

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT**

**PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER  
DPH NO. 2021-06**

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

**THIS MATTER** arises on the Petitioners' Request for Due Process Hearing with the Local Educational Agency. Respondent is [REDACTED] ("District" or [REDACTED]). Petitioners are the parents ("Parents" or "Petitioners") of D.A. ("D.A." or "Student"). Petitioners filed their Request for Due Process with the State of New Mexico Public Education Department on October 8, 2020. Petitioners' Due Process Request is granted in part.

**I. Procedural Background**

Pursuant to a Pre-Hearing Order, the parties timely filed their Joint Statement of Issues for the Due Process Hearing. The Parties also timely filed their respective Witness and Exhibit Lists.

Pursuant to various stipulations by the Parties, the Due Process Hearing commenced on January 11, 2021, and concluded on January 19, 2021, with various days off in between. The hearing took a total of five days. 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.

Pursuant to a stipulated extension of time, this final decision is due on or before March 29, 2021.

**II. Relevant Legal Overview**

The Parties have presented the following Joint Statement of Issues:

1. Whether Student was provided specialized reading instruction, based on peer-reviewed research, to meet his unique needs as a student with a reading disability including characteristics of dyslexia;
2. Whether Student was evaluated by [REDACTED] in all areas of suspected disability when the 2020 evaluation included no evaluation related to Student's behaviors;
3. Whether Student was provided education which met State standards;
4. Whether Student was provided audio texts through Bookshare or Learning Ally to allow access to the general curriculum, and independent learning and reading;
5. Whether [REDACTED] implemented Student's Individualized Education Plans ("IEPs");

6. Whether Student was timely and consistently provided Assistive Technology ("AT") sufficient to meet his unique needs;
7. Whether Student utilized the technology made available to him by the District in the manner he was instructed by the District AT personnel;
8. Whether IEP goals were designed to meet Student's needs that result from his disability, and to enable him to be involved in and make progress in the general education curriculum;
9. Whether [REDACTED] appropriately measured Student's progress toward goals through reliance on iReady;
10. Whether Student's behavior is the result of an undiagnosed Tourette Syndrome or Tic Disorder and whether the District has used that behavior to lower its expectations or misunderstand Student's needs resulting in inappropriate goals and supports;
11. Whether [REDACTED] has provided Student with education which was "free" when Parents have had to provide outside reading instruction for multiple school years to try and make up for [REDACTED] failure to provide specialized instruction;
12. Whether [REDACTED] refusal to provide necessary specialized instruction and services was based on [REDACTED] policy and predetermination to refuse to provide certain instruction and services (1/1 reading instruction by a Certified Academic Language Therapist ("CALT"); audio texts for dyslexic students; reading/writing/spelling goals focused on teaching encoding skills; standard AT tools for students with dyslexia; [REDACTED] policy to delay identification of dyslexia delaying early intervention; [REDACTED] policy to ration knowledge about dyslexia);
13. Whether Student's IEP teams included staff who could interpret the instruction implications of evaluation results and who had specialized expertise in dyslexia and evidence based reading instruction as well as Tourette Syndrome / Tic Disorders;
14. Whether [REDACTED] failed to provide Parents with Prior Written Notice ("PWN") about the Local Educational Agency's ("LEA's") rejection of their requests for specialized reading instruction. (The LEA is the generic name for the school district – in this case, the LEA is [REDACTED] or the District.);
15. And whether any of the actions and inactions of [REDACTED] denied Student a free and appropriate public education ("FAPE");
16. Whether Student is entitled to equitable remedy and what that remedy should be.

See Joint Statement of Issues.

As the party asserting these challenges to the District's actions, Petitioners have 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 (10<sup>th</sup> Cir. 1990). The District has the burden of proof with respect to its affirmative defenses.

While the Parties have presented me a multitude of issues to address, the essential questions before me are twofold: (1) whether the District has violated the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.*, and if so, whether the violation has resulted in the denial of a Free and Appropriate Public Education ("FAPE")(substantive violation) or (2) whether any procedural violation may be redressed by an appropriate procedural remedy (procedural violation). "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-1J*, 51 F.3d 921, 925 (10<sup>th</sup> Cir. 1995). "[A] child is entitled to 'meaningful' access to education based on [his] 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." *Dept. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982).

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 20 U.S.C. §§ 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.

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, parents have their 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). A hearing officer may also order a LEA to comply in the first instance with procedural requirements, even if there has been no denial of FAPE. See 34 C.F.R. § 300.513(a)(4).

### **III. Findings of Fact**

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.

In drafting this Memorandum Decision and Order, the DPHO has adopted those proposed findings that accord with her recollection of the evidence and testimony. The DPHO has reviewed the proposed findings by each party to determine where the DPHO concurs with what is stated, in terms of her recollection of the evidence presented overall. The DPHO has also reviewed the transcript and exhibits when necessary to refresh her memory or to find items that were not cited by either party. However, the DPHO has not always cite checked either party's citation to portions of the record to support particular proposed findings, if the proposed finding otherwise corresponds with her recollection of the testimony.

The 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.

1. D.A. is 11 years old and a 6<sup>th</sup> grade student at Wilson Middle School. Starting in first grade, it was apparent to D.A.'s parents that D.A. struggled with pre-reading and reading skills.
2. D.A.'s 5<sup>th</sup> grade teacher perceived him to be a leader and a student who is very knowledgeable about a number of subjects and capable of digesting and learning information presented orally. Tr 2 at 429. His challenges were reading and writing. *Id.* His 6<sup>th</sup> grade language arts teacher perceives him as "very capable" although he struggles with reading. Tr 3 at 655-656, 657 ("He won't read aloud.").
3. D.A. has superior knowledge of oral vocabulary (98<sup>th</sup> %), but cannot read the words for which he knows the meaning. Tr 1 at 45. "[H]is straight up vocabulary, that semantic part of his understanding, is huge. And then you go to the part that's phonological and it's way below." Tr. 1 at 46. He has tremendous comprehension of things which are read aloud to him. Tr 2 at 329.
4. During elementary school, D.A. expressed "frustration with being behind and feeling stupid." Tr 4 at 952. He could not do homework independently. Tr 4 at 953. For 5<sup>th</sup> grade research reports, D.A.'s mother read him materials. He dictated to her; she wrote it out and he turned it in. Tr 4 at 953. Parents continue to need to read to D.A. out in the community. Tr 4 at 999.

#### Indicia, Eligibility and Evaluation for Diagnosis of Dyslexia

5. In May 2017 (second grade), [REDACTED] eligibility determination for D.A. concluded he had a specific learning disability in basic reading, reading fluency, and math calculation and that he had the characteristics of dyslexia. Exh. 1; Exh. 2 at 1-2; Tr 1 at 56.
6. According to Ricky Adams, who evaluated D.A., his dyslexia is severe. Exh. 1; Tr 1 at 31-32, 35-37, 39, 40-41. During testing, "he couldn't read the words well enough to get the gist of what he was reading." Tr 1 at 36. "[I]t appeared to be due to phonological aspects of processing, in particular, the rapid naming and some aspects of the phonological awareness." Tr 1 at 41.
7. Chris Fox is employed by [REDACTED] to do professional development for teachers in Wilson training and the SPIRE program, which are programs for children with dyslexia. Tr 5 at 1147-49. She works for Cooperative Educational Services as a consultant and trainer in reading. *Id.* According to Ms. Fox, students who have

dyslexia need daily instruction to help them “internalize the concepts they’re learning.” Tr 5 at 1175.

8. “[D]yslexia is neurobiological in origin and there are some brain differences in folks with dyslexia. . . . With . . . individuals with dyslexia, most of the brain activity. . . occurs in the frontal lobe and the other areas are not activated.” Tr 5 at 1173-1174; see *also* Exh. 22 at 8 (“Poor readers use slower more inefficient areas of the brain to decode”; image of dyslexic “reading brain” shows activity in frontal lobe).
9. Dyslexia requires retraining of the brain for a student to become a successful reader. Tr 4 at 868, 871; Exh. 22 at 2, 6 (“The student with dyslexia is born with a brain that is structurally and functionally different.”), 8-10, 31-35.
10. Students with dyslexia who do not receive necessary intensive intervention for sufficient time to reach mastery simply “cope” by developing mechanisms such as skipping over words or guessing at words in text rather than accurately decoding. Tr 4 at 888. Guessing at words is not reading and that habit must be un-learned for the dyslexic student to do the hard work of slowing down, applying all learned knowledge about decoding all the time. Tr 4 at 888-890. Guessing interferes with the necessary re-training of the brain. Tr 4 at 890.
11. Automaticity in reading is a prerequisite for comprehending. Tr 1 at 260 (“[I]n order for the student to read any text and comprehend it, which is the goal of reading, you want to make sure you are taking the load off of the word recognition piece. So that is why you want it automatic.”; “It is likely that if a student is struggling to recognize the words and putting forth more effort, that their comprehension will be compromised.”).
12. According to Tawnya Yates, who is an [REDACTED] reading resource teacher and a Certified Academic Language Therapist (“CALT”), the delivery and intensity of reading instruction should be matched to the severity of each individual student’s needs. Tr 1 at 271-272.
13. D.A. was not identified as a student with a specific learning disability in written expression, because his problems were in spelling. His overall score was not a standard deviation and one half below the expected score based on age, although it was more than a standard deviation and one half if looking at grade level. Tr. vol. 1 at 57. The evaluator testified that Student also could have been determined to be eligible as a student with a Specific Learning Disability in written expression, but the evaluator “knew that he was going to get interventions that would be appropriate for the spelling which in my mind would help with the overall written expression.” Tr 1 at 56-57. Sometimes “with kids who are real bright,” extra pullout time for special education could be detrimental considering the issue of the least restrictive alternative. Tr 1 at 58-59.



14. “Spelling is very connected to word reading obviously, and dyslexia. Usually they go hand in hand.” Tr 1 at 49. “[I]f you can’t spell words correctly and you’re spelling them too poorly that other people can’t read what you’re reading [sic], you’re missing the whole purpose of written expression.” Tr 1 at 50. Difficulty with spelling also depletes a student’s energy leading to decreased output and diminished content. Tr 1 at 50.

B. Student was not provided specialized reading instruction  
to meet his unique needs as a student with reading disability,  
including the characteristics of dyslexia

*Individualized Education Plans*

15. D.A. was initially evaluated for special education at the end of second grade (2016-17) and determined to be a student with specific learning disability including characteristics of dyslexia (May 2017).
16. Student’s Individualized Education Plan (“IEP”), dated April 19, 2018 (third grade), reported that Student had not met his reading goals for the previous year and was reading at 1<sup>st</sup> grade level according to SPIRE assessments. Exh. A at 3. His goals, generally, were to increase his de-coding skills and his comprehension to instructional level. *Id.* at page 6. The IEP team rejected Parents’ request for a dyslexia therapist, but increased his reading instruction minutes, ostensibly based on his prior success. *Id.* (Section on Prior Written Notice)(“PWN”) at page 2 of 2. (“Prior Written Notice,” often referred to as “PWN” is the notice provided in a separate section of Student’s IEPs, at the end of each IEP, providing notice as to whether a request has been accepted or rejected. The IDEA requires prior written notice of decisions reached at the IEP meeting.).
17. Student’s IEP, dated April 17, 2019 (fourth grade), provided that his eligibility was for a Specific Learning Disability, with the “primary cause” being dyslexia. Exh. B, page 1. Student had “deficits in the processing areas of rapid naming and advanced phonological awareness that interfere with his ability to perform up to grade level standards in the areas of basic reading skills, reading fluency, and math calculation.” Exh. B at page 5. He needed Assistive Technology in the form of “word prediction software,” consisting of “dictation / speech to text.” *Id.* His goals were focused on learning to decode words at grade level, with 80 % accuracy. *Id.*, page 6. He also needed assistance to improve his math fluency. *Id.* He was placed in a special education setting for language arts (285 minutes per week) and math (450 minutes per week). *Id.*, page 7. He received a list of accommodations. *Id.*, page 8. Student “require[d] direct, specialized instruction utilizing multi-sensory academic explicit / direct programs in order to have access

to the general education curriculum.” *Id.*, page 9.

18. The District declined Parents’ request for a three year re-evaluation with full testing due to lack of progress, because Student was ostensibly making progress. The “new area of concern,” which was written language, could be addressed through a performance based evaluation with Tier II Interventions and Strategies and a referral for Assistive Technology. Exh. B (section on PWN), page 2.
19. When the District rejected Parents’ request for 1x1 reading instruction at the two April 2019 IEP meetings (end of 4<sup>th</sup> grade), there was no PWN on the reason for rejecting Parents’ request and for adding 15 minutes of “direct, one on one reading support.” In fact, some members of the Team thought this request referenced [REDACTED] providing Student with time in the classroom with an Educational Assistant. See Exh. B at 5 and PWN p. 2; Tr 1 at 192-196.
20. The IEP team amended Student’s IEP on August 29, 2019 (fifth grade). The IEP continued to state that Student “requires a lot of adult support in writing with pencil and paper.” Exh. C, page 5. In the area of “Special Consideration” / “Assistive Technology,” the IEP added a portable writing device with specific assisted writing and reading tools, to be available 100 %, as well as a recommendation for membership in Bookshare. *Id.*, page 6. (Bookshare provides audio access to text books and other books eliminating any barriers to access to the general education curriculum when a student cannot read at grade level. Tr 1 at 113-114.).
21. The Prior Written Notice in Student’s IEPs at the end of 5<sup>th</sup> grade misstated the reasons for [REDACTED] rejection by stating that Wilson Middle School could provide specialized reading instruction and had programs that addressed dyslexia. Exh. D , PWN p. 1; Tr 590-592; Tr 4 at 976 (parents were not told by anyone how any program at Wilson Middle School would address D.A.’s dyslexia).
22. No one from Wilson Middle School attended Student’s transition IEP in the spring of 5<sup>th</sup> grade. Exh. D ; Exh E; Tr 2 at 534-536, Tr 3 at 591, 731-734 (Wilson principal sees nothing in IEPs to show middle school staff in attendance); Tr 4 at 971 (Parent verifies no one from middle school attended); Tr 5 at 1103-1104 (head special education teacher from Wilson too busy to attend IEPs for incoming 6<sup>th</sup> graders). Failure to have any staff from the middle school led to misunderstanding about the middle school’s ability to meet Student’s needs. See, e.g., Tr 2 at 455-456, Exh. D at PWN p. 2 (“District will provide a specialized class for reading instruction at the middle school. . . . Programs at the middle school will address dyslexia.”).
23. After the IEP meetings, Mother went to meet with the middle school principal



who advised her not to put D.A. in any special education classes at Wilson because those classes would not benefit him. Tr. 4 at 972, 987.

*Parents' Requests for Dyslexia Therapist*

24. Claudia Gutierrez, the [REDACTED] executive director of student achievement, agrees that dyslexic students need reading instruction which is "explicit, systematic, sequential, multisensory and diagnostic." Tr. 1 at 223-226; Exh. 17 at 5; see also §6.31.17.7(F) NMAC (7/14/20). Diagnostic teaching refers to the teacher's ability to track how an individual student is responding and adjust when a student struggles to allow the student to acquire the skill. Tr 1 at 226. "[T]he most important feature for teaching students to read is effective reading instruction." Tr 1 at 224; Exh. 17 at 4. A "highly trained specialist" is the key to provision of instruction for a student with dyslexia. Exh. 17 at 11. [REDACTED] "[doesn't] have specialists everywhere." Tr 1 at 227-228. "Some students may need one-on-one." Tr 1 at 228. Lessons and repetition are structured to increase the student's automaticity and immediate corrective feedback is necessary. Tr 1 at 228-229.
25. During the IEP at the end of 3<sup>rd</sup> grade, when Parents asked that D.A.'s specialized reading instruction be from a person qualified as a "dyslexia therapist," they were told that [REDACTED] "does not provide that." Tr 2 at 389; Exh. A at PWN pages; Tr 4 at 958 (parents were told that "they [REDACTED] don't do that and they rejected it."). According to the 3<sup>rd</sup> grade special education teacher at the IEP, [REDACTED] uses its chosen reading curriculum and chosen teachers and does not have dyslexia therapists. Tr 5 at 1086-1088. At Bandelier Elementary School, [REDACTED] chosen reading curriculum was SPIRE.
26. When Parents again requested that [REDACTED] provide D.A. with "dyslexia therapy" at the April 2020 (end of 5<sup>th</sup> grade) IEP, there was no explanation given, based on analysis of Student's needs, as to why [REDACTED] could not do that or was refusing. Tr 1 at 144-145; Tr 4 at 975-976. The Prior Written Notice states that the District rejected because Wilson Middle School had "programs" to address dyslexia. Exh. D (PWN), page 2 of 3 ("Programs at the middle school will address dyslexia."). Those programs were not explained to the IEP team, including Parents, and the programs were not described in the IEP. Exh. D (PWN), page 2 of 3; Tr 2 at 455-456; Tr 3 at 657 (Language Arts teacher at Wilson Middle School for 42 years did not know of any dyslexia program at Wilson). During the 5<sup>th</sup> grade IEPs, Parents' request for reading instruction by a dyslexia therapist was once again rejected by [REDACTED] staff present "because they don't have them." Tr 2 at 531-532. ("They rejected it because it was my understanding that the district does not have dyslexia therapists.")
27. Parents brought this due process request against [REDACTED] because [REDACTED] would never address Student's need for a dyslexia therapy level reading instruction,

just repeating over and over “We don’t do that.” Tr 4 at 1024.

*Student’s Progress in Reading*

28. █████ reading instruction to Student in elementary school often consisted of iReady computer-based instruction. Tr 3 at 572 ( “He’d used it for years.”); Tr 3 at 614-615. The iReady program would take into consideration that Student was in the fifth grade as opposed to the second grade by giving him assignments based on his diagnostic results, rather than his grade level. “It would meet him where he was at and . . . give him instruction to increase that skill level and give him practice.” Tr 3 at 615.
29. iReady, which includes computer-based instruction as well as serving as a platform for testing and evaluation, is not focused on students with dyslexia but is used for all students in █████ Tr 1 at 232-233; Tr 3 at 711-712. Provision of reading instruction through iReady computer lessons at both Bandelier Elementary School and Wilson Middle School is not specialized instruction for a student with dyslexia. Tr 2 at 506. Lessons through iReady are selected by the computer. Tr 3 at 625 (“It would be based on what the computer would assign him.”).
30. During 3<sup>rd</sup> grade, D.A.’s general education teacher would read things to him at her desk and then highlight materials printed out on paper. Tr 2 at 342-344. The teacher knew that Student could not read 3<sup>rd</sup> grade level texts and that his reading was at a kindergarten level. Tr 2 at 344. She has no training in dyslexia or in SPIRE. *Id.* (SPIRE is one to two programs provided by █████ for students with dyslexia.)
31. Kristin Hurd was the cross-categorical (special education) teacher for Student in fourth and fifth grade (2018-19 and 2019-20). Tr 2 at 479-80. She knew that in order to learn a skill, D.A. needed 1/1 and practice. Tr 3 at 578-579. Once he received the necessary instruction, he was “off to the races.” Tr 3 at 578.
32. █████ supports two programs specifically for students with dyslexia: SPIRE and Wilson. Tr 1 at 207.
33. Training offered to █████ teachers in SPIRE lasts 3 days during the “training year,” some coaching, and an optional day of training the following year. Tr 1 at 207-208. █████ considers that teachers who have received the 3 days of training in SPIRE are capable of delivering that instruction. Tr 1 at 208-209. █████ recommends that the SPIRE reading program be taught to students in groups of 5 or 8, depending on the grade. Tr 1 at 209-210.
34. Once a teacher has received █████ SPIRE or Wilson training they will always be recognized by █████ as being able to provide those programs, regardless of skill

or delivery with fidelity. Tr 1 at 211-212.

35. [REDACTED] training in SPIRE and Wilson is that teachers move on to a new lesson once a student reaches 80% or better accuracy on a lesson. Tr 1 at 212-213; *but see*, Tr 3 at 693-694 (SPIRE teacher in 6<sup>th</sup> grade “moves on” when he “felt like everybody had understanding of it.”). Data is supposed to be collected regarding a student’s progress through lessons in either program. Tr 1 at 214-215.
36. Whether a student in [REDACTED] receives SPIRE or Wilson depends on which program teacher(s) at the school are trained in and then whether the student’s assigned teacher(s) in the following year have training in the program the student started in. Tr 1 at 215-216 (Q: “So basically it depends on who at the schools is trained and what they’re trained in. Is that correct?” A: “Yes.”).
37. Teachers are provided their SPIRE materials at the beginning of the training. [REDACTED] does not require that teachers receive all SPIRE training before they begin providing SPIRE reading instruction. Tr 5 at 1178, 1183. It would be very difficult for an [REDACTED] teacher who does not have all the training to provide SPIRE instruction to multiple groups of students merely by relying on the script because a teacher in this position lacks the background knowledge. Tr. 5 at 1183-1184.
38. [REDACTED] “tries” to get groups of students “in homogeneous groupings as much as possible” for delivery of SPIRE reading instruction. Tr 5 at 1179. When students are in groups where there are more than 6-8 students, that’s not efficacious because individual students will not receive individualized instruction. Tr 5 at 1180.
39. [REDACTED] teachers delivering SPIRE instruction are not observed unless they request observation. Tr 5 at 1185-1186 (“[W]e’re not forcing our way [into classrooms to observe SPIRE]”). During the 2020-21 school year, due to Covid, SPIRE training is all remote: some video learning and some Google Classroom discussion. Tr 5 at 1155, 1176-1178. One [REDACTED] trainer believes that is a sufficient amount of training if teachers “are engaged and participating.” Tr 5 at 1154.
40. Whether [REDACTED] students receive SPIRE or Wilson Reading (in an intervention model only) is dependent on what training teachers choose to get. Tr 5 at 1182. Many more teachers are trained in SPIRE which is a much more scripted program; a teacher’s “learning curve” is not so steep. Tr 5 at 1182-1183. SPIRE does not have “certified trainers.” Tr 5 at 1150. According to Petitioners’ expert, SPIRE is designed as a classroom reading instructional program and would not be effective for a student with severe dyslexia, unless it is taught one on one. Tr 4 at 887.
41. In contrast, the other program offered by [REDACTED] for students with dyslexia – Wilson

Reading – does have certified trainers and also has training to become a Wilson “dyslexia therapist.” Tr 5 at 1150-1151. However, this level of training in Wilson is not currently offered by [REDACTED] for classroom teachers. One of [REDACTED] trainers for Wilson Reading is herself a Wilson dyslexia therapist. Her opinion is that the Wilson dyslexia therapist level of training is similar to the training of a Certified Academic Language Therapist (“CALT”). Tr 5 at 1151.

42. In the SPIRE program, 80% accuracy is considered “mastery” allowing the teacher to “move on” with the instruction. Tr 5 at 1067, 1069-1070, 1171-1172.
43. At Bandelier Elementary School, D.A. received some SPIRE reading instruction from his special education teacher in a classroom setting with multiple students where only some needed SPIRE and were at the same level for SPIRE. Tr 2 at 483-485.
44. During 3<sup>rd</sup> grade (2017-18), Shannon Francis taught Student; she is a special education cross-category teacher. Tr 5 at 1033, *et seq.* Student’s reading instruction was in a classroom where students were divided into groups of 6-8 students for SPIRE with part of the SPIRE instruction in “whole group” of 15 -17 students. Tr 5 at 1062-1063. Reading was taught for 20-45 minutes depending on the day, 3-4 days per week. Tr 5 at 1038, 1064. If “most kids” in the group get it, the teacher would move on in D.A.’s 3<sup>rd</sup> grade classroom. Tr 5 at 1070. Ms. Shannon testified that she measured when to move forward to a new SPIRE lesson based on “[k]ind of the body language, certain things that I’m getting back from the students.” Tr 5 at 1065. D.A. had completed Level 1 by February 2018 but “just because he was in SPIRE Level 1 doesn’t mean that he required every single concept within SPIRE Level 1.” Tr 5 at 1092. Instead, his teacher tested him and “hit those areas” where Student showed weakness. *Id.*
45. It did not seem to Ms. Francis that D.A. was generalizing reading skills “learned” in SPIRE to independent reading in other settings. Tr 5 at 1079.
46. D.A.’s special education teacher for 4<sup>th</sup> (2018-2019) and 5<sup>th</sup> grades (2019-2020) was licensed through an alternative licensure program at CNM which included a “basic” course on reading. Tr 2 at 480-482. She was first trained in SPIRE for 2 days when she was an Educational Assistant. Tr 2 at 482. This level of training qualified her in [REDACTED] to begin providing SPIRE instruction. Tr 2 at 482. The initial 2 day training received as an EA (before receiving her special education teaching license) in approximately 2015 is the only SPIRE training she has ever had. Tr 2 at 482. She has never received training about dyslexia, either at CNM or through her employer, [REDACTED] Tr 2 at 504. She has never been offered or asked for more training. Tr 2 at 533. She had no curriculum for writing instruction. Tr 3 at 609. SPIRE “is a scripted teacher manual.” Tr 2 at 488, 491-492. D.A.’s special education teacher used the script but also added to it. Tr 2 at 492.

47. During 4<sup>th</sup> grade (2018-19), there were 12 students in the classroom and students were divided into 2 groups. Tr 2 at 489-490. During 4<sup>th</sup> grade (2018-19), SPIRE lessons were presented 2-3 days per week by either the teacher or her Educational Assistant ("EA"). Tr 2 at 489-491. During 5<sup>th</sup> grade, the class had no Educational Assistant (EA) and the teacher had 10-14 students in the class. Tr 3 at 607-608.
48. In April 2019, the spring semester of Student's fourth grade year, Parents requested formal testing as part of the 3 year re-evaluation due to D.A.'s lack of progress. Tr 2 at 527-531; Exh. B at last page of PWN. Failure to progress is one reason to conduct formal testing during a reevaluation. Tr 1 at 89. 20 U.S.C. §1414(a)(2)(A)(i),(b)(2)(A)(ii),(3)(A)(ii),( C); 34 CFR 300.305(a)(2)(i)(B)(ii); 34 CFR 300.305(a)(2)(B)(iv) (re-evaluation can be to determine "[w]hether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate. . . in the general education curriculum.")).
49. Parents were frustrated when [REDACTED] determined no testing would be done for the 3 year reevaluation for which they had requested a full evaluation, because they were not seeing progress in reading and were concerned because D.A. was heading in to middle school. Tr 4 at 965-968.
50. In March 2019, D.A.'s Progress Towards Goals report stated that Student was "making progress in decoding words especially with the support of his dyslexia therapist. When [Student] is given ample time to decode and a distraction free environment, he makes more gains." Exh. V at 2; see also Tr 4 at 993. Parents had retained Annette Talley, a CALT, to begin working with D.A. 1/1 at the Scottish Rite clinic in Albuquerque in June 2017. Tr 4 at 918-919. Ms. Talley's work will be addressed in further detail, *infra*.
51. No data records exist as to what D.A. covered through SPIRE during 4<sup>th</sup> (2018-19) and 5<sup>th</sup> (2019-20) grades. Tr 2 at 485. To the extent records existed about D.A.'s receipt of SPIRE instruction, including the binder of student work, those records were shredded by the special education teacher. Tr. 2 at 485-488, 495-496. She did not pass on any information to the middle school about D.A.'s work or history of progress in SPIRE. Tr 2 at 487.
52. At the end of 5<sup>th</sup> grade year (2019-2020), D.A. was working in "level 4" of SPIRE. Tr 2 at 497. After [REDACTED] went to remote learning in April 2020, no SPIRE instruction was provided during the remainder of D.A.'s 5<sup>th</sup> grade year. Tr 2 at 497-498. Instead, remote learning consisted of a read aloud book, writing assignments and "social emotional learning." Tr 3 at 624-625.
53. Student started middle school, 6<sup>th</sup> grade (2020-21), at Wilson Middle School in

the fall of 2020.

54. The only “specialized” reading curricula in use at Wilson Middle School during the 2020-21 school year are SPIRE and iReady. Tr 3 at 677, 745 (principal indicates it is “mainly SPIRE”).
55. Student started his 6<sup>th</sup> grade year (2020-21) with a special education class for math and inclusion support from a special education teacher for language arts. Tr 3 at 737-740. When the special education inclusion teacher for language arts retired in October 2020, an Educational Assistant (“EA”), David Payne, was assigned. Tr. 3 at 738-739.
56. In 6<sup>th</sup> grade (remote), the Language Arts teacher expects Student to complete assignments by having his mother or another adult read to him or [REDACTED] Educational Assistants to work with him to complete. Tr 3 at 659-660, 662. Mr. Payne, the assigned EA reads to D.A. and edits his written work. Tr 3 at 786-787. In the Google Meet, the EA assists D.A. with classwork for the day by inserting answers based on discussion with D.A., and then ensures that Student clicks on the “turn in” button. Tr 3 at 792-793.
57. Carl Ross, Student’s teacher for SPIRE during 6<sup>th</sup> grade (2020-21), began work as a teacher at Wilson Middle School the previous year in approximately March 2020. Tr 3 at 680. Mr. Ross is “taking classes at CNM right now” to obtain his teaching license. Tr 5 at 681. He has two years left to be certified to be able to teach special ed.” Tr 5 at 682.
58. Mr. Ross began teaching SPIRE during the 2020-21 school year *before* he had received any SPIRE training from [REDACTED] Tr 3 at 683-686, 688 The SPIRE training Mr. Ross has received this school year from [REDACTED] has been partially self-study on the computer and then discussion with an instructor over Google meet; he has not completed the 3 sessions of training. Tr. 3 at 683-685, 720-721, 744 (“the District provides SPIRE training and supports.”) At CNM, Mr. Ross began a reading instruction class in January 2021 which is his first coursework in reading instruction at CNM. Tr 3 at 685.
59. During the 2020-21 school year, Mr. Ross teaches 6 periods of SPIRE reading. Tr 3 at 685-686. He does not know if SPIRE is geared toward students with dyslexia. Tr 3 at 707-708. D.A.’s class has approximately 9 students at different levels in SPIRE. Tr 3 at 689-671. The class was divided into 2 groups for direct instruction. Tr 3 at 691-692.
60. Mr. Ross’s class consists of SPIRE lessons and independent work reading or listening to assigned articles about different topics. Tr 3 at 691-692. A student can pass the class by turning in answers on the articles regardless of progress in SPIRE. Tr 3 at 710.

61. Generally, Mr. Ross provides a SPIRE lesson over 3 days and then if he observes students seem to understand, he moves on to the next lesson. Tr 3 at 693-694. If Mr. Ross has a question, he “shoot[s] the SPIRE lady a question.” TR 3 at 720. He assumes the SPIRE lady, identified as Christine Chapman, is a District employee; she responds to questions. *Id.*
62. Mr. Ross’ supervisor is Debbie Macgillivray, the head special education teacher. TR at 687.
63. His provision of SPIRE instruction this school year, while he is still receiving SPIRE training, has not been observed by the District’s SPIRE instructors. Tr 3 at 706 (Mr. Ross requested observation, but postponed due to death in observer’s family and not re-scheduled), 720-721. The school principal has observed him. *Id.* Mr. Ross would appreciate having an observer to assist him: “Well, I need – sometimes I don’t even know. *So I would say that any support that someone wants to give me then I’m definitely open to it.* I’m not in the position to really say no, that I don’t need anything.” Tr 3 721 (emphasis added). This statement by Mr. Ross specifically drew the Hearing Officer’s attention, because it was obviously a heartfelt request by Mr. Ross.
64. D.A. was placed in the SPIRE “Level 6” group by Mr. Ross even though his performance on the pre-assessment placed him at “Level 4.” Tr 3 at 694-696, 699 (Level 4 was “approximately the level he had tested into”), 700-701; Exh. 27. The teacher’s understanding was to place students in the level that was “closest” to their testing. Tr 3 at 695 (“[U]nfortunately [SPIRE has] eight different groups . . . . So I kind of have to in some situations get the kid to the closest group I could get them to.”).
65. During 6<sup>th</sup> grade SPIRE, the teacher marks off the steps of a lesson when he presents the step; if a student misses class, there is no mechanism for redoing the lesson. Tr 3 at 702. The teacher attempts to reach out to Student on attendance and participation through text messages but Student does not respond. Tr 3 at 704-706. Student’s grade for the 2<sup>nd</sup> 9 weeks and fall 2020 semester was a “D.” Tr 3 at 710.
66. Mr. Payne was assigned to work “one on one” with D.A. on October 12, 2020. Tr 3 at 783-785; Exh. 12 at 17. Mr. Payne understood that he was assigned to work with D.A. because he had dyslexia and needed assistance in his classes. Tr 3 at 785. Mr. Payne estimates that he has spent 5 hours per week engaging 1/1 with D.A. since he was assigned in mid-October 2020. Tr 3 at 799-800. He has not been trained in SPIRE and is not providing D.A. with assistance in SPIRE. Tr 3 at 797.
67. Carl Ross, the SPIRE teacher, does not know what Mr. Payne does. Tr 3 at 718



("I don't know what Mr. Payne does."). Once Mr. Payne was assigned to him, Student rejected Mr. Ross's SPIRE class altogether and spent the time with Mr. Payne instead. Tr 4 at 979. Parents were unaware until the Due Process Hearing that D.A. was not logging in to Mr. Ross's SPIRE class at all. Tr 4 at 979-980; Tr 4 at 980-981, 1004.

#### *Student's Assessments in Reading*

68. ■■■■ staff intermittently read the iReady reading assessment to D.A. which invalidates the results. Tr 2 at 506-508; Tr 3 at 562-563; Tr 1 at 248-250 (if the test is being read to a student, "[i]t's not measuring their own ability to independently read. . ."); Exh. 10 at 30.
69. In 4<sup>th</sup> grade (2018-19), Student's iReady reading assessments (3 x per year) do not demonstrate reading progress. Student's iReady assessments were 409 reading, followed by 465 reading, followed by an assessment in spring 2019 that was invalidated because the special education teacher read the assessment for Student. See Exh. C at 3-4; Tr 3 at 573-577; see also Albuquerque Public Schools Board of Education Proposed Finding of Fact Number 7.
70. In 5<sup>th</sup> grade (2019-20), iReady reading assessment was only done twice. Student's first assessment overall reading score was 501; his grade level for reading was third grade. Tr 3 at 584-585, 593-594; Exh D at 3; Exh. W. His second assessment overall reading score was 427; his grade level for reading was first grade. Tr 3 at 584-585, 593-594; Exh D at 3; Exh. W. Student's score in winter was worse than in the fall. Tr 3 at 584-585, 593-594; Exh D at 3; Exh. W. In its Proposed Findings, the District has not addressed Student's fifth grade scores on iReady. See ■■■■ Proposed Finding of Fact Number 7.
71. Ms. Hurd's opinion is that the drop in Student's overall reading score in fifth grade did not represent his actual ability in reading. Tr 3 at pages 584 to 296. Sometimes students are "not . . . real engaged in the diagnostic." Tr 3 at page 585. Ms. Hurd believes Student was doing better than the assessment in his reading skills, because she has "never one time noticed [D.A.] going backwards in his academics." Ms. Hurd's testimony on these points is not credible.
72. In sixth grade, Student received an iReady overall reading score of 463 for the winter. Petitioners' Exh. 27 at page 2; see also ■■■■ Proposed Finding of Fact Number 7. This was reported as a first grade reading level. Exh. 27 at page 2. This score was flagged as unreliable, so Student was scheduled for a new assessment; the new assessment was determined to be unreliable because the educational assistant read the test to Student.
73. The intermittent practice of reading the iReady reading assessment to D.A. creates confusion about Student's progress and true reading skill levels,

including for this school year, 2020 to 2021 (6<sup>th</sup> grade). See, e.g., Tr 3 at 794-796; Tr 5 at 1130-1131 (for mid-year of 2020 to 2021 school year, Wilson Middle School educational assistant David Payne read portions of reading assessments to D.A., because his “iReady diagnostic reading was reset” and Payne was told “to try to help him get an accurate . . . score on reading”); see *especially* 1130, lines 16 through 20 (David Mackey, special education case manager for Student testifies, “So I think there was miscommunication between myself and Mr. Payne. We had a dialogue about there were some things that [Mr. Payne] could read and some thing that he shouldn’t read because we need an accurate assessment;” ) and 1131, lines 8-10 (Mackey’s hope is “soon, hopefully middle of the week at worst,” Student would receive accurate testing in reading).

74. SPIRE levels measure a student’s instructional level, which is defined at the “level that [a student] reads at with challenge but not frustration.” Tr 3 at page 587; 595. It does not correspond with grade level. *Id.* The SPIRE levels translate into greater accuracy, fluency, and comprehension in independent reading, because “when you’re learning [SPIRE] concepts in reading and spelling and decoding, one can only assume that your reading would improve.” Tr 3 at 596.
75. To track a student’s progress in SPIRE levels, instructors rely on a detailed work sheet. Tr 3 at 597 to 600. The forms are maintained until the end of the year, when they are offered to the student or his parents; if the parents do not keep the record, the standard practice is to shred the records, which was apparently done in Student’s case. Tr 3 at 599-600.
76. In August 2019 (fifth grade), Student’s reported SPIRE score was Level 4. His overall reading score on iReady was grade 3. Exh. D at page 3.
77. In sixth grade, in the fall of 2020, D.A.’s SPIRE pre-assessment placed him at Level 4. Tr 3 at 694-696, 699 (Level 4 was “approximately the level he had tested into”), 700-701; Exh. 27.
78. Progress Toward Goals (PTG) was not measured during the 2019-20 school year after campuses were closed; the LEA directed all staff on what language to use in PTG reporting: “That language was given to us as a school. We were given that comment to maintain consistency.” Exh. 27 at 2 (5/18/2020 entry) and Tr 3 at 602-604, 619-620.
79. Progress Toward Goals reporting for 6<sup>th</sup> grade year (2020-21) for D.A. was not written by D.A.’s teacher(s). See, e.g., Exh. 27 at 2; 7-8; and Tr 3 at 713-714 (SPIRE teacher did not provide PTG information for reading goals); Tr 4 at 856-857 (math); Exh. 27 at 7-8.

*Student's Individualized 1:1 Instruction  
through Scottish Rite and Private Tutoring*

80. In Student's time at Bandelier Elementary school, Parents became convinced that Student was not receiving an appropriate education; he need reading instruction from a dyslexia therapist. Tr 4 at 1005-1006. They found Annette Talley, who is certified as a dyslexia therapist. Tr 4 at 1021-1022.
81. Scottish Rite has a longstanding project to research dyslexia and provide reading instruction to children with dyslexia. Tr 4 at 914-915. Its reading instructors complete a two year, 700 hour training to become a dyslexia therapist who can, upon completion of a national exam, become a "certified academic language therapist" or "CALT." Tr 4 at 916. Scottish Rite has a clinic in Albuquerque where children accepted into the program can receive 1/1 reading instruction using a curriculum, known as "Take Flight." Tr 4 at 917-918.
82. Annette Talley, a CALT, began working with D.A. 1/1 at the Scottish Rite clinic in Albuquerque in June 2017. Tr 4 at 918-919. She worked with him two days a week for one hour each session. *Id.* Ms. Talley was furloughed by Scottish Rite in March 2020 due to public health restrictions of COVID. Tr 4 at 919-920. She resumed work with D.A. in October 2020, two days per week, for an hour each session, before school. Tr 4 at 920.
83. Ms. Talley presents a very structured reading curriculum, "a therapy level program specific for multisensory approach to students with dyslexia" intended to build D.A.'s independent reading skills lesson by lesson. Tr 4 at 921-924, 940. The very detailed reading instruction presents "quick, short bits [to] help with retraining of that brain" followed by frequent review to reinforce learning to mastery. Tr 4 at 924, 925, 926-927. ("[W]hat we're doing is . . . developing those neurologic links, those neurological connections that is helping to develop the automaticity."), 928-930, 931-932. Use of cursive writing is part of the multisensory instruction to help train the brain. Tr 4 at 929-930. The reading instruction and format for lessons presented through Scottish Rite are supported by evidence to be effective for students with dyslexia. Tr 4 at 934-935.
84. Ms. Talley's opinion is that D.A. needs 1/1 instruction with a dyslexia therapist or CALT 4-5 days a week during regular school hours. Tr 4 at 935-939, Tr 4 at 940-941, 943-944, 1012-1013, 1019. "He needs . . . [f]ive days a week, every school day. . . a one-on-one dyslexia therapist." (Parent at Tr 4 at 1019). While a small group (up to 3 students) is theoretically possible, it is improbable to accomplish because all students in a group would need to be at exactly the same skill level and progress at exactly the same pace. Tr 4 at 937.
85. Ms. Talley's opinion is that for a student with dyslexia like D.A., what might be characterized as "optimum" reading instruction *must be provided* in order to

achieve steady progress and functional reading commensurate with intelligence and potential. Tr 4 at 944-946. Anything less leads to no progress and increasing frustration and disengagement from the struggling reader. Tr 4 at 945-946.

86. Ruth Johnson began providing Wilson Reading 1/1 instruction to D.A. in April 2020 after Scottish Rite had closed its facility to the public based on COVID. Tr 4 at 864, 882. She works with D.A. 3 times per week 1/1 for one hour. Tr 4 at 882-883, 905.
87. Dr. Johnson, has a Ph.D. in special education and worked for decades in New Mexico public schools. Tr 4 at 864, 881-882 Dr. Johnson taught special education in [REDACTED] and was an [REDACTED] principal for 17 years before working as a diagnostician for 19 years through Cooperative Educational Services at the Belen Schools. *Id.* She sought out specialized training in dyslexia and teaching of reading from the Wilson Academy in Denver when she was working as a diagnostician. Tr 4 at 866-868. Dr. Johnson supplemented her Wilson training by contracting with Chris Fox, who provided Wilson Reading training for [REDACTED] teachers. Tr 4 at 875, 881.
88. Presenting reading instruction through Wilson Reading requires very specific lessons which are presented in the same manner each session. Tr 4 at 883-885. A student does not move on to a new lesson unless testing shows the student has mastered the skill taught. Tr 4 at 885.
89. A severely dyslexic student needs 1/1 instruction. Tr 4 at 886 *et seq.* One to one instruction is necessary for a variety of reasons: 1) it is not possible to gauge a student's understanding and mastery in a classroom or group; 2) group instruction does not allow for immediate correction and allows students to continue to guess or repeat errors; 3) massive amounts of repetition and practice needed for a single student may be abbreviated to accommodate the group; 4) moving ahead with a group means that some student(s) never master the skill introduced. Tr 4 at 887-888, 892.
90. Ms. Johnson's opinion is that students who are dyslexic should receive necessary reading instruction 5 days per week during regular school hours. Tr 4 at 907-908.

*Petitioners' Claim that [REDACTED] Did Not Provide Student with Audio Texts to Allow Access to General Curriculum, including Bookshare*

91. The IEP team amended Student's IEP on August 29, 2019 (fifth grade). In the area of "Special Considerations" / "Assistive Technology," the IEP added, *inter alia*, that "[m]embership in Bookshare for online rights to Accessible Instructional Materials is recommended." Exh. C, page 6. This is the only reference to

Bookshare in Student's IEPs that the Hearing Officer could locate; Petitioners did not identify any other reference.

92. "Bookshare" is a program that allows students to download audio books. Tr 1 at 113-114.). Although need for audio texts was recommended by the 2019 AT evaluation, an AT evaluation is not required for provision of audio books; the prerequisites are a reading goal and meeting criteria for Bookshare. Tr 1 at 112-113.
93. Nancy Muller works for the Assistive Technology department with [REDACTED] Tr 92. She testified that to access Bookshare, a student needs to contact the "Bookshare sponsor," who is "someone at the school that knows how to upload books for students to their digital devices." Tr 121.
94. During 5<sup>th</sup> grade (2019-20), the general education teacher or other students would need to read text to D.A. Tr 2 at 429-430. He did not receive a Chrome Book (which could have "read" text he highlighted to him through the Snap&Read app added to all Chrome Books distributed by [REDACTED] until second semester . Tr 2 at 430-431.
95. Petitioners presented a list of occasions when the District failed to assist Student to obtain audio books on Bookshare.
  - a. Any student with a print disability is eligible to receive Bookshare. Tr 1 at 218. A student actually getting audio texts through Bookshare depends on whether someone asks that the textbooks be provided or it could be written in to the IEP. Tr 1 at 218-219. "There's no standard practice automatically assigning every book." Tr 1 at 219.
  - b. Student's fifth grade general education teacher did not have access to Bookshare and she assumed that was a special education function. Tr 2 at 444-445.
  - c. Claudia Gutierrez, the executive director of student achievement for [REDACTED] testified that the sponsor teacher (a type of case manager for students in special education) should assist a student to access Bookshare. Ms. Gutierrez did not know how this was achieved. Tr 1 at 120-123; 219.
  - d. D.A.'s sponsor teacher for 4th/5th grades "struggled with Bookshare." Tr 2 at 502; Tr 3 at 557-558, 563-564. She had received no training from [REDACTED] on how to access and use it. Tr 2 at 502-503.
  - e. D.A.'s 5<sup>th</sup> grade general education teacher does not have access to Bookshare and has "never set up a Bookshare account for a student because [she doesn't] have access to it." Tr 2 at 445. D.A.'s class used 5

novels during the school year, but D.A. was in the special education classroom and did not get to read those novels. Tr 2 at 446-447.

- f. D.A.'s 5<sup>th</sup> grade teacher was worried about how he would receive "access to sixth grade level texts that support his learning needs"; although she participated in his IEP, she did not learn how he would get access to 6<sup>th</sup> grade texts. Tr 2 at 448-451; Exh. D.
  - g. During 6<sup>th</sup> grade (2020-21) school year, no audio texts have been provided through Bookshare to D.A. Tr 1 at 142-143, 157-158; Exh. 12 at 1. The head special education teacher at Wilson Middle School believes it is the responsibility of the case manager teacher "to make sure that [D.A.'s] teachers had access to Book Share if it were in the IEP. Tr 5 at 1117-1118. She has never gone to any of the professional development offered about Bookshare. Tr 5 at 1118.
  - h. The 6<sup>th</sup> grade special education case manager teacher assigned to D.A. at beginning of November 2020 has never used Bookshare for any student and does not know about the connection between dyslexia and the use of Bookshare. Tr 5 at 1138-1139. At the time of the Due Process Hearing, he had not previously done anything about ensuring Bookshare use for D.A. but he has now requested training on Bookshare for teachers at Wilson. Tr 5 at 1138.
  - i. Parents have never been provided information from [REDACTED] about audio texts through Bookshare for D.A. Tr 4 at 974-975, 1013-1014 "[W]e can't access his Book Share account. You have to talk to someone at school about putting a book in his Book Share account. . . .[A]lthough we've been told multiple times that we have that tool I've never figured out how I could use it.").
96. Student's IEPs do not record that [REDACTED] ever consistently provided D.A. with his textbooks and supplemental reading books by provision of those books through audio text. Tr 1 at 120, 122-123 (AT therapist did not upload books for him and does not recall that he used Bookshare).

### C. Student's Writing Instruction

97. Petitioners present several claims related to Student's difficulties in learning to write; these difficulties are related to his diagnosis of dyslexia. Petitioners contend as follows. Student did not have appropriate writing goals in his IEP for his third, fourth, and fifth grade years. Student did not receive necessary evaluations in Assistive Technology related to writing. Student was not re-evaluated in writing / written expression, and did not receive formal testing in writing as part of his three-year re-evaluation. In addition to these procedural

errors, the District failed to implement Student's IEP when it did not provide timely special education interventions for his writing, did not provide appropriate instruction in Assistive Technology related to his writing, and failed to collect necessary data to measure his progress in writing.

98. Because the DPHO's finding is that all of these issues are related to the District's ultimate failure fully to recognize and address Student's difficulties in learning to write, related to his diagnosis of dyslexia, the DPHO addresses these issues in the same section, rather than breaking them into these IDEA categories.

*Student's Progress in Writing*

99. D.A. struggled with writing every year of elementary school. Tr 2 at 334; Tr 3 at 579; Exh. C at 5 ("concerns in writing" from IEP at beginning of 5<sup>th</sup> grade).
100. In 4<sup>th</sup> grade general education class, D.A. "would be opposed" to doing writing. Tr 3 at 634. Note taking, research reports and worksheets were expected of students in 4<sup>th</sup> grade. Tr 3 at 642. D.A. would need to rely on an Educational Assistant to get written work done as well as for content learning in his 4<sup>th</sup> grade general education classroom. Tr 3 at 643, 646. During 5<sup>th</sup> grade, D.A.'s general education teacher wrote for him. Tr 2 at 431. His mother also wrote for him. Tr 4 at 953.
101. In 5<sup>th</sup> grade, the longest written work Student ever produced for his general education class was a single paragraph. Tr 2 at 451. His IEP provided that he would have assistance from peers to edit written work. Exh. C at 7. As a practical matter, his 5<sup>th</sup> grade teachers directed him in "editing" to produce writing. Tr 2 at 452. Even after a teacher talked him through necessary edits, he was not able to make the edits. Tr 2 at 476.
102. The 6<sup>th</sup> grade SPIRE teacher is not working on writing other than to the extent the SPIRE lesson includes spelling in a lesson. Tr 3 at 716-717.
103. In 6<sup>th</sup> grade (remote), the assigned EA reads to D.A. and edits his written work. Tr 3 at 786-787. He discusses Student's class work for the day with Student, inserts answers based on the discussion, and then ensures that Student clicks on the "turn in" button. Tr 3 at 792-793.
104. Student's spelling deficits make it difficult for any reader to know what he is communicating through writing, especially with no context. Tr 1 at 103; Exh. C at 5; Tr 3 at 579. Even with "voice typing," he is unable to accurately conduct spell check unless multiple laborious steps are undertaken, one misspelled word at a time. Tr 1 at 107-108, 135-136, 156-157.



### *Student's Writing Interventions and Goals*

105. Student had no writing or written expression goals for 3<sup>rd</sup> grade, 4<sup>th</sup> grade or 5<sup>th</sup> grade although a writing goal would have been justified based on the initial evaluation at end of 2<sup>nd</sup> grade. Exh. 1; Exhs. 3, A, B, C; Tr 1 at 66-67; Tr 3 at 608-610; Tr 5 at 1077 (no writing goal in 3<sup>rd</sup> grade because he “did not qualify” in written language); Tr 5 at 1088 (no writing goal for 4<sup>th</sup> grade “[b]ecause he did not qualify in writing.”) The special education teacher and the Assistive Technology provider both recognized the need for a writing goal by the beginning of 5<sup>th</sup> grade at the latest. Tr 1 at 147-148; Exh. 11 at 1; Tr 3 at 564-567, 579.
106. Before 6th grade, Student had no writing or spelling goals even though his writing and spelling skill deficits were a known feature of his dyslexia dating back to his original evaluation in 2017.
107. Despite agreement at the end of 4<sup>th</sup> grade/5th grade (2018-2020) that D.A. struggled with writing, and despite Parents’ request for re-evaluation, he was not evaluated in writing/written expression as part of tri-annual reevaluation in spring 2020. The re-evaluation did not include any formal testing in writing. Exh. Z at 2; Exh. U; Tr 1 at 64-66; 69-70 (diagnostician’s opinion is that 2020 evaluation of Student’s writing would be “extraneous information,” because Student’s instructors could provide more accurate information).
108. Special interventions for writing were not initiated for fifth grade (2019-20). Exh. Z at 2; Tr 1 at 64-66. D.A. did not receive instruction on how to spell. Co-writer, provided as technology beginning in 5<sup>th</sup> grade, does not teach spelling; it is simply an accommodation, not specialized instruction. Tr 2 at 469-470.

### *Assistive Technology for Writing*

109. No evaluation to determine D.A.’s need for Assistive Technology related to written communication was conducted until the end of 4<sup>th</sup> grade (May 2019). Exh. K; Tr 1 at 93-94. For a student with dyslexia, one issue is ability to spell and produce handwriting. Tr. 1 at 95-96. See also Exh. 17 at 14 (accommodations for a student with dyslexia might include speech to text software for tasks requiring written response or performance). When D.A. was evaluated for Assistive Technology, his spelling difficulty was evident, as was his difficulty sounding out words. Tr 1 at 100-103, 109. At the end of 4<sup>th</sup> grade, D.A.’s spelling was 26% accurate for words at a K-3 level. Tr 1 at 104-105; Exh. K at 8-9 (“Assessment of Spelling Skills” section). In 3<sup>rd</sup> grade, his writing was “letter strings” without spacing to delineate words. Tr 5 at 1077-1078.
110. [REDACTED] did not provide Student with AT equipment/tools to use throughout the school day in all classes, until the beginning of 5<sup>th</sup> grade when a Chrome book was first assigned for his individual use. Tr 1 at 123-124; Tr 2 at 510.

111. The Assistive Technology evaluation resulted in 6 recommendations, not all of which were implemented. Exh. K; Tr 1 at 111-112.
112. [REDACTED] IEPs after Student was eligible for AT provided 180 minutes *per year* of AT services. Exh. C (PWN), page 1 of 2; Tr 1 at 119-120; Tr 1 at 145 and Exh. D at PWN.
113. D.A.'s 5<sup>th</sup> grade IEP (Exh. C (PWN), page 1 of 2) states that the District would collect data on D.A.'s use of his portable writing device, but his 5<sup>th</sup> grade general education teacher kept no data. Tr 2 at 447-448.
114. D.A.'s ability to write accurately was greatly enhanced if he could "voice type" (dictate). Tr 1 at 106; Exh. K. However, that process was complicated by background voices or noise or extraneous words being added into a dictated text and the many steps and difficulty of for D.A. of editing and making corrections. Tr 2 at 512-515, 517-520. "[T]he incoherency and the lack of using grammatical mechanics" was daunting. Tr 2 at 514-515.
115. The 5<sup>th</sup> grade general education teacher expected Student to dictate notes by using his headset/microphone in the midst of the 5<sup>th</sup> grade classroom. Tr 2 at 465-466. He never did. Tr 2 at 466-467. She had a number of questions about how D.A. should be supported to use writing technology in class, but her questions were never addressed by [REDACTED] Tr 2 at 467-468; Exh. 11 at 23. The AT provider did not provide any in class support for D.A. in his general education 5<sup>th</sup> grade classroom. Tr 2 at 448.
116. Support for staff and parents about the use of D.A.'s Assistive Technology equipment was through in person / phone / email contact including lengthy written instructions from AT provider given to them 2.5 months after the beginning of the 5<sup>th</sup> grade year. Tr 1 at 153; Tr. 2 at 464-465; Exh. 11 at 15-22
117. Although Parents had a meeting with the AT provider who "showed" them the technology, they were unable to assist D.A. to use it independently or effectively. Tr 4 at 953-954. When he would dictate "the speech to text," "it was just a jumble of things." Tr. 4 at 954. His parents had to edit it for him to have text which made sense and was what he intended to express. Tr 4 at 954.
118. During 6<sup>th</sup> grade (2020-21), the AT provider has received no reporting from middle schoolteachers about D.A.'s use of Assistive Technology and has not communicated with them about his use of AT for writing. Tr 1 at 159-160. Student's language arts teacher has had no contact with Assistive Technology. Tr 3 at 674. Student's SPIRE teacher has had no contact about Assistive Technology until an email in 2021 which might possibly have addressed D.A.'s Assistive Technology. Tr 3 at 717-718. Student's math teacher had no contact

with the AT provider until recently receiving an email. Tr 4 at 844. The current special education case manager teacher “just found out” the week before the hearing about the Assistive Technology provider. Tr 5 at 1142.

119. Individual direct instruction for D.A. and classroom staff (on how to support D.A.) by the AT provider was so time limited that D.A. was unable to learn to use AT tools/equipment independently and functionally in his classes and for written work. Tr 1 at 123-124, 129-134, 141-142; Exhs. R, S, T and 25 (AT logs); Tr 1 at 149-152 (no direct instruction for D.A. on how he could learn to use his writing device/tools during general education classes which had more students and were noisier — expectation was he could just leave the classroom on his own and go into the hall to dictate); Tr 1 at 162; Exh. 25 at 4 (last AT service was October 30, 2020 or more than 2 months prior to the Due Process Hearing).
120. During the 2020-21 school year, D.A. struggled to join in on some of the remote classes. See, e.g., Tr 4 at 845-847 (D.A. “struggled to type in the code for study skills class” and could not join in because the voice to text feature he relied on would not write correct code). Struggling to log in created frustration for D.A. Tr 4 at 851.
121. During 6<sup>th</sup> grade, either a Parent or Mr. Payne needs to help D.A. with all homework. Tr 4 at 982-983. Parent is uncertain how work during school is getting done. Tr 4 at 984-985. The EA assigned to Student in 6<sup>th</sup> grade works with Student to edit voice dictated text with the EA actually making the typed changes to the text. Tr 3 at 798-799, 806.
122. Student is not able to self-edit dictated text in part because he cannot read. When the computer program/app identifies misspelled or incorrect words and generates a list of possible “correct” words, Student cannot accurately read those words. Tr 4 at 954-955. The “tool” allows for a very laborious process (“hours long” for a 4 paragraph project) with multiple steps to get one word right and takes “a long time to use.” Tr 4 at 1015-1016.
123. Despite the late introduction of Assistive Technology for writing and D.A.’s struggle to uniformly use voice dictation and additional features successfully, [REDACTED] wrote no AT goal. See Exh. C at 8, Exh. D at 7; Tr. 1 at 117-118. [REDACTED] policy is to not write AT goals for students who qualify and are provided with Assistive Technology equipment and services. Tr 1 at 117, 137 (“AT is a supplemental services; we don’t write goals.”).

#### D. Special Education in Math

124. Although iReady was part of the “curriculum” for D.A.’s math instruction in elementary schools, all records about his progress were destroyed at the conclusion of his elementary school years. Tr 2 at 524.

125. Student started his 6<sup>th</sup> grade year (2020-21) with a special education class for math and inclusion support from a special education teacher for language arts. Tr 3 at 737-740.
126. Although Student's IEPs for 6<sup>th</sup> grade (Exh. D, E, F) include a math goal, D.A. was moved out of special education math class pursuant to staff suggestion and an IEP amendment on September 4, 2020. Exh. F; Tr 3 at 745-746, 748, 751, 753-754; Tr 4 at 824-826. At the time he was moved, i-Ready assessment measured his overall math skills at 4<sup>th</sup> grade,. Tr 3 at 759. The principal believes that the IEP goal should have been removed when Student was moved out of the special education math class. Tr 3 at 771-772. Student did not receive special education in math and the general education teacher did not believe he needed specialized instruction for math. Tr 4 at 835-836 (he received same instruction as all other 6<sup>th</sup> graders in the general education class). Student received a grade of D- in math first 9 weeks. Exh. 4 at 20; Tr 4 at 854-855.
127. David Payne was assigned to work "one on one" with D.A. on October 12, 2020. Tr 3 at 783-785; Exh. 12 at 17. D.A. was receiving an "F" in 6<sup>th</sup> grade math before Mr. Payne was assigned to help him; Parent is uncertain if D.A. is doing his own work in math. Tr 4 at 978.

#### E. Student's Attendance

128. In early January 2021, [REDACTED] created a physical schedule for D.A. so he could simply click on his schedule at class time to join a class. Tr 3 at 766-768; Tr 5 at 1140-1141 (link created so Student did not have to "hunt around"; sometimes teachers have to change access codes for security reasons). D.A. continues to log out before classes are concluded. Tr 3 at 767-768.
129. The report card generated by [REDACTED] for D.A. showed multiple "tardies" even though teachers have been told not to record tardies during the 2020-21 school year. Tr 4 at 855. [REDACTED] reporting on student absences/tardies during 2020-21 school year "is extremely unreliable" and not accurate. Tr 5 at 1128-1129.
130. In its Closing Argument, the District voices its "concerns about . . . [S]tudent's attendance and participation in remote learning. As evidenced by the testimony of his teachers, his participation is dependent upon interest level and, in some instances, is nearly non-existent." Albuquerque Public Schools' Board of Education Closing Argument at page 15. The District refers to "the testimony of [Student's] teachers"; in its Proposed Findings; the District does not provide any proposed finding regarding attendance, nor does it provide any citation to the record. See Albuquerque Public Schools Board of Education Proposed Findings of Fact.

F. Student's Evidence in Support of the Allegation  
that the District Violated the IDEA,  
by Failing to Evaluate Student for Tourette's Syndrome

131. When D.A. was initially evaluated in May 2017, the diagnostician did not evaluate or assess concerns related to D.A.'s classroom behavior. Exh. 1; Tr 1 at 62.
132. Parents understood that the behavior goal written for 3<sup>rd</sup> grade was because "he couldn't focus. . . . he moved around. He wanted to go to the bathroom all the time. . . . [l]eaving class, wanting to leave class, go to the nurse." Tr 4 at 960. These kinds of complaints were consistent throughout grade school. Tr 4 at 960-961. Despite behavior goals in every IEP, Parents have never been told that Student has made progress on the "behavior" concerns. Tr 4 at 964.
133. The two 3<sup>rd</sup> grade teachers had "major concerns" about D.A.'s behavior during unstructured times. Exh J at 4. Teachers also complained about his behavior in the classroom described as "disruptive during instruction." Exh. 9 at 1; Tr 5 at 1074-1075. Instead of listening to his teachers during class, D.A. was talking or "may have been making noises," but his teacher did not able specifically to recall. Tr 5 at 1075-1076.
134. The only explanation Parents heard from [REDACTED] is that Student's behaviors were to avoid work. Tr 4 at 961. There was no medical explanation to explain frequent need for the bathroom. Tr 4 at 962.
135. At home, his mother observed that D.A. had "a lot of energy, like electricity all the time." He cannot sit still, makes faces all the time, and sits up on his toes. There is "something" there; D.A. stands out from his brother and sisters. Tr 4 at 962-963. Student's mother thinks he should be evaluated for Tourette's Syndrome. Tr 4 at 963.
136. S.A.'s 3<sup>rd</sup> grade general education teacher (2017-18) characterizes him as "kind of a goofball", he both "kind of wanted to be the center of attention . . . but just kind of like off to the side a little bit. . . .making comments and that kind of thing while things were happening. . . . a little bit of a prankster." Tr 2 at 330. He seemed "fidgety," and "would just kind of get wiggly." Tr 2 at 377. "It seemed like his behaviors would just kind of escalate by him moving his body more and needing to get up and out of his seat." Tr 2 at 377. The teachers' strategies with D.A. were not always successful. Tr 2 at 348-352; 376-377.
137. During 3<sup>rd</sup> grade, Student also had problems with "behavior" on the playground and during unstructured time. Tr 5 at 1060. Student's general education teacher believed that he (and others) would "try to go around and create havoc." Tr 2 at 352-360, 363-364; Exh J at 1. When D.A.'s 3<sup>rd</sup> grade teachers referred him to

the Health and Wellness team, concerns noted were: “threatening behavior/bullying,” “discipline problems/defiance of rules,” and “impulsivity.” Exh. J at 2-3. His third grade teachers had “major concerns” regarding his behavior. Exh. J at 3; Tr 2 at 363; Exh. 6. On one occasion D.A. talked about a student being “ugly” because her father was “ugly.” Tr. 2 at 379; Exh. 9 at 6-7. During 3<sup>rd</sup> grade Student received discipline for his “behaviors.” Tr 2 at 394-395.

138. Petitioners cite Student’s poking and teasing another student as one example of a symptom of Tourette’s. See Petitioners’ Proposed Finding of Fact No. 27, *citing* Tr 2 at 376; Exh. 9 at 4.
139. During 3<sup>rd</sup> grade D.A.’s teachers found that he needed “body breaks.” Tr 2 at 373; Exh. 7 at 3. He took “frequent water breaks”. Tr 2 at 377-378; see also Tr 5 at 1083. The music teacher reported on at least one date that D.A. “was jumping around during class and he was pushing people and not listening” and being “out of control.” Tr 2 at 375; Exh. 9 at 3.
140. The special education 3<sup>rd</sup> grade teacher recalls that Student made “silly noises, silly faces, . . . kind of saying silly words” during class. Tr 5 at 1083; Exh. A at 4 (4/19/2018 IEP). She could not remember “if he made noises with his mouth or if he was more of a tapper.” Tr 5 at 1084. “[M]aking faces sometimes. Making noises sometimes.” Tr 5 at 1093. She assumed that he did this intentionally. Tr 5 at 1094. The IEP conducted at end of 3<sup>rd</sup> grade added that accommodations were needed to provide “opportunities for movement.” Tr 2 at 386-387; Exh. A at 8.
141. At the beginning of 4<sup>th</sup> grade (fall 2018), the special education teacher wrote to Parents about her concerns that D.A. left the classroom so often to go to the bathroom (twice in a 45 minute period), particularly in the afternoons. Tr 2 at 538-540; Exh. 10 at 1.
142. During 4<sup>th</sup> grade, Student was “highly distracted, not engaged in work.” Tr 3 at 560. “Maybe getting up, moving around, asking to go to the bathroom, asking to go to the nurse. Always volunteering for some reason to leave the class.” Tr 3 at 560.
143. According the IEP amendment written at the beginning of 5<sup>th</sup> grade, D.A. required 5 or more reminders to “focus” during a 45 minute block. Tr 2 at 452-453; Exh. C at 7.
144. D.A. frequently showed up at the nurse’s office without medical issues. Tr 2 at 408-412, 417-419; Exh. 15. During 5<sup>th</sup> grade he frequently left the classroom volunteering to be a “bathroom buddy” or “nurse buddy” to escort other students who were permitted to leave. Tr 2 at 435, 439.

145. During 5<sup>th</sup> grade, D.A. was increasingly “off task.” Tr 459; Exh. 4 at 17. His 5<sup>th</sup> grade general education teacher did not understand why he was increasingly off task. Tr 2 at 460-462. He talked about “off content topics,” “was mostly active [and] walked around the room quite frequently.” Tr 2 at 433. His activity created “a disruption a high percentage of the time.” Tr 2 at 433. Although not disrespectful to 5<sup>th</sup> grade general education teacher, he was not always responsive to her redirection. Tr 2 at 472-473 (when asked to get to work, he would walk away from the teacher).
146. Petitioners’ evidence that Student’s behavior should have created a suspicion that Student has Tourette’s or a Tic Disorder are as follows:
- a. Tourette Syndrome and Tic Disorders are characterized by involuntary (motor and/or vocal) tics. Tr 2 at 290-291, 293-294.
  - b. Tics do not remain the same; they change from day to day and over time and they wax and wane. Tr 2 at 301; Exh. 18. The kinds of tics experienced are not the same for everyone. Tr 2 at 308-309. There is an unlimited variety of possible vocal and motor tics. Tr 2 at 318-319.
  - c. The incidence of Tourette Syndrome or Tic Disorders is 1 in 100 persons between ages of 5 and 18 in the U.S. Tr 2 at 293, 303-304; Exh. 18 at 2.
  - d. Tics are involuntary and result from a medical condition. Tr 2 at 305-307; Exh. 18.
  - e. A student with TS who has no diagnosis but knows he gets in trouble for expressing tics in the classroom could possibly self-manage the situation by relying on frequently leaving the classroom. Tr 2 at 321.

Petitioners’ Proposed Findings of Fact Nos. 101-102; 106; 107.

147. Respondent proposes a finding that Parents “never brought this concern to the IEP team. Petitioner testified that her concern regarding Tourette’s Syndrome materialized after she searched and spoke with her legal counsel. Vol. 4 pg. 988. Petitioner also testified that Student was ‘electric’ and is a ‘typical boy with impulse control problems.’ Vol. 4. Pg. 989.” Respondent’s Proposed Finding of Fact No. 11. The DPHO agrees with this proposed finding. In addition, Mother testified that she talked with Student’s pediatrician about having Student evaluated for attention deficit disorder, but never followed through. Tr 4 at pages 987-88.
148. Respondent also proposes a finding that “Petitioner[s] never indicated that the student had made random sounds, shouts out loud inappropriately at home, rolls his eyes involuntarily or any other tic disorder and Tourette Syndrome types of



behaviors.” Respondent does not cite to any evidence supporting that these are *sina qua non* symptoms of Tourette’s or Tic Disorders, nor does the DPHO remember any such evidence.

149. On the other hand, Petitioners’ very limited list of possible signs of either disability could also be a list of normal behavior for a young child or adolescent, a child who craves attention, a child who wants to avoid something unpleasant, or, as Student’s pediatrician thought, possibly a child with the disability of Attention Deficit Disorder.
150. Petitioners propose a finding that “█████ lacks a formal process for obtaining evaluation of Tourette Syndrome/Tic Disorder.” Petitioners’ Proposed Finding of Fact No. 35, *citing* Tr 1 at 70-71; 84-85; Tr 2 at 295-297. The testimony cited, however, is that (1) one witness would document anything she noticed, did not know what the process would be for an evaluation, but knew how to find an applicable process for diagnosis of a neurological disorder that school personnel could not diagnose, and (2) another witness, who oversaw services for students with Tourette Syndrome, would provide support if there were a diagnosis, or investigate if there were a suspicion of Tourette’s. In addition, the Wilson Middle School principal testified that she would rely on parents to voice concern, then gather documents from parents and then submit to “our district support person” to find out what steps would be to obtain evaluation for TS or “whatever it takes. . . evaluation or a doctor’s note or a doctor’s report or whatever.” Tr 3 at 761-763. None of this supports the Proposed Finding that “█████ lacks a formal process” to identify Tourette’s Syndrome if there is a suspicion of this disability.

#### IV. Conclusions of Law and Analysis

The IDEA requires the application of complex legal principles to an oftentimes factually intensive record. Accordingly, “Conclusions of Law” must necessarily reference and synthesize factual findings. To the extent the DPHO refers to a factual basis for the Conclusions of Law, it is synthesized from findings set forth in the findings section of this Memorandum Decision and Order, *supra*.

The Parties have presented sixteen joint issues for the Hearing Officer’s consideration. The DPHO will address the less complex issues first. The Issue Numbers will therefore appear out of order, but will be labeled with their original number.

##### A. Tourette’s Syndrome / Tic Disorders

1. **Issue Number 2** is “Whether Student was evaluated by █████ in all areas of suspected disability when the 2020 evaluation included no evaluation related to Student’s behaviors?”

2. **Issue Number 10** is “Whether Student’s behavior is the result of an undiagnosed Tourette Syndrome or Tic Disorder and whether the District has used that behavior to lower its expectations or misunderstand Student’s needs resulting in inappropriate goals and supports?”
3. For Issue Number 2, Petitioners argue that despite the consistent mention of Student’s behavior as contributing to his struggle to learn, and despite the inclusion of a behavior goal in every IEP, “█████ failed to conduct any evaluation to determine the cause(s) of Student’s behaviors.” Petitioners’ Closing Argument at pages 16-17.

Evaluation for special education should assess a student in all areas of suspected disability and provide relevant information about a student’s educational needs. 20 U.S.C. §1414(b)(3)(B),(C). Assuming that the Student’s behaviors were attributable to “avoidance” of school work is inconsistent with the IDEA’s focus on understanding student need to identify and provide necessary intervention and supports.

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Evidence in the record, and as recorded in ongoing school records at Bandelier, points to the need for evaluation for Tourette Syndrome and Tic Disorder.

*Id.*

4. Petitioners have failed to prove, by a preponderance of the evidence, that there is a “suspicion” that Student has Tourette Syndrome or a Tic Disorder, as suspicion is defined in federal precedent. See *Schafer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990)(burden of proof); see *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9<sup>th</sup> Cir. 2016)(construing “suspicion of disability”). This does not mean that Student does not, in fact, have either disorder. During the evidentiary hearing, however, Petitioners presented, at best, some very anecdotal evidence that Student may have one of these disorders. They presented the same evidence to Student’s primary care provider, who thought Student might have ADD; Mother was not asked and did not testify that Student’s PCP thought Student might have Tourette Syndrome or a Tic Disorder.
5. Student definitely has some behavioral difficulties in school, that appear to wax and wane but have continued throughout his time in school.
6. The question whether Student’s behavior, whatever its source, motivated some

bad action by the District, is beyond the Due Process Hearing Officer's jurisdiction. A Due Process Hearing Officer has jurisdiction over claims that a Local Educational Agency has violated the IDEA, including state or federal standards implementing the IDEA, and has thereby denied a student a free and appropriate public education. See 20 U.S.C.A. § 1400 *et seq.* Even assuming an underlying violation of the IDEA, there is nothing in the IDEA that gives a Due Process Hearing Officer the authority to consider – as a stand alone issue – the motives of school personnel in any failed attempt to implement the IDEA. Thus if a bad motive led the District to violate the IDEA, the claim for purposes of a Request for Due Process is the violation itself, not the underlying motive.

7. Petitioners request a more specific remedy in the form of an order to [REDACTED] to pay for a medical doctor or a neuropsychologist to conduct a Tourette Syndrome evaluation for Student. As legal authority to support their entitlement to this remedy, Petitioners cite only to 20 U.S.C.A. § 1414 (b)(3)(B) and ( C), which provides as follows:

Each local educational agency shall ensure that--

(B) the child is assessed in all areas of suspected disability;

© assessment tools and strategies that provide relevant information that directly assists persons in determining the educational needs of the child are provided; and

20 U.S.C.A. § 1414 (b)(3)(B) and ( C).

8. Petitioners also refer generally to the Hearing Officer's Memorandum Decision and Order in DPH No. 1920-11, which involved whether the LEA had violated the IDEA's "child find" obligation by failing to evaluate the student for Tourette's Syndrome or Tic Disorders. Other than referring this Hearing Officer to the Decision in DPH No. 1020-11, Petitioners do not explain why in particular this Decision is factually analogous to D.A.'s circumstances. See DPH No. 1920-11 at pages 47-50.
9. In the case of Student, neither the cited sections of the IDEA nor the Decision in DPH No. 1920-11 mandate the evaluation described by Petitioners:

The IDEA requires that school districts locate, identify and evaluate all children with disabilities from birth through age 21, including children who attend private schools. 20 U.S.C. § 1412(a)(3). The statute does not require specific testing in every conceivable area of disability, but rather it only requires assessments in all areas of "suspected disability." 20 U.S.C. § 1414(b)(3)(B).

*Jason O. v. Manhattan Sch. Dist. No. 114*, 173 F. Supp. 3d 744, 760 (N.D. Ill. 2016)(citation omitted), *vacated and remanded sub nom on other grounds*, *Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677 (7th Cir. 2017)

10. Pursuant to the “child find” mandate, 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 (10<sup>th</sup> Cir. 2002). All children residing in the local educational agency’s (“LEA”) jurisdiction, who are suspected as 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”). 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).
11. 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 Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9<sup>th</sup> 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. Under any standard or any of the factors listed in *Timothy O.*, Petitioners have failed in their burden to support, by a preponderance of the evidence, that the District has had any reason to suspect that Child has Tourette’s Syndrome or a Tic Disorder.
12. Lila Ramirez, who was called as a witness by Petitioners, offers training in Tourette Syndrome in Albuquerque schools. Notably, she testified that she attends IEPs “if a parent feels . . . we need to look at Tourette.” Tr 2 at 296. Petitioners’ decision to call Ms. Ramirez as a witness but not, apparently, to call her for assistance before the hearing, undercuts, as a matter of fact and a matter of law, that the District is required by Section 1414(b)(3)(C) to pay for an evaluation of Student as part of its obligation to provide “assessment tools and strategies” to determine Student’s educational needs. If this language requires what Petitioners are suggesting, without a request by Parents or a reasonable suspicion of disability, the burden on a school to evaluate for possible medical, physical, behavioral, and educational diagnoses that could account for the voluntary or involuntary behavior exhibited by Student would have virtually no limits.

13. The DPHO therefore **DENIES** Petitioners' claim, as described in Issues 2 and 10.

B. Whether [REDACTED] Denied Student a "Free" Education?

14. **Issue Number 11** is "Whether [REDACTED] has provided Student with education which was 'free' when Parents have had to provide outside reading instruction for multiple school years to try and make up for [REDACTED] failure to provide specialized instruction?"
15. Both as a matter of fact and as a matter of law, Petitioners have failed to develop the issue of the District's alleged violation of the IDEA due to Parents' payment for reading tutors, specializing in dyslexia.
16. Parents acted reasonably in seeking assistance for D.A. elsewhere, once they realized that D.A. was not making appropriate progress at [REDACTED]. Theoretically, Parents could have, in these circumstances, sought reimbursement for D.A.'s tutoring. However, they did not do so. Even if they had, Parents have not presented any evidence with regard to cost. Indeed, Parents have not made *any* request for *any* remedy related to tutoring, other than a declaration that Student's education was not free. Even if they did, because there was no evidence presented that the tutoring met all the factors required by binding Tenth Circuit precedent, these two "placements," by definition, are not reimbursable placements. *See Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1236–37 (10th Cir. 2012).
17. Instead, Petitioners appear to be requesting a "stand alone" declaration that by forcing Parents to seek out alternative educational opportunities for Student, the District violated the IDEA.
18. I am not aware of any legal authority permitting a Due Process Hearing Office to declare that an act *per se* is contrary to the IDEA, in the absence of an applicable IDEA claim or remedy. Nor have Petitioners presented any such authority.
19. The DPHO therefore **DISMISSES** Petitioners' claim, as described in Issue Number 11.

C. Whether the District Denied Student FAPE as a Result of [REDACTED] Policy to Ration Educational Services Related to Dyslexia

20. **Issue Number 12** is "Whether [REDACTED] refusal to provide necessary specialized instruction and services was based on [REDACTED] policy and predetermination to refuse to provide certain instruction and services (1/1 reading instruction by a

CALT; audio texts for dyslexic students; reading/writing/spelling goals focused on teaching encoding skills; standard AT tools for students with dyslexia; [REDACTED] policy to delay identification of dyslexia delaying early intervention; [REDACTED] policy to ration knowledge about dyslexia)?"

21. The phrase "policy and predetermination to refuse to provide certain instruction and services" appears to suggest that the Due Process Hearing Officer should conduct an inquiry as to a school district's motive in denying instruction and services, separate and apart from whether the District's denial of services in Student's individual case has violated the IDEA. To this extent, the Hearing Officer has no authority or jurisdiction to determine or declare "why" the District has violated the IDEA. This claim as such is **DISMISSED**, without prejudice to any other legal remedies Petitioners may have in a different forum.
22. Regardless whether [REDACTED] intended to "ration" educational services related to dyslexia, Petitioners did present evidence that [REDACTED] does not provide certain services, based on District policy or practice. This is arguably relevant to whether, in the case of Student, the District made an individualized decision to deny 1:1 instruction or instruction by a dyslexia therapist. To this extent, where this evidence is relevant to whether Student was denied a free and appropriate public education, in violation of the IDEA, the DPHO has taken the evidence into account.

D. Whether Student's IEP Teams Included Staff  
Who Could Explain Technical Information to Parents?

23. **Issue Number 13** is "Whether Student's IEP teams included staff who could interpret the instruction implications of evaluation results and who had specialized expertise in dyslexia and evidence based reading instruction as well as Tourette Syndrome / Tic Disorders?"
24. The IDEA states who specifically should attend a student's IEP:

The term "individualized education program team" or "IEP Team" means a group of individuals composed of--

- (i) the parents of a child with a disability;
- (ii) not less than 1 regular education teacher of such child (if the child is, or may be, participating in the regular education environment);
- (iii) not less than 1 special education teacher, or where appropriate, not less than 1 special education provider of such child;

- (iv) a representative of the local educational agency who--
  - (I) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities;
  - (II) is knowledgeable about the general education curriculum; and
  - (III) is knowledgeable about the availability of resources of the local educational agency;
- (v) an individual who can interpret the instructional implications of evaluation results, who may be a member of the team described in clauses (ii) through (vi);
- (vi) at the discretion of the parent or the agency, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate; and
- (vii) whenever appropriate, the child with a disability.

20 U.S.C.A. § 1414(d)(1)(B).

- 25. Petitioners take issue with whether there were attendees who could “interpret the instruction implications of evaluation results,” and attendees “who had specialized expertise in dyslexia and evidence based reading instruction.”
- 26. Petitioners’ argument is twofold: those persons attending the IEPs did not have the necessary expertise to comply with Section 1414(d)(1)(B), and [REDACTED] did not have Student’s diagnostician(s) attend his IEP meetings.
- 27. In some circumstances, even though the diagnosticians did not attend, the attendance of Student’s reading instructor would arguably be sufficient to comply with Section 1414(d)(1)(B). See *Bd. of Educ. of Albuquerque Pub. Sch. v. Maez*, No. 16-CV-1082 WJ/WPL, 2017 WL 3278945, at \*9 (D.N.M. Aug. 1, 2017)(“autism-specific teacher . . . certainly . . . had the ability to provide the necessary information”).
- 28. Here, however, the DPHO concludes by a preponderance of the evidence that Student’s teachers were *not* qualified to interpret the instructional implications of evaluation results. As detailed in the Findings of Fact, Student’s teachers often lacked knowledge about dyslexia, severe dyslexia, the SPIRE program, and the significance of iReady scores or SPIRE levels. They often reported that they



knew Student was progressing in his reading skills because they had a “sense” of Student’s ability or even the ability of Student’s assigned group. No one was able to explain the resources available at Wilson Middle School during Student’s transition IEP in fifth grade. In essence, Student’s teachers largely lacked the capacity, due to lack of training, to explain the list of items in Section 1414(d)(1)(B); this incapacity mirrored teachers’ lack of consistent knowledge about how to instruct Student in class as part of the SPIRE program, or what other resources might be brought to bear.

29. The DPHO therefore **GRANTS** Petitioners’ claim, as described in Issue 13, as a procedural violation.
30. Petitioners’ proposed remedy for this alleged violation of the IDEA is to have a Certified Academic Language Therapist attend all future IDEA meetings, payment for Student, Student’s teachers, and Parents to attend the International Dyslexia Association annual conference, training for staff regarding Tourette Syndrome and Tic Disorder, and designation by [REDACTED] of an [REDACTED] employee to attend future IEP’s in order to explain all aspects of Assistive Technology relevant to Student’s special education program.
31. The DPHO **DENIES** Petitioners’ claim related to Tourette Syndrome / Tic Disorders, on substantially the same basis that the DPHO denied Petitioners’ claim that the District currently has reason to suspect that Student has either disorder, as described in Issue Number 10, *supra*.
32. The DPHO **DENIES** Petitioners’ remedy in the form of ordering payment for attendance at the International Dyslexia Association annual conference, but **GRANTS** Petitioners’ remaining requests, and will include such remedies at the end of this Decision. See 34 C.F.R. § 300.531(a)(2)(procedural violation results in denial of FAPE if it, *inter alia*, “significantly impeded the parent’s opportunity to participate in the decision-making process for a provision of a free appropriate public education;” or “caused deprivation of educational benefit”); 34 C.F.R. § 300.513(a)(4)(hearing officer may order a LEA to comply in the first instance with procedural requirements, even if there has been no denial of FAPE).

#### E. Whether Student was Denied a Free and Appropriate Public Education

There are eight joint issues presented by the Parties which directly address whether Student was denied a free and appropriate public education (“FAPE”).

- a. Whether Student was provided specialized reading instruction, based on peer-reviewed research, to meet his unique needs as a student with a reading disability including characteristics of dyslexia (**Issue Number 1**);

- b. Whether Student was provided education which met State standards **(Issue Number 3)**;
  - c. Whether Student was provided audio texts through Bookshare or Learning Ally to allow access of the general curriculum, and independent learning and reading **(Issue Number 4)**;
  - d. Whether [REDACTED] implemented Student's IEPs **(Issue Number 5)** ;
  - e. Whether Student was timely and consistently provided Assistive Technology sufficient to meet his unique needs **(Issue Number 6)**;
  - f. Whether Student utilized the technology made available to him by the District in the manner he was instructed by the District AT personnel **(Issue Number 7)**;
  - g. Whether IEP goals were designed to meet Student's needs that result from his disability, and to enable him to be involved in and make progress in the general education curriculum **(Issue Number 8)**;
  - h. Whether [REDACTED] appropriately measured Student's progress toward goals through reliance on iReady **(Issue Number 9)**.
33. In addition, **Issue Number 14**, "Whether [REDACTED] failed to provide Parents with PWN about the LEA's rejection of their requests for specialized reading instruction" is an allegation of procedural violation which is related to the larger question whether Student was denied FAPE.

#### *Reading and Math Programs*

- 34. Issues **1, 3, 5, 8, 9**, and **14** address Student's special education reading program related to his dyslexia, as well as his program related to math. The DPHO will therefore address these issues together, together with the issue whether Student was denied FAPE in relation to these issues.
- 35. As already described, *supra*, in reviewing Student's IEP and the implementation of his program, the Due Process Hearing Officer must be highly cognizant of the Supreme Court's clear direction that the DPHO is not invited "to substitute [her] own notions of sound educational policy for those of the school authorities which [she] reviews.' *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034, *as cited in Endrew F.*, 137 S. Ct. at 1001-02.
- 36. "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 (emphasis added). 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).

37. There is another side to 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).

38. The Hearing Officer listened carefully to five 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.
39. The Hearing Officer agrees with Petitioners that the District failed to provide Student with necessary specialized instruction, based on research, to meet his 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. Student has not received specialized instruction that is reasonably calculated to enable him to make progress appropriate in light of his circumstances. [REDACTED] has not provided Student the chance to meet challenging objectives.
40. The Hearing Officer also agrees with Petitioners that the District failed to provide Student with an education which met State standards.

41. IDEA's statutory definition of "specific learning disability" includes "dyslexia." 20 U.S.C. §1401(30)(B).
42. When IDEA was last re-authorized in 2004, Congress added a section on personnel qualifications, 20 U.S.C. §1412(a)(14), which is applicable to LEAs through operation of 20 U.S.C. §1413(a)(1). The State Educational Agency ("SEA") is required by IDEA to "establish[] and maintain[] qualifications to ensure that personnel . . . are appropriately and adequately trained, including that those personnel have the content knowledge and skills to serve children with disabilities." 20 U.S.C. §1412(a)(14)(A) (emphasis added).
43. Beginning in 2010, New Mexico law created state standards which specifically apply to education for students with dyslexia. NMSA 1978, § 22-13-32 (2010, and as amended effective 6/4/2019).
44. Amendments to state education regulations made in July 2020 included addition of a new section on educational standards for general education: §6.30.17.1 NMAC et seq. This new regulatory section outlined specific requirements for students with dyslexia related to the 2019 amendment to NMSA §22-13-32.
45. The statute created new requirements that each school district create a "literacy professional development plan" setting forth its plan to train staff. See, e.g., NMSA §22-13-32(E) (includes requirement for a plan for "training in evidence-based reading intervention for reading interventionists and special education teachers working with students demonstrating characteristics of dyslexia or diagnosed with dyslexia"); NMSA §22-13-32(F) ("School districts . . . shall train special education teachers to provide structured literacy training [sic] for students who are identified with dyslexia as a specific learning disability and who are eligible for special education services."). The amendments to NMSA § 22-13-32 required NMPED to "adopt rules, standards and guidelines necessary to implement this section"; NMPED's regulations were issued effective July 14, 2020, at the beginning of Student's sixth grade year. See NMSA § 22-13-32(H); Section 6.31.17.1 NMAC et seq. (7/14/20). The regulations include both standards specific to all students and standards specific to students with dyslexia eligible for special education.
46. The state standards created in July 2019 by statute apply to this case, at the latest, after July 1, 2019, and include the following:
  - E. Within the course of the 2019-2020 and 2020-2021 school years, *every school district* and charter school shall develop and implement a literacy professional development plan that includes a detailed framework for structured literacy training by a licensed and accredited or credentialed teacher preparation provider for all

elementary school teachers and for training in evidence-based reading intervention for reading interventionists and special education teachers working with students demonstrating characteristics of dyslexia or diagnosed with dyslexia. The plan shall continue to be implemented each school year and may be updated as necessary. The department shall provide lists of recommended teacher professional development materials and opportunities for teachers and school administrators regarding evidence-based reading instruction for students at risk for reading failure and displaying the characteristics of dyslexia.

F. *School districts* and charter schools shall train school administrators and teachers who teach reading to implement appropriate evidence-based reading interventions. School districts and charter schools shall train special education teachers to provide structured literacy training for students who are identified with dyslexia as a specific learning disability and who are eligible for special education services.

NMSA 1978, § 22-13-32 (emphasis added).

47. The New Mexico Public Education Department (“NMPED”) has implementing regulations defining the following terms:
  - a. "Structured literacy" is defined: systematic, cumulative, explicit, diagnostic, and multi-sensory instruction that includes deep content knowledge and specific teaching expertise that focuses on the elements of phonological awareness, word recognition, phonics and decoding, spelling, and syntax at the sentence and paragraph levels for prevention of reading deficits. §6.31.17.7(F) NMAC (7/14/20).
  - b. Requirements for professional development include that a school district has a "literacy professional development plan that includes a detailed framework. . . for professional development in evidence-based reading interventions" for special education teachers who work with dyslexic students and that each school district is required to "provide sustained professional development." §6.30.17.11(A),(B) NMAC.
48. The DPHO notes that the “statutory period” in this matter is October 8, 2018 to October 8, 2020. Request for IDEA Due Process Hearing, received October 8, 2020, ¶ 82. New State standards adopted after October 8, 2018 would not apply to the statutory period. Accordingly, the New Mexico statutory provisions establishing new state standards would apply only from July 1, 2019 through the

remaining statutory period for Petitioners' Due Process Request. Similarly, NMPED regulations or guidance establishing *new* state standards would only apply to a short window of time, between July 14, 2020, and October 8, 2020. However, to the extent the NMPED is either defining or clarifying terms applicable to school districts by statute, or defining or clarifying best practices related to the instruction of students with dyslexia, the regulations and guidance are certainly persuasive authority as to the meaning of existing standards.

49. For example, the NMPED Dyslexia Handbook provides that "[s]tructured literacy is an umbrella term for evidence-based programs aligned with the International Dyslexia Association's Knowledge and Practice Standards. This approach to reading instruction is grounded in science. . . through the elements and principles of effective, explicit, systematic reading instruction identified by the science of reading over several decades of empirical research." Exh. 17 at 7 (NMPED Dyslexia Handbook, 2020). This does not establish a new standard.
50. The principles of Structured Literacy Instruction identified in NMPED's Dyslexia Handbook are that instruction be: 1) explicit; 2) systematic and cumulative; 3) diagnostic, and 4) multi-sensory. Exh. 17 at 8. The definition of "diagnostic instruction" is: "Teachers use informal and formal assessment to continuously monitor progress and identify the skill level and needs of individual students. Students must reach a level of automaticity with each skill before they are ready to move on to more complex skills." Exh. 17 at 8.
51. A student's "needs" are linked to when effective reading intervention begins: "Dyslexia is a neurobiological disorder, and brain plasticity decreases through childhood. Research has shown that it takes four times as long to effectively intervene with a fourth-grade student as it does when a child is in late kindergarten because of brain development and because of the increase in content students must learn as they grown older (National Inst. of Child Health and Human Development)." Exh. 17 at 10 (emphasis added).
52. The ability of a dyslexic student to become a proficient reader is directly linked to the instruction the student receives:

Dyslexia is a lifelong condition. With proper help, many people with dyslexia can learn to read and write well. Early identification and intervention using an evidence-based, multi-sensory structured literacy intervention program taught by a highly trained specialist is the key to helping individuals with dyslexia achieve in school and in life. Individuals with dyslexia may need one-on-one help to move forward at their own pace. . . . [S]tudents with dyslexia often need a great deal of structured practice and immediate, corrective feedback to develop automatic word recognition skills (International Dyslexia Assoc., 2020).

Exh. 17 at 11. (emphasis added).

53. The DPHO concludes that [REDACTED] has failed to provide Student FAPE, in violation of both the IDEA and New Mexico state standards. In this regard, the effective date of the amendment to Section 22-13-32 and its implementing regulations could, in theory, present several detailed and potentially complex issues related to what are new applicable standards, applicable *per se* to the District's actions only if passed or promulgated before the action was taken, and what are persuasive authority or guidance as to the meaning of pre-existing standards. However, a trip down this "rabbit hole" is not necessary for the DPHO's Decision. While State authorities apply as a matter of law to the latter stages of Student's educational experience and as a matter of persuasive authority as to the entire statutory period, the "north star" in the DPHO's analysis remains whether Student was provided specialized reading instruction in accordance with the IDEA, relying on the guidance provided by *Endrew F.*, 580 U.S. [REDACTED], 137 S. Ct. at 999-1000.
54. In this instance, the DPHO concludes that [REDACTED] failed to ensure that Student's teachers had the professional training, professional development, and oversight throughout the school year, to ensure that they had the capacity to provide the instruction Student required to enable him to make progress appropriate in light of his circumstances. [REDACTED] failed to ensure that Student received specialized daily instruction that correlated with his severe reading disability and above average intelligence. The educational program offered by the IEP was not "appropriately *ambitious*" in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000 (emphasis added).
55. In this regard, the DPHO concludes that of the two programs [REDACTED] offers to [REDACTED] students with reading difficulties, Wilson Reading Program and SPIRE, there is no dispute that the Wilson Reading Program, if taught with fidelity, could be an appropriate reading program for a student such as D.A., with severe dyslexia.
56. The Parties dispute whether SPIRE could also be an appropriate reading program for Student, if taught with fidelity. In this regard, Petitioners failed to prove, by a preponderance of the evidence, that Student could not learn to read relying on SPIRE. By suggesting otherwise, Petitioners are inviting the DPHO "to substitute [her] own notions of sound educational policy for those of the school authorities which [she] review[s]." *Rowley*, 458 U.S. at 206, 102 S.Ct. 3034, as cited in *Endrew F.*, 137 S. Ct. at 1001–02.
57. On the other hand, neither is there any way to state that Student could and did learn to read relying on SPIRE. Petitioners did prove, by a preponderance of the evidence, that Student's teachers failed to provide SPIRE instruction, or any

reading instruction, with fidelity.

58. The District has chosen iReady to measure Student's progress. The iReady "hard numbers" showed that despite his above average intelligence, Student's highest grade level in reading from third to fifth grade was third grade. In fifth grade, he dropped from a third grade reading level back down to first grade. Two iReady reading assessments, one in fourth grade and one in fifth grade, were invalidated because the tester read the test to Student, which would artificially inflate his iReady score and therefore his grade level.
59. In sixth grade, Student received an iReady overall reading score of 463 for the winter. Petitioners' Exh. 27 at page 2; [REDACTED] Proposed Finding of Fact Number 7. This was reported as a first grade reading level. Exh. 27. [REDACTED] rejected the validity of this assessment for reasons that are not clear to the Hearing Officer, but then also rejected the second assessment because Student's educational assistant read the second test to Student. Thus Student's grade level for sixth grade reading appears to be either first grade or entirely unknown as of the date of the Due Process hearing, which occurred at the beginning of second semester, this year.
60. Student's failure to advance in his grade level for reading skills is particularly troubling, when Student is demonstrably a bright child.

Specifically, the Court in *Endrew F.* explained that a "child's educational program must be appropriately ambitious in light of his circumstances," which does not necessarily mean "aim[ing] for grade-level advancement if that is not a reasonable prospect." *Id.* at 992. Nevertheless, "for a child fully integrated in the regular classroom, an IEP typically should, as *Rowley* put it, be 'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.'" *Id.* at 992, 999 (reiterating, "advancement from grade to grade is appropriately ambitious for most children in the regular classroom").

*Candi M. v. Riesel Indep. Sch. Dist.*, 379 F. Supp. 3d 570, 596 (W.D. Tex. 2019).

61. Here, while Student is not fully integrated in the regular classroom, his pull-out class is in reading; Student has no additional obstacles to progress in reading other than his dyslexia. Indeed, Mr. Adams, the diagnostician, described Student as "real bright." Therefore, Student's failure to advance past third grade in reading is significant, in terms of whether he is receiving a reading program for his dyslexia that is appropriately ambitious. The District was not "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. Instead, the District



discounted the validity of his scores, even when they had not been previously invalidated, on the basis of a “sense” that Student was not applying himself during the assessment, because when he applies himself, he can perform well in reading. Thus the hard numbers are incorrect, because District personnel theorized, without supporting data, that Student reads better than his scores reflect.

62. SPIRE’s eight levels measure a student’s instructional level, which is defined as the “level that [a student] reads at with challenge but not frustration.” They do not correspond with grade level.
63. At Bandelier Elementary School, to track a student’s progress in SPIRE levels, instructors rely on a detailed work sheet. The forms are maintained until the end of the year, when they are offered to the student or his parents; if the parents do not keep the record, the standard practice is to shred the records, which was apparently done in Student’s case.
64. The destruction of Student’s elementary classroom records regarding his progress in the SPIRE levels is troubling. For one thing, the data regarding Student’s SPIRE levels appear to be educational records, because they were maintained by his teacher throughout the year and were available to Student’s parents. See *Falvo v. Owasso Indep. Sch. Dist. No. I-011*, 233 F.3d 1203, 1215 (10th Cir. 2000), rev’d, 534 U.S. 426, 122 S. Ct. 934, 151 L. Ed. 2d 896 (2002), and opinion vacated in part, reinstated in part, 288 F.3d 1236 (10th Cir. 2002), and abrogated on other grounds by *Gonzaga Univ. v. Doe*, 536 U.S. 273, 122 S. Ct. 2268, 153 L. Ed. 2d 309 (2002).
65. For another, as a result of the destruction of the underlying data, the reliability of the reported SPIRE levels is uncertain, based on the varying size of the group, the questionable reports by various teachers of how they judged whether Student had achieved mastery of a particular level, and whether Student’s teachers had the necessary competence to judge with fidelity whether Student was, in fact, mastering a particular level. For example, several teachers testified that they gauged whether the entire group had moved on; another teacher testified that she relied on “kind of the body language” of the group, but at the same time, she did not believe that Student was generalizing what he learned in SPIRE to independent reading in other settings. In contrast, Ms. Gutierrez, the executive director of student achievement for ██████ testified that as part of the validity of either SPIRE or Wilson, data should be collected regarding a student’s progress through lessons in either program.
66. Nor are the resulting SPIRE levels applied to individual students with any fidelity or reliability. For example, in August 2019 (fifth grade), Student’s reported SPIRE score was Level 4. His overall reading score on iReady was *at best* grade 3. In sixth grade, his SPIRE pre-assessment again placed him at level 4,

but Student's teacher changed him to level 6 so he would fit into one of the two reading groups in class – the ultimate square peg in a round hole.

67. Thus setting aside the ad hoc and entirely unsupportable advancement of Student from level 4 to level 6, Student's highest SPIRE level placed him at level 4 at the halfway point in his public school education, when level 8 is mastery of the reading skills necessary to achieve literacy.
68. The scores that are available confirm anecdotal reports about Student, by both his teachers and Parents, that Student is unable to read at a basic level, and that as a result, he avoids reading. Parents read to him, his teachers read to him, and he is currently assigned to an educational assistant who reads assignments to him and even read his iReady assessment to him.
69. The DPHO concludes that the District failed to implement Student's IEPs, as follows:
  - a. Student has not received specialized instruction in reading to address his dyslexia.
  - b. Due to the pandemic, starting in March 2020, Student received no reading instruction for the remainder of 5<sup>th</sup> grade.
  - c. In 6<sup>th</sup> grade, D.A. has not received instruction from a special education math teacher since beginning of September although his IEP continues to provide that he has learning disability in math and a math goal. While Mr. Payne, the EA, now assists D.A. with work in the general education 6<sup>th</sup> grade math class, it is unclear from the record what work D.A. is doing versus what work Mr. Payne does — before Mr. Payne was assigned to assist D.A., D.A. had an "F" in math. In any event, inclusion instruction by Mr. Payne does not fulfill Student's IEP for math for sixth grade.
70. The DPHO also concludes that the LEA failed to write reading/writing/spelling goals which were designed to meet Student's needs and allow him to progress in the general curriculum. 20 U.S.C. §1414(d)(1)(A)(i)(II),(IV)(aa)-(cc).
71. Specifically with regard to writing, the DPHO defers to the diagnostician that Student could learn writing skills through an otherwise effective writing program to address his dyslexia. However, goals should be written to meet the child's needs and "enable the child to be involved in and make progress in the general education curriculum" and to "meet each of the child's educational needs that result from the child's disability." 20 U.S.C. §1414(d)(1)(A)(i)(II)(aa)(bb). Even if reading instruction had included appropriate specialized instruction to meet Student's writing/spelling deficits arising out of dyslexia, which it did not, IDEA

still demands that D.A. should have had annual writing and spelling goals since competence in these areas is integral to progress in the general curriculum. The writing goals in place do not adequately require the District to track Student's progress.

72. The DPHO concludes that [REDACTED] did not appropriately measure Student's progress towards goals through reliance on iReady. 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).
73. The DPHO concludes that [REDACTED] failed to provide Parents with Prior Written Notice about the District's rejection of their requests for specialized reading instruction.
74. The DPHO agrees with Petitioners that "PWN is a critical procedural protection under the IDEA and is intended to ensure that parents can be full participants in the IEP process based on clear explanation of an LEA's rejection of parents' suggestions and requests. See 20 U.S.C. §1415(b)(3)." Petitioners' Closing Argument at page 22. "PWN must include an explanation of why the LEA refuses and 'a description of each evaluation procedure, assessment, record or report the [LEA] used as a basis for [refusal]'; 'description of other options considered by the IEP Team and the reasons why those options were rejected.'" 20 U.S.C. §1415(c)(1)(B),(E). *Id.* at pages 22-23.
75. The DPHO concludes that this is a procedural violation, that for a time at least, impeded Student's right to a free appropriate public education, and significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education. See 34 C.F.R. § 300.531(a).
76. However, this procedural violation was largely remedied by the passage of time. Clearly, as they appear to admit, Parents became aware at some point that the District would not provide the specialized reading instruction – 1:1 intensive instruction by a Certified Academic Language Therapist – that they were requesting. Their complaint is that "they were not told why or what [REDACTED] relied on in rejecting such reading instruction for D.A. There is no description of any individualized reasons Parents' request was rejected, simply a litany of 'no.'" *Id.* Therefore, the DPHO concludes that this procedural violation did not *per se* deny FAPE in the past, which might justify compensatory education, but can be remedied by requiring that the District comply with PWN in future IEPs.
77. With the exception of the denial of PWN, the Hearing Officer concludes that these violations of the IDEA, and specifically the failure to provide specialized reading instruction, have denied Student FAPE not because Student remains behind his peers in reading, but because the District has presented no cogent

and responsive explanation for why Student could not learn to read at the level of his general education peers if he were provided the reading program with fidelity that her IEP should have and in some respects did design for him. Essentially, the District has placed Student in a special education program without fidelity to SPIRE – or any similar program – that is appropriately adopted to address his specific reading deficits. 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.*

78. The DPHO therefore **GRANTS** Petitioners' claims, as described in Issues 1, 3, 5, 8, and 9, and 14, with regard to Student's special education program.
79. As to Student's reading program, the District's violations, both individually and in the aggregate, have denied Student FAPE and will be remedied accordingly through an award of compensatory education.
80. As to Student's writing program, the failure to include a writing goal in the IEP is a procedural violation. Petitioners have not shown a denial of FAPE as to writing instruction, separate and apart from the denial of FAPE as to his reading program. This violation will therefore be remedied by an order for future action requiring that Student's IEPs contain appropriate writing goals.
81. With regard to his disability in math, Student remains entitled to receive inclusion special education in the general education classroom, which the District has failed to provide. This substantive violation denies Student FAPE; however, Petitioners have failed to prove by a preponderance of the evidence that Student is entitled to compensatory education in the area of math. This violation will therefore be remedied by an order for future action requiring that Student be provided specialized instruction by a qualified special education teacher to support Student's math goals in the inclusion setting;
82. Issue Number 14, "Whether [REDACTED] failed to provide Parents with PWN about the LEA's rejection of their requests for specialized reading instruction" will also be remedied as a procedural violation.

#### *Assistive Technology*

83. The remaining issues, related to Assistive Technology, are **Issue Number 4**, whether the District is providing audio texts to allow Student to access the general curriculum and independent learning and reading, and **Issues Numbers 6 and 7**, whether the District is providing sufficient Assistive Technology and whether Student is utilizing the AT that is provided.

84. By a preponderance of the evidence, Petitioners have proven that in order to allow him access to the general curriculum, Student needs to receive assistance with his reading through either Bookshare or Learning Ally, which are designed to read books for Student. In addition, Student needs assistance with his writing through a portable device that includes a speech to text feature.
85. The DPHO concludes that Petitioners have proven by a preponderance of the evidence that the District has failed to provide and continues to fail to provide Bookshare. The DPHO does not recall any reference to Learning Ally and Petitioners provide no citation to the record regarding Learning Ally. Petitioners also complain about Snap&Read, apparently that Student did not receive access to Snap&Read until fifth grade, which they have also proven by a preponderance of the evidence. However, with regard to any of these devices, Petitioners have not proven by a preponderance of the evidence that the lack of this Assistive Technology denied Student access to the general education curriculum or otherwise denied FAPE.
86. If there was evidence presented that the District's apparently sporadic and sometimes insufficient efforts to provide any of these devices have at times denied Student access to the general curriculum, or have otherwise interfered with his access to FAPE, Petitioners have not provided citations to the DPHO. See *Preciado v. Bd. of Educ. of Clovis Mun. Sch.*, 443 F. Supp. 3d 1289, 1300 (D.N.M. 2020) ("The Court will not comb through hundreds of pages to find the snippets of evidence that support [Student's] position, assuming such evidence exists.").
87. Accordingly, since access to Snap&Read has apparently been remedied and there is not sufficient evidence that denial of Snap&Read in the past denied FAPE, the DPHO concludes there is no available remedy for this violation.
88. The DPHO therefore **GRANTS** Issue Number 4, but only with regard to Bookshare, to be remedied by an order for the District to provide Bookshare or a similar device or service to allow Student to access the general curriculum without having mastered necessary reading skills. This will include assistance with how to access Bookshare.
89. With regard to Issues Numbers 6 and 7, the DPHO concludes that the District has failed to provide timely and consistent Assistive Technology to meet unique needs, despite good faith efforts by Student to utilize the technology as directed. As expressed by Petitioners, "to increase the functional capability of the child. 20 U.S.C. §1401(1)(A). AT services required to be made available include "training or technical assistance" for the child, family and educators. 20 U.S.C. §1401(2)(E),(F). During 5<sup>th</sup> and 6<sup>th</sup> grade, neither the student, family or staff has been provided sufficient training. Most critically, D.A. needs more direct work

with the AT provider that would allow practice and possibly introduce alternative or additional AT based on his unique needs. If he is not capable of functional use on a regular basis, then AT needs to be enhanced and supported for it to be useful as intended.” Closing Argument at 20-21.

90. The DPHO therefore **GRANTS** Petitioners’ claims related to Issue Number 6 and Issue Number 7. Issue Number 6 will be remedied by an order for the District to increase the scope and hours of AT service.

#### F. Absences

91. The District responds in part to Petitioners’ Due Process Request by stating that “[a]lthough not an issue identified by the Petitioners, the District has concerns about the student’s attendance and participation in remote learning. As evidenced by the testimony of his teachers, his participation is dependent upon interest level and, in some instances, is nearly non-existent.” Albuquerque Public Schools’ Board of Education Closing Argument, at page 15.
92. The District is inviting the DPHO to wade into a thorny legal and factual issue, with almost no argument and with citations to evidence in the record consisting only of the phrase “[a]s evidenced by the testimony of his teachers.”
93. The District appears to fault Petitioners for having failed to “identify” this issue, when clearly this point is in the nature of an affirmative defense by the District, which the District failed to list in the Joint Statement of Issues. The District provides no legal authority to establish that the parents in a Due Process Hearing are required to disprove that absences were not an intervening cause of their child’s failure to progress in his academic program. The DPHO declines to develop the District’s argument for it, and therefore concludes that this issue has been waived.
94. If not, then the DPHO concludes that there is no evidence in the record, as cited by the District or otherwise, establishing an extreme history of absences by Student or any connection between his absences and his failure to progress in his educational program. If anything, the District’s teachers expressed enthusiasm about Student, albeit with reservations about his behavior in class. 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, 1127–30, 49 IDELR 241 (10<sup>th</sup> Cir. 2008). This is certainly not that case.

#### G. Whether Student Is Entitled to an Equitable Remedy and What that Remedy Should Be

95. The Hearing Officer has equitable authority to fashion all appropriate relief to

address the District's violations 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).

96. 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.* (emphasis added).
97. "In 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 in *Reid* 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 or deficiencies."
98. *M.S. v. Utah Sch.*, 822 F.3d 1128 (10<sup>th</sup> Cir. 2016), provides guidance to determine how the DPHO should approach equitable relief. In *M.S.*, the Tenth Circuit rejected the Hearing Officer's delegation of authority to the school to determine the student's future program. In addressing the inherent problem in such delegation, the Court noted the problem of the "endless loop" created by allowing a school to continue on course with only the equivalent of an advisory opinion by the Hearing Officer, a result which would inevitably occur without an intervening equitable force to break the cycle.
99. In this context, the Tenth Circuit quoted the following construction by the Fourth Circuit of the nature and purpose of "compensatory education":
 

compensatory education involves discretionary, prospective, injunctive relief crafted by a court *to remedy* what might be termed an educational deficit *created by* an educational agency's failure



over a given period of time to provide a FAPE to a student.

*M.S.*, 822 F.3d at 1135-1136 (emphasis added), *quoting from G. ex rel. RG v. Fort Bragg Dependent Schools*, 343 F.3d 295, 309 (4<sup>th</sup> Cir. 2003).

100. Throughout the Due Process Hearing, the District made its position clear that it sees no reason to change the approach to Student's program that created the deficit in the first place. Thus the Tenth Circuit's warning in *M.S.* clearly applies equally here: "Allowing the educational agency that failed or refused to provide the covered student with a FAPE to determine the remedy for that violation is simply at odds with the review scheme set out at § 1415(i)(2)(c)." *M.S. ex rel. J.S.*, 822 F.3d at 1135.
101. Here, the District has failed to design and implement a strategy to provide FAPE to Student. Accordingly, the only effective equitable remedy available in some instances is to require [REDACTED] to hire personnel to provide the services necessary to accomplish what [REDACTED] should have but has not accomplished in the lengthy time it has had to do so.
102. In fashioning an award of compensatory education, the Hearing Officer is aware that the passage of time without an appropriate reading program has likely placed Student in a worse position than he would have been had he been provided FAPE from the beginning of the statutory period. Accordingly, the Hearing Officer concludes that Student should "start from scratch," with the guidance of a Certified Academic Language Therapist ("CALT") or dyslexia therapy-level trained instructor. The Hearing Order therefore will direct the District to provide an appropriate reading program, without a limit on the duration of the program, other than the completion of Student's reading program or Student's graduation.
103. Procedural defects do not support a remedy in the form of compensatory education, unless there is a "rational basis" to believe at least one of three things is true: (1) the procedural errors seriously hampered the parent's opportunity to participate in the decision process, (2) compromised the student's right to an appropriate education, or (3) caused a deprivation of educational benefits. See *O'Toole*, 144 F.3d at 707. 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 (10<sup>th</sup> 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 (10<sup>th</sup> 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 (10<sup>th</sup> Cir. 2008).



104. In this case, as described in this Decision, there were both substantive and procedural violations that denied FAPE. Regardless, however, even in the absence of a denial of FAPE, a hearing officer may also order a LEA to comply in the future with non-technical procedural requirements. See 34 C.F.R. § 300.513(a)(4). Where a procedural violation is non-technical but has not resulted in the denial of FAPE, the Hearing Officer will direct that the District comply with specific procedural requirements in the future.

## **V. Conclusion and Remedy**

Petitioners' claims related to Issues Numbers 1 through 16 are granted and denied as follows:

1. In Issue Number 1, Petitioners assert a claim that [REDACTED] denied Student specialized reading instruction, based on peer-reviewed research, to meet his unique needs as a student with a reading disability including characteristics of dyslexia. This claim is GRANTED.
2. In Issue Number 2, Petitioners assert a claim that Student was not evaluated by [REDACTED] in all areas of suspected disability when the 2020 evaluation included no evaluation related to Student's behaviors. This claim is DENIED.
3. In Issue Number 3, Petitioners assert a claim that Student was not provided education which met State standards. This claim is GRANTED.
4. In Issue Number 4, Petitioners assert that Student was not provided audio texts to allow access to the general curriculum, and independent learning and reading. This claim is GRANTED.
5. In Issue Number 5, Petitioners assert that [REDACTED] did not implement Student's Individualized Education Plans ("IEPs"). This claim is GRANTED.
6. In Issue Number 6, Petitioners assert that Student was not timely and consistently provided Assistive Technology ("AT") sufficient to meet his unique needs. This claim is GRANTED.
7. Issue Number 7 relates to Petitioners' claim related to Issue Number 6, which has been granted.
8. In Issue Number 8, Petitioners assert that [REDACTED] did not design IEP goals that met Student's needs that result from his disability, and to enable him to be involved in and make progress in the general education curriculum. This claim is GRANTED.
9. In Issue Number 9, Petitioners assert that [REDACTED] did not appropriately measure

Students' progress toward goals through reliance on iReady. This claim is GRANTED.

10. In Issue Number 10, Petitioners assert that Student has an undiagnosed Tourette Syndrome or Tic Disorder, and that the District has used that behavior to lower its expectations or misunderstand Student's needs resulting in inappropriate goals and supports. This claim is DENIED.
11. In Issue Number 11, Petitioners assert that Student was denied an education which was "free" when Parents have had to provide outside reading instruction for multiple school years to try and make up for [REDACTED] failure to provide specialized instruction. This claim is DISMISSED.
12. In Issue Number 12, Petitioners assert that [REDACTED] refusal to provide necessary specialized instruction and services was based on [REDACTED] policy and predetermination to refuse to provide certain instruction and services (1/1 reading instruction by a Certified Academic Language Therapist ("CALT"); audio texts for dyslexic students; reading/writing/spelling goals focused on teaching encoding skills; standard AT tools for students with dyslexia; [REDACTED] policy to delay identification of dyslexia delaying early intervention; [REDACTED] policy to ration knowledge about dyslexia). This claim is DISMISSED.
13. In Issue Number 13, Petitioners assert that Student's IEP teams did not include staff who could interpret the instruction implications of evaluation results and who had specialized expertise in dyslexia and evidence based reading instruction as well as Tourette Syndrome / Tic Disorders. This claim is DENIED insofar as Petitioners assert that Student's IEP teams should have included staff who could explain Tourette Syndrome or Tic Disorders, without prejudice to any future request. This claim is GRANTED as to Petitioners' claim that the IEP teams did not have specialized expertise in dyslexia and reading instruction and Assistive Technology services.
14. In Issue Number 14, Petitioners assert that [REDACTED] failed to provide Parents with Prior Written Notice ("PWN") about the Local Educational Agency's ("LEA's") rejection of their requests for specialized reading instruction. This claim is GRANTED.
15. In Issue Number 15, Petitioners assert that [REDACTED] denied Student a free and appropriate education as a result of the described violations. This claim is GRANTED in part with regard to Issues Numbers 1, 3, 4, 5, 6, 7, 8, 9, and DENIED in part with regard to Issues Numbers 2, 10, 11, 12, 13, and 14, as described, *supra*. (In some instances, Plaintiffs have not proven that [REDACTED] has denied FAPE in the past as a result of the particular violation, but the violation will be remedied by an order that the District comply in the future with the procedural requirement.).

16. As to Issue Number 16, Petitioners are entitled to several equitable remedies, as described, next.

As remedies for the foregoing violations, the DPHO ORDERS the District as follows:

1. The District is directed to provide Student 1/1 daily reading instruction during the school day (in place of an elective and for 60 minutes *daily*, 5 days per week) at the school campus (or remotely if campuses are closed due to public health orders) from a Certified Academic Language Therapist (“CALT”) or dyslexia therapy-level trained instructor, who is or is not an [REDACTED] employee. (The DPHO notes, for example, that Chris Fox may qualify as a “dyslexia therapist,” although she is not a CALT.) The selected contractor or employee must be acceptable to Petitioners. The selected contractor or employee will be given authority by [REDACTED] to select a reading instruction curriculum specific to dyslexia therapy (e.g., Sounds and Syllables or Wilson Reading) for a student of D.A.’s severity and age; with such reading instruction to continue through Student’s [REDACTED] education until completion of the program whether that be in two school years or more, and at [REDACTED] expense; and with such reading instruction to also be available for Student each summer beginning with summer 2021; with attendance of the selected contractor or employee at all IEP meetings.
2. The District is directed to provide Prior Written Notice in compliance with federal and State standards.
3. The District is directed to designate a special education administrator at a District or local school level, who will be responsible each school year for ensuring Student’s access to Bookshare and will be responsible each school year for ensuring that all teaching staff who work with Student have received training on Bookshare and its use for students with dyslexia and who will participate in Student’s IEPs, if requested by Parents.
4. The District is directed to increase the scope and hours of AT service to ensure that Student, family and staff are provided all necessary training, practice and support to enhance Student’s ability to independently and functionally use speech to text to create a final written product.
5. The District is directed to ensure that a person familiar with AT services at Student’s school attends all IEPs.
6. [REDACTED] is directed to provide at least 540 minutes of AT support per academic year, to include training on Bookshare and speech to text, for 2021-2022.
7. [REDACTED] is directed to provide specialized instruction by a qualified special education

teacher to support Student's math goals in the inclusion setting.

8. [REDACTED] is directed to reconvene Student's IEP team to write new goals when [REDACTED] students return to in person learning: goals, which are consistent with the DPHO decision. The goals must include a goal for progress in all aspects of writing, together with a description of a proper measure of progress towards all goals and what data must be collected and maintained to measure progress towards all goals.
9. [REDACTED] is directed to ensure the attendance of an [REDACTED] administrative level employee at the reconvened Student's IEP, to explain to staff and Parents the required contents of an IEP, including setting of appropriate goals for reading, writing, and math, measurement of progress toward goals, and Prior Written Notice.

### **ORDER**

Therefore, for the foregoing reasons and under the foregoing terms, Petitioners' 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.

/s/ Nancy L. Simmons  
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 Debra Poulin, Esq., this 30<sup>th</sup> day of March, 2021.

/s/ Nancy L. Simmons  
Nancy L. Simmons, Esq.  
Due Process Hearing Officer