NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER
DPH NO. 2425-17

DUE PROCESS HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioner's Request for Due Process Hearing with the Local Educational Agency ("LEA"). Respondent is Clovis Municipal Schools ("District" or "CMS"). Petitioner is the parent ("Parent") of C.G. ("C.G." or "Student"). Petitioner filed her Request for Due Process with the State of New Mexico Public Education Department on January 7, 2025. Petitioner's 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 March 3, 2025, and concluded on March 6, 2025. The hearing took a total of four days. Both Parties timely filed Proposed Findings of Fact and Conclusions of Law. Petitioner also submitted Petitioner's Closing Argument, which contains legal argument and Petitioner's proposed remedy. The District was invited to provide a separate brief and a proposed remedy, but has declined to provide a separate document.

Pursuant to a stipulated extension of time, this final decision was due on or before Monday, April 28, 2025. The Due Process Hearing Officer ("DPHO") asked for consent to issue her opinion today, April 28, 2025. Petitioner provided consent; the DPHO apparently has not heard from the District.

II. Relevant Legal Overview

The Parties have presented the following Joint Statement of Issues:

1. Whether the District evaluated Student in all areas of suspected disability;
2. Whether the District has provided Student with education which is "free";
3. Whether the District has provided Student with education in his Least Restrictive Environment;
4. Whether the District has provided Student with access to the general curriculum;
5. Whether the District has provided Student with specialized instruction and

accommodations to meet his unique needs arising from disability;

6. Whether the District made a unilateral change of placement for Student to attend iAcademy effective January 8, 2025 or did this move constitute a change of location for Student, not impacting his provision of services;
7. Whether the District has created IEP goals which meet Student's needs;
8. Whether the District provided Student with education which is consistent with state standards;
9. Whether the District provided Student with appropriate related services;
10. Whether Student potentially needed assistive technology and services or whether Student's behavior interfered with his ability to access assistive technology and services;
11. Whether the District has provided accurate and complete PWNs;
12. Whether Student was denied FAPE during the statutory period;
13. Whether, if there was a denial of FAPE, Student is entitled to remedy and what that remedy should be.

See Joint Statement of Issues.

Parent asserts the following additional issues:

1. Whether the District has punished Student for manifestations of disability and whether this was caused by lack of professional knowledge and training;
2. Whether the District interfered with Parent's right to have the Special Ed Ombud participate;
3. Whether Student continues to be denied FAPE after Parent filed her Request for Due Process hearing on January 7, 2025, through the week of the Due Process Hearing (March 3- March 7, 2025);

The District also asserts additional issues:

1. Whether at any time prior to filing of the instant matter, the Parent advised the District that she disagreed with the IEP, the Student's schedule of services or BIP;
2. Whether the Corrective Action Plan, already in place and underway, addresses all of the same issues brought in this Complaint.

As the party asserting her challenges to the District's actions, Petitioner has the burden of proof in this case. *See Schafer v. Weast,* 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4,* 921 F.2d 1022 (10th Cir. 1990). The District has the burden of proof with respect to its affirmative defenses.

While the Parties have presented the DPHO a multitude of issues to address, the essential questions 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-11,* 51 F.3d 921, 925 (10th Cir. 1995). "[A] child is entitled to 'meaningful' access to education based on [his] individual needs." *Fry v. Napoleon Cnty. Sch.,* 580 U.S. 154, 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. 386, 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).
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> 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 complaint concerning a procedural violation of the IDEA may or may not result in a remedy. Thus while a school district must comply with both IDEA procedures *and* provide special education services "reasonably calculated to enable the child to receive educational benefits," a procedural error, standing alone, does not necessarily result in a remedy.

> While "a failure to meet [either] one of these considerations may result in court ordered relief," *Erickson v. Albuquerque Pub. Schs.,* 199 F.3d 1116, 1120 n. 4 {10th Cir.1999), the type of relief sought will often determine which of the two considerations is dispositive in a particular case. For example, where a school district has allegedly failed to comply with a procedural requirement of IDEA and the plaintiff seeks only an order mandating prospective compliance, then question (1) (whether the school district complied with IDEA's procedural requirements) may be the crucial inquiry, while question (2) (whether the school district provided a FAPE) may often be irrelevant because the claim seeks only to vindicate the student's procedural, rather than substantive, rights under IDEA. But where ... only compensatory relief is sought, the pivotal question is (2), because an award of compensatory education vindicates the student's substantive right to receive a FAPE and compensates for a past deprivation of educational opportunity rather than a deprivation of purely procedural rights. *See Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 726-27 (10th Cir.1996); *Erickson v. Albuquerque Pub. Sch.,* 199 F.3d 1116, 1122-23 (10th Cir. 1999) ("[C]ompensatory education is not an appropriate remedy for a procedural violation of the IDEA."). Of course, where a procedural violation is alleged to have caused the substantive deprivation of a FAPE (the case here), question (1) still bears obvious significance.

Garcia v. Bd. of Educ. of Albuquerque Pub. Sch., 520 F.3d 1116, 1125-26 (10th Cir. 2008)

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, moving forward, 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.

Notably, both parties have occasionally submitted proposed findings without citation to the record, or with citation to the record in its entirety or to large portions of testimony. Again, where the a party's proposed finding accords with the DPHO's clear memory of the hearing, such a finding may be adopted.[1] The DPHO also found certain details in the record particularly important to the decision at hand, and therefore provided more specific facts with citations to the record. On the other hand, just like any other trier of fact, the DPHO generally declined to "go beyond the referenced portions" of the testimony and exhibits, and reserved the discretion to avoid serving as an advocate for either party, by combing through the record on behalf of either side of the dispute. *See, e.g., Anderson v. Coca-Cola,* No. 23-3018, 2023 WL 6307487, at *4 {10th Cir. Sept. 28, 2023), and citations therein.

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, unnecessary to the legal analysis, or were worded awkwardly.

The Findings of Fact have generally been organized by their relationship to the parties' Statement of Issues. Due to overlapping findings, the DPHO has combined some issues.

Background Facts

1. C.G. is a 10 year old, 4th grade student at Zia Elementary School ("Zia") in the Clovis Municipal Schools ("District" or "CMS"). His eligibility for special education under the IDEA is Other Health Impaired ("OHI").[2]

2. Petitioner [redacted] C.G.'s mother, teaches gifted students at the CMS high school.

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[1] For example, multiple witnesses testified over multiple days of the hearing that C.G. did not feel welcome at school and felt he had no friends there.

[2] The DPHO attaches to this Memorandum Decision and Order a list provided by Parent, which provides acronyms used by witnesses and documents in this Due Process Hearing.

TR vol. 4 at 1427-1429.

3. C.G. entered kindergarten in the 2020-2021 school year. He attended Parkview Elementary, his neighborhood school, for kindergarten, 1st grade, and 2nd grade. In the spring of 2nd grade (2023), the family moved and C.G. began attending Zia Elementary for the last quarter, based on his change of address. TR vol. 1 at 268, 272-273; TR vol. 4 at 1449-1450; Exh. P-12; Exh. P-143; Exh. P-14.

4. C.G. was initially determined eligible for special education in the spring of 2018, when he was a preschool student. He was designated in the category orother Health Impairment, based on Attention Deficit (Hyperactivity) Disorder ("ADHD"). Exh. P-1. C.G. was later determined to have Gifted eligibility along with OHi in January 2022, in the middle of 1st grade. Exh. P-4.

5. C.G.'s OHi eligibility has always been based on the clinical diagnosis of ADHD. C.G.'s ADHD has never been in dispute, including at the Due Process hearing. The District agrees that C.G. has been diagnosed with ADHD. District's Proposed Finding of Fact No. 4, *citing* TR vol. 1, p. 203: 1-25. The characteristics of ADHD identified by original evaluation when he was 3, along with the recommendations then, are still valid. *See* Exh. P-1 at 12-18; TR vol. 2 at 720-726 (Saundra Taylor, diagnostician).

6. These characteristics include inattentiveness, difficulty sustaining attention, appearing not to listen, struggles to follow through on instructions, dislike or avoidance of tasks requiring "a lot of thinking," fidgeting, difficulty remaining seated, excessive physical activity, difficulty engaging in activities quietly, "[a]cts as if driven by a motor," "[t]alks excessively," blurts out answers, interrupting the questioner, "[d]ifficulty waiting or taking turns," and "[i]nterrupts or intrudes upon others." Exh. P-1 at 14. C.G. was determined to be experiencing a need for special education support *in the area of social-emotional skills."* !;xh. P-1 at 18 (emphasis added).

7. C.G. has also been diagnosed with Intermittent Explosive Disorder. TR Vol. 1, p. 203:1-25, and Oppositional Defiant Disorder. TR Vol. 1, p. 37: 18-23.

8. In May 2023 (end of 2nd grade), after C.G. had moved to Zia, the District removed C.G.'s OHi eligibility and intended to serve him only as a student who was Gifted. Exh. P-6; Exh. P-14 at 18-19. There was no re-evaluation before removal of OHi eligibility, other than an occupational therapy evaluation recommending cessation of OT services. TR vol. 4 at 1453-1454; Exh. P-6 at 3; Exh. P-14 at 18-20. Parent opposed removal of OHi eligibility and the cessation of occupational therapy services. P-14 at 18-20; TR vol. 4 at 1453-1454.

9. Neither the removal of OHi as C.G.'s eligibility in May 2023 nor the re-establishment of

OHi eligibility by January 2024 was based on any evaluation by a diagnostician; instead, OHi eligibility was apparently tied to whether C.G. was determined to need the related service of occupational therapy. Exh. P-3; Exh. P-6; Exh. P-7; Exh. P-14; Exh. P-15. *Compare* Exh. P-1 (original evaluation identifying OHi).

10. When C.G. started 3rd grade (August 2023), the District did not provide him any special education based on IDEA eligibility, since OHi had been eliminated at the end of 2nd grade. At the beginning of 3rd grade, C.G.'s special education was provided through the Gifted program at ZIA. The IEP conducted in May 2023 indicated C.G. would receive school counselor services in 3rd grade, but not as a related service under the IEP. *Compare* Exh. P-6, Exh. P-14 (OHi eligibility in May 2023) with Exh. P-15 (IEP based on OHi on 1/4/2024).

11. In the spring of 2020, C.G. was also evaluated for occupational therapy, as an ancillary service. He has difficulty with auditory processing, touch processing, movement processing, body position processing, and oral sensory processing. Exh. P-3, page 3. He protects his ears from sound, and struggles to complete tasks when there is noise. *Id.* He "pursues movement to the point it interferes with daily routines." *Id.* He is "sensation seeking," which may lead to difficulty in completing tasks. *Id.* "Students with sensory seeking concerns *can benefit from intensity in experiences as part of the school day so they do not have to stop engaging in classroom activities to get the extra sensory input they desire." Id.* (emphasis added). *Students that avoid activities cope with stimuli* by keeping it at bay either by withdrawing from the stimuli or *by engaging in an emotional outburst that enables them to get out of the threatening situation." Id.,* page 4 (emphasis added).

12. C.G.'s occupational therapy evaluation for December 4, 2023 noted a "current concern" for 2023, that his "school participation and work completion have *deteriorated significantly in this 3rd grade school year.* He requires extensive cues to participate in classroom activities, and he has frequent outbursts, including aggression towards things and people." P-3, page 10 (emphasis added). There were extensive behavioral and executive function recommendations. P-3, beginning page 20.

13. C.G.'s OHi special education eligibility was restored by January 2024, including receipt of ancillary services in the areas of counseling and occupational therapy. TR Vol. 1, p. 203: 1-25.

14. The District correctly notes that C.G. "Started off the [2024] school year fairly strong." TR Vol. 1, p. 41: 15-25; p. 44: 1-5, *as cited in* District's Proposed Finding of Fact No. 10. C.G.'s behavior began to escalate later in the fourth grade. TR Vol. 2, p. 670: 1-25, pp. 789-790: 1-25.

15. Since the fall of 2024, C.G. has been accompanied, while at school, by a Behavior Assistant ("BA"). The BA is supervised by the District's Board Certified Behavior Analyst.[3] TR vol. 2, p. 490: 1-25; vol. 2, p. 555:1-25.

16. The District hints that the perceived escalation in C.G.'s behavior was caused by his contact with Jared Cordum, who provided outside occupational therapy services to C.G. during 2023-2024. Vol. 2, p. 439-442: 1-25. C.G. stopped receiving services with Cordum in Spring 2024. TR. Vol. 2, p. 441: 21-25. The District presented hearsay evidence that Cordum was arrested and convicted for sexual contact with children., but zero evidence of such contact with C.G. TR. Vol. 2, p. 441: 21-25.

17. Regardless ofthe District's general accusations as to Mr. Cordum, the DPHO finds there is no evidence that C.G.'s behavior in fourth grade was affected by any prior experience with Cordum. There is no evidence Cordum was involved in criminal activity as to C.G. The District's argument, consisting of opaque hints for which they have provided zero support, is frivolous.

Joint Issues

Issue 1: Whether the District Failed to Evaluate Student in All Areas of Suspected Disability

18. Parent has suspected autism since C.G.'s doctor brought up the possibility when he was in preschool. TR vol. 4 at 1438-1439.

19. During the fall of 2024, C.G. explained to his school counselor, Janice Martinez, that his "whole body feels on fire." TR Vol. 2 at 618. He is often unable to explain why he has done some something, including yelling and screaming and ripping up paper. TR vol. 4 at 1440; 1460; 1467-68. School staff have also described C.G.'s behavior as unpredictable and volatile. TR vol. 1 at 242; 243; 288; and 314.

20. Since he was in preschool, C.G. has consistently demonstrated characteristics associated with autism, demonstrating: impaired social communication with adults and peers, struggling with transitions; inflexibility; inability to tolerate change and need for routine, predictability and structure; unwillingness to try new or non-preferred activity; and severe sensory processing differences. *See* TR vol. 4 at 1432 *et seq;* testimony by all Zia school staff and IEPs in the record; Exhibits P-42, P-43, P-44 *and compare,* 34 C.F.R. §300.8(c)(l)(i),(iii).

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[3] The term "BCBA" appears from the record and from Petitioner's list of acronyms, attached, to be synonymous with an "analyst" or a "therapist." Regardless, BCBAs are licensed professionals in the field of behavioral analysis.

21. Each time the District has conducted an evaluation to determine whether C.G. has autism, the District has determined that he does not demonstrate autism. The District's evaluations for C.G. for autism may have tended to ignore information from C.G.'s mother, as well as C.G.'s historic patterns of behavior. *See* TR vol. 4 at 1438-1445; 1448; Exh. P-2; Exh. P-8.

22. Parent also believes that there is reason to suspect that C.G. has Tourette Syndrome ("TS"). TS "is a neurodevelopmental disorder which becomes evident in early childhood or adolescence." Exh. P-66 at 2. Motor and vocal tics are the basis for a TS diagnosis. "Motor tics are uncontrolled movements, such as eye blinking, shoulder shrugging and jumping. Vocal tics are repetitive, involuntary sounds, words, or phrases including sniffing, grunting and repeating others' words." Exh. P-66 at 2. Tics can be simple or complex. *Id.* Complex motor tics "may seem purposeful in appearance" and can include such things as touching and tapping. Complex vocal tics are words or phrases that may occur out of context and may include coprolalia (uttering obscenities). *Id.* Types oftics and how often they occur change over time. Exh. P- 64 at 2.

23. Parent submits that various acts by C.G., noted by school staff and in school records, may "provide many examples of C.G.'s conduct which may be motor or vocal tics." Examples include repetitive acts, repetition of words, throwing objects, ripping or tearing up paper, kicking, using offensive or hurtful language, making up facts, yelling, banging objects, and pacing. These examples were supported by multiple witnesses during the four days of hearing.

24. Parent has requested evaluation for both disabilities. TR vol. 4 at 1464; 1520-1521; Exh. P-2; Exh. P-8; Exh. P-9; Exh. P-16.

25. As a result of the Corrective Action plan previously ordered by the New Mexico Public Education Department after Parent filed a state complaint, the District indicated it would have C.G. evaluated for TS. The evidence presented by the parties was unclear as to whether the District has unreasonably delayed necessary paperwork to facilitate the evaluation for TS, or Parent has done so, or both.

26. The District has also agreed to re-evaluate whether C.G. has autism, as part of the Corrective Action Plan.

27. As of the date of the Due Process Hearing, neither evaluation had been completed.

Issue 2: Whether the District Failed to Provide Student with a "Free" Education

28. C.G. was frequently suspended, with and without documentation that he had technically or officially been suspended, during both 3rd and 4th grade years, which

required Parent to take him home or keep him home. Exhs. P-33, 34, 35, 36, 37, and 38.

29. Parent credibly estimates she has received "a couple of dozen calls" from school staff at Zia to pick C.G. up during the middle of the day. TR Vol. 4 at 1451.

Issue 3: Whether the District Provided Student with Education in His Least Restrictive Environment

Issue 4: Whether the District Provided Student with Access to the General Curriculum[4]

30. During his time at Zia, C.G. has increasingly been out of the classroom and over time, he was often not allowed back into the classroom if he left. Exh. P-32 and TR vol. 2, starting at 489 (testimony of Gisela Aburto, BA).

31. Starting on November 7, 2024, C.G. was placed on a restrictive schedule. He began the school day late every day and was scheduled to be in the so-called "conference room" for large portions of the school day, with only an adult BA and educational assistant, with no other students from his general curriculum class. Exh. P-8 at 39-40 (schedule beginning in November 2024) and TR vol. 2, starting at 489 (testimony of Gisela Aburto, BA); TR vol. 2, starting at 603 (testimony of Janice Martinez).

32. Neither the BA nor the EA is a teacher. *See generally* TR vol. 1, page 158. Neither the BA nor the EA actually teaches C.G. while he is in the resource room. Instead, C.G. is encouraged to participate in his general education classroom class via video access on his computer. As expressed by the EA, "I was told that [C.G.] would come into my classroom with his computer, his Chromebook, and all of his own work. *And all I had to do was provide a space for him.* So I set up a table in the back of the room." *Id.* at 166 (emphasis added).

33. The District agrees that C.G. never interacted with his general education teacher and peers on his computer, through Google Classroom streaming. *See* Proposed Finding of Fact No. 74, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 9, *citing* TR vol. 1, page 49:1-25; page 50: 1-19. "To date, [C.G.] has refused to log into Google Classroom while in [the] [r]esource [r]oom." *Id.,* Proposed Finding of Fact No. 75, at page 9, *citing* TR vol. 1, p. 30: 16-19; p. 32:8-12; vol. 2, p. 601: 1-25. The EA permitted C.G. to participate in her classroom on occasion, but her students function considerably below C.G. *Id.* at 171 ("My fourth-graders are functioning at probably a third-grade level. Some of them even second or first. I have a

[4] These are separate legal issues, but in C.G.'s case, the issues overlap as to the facts presented.

couple of non-readers that are in fourth grade.").

34. C.G.'s school counselor, Janice Martinez, testified credibly that she worried that confinement in the school conference room would be dangerous for any child's mental health. TR Vol. 2 at 626-627. Ms. Martinez was not consulted about the plan, but understood that C.G. could remain in his general education classroom only if he stayed "regulated." *Id.* at 625 to 626. Ms. Martinez felt that "[t]he confinement ... would be hard for anybody's mental health to be secluded in the conference room." *Id.* at 626. Ms. Martinez described the conference room as small, as the size of an office, not a classroom. *Id.* at 626-27.

35. Ms. Martinez also testified credibly that adult reaction to C.G. affected his ability to self-regulate, and that C.G. was not given a sufficient opportunity to avoid being confined in the conference room, due to adult reactions to his behavior and the withdrawal of any workable opportunity to show he should be allowed to remain in the classroom. Confinement had become routine. TR vol. 2, starting at 603.

36. While C.G. is very bright, capable and verbal, his academic performance, including grades and skill-based measures, have declined since he has been a student at Zia. Multiple citations in the record, including Exh. P-18 at 3.

37. Outside of school, C.G. participates in Boy Scouts, is very inventive and creative and enjoys playing with neighborhood children. TR vol. 4, page 1432, *et seq.*

38. C.G. has repeatedly expressed to Parent and school staff that he has no friends at school.

Issue 5: Whether the District Provided Student with Specialized Instruction and Accommodations

Issue 7: Whether the District Created IEP Goals which Meet Student's Needs

Issue 9: Whether the District Provided Student with Appropriate Related Services

39. In support of her contention that the District did not create IEP goals which met C.G.'s needs, Parent posits that "[r[ather than reliance on actual understanding of Student's behaviors of concern which could result from full evaluation and conducting [Functional Behavioral Analyses], the LEA has assigned its staff to "watch" and monitor Student constantly --- beginning with assignment of Behavior Assistant (BA) in December 2023, followed by assignment of a Behavior Assistant and an EA in November 2024, in addition to having school administrators ... spend hours upon hours each day following Student." Parent's Requested Finding of Fact No. 59, Parent's Requested Findings of

Fact and Conclusions of Law, submitted 3/31/25, at page 14.

40. The DPHO agrees with the proposed finding, but disagrees that the proposed finding supports a deficiency in the IEP goals, rather than a deficiency in implementation of the IEP goals. Petitioner has not pointed the DPHO to specific IEPs with specific deficiencies with regard to C.G.'s goals. The DPHO declines to "go beyond the referenced portions" of the testimony and exhibits, to the extent suggested by Petitioner in her broadly described complaint about "IEP goals." *See, e.g., Anderson v. Coca-Co/a,* 2023 WL 6307487, at *4, and citations therein.

41. Nonetheless, the DPHO has reviewed the most recent IEP, which appears to be for October 30, 2024. *See* Exh. P-18. The IEP goals are described beginning on page 14. There are several goals that address C.G.'s behavioral challenges. The measurements of progress are somewhat unclear, and the methodology to support the desired results is very unclear. Nonetheless, the DPHO cannot find, based on applicable Tenth Circuit law,5 that the IEP goals *themselves* violate the IDEA. Accordingly, the DPHO finds that by a preponderance of evidence, Petitioner has not shown that the IEP goals *per se* are insufficient to meet C.G.'s needs.

42. However, based on the evidence adduced at the Due Process hearing, the more significant question in this case is whether the District *adopted and implemented* an *effective plan* to reach the stated goals, through specialized instruction and accommodations, or appropriate related services, or all three.

43. The District conducted a Functional Behavioral Assessment ("FBA") in October 2023, and then conducted another FBA in December 2023, once C.G.'s eligibility under OHi was re-determined. Exh. P-21; Exh. P-22. The District's FBAs from October 2023 and December 2023, when C.G. was in the third grade, are the only FBAs ever conducted by the District.

44. The District has written at least seven Behavioral Intervention Plans ("BIPs") or BIP "reviews" not based on any current FBA. *See* Exh. P-24, P-25, P-26, P-27, P-28, P-29, P-30 (2/25/25). Although C.G. has been suspended and/ or out of school for long periods of time during 2023-24 and 2024-25 school years, the District has never conducted contemporaneous FBAs to examine and understand current behaviors of concern.

45. At Zia, the multiple BIPs, multiple suspensions, and assignment of multiple staff to

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[5] The DPHO will further explain the legal differences between deficient IEP goals and deficient implementation in the legal analysis and conclusions section, *infra.*

watch over or follow C.G. have been largely ineffective to address why he was evaluated as in need of special education support in the first place, when he was 3, when the District found that C.G. needed particular assistance *"in the area of social-emotional skills."* Exh. P-1 at 18 (emphasis added).

46. C.G. has received far less education and been far less successful in 3rd and 4th grades than he was in 2nd grade (Parkview Elementary). At Parkview, he was allowed to leave the classroom and come back on his own (use bathroom) and his teacher even had established a way to give him a graceful exit by cuing him to ask if he wanted to go wash his face. TR vol. 4 at 1445-1447.

47. During fall 2023, at Zia, when Student was in 3rd grade and had no IDEA special education eligibility or services, Student was believed by staff to have difficulties with anger and was suspended from school for more than a week. On November 13, 2023 following his suspension from school from November 2 through November 13, 2023, the District wrote a Safety Plan for him which addressed C.G.'s "escalating." When C.G. escalated, he was required to leave the educational setting and go to an office where adults would block the door to keep him there if he had not de-escalated. Exh. P-23; Exh. P-33. It is reasonable to infer from these facts that C.G.'s sense and anger that nobody at his school liked him was created or heightened by these events.

48. The District's pattern of emphasizing physical control of C.G., above related services and goals designed to address the precipitating causes of his disregulation, continues to the present day. As described by multiple witnesses throughout four days of testimony, the District's approach to C.G.'s behavioral challenges and escalation appeared to the DPHO to be "wash, rinse, repeat." The District has failed to develop a workable approach that takes into account actual understanding of C.G.'s concerning behaviors, developed through a current Functional Behavioral Assessment and appropriate training and observation. Due to this lack of support by the District, a pattern is created and continued that routinely fails C.G. Well-meaning District staff have neither the benefit of a current FBA nor training on how to address C.G.'s behavior in the context of C.G.'s diagnosis. Instead, District staff routinely observe C.G. until he is triggered, try to comfort or dissuade him as they are able, meet with resistance by C.G. of unknown origins, and remove him to the "conference room" if C.G. continues to resist or escalates in his concerning behavior. C.G. reports to his mother that no one likes him at his school. He returns the next day with the same result. The District then concludes that C.G.'s behavior is targeted, intentional, and cannot be tempered.

Issue 6: Whether the District Made a Unilateral Change of Placement for Student in January 2025

Parent's Issue 3: Whether Student Continues to Be Denied FAPE after Parent filed Request for Due Process Hearing on January 7, 2025, through the Week of the Due Process Hearing (March 3-March 7, 2025)[6]-

49. On January 3, 2025, Parent received an email from James "Scott" Sparks, the CMS administrator over special education. Mr. Sparks served Prior Written Notice ("PWN") on Parent, stating that the District had decided to have C.G. attend an alternative school, known as iAcademy, beginning January 8, 2025, the first day of the spring semester. Exh. P-20; *see* TR vol. 4, pages 1371-1373. The PWN was created on December 20, 2024, but not e-mailed to Parent until January 3, five days prior to the first day of school. *Id.* Notably, Mr. Sparks is aware that C.G. struggles with transitions.

SO. Prior to deciding to transfer C.G. to iAcademy, Mr. Sparks met with other school officials in a series of conversations, but not with Parent, because "nothing would change" at iAcademy, so Mr. Sparks believed that a new IEP was not necessary. TR vol. 4, page 1376.

51. Thus while the PWN for the move to iAcademy states that "[a] meeting was held on 12/20/24 to discuss special education services for Student," and that the *"team* reviewed and discussed the following input/data and information," Parent was not invited to this meeting. Exh. P-20 (emphasis added); TR 4, page 1376.

52. The PWN states, as the "basis for the proposed ... action" that "[i]n spite of the District's efforts to make adjustments to [Student's] schedule, and provide services to meet his needs, [Student's] behaviors have continued." Exh. P-20. The District added, "As the parent previously requested that [Student] be enrolled at iAcademy, the District believes that this change of location will allow the student to work closely with his case manager and an opportunity for a reset." *Id.* As the reason "used as a basis for the proposed ... action," the District states, "In spite of the District's efforts to make adjustments to [Student's] scheduled, and provide services to meet his needs,

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[6] The DPHO addresses Parent's Issue 3, whether Student was denied FAPE through the week of the Due Process Hearing, as part of Joint Issue 6, because there is a continuum of facts surrounding C.G.'s exclusion from school beginning with the attempted change of placement from Zia to iAcademy, and C.G.'s subsequent return to Zia, followed soon thereafter by C.G.'s removal from school entirely, based on the District's unusual decision to conduct both an internal threat assessment and a third party threat assessment, based on the same events.

[Student's] behaviors have continued." *Id.*

53. The change from Zia Elementary to iAcademy was scheduled to start January 8, 2025. On January 7, 2025, Petitioner filed her Due Process Request, and invoked "stay put."

54. In response to Petitioner's Motion to Enforce Stay Put, the District submitted "Clovis Municipal Schools' Response to Petitioner's Motion to Enforce Stay Put," which detailed that "Zia staff, and the Student's case manager, note that the Student returned to school for the 2024-2025 school year with a number of escalated behaviors," allegedly including "violent and aggressive behaviors towards staff." In its Response, the District further noted that "[i]n spite of the Zia team's efforts to increase support and create a plan for the Student that allows him to be academically successful, the Student's behaviors continued to escalate prior to the holiday break."

55. At the hearing on Petitioner's motion, counsel for the District stated that iAcademy is a "better location for [Student's] needs." iAcademy is focused on "different types of learners," on students who "need something different." iAcademy provides a "different presentation of educational materials" and is more "hands on" than academic. The move to iAcademy was an "administrative move" to see if it would "make a difference in [Student's] ability to access his education."

56. The DPHO found, by separate order, that the transfer to iAcademy was a change of placement, not just a change of location,[7] and that therefore stay put applied, to require the District to allow C.G. to remain at Zia. *See* Opinion and Order Directing Stay Put, dated January 24, 2025.

57. Testimony and evidence adduced at the Due Process hearing further clarified the events leading up to the attempt to transfer C.G. from Zia to iAcademy.

58. Specifically, in October 2023, more than one year prior to the decision by Mr. Sparks to transfer C.G. to iAcademy, iAcademy had already rejected C.G. as not being an appropriate fit for the school, due to his grades and attendance. TR vol.3. page 885. The iAcademy principal may also have advised C.G. he should avoid getting suspended at his neighborhood school, if he wanted an opportunity to attend iAcademy. *Id.,* page

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[7] The District incorrectly states that "[t]he Hearing Officer never made a determination that the move to iAcademy was a change of placement." *See* Proposed Finding of Fact No. 61, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 7, *citing* TR vol. 1, page 12:1-25. In support, the District cites to a page of the transcript which provides no support for this contention, which is directly contradicted by the Opinion and Order Directing Stay Put.

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59. After the rejection of C.G., the possibility of transferring C.G. was nonetheless subsequently raised by the District at an IEP for C.G. on October 30, 2024. The IEP documents that "Parent and [Student] participated in an interview with iAcademy. Following the interview, the parent determined that the iAcademy placement would not adequately meet [Student's] needs." *See* IEP, dated October 30, 2024, Exh. P-18, at 36. C.G. was not moved to iAcademy at that time, nor was the move included as a possible alternative placement in the IEP. At the same IEP meeting, Petitioner "requested to table the meeting as she was not happy about the proposed change in program" at Zia. *Id.,* at page 38.

60. Testimony by District personnel who work at iAcademy and at Zia helped clarify the differences between Zia and iAcademy as a placement for C.G. The director of special education, Mr. Sparks, testified that Zia does not "have the supports and services that [C.G.] needs because of the size of the school." TR vol. 4, page 1342. Mr. Sparks' view is that C.G. is overstimulated at a large school. *Id.* As expressed by Mr. Sparks, "[i]f we can't adapt the environment that he currently is in, do we look at another environment that is smaller, less hectic, less students?" *Id.* Mr. Sparks rejected the possibility of a self-contained classroom at Zia, not because a self-contained classroom would not assist C.G., *but because "we're not required to operate [a self-contained classroom] in every school." Id.,* pages 1342-46 (emphasis added). Mr. Sparks noted that the last IEP had directed assignment to a smaller classroom such as the resource room to address C.G.'s behavioral challenges, so the smaller size of iAcademy also seemed like a possible solution for C.G. *Id.,* pages 1378-1379.

61. In contrast, Melinda Hewitt, the teacher who would be assigned to C.G. at iAcademy, believed the size of the classroom and the nature of the students at iAcademy might prove even more problematic for C.G. than Zia Specifically, the size of the class, and the pre-existing close relationship of the students, might result in C.G.'s social isolation. TR vol. 4, page 1080. Moreover, C.G. would not necessarily receive more attention at iAcademy than at a larger school. *Id.,* pages 1080-1081.

> Did you also express to [redacted] your concern that you wouldn't have time for tantrums?
>
> No, I don't recall saying that. My -- my concern, as far as behavioral things, is I know - people think, "Oh, iAcademy is a small school. My kid's going to get so much attention. They're going to get more attention." And with two different grade levels, that's not necessarily always the case. I can't always spend my time with one student. And she expressed that a behavioral specialist would be there to support me.

Id.

62. Petie Davis, the dean of iAcademy, testified that iAcademy is "made for more of a specific student. We wanted to give students that don't do well in the general education setting a chance to be successful." TR vol. 3, page 851. Specifically, iAcademy focuses on students who have been bullied at their neighborhood school, who have anxiety issues. *Id.,* page 854.

63. The criteria for admission to iAcademy are good behavior, good attendance, and good grades. *Id.,* page 862. C.G. was therefore denied admission originally, in October of 2023, because of his grades and attendance. *Id.,* page 885.

64. When Mr. Davis was first asked to accept C.G., in December of 2024, he expressed concern that C.G.'s disruptive behavior might upset his other students, due to their anxiety issues.. *Id.,* page 889. He expressed to Mr. Sparks that iAcademy students who were disruptive were typically unsuccessful at the school. *Id.,* page 891. The decision whether to accept C.G. was taken away from Mr. Davis, which had never happened previously. *Id.,* page 891.

65. Mr. Davis was never previously asked to accept a particular student, but he was "willing to give it a try." *Id.* at pages 864-865. He was "willing to give it a shot, give it a chance, and see what happens." *Id.,* page 901. However, a student attending iAcademy would be sent back to his neighborhood school for "extreme behavioral issues," including classroom disruption or verbal abuse towards staff. In such a case, a student was given up to nine weeks to correct his behavior. *Id.,* pages 873-874.

66. Mr. Davis did not know if C.G. would need a new IEP at iAcademy. *Id.,* page 907. He acknowledged that he did not have "the experience of trying to figure that out at this level," but was hopeful that C.G. might be less anxious at iAcademy because of the focus on technology. *Id.,* pages 908-913. Mr. Davis was concerned that he and his staff might not have the necessary tools, and believed the teachers would need more training. *Id.,* pages 919-910.

67. C.G. was not allowed back at Zia until the DPHO entered a formal written order requiring stay put. C.G. was not allowed to return to Zia until late January, 2025. In the meantime, C.G. was at home.

68. Soon after C.G. was allowed to return, he was suspended.

69. Thus at the time of the Due Process Hearing, C.G. had not attended school since February 13, 2025. The District had suspended him indefinitely and ultimately

provided, on February 21, 2025, that the District was obtaining a "third party threat assessment," and that C.G. would be kept out of school until the third party threat assessment was completed and there was a meeting to review the third party threat assessment. CMS had selected the third party assessor, which is Mental Health Resources. Then "someone" in "Central Office" would determine when C.G. could return to school. TR vol. 1 at 264-267 (Principal Davis); Exh P-34 at 10; Exh P-58 at 58-60. That the DPHO was able to determine during the Due Process hearing, the District had not shared with Parent any discernible, viable plan or time table to return C.G. to school.

70. In addition to the planned third party threat assessment, the District has performed various internal threat assessments regarding C.G. *See* Exh. P-72. These assessments apparently were not provided to Parent prior to the Due Process hearing.

71. Dr. Carlton Lewis is the director of mental health for the District. TR vol. 4, page 1285. He testified that he accepted Dr. Martinez' current threat assessment on February 20, 2025, which recommended that C.G. be permitted to return to Zia. *See* Exh. P-72, page 14. Dr. Lewis does not know why the District then required a third party threat assessment; he thought Mr. Sparks would know. TR, vol. 4, pages 1308-09. Mr. Sparks did not know why the District required a third party threat assessment; he thought Dr. Lewis might know. TR 4, pages 1369-1370.

72. Mindy Sena is the District's incident investigator. TR vol. 3, pages 1012-1013. In tone and manner at the Due Process Hearing, Ms. Sena was hostile and defensive, towards Parent as well as towards the process of the hearing. She was hostile towards questions regarding her job assignment at Zia. At one point during her testimony, she inappropriately turned to counsel for the District for instruction as to whether she should answer a particular question. Her testimony was biased and not credible.

73. Ms. Sena testified that she participated as part of a team to decide whether a third party threat assessment was necessary, yet she testified that she did not know why the decision was made. TR vol. 3, pages 1039-1041. The team met and decided that a third party threat assessment was necessary on February 21, 2025. On February 26, 2025, Ms. Sena contacted Parent concerning the need to sign a release for the third party threat assessment. Ms. Sena did not explain the process of a third party assessment to parent "because she didn't ask." *Id.,* page 1040.

Issue 8: Whether the District Provided Student with Education which Meets State Standards

74. The DPHO will address this issue in the legal analysis and conclusions section, *infra.*

Issue 10: Whether the District Failed to Consider Providing or Failed to Provide Student with Assistive Technology Services and Equipment

75. The DPHO will address this issue in the legal analysis and conclusions section, *infra.*

Issue 11: Whether the District Failed to Provide Accurate and Complete PWN

76. The DPHO will address this issue in the legal analysis and conclusions section, *infra.*

Issue 12: Whether Student Was Denied FAPE during the Statutory Period

77. The DPHO will address this issue in the legal analysis and conclusions section, *infra.*

Issue 13: Whether. if There Was a Denial of FAPE.
Student is Entitled to Remedy and What that Remedy Should Be

78. The DPHO will address this issue as a separate section of the Memorandum Decision and Order, *infra.*

Parent's Issues

Parent's Issue 1: Whether the District Has Punished Student for Manifestations of His Disabilities

79. As already found, *supra,* with regard to whether the District failed to provide C.G. with a *{{free"* education, C.G. was frequently suspended, with and without documentation that he had technically been suspended, during both 3rd and 4th grade years, which required Parent to take him home or keep him home. Exhs. P-33, 34, 35, 36, 37, and 38.

Parent's Issue 2: Whether the District Interfered with Parent's Right to Have the Special Ombud Participate

80. Petitioner appears to have abandoned this issue, or has failed to provide proposed findings to support this issue. Regardless, to the DPHO's recollection, only the District addressed this issue during the Due Process Hearing. The DPHO declines to comb through the record to discern the basis for this complaint, so will deem the issue abandoned by Petitioner.

District's Issues

District's Issue 1: Whether at Any Time Prior to Filing of the Instant Matter, the Parent Advised the District that She Disagreed with the IEP, the Student's Schedule of Services, or the Behavior Intervention Plan

81. The DPHO will address this issue in the legal analysis and conclusions section, *infra.*

District's Issue 2: Whether at the Corrective Action Plan, Already in Place and Underway, Addresses All of the Same Issues Brought in this Complaint

82. The DPHO will address this issue in the legal analysis and conclusions section, *infra.*

IV. Legal Analysis and Conclusions

Assessment and Evaluation and Other Issues Involving Procedure

As previously set forth, the general mandate of the IDEA to provide special education to children with disabilities broadly divides into procedural and substantive requirements. *See* "Relevant Legal Overview," starting on page 1, *supra.* Petitioner has raised several procedural challenges to the District's efforts. The two separate issues raised by the District are also in response to Petitioner's procedural challenges.

All of Petitioner's procedural challenges fall generally into the category of assessment and evaluation - whether the District followed correct procedure in designing C.G.'s special education program, before it began to implement the program.

The first step towards compliance with the IDEA is the District's "child find" obligation. Specifically, all children suspected to have disabilities who are in need of special education and related services must be identified, located, and evaluated. *See* 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.lll(a)(i). "Child find" is the responsibility of the Local Educational Agency, in this case the District. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.lll(a)(i); *see Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.,* 181 F.Supp.2d 1307, 1310 (D.Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See id.* at 1311.

As the word implies, "suspicion" is a low bar. *See, e.g., JK v. Missoula County Public Schools,* 2016 WL 4082633 * 9 (D.Mont. 2016). The Ninth Circuit has defined "suspicion" to equate with being put on notice that symptoms of disability are displayed by the child. *See Timothy* 0. *v. Paso Robles Unified Sch.Dist.,* 822 F.3d 1105, 1120 {9th Cir. 2016}.

Here, in **Joint Issue No. 1,** Parent's complaint is that the District has yet to evaluate C.G. for Tourette Syndrome. In addition, while C.G. has been evaluated for autism, and while District evaluators have concluded that C.G. does not have autism; Petitioner believes the evaluations are incorrect and has therefore requested new evaluations for autism.

Prior to filing her Request for Due Process Hearing, Petitioner filed a state complaint with NMPED. The resulting Corrective Action Plan includes the requirement that the District evaluate C.G. for Tourette Syndrome and re-evaluate him for autism. The District appears to assert, in the **District's Issue No. 2,** that this may moot this issue. However, the District has not even used the word "moot," much less has the District presented any argument as to how the Corrective Action Plan preempts, or even affects, the dispute now pending before the DPHO. The DPHO therefore rejects the District's Issue No. 2

Pursuant to the low bar presented by the phrase "suspicion of disability," the DPHO will direct the District to evaluate C.G. for autism and Tourette Syndrome. Petitioner has not shown by a preponderance of the evidence that C.G., in fact, has either disability. Therefore an award of compensatory education is not warranted as to this procedural violation. *See generally Garcia,* 520 F.3d at 1125-26.

The holding that Petitioner has not shown that C.G. has autism is also dispositive of Petitioner's complaint, in **Joint Issue No. 8,** that the District has not provided C.G. with education which is consistent with state standards. The "state standards" cited by Petitioner are the standards that apply to students with autism. When and if C.G. is evaluated as having autism, those standards will apply, and, should the District fail to apply these standards to C.G., Petitioner is free to bring a new request for a due process hearing to rectify this failure. All of this, however, is speculative, and therefore none of this is ripe for review at this time.

In **Joint Issue No. 7,** Petitioner contends that the District has failed to create IEP goals which meet Student's needs.[8]

The question of adequate IEP goals is whether Petitioner has met her burden by a

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There is some question whether the issue of adequate IEP goals presents a substantive issue or a procedural issue. *Compare O'Too/e By & Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233,* 144 F.3d 692, 706 (10th Cir. 1998)(addressing question of deficiency of IEP goals as a procedural issue) *with Albuquerque Public Schools v. Maez and Mondragon, on behalf of M.M.,* p. 22, No. 16-cv-1082 WJ/WPL (D.N.M. August 1, 2017)(1EP goals viewed as substantive). Thus tThere appears to exist a legal riddle. Because the DPHO has found that the IEP goals were not inadequate, and because the DPHO concludes, *infra.* that the District clearly denied FAPE in its implementation of C.G.'s program, the DPHO is not required to reach a decision on the matter whether creation of the IEP goals implicates procedure or substance. Petitioner's remedy would not change.

preponderance of the evidence to establish that the LEA did not "offer an IEP reasonably calculated to enable a child to make progress appropriate in light ofthe child's circumstances," *Endrew F.* , 137 S. Ct. at 999, considering thee "unique circumstances" of this Student. *Id. at* 137 S. Ct. at 1001. The DPHO has already found that Petitioner has not shown by a preponderance of the evidence that the IEP goals *per se* are insufficient to meet C.G.'s needs. Joint Issue No. 7 is therefore denied.

In **Joint Issue No. 10,** Petitioner contends that the District should "conduct[] an assistive technology evaluation to determine possible need for services and equipment to assist Student's writing function." In support, Petitioner cites C.G.'s avoidance and frustration with written work. Petitioner fails to present any evidence that assistive technology is likely to assist C.G. with written work, and has therefore failed to sustain this claim by a preponderance of the evidence, and this claim will therefore be denied.

In support of **Joint Issue No. 11,** regarding the alleged denial of accurate and complete Prior Written Notice, Petitioner has submitted proposed findings that support her claim that the District did not provide sufficient notice to Parent, to make clear what steps were necessary to obtain an assessment as to Tourette Syndrome. *See* Parent's Requested Findings of Fact Nos. 65 and 55, Parent's Requested Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 16. However, this issue is subsumed by the DPHO's ruling that the District must evaluate C.G. for Tourette Syndrome, and that this is purely a procedural violation at this point. The DPHO makes no ruling as to whether, when and if C.G. is assessed as having Tourette Syndrome, Petitioner could then litigate entitlement to compensatory services in a new Due Process Hearing Request.

In the pre-hearing Joint Statement of Issues, Petitioner asserted a separate issue related to the participation of the "Special Ed Ombud." *See* **Parent's Issue No. 2.** The DPHO has no recollection of Petitioner's having introduced evidence related to this issue at the Due Process Hearing, and Petitioner has not submitted proposed findings of fact in support of this issue. The DPHO therefore considers this issue to be abandoned, and will not make any ruling on this issue.

Finally, the District submits the following issue as the **District's Issue No. 2:** "Whether at any time prior to filing of the instant matter, the Parent advised the District that she disagreed with the IEP, the Student's schedule of services or BIP."

The District has not submitted either proposed findings or legal argument to support this contention. Notably, the District was free to question Parent concerning what she had done to challenge particular aspects of C.G.'s program, prior to filing her Request for Due Process Hearing, yet the District failed to do so.

If Petitioner has the burden to affirmatively show at a Due Process hearing that she

complained as the District describes, then this would suggest that *any* failure to complain at any point prior to requesting a Due Process Hearing would then operate as a waiver of the opportunity to challenge the District's compliance with the IDEA at a subsequent Due Process hearing.

The DPHO knows of no such legal requirement. That the DPHO was able to discover, the only law in the Tenth Circuit that comes close to addressing administrative exhaustion in this context is *Ellenberg v. N.M. Military Inst.,* 478 F.3d 1262, 1275-1279 (10th Cir. 2007). The Tenth Circuit held in *Ellenberg* that before relief may be sought in *federal court,* the party "must first request an IEP for the disabled child, or seek a change to a current IEP if one exists." *Id.* at 1267. The Tenth Circuit has since called into question the breadth of *Ellenberg,* in *Muskrat v. Deere Creek Pub. Schs.,* 715 F.3d 775, 783 (l0thCir. 2013). Even if the analysis in *Ellenberg* remains viable, *and* applies to what a parent must do prior to filing a Request for Due Process Hearing, its reach still appears limited - the point made there was that a parent must request an IEP, or seek a change to an IEP, prior to starting from scratch to challenge a placement. This is unquestionably distinguishable from the District's suggestion here, that Parent's perceived omissions concerning specific aspects of C.G.'s special education program have some effect on the current review by the DPHO.

There is no legal authority that the DPHO was able to locate that suggests that Parent was required to do more than she has done to alert the District of her complaints concerning C.G.'s program. While the DPHO, once again, declines to scour the entirety of the record to determine whether Parent alerted the District about *every* one of her complaints, it is clear that Mother objected to the removal of C.G.'s OHi eligibility in the spring of 2023. She also appeared to object to the change in program at the IEP meeting in October 2024, but her objection was either ignored, overruled, or she was persuaded to drop the matter. *See* IEP, dated October 30, 2024, Exh. P-18, at page 38 (quoting the District's IEP, Petitioner "requested to table the meeting *as she was not happy about the proposed change in program"* at Zia).

Even if Mother did not formally object to all the IEPs, or reluctantly agreed to aspects of C.G.'s IEPs over the years, or even enthusiastically agreed to other aspects, the most critical issue concerning C.G.'s IEP is clearly the District's subsequent implementation. After listening to four days of the Due Process hearing, and reviewing the numerous documents submitted by the parties, the DPHO has no question that Parent complained about the implementation of C.G.'s special education program, including the schedule of services and the District's behavioral interventions.

Substantive Violations Related to the Denial of FAPE

In **Joint Issue No. 2,** Petitioner complains about the District's informal and formal suspensions and telephone calls regarding C.G.'s behavior, which led to Parent's having to interrupt her work day to pick him up or keep him home. *See* Parent's Requested Findings of

Fact Nos. 25 and 27, Parent's Requested Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 7. Petitioner adds that the District Superintendent expressed concern that the multiple telephone calls and meetings were imposing stress on Parent. *Id.,* Paragraph 28. Petitioner's legal support for Issue No. 2 is that Parent has been forced to participate in matters related to C.G., the District refused to provide occupational therapy for C.G. during the fall of 2023, and the District required Parent to use her medical insurance to obtain a Tourette Syndrome evaluation. *Id.,* Paragraph 8, page 19.

Petitioner has presented no legal argument to support that the District's intermittent requests for Parent's assistance violate the IDEA. There may be such legal authority somewhere, but Petitioner has not presented the DPHO with legal authority, and the DPHO declines to develop the issue on Petitioner's behalf.

Nor has Petitioner provided any guidance as to what remedy would be or should be available to correct this asserted violation of the IDEA. Nor has Parent provided any guidance as to how any remedy specifically would be measured. The DPHO declines to develop a remedy in the absence of any guidance from Petitioner.

The DPHO agrees that the District has failed to provide "a cogent and responsive explanation for" its decision to remove C.G.'s eligibility for special education on the basis of OHi. *See generally Endrew F.,* 137 S. Ct. at 1001-02. This rash decision also caused the District to deny C.G. necessary OT services during the fall of 2023. Parent apparently filled in the void with her own funds. However, even this point is not clear, much less has Petitioner provided evidence as to what the actual cost to Parent was in paying for OT outside of school.

Finally, the evidence adduced at the Due Process Hearing failed to sustain Petitioner's claim, based on the applicable preponderance of the evidence standard, that Parent's medical insurance paid for or will pay for the evaluation as to Tourette Syndrome. Nor has Petitioner provided legal authority for her suggestion that there is an IDEA remedy available to address the use of insurance benefits, rather that District funds, to pay for an evaluation otherwise required by the IDEA.

The DPHO therefore denies any claim related to Joint Issue No. 2, specifically with regard to Parent's apparent request for a remedy based on her expenditure of time, money, or emotional distress.

Joint Issue No. 6 is "Whether the District made a unilateral change of placement for Student to attend iAcademy effective January 8, 2025 or did this move constitute a change of location for Student, not impacting his provision of services." The DPHO previously ruled on this question, in a "stay put" order dated January 24, 2025. The evidence and testimony adduced at the Due Process Hearing have not changed the DPHO's opinion, and accordingly the legal analysis largely duplicates the analysis provided in the prior Order.

According to the IDEA, a school district should ordinarily place a child with disabilities in "the regular educational environment":

> To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and that special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(B). The United States Court of Appeals for the Tenth Circuit has expressed this as "at most a preference for education in the neighborhood school." *Murray By & Through Murray v. Montrose Cnty. Sch. Dist. RE-1J,* 51 F.3d 921, 929 (10th Cir. 1995).

The Code of Federal Regulations clarifies that while Section 1412(a)(5)(B) may not be a mandate, it is the preference and therefore should serve as the default:

> In determining the educational placement of a child with a disability, including a preschool child with a disability, each public agency must ensure that-
>
> (a) The placement decision-
>
> (1) Is made by a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options; and
>
> (2) Is made in conformity with the LRE provisions of this subpart, including §§ 300.114 through 300.118;
>
> (b) The child's placement-
>
> (1) Is determined at least annually;
> (2) Is based on the child's IEP; and
> (3) *Is as close as possible to the child's home;*
>
> *© Unless the IEP of a child with a disability requires some other arrangement, the child is educated in the school that he or she would attend if nondisabled;*
>
> (d) In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs; and
>
> (e) A child with a disability is not removed from education in age-appropriate regular

classrooms solely because of needed modifications in the general education curriculum.

34 C.F.R. § 300.116 (emphasis added).

In this case, the filing of a Due Process Request turned this preference into a dictate, to preserve the *status quo* while waiting on an administrative hearing to determine whether the District will be allowed to change the placement :

> Except as provided in subsection {k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.

20 U.S.C. § 1415 (j); *see also* 34 C.F.R. § 300.518 (a).

The District appears to argue that so long as the program at iAcademy includes all the programming provided by Student's IEP, there has not been a change in placement, although the DPHO agrees that this is one aspect to consider in determining whether a transfer to a different school is a "change in placement," this is certainly not determinative. Otherwise, a school district could move all students with a disability out of a neighborhood school, so long as each child's IEP remained in place. The DPHO knows of no legal support for such a theory, which appears to contradict the clear purpose of the IDEA to allow children with disabilities to participate as fully as they are able with their general education peers in their neighborhood school. The District has supplied none.

Based on the testimony of Mr. Davis and Ms. Hewitt, the DPHO also disagrees with the premise that the programming would have been identical.

Notably, while there may be some other way to construct an involuntary change in schools that would not also be a change in placement, only two circumstances come to mind - a school that closes or a student who transfers to a different district. *See, e.g., J.M. v. Chino Valley Unified Sch. Dist.,* 2018 WL 6075349, at *7 (C.D. Cal. Feb. 23, 2018). Other than these two obvious examples of a change in location, it strains imagination, if not credulity, to assume that a school district would transfer a child with disabilities to a new school, over a parent's objection, without some reason to think that the transfer would change the child's placement.

Here, for example, the District, in the form of Mr. Sparks' testimony at the Due Process hearing, has failed to offer any legitimate basis for the transfer, other than C.G.'s perceived misbehavior, combined with a vague hope that a smaller school can work a miracle with C.G. In contrast, the more unbiased testimony of iAcademy personnel, including the dean and the

teacher who would be assigned to C.G., leads the DPHO to conclude that iAcademy is not currently structured to accept C.G., in terms of addressing his disabilities. If anything, from what the DPHO learned from the testimony of the two I-academy witnesses presented at the Due Process hearing, iAcademy is at present even less equipped to help C.G. than Zia.

The DPHO agrees with and adopts Parent's position in Issue No. 6.

The remaining joint issues go to the heart of Petitioner's central contention that C.G. has been denied FAPE. The DPHO will therefore address the remaining issues as a single coherent whole.[9] These joint issues are as follows:

Joint Issue No. 3: Whether the District has provided Student with education in his Least Restrictive Environment;

Joint Issue No. 4: Whether the District has provided Student with access to the general curriculum;

Joint Issue No. 5: Whether the District has provided Student with specialized instruction and accommodations to meet his unique needs arising from disability;

Joint Issue No. 9: Whether the District provided Student with appropriate related services; and

Joint Issue No. 12: Whether Student was denied FAPE during the statutory period.

In addition, Petitioner raises two separate issues, as to (1) whether the District has punished Student for manifestations of disability and whether this was caused by lack of professional knowledge and training **(Parent's Issue No. 1);** and as to (2) whether Student continued to be denied FAPE after Parent filed her Request for Due Process hearing on January 7, 2025, through the week of the Due Process Hearing (March 3- March 7, **2025)(Parent's Issue No. 3).**

For purposes of clarity, the DPHO will reverse the numerical order of the issues submitted, and begin the analysis with two related issues - whether the District has provided Student with specialized instruction and accommodations to meet his unique needs arising from disability **(Joint Issue No. 5),** and whether the District provided Student with appropriate related services)(Joint **Issue No. 9).** In turn, resolution of these issues will also go directly to

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[9] Joint Issue 13, whether, if there was a denial of FAPE, Student is entitled to remedy and what that remedy should be., will be addressed in the final section of this Memorandum Decision and Order.

the DPHO's analysis as to whether the District has provided access to the general curriculum in the least restrictive environment **(Joint Issues Nos. 3 and 4).**

Specifically, C.G. has been identified as eligible for special education on the basis of "other health impairment," which "means having limited strength, vitality, or alertness, *including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment,* that - (i) Is due to chronic or acute health problems such as ... *attention deficit disorder or attention deficit hyperactivity disorder,* ... and (ii) [a]dversely affects a child's educational performance." 34 C.F.R. § 300.8.

On the basis of this eligibility, C.G. was *per se* entitled to specialized instruction and accommodations to meet his unique needs arising from the disability of ADHD, and was also entitled to appropriate related services. Addressing C.G.'s need to learn to deal with his heightened alertness to environmental stimuli was and is critical to the potential success of any special education program. In addition, the District should have provided "related services." The term "related services" is defined in the IDEA to mean, *inter a/fa,* "such developmental, corrective, and other supportive services ... as may be required to assist a child with a disability to benefit from special education, ..." 20 U.S.C. § 1401(22); *see also* 34 C.F.R. § 300.34.

The Functional Behavior Assessment ("FBA") and the Behavior Intervention Plan are a critical part of C.G.'s entitlement to accommodations and related services. Specifically, the District agrees that C.G.'s challenging behaviors are "identified through a Functional Behavior Assessment ("FBA")." *See* Proposed Finding of Fact No. 26, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 4, *citing* TR vol. 1, page 87: 7-10,.

Despite this understanding of the critical role of the FBA, the last FBA for C.G. was completed by the District at the end of October, 2023. *See id.* This was almost a year and a half ago. In October 2024, the IEP team met to discuss the Student's services and review the Behavior Intervention Plan ("BIP")." Proposed Finding of Fact No. 23, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 6, *citing* TR vol. 1, p. 93:1-25. Despite multiple meetings to consider C.G.'s behavior and to modify various behavior intervention plans, the IEP team did not decide until February 2025, immediately prior to the Due Process hearing, that the District should "conduct a new FBA." *Id.,* Proposed Finding of Fact No. 27, at page 4, *citing* TR, vol. 2, p. 636: 1-25.

The IDEA requires more focus than demonstrated by C.G.'s IEP team. Specifically, under the rubric of "consideration of special factors," the IDEA requires that "[t]he IEP team shall, in the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior." 20 U.S.C.. § 1414 (B)(i). In C.G.'s case, the interventions appeared to be mostly

negative in nature - for example, the BIPs continually tended to emphasize, from 2023 and throughout 2025, how C.G. would learn to control his reaction to contemporaneous events, with some negative and positive reinforcement by others, rather than any concerted attempt by District employees to identify, plan for, and avoid triggering events in advance. *See* Exh.P-23 through P-30.

In addition, the District performed a psychological examination only once it was required to do so by the NMPED Corrective Action Plan *See* Proposed Finding of Fact No. 53, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 6, *citing* TR vol. 4, page 1400-1402: 1-25. This examination was completed on November 24, 2024. *See* Exh. P-10. The evaluation emphasizes C.G.'s risk to others, and recommends additional mental health services and counseling services, as well as communication between the school-based provider and the community provider. See Ex. P-10 at pages 11 and 13. It does not provide recommendations as to how the District can provide specialized instruction and accommodations to C.G. to meet his unique needs arising from the disability of ADHD; nor does the evaluation recommend appropriate related services, other than an increase in mental health counseling.

Additionally, regardless of the strength of the FBA or the BIPs, or the lack thereof, implementation remains a serious and very obvious problem. While the Behavior Assistant who was directly assigned to C.G. believed that C.G.'s actions were at times intentional, she also had some positive reports about his behavior, and sympathy and patience regarding his underlying disability. She appeared open to doing what she could to assist C.G., but she did not appear, as of yet, to have the training or instruction either to consistently spot and prevent triggering events, or to consistently prevent C.G.'s escalation once his challenging behavior is triggered.

In contrast to the more measured and objective testimony presented by C.G.'s assigned BA, District administrators attribute motive and intention to C.G., without taking into account his disability. Thus throughout the four days of the Due Process Hearing, the attitude of District administrators, including the Special Education Director and the principal of C.G.'s school, was expressed in testimony as being that C.G. was likely acting intentionally and maliciously. The District describes C.G. and his behavior as "violent," "volatile," "manipulative," "targeted," "aggressive," and "voluntary." Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, *passim.* This suggests a level of indifference to the *point and purpose* of specialized instruction and accommodations, and related services, which is to recognize that the original and primary cause of C.G.'s behavior is his disability.

Based on the existing record, as already described in the Findings of Fact, *supra,* there is no question that C.G.'s exile from his general education classroom, to the conference room, has denied C.G.'s access to the general curriculum .

The District has responded that C.G.'s placement in the conference room was necessary in response to C.G.'s behavioral challenges. This response is unavailing for two reasons.

First, the District has failed to provide a cogent explanation as to why District personnel could not address C.G.'s behavioral issues within the general education classroom. Specifically, the District has had several years to work out a behavioral plan and the implementation thereof, that would allow C.G. to remain in his classroom with his peers, or at least to be able to remain there with more frequency. Instead, the testimony by District administrative personnel tended to focus on the view that C.G. was incorrigible, and that his acting out was intentional and manipulative. Yet the District offered no witness with the necessary professional background to confirm this very dire assessment.

Other witnesses, including C.G.'s occupational therapist and his counselor, appeared to have a favorable view of C.G.'s ability to get along with his peers and with adults. C.G.'s behavioral assistant and his classroom teacher appeared well aware of C.G.'s difficulties in navigating the general education classroom, but did not appear ready to give up entirely on C.G.

In addition, it is impossible not to take note that there is general agreement - or at least no real dispute - that C.G. did well at his first school, did not do as well at Zia, began to escalate after he was exited from his special education program at Zia, and has continued to have trouble at Zia. His escalation increased after the District denied him entry to Zia at the beginning of this semester; upon his return to Zia, his behavior further escalated, according to reports by the District. Yet Parent reports that C.G. does well in other social settings.

After listening to four days of testimony and reviewing the three large volumes of documents submitted, the DPHO's "best sense" of what is occurring is a mixture. The dearth of planning, training, and observation by experts has led to mistakes by District personnel in how they both pre-plan for C.G.'s behavioral challenges, and how they respond to them. After being locked in rooms and exiled to a small resource room, without any apparent educational support, C.G. may well be intentionally acting out, either in anger or as a way of escape. The DPHO, however, is not an expert in ADHD, and therefore does not "hold" as a legal conclusion that this is what has occurred. What the DPHO does hold, however, is that nothing in the four days of hearing satisfied the "fair expectation" that District authorities would "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." *See Endrew F.,* 137 S. Ct. at 1001-02.

Second, even if re-direction to the resource room is a reasonable alternative to the general education classroom on occasion, the testimony of the educational assistant assigned to C.G., and well as the testimony of Ms. Martinez, C.G.'s counselor, make clear that the

resource room is not remotely functioning as represented by the District. While the District contends that C.G. has an educational assistant "assigned" to him for support, this is not the understanding of the EA herself. As expressed by the EA, "I was told that [C.G.] would come into my classroom with his computer, his Chromebook, and all of his own work. *And all I had to do was provide a space for him.* So I set up a table in the back of the room." (Emphasis added).

Most telling was the testimony of C.G.'s counselor; while the DPHO has already quoted Ms. Martinez in her findings of fact, Ms. Martinez' professional opinion is worth reporting here. Specifically, Ms. Martinez' professional opinion was that adult reaction to C.G. affected his ability to self-regulate, and that C.G. was not given a sufficient opportunity to avoid being confined in the conference room, due to adult reactions to his behavior and the withdrawal of any workable opportunity to show he should be allowed to remain in the classroom. Confinement had become routine. Ms. Martinez understood that C.G. could remain in his general education classroom only if he stayed "regulated."

Moreover, Ms. Martinez worried that confinement in the school conference room would be dangerous for any child's mental health. Ms. Martinez felt that "[t]he confinement .. . would be hard for anybody's mental health to be secluded in the conference room."

The DPHO agrees with and adopts Parent's position in Joint Issues 3, 4, 5, and 9.

The DPHO also agrees with and adopts Parent's position in **Joint Issue No. 12.** Based on the DPHO's findings and conclusions with regard to denial of access to the general curriculum, the denial of access to specialized instruction and accommodations to meet C.G.'s unique needs arising from disability, and the denial of appropriate related services, the District has also denied C.G. a free and appropriate public education. C.G.'s grades have suffered, and he has not made any recognizable progress on the area of his social-emotional skills. The District has denied C.G. FAPE from January 2023 through the present time.

In **Parent's Issue No. 1** and **Parent's Issue No. 3,**[10] Petitioner raises two additional issues related to Petitioner's central contention that C.G. has been denied FAPE. Both of these issues relate to C.G.'s exclusion from school.

Parent's Issue No. 1 is "whether the District has punished Student for manifestations of his disabilities."

The District suggests, in its Proposed Conclusion of Law No. 9, that the DPHO lacks

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[10] **Parent's Issue No. 2** is "Whether the District interfered with Parent's right to have the Special Ed Ombud participate." The DPHO deemed this issue abandoned, pages 18 and 21, *supra.*

authority to address this issue: "Nothing within IDEA gives a DPHO the authority to address claims that a student has been disciplined on the basis of his disability; such claims are properly brought only under the Americans with Disabilities Act and/or Section 504." *See* Proposed Conclusion of Law No. 9, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 15.

The District's view is clearly incorrect. Instead, 34 C.F.R. § 300.530(e)(l) dictates that:

> Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's lEP, any teacher observations, and any relevant information provided by the parents to determine-
>
> (i) If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
>
> (ii) If the conduct in question was the direct result of the LEA's failure to implement the IEP.

34 C.F.R. 300.530(e)(l)(i,ii). Suspending a child and sending him home constitutes a change of placement. *See, e.g., D.S. v. Blue Ridge Sch. Dist.,* No. 3:24-CV-00184, 2025 WL 976700, at *5 (M.D. Pa. Mar. 31, 2025).

There is an additional wrinkle here, because some of the challenged suspensions apparently occurred when the District had improvidently removed C.G. from special education services. 34 C.F.R. § 300.530(e)(l) addresses "a child with a disability," but also invokes the oversight of the "IEP Team," suggesting that a suspension during the time frame that C.G. was not eligible for special education pursua.nt to the IDEA would not call for oversight by the IEP team. Indeed, no lEP team existed for C.G. during some of his suspensions.

There is also a question as to whether and when C.G. was actually "suspended," since Petitioner submits only that "C.G. was frequently suspended, with *and without documentation that he had technically been suspended,"* and that Parent was required "to take him home *or keep him home." See* Finding of Fact No. 28, page 9, *supra.* (emphasis added). Thus at this point in time, there is no way to sort out whether C.G. was sent home for part of an afternoon for minor misbehavior, or sent home for long periods of time as punishment.

Regardless of the circumstances existing at the time, the failure to hold a manifestation determination meeting *per se* is clearly a procedural violation, that cannot be remedied retroactively. On the other hand, four days of testimony and a review of numerous written

documents in the record have convinced the DPHO that the District will not hesitate moving forward to exclude C.G. from Zia, through various means, very likely including over reliance on formal and informal suspension or temporary exclusion. Therefore, the DPHO will order that henceforth, the District must document in writing every time it sends C.G. home temporarily due to perceived misbehavior. Every time the District officially suspends C.G., it must conduct and document a manifestation determination.

The most recent event resulting in C.G.'s removal from school is the District's stated need for a third party threat assessment. Specifically, **Parent's Issue 3** is "whether Student continues to be denied FAPE after Parent filed her Request for Due Process hearing on January 7, 2025, through the week of the Due Process Hearing (March 3- March 7, 2025).

There is a procedural aspect of this issue, and a substantive issue.

First, it is a denial of FAPE to conduct threat assessment determination meetings without participation of the student's parent. *See* DPH 1920-04, *Brainard v. Albuquerque Public Schools,* final decision (4/2020) at 100-105, 108. Here, Parent was not permitted to participate in the process - indeed, she was largely kept in the dark about the threat assessments. The DPHO therefore agrees with and adopts Parent's Issue 3. However, any remedy for this short amount of time is subsumed by the DPHO's holding that C.G. has been denied FAPE since the Spring of 2023 until the present. Specifically, even had C.G. been permitted on the Zia campus, he would have been denied FAPE by the system already in place for him.

As a procedural remedy, the DPHO will order that should an issue arise again with regard to a threat assessment, Parent must be included in the threat assessment meetings.

V. Remedy

The District submits that Zia does not have the capacity to serve C.G. District's Proposed Finding of Fact No. 105, Clovis Municipal Schools' Proposed Findings of Fact and Conclusions of Law, submitted 3/31/25, at page 13. Petitioner goes further, requesting that the DPHO either order very broad and detailed changes at Clovis Municipal Schools, or "hold that the LEA does not demonstrate present time (spring 2025) and hold that the LEA does not demonstrate present capacity or will to deliver FAPE" to C.G. *See* Petitioner's Closing Argument, submitted 3/31/25, at page 13. Petitioner further submits that "[t]he evidence in the record does not reasonably establish that the District infrastructure is presently capable of meeting Student's unique needs based on present knowledge and staffing. *"Id.*

The District has not stipulated that CMS does not have the present capacity to deliver FAPE to C.G., only that Zia does not. Presumably, the implication is that C.G. should attend iAcademy. The Due Process Hearing, however, thoroughly examined this alternative, and the DPHO has concluded that if anything, iAcademy is *less* prepared to accept C.G. Mr. Sparks

further testified that there was no other self-contained school that could accept C.G.

The United States Supreme Court held in *Forest Grove Sch. Dist. v. T.A.,* 557 U.S. 230, 247, 129 S. Ct. 2484, 2496, 174 L. Ed. 2d 168 (2009) that the "IDEA authorizes reimbursement for the cost of private special-education services when a school district fails to provide a FAPE and the private-school placement is appropriate, regardless of whether the child previously received special education or related services through the public school." This may be where this case is ultimately headed, should the District continue on its previously chosen course that the only available placement for C.G. is iAcademy.

On the other hand, this case is not remotely ripe for an order by the DPHO directing a private-school placement for C.G. Petitioner did not present evidence that the entire District is incapable of providing FAPE. Nor did Petitioner present evidence of any private alternative for C.G., either inside or outside the District. There is nothing in the record upon which the DPHO could possibly base such a wide ranging decision. Indeed, Petitioner did not request an alternative placement in her Request for Due Process Hearing, and has not made such a request in her description of a possible remedy. Thus the District has not even received notice of this possible request, even for a holding that it lacks capacity to provide FAPE, much less for the remedy of private placement.

Petitioner's request, even if granted, would split the holding in *Forest Grove* in two. Thus a holding that the District has no capacity to provide FAPE would leave Petitioner without a remedy. Specifically, the inquiry permitted by Forest Grove is twofold - a hearing officer may "conclude[] that a school district failed to provide ... FAPE," but to allow a private placement, the hearing officer must then address whether the school district received notice that the parent was contemplating a private placement, and then consider whether reimbursement is appropriate. *Id.* at 247-48.

The DPHO therefore rejects the alternative request by Petitioner, that the DPHO hold that the District is incapable of providing FAPE. On the other hand, the DPHO will hold that there is no evidence that the District is presently able to provide FAPE, without extensive substantive changes in the program it will offer C.G. The DPHO will therefore set forth an equitable remedy for Petitioner, without prejudice to Petitioner's filing of a new Request for Due Process Hearing to request reimbursement for a private placement, should the District continue on its present recalcitrant course.

The DPHO directs as follows:

In preparation for 2025-26 school year beginning in August 2025:

1. The District shall create a full day special education classroom for elementary students who have a disability and are gifted, staffed by a teacher or teachers

who are licensed to teach Gifted education and have special education licensure, with such classroom operational by the first day of school. (Twice exceptional or 2E classroom). Along with C.G., the other students in this classroom may be from neighborhood schools across the District and could be in 4th, 5t\ or 6th grades.

2. The twice exceptional classroom shall be at the elementary school campus whose leadership welcomes creation of the twice exceptional classroom and is willing to support the twice exceptional classroom staff and school staff to fully understand and meet *C.G.'s* needs and those of his classmates. The District should fairly consider whether Dean Davis, of iAcademy, should be hired to administer this program, either at the site of Zia Elementary or at the site of iAcademy, or any other site that is feasible for Dean Davis.

3. The District shall contract with faculty from a nationally recognized university program focused on teacher preparation for the education of twice exceptional students, such as Dr. Claire Hughes (formerly of UNM) at the Levin College of Public Affairs and Education at Cleveland State University to help develop the Twice exceptional classroom over the summer of 2025 and to provide ongoing on site and remote training and support to classroom staff, including EAs or RBTs, related service providers and school and District administrators throughout the 2025-2026 school year. *See, e.g.,* https://levin.csuohio.edu/twice-exceptional-teacher-educ; https://www.cleveland.com/ opinion/2023/11/ unlocking-students-potentia1-th rough-twice-exceptional-education-claire-e-hughes.htm l.

4. The District should ensure, to the greatest extent necessary in light of employee choice, that Zia staff who have maintained positive relationships with C.G. will continue as his providers during the 2025-26 school year, in order to maintain continuity and predictability for him. Those staff should include Janice Martinez, school counselor; Raphael Chavez, COTA; Dr. Melodye Thomas, OT; and any other staff identified by Parent.

5. The District should ensure that LEA staff who have had unsuccessful relationships with C.G. or Parent not be assigned to tasks involving C.G. or his education. Those staff *not* assigned in the future must include Mindy Sena in any capacity.

6. The District shall provide procedural protections for any contemplated suspension, pursuant to the IDEA, and shall designate an employee with either training and experience in ADHD or prior positive experience with C.G., who will be responsible to ensure that a full day education is provided to C.G., and who

will provide technical assistance or direct support/modeling to staff. If the District nonetheless persists in suspending C.G. and/or calling Parent, it shall document each instance thereof, and provide written notice to NMPED, copying Parent, to ask for technical assistance and/or funding to assist the District.

7. The District must document in writing every time it sends C.G. home temporarily due to perceived misbehavior. Every time the District officially suspends C.G., it must conduct and document a manifestation determination.

8. Should an issue arise again with regard to a threat assessment, Parent must be included in the threat assessment meetings.

9. The District shall provide written notice to NMPED Office of Special Education by May 8, 2025, and at the latest by May 23, 2025, that it has been unable to meet C.G.'s needs during the 2024-25 school year and that the District requires technical assistance/additional funding support from NMPED, with such written notice to be copied to Parent. Such notice shall provide specific information about the District's identified areas of need based on this due process proceeding and knowledge about C.G.'s education at Zia. The District shall copy Parent. The written notice shall include any voluntary input by all District employees who have worked *directly* with C.G.

10. The District shall plan district-wide professional development as soon as it can be scheduled and no later than November 1, 2025 on ADHD, with such training to be presented in person for at least a half a day. Prior to this training, all District teachers, principals and related services staff should be required to view introductory online NMPED material explaining ADHD, including any Educator's Guide.

11. If C.G. is diagnosed with Tourette Syndrome/Tic Disorder, the District shall schedule 2 youth ambassador presentations, for Student's elementary school (2025-2026) and future middle school, to ensure that students and staff hear from an impacted individual who can explain the experience of being a student with TS or Tic Disorder, including the need for support from peers in a school setting and in the community. *See* *https:1/tourette.org/youth-ambassador-program/*

12. As compensatory education, the LEA shall be required to set aside $20,000 to pay for Student or Parent and Student to attend in person or virtual camps, conferences (including out of state) which deliver information and support to school aged persons or their families concerning autism, TS or Tic Disorder, Twice exceptional education, or ADHD, at the choosing of Petitioner, with the

funds to be used for travel, lodging, registration or attendance fees when scheduled over the next two year to be used by July 1, 2027. Parents and Student shall select the event(s) and the District's special education department shall appoint a point person to ensure timely pre-payment and/or reimbursement of necessary funds. At their choice, Parent and/or Student will be invited to share experiences and learning with the District administration and special education departments upon their return.

13. The District shall develop written procedures and train staff about IDEA's requirement to provide a student's special education record, if any referral is made to law enforcement. The written procedure and any necessary forms (including informed consent form for a parent to sign) should be developed no later than July 1, 2025 to be in effect by the first day of the 2025-2026 school year. Once the procedure and any related form(s) are developed, they should be provided to Parent no later than July 15, 2025.

14. If, based on any ongoing evaluations, or concerns in fall 2025 about skill gaps due to being out of school, C.G. needs tutoring during the 2025-26 school year for any subject areas, the District, as part of compensatory education shall pay for such tutoring, with Parent to select an appropriate tutor with teaching credentials, with tutoring to be set up and provided on the school campus or in another setting, on a schedule and in a location as selected by Parent.

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(1)(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.

Nancy L. Simmons, Esq.
Due Process Hearing Officer

CERTIFICATE OF SERVICE

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 Caroline Bass, Esq., this 29th day of April, 2025.

Nancy L. Simmons, Esq.
Due Process Hearing Officer

Acronyms

Unique to Clovis Municipal Schools

AEP	a program (now called ICAN) which stands for "alternative Education placement" (p. 765)
BA	Behavior Assistant
CMS	Clovis Municipal Schools
Ed Fellow	a student teacher pursuing getting licensure (a state program) - 1076-77
GT	Gifted & Talented (p 1428)
MHR	Mental Health Resources, a local private group
PRMC	Presbyterian Regional Medical Ctr. -in Clovis (p. 1288)
TCI	Threat credibility investigation done by school team (p. 1242)
TOSA	Teacher on Special Assignment (p. 1118)

IDEA and more common

BCBA	Board Certified Behavior Therapist
BIP	Behavior Intervention Plan
COTA	Certified Occupational Therapy Ass. (p. 1089)
FBA	Functional Behavioral Assessment
ISS	in school suspension
NMPED	New Mexico Public Education Department
OSS	out of school suspension
RBT	Registered Behavior Tech