THE STATE OF NEW MEXICO
BEFORE THE PUBLIC EDUCATION DEPARTMENT

No. DPH 1213-14

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Against the Local Education Agency, filed with the State of New Mexico Public Education Department on October 12, 2012. *Request for Due Process Hearing Against the Local Education Agency, October 12, 2012 (Due Process Request).* The Petitioner's Request for Due Process is denied.

Procedural Background

The Respondent LEA responded to Petitioner's Due Process Request on October 22, 2012. *[LEA's] Answer to Request for Due Process Hearing, October 22, 2012 (Response).*

Due to the LEA's chief counsel's need for medical care, the due process decision was initially extended for entry of a decision to on or before February 11, 2013. *Pre-Hearing and Extension Order, November 1, 2012.*

On November 5, 2012, the LEA moved to dismiss Petitioners' issues regarding methodology selection as being outside the jurisdiction of the due process hearing officer. *Respondents' Motion and Memorandum in Support of Motion to Dismiss for Lack of Jurisdiction, November 15, 2012.* Petitioners' responded on November 13, 2012, and requested that the LEA's jurisdictional motion be denied. *Petitioners' Response in Opposition to Respondents' Motion to Dismiss for Lack of Jurisdiction, November 13, 2012.* A Memorandum Opinion and Order was entered on November 28, 2012, which denied the LEA's jurisdictional dismissal request. *Memorandum Opinion and Order, November 28, 2012.*

The LEA filed its statement of issues for the due process hearing on December 21, 2012. *Respondent's Statement of Issues for Due Process Hearing, December 21, 2012.* The Petitioners, as well, filed a statement of issues for the due process hearing on December 21, 2012. *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

The parties timely filed their respective Witness and Exhibit Lists. *See Petitioner's Exhibit List, January 2, 2013; Petitioner's Witness List, January 2, 2013; Respondent's Witness List, January 2, 2013; Respondent's Exhibit List, January 2, 2013; and Respondent's Proposed Joint Exhibit List, September 19, 2012.*

On January 3, 2013, the due process hearing date was reset via firm setting to commence on February 4, 2013, from January 7, 2013, due to medical necessity with the LEA's chief counsel. *Extension Order, January 3, 2013.* The date for issuance of the due process decision was extended through March 7, 2013. *Id.* A subsequent request for an additional extension was denied on January 4, 2013, although it did not preclude a request for an extension post-trial, should it be required. *Order, January 4, 2013.*

The due process hearing commenced on February 4, 2013, and concluded on February 6, 2013. Tr., Vols. 1-3. Both parties were well-represented by their respective trial counsel -- Ms. Archuleta-Stahelin for the Respondent, and Ms. Stewart for the Petitioners. Proposed Findings-of-Fact and Conclusions-of-Law, with written argument, were ordered due on March 12, 2013. Tr., pp. 854-856. Respondent requested an extension for issuance of the hearing officer's decision, which was granted, for filing of his decision to on or before April 12, 2013. Tr., p. 855.

The Respondent filed its proposed Findings-of-Fact and Conclusions-of-Law on March 12, 2013. *[LEA's] Proposed Findings of Fact and Conclusions of Law, March 12,*

2013. The Respondent also filed its written closing argument on March 12, 2013. *[LEA's] Brief in Chief, March 12, 2013*. The Petitioners filed proposed Findings-of-Fact and Conclusions-of-Law, with argument, on March 12, 2013. *Petitioner's Requested Findings of Fact and Conclusions of Law, March 12, 2013*.

This decision is due on or before April 12, 2013. Tr., p. 855.

Issues as Initially Presented by the Parties

1. Whether the LEA denied the Student a free, appropriate public education (FAPE) by failing to have an appropriate IEP in place for the Student at the beginning of the 2012-13 school year? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012*.

2. Whether the LEA denied the Student a FAPE by not implementing an appropriate IEP for the Student during the 2012-2013 school year and whether the IEP in effect was implemented? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012*.

3. Whether the Student's IEP was properly implemented in the 2012-2013 school year and, if not, whether that constituted a denial of FAPE to the Student? *Respondent's Statement of Issues for the Due Process Hearing, December 21, 2012*.

4. Whether the 2012-2013 IEP denied the Student a FAPE based on failure to provide for specialized instruction in a deficit area of social skill; failure to rely on evidence based practices to address behavior; failure to identify or provide positive behavioral supports or include a Behavior Intervention Plan (BIP)? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012*.

5. Whether the Student was denied a FAPE by making her subject to the school wide

discipline plan which has the effect of punishing her on the basis of disability and removing her access to education? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

6. Whether the Student was denied a FAPE because the LEA did not identify her in all areas of suspected disability? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

7. Whether a FAPE was denied the Student because, regardless of the disability label, she was not provided with all necessary special education and supports for her access to the general education curriculum and non-academic activities in the least restrictive environment (LRE)? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

8. Whether the Student's June 2012 IEP provided her with a FAPE? *Respondent's Statement of Issues for the Due Process Hearing, December 21, 2012.*

9. Whether a FAPE was denied the Student by failing to revise the June 2012 IEP in the fall of 2012 when it was evident that the IEP was inadequate to assure a FAPE? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

10. Whether a FAPE was denied the Student by failing to complete the evaluation for Occupational Therapy which was agreed to in the June 2012 IEP and by failing to provide the necessary related service of Occupational Therapy? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

11. Whether the Student was evaluated in all areas of suspected disability? *Respondent's Statement of Issues for the Due Process Hearing, December 21, 2012.*

12. Whether a FAPE was denied the Student by failing to take any reasonable action,

including supplementary aids and services, to eliminate the bullying of the Student which interferes with her access to and receipt of public education? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

13. Whether the Student is entitled to equitable relief? *Petitioners' Statement of Issues for Due Process Hearing, December 21, 2012.*

The issues noted above were clarified through the proposed Findings-of-Fact and Conclusions-of-Law submitted by the parties post-hearing; therefore, those matters contained in the Issues as Presented by the Parties which are not preserved through the proposed Findings-of-Fact and Conclusions-of-Law submitted by the parties are deemed abandoned.

Legal Overview

The burden of proof rests with the party challenging the IEP. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *Johnson v. Indep. Sch. Dist. No. 4 v. Bixby,* 921 F.2d 1022 (10th Cir. 1990). In this action, the burden rests, therefore, with the Petitioners (the Student).

Exhaustion of administrative measures counsels that parents first turn to educator professionals to remedy disputes regarding a child's education. *Cudjoe v. Indep. Sch. Dist. No. 12,* 297 F.3d 1058, 1065-66 (10th Cir. 2002)(student must first assert right to be evaluated for IDEA eligibility before making demand for hearings and procedures to address IDEA claim).

During the pendency of the administrative due process proceeding, the child must remain (stay-put) in her then current educational placement. 34 CFR § 300.518.

A twofold inquiry is demanded to determine if a child has been provided with a FAPE. *Bd. of Edu. of Hendrick Hudson Central School Dist. v. Rowley*, 458 U.S. 156

(1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. ""The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the "free appropriate public education" mandated by the Act."" *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. *See CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 638 (8th Cir. 2003)(persuasive, citing *Rowley*, 458 U.S. at 202). Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). Some benefit and meaningful benefit are similar, although not synonymous. *See Los Alamos Public Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)((distinguishing *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008)(stating that the test is some benefit as compared with meaningful benefit)). *See also Meza v. Board of Education of the Portales Municipal Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide "some educational benefit").

Pursuant to 20 U.S.C. § 1415(b)(3), "a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's education." *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d at 925. As a result, a "parent wishing

to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency." *Id.*

Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). An IEP is to be in place at the beginning of each school year. *See* 34 C.F.R. § 300.342(a). The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.342(b)(ii). An appropriate plan considers the particular needs of the child and the child's potential, while providing meaningful learning, and must be calculated to provide educational benefit at the time it is offered and developed. *Id.* A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d at 926. Parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208.

Among other things, when the child's behavior impedes his or her learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 CFR §300.24(a)(2)(i); §6.31.2.11(F)(1) NMAC. The New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBSs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. §6.31.2.11(F)(1) NMAC. The use of the FBA/BIP is,

however, an encouragement – they are not required components of the IEP. *See* 34 C.F.R. §300.320.[1] The IEP team makes the determination of whether a behavioral intervention or support is required, rather than a regulatory requirement. *See In re: Student with a Disability*, 110 LRP 34262 (New Mexico SEA C0809-29)((citing Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46683(2006)). A student may be removed from his regular classroom if necessary to protect his or her safety or the safety of other students. *See* 20 U.S.C. § 1412(a)(5); *Rowley*, 458 U.S. at 181, n. 4.

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

A hearing officer's determination must be generally based on substantive grounds as to whether a child received a free, appropriate public education (FAPE). 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a FAPE only if the procedural inadequacies: (1) impeded a child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a FAPE; or (3) caused deprivation of educational benefit. *Id*. at (a)(2).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 C.F.R. §300.503; §6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the District provide them

[1] Compare the permissive use of "encouragement" for an FBA/BIP to be integrated into IEPs in situations noted in §6.31.2.11(F)(1) NMAC, with the mandatory requirement of an FBA/BIP where a disciplinary change of placement, like suspension for over ten days, takes place – then, if found to be a manifestation, the IEP team "must" conduct an FBA/BIP. See 34 CFR §300.530(a)&(f).

with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 C.F.R. §300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's FAPE. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Community Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dept. of Mental Health and Mental Retardation v. Paul B., et al*, 88 F.3d 1466 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the District of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004). Misinformation provided to parents may prevent them from meaningfully participating in the IEP process. *Bell v. APS*, 52 IDELR 161 (D.N.M. 2008).

Related services include transportation and psychological services. *See* 34 C.F.R. § 300.24(a).

Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, comprised the student's right to an appropriate education, or caused a deprivation of educational benefits. *O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of FAPE. *Urban v. Jefferson*

County Sch. Dist. R-1, 89 F.3d 720 (10th Cir. 1996). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. APS*, 520 F.3d 1116 (10th Cir. 2008).

All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a)(i). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. 34 C.F.R. §300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. §6.31.2.10(D)(1)(a)&(b) NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 1307 (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 (quoting *W.B. v. Matual*, 67 F.3d 848, 501 (3rd Cir. 1995). That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). A LEA's failure to meet its "child find" obligation is a cognizable claim. *See Compton Unified Sch. Dist. v. Addison, et al*, 598 F.3d 1181 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024 (8th Cir. 2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150 (1st Cir. 2004).

A "child with a disability" is defined as a child evaluated and determined to be eligible for, among other things, serious emotional disturbance (generally referred to as

emotional disturbance) and other health impairment. 34 C.F.R. §300.8(a). To be qualified, the child must be in need of special education and related services because of the emotional disturbance or other health impairment. *Id.*

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

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

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

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

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

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

34 C.F.R. §300.8(c)(4)(i).

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

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

Social maladjustment alone does not equate with serious emotional disturbance. *Springer at* 134 F.3d 664 (*citing A.E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 476

(10th Cir. 1991). Equating simple bad behavior with a serious emotional disturbance enlarges the "burden IDEA places on state and local education authorities." *Id.* Even a student's bad conduct, however, may merge with an independent serious emotional disturbance to qualify for special education services. *Id.* at 665.

A parent has the right to an Independent Education Evaluation at public expense if the parent disagrees with the public agency's evaluation. 34 C.F.R. §300.502. The criteria used by the independent evaluator must be the same as that the public agency uses when it initiates the evaluation. *Id.* at §300.502(e). Although not exhaustive, the evaluation must use a variety of assessment tools to gather functional, developmental, and academic information about the chid, with no single measure used to make a determination, with assessment administered by trained and knowledgeable personnel in all areas of suspected disability, to also include data from the child's parents, classroom or State assessments, and classroom observations, observations by teachers and other related service provides, present levels of academic achievements, and the need for special education and related services. 34 C.F.R. §300.304-305.

In unilateral placement situations, reimbursement costs may be awarded where the school's IEP (and presumably the program under the IEP as implemented or otherwise administered) is not appropriate and the parent's placement is appropriate, with equitable factors considered. *Burlington Sch. Committee, et al, v. Mass. Dept. of Edu.*, 471 U.S. 359 (1985). The private placement need not meet state standards, nor must it be state approved. *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). Eligibility is not conditioned on first receiving public special education services. *Forest Grove Sch. Dist. V. T.A.*, 557 U.S. 230 (2009).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia,* 401 F. 3d 516 (D.C. Cir. 2005); *Meza v. Board of Education of the Portales Municipal Schools*, D.N.M. Nos. 10-0963, 10-0964 (2011). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza*, *id.* Indeed, even with a FAPE denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the in the student's education. *Chavez v. New Mexico Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). An order requiring the training of district personnel or for the district to hire outside consultants may exceed hearing officer authority. *See* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act, An Update*, Journal of the National Association of

Administrative Law Judiciary, 31-1, pp. 28-33 (Spring 2011).

Findings-of-Fact

1. The Student is a nine-year-old fourth grader. *Ex. E.* Tr., p 25.

2. Before third grade, the Student attended R.G. Elementary, where she complained that she was bullied; she stopped going to school, at which time she began to live with her grandmother and began to attend D.V. Elementary. Tr., pp. 630-631; Tr., p. 719.

3. The matters relevant to this due process proceeding are those which have taken place at D.V. Elementary School.

4. While at D.V. Elementary, on about February 14, 2012, the LEA conducted a psychological evaluation, which resulted in a Psychological Evaluation Report prepared by the school psychologist, Ms. R.H., which stated that the Student did not meet the criteria for Emotionally Disturbed. Ex. A. Tr., p 161.

5. At the time of the EDT, neither the Student's grandmother nor mother disagreed with that determination. Tr., p. 230.

6. Petitioners presented no Independent Educational Evaluation (IEE) diagnosing the Student as emotionally disturbed, as applied under the IDEA.

7. Student was, however, qualified eligible for special education services under the specific learning disabled category (SLD), for basic reading, reading fluency. Ex. E; Ex. M.

8. The 2012-13 school year began on or about August 14, 2012. N.M. has not received any public education since September 19, 2012. Tr., pp. 785-787.

9. She was removed from the LEA school and educational settings by her parent/guardian on about September 19, 2012. Tr., p. 226.

10. She has not returned to school or an educational setting, public, homebound,

home school, or otherwise, since that time. Tr., p. 240.

11. She was withdrawn from the school rolls due to absenteeism after missing ten days of school. Tr., p. 223.

12. Her parent/guardian[2] have had criminal charges filed against them based on a violation of the New Mexico Compulsory Attendance laws. Tr., p. 493.

13. The Student has presented no evidence that she would be refused immediate return to the school setting in the LEA or that the provisions of her present IEP would not continue on her immediate return.

14. Student's placement for the 2012 – 2013 school year was in a general education 4th grade classroom with pull out 90 minutes a day for provision of academic instruction in reading. Ex. E; Ex. M.

15. During the first five weeks of fourth grade, in the fall of 2012, the Student received In School Suspension (ISS) and was also suspended. Tr., pp. 127, 141 (suspended four days in first month). Ex. 14; Ex. 24.

16. Student has received punishment consisting of ISS (In school suspension requiring loss of recess) for August 27, 2012 for three days, September 5, 2012 for two days, and September 11, 2012 for two days. Tr., pp. 127, 141.

17. The Student also left campus on her own without adult permission several times. Tr., pp.26-27; 65-66; 136-137, 142.

18. Principal M. was the principal at DV Elementary while Student was in school. Tr., p. 128.

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[2] In these proceedings, the Student's mother and grandmother act as the parent and guardian for the Student.

19. Principal M. has four years experience as a school principal and was a teacher for five years prior to that. Tr., p. 208.

20. Principal M. received training in state and out of state on how to deal with difficult parents and children. Tr., p. 205.

21. Principal M., as principal of DV Elementary, did not see anything in the Student's behavior that she did not think she could handle or that needed intervention. Tr., p. 207.

22. Principal M. sought direction from the LEA's Central Office when she received pressure from Student's grandmother to do so. Tr., p. 207.

23. During the time Principal M. has been principal, no other parents had withdrawn their students from school because they felt their student was unsafe nor did she receive any such complaints. Tr., p. 208.

24. No students had ever been seriously injured at DV Elementary during the time Principal M. has been principal. Tr., p. 209.

25. It is not uncommon for children who do not usually exhibit behavior issues to exhibit peer seeking behaviors when they return to school to school after summer break. Tr., p. 201.

26. Sometimes students need transition time to get used to their new teachers, as they are getting adjusted. Tr., p. 201.

27. This current school year seemed to be a better school year for Student with regards to making friends. Tr., p. 201.

28. This year, Principal M. saw Student running around the playground, smiling and playing with other children. Tr., p. 203.

29. A Functional Behavior Assessment (FBA) was conducted on the Student by Ms. D.C. and Ms. A. in May, 2012, and was signed by Principal M. Ex. B.

30. The May 2012 FBA identified three categories of "problem behaviors": attention seeking behaviors; immaturity, and attendance. Ex. B; Tr., pp. 32-39. The FBA suggested that the Student had deficits in "social competence skills," that is, in integrative thinking, feelings, and behaviors, when social interactions are part of a learning process, as in small group settings, group work, learning centers, play and leisure, and the like. Ex. B. This determination was made based on observations by the behavior specialist. Tr., pp. 403-407.

31. A subsequent IEP meeting was held on June 11, 2012, which addressed, among other things, the Student's behaviors. Ex. E.

32. Although the IEP stated that the Student had behaviors which impeded her learning or that of others, it noted that positive behavior interventions, accommodations, and/or goals were included in the IEP to address the problem behaviors. Ex. E.

33. The IEP stated that an FBA did not need to be conducted and that the Student did not have a Behavior Intervention Plan (BIP) – the IEP Team did not make them components of the IEP. Ex. E.

34. For discipline, the Student was to follow the school-wide discipline plan, and the Student required modifications described in Annual Goals and/or Instructional Accommodations. Ex. E.

35. The Accommodations/Modifications in the IEP included the behavior supports for alternate seating, frequent breaks, change focus tasks to refocus on academic activity, peer mediation, frequent checkpoints for daily and long-term assignments, partner reading, repeat instructions, and auditory aids. Ex. E. Tr., pp. 214 - 216.

36. The Student's grandmother had requested an IEP because of her concerns about the Student's education and need for special help. Ex. 6. At the IEP, she requested the District's help for the Student to develop social skills and to be protected from bullying. Ex. P. Tr., pp. 115-122; 699-701.

37. Another IEP was conducted, with that IEP dated September 28, 2012. Ex. M.

38. Similar to the June 11, 2012 IEP, the September IEP stated that an FBA did not need to be conducted and that the Student did not have a Behavior Intervention Plan (BIP) – the IEP Team did not make them components of the IEP. Ex. M.

39. Similarly, in the September 28, 2012 IEP, like the June 11, 2012 IEP, the IEP included the use of positive behavior interventions, accommodations, and/or goals. Ex. M.

40. Once again, for discipline, the Student was to follow the school-wide discipline plan, and that the Student required modifications described in Annual Goals and/or Instructional Accommodations. Ex. M.

41. The Accommodations/Modifications under the IEP included the behavior supports for alternate seating, frequent breaks, change focus task to refocus on academic activity, peer mediation, frequent checkpoints for daily and long-term assignments, partner reading, repeat instructions, and auditory aids. Ex. M.

42. In both of the IEPs (June 11, 2012 and September 28, 2012) the IEP Teams concluded that the Student did not require an FBA and that the Student did not require a BIP as appropriate discipline provisions for the Student. Ex. E; Ex. M.

43. The last IEP was the September 28, 2012 IEP, which is the IEP for stay-put purposes in these proceedings – the Petitioner's Request for Due Process was filed on October 12, 2012. See *Due Process Request*.

44. In order to build a relationship with the Student, Principal M. was sometimes more lenient with her with regard to discipline. Tr., p. 217.

45. During the first months of the 2012 – 2013 school year, teachers and staff implemented supports to help the Student with her peer relationships, including creating positive modeling in buddy groups. Tr., p. 218.

46. The Student's mother and grandmother requested that a Recreational Therapy evaluation and a Social Work evaluation be performed, but the Student was pulled from school before either one of those could be performed. Tr., p. 222.

47. When a student has in-school suspension, he/she stays with Principal M. and does school work. Tr., p. 225.

48. Principal M. had not experienced the Student having any pervasive mood of unhappiness or depression. Tr., p. 226.

49. The Student maintained satisfactory and interpersonal relationships with her peers and teachers. Tr., p. 226.

50. The Student was pulled from school on September 19, 2012 by her mother and grandmother. Tr., p. 222.

51. After Student failed to return to school after ten days she was withdrawn from the rolls as a student of the LEA. Tr., pp. 222-224.

52. According to Principal M., the LEA remains obligated to provide the Student services, but she still must re-enroll in school. Tr., p. 223.

53. There is no evidence that Student is a student in need of early intervention, or habitual truant, pursuant to NMSA 1978, § 22-8-2(B).

54. The family neither requested homebound services nor home schooling after the

Student was withdrawn from the rolls of D.V. Elementary. Tr., p. 240.

55. Ms. C.M. was the Student's fourth grade regular education teacher and team taught with Ms. F. Tr., p. 250.

56. Ms. C.M. has been teaching in this district for the last 24 years. Tr., p. 251.

57. Ms. C.M. attended the IEP in June 2012. Tr., p. 269.

58. The Student's mother had concerns that children were bullying the Student and reported those to Ms. C.M. Tr., p. 271. Ms. C.M. shared those concerns with Principal M. to investigate. Tr., p. 271.

59. Ms. C.M. worked to create a risk free environment that is conducive to learning. Tr., p. 277.

60. The Student was not the only student in Ms. C.M's classroom who needed redirection in order to follow the class rules. Tr., pp. 280-281.

61. Ms. C.M. would go over the classroom rules for the benefit of all students, multiple times a time, every day. Tr., p. 281.

62. Ms. C.M. met with Ms. N., the Student's special education teacher to go over the Student's accommodations. Tr., p. 282.

63. Ms. C.M. and Ms. F. met with D.O., the school counselor, to request support with the Student in making friends. One suggestion was to create a "Girls' Group." The Student was pulled from school before this plan could be implemented. Tr., pp. 307-308.

64. The Student had friends in Ms. F.'s classroom. Tr., p. 291.

65. Ms. F. gave the Student special jobs to help build her confidence and self-esteem. Tr., p. 299.

66. Ms. F. attended the IEP meeting in September 2012. Ex. M. Tr., p. 314.

67. At the time of the IEP, the District proposed that a new FBA be performed. Ex. M.

68. At the time of that IEP, the Student's grandmother and mother rejected the proposal for a new FBA. Tr., p. 315.

69. Ms. R.A. is a school psychologist for the LEA. Tr., p. 318.

70. Ms. R.A. performed psychological testing on the Student, which included gathering data, reviewing records, and formal testing, and then prepared a Psychological Report. Ex. A.

71. The Student's mother and her grandmother reported to her that they had concerns the Student was being bullied at school, that she did not have any friends, and that she was having problems with homework. It was also reported that she had been suspended from school the prior school year. Tr., pp. 325 – 326.

72. Based on Ms. R.A.'s findings, she did not believe that the Student had anxiety about school -- it was more that she did not like going to school or her teachers. Tr., p. 334.

73. Ms. R.A. found that the Student connected with some of her teachers and therefore Ms. R.A. did not believe the Student was having trouble developing successful relationships with her teachers. Tr., p. 334.

74. Ms. R.A. found that the Student had anxiety to live up to the expectations of significant members of her life and not feeling capable of doing what others expected of her. Tr., p. 335.

75. She found no characteristics of depression in the Student. Tr., p. 336.

76. Ms. R.A.'s observation of the Student in the classroom did not indicate a need for further interviews with teachers. Tr., p. 347.

77. Ms. R.A. participated in the IEP in June of 2012. Ex. E.

78. Her modifications included modification of instruction, partner reading, homework modifications, frequent breaks, repeat instructions, checking in with the Student, redirecting

the Student and creating a successful environment to lead to less frustration. Tr., pp. 360-361.

79. Ms. R.A. received a referral for an FBA in the fall of 2012. Tr., p. 384.

80. Peer mediation would help the Student see appropriate ways of gaining attention by modeling with her peers and help her find a better way to make requests. Tr., p. 593.

81. A skill deficit is not always based on the existence of a disability. Tr., p. 612.

82. Ms. R.A. did not find that the Student was in need of social or psychological services beyond what she recommended in the FBA. Tr., pp. 612 – 613.

83. The Student requires the opportunity to be with general education peers and continue to have access and support and experience with children who do not have disabilities. Tr., p. 616.

84. Peer mediation would be skill building, both verbally and physically, if utilized properly. Tr., pp. 618 – 619.

85. Another recommendation is seating the Student in close proximity to the teacher where she could have her behavior redirected to the appropriate behavior. Tr., p. 619.

86. When Ms. R.A. received the referral for the second FBA in the fall of 2012, she contacted Student's grandmother, who informed her that the Student was no longer in school. Tr., p. 622.

87. Ms. D.C. is a behavior specialist with the LEA. Tr., p. 385. She has a master's degree in special education, with an emphasis in emotionally disturbed and behavior disorders. Tr., p. 385.

88. The LEA has one behavior therapist or specialist. Tr., pp. 29; 385 et seq. She may be called in to all 16 schools in the District and is "spread out all over in a typical day." Tr., pp. 423-424. Ms. D.C. does not provide direct services to a child, but instead makes recommendations for school staff to follow in working with the child. Tr., pp. 390-393.

89. Ms. D.C. assisted Ms. R.A. by observing the Student in the classroom. Tr., pp 393-395.

90. It was determined that the Student needed more instruction, experiences and opportunities to be able to learn social competence. Tr., p. 406.

91. In May of 2012, it was determined that it was not necessary to conduct a Behavior Intervention Plan (BIP). Tr., p. 433.

92. Ms. D.C. believed that developing accommodations and modifications would be sufficient. Tr., p. 434.

93. The Student would benefit from a general education classroom in order to learn appropriate skills. Tr., pp. 435-437.

94. In the LEA, besides behavior management specialists, school psychologists, social workers, and school counselors are all involved in behavior management. Tr., p. 438.

95. Conduct disorders are not considered to be part of the identification of emotional disturbance, as applied under the IDEA. Tr., p. 440.

96. Based on Ms. D.C.'s observations and her review of the record, some of the Student's behaviors fall within the definition of socially maladjusted behaviors. Tr., p. 446.

97. Ms. D.C. and Ms. R.A. agreed upon the types and levels of support the Student would need. Tr., p. 447.

98. Character Counts provides positive behavior supports in a general education curriculum. Tr., pp. 454 – 455.

99. Placing the Student in an educational environment that was fairly uniform and consistent as opposed to going to teacher to teacher and classroom to classroom throughout the day would not be best for her because it would restrict the opportunities she had to learn. Tr.

p. 457.

100. Reports of bullying would not have changed the recommendations made by Ms. D.C., Ms. R.A., and the school counselor. Tr., p. 471.

101. R.B. holds the position of Truancy Liaison Coordinator for the LEA. Tr., p. 476.

102. He was present at an administrative truancy hearing on October 24, 2012. Tr., p. 488.

103. At that hearing, the Magistrate Judge in the truancy proceedings was informed by the family that the reason the Student was not in school was because she was being bullied. The Magistrate Judge informed the family that the Student needed to be in school either in the LEA or somewhere else. Tr., pp. 489 – 490.

104. A criminal complaint was filed against the Student's family charging a violation of the New Mexico Compulsory Attendance Laws. Tr., p. 493.

105. F.A. is the Director of Personnel for the LEA -- part of his job is in Leadership and Development. Tr., p.498.

106. Principal M. requested Mr. F.A. to assist in a discipline issue by giving due process to the Student. Tr., p. 499.

107. Mr. F.A. was asked to investigate the incident that occurred on September 19, 2012 wherein it was alleged that the Student had been injured by another student. Tr., p. 502.

108. Mr. F.A. met with the Student and the grandmother on October 2, 2012. Tr., p. 506.

109. The Student's grandmother would not let Mr. F.A. speak to the Student and requested he read her written statement. Tr., p. 508.

110. The investigation consisted of reading the statements that had been accumulated by the principal and the SRO. Tr., p. 509.

111. After conducting the investigation, Mr. F.A. concluded that the Student had been the aggressor in the incident of September 19, 2012. Tr., p. 515.

112. Ms. S.M., the Student's private therapist, has been treating the Student for alleged bullying. Tr., p. 538.

113. Ms. S.M. has never contacted anyone at the LEA about the alleged bullying, nor has she observed the Student in her classroom setting. Tr., p. 539.

114. Ms. S.M. did not verify the stories of bullying reported by the Student. Tr., p. 539.

115. Ms. S.M. relied on the subjective statements from the Student and her family in the clinical setting. Tr., p. 545.

116. Ms. S.M. has not performed any type of assessments to measure the reduction of anxiety and depression experienced by the Student since she has been out of school. Tr., p. 541.

117. Ms. S.M. attended an IEP for N.M. in June 2012. Ex. D.

118. Ms. S.M. neither made recommendations nor did she provide the IEP team with any information at that IEP meeting. Tr., p. 542.

119. The Student stated to Ms. S.M. that sometimes she may have instigated an incident of bullying. Tr., p. 544.

120. Ms. S.M. diagnosed the Student with 311 depressive disorder and 300.02 generalized anxiety disorder. Tr., p. 545.

121. Ms. S.M. did not base her diagnoses of general anxiety disorder and depressive disorder on any formal assessment of the Student. Tr., p. 545.

122. Ms. S.M. has noted that the Student sometimes has a hard time following through with activities, with a hard time understanding, yet Ms. S.M. has never given the Student testing and does not consider herself an expert. Tr., pp. 534-535.

123. It was Ms. S.M.'s understanding that the reason the Student's family took the

Student out of school was because there had been an incident where she fell to the ground and a gang of kids stepped on her and kicked her, and they were afraid of another altercation similar to this one. Tr., p. 548.

124. Aside from filing for a due process hearing, since removing the Student from school in September 2012, it is the grandmother's testimony that she only corresponded with the LEA on two occasions. Tr., p. 710.

125. In regards to talking to Mr. R.B. about the September 19, 2012 incident, the Student's grandmother decided that it was not in the Student's best interests for her to talk and meet either with Principal M. or R.B. Tr., p. 711.

126. The Student's grandmother allowed the Student to come to her IEP in September 2012, when she found her sitting in front of the school after she had attempted to walk off campus. Tr., p. 715.

127. The Student's grandmother never observed the Student in the classroom or activities school settings. Tr., p. 718.

128. The Student's grandmother made no attempt to obtain an alternative school situation for the Student after she removed her from D.V. Elementary. Tr., p. 720.

129. The Student's grandmother did not make attempts, other than two pieces of correspondence to the LEA, to resolve the issues she had with the school in order to get the Student back in a school setting. Tr., pp. 719 – 720.

130. The Student's proposed private placement school does not receive educational programming through the IEP process. Tr., p. 758.

131. The Student's proposed private school has experience providing education to students with disabilities and students who have been bullied. Tr., pp. 742-743. The school has reading instruction. Tr., p. 747.

132. The proposed private placement's student environment consists of children with autism spectrum from classic autism thorough high range functioning autism, students with Asperger's, students with mental illnesses, students with bipolar disorder, students with ADHD and students with specific learning disabilities. Tr., p. 747.

133. However, from a special education perspective, special education students do much better when they are in a general education setting as much as possible with their groups rather than being segregated in an all day special education setting. Tr., p. 852.

134. In the fourth grade section, there are eight students, with a lot of them that do not have long attention spans. Tr., pp. 747-748.

135. Tuition at the Student's proposed private school is $12,500 annually for private pay and $15,000 for IEP placement when IEP documentation and reporting are required; material fees are $150. Tr., pp. 740-742, 751.

136. Grandparent has an income of $710 per month. Tr., p. 667. Mother, who has a 9th grade education, is disabled and without reliable transportation. Tr., p. 773. The family cannot afford to send the Student to private school. The family lacks reliable transportation and cannot drive the Student to Albuquerque each school day to bring her to the proposed private school. Tr., p. 668.

137. The Student's proposed private placement school does not provide ancillary services to its students. Parents may pay for outside services and have the providers come to the school. Tr., p. 759.

138. Officer G. is a School Resource Officer for the LEA, and at the time in question was assigned to D.V. Elementary. Tr., p. 781.

139. Officer G. was familiar with the Student prior to the September 19, 2012 incident.

Tr., p. 786.

140. On September 19, 2012, Officer G. was called to D.V. Elementary school because the Student had left the school campus without permission. Tr., p. 786.

141. The Student refused to return to school and continued walking toward an expressway, which is dangerous at the time of the day the Student was walking toward it, when her grandmother arrived and picked her up and returned her to school. Tr., pp. 786-787.

142. Officer G. returned to the school and was informed the Student's grandmother had called for an ambulance and medical assistance. Tr., p. 790.

143. Officer G. took the Student to the school nurse to check on her well-being. The nurse reported that the Student was just upset and that she had not received any physical injuries. Officer G. did not see any evidence of any physical injuries to the Student. Tr., p. 790 - 791.

144. Officer G. conducted an investigation of the incident and after interviewing witnesses to the incident, it was his conclusion that the Student had been the aggressor. Tr., p. 793.

145. In the twenty statements that he took from students and staff who witnessed the event, no one corroborated the Student's version of the incident. Tr., p. 823.

146. The Student had friends at school -- Officer G. witnessed her playing with children in the playground and eating lunch with other students. Tr., pp. 821 - 822.

147. Ms. M. Sz., special educational assistant, was on lunch duty at the time of the September 19, 2012 incident. Tr., p. 825.

148. The Student was in view of Ms. Sz. almost constantly during lunch period on September 19, 2012. Ms. Sz. did not witness any child physically assault the Student, nor did the Student come to Ms. Sz. with complaints that any child had physically assaulted her. Tr.,

p. 828 – 829.

149. Ms. Sz. observed the Student playing with friends during lunch periods. Tr., p. 832.

150. Ms. Sz. had a nice rapport the Student; the Student often talked to Ms. Sz. during lunch period. Tr., p. 833.

151. Ms. N. has been a special education teacher for the LEA for sixteen years. Tr., p. 837.

152. Ms. N. attended the June 11, 2012 IEP when it was determined the Student qualified for services. It was Ms. N.'s responsibility for implementing her goals and objectives. Ex. E. Tr., p. 839.

153. Ms. N. had the Student for a multi-sensory reading program for 90 minutes per school day. Tr., pp. 840 – 841.

154. Even though Ms. N. had the Student for only a few weeks in the beginning of the 2012 – 2013 school year, she felt she was progressing in her reading and sent a note to the family regarding her progress. Tr., p. 841.

155. The Student did not exhibit any behavior problems in Ms. N.'s class except for one incident where she was making a clicking noise and Ms. N. moved her seat which resolved the issue. Tr., p. 842.

156. The Student never told Ms. N. that she was unhappy nor did Ms. N. witness any behavior that would have led her to believe she was unhappy. Tr., p. 842.

157. Ms. N. never had to take any disciplinary actions against the Student. Tr., p. 843.

158. Ms. N. did not see the Student having difficulties in school. Tr., p. 844.

159. Ms. N. could meet with the Student's general education teachers if she felt she needed additional information or support for the Student's special education program. Tr., pp. 845 – 846.

160. The Student qualified for services in June of 2012. Extended School Year services would not have been an option for N.M. until the summer of 2013. Tr., p. 852.

161. Greater weight is given to the testimony LEA's officers, teachers, staff and investigators regarding the events and complaints the Student had about being bullied, over the testimony of the mother and the grandmother – the LEA investigated the incidents, objectively evaluated the materials, and concluded that the Student initiated aggressive behavior and was not bullied by the other students.

162. The Student's mother and grandmother love the Student and believe what she says to them, yet they did not conduct objective investigations of the events, like the LEA agents did.

163. Greater weight is given to the LEA's staff, teachers, psychologists and diagnosticians over the Student's therapist witness, Ms. S.M.– Ms. S.M. generally relied on her clinical assessments based on the subjective self-serving statements of the Student and her family, rather than on objective educational tools in the special education environment – she was not an independent educational evaluator.

Analysis and Conclusions-of-Law[3]

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.

[3] The Conclusions-of-Law and Analysis follow in form to the list of the Student's proposed Conclusions of Law, which are deemed to be her issues for preservation after the due process hearing. *See Petitioner's Requested Findings of Fact and Conclusions of Law, March 12, 2013.* To the extent applicable, the issues raised by the parties pre-trial will be noted in footnotes comparing to those which apply to the conclusions reached under this format. The ultimate issues, however, are those preserved by the proposed Findings of Fact and Conclusions of Law submitted by the parties.

2. The statute of limitations period begins two years from the date the initial request for due process was filed; therefore, the material time period to consider in these proceedings is from October 13, 2010 onward. *See* §6.31.2.13(I)(18)(b) NMAC.

3. The Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to identify her in all areas of suspected disability.[4] The Student failed to meet her burden to establish that she meets the criteria as a student with emotional disturbance in addition to the identified specific learning disability in reading. 34 C.F.R. §300.8(c)(4)(A),(B),(C),(D),&(E). Specifically, she did not show over a long period of time and to a marked degree that adversely affects her educational performance, which is, either singularly or in a combination, that she had a condition resulting in an inability to learn not explained by health, intellectual or sensory factors; inability to maintain or to build satisfactory interpersonal relationships with peers or teachers; behaviors or feelings which are inappropriate under normal circumstances; generally, a persuasive mood of unhappiness or depression; and a tendency for development of physical symptoms or fears which are associated with personal or school problems. 34 C.F.R. § 300.8(c)(4)(i). The Student did not meet her burden to show that her therapist was a qualified evaluator who used a variety of assessment tools to gather functional, developmental, and academic information about the chid, with no single measure used to make a determination, with assessment administered by trained and knowledgeable personnel in all areas of suspected disability, to also include data from the child's parents, classroom or State assessments and classroom observations, observations by teachers and other related service provides,

[4] Issues 1, 2, 3, 6, 8, 9, and 11.

present levels of academic achievements, and the need for special education and related services. 34 C.F.R. §300.304-305. The Student could have requested, but did not request, an Independent Education Evaluation at public expense to assist her with this burden. 34 C.F.R. §300.502. Thus, the Student did not demonstrate she exhibited one of the five listed symptoms, "over a long period of time," "to a marked degree," and that her condition adversely affected her educational performance. *Springer v. Fairfax County Sch. Bd.*, 134 F.3d 659, 663 (4th Cir. 1998)(persuasive, although not binding precedent). The Student's condition is social maladjustment/bad conduct – it is not coupled with an underlying serious emotional disturbance. *See Springer at* 134 F.3d 664 (*citing A.E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 476 (10th Cir. 1991).

4. The Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to have an IEP in place for her during the 2012-2013 school year which included behavioral positive behavior goals.[5] Both the June 11, 2012 and September 28, 2012 IEPs included behavioral interventions, accommodations, and goals. The IEP team determined there was no need for an FBA/BIP. There is no requirement that an IEP include provisions for an FBA/BIP. *See* 34 C.F.R. §300.320. A subsequent request for a new FBA was initially rejected by the Student's grandmother. For behavior and discipline, the Student was to follow the school-wide discipline plan, and the Student required modifications described in Annual Goals and/or Instructional Accommodations, which were behavior supports for alternate seating, frequent breaks, change focus task to refocus on academic activity, peer mediation, frequent checkpoints for daily and long-term

[5] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11.

assignments, partner reading, repeat instructions, and auditory aids. The teachers followed and used the goals and accommodations. The Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

5. Similarly, for the reasons stated in paragraph 4,[6] above, it is concluded that the Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to have a BIP in place for her during the 2012-2013 school year to devise and deliver a system of support and positive behavioral interventions to ensure her daily access to education. The Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

6. The Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to provide her with direct instruction and supports to remediate her deficits in social competence.[7] The May 2012 FBA noted that the Student had problem behaviors, which included deficits in "social competence skills," which consisted of integrative thinking, feelings, and behaviors, when social interactions are part of a learning process, as in small group settings, group work, learning centers, play and leisure, and the like. Both

[6] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, and 11.

[7] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

the June 11, 2012 and September 28, 2012 IEPs included behavioral interventions, accommodations, and goals, as noted in paragraph 4, above, which address, by being remedial behavioral interventions, social competence deficits, among other things. The teachers followed and used the interventions, accommodations and goals. Therefore, the Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu.of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

7. Similarly, for the reasons stated in paragraphs 4 and 6, above, the Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to have IEPs in place for her during the 2012-2013 school year (June 2012/September 2012) by not providing for specialized instruction in social competence and denied her a FAPE.[8] The Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

8. Similarly, for the reasons stated in paragraphs 4, 6, and 7, above, the Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to provide her with any specialized services or supports to address her deficits in social competence.[9] The Student has not met her burden that the LEA has either not complied with the

[8] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

[9] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

9. The Student failed to meet her burden to establish that the LEA denied her a FAPE by failing to actively address and halt bullying or perceived bullying which she contends led to her and to her parent/guardian's belief that she was not safe at school.[10] While bullying may, in the appropriate circumstances, *see T.K. v. New York City Dep't. of Edu.*, 112 LRP 8001 (E. D. N.Y. 2011), give rise to a denial of FAPE, this case does not present such circumstances. Deference and weight are given to testimony of the LEA's staff, investigators, officers and teachers who investigated the incidents of alleged bullying and, after conducting interviews and objective analysis, found that the Student was not bullied. Factually, therefore, it is found that the Student was not bullied. Thus, the Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

10. The Student failed to meet her burden to establish that the LEA denied her a FAPE through its repeated reliance on discipline, including school exclusion and police intervention, in lieu of educational program informed by understanding about positive behavioral supports and her unique needs as result of disability.[11] Both the June 11, 2012

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[10] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

[11] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

and September 28, 2012 IEPs included the use of positive behavior interventions, accommodations, and/or goals. *See* 34 CFR §324(a)(2)(i); §6.31.2.11(F)(1) NMAC. The teachers followed and used positive behavioral supports. The Student is socially maladjusted, having problem behaviors. Progressive suspension took place under the LEA's plan until the Student's parent and guardian removed her from the school setting. Had the Student been suspended for more than 10 days, then a manifestation determination would have been required to determine if the Student's misbehavior was due to her disability. *See* 34 CFR §350(e). An FBA/BIP would have then been required. *See* 34 CFR §350(f). Therefore, suspension of an eligible child for less than 10 days is not precluded. The Student's contention that reliance on discipline including school exclusion and police intervention rather than an educational program using positive behavioral supports and considering the Student's unique needs is unfounded. Indeed, there was a Functional Behavioral Assessment, another one was requested by the LEA yet was not timely approved by the Student's guardian, which could have led to a Behavioral Intervention Plan. The District did not deny a free appropriate public education to the Student by imposing discipline on the Student. Thus, the Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. See *Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

11. The Student failed to meet her burden to establish that the LEA denied her a FAPE by her withdrawal from the LEA's rolls allegedly after the filing of this due process request as an illegal change of placement since it removed education and special education

from her entirely with no IEP meeting or reevaluation.[12] Factually, the Student left the school setting on September 19, 2012, an IEP was completed on September 28, 2012, the Student was withdrawn[13] from the LEA's rolls ten days after she left school, and a due process complaint was filed on October 19, 2012. The September 28, 2012 IEP was in place at the time the Student became withdrawn from the LEA's rolls, and it remains in place now for purposes of "stay-put," since administrative due process proceedings were begun on October 19, 2012. *See* 34 CFR §300.518. Although not cited by either party, there is authority that a unilateral disenrollment from school due to truancy is a change in placement, and, without a new IEP meeting with the procedural requirements being met, a denial of FAPE may result. *See R.B. v. Mastery Charter Sch., et al*, 762 F. Supp. 2d 745 (E.D. Pa. 2010). However, *R.B. v. Mastery Charter Sch., id.,* is a Pennsylvania case, not a case applying New Mexico law. In New Mexico, the "withdrawal" of a student is based on public school finance and funding– that is, under NMSA 1978, § 22-8-12.1, a school board makes its budgetary estimate for the succeeding fiscal year based on the "membership" of qualified students in its programs. *Id.* "Membership" is defined as the current roll of entries and reentries minus withdrawals. NMSA 1978, § 22-8-2(B). The term "withdrawn" from school includes those who are absent for as many as ten consecutive days. *Id.* Although testimony at the due process hearing addressed the "Compulsory Attendance Law,"

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[12] Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 11 and 12.

[13] Although testimony and proposed Findings of Fact and Conclusions of Law by the parties refer to the Student being dropped or disenrolled, the term "withdrawn" will be used rather than "disenrolled" because under New Mexico law a student is withdrawn from LEA class rolls due to absenteeism, rather than "disenrolled." NMSA 1978, § 22-8-2(B).

compulsory school attendance is the vehicle for the Student's collateral truancy proceeding in the New Mexico Magistrate Court, *see* NMSA 1978, § 22-12-7 (as amended 2009), rather than the underlying basis for withdrawal due to funding from LEA school rolls. *Compare* Compulsory School Attendance Law, NMSA 1978, § 22-12-1 et seq. *with* the Public School Finance Act, NMSA 1978, § 22-8-1 et seq. Thus, the New Mexico "withdrawal" from the LEA rolls is a term of art to determine funding – for a funding mechanism – not a disenrollment from education. The last IEP continues to remain in place – it does not disappear. This is consistent with the underlying statutory construction of the IDEA and implementing regulations. For instance, when a student transfers between districts within the state, then FAPE must continue until the new agency either adopts the old IEP or creates a new one. *See* 34 CFR §300.323(e); §6.31.2.11(H)(1) NMAC. The prior IEP remains in place in the interim. *See Marshall v. Monrovia Unified Sch. Dist., et al*, 627 F.3d 773 (9th Cir. 2010)(interpretation under California law). Similarly, IEP educational agency members cannot predetermine educational placement for an IEP. *See generally K.D. v. Dept. of Edu.*, 665 F.3d 1110 (9th Cir. 2011)(persuasive; predetermination allegation raised by parent rejected). However, under the Student's argument, if a new IEP meeting would be required prior to the student being "withdrawn" for funding purposes from the LEA's rolls then it would effectively force a predetermination on the IEP Team because the IEP Team has no option under New Mexico law other than to "withdraw" the student from the funding rolls under the funding definition of "membership." NMSA 1978, § 22-8-2(B). Any other result would presumably make the LEA subject to receipt of funding for a student for whom it would not otherwise be entitled to receive funds, with possible numerous implications arising from that action. It is noted that this Student is not a student in need of early

intervention, or habitual truant, which are excepted from the funding membership mechanism. NMSA 1978, § 22-8-2(B). Similarly, the Student has presented no evidence that she would be refused immediate return to the school setting in the LEA or that the provisions of her present IEP would not continue on her immediate return. A student in New Mexico has a right to a free public education with a right to attend public school. NMSA 1978, § 22-12-2(A). A student in New Mexico is required to attend school until age eighteen, or on graduation, or receipt of a general education development certificate. NMSA 1978, § 22-12-2(A). This is consistent with Principal M.'s testimony that the LEA remains obligated to provide the Student services, but the Student still must re-enroll in school. Thus, contrary to the analysis under Pennsylvania law in *R.B. v. Mastery Charter Sch., et al*, 762 F. Supp. 2d 745, the plain meaning of the New Mexico withdrawal provisions is that a student is automatically withdrawn from the LEA rolls for administrative funding statistical purposes -- not for IDEA placement change. *See generally, Robbins v. Chronister*, 435 F.3d 1238 (10th Cir. 2006)(statutory construction factors in non-education § 1983 action). The Student's September 28, 2012 continues in place to meet the Student's unique, individual needs. Thus, the Student has not met her burden that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable her to receive educational benefits. *See Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a FAPE.

12. The Student failed to meet her burden to establish that she is entitled to equitable relief in the form of compensatory education consisting of a private school

placement at public expense.[14] It is concluded that there has been no denial of a FAPE to the Student by the LEA. Therefore, equitable relief is not awarded.

13. Since it is concluded that there has been no denial of a FAPE to the Student by the LEA and no equitable relief awarded, then the Student's proposed private placement is denied.[15] Petitioners' theory is that since the Student was removed by her parent/guardian from the school setting due to an inappropriate IEP or wrongfully implemented IEP, with a Due Process Compliant request for a subsequent private setting as a remedy, then it is akin to a removal from the public school setting into an immediate private placement, in context of the *Burlington Sch. Committee, et al, v. Mass. Dept. of Edu.*, 471 U.S. 359 (1985), and *Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993) unilateral placement tests. Finding persuasive guidance in the unilateral placement analysis, then the issues to be considered are: (1) the appropriateness of the school's IEP (whether a FAPE was denied the Student in context); (2) the appropriateness of the parents' placement (which would now include the appropriateness of the parents' proposed placement); and other equitable factors. *See Burlington,* 471 U.S. 359. Proposed placement considerations will not be barred because the school might not be state approved or because it might not otherwise meet state standards. *See Florence Co. Sch. Dist. Four v. Carter*, 510 U.S. 7 (1993). As already concluded, for the reasons noted above, the June 11, 2012 and September 28, 2012 IEPs are appropriate and LEA did not deny the Student a FAPE. It is also concluded that the parents proposed placement is inappropriate – the Student is nine-years old, qualified

[14] Issue 13.

[15] Issue 13.

for special education services as specific learning disabled for basic reading/reading fluency. The parent/guardian's proposed private placement would place her in a segregated school environment consisting of children with short attention spans, some with autism spectrum from classic autism thorough high range functioning autism, students with Asperger's, students with mental illnesses, students with bipolar disorder, students with ADHD and students with specific learning disabilities. This would not be in the least restrictive environment for the Student. *Murray v. Montrose County School Dist. RE-1J*, 51 F.3d at 926. Therefore, the Student's proposed private placement is denied.

14. Petitioners ask alternatively for the equitable relief of analysis and direction of an educational program by an outside professional, like Dr. Ross Greene.[16] *See* Petitioners' Proposed Findings of Fact and Conclusions of Law, p. 14. This, too, is denied, since there has not been established by a preponderance of evidence that the LEA denied the Student a FAPE.

15. Any claims or defenses otherwise raised which are not specifically addressed herein, and due to the order and remedy, are denied.[17]

Order

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioner's request for due process is denied and her Due Process Request is dismissed with prejudice.

Review

Any party aggrieved by this decision has the right to bring a civil action in a court of

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[16] Issue 13.

[17] Issue 10 – The Student has not preserved an issue regarding occupational therapy; alternatively, she has not met her burden that there was a denial of a FAPE.

competent jurisdiction pursuant to 20 USC § 1415(i) (2004), 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.

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MORGAN LYMAN, ESQ.
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: April 12, 2013

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by facsimile transmission only to G. Stewart, T. Ford, Jacquelyn Archuleta-Staehlin, and A. Gonzales, Esqs., and via certified mail only to the Petitioners at their address of record, all on this 12th day of April, 2013.

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