

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of

as Parents of        Student

Petitioners

v.

LOS LUNAS PUBLIC SCHOOLS

Respondent

DPH #1415-02

**DECISION**

**September 26, 2014**

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**Muriel McClelland  
Due Process Hearing Officer**

Attorneys for Petitioners (Parents)

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**DECISION**

**STATEMENT OF PROCEDURE**

Petitioners (Parents) filed a request for due process on July 16, 2014, alleging that Student had never been identified as IDEA eligible because of hearing impairment, that his hearing aid was not repaired by District, that he was improperly disciplined and District never performed a FBA or developed a BIP, that he was not provided specialized research-based reading/writing/spelling instruction, and that his IEP, in general, was not implemented, accommodations/modifications were not complied with by regular education teachers, and educational goals not attained. *[DPHO Exhibit 1]* A Pre-Hearing conference was held on July 25, 2014 and an Order entered. *[DPHO Exhibit 2]* District filed its Entry of Appearance and Answer on July 28, 2014. *[DPHO Exhibits 3, 4]* Statements of Issues were entered August 4 and August 11, 2014. *[DPHO Exhibits 7, 8]* Parties timely filed their Exhibit and Witness lists on August 11, 2014. *[DPHO Exhibits 9, 10, 11, 12, 13, 14]* The Due Process Hearing took place August 18-20, 2014. Requested Findings of Fact, Conclusions of Law, and Closing Arguments were filed September 10, 2014. *[DPHO Exhibits 15, 16, 17, 18]*. Respondent submitted an Offer of Judgment prior to the hearing. *[DPHO Exhibit 19]* This Decision was entered September 26, 2014. *[DPHO Exhibit 20]*

**STATEMENT OF ISSUES**

**PETITIONERS' STATEMENT OF ISSUES**

1. Whether the LEA failed to evaluate for and identify all areas of Student's disability

including but not limited to deaf/hard of hearing?

2. Whether the LEA failed to provide all necessary accommodations and modifications required by Student's needs resulting from hearing impairment?

3. Whether the LEA failed to provide all necessary assistive technology and equipment, related services and supplementary aids and services including but not limited to computers, audiology texts (with head phone access), FM system and other possible equipment?

4. Whether the LEA failed to repair or replace Student's hearing aid?

5. Whether the LEA denied Student access to the general curriculum?

6. Whether the LEA failed to provide Student with all necessary related services including SLP services and sufficient quantity of meaningful audiology service?

7. Whether the LEA failed to provide Student with specialized research-based reading/writing/spelling instruction or an appropriate measurable reading goal?

8. Whether the LEA punished Student for conduct which was the result of his disability and/or his unmet education needs and the LEA's inadequate programming and provision of special education?

9. Whether the LEA's plan to have Student graduate illegally deprives him of continued entitlement to necessary special education?

10. Whether the LEA has lowered its expectations for Student's learning rather than providing necessary service and instruction based on his disability?

11. Whether the LEA has failed to write meaningful annual goals and measure progress towards goals?

12. Whether the LEA has failed to provide Student with education which is free?

13. Whether the LEA unlawfully red flags Student's receipt of special education on his high school transcript?

14. Whether the LEA failed to provide Student with necessary behavior supports?

15. Whether the LEA failed to appropriately conduct manifestation determination hearings?

16. Whether the LEA failed to conduct FBAs and create/review BIPs?

17. Whether the LEA had inaccurately described Student's placement as "homebound," during times he was suspended/expelled from the District, when homebound instruction does not meet Student's individualized needs?

18. Whether the LEA has failed to accurately describe Student's placement, its provision of education and Student's length of school day based on its predetermination and administrative convenience?

19. Whether the LEA has systematically failed to comply with IDEA in its official reporting/coding descriptions of Student's education in order to protect itself and without regard to meeting Student's individual needs for specialized education and access to the general curriculum?

#### RESPONDENT'S STATEMENT OF ISSUES

1. Whether the Petitioners brought their concerns to the IEP team for consideration and response?

2. Whether the Petitioners' failure to present their concerns to the IEP team for consideration bars their claims?

3. Whether the District has an obligation to provide hearing aids to a student?

4. Whether the District has an obligation to maintain hearing aids for a student who

refuses to wear them?

5. Whether the fact that the student has a hearing impairment required any changes to his individual educational program?

6. Whether it makes any difference to the provision of FAPE if you call the out of school placement an alternative educational setting or homebound?

7. Whether Petitioners' complaint is anything more than a shotgun approach in an attempt to uncover some failing to support the filing of the Due Process Complaint?

8. Whether any claims related to the disciplinary actions taken by the District are within the jurisdiction of the Hearing Officer?

### **General Findings**

1. Student is 16 years old and enrolled in his junior year of high school in the 2014-2015 school year. *TR III, 629, 694*

2. Student has a SLD eligibility for special education services. His IEP noted that he suffers a hearing impairment in his right ear for which he has been fitted with a hearing aid but that is not his primary disability for purposes of IDEA eligibility. Student has also been diagnosed ADHD but is not on medication according to Parent. *Exh 2; TR I, 130; TR III, 735, 790-791*

### **Long Term Suspension**

3. Student is currently on Long Term Suspension (LTS) receiving educational services 10 hours a week from 3 PM to 5 PM in an Alternative Education Setting (AES) conducted at various locations in the community. *TR I, 153; TR II, 412-413, 415, 510-511*

4. Student was placed on LTS January 29, 2014 after a manifestation determination

team concluded his behaviors were not the result of his disability. Student and Parents attended this hearing along with District personnel. Parents did not appeal the manifestation determination decision or the LTS. *Exhs 5, 6, 7, 12; TR I, 253-257; TR II, 561; TR III, 684, 719-720, 783*

5. Student's suspension just short of one year was considered progressive discipline, and not for just one incident. Previous to the suspension hearing Student was involved in a number of altercations with other students for which he received short term or in-school suspensions. *Exh 61; TR I, 256, 262; TR II, 314; TR III, 724*

6. Student has a history of fighting, resulting in a previous LTS dating from April 25, 2012 to December 31, 2012 as he was transitioning from middle school to high school. *Exh 7, p.2; TR II, 578-579; TR III, 822-823*

7. Student is scheduled to return to the high school in January, 2015. *TR I, 49; TR II, 334*

### **Testing/Evaluations**

8. According to the school diagnostician who did a re-evaluation in January, 2014, characteristics of dyslexia probably should have been addressed, however, she did not believe dyslexia testing would have altered her assessment. She could not answer why Student was not evaluated for the exceptionality of hearing impairment as that was not her area of expertise. *Exh 46; TR II, 379, 390-396, 402*

9. Student was able to be tested at "desk range" with no hearing difficulty. *TR II, 386, 404*

10. The audiologist who performed Student's hearing evaluations is a fourteen year employee of the LEA. Previous to that time she was a school teacher. *TR I, 125*

11. Student's hearing aid is nonfunctioning. According to the case manager, father stated at the IEP meeting that Parents "haven't had the chance ...to get things going with that." *TR I, 37-38, 50*

12. Student's hearing loss is in the mild to moderate range in low frequencies only, as demonstrated by his audiograms. Student experiences difficulty hearing male voices. Student's right ear hearing is excellent. *Exhs 55, 56, 57; TR I, 146-147, 170-173, 210-215*

### **Hearing Impairment**

13. Parents and Student believe that Student's problems in school emanate from his hearing impairment and his inability to hear in the classroom, causing frustration and acting out behaviors. *Testimony of Parents, TR III, 665-692; 775-797*

14. When questioned by the audiologist, Student did not report any difficulties in hearing teachers or accessing his educational materials. *TR I, 216, 234*

15. The hearing aid was working March 26, 2013 but needed repair as of April 26, 2013. The hearing aid is still not working as of the date of the due process hearing. *TR I, 42-43*

16. The audiologist discussed Student's hearing aid problems with Parents who originally did not see the point in paying for repairs if Student did not wear it. At the IEP meeting in April, 2014, the audiologist learned for the first time that finances may be a problem. After the April meeting the audiologist offered Parents the opportunity to explore options and had made several calls prior to that date but never heard back. *Exh 56, p. 4; TR I, 47, 157-159, 247, 249; TR II, 401; TR III, 731-733; see also TR III, 642-643*

17. The audiologist's main concern was that Student chose not to wear the hearing aid, an over-the-ear model, despite being prompted. It was always in his backpack whenever she

consulted with him. *TR I, 160, 176, 204-205, 243, 247; TR II, 567-568; TR III, 741*

18. Student was embarrassed to wear his hearing aid in front of other students and was aggressively teased by his peers, including having the aid flicked off his ear. *TR III, 643, 709, 711, 728*

19. The audiologist never recommended a FM (frequency modulation) system because it attaches to the hearing aid which Student did not utilize. Members of the IEP team discussed a FM system but Student rejected it. *TR I, 161-162, 203-204; TR II, 567, 574-576*

20. The practice followed by the LEA is that if a hearing aid cannot be serviced by the school audiologist, parents will take it to a private service provider. Mother stated that repairs would not be covered by insurance, however, that has yet to be verified. *TR I, 148; TR III, 707, 730, 786*

21. According to the audiologist, if Student wore his hearing aid he would be able to test in a regular environment with a school diagnostician and hear very effectively in the regular classroom, even considering the elevated noise level. *TR I, 169*

22. Parent admitted she never asked the school for help in getting the hearing aid repaired, nor did she inquire about getting it replaced. *TR III, 783*

23. According to the audiologist, while hearing loss can have an impact on behavior she did not believe Student's hearing loss was a major factor in his behavior or misconduct. *TR I, 153, 189, 227*

### **Student's Current IEP**

24. Student's current IEP was timely developed by the IEP team at a meeting held on April 4, 2014. *Exh 2; TR I, 28-29, 35-36*



25. The IEP team comprised the IEP facilitator, ROTC instructor, audiologist, AES teacher, social worker, case manager (a credible witness) and Student's father. Student also attended.

*Exh 2, p. 38; TR I, 110-111, 168; TR II, 319-320, 498*

26. Student's hearing impairment was discussed at the IEP meeting. *TR I, 48-53, 55-58; TR II, 437*

27. Parent actively participated in the IEP meeting. *TR I, 110*

28. Accommodations recommended by the audiologist comprised seating in the front of the classroom with left ear turned to speaker; shortened assignments, reduction of background noise, more time with exams. Audio books were not requested by either Parent or Student and were not discussed. *Exh 2, p.23; TR I, 87, 139, 179-183, TR II, 419, 431, 468, 472, 572*

29. Student stated to attendees at the IEP meeting that he liked fighting. Parent and his case manager discussed getting him involved in boxing as a positive outlet. Student at the due process hearing, however, denied liking to fight. *TR I, 41, 118; TR III, 637,682-683, 737*

30. Father stated at the IEP meeting and testified in the due process hearing that he believed the LTS was unjust, basing his opinion on Student's version of the incident. The charges leading to the LTS were fully spelled out at the disciplinary hearing which both Parents and Student attended. Mother echoed this sentiment. *TR I, 62, 110; TR III, 609-611, 672-673, 687, 692*

31. An interest in culinary arts was not mentioned by either Parent or Student and consequently was not discussed at the IEP meeting. This is disputed by Student; Student stated he did express his interest in culinary arts "all the time." Culinary arts is a hands-on course which cannot be provided at the AES. *TR I, 97; TR III, 630, 654*

32. Student had no problem hearing at the IEP meeting (which lasted approximately

2.5 hours), and was able to communicate with the team. *TR I, 111*

33. Student's IEP did not require the provision of a hearing aid in order for Student to receive educational benefit and FAPE. *Exh 2*

34. District consistently and inaccurately used the term "homebound" to describe Student's educational setting when, in fact, he attends an AES as a result of his LTS. *TR I, 284-286; TR II, 333, 421-422, 432-433, 512-520, 583; TR III, 824*

35. Student's graduation pathway was changed in his most recent IEP from a standard pathway to a career pathway without further explanation. *TR II, 453, 531-532*

#### **Academic and Classroom Performance**

36. The April, 2014 IEP was not fully effected during the first semester of 2014-2015 because of the AES placement. Student's IEP for the 2014-2015 school year contemplated both the AES and his return to school. *TR I, 116-117*

37. Student was a leader in his ROTC class, a role he would resume when he was back in school. *TR II, 323-324*

38. His ROTC instructor, a very credible witness who took an obvious interest in Student, never noticed an impact on Student's day-to-day activities and classroom performance as a result of a hearing loss. Student had to be reminded on occasion to pay attention. His biggest problem was that he was disruptive in the classroom. Student "out of nowhere, impulsive, and would get into a fight." *TR II, 332-323, 338*

39. This instructor did not recall ever seeing Student with his hearing aid. *TR II, 325*

40. Student did not have problems with discipline or educational materials while in

ROTC. *TR II, 351*

41. The ROTC instructor did not recall a discussion of BIP/ FBA at the IEP meeting and did not believe a BIP could be developed for Student because his behaviors were impulsive and not predictable. The IEP alluded to a FBA and BIP which were never developed because Student was in the AES. *Exh 2, p. 11; TR II, 336, 339, 442*

42. Student presented a behavior problem in his world history class. Student, at his request, did independent work for this subject outside the classroom in the room usually reserved for detention. *TR II, 493-495; TR III, 616-619, 833*

43. In the AES, Student receives services from a special education teacher who teaches him 1:1 using assignments in subjects covered in the regular education curriculum and modified research-based instruction in language arts. This teacher was a very credible witness and was extremely sympathetic to Student and his educational needs while on LTS. Student liked her and did not present any behavior problems in this teaching environment. *TR II, 413-415; TR III, 613*

44. In the spring of 2014 this teacher had also worked with Student and three other boys in a AES using regular education curriculum, texts and class assignments for the most part. *TR II, 421-430, 469-470*

45. Student's AES teacher had previous experience with Student as his special education English teacher in the regular education classroom, prior to the LTS. *TR II, 447*

46. The AES teacher was not aware of Student's math goal (graphing functions) as expressed in his IEP. *Ex 2, p. 14; TR II, 444*

47. The goals in English were very appropriate and addressed, but not the goals in math. Math work was modified to match Student's levels. *Exh 2, p. 14; TR I, 123; TR II, 472*

48. The AES teacher never saw Student's hearing aid. She never received any indication that Student had difficulty with his hearing. *TR II, 433, 476*

49. Student did not present a behavior problem for this teacher, either in the classroom or in the AES. *TR II, 452*

50. Student does better in smaller, structured classes where there is less distraction due to background noises. *TR III, 615*

51. Regular education teachers were provided a list of accommodations and modifications, which they utilized in their classrooms. *Exh 59, p. 2; TR II, 431-432, 573-574, 588*

52. Student accessed IEP accommodations although he reported he had trouble getting teachers to seat him in the front of the classroom. *Exh 8; TR III, 639-640*

53. Student considers both the ROTC Colonel and the AES teacher as his allies. *TR III, 651*

54. Student did not receive 300 minutes of math and 300 minutes of reading as specified in his IEP while and because he attends the AES, neither is he receiving 20 hours of special education. *TR II, 459-461*

55. Student is able to make up any credit deficiencies in the AES. *TR I, 120; TR II, 453*

56. Student has the opportunity to work towards goals and objectives in the AES, has made progress, and can continue to make progress towards his goals and objectives in that environment. *TR II, 485-486*

57. Student received educational benefit from the instruction he received in the AES in the spring and fall of 2014. *TR II, 472, 485*

58. Student did not present as credible. *Testimony of D.M., TR III, 605-664, especially 655-659; TR III, 689*

59. Not attending school may have had a slight impact but not a significant impact on Student's ability to learn the subject matter because he was compensated by 1:1 instruction. *TR II, 450-451*

## DISCUSSION

### **Disciplinary Proceeding**

The event that prompted the filing of the due process request was Student's long term suspension and the severity of the discipline imposed. Parents take the position that Student's hearing loss triggers or at least contributes to his behavior because he cannot hear adequately, but evidence does not support that theory. Once the manifestation determination team concluded that Student's behaviors did not result from his disability, special education services had to be performed in his Alternate Education Setting (AES) to the greatest extent possible. *34 CFR § 300.530* Delivery of special education services has to be considered in that context.

### **Eligibility /Hearing Impairment/ Evaluations**

IDEA defines deafness as "a hearing impairment that is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, that adversely affects a child's educational performance." *34 CFR § 300.8(c)(3)* Hearing impairment "means an impairment in hearing, whether permanent or fluctuating, that adversely affects a child's educational performance but that is not included under the definition of deafness ...." *34 CFR 300.8(c)(5)*

Parents challenge Student's primary eligibility of SLD, believing it should be D/HH

(Deaf/Hard of Hearing). Considerations for D/HH eligibility under IDEA are:

The IEP Team shall–

(iv) consider the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child’s language and communication needs, opportunities for direct communication with peers and professional personnel in the child’s language and communication mode, academic level and full range of needs, including opportunities for direct instruction in the child’s language and communication mode ....

*20 U.S.C. § 1444 (d)(3)(B)(iv)*

Student’s language is English and his communication mode English speech. District acknowledges that Student suffers a hearing impairment but does not consider it significant enough to impede Student’s education. In a recent New Mexico case, a hearing officer found that a mild to moderate hearing loss did not qualify the student for D/HH eligibility under IDEA, and that student’s hearing loss could be addressed with accommodations similar to the ones instituted in this case. *In re: Student with a Disability, 113 LRP 36662 (August 27, 2013)* That is also the case here.

As a high school student, Student understandably doesn’t want to wear his hearing aid. If he did, his hearing would be compensated for any loss. The school cannot force him to wear it. *C.B. ex rel. E.B. v. Pittsford Cent. Sch. Dist., 54 IDELR 49 (WD NY 2010)* Clearly, from all reports from both teachers and Parents, Student lacked the incentive to wear it before it ever needed repair.

Under IDEA an assistive technology device is “any item, piece of equipment, or product system...that is used to increase, maintain, or improve the functional capabilities of a child with a disability.” *34 CFR § 300.5* A hearing aid could be a covered device under this definition. *Letter to Bachus, 22 IDELR 629 (OSEP 1995)* “Determinations regarding ... the nature and extent

of assistive technology devices or services to be provided to the student must be made by the participants on a student's individualized education program (IEP) team." *Letter to Culbreath*, 25 IDELR 1212 (OSEP 1997) The relationship must exist between the student's educational needs and the device. *Letter to Noan*, 22 IDELR 888 (OSEP 1995) Generally, the LEA is not required to purchase devices the student would require regardless of whether or not the student is attending school. *Letter to Anonymous*, 24 IDELR 388 (OSEP 1996); *Letter to Galloway*, 22 IDELR 373 (OSEP 1994)

A device qualifies as assistive technology only if it is necessary for a student to receive educational benefit. *Letter to Fisher*, 23 IDELR 565 (OSEP 1995) A LEA does not have the responsibility to provide medical equipment. *J.C. v. New Fairfield Bd. of Educ.*, 56 IDELR 207 (D. Conn. 2011) The mere mention of a device in an IEP does not represent a LEA's commitment to provide same. There is no responsibility for school districts to provide the specific assistive technology devices or services specified by parents or to agree with each request. *A.S. and W.S. v. Trumbull Bd. of Educ.*, 45 IDELR 40 (D. Conn 2006); *Eric H. v. Methacton Sch. Dist.* 38 IDELR 182 (E.D.Pa 2003); *Los Angeles Unified Sch. Dist.*, 46 IDELR 232 (SEA CA 2006); *Collier County Sch. Bd.*, 44 IDELR 80 (SEA FL 2005)

Generally, a LEA is not responsible for providing eyeglasses, a hearing aid, or other personally prescribed device as an assistive technology device unless the IEP team has determined it is necessary to provide FAPE and it is included in the IEP. OSEP clarifies this policy:

Historically, it has been the policy of this Office that a public agency was not required to purchase a hearing aid for a student who was deaf or hearing impaired because a public agency is not responsible for providing a personal device that the student would require regardless of whether he/she was attending school. However, this policy does not apply to a situation where a public agency determines that a child

with a disability requires a hearing aid in order to receive a free appropriate education (FAPE), and the child's individualized education program (IEP) specifies that the child needs a hearing aid.  
*Letter to Seiler, 20 IDELR 1216 (OSEP 1993)*

There was no showing that a hearing aid was necessary to provide Student with FAPE especially if he did not use it. The evaluation of the audiologist was sufficient to determine that Student's hearing loss was in the mild to moderate range and could be addressed by accommodations. Teachers followed accommodations enumerated in his IEP in the regular classroom for the most part. Student was able to request and get a different setting if they did not. Student did not need his hearing aid in order to benefit from his education, even more so in the AES where he received 1:1 instruction in a small structured setting.

There were several different explanations for the failure to repair the hearing aid: the audiologist spoke to Parents who did not want to pay for repairs if Student didn't wear it; Parents did not have the money to repair it and it was not covered by insurance; Parents were too busy to attend to it; audiologist requests to Parents to bring it in went unheeded, as were her attempts to assist Parents in getting the hearing aid repaired or replaced; Parents never got messages left by the audiologist. Clearly the hearing aid should be functional and Parents share a responsibility with District to cooperate in getting it repaired or replaced. The failure to do so to date did not result in a denial of FAPE in the instant case.

### **FBA/BIP**

District never performed a FBA, nor did it develop a BIP as specified in Student's IEP. Whether a BIP can be developed for the kinds of impulsive behaviors Student exhibits where triggers cannot be identified is open to debate. A FBA/BIP cannot be developed while Student is still on LTS. Under the facts of this case the failure to develop a FBA/BIP did not result in a denial



of FAPE.

### **IEP/Provision of FAPE**

Student's IEP of April 4, 2014, developed after the disciplinary proceeding, was designed to cover both the time on LTS and the return to the regular high school setting. Student's desired elective, culinary arts, could not be provided in the AES and was not addressed in the IEP. The IEP referred to "homebound" to mean AES. The reference to SEE was clearly in error. The transition plan was sorely lacking in content. The reference to the School for the Deaf upon graduation was meaningless in the context of this case. The change from standard to career path for graduation went unexplained and should have been.

All of the above procedural and technical errors, and any others not enumerated here, did not affect the overall content and intent of the IEP which was to provide FAPE in both of Student's settings. *O'Toole v. Olathe District Schools Unified School District No. 233*, 44 F. 3d 692, 701 (10<sup>th</sup> Cir. 1998); 20 U.S.C. § 1415 (f)(3)(E)(ii); *Houston ISD v. Bobby R.*, 31 IDELR 185 (5<sup>th</sup> Cir. 2000) His credits could be made up, he would graduate on time, goals were being met to the extent possible in the AES, accommodations were provided, and he received educational benefit in the AES, even with the shortened school day, because of 1:1 instruction in the regular educational curriculum. Student could probably benefit even more, especially in his regular education classrooms, if he elects to wear his hearing aid. That choice was and is his.

### **Other Issues**

The DPHO does not have jurisdiction over special education designations or state reporting criteria. Other issues raised by the parties are addressed in the findings of fact and conclusions of law herein.

## CONCLUSIONS OF LAW

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, *et seq.*, (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC.

2. The jurisdiction of a due process hearing officer is limited to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.

3. This proceeding has complied with all procedural safeguards required by the IDEA, its implementing regulations, and the New Mexico Special Education Regulations. *Ibid.*

4. Parent bears the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005)

5. The statute of limitations for due process hearings under IDEA is two years prior to the date the due process complaint was filed. The complaint in this matter was filed on July 16, 2014. 20 U.S.C. § 1415(f)(3)(C)(2004); 34 CFR § 300.507(a)(2)

6. At all relevant times, Student was eligible for special education and related services as a student with a disability. 34 CFR § 300.8

7. IDEA does not give a substantive right to a particular disability classification so long as a student has a disability listed under 34 CFR § 300.8 and is receiving services which address his or her unique needs. 20 U.S.C. § 1444(d); 34 CFR §§ 300.320-300.324

8. District's failure to develop the FBA and the BIP pursuant to the IEP did not result in a denial of FAPE. 34 CFR § 300.324(a)(2)(I); *Harris v. Dist. of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008)

9. The LEA consistently and incorrectly used the term “homebound” to mean AES.

This error has not affected the provision of FAPE to Student.

10. Procedural errors in the development of the IEP and misnomers were not critical to the provision of FAPE. *O’Toole, op cit.*

11. Student’s hearing loss did not rise to the level of a disability recognized under IDEA’s definition of Deaf or Hard of Hearing. *34 CFR § 300.8.*

12. Student was properly evaluated and implications interpreted by the IEP team. *20 U.S.C. § 1414(d)(1)(B)(v); 34 CFR § 300.308(b)*

13. Student has received specialized reading instruction, has made progress, and has received more than *de minimus* educational benefit to address his individual needs.

14. Student’S IEP was reasonably calculated to enable Student to obtain educational benefit in the AES and in the regular school setting. *W.G. v. Board of Trustees, 960 F. 2d 1479, 1487 (9<sup>th</sup> Cir. 1992)*

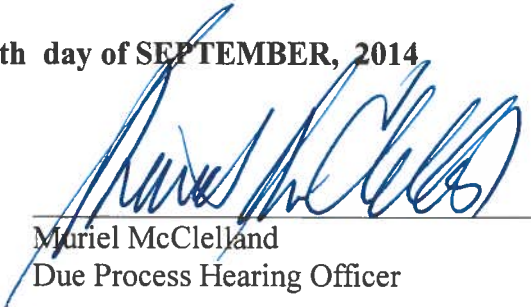
15. Parents failed to prove by a preponderance of the evidence that Student’s re-evaluation and the audiologist’s assessment were not adequate to identify all areas of disability or that Student should have a D/HH eligibility.

16. Parents did not meet their burden by a preponderance of the evidence to prove Student was denied FAPE in the statutory period.

**ORDER**

WHEREFORE IT IS HEREBY ORDERED THAT Petitioner's Request for Due Process against the LEA be dismissed with prejudice.

**THIS DECISION IS ENTERED THIS THE 26th day of SEPTEMBER, 2014**



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Muriel McClelland  
Due Process Hearing Officer

**RIGHT TO APPEAL**

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I)(2004), 34 CFR § 300.516 and 6.31.2.13(I)(25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

## CERTIFICATE OF SERVICE

I hereby certify that I mailed by US mail a copy of the foregoing Decision on September 26, 2014 to the following persons:

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