**BEFORE THE PUBLIC EDUCATION DEPARTMENT**
**DPH No. 1617-14**

# HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing Against the Local Education Agency (LEA) (Due Process Request), filed with the State of New Mexico Public Education Department on December 5, 2106. The Petitioners' Request for Due Process is granted in part.

## PROCEDURAL BACKGROUND

The Respondent LEA responded to Petitioners' Due Process Request on December 15, 2016. [LEA's] Response Including Prior Written Notice to Due Process Hearing Complaint, December 15, 2016 (Response).

The parties timely filed their Joint Statement of Stipulated Facts on January 13, 2017. *See* Joint Statement of Stipulated Facts, January 13, 2017 (JSF). The parties timely filed their respective statements of issues for the due process hearing on January 18, 2017. *See* Petitioners' Statement of Issues, January 18, 2017 (Petitioners' Issues); Respondent's Statement of Issues, January 18, 2017 (Respondent's Issues). The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibit List, January 18, 2017; Petitioners' Witness List, January 18, 2017; Respondent's Disclosure of Witnesses, January 18, 2017; and Respondent's Disclosure of Exhibits, January 18, 2017. The Respondent supplemented its witness disclosure on January 18, 2017. *See* Respondent's Supplemental Disclosure of Witnesses, January 18, 2017.

The due process hearing commenced on January 23, 2017, and concluded on January 27, 2017. Both parties were well-represented by their respective trial counsel.

Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on March 24, 2017. Tr. 1,201-1,203. The District requested an extension for issuance of the Hearing Officer's decision, which was granted for good cause shown, for the filing of his decision on or before April 7, 2017. Id.

On March 22, 2017 the District asked for an extension of time, unopposed by the Petitioners, to file their respective Findings of Fact and Conclusions of Law and Arguments by March 31, 2017, and to extend the date for the Hearing Officer's decision for an additional week. Respondent's Unopposed Motion for Extension of Time, March 22, 2017. An Extension Order granting the motion was entered on March 27, 2017, extending filing dates by March 31, 2017, and extending the date for the Hearing Officer's decision by April 14, 2017. Extension Order, March 27, 2017.

The Respondent filed its proposed Findings of Fact and Conclusions of Law on March 31, 2017. [LEA's] Findings of Fact and Conclusions of Law, March 31, 2017 (R's F&C). Its Closing Argument was filed on March 31, 2017. [LEA's] Post-Hearing Memorandum of Law, March 31, 2017 (R's Argument). The Petitioners filed their proposed Requested Findings of Fact and Conclusions of Law on March 31, 2017. Petitioners' Requested Findings of Fact and Conclusions of Law, March 31, 2017 (Ps' F&C). The Petitioners also filed their Closing Argument on March 31, 2017. Petitioners' Closing Arguments, March 31, 2017. (Ps' Argument).

This decision is due on or before April 14, 2017. Extension Order, March 27, 2017.

## ISSUES [1]

1. Whether a procedural violation in the IEP process rose to the level of a denial of a free appropriate public education (FAPE). *See* Petitioners' Issues Numbered 1, 14, 16 *and* Respondent's Issues 1 (a), 2 (a), (b), (c), and 3 (a), (b), (c).

2. Whether Petitioners' failed to first address certain issues with the IEP team prior to filing for due process alleging denial of a FAPE , thus not exhausting administrative remedies, which is a jurisdictional challenge. Response, para. 1. Tr. pp. 6-8. *See* Petitioners' Issues Numbered 4, 5, 7, 9, 12, 15 *and* Respondent's Issues 1 (d), (e), (f), (i), (j), (l),(m).

3. Of those matters that were first exhausted through the IEP process (one-on-one aide, communication, and least restrictive environment), then whether the Respondent's actions denied the Student's right to a FAPE. *See* Petitioners' Issues Numbered 2, 6, 11 *and* Respondent's Issues 1 (b), (g), (k).

4. Whether there was a failure to implement portions of IEPs, and if so, whether a FAPE was denied. *See* Petitioners' Issues Numbered 3, 8, 10, 13 *and* Respondent's Issues 1 (c), (h).

5. What equitable remedy, if any, should be awarded if a violation of FAPE is found. *See* Petitioners' Issue Numbered 17.

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[1] As a pre-hearing matter the Petitioners submitted 17 numbered "issues," *see* Petitioners' Issues, and the Respondent submitted 19 "issues." *See* Respondent's Issues. An additional jurisdictional Respondent issue was raised in its Response and was discussed at the outset of the hearing. *See* Response, para. 1. Tr. pp. 6-8. These issues by the parties have been compacted into the five issues noted in this sub-heading. If any of the 36 pre-hearing "issues" propounded in writing by the parties were not preserved by proposed Findings-of-Fact and Conclusions-of-Law by the respective parties then they are deemed abandoned and are not addressed.

The Petitioners proposed Requested Findings of Fact and Conclusions of Law, and Argument, further refine their issues, (Ps' F&C, Ps' Argument, March 31, 2017), as do the Respondent's proposed Findings of Fact and Conclusions of Law, and Post-Hearing Memorandum of Law. (R's F&C, R's Argument, March 31, 2017). This Memorandum Decision and Order will address the issues presented by the parties, through the five issues presented above. The five issues encompass the unabandoned remaining "refined issues" under the written proposed Findings of Fact and Conclusions of Law and Arguments submitted by the parties.

The unabandoned, remaining, preserved "refined issues" explored in this Memorandum Decision and Order, under the five above issues, discuss:

(A) Are Petitioners claims jurisdictionally barred for failure to exhaust or because they are not ripe? R's Argument; R's F&C, pp. 1-3.

(B) Was "intellectual disability" eligibility added to the IEP without adequate reevaluation? Ps' Argument; Ps' F&C, Issue 1(a), p. 6.

(C) Did the District fail to provide Parents with adequate notice, including a prior written notice, that it had added "intellectual disability" as an eligibility in 2015? Ps' Argument; Ps' F&C, Issue 1(b), p. 9.

(D) Did the District refuse to provide the Student with a designated 1/1 Educational Assistant (EA)? Ps' Argument; Ps' F&C, Issue 2.

(E) Did the District fail to provide Adaptive Physical Education (APE)? Ps' F&C, Issue 3, p. 15.

(F) Did the District rely on the Parents to remove the Student or keep the Student home? P's F&C, Issue 4, p. 17.

(G) Did the District fail to provide the Student with hours of education and subjects required by the State of New Mexico for the 6th Grade? P's Argument; Ps' F&C, Issue 5, p. 17.

(H) Did the District not meet the Student's changing needs around communication and use of technology? Ps' Argument; Ps' F&C, Issue 6, p. 18.

(I) Did the District not provide the Student with necessary physical movement and change in position during 2016-2017? Ps' F&C, Issue 7, p. 23.

(J) Did the District not have a workable evacuation plan for the Student in 2016-2017? Ps' F&C, Issue 8, p. 23.

(K) Did the District ignore and fail to evaluate the Student's potential need for instruction in Spanish? Ps' F&C, Issue 9, p. 24.

(L) Did the District not provide research based reading instruction in the 5th and 6th grades? Ps' Argument; Ps' F&C, Issue 10, p. 24.

(M) Did the District not provide education in the least restrictive environment, including failing to support the Student's attendance and participation in classes in the general education setting? Ps' F&C, Issue 11, p. 25.

(N) Did the District not properly support the Student's ability to eat at school? Ps' F&C, Issue 12, p. 25.

(Note, there are no Issues 13 or 14 listed in the Ps' F&C.)

(O) Did the District fail to provide necessary and related services (PT, OT, SLP, AT)? Ps' F&C, Issue 15, p. 27.

(Note, there is not an Issues 16 listed in the Ps' F&C.)

(P) Are Petitioners entitled to an equitable remedy? Ps' F&C, Issue 17, p. 28.

## RELEVANT LEGAL OVERVIEW

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). Once a subject-matter jurisdictional challenge is made, the responding party has the burden to establish jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed. 2d 351 (1992). In this action, the burdens rest, therefore, with the Petitioners.

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 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). "[A] child is entitled to 'meaningful' access to education based on her individual needs." *Fry v. Napoleon Community Schls.*, 580 U.S. ___, Slip Op. at 11 (2017).

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, Slip Op. at 11

(2017). The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." Id. at 14. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. Id. at 15-16. Deference is given to the expertise and exercise of judgement by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. Id. at 16. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. Id. at 11.

*Endrew*, id., and *Fry*, 580 U.S. ___, were both issued after the evidentiary portion of the due process hearing was completed, but before proposed Findings of Fact, Conclusions of Law, and Argument, were submitted by the parties. The effect of these decisions is applied retroactively. *See Harper v. Virginia Dep't of Taxation*, 509 U.S. 86 (1993).

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). Although not dispositive of whether an IEP was reasonably calculated to confer educational benefit, past progress is strongly suggestive that the current IEP continues to provide that trend. *Thompson R2-J Sch. Dist. V. Luke P. Ex rel. Jeff P*, 540 F.3d 1143, 1153 (10th Cir. 2008). 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). *But see Endrew*, 580 U.S. ___ (appropriate in light of the child's circumstances). Some educational benefit is required. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). *But see Endrew*, 580 U.S. ___ (appropriate in light of the child's circumstances). IDEA's statutory goal is "to provide each child with meaningful

access to education by offering individualized instruction and related services appropriate" to meet the student's "unique needs." *Fry*, 580 U.S. ___, Slip Op. at 15.

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.*

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. 34 C.F.R. § 300.321. Related services are such "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education ..." 34 C.F.R. § 300.34(a). *See Irving Ind. Sch. Dist. V. Tatro*, 468 U.S. 883 (1984)(services to aid student to benefit from special education).

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. Id.

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.

All children with disabilities who are in need of special education and related services are to be identified, located and evaluated. 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111(a)(i) ("child find"). The school district "bears the burden generally in identifying eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002).

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).

The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.323(c)(2). 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)

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). "The only relief that an IDEA officer can give ... is relief for the denial of a FAPE." *Fry*, 580 U.S. ____, Slip Op. at 10.

Hearing officers have authority to grant relief as deemed appropriate based on their findings. 34 CFR § 300.511, 300.513. 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). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza v. Bd. of Educ. of the Portales Mun. Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011). 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 student's education. *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010).

## FINDINGS OF FACT

1. There is jurisdiction over the parties and of the subject-matter only for matters raised contesting a free appropriate public education under the IDEA and first exhausted.

2. The Student is 11 years old. JSF, ¶ 1.

3. The Student was in the sixth grade at JA Middle School during the 2016-17 school year. JSF, ¶ 2.

4. The District placed the Student in a self-contained special education classroom. JSF, ¶ 2.

5. The Student is currently identified for special education services under two eligibilities: Orthopaedic Impairment and Intellectual Disability. JSF, ¶ 5.

6. The District is the Local Education Agency. JSF, ¶ 7.

7. The Student has received special education services from the District for his entire educational career. JSF, ¶ 6.

8. The relevant IEPs during the statutory period are: (a) IEP of September 30, 2014; (b) IEP of May 20, 2015; (c) IEP of March 18, 2016; and (d) IEP of September 30, 2016. JSF, ¶ 9.

9. The IEP of September 30, 2014 found Student eligible for services due to orthopedic impairment. Ex. 3. The Student was to be provided continuous adult support (1:1 EA) because of the Student's significant safety, medical, mobility, self-help skill, fine motor skill, gross motor skill, and communication needs. Ex. 4.

10. On May 20, 2015, a report was issued by the Multidisciplinary Evaluation Team (MET) which reached a consensus that the Student exhibited eligibility for both intellectual disability and orthopedic impairment. Ex. 13. The Student's cognitive abilities were found to be in the very low range, significantly below average, and it was determined that he had significantly sub-average intelligence, thus substantiating an intellectual disability eligibility. Id.

11. A written Notice of Evaluation in Spanish was provided to the Student's Parents on February 25, 2015. JSF, ¶ 8.

12. A consent (written in Spanish) for a re-evaluation was signed by the Student's Mother on March 9, 2015. JSF, ¶ 8.

13. The IEP of May 20, 2015 found the Student eligible for services due to intellectual disability and orthopedic impairment. Ex. 11. The 1:1 EA was discontinued for the 2015-2016 school year. Ex. 12. For the remainder of the 2014-15 school year the Student was to receive educational services in the cross categorical program. Id. Commencing in the 2015-2016 school year the Student's services will be changed to receive educational service in the

intensive support program. Id. The Parents proposed no other items to consider, and noted no objections. Exs. 11, 12.

14. The IEP of March 18, 2016 found the Student eligible for services due to intellectual disability and orthopedic impairment. Exs. 18, 19. The Parent's request for 1:1 EA was rejected, as was their request for education in the cross categorical program. Ex. 20. For the remainder of the 2015-2016 school year the Student was to receive services in the in the intensive support program. Id.

15. The IEP of September 30, 2016 found the Student eligible for services due to intellectual disability and orthopedic impairment. Exs. 27, 28. The Parents' request for a 1:1 EA was rejected. Ex. 28. The Parents voiced their request that they would like more communication, that they would like a 1:1 EA, and that the Student be returned to a cross categorical program. Ex. 27.

16. The Student was diagnosed with cerebral palsy when he was about two years old. Tr. 683.

17. The Student's Mother was told by medical providers that the condition was not going to improve, but that it was not going to worsen – the Student went to preschool where he painted, he walked, he could say some words, and when he went to grade school he played baseball and would grab his Mother's hand to take her with him to do what he wanted to do, until around 2013. Tr. 683-688, 930.

18. The Student suffers from a medical condition which caused him physical regression in his motor skills. JSF, ¶ 3.

19. The Student probably does not have cerebral palsy, which is not something which progresses or worsens. Tr. 1088.

20. Cerebral palsy causes problems with motor function, and may sometimes cause problems with cognitive functions, because there may be some damage to the brain, but cerebral palsy is not synonymous with impaired cognitive function. Tr. 599.

21. The Student's physical movements were noticed to be changing by his Mother, and the Student's pediatrician became aware of the changes about more that six months before the Due Process Hearing date on January 25, 2017. Tr. 614.

22. The Student's muscles were becoming more tight -- he couldn't move in the way he used to move, starting with his right arm. Tr. 600.

23. The medical movement changes are found to be about July or August 2016, which arise after March 18, 2016 but before September 30, 2016.

24. Dr. T, the Student's pediatrician, requested a consultation with University of New Mexico (UNM) neurologists to address the observations of what had occurred during that time period. Tr. 600.

25. An MRI was obtained as requested by Dr. T, and the Student was seen by UNM neurologists, Dr. R and his associate. Tr. 600, 1077.

26. The initial appointment was not scheduled until late September or early October, 2016. Tr. 1078.

27. Another UNM associate was first scheduled to evaluate, but he suggested another neurologist (Dr. R). Id.

28. It is found that the referral by Dr. T to UNM was for the unique movement circumstances the Student was presenting to her and to the Student's Mother in July or August 2016, although the actual subsequent clinical appointments, testing and diagnosis of

what was presented to the Student's pediatrician were performed after the September 30, 2016 IEP.

29. On November 3, 2016 the Student was medically found to have iron deposits in the globus pallidus bilaterally based on an MRI, with an "eye of the tiger" sign, which are consistent indicators for a diagnosis of PKAN, which is a terminal diagnosis, with no curative treatments. Ex. 29.

30. Confirmation of PKAN should be performed by genetic testing. Ex. 29.

31. PKAN is an acronym for pantothenate kinate-associated neurodegeneration. Tr. 1079.

32. PKAN is a very rare disease. Tr. 1082.

33. Symptoms consists of a gradual worsening in different functioning areas, with a component of dystonia, which is a specific type of muscle tightness. Tr., 1086. It is a progressive or worsening problem, tr. 1089, degenerative. Tr. 1092.

34. Dystonia is typically worse when pain, agitation, or frustration are present. Tr. 1087.

35. The pain is not only musculoskeletal pain, as in the arms and legs, but can include other types of pain, such as belly pain. Tr. 1087-1088.

36. Dystonia causes an increase in muscle tone in which muscle types are affected, for example, bending at the elbow may cause fingers to push out, and shoulders to push out, instead of pushing in, compared to spasticity, where the stronger of the two muscles which oppose each other becomes dominant (such as evinced in common strokes or the most difficult kind of cerebral palsy). Tr. 1086-1088. Muscle problems can include breathing, swallowing, chewing and eating. Tr. 1093.

37. Learning or cognitive problems may be present in PKAN patients, although physical problems could affect testing for cognitive issues because of the physical nature and manipulation required in cognitive testing. Tr. 1095.

38. Consistent with dystonia, learning becomes difficult where one side of neck muscles turns the head in an uncomfortable position, and eyes can close and then reopen, due to an uncontrollable forced automatic resistence. Tr. 1114-1115.

39. During the course of the 2016-2017 school year (in conjunction with the Student's pediatrician's and Mother's note in change in condition it is found to have been pre-September 30, 2016), in his educational setting, the Student's trunk stability changed - his trunk rotation and dystonic movements are abnormal – his right arm goes to the right behind him while his upper trunk rotates to the right, his right leg extends, and his head rotates severely to the right side, remaining in this posture for some time; his muscles contract, the tone is twisting, and his arm moves severely to the right, behind his back, with his head following, in uncontrollable movements. Tr. 645-646.

40. In conjunction with the Student's pediatrician's and Mother's note in change in condition, it is found to have been pre- September 30, 2016 that the Student is "kind of like being trapped; all these things to say, but you can't get it out." Tr. 605. Movement in the neck and shoulders, as the Student's condition evinces, could impact eye gaze. Tr. 1096.

41. During the course of the 2016-2017 school year (in conjunction with the Student's pediatrician's and Mother's note in change in condition it is found to have been pre-September 30, 2016), due to the progressive nature of his muscular contractions, the Student is unable to open his mouth resulting in an inability to eat correctly, and to chew, and to swallow. Tr. 609-611. Ex. V.

42. During the course of the 2016-2017 school year (existing prior to September, 2016) the Student was wheel-chair bound. Ex. 27.

43. The Student was put into the intensive global support program during the 2016-2017 school year (6th Grade). Tr. 30, 892-895.

44. The intensive global support classroom, or intensive support program, has three students in wheelchairs, four students who do not speak, and four students whose first language is Spanish. Tr. 30-32. It is a contained classroom, with four staff and seven children. Tr. 433.

45. Before the Student was placed in the intensive support program he was happy about going to school and enjoyed interacting with others. Tr. 195-198, 397, 714-715, 1023. At that time the Student had a 1:1 EA. Ex. 20.

46. After he started in the intensive support program (considered in part to arise pre-September 30, 2016), however, difficulties arose, such as becoming scared, crying, resisting going into the school, and wanting to go home. Tr. 53, 79-80, 144, 159, 206, 693-695, 703.

47. On September 19, 2016, at about 1:00 p.m., the Student had been hit on the back of the head while in the classroom. Ex. O.

48. On September 23, 2016 the Student became upset due to the noise in the classroom and the behavior of other students – he did not participate. Ex. 32 at 10.

49. The Student was "writhing and bending over and spasming out with his feet, throwing his head back and twisting to the right. It had been going on for several hours ... he was really spasming badly." Tr. 421-423.

50. The Student was vulnerable to being hurt in the confusing and chaotic classroom. Tr. 425.

51. On September 23, 2016 the Student was taken to the Emergency Department at the University of New Mexico where he presented to the health care providers with a body flexed and biting his lip, and was noted to be a child with cerebral palsy. Ex. J. *See also* Ex. K (photographs of the Student's lip, and bruises on his face, neck and arms, taken prior to the September 30, 2016 IEP, but after the March 18, 2016 IEP).

52. The medical note discusses another student in the Student's class who hit him on the day of the emergency visit, as well as on September 19, 2016, when the Student was hit in the mouth and his lip was split. Id.

53. He had a lower lip laceration, and dystonia, which causes a great deal of stress, resulting in lock jaw. Id.

54. The Student's right neck face was rotated to the right, his face was turned upward, his jaw was displaced, and he had symptoms of biting his lip. Id.

55. The Student had lost weight during the last 1.5 months, and has had about four episodes of lock jaw in the last 1.5 months, since school had started. Id.

56. The Student's jaw tightens and he begins biting his lip after the bullying episodes. Id.

57. On September 28, 2016, while in school, the Student choked on a hot dog, where the Heimlich maneuver had to be performed on him. Ex. O.

58. The Student did not have the assistance of a 1:1 EA during these time periods. Exs. 18, 19, 20, 27 and 28.

59. On September 30, 2016 an IEP was held with the education plan noting difficultly the Student has with eating – "[h]e demonstrates a high level of ataxia in his upper body and often has clenched teeth making it difficult for him to take in food." Ex. 27.

60. Because the Student choked on a hot dog (again, there was no 1:1 EA to assist him) the plan was that the Student would now only eat pureed foods, and to drink from a straw. Id.

61. When the Student eats he pools food between his cheek and gum, he has difficulty chewing and swallowing, and often when he drinks through a straw he turns his head over his right shoulder. Id.

62. The IEP of September 30, 2016 did not provide for a 1:1 EA. Ex. 27.

63. The September 30, 2016 IEP has a communication plan based on "thumbs up/thumbs down." *See* Ex. 27 at p. 5.

64. In language arts, the Student's communication goal is to use eye gaze or a thumbs up/thumbs down method to reach a 60% accuracy. Id.

65. The speech and language therapist reports the Student communicates his likes and dislikes through a through thumbs up/thumbs down, and uses a speech output device to answer questions and participate in group activities.

66. The Student's communication device is an I-Pad type of speech generating device, with buttons or icons. Tr. 368.

67. Dr. R articulates the problem that exists with PKAN and movement and communication by noting that physically manipulating or moving objects is difficult, pressing buttons on a computer, even just sitting still can impact testing, and in context of his testimony, impacts communication. Tr. 1095-1096.

68. The degenerative nature of the condition decreases the Student's ability to move body parts, so that in essence someone with PKAN is unable to communicate without proper adaptive communication devices. Id. Technology is improving, so a proper device can be

explored by a speech language therapist with special expertise in adaptive communication devices and knowledge about PKAN. Tr. 1093-1096.

69. The IEP of September 30, 2016 (Ex. 27) provides that the Student is to receive physical education. Id.

70. The IEP goal was that the Student "demonstrates competency in some movement forms." Ex. 27 at 13.

71. The goal relates to accessing his computer device. Id.

72. The Student did not receive adapted physical education until the last week of October, 2016. Tr. 157-158, 868-870, 880.

73. When received, the physical education was comprised of the Student propelling himself in a wheelchair where it would take him 15 minutes to go a few feet. Tr. 882-886.

74. Weight is given to the testimony by Drs. T and R as to the Student's medical needs and care and how the medical condition impacts of the Student's communicative, physical and mental abilities, including how the medical condition relates to comprehension for future evaluations. To the extent there is contrary evidence then their testimony is found to hold greater credibility based on their skills, education, training and practice. The impact of the medical condition on the Student's educational needs, however, is left to the Hearing Officer.

75. Unless otherwise found, all other testifying witnesses, are found to be truthful and credible, giving such weight to their testimony as appropriate in consideration of the other testimony and evidence admitted in this action.

76. Should there be a difference in testimony between competing testimony and the factual findings then it is found that credibility and weight are given to the testimony supporting the factual findings.

77. Factual determinations indicated in the Analysis and Conclusion section, below, if not stated above, are also by reference deemed as Findings, as are Conclusions if better described as Findings.

## ANALYSIS AND LEGAL CONCLUSIONS

### 1. Procedural Deficiencies

The Petitioners' unabandoned, remaining, refined, and preserved issue contesting procedural deficiencies is that the District failed to provide the Student's Parents with adequate notice, including prior written notice, and to inform them that it had included the Student's eligibility as "Intellectual Disability," in addition to eligibility for "Orthopaedic Impairment." *See* Ps' F&C Issue 1(b) at p. 9 and Ps' Argument at p. 7. The crux of the Petitioners' argument is that because they did not receive what they allege to be sufficient notice and because the District did not explain to them that "intellectual disability" is synonymous with "mental retardation," as interpreted by federal law, then they did not meaningfully participate in the IEPs of May 20, 2015 (Ex. 11), March 18, 2016 (Exs. 18 and 19), and September 30, 2016 (Ex. 27). These IEPs found that the Student was eligible services due to "intellectual disability," based in part on a Multidisciplinary Evaluation Team (MET) Report of May 20, 2015 (Ex. 13), in addition to orthopaedic impairment. Resulting from these alleged errors, argue the Petitioners, is a denial of a FAPE because the Respondents removed the Student from his prior cross-categorical classroom setting into an intensive support program (ISP), which was a more restrictive educational environment. This issue is not found to be well-taken and should be denied.

Evaluating the test for procedural deficiency, in part as this issue is preserved by the Respondents as to parental participation, a procedural violation will result in a denial of a free

appropriate public education only if the procedural inadequacies significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education. 34 C.F.R. § 300.513(a)(2)(ii). An IEP will not be set aside based on procedural defects unless a rational basis exists that the procedural errors seriously hampered the parents' opportunity to participate in the decision process. *O'Toole*, 144 F.3d at 707. While articulating that the IEP process exists to allow parents and school representatives the ability to air their opinions for a child's IEP, the United States Supreme Court's recent opinion in *Endrew*, 580 U.S. ___, Slip Op. at 16, does not impose a less restrictive standard for a procedural deficiency than the federal regulations require, id., to wit, that the procedural deficiencies significantly impeded the parents' opportunity to participate in the IEP process. 34 C.F.R. § 300.513(a)(2)(ii).

The Petitioners contend that although a form notice regarding eligibility reevaluation was provided to the Petitioners, one in English and one in Spanish, the two forms did not translate as the same thing. See Ps' F&C, para. 39. Both forms, however, state that in two languages that the reevaluation was to intelligence. *See* Exs. 5 (inteligencia) and 6 (intellectual abilities achievement). The Spanish form stated in the English language, however, that the evaluation would also include adaptative behavior, and that " [s]peech language, observation across multiple settings [.] SLP, OT & PT evaluations will be administered, if needed." Ex. 5. The English language form stated the same thing in the English language. *See* Ex. 6. Mother signed another form in the Spanish language consenting to the evaluation, which was written fully in Spanish, which also included intelligence testing, academics, with verbal, cognitive, memory and perception testing. Ex. 8. These forms were completed on February 25, 2015. Id.

Evaluation testing took place on March 9, 10 and 27, 2015. Ex. 13. Speech and language testing were administered on April 21, 2015. Ex. 13. On April 22, 2015 an eligibility criteria report was generated deciding that the Student met the criteria for intellectual disability. Ex. 9. On May 20, 2015 a prior written notice of proposed actions was completed noticing, among other things, intellectual disability eligibility, Ex. 12, with an IEP Team meeting on the same day, resulting in an IEP plan signed by the Parents, among others. Ex. 11. The Parents did not object to the intellectual disability eligibity, nor did they propose any other items for consideration. Ex. 12.

To the extent the Petitioners argue a procedural violation that the parents did not meaningfully participate in the process because the April 22, 2015 report concluded intellectual disability before the IEP educational plan of May 20, 2015, it is not found to be well-taken. *See* Ps' F&C Issue 1(b) at p. 9-10. There was a flow – first testing, then it was completed, then a report was generated on April 22, 2015, and after that an IEP Team meeting, prior written notice, and an IEP educational plan, all on May 20, 2015. The fact that the eligibility report and the IEP notice and plan were on different dates does not amount to a defect that significantly impeded the Parent's opportunity to participate in the decision-making process. It simply shows that time line and flow from one date to another date, culminating in an IEP Team meeting (in which they participated) and an education plan.

On February 25, 2016 a new IEP meeting was set up to be subsequently held and notice was provided in the Spanish language. Ex. 17. Prior written notice of proposed action was completed on March 18, 2016, and noticed, among other things, eligibility based on intellectual disability. Ex. 20. Importantly to a determination of the Parents' meaningful participation in the process, this prior written notice has the Parents proposing support from a 1:1 EA, with a

cross categorical program rather than an intensive support program, which was rejected by the IEP Team. Id. This supports that the Parents were aware of the process for IEP Team review, and that they could ask for what they wanted to be included in an educational plan. Id. An IEP Team meeting was held on March 18, 2016, and an IEP educational plan was issued on the same day. Exs. 18 (Spanish) and 19 (English). The educational plan was based on intellectual and orthopedic impairment eligibilities. Id.

On September 27, 2016 another IEP meeting was noticed to be held to discuss the Student's current special education program. Ex. 26. On September 30, 2016 a prior written notice of proposed action was issued which included, among other things, a request by the Parents for "[a] one-on-one for" the Student, which was rejected by the IEP Team. Ex. 28. Once again, this supports the Parents's ability to act in meaningful participation. Id. On September 30, 2016, an IEP Team Meeting was held and an educational plan of that date was issued, determining eligibility based on intellectual disability and orthopaedic impairment. Ex. 27. Importantly, in the IEP education plan, the Parents once again raise that they would like the education plan to provide for 1:1 EA in a cross categorical setting, with the Father proposing that his child's education could be enhanced by "more communication." Id. Once again, this shows that Parents were able to meaningfully participate in the IEP process.

Although Mother was a primary Spanish speaker, tr. 681-739, Father was proficient in the English language. Tr. 929-056. Both Parents attended and participated in the three IEP meetings where the eligibility for intellectual disability was discussed, and in which they gave no opposition to the educational programs based on intellectual disability. Exs. 11, 18, 19, and 27. A translator was available at the three IEP meetings to translate for the Mother between the English and Spanish languages. Id.

Petitioners' contention that since the phrase "intellectual disability" was not described to them as mental retardation, which thus resulted in a lack of meaningful participation, is not well-taken. *See* Ps' F&C Issue 1(b) at p. 9-10. Respondent correctly notes that the term "intellectual disability" replaced the phrase "mental retardation" pursuant to Rosa's Law (PL 111-256). *See* R's Argument at p. 8. Since the federal law requires that the term "mental retardation" be replaced with "intellectual disability," then use of the mental retardation term by the IEP Team would not be appropriate. It is a term of eligibility, just as "orthopaedic impairment" is a term for eligibility. The standard for determination is not whether the school is required to explain and any all terms of art or law in the IEP process, but whether the parents' opportunity to participate in the IEP process was significantly impeded. 34 C.F.R. § 300.513(a)(2)(ii).

To the extent the Petitioners allege that a diagnostician failed to interpret the results of the MET evaluation for them, or that they did not sign a form after discussion at the MET meeting, the arguments are not found be well-taken. Ps' F&C at p. 10. Parental input is noted in the IEPs, and in case history. Exs. 11, 18, 19, and 27. The MET describes the assessments and what intellectual impairment consists of. Ex. 13. The Petitioners have not met their burden to show that this seriously hampered the Parents' opportunity to participate in the process. *See O'Toole*, 144 F.3d at 707.

The Parents were aware of how to participate in the process, as shown by their attendance at the meetings, their involvement, and requests for 1:1 EA and communication. To the extent testimony may otherwise indicate, weight is given to first in time notations in the IEPs showing their participation in the processes. While the practice is not condoned of having Spanish notices to be written in partial English, and for some notices to only be in English or

others in Spanish, given the facts of this case the Petitioners did not meet their burden to show the Parents' opportunity to participate in the IEP was significantly impeded. Translators were present at the IEP meetings. The Father, who was fluent in English, was present at all the IEP meetings, and he communicated with the Mother. The practices of the Parents in seeking a 1:1 EA and voicing a need for more communication is indicative that despite the errors they were able to voice to the IEP Team the items they would like to be considered in the education plan. For the foregoing reasons, it is found and concluded that the Parents' opportunities to participate in the IEP processes were not significantly impeded by procedural errors. 34 C.F.R. § 300.513(a)(2)(ii).

**2. Exhaustion**

Jurisdiction properly lies over the parties and over the subject-matter, 34 C.F.R. §300.507(a); §6.31.2.13(I)(1) and §6.31.2.13(I)(3) NMAC, except for those matters not first administratively exhausted. *See Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775 (10th Cir. 2013)(exhaustion has been assumed to be jurisdictional). Matters regarding the content of an IEP must first be exhausted administratively and brought before the IEP Team for consideration before a challenge may be jurisdictionally entertained in the due process chain. *See Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1275 n. 11 (10th Cir. 2007). "The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue." *Endrew*, 580 U.S. ___, Slip Op. at 16 (citations omitted).

The Respondent avers that the only issue available for due process hearing resolution is that for a one-on-one student dedicated educational assistant (1:1 EA) because that is the

only issue Petitioners brought before the IEP Team for consideration – that is, that is the only matter that they have administratively exhausted before the IEP Team. *See* R's Argument, pp. 2-4. The Respondent also submits, without waiving its exhaustion issue, that the need for a 1:1 EA is not ripe and should not be considered based on the diagnosis of PKAN because it arose after the Petitioners' request for a due process hearing was filed. Id. at pp 4-5. The exhaustion issue was raised in the Respondent's Response, although the ripeness issue was not pleaded. *See* Response, pp. 1-2. The Petitioners have not argued either issue. *See* Ps' Argument. Given the jurisdictional components of these issues, however, they must be addressed.

The Respondent is correct in its position that the IEP Team must first have the opportunity to review requested educational components a student and his parents want to be included in the IEP. *See Ellenberg*, 478 F.3d 1275. The United States Supreme Court has recently reinforced this premise by stating that the nature of the IEP process is to allow parents and school representatives to discuss and evaluate "their respective opinions on the degree of progress a child's IEP should pursue." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, Slip Op. at 16. Deference is to be given to the expertise and exercise of judgement by the school authorities. Id. Thus, to allow the expertise and the judgment of the school authorities and the parties to present their opinions, then the requested educational components (what they want in the IEP document) must first be brought before the IEP Team to consider in forming the IEP itself. Only then may a hearing officer address in a due process hearing whether there was a denial of FAPE because the requested educational components were not included.

This does not, however, bar all matters not first raised before the IEP Team, but only those which the parties ask to be considered as part of the IEP document itself. For instance,

once the IEP provides an educational plan, then whether that plan is appropriately implemented would not have to be brought before the IEP Team for exhaustion resolution, for that could create an ending circular process. The plan itself is the educational component. Similarly, if the underlying process (the procedure for the creation of the IEP) is alleged by a student and his parents to be faulty, then having the IEP Team first reconsider the alleged procedural deficiencies before the issues could be raised in a due process hearing is inconsistent with procedural test where findings must be made that a child's right to FAPE was impeded, or the parents' opportunity to participate was significantly impeded, or that there was a deprivation of educational benefit. 34 C.F.R. § 300.513(a)(2). Thus, the Respondent's position is not well-taken that due to a failure to exhaust the only matter that may be considered in this due process hearing is that of a 1:1 EA.

As to ripeness, the Respondent is also correct in its legal argument that matters must first be ripe prior to review. *See* R's Argument, pp. 4-5 (citing *Morgan v. McCotter*, 365 F. 3d 882 (10th Cir. 2004)). The Respondent's theory is that because the Student's PKAN diagnosis was presented after the Petitioner filed for a due process hearing then it cannot be considered as to whether denial of a 1:1 EA was appropriate. Id. However, as this Due Process hearing Officer's findings indicate, PKAN is a recent medical diagnosis of the Student's condition, yet the condition itself and its educational ramifications, that is, the unique circumstances of the Student, predated the Petitioners' filing for due process relief. Importantly, as well, is that because it is concluded that FAPE was denied because there was not a 1:1 EA, then analysis of PKAN and its medical relationship on the Student's education is relevant for prospective relief. Therefore, the matter is ripe in this due process hearing.

As noted, the Respondent contends, factually, that the only issue appropriately first exhausted through the IEP Team is the 1:1 EA. *See* R's Argument, pp. 2-4. As the Due Process Hearing Officer's findings now indicate, however, two other issues were also raised before the IEP Team that resulted in the September 30, 2016 IEP – the issue of communication and the issue of least restrictive environment (cross categorical setting). *See* Ex. 27, p. 4. What is within the four corners of the IEP document becomes the cornerstone for analysis of whether a FAPE has been or is being provided. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). In a heading where parental input is listed for enhancing the Student's education, the Parents ask for a 1:1 EA in a cross categorical setting, and "Dad wants ... [t]o protect him and more communication." Ex. 27, p. 4. The communication issue was raised as contesting a "thumbs up/thumbs down" IEP communication plan. *See* Petitioners Issues, No. 6. As a result, the September 30, 2106 IEP "more communication" issue was also exhausted, as is the issue of lest restrictive environment.

Given this exhaustion and ripeness framework, it is concluded that there is administrative due process hearing jurisdiction to entertain whether the content of the September 30, 2106 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his child's unique circumstances in the absence of a 1:1 EA, and based on a "thumbs up/thumbs down" communication plan, and whether it was in the least restrictive environment. Ex. 27. It is also concluded that it is concluded that there is administrative due process hearing jurisdiction to entertain whether the content of the March 18, 2016 IEP was reasonably calculated to enable the Student to make progress appropriate in light of his child's unique circumstances in the absence of a 1:1 EA, and whether it was in the least restrictive environment. Exs. 18, 19. All other IEP content matters are thus

adminsitratively barred. There is administrative due process hearing jurisdiction to entertain failure to implement IEP claims. There is administrative due process hearing jurisdiction to entertain procedural deficiencies.

Specifically, as to the issue that intellectual disability was added to the IEPs without adequate reevaluation (*see* Ps' F&C Issue 1(a) at p. 6), it is found and concluded that it is barred for a failure to first exhaust before the IEP Team. Petitioners had the opportunity to bring up their concerns in the IEP of May 20, 2015 (Ex. 11), the IEP of March 18, 2016 (Exs. 18 and 19), and the IEP of September 30, 2016 (Ex. 27). They did not ask that the issue be explored. Moreover, Petitioners did not seek an Independent Educational Evaluation at public expense, and, had they done so and had the request been denied, then there would have been another avenue to a due process hearing on that issue. *See* 34 CFR § 300.502. On the other hand, had the Petitioners made a timely request for an Independent Educational Evaluation (IEE), and had an evaluation been obtained, then they could have presented it to the IEP Team for their consideration in addition to what was reviewed in the Multidisciplinary Evaluation Team (MET) Report of May 20, 2015. (Ex. 13). Should there still have been an impasse then the matter could have been addressed at a due process hearing. Since the matter was neither brought before the IEP Team nor was it based on an IEE review, however, then it cannot properly be considered in this due process hearing.

As to the issue of whether adaptive physical education (APE) should have been a part of an IEP consistent with general curriculum standards for the 2016-17 school year (*see* Ps' F&C Issue 3 at p. 15), it is found and concluded that it was not brought before an IEP Team and is barred from review. *See* Exs. 18, 19, and 27.

It is found and concluded that the Petitioners' claims that in October, 2016 they had to remove the Student from school or to keep him home because of another student's violent behavior, or because the school nurse is unable to meet the Student's needs (*see* Ps' F&C Issue 4 at p. 17), were not exhausted through an IEP Team process, or they arose after the last IEP, and therefore barred from review. *See* Ex. 27 (IEP dated September 30, 2016).

Regarding the Petitioners' allegations that the District did not provide the Student with education and subjects required by the State of New Mexico for the 6th grade (*see* Ps' F&C Issue 5 at p. 17), this too was not first brought before an IEP Team for first review. It is found and concluded that it is barred due to a failure to administratively exhaust. *See* Exs. 18, 19, and 27.

The Petitioners did not voice their concerns to an IEP Team that the District was not providing the Student with necessary physical movement and change in position (*see* Ps' F&C Issue 7 at p. 23), so to be considered as part of the educational plan (IEP) for the Student. *See* Exs. 18, 19, and 27. It is found and concluded that this claim was not administratively exhausted before an IEP Team. Id.

A challenge by the Petitioners to a "workable evacuation plan" in the 2016-2017 school year for inclusion in an IEP (*see* Ps' F&C Issue 8 at p. 23) was not first brought before an IEP Team, and it is found and concluded that it is adminsitratively barred for failure to exhaust. *See* Exs. 18, 19, and 27.

There was never a request from the Petitioners to an IEP Team (*see* Ps' F&C Issue 9 at p. 24) asking that the District additionally consider as separate part of an IEP an additional potential need for instruction in Spanish because it ignored and failed to evaluate the Student's potential need. *See* Exs. 11, 18, 19, and 27. Although the Petitioners use the word "evaluate" in the presentation of their issue, they are not complaining about an "educational evaluation"

under 34 CFR § 300.301 and § 300.304. Since the matter was not first brought before an IEP Team to consider before being made an issue in the due process hearing then it is found and concluded that it was not administratively exhausted.

The Petitioners claim that during the 5th and 6th grades (during the 2015-2017 school years), that the Student was not provided with research based reading instruction – that is, that the IEPs did not contain elements for research based reading instruction – then it should have first been brought before the IEP for consideration (*see* Ps' F&C Issue 10 at p. 24). Deference is given to the expertise and exercise of judgement by the school authorities. *Endrew,* 580 U.S. ___, Slip Op. at 16. If there is a disagreement with that expertise, then to preserve their input, they must bring it up to the IEP Team for initial consideration. Whether the IEPs of May 20, 2015 (Ex. 11), March 18, 2016 (Exs. 18 and 19), and September 30, 2016 (Ex. 27) did or did not contain research based reading instruction will not be reviewed because the Petitioners did not first present their contention that they did not contain research based reading instruction to an IEP Team. The IEP Team, given their expertise, should have been given an opportunity to investigate and consider in their exercise of judgment whether the IEPs they created contained the now requested research based reading instruction. After IEP Team review, if the Petitioners and the IEP Team continued to hold differing opinions, then the issue would have been preserved in the IEP document for a due process hearing review. The Petitioners did not do this – it is found and concluded that they did not first administratively exhaust this issue prior to filing for due process, and it is therefore barred from review. *See* Exs. 11, 18, 19, and 27.

In the Petitioners contention that the District filed to provide necessary related services, as noted earlier, the issue of communication was preserved and brought before the IEP Team.

Thus, the speech-language "thumbs up/thumbs down" communication needs with assistive technology will be substantively considered later on in this decision. *See* Ps' F&C Issue 15 at p. 27, paras. 142-145. However, the request that physical goals should be to be changed based on the Student's changing condition during the 2016-2017 school year *(see* id., para. 147) was not first exhausted before an IEP Team, and it is therefore found and concluded that it is barred, *see* Exs. 18, 19, and 27. Similarly, whether physical therapy (under the IEPs of March 18, 2016 (Exs. 18 and 19), and September 30, 2016 (Ex. 27) should be changed will not be considered due to a failure to exhaust. *See* Ps' F&C, para. 147.

Following the authority recently articulated in *Fry*, 580 U.S. ___, and *Endrew*, 580 U.S. ___, and the decisions of the Tenth Circuit Court of Appeals in *Cudjoe*, 297 F.3d 1058, *Ellenberg*, 478 F.3d 1262, *Sytsema*, 538 F.3d 1306, and *Muskrat*, 715 F.3d 775, it is concluded that three substantive issues regarding a denial of FAPE as presented by the Petitioners have been properly exhausted and are ripe for determination, to wit: 1:1 EA *(see* Ps' F&C Issue 2 at p. 10, part of Issue 4 at p. 17, part of Issue 11 at p. 25, part of Issue 12 at p. 25, and part of Issue 15 at p. 27), communication (*see* Ps' F&C Issue 6 at p. 18, and part of Issue 15 at p. 27), and least restrictive environment (*see* Ps' F&C Issue 11 at p. 25). They will be considered under a separate section in this opinion. The other issues contending a denial of FAPE as not being considered as part of the educational plan were not properly exhausted before an IEP Team and are barred, as explained above.

**3. Substantive Denial of FAPE**

"[T]he measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date ...." *O'Toole*, 144 F.3d at 701-02, quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3rd Cir. 1995). The standard for a substantive

denial of a FAPE is whether the District offers a reasonable, rather than ideal, IEP plan "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew,* 580 U.S. ___, slip op. at 11, which is "appropriately ambitious in light of [the child's] circumstances." Id. at 14. The adequacy of the IEP plan is determined by the "unique circumstances" of the child for whom the IEP was created. Id. at 15-16.

Three issues were exhausted, as noted elsewhere in this opinion. They are : (a) 1:1 EA, (b) Communication, and (c) Least Restrictive Environment (LRE). The issue regarding the 1:1 EA will be viewed as existing on two dates education plans were offered to the Student – March 18, 2016 (IEP of March 18, 2016, Ex. 19), and September 30, 2016 (IEP of September 30, 2016, Ex. 27). The Communication issue will be reviewed as existing as of September 30, 2016 ( IEP of September 30, 2016, Ex. 27). *See O'Toole,* 144 F.3d at 701-02. The LRE issue will be viewed in light of the March 18, 2016 IEP (Exs. 18, 19), and the September 30, 2016 IEP. Ex. 27.

As to the 1:1 EA , it is found and concluded that Petitioners have met their burden that FAPE was denied by not having a 1:1 EA in the September 30, 2017 IEP. However, it is found and concluded that the Petitioners have not met their burden to prove that a 1:1 EA in a cross category class was needed as of the March 18, 2016 IEP. The determination is made based on the Student's unique educational needs at the times of the two IEPs.

As found elsewhere in this opinion, the Petitioners did not exhaust their item before an IEP Team challenging the Multidisciplinary Evaluation Team (MET) Report of May 20, 2015 (Ex. 13), nor did they seek an independent evaluation. The MET Report is, therefore, the evidence finding eligibility for both intellectual disability and orthopaedic impairment. Id. Classroom observation occurred with the assessment, in which an EA was with the Student, who helped him with eating and other tasks. Id. It was noted that the Student had a medical

diagnosis of cerebral palsy, and that his intelligence assessments suggested significant sub-average intelligence, which determined a need for Intellectual Disability eligibity. Id. Based on that report the IEP Team determined on May 20, 2015 that he was eligible for special education services under Intellectual Disability and Orthopaedic Impairment. Ex. 11. At that time the Parents noted that they like that the Student walks well, that he can get around by himself, that he can talk, and that he improve his reading and writing. Id. His motor skills varied, for instance, at the time he was able to put on his sweater, and he was not in a wheelchair, although it was suggested that a wheelchair could help him move around better with his peers. Id. The Prior Written Notice of Proposed Action proposed, with acceptance, that for the remainder of the 2014-15 school year that the Student would remain in his cross categorical program, but that beginning in the 2015-16 school year that he would be put into an intensive support program, with a lower staff/student ratio and to support his fine motor skills, safety and self help, and thus discontinue the 1:1 EA. Ex. 12. Tr. 1035-1036.

Then on March 18, 2016, a new IEP continued with the intensive support system, rather than the cross categorical 1:1 EA that the Parents had sought. Exs. 19 and 20. It was noted that although the Student was showing uncontrollable body movements, had difficulty opening his hands to drink from a cup, and that he struggled with using utensils to eat, he was still using adapted self-feeding equipment. Id. He could apply glue for class projects, and could independently complete work using his left hand gross grasp of his writing utensils. Id. By this time he was using a loaner stroller wheelchair. Id. A lower staff/student ration was better able to suit the educational needs in an intensive support program, according to the March 18, 2016 Prior Written Notice of Proposed Actions. Ex. 20. There is nothing to indicate safety issues at that time. The Petitioners have not met their burden to prove that the education plan of the

March 18, 2016 IEP failed to provide the Student a free appropriate public education for either the 1:1 EA or the cross category class issues.

From the March 18, 2016 IEP to the September 30, 2016 IEP, the Student's unique circumstances, however, considerably changed. Medically, the Student's movements were noticed to be changing, with the Student's pediatrician becoming aware of the changes about more that six months before the Due Process Hearing date on January 25, 2017. Tr. 614. Thus, the medical movement changes are considered to be about July or August 2016, which arise after March 18, 2016, but before September 30, 2016. What was noticed and according to the Student's Mother was that the Student's muscles were becoming more tight, and that he couldn't move in the way he used to move, starting with his right arm. Tr. 600. At that time Dr. T, the pediatrician, requested a consultation with University of New Mexico (UNM) neurologists to address the observations of what had occurred during that time period. Id. After time an MRI was obtained as requested by Dr. T and the Student was seen by UNM neurologists, Dr. R and his associate. Tr. 600, 1077. The initial appointment was not scheduled until late September or early October, 2016. Tr. 1078. Another associate was first scheduled to evaluate, but he suggested another neurologist (Dr. R). In any event, it is found that the referral by Dr. T to UNM was for the unique movement circumstances the Student was presenting to her and to the Student's Mother in July or August 2016, although the actual clinical appointments and testing were performed after the September 30, 2016 IEP. Thus, the unique circumstances were apparent prior to the September 30, 2016 IEP.

The Student was put into the intensive global support program during the 2016-2017 school year (6th Grade). Tr. 30, 892-895. The classroom has three students in wheelchairs, four students who do not speak, and four students whose first language is Spanish. Tr. 30-32.

It is a contained classroom, with four staff and seven children. Tr. 433. Prior to the intensive support program, the Student was happy about going to school and enjoyed interacting with others. Tr. 195-198, 397, 714-715, 1023. Difficulties arose after that, such as becoming scared, crying, resisting going into the school, and wanting to go home. Tr. 53, 79-80, 144, 159, 206, 693-695, 703.

On September 23, 2016 it was recorded that the Student was upset due to the noise in the classroom, and the behavior of other students, and that he did not participate. Ex. 32 at 10. On about that same day, classroom observation showed the Student "writhing and bending over and spasming out with his feet, throwing his head back and twisting to the right. It had been going on for several hours ... he was really spasming badly." Tr. 421-423.

On September 23, 2016 the Student was taken to the Emergency Department at the University of New Mexico where he presented to the health care providers with a body flexed and biting his lip. Ex. J. The medical note discusses another student in the Student's class who hit him on the day of the emergency visit, as well as on September 19, 2016, when the Student was hit in the mouth and his lip was split. Id. The stress to the Student, who was a patient with cerebral palsy, lower lip laceration, and dystonia, cause him a great deal of stress, resulting in lock jaw. Id. The Student's right neck face was rotated to the right, his face was turned upward, his jaw was displaced, and he had symptoms of biting his lip. Id. He had lost weight during the last 1.5 months, and has had about four episodes of lock jaw in the last 1.5 months, since school had started. Id. At this time, the Student is nonverbal and could only communicate with his I-Pad. Id. The Student's jaw tightens and he begins biting his lip after the bullying episodes. Id. *See also* Ex. K (photographs of the Student's lip, and bruises on his

face, neck and arms, taken prior to the September 30, 2016 IEP, but after the March 18, 2016 IEP).

The School's Student Health Incident List reports that on September 22, 2016 it was reported that the Student had been hit on the back of the head on September 19, 2016, at about 1:00 p.m. Ex. O.

On September 23, 2016 the Student had "horrible" spasms. Id. It was recorded that the Student was upset due to the noise in the classroom and the behavior of other students and that he did not participate. Ex. 32 at 10. Classroom observation by the School Nurse showed the Student "writhing and bending over and spasming out with his feet, throwing his head back and twisting to the right. It had been going on for several hours ... he was really spasming badly." Tr. 421-423. He was vulnerable to being hurt in the confusing and chaotic classroom. Tr. 425.

On September 28, 2016, the Student choked on a hot dog, where the Heimlich maneuver had to be performed. Ex. O.

Dr. R, the UNM board certified neurologist with a special qualification in child neurology subsequently, tr. 1074, opined that the Student's diagnosis, upon which the referral by Dr. T was initially based in July or August 2016, was strongly indicative of PKAN, rather than cerebral palsy. Tr. 1079. PKAN does not consist of muscle spasticity, where the stronger of two opposing muscles "wins out." Tr. 1087. With PKAN, the pattern differs, so where the elbow bends and the wrist might go up, fingers out, with shoulders out instead of in. Id. It becomes worse when someone is in pain, is frustrated, or agitated. Id. It differs from cerebral palsy in that cerebral palsy does not progress or worsen, whereas PKAN progresses and worsens. Tr. 1089. Cognitive or learning problems can exist. Tr. 1094-95. There is no defined cure for PKAN. Tr. 1104.

The IEP of September 30, 2016 notes the difficultly the Student has with eating – "[h]e demonstrates a high level of ataxia in his upper body and often has clenched teeth making it difficult for him to take in food." Ex. 27. Because it was noted that the Student had choked on a hot dog, the Respondent concluded that he would only eat pureed foods, and to drink from a straw. Id. When he eats, the IEP of September 30, 2016 explains that when the Student eats [2] he pools food between his cheek and gum, he has difficulty chewing and swallowing, and often when he drinks through a straw he turns his head over his right shoulder. Id.

The IEP of September 30, 2016 finds that the Student is not in need of a 1:1 EA despite the changes in the Student's safety issues resulting from the bullying, the bruises, the lip lacerations, the lock jaw, the loss of weight, the anxiety, the stress, his being physically struck by other students, and his apparent degenerative condition and loss of weight. Ex. 27. These are not even discussed in the IEP, yet circumstantially, they were apparent to such an extent the Mother sought medical attention. Id. The School Nurse saw the chaos in the classroom. Tr. 421-423. As to choking on a hot dog, the IEP fails to mention the need for a Heimlich maneuver to remove the food, or the Student's horrible spasms, as noted in the Student Health Incident List for matters occurring before the September 30, 2016 IEP and after the March 18, 2016 IEP. Ex. O.

Dr. R notes from a physical standpoint that the Student needs one-on-one attention to allow the Student to move, stretch, be comfortable, to catch up on things he might have missed while he was distracted by his physical feelings, to allow him to engage, to help with

[2] This addresses the Petitioners F&C Issue 12, as well, that the District did not support the Student's ability to eat at school, since an 1:1 EA impact's ability to eat at school.

his discomfort, and to use objects. Tr. 1119-1120. The School Nurse notes that the Student requires a one-on-one when he leaves the classroom because the Student is unable to move himself in a wheelchair, he is unable to access his communication device, and he is not able to protect himself outside of the classroom. Tr. 433.

The Respondent's position that removal of the aggressive student who hit the Student from the classroom "fixes" the safety problem for the Student is not well-taken. The focus should rather be on the vulnerable Student and his unique circumstances, as being unable to speak up for himself, unable to defend himself in his vulnerability, whether it be from an aggressor student subsequently removed, or others. The point made is that the Respondent was put on notice that the Student is in need of greater safety services than those which are being provided by its present lower student/staff ratio in its intensive support program. Similarly, focusing on the Student and his unique needs, the Student's ability to safely eat, to stop biting his lip, to reduce stress, anxiety and resulting lock jaw, all point to a need for greater services than only the smaller student/staff ration intensive support program provides.

Because of these matters (whether standing alone or coupled with the communication needs also addressed elsewhere in this opinion), it is found and concluded that the program being provided by the IEP of September 30, 2016, which fails to include a 1:1 EA, is not "appropriately ambitious in light of [the Student's] circumstances," *Endrew*, 580 U.S. ___, Slip Op. at 14. This is reasonable, rather than ideal, so that the Student may make "progress appropriate in light of [his] circumstances." *Endrew*, 580 U.S. ___, Slip Op. at 11. Although the unique needs of each child, id. at 15-16, are considered in finding a denial of FAPE, it does escape notice that in *Fry*, 580 U.S. ___, the child had cerebral palsy, and was provided

a 1:1 EA (which the school district argued was sufficient), yet that the parents sought greater services with a service dog. Id., Slip Op. at 6. For the foregoing reasons, a 1:1 EA is appropriate in light of the Student's unique circumstances. It is found and concluded that the Petitioners have met their burden that the IEP of September 30, 2016 substantively denied the Student a free appropriate public education.

The Petitioners have exhausted their communication issue, as well. It is reviewed as existing as of September 30, 2016 ( IEP of September 30, 2016, Ex. 27).

As Dr. T explains, PKAN is a progressive disorder, which means that under the diagnosis (which, as found earlier in this opinion, gives a definition to the Student's medical condition arising prior to the September 30, 2016 IEP), the Student is "kind of like being trapped; all these things to say, but you can't get it out." Tr. 605. The September 30, 2016 IEP, however, has a communication plan based on "thumbs up/thumbs down." *See* Ex. 27 at p. 5. In language arts, the Student's communication goal is to use eye gaze or a thumbs up/thumbs down method to reach a 60% accuracy. Id. Movement in the neck and shoulders, as the Student's condition evinces, could impact eye gaze. Tr. 1096. The speech and language therapist reports the Student communicates his likes and dislikes through a through thumbs up/thumbs down, and uses a speech output device to answer questions and participate in group activities.

The communication device used by the Student is an I-Pad type of speech generating device, with buttons or icons. Tr. 368. Dr. R articulates the problem that exists with PKAN and movement and communication by noting that physically manipulating or moving objects is difficult, pressing buttons on a computer, even just sitting still can impact testing, and in context of his testimony, impacts communication. Tr. 1095-1096. The degenerative

nature of the condition decreases the Student's ability to move body parts, so that in essence someone with PKAN is unable to communicate without proper adaptive communication devices. Id. Technology is improving, so a proper device can be explored by a speech language therapist with special expertise in adaptive communication devices and knowledge about PKAN. Tr. 1093-1096. Notwithstanding the Student's degenerative nature of physical condition, which impacts the use of computer skills, evolving into communication for thumbs up/thumbs down, the September 30, 2016 IEP did not create an education plan for the Student to be assisted by a speech language therapist with special expertise in new and on-going adaptive communication techniques in accord with the degenerative movement and inability to keep still, consistent with the Student's condition. The Student should not be trapped by an inability to communicate if there is appropriate assistive technology available to benefit the Student in his unique educational needs to give him meaningful access to education. "[T]he FAPE requirement provides the yardstick for measuring the adequacy of the education that a school offers to a child with a disability: under this standard ... a child is entitled to 'meaningful' access to education based on her individual needs." *Fry*, 580 U.S. ___, Slip Op. at 11.

The Student remains trapped in a degenerative body where he is unable to communicate to meet his educational needs without expert speech and language knowledge and guidance as to the appropriate changing assistive technology that would allow him to benefit from special education. *See Tatro*, 468 U.S. 883 (1984). Thus, the September 30, 2016 IEP, which fails to make available expertise that should consider adaptive changing technologies for the Student's unique condition where the elbow bends and the wrist might go up, fingers go out, shoulders go out instead of in, worsening with pain, frustration, or

agitation, is not "appropriately ambitious in light of [the Student's] circumstances." *Endrew,* 580 U.S. ___, Slip Op. at 14. The IEP of September 30, 2016 does not allow the Student may make "progress appropriate in light of [his] circumstances," *Endrew,* 580 U.S. ___, slip op. at 11; that is, his unique circumstances. Id. at 15-16. It is found that the assistance of a speech language therapist with expertise in the changing environment in adaptive technology to meet the educational communication needs of this Student is reasonable – it is not an ideal demand. Id. It is found and concluded that the Petitioners have met their burden that the communication provided by the IEP of September 30, 2016 substantively denied the Student a free appropriate public education.

As to the contention that an IEP was inappropriate because it was not in the least restrictive environment (the cross category class) by failing to support the Student's attendance and participation in general education setting classes (*see* Ps' F&C Issue 11 at p. 25), although exhausted in the March 18, 2016 IEP (Exs. 18,19) and the September 30, 2016 IEP (Ex. 27), it is found and concluded that the Petitioners did not meet their burden that it denied the Student a FAPE. While Respondent's contention that the intensive support program was not based on the Student's evaluation finding cognitive impairment, the circumstantial facts show otherwise. The Student was originally in the cross categorical program, then, after the May 20, 2015 MET Report determining cognitive eligibility, he was moved into the intensive support program. *See* Exs. 18, 19 and 27. Nonetheless, as noted elsewhere in this opinion, the Petitioners did not seek, nor did they produce as evidence, another educational evaluation discrediting the cognitive intellectual disability eligibility determination. Given these facts with the only evaluation being that conducted by the Respondent, the March 18, 2016 and the September 30, 2016 IEPs provide the Student with

a FAPE under the dual intellectual disability and orthopaedic impairment eligibility in the least restrictive environment. *See* 34 CFR § 300.114.

**4. Implementation**

"While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which obviously must be evaluated as such (citations omitted). Thus, we do not hold that a school district can ignore the fact that an IEP is clearly failing, nor can it continue to implement year after year, without change, an IEP which fails to confer educational benefits on the student." *O'Tolle*, 114 F.3d 692, 701 (10th Cir. 1998).

It is found and concluded that the Petitioners have met their burden that adaptive physical education has not been implemented under the September 30, 2016 IEP. (Ex. 27). The Student did not receive adapted physical education until the last week of October, 2016. Tr. 157-158, 868-870, 880. When received, the physical education was comprised of the Student propelling himself in a wheelchair where it would take him 15 minutes to go a few feet. Tr. 882-886. The IEP goal was that the Student "demonstrates competency in some movement forms." Ex. 27 at 13. The goal relates to accessing his computer device. Id. There is no evidence to suggest propelling himself in a wheelchair of 15 minutes to go a few feet or that he access his computer device confers physical education educational benefits "appropriately ambitious in light of [the child's] circumstances." *Endrew*, 580 U.S. ___, Slip Op. a 14. *But see Van Duyn v. Baker Sch. Dist.* 5J, 502 F.3d 811 (9th Cir. 2011)(pre-*Endrew* case concluding failure to implement is to be a material portion of the IEP).

## 5. Relief

The Respondent will provide the Student with a 1:1 EA in his present intensive support program classroom. A particular person (or persons) for the 1:1 EA is not ordered. *Rowley*, 458 U.S. at 207-208. The 1:1 EA will be with the Student from the time he arrives at school until he is returned to his Parents or other guardians after the school day concludes. The 1:1 EA will assume duty on May 15, 2017. The 1:1 EA may be a single person, or more than one person, although they all must be fully trained as to the Student's unique circumstances. Since the relief is prospective, then the 1:1 EA will be trained on the effects of PKAN on the Student and his ability to make progress appropriate in light of his circumstances. To assist in this prospective requirement for a 1:1 EA, all educators and staff associated with the Student's education plan and program will be similarly trained on the effects of PKAN on the Student and his ability to make progress appropriate in light of his circumstances. This initial training will all take place before May 15, 2017.

To be perfectly clear – the 1:1 EA is to be for this Student and this Student only. S/he is not to be shared with other students requiring special education services while assigned to perform 1:1 EA duties for this Student.

Since the 1:1 EA is now ordered for prospective relief, then to be completed by July 15, 2017, is an individual comprehensive communication evaluation to assess the Student's on-going communication technology needs, the results of which are to be shared with the comprehensive independent education evaluation evaluators, as also ordered below. It will be arranged and paid for by the Respondent as a public expense. The Students' Parents are to give their input to be considered in the evaluation process. The Student's Spanish language is to be considered in the evaluation. The report will be shared with the Parents.

The evaluator is to be a speech language therapist with special expertise in adaptive communication devices and knowledge about PKAN and the physical limitations, and with access to improving types of technology. Tr. 1093-1096.

Since the 1:1 EA is now ordered for prospective relief, then to be completed by August 15, 2017 is a comprehensive independent education evaluation using the medical diagnosis of PKAN to address cognitive impairment, intellectual disability, orthopaedic impairment, eligibility, adapted physical education, physical therapy, occupational therapy, speech and language, communication, assistive technology, language arts, audio and visual, educational needs, and academic needs, and such other areas the evaluator deems relevant. The model proposed by Dr. R as to the process for the evaluation is to be followed; that is, it is to be performed under the supervision of a pediatric neuropsychologist, tr. 1097-1098, with regard to the testing environment, tr. 1099, someone who specializes in doing the type of testing with PKAN and for others with a wide variety of needs. Id. at 1102. The Students' Parents are to give their input to be considered in the evaluation process. The Student's Spanish language is to be considered in the evaluation. The evaluation is also to consider eligibility, due to the prospective nature of the remedy, so that the 1:1 EA, educators, and staff can be trained to appropriately provide education to the Student due to the nature of the proposed eligibility – be it cognitive, with intellectual disability components impacting education, or only orthopaedic impairment, or both. It will be arranged and paid for by the Respondent as a public expense. The report will be shared with the Parents.

By the first week of school in the 2017-2018 school year the 1:1 EA, and all educators, and staff associated with the Student's education plan and program, will be trained by the

Respondent based on the evaluation results of the Student and his ability to make progress appropriate in light of his unique circumstances.

The Petitioners' request for compensatory education is denied. While substantive violations of FAPE are found, including a failure to implement, the Petitioners have not met their burden proving any compensatory education services reasonably calculated to provide the Student with the education benefits which he should have received had the Respondent provided the services in the first place. *See Reid*, 401 F. 3d 516 (D.C. Cir. 2005). There being insufficient evidence to allow an accounting or explanation to tie a compensatory education award to past violations, then the request is denied. *See Meza*, D.N.M. Nos. 10-0963, 10-0964 (2011).

Any claims or defenses otherwise raised which are not specifically addressed herein, will be, and hereby are, denied.

**ORDER**

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process Hearing Against the Local Educational Agency is granted in part and denied in part. The Petitioners met their burdens proving substantive violations of a FAPE due to failure of the September 30, 2016 IEP to include a provision for a 1:1 EA, and due to a communication plan based on "thumbs up/thumbs down" in the September 30, 2016 IEP. Additionally, the Petitioners met their burden proving that the physical education program in the September 30, 2016 was not implemented. All other claims are denied, many due to a failure to first exhaust before the IEP Team. Compensatory education is not awarded. What is awarded, however, is prospective relief for an 1:1 EA in the Student's intensive support classroom. By May 15, 2017, the 1:1 EA, and all educators and staff

involved in the Student's education services will be initially trained on the education needs of the Student with a PKAN condition. By July 15, 2017, a comprehensive communication evaluation a speech language therapist with special expertise in adaptive communication devices and knowledge about PKAN will be completed. By August 15, 2017, a comprehensive educational evaluation will be completed under the direction of a pediatric neuropsychologist, considering the Student's unique needs with PKAN, among other needs. Then, by the first week of school in the 2017-2018 school year the 1:1 EA, all educators, and staff associated with the Student's education plan and program will be trained by the Respondent based on the evaluation results of the Student and his ability to make progress appropriate in light of his circumstances.

It is so administratively ordered.

**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: April 14, 2017

## CERTIFICATE OF SERVICE

I certify a true copy hereof was sent via email attachment only to G. Stewart, E. Howard-Hand, and M. Zenderman, Esqs., and via U.S. Mail with delivery notification receipt to the Petitioners at their address of record, with a copy through the U.S. Mail to the New Mexico Secretary of Education, all on this 14th day of April, 2017.