BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1718-03

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioner's Request for Due Process Hearing Against Local Education Agency (Due Process Request), filed with the State of New Mexico Public Education Department on July 31, 2017. The Petitioner's Due Process Request is granted in part.

PROCEDURAL BACKGROUND

The Respondent LEA responded to the Petitioner's Due Process Request on August 8, 2017. *See* [LEA's] Response Including Prior Written Notice to Due Process Hearing Complaint, August 8, 2017 (Response). The Prehearing and Extension Order was entered on August 14, 2017. *See* Prehearing and Extension Order, August 14, 2017 (Prehearing Order). On August 17, 2017, the Respondent filed its Motion to Compel Production by Petitioner. *See* Motion to Compel Production by Petitioner, August 17, 2017 (Motion to Compel). The Petitioner filed his response opposing the Motion to Compel on August 22, 2017. *See* Response in Opposition to LEA's Motion to Compel, August 22, 2017 (Response to Motion to Compel). On August 22, 2017, an Order Granting in Part Respondent's Motion to Compel was entered. *See* Order Granting in Part Respondent's Motion to Compel, August 22, 2017 (Order Compelling Production). The Petitioner filed a Motion Seeking Production of Missing Educational Records on September 1, 2017. *See* Petitioner's Motion Seeking Production of Missing Educational Records, September 1, 2017 (Motion for Production). On September 1, 2017, the Petitioner filed a Motion to Allow Site Visit During Due Process Hearing. *See*

Motion to Allow Site Visit During Due Process Hearing, September 1, 2017 (Motion for Site Visit). The Respondent filed its Response in Opposition to Petitioner's Motion Seeking Production of Missing Educational Records on September 6, 2017. *See* Respondent's Response in Opposition to Petitioner's Motion Seeking Production of Missing Educational Records, September 6, 2017 (Response to Production). Also, on September 6, 2017, the Respondent filed its Response in Opposition to Petitioner's Motion to Allow Site Visit During Due Process Hearing. *See* Response in Opposition to Petitioner's Motion to Allow Site Visit During Due Process Hearing, September 6, 2017 (Response to Site Visit). After a hearing on September 7, 2017, an Order Denying Petitioner's Motion Seeking Production of Records was granted. *See* Order Denying Petitioner's Motion Seeking Production of Records, September 7, 2017 (Order Denying Records Request). Also, on September 7, 2017, an Order Holding in Abeyance Petitioner's Motion to Allow Site Visit During Due Process Hearing was entered. *See* Order Holding in Abeyance Petitioner's Motion to Allow Site Visit During Due Process Hearing, September 7, 2017 (Site Visit Abeyance Order). The Petitioner did not request revisiting the Site Visit Abeyance Order during the Due Process Hearing, so the issue is deemed abandoned and as a result the Motion for Site Visit is now denied.

On September 7, 2017, the parties filed a Joint Statement of Stipulated Facts. *See* Joint Statement of Stipulated Facts, September 7, 2017 (JSF). The parties timely filed their respective Statements of Issues for the Due Process Hearing. *See* Petitioner's DPH Issues Statement, September 7, 2017 (Ps' Issues); Respondent's Statement of Issues, September 8, 2017 (R's Issues). The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioner's Exhibit List, September 7, 2017 (P's Ex. List); Petitioner's Witness List, September

7, 2017 (P's Witness List); Respondent's Disclosure of Witnesses, September 7, 2017 (R's Witness List); Respondent's Proposed Exhibits, September 7, 2017 (R's Ex. List); and Respondent's Amended Disclosure of Witnesses, September 7, 2017 (R's Amended Witness List).

The Due Process Hearing commenced on September 12, 2017, and concluded on September 18, 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 23, 2017. Tr. 1440. The Respondent requested 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 14, 2017. Tr. 1440.

The Respondent filed its proposed Findings of Fact, and Conclusions of Law, on October 23, 2017. *See* Respondent's Proposed Findings of Fact and Conclusions of Law, October 23, 2017 (R's F&C). Its Closing Argument was filed on October 23, 2017. *See* Closing Argument, October 23, 2017 (R's Argument). The Petitioner filed his Requested Findings of Fact and Conclusions of Law on October 23, 2017. *See* Petitioner's Requested Findings of Fact and Conclusions of Law, October 23, 2017 (Ps' FFCL). The Petitioner also filed his Closing Argument on October 23, 2017. *See* Petitioner's Closing Argument and Memo of Law, October 23, 2017. (Ps' Argument).

This decision is due on or before November 14, 2017. Tr. 1440.

ISSUES

(1) Whether the LEA denied the Student a FAPE commencing in August 2016, and continuing, due to its alleged failure to consider the possibility that the Student has Tourette Syndrome

(TS), the impact of TS, and by the LEA allegedly ignoring best practice and knowledge about "the range of needs students have at school and scientific knowledge that TS is a neurological condition." P's Issue 1; R's Issue 1.

(2) Whether a FAPE was denied by the LEA, commencing in August 2016, and continuing, due to an alleged misidentification of the Student with Emotional Disturbance "without having secured evaluation of TS and without considering a possible need to identify him as a student with specific learning disability in math." P's Issue 2; R's Issue 1.

(3) Whether a manifestation determination and disciplinary change of placement denied the Student a FAPE, including by an alleged failure to identify and a failure to provide an IEP. P's Issue 3; R's Issue 2.

(4) Whether a FAPE was denied, commencing in August 2016, and continuing, by an alleged failure to provide the Student with "positive behavioral supports consistent with his needs which should have allowed him to 'tic' as needed throughout the school day without admonishment, hostility and punishment as well as education to staff and students about TS." P's Issue 4; R's Issue 1.

(5) Whether a FAPE was denied, commencing in August 2016, and continuing, by an alleged failure by the LEA in its Child Find duties, and in not identifying the Student for special education until the end of April 2017. P's Issue 5; R's Issues 1 and 5(a)(ii).

(6) Whether a FAPE was denied, commencing in August 2016, and continuing, by the LEA's alleged failure to provide special education and services, including positive behavior consistent with the Student's needs, which includes the needs for alleged TS. P's Issue 6; R's Issues 1 and 5 (a)(i).

(7) Whether a FAPE was denied, during the statutory period, by placement of the Student at the CR Alternative School, based on an IEP, and whether the IEP was reasonably calculated to provide the Student with a FAPE, including access to alleged "necessary" specialized instruction, the 7th grade curriculum, extracurricular activities, and education in the LRE. P's Issue 7; R's Issue 3.

(8) Whether a FAPE was denied by the alleged inadequacy of the May 2017 IEP by allegedly failing to address "needs for specialized instruction, supplemental aides and services, modifications and accommodations." P's Issue 8; R's Issue 1.

(9) Whether a FAPE was denied, commencing in August 2016, and continuing, by an alleged failure to evaluate the Student's potential need for assistive technology equipment and services, and for the potential need for audio texts. P's Issue 9; R's Issues 1 and 5(a)(iii).

(10) Whether a FAPE was denied by the alleged failure or excusal of a general education teacher at the 2017 IEP meeting. P's Issue 10; R's Issue 4.

(11) Whether there is administrative jurisdiction over the Petitioner's claims for payment for a private neuropsychological evaluation and an IEE for TS due to an alleged failure to exhaust administrative remedies or because the claims are not ripe for review. R's Issue 6.

(12) Whether the Petitioner's claims "are barred due to waiver, estoppel or laches." R's Issue 7.

(13) Whether there is administrative jurisdiction to reduce the length of the Student's suspension, or to change the location of his disciplinary placement. R's Issue 8.

(14) Whether the Petitioner is entitled to an equitable remedy, and what that remedy should be. P's Issue 11; R's Issue 1.

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 Petitioner.

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 judgment 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.

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. *See* 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). All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a)(i). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. *See* 34 C.F.R. §300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. *See* 6.31.2.10(D)(1)(a)&(b), NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenberg v. Bd. of Educ. of Salt*

Lake City Sch. Dist., 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). A LEA's failure to meet its "child find" obligation is a cognizable claim. *See Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8th Cir. 2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1,4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150, 162 (1st Cir. 2004).

A disability is suspected, under persuasive authority from the Ninth Circuit, when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F. 3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

A "child with a disability" is defined as a child evaluated and determined to be eligible for, among other things, serious emotional disturbance (generally referred to as emotional disturbance) and other health impairment. *See* 34 C.F.R. § 300.8(a). To be qualified, the child must be in need of special education and related services because of the emotional disturbance or other health impairment. *Id.*

An "emotional disturbance" is a condition, over a long period of time and to a marked degree that adversely affects the child's educational performance, which is, either singularly or in a combination, composed of the following characteristics:

1. an inability to learn not explained by health, intellectual or sensory factors;

2. an inability to maintain or to build satisfactory interpersonal relationships with peers or teachers;

3. behaviors or feelings which are inappropriate under normal circumstances;

4. generally, a persuasive mood of unhappiness or depression; and

5. a tendency for development of physical symptoms or fears which are associated with personal or school problems.

34 C.F.R. § 300.8(c)(4)(i).

Social maladjustment by a child is inapplicable, unless that child is also found to have an emotional disturbance. *Id.* at § 300.8(c)(4)(1i).

Thus, the child must demonstrate he has "(1) exhibited one of the five listed symptoms, (2) 'over a long period of time,' (3) 'to a marked degree,' and that his condition adversely affects his educational performance." *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998). Social maladjustment is specifically excluded, unless there is also an "independent serious emotional disturbance." *Id.*; *see Hansen*, 632 F.3d at 1026.

Social maladjustment alone does not equate with serious emotional disturbance. *See Springer*, 134 F.3d at 664 (*citing A.E. v. Indep. Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991)). Indeed, adolescence is a time of social maladjustment, and teenagers are a "wild and unruly bunch." *Id.* Equating simple bad behavior with a serious emotional disturbance

enlarges the "burden IDEA places on state and local education authorities." *Id.* Even a student's bad conduct, however, may merge with an independent serious emotional disturbance to qualify for special education services. *Id.* at 665.

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

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 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, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720,

726 (10th Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order a LEA to comply with procedural requirements. *See* 34 C.F.R. § 300.513(a)(3). "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753.

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. *See Timothy O.*, 822 F. 3d at 1124. Thus, for procedural violations to constitute a denial of FAPE, they must be found to seriously impair the parents' opportunity to participate in the IEP formation process, or result in an educational opportunity loss to the child, or cause a deprivation of educational benefits to the child. *Id.* Otherwise, the error is harmless. *Id.* An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. *See* 34 C.F.R. § 300.323(c)(1).

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, 1998 WL 406787, *3 (10th Cir. Jul. 16, 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. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (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).

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.*

The IEP team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about

the general education curriculum; and (iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. *See* 34 C.F.R. § 300.321.

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. *See* 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 also Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (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.

The IEP is to be implemented as soon as possible after the IEP meeting. *See* 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.2d 960, 970 (D. Kan. 2003).

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.

If a child with a disability is removed due to disciplinary changes in placement exceeding 10 consecutive days then a manifestation determination is required within 10 school days of the decision to change placement. 34 C.F.R. § 300.530(b)(2), (e). The relevant IEP Team members, including the parent, must review all of the relevant information in the

student's file, including the IEP, teachers' observations, and relevant parental information. 34 C.F.R. § 300.530(e). The team is to determine if the child's conduct "was caused by, or had a direct and substantial relationship to, the child's disability," or if the child's disciplinary conduct directly resulted from the LEA's failure to implement the IEP. *Id.* If the conduct is determined not to be a manifestation of the disability then the LEA may apply disciplinary action in the same manner and for the same duration as it would for a child without a disability, except that the child would still be entitled to a FAPE in the new setting and to receive behavioral intervention services and modifications addressing the behavior so that it does not recur. 34 C.F.R. § 300.530(d). If the behavior is determined to be a manifestation of the disability, then a behavioral assessment is to be conducted and behavioral plan implemented to address the child's behavior. 34 C.F.R. § 300.530(f).

When disciplinary issues arise, a child who has not been determined eligible for special education services may be afforded protections afforded a child who has been determined eligible for services when the parent expresses a written concern to an agent of the LEA that the child is in need of special education services, that an evaluation has been requested, and that a LEA agent has expressed concern to the LEA supervisory authorities about a pattern of the child's behavior. *See* 34 C.F.R. § 300.534(b). If the parent refuses an evaluation or services, then notice is not imputed to the LEA. *See* 34 C.F.R. § 300.534(c). A child is then treated as any other child without a disability for disciplinary measures. *See* 34 C.F.R. § 300.534(d).

A child is entitled to a FAPE in the new disciplinary setting when the conduct is determined not to be a manifestation of the disability. *See* 34 C.F.R. § 300.530(d). If properly

alleged as a violation of FAPE then a remedy for denial of FAPE could exist despite a determination that it is not a manifestation of disability, including the appropriateness of the placement due to a disciplinary infraction. *See Dist. of Columbia v. Doe*, 611 F.3d 888, 898 (D.C. Cir. 2010)(days in disciplinary alternative setting as inappropriate and denying FAPE due to minimal disciplinary issue).

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*, 538 F.3d at 1316. The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Id.*

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 34 C.F.R. § 300.511, 300.513. "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753. 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 v. Dist. of Columbia*, 401 F. 3d 516, 524 (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., Nos. 10-0963, 10-0964 (D.N.M. 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, unless otherwise found or concluded that the matter was not first exhausted.

2. The Student is now 13 years old. *See* R's Ex. 22.

3. The Student attended LCPS from his kindergarten year until partially through the 4th grade, withdrawing on December 2, 2014. JSF No. 4.

4. The Student reenrolled in LCPS on August 10, 2016 for his 6th grade year, attending CRMS. JSF No. 5.

5. The Student was in the 6th grade at CRMS Middle School during the 2016-17 school year. R's Ex. 22.

6. LCPS referred the Student to a Student Assistance Team (SAT). JSF No. 6.

7. The SAT met on October 11, 2016. JSF No. 7.

8. LCPS convened an Eligibility Determination Team (EDT) meeting on April 27, 2017, and accepted the evaluation report. JSF No. 8.

9. The EDT determined that the Student was eligible for special education as a student with an emotional disturbance and other health impairment based on Attention Deficit/Hyperactivity Disorder. JSF No. 9.

10. LCPS developed an Individualized Education Plan (IEP) for the Student on May 4, 2017. JSF No. 10.

11. While at CRMS the Student engaged in a series of incidents of misbehavior.

12. A suicide risk assessment was developed due a statement he made that if his father was called then he would kill himself on September 15, 2017. Tr. 65, 146.

13. As a result, CRMS staff met with the Student's Father and explained intervention and evaluation options, the SAT process, a psychological screening, and a full psychological evaluation. Tr. 1336-1337.

14. The SAT met, and, after explaining intervention and evaluation options, the SAT process, a psychological screening, and a full evaluation for special education, the Father stated that he wanted to have the Student evaluated by a private evaluator. Tr. 181, 432, 1196, 1338, 1340-1341.

15. Notice is taken that SAT is not a part of the IDEA procedure.

16. Behavioral interventions were implemented, including developing a Functional Behavior Assessment (FBA), with positive behavior supports, and psychological screening should the behavior supports prove ineffective. Tr. 337-338, 175, 190, 392, 410-411.

17. At the SAT the Father consented to a screening. P's Ex. 3. Tr. 119.

18. The Student began inappropriate classroom interaction from about October 6, 2016, through October 21, 2017, including spinning pencils, pushing other students, throwing a pencil and a notebook like a frisbee, not staying on task, yanking another student, leaving class for a brief period of time and then returning. P's Ex. 6. Tr. 159-160, 161-163.

19. The Student physically contacted other students, used profanity, and name calling. Tr. 1045-1046, 1054.

20. The FBA was prepared on November 11, 2016, where it was determined that the Student's behavior was due to a performance deficit and the function for attention seeking. P's Ex. 7. Tr. 417, 420 421, 1051, 1140.

21. It is noticed in this context that the FBA is not a part of the IDEA procedure.

22. In November and December 2016, Vanderbilt Assessment scales were completed by some of the Student's teachers, which resulted in possible concerns for ADHD, hyperactive/impulsive subtype, and Oppositional Defiant/Conduct Disorder (ODD/CD). R's Ex. 8. The Father's data indicated ODD/CC, anxiety, and depression as possible concerns. R's Ex. 8.

23. After the winter break, in January and February 2017, some of the Student's behaviors escalated, although in one class his behavior improved. Tr. 124, 324, 246.

24. On February 14, 2017, another SAT meeting was held, which included a Behavior Intervention Plan (BIP). R's Ex. 10.

25. The Father received a copy of the BIP on February 15, 2017. Tr. 1228.

26. The SAT found that it was appropriate to proceed with a psychological screening to assist with whether the Student may have disabilities; if so, then there would have been a full psycho-educational evaluation. Tr. 1078, 1142-1143.

27. Soon thereafter the LCPS and the Father agreed to "hold off" on the referred screening because the Father was in the process of having a private evaluation performed. Tr. 1142.

28. The Respondent did not conduct a screening or evaluation of the Student either to assist in a suspicion of disabilities, or to determine if the Student had disabilities for which he would be eligible for special education services.

29. On February 13, 2017, a private Comprehensive Neuropsychological Examination was begun. P's Ex. 20.

30. In school at CRMS, the Student made verbal statements to other students, with obscene name calling, and treating teachers with disrespect, including where one student told the Student not to treat the teacher the way he treated her. Tr. 125-128.

31. The Student would sometimes shout out answers to math problems before his peers had an opportunity to respond. Tr. 74-75.

32. The Student would become upset when his answers were incorrect, or when he did not understand a new concept. Tr. 129.

33. He would spin a lanyard with a key on it, tr. 77, and would argue when asked to put the key away. Tr. 131.

34. The Student would refuse to stop playing computer games when asked to do so. P's Ex. 8.

35. Other behaviors during the 2016-2017 school year included inappropriate noises, tr. 68, 84-85, shouting out in math class, tr.74, talking excessively and blurting out, tr. 81-82, 108-109, taking other student's personal items like pencils, tr. 196-197, 203-204, 208, leaving class, tr. 86, fidgeting, and blurting out inappropriate comments. P's Ex. 23. Tr. 358.

36. The Student at times fidgets, tosses objects into the air, speaks out of turn, and gets physical with peers. Tr. 1186, 1217-1218, 1222-1223.

37. The Student sometimes blurted things out, which occurred prior to the filing of the Due Process Request. Tr. 1222-1223.

38. The father considered some the Student sometimes to have "tics." Tr. 12225-1227.

39. The Student engaged in particularly disruptive behavior in Mr. H's class. Tr. 249-399.

40. The Student was in Mr. H's classroom beginning the 2nd quarter of the 2016 year. Tr. 252.

41. The Student called other students offensive names and used profanity. Tr. 268, 296, 312.

42. The Student made a number of disparaging and disrespectful remarks to Mr. H. Tr. 277-278, 279.

43. The Student engaged in frequent belches in Mr. H's classroom, not in a manner where it was accidental to say "excuse me," but in a body movement where he would outstretch his arms, tilt his head back, and belch loudly, as loudly as he possibly could. Tr. 287.

44. On January 24, 2017, the Student received a "write up" in Mr. H's classroom by engaging in inappropriate noises, vulgarities, and disruptive behavior. P's Ex. 18, p 15.

45. On March 8, 2017, the Student completed the day's assignment with a good day, according to Mr. H, although the negatives were 15 uses of profanity or near profanity, 12 outbursts, screams, grunts, or noises not counted with profanity, one belch, and two incidents of disputing another student's computer by unplugging it and pulling the monitor by the cord. P's Ex. 18, p. 15.

46. At the Due Process Hearing Dr. MG, the LEA's supervising school psychologist, who is also in private practice, tr. 603, considered the various circumstances regarding the 12 outbursts, screams, grunts, and noises not counted with profanity, and was of the opinion that they could raise a suspicion for further screening and possible evaluation for Tourette's Syndrome (TS). Tr. 806-812. *See* P's Ex. 18, p. 15.

47. Other behaviors exhibited by the Student poised to Dr. MG did not amount to a suspicion, in his opinion. Tr. 806-812.

48. Dr. MG did not see evidence of "tics." 632-633.

49. Dr. AH, in her review of the Student's records, did not see evidence of TS. Tr. 1347-1354, 1358-1360.

50. Significant weight is given Dr. MG's opinion. The issue is one of suspicion for further referral to screen, or evaluate, based on his educated understanding of TS, not whether he is one who would ultimately make a diagnosis of TS.

51. It is therefore found that as of March 8, 2017, the LEA suspected that the Student had a disability potentially for TS for which a screening would have been appropriate, based

on the 12 outbursts, screams, grunts, and noises not counted with profanity, yet with the eventual assessment and diagnosis to be made by healthcare practitioner for a disorder.

52. It is therefore found that the other behaviors exhibited by the Student on other dates did not amount to a suspicion for a referral.

53. At some time thereafter a private Comprehensive Neuropsychological Examination was completed by Dr. JV, Ph.D., and delivered by the Father to Assistant Principal H. R's Ex. 32. Tr. 440, 441, 484, 485.

54. Mr. W told Ms. H that additional demographic material was needed in Comprehensive Neuropsychological Examination to identify the Student, and the evaluation was returned to the Father. Tr. 440, 441, 484, 485, 486, 1143, 1144.

55. On April 19, 2017, the Father provided Ms. H with a copy of the updated private Comprehensive Neuropsychological Examination, with the demographic supports. Tr. 486.

56. The Comprehensive Neuropsychological Examination was delivered to Mr. W and to the Special Student Services on the same day. R's Ex. 11. Tr. 486, 1144.

57. The Comprehensive Neuropsychological Examination diagnosed the Student with Disruptive Mood Dysregulation Disorder, ADHD (primarily hyperactive/impulsive type), a parent-child relational problem, an academic or educational problem, and post-traumatic stress disorder. P's Ex. 20.

58. The Comprehensive Neuropsychological Examination studied the Student's neurological and psychiatric systems. P's Ex. 20.

59. TS is a neurological condition. Tr. 1435.

60. The Comprehensive Neuropsychological Examination did not diagnose TS. P's Ex. 20.

61. The Student is not eligible for services under OHI because of TS.

62. The private Comprehensive Neuropsychological Evaluation cost $1,866.60. P's Ex. 21.

63. On April 19, 2017, while going toward the school bus, the Student picked up some rocks and threw them at other students, causing pain and injury to two of them. P's Ex. 18.

64. The Student's actions were contemplated and intentional. P's Ex. 18, R' Ex. 14. Tr. 1438-1439.

65. The Student was suspended for 10 days pending a long-term suspension hearing. P's Ex. 18.

66. Principal R conducted an investigation and gathered witness statements. P's Ex. 18. R' Ex. 14. Tr. 536.

67. On April 24, 2017, the Respondent accepted the private evaluation. P's Ex. 16.

68. A Multidisciplinary Evaluation Team Meeting (MET) was scheduled. P's Ex. 16.

69. On April 26, 2017, a long-term suspension hearing was held, with a decision entered May 1, 2017. P's Ex. 19.

70. Although Principal R had requested a year suspension, it was reduced to six months by the Hearing Officer. *Id.*

71. On the day of the hearing Principal R provided the Hearing Officer and the Father a copy of the Long Term Suspension Packet (P's Ex. 18). Tr. 557-558.

72. The Long Term Suspension Packet included a police report, an admission from the Student, a narrative of events, Principal R's interpretation of other student witness statements, and other relevant documents. P's Ex. 18.

73. The Long Term Suspension Packet did not include the written statements from the three other student witnesses. *See* P's Ex. 18. Tr. 536, 579, 591-593.

74. A Multidisciplinary Evaluation Team Meeting (MET) was held on April 27, 2017, which formally accepted the private Comprehensive Neuropsychological Examination and found the Student to be eligible for special education based on ED and OHI based on ADHD. R's Exs. 15-17. Tr. 313-314, 360-361, 1087-1088, 1091. The Student was not found to have a learning disability in math. R's Ex. 15.

75. General Education Teacher GAK was at the meeting, and she provided a written statement regarding her assessment of the Student's behaviors and education. P's Ex. 23, p. 6. She was subsequently excused by the Father. Tr. 1330.

76. A Manifestation Determination Meeting was held on April 27, 2017. P's Ex. 25.

77. The Manifestation Determination IEP Team discussed was the "behavior incident reported" on the Manifestation Determination and Review, or MDT, that on April 20, 2017, another student reported he had been hit on the head with a rock on April 19, 2017, that there was another student who had been hit with rocks a few times, that the students witnessed the Student throwing the rocks, and that the Student said it could have been an accident, since he picked up little rocks and threw them. Tr. 1096.

78. The Long Term Suspension Packet was not provided to the Manifestation Determination IEP Team. Tr. 1098.

79. The three student witnesses' statements were not provided to the Manifestation Determination IEP Team, including the Father. Tr. 364, 469-470, 504-510, 1098.

80. Based on the conduct of the Student under the information presented to them, the Manifestation Determination IEP Team found that the behavior was not a manifestation of the Student's disabilities. P's Ex. 25.

81. On April 27, 2017, an IEP Meeting Request was prepared. P's Ex. 26.

82. An IEP Team meeting was commenced on May 4, 2017. P's Ex. 28.

83. Team members were present, except for General Education Teacher GAK, as more fully noted in the Analysis section below (and now incorporated). P's Ex. 28.

84. General Education Teacher GAK was excused by the Father and the LEA, with a statement that her attendance was not necessary because her areas of the curriculum or related services were not being modified or discussed in the meeting. *See* P's Ex. 28.

85. General Education Teacher GAK did not submit a written version of her input into the development for the IEP meeting. *See* P's Ex. 28.

86. According to the IEP, the Student was to be provided services at the CR Alternative School for the 2017-2018 school year, where the Student would have services in the general education setting, delivery in small group or individual settings, in his regular class 80 percent or more of the day with modified assignments (shortened lessons), extra time to complete assignments as long as progress is being made, chunk bigger assignments into smaller tasks, Student correction of correct assignments, and testing in small groups for the regular education services, all set forth in more detail in the Analysis section below (and incorporated). *See* P's Ex. 28.

87. It is therefore found that the areas of General Education Teacher GAK's curriculum or related services were being modified or discussed in the IEP meeting.

88. The IEP is otherwise appropriate to provide a FAPE.

89. A subsequent administrative appeal upheld the six-month suspension, with a letter order issued on May 10, 2017. R's Ex. 24.

90. The Student is now a 7th grade student at LCPS, attending CR Alternative School. JSF No. 11.

91. Although the Student is now in the 7th grade at CR Alternative School, the relevant two-year time frame considered in the Petitioner's claims for denial of a FAPE is from July 31, 2015, through July 31, 2017, when the Due Process Request was filed. Alleged ongoing or alleged continuing claims occurring after the Due Process Request filing date of July 31, 2017, are not considered to have been raised or otherwise ripe.

92. Weight is given to the testimony from Dr. MG, Ph.D. He holds a Bachelor's Degree in Psychology from California State University, a Master's Degree in Counseling from California State University in Fresno, California, and a Ph.D. in Counseling Psychology from New Mexico State University. Tr. 603-604. He is a licensed Supervising School Psychologist, Level 3, and a licensed psychologist through the New Mexico Board of Psychologist Examiners. Tr. 605. He is primarily in private practice, yet he works a quarter of the time for LCPD as the Supervising School Psychologist, and has worked with LCPS for about 28 years. Tr. 606. He was thoughtful with his answers and took time before answering questions about suspicions relating to TS. He testified during a morning and part of an afternoon, giving answers to hypothetical questions posed by the parties. He listened to testimony of some of

the testifying witnesses. He was not evasive. Although he worked part time for LCPS, his opinions were objective. He is truthful and credible. Importantly, given the nature of TS and the nature of "suspicions," of the three persons holding doctorates involved with the Student and these proceeding, Dr. MG was the only witness to testify in person. Dr. AH testified over the telephone. Dr. JV did not testify.

93. The Student's Father wants the best for Student. He is having difficulties with him, and is trying the best he can to help his child with his education during adolescence. There may be some places where his testimony is inconsistent with documents or other statements, but overall he is credible and truthful. Dates and people and places are somewhat convoluted, so his testimony is viewed that way and has no bearing on his credibility. He is committed to the education and well-being of his child. He is zealous in his advocacy, which may make his testimony somewhat self-serving, and in this regard the weight given his testimony is balanced. He is not an expert in special education, but is a parent trying to obtain resources to help his child in this complex and fast-paced environment, where he obtained a private Comprehensive Neuropsychological Examination.

94. Principal R came across as truthful at the hearing. He acted as the point person for discipline. Records and witness statements in his possession were not brought before the Manifestation Determination IEP Team, yet this does not impact the truthfulness of his testimony, made under oath, at the Due Process Hearing. He was forthcoming with his impressions. As to the issues in question regarding discipline and the Student's conduct, weight is given to his testimony for being the person with the most investigative knowledge of the rock throwing behavior conduct incident. He is found to be credible.

95. The testimony of Ms. JS, Ms. CH, Ms. GAK, Ms. RCD, Assistant Principal SH (Ms. H), Ms. TF, and Mr. W, is found to be truthful, and they are found to be credible, relevant to their specific areas of administration or education. They answered questions to the best of their ability.

96. Mr. RH (Mr. H) is found to be credible, particularly in regard to his testimony in his description of the Student's behavior activities, and the demonstrative use of his movements describing the Student while testifying. When he described the Student's belching, he did so not only vocally, but with body language that showed no impulsivity on the Student's part, but rather that the Student acted deliberately. Weight is given to his description of events.

97. Dr. AH testified over the telephone, so demeanor and attributes of an in-person witness cannot be determined. Her telephone testimony is given weight to the extent it describes the characteristics and overall background as to TS, the "tic" relationship to things other than TS, and a record review. She holds a Psy.D. Degree from the Georgia School of Professional Psychology, a Master's Degree in Education in School Psychometry and a Specialist-in Education Degree in School Psychology from Georgia State University, and a Bachelor's Degree in Psychology from North Carolina State University. She has worked in various clinical psychology positions in New Mexico, and, among things, was an evaluator with the UNM Neurodevelopmental Evaluation Clinic, where she also taught. She is found to be truthful and credible in her telephone testimony.

98. Witnesses SG, JM, MJ, YJ, and CH testified about the programs at CR Alternative School. However, this evidence comes outside of the window for claims raised prior to the

filing of the Due Process Request, and does not otherwise become relevant for compensatory education because no compensatory education was awarded, which would have then considered the CR Alternative School environment in context of the CR Alternative School services.

99. 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.

100. 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, and vice-versa.

ANALYSIS AND LEGAL CONCLUSIONS

The primary challenge is whether the LEA should have evaluated the Student for TS, although much of the testimony at the due process hearing was about whether the Student was a student with TS. The initial focus of this decision, then, is whether the LEA breached its procedural duty to evaluate - not whether the Student was a student with TS. The secondary focus is that, considering the Student's eligibilities, whether a FAPE was denied including in, among other things, the manifestation determination procedure. The relevant time periods considered in this decision are for claims ripe and relevant predating by two years the filing of the Due Process Request of July 31, 2017. Thus, the allegations by the Petitioner for claims arising after the Due Process Request of July 31, 2017, and facts in support of those allegations, will not be considered.

TS, Child Find, Evaluations, and Related Issues

The failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. *See Timothy O.*, 822 F. 3d at 1124. The first step, therefore, is to determine if the procedure was violated.

TS is a neurological condition. Tr. 1435.

Significant weight is given to the testimony of Dr. MG, PhD. After examination of Dr. MG by the parties, first fully during the morning session of Day 3 of the hearing, then into the afternoon after the lunch break, Dr. MG sought to fully and completely explain TS and behaviors associated with TS, particularly in regard to this Student. Tr. 602-815. He sat in during testimony or partial testimony of other witnesses at the Due Process Hearing. In particular, the issue arose as to what relevant factual matters in the Student's behavior might exist to lead to a suspicion that the Student might be suspected of a disability associated with TS. At the close of the testimony, the Due Process Hearing Officer asked him whether there was evidence he was made aware of which led him to suspect the Student would need an evaluation for TS. Tr. 807. It is noted that a finding is made that Dr. MG is found to be highly credible, as explained in the Findings of Fact portion of this decision. Dr. MG, the LEA's Supervising School Psychologist, who is also in private practice, tr. 603, commented that "[i]t's a very difficult question to answer." Tr. 807. A short break was taken for Dr. MG to consider his response.

Dr. MG testified that there were things which concerned him enough for him to have wanted to conduct a screening, and, depending on the outcome of the screening, it could possibly lead to a referral for a formal assessment by a licensed healthcare practitioner to give a diagnosis. Tr. 809. His concerns were explained that, although other behaviors that were

presented to him were likely consistent with ADHD coupled with DMDD, there were 12 outbursts, screams, grunts, and noises not counted with profanity that could raise a suspicion. Tr. 812. This was based on behaviors in Mr. H's classroom on March 8, 2017. Tr. 811-812. *See* P's Ex. 18, p. 15.

The burden is on the LEA to identify an eligible student under the IDEA. *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). A suspicion of disability is what is required, not actual knowledge of the underlying qualifying disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). Suspicion arises when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O*, 822 F. 3d at 1120 (persuasive in this context, yet not binding). That "notice" may be expressed by parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121. *See Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). Identification and evaluation are to be within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See Wiesenberg*, 181 F. Supp. 2d at 1311.

With these factual and legal underpinnings, noted above, it is found that on March 8, 2017, the LEA suspected that the Student had a disability potentially for TS for which a screening would have been appropriate, yet with the eventual assessment and diagnosis to be made by healthcare practitioner for a disorder.

It is found that on March 8, 2017, the LEA did not make a referral for a screening or to a licensed healthcare professional for an assessment related to TS.

However, prior to the March 8, 2017 suspicions, the LEA's SAT Team (which is a general education team, not a special education team) made a referral for a psychological screening on about February 14, 2017, R's Ex. 10, p. 2, to determine if the Student may be a student with a disability. Tr. 1078. The public psychological screening was set to begin thereafter, but the Student's Father met with Mr. W, who was to conduct the public screening, and stated he was having a full evaluation to be completed by a private practitioner, and it was agreed to "holding off on the screening" pending the receipt of the private evaluation. Tr. 1142.

A private Comprehensive Neuropsychological Examination was performed commencing on February 13, 2017, P's Ex. 20, a copy was given to the LEA by the Father some time thereafter, R's Ex. 22; 439-440, it was returned by the LEA to the Father because there was not a demographics page, and then the complete document was eventually delivered to the LEA on April 19, 2017. Tr. 486.

To the extent the Respondent's raise the issues of waiver, estoppel, or laches due to the Respondent's foregoing the public screening because of a contemplated private evaluation, it is determined that these issues are better considered in the second step of the statutory and regulatory IDEA procedural violation scheme, rather than through general civil law defenses. *See* 34 C.F.R § 300.513 (hearing officer determination limited to whether FAPE was denied). *See also Garcia*, 520 F. 3d at 1125-26 (equities may arise in relief rather than in case-in-chief). That is, given the IDEA's procedural test, the first question is whether there was a procedural violation, and if this is answered affirmatively, then the second step is whether that violation impeded a child's right to a free appropriate public education, significantly

impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). Thus, the contemplated, and eventual, private evaluation's impact will be viewed on how it relates to step two of the procedural violation, under the regulatory scheme, rather than resorting to defenses outside of the IDEA.

It is concluded that a procedural violation occurred by the Respondent's failure to conduct, on or after about February 14, 2017, a referral for a screening or to a licensed healthcare professional for an assessment related to disability under the SAT Team's request. The identification and evaluation burden lies with the Respondent. *Cudjoe*, 297 F.3d at 1066. It is based on notice of a suspicion of a disability displayed by the child. *See Timothy O.*, 822 F. 3d at 1120. The suspicion arose, and the Respondent was then procedurally bound to proceed with its child find obligation.

It is also concluded that a procedural violation occurred by the Respondent's failure to make, on or after March 8, 2017, a referral for a screening or to a licensed healthcare professional for an assessment related to disability/TS. The identification and evaluation burden lies with the Respondent. *Cudjoe*, 297 F.3d at 1066. It is based on notice of a suspicion of a disability displayed by the child. *See Timothy O.*, 822 F. 3d at 1120. Giving weight to Dr. MG's testimony, that suspicion arose on March 8, 2017.

With this foundation, having found and concluded above that procedural violations occurred, in the failure to evaluate/suspicion context, then the next step is to determine if it meets the second prong to establish a denial of free appropriate public education. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996). That is, did this procedural

error seriously hamper the parents' opportunity to participate in the decision process, comprise the student's right to an appropriate education, or cause a substantive deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707.

A Comprehensive Neuropsychological Examination (CNE) was performed between February 13, 2017 and February 17, 2017. P's Ex. 20. The provider was Dr. JV, Ph.D., a psychologist. The psychometrician was HT-M, M.S. Both psychological health care evaluators signed the evaluation. *Id.*

The CNE consisted of a Clinical Interview; Behavior Assessment System for Children, 3rd Edition Structural Development History (BASC-3 SDH); Wechsler Intelligence Scale for Children, 5th Edition (WISC-V); Woodcock Johnson Tests of Achievement, 4th Edition (WJ-IV ACH); NEPSY-II; Conners' Continuous Performance Test, 3rd Edition (CPT III); Behavior Assessment System for Children, 3rd Edition, Teacher (BASC-2 TRS-A); Behavior Assessment System for Children, 3rd Edition, Self-Report (BASC-2 SRP-A); and Trauma Symptom Checklist for Children (TSCC). *Id.* The Student's neurological and psychiatric systems were reviewed, in which it was found that the Student reported talking or complex movements during sleep, with sleeping pattern disruption, waking up at 2:00 a.m., but "no other constitutional issues." *Id.* at 4. Visual change was reported, "but no other eye issues." *Id.* Dizziness/vertigo and getting dizzy when sitting up were reported by the Student, "but no other neurological issues." The Student denied any suicidal or homicidal ideation. *Id.* Memory loss, confusion, stress, difficulty concentrating, getting stressed out at school, and feeling forgetful were reported, "but no other psychiatric issues." *Id.*

MSE/Testing Observations in the CNE noted that for the clinical interview the Student's eye contact appeared to be within normal limits, and that the motor movements in his face, and his upper and lower extremities, fell within normal limits. *Id.* The Student presented with a depressed mood, although his affect appeared within normal limits. *Id.* The NEPSY-II was administered to help assess attention, executive functioning, language difficulties, sensorimotor impairment, and social perception. *Id.* at 6. Particularly in the sensorimotor domain, the scores indicated that the Student's fingertip tapping finger dexterity assessment had him at the expected level range, indicating average ability for fine manual control and programming. *Id.* at 7. The Student's manual motor sequences placed him at the expected level range which indicated an average ability for sequential manual motor planning. *Id.* For his visuomotor precision, his overall performance fell in the borderline range, which may be "indicative of a deficit in fine-motor coordination or an impulsive responding style, trading accuracy for speed." *Id.* It was noted that the Student did not lift his pencil for the task, which is above the expected level for the Student's age group. *Id.* Of the 15 assessment measures in the sensorimotor subtests of the NEPSY-II, 13 were classified as either at expected levels or above expected levels. *Id.* at 10. The two remaining assessment measures for visuomotor precision were found to be borderline. *Id.*

The Conners' CPT III assessment tool in the CNE measures attention, impulsivity, and vigilance, helpful when considering a diagnosis of Attention Deficit Hyperactivity Disorder (ADHD). *Id.* at 11. It was found that the Student "did not suggest problems with inattentiveness and impulsivity but may suggest problems with sustained attention." *Id.*

Other tests or assessments were performed, yet will not be included in this discussion. In summary, the evaluators diagnosed Disruptive Mood Dysregulation Disorder, ADHD (primarily hyperactive/impulsive type), a parent-child relational problem, an academic or educational problem, and post-traumatic stress disorder. *Id.* at 14.

Dr. JV, through the CNE, did not diagnose TS. *See* CNE, Ex. P. 20. As noted above, particularly under the NEPSY-II, the Student's sensorimotor domain, manual motor sequences, and visuomotor precision were all tested, evaluated and considered in Dr. JV's diagnosis. *See Id.* Dr. JV's diagnosis considered that the MSE/Testing Observations noting the Student's eye contact, facial motor movements, and upper and lower extremities were within normal limits. *See Id.* Dr. JV's diagnosis considered the Conners' CPT III assessment that impulsivity was not a problem. *See Id.* When considered with opinions voiced at the Due Process Hearing that ADHD may be comorbid or associated disorders with TS, tr. 635, 644, 1405, 1408-1409, it is found that Dr. JV's CNE performed a complete neurological and psychological evaluation which had the capacity to diagnose TS, but did not result in a diagnosis of TS.

Under these facts, it is concluded that the Respondent's procedural violation by failing to conduct, on or after about February 14, 2017, a referral for a screening or to a licensed healthcare professional for an assessment related to disability did not impede the Student's child's right to a free appropriate public education, or significantly imped the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). The Father sought and received a private evaluation – the CNE. It was begun on February 13,

2017 – the day before the February 14, 2017 procedural violation. A complete psychological and neurological evaluation was performed, and the Student was diagnosed with Disruptive Mood Dysregulation Disorder, ADHD (primarily hyperactive/impulsive type), a parent-child relational problem, an academic or educational problem, and post-traumatic stress disorder. Thus, although the Respondent failed in its initial procedural obligation, the very timely private CNE supplanted the underlying purpose of the procedural violation – the required screening, assessment, or evaluation. As a result, there is not rational basis to believe the Student's right to an appropriate education was comprised, or that the error seriously hampered the parents' opportunity to participate in the decision process, that it or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. Under the same analysis, Respondent's procedural violation foregoing the public screening because of a contemplated private evaluation was harmless. *See Timothy O.*, 822 F. 3d at 1124.

Similarly, under these facts, it is concluded that the Respondent's procedural violation by failing to conduct, on or after March 8, 2017, a referral for a screening or to a licensed healthcare professional for an assessment related to disability/TS did not impede the Student's right to a free appropriate public education, or significantly imped the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). Although the March 8, 2017 incidents which gave Dr. MG concern to suggest further inquiry were less than a month after the CNE testing began, the Petitioner has not met his burden to show that his own CNE did not continue as a valid psychological and neurological evaluation as of March 8, 2017 which did not result in a diagnosis of TS. There is a difference between

"suspicions," as noted by Dr. MG as concerns for a referral because of classroom behaviors, and the Petitioner's own CNE full psychological and neurological evaluation assessment which tested in detail the Student's neurological and psychiatric systems, eye contact, motor movements in his face and his upper and lower extremities, sensorimotor impairment, and visuomotor precision, among other things. Dr. AH, Psy. D., corroborates in her review of the CNE that TS symptoms did not arise. Tr. 1382-1385. The Petitioner did not meet his burden to show that the March 8, 2017 "suspicions" would have otherwise changed the validity of the CNE, which did not result in a diagnosis of TS. Therefore, similar to the February 14, 2017 procedural violation, the March 8, 2017 procedural violation was supplanted by the Petitioner's own CNE, which Petitioner has not proved was no longer valid due to the March 8, 2017 classroom suspicions. As a result, there is not rational basis to believe the Student's right to an appropriate education was comprised, or that the error seriously hampered the parents' opportunity to participate in the decision process, that it or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707.

Given the foregoing analysis, there was no violation of a FAPE by the procedural violations by the failure to conduct a referral on March 8, 2017, or by the procedural violation of failure to conduct a screening on February 14, 2017. *See* 34 C.F.R. § 300.513 (a)(2).

The preponderance of the evidence supports, and it is found, that the Student was diagnosed with Disruptive Mood Dysregulation Disorder, ADHD (primarily hyperactive/impulsive type), a parent-child relational problem, an academic or educational problem, and post-traumatic stress disorder – not TS. This is based on the diagnosis in the Petitioner's own CNE. There was no other diagnosis.

Having concluded that there was not a violation of FAPE for the failure to evaluate for TS, without evidence establishing a diagnosis of TS, then Issues Nos. 1, 2, 4, 5, 6, and 12 flow from that conclusion. Specifically, as to Issue 1, the foundation of the issue is based on a failure to evaluate and thus consider TS, yet the Petitioner did not meet his burden to prove there was a FAPE denial in that the Student should have been evaluated, and if so, whether that evaluation would have resulted in a finding that he was a student with TS, so best practices about TS and knowledge of TS as a neurological condition are moot. As to Issue 2, the foundation of the issue would be based on a due process finding that the Student should have been evaluated, and if so, whether that evaluation would have resulted in a finding that he was a student with TS, which would thus result in a misidentification of Emotional Disturbance, yet the Petitioner did not meet his burden to prove a violation of FAPE or that Student was a student with TS, so the issue of misidentification is moot. As to Issue 4, the issue is framed around "tics" and their relationship to TS and resulting alleged admonishment, hostility, and punishment, yet this would be based on a due process finding that the Student should have been evaluated, and if so, whether that evaluation would have resulted in a finding that he was a student with TS, so the issue of "tics" and punishment is moot. As to Issue 5, it was found, and concluded, explained above, that the "Child Find" procedural violations did not ultimately result in a violation of FAPE. As to Issue 6, the issue relates to special education and services, including positive behavior, based on the needs of a child with alleged TS, yet this would be based on a due process finding that the Student should have been evaluated, and if so, whether that evaluation would have resulted in a finding that he was a student with TS, so behavior supports and needs of a child with TS are

moot. As to Issue 12, this was addressed through the framework of the statutory and regulatory scheme addressing a procedural denial of FAPE, rather than general civil law defenses of waiver, estoppel, or laches, which might not be available under the IDEA's FAPE umbrella.

The Petitioner further contends that there was a failure to evaluate the Student's potential need for assistive technology equipment and services, and potential need for audio texts. *See* Issue 9. The disabilities taken into consideration in this analysis are ED and OHI, having concluded that TS is not a specific part of the OHI equation. To the extent that the Petitioner has not abandoned this issue, having reviewed his Argument and F&C, it is nonetheless found he has not met his burden that the LEA had otherwise failed to evaluate the Student for assistive technology equipment and services, and potential need for audio texts. A three-prong test exists to make a determination as to whether a related service must be provided under the IDEA. *See Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984)(a disability so to require special education, the service must be necessary to aid the child with disability to benefit from the special education, and service must be performed by a non-physician). The LEA "must ensure" assistive technology or assistive services are made available to the child. 34 C.F.R. § 300.105(a). The Petitioner raises this as a failure to evaluate issue, presumably under the "failure to ensure" language under 34 C.F.R. § 300.105(a). Thus, combing an evaluation test, *see e.g. Timothy O.*, 822 F. 3d at 1120 (disability evaluation rather than assistive technology evaluation) with the *Tatro, supra,* test, the question is whether the Petitioner has met his burden to show that the Respondent was on notice to suspect that the Student needed assistive technology equipment and services, and potential

need for audio texts, to benefit from the special education services under ED/OHI (yet not incorporating TS), so to require an evaluation. It is concluded that the burden has not been met. The Petitioner has not tied his allegation issue to the facts presented. *See* P's Argument and F&C. He fails to prove what the alleged assistive technology equipment and services are, and the unripe "potential need" for audio texts, and how the Respondent should have been on notice to suspect that (whatever they were) that they were needed for the Student's ED/OHI disability. *See Timothy O.*, 822 F. 3d at 1120. As a result, it is found that the Petitioner did not meet his burden for an evaluation by the Respondent for assistive technology, and it is concluded that a FAPE was not denied.

Reimbursement for Private Neuropsychological Examination

The Respondent disputes Petitioner's reimbursement request for Dr. JV's Comprehensive Neuropsychological Examination because of a failure to exhaust administrative remedies or because the claim is not ripe. *See* Issue 11. Because it has been determined that a FAPE was not denied, and because the private evaluation was not an Independent Educational Evaluation, then there is no need to discuss whether the issue was first administratively exhausted or brought before the IEP Team, or otherwise ripe. The cost of the Comprehensive Neuropsychological Evaluation was $1,866.60. P's Ex. 21.

There are two avenues to order the Respondent to pay for an educational evaluation. The first is if the evaluation is an Independent Educational Evaluation (IEE). *See* 34 C.F.R § 300.502. The other is as a remedy for a denial of a FAPE. *See M.M. v. LaFayette Sch. Dist.*, 68 IDELR, 116 LRP 31747 (N.D. Cal. July 27, 2016).

There are procedural mechanisms associated with an IEE and payment at public expense. 34 C.F.R § 300.502. The IEE must be requested by the parent if there is a disagreement with an evaluation obtained by the public agency. *See* 34 C.F.R § 300.502(b). In this case, the LEA did not conduct an initial evaluation which the Father disagreed with, and an IEE was never requested by the Father. The private Comprehensive Neuropsychological Examination was not an IEE, and not subject to reimbursement as an IEE. Thus, the administrative exhaustion and ripeness argument by the Respondent need not be addressed, because the private evaluation was not an IEE.

The second avenue is to remedy a denial of a FAPE. *M.M. v. LaFayette Sch. Dist.*, 68 IDELR, 116 LRP 31747. It has been concluded, above, that although there were procedural violations in failure to evaluate for suspicions of disabilities, they did not, however, ultimately result in a violation of a FAPE. There being no violation of a FAPE then a remedy of reimbursement is inapplicable.

Therefore, the request for reimbursement of $1,866.6 is denied.

Manifestation and Suspension

One of this issues raised is whether a manifestation determination and disciplinary change of placement denied the Student a FAPE, by an alleged failure to identify the Student and an alleged failure to provide the Student with an IEP. *See* Issue 3.

Summarily, as to the contention that there was a failure to identify (in the context of the allegations, the failure to identify is an alleged failure to identify TS), it has been held, above, that the failure to identify did not result in a violation of FAPE. This issue is, therefore, moot as to its relationship with a manifestation determination.

The Respondent questions whether there is administrative jurisdiction to address the length of the Student's suspension, or to change the location of his disciplinary placement. *See* Issue 13. Given the allegation that there was an alleged denial of FAPE due to the disciplinary proceedings, then it is concluded there is administrative jurisdiction to consider these FAPE issues flowing from a manifestation determination. A hearing officer has jurisdiction to determine whether a child has received a FAPE. *See* 34 C.F.R. § 300.513 (a)(1); 34 C.F.R. § 300.530(d). *See Dist. of Columbia v. Doe*, 611 F.3d 888, 898 (D.C. Cir. 2010). Given the procedural framework for the manifestation determination, *see* 34 C.F.R. § 300.530(d), the issue to be resolved is whether a procedural violation occurred, and, if so, whether that violation impeded a child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2).

The alleged procedural manifestation violation questions whether Father and the IEP Team reviewed all the relevant information in the Student's file, and teachers' observations. *See* 34 C.F.R. § 300.530(e). Having found and concluded that the TS failure to identify issue is moot, given other findings and conclusions in this decision, the Student's disabilities on which the manifestation issue arises are considered to be those contained in his IEP of May 4, 2017. (P's Ex. 28, R's Ex. 2). Those eligibilities are: (1) Other Health Impairment (ADHD) (OHI), R's Ex. 16; and (2) Emotional Disturbance (ED). R's Ex. 17.

On April 27, 2017, an IEP Meeting Request was prepared. P's Ex. 26. A Multidisciplinary Evaluation Team Meeting (MET) was held on April 27, 2017. P's Ex. 23.

A Manifestation Determination Meeting was also held on April 27, 2017. P's Ex. 25. The Student was initially proposed to have a long-term suspension for one year, although it was subsequently reduced to six months by a hearing officer. *See* P's Ex. 19. The meeting was held to address a report that on April 19, 2017, the Student had thrown a rock and hit another student on the head, and another student was hit with a rock a few times. *Id.* The Father was at the meeting, as was the assistant principal. Tr. 364, 1252. According to one member of the IEP Team at the meeting, School Psychologist Mr. W, the behavior (conduct) the IEP Team discussed was the "behavior incident reported" on P's Ex. 25, Manifestation Determination and Review, or MDT. Tr. 1095-1096. That behavior was that on April 20, 2017, another student reported he had been hit on the head with a rock on April 19, 2017, that there was another student who had been hit with rocks a few times, that the students witnessed the Student throwing the rocks, and that the Student said it could have been an accident, since he picked up little rocks and threw them. Tr. 1096. Note that an IEP had not yet been completed by this date. *See* P's Ex. 28 (IEP, May 4, 2017). This is relevant circumstantially in context of information presented, because the subsequent IEP of May 4, 2017, which is several days after the MDT, stated the disciplinary issues in the IEP were that the Student "received many disciplinary referrals for disruptive behavior in the classroom, which culminated in a long term suspension related to throwing rocks at another student." P's Ex. 28, p. 9. However, the additional testimonial evidence under oath is that the reason for the suspension under the MDT was because the Student had created an unsafe condition by the rock throwing event. Tr. 559, 573, 579. It is found that conduct in question for which it was to be determined whether

there was a manifestation of the Student's disability was only the rock throwing event of April 19, 2017 -- not including the Student's prior misbehavior incidents.

At the meeting were the Father, Case Manager ZB, Diagnostician JS, School Principal (actually the assistant principal) MH, School Psychologist Mr. W, LEA Representative RD, Special Education Assistant Director DB, and Special Education Coordinator TF. R's Ex. 20. P's Ex. 25. The Father consented via an IEP Attendance/Excusal Form to excuse General Education Teacher GAK. R's Ex. 20; P's Ex. 26. A Prior Written Notice of Proposed Actions was completed, with a signature by the Father that procedural rights were provided to him. P's Ex. 25. The record does not disclose any written procedural notice safeguards notice that the Father acknowledged receiving. There is a statement that the Father could receive procedural safeguards, yet that he would have to contact the school psychologist or special education office to obtain a copy, which is above where the Father's signature was located. This is relevant circumstantially as evidence in context of information presented eventually at the Manifestation Determination Meeting because 34 C.F.R. § 300.530(h) requires ("must . . . provide") procedural safeguards to be given to the parent as described in 34 C.F.R. § 300.504 (IEE, PWN, parental consent, access to education records, opportunity to resolve complaints through the due process or complaint procedures, mediation, stay put pendency, procedures for interim alternative educational settings, private school unilateral placements, civil actions, and attorney's fees). *See id.* This is viewed as an event where the record is incomplete as to what the Father was provided by the Respondents bearing circumstantially toward the way the meeting was generally held. *See* Tr. 510 (no procedural safeguards subsequently discussed).

The only facts presented at the Manifestation Determination Meeting were by Assistant Principal H, who said that the Student said to another student that he was going to throw rocks at yet another student, that he followed the student and threw rocks, and did it again, and that the Student was eventually confronted by the incident and was calm and admitted doing it. Tr. 1098. There is no indication that Principal R's Long Term Suspension Packet, as explained below, was provided at the Manifestation Determination Meeting, or that written witness statements were provided at the meeting. *See Id.*

Principal R gathered information about the rock throwing incident prior to the Manifestation Determination Meeting. Tr. 536. He created a packet, described as the Long Term Suspension Packet, on April 20 or 21, 2017. Tr. 570. The packet consists of statements by other students, the policy violation, the proposed date of the one year suspension, the student's grades and attendance, notification of signed documents, a "Manifestation Determination (if applicable)," current year discipline, previous years' discipline, interventions, statements from administrators, student statements, victim and perpetrator statements, other evidentiary matters, a timeline, Class III citation, and a police report. P's Ex. 18, pp. 1-32. The Juvenile Class III report indicates that the Student has had many situations where he brought injury to others. *Id.*, p. 32. Principal R's concerns, as noted in narrative, were the safety of the children on campus, the Student's problems with injuring other students, and disrupting the learning environment. *Id.*, p. 29. Principal R includes in his narrative that one of the student's involved in the incident (a victim) described the Student as untruthful and the school principal gave credibility to the victim's statement that the Student was untruthful. *Id.*, p. 28. The three students who gave statements were nervous. *Id.* One of the witness students

said that the Student threw a couple golf ball sized rocks. *Id.* That was contrary to the Student's report that he threw little rocks. *Id.* The Student's written report of events was contained in the Long Term Suspension Packet, *see* P's Ex. 18, p. 30. *Id.* The Long Term Suspension Packet did not include, however, the written statements from the three other student witnesses. *See* P's Ex. 18. There were written statements from the other three witnesses that existed. Tr. 536, 579, 591-593.

The statements from the other student witnesses, taken on April 20, 2017, contain possible exculpatory or mitigation matters regarding the underlying conduct or behavior. R's Ex. 14. The statement from one witness states that he heard the Student accusing another person of the rock throwing event, but he thought about it on the bus, and then he started thinking about it, "[a]nd when I started to talk with Mr. [R] (Principal R) and now I know it was [the Student]. R's Ex. 14, p. 1. There is a place on the statement that is crossed out after the sentence indicating the discussion with Principal R, with the words "I well think that it was [the Student]." *Id.* A second statement may include some material where the Student places the blame for the rock throwing on a witness, but the witness knows it was really the Student. *Id.*, p. 2. A third statement may include some material where the Student, after the incident, remarks that he did not throw the rock, although the witness discredits the statement – "[a]nd [the Student] came up and said 'did you get hit with a rock' and I said 'yes,' who threw it and [the Student] goes after 'I don't." *Id.*, p. 3. Notice is taken that these statements are from middle school students being questioned by their principal. Review of the evidence does not show that these statements were provided to the IEP Manifestation Determination Team members, including the Father, as a Team member. Tr. 364, 469-470, 504-510. Specifically,

when questioned about whether other student statements were presented at the Manifestation Determination Meeting, Mr. W replied "no." Tr. 1098.

A long term suspension hearing was administratively held on April 26, 2017, with a decision issued on May 1, 2017. R's Ex. 21. The Hearing Officer reduced the proposed long term suspension from six months to one year. *Id.* On the day of this hearing, April 26, 2017, the Student's Father was provided a copy of the Long Term Suspension Packet. Tr. 557-558. A subsequent administrative appeal upheld the six-month suspension, with a letter order issued on May 10, 2017. R's Ex. 24.

The procedural question, with the analysis above, is whether the Manifestation Determination IEP Team, including the Father, reviewed all of the relevant information in the Student's file, including his IEP, among other things. *See* 34 C.F.R. § 300.530(e). An IEP had not yet been held. What relevant information did exist, created by the Respondent prior to the Manifestation Determination Team Meeting, was the Long Term Suspension Packet (P's 18), and the other students' witness statements (R's 14). The Father did receive a copy of the Long Term Suspension Packet on April 26, 2017, although it was not provided as a part of the Manifestation Determination Team Meeting, which was a day later. The Manifestation Determination IEP Team did not receive a copy of the Long Term Suspension Packet, which included the Student's written version of events. Importantly, as well, the Manifestation Determination IEP Team, including the Father, did not review the three other students' written witnesses' statements. The witnesses' statements do not fully support the version of events presented by Assistant Principal H, including the change in wording by one student due to some confusion after he had had time to talk with Principal R, who was the administrator

requesting the long term suspension. See R's Ex. 21. Whether this information would have led to further inquiry by the Manifestation Determination IEP Team, or whether different decision would have been reached, is unknown. What is found is that the witnesses' statements and the Long Term Suspension Packet were relevant information which should have been, but were not, reviewed by the Manifestation Determination IEP Team. It is therefore concluded that a procedural violation occurred. *See* 34 C.F.R. § 300.513(a)(2).

Having concluded a procedural violation occurred, the next step is to determine if it meets the second prong to establish a denial of free appropriate public education. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996). That is, did this procedural error seriously hamper the parents' opportunity to participate in the decision process, compromise the student's right to an appropriate education, or cause a substantive deprivation of educational benefits? *See O'Toole*, 144 F.3d at 707. It is concluded that the failure to disclose the relevant information seriously hampered and significantly impeded the Father's opportunity to participate in the Manifestation Determination IEP process. *See* 34 C.F.R. § 300.513(a)(2). *O'Toole*, 144 F.3d at 707. Therefore, the Petitioner has met his burden to prove a violation of a FAPE.

The impact of not having witness statements which were taken by the administrator seeking long term suspension which may suggest overbearing by that administrator, or the witnesses' confusion, or the inability to compare the witnesses' statements with the Long Term Suspension Packet, perhaps as impeachment to the version of events represented by the Respondent, seriously hampered and significantly impeded the Father's ability to participate in the process. The Father did not accept the principal's proposed suspension of his child –

indeed, he administratively contested the suspension through an internal LCPS hearing, saw the suspension reduced by half, went through another internal LCPS administrative review, and then filed for Due Process under the IDEA. It cannot be said that the error was harmless. There were records relevant to the conduct which should have been disclosed, but were not.

This addresses Issues 3 and 13.

IEP and Related Issues

An IEP (hereinafter "the IEP") was completed on May 4, 2017. P's Ex. 28, R's Ex. 22. This was after the Manifestation Determination of April 27, 2017. P's Ex. 25. There being no IEP at the time of the manifestation determination, then there was not one to consider. *Id.* The IEP Team members in attendance were the Father, Case Manager ZB, School Principal (actually the assistant principal) Ms. H, School Psychologist Mr. W, Special Education Teacher MJ, LEA representative RD, and District Special Education Coordinator TF. R's Ex. 22. The General Education Teacher, GAK, was not present – there was an IEP Attendance/Excusal Form signed by the Father and a representative of the LEA stating her attendance was not necessary because he and the LEA agreed that the Student's curriculum or related services are not being modified or discussed. *Id.* The IEP Medical/Nursing Services Provider, TD, did not attend. *Id.*

The IEP considered the Student's average to high average cognitive abilities and the Student's good scores in his academic testing as relative strengths as outlined by Dr. JV in her CNE. *Id.* They considered Dr. JV's assessment that the Student had strong language and memory skills. *Id.* The IEP Team considered Dr. JV's assessment that although the Student had relative challenges in math, his scores were not low enough to meet a significant

discrepancy suggesting a learning disability. The IEP Team considered, according to Dr. JV's assessments, that the Student was noted to have soft signs of attention and executive functioning difficulties, difficulties with social judgment, and with mood regulation and behavior control. *Id.*

The Student was found to be eligible for services under the criteria of Emotionally Disturbed and Other Health Impaired. *Id.* It was determined he is in need of special education services *Id.* It was determined that the Student would attend the LEA's alternative education setting due to his long-term suspension. *Id.* A Behavior Intervention Plan was completed based on a skill deficit, and proposed positive behavior supports. *Id.*

The IEP placed the Student in the general education setting with accommodations, and to be pulled out of class by the school psychologist, while at the alternative educational setting. *Id.* Related services were to be delivery in small group or individual settings, with mental health services. *Id.* The Student would be in his regular classes 80 percent or more of the day. *Id.* Accommodations for the Student were modified assignments (shortened lessons), extra time to complete assignments as long as progress was being made, chunk bigger assignments into smaller tasks, and allowing the Student to correct assignments. *Id.* Testing would be in small groups. *Id.* These accommodations would be for the regular education services in social studies, electives, math, English language arts, and science. *Id.* The Student would perform activities with peers at lunch/breakfast, assemblies, library, electives, and in extracurricular activities. *Id.* Case management was to be 50 minutes each week, with psychological services for 22 minutes each week. *Id.* Due to the Student's behavioral needs, curb to curb

transportation would be provided. *Id.* The IEP did not find the Student had assistive technology needs. *Id.*

The Petitioner challenges the IEP because General Education Teacher GAK was not present, although the Father had agreed that she could be excused. An IEP Team member may be excused if the agency and the parent agree in writing that the member's attendance is not necessary because that "member's area of the curriculum or related services is not being modified or discussed in the meeting." 34 C.F.R. § 300.321(e)(1). The excuse is preconditioned on, among other things, the excused IEP member's submission, in writing to the parent and to the IEP Team, "input into the development of the IEP prior to the meeting." 34 C.F.R. § 300.321(e)(2)(ii). The Petitioner challenges that the teacher should have been present because "a vacuum of understanding and planning" was created by not having the general education teacher present. *See* P's Argument p. 19. P's F&C p. 26. Read in context of the argument, the Petitioner challenges the general education teacher's absence relating to curriculum and related services. *See* Issue 10.

The record does not reflect that General Education Teacher GAK's provided a written submission regarding the development of the IEP to the Father and the IEP Team prior to (and for) the IEP meeting. P's Ex. 23, p. 6.

The IEP, as reflected above, modified the general education curriculum of the Student's educational services which he was receiving prior to the IEP while in the general student population while General Education Teacher GAK was his general education teacher. Accommodations were made for the regular education services in social studies, electives, math, English language arts, and science. The Student was found eligible for services under the

criteria of Emotionally Disturbed and Other Health Impaired and determined to be in need of special education services. The IEP changed his placement to the LEA's alternative education setting due to his long-term suspension, provided for him to be pulled out of class by the school psychologist, provided for related services in small group or individual settings, modified his assignments (shortened lessons), gave extra time to complete assignments as long as progress is being made, allowed the Student to chunk bigger assignments into smaller tasks, and allowed the Student to correct assignments, with testing to be in small groups.

General Education Teacher GAK should not have been excused. This if found to be a procedural error. *See* 34 C.F.R. § 300.513(a).

The next step is to determine if it impeded a child's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. *See* 34 C.F.R. § 300.513(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, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *O'Toole*, 144 F.3d.

General Education Teacher GAK had participated in a Multidisciplinary Evaluation Team (MET) meeting on April 27, 2017. P's Ex. 23. The Father was at that meeting as well. *Id.* General Education Teacher GAK drafted written materials which discussed the Student's skills, his behaviors, his grades, playing a musical instrument, social studies concerns, and that he is bright and is able to connect history with real world issues. P's Ex. 23, p. 4. Tr. 241. She

provided these materials to a diagnostician via email. Tr. 241-242. It was incorporated into the MET Team report. P's Ex. 23. Ms. GAK also participated in that meeting in a discussion of ADHD/OHI and ED. Tr. 222-226. Therefore, it is found, and concluded, that the procedural errors did not impede the Student's right to a free appropriate public education, or significantly impeded the father's opportunity to participate in the decision-making process for a provision of FAPE, or caused a deprivation of educational benefits. *See* 34 C.F.R. § 300.513(a)(2). There is no rational basis to believe the Student's right to an appropriate education was compromised, or that the errors seriously hampered the parents' opportunity to participate in the decision process, or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. Thus, the Petitioner has not met his burden to prove a denial of a FAPE.

The Petitioner contends that the change of placement under the IEP to the alternative school during the long-term suspension period, CR, denied him a FAPE because it did not provide him with necessary specialized instruction, the 7th Grade curriculum, extracurricular activities, or an education in the LRE. Issue 9. It was refined by his argument that it takes the Student away from his neighborhood, and punishes him for behavior. P's Argument, p. 20. It is noted that only claims ripe for review at the time of the filing of the Due Process Request on July 31, 2017 are considered. *See Kansas Judicial Review v. Stout*, 519 F.3d 1107, 1116-17 (10th Cir. 2008). In other words, only that evidence which existed at the time of the IEP, prior to the filing of the Due Process Request on July 31, 2107, is ripe for review. Determination will be based primarily on the face of the IEP, and the text of the document developed. *See Sytsema*, 538 F.3d 1306 (10th Cir. 2008).

The Student has an IEP in an alternative setting due to his long term suspension. It is noticed that, by its nature, being in an alternative school based on suspension is more behaviorally restrictive to the general educational population than the general education environment in a non-alternative setting. However, the least restrictive environment (LRE) requires that children with disabilities be educated, to the extent appropriate, with nondisabled children – this is where the least restrictive environment arises, not the "brick-and-mortar" of the alternative setting. *See* 34 C.F.R. § 300.114(a)(2). The Petitioner's claim that because the Student is put into a "brick and mortar" facility as an alternative setting fails to support the claim. The IEP places the Student, although at the alternative school, in 80 percent or more each day in a setting with his nondisabled peers, although all the students, disabled or nondisabled, are in the alternative behavior setting. *See* P's Ex. 28. As noted above, the IEP provides for regular education services in social studies, electives, math, English language arts, and science, with some accommodations to support his special needs. *Id.* Under the IEP, the Student performs activities with peers at lunch/breakfast, assemblies, library, electives, and in extracurricular activities. Thus, the Petitioner presents insufficient evidence to meet his burden that the Student's IEP placed him in a more restrictive environment than his nondisabled peers in that "brick-and-mortar" CR Alternative School environment. *See* 34 C.F.R. § 300.114(a)(2). *See Murray*, 51 F.3d at 926.

The Petitioner could not raise a failure-to-implement claim for his services at the CR Alternative School because at the time of the filing of the Request for Due Process the Student had not yet begun the school at the CR Alternative School. As a result implementation could not have been ripe. Thus, what is actually happening now at the CR Alternative School

regarding the services in the 7th grade will not be considered. However, under the IEP in place prior to filing the Due Process Request, the IEP's accommodations and services include small group or individual settings, modified assignments (shortened lessons), extra time to complete assignments as long as progress is being made, chunking bigger assignments into smaller tasks, and allowing the Student to correct assignments, with testing in small groups. It is found, and concluded, from the Petitioner's allegations contesting the IEP, that the Petitioner has not met his burden to prove that IEP was not reasonably calculated to enable the Student to make progress appropriate in light of the Student's circumstances, including specialized instruction to meet his needs, which notes extracurricular activities. *See Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. at 999 (2017). The disabilities taken into consideration in this analysis are ED and OHI, having concluded that TS is not a specific part of the OHI equation.

The Petitioner's next contention is that FAPE was denied by alleging the IEP was inadequate because it did not meet his needs for specialized instruction, supplemental aides and services, and modifications and accommodation. Issue 8. This matter is addressed above, in that the IEP details the regular education classes, accommodations in those classes, testing procedures, extra time, corrections, and services with non-disabled peers, among other things. To the extent the Petitioner claims these services, instruction, accommodations, modifications, and aides do not meet his unique needs as a Student with OHI and ED (TS has already been found in this decision not to be a specific part of the OHI equation), then it is found that he has not met his burden that the IEP was not reasonably calculated to enable the Student to make

progress appropriate in light of the Student's circumstances, including specialized instruction to meet his needs. *See Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. at 999 (2017).

Relief

The Petitioner seeks equitable relief. *See* Issue 14. The procedural violations alone that did not result in a denial of a FAPE will not be remedied. However, the procedural violation that was found and concluded to violate FAPE based on failure to provide relevant information (records) to the Father at the Manifestation Determination Meeting (the witnesses' statements) and to the Manifestation IEP Team members (the witnesses' statements and the Long Term Suspension Packet) may, or may not, support a discretionary equitable remedy. The focus will be on the violation of FAPE and placing the Student back to where he would have been had the violation not arisen. *See Reid*, 401 F. 3d at 523-24 (test for compensatory qualitative approach, yet concept viewed favorably in this remedy analysis). In doing so, all relevant factors will be considered. *See Florence County Sch. Dist. v. Carter*, 510 U.S. 7, 16 (1993).

The FAPE violation for which a remedy may be appropriate is that because the Respondent did not supply relevant records to the Manifestation Determination IEP Team, which included the Father, then the Father's opportunity to participate in the Manifestation Determination IEP process was seriously hampered and significantly impeded. In procedural violation matters resulting in a violation of a FAPE based on documents not being considered and manifestation determinations, similar to this present case, courts have ordered that a second manifestation determination meeting be held, and that compensatory education be provided for services lost due to the loss of educational benefits because of the FAPE violation.

See Bristol Twp. Sch. Dist. v. Z.B., No. 15-4604 (E.D. Pa., Jan. 14, 2016), 67 IDELR 9, 116 LRP 1736. In an appropriate case, a disciplinary action may be reduced. *See Dist. of Columbia v. Doe*, 611 F.3d 888 (D.C. Cir. 2010). These cases have been thoughtfully considered.

It is concluded, in this particular case, that equitable powers be balanced, and applied almost as if compensatory education would be the remedy, rather than ordering a second manifestation determination. This is influenced by binding precedent in the Tenth Circuit that remanding or delegating issues back to the IEP Team is improper, at least for another placement determination. *See M.S. v. Utah Sch. for the Deaf and Blind*, 822 F.3d 1128 (10th Cir. 2016). As a result, the equitable remedy, if any, will address whether the Petitioner has met his burden of proof that he would be entitled to services other than those being provided if the Student is put back to where he should have been had the Respondent provided the services in the first place. *See generally Reid*, 401 F.3d at 523-24 (qualitative compensatory education relief test). This allows for a determination on this record of whether the Petitioner can meet his burden, based on review of the undisclosed records resulting in the FAPE violation and testimony relating to them, that a different manifestation determination result would arise with the records now disclosed as part of the Due Process Hearing.

Having considered the student witnesses' statements, as noted in the Analysis section of this decision, the materials in the Long Term Suspension Packet, which includes the Student's written admission, and having listened to the testimony of Principal R, among others, it is found and concluded that the Petitioner did not meet his burden to prove that the underlying conduct of the Student (rock throwing and injury to other students) did not take place. The original manifestation determination was based on this underlying conduct, so having now

found the conduct to have occurred after considering the undisclosed materials and testimony, then the manifestation determination stands. The misbehavior having now been determined to be the same as that on which the manifestation determination was originally made, it is concluded that the Petitioner has not met his burden to show what other educational benefits, if any, were denied because of the FAPE violation. As a result, no equitable remedy is awarded.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioner's Request for Due Process Hearing Against the Local Educational Agency (LCPS) is granted in part and denied in part.

There is jurisdiction over the parties and the subject matter. *See* 34 C.F.R. § 513.

In summary, the Petitioner met his burden proving that three procedural violations arose under the IDEA, although only one resulted in a denial of FAPE. The Petitioner met his burden that procedural violations occurred by the Respondent's failure to identify and evaluate the Student based on a suspicion of a disability (February 14, 2017 and March 8, 2017), although they were deemed harmless. The Petitioner met his burden that a procedural violation occurred because General Education Teacher GAK should not have been excused from the IEP, although it was deemed harmless. The Petitioner met his burden that a procedural violation occurred by the Respondent's failure to disclose for review to the Father and the IEP Manifestation Team relevant records and information, which significantly impeded the Father's opportunity to participate in the decision-making process of the Manifestation Determination, thus denying a FAPE. However, no remedy is awarded because, after placing the Student back into the place he would have been absent the FAPE violation,

the Petitioner did not prove that anything more was appropriate other than what was being provided.

The Petitioner did not meet his burdens to prove other claimed violations of FAPE, as otherwise detailed in this decision. Those claims will be, and hereby are, denied.

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

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 14, 2017

CERTIFICATE OF SERVICE

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