent calls from the District complaining about Student’s behaviors. As discipline, Student was required to participate in community service, which included pulling weeds, cleaning windows and washing tables in the cafeteria. TR 62 (Esquibel), TR 757-758 (J. Weathers).

196. Behaviors that interfere with learning include when a student is distracted or has disruptive or impulsive behaviors, academic readiness problems, difficulty staying on

task, difficulties initiating behaviors, and difficulties maintaining attention. TR 900-901 (Weigand).

197. Ms. Weigand testified that in her record review she noted that Student exhibited behaviors in the school setting that interfered with learning, such as: difficulties sustaining attention, not following through with instructions, being easily distracted, interrupting, leaving his seat, defiance and refusals, and talking excessively. TR 907, 917 *see also* TR 911 (attendance is also a behavior that was impacting Student's ability to access education) (Weigand); PE 12.

198. Student's behaviors warranted a Functional Behavioral Assessment because the behaviors were interfering with the Student's ability to access instruction. TR 907-908 (Weigand).

199. Positive behavioral supports are supports that increase a student's academic behavior so that the student is able to access the learning environment. TR 911-912 (Weigand). Disciplining a student is not a positive behavioral support because it is reactionary, does not teach new behaviors, and may actually reward negative behaviors. TR 923, 927, 972-973 (Weigand).

200. The Functional Behavior Assessment process requires gathering specific information about a student's behavior, information about the environmental context, and information about the antecedents to the behavior. TR 922 (Weigand). The primary goal of a Functional Behavior Assessment is to provide a hypothesis about what the function of a target behavior is so that strategies can be implemented to help a student develop more appropriate behaviors. TR 924- 927 (Weigand).

201. Ms. Weigand testified that in her professional opinion, it is important to ensure that Student is receiving appropriate instruction, that a Functional Behavior Assessment be conducted and a Behavior Intervention Plan developed by a Board Certified Behavioral Analyst with specialized training, that positive behavioral strategies be put in place to assist Student to improve academic behaviors, and that collection of data and monitoring continue. TR 927-937, 949 (Weigand).

202. In her evaluation of October 2012, Dr. Parks identified significant findings regarding Student's behavior in attention, anxiety and adaptive behavior skills. TR 153, 158 (Parks). The evaluation found that Student's anxiety impacts his school performance because he is afraid of what other people think or of being wrong, so he does not want to participate or try new activities. TR 154, 158 (Parks); JE PP.

203. Due to Student's anxiety, Dr. Parks recommended that Student receive cognitive behavioural therapy to address anxiety in the school setting in addition to outside therapy. TR 162-164, 173-174, 206 (Parks); JE PP. She also recommended that Student needed positive behavioural supports. TR 173-174 (Parks); JE PP. According to Dr. Parks, Student needs a plan that includes strategies to support him attending classes, but it is also critical to identify the causes behind why Student is not attending class. TR 202-203 (Parks).

204. Robert Quintana testified as an expert in assistive technology for school-aged children. Mr. Quintana is a Speech and Language Therapist with many years of specialized training and experience in evaluating and training students and staff in assistive technology in the educational setting. Among other things, Mr. Quintana works for the Espanola Public Schools and has conducted at least one assistive technology evaluation for the District in

the past. He provided compensatory speech and language services for the District in the summer of 2013. He was identified as an assistive technology specialist on the draft agenda for one of Student's IEP meetings, although he was never contacted by the District about Student. *See* PE 5. Mr. Quintana's expert testimony was credible and helpful.

205. Assistive technology is equipment and strategies, whether high or low tech, that help support a student's success in the classroom based on identified areas of need or impairment. TR 1175 (Quintana). Assistive technology includes applications that can be used on a computer or an iPad. *See* TR 1177 (Quintana).

206. Assistive technology also includes services such as training needed by students on the use of any equipment, use of applications, and instructions on how to integrate applications into their daily routines for assignments so that they can use their devices in a functional and beneficial way. *See* TR 1180 (Quintana). In addition, assistive technology includes supports for school personnel such as training for the teachers and staff working with students to ensure that they know how to integrate the technology and applications into the instruction. TR 1181-1184 (Quintana).

207. Assistive technology is not a replacement for instruction but is a support to assist students in learning new skills or further developing their skills, as well as supporting them in completing assignments. PE 1, pp. 1176-1177 (Quintana).

208. Training for Students in the effective and appropriate use of assistive technology, as well as training teachers and staff working with those students, is important. In addition to use of the assistive device itself, teachers need training in how to integrate the use of the assistive technology into their teaching and curriculum. TR 1180-84 (Quintana).

209. In a March 2, 2012 Mediated Agreement, the District agreed to address Student's need for assistive technology. TR 433 (Lucero); PE 23, p. 2 (Discussing "Adaptive Technology"). The District agreed that "[n]o later than March 16th the Special Education Director will collaborate with DVR personnel, the District rehabilitation counselor, and resources through Highlands University to determine technology that will assist Student to organize, communicate effectively, and supplement classroom study." *Id.* The District further agreed that "[n]o later than one week following this collaboration, identified technology will be purchased and provided to Student." *Id.* This was to be incorporated into Student's next IEP to be held no later than March 16, 2012. *Id.* at p. 2.

210. By March 16, 2012, the District had failed to collaborate concerning Student's assistive technology needs or to provide Student with any assistive technology. The March 16, 2012 IEP again states "no" in response to the question: "Does the student have Assistive Technology needs?" JE DD, p. 5.

211. Sometime after March 16, 2012, the District obtained information from the Division of Vocational Rehabilitation and New Mexico Highlands University to guide determination of appropriate assistive technology for Student. TR 434 (Lucero).

212. Based on its conversation with the Division of Vocational Rehabilitation and Highland University, the District acknowledged Student's need for assistive technology and provided Student with an iPad and digital recorder. TR 506-507 (Lucero). The District did not provide Student with a keyboard or screen protector for the iPad. JE EE, pp. 5, 16, 28; TR 866 (Student). The District also did not provide Student with any applications that would have allowed Student to access educational benefit from the equipment. TR 1460-1461 (J. Weathers) (Mrs. Weathers installed Dragon Dictate).

213. A draft May 21, 2012 IEP provides for the first time that Student has Assistive Technology needs. JE EE, p. 5. The IEP refers to the iPad and recorder, including them as an accommodation. JE EE, pp. 5, 16, 28. However, the IEP did not set out a plan for Student's effective or beneficial use of the equipment provided. *See* JE EE; *see also* TR 1189-1190 (Quintana) (student and teacher need training and need for goals and objectives related to use of the equipment).

214. On May 21, 2012, the District agreed to provide Student with technical assistance with the iPad and to provide a microphone headset for the iPad during the summer of 2012. JE CCC, p. 1. The District never provided Student with the microphone headset. TR 1461 (J. Weathers). Because Student was the only student in the District provided with an iPad, the District's IT staff expressed, on May 29, 2012, that "training and support of the iPad device from West Las Vegas IT staff will be very limited" and that the IT staff would have to learn to solve problems as encountered. PE 10, p. 6.

215. The District did not provide Student with any training on the effective or appropriate use of the assistive technology prior to or at the beginning of the 2012-2013 school year. TR 1109 (J. Weathers). The District never provided Student's teachers with any training in the assistive technology provided to Student. TR 766 (Garcia).

216. At the September 6, 2012 IEP meeting, the team developed an IEP that provided that 2 hours per week of assistive technology training by an Assistive Technology evaluator would be provided through October 15, 2012. JE FF, p. 23. The IEP is lacking in critical detail with respect to this plan including identifying who would be trained and in what areas. Furthermore, as of this time, the District had not conducted or presented any

assistive technology evaluation to Petitioners or to Student's IEP team and did not have an assistive technology person qualified to evaluate Student on staff.

217. On October 12, 2012, the District arranged for the Student to meet with Michael Adams for training on the iPad. Mr. Adams was not a District employee and Ms. Rubin, the District Special Education Director who arranged this training for Student, had no idea about Mr. Adams' qualifications to provide training to school-aged students on the use of assistive technology. PE 10, p. 1; TR 1400, 1409 (Rubin).

218. The October 15, 2012 meeting with Mr. Adams was the only assistive technology "training" provided to Student. Assistive technology training for Student needed to include actual use of the iPad to allow demonstration of skill level with the device. TR 1199 (Quintana). Training also needed to include assignments or tasks developed for use with the device. *Id.* at 1200. The October 15, 2012 meeting lasted approximately 45 minutes to an hour and was done without the iPad. *See* PE 10, p. 1; TR 1110 (J. Weathers). The training was not adequate to address Student's need for training and use of the iPad at school. TR 1180 (Quintana).

219. After this, the District did not provide any further "training" for Student or school staff on the assistive technology required by Student's IEP. Mr. Weathers made efforts to communicate with Mr. Adams after Student's first meeting with him, but those efforts went unanswered. Even the District was unable to get any response from Mr. Adams. TR 1111 (J. Weathers). Furthermore, after this, the District did nothing to ensure that an assistive technology evaluator was involved in any training or that it obtained an assistive technology evaluation of Student. TR 1112 (J. Weathers).

220. Student was unable to use the assistive technology provided to him by the District. *Id.*

221. Student was disciplined and was told not to use his iPad because District staff feared that because he was using the iPad on his lap, he was trying to take photos up the skirts of female students. TR 865 (Student).

222. The District provided Student with only one application for the iPad, Dragon Dictate, which required WiFi connection. The District did not train Student on Dragon Dictate. Moreover, due to problems with the WiFi connection at school, the Dragon Dictate would freeze and not work at school. TR 1198 (Quintana).

223. Mr. Quintana conducted an independent assistive technology evaluation of Student on August 29, 2013. PE 1. As part of his evaluation, Mr. Quintana reviewed previous evaluations of Student and the assistive technology that had previously been provided to him by the District. *Id.*; TR 1195 (Quintana). He also interviewed Student and worked with an iPad and other assistive technology with Student. TR 1195, 1997 (Quintana). Mr. Quintana also called the District, but his call to the District was not returned. TR 1217, 1223 (Quintana).

224. In Mr. Quintana's expert opinion, Student needs assistive technology, including training, as part of his educational program. *See* PE 1; *see also* JE PP, p. 12 and TR 170-171 (Parks) (Dr. Parks recommends assistive technology for Student to support him both in reading and in writing.); TR 566, 576, 609, 641 (Hancock) (Ms. Hancock recommends assistive technology to support Student in writing and math and as positive behavior support to help Student to engage in academic work).

225. Mr. Quintana concluded that Student could benefit from assistive technology as both support tools for completing academic assignments and in helping further development of his skills in reading, written expression, math and student skills. PE 1, p. 4. Mr. Quintana concluded and recommended that “it is critical that AT be made available for Student at all times in all school settings.” He also recommended that an assistive technology designee or case manager be assigned as a main support and contact at the school so Student and his team always had a point of contact. PE 1, p.5.

226. In Mr. Quintana’s expert opinion, the District has not adequately or appropriately addressed Student’s assistive technology needs. TR 1177, 1181, 1202, 1203 (Quintana).

227. Mr. Quintana recommended different applications for use with the iPad which would help Student with development of skills necessary to his education. Student would receive educational benefit from being able to have access to assistive technology to address his individual learning needs. TR 1196 (Quintana). For example, there are applications that can assist with note taking. This type of support would help him attend during instruction and still be able to retrieve information in a simple, organized way. TR 1201, 1207-1208 (Quintana). There are also applications that would assist the Student in being able to stay organized regarding assignments. TR 1208 (Quintana). There are additional applications that can supplement instruction in math, writing and reading. TR 1208-1210, 1223 (Quintana). Assistive technology could also be used to support Student’s interest in science. TR 1211 (Quintana).

228. Beginning in April 27, 2011, at the time of Student's first IEP, Student was 14 years old. JE AA, p. 1. This is the age when transition assessment and planning was required as part of his IEP. JE AA, p. 10.

229. Dr. Juan Portley testified as an expert in transition assessment and planning. He has a Master's Degree in Special Education from Pennsylvania State University and a Doctorate in Special Education, with a focus on transition, from the University of Oklahoma. Dr. Portley works for the North East Regional Educational Cooperative. TR 249 (Portley); PE 15. He is available to provide assistance to the District for transition assessment and planning for Student. TR 285 (Portley). Dr. Portley's testimony was helpful and reliable.

230. Transition planning requires working with students to help them understand what their interests are, as well as the impact of their disabilities, so that they develop realistic goals for themselves. TR 256-257 (Portley). It is also important to help students develop different skills, such as budgeting, for different living domains. TR 257-258 (Portley).

231. As a student with executive function deficits, Student requires assessment and planning that would address development of "soft skills," with inclusion of goals to address these skill needs in his IEP. TR 259-260, 268, 269 (Portley); *see also* TR 171-172 (Parks). The IEP team also needs to consider what kind of "soft skills" Student will need to be successful; these kinds of skills are directly related to work, such as taking directions, being organized, and showing up to work on time and ready to work. TR 258 (Portley). Student requires specialized instruction in order to build the soft skills that he needs to develop. TR 270 (Portley).

232. An adequate transition goal would be skill-based and measurable over a length of time. TR 265 (Portley). In Dr. Portley's opinion, Student's IEPs have not had adequate transition goals. TR 262, 280 (Portley).

233. The April 27, 2011 IEP identified Student's post-secondary goals as enlisting in the Marines upon graduation. JE AA, p. 10. As of that time, the only transition assessment done with Student had been a student interview. *Id.*

234. To enlist in the Marines, Student will need at least 8th grade academic skills to pass an entrance exam, the ASVAB. TR 263 (Portley). Student is discouraged and feels that he will not be successful in meeting his goal of joining the Marines because he will not have the academic skills to pass the ASVAB. TR 855-856 (Student). The lack of an adequate IEP and of direct specialized instruction negatively impacts Student's ability to achieve his goal of joining the Marines.

235. The April 27, 2011 IEP contained one transition goal, which was that Student "will research the different armed services and be able to identify the different requirements for enlisting." JE AA, p. 17. This goal was not measurable and the IEP did not include any criteria for mastery of this goal. *Id.*

236. The November 8, 2011 IEP also identified enlisting in the Marines as Student's post-secondary goal. As of this time, the only transition assessment done with Student was still a student interview. JE BB, pp. 7-8.

237. The November 8, 2011 IEP included only one "goal" for transition, which was that Student "will work toward taking a career inventory assessment." JE BB, p. 14. The criteria for mastery was that Student "will have a hard copy of career inventory assessment results." JE BB, p. 14. This was not a true goal for transition, but rather was part of an

assessment process for Student that the District should have completed. Completion of a career inventory assessment by a student should take about one hour. TR 245 (Aragon).

238. The November 8, 2011 IEP required that Student be provided with 15 minutes per week of rehab counseling to address transition. JE BB, p. 17.

239. On January 7, 2012, Petitioners complained to the NMPED that, among other things, rehab counseling had not been provided as required by the IEP. PE 30, p. 2.

240. Marilyn Aragon is the District's rehabilitation counselor and has worked for the Defendant in that capacity for thirteen years. Ms. Aragon has a Special Education licensure. Her duties include helping students transition to the work world or post-secondary schooling. TR 209-210.

241. In the November 2011 EDP, rehabilitation counseling was added for fifteen minutes per week in a segregated setting. Exhibit J-BB.

242. These services are given in the computer lab at the technology center at the middle school. TR 212-213.

243. Ms. Aragon met with Student once in November 20, 2011. He left early and refused to meet again in November. Therefore, Ms. Aragon made arrangements to have C.A. included in the group of special education eighth grade students in transition. TR 213-214.

244. Student did not want to meet with Ms. Aragon in January 2012; however, she met with C.A. monthly in February, March and April for an hour each time in the group setting. TR 215-216.

245. Ms. Aragon provided Student with a hard copy of his career inventory assessment results. TR 217.

246. C.A. attended a transition fair in April 2012 where New Mexico Department of Workforce Solutions, DVR colleges and other organizations were present to provide information to students. TR 220, 224.

247. Ms. Aragon scheduled a meeting with a DVR representative, NMHU professor, and Mr. Weathers to collaborate on what kind of technology would be best for Student but was not involved in decisions about assistive technology. TR 222.

248. The January 11, 2012 IEP again identified enlisting in the Marines as Student's post-secondary goal. As of this time, the only transition assessment done with Student had been a student interview and a career game booklet. JE CC, p. 11. A hard copy of the career inventory assessment required by the IEP had not been provided to Petitioners, even though the IEP required notice to the parents, and the annual goal for transition remained the same, i.e. completion of a career inventory assessment. *See* TR 217 (Aragon); JE CC, pp. 11, 20. The IEP continued the requirement that Student be provided with 15 minutes each week of rehabilitation counseling. JE CC, p. 21.

249. The March 16, 2012 IEP remained unchanged with respect to the status of transition assessment and planning. JE DD.

250. The District did not provide the required rehab counseling to Student during the 2012-2012 school year. *See* PE 30, p. 2; TR 1023-1024 (J. Weathers). Nor did the District ensure completion of any transition assessment or the completion of a hard copy of a career inventory assessment. TR 217 (Aragon).

251. On April 27, 2012, Petitioner Julian Weathers and Student attended a transition fair at New Mexico Highlands University at the invitation of the District. PE 27, p. 7; TR 1068-1078 (J. Weathers).

252. In the fall of 2012, at the September 6, 2012 IEP meeting, the District removed the rehab counseling services from Student's IEP for reasons unrelated to his educational need but because of the restraining order that Ms. Aragon had obtained. JE FF, p. 22. That IEP contained the same post-secondary goal for Student, i.e. enlisting in the Marines. *Id.* at p. 12. The IEP documents that a career interest inventory and assessment still needed to be done and does not contain any goal for transition. *Id.* at pp. 12, 17-19.

253. The transition provisions of the November 20, 2012 IEP remained unchanged from the September 6, 2012 IEP. JE HH, pp. 20-21.

254. Julianne Unger's testimony is given great weight. She holds a Master of Arts degree for the University of New Mexico in special education, issued in 1981, and has post-graduate work toward a doctorate in psychology. PE 18. She works as a diagnostic liaison with Albuquerque Public Schools. *Id.* She has been in the special education field in New Mexico since 1977. *Id.*

255. When questioned about whether compensatory education would be appropriate, Ms. Unger's opinion was that it is a very difficult question to answer. Although appropriate, she looked at the Student at the present time and testified that a 16 year student cannot be taught how to read for eight hours a day -- it will not happen. TR 608. She was of the opinion that the Student might be able to be taught to read one hour a day, but the Student must agree to work year round with a goal to learn to read and obtain better skills in reading a math. *Id.*

256. Ms. Unger testified that the Student's participation and agreement are required for the compensatory education process to work. TR 609.

257. Ms. Unger testified that children with dyslexia have to expend more time for the brain to function and, therefore, they are tired at the end of the school day. TR 610-611. As a result, according to Ms. Unger, logistically, it is difficult to undertake additional work. *Id.* Furthermore, only if the Student is willing to participate would additional services after his eighteenth birthday be appropriate. *Id.*

258. Mr. Weathers, the Student's acting parent, provided insight into the Student's present ability to focus on academics. TR 1141. For instance, the Student will not stay in a restaurant with his parents for more than ten minutes because it is not a comfortable situation for him, and then he leaves, which is something he has become accustomed to. *Id.* Hands on programs, such as 4-H, retain the Student's interests. TR 1142. Social programs, such as 4-H, are what help the Student. *Id.* It is circumstantially found that this is where his interests lie.

259. Petitioners have not met their burden to prove, should compensatory services be applicable, that the Student would be willing and agree to participate in post-school day hours and summer hours in reading and math programs, which would be in addition to his prospective educational services they have requested as well as the present services being provided through the remainder of his school tenure. Thus, compensatory education services will be denied.

CONCLUSIONS OF LAW AND ANALYSIS

1. Jurisdiction properly lies over the parties and over the subject-matter arising under the IDEA. 34 C.F.R. §300.507(a); §6.31.2.13(I)(1) and §6.31.2.13(I)(3) NMAC. There is no jurisdiction for actions arising outside of the IDEA; thus, any claim that the LEA retaliated against the Petitioners and the Student by, among other things, attempting to

chill their advocacy of the Student by securing the attendance of legal counsel at IEP meetings where Petitioners were not represented and obtaining a baseless restraining order against Petitioners in response to attempts to seek advocacy and help for the Student, is dismissed. *Id.* The hearing officer is without jurisdiction to award costs and attorney's fees. 34 C.F.R. § 300.517. Petitioners' request for reimbursement for the independent assistive technology evaluation is viewed as a cost; therefore, it is dismissed, as is any request for attorney's fees.

2. The statute of limitations period begins two years from the date the parents knew or should have known about the action that forms the basis for the complaint – in this instance, the material time period to consider in these proceedings is from April 3, 2011 onward. *See* §6.31.2.13(I)(18)(b) NMAC. Petitioners have failed to meet their burden to prove an exception to the two year statute of limitations exists.

Employing persuasive authority from the Third Circuit of Appeals in *D.K., et al, v. Abington School Dist.*, 696 F.3d 233, 59 IDELR 271 (3rd Cir. 2012), it is concluded that Petitioners have not proved that they were prevented from filing a due process complaint because the LEA withheld information from them or that District made misrepresentations to them – they did not prove causation. Petitioners had a lengthy history with the SAT process and the special education setting with the LEA. In October 2007 they had a SAT meeting with a follow-up SAT meeting in April 2008. They have not shown they were prevented from pursuing an IDEA complaint by the LEA; there is no causation element. In May 2008 a diagnostic evaluation was performed with Mrs. Weathers present. In 2008 Mrs. Weathers asked the school principal about the results of an evaluation and the principal replied it was okay if she had not heard anything; thus, she expressed her

knowledge of an IDEA issue at that time for which she could have pursued IDEA complaint options-- that is, she should have known at least by that time that since she had not received results from the diagnostic testing that there was an action that could form a basis for a complaint. The parents and the LEA were in communication with one another to such an extent that in 2009 the Student was home schooled. These are all red flags placing Petitioners on notice of IDEA complaint issues. Petitioners have not shown that they were prevented from filing a due process complaint in a timely manner to address their concerns; that is, they have not shown that the LEA caused them not to act. Thus, only matters from April 3, 2011 onward will be considered in the determination of the issues in this case.

3. Petitioners have not met their burden to show that the IEP meeting of April 27, 2011 was not composed of proper parties, specifically that there was not a qualified person to interpret results. What is required is a district representative who was qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, and was knowledgeable about the general education curriculum, and was knowledgeable about the availability of district resources; someone who could interpret the instructional implications of evaluation results. 34 C.F.R. § 300.321. An expert on the child's specific disability is not required. *See R.P. v. Prescott Unified Sch. Dist.*, 631 F.3d 1117, 1122 (9th Cir. 2011). Petitioners have not shown the LEA failed in this regard.

4. The IEPs from April 27, 2011 onward were not fully implemented. The LEA's failure to follow the IEPs in math, reading, small group settings, lack of support staff, placement in a resource lab without an amended IEP, lack of use of assistive technology training and use, failure to have an independent behavior assessment, lack of assistive

technology training, and limited rehabilitation counseling cannot be said to be immaterial; only trivial benefit to the Student, if any at all, was provided without the various components not implemented by the LEA. Thus, the LEA has denied the student a FAPE. *See Gallegos v. Albuquerque Public Sch., et al*, Proposed Findings and Recommended Disposition, February 28, 2013, adopted by Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, April 5, 2013 (D.N.M. CV 12-30 MV/CG), p. 16.

5. The LEA met its child find obligation and evaluation of areas of suspected need between April 27, 2011 and November 20, 2012. Testing was performed and according to the test results the Student did not meet, under the LEA's testing protocol, the definition of specific learning disabled. Thus, because the achievement tests administered by the LEA showed results consistent with achievement, rather than cognitive issues, then their interpretation was that the Student was eligible for services under the other health impaired category. That was where the suspected disability was perceived to be at that time, from the testing information the LEA conducted. Thus, the child find obligation and evaluation by the LEA for a child suspected of a disability was met. 34 C.F.R. §300.111(c)(1). Furthermore, since the Student was not then suspected of a specific learning disability, then the Student has not met his burden that the members of the team were insufficient. 34 C.F.R. § 300.308.

6. Commencing on November 20, 2012 the IEP team became aware of Dr. Parks' pediatric neuropsychological evaluation finding the Student with the specific learning disability of dyslexia. The IEP disputed the finding. Nonetheless, it is concluded, based on the testimony of Dr. Parks and her special qualifications as a pediatric Neuropsychologist

that as of November 20, 2012 the Student qualifies for services under the specific learning disabled category from dyslexia. 34 C.F.R. § 300.8(c)(10).

7. The IEPs from November 20, 2012 onward do not offer the Student a FAPE. This is the point where the Student became eligible for services under the dyslexia provision for reading, as determined above. Dr. Parks' neurological evaluation, and great weight is given to Dr. Parks' testimony, concluded eligibility, and it is concluded that the Student is eligible under the specific learning category. At that point, as Ms. Unger prescribes, the Student required education in a small, segregated setting. The Student was placed in a general education setting, with limited resources available to meet his special needs. Thus, it is concluded that the IEPs from November 20, 2012 onward did not provide the Student with an individualized educational program reasonably calculated to enable the Student child to receive some and meaningful educational benefits. *Rowley*, 458 U.S. at 207; *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995); *Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008))(stating that the test is some benefit as compared with meaningful benefit)); *Meza v. Bd. of Educ. of the Portales Mun. Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide "some educational benefit"). For similar reasons as noted below in the transition process analysis, providing this intelligent Student with appropriate skills to attain an eighth grade reading level to attain the reading skills to hope to serve his country in the future as a United States Marine is not requiring the LEA to provide a maximum educational benefit. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). Some benefit and meaningful benefit are similar, but not synonymous. See *Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233

(2009)(distinguishing *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008)(stating that the test is some benefit as compared with meaningful benefit)). *See also Meza v. Bd. of Educ. of the Portales Mun. Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide “some educational benefit”). Rather, education in a small, segregated setting is appropriate to provide the Student with some and meaningful educational benefits to attain his transition goal. This comports with the least restrictive environment.

8. The IEPs from April 27, 2011 onward fail as to transition services; each IEP follows its predecessor in language and each is defective. There are not measurable post-secondary goals related to the Student’s age appropriate transition related to his training, education, and employment. 34 C.F.R. §300.320(b). If anything, the goals are vague and overly broad, rather than appropriate and measurable. *See Dracut Sch. Comm. v. Bureau of Special Educ. Appeals of the Massachusetts Department of Elementary and Secondary Educ., et al*, 737 F. Supp. 2d 35 (D.C. Mass. 2010). It is undisputed that the Student hopes to serve our country as a United States Marine, and then secondary in ranch work. To qualify as a Marine the Student requires at least an eighth grade reading level. The IEPs fail to show how the Student is to receive this eighth grade reading level. This is procedural defect. *See Bd. Of Educ. v. Ross*, 486 F.3d 267, 276 (7th Cir. 2007). Contrary to the LEA’s position that the Student is seeking a Cadillac in educational opportunities rather than appropriate services, it is concluded that this intelligent Student with dyslexia and anxiety should, by the time he graduates from school, at least be able to read at an eighth grade level to allow him to serve his country as a Marine. This is not a “Cadillac,” but what is appropriate for transition. The LEA’s inclusion of the Student in general education classes

with insufficient supports, lack of 1:1 small, segregated learning settings, and lack of technology training, among other things, as otherwise noted in this opinion, did not allow the Student to benefit from appropriate services toward this transition goal; that is, the procedural transition violation created IEPs that were not reasonably calculated to enable the child to receive educational benefits. *See Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). This procedural violation has caused a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(3).

9. Depending on the use of the device, technology may be a tool or a toy. In this case, the LEA provided this teenage Student with assistive technology, yet without the training necessary to properly operate it, either to him or to educational staff. Thus, he was provided a tool, yet without training it became a toy he used in the classroom. The fact that there were allegations that he was trying to use it to take inappropriate photographs supports his untrained use of the technology. Petitioners have met their burden to show that the Student and staff must be properly trained in the use of assistive technology. 34 C.F.R. § 300.6. Particularly arising at the time of the dyslexia determination, failure to properly educate the Student and staff on the use of the technology on how to obtain notes, assignments, keyboard issues, and lack of internet access for Dragon Dictate to properly operate did not allow the Student, from November 20, 2012 onward, to obtain some and meaningful educational benefit from his IEPs, thus denying him a FAPE. *See generally Rowley*, 458 U.S. at 207 (legal test, yet not based on factual pattern under assistive technology).

10. The Student's behavior has impeded his learning and the learning of others. Thus, positive behavioral interventions, supports, and other strategies must be considered.

34 C.F.R. §300.24(a)(2)(I); §6.31.2.11(F)(1) NMAC. A behavior intervention plan is appropriate in these circumstances, to utilize a functional behavior assessment. The Student has been suspended, has engaged in altercations, has been alleged to have taken inappropriate photographs with what should have been assistive technology, and otherwise acted out in situations that impede his learning as well as that of others in the school setting.

11. The LEA will be ordered to provide the Student with education in a small, segregated setting to reach his transition goals of developing an eighth grade reading level, as well as in math and written language, for his desired enlistment as a United States Marine, and/or eventual vocation as a ranch hand. Given this education in a small, segregated setting as enhancing his present levels of educational services, as well as the specific educational deficits which result from the LEA's denial of a FAPE, *see Gallegos v. Albuquerque Public Schs., et al.*, Proposed Findings and Recommended Disposition, February 28, 2013, adopted by Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, April 5, 2013 (D.N.M. CV 12-30 MV/CEG), p. 30, coupled with the factual determination that the Petitioners have not met their burden to show that this teenage tenth grade Student with dyslexia and anxiety who runs track will be willing and agree to perform additional compensatory education services after school, the request for compensatory education is denied. As noted in *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010), subsequent placement may provide a remedy for the FAPE violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

12. As for summer ESY transportation services, and the Student not attending school because his acting parent was barred from the school grounds, it is concluded that the

transportation services were by agreement of the parties. There is nothing that prevented the acting parent from leaving the Student near the school grounds for the summer services, rather than having to go onto the school grounds with him due to a restraining order. Thus, this did not deny a FAPE. 20 U.S.C. § 1414(a)(1)(D)(ii)(III)(aa). *See D.A. v. Fairfield-Suisun Unified Sch. Dist., et al*, 62 IDELR 17 (D.C., E.D. Cal., 2:11-cv-01174-TLN-KJN)(school district is absolved of duty of for provisions of services if the student or parents refuse to consent or cooperate).

13. To the extent other procedural violations are alleged by Petitioners to have taken place, they are concluded not to have impeded a child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or caused deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2).

Therefore, it is ordered:

1. The Student is a Student with a disability under the Specific Learning Disabled category based on dyslexia for reading, writing and math. 34 C.F.R. § 300.8(c)(10). He is also qualified under Other Health Impaired due to anxiety, ADHD. 34 C.F.R. § 300.8(c)(9).

2. Commencing within a reasonable time from the date this order is issued, yet no later than the beginning of the school semester after winter break in January 2014, the LEA will provide the Student during the regular school day, under the normal school calendar year, as a pull-out with: (1) direct 1:1 instruction in reading in a segregated, small group setting for one hour a day, five days a week by a teacher qualified under the law to teach students with dyslexia; and (2) direct 1:1 instruction in math one hour a day, five days a week, in a segregated, small group setting by a teacher qualified under the law to teach

students with dyslexia. Methodology is left to the LEA. *Rowley*, 458 U.S. at 207-208. Educational services for dyslexia will be provided by trained educators, according to New Mexico law. NMSA § 22-13-32 (E) (2010). These pull-out services of ten hours each week are to compliment, but not to duplicate, the existing special education service hours under the last completed IEP; thus, math and reading in the existing IEP special education service hours will be redacted, with the remaining IEP existing service hours after math and reading are redacted to be added to the additional pull-out of ten hours.

3. The Student's transition plan is to enter the United States Marines on graduation from High School and to work as a ranch hand. To do so, he must gain the skills to acquire an at least eighth grade reading level. For an eighth grade reading level to be attained he will have, during the regular school day as a pull-out, direct 1:1 instruction in reading in a segregated, small group setting for one hour a day, five days a week by a teacher qualified under the law to teach students with dyslexia, as ordered. He will participate in 4-H to gain social skills necessary to serve as a Marine and as a ranch hand. He will attend one-on-one quarterly recruitment meetings with a Marine recruiter to learn about Marine duty, which the LEA will schedule. He will participate in high school athletics. This will all take commence at a date no greater than the beginning of the school semester after winter break in January 2014. 34 C.F.R. §300.43; 34 C.F.R. 320(b).

4. Commencing within a reasonable time from the date this order is issued, yet no later than the beginning of the school semester after winter break in January 2014, the LEA will provide the Student with assistive technology in the form of a digital recorder (already provided), a dictation program (such as Dragon Dictate, which is being provided) and an electronic device, such as an Ipad or Ipod (such as is already being provided). The devices

must include applicable operating mechanisms, such as internet access if the program requires it to successfully operate, or a keyboard. 34 C.F.R. §300.320(b); 34 C.F.R. §300.105. The Student and his family will be trained to use these devices by appropriate trainers with knowledge of the device and its application to this Student with dyslexia. *Id.* at (e). The Student's general and special education teachers and staff will be trained on the use of the assistive device and how it is to be used with the Student, with stated goals and objectives for use of the equipment, as well as any other providing special education services to the Student. *Id.* at (f). Methodology is left to the LEA. *Rowley*, 458 U.S. at 207-208.

5. Commencing within a reasonable time from the date this order is issued, yet no later than the beginning of the school semester after winter break in January 2014, the LEA will conduct a FBA and with the information gathered create a BIP, considering positive behavioral interventions, supports, and other strategies.


6. Any claims or defenses otherwise raised which are not specifically addressed herein, and due to this order, are denied.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Due Process Request of April 3, 2013 is granted in-part.

REVIEW

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 U.S.C § 1415(i), 34 C.F.R. § 300.516, and §6.31.2.13(I)(24) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.



MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: November 21, 2013

CERTIFICATE OF SERVICE

I certify a true copy hereof was posted via U.S. Mail to Attorney D. Poulin, Attorney T. Ford, Attorneys J. Staehlin and K. Kilgore, and Attorney Gloria Regensberg, Esq. (by and for the Secretary of Education), and to Mr. And Mrs. Weathers (via certified mail at their address of record), all on this 21st day of November, 2013.

RK