BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1617-26

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing Against Two Local Education Agencies (Due Process Request), filed with the State of New Mexico Public Education Department on June 2, 2017. The Petitioners' Request for Due Process is granted in part.

PROCEDURAL BACKGROUND

The case was reassigned to the present Due Process Hearing Officer on July 3, 2017. Letter Assignment, New Mexico Public Education Department, July 3, 2017. On July 11, 2017 a Prehearing Conference was held with counsel for the Petitioners and for the two local Education Agencies, BC School District (BCS) and LL Schools (LLPS). *See* Letter Order, July 6, 2017. At the Prehearing Conference BCS moved to bifurcate the due process hearing between it and the other school district, LLPS. *See* Order Bifurcating Due Process Hearing, July 11, 2017. The request was granted, *id.*, and the allegations by the Petitioners under their Due Process Request in this present due process hearing, DPH 1617-26, proceed only against LLPS, as the local educational authority (LEA).[1]

The Respondent LEA responded to Petitioners' Due Process Request on June 13, 2017. *See* [LEA's] Answer to Request for Due Process, June 13, 2017 (Response). The LEA proposed Joint Stipulations of Fact, filed on August 21, 2017. *See* [t]he Parties Statement

[1] The action against the other school district was renumbered as DPH 1718-01. *See* Letter, New Mexico Public Education Department, July 12, 2017.

of Fact Stipulations, August 21, 2017. The LEA also filed its proposed Joint Statement of Issues. *See* [LEA's] Joint Statement of Issues, August 21, 2017.[2]

The parties timely filed their respective Statements of Issues for the due process hearing on August 21, 2017. *See* Petitioners' Statement of Issues, August 21, 2017 (Ps' Issues); Respondent's Statement of Issues, August 21, 2017 (R's Issues). The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibits, August 23, 2017; Petitioners' Witness List, August 23, 2017; Respondent's Proposed Witness List, August 23, 2017; and Respondent's Proposed Exhibit List, August 23, 2017.

The due process hearing commenced on August 28, 2017, and concluded on August 30, 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 October 4, 2017. Tr. 988-989. An extension of time was granted on the unopposed request by the LEA for submission by the parties of Proposed Findings of Fact and Conclusions of Law, with written argument, on or before October 6, 2017, by noon. *See* Letter Order, Amended Submission Dates, October 4, 2017. A joint request was made for an extension to issue the Hearing Officer's decision, which was granted for good cause shown, for the filing of his decision on or before November 1, 2017. Tr. 988-989.

The Respondent filed its proposed Findings of Fact, and Conclusions of Law, on October 6, 2017. Respondent's Findings of Fact October 6, 2017 (R's FF), and Proposed

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[2] Both the LEA's Joint Statement of Issues and Statement of Fact Stipulations, although noting they are for the "parties," are not represented to have the concurrence of the Petitioners. Therefore, there are viewed as the Respondent's proposed Joint Statement of Issues and proposed Statement of Fact Stipulations, rather than actual joint stipulations.

Conclusions of Law, October 6, 2017 (R's C). Its Closing Argument was filed on October 6, 2017. Respondent's Post-Hearing Memorandum of Law, October 6, 2017 (R's Argument). The Petitioners filed their proposed Requested Findings of Fact and Conclusions of Law on October 6, 2017. Petitioners' Requested Findings of Fact and Conclusions of Law, October 61, 2017 (Ps' FFCL). The Petitioners also filed their Closing Argument on October 6, 2017. Petitioners' Closing Argument and Memo of Law, October 6, 2017. (Ps' Argument).

This decision is due on or before November 1, 2017. Tr. 989.

ISSUES

(1) Whether the Petitioners were denied a FAPE because the Student was not eligible for services under a specific learning disorder resulting from dyslexia. Petitioners' Statement of Issues, (Ps' Issues) No. 1.

(2) Whether the LLPS's IEPs, and the adopted IEP from BCS, were appropriate given the Student's unique circumstances of having characteristics of dyslexia. Ps' Issues Nos. 1, 4. Respondent's Statement of Issues (R's Issues) No. 3.

(3) Whether the LLPS's IEPs, and the adopted IEP from BCS, were appropriate, or as implemented, in regards to sports, special education services, and the least restrictive environment. Ps' Issues Nos. 2, 3, 4, 5, 6, 7, 8, and 11. R's Issues Nos. 3, 4, 5, 6, 7, 8, 9, 10, 11, and 14.

(4) Whether the LLPS's IEPs, and the adopted IEP from BCS, were appropriate, or as implemented, in regards to the Student's behavior and attendance. Ps' Issues Nos. 6, 9, and 10. R's Issues Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 12, 13, 14, and 15.

(5) Whether the Petitioners are entitled to an equitable remedy of compensatory education, and if so, to how much. Ps' Issue 15.

RELEVANT LEGAL OVERVIEW

The burden of proof rests with the party challenging the IEP. *See Schaffer v. Weast*, 546 U.S. 49 (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. 176, 207, 102 S.Ct. 3034, 73 L.Ed 690 (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.*, 458 U.S. 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 County 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 Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743, 753-754 (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 County Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). The educational program offered by the IEP must be "appropriately ambitious

in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. *Endrew*, 137 S. Ct. at 1001. 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. *Endrew*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Endrew*, 137 S. Ct. at 999.

Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. *See CJN v. Minneapolis Pub. Sch.*, 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*, 137 S. Ct. 999 (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*, 137 S. Ct. at 999 (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*, 137 S. Ct. at 755.

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.

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.* 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).

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 County 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 id.*

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 County 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. Sch.*, 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*, 137 S. Ct. at 753.

Hearing officers have authority to grant relief as deemed appropriate based on their findings. 34 C.F.R. § 300.511, 300.513. Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence County 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). A student's behavior, attitude, bad habits, and attendance may

be considered when addressing an equitable remedy. *Garcia Albuquerque Pub. Schs.*, 520 F. 3d 1116 (10th Cir. 2008).

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 (FAPE) under the IDEA.

2. The Student is 14 years old. Exs. 4/A, 5/B, 6/C, and 8/D.

3. The Student was in the 8th grade at LLPS Middle School during the 2016-17 school year during this dispute period. *Id.*

4. The Student was in the 7th grade at BCS for the 2015-2016 school year. Tr. 651.

5. The Student transferred to LLPS as an out of district residence transfer Student for his 8th grade school year. Ex. 23. Tr. 636.

6. This action proceeds against the LLPS only, as the LEA.

7. A Psychoeducational Evaluation Report was prepared while the Student was at BCS and the diagnostic report of January 26, 2015 found the Student to exhibit characteristics of dyslexia. Ex. F/17. It consisted of, among things, Woodcock Johnson IV Test for Cognitive Ability, Short Term Memory -81 (low average), Cognitive processing Speed - 105 (average), Perceptual Speed - 104 (average), Number Facility - 90 (average), Cognitive Efficiency - 87 (low average), Woodcock Johnson Test of Achievement, Broad Reading - 63 (very low), Broad Mathematics - 94 (average), and Broad Written Language - 75 (low). *Id.*

8. The Student had an IEP at BCS, dated February 5, 2015, ex. 1, as a specific learning disabled student due to reading and writing deficiencies, and for other health impairment due to ADHD. *Id.*

9. The IEP from BCS did not incorporate characteristics of dyslexia. Tr. 641-642.

10. When the Student transferred to LLPS, the LLPS adopted his BCS IEP. Tr. 90, 102-103.

11. LLPS did not conduct its own initial IEP when the Student began school with them. Tr. 90.

12. The Student was placed in a class for students with reading below grade level where the methodology of Language! Live was incorporated into the Student's educational services. Tr. 120-121.

13. The class was for 52 minutes a day and fewer than 15 students. Tr. 39, 41.

14. The Language! Live reading program was geared for students at the 5th grade level. Tr. 122.

15. The Student's reading level was at the 2nd grade level. Ex. B, p. 6. Tr. 120-121.

16. On October 6, 2016 the Student caused a disturbance in the commons area of the school by kicking trash, stirring up bees, and yelling at other students, and being argumentative with a teacher, for which he received an out-of-school suspension. Ex. G.

17. On October 24, 2016 the first IEP conducted by LLPS was completed. Ex. 4/A. Tr. 102.

18. This IEP acknowledged information considered by the IEP Team consisted of the Woodcock Johnson IV Test for Cognitive Ability, Short Term Memory -81 (low average), Cognitive processing Speed - 105 (average), Perceptual Speed - 105 (average), Number

Facility - 90 (average), Cognitive Efficiency - 87 (low average), Woodcock Johnson Test of Achievement, Broad Reading - 63 (very low), Broad Mathematics - 94 (average), and Broad Written Language - 75 (low), as contained in the Diagnostic Evaluation from Belen Public Schools (2/5/2015). Ex. 4, p. 3. This IEP stated it took the information from a "diagnostic evaluation" from BCS dated 2/5/17. Ex. 4, p. 3. The noted information in the IEP corresponds to the Psycheducational Evaluation Report of January 26, 2015. It is found that the diagnostic evaluation was for the Psycheducational Evaluation Report of January 26, 2015, and that the BCS IEP was on 2/5/17. It is found the IEP Team was aware of and considered the Psycheducational Evaluation Report of January 26, 2015. Tr. 90, 100, 104. 19. The October 24, 2016 IEP, however, did not contain another significant aspect of the Psycheducational Evaluation Report of January 26, 2015 – that the Student "exhibits characteristics of an individual with Dyslexia." *Compare* Ex. 4 *with* Ex. 17.

20. It is found that LLPS was aware of the Psycheducational Evaluation Report of January 26, 2015. Ex. 24. Tr. 104-105, 108.

21. Traditionally in the forms LLPS uses, when a student has characteristics of dyslexia it is documented on the front page of the IEP. Tr. 107-108.

22. The IEP Team meetings resulting in plans of October 24, 2016, December 9, 2016, January 26, 2017, and February 1, 2017 (and adoption of the BCS plan) did not find or consider that the Student had characteristics of dyslexia, or that he was specific learning disabled resulting from dyslexia. Exs. 4/A, 5/B, 6/C, and 8/D. Tr. 449.

23. Characteristics of dyslexia, however, are found to be unique circumstances for this Student's education. *See* Tr. 692 - 695.

24. The IEP Team meetings resulting in plans of October 24, 2016, December 9, 2016, January 26, 2017, and February 1, 2017 (and adoption of the BCS plan) did not find or consider what the unique, individual characteristics of dyslexia were for this Student – there was no knowledge of what the dyslexia characteristics actually were that would impact the Student's education services. Exs. 4/A, 5/B, 6/C, and 8/D.

25. The October 24, 2016 IEP removed the Student out of the Language! Live reading program into a inclusion English class containing about 22 students. Ex. 4, p. 6. Tr. 249-250.

26. The Student's reading is significantly below the 8th grade level. Tr. 78, 120-121.

27. The IEP of October 24, 2016 proposed a FBA, yet the Student's Mother objected to it. Ex. 4. It also contained a request by the Team for recreational therapy to assist with the Student's behavior, which continued throughout the IEP processes, which were always rejected by the Mother. Exs. Exs. 4/A, 5/B, 6/C, and 8/D.

28. The Student wanted to remain in the Language! Live program because it was easy. Ex. 4, p.6. Tr. 225.

29. The Student was scoring about an 84% while in Language! Live under the teacher's scores. Ex. 4. Tr. 81.

30. Participation in sports was a motivating factor for the Student. Tr. 170-180. The Student played football and was a wrestler. Tr. 48.

31. Wresting began on about November 1, 2016. Tr. 718.

32. The Student was recruited into the high school wresting program, although he was in Grade 8. Tr. 717, 741.

33. On December 2, 2017 the Student engaged in misbehavior. He argued with a teacher (the same teacher he had confronted in his earlier discipline matter), refused to

follow instructions, and was disruptive in the classroom, for which he was given an out-of-school suspension for three days. Ex. G.

34. In the middle of December the Student's grades were faltering, causing concern for eligibility to wrestle. Tr. 721. The Student was provided a working lunch to assist him with achieving passing grades. Tr. 676-677, 723-724.

35. Under New Mexico's Activities Association rules, a student athlete must have a 2.0 to participate in sports. Tr. 719, 731-732.

36. On December 9, 2016 the IEP Team met, and continued with their proposals consistent with the IEP of October 24, 2016, yet added, among other things and despite the Mother's objections, a FBA. Ex. 5/B.

37. As of December 17, 2016 the Student was found to be ineligible for wresting due a 1.9 GPA. Tr. 723. His ineligibility for wrestling became final after the Christmas break. Tr. 722-725, 828-830.

38. A psychologist (who did not testify) prepared a letter on about January 11, 2017, stating, yet without giving an explanation for, that SDL was the reason for the Student's low grades, and asked that the Student's eligibility for sports be reconsidered. Ex. 36. Little weight is given to this report. The psychologist did not testify and was not subject to cross examination. His report does not indicate any basis for his opinion. *Id.*

39. January 24, 2017 brought forth another disruptive incident by the Student – he went into the book room and urinated on the school books and on the floor. Ex. G. He was given an out-of-school suspension for three days. *Id.*

40. A third LLPS IEP meeting was held on January 26, 2017. Exs. 6/C and 7. The resulting IEP continued with the proposals consistent with the IEPs of October 24, 2016, and

December 9, 2016, resulting in a plan that added, among other things, that a BIP was to be performed. *Id.*

41. The Student began to miss school between January 30, 2017 through February 3, 2017, and then extending into February 6, 2017 through February 10, 2017. Ex. H.

42. February 1, 2017 was the fourth LLPS IEP meeting which resulted in a plan consistent with the October 24, 2016, December 9, 2016, and January 26, 2017 plans, yet interpreted the BIP and added behavior solutions where intervention would lead to a structured environment, and other positive reinforcements. Exs. 8/D.

43. On February 10, 2017 the Student ingested an overdose of over-the-counter medication and Student was provided hospital medical attention for that date after the Student's Mother took him for health care. Tr. 832-833. The District was not notified of the overdose. Tr. 837.

44. On February 13, 2013 the Student flashed a red laser light beam into the custodian's eyes two times, he then called a teacher a snitch, and blocked the cafeteria doors so other students could not exit. This resulted in a one day out-of-school suspension. Ex. G.

45. All of the misbehavior episodes occurred during unstructured time, and academics were not the source of the misbehavior issues. Tr. 205.

46. The Student stopped coming to school after this event. Ex. H. Tr. 628.

47. Medical excuses were provided at various times first commencing for January 2, 2017 and continuing into April 24, 2017. Ex. K.

48. School work assignments were requested and provided to the Student's Mother. Tr. 844-845.

49. LLPS, through its school attorney, advised the Mother that keeping the Student home from school and obtaining assignment was not an option – he had to be home schooled or attend school. Ex. 32, p. 1. Tr. 848.

50. Truancy proceedings were noticed to the Student's Mother commencing on October 28, 2016, and concluding with a notice of an administrative truancy on about April 11, 2017. Ex. 29.

51. On May 16, 2017 a final IEP meeting was held which resulted in a prior written notice returning the Student to his home BCS school district, and with a written notice stating that the purpose of the meeting was for transition. Exs. 10/E. Tr. 330. A meeting was held and the Mother participated in it, although she hoped it would be a more substantive meeting, rather than only a transition meeting. Tr. 416, 427, 814.

52. It is found that the after-the-fact testimony by some of the District witnesses that even if they had considered characteristics of dyslexia or dyslexia then the programs offered would have been the same to hold little weight on the primary issue presented – that is, whether the IEPs (or adoption of the BCS IEP) failed to include the unique circumstances of characteristics of dyslexia for the Student. The IEP Teams did not consider the it – the witnesses did not speak for the Teams.

53. The Student is no longer enrolled in the LLPS – he is back at the BCS. Tr. 634-635, 745-746.

54. Weight is given to the testimony from diagnostician Ms. S as to diagnostic issues from an educational standpoint, in general, since she is the only diagnostician who testified regarding dyslexia and characteristics. She is knowledgeable and experienced in educational diagnostics in New Mexico, having combined experience for about 17 or 18 years. She holds

a master's degree in special education and is a licensed diagnostician in the State of New Mexico through the PED. Tr. 713. Her opinion is given specific weight in that the IEP Team, not the diagnostician, is to take action based on characteristics of dyslexia. Tr. 703-706. Her testimony was forthcoming and complete; not evasive. Although her knowledge of the Student was limited, her testimony about the characteristics of dyslexia and the educational programs is objective.

55. The Student's Mother is credible, appearing truthful, and committed to the education of her son. She is zealous in her advocacy, which may make her testimony somewhat self-serving, and in this regard the weight given her testimony is balanced.

56. Mr. B is found to be truthful. Although the Petitioners sought to impeach Mr. B's testimony because he is also a football coach in addition to a language instructor, this is unpersuasive. Mr. B holds a master's degree in special education, and a bachelor's degree in English, both from New Mexico State University. Tr. 246. He held up very well testifying through the morning and part of the afternoon. He was trained in Language! Live for three days in Dallas, Texas, for a training with Cambium for Advanced Language! Live, and to become a trainer. Tr. 50. His knowledge of dyslexia or characteristics of dyslexia may be incomplete, yet that does not impact his credibility.

57. Ms. L, Ms. N, Principal S, and Assistant Principal M are all found to be truthful.

58. Weight, to the extent applicable under the issues, is given to the testimony of Coach C. Of all of the educator witnesses, he had the strongest personal connection with the Student and held a good relationship with him. His knowledge of the Student and the Student's day-to-day school life is beneficial, although limited to a short period of time. He was truthful and answered the questions posed to him to the best of his ability.

59. SPED Director Ms. P's credibility (which actually should have been weight to testimony about dyslexia) was questioned because of her position as the SPED Director and her lack of knowledge about a "Dear Colleague Letter" from the Department of Education regarding dyslexia, tr. 817, yet she was rehabilitated as to following NM PED and federal regulations. Tr. 820. As for a credibility determination, Ms. P was truthful and she answered questions to the best of her ability.

60. Mr. PC and Ms. AS generally discussed administrative tasks, and their testimony is found to be credible for the purposes of the tasks.

61. 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.

62. 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

The crux of this dispute centers on two distinctly factual and legal theories about this 2016-2017 school year out-of-district transfer 8th grade Student athlete, who was refused permission to continue to attend LLPS as an out-of-district transfer student into high school for the 2017-2018 school year. The Petitioners present their case about a middle school young man enthusiastic about sports who was denied a FAPE by the District because, among other things, he was a student with dyslexia or characteristics of dyslexia, which were not considered in his IEPs, thus resulting in inappropriate special education services, in his misbehavior, in low grades, and the eventual loss of his privilege to play sports. Conversely,

the District paints a picture of a rebellious adolescent who urinates on school books, points laser beams in a school custodian's eyes, and refuses to attend school, among other things, who was eligible for receipt of special education services under the category of Specific Learning Disability (SLD) and Other Health Impairment (OHI). Despite the IEPs' plans for services or requested services, the District contends the Student's actions themselves prevented him from obtaining educational benefit from the offered special education programs, relieving it from any liability for a denial of FAPE, citing *Garcia v. Albuquerque Public Sch.*, 520 F.3d 1116 (10th Cir. 2008). This decision lies somewhere in-between.

Dyslexia and the Characteristics of Dyslexia

The position taken by the Petitioners is that the Student has the neurological condition of dyslexia which makes him eligible for special education services under the definition of a Specific Learning Disability (SLD). Referring to the "Dear Colleague Letter" by the United States Department of Education of October 23, 2015, 115 LRP 50994 (OSERS 10/23/15), the Petitioners point to the need of school districts "to be cognizant of addressing the unique educational needs of children with specific learning disabilities resulting from dyslexia . . . ." (OSERS 10/23/15). *Id.* Under the "Dear Colleague Letter" the condition of dyslexia forms the basis of the specific learning disability. (OSERS 10/23/15).

The IEPs from both from BCS and LLPS find the Student eligible for services under Attention Deficit Hyperactivity Disorder (ADHD) under Other Health Impairment (OHI), and for severe deficits in reading and writing under SLD. *See* Exs. 1, 3, 4/A, 5/B, 6/C, 8/D, and 10/E (with 10/E consisting of invitation, prior written notice, meeting participants, and special services only, yet for convenience will also be called an IEP). None of the IEPs in evidence, either from BCS, or LLPS, find the Student eligible for services based on the

condition of dyslexia as a specific learning disability. *Id.* Similarly, none of the IEPs in evidence, either from BCS, or LLPS, have any indication that the Student's educational plans consider dyslexia, or characteristics or suggestions of dyslexia, as part of the individualized educational programs. *Id.* Of the LLPS IEPs, only the May 16, 2017 meeting has any indication or reference to dyslexia, that being a "Special Services K-12" form, which has the word "DYSLEXIA" printed on the lower left side of the page, yet the box is not checked; rather the form reflects services are for a BIP and for an FBA. See Ex. E, p. 6. Thus, the four corners of the IEPs will viewed as a touchstone to determine if a FAPE has been or is being provided. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

The Petitioners also contend is that "LLPS failed to provide [the Student] education which was consistent with state requirements for students with characteristics of dyslexia ...". *See* Due Process Request, p. 17. The District's position, and admission, is that the "Student qualifies for receipt of special education services under the category of specific learning disability in the areas of reading and written language with a suggestion of dyslexia tendencies in the area of reading." *See* R's Argument, p. 2.

This all ties into a Psychoeducational Evaluation Report conducted by BCS dated January 26, 2015. Ex. F, 17. During the relevant periods of time in this case, LLPS was aware of and relied on the report. Tr at 369. In pertinent part, the report summarizes that in addition to significant documented academic deficits in reading and written language, a medical diagnosis of ADHD, and neuroprocessing weakness in short term working memory, the Student "exhibits characteristics of an individual with Dyslexia." *Id.*, F at p. 15, 17 at p. 15. The Report also notes letter/word identification at .1 percentile; spelling at second percentile; and sentence reading fluency at 3rd percentile. *Id.*, F at 7, 17 at 7.

Given this foundation, the Petitioners and the District thus raise two interconnected, yet separate issues. The first issue is whether the Student should be found to be eligible for services with specific learning disabilities resulting from dyslexia. The second issue is whether the LLPS IEPs were appropriate (and if reliance on the initial BCS IEPs was appropriate) by failing to consider dyslexia or characteristics of dyslexia.

Factually, among other things, the Petitioners rely on the language of the January 26, 2015 Psychoeducational Evaluation Report finding the Student exhibiting characteristics of dyslexia as meaning that the Student had specific learning disabilities resulting from dyslexia. Ps' Argument, pp. 3-4. They argue that because New Mexico regulations speak of dyslexia as a condition "characterized" by word recognition difficulties and with poor spelling and decoding abilities, then the Psychoeducational Evaluation Report's language that the Student exhibited characteristics of dyslexia equates with a conclusion that the Student was eligible for services with specific learning disabilities resulting from dyslexia. *Id.* In this regard, the Petitioners ask that Exhibits 15 and 16 also be considered in the characteristics of dyslexia becoming eligibility for dyslexia analysis. *Id.* Exhibit 15, like the Psychoeducational Evaluation Report, states that the Student "displays the characteristics of a student with Dyslexia." Ex. 15. Exhibit 16 is a Differential Diagnosis for Dyslexia Worksheet by BCS discussing the diagnostic profile associated with dyslexia. Ex. 16.

As a matter of law, the Petitioners rely on the language of a regulation and the phrase in the reports that the Student either displays or exhibits "the characteristics of a student with Dyslexia." Ps' Argument, pp. 3-4.

New Mexico regulation §6.31.2.7(B)(6) NMAC, under definitions, reads:

> (6) "Dyslexia" means a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.

Interpretation of the New Mexico regulation will proceed under the Uniform Statute and Rule Construction Act, §§ 12-2A-1 through 20, NMSA 1978. *See* § 6.31.2.14(B) NMAC. In this regard, the essential and primary source of the meaning of a rule is the text itself. *See* § 12-2A-19 NMSA 1978. The rule is to be construed to give effect to its objective and purpose, and its entire text, while avoiding an unconstitutional, absurd or unachievable result. *See* § 12-2A-18 NMSA 1978.

Reviewing the dyslexia definition, under the rules of construction, the terms "characteristics" and "characterized," particularly as used in context of the entire definition coupled with the word "typically," speak in terms of traits, signs, or tendencies that arise in a factual context. It does not support, as the Petitioners propose, that a phrase that the Student displays or exhibits characteristics of a student with dyslexia equates with a conclusion as *a matter of law* that the Student is eligible for services with specific learning disabilities specifically resulting from dyslexia.

As for matters of fact on this issue, the Petitioners have not met their burden that the Student is eligible for specific learning disability resulting from dyslexia, rather than only showing signs or characteristics of dyslexia. *Schaffer v. Weast*, 546 U.S. 49 (2005)(burden of proof on party making challenge). As a matter of practice, an educational diagnostician completes a New Mexico Team Differential Diagnosis for Dyslexia Worksheet and does not

determine the equivalency that a student has the specific learning disability resulting from dyslexia, but only that a student has the characteristics of dyslexia. Tr., 421. Educational Diagnostician Ms. S describes the evaluator's role as being to help determine evaluation criteria and to then highlight dyslexia characteristics, note them in the report, and then it is up to the IEP Team for further action. Tr. 694. Although Ms. S's answer is in response to a question based on instructions, the answer first notes that the diagnostician's role is only to report characteristics of dyslexia, as well as to decide curriculum and instructional strategies. Tr., 694-695. The LLPS IEP team or teams did not consider eligibility for dyslexia. Tr, 449. Thus, the issue to be decided, factually, is whether the evidence presented by the Petitioners in addition to the characteristics of dyslexia meets their burden to allow a finding of a specific learning disability resulting from dyslexia specifically.

A specific learning disability is defined is "a disorder in one or more of the basic psychological processes involved in understanding or in using language, written or spoken," which manifests itself in "the imperfect ability to listen, think, speak, read, write, spell . . . including conditions such as . . . dyslexia." 34 C.F.R. § 300.8 (c)(10). New Mexico's regulation, as noted earlier, provides the traits or characteristics typically seen with dyslexia, such as "difficulty with accurate or fluent word recognition" and "poor spelling and decoding abilities" typically resulting "from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge." §6.31.2.7(B)(6) NMAC.

Although limited testing is available, the Team Differential Diagnosis for Dyslexia, Ex. 16, notes the test results in reading and spelling are consistent with a diagnostic profile of dyslexia. Ex. 16, p. 4. Phonological skills are below average. *Id.* The Student's letter/word identification was at .1 percentile; spelling at the second percentile; and sentence reading fluency at the third percentile. Exs. F at 7, 17 at 7. The Student has always had low reading and writing scores. Ex. 17. Tr. 189-192. The Student struggles with spelling. Tr. 265. He could not sound out words. Tr. 313-314. He has documented academic deficits in reading and written language, and neuroprocessing weakness in short term working memory, and "exhibits characteristics of an individual with Dyslexia." Exs. F at p. 15, 17 at p. 15.

Despite the testing, however, the Petitioners present no evidence of a diagnosis of specific learning disorder specifically because of dyslexia or a diagnosis of dyslexia. *See* § 22-13-32 NMSA 1978 (E)(noting identification of dyslexia as a specific learning disability). They failed to present, for instance, a clinician with specialized clinical training capable of making a diagnosis under the criteria for a disorder. The Petitioners apparently rely on the testing, with characteristics of dyslexia, for a due process hearing finding amounting to a diagnosis of dyslexia resulting in a specific learning disorder. This invitation is declined. Thus, it is found and concluded that the Petitioners have not met their burden that Student is eligible for services for a specific learning disability specifically resulting from dyslexia, with a need for special education services. 42 C.F.R. § 300.306. *See Letter to Unnerstall,* 68 IDELR 22 (OSEP, April 25, 2016)(for dyslexia evaluation purposes, evaluation could be by licensed physician for determination of medically related disability to meet needs of special education

services).[3] It is found and concluded, however, that the Student had the unique condition of being a child with specific characteristics of dyslexia.

IEPs

The Student entered LLPS as an out-of-district transfer student from BCS. While at BCS he was determined to be eligible for special education services under OHI (ADHD) and SLD (reading and writing). Neither dyslexia as an eligibility, nor characteristics of dyslexia as a part of the Student's educational circumstances, were considered in the BCS IEP. *See* Exs. 1, 2, and 3. LLPS had the option to either adopt the BCS IEP or develop, adopt, and implement a new IEP. 34 C.F.R. § 300.323(e). It opted to adopt.

After the Student's transfer the District applied the last IEP from BCS for its educational plan for the Student until it could meet and form its own educational program. LLPS was aware of the BCS Psychoeducational Evaluation Report of January 26, 2015. Ex. F, 17. On October 24, 2016, the first IEP was produced. Ex. 4/A. On December 9, 2016 a secondary IEP was created. Exs. 5/B. On January 26, 2017, another secondary IEP was completed. Exs. 6/C. February 1, 2017 brought forth yet another IEP. Exs. 8/D. Finally, the IEP proposing that the Student be returned to BCS was issued. Exs. 10/E. Neither dyslexia as an eligibility, nor characteristics of dyslexia as a part of the Student's educational circumstances, were considered in the LLPS IEPs.

As noted above, the Student's IEPs did not incorporate that the Student had characteristics of dyslexia, the conditions which existed at the time the IEPs were offered or

[3] The Petitioners have not requested an evaluation as relief in this due process hearing. *See* Due Process Request, Issues, and Argument, generally. At one point, on January 12, 2017, the Petitioners sought an Independent Educational Evaluation, to which the District concurred, yet the Petitioners subsequently withdrew their request on January 26, 2017. Ex. M.

adopted. *See O'Toole*, 144 F.3d at 701-02 (quoting *Carlisle Area Sch. v. Scott P.*, 62 F.3d 520, 534 (3rd Cir. 1995))(measure of IEP determined at time offered to student, not later date). The LLPS's IEPs (or adoption of the BCS IEP) did not acknowledge that the Student had characteristics of dyslexia. Exs. 4/A, 5/B, 6/C, and 8/D. The Petitioners' point is well-taken that if characteristics of dyslexia were not addressed in the IEPs, then any educational programs and services proposed without incorporating characteristics of dyslexia could not amount to research based specialized instruction, thus making the services facially inappropriate. The District's position that Language! Live was appropriate because of an after-the-fact interpretation that it would have been appropriate had characteristics of dyslexia been a part of the IEP plans is unpersuasive. The plans themselves (or the adoption of the BCS plan) form the basis for denial of FAPE. *See O'Toole*, 144 F.3d at 701-02.

The Student's educational plans were for a child with special needs for ADHD, and in reading and writing -- not for a child with specific characteristics of dyslexia. As explained by Educational Diagnostician S : "Every individual with dyslexia learning disabilities [is] different. There's mild, moderate and severe levels of that." Tr. 704. The plans demand that they be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew,* 137 S. Ct. at 999, which is "appropriately ambitious in light of [the child's] circumstances." *Id.* at 1000.

As noted in the legal analysis section above, given New Mexico law, characteristics of dyslexia in a specific learning disability classification are in and of themselves to be considered. New Mexico's regulatory framework discusses characteristics of dyslexia, such as "difficulty with accurate or fluent word recognition" and "poor spelling and decoding abilities," which could result in reading comprehension and reduced reading experience

problems and could impede vocabulary growth and background knowledge. § 6.31.2.7(B)(6) NMAC. Thus, the "characteristics" are, in and of themselves, educational disability matters unique to the child possessing them. This is consistent with specific learning disabled being defined at the federal level which includes a condition such as dyslexia. 34 C.F.R. § 300.8(c)(10)(i).

Given this foundation, "characteristics of dyslexia" are unique circumstances of the Student for whom the IEP was created, and upon which the adequacy of the IEP is to be determined. *See Endrew*, 137 S. Ct. at 1001. These characteristics existed at the time the IEPs were offered or adopted. *See O'Toole*, 144 F.3d at 701-02.

The point is not missed that Educational Diagnostician S, in review of the LLPS IEP(s), is of the opinion that even if the IEP had indicated dyslexia as the eligibility (and presumably noting characteristics of dyslexia as unique circumstances of this Student), the reading and writing methods employed by the District would be the same. Tr. 708-709. However, this may more likely go toward remedy, if any, rather than the issue regarding a facial denial of FAPE due to the plans. The IEP "must be reasonably calculated to enable [the Student] to receive educational benefits." *Rowley*, 458 U.S. at 207. If the IEP fails to consider characteristics of dyslexia, as has happened here, then the IEP (the plan itself) is not calculated to provide educational benefits, even if educational benefits might otherwise exist under another educational plan that did not include dyslexia characteristics. Even if it goes to remedy, the qualitative approach presumably would have to look at the unique circumstances of the Student to place the Student back to where he would have been had the IEP been appropriate – that is, a focus on the Student's unique individual needs with particular characteristics of dyslexia to meet those unique needs, rather than an educational plan, as Educational

Diagnostician S explained after-the-fact (as well as other educators), that only encompassed a general framework for a student with dyslexia, not for this individual student and his unique circumstances presenting characteristics of dyslexia. Tr. 708-709.

It is concluded, therefore, that the IEPs and adoptions, therefore, were not appropriately ambitious given the child's unique circumstances. *Endrew,* 137 S. Ct. at 1000. Creating an IEP without incorporating characteristics of dyslexia is not just lacking an ideal plan under these unique circumstances of the Student – it results in an unreasonable plan. *Endrew,* 137 S. Ct. at 999. As a result, the LLPS IEPs and adoption of the BCS IEPs resulted in a substantive denial of FAPE. 34 C.F.R. § 300.513 (a).[4] The Petitioners have met their burden.

Sports, Special Education, and Least Restrictive Environment

The Petitioners' next position, in context of the flow of the combined issues and argument, is that if the LLPS's IEPs included specific learning disabled resulting from dyslexia or specific learning disabled with characteristics of dyslexia in their plans then their placement of the Student into an inclusive 8th grade language arts program, among other things, violated a FAPE and impacted his eligibility for sports. Ps' Argument, p. 17 . The Respondent's position generally is that even if the plans had categorized dyslexia or characteristics of dyslexia, the placement into an inclusive 8th grade setting with

[4] The District's contention that the Petitioners failed to first bring before the IEP Team the eligibility issue of dyslexia is found to be without merit. R's Argument, p. 5, paragraph 34. 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). Additionally, any issue that the "characteristics of dyslexia" matter should have first been raised before the IEP Team is waived because the District admits that the Student qualified for SPD in reading and writing with a suggestion of dyslexia tendencies and was, therefore, aware that the matter was ripe. *See* R's Argument, p. 2.

accommodations, services, and modifications was in the least restrictive environment and that the result would be the same – that is, it would have provided the same services, resulting in appropriate IEPs. R's Argument, p. 12.

The Student was an athlete at LLPS. Tr. 48. He played football and was a wrestler. Tr. 48. Football season was between August through the end of October. Tr. 48. Wresting season began in November. Tr. 48. Although in the 8th grade, the Student became eligible for high school wresting. Tr. 49. He was, according to his middle school coach, " a man amongst boys at the middle school level." Tr. 49.

Sports were the Student's main motivators. Tr. 179-180.

The adopted IEP was the Family School IEP from BCS. Ex. 3. One of the noted accommodations was text to speech. *Id.* When the Student entered middle school at LLPS he received specialized instruction in the Language! Live program by a highly trained teacher in Language! Live. Tr. 50, 360. The Student began the Language! Live program from the first day of school, beginning in August 2016. Tr. 45. LLPS had received the BCS records at the beginning of the school year. Tr. 45 - 46.

The Student was placed in the Language! Live reading method program in a class of fewer than 15 students for 52 minutes a day. Tr. 39, 61. The Language! Live program is appropriate for students with dyslexia. Tr. 709-711. It is designed for children who are reading significantly below grade level. Tr. 51. The Language! Live program was geared for students reading at the 5th grade level. Tr. 122.

On October 24, 2016, the LLPS completed its IEP. Ex. 4/A. The Student was noted to have low reading and writing skills, and that information was included as provided by the diagnostic evaluation from BCS. *Id.* For reading and writing, it was noted that Student was

provided the methodology of the Language! Live program, although when motivated it was felt he could do better, yet the Student had a Lexile Level of 655, and a reading level in the second grade. The Student was then placed in an 8th grade inclusion setting, without Language! Live. *Id.* Thirty minutes a day of reading and writing were scheduled. *Id.* The parent (the parent is the Mother) agreed reading and writing goals were appropriate and concurred with an inclusion setting. *Id.* The IEP plan provided for regular education classroom with special education services with 80% or more of the day in the regular classroom. *Id.* The Student had accommodations for state and district testing, with small groups, extra time, and portions read aloud. *Id.* He was in an inclusion setting for language arts. *Id.* The Student's primary disability is SDL. *Id.* His secondary disability is OHI. *Id.* These eligibilities continued throughout the LLPS's IEPs, except the final plan. When noted why supplementary aids and services are not adequate to meet the needs of the Student in the general education classroom, the IEP stated that the Student "has severe deficits in areas of reading and writing . . . struggles to read grade level texts and [struggles] to express himself in written form." *Id.* These least restrictive environment notations are contained in all of the LLPS's IEPs, except the final plan.

The Student was removed from the small Language! Live reading class and into an inclusion English class of about 22 students in November 2017. Tr. 249-250. He was removed from the Language! Live reading program because of his reading teacher's observations, discussions with the Mother, and daily scores, although daily scores could not be produced. Tr. 75. The Student wanted to stay in Language! Live because it was easy. Exs. 4/A. He was scoring at about an 84% under the teacher's scores. *Id.*

The Student began a wresting program on November 1, 2016. Tr. 718. Although a middle school student, he was allowed to compete in high school wresting. Tr. 717. According to the New Mexico Activities Association rules, a wrestler has to have at least a 2.0 GPA to compete. Tr. 719. Grade checks were made weekly on the Student, and he was not making the grades academically. Tr. 720. The coach gave him help to allow studying for extra time. Tr. 734. A concern arose that at least by December 17, 2016, the Student had to have a GPA by 2.0 to compete. Tr. 721.

On December 9, 2016, another IEP plan was completed. Ex. 5./B. *Id.* It is noted that on November 8, 2016, the Student was placed language arts inclusion and was then in the initial stages of that goal. *Id.* Accommodations for him included having portions read aloud to him or speech to text, small groups, and extra time. *Id.* He continued with 30 minutes a day of special services in reading and writing. *Id.* At this time the Student was exhibiting low grades due to suspensions and outside therapy. *Id.*

A working lunch was provided to the Student to assist him in receiving passing grades to play sports. Tr. 676-677, 723-724.

On December 17, 2017, the wresting coach met with the Student and his mother and it was explained that the Student had a 1.9 GPA and that he barely missed eligibility, but that he could not wrestle. Tr. 723. The Student had two Fs. Tr. 724. Ex. 25. After Christmas break it was determined he was ineligible for the wrestling team. Tr. 723.

On January 11, 2017, the Student's psychologist asked that the Student's grade point under 2.0 be reexamined to allow him to remain in wresting, opining that his SLD (without explanation) was the reason for the low grades. Ex. 36.

On January 26, 2017 another IEP was completed. Exs. 6/C and 7. Academics generally remained the same, with addendums to behavior issues. *Id.*

An IEP was completed on February 1, 2017. Exs. 8/D. Academics generally remained the same, with behavior issues being addressed. *Id.*

The Student discontinued reporting to school on or about February 14, 2017. Ex. H. Tr. 628.

Student's Mother then asked for and obtained assignments from LLPS, where the Mother and the Student's sister helped the Student with his studies. Tr. 844-845.

The final IEP meeting was on May 16, 2017, which resulted in a prior written notice returning the Student to his home residency school district. Exs. 10/E.

The October 24, 2106 IEP changed the Student's educational placement for language arts from the Language! Live program, which was designed for children who are reading significantly below grade level, into an 8th grade reading program. The IEP noted that in reading the Student read at the 2nd grade level, with a Lexile Level of 655. It is found that the Student's reading is significantly below the 8th grade level. The Language! Live program, however, was geared toward students reading at the 5th grade level. The Language! Live program was also an appropriate program for a student with characteristics of dyslexia.

The IEP of October 24, 2016 did not consider the Student to be a student with characteristics of dyslexia. Based on the Student's first reading instructor's recommendation, the Student was removed from the Language! Live reading program because of observations, discussions with the Mother, and apparently daily scores. No other testing was performed. The Student wanted to stay in Language! Live because it was easy. He was scoring at about

an 84% while in Language! Live, under his teacher's class scores, yet standard scores had him at the 5th and 2nd grade reading levels. Ex. 4?a. Tr. 121.

The IEPs had various accommodations, modifications, and services, such as to help Student identify details with 80% accuracy (which would assist the Student in reading train schedules when he grows older, should he work for the railroad as a transition from high school), or write coherent paragraphs with 80% accuracy, or to allow for repeated instructions or shortened assignments when a lot of reading is required, to have tests read aloud, to redo failed tests, and to 30 minutes per day each in reading, writing, and advisory special education services. See Ex. 4/A. None however, connect the services or modifications to characteristics of dyslexia. Exs. 4/A, 5/B, 6/C, 8/D, and 10/E.

The IEP of October 24, 2016, and the subsequent following IEPs, placed the Student, tested at a 2nd grade reading level, Lexile Level 655, yet with 84% accuracy rate in a 5th Grade Language! Live program designed for children reading significantly below their grade level, into an 8th grade reading inclusion setting in a less restrictive environment,[5] without a transitional foundation advancing from a 2nd grade level into an 8th grade reading environment. Although the plans contained services, whether defined as accommodations, educational services, or modifications, they did not consider the characteristics of dyslexia, or provide services to meet those characteristics, and were not calculated to provide educational benefits. *See Rowley*, 458 U.S. at 207. The LLPS's IEPs, therefore, were not appropriately ambitious given the child's unique circumstances. *Endrew,* 137 S. Ct. at 1000. Once again, as noted earlier, creating an IEP without incorporating characteristics of dyslexia

[5] A Student is to be placed in the least restrictive environment with removal to special classes depending on the nature of the severity. *See* 34 C.F.R. § 300.114(a)(2)(ii).

is not just lacking an ideal plan under these unique circumstances of the Student – it results in an unreasonable plan. *Endrew,* 137 S. Ct. at 999. "Characteristics of dyslexia" are more than just a label - they are unique to this Student and his education. As a result, the LLPS IEPs and adoptions of the BCS IEPs resulted in a substantive denial of FAPE. *See* 34 C.F.R. § 300.513 (a). The Petitioners have met their burden.

A student with a disability is to be educated, to the maximum extent appropriate, in an environment with nondisabled children. 34 C.F.R. § 300.114(a)(2). The District's position is that the Student moved to the inclusive reading program because it was his least restrictive environment. However, as noted in other portions of this decision, that was based on the IEPs (beginning with the October 24, 2016 IEP) not considering the Student to have characteristics of dyslexia. The reading teacher who proposed the exit from Language! Live small study group into the inclusive setting without Language! Live, Mr. B, was of the opinion that the move was needed to assist the Student with his high school abilities. Tr. 85-87. This exit from Language! Live, however, fails to consider that this Student had unique characteristics of dyslexia – that is, that there was something more that only SDL reading and writing issues. Mr. B testified he was unaware of the Student presenting with characteristics of dyslexia. He gave no tests, or other skills assessments in his recommendation for the move. Tr. 85-88. While it does not go unnoticed that the Student was reading at the 2nd grade level although he was in the 8th grade, that the Student thought it was easy, and that Mr. B hoped to challenge the Student with greater academic materials in a less restrictive environment, the best of intentions do not meet with not addressing characteristics of dyslexia in the first place. Thus, the Petitioners have met their burden that moving the Student into the less restrictive environment for inclusive reading violated a FAPE. *See* 34 C.F.R. § 300.513 (a)(1).

The Petitioners have not met their burden, however, to prove that had the IEP plans considered characteristics of dyslexia then the Student would have met eligibility for sports. *See Albuquerque Pub. Schs. v. Mondragon*, 117 LRP 31229 (D. N.M. No. 16-cv-1082, Aug. 1, 2017)(reversing IHO's decision and burden shifting). Although grades were a motivating factor for the Student to do well, the Petitioners do not prove that the Student's failure to reach a 2.0 GPA to be eligible for sports was based on the IEP plans not considering characteristics of dyslexia. Although the Student's psychologist asked that the Student's grade point under 2.0 be reexamined to allow him to remain in wresting, opining that his SLD (without explanation or reference to characteristics of dyslexia) was the reason for the low grades, it does rise to sufficient proof that characteristics of dyslexia, had they been considered in the plans, would have allowed the Student's GPA to increase beyond 2.0. Ex. 36. Circumstantial supposition perhaps, and the Mother's belief, *see* tr. 831-833, 837-838, but supposition does not equal evidence. Although the argument can be made that had the 8th grade Student continued with Language! Live reading in the "easy" 5th grade level as an appropriate accommodation or support, then his grades would have been at least over 2.0, which would have allowed him to continue with sports, there is insufficient evidence to support the burden placed on the Petitioners that the reason for his 2.0 GPA, and this ineligibility, was because of the Language! Live change or, more appropriately, because the IEPs did not consider characteristics of dyslexia. The inverse might indeed be true – the Student's grades in language in the second semester inclusive program were in the "C" range, ex. J, p. 3, although this is not an issue to decide. Suffice to say that the Petitioners did not meet their burden on this issue.

The Petitioners contend that the reading and writing goals in the IEPs did not enable the Student to make progress, and that as implemented he failed to make progress. Ps' FFCL, p. 22. They also allege that audio books were required as accommodations or assistive technology. Ps' FFCL, pp. 12-13, 25. They claim that spell check was not provided to the Student. Ps' FFCL, p. 12. From the conclusions relating to characteristics of dyslexia not included in the IEPs, the Petitioners' point is well-taken. Not considering characteristics of dyslexia for goals, skills, accommodations and services with this Student reading at a 2nd grade level at the time the October 24, 2016 IEP was created made it, as well as the IEPs which followed, facially inappropriate, under the standards noted above, and a violation of a FAPE. *See* 34 C.F.R. § 300.513 (a). However, the Petitioners do not meet their burden to show that, for instance, decoding, fluency, or measurement by independent work, audio books, and spell check, were appropriate avenues that had to be included in the IEPs for this Student with characteristics of dyslexia. *Id.* p. 22. The Petitioners's arguments are made, but the evidence presented by the Petitioners is the key, and it does not rise to the level of proving that to be appropriate the IEP under SDL with characteristics of dyslexia required reading and writing goals with decoding and fluency skills, audio books, and spell check, among other things. *See Irving Ind. Sch. Dist., v. Tatro*, 104 S. Ct. 3371 (1984)(three part test for special education services, including that services must be necessary). For example, there is no evidence that the audio books or spell check or decoding services were necessary, rather than perhaps helpful, for the Student to benefit from the special education. *Id.* The burden has not been met. *See Albuquerque Pub. Sch. v. Mondragon*, 117 LRP 31229 (D. N.M. No. 16-cv-1082, Aug. 1, 2017)(reversing IHO's decision and burden shifting to school district). Since the Petitioners's argument regarding the content of the IEP has failed, then the implementation

issue, had content been found to be appropriate, becomes moot. *See O'Tolle*, 114 F.3d 692, 701 (10th Cir. 1998)(adequacy of IEP from perspective at written, and implementation is on-going, yet a failing year-after-year IEP has to be changed).

The Petitioners allege that appropriate transition services, after age 14, were not provided in the IEPs for post-high school movement. Ps' FFCL, p. 25. New Mexico requires post-secondary transition services after age 14. *See* § 6.31.2.11(G)(2) NMAC. Arguing that goals in an IEP do not meet academic achievement of the child for transition services, they contend the IEPs are deficient. *Id.* Once again, from the conclusions relating to characteristics of dyslexia not included in the IEPs, the Petitioners's point is well-taken. Transition services for a child with characteristics of dyslexia were not included in the IEPs, thus resulting in a denial of a FAPE. The Student turned 14 years old on March 15, 2017. *See* Ex. 1 (dob 3/15/03). The February 1, 2017 IEP has measurable post-secondary goals based on the Student with ADHD and SLD. Ex. 8/D. The Student completed a "here and now survey" indicating an interest in working on the railroad. *Id.* The Student's planned course of study was a standard option. His projected date of graduation was May 21, 2021. *Id.* He had a projected course of academic studies for 9th, 10th, 11th, and 12th grades, which all include future academics. *Id.* Transition services and interagency linkages speak of community experiences such as field trips and sporting events, organizational skills, and career survey annually. *Id.* These are all based on the instruction and career development of a child with ADHD and SDL due to reading and writing – not a student with characteristics of dyslexia. Once again, the IEP is facially deficient, thus not providing a FAPE. *See* 34 CFR § 300.513 (a). The services were not based on the Student's individual needs, although, absent of the lack

the characteristics of dyslexia considerations, they did note his preferences and interests, post-secondary education and employment. *See* 34 C.F.R. § 300.43; §6.31.2.11(G)(2) NMAC.

The Petitioners' argument is unpersuasive that the Student was denied a "free" appropriate education because the Mother, and the Student's sister, helped him with studies after the Student was removed from school. Ps' Issue 8. The Student physically left school. Tr. 838-839. He was not enrolled into another school. Tr. 844-847. He was not home schooled. A FAPE must be made available to a student. *See* 34 C.F.R. § 300.101. Although the plans were inappropriate, as otherwise explained, due to a failure to consider characteristics of dyslexia, this does not allow the Student to abandon his educational settings. In certain circumstances the Student may enroll in a private school if there is a proper placement. *See Florence Co. Sch. Dist. v. Carter*, 114 S. Ct. 361 (1993). But these are not the circumstances presented by the Petitioners in this case. The Student unilaterally stopped attending school, yet the school represented that it continued to make education available at the school unless the Petitioners enrolled the Student in a home school or otherwise transferred him out of the school district. Thus, the District continued to make education available to the Student, which was free, albeit with an inappropriate plan. As a result, the Petitioners have not met their burden to prove the District failed to make an appropriate education which was "free."

Behavior and Attendance

On October 6, 2016 the Student caused a disturbance in the commons area, kicking trash, arguing, stirring up bees, and yelling at other students. He received out-of-school suspension. Ex. G.

On October 24, 2016, the LLPS completed its IEP. Ex. 4/A. It was noted the Student exhibits behaviors that impede his learning or the learning of others. *Id.* Although the

District proposed that the Student have a functional behavior assessment, the parent disagreed. *Id.* An FBA was thus rejected. *Id.* Behavior was a concern, yet a school-wide discipline plan was to be followed. *Id.* The parent did want recreational therapy to continue because the parent felt that if the Student was singled out then his behavior problems could increase. *Id.*

On December 2, 2016 the Student engaged once again in disruptive behavior with the same teacher he engaged in disruptive behavior with on October 6, 2016. Ex. G. This time he argued, refused to follow instructions, and disrupted the classroom. *Id.* He was given an out-of-school suspension of three days for this incident.

An IEP plan was completed on December 9, 2016. Ex. 5./B. Once again, behavior was a concern, yet the Student was to follow a school-wide discipline plan. *Id.* Once again the District proposed that recreation therapy be continued, but the parent disagreed because she did not want the Student singled out. *Id.* A school wide discipline plan was accepted, although the Student's behavior impacted academics. *Id.* The parent did not want a functional behavior assessment, although proposed by the District. *Id.* At this time the Student was exhibiting low grades due to suspensions and outside therapy. *Id.* At this time a functional behavior assessment was accepted by the IEP Team. *Id.*

On January 24, 2017 the Student was suspended in an out-of-school suspension for three days. Ex. G. He went into the book room and urinated on the school books and on the floor in the book room. *Id.*

On January 26, 2017 another IEP was completed. Exs. 6/C and 7. Although similar to the prior IEPs, this IEP had several addendums relating to behavior. *Id.* The Functional Behavioral Assessment (FBA) was reviewed and a Behavior Intervention Plan (BIP) was

needed. *Id.* The FBA identified the problem behaviors, reviewed the preceding and post-behavior events, evaluated the effectiveness of positive interventions, and found the primary function or explanation for the Student's behavior was to get the attention of his peers and his classroom instructor. *Id.* A BIP was to be created and accommodations were to be reviewed at another meeting. *Id.*

LLPS provided positive reinforcements and interventions trying to get the Student focused. Tr. 120, 910.

After returning from this suspension, and the January 26, 2017 IEP, the Student began to miss school. The weeks of January 30 through February 3, 2017 show him ill or at doctor's appointments for several periods, with this activity extending into February 6 and to February 10, 2017. Ex. H.

In the interim, another IEP was completed on February 1, 2017. Exs. 8/D. Similar to the other IEPs, this plan primarily added language to review behavior and approve the BIP and accommodations. *Id.* The BIP noted that the Student's behavior was "a performance deficit," where intervention would lead to structured environment with positive reenforcement, cues, redirection, and case manager, and office referrals based on occurrences. *Id.* The Student was to create an agenda, avoid having to read aloud, and rewarded, if he otherwise meets eligibility, with participation in wrestling and football. *Id.*

On about February 10, 2017 the Student had an overdose of an over-the-counter medication. Ex. 37. The Mother discovered Student's unusual behavior after she picked him up from school that day. Tr. 832. He was taken to the hospital. Tr. 833. He was released later that day. Ex. 37. LLPS was never notified of the overdose. Tr. 837.

On February 13, 2017 the Student flashed a red laser light into the custodian's eyes two times, yelled at the teacher that he's a "snitch," and then blocked the cafeteria doors so other students could not exit. He was suspended out-of-school for one day. Ex. G.

Commencing on the day after this last suspension, the Student stopped reporting for school. Ex. H. Tr. 628.

Petitioners then began to submit medical excuse notes to the District for certain excused absences. Ex. K. Initially the Student was given an excuse from January 2, 2017 through February 8, 2017. *Id.* His next medical excuse was for February 15, 2017 through February 16, 2017. *Id.* His next excuse was for February 17, 2017 through April 3, 2017. *Id.* His next excuse was for March 27, 2017 through April 24, 2017. On March 27, 2017, a medical note explained that it was not in the Student's best interests to attend school until an IEP evaluation is performed, so to lessen his anxiety and make him more productive in the classroom. *Id.* He was next excused from April 24, 2017 through May 1, 2017. *Id.*

The behavior issues the Student experienced were during unstructured times. Tr. 205. Academics were not the source of the Student's misbehavior. *Id.*

With this factual foundation, it is found and concluded that the Petitioners have met their burden to show that the IEP plans relating to behavior did not facially include behavior for a student with characteristics of dyslexia, thus denying a FAPE. *See* 34 CFR § 300.513(a)(1). However, they did not meet their burden to prove, as they also contend, that the Student was disciplined for behaviors flowing from his disability because of LLPS's alleged failure to implement an appropriate IEP and obtaining behavioral consultation/support from a Board Certified Behavior Analyst or other professional with expertise. *See* Ps' Issues, p. 2, F&C, p. 14. Despite the lack of the characteristics of dyslexia not

being included in the IEPs, the Student's behavior is otherwise reflected in the plans, and as implemented.

There may be occasions when a Student's lack of enthusiasm and commitment to school are related to his disability. *Garcia v. Albuquerque Pub. Sch.*, 520 F.3d at 1127. Petitioners have not, however, proved that this is one of those situations. Said another way, they have not proved that there is a relationship between urinating on books, shining lasers in the eyes of a custodian, and blocking doorways restricting access to other students, and the lack of characteristics of dyslexia contained in his LLPS's IEPs.

Positive behavior reinforcements and interventions were in place by LLPS trying to get the Student focused. The behavior issues the Student exhibited were during unstructured times. LLPS sought to have behavioral interventions for the Student since its initial IEP. They sought recreational therapy as a behavior tool, to which the Mother rejected, since she did not want the Student to be singled out. Although not mandated unless a manifestation determination is necessary, *see* 34 C.F.R. § 300.530(f), the LLPS nevertheless proposed at every single IEP meeting that a functional behavior assessment be performed to assess the Student's behavior issues. The Mother rejected those proposals. Finally, despite the Mother's continued rejection, on December 9, 2017, the IEP Team ordered an FBA. On January 26, 2017 the FBA was reviewed, which identified the problem behaviors, reviewed the preceding and post-behavior events, evaluated the effectiveness positive interventions, and found the primary function or explanation for the Student's behavior was to get the attention of his peers and his classroom instructor. It was then concluded a Behavior Intervention Plan (BIP) was needed. *Id.* The FBA identified the problem behaviors, reviewed the preceding and post-behavior events, evaluated the effectiveness of positive interventions, and found the primary function or explanation for

the Student's behavior was to get the attention of his peers and his classroom instructor. On February 1, 2017 a BIP was approved. The BIP indicated Student's behavior was "a performance deficit," and that intervention was to lead to structured environment with positive reenforcement, cues, redirection, and case manager, and office referrals based on occurrences. An agenda was to be created by the Student, with him avoiding having to read aloud, and rewarded, if he otherwise meets eligibility, with participation in wrestling and football.

In relevant part, 34 C.F.R. § 300.324(a) reads:

(2) Consideration of special factors. The IEP Team must -

> (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior;

Id.

Thus, the Student was found to have behaviors which impeded his learning or that of others, positive behavioral interventions and supports were considered and provided, as well as other strategies. Although characteristics of dyslexia were not considered in the interventions and supports, the Petitioners have not presented evidence to show that the IEP behavior issues were due to characteristics of dyslexia, or that his ADHD or other specific learning disabilities would otherwise have demanded a different approach to the IEP behavior issues. The Petitioners have not proved that a FAPE was denied. *See* 34 C.F.R. § 300.513. *See, e.g., T.L. v. Lower Merion Sch. Dist.*, No. 15-0885, 68 IDELR 12 (E.D. Pa. June 20, 2016)(even without FBA, IEP appropriate for dealing with behavior issues).

The case of *Garcia v. Albuquerque Pub. Sch.*, 520 F. 3d 116, left "for another day" questions of liability and whether an educational loss to the student arose where student's poor attitude and bad habits prevented her from the receipt of any educational benefit. *Id.* Rather,

the remedial authority of the court was discussed in an appropriate remedy, if any, given a student's behavior issues. *Id.* A similar avenue will be taken in this case. Thus, the issue proposed by the District that due to the Student's actions it is relieved of any liability will not be addressed – the issue may be considered in relief.

The Student was noticed, and was eventually referred for a truancy determination for ten or more unexcused absences, with notices commencing on October 28, 2016, and concluding with a notice for an administrative truancy determination to be held on April 11, 2017. Ex. 29. The truancy issue is based on the New Mexico Compulsory Attendance Law, § 22-12-1 through 22-12-19 NMSA 1978. The Student alleges that the truancy notice amounted to a threat of criminal prosecution of the Mother, and that the wrong withdrawal forms were used. Ps' FFCL, p. 21, # 109. However, the Petitioners do not tie-up their argument with a proposed legal conclusion alleging how it violates a FAPE. *See* Ps' FFCL, pp. 20-21. The District alleges that the Student is unable to prove that the referral through implementation was inappropriate. See R's C, p. 3, # 18. Given this framework, it is found and concluded that the Petitioners have not met their burden of proof that the referral for truancy was inappropriate. The New Mexico law mandates the referral. The appropriate forum would be the state court to address the defenses to the truancy issue. A hearing officer can only give relief for the denial of a FAPE. *Fry*, 137 S. Ct. At 755. Truancy notices, a mistake on withdrawal forms noting transfer or withdrawal rather than "10 day drop," and notice of possible criminal prosecutions due to truant behavior under New Mexico law do not come under the FAPE umbrella. There is no IDEA administrative jurisdiction to address this issue. *See* § 6.31.2.13(I)(20) NMAC.

After the truancy issue arose, the District had its final IEP with the school's attorney in attendance. Exs. 10/E. The Student contends that the Petitioners hoped for a full IEP, yet

instead were provided a meeting where the attorney represented the District in the IEP Team meeting, which resulted in the Student being denied another transfer to LLPS for the 2017-2018 school year. P's FFCL, pp. 21-22. The District's position is that it is not obligated, under New Mexico law, to grant an out-of-district student a transfer. R's FFCL, p. 10, #65. It is found and concluded that notice of the meeting was provided, that the notice of meeting noted the District's counsel would attend, and that although Mother did not agree with the position of the school's attorney or the IEP Team's acceptance of the proposal to return the Student to BCS unless he resides in the LLPS district, the IEP Team made the determination with Mother voicing her objections. Exs. 10/E. The invitation to the IEP meeting included a purpose to discuss transition planning. *Id.* Whether the Mother was prepared for a full, otherwise inclusive, IEP misses the point – the IEP was for transition planning. That is, the Petitioners have not met their burden to prove that the matter was predetermined. *See Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004)(predetermination does not allow *meaningful participation). The Petitioners have not met their burden proving that there was* any procedural violation in this regard, or, had there been, that the Mother's rights to meaningfully participate were significantly impeded. *See* 34 C.F.R. § 300.513(a)(2)(ii). Thus, the District's argument is well-taken.

An administrative procedure exists in New Mexico to dispute the re-enrollment process, and priority is given to students residing in the school district. *See* § 22-1-4 (E) NMSA 1978. This procedure is outside of the IDEA parameters – the issue is outside of the realm of FAPE. There is no IDEA administrative jurisdiction to address this issue. *See* § 6.31.2.13(I)(20) NMAC.

Relief

The Petitioners seek equitable relief to provide the Student with "reading/writing/spelling skills remediation through private services paid for by the LEA, which could be received outside the Student's school day, or on the weekend or during summer hours," which they otherwise explain in their Argument. Ps' FFCL, p. 24. They expand on this request in their argument by requesting Language! Live for 90 minutes daily for five times a week for 36 weeks, which the Petitioners contend is based on the number of weeks FAPE was denied to him during the school year. Ps' Argument, p. 18. They request that the remedy be provided in "real-time" in order to consider the Student's other daily activities, and to be on-going for a two year period.[6] *Id.*

The Petitioners' request for compensatory education is denied. While substantive violations of FAPE are found, 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). The Petitioners argue for a quantitative approach, more of like a number of hours provided based on the number of hours lost, rather than a qualitative approach, where there is to be evidence of what future compensatory education services will place the Student back into the place he should have been absent loss of the services. There was no evidence what the loss of services were which should have been provided for this Student who had unique characteristics of dyslexia and how a certain number

[6] The Petitioners only argue for an equitable remedy for compensatory education services. Ps' F&C, p. 24, Ps' Argument, p. 18. Other remedies were initially included in their proposed resolution, however. Due Process Request, p. 20. The other initial requests for proposed resolutions are deemed abandoned due to the final argument for only compensatory education services.

of hours of compensatory education services would put the Student back into the place he should have been without them. There being no evidence, for instance by an expert, for 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).

It does not go unnoticed that evidence presented by the District is that despite the lack of characteristics of dyslexia being considered in the IEPs, the IEPs still may have provided appropriate services for a student who might be considered to have dyslexia. However, it is also noted that the characteristics of dyslexia uniquely for this Student, individually, were not considered in this analysis – rather, it was the plans or programs under the plans for a student with dyslexia, not this particular Student with his unique educational needs for his characteristics of dyslexia. This issue need not be determined in considering a remedy, however, given the conclusion that the Petitioners have not met their burden under a qualitative compensatory education approach.

Similarly, given the lack of evidence for a qualitative compensatory education conclusion, the issue of whether the Student's actions and behaviors should amount to a discretionary denial of relief under *Garcia v. Albuquerque Pub. Sch.*, 520 F. 3d 116, need not be considered. Suffice to say that the Student's discontinuation of school, coupled with his other actions, could have had an impact on an award of compensatory services had they not otherwise been denied.

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 (LLPS) is granted in

part and denied in part. The Petitioners did not meet their burden to prove a violation of FAPE because the LLPS's IEPs of October 24, 2016, December 9, 2016, January 26, 2017, and February 1, 2017 (and adoption of the BCS plan) did not find the Student eligible for educational services under specific learning disabled specifically resulting from dyslexia. The Petitioners have, however, met their burdens of proving substantive violations of a FAPE due to failure of the LLPS's IEPs of October 24, 2016, December 9, 2016, January 26, 2017, and February 1, 2017 (and adoption of the BCS plan) to include and address the Student's unique, individual, characteristics of dyslexia for his educational needs. The plans were not appropriately ambitious given these unique circumstances. Flowing from the faulty plans were FAPE violations for accommodations, educational services, modifications, transitions, and behavior analysis because the plans did not consider the characteristics of dyslexia for this specific Student's individual, unique circumstances. The Petitioners have not proved a FAPE violation to require their requested least restrictive environment, or for sports eligibility, or for their requested specific programs consisting of decoding and fluency skills, audio books, and spell check. The Petitioners have not proved a FAPE violation because education after Student discontinued school was not "free." The Petitioners have not proved a FAPE violation for failure of the plans to include behavioral consultation/support from a Board Certified Behavior Analyst or other professional with expertise. The Petitioners have not proved a FAPE violation that the Student's behavior issues were because of his unique circumstances due to characteristics of dyslexia, ADHD, or other specific learning disabilities in reading and writing. The Petitioners have not proved a FAPE violation that the District's counsel engaged in predetermination behaviors which amounted to a procedural violation with a lack of meaningful participation by the parent in the final IEP meeting. There is no administrative jurisdiction to address the Student's truancy under

the New Mexico truancy laws. There is no administrative jurisdiction to address out-of-district re-enrollment under New Mexico law. Compensatory education is not awarded because the Petitioners did not meet their burden showing qualitatively what educational services were needed to put the Student into the place he would have been had the District provided him services for his unique characteristics of dyslexia in the first place. Similarly, the District's services in the IEPs were not shown to be otherwise appropriate due to the Student's unique needs, which could thus have relieved the District of compensatory education services, should they have been awarded -- this issue need not be further addressed, given the insufficient proof for compensatory services. Finally, had compensatory education services been awarded, then the Student's behavior and exit from school may have been considered to reduce a compensatory education award, yet, once again, due to the insufficient proof for compensatory services, this issue need not be further addressed.

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.

It is so administratively ordered.

MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: November 1, 2017

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent via email attachment only to G. Stewart, J. Archuleta-Staehlin, L. Castille, 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 1st day of November, 2017.