

**BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH NO. 1819-03**

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

THIS MATTER arises on the Petitioner's Request for Due Process Against [REDACTED] Municipal Schools, Petitioner's Local Education Agency ("District"). Petitioner filed her Request for Due Process with the State of New Mexico Public Education Department on July 24, 2018. The Petitioner's Due Process Request is granted in part.

I. Procedural Background

Pursuant to an Amended Pre-Hearing Order, the parties timely filed their respective Statements of Issues for the Due Process Hearing. The parties also timely filed their respective Witness and Exhibit Lists.

Pursuant to a Stipulated Continuance, the Due Process Hearing commenced on October 22, 2018, and concluded on October 24, 2018. Both parties were well-represented by their respective trial counsel. Both parties timely filed Proposed Findings of Fact and Conclusions of Law, and Closing Arguments. Upon request by the Due Process Hearing Officer ("Hearing Officer"), the parties filed supplemental authorities.

Pursuant to a stipulated extension of time, this final decision is due on or before February 4, 2019.

II. Relevant Legal Overview

As the party challenging the Individual Education Plan ("IEP") and the implementation thereof, Petitioner has the burden of proof in this case. *See Schafer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990).

While the parties have presented me a total of thirty-two issues to resolve, the essential question before me is whether Student has been provided a free and appropriate public education ("FAPE"). Petitioner (also referred to herein as "Parent") contends that for many reasons, Student has been denied her rights pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.* The District responds to the contrary, that Student has not been denied her rights pursuant to the IDEA, and that, in any event, Student was not denied FAPE.

To resolve this matter, the Due Process Hearing Officer must engage in a twofold inquiry. *Dept. 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 first question is whether the District has complied with the

procedures set forth in the Act. The second question is whether the IEP developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits, and whether the District did, in fact, implement the IEP. *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 received the ‘free appropriate public education’ mandated by the Act.” *Murray v. Montrose County Sch. Dist. RE-IJ*, 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 Cnty. 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.

We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S., at 206, 102 S.Ct. 3034.

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue. *See* §§ 1414, 1415; *id.*, at 208–209, 102 S.Ct. 3034. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

Endrew F., 137 S. Ct. at 1001–02. 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.

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. § 300.531(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)(emphasis added). Notably, in this regard, a parent has her own enforceable rights pursuant to the IDEA, separate and apart from the child's entitlement to FAPE: "[T]he Court disagrees that the sole purpose driving IDEA's involvement of parents is to facilitate vindication of a child's rights." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 517, 127 S. Ct. 1994, 1996, 167 L. Ed. 2d 904 (2007). Nonetheless, the Supreme Court has pointedly noted "the primacy of a FAPE in the statutory scheme." *Fry*, 137 S. Ct. at 753. "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Id.*

Technical deviations alone are insufficient to establish a violation of the IDEA. *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 Systema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir.2008). Procedural defects must amount to substantive harm in order to support an award of compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). However, a hearing officer may also order a LEA to comply with procedural requirements. *See* 34 C.F.R. § 300.513(a)(4).

III. Hearing Officer's Combined Statement of Issues¹

1. Whether the LEA failed to evaluate Student in all areas of suspected disability, specifically for dyslexia and for autism? (P(1))
 - a. Whether the LEA failed to provide Prior Written Notice concerning Parent's multiple requests for identification of dyslexia and specialized reading instruction sufficient to meet Student's needs for remediation and whether that failure impaired Parent's ability to enforce Student's right to a FAPE? (P(9)).
 - b. Does the Petitioner's failure to follow through with the IEE provider she chose represent a denial of FAPE on the part of the District? (R(1))

¹ I am cognizant of the potential problems that re-organization of the issues may create for the parties. *See, e.g., M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1196 (9th Cir.), *cert. denied sub nom. Antelope Valley Union High Sch. Dist. v. M.C. ex rel. M.N.*, 138 S. Ct. 556, 199 L. Ed. 2d 437 (2017). However, I find the issues as stated are unnecessarily duplicative and lacking in internal organization. The parties were invited to submit a Joint Statement of Issues but declined to do so. I have therefore combined and re-organized the issues, without omitting any issue or re-phrasing any issue.

- c. Does the Petitioner's failure to schedule an IEE bar her claims against the District that challenge the findings of the District's evaluation? (R(2))
 - d. Does the Petitioner's refusal to accept the District's evaluation and then subsequent failure to follow through on the IEE she requested support a claim for failure to identify and a denial of FAPE? (R(10))
 - e. Does the Petitioner's refusal to utilize their selected out-of-town evaluator for the IEE constitute a waiver of the parent's right to make a claim that the District's evaluation was improper? (R(14))
 - f. Does the Petitioner's refusal to take the student to an evaluator for an IEE unless the evaluator reached a desired specific conclusion regarding the student's disability constitute a waiver of the parent's right to make a claim that the District failed to evaluate the student in all areas of a suspected disability? (R(15))
2. Whether the LEA failed to conduct appropriate IEP meetings?
- a. Whether the LEA failed to have a person in attendance at Student's IEP's who could interpret the instruction implications of her evaluations? (P(4)).
 - b. Whether the LEA failed to include Parent as a true member of the IEP team? (P(11))
 - c. If a parent is in attendance at an IEP, along with their advocate, and does not object to the IEP created for their child, can they now claim a failure of opportunity for meaningful participation in the IEP process? (R(11))
3. Whether the LEA wrote appropriate IEP goals?
- a. Whether the LEA wrote IEP goals for reading which go against reading research and assumed Student would guess at words rather than accurately decode? (P(5))
 - b. Whether the LEA wrote IEP goals which aimed too low, progressively decreased expectations and substitute accommodations and "do overs" for providing Student with necessary instruction for remediation of skills? (P(6)).
 - c. Whether the LEA failed to write goals for spelling despite Student's inability to spell? (P(10))
 - d. If a parent is in attendance at an IEP meeting, along with their advocate, and does not object to an IEP created for their child, can they now claim a denial of FAPE? (R(7))

4. Whether the LEA's special education program for Student failed to provide Student with FAPE?
 - a. Whether the LEA failed to provide Student with evidence based reading/writing/spelling instruction sufficient to meet her needs as a student who is dyslexic, of average intelligence, and has failed to make meaningful progress in necessary skills for accurate and fluent reading with comprehension, for writing and spelling? (P(3))
 - b. Does the Petitioner's failure to ensure consistent and timely school attendance contribute to a denial of FAPE and educational neglect? (R(3))
 - c. Does a student's failure to attend school in a consistent and timely manner bar a parent's claims of lack of progress? (R(4))
 - d. Does parental interference with a student's attendance and timeliness at school bar a claim of a denial of FAPE? (R(5))
 - e. Does the Petitioner's failure to send the student to school on a consistent and timely basis excuse compliance with New Mexico's compulsory attendance requirements (R(6))
5. Whether the LEA failed to provide Student with necessary related services ?
 - a. Whether the LEA failed to provide Student with necessary related services in speech language pathology and assistive technology? (P(2))
 - b. Whether the LEA failed to provide Student with access to audio versions of texts? (P(8))
 - c. Whether the LEA failed to provide Student with access to the general curriculum by failing to teach her to read accurately and by failing to provide her with audio versions of texts and assigned reading books? (P(7))
6. Whether the LEA failed to implement the April 2017 IEP when it failed to refer Student to a counselor for screening? (P(12))
 - a. Does the Petitioner's failure to return consent for counseling screening constitute a denial of FAPE on the part of the District? (R(8))

- b. Does the Petitioner's failure to consent to evaluation bar a claim of a denial of FAPE? (R(9))
- 7. Whether the LEA has failed to adequately address bullying against Student, based on disability, when such bullying decreased her access to education?
 - a. If the District has investigated each and every report of bullying by the parent on behalf of the student and found no pattern of bullying at either school which the student attended, yet the parent continued to keep the student home from school, can the parent now support a claim for denial of FAPE? (R(12))
 - b. Does a claim of bullying fall within the scope or jurisdiction of an IDEA claim? (R(13))
- 8. Whether the LEA punished Student for manifestation of her disability? (P(3))
- 9. Whether any of the failures (P 1-14) singly or in combination denied Student a FAPE (P(15)).
- 10. Whether Student is entitled to remedy for denial of FAPE? (P(16))
- 11. And to what equitable remedy is Student entitled? (P(17))

IV. Hearing Officer's Findings of Fact²

- 1. Student was ten years old at the time of the Due Process hearing. She turned eleven years old in December 2018. She is currently eligible for special education services. Exhibit 12. Her primary disability is a specific learning disability in reading and written language. *Id.* "[Student] has average intelligence with processing deficits and academic delays in the areas of reading and written language that adversely affect her educational performance making her eligible as a student with a specific learning disability." *Id.*

Robert Nora (and Carlyn Hancock)

- 2. Robert Nora was Student's teacher for fourth grade and a portion of third grade. He taught Student during the 2017 / 2018 school year. He began teaching Student by April 3, 2017. When Student began as Mr. Nora's student, her grade level in reading was 2 to 2.3, pursuant to her IEP.

² 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.

3. Mr. Nora was in his first few years of teaching. Prior to working for Clovis Municipal Schools, Mr. Norton had only taught reading to his own children. When Mr. Nora was teaching special education for Student, he had an alternative license from the Public Education Department to teach special education. According to Carlyn Hancock, the deputy director of student support services, Mr. Nora was eligible for alternative license as long as he was working towards earning the required course work to get a teaching license. Page 846. Mr. Nora subsequently lost his alternative license and doesn't know what license he currently holds. The Hearing Officer sustained the District's objection to any additional exploration of the status of Mr. Nora's current license.
4. Mr. Nora taught Student in a resource room. There were approximately ten students in the resource room.

Read Naturally and Orton-Gillingham

5. Student's reading program to address her specific learning disability was "Read Naturally." "Signs for Sounds" is the spelling, phonemes, and sounding out portion of Read Naturally. Mr. Nora was trained in Read Naturally through limited supervision by an experienced liaison, and self-trained by reading the Read Naturally books.
6. Mr. Nora's curriculum was originally limited to Read Naturally. During the 2016 / 2017 school year, Mr. Nora was not qualified to teach Orton-Gillingham, and therefore did not use this program.
7. 2017/ 2018 was the first school year that special education teachers were offered training in Orton-Gillingham. Ms. Hancock testified that where Read Naturally "is maybe a little deficient, then there are other things pulled in to support that; i.e., the Orton-Gillingham." Page 854. However, "if [Read Naturally] is done with fidelity and all the parts are used with fidelity, [Ms. Hancock] does not believe that there are a lot of deficiencies with Read Naturally." Page 854. "[E]very kiddo benefits from different strategies. And in no one class would you just use one thing and expect that to reach every student." Page 854.
8. Mr. Nora explained the design of the Read Naturally program. Pages 62-64. Students begin with a picture and four vocabulary words and write a short prediction of what the story will be about. They listen to the words and the definitions and review their work with the teacher until the prediction makes sense. They read the vocabulary words and can listen to them at the same time, to familiarize themselves with the words that will appear in the story. Students then write a short prediction of what the story will be about, using one of the vocabulary words. The students then do a "cold read," which means they read the story without having listened to it. The teacher times them for one minute, and subtracts any words the student has missed. This is the student's "cold read" score.

9. After the cold read score, the teacher reviews the material with the students. The teacher sets a goal for improvement on the cold read score. Mr. Nora typically set the goal at 20 words more. Students listen to the story being read to them on a CD three times. Once students have listened to the story three times, “they do their own self-reading,” without the assistance of the CD. The students time themselves, and have to “pass it twice,” before they work with Mr. Nora again. Students “pass” by reading a certain number of words per minute, regardless “whether they’re right or wrong.” Page 64, line 12-19. This is the “hot read” score.
10. Mr. Nora testified that Read Naturally is a “hectic” reading program, due to the series of hot and cold reads. Page 133, line 7. Mr. Nora could not determine whether students were simply memorizing the passage. Page 65, line 9-19.
11. De-coding was not part of the Read Naturally program. During the hearing, Mr. Nora did not appear fully to understand the concept of de-coding. Page 65, line 25 to page 66, line 24. At times, Mr. Nora appeared to believe that memorizing words was sufficient progress, and that somehow students would learn to tie phonemic awareness into the Read Naturally program on their own. Page 67, line 4-14.
12. Mr. Nora was not clear regarding how Read Naturally could be used to track Student’s reading goals. Page 70, line 3-6; 21. Mr. Nora tracked progression on Read Naturally by personally observing how students performed on each section of hot and cold reads. Pages 143-46. Mr. Nora also testified that he used an Excel spread sheet to track Student’s progress, but he no longer has the spread sheet. Page 71, line 19-25; page 72, line 1-2. For the 2017 / 2018 school year, “there’s no data about what [Student] did on Read Naturally.” Page 72, line 20-23.
13. Mr. Nora believed that Student could learn to read by “seeing the words over and over again and repeating them.” Page 78, line 15 to page 78, line 21. Mr. Nora testified, “I don’t know what the cure for dyslexia is, other than hard work and repeated practice.” Page 179, line 25, to page 180, line 1.
14. At the beginning of the 2017 / 2018 school year, Mr. Nora trained for one week on Orton-Gillingham. Mr. Nora’s curriculum for the remainder of the 2017 / 2018 school year included Orton-Gillingham and Read Naturally. The Orton-Gillingham program, which emphasizes phonemics, was significantly different from Read Naturally; when Mr. Nora learned about the Orton-Gillingham reading program, it was “like [a] . . . [h]ead explosion.” Page 83, line 8-14.
15. Mr. Nora used Orton-Gillingham to teach Student how to sound out words. Mr. Nora testified that Read Naturally and Orton-Gillingham support each other, because Orton-Gillingham is teaching students to sound out words faster, which allows them to retain and comprehend what they’ve read.

16. Mr. Nora's view was that Student must have worked on sounding out words, because she was issued an Orton-Gillingham book to do so. "Orton-Gillingham is a group process." Page 82, line 11. He appeared to have no independent memory of Student's de-coding skills or her learning how to sound out words. Page 81. Mr. Nora saved Student's Orton-Gillingham book last year, but threw it out at the end of the school year.
17. Ms. Hancock testified that the District's liaisons to the special education classrooms and teachers were well-qualified special education teachers. Page 917-19. According to Ms. Hancock, the liaisons would have known if Mr. Nora were not teaching Orton-Gillingham correctly. Page 921-22. In the absence of testimony by the District's liaisons, the Hearing Officer considers this testimony speculative and gives it little weight.
18. The clear import of the testimony of all witnesses over the course of the three-day hearing was that Student had difficulties with de-coding and phonemic awareness, meaning in layperson's terms that she has difficulty sounding out words quickly, rather than simply memorizing each word, and that as a result, her inability to read quickly may affect her level of comprehension of text. While these may also be the symptoms of dyslexia, the presence of these symptoms does not necessarily mean that a student has dyslexia. The Hearing Officer finds, however, that Mr. Nora's lack of training and experience, as well as his lack of understanding regarding both the importance of de-coding, Student's struggles with de-coding, and dyslexia as a diagnosis, detrimentally affected his ability to teach the two reading programs – Read Naturally and Orton-Gillingham – and detrimentally affected his ability to implement her IEP and track her progress.

Istation

19. Student sometimes worked on a computer program known as "Moby Max." Moby Max allowed students "to go from the rigors of trying to read." It allowed Mr. Nora to "give them a break." Page 42, lines 3-10. Moby Max is part of the District's Istation program for students. Mr. Nora was not clear how Istation worked or how to interpret the data on Istation; he believed Istation was more a tool for the general education side. Page 43, line 2-9.
20. During the Due Process Hearing, Mr. Nora was asked to interpret some of Student's Istation pages. *See generally* Pages 120-132. He was unable to fully explain the Istation pages, but believed that they showed Student was performing below her grade level. He believed Student's general education teacher would be more appropriate to ask, because Istation was a tool for the general education side. Mr. Nora also noted that if a person clicked on the score, Istation would show the person "where she's weak on [the] Istation test." Based on the testimony of Mr. Nora and other teachers during the hearing, the Hearing Officer's understanding is that a full understanding of the significance of Istation scores would not be possible without having the use of the actual computer program or a

full printed set of all Istation pages available to understand the meaning of a particular score.

21. In the District's Proposed Findings of Fact, the District attempts to add to the Due Process Hearing record via numerous citations to information online concerning Istation. *See* Clovis Municipal Schools Board of Education Proposed Findings of Fact, at ¶¶ 19-20, 23-31. The Hearing Officer knows of no rule or authority that would allow her to consider information from an online website, provided in proposed findings of fact after the close of the Due Process Hearing. The information provided by the District is therefore rejected, unless it merely duplicates evidence submitted at the hearing.

Student's Progress and Accommodations

22. On March 15, 2016, Student was reading at a 2.0 level at 22 words per minute.
23. Student's IEP for 2017 stated that a reading level of 3.5 was the goal for Student. Page 113. Student did not reach this IEP goal. In March 2017, Student's Brigance testing showed most of her reading and language skills were at a first grade level. Page 122.
24. On Student's Progress Report for January 4, 2018, for her fourth grade year, Student was reported as reading at the 3.0 reading level averaging 40 words per minute. Petitioner's Exhibit 10. According to Ms. Nora, this measure was derived from Student's progress in Read Naturally. Page 75, line 4 to line 24.
25. Student's current March 26, 2018 IEP found that Student needed special education on the basis of a specific learning disability in the area of reading. Exhibit 12; Page 107, line 20.
26. The March 26, 2018 IEP noted that Student could read a 3.0 grade level passage at 60 words per minute. Page 108, line 1-19. For the March 26, 2018 IEP, information regarding Student's reading level was derived from Mr. Nora's experience and "some information" came from Istation. Page 108, line 1-19; Pages 163-64. Mr. Nora judged Student's reading level based on her hot read / cold read progress in Read Naturally. Page 165. Mr. Nora had data regarding Student's progress at one time, in the form of Student's work samples, but no longer had these samples. Page 169.
27. Mr. Nora testified that the changes in Student's reading fluency were based on his assessments of Student during the course of the Read Naturally program, and reflects that Student has made progress. Pages 163-64.
28. According to Mr. Nora, in the middle of fourth grade, Student was reading at a third grade level, as measured by the Read Naturally program. Page 75, line 6 to line 19. The Hearing Officer's understanding is that the Read Naturally score for grade level and words per minute was based on Mr. Nora's assessment following the "hot read." Based

on Mr. Nora's description of how he taught the class as a group, and how he administered the "hot read," the Hearing Officer does not find this score reliable and finds that the score was likely inflated.

29. In the March 26, 2018 IEP, there was no reading level goal provided, and the comprehension goal went from 80 % to 70 %. Page 113. During the hearing, Mr. Nora was asked "why were the expectations for [Student's] reading decreasing," and he responded, "I don't have an answer for you." Page 114, line 4-6.
30. Student's reading goal to "fluently read a passage *at her level*" was connected to her performance on the Read Naturally program. Page 114 (emphasis added). Regarding "answering comprehension questions," the goal was also connected to Read Naturally, as well as "other material" which Mr. Nora would read to the group, and then the students would answer questions together as a group, or sit down and answer them separately, or team up with another student. Page 114-115.
31. Mr. Nora testified that the comprehension goal in Student's March 26, 2018 IEP was not based on a particular grade level; instead, Student's goal was to comprehend 70 % of whatever she read at her own current reading level, her lexile. Thus when Mr. Nora was asked, "So this benchmark was not intended to reflect that [Student] could read a particular grade level text on her own and comprehend it at 70 percent?" Mr. Nora responded that in terms of Student's IEP, "This was – looking on here, you know, it's a document – a federal document. So it's based on – at her level. *So if her level is a 1.5, then that's on her level.*" Page 115, line 13-20 (emphasis added)
32. During the time Mr. Nora was teaching her, Mr. Nora does not recall Student's ever having read at grade level. Page 57, line 14-16; *see also* Page 180, line 11-14. Mr. Nora did not have an assessment and could not tell what Student's decoding level was. His only assessment was that Student was in the middle top tier of the resource room. Page 56, line 25 to page 57, line 10.
33. De-coding was listed as a goal in Student's April 2017 IEP. Exhibit 10; Page 89, line 8-25. At the time of her April 2017 IEP, Student's ability to spell was below 1st or 2nd grade level. Exhibit 10; Page 91, line 1-4.
34. Mr. Nora believed a goal of 3.5 reading level "was kind of steep." Page 97, line 11-12. Although Student "might never be able to read on grade level as far as the definition of grade level," Mr. Nora believed "she could make gains." Page 97, line 14.
35. Because of her difficulties in reading, diagnosed as a specific learning disability, Student received accommodations to assist her. Her accommodations included having the computer read test questions to her for the PARCC state testing, and having subject matter in her substantive classes read to her. She was never provided audiobooks to assist

her in her substantive classes. According to Mr. Nora, special education students also received reduced homework in their general education classrooms.

36. Mr. Nora described various interventions that might be possible to allow Student to reach or maintain grade level for her general education courses, including receiving lessons early and audiobooks. Page 180, line 25, to page 181, line 21. Mr. Nora had never seen an audiobook used at his school.

Absences

37. Student's absences and tardies for fourth grade are reflected in Exhibit 18. Page 153-54. She had 13.5 excused absences, 2 unexcused absences, and 40 tardies during fourth grade. Mr. Nora's class was not Student's first class, but he still believed Student's tardies may have affected her progression in reading. Page 154-55.
38. Mr. Nora testified that he believed Student's absences led her to regress in her reading. Page 96, line 21-25. Mr. Nora's data to support this belief was Student's Istation records and her regression overall. Page 116, line 20. Mr. Nora was not able to understandably explain how he drew the conclusion that Student's regression was due to absences, rather than not having fully absorbed the reading lessons. Page 118, line 15-Page 119, line 2.

Jennifer Bolin

39. Jennifer Bolin was Student's fourth grade general education teacher. Page 285. She taught Student during the 2017 / 2018 school year, with the exception of less than a semester at the end of the school year, when Student transferred.
40. According to Student's Istation results, in April of 2017, Student was reading at a second to second grade, two month level. Exhibit 16, page 7; Page 299. Ms. Bolin was unable to explain the Istation results fully without access to additional information on the computer program. Pages 305-313.³

³ Tara Calcanis, Student's fourth grade teacher during her second semester, describes Istation as a "standardized assessment for monthly progression to see how they do in various areas of academics to make sure that they're progressing in all areas to be successful on the PARCC assessment and other school-level requirements." Page 399.

According to Ms. Bolin, there is an Istation "standards report" that describes what standards a student is struggling with, which ones she has mastered, and which ones she is approaching. Page 314. The standards report was provided by the District during the Due Process hearing and admitted as Exhibit 46. See Pages 710-715. According to Shelly Grim, Student's fifth grade teacher, the standards report "would probably not be the best report to look at . . ." Page 715, lines 7-10. The standards report was produced and admitted as Exhibit 46,

41. Exhibit 27 is a record of Ms. Bolin's parent / teacher conference with Student's mother ("Parent"). Ms. Bolin agreed that at the beginning of fourth grade, Student was reading at a second-grade, second month level, i.e., her "lexile level." Page 317. Exhibit 27 reflects that some material was being read aloud to Student in class. Page 317, line 21-22.
42. Page 5 of Exhibit 27 shows Student's work in Ms. Bolin's class. Page 318-19. Exhibit 25, page 3, also contains an example of Student's writing from Ms. Bolin's class. Page 371.
43. Ms. Bolin agreed that Student could not read material at a fourth grade reading level. Page 319. Based on Ms. Bolin's experience teaching fourth grade students, Ms. Bolin testified that "a fourth-grade student in the general education classroom [would] be able to read Page 5 of Exhibit 27 independently." Page 320, line 25, to page 321, line 5. It would be "pretty easy" or "fairly easy" to read for a fourth grade student who was at the beginning to midway through fourth grade. Page 321-22. The sample work was not "academically rigorous." Page 321, line 21.
44. In fourth grade, tests were read aloud to Student and she was allowed to re-take or re-do work if she scored below 70 %. Ms. Bolin testified that the accommodation for reading aloud is also built into the Istation program. Page 302. Student could read some science in her own lexile⁴ or hear science materials from her peers or from adults. Page 294. She received an accommodation in order to study social studies. Page 296. According to Ms. Bolin, Student "was already shutting down on me because there's too many words there." Page 297, line 3-5.
45. Ms. Bolin always accommodated Student's own reading level her lexile, in providing her instruction. While Student received high grades in Ms. Bolin's class, Ms. Bolin also testified that she received many accommodations to assist her, including instructing Student at her lexile level rather than her grade level. Page 353-54. Student earned grades "through modifications and accommodations and the student had a good work ethic." Page 381.

and reviewed with Ms. Grim later during the hearing. Page 728.

⁴ While the District noted there was a more scientific explanation, the parties agreed that "lexile" generally means "reading level." Page 190, line 24 to page 191, line 9. Student's "own lexile" therefore refers to Student's reading level, not her grade level.

Tara Calcanis

46. Tara Calcanis taught Student for the last six weeks at the end of her second semester of her fourth grade year, after Student transferred schools. Page 394-396; *see also* Page 191 (dating Student's transfer).
47. Ms. Calcanis monitored Student's progress every month and gave her reports to the principal. These records were no longer available.
48. Ms. Calcanis testified that Student was experiencing a "lack of developing skills," but that Ms. Calcanis was not able to monitor Student's progress because of her absences. Page 405-406. Ms. Calcanis' experience was that Student could read at 3.0 to 3.8 level and that her decoding skills improved with practice in the classroom. Page 408. She would regress with each absence. Page 408.
49. At the same time, Ms. Calcanis testified that Student "really wouldn't . . . complete anything during the periods of time that she was with" Ms. Calcanis. Page 409. Instead, she would take work home and not return it. Page 409-410.
50. Student's grade level was 4.8; Petitioner's counsel asked if Student was therefore one year behind in her grade level. Page 410. Ms. Calcanis responded, "I would – I believe – and, again, it's been a year – I would believe that it was – she was pretty close to, if not no more than six months behind her peers" Page 410, line 18-22. Ms. Calcanis did not recall whether she ever heard a "cold read" by Student. Page 411. To the extent Student was in a heterogeneous reading group, with better readers, that would contribute to her performance "in terms of being able to perform about that passage." Page 411.
51. Ms. Calcanis testified that it was not unusual for students who are "low socioeconomically challenged" to have difficulty with de-coding, even at the end of fourth grade. Page 411-12. This is associated with lack of assistance at home. Page 412-13.
52. To the extent Ms. Bolin's assessment of Student's performance differed from Ms. Calcanis' assessment, the Hearing Officer gave greater weight to Ms. Bolin's testimony. Ms. Bolin had more experience with Student, and her demeanor and tone appeared to reflect a clearer and more current memory of Student.
53. Student received low scores in math, science, and social studies at the end of fourth grade, based on what she had submitted in class and what she failed to submit. Page 417-18.

54. Ms. Calcanis agreed that some students who struggle with reading develop coping skills that include saying they're tired, or need a drink of water, or need to go to the nurse. Page 420-21.
55. Ms. Calcanis believes that some of the questions on the Istation may have been read to Student as part of her accommodations, including spelling and comprehension. Page 432-33. "[T]here is a small portion that they are supposed to read independently." Page 434. Some questions are read to general education students as well. Page 434.
56. On Exhibit 16, page 2, regarding Student's Istation comprehension scores, Ms. Calcanis testified that Student would have listened to the material, and then answered the questions, and that would be her comprehension level. Page 434-35. The comprehension portion is read to students, but the fluency portion is not. Page 438-440.
57. When asked how this would be a valid measure of comprehension, Ms. Calcanis expressed that she did not really know what portions were read to students. Page 435. Ms. Calcanis uses Istation scores to do standard evaluation and to direct instruction. Page 435. Ms. Calcanis also mentioned that she would have to go into the particular assessment to truly understand what it meant. Page 435-36.
58. "[A] lot of comes down to guessing on it. And we've had some students that just happy-click and do really well. So I could not tell you that it's an accurate reflection of [Student's] abilities." Page 436-37.

Jennifer Wines

59. Jennifer Wines is the special education resource teacher for the Arts Academy at Bella Vista for third through fifth grade. To address her specific learning disability in reading, Student receives 300 minutes for reading and 150 minutes for writing, per week. Student's fifth grade program includes Read Naturally and guided reading through Teacher Created Materials, as well as Orton-Gillingham.
60. Ms. Wines' testimony was exceptionally defensive in tone and content, compared to the other District witnesses. This affected the weight accorded to Ms. Wines' testimony by the Hearing Officer.

Pull-Out Time

61. Student's current IEP indicates that Student is receiving 300 minutes per week individual and group setting reading in the special education setting. Exhibit 12, page 17. Ms. Wines testified this is not happening, except "[o]n occasion, when needed. But typically, no, because over half of that class receive services. And so I go into the general education . . . classroom." Page 188, line 13-16. Student may come across the hallway if

she needs a quiet spot, but she is not scheduled for any pull-out time. Page 186-87. Student's IEP was not amended to indicate that she would not be pulled into a special education setting. The same is true with regard to writing and written language. Page 189.

62. Ms. Wines' testimony did not convince the Hearing Officer that any serious thought was given to whether Student should receive special education services in the general education classroom or in a pull-out session. Ms. Wines testified at various times that resource rooms at Student's school are only used for students who are "really struggling," when Student is not, that a pull-out model might have an effect on Student's confidence, that a resource room would not provide Student any additional specialized instruction, and that Ms. Wines and the fifth grade teachers affirmatively decided whether Student would receive reading help in a resource room. Page 256-57. Ms. Wines also testified, however, that no one at Arts Academy is in a resource room, Page 277-78, and that the inclusion model adopted by Student's school assists students with State testing.
63. The Hearing Officer finds that the reason for Student's integration into the general education classroom was that the entire fifth grade is "departmentalized." Student was in a resource room for fourth grade, but in fifth grade at Arts Academy, all students are departmentalized, so Ms. Wines is able to teach all of her students in the general education classroom. "[F]ifth grade is departmentalized by levels of students. And so I can travel with them. Where fourth grade, we had three fourth-grade classes. And so at that time, I would pull my students, as needed, from their gen ed class, and they would come to my classroom." Page 191, line 22 to Page 192, line 2.
64. The purpose of departmentalizing is twofold: (1) getting students ready to change classes physically in middle school, and (2) grouping students together by their performance, including "honor classes for the higher kids." Students "are basically tracked," and Student is "in the lowest track." Page 192, line 5 to line 16. Neither of these reasons reflects the reflection necessary prior to changing Student's placement to learning full-time in a general education classroom, rather than in a pull-out setting.
65. Placing Student in a regular education classroom with the lowest track appears to the Hearing Officer, by Ms. Wines' description, to deprive Student or potentially deprive Student of the number of minutes of instruction in special education in a special education setting that would allow Ms. Wines to teach Student Orton-Gillingham and/or Read Naturally with fidelity, in order to allow Student to make progress appropriately in light of her circumstances. Notably, Ms. Hartley testified that Student's general education classroom only spends "a little bit every week" on Orton-Gillingham.

Student's Progress and Accommodations

66. According to Ms. Wines, Exhibit 41, page 2 measures Student's reading level on the first day of fifth grade, on August 13, 2018. Exhibit 41, page 2; Page 206, line 24 to page 207, line 15. She was reading at a third grade, first month grade level. Exhibit 41, page 2. She "would be best served by instructional materials prepared at the second grade level." *Id.* She scored greater than only 8 % of students nationwide. Exhibit 41, page 2. Student needed "urgent intervention" with her reading.
67. Ms. Wines testified that on the date of Ms. Wines' testimony, October 22, 2018, Ms. Wines' anecdotal experience was that Student was reading at approximately a beginning fourth grade to mid-fourth grade level. Page 228. Ms. Wines did not know offhand what level of books Student was currently reading, but testified that in her experience, she believed Student could pick up and read a book at a fourth grade level or even a fifth grade level. Page 223-25; 226-27. Ms. Wines' anecdotal assessment that Student was typically or often reading at a mid-fourth grade or close to a beginning of fifth grade level would represent significant and substantial jumps from Mr. Nora's assessment, in March 2018 and October 2018, and between the reading level assessment in August 2018 and Ms. Wines' anecdotal reporting two months later, from October 2018.
68. Ms. Wines also does not agree that Student is two years behind in her spelling.
69. Student's IEP for March 2018, Exhibit 12, provides that "[b]y annual review date [Student] will read text with sufficient fluency to support comprehension with 70 % accuracy as determine by formal and informal data collection as implemented by special education teacher." Exhibit 12, page 9. Ms. Wines uses Istation scores to assess Student's progress on this goal. Page 196. She is not present when Student does Istation in a computer lab with her general education classmates. Page 196-97. To Ms. Wines' knowledge, there is no accommodation on Istation, other than an untimed assessment. Page 197. Ms. Wines also personally observes Student's confidence and her fluency in the classroom. Page 197. Student also reads material from a book and then reads five to ten multiple choice questions to test her comprehension. This is called Accelerated Reading or "AR." Page 197-199. Student can repeat the test if she scores less than 70 %.
70. With regard to Student's IEP for March 2018, Exhibit 12, Ms. Wines believed that "70 % comprehension" meant that Student would understand 70 % of the text. Page 239 line 1-10. In her testimony, Ms. Wines did not express this goal as being a percentage of comprehension in the context of a specific grade level, one way or another. Ms. Wines' testified that she believed Student's IEP goals should have been more specific.
71. With regard to changing Student's IEP goal to eliminate an increase in Student's reading level as an IEP goal, Ms. Wines again referred to Istation, testifying that she believed Student should be exited from special education based on her Istation scores. Page 242 .

72. Student's reading is assessed by using Istation and Pivot. Page 228; 264; see Petitioner's Exhibit 26 and Respondent's Exhibit Y. Ms. Wines later testified that Student's progress on reaching her reading goals was measured by Istation and AR. Page 236; ex 12 pp. 9-10. The Hearing Officer's assumption is that all three are used by Ms. Wines to measure progress. Notably, Shelly Grim, Student's fifth grade homeroom teacher, testified that Pivot reflects content learning, not progress in reading. Page 700-701.
73. Ms. Wines understands Student's Istation testing to show that Student is currently scoring at 4.8 for reading, "which is not even a year behind . . . her current grade level." Page 243-244; *see especially* page 243, line 21-23. Ms. Wines' testimony regarding her knowledge of whether Istation was validated for the kinds of conclusions she was drawing with regard to the program was not based on any demonstrated expertise or knowledge. Page 244-45.
74. A reevaluation of Student's reading by the District's evaluator on April 16, 2018, reflected several reading scores in the bottom 10 %. Page 247. Despite her average performance range with regard to cognition, contrasted with low performance in reading, Ms. Wines did not believe Student needed special education. Page 247.
75. Ms. Wines testified that Student had improved in all areas except word analysis, also known as de-coding. Page 267-68. Ms. Wines testified that word analysis or de-coding "isn't an area of much concern to me." Page 268, lines 10-11. Student scored in the at the 17 % percentile in word analysis on Istation. Page 269.
76. Ms. Wines was asked whether percentile scores are used to make educational decisions. Page 265. Ms. Wines responded that the grade equivalent and progress reports are more important than the percentile score. Page 266.
77. Ms. Wines had never seen and was not familiar with the TEAM manual for the state. Page 279.
78. Ms. Wines was not "totally devastated" by how Student was doing in reading. Page 235. Ms. Wines had "no concerns" regarding Student's reading because "when expectations are raised, [Student] will rise to those." Page 242, line 1-2.
79. Student did not meet expectations for fourth grade at the end of her fourth grade year. Page 284. Ms. Wines attributed Student's problems on PARCC testing to possibly being the "kind of day she was having" or not "test[ing] very well on computer." Page 284.
80. Ms. Wines demonstrated what appeared to be a very rudimentary understanding of dyslexia. Ms. Wines is not proficient in diagnosing dyslexia, but believes Student's

willingness to read is a measure suggesting that she does not have dyslexia. “To me, a child who has dyslexia is shy and has a hard time asking for help.” Page 201, line 25.

Gayla Lonsdale

81. Gayla Lonsdale is an educational diagnostician for Clovis Municipal Schools. Page 442. Ms. Lonsdale evaluated Student on March 25, 2015, and her evaluation appears at Exhibit 3. Student was in first grade at the time of this evaluation. Page 506. Testing showed that Student was a student with average intelligence. Page 455.
82. Ms. Lonsdale did not do an evaluation with regard to social-emotional behavior. Page 448. Ms. Lonsdale did not believe Student’s behavior was symptomatic of autism, requiring a specific evaluation. Page 448-453.
83. Student’s mother reported that Student was having difficulty sounding out words. Page 450.
84. Student’s skills deficits were predictive of difficulty in reading, especially her deficits in de-coding. Page 456-64. A slow reader may “miss the gist of what the text is telling you.” Page 457-58. Ms. Lonsdale agrees that “a student has to be able to do both decode and encode in order to be academically successful.” Page 493.
85. There was a concern whether Student could reach grade level competency in reading. Page 466.
86. Ms. Lonsdale believed that Student would not be eligible for speech language services based on her specific learning disability. Speech language therapy was limited to students who have speech-language impairment. Page 467-68.
87. Ms. Lonsdale recommended Orton-Gillingham for Student. Page 469-70.
88. For children in grades kindergarten through third grade, the evaluator must use the Dual Discrepancy Model, which compares the student’s performance with other students in the same grade level. Page 470-71. After third grade, students may be evaluated using Severe Discrepancy, which evaluates whether there is a severe discrepancy between predicated ability and actual results. Page 471. “[Y]ou have, . . . for example, basic reading skills. You have their predicted ability based on their overall cognition. And then you have how they actually did on the achievement test. And then you have the difference, whatever that may be.” Page 472, line 19-24. There must be a certain discrepancy to be significant.
89. Ms. Lonsdale defines dyslexia as “someone that has overall average intelligence, and their phonological processing is unexpected, meaning lower, in respect to that cognitive ability.” Page 533.

90. Exhibit 4, Page 3, states that “[f]or any child with specific learning disability in written expression or any area of reading, the Differential Diagnosis of Dyslexia Worksheet should be completed by the diagnostician, school psychologist.” Ms. Lonsdale did not perform the Differential Diagnosis of Dyslexia Worksheet for Student. Ms. Lonsdale interpreted Exhibit 4 to permit the evaluator to exercise discretion. Ms. Lonsdale did not believe she was required to complete the work sheet if she “didn’t think that there was a dyslexic profile.” Page 487. Ms. Lonsdale considered all relevant factors, in her own professional discretion rather than using the work sheet, and determined that additional testing for dyslexia was not necessary. Page 485.
91. Ms. Lonsdale’s recommendations on academics would not have changed if she had diagnosed Student has having dyslexia. Page 522. Ms. Hancock also testified that the District uses Read Naturally and Orton-Gillingham to support students with dyslexia. Page 855. According to Ms. Lonsdale, Read Naturally is “more for word fluency, sight-word-based.” Page 489. Ms. Lonsdale is unfamiliar with whether Read Naturally assists students with decoding skills. She does believe that the use or Orton-Gillingham with fidelity does help with decoding and encoding. Page 492-93.
92. Ms. Lonsdale agreed that a student may test as having a specific learning disability in first grade, and then may not qualify later, based on maturity and exposure to instructional material. Page 508.

Carol Roark

93. Carol Roark is an educational diagnostician for the Clovis Municipal Schools. Page 543. Exhibit 7 is Ms. Roark’s evaluation report.
94. Student’s mother requested a full re-evaluation for Student in mid-February 2018. Instead, Student was initially referred for a REED. A REED is a “review of existing evaluation data.” Page 527. On the REED, Student’s Istation scores indicate that she is moderately below to seriously below grade level in language arts. Page 549.

Reliance on Istation Assessments

95. On page 3 of Ms. Roark’s evaluation appears a chart called “Istation Dual Discrepancy Analysis.” Page 559. Student had a deviation of a negative 1.0 during the third nine weeks, whereas a standard deviation of negative 1.5 or higher indicates a significant difference between the child and her peers. Page 559-60. Ms. Roark was asked, “Is the Istation program, which is a computer-based program and that the student does on their own, is that authorized to be looking at Dual Discrepancy?” Ms. Roark answered, “yes,” but was unable to answer by whom this use was authorized. Page 560.

96. Ms. Roark was unable to explain in a way that was understandable or coherent to the Hearing Officer what Istation score was used or why. Page 561-62. The Istation score is called “English language,” and does not distinguish among comprehension, fluency, or analysis. It is “the overall reading score.” Page 562. Ms. Roark testified, “I’m not 100 percent sure exactly how Istation works. But I know there are different components to it. But this score that’s reflected here is her overall reading score.” Page 563. Ms. Roark did not believe Istation read the English language arts portion of the test to the child. Page 563.

Results of Validated Testing

97. In the Kaufman Test of Educational Achievement, Student scored below average in reading fluency, orthographic processing, academic fluency, letter and word recognition, spelling, word recognition fluency, decoding fluency, and writing fluency. Page 568. Student’s “below-average scores came from composites that had to do with speed. She was a little bit slower completing some of the tasks. That’s not to say she couldn’t. If it wasn’t timed, she did very well.” Page 568.
98. “[T]he reading fluency, word recognition fluency, and decoding fluency were either at the 7th or the 9th percentile.” Page 571. Ms. Roark did not believe this reflected difficulty with reading, but just difficulty with speed. “[S]he was able to comprehend what she was reading and sound out the words, just not quickly.” Page 571.
99. Student’s decoding was not an area of deficit, just her fluency with decoding. Page 614. Ms. Roark wasn’t certain but she believed Student’s problem with de-coding was only her speed, not her accuracy. Page 571-72; 614.
100. Student scored 52 out of one hundred for her reading composite. Page 573.
101. Student did not meet the criteria for specific learning disability, based on the Severe Discrepancy Model. Page 574.
102. Ms. Roark discounted Student’s low scores in specific areas, including decoding, spelling, and phoneme isolation. She believed these items would make Student a slow reader, but would not qualify her as eligible for special education based on specific learning disability.
103. Ms. Roark agreed that the nationally recognized test that the District purchased, in terms of the test authors’ view, provides that a significant difference between ability and achievement would support a diagnosis of specific learning disability. Page 615-616. According to Ms. Roark, “[t]hat’s just how the test authors use it. My job is to interpret that for our school district.” Page 616. The State’s definition of significant difference is 23 points between ability and achievement. Page 616. The test’s authors would find a

significant difference with regard to the following sub-tests: phonological processing, math concepts and applications, letter and word recognition, math computation, nonsense word decoding, silent reading fluency, math fluency, written expression, spelling, word recognition fluency, and decoding fluency. Page 617. The greatest difference detected by the computer algorithm was in decoding fluency (20 point difference), reading fluency (19 point difference), and academic fluency (22 points). Page 618. New Mexico uses a 23 point difference to determine a severe discrepancy. Page 619.

104. On cross-examination by the District, Ms. Roark testified that she considers the standard score more relevant than the percentile, because the standard score is easiest to interpret. 85 to 115 is considered an average standard score. Page 627-28. Ms. Roark would consider anything below 80 to be significant. Page 629-30.
105. The percentile indicates where a student stands among other students in similar situations. Page 628.
106. Student had significantly lower standard scores in spelling and academic fluency. Page 631-633. Academic fluency includes math fluency, writing fluency, and either decoding fluency or silent reading fluency – Ms. Roark was not certain between these last two. Page 633. Student’s score was brought down by writing fluency, because of how much time Student took in her writing. Page 633. This would not cause Ms. Roark any concerns, so long as Student’s teacher accommodated her by giving her extra time. Page 633. Of the 16 subtests, Ms. Roark was concerned by “just three,” which are spelling, decoding fluency, and writing fluency. Page 635.
107. Ms. Roark does not determine whether a student should be exited from special education based exclusively on one test. Page 638. Instead, Ms. Roark’s recommendation is “made on the total performance of the student in the testing that [Ms. Roark] did of her.” Page 638. She did not need to do anything else. Page 638.
108. Ms. Roark agrees that PED TEAM Manual, with regard to determining eligibility for special education on the basis of specific learning disability, based on the Severe Discrepancy Model, provides guidelines. The guidelines should not be interpreted in a formulaic manner. “[T]he diagnostician and the team are supposed to exercise professional judgment.” Page 648.

Dyslexia

109. On the WIST, another component that Ms. Roark used for dyslexia testing, Student scored even worse in word identification, spelling, and fundamental literacy ability index. Page 579-80. This supports one of the characteristics of dyslexia, but Student did not meet the other requirements. *Id.*; see also Page 643-44. The District did not produce Ms. Roark’s dyslexia work sheet. In order to be diagnosed as having dyslexia, Student would

first have to have a specific learning disability, because dyslexia is a subset of the diagnosis of specific learning disability. Page 639. Ms. Roark's understanding was that a student must have an average IQ score, and then below average in the reading and spelling areas, and below average in phonological processing. Page 607. Ms. Roark's understanding of the form is that a student must have a deficit in every area. Page 607-08.

110. Student met several criteria for dyslexia. Page 599-604. However, Student performed in the average range for one item, phonological processing. Page 604. In addition, according to Ms. Roark, Student did not qualify as having a specific learning disability, pursuant to the severe discrepancy model. Page 607.

Reliance on Student's Absences to Account for Lack of Progress

111. In performing her evaluation, Ms. Roark appeared to the Hearing Officer to heavily weight Student's absences. Page 574. Ms. Roark did not chart out what instruction Student missed when she was absent, and did not know anything specific about the curriculum that was being provided to Student. Page 582. Ms. Roark could not say Student's rate of absence was the cause of her struggles in reading, but it was a factor to consider. Page 582. Ms. Roark did not look at samples of Student's work, but did look at what her teachers reported on the REED in the IEP. Page 610.
112. When asked to state how she had exercised professional judgment in deciding that Student was ready to exit special education, Ms. Roark testified, "In my professional judgment, her absences – we can't rule out her absences and her missing school as being, you know, one of the factors influencing these scores." Page 611. Ms. Roark testified that Student's absences "definitely [contributed] to [the low scores], . . . [b]ecause if the child is not attending the school, they're not getting the instruction." Page 612. Ms. Roark could not explain how she accounted for the possibility that any absences were the result, not the cause, of Student's academic failure. Page 611-12. Ms. Roark does not know the specific curriculum Student was missing, but she does "know that it's relevant to her reading and spelling." Page 612. She "[couldn't] say for sure" why it mattered that Student missed Read Naturally, if Read Naturally was not assisting her," but "[i]t's part of what we have to look at whenever we're looking at a learning disability as the exclusionary factors." Page 613.
113. Ms. Roark first testified that Student did not need a functional behavioral assessment to see why she was missing school, but then stated she didn't know. Page 582-83.
114. With regard to specific scores in the very low range, Ms. Roark suggested that Student should "attend[] school regularly." Page 581. While Student received low scores for skills that students were not typically learning in fourth grade, Student "missed [school] consistently throughout her education." Page 581-82.

Joy Christine Downey

115. Joy Christine Downey is the speech language pathologist for Clovis Municipal Schools. Page 649-50.
116. Exhibit 3 contains Ms. Downey's evaluation report from April of 2015. Page 650. Ms. Lonsdale participated in the same report on different sections. Page 651.
117. At the time Student was tested, she was seven years and four or five months. Page 656. With regard to her word structure, her age equivalent was four years, ten months. Page 657. She was about two years behind with regard to follow increasingly complex directions. Page 657. She also scored low on formulating sentences. Page 658.
118. Ms. Downey did not find Student eligible for special education on the basis of speech language impairment. Page 663. "As a related service, you still have to be eligible to receive speech-and-language therapy." Page 664. At the same time, however, Ms. Downey agreed that the TEAM Manual does not address what services children receive, but only special education eligibility. Page 664. The TEAM Manual directs school districts to provide the related service of speech-and-language therapy if it is "educationally relevant" and "justifiable enough to pull them from the regular education classroom." Page 665. Ms. Hancock testified that the student would "have to be eligible for stand-alone SLP in order to get SLP as a related service connected to a different disability." Page 875.
119. On cross-examination, Ms. Downey agreed that Student could receive speech-and-language services without having any other exceptionality. Page 675-76. In this case, Student did not qualify for services, regardless of what her exceptionality was. Page 676.
120. Student's articulation difficulties could have affected her reading development. Page 667.
121. Ms. Downey would not test for pragmatic language unless she were alerted to a problem. Page 668. In terms of the possibility that Student had autism, Ms. Downey believes that she would have looked at that issue during her evaluation, and would have given her additional testing if she had any concerns. Page 670.

Shelly Grim

122. Shelly Grim is Student's homeroom teacher for fifth grade. Page 692.
123. Exhibit 41 is an accurate description of Student's school day in fifth grade. Page 693. Student attends library, music or dance during her first class. Page 696.

Istation

124. Istation is self-correcting. For example, if Student picks “the sweater was gone” as an answer and the answer is incorrect, the computer will self-correct to “the sweater was pink.” Page 705. Ms. Grim testified that vocabulary is an audio program, but comprehension is not. For comprehension, Student answers multiple choice questions. Page 705-06. Ms. Grim is not sure whether the multiple choice questions self-correct. Page 706. Istation decides what to teach the student and decides whether the student has mastered a particular level. Page 706-07. Ms. Grim believes Istation prepares students for the PARCC exams. Page 708. Ms. Grim does not know whether Istation ever reviews prior materials to see if the student can still do the work. Page 711. Istation reflects where a student is or is not in her grade level. Page 712-13.
125. The standards report from Istation indicates as of the date of the Due Process Hearing that Student was in the worst tier for spelling and is declining, although her overall went up. Ms. Grim was not sure whether the lack of change in word analysis between May 2018 and October 2018 actually reflected a lack of change between those dates; Istation might be measuring as of the baseline at the beginning of the school year. “You’d have to call the company I’m not sure if they’re comparing that to September or if they’re comparing it to May of last year.” Page 733-34.
126. Istation appeared to say that Student’s word analysis was at the lowest level for October 2018. But Exhibit 46 “is just a standards report. If you want . . . to see how she’s growing, her growth, what she’s done, then you would need the growth report. That’s what I look at. And then I also look at the priority report and the rate-of-improvement report. And her rate of improvement is high, according to the Istation reports.” Page 735-36. This report was not previously produced by the District as part of Student’s records. Page 736.⁵
127. Exhibit Y shows Student’s advanced reading Istation results; in contrast to the standards report, Ms. Grim agreed that this assessment was reliable. Page 737. Student was up and down on text fluency and comprehension. She needed work on word analysis. Page 737. Her vocabulary was amazing. Page 737.

⁵ At the Due Process hearing, an issue arose regarding the District’s failure to produce Istation records at the beginning of the case, rather than as various witnesses testified that they made educational assessments of Student based on various pages available on Istation. In that context, counsel for the District stated that Istation information is “not information that they bring to an IEP meeting or that the IEP decisions are based on” Istation reports were more similar to coursework. Page 754. Istation records “are not generally considered to be educational records in the manner in which we’ve utilized them over the years.” Page 754. I ruled that the Istation records are educational records, based on the arguments of counsel and my understanding of the law. Page 750-762.

128. In Student's Istation "Rate of Improvement, Reading Results for Fifth Grade," Student's reading is improving. Exhibit 47; Page 762-63. "She's making the gains that are expected of a grade-level student." Page 763.
129. Istation assists a teacher to identify where a student is struggling in a certain area. If a teacher hasn't picked up something in class, it will pick up on the problem; if a teacher believes there's a problem, Istation will help confirm that assessment. Page 785.
130. Istation reflects performance on comprehension, vocabulary, skills analysis, fluency, and overall. It is not 100 percent reliable to tell a teacher whether a student is performing at grade level. Page 785-86. The Istation doesn't so much tell the teacher whether a student is performing at grade level as tell the teacher whether a student is progressing. Page 787.

Performance in Class

131. Fifth graders receive about two pages of homework per week from Ms. Grim, "because we work it in the class, but they still need some practice at home just to help with that." Page 715.
132. Student returns homework most of the time, unless she's absent. "But overall, she gets it in." Page 723.
133. Ms. Grim agrees that Student is nowhere near fifth-grade level for spelling. Page 738. Student "is struggling with word analysis while making gains in other areas." Page 738.
134. Ms. Grim knows that Student reads well, because she is able to read the joke or the day and the quote of the day. "She reads with great fluency. And she usually gets the joke." Page 739. Student "reads beautifully out loud, rarely stumbles over a word, can help other children correct their words." Page 740.
135. If a student is late for class, she misses the opportunity to read the assignments on the board, understand the objective, and understand the organizational process. Page 771-72.
136. Exhibit 48 is the PARCC testing from the spring of 2018, for math. Page 768. Student was not at grade level in math during the spring of 2018, meaning she was performing lower than fourth grade level. She is now mastering fifth-grade math skills. Page 768-69.

Christi Hartley

137. Christi Hartley teaches reading and writing in fifth grade at Arts Academy. Page 791. Student is in Ms. Hartley's reading and writing class.

138. Student is a “lead reader” in her section of the fifth grade class. Page 799-800. (Student’s section is the lowest track of fifth grade.) “She has easily been able to answer the comprehension questions I have for her. . . . [S]he was able to read her book and help her neighbors with answering the four questions that I gave them to work on.” Page 800.
139. The book Student was reading was a beginning chapter book, called *Beloved*. *Beloved* is a 3.6 or 3.7 (third grade, sixth or seventh month) book. Ms. Hartley usually tries to stay within that range, up to a 4.2, “with this group.” Page 801. Student can write a short “mentor sentence” without difficulty. Page 802. Ms. Hartley believes the class can sit and generate sentences, but Ms. Hartley is “just not there with those standards for that class yet.” Page 804. Ms. Hartley has not observed Student write a freestyle sentence, without copying from the board or look at a flip chart. Ms. Hartley’s doesn’t know if Student will “ever be expected to do that at any point in [her] class this year.” Page 814.
140. Student is a “high speller” in her group of 18. Page 814.
141. Orton-Gillingham changed the way Ms. Hartley teaches, because of the emphasis on spelling and sounding words out. Page 823. Orton-Gillingham includes what Ms. Hartley thinks of as “phonics,” or phonemics. Page 824. Ms. Hartley was unable to state, however, why a student would have an assignment to fill in a letter to make a word, and why Student’s inability to do that would be an indicator of a problem. Student’s class works with Orton-Gillingham “a little bit every week.” Page 839.
142. Student has missed eight of forty-eight classes. This has created “some holes that we have with each other.” Page 836. Ms. Hartley did not explain what this means, in terms of Student’s progress in reading.

Carlyn Hancock

143. Carlyn Hancock is the deputy director of student support services. She appeared as the representative of the District at counsel table during the Due Process hearing.
144. Student’s March 2018 IEP, her current IEP, describes Student’s strengths and weaknesses using her Istation scores. Page 856-57. Ms. Hancock agreed that a parent would not be able to understand Student’s Istation scores. Page 858. The Istation scores are in the IEP “[b]ecause it is a measure that we use to determine where a child is functioning or how a child is progressing, according to what the school measures.” Page 859.

145. Student received an accommodation on the PARCC of “text-to-speech.”⁶ Page 859. Student received this accommodation because she was “a struggling reader who is not reading on grade level,” so the District wants to make sure she is not penalized “by having her run across an unfamiliar term on the PARCC assessment.” Page 859.
146. Student does not need audiobooks, however, because “[s]he has made actually exceptional progress in her classrooms.” Page 860. Her grades reflected that she did not need audiobooks. Page 860.
147. There are textbooks in middle school that Student will have to read, but she will receive assistance from adults, without the need for audiobooks. Page 861. To Ms. Hancock’s knowledge, no one in Clovis Municipal Schools receives an audiobook. Page 862.
148. Student receives the accommodation of having the questions read to her on the PARCC because it is a test. “In the classroom, there are lots of other ways for her to access the material.” Page 864. Even if she wishes to attend college, Ms. Hancock’s opinion is that “there are ways that kids who don’t read well can succeed in college.” Page 865. Ms. Hancock acknowledges that “State regulation requires that . . . school districts have a way to provide audio access for students with print disability,” but only “[i]f that were to be needed.” Page 866. Out of the 800 to 900 students in special education, Clovis Municipal Schools has “not had anyone who has needed audio access that that accommodation could not be met through the classroom.” Page 866.
149. A student with very poor spelling could receive an assistive technology evaluation to determine whether there was an appropriate support to allow the student to write more quickly and with more confidence. Page 867-69. If this is an issue, the IEP team can request a screening and if the screening supports an evaluation, the student will receive an evaluation. Page 869-70.
150. Ms. Hancock was asked whether Student had any concerns about Student’s ability to be successful when she gets to middle school, and she responded, “None at all.” Page 876. Ms. Hancock’s only concern was Student’s attendance.
151. Ms. Hancock never saw the paperwork that Mr. Nora kept on Student’s progress in Orton-Gillingham. Page 882. Even though Student transferred in the middle of the year, the Orton-Gillingham progress reports would not necessarily have been transferred to her new teacher at her new school. Page 883.
152. The District has not agreed to offer Student a neuropsychological evaluation for Student that would look at both autism and dyslexia. Page 938.

⁶ “Text-to-speech” means that a student listens to questions on head phones. Page 859.

Parent

153. Student's mother ("Parent") had substantial difficulty testifying, because of her emotional reaction to events and because of an apparent lack of organized thought. Page 940-42. At times, Parent's testimony was so unresponsive and disjointed that the Hearing Officer was not able to follow her train of thought. *See, e.g.*, Page 1003-1004. The Hearing Officer found overall that Parent is a loving mother who is genuinely concerned about her daughter, but that her understanding of some events lacks objectivity or personal knowledge, and that her reaction to some events is exaggerated.
154. Parent first started to notice that Student was having difficulty with reading in kindergarten. Page 960. Parent requested testing for autism.
155. Parent testified credibly that Student needs help with reading problems she brings home from school, that she doesn't like to read aloud at home, and that she has difficulty working on Google Classroom, as directed by her teacher, because she mixes up the user name and the passcode and is unable to write it down. Page 949-952. At the same time, Parent testified that Student likes to read and watch stories on her tablet, and agreed that loading books on her tablet might assist Student with reading practice. Page 993-95.
156. Parent testified credibly that Student has expressed that she has a hard time following the instructions in her small group this year, and that she preferred last year when she was in a pull-out classroom. Page 953-954. In her regular classroom, Student reports that "[t]here's a lot going on, and it's really hard for us to think." Page 954.
157. On the positive side, Student does like math, and does like Ms. Grim. Student has two friends at school. Page 953.
158. Parent testified that when Student is tardy, she is only tardy by about five minutes, because of traffic before school. Parent was able credibly to explain some of the reasons for Student's absences; some of the absences did not appear to be appropriate or supportable. Overall, the Hearing Officer found that Parent sometimes inappropriately discounted the importance of Student's absences and tardies.
159. At one point in Parent's testimony, Parent stopped because "[s]he's laughing at me," meaning someone at the District's counsel table. Page 957-58. The Hearing Officer had also heard laughter from the District's table in the hearing room, and was required to caution the District not to laugh. There was no further disruption.
160. Student has continued to struggle with her reading this year. Page 962. Parent works with her with books at home, and Student likes to read stories about animals with Parent, on Student's tablet. Page 962-63.

161. Parent testified that during IEP meetings, everything was pre-typed and that her issues were not addressed or listened to. Page 963-64. Parent did not understand the paperwork from Istation and the paperwork was not adequately explained to her. Page 964-65.
162. Student reported to Parent that on Istation, if she got the answer wrong too many times, Istation would put her back, presumably back to the last lesson. Instead of allowing Istation to put her back, Mr. Nora would answer the question for her so that she could move forward. Page 966-67.
163. Parent is concerned about Student's ability to work independently in middle school. Page 968.
164. Parent believes Student could benefit from assistive technology to allow her to work more independently and completely in terms of full sentences and spelling, but she was never offered anything like that. Page 968-69. Parent believes Student would benefit from using audiobooks. Page 983-84.
165. Student doesn't always hear sounds correctly; Parent believes this is hurting her spelling. Page 978. Student does not bring home spelling homework and Parent does not believe she is working currently on spelling. Page 980.
166. Parent requested an evaluation of Student in February 2018. She asked for an evaluation for counseling, but then withdrew consent because a counselor Parent did not like the person who was going to do the evaluation. Page 984-85.
167. Parent filed a Due Process Hearing request because Ms. Roark told her the District was intending to exit Student from special education. Page 987-88.
168. Parent generally testified that she had not communicated very often with school personnel. Page 988-992.
169. Parent believes Student is making progress in math this year. Page 1013. As to reading, Parent believes that Student is only learning to copy off the board. Page 1013-14. Parent is concerned that Student is "sixth grade" and is performing at a third grade level. Page 1015-16. Her progress is "not significant, not to where it's going to help her in junior high." Page 1016.

Exhibits and Statements by Counsel concerning Exhibits

170. Exhibit X is Student's most recent report card. She received a D in math but good grades overall. Page 1036-37.

171. Exhibit 48 is PARCC testing for 2017-2018, Spring 2018. Page 1034-35. With regard to English / language arts overall, Student “[m]ay need additional support to meet expectations at the next grade level.” Exhibit 48, “English Language Arts / Literacy Assessment Report, 2017-2018,” page 1 of 2. She did not meet expectations and was below the District average in reading and writing. *Id.* at page 2.
172. Ms. Hancock attempted to clear up the origins of the work assignments appearing in Exhibit 37. According to Ms. Hancock, the first thirteen pages are from Joy Martin, Student’s third grade teacher. Page 911; 913; 921; 1035-36. Her testimony was based on several assumptions and therefore the Hearing Officer makes no finding regarding the origins of the first 13 pages. Pages 14-15 and pages 18 to 21 are from Ms. Calcanis’ class. Pages 16 and 17 are from Jennifer Wines. Page 913.
173. Counsel for Parent reviewed Exhibit 31 with Parent. Pages 1-3 are examples of Student’s work from the end of last school year, in May 2018. Page 980-82.

Student’s Experience at School

174. Mr. Nora, Ms. Bolin, Ms. Calcanis, Ms. Grim, and Ms. Hartley testified credibly that Student enjoys school. She’s social, well-liked, upbeat, and has a few friends. None of Student’s teachers observed her being bullied by other students. On the other hand, Parent credibly testified that she believes and Student reports that she’s unhappy at school, and feels bullied and that she’s “not smart like the rest of the kids.” Both of these descriptions of Student’s experiences at school could be true; a child can complain about school at home and appear to enjoy school once she gets there, and a child can both enjoy and dislike school. Student’s teachers are in a better position to observe Student at school and so the Hearing Officer finds her teachers’ reports of how she behaves at school more credible.
175. Parent credibly testified that Student has reported that she is embarrassed to ask for help and doesn’t like to ask for help in school. Student’s teachers described Student differently. Again, Student may be uncomfortable asking for help, but still be able to do so. The Hearing Officer finds the reports of Student’s teachers, that Student is able to ask for help at school, more credible.
176. None of Student’s teachers have observed the type of socially maladaptive or unusual behavior Parent cites as supporting a potential diagnosis of autism. *See, e.g.*, Page 838. Parent’s testimony that Student is or has been repetitive in her actions and prefers routine, while credible, was not based on any special expertise by Parent with regard to diagnosing autism, and was not described in a way to make a reasonable observer suspect autism as the cause.

177. Ms. Roark understood that Student's mother was requesting a counseling evaluation, not an evaluation for autism. Ms. Roark testified that Student's mother consented to an evaluation by the school counselor, and then withdrew her request for a counseling evaluation. Page 556-558. Exhibit 43 is confusing, but appears to withdraw consent by Student's mother to an evaluation for counseling. Ms. Roark credibly testified that she clarified with Student's mother that she did not want the counseling evaluation. Page 598.
178. Ms. Hancock testified that the IEP team believed that Student's social skills issue was related to a potential need for counseling, not to autism. According to Ms. Hancock, there was never any discussion of any need to evaluate Student for autism. Page 884-891.
179. The Hearing Officer was unable to determine, one way or the other, whether Parent was sufficiently clear with school personnel regarding her suspicion that Student had symptoms of autism, in order to alert the District to her request for an evaluation. Parent testified that she herself did not originally suspect autism.
180. In this regard, Petitioner has attempted to incorporate additional evidence regarding autism and girls in her Closing Argument, via a reference to a website. Petitioner's Closing Argument at page 4. Petitioner's position is that autism is more difficult to diagnose in girls. Perhaps so, but for the same reasons that I have not relied on the additional factual information the District has attempted to provide regarding Read Naturally and Istation, I have not reviewed or relied on the extra-hearing information provided by Petitioner concerning autism and girls.
181. Parent cited Student's being kept after in class to complete work at one point, being asked to use cards to seek assistance, and being called a "guinea pig" as examples of bullying, discrimination, or mistreatment by Student's teachers. Each of the described events had an equally benign explanation. The "guinea pig" comment, for example, was used by Mr. Nora to describe Orton-Gillingham, because Orton-Gillingham was a new learning program. Some of Student's teachers were hostile towards the view that Student might be having difficulty in reading that the school was not addressing, and some of Student's teachers appeared at times to have hostile feelings towards Parent. The Hearing Officer heard or observed nothing that tended to show that any school personnel feels or demonstrates hostility or discrimination towards Student or towards her disability.
182. Overall, Student's teachers demonstrated a lack of understanding or particularized knowledge of the significance of Student's disability, for example, in terms of her deficits in de-coding and encoding and the effect that these deficits might have in her progress overall. Some of Student's teachers appeared to equate Student's specific learning disability to an inability to progress generally, rather than to a need for special education to target her disability. This discounting of the significance of Student's learning

disability in her progress overall led the Hearing Officer to give less weight to any testimony that Student was progressing “as expected.”

Hearing Officer’s Limited Adoption of Petitioner’s Proposed Findings of Fact⁷

183. The Hearing Officer concurs with and therefore adopts Petitioner’s Proposed Findings of Fact Nos. 1, 3-5, 8, 9, 13, 15, 17, 20, 22, 23, 27, 28, 40 (“The District has never offered Parent a neuropsychological evaluation for [REDACTED] to look at both dyslexia and autism,” citing Tr. at 938), 44-47, 53-55, 57, 60-61, 63, 66, 70, 86-88, 90, and 92-96.
184. Petitioner’s Proposed Finding of Fact No. 6 is a definition of dyslexia from the New Mexico Administrative Code, and is therefore binding on the Hearing Officer but not a finding. The same is true for Petitioner’s Proposed Finding of Fact No. 38, with regard to the definition of autism, Petitioner’s Proposed Finding of Fact No. 73, with regard to New Mexico’s treatment of spelling, and Petitioner’s Proposed Finding of Fact No. 89, with regard to teaching skills.

Hearing Officer’s Limited Adoption of Respondent’s Proposed Findings of Fact

185. The Hearing Officer concurs with and therefore adopts Respondent’s Proposed Findings of Fact Nos. 2, 4-5, and 35-36.
186. In Proposed Findings Nos. 12-17, Respondent has done what Petitioner attempted to do with regard to autism in girls. In this instance, Respondent has attempted to incorporate additional evidence regarding the Read Naturally Program, via a reference to a website. For the same reasons that I have not relied on the factual information the District has attempted to provide regarding Istation, nor the information Petitioner has attempted to provide regarding autism, I have not reviewed or relied on the extra-hearing information provided by Respondent concerning Read Naturally. The Hearing Officer does find, on the basis of the testimony and evidence presented at the Due Process hearing, that Read Naturally is an appropriate program to teach reading in a special education setting, but that Orton-Gillingham or a similar program was necessary to teach Student in terms of her specific learning disability. This is aside from the question whether either program was implemented with fidelity.

⁷ I have not cite checked either party’s citation to portions of the record to support particular proposed findings. I have reviewed the proposed findings by each party to determine where I concur with what is stated, in terms of my recollection of the evidence presented overall. My decision not to include a particular proposed finding does not indicate rejection of the finding, except as otherwise indicated in this Memorandum Decision and Order. For example, some proposed findings were duplicative or were worded awkwardly.

IV. Hearing Officer's Conclusions of Law⁸

A. *Res Judicata*

1. Respondent contends for the first time in its post-hearing submissions that Petitioner's claims "may be" barred by the doctrine of *res judicata*, based on the theory that her claims were raised by Petitioner in a PED State Complaint, which was addressed and resolved through a facilitated Mediation that resulted in a Mediated Agreement on March 26, 2018. *See* Petitioner's Exhibit 22. Respondent did not develop this issue sufficiently – either factually or legally – to enable the Hearing Officer to make a ruling on this question. Petitioner received no notice that this would be an issue at the Due Process hearing or in post-hearing submissions. The Hearing Officer therefore concludes that Respondent has not preserved this issue.

B. Hearing Officer's Conclusions of Law as to Issues Presented by the Parties

1. Whether the LEA failed to evaluate Student in all areas of suspected disability, specifically for dyslexia and for autism?
2. 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, who are suspected to having a disability, must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(i) ("child find"). 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 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 Weisenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.* 181 F. Supp. 2d 1307, 1311 (D. Utah 2002). 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. Conn. 2009).
3. Our circuit has not specifically defined "suspicion of disability." Under persuasive authority from the Ninth Circuit, a disability is suspected when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O. v. Paso*

⁸ 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.

Robles Unified Sch. Dist., 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behavior in and out of the classroom. *Id.* at 1121. Clearly, however, pursuant to the Supreme Court's decision in *Endrew*, the parent's suspicion is not sufficient to trigger a child find responsibility. Thus the Due Process Hearing Officer is required to defer to the expertise of school authorities in this aspect of the IDEA, while at the same time "fairly expect[ing] those authorities to be able to offer a cogent and responsive explanation for their decisions" *Endrew F.*, 137 S. Ct. at 1001.

Autism

4. Pursuant to 34 C.F.R. § 300.8(c) (1)(i), "[a]utism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."
5. Petitioner failed in her burden of proof to show, through expert testimony or anecdotal reports, that Student has these symptoms of autism to any significant degree, much less that her alleged autism is a disabling condition recognized by IDEA that was not properly identified and educationally addressed. *See* 34 CFR § 300.8. Instead, Petitioner presented the strong and no doubt heart felt opinion of Student's mother, and random and isolated examples of Student's behavior that were not supported by credible witnesses regarding Student's behavior at school, and that were not, in any event, significantly indicative of autism.
6. An IEP is not required to conform to a parent's wishes in order to be sufficient or appropriate. *Shaw v. Dist. of Colombia*, 238 F.Supp.2d 127, 139 (D.D.C. 2002) (IDEA does not provide for an "education . . . designed according to the parent's desires."). The IDEA does not authorize parents to make unilateral decisions about programs funded by the public. *See, N.R. v. San Ramon Valley Unified Sch. Dist.* 47 IDELR 98 (N.D.Cal. 2007); *Slama v. Indep. Sch. Dist. No. 2580*, 259 F. Supp.2d 880, 885 (D. Minn. 2003); *O'Dell v. Special Sch. Dist.*, 47 IDELR 216 (E.D. Mo. 2007).
7. At the same time, "[t]he identification of children who have disabilities should be a cooperative and consultative process," recognizing that an LEA's judgment "regarding a student's ability can be flawed." *Pasatiempo by Pasatiempo v. Aizawa*, 103 F.3d 796, 802 (9th Cir. 1996). Thus the LEA's "determinations alone should not be determinative. The informed suspicions of parents, who may have consulted outside experts, should trigger the statutory protections." As Petitioner contends, these statutory protections include Prior Written Notice. "When [the LEA] or the parents suspect disability, the

parents should receive notification of, and have the opportunity to contest, conclusions regarding their children. *Id.*, 103 F.3d at 802. The LEA does not have “unilateral discretion” in this or many other areas “in the special education arena.” *Id.*

8. With regard to the assertion that the District failed to evaluate Student for autism, “[w]hile the threshold for suspicion [of disability] is low,” a suspicion that “something was amiss,” such as existed here, was not sufficient to trigger the District’s child find substantive obligations or accompanying procedural protections pursuant to the IDEA. *See e.g., JK v. Missoula County Public Schools*, 2016 WL 4082633 * 9 (D. Mont. 2016). This conclusion by the Due Process Hearing Officer is *not* either a finding of fact or a conclusion of law that Student does not have autism – only that the evidence offered by Petitioner does not sustain Petitioner’s burden to show that the District violated the IDEA by failing to evaluate Student for autism.
9. The District stipulated that it was not challenging whether Student had a specific learning disability that was caught as a result of Gayla Lonsdale’s evaluation (“Lonsdale evaluation”). Page 519 of DPH. Petitioner does not appear to challenge any procedural violation occurring as a result of Ms. Lonsdale’s conduct of her evaluation of Student, and any such challenge would appear to be barred by the applicable two-year statute of limitations. Accordingly, the Hearing Officer has reviewed the Lonsdale evaluation and Ms. Lonsdale’s testimony only for its relevance to the question whether Student **should be** suspected as having dyslexia. Neither the Lonsdale evaluation or Ms. Lonsdale’s testimony establishes by a preponderance of the evidence that Student should be suspected of having dyslexia, as the word “suspected” is used in the IDEA. *See* 20 U.S.C. §1414(b)(3)(B)(“Each local educational agency shall ensure that . . . the child is assessed in all areas of suspected disability).
10. The educational evaluation prepared by Carol Roark (“Roark evaluation”) was prepared in anticipation of an IEP meeting which has not yet occurred. Therefore, whether there were any procedural irregularities in the conduct of the evaluation is not an issue currently before the Hearing Officer. In terms of the issues currently before the Hearing Officer, the Roark evaluation *is* relevant to the question whether any other violations of the Individuals with Disabilities Education Act alleged by Petitioner, if true, has denied Student FAPE. Specifically, the Lonsdale evaluation and the Roark evaluation are relevant to the Hearing Officer’s decision whether Student has been evaluated as to all areas of suspected disability. If, for example, either evaluation supported or tended to support that Student should have been diagnosed with autism or dyslexia, this information would be relevant to the Hearing Officer’s inquiry, regardless whether the conduct of either evaluation was subject to its own procedural irregularities.

Dyslexia

11. Dyslexia “means a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristically results from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.” §6.31.2.7 (B)(6) NMAC.
12. The question whether Student has dyslexia is a closer question than the question of autism. I conclude that Petitioner did sustain her burden of proof to show that “child find” was triggered on the basis of the suspected disability of dyslexia.
13. Petitioner contends that state law requires that a student be evaluated for dyslexia in a particular way, whenever a student has a learning disability in reading or written language. Upon review of the authorities cited by Petitioner, the Due Process Hearing Officer concludes that this statement of the applicable standard is overly broad. The State’s eligibility form does not mandate any automatic testing for autism and permits the evaluator to exercise professional discretion in a close case. The DPHO reads the legal authorities cited by Petitioner, as well as the State’s eligibility form regarding dyslexia, as providing guidance to local educational authorities, not an absolute legally cognizable or enforceable mandate for specific testing as described by Petitioner.
14. Thus the Due Process Hearing Officer is required to defer to the expertise of school authorities in this aspect of the IDEA, while at the same time “fairly expect[ing] those authorities to be able to offer a cogent and responsive explanation for their decisions . . . ” *Endrew F.*, 137 S. Ct. at 1001.
15. I agree with Petitioner that the LEA has failed to appropriately evaluate Student for dyslexia. See 20 U.S.C. §1414(b)(3)(B); §6.31.2.7 (B)(6) NMAC. Ms. Roark’s explanation of why she did not conduct specific assessments to rule out dyslexia for Student was not cogent and responsive as required by the Supreme Court in *Endrew*. At the same time, Petitioner has failed to sustain her burden to show the District’s failure to assess Student for dyslexia “made it impossible to determine and deliver the specialized instruction required to meet her needs and provide for her progress.” The consensus at the Due Process hearing was that Orton-Gillingham, delivered with fidelity, was an appropriate special education program for Student, whether she in fact has dyslexia or a different reading disability with similar symptoms. Petitioner provided no evidence to the contrary. Thus the specific issue of failure to diagnose for dyslexia, standing alone, does not support an award of compensatory education.

16. The question remains whether the District should be ordered to assess Student for dyslexia. The District has defended its actions, with regard to its child find obligations related to autism and dyslexia, with reference to the District's offer of an Independent Educational Evaluation ("IEE"). The parties' respective positions with regard to the IEE are somewhat muddled. The Hearing Officer's understanding is that the District offered one type of IEE, but Petitioner preferred another, one that was more inclusive. Thus Petitioner has offered and the Hearing Officer has adopted a proposed finding that "[t]he District has never offered Parent a neuropsychological evaluation for [Student] *to look at both dyslexia and autism*," citing Tr. at 938. (Emphasis added.)
17. Because Petitioner has been offered an IEE and has declined to participate, and because Petitioner has not made clear to the Hearing Officer why an IEE that is different than the one already offered by the District is mandated by the IDEA for any reason, the Hearing Officer denies Petitioner's request for a neuropsychological evaluation to look at both dyslexia and autism. The Hearing Officer does not make any finding of fact or conclusion of law as to whether the IEE offered is sufficient to assess Student for dyslexia, because Petitioner has not clearly presented that issue to me for decision and has not sustained her burden to show that the IEE currently on the table – an IEE that has not yet been performed due to Petitioner's decision – is procedurally or substantively deficient to address Petitioner's request for an assessment for dyslexia.
18. The District's remaining issues regarding the IEE currently on the table are either not ripe or are moot. In either case, having concluded that the IEE currently on the table has never been presented to me for review, I am without jurisdiction to address the District's points.

2. Whether the LEA failed to conduct appropriate IEP meetings?

19. Regarding this issue, Petitioner contends that the District failed to have someone at the IEP to interpret Student's evaluations and failed to include Student's mother "as a true member of the IEP team." The District responds that Student's mother had an advocate there and did not object to Student's IEP, so she is precluded from complaining that she was not included in the IEP process. The District cites no legal authority for the view that appearing at an IEP with an advocate and failing to object operates as a waiver of rights, and both the entire tenor of the IDEA, as well as the only Supreme Court precedent to address waiver, strongly suggest otherwise. *See Sch. Comm. of Town of Burlington, Mass. v. Dep't of Educ. of Mass.*, 471 U.S. 359, 374, 105 S. Ct. 1996, 2004, 85 L. Ed. 2d 385 (1985).
20. After three days of testimony and reviewing a large number of school records about Student, the Hearing Officer concludes, without question, that the District relies too often on vague references to Istation scores, when school authorities and personnel were frequently unable to explain to the Hearing Officer what Istation scores represent and what they can and cannot measure. The Hearing Officer's general understanding is that

some Istation scores can be used to assess where a student is in the general education curriculum, on the day Istation is accessed, and that there is a way for an educator who is sitting at a computer in front of the program to delve deeper and assess progress in substantive areas in the general education context. I heard nothing to convince me – even close – that Istation is intended to measure or has been validated to measure whether Student is able to read fluently or is progressing in her ability to de-code or indeed to measure anything much else related to her special education needs. I heard nothing to convince me – even close – that the school personnel who rely on Istation are intending to use Istation for this purpose, or, if they are intending to use Istation for this purpose, that they know how to manipulate the program to provide the answer they’re seeking.

21. Parent had other complaints concerning the conduct of the IEP’s, including pre-typing the IEP, not being able to see the IEP as it was being written or re-written, not being clear about her rights, and not listening to her input. Some District witnesses appeared hostile to Parent and her concerns. On the other hand, Parent’s complaints about the District appeared to the Hearing Officer at times to reflect an inappropriate “default” position by Parent that the District was affirmatively acting against Student’s best interests.
22. A black and white view of either Parent or the District and its personnel does not benefit Student. An IEP is designed as a cooperative process between a parent and cooperative and consultative process,” precisely because a parent may know something about a student that the school does not, and vice versa. *See, e.g., Pasatiempo*, 103 F.3d at 802.

It takes two to tango--both teachers and parents need to put forth the effort to improve their relationship with each other in order to make life a little easier for the teacher, thus making a child's educational rights accessible.

Both parents and teachers have the interest of the child at heart. This common goal should lead parents and special educators to see each other as partners. When they do, they will develop new, improved perceptions of each other, which will lead to an improvement in their relationship.

Jordan Radford McDowell, *Burning Out: The Effect of Burnout on Special Education*, 2017 B.Y.U. Educ. & L.J. 99, 119 (2017)(footnotes omitted).

23. To remedy the District’s procedural violation of the IDEA in excluding Parent as a member of the IEP team, I will order that the District must either forego reliance on Istation in the IEP or at IEP meetings with Parent, or come to IEP meetings prepared to access the Istation program in “real time” in a manner that is accessible to all attendees. The District must ensure the attendance of at least one person who can explain how Student’s Istation results are relevant to the development of Student’s IEP.

24. I will also order the District to hire an experienced facilitator for all IEP meetings held through Student's seventh grade year. For the next IEP, the District must pay for the fees for an advocate of Parent's choice, including an attorney, with a limit of two hours of compensable time before and after the IEP meeting, in addition to the time required to attend the entire meeting.
25. I will not award compensatory education hours beyond what I am awarding for other IDEA violations, because Petitioner has failed to sustain her burden to show that the failure to include Parent as a member of the IEP team resulted in the denial of a specific educational benefit that could be remedied by a compensatory award. *See* 34 C.F.R. § 300.513 (specifying when a hearing officer may find that a procedural violation denied FAPE, and providing that a hearing officer has authority to order an LEA to comply with procedural requirements of the IDEA).

3. Whether the LEA wrote appropriate IEP goals?

and

4. Whether the LEA's special education program for Student failed to provide Student with FAPE?

26. The District appears once again to argue that by appearing at the IEP and failing to object, Petitioner has waived her rights, this time any claim that Student was denied FAPE. The Hearing Officer rejects this statement of issue (Respondent's No. 7), for the same reasons as outlined, *supra*.
27. In reviewing Student's IEP and the implementation of her program, the Due Process Hearing Officer is highly cognizant of the Supreme Court's clear direction that I am not invited "to substitute [my] own notions of sound educational policy for those of the school authorities which [I] review." *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034."
28. What I have stated as a general proposition bears repeating with regard to Student's special education program: "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.*, 580 U.S. _____, 137 S. Ct. at 999. This may *or may not* mean that a child must "progress[] smoothly through the regular classroom." *Id.* at 1000. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Id.* at 999. Instead, the educational program offered by the IEP must be "appropriately ambitious." *Endrew*, 137 S. Ct. at 1000. Thus if "progressing smoothly" . . . *is not a reasonable prospect*," then [t]he goals may differ, *but every child should have the chance to meet challenging objectives.*" *Id.* at 1000(emphasis added).

29. In urging the Hearing Officer to keep in mind this cautionary language from *Rowley* and *Endrew*, the District tends to neglect the other side of this deferential coin – which is that with great authority comes great responsibility. Thus the deference accorded school authorities is not automatic. Instead, “deference is based on the application of expertise and the exercise of judgment by school authorities.” *Id.*, 137 S. Ct. at 993-94.

The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. *By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.*

Id., 137 S. Ct. at 1001–02 (emphasis added; citations omitted).

30. The Hearing Officer agrees with Petitioner that the LEA failed to write reading/writing/spelling goals which were designed to meet Student’s needs and allow her to progress in the general curriculum. 20 U.S.C. §1414(d)(1)(A)(i)(II),(IV)(aa)-(cc).
31. The Hearing Officer agrees with Petitioner that the District’s documented and described reliance on Istation for instruction, measurement of “progress” and communication of information about Student’s learning is a denial of FAPE. The IDEA does not allow a child’s specialized instruction and special education program to be entrusted to the unknown vagaries of a computer program’s algorithms. *See, e.g., Endrew F.*, 137 S.Ct. at 999 (“An IEP is not a form document.”); at 1000 (every IEP begins with an *accurate* description of student’s present achievement).
32. The Hearing Officer agrees with Petitioner that the LEA did not offer Student IEPs which were “reasonably calculated to enable [her] to make progress in light of [her] circumstances.” *Endrew F.*, 137 S.Ct. at 999.
33. The Hearing Officer agrees with Petitioner that the LEA failed to provide Student with necessary specialized instruction, based on research, to meet her individual needs in reading, writing, and spelling. 20 U.S.C. §1414(d)(1)(A)(i)(IV); §6.31.2.9(B)(10)(b) NMAC. All students got the same instruction: *Read Naturally* with some add-on pieces from limited Orton-Gillingham training beginning sometime in the 2017-18 school year, and intermittent “intervention” created by unknown programmers of Istation. Neither

Read Naturally nor Istation have any apparent research base or validity for meeting Student's needs in accurate and fluent decoding and encoding.

34. The Hearing Officer concludes that Petitioner sustained her burden to prove, that Student is a hard working student with a good attitude towards learning. Student has average intelligence with processing deficits and academic delays in the areas of reading and written language that adversely affect her educational performance. Student has advanced from grade to grade but her lexile – her actual reading level – has not advanced with her.
35. The Hearing Officer also concludes that it is undisputed that Student has made progress in her reading level.
36. The Hearing Officer listened carefully to three days of testimony and has reviewed the exhibits admitted, largely to the extent either party drew attention to and explained the significance of an exhibit through testimony or argument.
37. Based on the evidence presented, the Hearing Officer concludes that the re-design of Student's IEP, effectively to reduce her reading, writing and spelling goals between the 2017 and 2018 IEP, was a denial of FAPE, both because the reduction in goals was not based on Student's individualized needs or potential, and because I find Petitioner's evidence credible that Petitioner did not receive sufficient notice of this substantial change in Student's IEP. Indeed, the academic professionals who were either present at the creation of the IEP, or who later commented on the IEP at the Due Process hearing, either stated that they did not understand the change, or were not responsible for the change, or would not have made the change. The impression created for the Hearing Officer was that this change was not the result of a careful consideration of Student's individualized needs or potential.
38. Unfortunately, this reduction in expectations mirrored what was already in place in the District's expectations in the classroom.
39. Some of the earliest records presented to the Due Process Hearing Officer reflect that by April 2017, when Student was in third grade, she was reading and spelling at substantially below grade level. Learning to decode was specifically listed as a goal.
40. By fourth grade, Student had advanced to a low third grade reading level, as measured by Mr. Nora using *Read Naturally* assessments and Istation. Mr. Nora believed that in Student's fourth grade year, a goal of reading at a 3.5 read level "was kind of steep." Overall, Mr. Nora had somewhat vague explanations of what appeared to be basic concepts in special education. He relied heavily on *Read Naturally* to assess Student's progress in attaining her IEP goals, without a clear grasp of the limitations of his self-described teaching of the *Read Naturally* program, which relied on repetition of words to

teach a child whose primary impediment to reading is apparently de-coding, fluency, and speed.

41. There was no real dispute in the testimony that Orton-Gillingham, taught with fidelity, was the appropriate program to teach reading skills to Student, regardless whether she should have been diagnosed as having dyslexia or diagnosed with a different or unnamed reading deficit (or group of deficits) that would still account for her difficulties with de-coding, fluency, and speed. Everyone agrees that Student has these deficits in her ability to read, and that her overall intelligence does not account for these deficits.
42. While Mr. Nora learned and attempted to teach Orton-Gillingham, he was not sufficiently trained to teach the program with fidelity, as evidenced by his inability to state – or give any clear assessment whatsoever – regarding whether Student had or had not received assistance in de-coding by learning through the Orton-Gillingham program. Mr. Nora’s assessment of Student’s progress in de-coding and her other reading deficits was guesswork.
43. As her fourth grade general education teacher, Ms. Bolin’s experience with Student’s reading grade level was that Student could not read fourth grade material that would be “fairly easy” for a fourth grade student and that Ms. Bolin was required to accommodate Student’s reading disability by reading fourth grade texts to her.
44. When Student’s reading was tested at the start of the current school year, fifth grade, she was assessed to be reading at a third grade, first month grade level. Ms. Wines rejected this assessment, without any well-reasoned explanation. Instead, Ms. Wines reported her anecdotal experience with Student’s reading skills and referred to Student’s Istation scores. Ms. Wines then testified with personal certainty that Istation has been validated, but was unable to say how, when, or where. There is no evidence to support that Student’s Istation scores – either the program itself or the haphazard way they were used in Student’s case – were a reliable and validated way to chart Student’s progress in reaching her specific reading goals.
45. Ms. Grim testified credibly that Student can read “the joke of the day” and “the quote of the day” easily and well. At the same time, Student “is struggling with word analysis while making gains in other areas.” Ms. Hartley testified credibly that Student was, on the date Ms. Hartley testified, reading a 3.6 or 3.7 book, and that Ms. Hartley tries to stay within that range, up to a 4.2 “with this group.”
46. The overall tenor of the testimony the Hearing Officer heard was that Student could not do any better in her reading, because of her reading disability. The support for this position, however, was *ad hoc* and anecdotal. As a result, the IEP goals aimed too low, progressively decreased expectations, and substituted accommodations and “do overs” for providing Student with necessary instruction for remediation of her deficits in reading

skills. These decreasing expectations were also reflected in the implementation of her IEP goals, which focused on giving Student more time to read, forgiving her errors, and moving on, rather than actually taking the time to work with her individually to address her reading deficits.

47. The District is not obligated to teach Student to read, any more than my seventh grade physical education teacher was obligated to teach me how to perform a routine on the uneven parallel bars. Neither is the District required to teach Student to read at her grade reading level. Students may have skill deficits that cannot be remediated or cannot be remediated by a special education program. Even if they have deficits that could be remediated by a special education program, they are not entitled to the best program available.
48. Federal law makes clear that for the most part, school authorities and experts are the best persons to determine how best to educate a child. But when a lawyer tells me to plead guilty, it's not sufficient to say I should do so "because I'm your lawyer." The same is true of the expressed views of educational professionals. The Hearing Officer did not hear a "cogent and responsive explanation" for the decision to reduce Student's reading goals, nor for the ongoing approach towards implementation of the IEP that favors accommodation over an actual 300 minutes per week in reading and 150 minutes per week in writing that focuses on Student's specific deficits, emphasizing implementation of the Orton-Gillingham reading program. See *Endrew F.*, 137 S. Ct. at 1001–02.
49. Notably, Ms. Lonsdale prescribed Orton-Gillingham as Student's program beginning when she was first evaluated in first grade. Petitioner sustained her burden to show that the District has not implemented the Orton-Gillingham program with fidelity, either in fourth or fifth grade.
50. Student has been consistently evaluated by her teachers relative to the expectation that she cannot perform at a higher level, commensurate with her general education peers. Thus, for example, she is a "lead reader" in the lowest track section of her fifth grade class; her general education teacher limits the reading level in this track to 4.2.
51. The Hearing Officer concludes that the District has denied Student FAPE not because Student remains behind her peers, but because the District has presented no cogent and responsive explanation for why Student could not learn to read at the level of her general education peers if she were provided the reading program with fidelity that her IEP should have and in some respects did design for her. Essentially, the District has placed Student in a special education program without fidelity to the Orton-Gillingham program – or any similar program – that is appropriately adopted to address her specific reading deficits. At the same time, Student's reading goals and the approaches of her teachers – most notably her special education teachers -- assume she will never be able to catch up to her peers. This is insufficient pursuant to *Endrew F.*, because it fails to "offer an IEP

reasonably calculated to enable [Student] to make progress appropriate in light of the child's circumstances." *Endrew F.*, 580 U.S. _____, 137 S. Ct. at 999. Student has never been given the chance to meet challenging objectives, as required by *Endrew F.*

52. The District responds that Student's absences bar Petitioner's claims that the denial of appropriate IEP goals and implementation denied Student FAPE. Two of the District's issues – Numbers 4 and 5 – express this defense as a "bar." In an extreme case, there may be an argument to be made that a student's behavior problems may bar some forms of relief. *See, e.g., Garcia v. Albuquerque Public Schools*, 520 F.3d 1116, 49 IDELR 241 (10th Cir. 2008). This is certainly not that case.
53. Respondent's Statement of Issues Number 6 asks the apparently rhetorical question, whether the failure to send a student to school excuses compliance with compulsory attendance laws. It does not. The more nuanced question is Respondent's Number 3, whether Petitioner's failure to ensure consistent and timely attendance contributed to a denial of FAPE. In this regard, the broad lesson of *Garcia* is that to learn from his teachers, a student must attend school.
54. Student has missed eight of forty-eight classes in fifth grade, and missed fifteen days, presumably out of 180 days, in fourth grade. Student is also frequently tardy. Parent explained Student's tardy arrival as the result of traffic. This explanation suffices on the first day, but not on the days thereafter.
55. However, other than repetition of their opinions that her absences may have affected her progress, the District's personnel did not provide a well-reasoned basis to conclude that Student's absences were, in fact, the primary or even a substantial obstacle to her progress, rather than the lack of appropriate goals and implementation of an appropriate program.

5. Whether the LEA Failed to provide Student with necessary related services?

56. The term "related services" is defined in the IDEA to mean "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, ...) as may be required to assist a child with a disability to benefit from special education,...." 20 U.S.C. § 1401(22).
57. Petitioner did not sustain her burden of proof to demonstrate that the District failed to evaluate whether Student needed related services in speech language pathology.
58. Petitioner failed in her burden of proof to demonstrate that she is eligible to receive related services in speech language pathology.

59. Petitioner sustained her burden of proof to demonstrate that the District failed to evaluate whether Student needed related services in assistive technology and access to audio versions of texts.
60. The LEA failed to evaluate for or provide a laptop or writing device as Assistive Technology despite Student's inability to do any independent writing and her advanced grade (end of elementary). Assistive technology is available to "increase. . . or improve functional capabilities of a child with a disability." 20 U.S.C. §1401(A).
61. The LEA failed to evaluate whether Student needs supplemental aids/services (20 U.S.C. §1414(d)(a)(A)(i)(IV) to give Student independent access to the general curriculum by failing to provide Student with audio textbooks/books even though it knew Student was of average intelligence but could not independently read grade level books. Supplemental aids and services "means aids, services, and other supports that are provided in regular education classes. . . ." Direct access to instructional materials is required under IDEA through availability of instructional materials which are accessible to persons with print disabilities. 20 U.S.C. §1412(a)(23) and 20 U.S.C. §1413(a)(6).
62. The District must conduct an IEP meeting to determine whether Student needs related services in assistive technology and access to audio versions of texts.

6. Whether the LEA failed to implement the April 2017 IEP when it failed to refer Student to a counselor for screening?

63. Petitioner failed to carry her burden of proof to show that she requested a specific type of evaluation for counseling and that she did not withdraw her request that Student be evaluated for counseling, or that there was a reasonable basis to believe that Student required counseling as a related service.

7. Alleged Bullying

64. Petitioner failed to carry her burden of proof to show that Student was bullied at school.

8. Alleged Punishment of Student for Manifestation of Her Disability

65. Petitioner failed to carry her burden of proof to show that Student was punished for the manifestation of her disability.

9. Denial of FAPE

66. The Hearing Officer has previously addressed the denial of FAPE as to each statement of issues.

10 and 11. Remedies

Relevant Law

67. I have concluded that Student did not receive FAPE during her fourth and fifth grade year, due to the reduction in her reading goals in her IEP, and due to lack of effective teaching of her special education program and validated assessment of her progress in reaching her goals. I have also additionally concluded that Student is not receiving FAPE during her fifth grade year due to the District's failure to make an individual assessment regarding whether Student needs pull-out time to implement her special education program.
68. The Hearing Officer has equitable authority to fashion all appropriate relief to address Respondent's violation of the IDEA. *Burlington School Comm. v. Mass. Dep't. of Ed.*, 471 U.S. 359, 369, 374 (1985); *Florence County School District Four v. Carter by and through Carter*, 510 U.S. 7, 15-16 (1993). The emphasis in each case is on the unique circumstances of the student as well as the particular IDEA violations committed by the School. "[T]he essence of equity jurisdiction is to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. . . . Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Reid v. District of Columbia*, 401 F.3d 516, 523-24 (D.C. Cir. 2005).
69. Compensatory education is, as the term suggests, educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. *Id.* at 518. The goal in awarding compensatory education should be "to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Id.*
70. The *Reid* court agreed with the Ninth Circuit that "there is no obligation to provide a day-for-day compensation for time missed. Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Id.* at 242 (*citing Parents of Student W. v. Puyallup School Dist. No. 3*, 31 F.3d 1489, 1497 (9th Cir. 1994)). The court concluded that "[i]n every case, . . . , the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the education benefits that likely would have accrued from special education services the school district should have supplied in the first place." *Id.* at 524 (emphasis added). The court noted that "whereas ordinary IEPs need only provide "some benefit," compensatory education awards *must do more* – they must compensate." *Id.* at 525 (emphasis added). The court explained that "this flexible approach will produce different results in different cases depending on the child's needs. Some students may require only short, intensive compensatory programs targeted at specific problems of deficiencies.

Others may need extended programs, *perhaps even exceeding hour-for-hour replacement of time spent without FAPE.*” *Id.* (emphasis added).

71. The court in *Reid* did not hold that an hour-for-hour compensatory education award is *per se* invalid and did not create a ban on such awards. In fact, the court recognized that an hour-for-hour award may be appropriate. Thus, “[a] formula-based award may in some circumstances be acceptable if it represents an individually-tailored approach to meet a student's unique prospective needs, as opposed to a backwards-looking calculation of educational units denied to a student.” *Friendship Edison Public Charter School Collegiate Campus v. Nesbitt*, 532 F.Supp.2d 121, 123 (D.C. Dist. 2008).

Given the availability of reimbursement for compensatory instruction, were it impossible to obtain an award of the instruction itself, children's access to appropriate education could depend on their parents' capacity to front its costs – a result manifestly incompatible with IDEA's purpose of “ensur[ing] that *all* children with disabilities have available to them a free appropriate public education,” 20 U.S.C. § 1400(d)(1)(A) (emphasis added). Even worse, students who remained in public school would lack any effective redress for FAPE denials, even those extending over many years, as in [this student's] case.

Reid, 401 F.3d at 522-32 (citation omitted).

IV. Reward of Relief

1. Student shall be maintained in special education through at least the conclusion of her sixth grade year, as compensatory education for the LEA's failure to meet her needs.
2. Student shall receive compensatory education in reading/writing/spelling beginning now and continuing through sixth grade with a 1/1 licensed special education teacher who has been extensively trained in Orton-Gillingham or similar program acceptable to Parent, or who will be overseen (long distance if needed) by an identified expert in instruction for students with reading deficits in the areas typically and often encompassed in the diagnosis of dyslexia, including de-coding, encoding, word analysis, fluency, and ability to read quickly enough to ensure comprehension, as recommended by the southwest

branch of the International Dyslexia Association or other expert agreed to by Parent.⁹ Student shall receive 300 minutes for reading and 150 minutes for writing per week.

3. Student is *not* awarded an independent neuropsychological evaluation.
4. Student is *not* awarded an independent speech language evaluation.
5. Student shall receive an independent Assistive Technology evaluation, followed by the LEA's provision of all recommended services/equipment.
6. Student shall receive an independent evaluation to determine whether she should receive audio books for all general education textbooks and supplemental class reading books, with provision of recommended audio books to Student to continue through middle school.
7. Student's next IEP meeting shall be a facilitated IEP, as previously described in this Memorandum Decision and Order, and Parent and Student will receive the assistance described to enable them fully to understand the IEP.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, Petitioner's Request for Due Process Hearing Against the Local Educational Agency is GRANTED in part and DENIED in part. Other than as noted herein, there is jurisdiction over the parties and the subject matter. See 34 C.F.R. § 513. 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 29 U.S.C. § 1415, 34 C.F.R. § 300.516, and § 6.31.2.13(I)(24) NMAC 2018-19. 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.

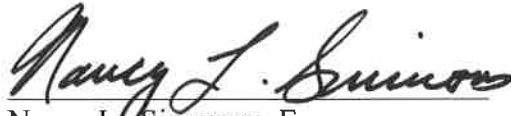
⁹ The southwest branch of the International Dyslexia Association is the group Petitioner has requested, to assist in choosing an expert to oversee Student's instruction in Orton-Gillingham. The Hearing Officer assumes, based on the testimony at the Due Process hearing, that a dyslexia association will be familiar with persons who have expertise in Orton-Gillingham. My reference to this organization is not intended to suggest that Student should be suspected as having or does have dyslexia, a question I have otherwise addressed in this Memorandum Decision and Order.



Nancy L. Simmons, Esq.
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Memorandum Decision and Order was electronically transmitted via email to the Parties, and a courtesy copy was electronically transmitted via email to New Mexico Public Education Department to Michelle Bowden, Esq., this 4th day of February, 2019.



Nancy L. Simmons, Esq.
Due Process Hearing Officer

