

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER**

SUSAN CYBERSKI, Parent,  
on behalf of Student, a Student,

Petitioners,

vs.

DPH No. 1617-04

ALBUQUERQUE PUBLIC SCHOOLS,

Respondent.

**HEARING OFFICER'S  
DECISION AND ORDER**

Earl Mettler, Due Process Hearing Officer  
January 19, 2018

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**INTRODUCTION AND SUMMARY**

This due process proceeding was filed by Petitioner Parent on behalf of her daughter ("Student") complaining that the Respondent local education agency Albuquerque Public Schools ("APS", the "LEA") in which Student was and is currently enrolled, denied Student

a free appropriate public education (“FAPE”) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400, *et seq.*

At the time of this decision, Student is in the 7<sup>th</sup> grade, is 13 years old, is enrolled in a middle school of the LEA, and is not receiving special education services.

Petitioner contends that Student has been entitled to such services for several years, but that the LEA incorrectly terminated them (“exited” the Student from special education) in 2014 when she was enrolled in an elementary school of the LEA. Petitioner contends that the LEA followed improper procedures, primarily by delaying a decision on special education eligibility while waiting for results of certain teaching techniques. Petitioner also contends the LEA mistakenly determined that Student did not need special education services. Petitioner seeks reimbursement for the cost of a private school placement arranged for Student’s 6<sup>th</sup> grade year, and ongoing tuition reimbursement.

Respondent LEA contends that it correctly followed federal and state requirements when it determined that Student was not entitled to services. It contends that Student’s conditions had no adverse impact on her educational performance. The LEA contends that it is not liable for the cost of private school placement, and that the private school that Student attended for 6<sup>th</sup> grade was not an appropriate placement.

The undersigned finds that the LEA’s application of its response to intervention (“RTI”) process in this case ran afoul of the U.S. Department of Education’s interpretation of the IDEA eligibility determination rules. In addition, the LEA incorrectly determined Student to be ineligible for special education when in fact she had been determined to have a learning disability and did need special education services. Petitioner is entitled to reimbursement for one year of private school tuition. The undersigned also finds that Petitioner has not met her burden of proving that Student is currently entitled to special

education services or to reimbursement for private school costs she may incur in the future.

## **FINDINGS OF FACT**

### **Overview of Student's Educational and Eligibility History**

1. [REDACTED]  
[REDACTED] 883.
2. [REDACTED] She began learning English at age 5.
3. APS initially screened/assessed Student for existence of disability and need for services in 2009 when she was enrolled in a private school. It identified Student as having speech and language deficits, and its multidisciplinary team meeting determined that she was eligible for special education services based on speech language impairment. Exs. 1 – 3; Tr. 886-889. At that time, she was very difficult to understand and spoke with a lisp. Tr. 892-93.
4. APS conducted a performance-based reevaluation of Student's speech language disability in 2013, without formal testing, and concluded she continued to be a Student with Speech Language Impairment in need of speech language therapy. Tr. 893-96, 899-901; Ex. 6, pp. 2-3.
5. Student attended private school at Eastern Hills Christian Academy until April 2014, shortly before the end of 4<sup>th</sup> grade, when she was transferred to John Baker Elementary, an APS school. Tr. 884, 899; Ex. 9 (4/11/14 IEP).
6. The LEA provided speech-language therapy services to Student for one-half hour per week while she was at Eastern Hills, beginning November 2009, through an IDEA Private School Services Plan. Tr. 890-892, 896; Exs. 3, 6 and 9.

7. In 2013, between third and fourth grades, a neuropsychological evaluation of Student was done by John H. King. He reported Student had no significant psychological issues, and “achievement levels in the average range and consistent with her level of intellectual functioning.” However, Dr. King also found Student to have a phonological disorder in the form of a speech articulation deficit. He recommended speech language therapy and daily work on reading skills. Ex. 4, pp. 8-9. This private report was accepted by APS’ private evaluation review group.
8. Parent enrolled Student in an elementary school of the LEA, John Baker Elementary, in April 2014, near the end of 4<sup>th</sup> grade.
9. At that time, APS was still providing speech language services for articulation. Tr. 496-97. Her prior IEP had related to an articulation deficit only. Ex. 47, pp. 4-5; Tr. 496.
10. Also at that time, Petitioner requested that Respondent evaluate Student for learning disabilities. The request was made by handwritten letter dated April 7, 2014. Ex. 8; Tr. 902-03. Petitioner signed a consent for evaluation on May 30, 2014. Ex. 12, p. 1.
11. After this request, the LEA initiated its Student Assistance Team (“SAT”) process in April 2014, and continued it through the 2014-15 school year, while Student was enrolled at the LEA’s elementary school. Exs. 10, 18 and R.
12. Also, a Multidisciplinary Evaluation Team (“MET”) was convened and met October 15, 2014. At that time, the MET determined Student no longer needed specially-designed instruction for SLI-Articulation. Ex. 25. After that



determination, the LEA discontinued speech language therapy services to Student. Tr. 920-21.

13. Parent then pursued two Independent Educational Evaluations (IEE) for Student Tr. 928-929. Those IEEs were provided to APS which then conducted a second MET meeting in May 2015. Ex. 25.
14. The MET reached the same determination in the second meeting, in May 2015. Ex. 25.
15. Petitioner signed the MET report at the May 2015 meeting, but noted her disagreement with the determination, which was to exit Student from special education services. Ex. 25, p. 1.
16. That autumn, when the 2015-16 school year began, Petitioner placed Student at a private school, Designs for Learning Differences (“DLD”) Sycamore School, for her 6<sup>th</sup> grade year, in order for her to have smaller classes, a visual-based math curriculum, multi-sensory teaching methods and more one-to-one instruction. Tr. 935-37. Student completed 6<sup>th</sup> grade at DLD.
17. For 7<sup>th</sup> grade, Petitioner enrolled Student at her neighborhood APS middle school, Hoover Middle School, for the 2016-17 school year. Stipulated Fact 1. [REDACTED]  
[REDACTED] Tr. 882.
18. The LEA also identified Student as an English Language Learner (ELL) Student when she was enrolled in APS in 2014, and provided ELL instruction during the 2014-15 school year. Ex. 16; Tr. 176-78 (“sheltered instruction” and 45 minutes per day of instruction with certified teacher outside regular classroom).

19. ELL is not in itself a learning disability for IDEA purposes. Because ELL can be an interfering factor in a Student's ability to access the curriculum, a diagnostic team must determine whether the adverse educational impact arises from ELL factors or from a disability. Tr. 1201: 3-10, Exhibit P, page 37.
20. The ELL curriculum that was used with Student is a general education curriculum. Tr. 209.
21. Although attributing the need for services to ELL as opposed to educational disabilities is "not a perfect science", and a Student may have needs in both categories. Student was generally proficient in English in 5<sup>th</sup> grade, according to ELL testing, but was also repeatedly diagnosed with learning disabilities related to speech, language and articulation. Tr. 244-246; Ex. 30 p. 1A (proficient in English); Tr. 1201 ("not a perfect science"); 20 U.S.C. §1414(d)(3)(B)(ii) (dual needs).
22. Incidents of bullying have been reported by Student or by Parent at the LEA schools Student attended. Ex. 35, pp. 1-4; Tr. 119-123, 148-174; Ex. 52 (only certain pages admitted, see Tr. 148-174).
23. In 5<sup>th</sup> grade, APS referred Student for a suicide assessment. Tr. 114-115; Ex. 32.
24. Student was questioned at the hearing. She spoke with a slightly to moderately noticeable unusual mode of pronunciation of certain sounds, but was understandable and capable of answering questions from the attorneys. She stated that at the present time it is her preference to stay in her current middle school. Tr. 843.

### **Evaluations and Determinations within the Statutory Period**

25. As part of the evaluation that Petitioner requested upon enrolling Student in an LEA school, a speech and language reevaluation was done by APS diagnostician Michele Schoenholzer on June 13, 2014. Student was found to have various deficiencies in articulation and expressive language skills. Ex. 14, p. 5. Student's mother was advised of this determination. Ex. 48, p. 30.
26. A written finding of the eligibility criteria of speech or language impairment as defined by the IDEA was generated August 18, 2014. Ex. 27.
27. The elementary school's SAT chairperson emailed Petitioner stating that no special education services could be provided until after six weeks of Tier II interventions had been implemented and documented. In the fall of 2014, the 5<sup>th</sup> grade classroom teacher was working on developing those interventions. Ex. 48, p.2; 607-08. Petitioner objected to the delay in provision of special education services that this would cause. Ex. 48, p. 5.
28. Another eligibility criteria finding, based on the criteria of specific learning disability manifested by inadequate achievement in oral expression, was done September 5, 2014. Ex. 28.
29. A speech therapist at the school during Student's 5<sup>th</sup> grade year, Jenna Haas, began working with Student in September 2014. She believed Student progressed very rapidly over a period of several weeks, in the fall of 2014, so that her speech became very intelligible. Tr. 673. She testified that Student was close to meeting her articulation goals, needing only an occasional prompt or request to repeat something. Her opinion was that Student's conversation was fully intelligible, though her pronunciation was not always accurate. Tr. 687-88. She believed that Student's speech needs could be met through classroom-based interventions. Tr.

718: 22-25. By the time of the MET meeting in October 2014, Ms. Haas had only been working with Student about four weeks. Ex. 48, p. 12.

30. A MET meeting was held October 15, 2014. The MET team found that Student does have “substantiated communication deficits in the areas of articulation and expressive language.” Ex. 22, p. 12. The MET report stated that Student’s communication deficits might warrant a diagnosis of Specific Learning Disability, but said a disability on that basis “cannot be implemented until [Student]’s progress towards the implemented Tier II Language Interventions has been reported and deemed unsuccessful”. Ex. 22, pp. 1, 12. However, the report concluded that Student is ineligible for services because there is no adverse impact on education performance, stating this conclusion without specifying whether it refers to SLI or SLD or both. Ex. 22, p. 12.
31. At the MET meeting, the team relied on the opinion of Student’s previous speech-language pathologist, Karen Shirley, that articulation deficits no longer negatively impacted Student’s ability to participate in the academic curriculum. Ex. 22, pp. 1, 12. Ms. Shirley had provided speech therapy to Student a total of three hours. Tr. 343-344.
32. Student’s fifth grade (2014-15) teacher was a MET team member and agreed that Student’s articulation difficulties were not impacting her ability to understand or communicate in class. Tr, 192-93. The fifth grade teacher, Jameson Davis, has a reputation for academic rigor and is also known as a teacher of high fidelity. Tr. 633-34. Her dedication and the caliber of her work were reflected in her testimony, which the hearing officer found to be generally very credible.

33. A written notice of the MET's decision was generated. Petitioner testified that it was not given to her. Ex. 26; Tr. 920.
34. Immediately after the October 2014 MET meeting, Student's speech language therapy was terminated. Tr. 920-21. Petitioner does not recall receiving the prior written notice document, Ex. 26, but she has received the notice of rights document, Ex. 52.
35. As noted above, after APS exited Student from special education in October 2014, Parent pursued two Independent Educational Evaluations (IEE) for Student. Tr. 928-929. Those IEEs were provided to APS which then conducted a second MET meeting in May 2015. Ex. 25.
36. Between the two MET meetings, beginning in January 2015, the in-school speech therapist Ms. Haas worked with the classroom teacher on speech and language techniques, including a visual cue to help Student improve her articulation. Tr. 690-93. (Ms. Haas conferred with Karen Shirley, Student's speech pathologist from the prior school year, about how the classroom teacher should document Student's progress in articulation. Ex. 50, p. 19.) The classroom teacher continued to use this method through the entire school year. Tr. 191.
37. Ms. Haas testified that data developed by the teacher showed that Student progressed in her articulation. The nature of the 1:1 work that the fifth grade teacher did, and that Ms. Haas observed, was explained and corroborated by the teacher. Tr. 1007-16.
38. One of the two IEEs was an extensive independent educational evaluation (IEE) was done by a private diagnostician, Lisa Rhodes, in the spring of 2015. Ms. Rhodes report is dated March 13, 2015. Ex. 23. APS reviewed Ms. Rhodes

evaluation. Ex. 42. Ms. Rhodes was not available to testify at the hearing. Ms. Rhodes determined that Student met eligibility criteria for specific learning disability. Ex. 42. This private report was accepted in part by APS. Tr. 414. APS did, however, reject some of Ms. Rhodes' conclusions because she had used an older version of one test, Tr. 462, 1206. APS also believed that Ms. Rhodes' conclusions were affected by a misapprehension of what interventions had been done in the classroom. Tr. 488-90.

39. An APS employee offered as an expert, Ms. Kastler-Davis, concurred that the recommendations in Ms. Rhodes' report did not require specially-designed instruction. Tr. 1381. Another APS witness agreed that the recommendations in Ms. Rhodes' report fall within the scope of general education and would be classified as Tier I interventions in the NM PED's TEAM manual. Tr. 1247: 2-11, 1250; Ex. 23, pp. 24-25.
40. The other IEE was done by Rosario Roman, an ESL evaluator, who found Student to have deficits in oral expressive skills and phonological processes, and to need more time to listen and comprehend information.
41. In May 2015 another written finding of eligibility criteria for specific learning disabilities was generated. However, this one did not state any deficiencies in achievement. Ex. 29.
42. The MET team's second determination report written a few days later found Student to be ineligible for special education services. It stated that although Student met the criteria for eligibility in the area of oral expression, oral expression was "not a concern...in the school setting". Ex. 25, p. 1.

43. Petitioner signed the MET report of May 2015 but noted her disagreement with the determination, which was to exit Student from special education services. Ex. 25, p. 1.
44. As noted above, Petitioner placed Student at DLD the following school year, 2015-16 for 6<sup>th</sup> grade, and Student now attends the LEA's Hoover Middle School in this 2016-17 school year, in 7<sup>th</sup> grade. Her grades to date are good. Ex. Q, p. 1. Although she does struggle with the work, this evidence does not show that the present placement is inappropriate or that special education services are needed at this time. Tr. 946-947; 949-950, 1050.

#### **Termination of Special Education Services**

45. During the time she was at [REDACTED] Student received weekly speech language therapy for approximately five years from APS.
46. When Student entered Baker Elementary in 2014, the IEP that was prepared for her provided for weekly speech language therapy. The IEP placed Student in a large (29-30 Students) 5<sup>th</sup> grade general education classroom with pull out speech language services (articulation) for .5 hours a week. Ex. 9, p. 12; Tr. 40, 47.
47. The IEP was written as an annual IEP, to be in effect for one year. Ex. 9, p. 4.
48. At the end of 4<sup>th</sup> grade, Student's classroom teacher reported that Student learned best in small groups, needed frequent checks for understanding, required additional concept explanation and required additional practice in math. Ex. 30, p. 5. Her reading skills were below grade level. Ex. 9, p. 2 (reading at beginning 3<sup>rd</sup> grade level at end of 4<sup>th</sup> grade). The teacher provided her with tutoring/support before

and after school. Tr. 137, 229-231. The teacher had concerns and saw “red flags” to cause concern for Student’s academic skills. Tr. 435-436.

49. Early in 5<sup>th</sup> grade, while the IEP was still in effect, Student’s classroom teacher reported that she learned better in small groups, and needed help to remember what she was being taught in class. Tr. 59, 62. Her difficulty understanding concepts was causing her to require too much time to do homework, resulting in the teacher reducing her assigned homework. Ex. 50, p. 2; Tr. 134. She struggled with reading comprehension. Tr. 62, 134; Ex. 30, p. 5 (5<sup>th</sup> grade teacher’s summary comments, “can struggle during reading comprehension sections. . . . does well in small groups and she needs extra support in understanding directions at times”).
50. During 5<sup>th</sup> grade Student’s spelling skills were poor. Tr. 78 (modified spelling list). Her expressive language skills were low and her ability to retell a story was functionally inadequate. Tr. 562-565; Ex. 14, pp. 3-4. She also needed extra support in math. Tr. 84, 134, 138.
51. Student had articulation errors, spoke with a lisp and left endings off of words. Tr. 45; 192; Tr. 554-558; Ex. 14. Continued speech language therapy directed at remediating her lisp would have been appropriate. Tr. 568-569. Over the course of 5<sup>th</sup> grade, Student needed fewer cues to correct her speech as the year progressed. Tr. 99. Despite her lisp, Student volunteered to read aloud in class. Tr. 200.
52. In 5<sup>th</sup> grade, various services and techniques were provided to Student under a plan designated “Classroom Intervention Plan: Tier II”. These were developed and provided to address concerns regarding Student’s speech articulation and writing. Ex. R. The articulation services were developed in consultation with a speech language pathologist. Ex. R, pp. 1, 2.



53. Student also needed more 1:1 time with the teacher than other Students. Tr. 1013.
54. Tracey Fix, an APS diagnostician, was the lead evaluator for the MET process. Tr. 502-03. She testified that APS determined that Student was not eligible for special education services, applying IDEA regulation 34 CFR § 300.309(b)(3) and (c)(2), on the basis that she was making progress toward grade-level standards. APS noted that Student was an English language learner, but did not determine that ELL status was the cause of her difficulties, and ELL status was not the basis of the MET's decision. Tr. 451-55, 526-28, 583, 587-88.
55. Under the guidance of the New Mexico Technical Evaluation and Assessment Manual (NM TEAM), which is published by the New Mexico Public Education Department (NM PED), APS uses a two-prong eligibility test for special education. In addition to a qualifying disability, there must also be an adverse educational impact in order to identify a Student with a Specific Learning Disability (SLD) or Speech Language Impairment (SLI). Tr. 1257-59, Ex. P, pp. 20, 23.
56. In this case, APS required that adverse educational impact be shown by determining how Student would respond to interventions ("RTI"). The RTI process requires first trying certain techniques or providing certain services in the general education setting. Such education supports, known as interventions, are done in general education classrooms to support students who may need additional interventions to be successful. These interventions are provided and analyzed using a three-tiered system. The tiered interventions used by APS are provided for in the Response to Intervention (RTI) framework published by the New Mexico Public Education Department. Tr. 641: 20-25, 642: 1-12.

57. For Student's situation, APS special education administrator Yvette Montoya described a "parallel process" by which testing and classroom impact information would be gathered simultaneously. Ex. 47, p. 4.
58. In August 2014 the SAT chairperson at John Baker Elementary emailed Petitioner stating that no special education services could be provided until after six weeks of Tier II interventions had been implemented and documented. The 5th grade classroom teacher was working on developing those interventions. Ex. 48, p.2; Tr. 607-08. Petitioner objected to the delay in provision of special education services that this would cause. Ex. 48, p. 5.
59. The APS school principal who participated in the first MET on October 15, 2014 believed that there needed to be "six weeks" of Tier II interventions before Student's eligibility as a Student with specific learning disability could be considered and that a SAT process needed to be completed before a Student could be evaluated/qualified for special education. Tr. 780-781, 783-784; *see also* Tr. 571.
60. An APS instructional manager assigned to Student's elementary school, who participated in two of Student's MET meetings, testified that she did not recall any other instance in which determination of eligibility was delayed six weeks for an evaluation of whether services are needed. Tr. 852-53.
61. APS' deputy director of special education testified that RTI is a federal requirement, but methods are left up to the states. Tr. 1110, 1132-33.
62. The RTI approach was apparently continued through Student's 5<sup>th</sup> grade year. Although there were references to a six week period, there is no collection of data for a six week period, and no outcome data was produced with respect to RTI during any of the 5<sup>th</sup> grade year, except for a classroom record from late in the year. Tr. 71,

- 110, 180-181, 190-191; Ex. R. Other than these measurements done by Ms. Davis in 2015, there are no reports of results of Tier II interventions. Tr. 107-09. Tr. 619-620 (absence of data indicates either that the interventions were stopped or that the teacher quit collecting data), 626 (no SAT meetings after January 28, 2015).
63. Student's April 2014 speech goal had to do with "production of age appropriate speech sounds in conversation across various activities . . ." Before exiting Student from special education, including receipt of speech and language therapy, no data had been collected about Student's ability to generalize the articulation skills she had been drilled on in therapy into non-therapy settings. Tr. 686-687, 718. APS did not rely on any data showing that Student had meet her speech language goal, created in April 2014, at the time APS exited her from special education and receipt of speech language therapy. Tr. 687-689, 697-698 (only measurements taken were in controlled therapy setting); Ex. 9, p. 4.
64. The MET did consider the teacher's Classroom Performance Assessments. The Classroom Performance Assessment is a tool that evaluates a Student in the areas of listening, speaking, reading, writing, social communication and executive functioning. None of Student's scores indicated areas of concern in the view of the MET team, using a criterion provided by the publisher of the Assessment. Tr. 1337-39; Ex. 22, p. 17.
65. At its meetings in 2014 and 2015, the MET also used a predicted achievement level which, considered with intelligence testing, did not show a severe discrepancy. Tr. 1211-14, 1377; Ex. P, p. 24.
66. The APS speech language pathologist who had performed reevaluation in May/June 2014 and determined that Student met eligibility criteria for special education under

either Speech Language Impairment or Specific Learning Disabilities was excluded from the MET meeting on October 15, 2014. Ex. 22; Tr. 94, 286-295; 297-298, 299-300 (intent of having SLP evaluator skip MET meeting was to discourage conversation between professionals with different opinions), 301, 571-573, 1147-1148.

67. Before the actual exit meeting on October 15 , 2014, APS staff communicated to Petitioner that reevaluation testing had established Student met criteria for special education eligibility in two areas (Specific learning disability; Speech language impairment). Tr. 607, 907-08 (phone call with APS SLP who evaluated Student in summer 2014) Ex. 48, pp. 1-2.
68. The RTI process and its role in evaluation of Student was not made clear to Petitioner. Tr. 914-15.
69. The principal at John Baker Elementary referred to the role of the 4<sup>th</sup> and 5<sup>th</sup> grade speech therapists, each of whom had worked with Student for only a short time, as respectively beginning and continuing “the process for exiting [Student] from speech articulation services”. Tr. 786. The SAT chair at the school denied predetermination of the team’s eligibility determination. Tr. 649.
70. An APS special education diagnostician expressed the opinion that it is “better to miss a student who might have a disability than to identify one that doesn’t” and that it is worse to place a child in special education that does not need it than to not place a child who does. Tr. 1189, 1289.
71. The LEA exhibited a bias against determining eligibility in this case, shown by the statements in the two preceding paragraphs and by insisting on conducting RTI before deciding eligibility, relying on unquantified and undocumented classroom

observations and opinions of speech therapists who had little experience with Student, discounting and discrediting evaluations without disclosure to the parent, and selecting for MET participation persons who supported terminating services over an evaluator who recommended continuing services.

72. The LEA's bias against a determination of eligibility in this case caused Student to be deprived of the IEP process, including a fair consideration of all relevant information, the setting of clear and measurable goals, consideration of a full range of appropriate services, and provision of such services until appropriate goals are met.

#### **Student's Private School Placement and Parent Contributions**

73. Designs for Learning Differences, DLD-Sycamore School, the school Student attended for 6<sup>th</sup> grade, is a private accredited school for Students with disabilities operating since 1982, providing education for Students from 3rd through 12th grades. Tr. 726-728. Its instructional staff are qualified and experienced at provision of specialized instruction to Students with disabilities. Tr. 732-733. It provided specialized instruction to meet Student's needs. Tr. 740.
74. DLD Sycamore's high school program is an accredited program offering a diploma. Its credits are accepted at APS. Tr. 727-28.
75. DLD Sycamore provided small class size, multisensory teaching, necessary accommodations and modifications of instruction to meet Student's individualized needs. Ex. 38.
76. DLD Sycamore met Student's needs for repetition, re-teaching of concepts/materials, and extra time to complete written work. Tr. 740. Its language

- arts instruction focused on oral reading in order for the teacher to assess a student's oral reading ability as well as comprehension/understanding. Tr. 742-744.
77. DLD Sycamore provided direct curriculum and 1:1 instruction for Student on written composition as well as a computer lab for access to technology. Tr. 746-747. Graphic organizers were a standard feature to break down a writing task and drill students on the required features for the assigned written composition. Tr. 747-749.
78. DLD Sycamore effectively handled intermittent peer bullying in part by provision of ongoing close observation of student conduct and through delivery of daily "behavioral and social helps" which were successful strategies for Student. Tr. 743-746.
79. DLD Sycamore does not offer specialized interventions for ELL Students, and E.C received no such services during her time there. Tr. 752-53. Student also was not provided SLP services at DLD. Tr. 767.
80. Upon entry into 7<sup>th</sup> grade the following year, Student was assessed to be at or near grade level. Ex. Q, pp. 2-5.
81. The placement of Student at DLD Sycamore school during 2015-16 for 6<sup>th</sup> grade was appropriate.
82. Parent paid \$9,390.00 for Student's education at DLD Sycamore School during the 2015-16 school year. Ex. 39.
83. The Procedural Safeguards document which APS provided to Petitioner fails to provide notice of the requirements for parents placing a child with disability in private school and seeking reimbursement from the public schools. Tr. 930; Ex.

53, p. 18; 20 U.S.C. §1415(d)(2)(H) (“requirements for unilateral placement by parent of children in private school at public expense” to be included in procedural safeguards notice) and 20 U.S.C. §1412(a)(10)(C).

- 84. During 5th grade at John Baker Elementary, Petitioner hired a tutor to work with Student for several months for math and writing. Tr. 937-938.
- 85. Outside of school during the current school year, Petitioner provides Student with private occupational therapy and a social skills for girls group therapy. Tr. 950.
- 86. The parent contributions in the two preceding paragraphs militate against any equitable reduction of tuition reimbursement.

#### **Other Issues**

- 87. Student did not display a lack of focus or inattention in any class, and ADHD was not an area of suspected disability in the academic setting. Tr. 183, 238, 1077.
- 88. Dr. King, the neuropsychologist Petitioner sought out to conduct an independent evaluation, did not diagnose Student with ADHD. Generally neither Petitioner nor school staff observed Student having any attention problems at home or at school. Tr. 1032, 1033, 1034; Ex. 4.
- 89. To the extent that Student showed signs of anxiety in the classroom, such were also within the normal ranges for fifth grade Students and did not interfere with Student’s ability to participate in class activities or access the general education curriculum. Tr. 266.
- 90. Dr. King did not raise autism as a concern in his evaluation. Ex. 4; Tr. 1268.
- 91. There has never been any indication that school staff working with Student over her academic career have ever suspected that Student may be a child who demonstrates characteristics of autism. Tr. 1268.

92. Student's 5<sup>th</sup> grade teacher has a reputation for being very supportive of her students and attentive to their academic and social-emotional needs, and could be expected to have been aware of any characteristics that would have indicated autism as an area of suspected disability. Tr. 795.
93. Student has demonstrated success in communication and socialization. She was able to communicate effectively with peers and adults in the school setting. Tr. 810, 201, 215.
94. There have not been significant ongoing concerns about Student being bullied at Hoover Middle School in the current school year, as of the date of the hearing in this matter. Tr. 1082-83, 1085, 1089.

### **DISCUSSION**

This appeal raises the question whether an LEA may delay evaluating, at a parent's request, a Student for special education services in order to try techniques termed "interventions" and evaluate the Student's responses thereto. In this case, the parent requested evaluation because Student had transferred into a middle school of the LEA from a private school. The LEA began the evaluation process, but extended it into the next school year to continue its RTI process.

The U.S. Department of Education's Office of Special Education and Rehabilitative Services issued a memorandum dated January 21, 2011 the subject of which was "A Response to Intervention (RTI) Process Cannot Be Used to Delay-Deny an Evaluation for Eligibility under the Individuals with Disabilities Education Act (IDEA)".<sup>1</sup> The Memorandum references 34 CFR §300.301(b) regarding evaluations, and states that the

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<sup>1</sup> OSEP Memo 11-07 (January 21, 2011) available at: [www.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf](http://www.ed.gov/policy/speced/guid/idea/memosdcltrs/osep11-07rtimemo.pdf).



use of RTI strategies cannot be used to delay or deny a full evaluation. While the Memorandum explicitly speaks to initial evaluations, the same reasoning would apply to the evaluation here, where the Student had been in a private school and was transferring into a middle school of the LEA, and where her current IEP was focused solely on articulation. The Department notes in the Memorandum that it would be inconsistent with the evaluation rules generally for an LEA to delay evaluation on the basis that a child has not participated in an RTI framework. In a subsequent Dear Colleague Letter dated October 23, 2015, 16 IDELR 188, the Department expressed in more general terms that “use of MTSS [multi-tiered system of supports], such as RTI, may not be used to delay or deny a full and individual evaluation under 34 CFR §§ 300.304-300.311 of a child suspected of having a disability.”<sup>2</sup> An agency’s interpretation of its own regulation is controlling unless it is “plainly erroneous or inconsistent with the regulation.” *Auer v. Robbins*, 519 U.S. 452, at 461 (1997). See also *Letter to Brekken*, OSEP, June 2, 2010, 110 LRP 73610 (there is no basis in the IDEA for a district to postpone an evaluation once it receives a referral...just because the referring program has not used RTI).

In this case, APS not only delayed the process for RTI results, but made its decision to exit Student from services in October 2014 without any documented RTI results. Student had a five year history of needing speech language services. That history included two evaluations by the LEA and a diagnosis of a phonological disorder by an independent

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<sup>2</sup> The New Mexico counterpart regulations state a requirement that in determining eligibility based on a specific learning disability a school district “consider data obtained during implementation of tiers 1 and 2 in making an eligibility determination”. NMAC 6.31.2.10(C). However, that rule does not require nor authorize a district to delay evaluation to obtain such data. The implication is that existing data, if any, must not be ignored. It is of note in this case that even after delaying the evaluation for RTI, no RTI “data” was actually produced when Student was exited from special education. See Finding 63. Also, NMAC 6.31.2.10(C) and (F), pertaining to eligibility determinations generally, do not authorize a delay for the RTI process, and do require compliance with the federal regulations.

neuropsychologist. The LEA terminated her services based upon the opinions of staff that she was doing so well that she did not need services. These opinions were based upon only the few weeks at the end of Student's 4<sup>th</sup> grade year and the a few weeks of her 5<sup>th</sup> grade year. The speech language pathologists, in particular, based their opinions on only a very few therapy sessions with Student.

Thus the LEA's use of the RTI process in this case was a procedural violation of the IDEA. It resulted in the abandonment of Student's recently developed IEP, the discontinuance of speech language services, and loss of the benefits of the IEP process.

It also resulted in the denial of a free and appropriate public education ("FAPE") because Student was in fact entitled to services. It is undisputed that Student met the diagnostic criteria for a speech or language impairment and a specific learning disability, Ex. 22, p. 1. The LEA's negative determination of eligibility rests on the contention that Student was not a child with a disability, as defined by 34 CFR §§ 300.8(a), because she, in the terms of that rule, did not "need[] special education and related services". The undersigned finds that she did need continued special education services, as defined by 34 CFR §300.39, for the following reasons.

First, the LEA itself recognized that Student needed such services. Under §300.39(a)(1), special education means specially designed instruction. Specially designed instruction means "adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or deliver of instruction...[t]o address the unique needs of the child that result from the child's disability...." §300.39(b)(3). Here, the LEA actually provided such services, after terminating Student from special education, which shows that such services were needed. That the LEA designated them as general education services is not controlling. *L.J. v. Pittsburg Unified Sch. Dist.*, 68

IDELR 121 (9<sup>th</sup> Cir. 2016)<sup>3</sup>; see Findings 36, 37 and 52 above; *Long v. District of Columbia*, 780 F. Supp. 2d 49, at 61 (D.D.C. 2011) (provision of individualized services without a determination of special education eligibility may indicate student is in fact eligible).

Second, the LEA's perceived leap in Student's abilities between the last few weeks of 4<sup>th</sup> grade and two months into 5<sup>th</sup> grade is not credible. It is based largely on the opinions of the assigned speech therapists in those two grades, neither of which has spent much time with Student. And, it is contradicted by the IEP that APS prepared at the beginning of that period and the evaluation done by an APS speech pathologist during that period.

In both of the MET determinations of non-eligibility the APS team members critiqued and/or downplayed the conclusions of competent evaluators and relied on staff members' opinions about Student that had little or no objective support. The MET team showed a combination of a bias against finding Student eligible and, to some extent, a sincere belief that she did not need services.<sup>4</sup> See Findings 66-72.

By erring on the side of non-eligibility, the LEA foreclosed the IEP process. The IEP is the centerpiece of the IDEA and the principal mechanism by which its goals are achieved. *Honig v. Doe*, 484 U.S. 305, 311 (1988).

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<sup>3</sup> *L.J. v. Pittsburg* was clearly a more egregious case than this case. But the standard is not whether there was an extreme or suspicious effort to avoid classifying a student as eligible. It is simply whether the law was violated, i.e. whether the child did in fact need special education services because of her disability. APS understandably contends that the services Student needed could be provided in general education. But the label does not control. Even if some of the services were sometimes provided to general education students, here they were individually developed and provided because of Student's special need. See Findings 36, 37, 52.

<sup>4</sup> In addition, the October 2014 MET determination of non-eligibility tainted the May 2015 determination. Student was doing better with her speech problem as the year went on. Having already determined her to not need services in the October meeting, the MET obviously would not find her eligible in May, when she had progressed.

Compensatory relief, including tuition reimbursement for a private school placement, is available if a FAPE is denied or if a procedural violation, on its own, rises to the level of a FAPE denial. 20 U.S.C. § 1412(a)(10)(C)(ii); *CH v. Cape Henlopen School Dist.*, 606 F. 3d 59, 66-67 (3rd Cir. 2010). Here, the placement of Student at DLD Sycamore school during 2015-16 for 6<sup>th</sup> grade was appropriate considering the nature and quality of the services that school provided. The conditions of 20 U.S.C. § 1412(a)(10)(C)(ii) are satisfied, as are the factors and test set out in *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230 (2009) and *Jefferson County Sch. Dist. R-1 v. Elizabeth E.*, 702 F.3d 1227 (10th Cir. 2012). Therefore, tuition reimbursement for that year will be ordered.

The remaining question is whether there is entitlement to tuition reimbursement for the current school year, as requested by Petitioner. Special education services are not being provided, but the needs that Student had two years ago may not still be present. Clearly Student's articulation improved during 5<sup>th</sup> grade under the dedicated instruction of the classroom teacher Ms. Davis. She then had the benefit of small classes and personalized instruction at DLD Sycamore for 6<sup>th</sup> grade. Upon entry into 7<sup>th</sup> grade, she was assessed to be at or near grade level, and she is getting good grades in 7<sup>th</sup> grade so far. Findings 44, 74. On this point, therefore, the undersigned finds that Petitioner has not met her burden of proof.

### **CONCLUSIONS OF LAW**

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, et seq., (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, § 6.31.2.13(I) NMAC (2007).

2. The proceeding has complied with all procedural safeguards required by the IDEA and implementing regulations, and the New Mexico regulations. At the request of the parties, extensions of time, including an extension for post-hearing submissions and for entry of this decision, were granted, including an extension for entry of this decision to January 19, 2017.

3. The statute of limitations for due process hearings under the IDEA is two years. 20 U.S.C. § 1415(f)(3)(C) (2004). The request for hearing in this case was filed July 25, 2016. The period under review began on July 25, 2014. All of the claims made by Petitioner arose within the statutory period.

4. The actions of the LEA in terminating special education services and exiting Student from special education in October 2014, and maintaining that position in May 2015, denied Student a FAPE.

5. The LEA's delays of the evaluation process in 2014 and 2015 to await results of its RTI process violated 34 CFR §§300.304 – 300.311, as interpreted by the U.S. Department of Education.

6. The LEA's procedural violations of delaying the evaluation process to await RTI results, combined with not using demonstrable RTI results and relying on anecdotal and undocumented opinions from staff, some of whom had little experience with Student, and not informing Petitioner of pertinent evaluation information and not providing her with proper notice regarding tuition reimbursement rights, prevented the IEP process and denied Student a FAPE.

7. The placement of Student at DLD Sycamore School during the 2015-16 school year was an appropriate placement, and Petitioner is entitled to tuition

reimbursement for that placement. There are no factors that require an equitable reduction of the full tuition amount.

8. Petitioner has not met her burden of proof of entitlement to private school tuition reimbursement for the current school year.

9. Petitioner has not proven that the LEA has missed or ignored the possibility of issues of ADHD or autism, or that such possibilities require investigation at this time.

### **ORDER**

On the basis of the foregoing, it is hereby ORDERED as follows:

APS will reimburse Petitioner \$9,390.00 for Student's education at DLD Sycamore School during the 2015-16 school year within 90 days of the entry of this decision and order.

### **RIGHT TO APPEAL**

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. 300.516, and § 6.31.2.13(I) (25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

ENTERED this 19<sup>th</sup> day of January, 2017.

\_\_\_\_\_/s/\_\_\_\_\_  
Earl Mettler  
Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that this Order was served by email upon counsel for each of the parties on this 19<sup>th</sup> day of January, 2017.

\_\_\_\_\_/s/  
Earl Mettler