

COPY

BEFORE THE PUBLIC EDUCATION DEPARTMENT

DPH No. 1011-28

D.N.M. No. CV 12-30 MV/CG

**HEARING OFFICER'S
MEMORANDUM DECISION AND ORDER
ON REMAND**

THIS MATTER arises on remand from the Honorable Martha Vazquez, United States District Judge for the District of New Mexico. *See* Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, April 5, 2013. The underlying Magistrate Judge's findings and disposition were those from the Honorable Carmen Garza, United States Magistrate Judge for the District of New Mexico. *See* Proposed Findings and Recommended Disposition, February 28, 2013. Remand was for the limited purpose of reviewing compensatory education services initially awarded by the Hearing Officer in the Hearing Officer's Memorandum Decision and Order, filed on December 13, 2011. *See* Order Adopting Magistrate Judge's Proposed Findings and Recommended Disposition, April 5, 2013. An evidentiary hearing on the limited remand issue was conducted on August 29 and 30, 2013. *See* Transcripts, Vols. I-II. Proposed Closing Argument Briefs and proposed Findings of Fact and Conclusions of Law were timely filed by both parties. *See* Petitioner's Closing Argument, September 19, 2013; Petitioner's Proposed Findings of Fact and Conclusions of Law, September 19, 2013; Respondent's Hearing Brief, September 19, 2013; and Respondent's Proposed Findings and Conclusions, September 19, 2013. It is found and concluded that compensatory education services for 201.6 hours in math, reading and writing in a segregated small group setting should continue to be awarded, yet increased to two hours per week, including during the off-school calendar summer sessions, until the 201.6 hours are completed.

ISSUE PRESENTED BY THE COURT ON REMAND

What compensatory education services, if any, should be awarded through consideration of the Student's "unique educational needs, including his present educational services and the specific educational deficits resulting from (the Respondent's) failure to fully implement his IEP." *See* Proposed Findings and Recommended Disposition, February 28, 2013, p. 21.

FINDINGS OF FACT

1. Frank Gallegos ("Student") is a 16 year old student. *See, e.g.*, Petitioners' Remand Exhibit 7 ("Ps' RE-7"), p. 1 (listing Student's date of birth as June 12, 1997).

2. Student attended APS Valley High School in the 2012 to 2013 school year and currently attends Valley High School, where he receives special education. *See, e.g.*, Due Process Remand Hearing ("Remand Hearing"), Vol. I, pp. 33-24 (B. Cobos)(Student attended ninth grade English in Cobos' class at Valley High School); *see, e.g.*, Ps' RE-8, p. 1 (Student's IEP for Valley High School for March 20, 2013).

3. Student's special education increased from seventeen hours of special education to 21.5 hours of special education in his current IEP, dated March 20, 2013. *Compare* First Hearing, Findings of Fact Nos. 5 and 99 *and* Ps' RE-8 (Student's IEP for Valley High School for March 20, 2013).

4. The frequency of reading instruction provided to Student at 21st Century Public Academy did not comport with Student's IEP. *Gallegos v. Albuquerque Public Schools*, No. 1:12-cv-00030 MV/CG, Doc. 30, p. 17.

5. Student "suffered educational harm" as a result of the lack of special education services in accordance with his IEP at 21st Century Public Academy. *Id.*, p. 17. "Both

[Student's] 2009 and 2010 IEP's placed his reading skills at the second to third grade level. The 2009 IEP was based on assessments done in the 2008-2009 school year; the 2010 IEP was based on an evaluation done in November 2009. [Student's] standardized test scores in reading during the 2009-2010 school year did increase from 172 to 179, an increase of 7 points while the typical increase of his peers was 12. However, these scores place [Student] in the first percentile of his peers, and are actually at a first grade reading level." *Id.*, pp. 17-18.

6. "[T]he record reflects that that [Student] made almost no progress in his reading [during the 2009-2010 school year]. An increase of a few points on his standardized tests that are not reflected by any change in percentile, and continue to place him at a first grade level is a trivial benefit. Moreover, [Student] began receiving private, one-on-one tutoring before taking the test in the spring of 2010, which most likely accounts for the small amount of progress he did make." *Id.*, p. 18.

7. "On the whole, the record shows that [Student] made only trivial progress in his reading skills over the course of the 2009-2010 school year; a student who receives a *de minimus* benefit is denied a FAPE under IDEA. . . . Defendants failed to provide [Student] with adequate reading instruction as prescribed in the 2009 IEP; this was a material failure that caused FG educational harm." *Id.*, p. 18.

8. 21st Century did not provide Student with the 10 hours per week of special education instruction in a segregated setting as required by his IEP during the 2009 to 2010 school year. If Student had been provided with the special education instruction required by his IEP, he would have been provided with 360 hours of special education in a

segregated setting to address his math, reading and writing needs. See First Hearing Findings of Fact Nos. 6 and 15.

9. Student, who can progress if provided with consistent special education and related services delivered with fidelity, did not progress in math, reading or writing during the 2009 to 2010 school year and, thus, fell another year behind. This was significant for Student, who was already severely behind in math, reading and writing. First Hearing, Vol. 1, p. 282 (Glinski); First Hearing, Vol. 2, pp. 549-550 (J. Lowe).

10. The failure to provide Student with consistent special education and related services required by his IEP caused him educational harm by creating larger gaps between Student and his peers and by creating gaps in Student's skills. First Hearing, Vol. 2, pp. 544-545, 549-550, 565-566 (J. Lowe).

11. Student, a teacher and tutors agreed at the first Due Process hearing, on December 13, 2011, that Student continued to need remediation in reading, writing and math and would benefit from additional instruction and related services to fill in gaps and address the lack of IEP required instruction and related services during the 2009 to 2010 school year. See, e.g., First Hearing, Vol. 2, p. 353 (C. Lowe); First Hearing, Vol. 2, pp. 415-416, 420 (Lucero); First Hearing, Vol. 2, p. 566 (J. Lowe); First Hearing, Vol. 3, pp. 617-618 (Student).

12. Billy Cobos taught ninth grade English at Valley High School during the 2012-2013 school year. Student was in his class. Remand Hearing, Vol. I, pp. 33-34 (B. Cobos). Student is a "model student." *Id.*, p. 34. Student always sits in the front row of the class. *Id.*, p. 34.

13. Mr. Cobos gave Student the WRAT spelling test on August 12, 2012, and then again in early May 2013. Student made no progress in spelling. *Id.*, pp. 39-40.

14. Mr. Cobos gave Student the Brigance Criterion Referenced Assessment (“Brigance”) in August 2012 in a group and on May 13, 2013, by himself. The Brigance tested Student in reading comprehension, vocabulary comprehension, and sentence writing. *Id.*, pp. 41-42.

15. Mr. Cobos, as Student’s teacher, found that Student was still struggling with spelling, reading comprehension, and decoding as of the end of the 2012-2013 school year. *Id.*, pp. 42-43; *see also* Ps’ RE-4, page 1. Student is “still years behind in his skills, . . . grade-level-wise.” Remand Hearing, Vol. 1, p. 43. According to Mr. Cobos, if Student were asked to “read a short story or novel or a poem and tell [Mr. Cobos], without [Mr. Cobos’] assistance, what it was about,” Student “would struggle.” *Id.*, p. 53.

16. During the time he was teaching Student, Mr. Cobos assisted Student to access educational materials by, as he described it, “one-on-one level sit there and talk about it.” *Id.*, p. 45. Student accessed more than fifty percent of the novels the class was reading on audiotapes. *Id.*, pp. 46; 54.

17. Student’s special education language arts class with Mr. Cobos was between eight and twelve students. *Id.*, p. 49.

18. Other accommodations were required for Student because of the size of the class, including reading aloud to Student. *Id.*, p. 47. Mr. Cobos only had five minutes each class to spend one-on-one with Student. *Id.*, p. 53.

19. Danielle Neri was Student's special education math teacher for the 2012-2013 school year. Remand Hearing, Vol. I, p. 56. She had 15 to 18 students in her class. *Id.*, p.56.

20. Student "has almost the worst [math] anxiety [Ms. Neri has] seen in 13 years." *Id.*, p. 60. Ms. Neri believes that missing one year of special education instruction could have contributed to Student's math anxiety. *Id.*, p. 81.

21. Student began to receive math tutoring during the last six to seven weeks of school. *Id.*, p. 62. Ms. Neri noticed that once Student began receiving math tutoring as part of his compensatory educational services, "he[] excelled in his ability." *Id.*, p. 60; *see also* Ps' RE-4. On May 7, 2013, Ms. Neri wrote that she had observed that Student had only been "working with Ms. Ostrom one-on-one for a few weeks . . . , but his anxiety level seems to have decreased." *Id.*, p. 62-63; *see also* RE-4. This was a reference to Student's anxiety level during tutoring, not in class. *Id.*, p. 62-63. Student's "anxiety level . . . seemed to get better when he was with Ms. Ostrom, he was away from his peers." *Id.*, pp. 66-67. "The minute you showed him a test," his anxiety would return. *Id.* "[H]e seemed to do a little better once he got some one on one away from his peers" *Id.*, p. 67.

22. Student was assessed twice for math using the WRAT, at the beginning and end of the school year. Student was at a fourth grade math level the first assessment, and went up a level for the very beginning of the sixth grade for the second assessment. *Id.*, p. 64.

23. One difficulty Student shares with other special education students is that once a student misses steps along the way, "it is hard to – you try to fill in those gaps the best you can to bring them to the curriculum that you are at," but progress is difficult, due to what is called "scaffolding." Students who have gaps in their learning have a difficult time progressing in the curriculum because each step in math depends on a prior foundation.

Id., p. 71. Once a student “miss[es] the scaffolding,” then “[i]t’s all in how much they can catch up in the next part of what they get.” *Id.*, p. 79.

24. One accommodation Ms. Neri provided to Student was to place Student close to her desk so they could “work more one on one and go over things.” Ms. Neri does similar things for the other students, “except for Student got a little more attention because he needed it.” *Id.*, p. 73.

25. Patricia Ferryman provided compensatory education services to Student during the 2012-2013 school year. Remand Hearing, Vol. I, p. 84.

26. Ms. Ferryman observed that Student would not remember what he learned about counting coins and making change from week to week. Remand Hearing, Vol. I., p. 88. However, repetition seemed to help Student remember and retain what he learned. *Id.*, p. 89.

27. Sharon Ostrom provided compensatory education services to Student in the area of math and language arts from the end of February 2013 forward to the end of the spring semester. Remand Hearing, Vol. I, p. 93. She provided two hours of math and one hour of language arts. Remand Hearing, Vol. I, pp. 94; 104.

28. Ms. Ostrom provided instruction in the areas where Mr. Cobos and Ms. Neri indicated Student needed support. Remand Hearing, Vol. I, p. 102.

29. On the basis of feedback she received from Student and from Ms. Neri, Ms. Ostrom’s opinion was that one on one assistance was helpful to Student. *Id.*, p. 104.

30. Student’s father believes that the prior award of 201 hours of compensatory education hours was an appropriate and helpful remedy for his son. Remand Hearing, Vol. I, p. 108. He believes the hours will help Student because Student continues to struggle.

Id., p. 109. He believes Student “has continued to need extra support in his education as a result of missing a year of special education instruction at the 21st Century Academy.” *Id.*, p. 108.

31. Student’s father believes that there continue to be concerns that relate back to Student’s time in sixth grade, including the emotional impact of what occurred at 21st Century Academy, because Student is “always behind and he has to catch up.” *Id.*, p. 116-117; *see also id.*, pp. 129-30.

32. It would be inaccurate to say that once Student fully grasps something, it later escapes him down the road. *Id.*, p. 143.

33. Student’s father believes it would be feasible for Student to do both football and tutoring, and that an award of compensatory education services of 201 hours would not overwhelm Student. *Id.*, p. 118.

34. Student could also receive compensatory education services in the summer. *Id.*, p. 146.

35. Student’s father believes that the compensatory education hours Student has received have been helpful to him because it provides “supplemental support that he needs when he gets into the classroom,” and helps him with his self-esteem. *Id.*, p. 119. Student needs extra hours to give him the support that he can’t receive in the classroom. *Id.*, p. 130.

36. The extra tutoring Student received during the 2012-2013 school year did not frustrate Student; the extra tutoring helped Student’s morale. *Id.*, p. 122.

37. Student’s math anxiety increased after his experience at the charter school. *Id.*, p. 119-20.

38. Student had failing grades in math during the 2012-2013 school year, but his math improved and his grades improved after he received one on one tutoring from Ms. Ostrom. *Id.*, pp. 123-124.

39. Student still needs assistance to catch up in math, because Student still has difficulty in multiplying numbers or making change. *Id.*, p. 125.

40. Because Student has received private tutoring in reading and writing from Julia Lowe, he has done better in those subjects. *Id.*, p. 126; 127-128; *see also* Ps' RE-5.

41. The District has not done a re-evaluation since November 2009, even though Student should have received a three-year re-evaluation in November 2012. *Id.*, pp. 126-27.

42. Julianne Glinski, now known as Julianne Hancock ("Hancock") is an expert in educational diagnostics/evaluations. First Hearing, Vol. 1, pp. 232-233 (Glinski); *see also* Remand Hearing, Vol. I, p. 147.

43. Ms. Hancock holds extensive experience with evaluations for students with specific learning disabilities. Remand Hearing, Vol. I, p. 149. She was licensed as an educational diagnostician in 1981, has continued to work part to full time since her license, she has taught as an adjunct faculty member at the University of New Mexico in areas of differential diagnosis, and holds a license as a school psychologist at the master's level. She is engaged in three quarter time private practice with Diagnostic Assessments, Inc., where she performs, among other services, independent diagnostic evaluations in matters with the Laguna Indian Schools, Belen Public Schools, Moriarity Public Schools, West Las Vegas Public Schools, Santa Fe Public Schools, Espanola Public Schools and Rio Rancho Public Schools. *Id.*, at 148-149 (Hancock).

44. Importantly, in evaluating credibility, although she has testified as an independent expert for the Student, she now also works for the Albuquerque Public Schools for a quarter time as an educational diagnostician, and has provided personnel training to Albuquerque Public Schools' staff in the areas of specific learning disabilities and dyslexia. *Id.*, at 148-150.

45. Ms. Hancock has thirty-two years of experience in evaluations. *Id.*, at 198.

46. Significant weight is given to Ms. Hancock's testimony, both in the case in chief and in rebuttal, based on, among other things, her demeanor, memory, opportunity to observe and bias or prejudice and lack of bias or prejudice, including her present position with Albuquerque Public Schools, and her skill and experience in issues relating to diagnostic evaluations.

47. On November 12, 2009, Ms. Hancock conducted an educational diagnostic reevaluation of Student. Ms. Hancock issued a report dated November 20, 2009. First Hearing, RE D; First Hearing, Vol. 1, p. 109 (TT); First Hearing, Vol. 1, pp. 248-249 (Glinski); *see also* Remand Hearing, Vol. I, p. 147.

48. Ms. Hancock concluded that although Student's cognitive skills were within the average range of intelligence, Student's reading abilities were at a third grade level and that he was not able to decode enough words to get meaning from text, "particularly not anywhere close to his instruction level or his grade level placement where he's being instructed." First Hearing, Vol. 1, p. 240 (Glinski). She also concluded that Student's math skills were most similar to a student finishing the second grade and that his writing fluency was slow and labored and his spelling was "particularly low, most similar to a student in the middle of second grade." First Hearing, Vol. 1, p. 241 (Glinski). She concluded that since

his previous testing in July 2006, Student had made approximate academic gains of broad reading: one year, one month; broad math: six months and broad written language one year, one month. First Hearing, RE D, p. 7; First Hearing, Vol. 1, p. 243; *see also* Memorandum Decision and Order, dated December 13, 2011, ¶¶ 27, 44, 47 *and* Remand Hearing, Vol. I, pp. 161-169 (Student was having difficulty in reading comprehension, spelling, written language, and decoding).

49. For reading, Ms. Hancock recommended, among other things, that Student needed direct, multisensory research-driven reading instruction on a daily basis either one-on-one or in a small group with a teacher. This was based on research showing that such instruction is not as effective if the instruction is not provided every day, especially when a student has retrieval and processing difficulties like Student. First Hearing, Vol. 1, pp. 245, 276-277 (Glinski); *see also* First Hearing, RE D, p. 8; First Hearing, Vol. 2, pp. 555-556 (J. Lowe).

50. For math, Ms. Hancock recommended that Student develop necessary math for daily living because he had limited math skills and did not understand or use the language of math effectively. First Hearing, Vol. 1, p. 246-247 (Glinski).

51. In Ms. Hancock's opinion, Student should have made progress if he was provided with specialized instruction with fidelity. First Hearing, Vol. 1, p. 282 (Glinski); *see also* First Hearing, Vol. 2, p. 549-550 (J. Lowe).

52. In Ms. Hancock's opinion, during the ten hours that Student "was supposed to get special education, he lost that opportunity to learn and gain skills." Remand Hearing, Vol. I, pp. 153-54. A compensatory education award would help Student "recoup what was lost, that opportunity that he didn't receive to increase his skills academically." *Id.*

53. Although it is difficult to predict how much progress a child with learning disabilities will make in a school year, Ms. Hancock believes that Student would need an hour-for-hour compensatory education remedy to recoup the opportunity he lost in sixth grade. Remand Hearing, Vol. I., p. 155.

54. When a student does not receive consistent, daily instruction, such as what occurred with Student in the sixth grade, it is difficult to know what the student has missed, but when there is regression or a failure to progress, Ms. Hancock is of the opinion that at least the same number of hours that were lost would be necessary to try to recoup from the lost educational opportunity. Vol. I, pp. 157-58.

55. Although Ms. Hancock did not perform an assessment or review any assessments, *see* Remand Hearing, Vol. I, pp. 186-188, she did review the Student's IEPs from the seventh grade through the current program, as well as therapy notes on work some therapists had been doing with the Student. Remand Hearing, Vol. I, p. 148 (Hancock). She was also able to compare other test scores presented at the Second Due Process hearing. *See, e.g., id.*, at p. 161.

56. The Brigance reading comprehension test is not comparable to the Woodcock-Johnson administered by Ms. Hancock in 2009. Remand Hearing, Vol. I, p. 161. However, Ms. Hancock is able to compare the WRAT scores for Student during the 2012-2013 school year with the Woodcock-Johnson assessment in 2009. *Id.*

57. In the Woodcock-Johnson assessment Ms. Hancock performed for Student in 2009, Student received a score in spelling that was a grade equivalent of 2.5. Assuming Student received a WRAT spelling test score in August 2012 and May 2013 indicating a

third-grade level in spelling, Student has failed to progress in his skills in spelling. Remand Hearing, Vol. I, p. 161.

58. Student has, however, improved in his written language skills since Ms. Hancock's previous testing. *Id.*, pp. 167. 194.

59. The Standard Based Assessments tests that were provided to Student only test for a percent criteria. They are not norm referenced; instead, they test the student's competence in subject areas, such as beginning steps, nearing proficiency, proficient, or advanced. Remand Hearing, Vol. I, p. 194. In Student's case, he is in the beginning steps of his SBA scores, with the exception of writing. Remand Hearing, Vol. I, p. 200. Student was likely still "performing significantly below his expected level in the academic areas." Remand Hearing, Vol. I, p. 201.

60. Ms. Hancock believes that there are two different ways to provide Student with compensatory education services. The instructor providing one on one hours could take a tutoring approach towards learning the skills to pass a particular class. The approach Ms. Hancock recommends instead is to take the approach of breaking Student's skill sets into their component parts, to determine where Student is functioning in reading, math, and spelling, where he still has gaps in his learning, and build up from there, so he actually requires additional reading skills and his reading level will become higher. This type of approach has to be done individually to find Student's "splinter skills." Remand Hearing, Vol. I, pp. 163-64.

61. A "splinter skill" is a skill that allows greater grasp of the material than is really present in a child. Remand Hearing, Vol. I, pp. 166-167. By working with a student individually, an instructor can go back and fill in gaps that may not be immediately

apparent in a classroom setting. *Id.* This approach fills gaps that have been previously missed and builds up skills one on one. Remand Hearing, Vol. I, p.194.

62. In Student's case, because he has "splinter skills," but not all the foundational skills to truly support those splinter skills, he may superficially appear to have more skills than he actually possesses. Remand Hearing, Vol. I, p. 167. For example, he may be able to repeat what he has learned, without having absorbed its meaning. *Id.*

63. The lack of special education in sixth grade also affects access to the general education curriculum, because of the issue of scaffolding. Like all students, Student needed to build up his skills along the way. Because Student likely missed acquiring skills in sixth grade, the problems created by those gaps are compounded over time: "It is almost like a break in foundation, that all of a sudden you can't do something because you can't go back to that skill that's three levels down and it's not there to acquire." Remand Hearing, Vol. I, p. 168. For students who have missed necessary instruction, "it is almost like they are just playing catchup all the time." *Id.*, pp. 168-169. The foundation is "unbalanced." *Id.*, p. 169.

64. To make up for the deficits in sixth grade, Student would need significant compensatory education. Remand Hearing, Vol. 1, p. 202. To a reasonable probability, Ms. Hancock believes that 201.6 hours of compensatory education could put Student back in somewhat of a position that he might have been in had he received the special education services that were required in his sixth grade. Remand Hearing, Vol. I, p. 178. Ms. Hancock recommends that one on one compensatory education should focus on Student's reading level and basic math skills. "[I]f he could just get his reading level . . . up to a fifth and sixth grade, he could read magazines and newspapers. He can function. He might be able to get into some post secondary school opportunities." Remand Hearing, Vol. I, p. 171. Ms.

Hancock recommends that the hours of special education instruction that Student lost in sixth grade should be broken down currently “in a way that makes sense for [Student] now as a high schooler.” Remand Hearing, Vol. I, pp. 171-172.

65. Student is in need of intensive compensatory education services. “[I]t is usually best delivered more intensively so the skills build upon themselves, and there isn’t time to regress and have to recoup the skills that he had learned the week before.” Remand Hearing, Vol. I, p. 164.

66. Ms. Hancock evaluated the skill level and the services necessary, as defined by the IEP prior to Student’s sixth grade year. The individuals who wrote the IEP believed Student needed systematic direct instruction in reading and math and writing. Ms. Hancock assumed that the individuals who wrote the IEP were correct, “that that was probably the basic level that this student needed to receive in his education, and that’s why [Ms. Hancock] believe[d] that . . . [instructors for compensatory education services] should go back and try to recoup during those hours where he may not have gotten instruction that the professionals that knew him best said he needed and see if through compensatory education he could recoup some skills.” Remand Hearing, Vol. I, p. 199.

67. In Ms. Hancock’s opinion, compensatory education services, as she recommends, would allow the Student to recover from the regression and to make the progress he otherwise should have made in the sixth grade, thus supporting her opinion that one hour of math and one hour of language each week would assist the student to recoup the educational opportunities lost in his sixth grade year. *Id.*, at p. 201-203.

68. Although Ms. Hancock is of the opinion that compensatory education services must be consistent, *see id.* at p. 201, she offers no opinion as to what greater number hours, if any, need to be more intensive during the summer to compensate for the loss.

69. Julia Lowe (Ms. Lowe) is an expert in speech and language with extensive experience in providing school-based SLP services. She has provided reading and literacy tutoring to Student. First Hearing, Vol. 2, pp. 524-525; Remand Hearing, Vol. I, p. 205. Ms. Lowe testified at the first Due Process hearing and at the second Due Process hearing.

70. In 1998 Ms. Lowe was granted an undergraduate degree from Eastern New Mexico University in communication disorders, and obtained a master's degree from the University of New Mexico in speech and language pathology in 2000. First Hearing, Vol. 2, pp. 518-519. She holds an educational administration certificate from New Mexico Highlands University. *Id.*, at p. 519. She holds a speech and language pathology license in New Mexico, with a level three license in speech and language pathology by the New Mexico Public Education Department, and is a member of the American Speech and Hearing Association. *Id.* The American Speech and Hearing Association granted her a certificate of clinical competence, based on a fellowship year, graduate course work, national certification and boards. *Id.*, at pp. 519-520. She has remained to date with her recertification process and has attended conferences on remediation techniques, among other things. *Id.*, at p. 523. As of October 2011, Ms. Lowe had had fourteen years of practice as a speech and language pathologist. *Id.*, at p. 520.

71. In February 2010, during Student's sixth grade year, Parents obtained private instruction/tutoring from the Ms. Lowe and Carolyn Lowe (C. Lowe) for Student to address his reading and writing deficits. At Parent's request, Ms. Lowe conducted a private SLP

evaluation of Student in February, 2010. Ms. Lowe conducted a comprehensive SLP evaluation of Student using multiple standardized measures to identify specific areas of need. First Hearing, PE 1; First Hearing, Vol. 2, pp. 530, 532-540 (J. Lowe).

72. Ms. Lowe concluded that Student's core language skills were below average due to difficulty with expressive and receptive language tasks, auditory memory and cohesion and reasoning skills in the areas of negation, problems solving, predicting and determining causes. She made specific recommendations for continued SLP therapy and the classroom. First Hearing, PE 1.

73. C. Lowe also provided tutoring, and testified at the first hearing. C. Lowe provided Student with private instruction in reading and writing. See First Hearing, Vol. 2, pp. 328-3397 (C. Lowe).

74. Ms. Lowe initially worked with Student on speech and language skills to address Student's difficulties in comprehending information. She also worked with Student in reading and incorporated speech and language strategies into that work. First Hearing, Vol. 2, pp. 544-545 (J. Lowe).

75. The services provided by Ms. Lowe consisted of 1:1 instruction to Student. First Hearing, PE 25, p. 1; Vol. 2, pp. 571 (J. Lowe).

76. Ms. Lowe provided reading instruction to Student using the SRA Corrective Reading Program, a systematic multisensory reading program. First Hearing, Vol. 2, pp. 548-552; 559 (J. Lowe).

77. At the first Due Process hearing, Student testified that he believes that he benefitted from the help that he received from the Lowes. First Hearing, Vol. 3, p. 616.

78. At the first Due Process hearing, Ms. Lowe was asked her opinion regarding what compensatory education services she believed were necessary for the Student to recoup what he had lost; she found the issue difficult to pinpoint, and believed a new speech and language evaluation would be helpful, similar to one performed in 2010. First Hearing, Vol. 2, pp. 595-598 (J. Lowe).

79. Ms. Lowe resumed providing tutoring to Student on March 14, 2012. Remand Hearing, Vol. I, p. 206; *see also* Ps' RE-5. She saw him intensively through the summer of 2013. *Id.*, p. 207; Ps' RE-5.

80. Ms. Lowe has not formally assessed Student for his overall reading ability. *Id.*, p. 243. However, Ms. Lowe has assessed his reading comprehension through "[s]ubjective measures of [Student's] ability to answer questions, his ability to understand the text, those types of things." *Id.*, p. 244.

81. After tutoring services were resumed, and through the second Due Process hearing, Ms. Lowe has compared CELF test scores between Spring 2010 and May 2013, *id.*, p. 223, and in working with the Student for several years in a one-on-one capacity she has come to know the Student very well, she found that the Student's oral language has improved, his ability to answer questions has improved, his ability to follow complex direction has improved, his ability to understand word relationships and figurative language has improved, which is based on her relationship with the Student regarding trust, so that a strategy could be developed to attack the Student's challenges. *Id.*, p. 248.

82. In evaluating the Student's need for compensatory services, Ms. Lowe looked at, as a basis for her opinions, the Student's current levels and needs. *Id.*, p. 214. In

determining the Student's needs in reading and writing, Ms. Lowe worked with the Student's mother and father and reviewed the Student's current IEPs. *Id.*, p. 207.

83. When Ms. Lowe first resumed tutoring Student, she saw some of the same academic deficits in Student that she had observed in his sixth grade year at the Charter School. Remand Hearing, Vol. I, p. 207. "He still continued to struggle with his reading comprehension, his reading fluency, his oral language comprehension, and . . . he needed help working on identifying main idea, identifying salient details of a story, [and] understanding multiple meanings of words." *Id.*, pp. 207-208. Ms. Lowe and Student have been working on "academic vocabulary . . . reading comprehension, [and] being able to identify the main idea of the story." *Id.*, p. 208.

84. Petitioners' Remand Exhibit 6 contains charts that show Student's reading fluency over the period of time that Ms. Lowe has worked with Student. Ps' RE-6; Remand Hearing, Vol. I, pp. 209-210. Petitioners' Remand Exhibit 6 shows that when Student receives consistent, regular, one on one intervention, he picks up skills and is able to maintain them. When services are inconsistent, his skills, including his reading fluency, decrease. Ps' RE-6; Remand Hearing, Vol. I, pp. 209-210.

85. Student is not where he would have been with his academic skills had he received special education in sixth grade. Remand Hearing, Vol. I, p. 215.

[F]or [Student], . . . it was not just a year lost of academic instruction, the next year, and his confidence. When he went into seventh grade, . . . he didn't want to learn. He had shut out because sixth grade was so – he had shut down on school because sixth grade was so difficult for him. [T]here was a lot to overcome, not just the academic deficit, but just getting him to attempt tasks, to try tasks, to believe in himself The child was afraid because he had not had support.

Remand Hearing, Vol. I., p. 216.

86. Student's experience in sixth grade continues to impact Student at school, both socially and academically. Student is missing pieces of knowledge that should have been secured in sixth grade, but that he is now missing. Some things have to be re-taught, when Student hits gaps in his knowledge such that he does not have the skills or the vocabulary to know how to understand a particular concept. Remand Hearing, Vol. I., p. 210.

87. On the other hand, Student has also made academic improvement during the times Ms. Lowe has been assisting him, especially in language arts. Remand Hearing, Vol. I, pp. 236; 243.

88. The progress Student has made in his work with Ms. Lowe demonstrates that he could have made progress in sixth grade with special education services. Remand Hearing, Vol. I, pp. 252-253. However, even though Student has received tutoring and has made progress in his tutoring, he still needs compensatory education services to make up for the lack of special education instruction in sixth grade. Remand Hearing, Vol. I, pp. 209-210; 254-256. Student "missed a lot of core academic concepts, and . . . what's happened is now, as he's getting older, they are repeating themselves, and he still has a gap. There's a gap there that we need to be able to close somewhat." Remand Hearing, Vol. I, p. 209-210.

89. Student struggles with math facts and with understanding money and still has math anxiety. When Ms. Lowe first began working with Student about reading, "[h]e would be paralyzed" about reading as well. Remand Hearing, Vol. I., p. 211. He is now better about reading, but the math anxiety he had when Ms. Lowe first began working with him continues today. *Id.*

90. Based on her work with Student, Ms. Lowe's opinion is that, as a result of what Student lost in sixth grade, Student needs the 201.6 hours awarded after the first Due Process hearing to recoup the instructional opportunity he lost in sixth grade. Remand Hearing, Vol. I., pp. 210; 213.

91. Ms. Lowe believes that the 201.6 hours of compensatory education hours awarded after the first Due Process hearing should be provided as intensive services. Until he graduates, during the school year, Student needs, at a minimum, at least an hour in language arts and an hour in math, one to two times per week. Remand Hearing, Vol. I., pp. 216-218. Then during the summer, the remaining hours "could be provided more intensely during that period, . . . to help him secure some of those skills that were lost." Remand Hearing, Vol. I., pp. 217-218.

92. Although Ms. Lowe is of the opinion that summer hours could be provided more intensely, *see id.*, that has been no evidence presented as to what number of hours greater than the two hours she opines should be provided during the school year, if any, would be appropriate to allow the Student to more intensely secure the lost services through summer school.

93. Ms. Lowe's opinion is that, "[a]t this point, [the hours] need to be more intensely provided because [there is] a very limited window of time to provide those services to give him the most so he can be successful post secondary." Remand Hearing, Vol. I., p. 213. It has "to be very, very consistent and very structured. It needs to be one on one, [because Student] learns better . . . one to one." *Id.*, p. 217. "That could help make up for some of the lost time." *Id.* Student needs one-on-one assistance because he needs rapport

with an instructor to be able to tell the instructor what he does and does not understand. Remand Hearing, Vol. I, p. 248.

94. Based on what Student missed in sixth grade, assuming he made almost no progress in his reading, made trivial progress over the course of the 2009-2010 school year, and this was a material failure that caused Student educational harm, Ms. Lowe's opinion is that there is a reasonable probability that the number of compensatory education hours that Ms. Lowe is recommending would assist Student in recouping the opportunity that he lost in the sixth grade. Remand Hearing, Vol. I, pp. 257-58. It would assist Student to make up "those things that were missed, those missed opportunities. For [Student], that was a lot of missed opportunities." Remand Hearing, Vol. I, p. 258. Student has an average IQ, and so Ms. Lowe would expect that if he had been given quality instruction, he could and should make progress. Remand Hearing, Vol. I, pp. 258-259.

95. Significant weight is given to Ms. Lowe's testimony, based on, among other things, her truthful demeanor, memory, and importantly on her long-going relationship with the Student as a service provider to him for a number of years, both before and after the first Due Process hearing and before the second Due Process hearing, thus providing an opportunity to observe the Student and make qualitative assessments as to the Student's compensatory education needs. She has come to know the Student's needs very well.

96. Joab Gouveia is an expert in educational diagnostics and school psychology. Remand Hearing, Vol. II, p. 276. He has a bachelor's in special education, a master's in counseling from Bridge Water State University, a degree in business from Harvard University, and a Ph.D. from Union Institute University in school psychology and sociology.

Id., at p. 271. He is semi-retired, works with the APS District two days a week, consults with other districts, teaches an occasional evening at the University of New Mexico, and acts as a lead for diagnostic services in providing technical assistance and consultation on cases. Remand Hearing, Vol. II, pp. 271-272.

97. Dr. Gouveia was contacted only three weeks before the second Due Process hearing to conduct a statistical analysis of records provided to him by the District and its counsel. *Id.*, p. 343. This impacts the weight given to his testimony and analysis, when connected with other areas that impact the weight of his testimony, as noted herein.

98. Dr. Gouveia has never met the Student. *Id.* This impacts the weight given to his testimony and analysis, since his opinions are based only on raw data.

99. Dr. Gouveia did not speak with Student's teachers. Remand Hearing, Vol. II, pp. 349 -350. This impacts the weight given to his testimony and analysis, since his opinions are based only on raw data.

100. Dr. Gouveia testified that when he originally learned about this case, he questioned why Albuquerque Public Schools would be responsible for a special education remedy. Remand Hearing, Vol. II, pp. 346-347. He continues to wonder "how we would go back four years to remediate something three-and-a-half years ago when I can't find any documentation or data in here to support a 'lost year.'" Remand Hearing, Vol. II, pp. 345-346.

101. Dr. Gouveia first testified that he did not have any meetings with anyone where he discussed the theories that the District wanted to present in this case. However, he then acknowledged that he met with counsel for the District. Remand Hearing, Vol. II, pp. 342-343. This impacts the weight given his testimony.

102. Petitioners' Remand Exhibit 17 is Dr. Gouveia's notes for this case. Remand Hearing, Vol. II, pp. 344-345. The last page of Exhibit 17 appears to contain Dr. Gouveia's notes from his meeting with counsel for the District. Ps' RE-17; see Remand Hearing, Vol. II, p. 348-349.

103. At the bottom of the page of notes from Dr. Gouveia's conversation with counsel for the District, Dr. Gouveia wrote the following:

Two outcomes (Mike)

1. No more comp ed. Instruction is back at level.
2. IEP team address deficits needing.

Ps' RE-17; see Remand Hearing, Vol. II, pp. 348-349 ("In our discussion about trying to understand this case about possible outcomes, that was discussed.").

104. Dr. Gouveia testified that these two conclusions were not discussed as the desired outcome by APS, but he does not recall whether he and Mr. Carrico discussed any other possibilities as an outcome for his testimony. Remand Hearing, Vol. II, pp. 348-349. The two items listed in Dr. Gouveia's notes match the District's legal theory in this case, that Student either has already recouped all he lost in the sixth grade or that his continuing needs are otherwise being addressed in the special education classroom setting. See Remand Hearing, Vol. II, p. 328. This impacts the weight given to his testimony and analysis, since it presupposes a conclusion to be reached, rather than an independent diagnostic statistical approach.

105. Dr. Gouveia relied on an article to support his data analysis approach with MAPS scores in reaching his expert opinions. Remand Hearing, Vol. II, pp. 306, 311. However, when asked to produce the article, or to give a title or name of the reference article, even after a break, he was unable to do so. *Id.*, at pp. 340-341. This impacts the

weight given to his testimony and analysis, since his reliance on an article that he is unable to name or produce goes to whether or not his underlying statistical method held validity, whether it did or did not exist, and whether his testimony regarding the article was truthful.

106. During his trial testimony, Dr. Gouveia was off focus, as he relied on statistical analysis and graphic representations of only data for science, rather than math, until corrected by the Hearing Officer. *See Remand Hearing, Vol. II, p. 305.* This impacts the weight given his testimony in that he was unsure of his underlying data which supported his ultimate conclusions regarding the issues of reading, writing and mathematics.

107. Dr. Gouveia opined that based on his assessment only of data, that is, educational record data, that the Student was not in need of any compensatory educational services. *Remand Hearing, Vol. II, pp. 270-376.*

108. Dr. Gouveia's use of graph analysis combined different assessments with different testing procedures -- for instance, standard based assessment and MAP assessment -- and came to a conclusion that percentile results were the same or similar, for graph data, as percentage results. He was impeached on this issue. This impacts his credibility. *See Remand Gearing, Vol II, pp. 300, pp. 350-365.*

109. In reaching his expert opinion, Dr. Gouveia attempted to "graph[] the percentiles obtained on the standards based assessment ["SBA"] and also on the MAP [Measure of Academic Progress] just using percentiles because we have . . . two different types of tests, two different ways tests are administered here. So [Gouveia] attempted to formulate, based on [Student's] percentile, to get a graphic representation of his achievement on the state assessment." *Remand Hearing, Vol. II, p. 297.* Dr. Gouveia "wanted to plot out [Student's] achievement . . . , with two different assessments using

percentiles obtained, to see was there improvement? Was there recoument when he re-entered Albuquerque Public Schools? And perhaps he was able to posit what might have happened in grade six or what may have happened on that assessment in grade six.” Remand Hearing, Vol. II, p. 298.

110. Specifically, Dr. Gouveia admitted that in the graphs in Respondents’ Exhibits A and D, for the scores reflected for grades one through five and grades seven through nine, he mistakenly used SBA scores from Respondent’s Exhibit F that reflect only the number of items Student got correct on different tests in different years. Remand Hearing, Vol. II, pp. 300; *see also* Respondents’ Remand Exhibits A, D, and F. In contrast, for grade six, Student’s MAP result is expressed as a percentile score, that is, a score that makes a statistically relevant comparison between Student and other students. *See* Respondents’ Remand Exhibits A and D; Remand Hearing, Vol. II, pp. 300. In giving equivalent values to a series of SBA scores on one hand and the MAP score on the other hand, Dr. Gouveia’s charts assume that percent correct and percentile are comparable numbers, contrary to his own self-described methodology, and without any alternative methodology to support these differing scores as providing any basis for comparison. *See* Respondents’ Remand Exhibits A and D; Remand Hearing, Vol. II, pp. 300.

111. According to Ms. Hancock, however, there is no valid comparison that can be made between scores reflecting the percent of items a student got correct on a particular test, and a percentile score which compares one student to other students. *See* Respondents’ Remand Exhibits A and D; Remand Hearing, Vol. II, pp. 300; *see also* Remand Hearing, Vol. II, pp. 383-384 (Hancock testifies that scores measuring percentage correct on a test cannot be compared to a percentile score).

112. Ms. Hancock's testimony, as otherwise addressed, is found to be credible and is given significantly greater weight than the testimony of Dr. Gouveia.

113. Dr. Gouveia similarly incorrectly testified that Exhibit B, which compares the "percent correct on the various DBA scores for grades fifth and then seventh through ninth," could be used "to inform parents how their child is doing compared to their peers." Remand Hearing, Vol. II, pp. 315; 317. Dr. Gouveia's chart in Exhibit B, however, once again contains no reduction of the percent correct scores to a percentile; Exhibit B does not provide any reliable basis for comparing Student with his peers for each grade level. Respondents' RE-B; *see, e.g.*, Remand Hearing, Vol. II, pp. 302; 315; 317.

114. In cross-examination, Dr. Gouveia admitted that the only report that does compare a student's SBA and DBA scores to the performance of his peers is the "parent report." Remand Hearing, Vol. II, p. 352. However, Dr. Gouveia admits that in the "parent report" for Student, Student has remained at the beginning level on the SBA test. Remand Hearing, Vol. II, p. 352. Thus, for example, Respondents' Remand Exhibit F shows that Student was still at the beginning step in reading and the beginning step in math in eighth grade. Remand Hearing, Vol. II, pp. 352-353.

115. Dr. Gouveia conceded in his testimony that the MAP percentile results for Student for sixth grade show Student made no progress, except in science. Remand Hearing, Vol. II, pp. 353-354.

116. Dr. Gouveia's testimony that by seventh grade, Student had recouped the loss from sixth grade relies on the same faulty data and methodology that compares percentage correct on a single examination to a percentile score. However, rather than recognize that he was comparing "apples and oranges" by attempting to correlate SBA percentage correct

scores from APS in the fifth grade and seventh grades, with the low MAP percentile score from the charter school in sixth grade, Dr. Gouveia speculated that the MAP percentile score was the result of Student's level of discomfort with the way the MAP examination was administered, a conclusion that finds no support in the record and is belied by the testimony of witnesses with personal knowledge of Student's experience in the sixth grade and in his transition to the seventh. Remand Hearing, Vol. II, p. 301 (Gouveia admits that percent scores only allow a comparison across grades on Student's performance "[i]f you convert them to a percentile") *and* Remand Hearing, Vol. II, pp. 306-307 (Gouveia speculates that Student's performance may have dropped due to difference between paper and pencil exams in first through third grade SBA and DBA exams and computer based exam in sixth grade); pp. 354-355 (Gouveia admits that he does not know "anything about how [the] MAP was administered to [Student] in the sixth grade"); *compare* Remand Hearing, Vol. II, pp. 383-384; 388 (Hancock testifies that Exhibits A and D do not accurately reflect Student's progress over time and there is no way to do a longitudinal study of Student's progress using Dr. Gouveia's data).

117. Dr. Gouveia also incorrectly concluded, again based on his faulty comparative analysis of SBA / DBA percentage correct scores and the MAP percentile score, that while Student made no progress in sixth grade, he "picked up where he left off" when he re-entered APS schools in seventh grade. Remand Hearing, Vol. II, p. 311; 317-18 (Gouveia testifies that although Exhibit B represents percent correct, the graphical representation nonetheless shows that Student's "achievement resumed" after sixth grade, because "the graphical representation is correct"); 350 (Gouveia testifies that a document that shows "evaluation data . . . is as valuable as a graphic representation" as a document that compares

percentile scores to percentile scores); *compare* Remand Hearing, Vol. II, pp. 383-384; 388 (Hancock testifies that Exhibits A and D do not accurately reflect Student's progress over time and there is no way to do a longitudinal study of Student's progress using Dr. Gouveia's data).

118. Where Dr. Gouveia did compare percentiles to percentiles in Respondents' Exhibit C, Student shows a marked decline in grade six. *See* Respondents' RE-B.

119. Dr. Gouveia does not believe more instructional hours have made or will make any difference in Student's ability to recoup what he lost in sixth grade. He rejects the view that individual one on one instruction might assist Student because he believes that despite the individual assistance he has received, Student has not progressed over time. Remand Hearing, Vol. II, pp. 337-338.

120. Dr. Gouveia does not know what services Student has received on a daily basis because he has not observed Student or even talked with his teachers. Even his "general outline" of what instruction Student received in sixth grade was garnered from the "case discussion" with Mr. Carrico. Remand Hearing, Vol. II, pp. 356-357. He was "told that . . . the IEP was not followed. . . . [T]hat was the extent of it." Remand Hearing, Vol. II, p. 357. Because Dr. Gouveia is not familiar with the instruction Student has received, his opinion that individual instruction will not assist Student to recoup the instruction he lost in sixth grade is given little weight.

121. Dr. Gouveia is also not familiar with the amount or type of individual instruction Student has received over time. Therefore, any correlation Dr. Gouveia attempts to draw between Student's 1:1 instruction and his academic progress is given little weight.

122. Dr. Gouveia conceded later in his testimony that knowing that Student received two hours a week of math one-on-one tutoring in compensatory education, and “that’s when he showed this improvement reported by his math teacher,” would change his mind concerning whether an award of compensatory education would assist Student. Remand Hearing, Vol. II, p. 374.

123. Dr. Gouveia’s testimony was self-contradictory in that he agreed during cross-examination that “any student” would “of course” “respond better to one-on-one tutoring.” Remand Hearing, Vol. II, p. 370. In Dr. Gouveia’s view, “[i]t is not one or the other.” Remand Hearing, Vol. II, p. 371. Rather, Dr. Gouveia’s recommendation was that if one on one instruction were provided, that Student then be provided with classroom instruction that would allow him to also “demonstrate that on demand in a classroom.” Remand Hearing, Vol. II, pp. 369-370. Although Dr. Gouveia did not believe Student should be taught skills in isolation, he was “not saying there shouldn’t be a balance of individual and push-in to the classroom.” Remand Hearing, Vol. II, p. 371; *see also* p. 331.

124. Dr. Gouveia has never previously applied this type of analysis to the question whether a student needed compensatory education. Remand Hearing, Vol. II, pp. 375-376.

125. Dr. Gouveia voiced an opinion that the Student was not in need of any compensatory education to recoup for his lost year of education services while in the sixth grade. Remand Hearing, Vol. II, pp. 319-320. Nevertheless, he opines that instructional modifications are the best way to address the Student’s current educational needs. *Id.*, pp. 331-332. These current needs for modifications do not, however, address recoupment for past services lost, but only for his opinion regarding the present educational plan. He voices

no opinion as to how his proposed modifications would relate to compensatory service hours needed, if any, for recoupment of educational services lost.

126. In evaluating the testimony of Dr. Gouveia with that of Ms. Hancock and Ms. Lowe, greater weight is given to Ms. Lowe's opinions and the opinions of Ms. Hancock based on their personal and long-standing knowledge of the Student and his special, unique needs, as found earlier. To the extent there is contradictory testimony or evidence between Dr. Gouveia's opinions and those of Ms. Hancock and Ms. Lowe, it is found the opinions of Ms. Hancock and Ms. Lowe take precedence and are adopted by this Hearing Officer.

CONCLUSIONS OF LAW AND ANALYSIS

1. Jurisdiction properly lies over the parties and over the subject-matter. 34 C.F.R. §300.507(a); §6.31.2.13(I)(1) and §6.31.2.13(I)(3) NMAC.

2. It is concluded that compensatory education services for 201.6 hours in math, reading and writing in a segregated small group setting should continue to be awarded, yet increased to two hours per week, including during the off-school calendar summer sessions, until the 201.6 hours are completed to meet the Student's "unique educational needs, including his present educational services and the specific educational deficits resulting from (the Respondent's) failure to fully implement his IEP." See Proposed Findings and Recommended Disposition, February 28, 2013, p. 21. A qualitative approach is employed for the compensatory education award. See *id.*, at p. 21 (citing *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005)).

In crafting a remedy to compensate the Student for the specific educational deficits, see *id.*, as the Findings of Fact reflect, with citations to the record in the factual findings

incorporated herein in this analysis, opinions of experts have been weighed and considered for a qualitative remedy. Specifically, the opinions of Ms. Lowe and Ms. Hancock, who testified in both the first Due Process hearing and in the second Due Process hearing (which is limited to compensatory education) are given greater weight than the testimony of Dr. Gouveia, the District's expert witness.

Ms. Lowe and Ms. Hancock are familiar with the Student and his unique needs through the services provided to him over the years. Dr. Gouveia undertook a statistical approach on raw data three weeks before the second Due Process hearing commenced without meeting the Student, or without talking with his parents or teachers, or otherwise considering the Student's uniqueness, rather than a part of a data formula. Much like in a physician/patient relationship in other types of disability cases, where the doctors know their patient from on-going treatment, weight is given to the service provider, in this case, Ms. Lowe, and her opinion as to what services, qualitatively, are needed to compensate the Student for his lost sixth grade year of services. *See Banks v. IMC Kalium Carlsbad Potash Co.*, 77 P. 3d 1014, 134 N.M. 421, 2003 NMSC 26 (N.M. 2003)(persuasive state court authority in disability action, citing *Holbrook v. Lykes Bros. S.S. Co.*, 80 F.3d 777 (3rd Cir. 1996) for proposition that treating physician's ability to observe and know patient allows greater weight).

Ms. Lowe and Ms. Hancock both testified, as experts, that the award of 201.6 hours issued after the first Due Process hearing met the Student's unique needs to allow him to recoup his educational benefits lost during his sixth grade year, while considering his present educational plan. They considered his IEPs, his scores on tests, and, particularly with Ms. Lowe, her personal long standing service provider relationship with him. Both Ms.

Lowe and Ms. Hancock hold credibility with their qualifications and experience; indeed, Ms. Hancock presently is employed one-quarter time with the Albuquerque Public Schools to perform educational services for them, although she testified independently in this case.

Although Ms. Lowe did not conduct an additional evaluation, as she thought to be helpful in the first Due Process hearing for an opinion on compensatory education services, she has continued to work with the Student after the first Due Process hearing and has come to know his deficiencies and strengths at the present time and can compare them with his past lost educational opportunities. She was able to review data and scores on tests the Student has taken since that time. In her professional judgment, both as a service provider, and through her analysis of data, she came to the opinion that the Student required services of 201.6 hours intensively in at least two hours per week segregated settings to allow the Student to recoup what he had lost during the sixth grade. She was of the opinion, as was Ms. Hancock, that consistency was necessary, and recommended summer services.

Neither Ms. Hancock nor Ms. Lowe, however, provided a number of hours for the more intensive summer services, and the record not otherwise reflect a number of summer hours which might otherwise be in addition to the two weekly hours in math, reading and writing, as recommended during the school year.

Thus, qualitatively, that is, to compensate the Student for his specific educational deficits, the number of quantitative hours lost is also a similar measure of qualitative hours for an award of 201.6 hours intensively provided in at least two hours per week segregated settings. *See Mary McLeod Bethune Day Academy Public Charter School v. Bland*, 555 F. Supp. 2d 130 (D.D.C. 2008)(similar hours awarded to those lost is qualitative measure to close gap resulting from denial of FAPE). That is, there was a gap of about 201.6 hours that

resulted from the Student's lost sixth grade year while at the Charter School, and the opinions of the educational experts to whom evidentiary weight is given, Ms. Lowe and Ms. Hancock, connect the 201.6 hours to the need to close the gap created by the lost hours during the Student's sixth grade year, while looking at his current education and his prospective needs.

Ms. Lowe testified that assuming the Student made almost no progress in his reading, made trivial progress over the course of the 2009-2010 school year, which was a material failure that caused Student educational harm, it was her opinion is that there is a reasonable probability that 201.6 hours compensatory education hours would recoup the opportunity that the Student lost in the sixth grade. Ms. Hancock tied the past lost services with the present education with her explanation that the missed instruction is like playing catch-up all time, with an unbalanced foundation, so that 201.6 hours of compensatory education could put Student back in somewhat of a position that he might have been in had he received the special education services that were required in his sixth grade, with a focus on Student's reading level and basic math skills, to allow the Student to bring his reading level up to a fifth and sixth grade so he could read magazines and newspapers and function and possibly to get into some post secondary school opportunities.

Experts Lowe and Hancock reviewed the Student's reading and language levels, math skills, and diagnostic tools, and both reached the same opinion that the Student's unique needs, while considering his present educational services, require at least 201.6 hours in two hour per week segments. Weight and credibility is given to the testimony of these experts.

The Student's father believes 201 hours will not overwhelm the Student and that he will also be able to play football.

There is concern with the credibility of the District's expert witness, Dr. Gouveia, and thus very limited weight is given to his opinions and to the graphs and charts he produced. He believes that there is no need for any compensatory education services, based on his charting and graphs of raw data taken only from tests, some of which is either misinterpreted or which sheds doubt on his methods or data used. The District's apparent position that raw data interpretation on educational scores through statistical analysis equates with qualitative compensatory education is not found persuasive. They have cited no authority that a qualitative analysis means only a statistical data interpretation, and none has been independently found. To the contrary, authority cited by the Student concludes that a compensatory education plan is not a science. *See Friendship Edison Public Charter School Collegiate Campus v. Nesbitt*, 669 F. Supp. 2d 80 (D.D.C. 2009).

3. The District's position that Ms. Lowe is not an expert qualified to give an opinion on compensatory education is found unpersuasive, as well. *See* Respondent's Hearing Brief, September 19, 2013, p. 18. At the first Due Process hearing there was no objection to Ms. Lowe's opinion as to compensatory services. *See* First Hearing, Vol 2, p. 595. The issue was brought before the Hearing Officer after Ms. Lowe had testified at the second Due Process hearing, *see* Remand Hearing, Vol. II, pp. 266-269, where it was concluded that Ms. Lowe employed a basis for her testimony, and that her skill, education, training and experience in formulating an opinion would assist in making a decision and that her testimony was reliable. *Id.*, p. 269-270.

Initially, the Rules of Evidence are not required in these proceedings, with the exclusion parameters generally as to whether evidence is irrelevant, immaterial, unduly repetitious or excludable on constitutional or statutory grounds or privilege. *See* 6.31.2.13(I)(9)(c) NMAC. Ms. Lowe's testimony is relevant, material and not unduly repetitious or excludable on constitutional or statutory grounds or privilege. Nonetheless, persuasive guidance is found in the Federal Rules of Evidence regarding experts, in this instance, Rule 702. Ms. Lowe has excellent qualifications, skills and experience. She has acted, and continues to act, as a service care provider to the Student, much like a physician with a patient. The basis for the reliability for her opinions is in her comparison of CELF test scores between Spring 2010 and May 2013, working with the Student for several years in a one-on-one capacity so that she has come to know the Student very well, which allowed her assessment that the Student's oral language has improved, his ability to answer questions has improved, his ability to follow complex direction has improved, and his ability to understand word relationships and figurative language has improved; she reviewed the Student's current levels and needs, and worked with the Student's mother and father and reviewed the Student's current IEPs. On this basis, she developed a strategy to attack the Student's challenges.

It continues to be found that Ms. Lowe is a qualified expert capable of giving an opinion on compensatory education services for the Student. *See* Fed. R. Evid. 702.

4. In sum, giving great weight to the testimony of experts Lowe and Hancock, evaluating the lay witness testimony and exhibits in the first and second Due Process hearings, and giving limited weight to the testimony of expert Dr. Gouveia and his graphs and charts, it is concluded that Petitioners have met their burden to qualitatively prove that

201.6 hours in a small, segregated setting at two hours per week for lost reading, writing and math skills are required in compensatory education services to meet the Student's "unique educational needs, including his present educational services and the specific educational deficits resulting from (the Respondent's) failure to fully implement his IEP." See Proposed Findings and Recommended Disposition, February 28, 2013, p. 21. The two hours a week hours will be provided during the regular school semesters and during the summer until they are completed, giving credit for past hours provided in compensatory services resulting from the first Due Process hearing.

5. The Student did not meet his burden to show what number of hours greater than two hours a week are required for greater intensity during the summer session.

6. Methodology for the services is left to the District. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 156, 207-208 (1982).

7. Any claims or defenses otherwise raised which are not specifically addressed herein, and due to this order, are denied.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, on remand under the limited issue of compensatory services, the District is ordered to provide the Student 201.6 hours in reading, writing and math in a small, segregated setting at two hours per week (one hour math, and one hour in reading and writing) during the regular school semesters and during the summer until the hours are completed, giving credit for past hours already provided through compensatory services resulting from the first Due Process hearing, to qualitatively compensate for his lost year of reading, writing and math services.

REVIEW

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 U.S.C § 1415(i), 34 C.F.R. § 300.516, and §6.31.2.13(I)(24) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

15/

MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: October 18, 2013

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by facsimile transmission only to M. Carrico, D. Poulin, N. Simmons, and G. Regensberg, Esqs., and via certified mail only to the Petitioners at their address of record, with a copy through the U.S. Mail to the Secretary of Education, all on this 18th day of October, 2013.

|S|

ABSTRACT
NM SEA DPH No. 1011-28
On Remand from D.N.M. No. CV 12-30 MV/CG

On remand from United States District Court, District of New Mexico, adopting Magistrate Judge's Proposed Findings and Recommended Disposition on issue of qualitative compensatory education services. An evidentiary hearing was reopened on the limited remand issue of compensatory education.

Significant weight given to the Student's two experts in their analysis in the determination of the Student's unique educational needs, which includes his present educational services and considers the Student's specific educational deficits, which resulted from the District's failure to fully implement his IEP, as found in the first Due Process hearing. The Student's experts had a long standing relationship with the Student and his needs, with one expert acting as a service provider to the Student (much like a treating physician with a patient). The Student's experts both formed opinions, based on data and on personal knowledge of the Student and his needs, that of 201.6 hours of compensatory services (as awarded at the first Due Process hearing) were appropriate to remedy the Student's lost sixth grade year of services in math, reading and writing, while considering his deficits and his present educational services. Limited weight was given to the District's expert, who was the opinion the Student was not entitled to any qualitative compensatory services, based on a statistical analysis under his raw data review – among other things, he undertook his analysis three weeks before the remand hearing, did not speak with teachers or the Student, and his research and underlying data were questionable.

Although the Student's experts believed that summer services should be provided more intensively, there was no evidence as to what number of summer school hours were required to meet the need. Summer services greater than two hours were denied.

201.6 hours of compensatory education services were awarded for two hours a week (one hour in math, and one hour in reading and writing) during the regular school semesters and during the summer, until the hours are completed, with credit for compensatory hours provided by the District under the order from the first Due Process hearing.

The methodology for providing the compensatory education services was left to the District.

DPHO Morgan Lyman
10.18.2013