

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
PROCEEDINGS BEFORE THE  
DUE PROCESS HEARING OFFICER**

In the Matter of:  
**F.G. and R.G., PARENTS,  
on behalf of I.G., a STUDENT,**

Petitioners,

v.

DPH 1617-01

**GALLUP-MCKINLEY COUNTY SCHOOLS,**

Respondent.

**HEARING OFFICER’S FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND DECISION**

Earl Mettler, Due Process Hearing Officer  
November 7, 2016

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**INTRODUCTION AND SUMMARY**

This due process proceeding was filed by Parents on behalf of their son (“Student”) complaining that the local education agency (the “LEA”) in which Student is enrolled, the Gallup-McKinley County Public Schools, denied Student a free appropriate public

education (“FAPE”) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400, *et seq.*

Student is currently in the 11<sup>th</sup> grade, and was 16 years old at the time of the hearing. He is enrolled in high school, and is in his third year at Gallup High School (“High School”). Student has average intelligence. He is eligible for Special Education as a student with Other Health Impairment due to a diagnosis of ADHD and Specific Learning Disability.

Petitioners, his parents, contend that Student was denied a FAPE because the LEA failed to provide for sufficient speech language services, failed to adequately address the Student behaviors that were interfering with his progress, failed to consider and implement effective assistive technology, and failed to adequately report Student’s lack of progress toward goals. They also contend that Student had additional grounds to be found eligible for services, including dyslexia.

Respondent, the LEA, considers Student’s educational failures to be primarily the result of his behavior, especially engaging in refusal to do assigned course work, frequent refusals to participate and follow rules, and engaging in incidents including physical altercations that led to disciplinary actions. It contends that its program and services met the requirements of the IDEA and that student received educational benefit from them.

The due process hearing was conducted on September 19 – 21, 2016.<sup>1</sup>

After hearing all of the evidence and considering the arguments and post-hearing submissions of the parties, the hearing officer is persuaded that failures in crucial areas throughout the statutory period denied Student the education to which he was entitled

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<sup>1</sup> On the first day of the hearing, the hearing officer learned that a cousin of the hearing officer is a member of the school board of the LEA. The parties were so advised. Petitioners waived any conflict of interest. The LEA objected to the hearing officer hearing the matter. Upon consideration of the facts that the hearing officer had not seen or talked with the board member in at least one year, that they had never discussed special education or matters pertaining to the school board, that the board member had no involvement in the case, and that Petitioners had waived any conflict, the hearing officer deemed that there was no conflict of interest as defined in 34 C.F.R. § 300.511(c)(i).

under the IDEA and deprived him of any educational benefit. Based upon the findings and conclusions stated below, prospective relief and compensatory educational services are ordered.

## **FINDINGS OF FACT**

### **Student's Evaluations and Eligibility**

1. Student is currently in the 11<sup>th</sup> grade, and was 16 years old at the time of the hearing. He is enrolled in high school, and is in his third year at the same school.

2. Student has average intelligence. Ex. 15; Tr. 450.<sup>2</sup> He is eligible for Special Education as a student with Other Health Impairment due to a diagnosis of ADHD, and Specific Learning Disability in the areas of reading comprehension, math problem solving and written language. He has received Special Education services since elementary school. Complaint and Answer; Exs. 1 and 2. Student's phonetic decoding ability was tested and found to be at the 1<sup>st</sup> percentile when he was in the 8<sup>th</sup> grade. Tr. 421.

3. The LEA re-evaluated Student's eligibility in the fall of 2013. It found that although he has average cognitive ability, and was in the 8<sup>th</sup> grade at that time, his achievement levels in math, reading and writing were at the 2<sup>nd</sup> grade level. Ex. 15, p.2.

4. Student was also evaluated by the LEA in 2013 for assistive technology. At that time, Student's reading skill was measured at the 1<sup>st</sup> to 5<sup>th</sup> percentile, which was equivalent to second to third grade reading level. Ex. 11, p. 2; Tr. 200-201. The speech-language pathologist who evaluated him noted that Student was guessing at words based

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<sup>2</sup> Transcript references herein are to consecutively numbered page of the transcript. Pages 1 – 318 are found in volume 1 of the printed transcript; pages 319 – 638 are in volume 2, and pages 639 – 877 are in volume 3.

on initial letters and deduced that he did not have “phonological rules . . . firmly established.”).

5. An independent educational evaluation done in 2014 found that Student was below the 1<sup>st</sup> percentile in core language skills. Ex. 8, p.1. His writing skills tested at below the first percentile. Tr. 202. It also found significant delay in expressive and receptive language skills. The tester concluded that Student needed speech/language therapy. Ex. 8, p.1.

6. Student’s last reported lexile reading score at the time of the hearing was “far below” his grade level, at the 7<sup>th</sup> percentile and at a likely grade level of 4<sup>th</sup> or 5<sup>th</sup> grade. Ex. 36; Tr. 529. His special education English teacher’s assessment is that Student had made “little or no progress” on his reading goal. Tr. 235.

7. The curriculum used in Student’s Work Study class (“LCCE curriculum”) had student materials that were at grades 2-5 according to the teacher. Tr. 136-137. Books that Student is reading in English class are at the 2<sup>nd</sup> to 5<sup>th</sup> grade level. Tr. 255.

8. The dyslexia worksheet has not been done, and dyslexia has not been considered by an IEP team, Tr. 252, 299, 451-453. Whether Student has dyslexia was considered and discounted by an evaluator, Ex. 14, p.2.

### **IEP Terms and Implementation**

9. Individual Education Plans were developed for Student in September 2014, Ex. 4, in April 2015, Ex. 3, and January 2016, Ex. 2. Another IEP was drafted in May 2016, Ex. 1, but it was not finalized. The January 2016 IEP, Ex. 2, is and has been the operative IEP since it was written.

10. The January 2016 IEP relied on test evaluation results from September 2013. Ex. 2, p. 14; Tr. 225.

11. The January 2016 IEP repeated academic goals from the April 2015 IEP, because no progress was made toward the goals during that period. Exs. 2 and 3; Tr. 241. The special education teacher who was assigned to Student as his case carrier gave little thought to drafting the goals. Tr. 241-243.

12. Student's currently in force IEP provides that his grades are to be based on his participation, attendance and effort, in addition to actual mastery of material. This is different from other students. Ex. 2, p. 13; Tr. 359. The LEA treats giving grades based on "participation" as if it were an accommodation, i.e. something provided to bypass a skill deficit or impairment and facilitate access to the general curriculum. Tr. 359-360.

13. The IEP team, which included I.G.'s father, agreed that most of Student's needs could be met in the regular education classroom, with special education support. Specialized instruction is needed in Reading, Math and the Work Study program. Ex. 2.

14. The LEA is a rural district with schools in various small communities. It has suffered shortages in special education instructors and in positions such as speech language pathologist and behavior specialist. Tr. 364-365, 367-369, 380-385. No student at the High School receives more than one hour per week of speech therapy. Tr. 380. The LEA is "currently understaffed in speech and language therapists, live human beings, employees." It routinely requests waivers that allow it to exceed the recommended caseload limit for speech language therapists. Tr. 384-387. Due to staff vacancies, speech language therapy employees work only with elementary aged students. Tr. 496. No student at Gallup High School receives speech therapy through any model other than teletherapy. Tr. 499.

15. The currently in force IEP provides for speech-language therapy. It does not clearly document that therapy is limited to a teletherapy model, but the therapy is in fact provided remotely via an internet connection. Tr. 650-651, 656-657, 660. It is provided

by removing Student from class two times per week during his English class, for a 20 minute session. Tr. 684-686. The LEA has not provided prior written notice to the parents explaining that service delivery model and why it was selected. Tr. 675-676.

16. The current IEP reading goal does not target I.G.'s decoding or encoding (spelling) skills. The reading goal has no clearly delineated substance. It carries little import other than an implied intention that Student should understand what he reads, and it has no valid means of measurement. Ex. 2, pp. 16-17; Tr. 233-234.

17. The IEP provides for Student to receive 30 minutes per month of occupational therapy, but there are no records of it having been provided, and no information about its content or benefit. Tr. 777-778; Ex. 2, p. 29.

18. The LEA's provision of accommodations has been limited. It has not routinely provided Student with audio texts, in spite of his very low level of reading ability.

19. Student made little or no academic progress as reported by the LEA in its periodic progress reports. Ex. 6.

20. The LEA failed to keep track of or record information on progress toward goals after January 2016. Tr. 247-249; Ex. 6, p. 9.

21. The combination of ambiguous and unmeasurable IEP goals and failure to report on progress or the lack thereof toward those goals caused serious adverse educational impacts and denial of a free appropriate public education ("FAPE") to Student.

22. One of the Petitioners testified that Student has a mental disability, but the LEA had not been presented with a diagnosis and no additional evidence of it was presented at the hearing.

### **Recent Educational History and Progress**

23. Student had low grades during the past two academic years (2014-15 and 2015-16) and failed some classes. Exs. 17 and 18; Tr. 90.

24. Student has had licensed special education teachers in his English, math and Work Study classes. Tr. 29, 77.

25. During last school year (2015-16) and the current school year, Student was enrolled in a Work Study class. The Work Study class is mainly for students who are not on the standard pathway to graduation. It usually requires a career readiness plan, and it offers job training activities such as working in the school snack bar, to be followed by job training off campus for students on a career readiness pathway to graduation. Tr. 31-35, 46, 113.

26. In Work Study, Student earned a “stipend” of 75¢ per period to work in the snack bar. In that work, his usual task was placing a slice of pizza into a triangular box and placing the box in a warmer. Tr. 36-37; 43-45. Students who did not have IEPs and worked in the snack bar learned to do cashiering. Tr. 47-48.

27. The Work Study teacher taught work aspects such as attendance and added some basic math instruction. Tr. 47-48, 117-118. The Work Study teacher felt that Student did not benefit from that class last year, but enjoyed working the snack bar. Tr. 65. This year his cooperation and attitude in Work Study are better, and he is doing pages of work that he did not do last year. Tr. 70.

28. The Work Study class did not meet Student’s needs and did not benefit him. Tr. 53-54, 65. He never attended that class for an entire period; sometimes he left and sometimes the teacher called and had him removed from class. Tr. 55-57; 61-62, 85-85, 142; Ex. 35, p. 12.

29. Student demonstrated a reading ability at the 4<sup>th</sup> or 5<sup>th</sup> grade level when working with his assistive technology teacher. Tr. 728-729, 742. Written material in his

Work Study class was at the 2<sup>nd</sup> or 3<sup>rd</sup> grade level. Tr. 137. He has difficulty producing written work and has never written even a paragraph. Tr. 169-170.

30. In his English class, a Special Education class, Student qualified for a computer based reading program by scoring at “about fifth-grade level”. Tr. 163. His English teacher believes Student can read at the 5<sup>th</sup> grade level and write at the 6<sup>th</sup> grade level. Tr. 229-230, 171, 204. He has not written a full paragraph in English class. Tr. 170. During his 10<sup>th</sup> grade year, he tested at 2<sup>nd</sup> to 3<sup>rd</sup> grade level in math. Tr. 172.

31. In his Special Ed English class last year and currently, Student uses two computer based curricula: A program called Read 180 for reading and one called R-Book for writing. He did Read 180 two days per week, and independent reading the other three days, though that may have included listening to books. Tr. 168-169, 172-174. The books were not at 11<sup>th</sup> grade level. Tr. 177.

32. The English teacher advanced Student to Read 180 because in 9<sup>th</sup> grade he completed System 44, a program by the same publisher. Tr. 523. The programs can be used to determine a student’s lexile score, a quantitative measure of reading ability. Student’s last reported lexile score at the time of the hearing was “far below” his grade level, at the 7<sup>th</sup> percentile and at a likely grade level of 4<sup>th</sup> or 5<sup>th</sup> grade. Ex. 36; Tr. 529.

33. The special education English teacher did not work with Student on the writing skills which the LEA’s own evaluation recommended and did not work with him on his use of Assistive technology (iPad) for production of writing. Tr. 199, 202-203.

34. The special education English teacher feels that his class is really not working for Student. Tr. 209.

35. Student is currently in a Special Ed math class with a student-teacher ratio of 8:1. Tr. 350. The teacher is unaware that Student has a specific learning disability in math. Tr. Tr. 230-231; Ex. 15, p. 2.

36. Student has made no demonstrable progress in math for the last three school years. Tr. 327 (mid second grade level when assessed in fall 2016), 330-332; Ex. 15 p. 2 (math skills a mid-second grade in 2013); Tr. 339 and Ex. 2 p. 14 (2d grade skills, fall 2015). His poor math skills are linked to his reading difficulty. Tr. 332.

37. The math teacher this year is trying to bring him “up to speed”, having found him to be at a 3<sup>rd</sup> grade level, and because he got a D- in the prerequisite math class. Tr. 336. She feels he is now performing at a level higher than 3<sup>rd</sup> grade. Tr. 351.

38. Student is currently in a general education history class that has a Special Ed teacher in the classroom in addition to the general education teacher. Student is well-behaved in the class, but does not always participate. He did not have a textbook until recently because the School does not have enough books, and he does not use the iPad and has not had an audio book of the textbook. Tr. 537.

39. Student has not done the short daily opening “bell question” the teacher uses to start the class. Tr. 540, 561. The teacher believes he can handle the substance of the material, and finds him to be outgoing and verbal in class. Tr. 546-547, 558-559. The history teacher intends to speak with the case carrier teacher about what strategies to use with Student. Tr. 548-550.

### **Speech-Language Services**

40. When LEA’s speech-language pathologist who evaluated Student in August 2013, she made several recommendations for improving Student’s language and writing skills. These included teaching keyboarding, explicitly teaching writing skills, having Student type, explicitly teaching “phonics rules” and related knowledge calculated to improve spelling, and a Bookshare account for audio access to texts. Ex. 11, p.6; Tr. 574-575.

41. After Parent obtained an independent Assistive technology evaluation, Ex. 10, the LEA adopted some recommendations from that report, but gave no further consideration to the needs identified by the pathologist. Tr. 580-582. Thus her recommendations were not included in IEP goals and were not otherwise carried out. Tr. 571.

42. At the time of the hearing, Student was due to be re-evaluated regarding speech-language skills. Tr. 670. His current speech-language service provider, who provides therapy to Student remotely via the Internet, recommended that Student be exited from speech-language therapy, and viewed the purpose of a re-evaluation to be to provide a basis for discontinuing services, because he does not always attend and is “meeting his goals”. Tr. 677-681, 695-696, 704-705.

43. Upon objection by the parent, this was modified to say that the LEA “is willing to explore other options”. Ex. 2, p. 39. However, no other options have been explored. Tr. 392, 396-397, 498-499.

44. The current speech-language provider has not observed Student in the classroom, but relies on anecdotal information from teachers to believe he no longer needs therapy, even though their comments were mostly about his behavior. Tr. 697, 704, 739-740, 754.

45. The current provider believes that the therapy has been beneficial to Student and that he has made some progress in the sessions. However, he has difficulty with word definitions, listening comprehension and recalling detail, and received “cuing” or help with his performance. Tr. 705-705, 708-711. The therapist does not know if his speech-language skills in the classroom have improved because there is no data on that. Tr. 672-675, 696-697, 700-701. The therapy is not related to any of Student’s course work. Tr. 688-689.

46. At the meeting that developed the currently in force IEP, the LEA proposed discontinuing speech-language therapy. Tr. 390-392.

47. The IEPs during the statutory period were not reasonably calculated to provide Student with educational benefit, and the services provided by the LEA pursuant to the IEP did not provide Student educational benefit because the IEPs did not adequately and meaningfully address Student's severe speech-language deficits.

### **Behavior, Behavioral Assessments and Intervention Plans**

48. Student has a serious history of work refusal in his classes. Tr. 195, 205, 209, 724. Teachers have found Student to be very difficult to engage. Tr. 447, 546, 549, 685, 743. A major reason Student's current educational plan at the High School has not been successful is that he often does little or no work in class. Tr. 206, 235, 237-238, 519, 691. Teachers report that Student is "just not participating". Tr. 209. An example is that Student often stated he did not like his Work Study class, or that he was tired, and he sometimes distracted others. If the teacher removed him from the room to talk with him, Student would leave. Tr. 97. Other times, the teacher had security personnel remove him. Tr. 54-57. He would not stay through an entire Work Study class. Tr. 62.

49. Student's case carrying special education teacher feels there is nothing he can do about the lack of participation. Tr. 207-208, 228-230, 239.

50. The case carrying teacher is unable to state reasons for the behavior. Tr. 229. Other teachers also did not cite any underlying causes. Tr. 96-97. No cause of the behavior is delineated in the functional behavior analysis done last school year. Ex. 24. It is not possible to reshape Student's behavior if the cause is not identified. Tr. 468-469.

51. It is likely that Student's work refusal is due in part to his difficulty, and in some cases inability, to perform academically given that his key skills are far below grade level. *See* Tr. 466.

52. It is also likely that his work refusal is a learned behavior that he has been able to engage in with little or no consequence. Tr. 190-191, 307. At various points, leaving the classroom was an approved behavior for Student. Tr. 835.

53. The case carrying teacher asked Student's other teachers to do a daily behavior chart, something that was also required by his BIPs, but that was only minimally carried out. Ex. 27, p. 3; Tr. 82. The LEA's behavior coach would need such data to establish baseline information and then develop and monitor implementation of behavior strategies by staff. Tr. 475-479, 481-482.

54. The LEA does not have a behavior analyst. It has a behavior intervention coach. Tr. 454, 458. The behavior coach's work is mainly directed at elementary school students. Tr. 451. She has observed Student in common areas of the School, but has not been assigned or asked to work on decreasing his behaviors of concern in high school. If she was asked, she would have to do more work in order to be able to suggest solutions. Tr. 465, 470-473.

55. Student's Special Ed case carrier testified that he and the behavior coach discussed Student's lack of participation but "haven't been real successful." Tr. 223.

56. Inadequate observation and data gathering regarding Student's behavior produced an incomplete assessment of that behavior and led to adoption of BIP strategies that were not reasonably calculated to address the behavior at issue.

57. Student's behavior and participation are better in the current school year. Tr. 66, 69, 125, 134, 143. He has stopped violating the School's policy against use of cell phones in some of his classes, though not all. Tr. 67-69, 190. He is on-time, compliant

and participates willingly in at least some of his classes, but not all. Tr. 66, 69, 125, 134, 143, 150, 195, 218. He is more willing and interested in school this year. Tr. 847-848.

58. In the current school year Student is motivated by wanting to stay on the soccer team, which requires that he maintain his grades and stay out of trouble. *Ibid.*; Tr. 142-143, 6-7-608, 623-624, 635, 808. However, he still does not do all of the assigned work. Tr. 332-333 (math); Tr. 540, 561 (history).

59. Student also has a history of physical altercations with other students and use of vulgar and inappropriate language in the classroom. Ex. 32; Tr. 34. Student had seven days of in-school suspension during the 2015-16 school year. Tr. 414.

60. The IEP team found that Student's behavior was characterized by refusing academic demands, and it incorporated a behavior intervention plan (BIP) into his IEP. Ex. 2, p. 13; Tr. 98.

61. Behavioral intervention plans (BIPs) were done in October 2014, October 2015 and January 2016. Exs. 27, 26, 25. These were not based on then-current functional behavioral assessments (FBAs). Tr. 255-257; Ex. 25. An FBA was done later, in May 2016. At that time, the LEA did not prepare an accompanying BIP. Tr. 267-268.

62. The BIP written early in January 2016 provided that in the event of disruptive or off-task behavior or inappropriate language in the classroom, step 3 was "Visit with school counselor or school social worker if available." Ex. 25, p. 4. In practice, this was treated as Student having the option of leaving class, so long as he went to the specified locations. Tr. 56-57, 92, 126, 626. Indeed, one of the findings of fact proposed by the LEA was that "A portion of the plan was that when I.G. was frustrated or upset during class, he could leave the room and report to the counseling office for assistance." Respondent's proposed finding #32 (tendered without citation). The BIP's standard for Student's leaving the classroom was transmuted from a teacher's finding of disruptive or

off-task behavior or inappropriate language to Student's subjective decision. The result was that, again as offered by the LEA in a proposed finding, "he frequently leaves the classroom without permission to do whatever he chooses to do". *Ibid.*, proposed finding #33.

63. Student's parents understood that the intervention of leaving class to go to the counselor or social worker's office was to be used only when Student was "very agitated", rather than routinely. Tr. 835, 866. The LEA did not report to the parents how often Student was leaving class. Tr. 818.

64. The frequency and persistence of Student's behaviors indicated that the behavioral strategies in the BIPs were not appropriate or were not being appropriately implemented. This required that the IEP team meet to revise the behavioral interventions. It also required that the LEA include in the IEP team a behavioral specialist assigned to Student's case.

65. The failures of the LEA to adopt appropriate behavioral interventions, revise them as needed, and implement them, including by providing necessary training to staff, interfered with the provision of appropriate educational services to Student.

### **Assistive Technology**

66. In August 2013, the LEA did an evaluation related to whether assistive technology would benefit Student. Ex. 11. The evaluation, done by a speech language pathologist who is now Student's assistive technology provider, made several recommendations for improving Student's language and writing skills. These included teaching keyboarding, explicitly teaching writing skills, having Student type, explicitly teaching "phonics rules" and related knowledge calculated to improve spelling, and a

Bookshare account for audio access to texts. Ex. 11, p.6; Tr. 574-575. . It did not recommend providing any device. *Ibid.*

67. These recommendations were not included in IEP goals and were not otherwise carried out. Tr. 571. The therapist who did the evaluation understood this to be because the parents wanted an independent evaluation. Tr. 571.

68. After Parent obtained an independent Assistive technology evaluation, Ex. 10, the LEA adopted certain of its recommendations beginning in August 2014. Tr. 580--582. Features of assistive technology that were successful were iWordQ (Typing with word prediction which had oral feedback) ; Read2Go (app that provides audio access and screen highlighting to text book which has been downloaded through Bookshare) and as of the current school year, Notability (ability download class worksheets and fill in blanks) Tr. 582-584; 589-592, 752-754.

69. Although Student now has a device (iPad) for these functions, the person who provides his assistive technology does not know how much he uses it, or in what classes, and has not worked with his teachers about how it could be used. Tr. 586-588, 596-598, 725, 727, 734, 738, 740-741. In fact, Student's English teacher keeps it locked in a drawer, and Student cannot take it to other classes. Tr. 310, 199-200.

70. Student has never had an assistive technology goal in an IEP. Tr. 716-721, 729-731. Assistive technology is clearly helpful, but requires instruction, oversight and coordination that the LEA is not providing. Tr. 196-198, 237.

71. The IEP provides for Student to have an iPad tablet, as a supplementary aid, without a related goal. Tr. 715-717. The faculty member assigned to work with him on how to use the iPad does not believe a goal regarding using the iPad to help with class work. Tr. 730.731. She does believe Student benefits from using the device, particularly

the text-to-speech software, and that he may need to use such a device if he takes college classes. Tr. 754, 720.

72. Student has not used the iPad in any classes other than English. Tr. 105. The English teacher, who is also Student's Special Ed case carrier, keeps it locked up except for use in the English class. Tr. 310, 197-199.

73. None of Student's teachers object to his using the device in their class. Tr. 294.

74. Student has expressed reluctance to use the iPad because it causes him to appear different from the other students, although some other students have laptops at school. Tr. 616; Ex. 2, p. 4.

75. Assistive technology services were clearly needed and would have been beneficial to Student. Student's IEPs were not reasonably calculated to provide specially designed instruction to meet the unique needs of the child and did not include the supportive services that are necessary to afford educational benefit because they did not provide sufficient time for training and support in the use of assistive technology, and did not provide training and coordination of teachers to make the use of the technology effective.

76. The failure of the LEA to implement the use of the iPad as specified in the IEP deprived Student of potentially beneficial services, and constituted a failure to implement an important provision of the IEP.

### **Progress toward Graduation**

77. Student's transition plan has him on a "standard pathway" toward graduation. His father has expressed his desire that I.G. attend college. Ex. 2, p. 10.

78. There are two possible alternatives to standard graduation. One is the "abilities pathway", which is intended for students with marked disabilities and

predominantly low cognitive function, and is not available to Student. Tr. 445. The other is the “career pathway”, which has substantial disadvantages. Tr. 449.

79. Student is 2.0 credits behind where he should be in course progress toward graduation. Tr. 211-213; Ex. 17. He failed both semesters of English during 9<sup>th</sup> grade, both semesters of History during 10<sup>th</sup> grade, and one semester of Biology. Ex. 17. In 2016 Student took a World History class in summer school due to having failed it during the school year. Tr. 812. According to the computerized testing in that class, Student had considerable difficulty with some tests, while others were taken and passed so well and so quickly as to call the results into question. Tr. 812-814. He received .5 credits for the course.

80. The Work Study class is for students who are on a career pathway or ability pathway, rather than the standard pathway to graduation. It does not provide access to regular high school academic content and skill development. Tr. 29-31; Exs. 1, 2.

81. Student took the New Mexico high school competency exam (PARCC) tests in the spring of 2016. He did not achieve passing scores. Tr. 159, 373. His case carrier believes he could do an “alternative demonstration of competency” [ADC] by getting “accepted” by UNM. Tr. vol. 1 at 215-216. However, there is no clear evidence that Student would be accepted at UNM. *See* Tr. 375, 503, 870.

82. Student does not have a firm intention regarding his future post-high school. Tr. 446.

### **ADDITIONAL OBSERVATIONS AND DISCUSSION**

Petitioners point out that it is unclear why the District did not consider an eligibility of “speech language impairment” (SLI) for Student in 2013 based on his testing. Tr. 376; 34 C.F.R. §300.8(a)(11). Presumably a student with an eligibility of Speech Language Impairment would typically be provided more hours of speech language therapy than a

student with a different eligibility. However, the LEA asserts that the additional basis for eligibility would not have entitled Student to any additional services in this case given the finding of a specific learning disability. Tr. 376, 379. Given that little evidence to support a missed classification was presented, and that Student is due to be re-evaluated, and that additional services related to Student's speech language deficiencies are being ordered herein in any case, the hearing officer deems it unnecessary to decide this issue.

Considerable testimony was presented at the hearing regarding personal conflicts between LEA staff and Student's family, particularly his father who has been the more active parent regarding Student's education. This has resulted from statements, perceptions and misperceptions on both sides. While the evidence does not warrant an order on the point, the hearing officer recommends that the LEA consider assigning a different special education "case carrier" to Student.

### **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 (2007).

2. The proceeding has complied with all procedural safeguards required by the IDEA and implementing regulations, and the New Mexico regulations. At the request of the parties, extensions of time, including an extension for post-hearing submissions and for entry of this decision, were granted.

3. The statute of limitations for due process hearings under the IDEA is two years. 20 U.S.C. § 1415(f)(3)(C) (2004). The request for hearing in this case was filed July 6, 2016. The period under review began on July 7, 2014 and ended July 6, 2016. All of the claims made by Parents arose within the statutory period.

4. At all relevant times, Student was eligible for special education and related services under the IDEA as a student with a disability on the basis of Other Health Impairment due to a diagnosis of ADHD, and Specific Learning Disability in the areas of reading comprehension, math problem solving and written language. 34 C.F.R. § 300.8(c)(9) and (10).

5. Student's IEPs during the statutory period were not reasonably calculated to provide Student educational benefit and the services provided by the District pursuant to the IEP did not provide Student educational benefit. Student, therefore, was denied a FAPE from July 7, 2014 to the present and continuing, in violation of 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 1760 (1982); *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (2015).

6. The LEA failed to provide Student a FAPE by failing to provide speech and language therapy which were necessary to assist student to benefit from his special education. 34 C.F.R. § 300.34.

7. The LEA failed to provide Student a FAPE by not developing behavioral supports that were appropriate for Student and adequate to accomplish changes in behavior, resulting in the continuation of behavior that impeded learning and deprived Student of educational benefit. 34 C.F.R. § 300.324(a)(2)(i); Dear Colleague Letter, 68 IDELR 76 (2016).

8. The LEA failed to provide Student a FAPE by failing to implement the use of an iPad or similar device as specified in the IEP deprived Student of potentially beneficial services, and constitutes a failure to implement an important provision of the IEP.

9. The failure of Student's teachers to provide reports to Parents on Student's activities in school and on his progress or lack of progress and to otherwise share denied

Student educational benefit and significantly impeded the Parents' opportunity to participate in the decision making process regarding the provision of a FAPE to Student. *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10<sup>th</sup> Cir. 1998).

10. Each of the failures to provide a FAPE that are listed above related to a major element of Student's special education and related or supplementary services, and the failure to provide them resulted in the failure of Student to make even some educational progress. *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (2015).

11. Petitioners failed to carry their burden of establishing by a preponderance of the evidence that the IEP team improperly failed to consider Student's need for services related to dyslexia or further evaluation of whether Student is dyslexic.

### **REMEDY**

Appropriate relief under the IDEA is injunctive relief designed to ensure that Student is appropriately educated going forward. In addition, where there has been a substantive denial of FAPE, the remedy may include additional services to compensate Student and more quickly remedy the harm done by the deprivation of appropriate services. *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10<sup>th</sup> Cir. 1999). In determining the nature and the amount of additional compensatory services, the hearing officer must consider all the circumstances. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). Because the denial of a FAPE to Student extended over the entire statutory period, during which Student made no progress or *de minimus* progress toward his goals, additional services beyond what would otherwise be required by the Act are appropriate as compensatory services.

### **WHEREFORE, IT IS ORDERED** as follows:

1. The LEA will hire or contract with an educational professional well qualified in the needs of students with specific learning disability and speech language skill deficits

to oversee delivery of special and general education to Student for the remainder of the current school year, with such individual having at least weekly contact with staff and Student, and doing observation and review of assignments in order to provide input on necessary accommodations and instructional strategies.

2. The LEA will hire or contract with a certified behavior analyst to review Student's records relating to behavior and discipline and his evaluations and IEPs, meet with Student, and conduct a functional behavior analysis (FBA), and thereafter immediately develop a new behavior intervention plan (BIP), with assistance of the certified behavior analyst to the IEP team, within 60 days of this date. The LEA will also ensure that all relevant staff are informed and advised regarding implementation of the plan, and that data necessary to evaluate the plan is collected. The LEA will also ensure that the BIP is reviewed at 60 day intervals and more frequently when needed, through the remainder of the current school year.

3. The LEA will provide related services sufficient to meet Student's needs in the areas of speech language and occupational therapy, and such services will be provided in a 1:1 ratio and in an in-person setting by qualified professionals. With the consultation of Student and parents as to feasibility and timing, the LEA will provide additional compensatory speech language services in the same manner, up to 2 hours per week, for the remainder of the current school year.

4. The LEA will provide all services and equipment recommended in Student's assistive technology evaluations, and ensure that all teachers and staff understand the need for such equipment and facilitate and support its use in all of Student's classes, and ensure that Student himself understands the purpose and utility of the services and equipment. The LEA will provide Student with audio access, available both in school and

outside school, to all assigned texts and supplemental reading, to the extent technologically feasible.

5. The LEA will generate and provide to Student's parents progress toward goal reports containing substantive information about present levels of performance, including skill development, at regular interval not less frequent that grade report cards are issued to students.

6. The LEA will maintain Student on a standard pathway toward graduation, unless changed through a process that adheres to full procedural rights and that provides full knowledge by Student and his parents. The LEA will provide full disclosure to Student and parents of the disadvantages of any other pathway and that information regarding Students right to continued receipt of necessary special education through the school year in which he turns 22 years of age.

7. The LEA will provide supportive services and practical assistance (e.g. with scheduling) as may be needed for Student to complete any required courses that he has failed to date.

8. The LEA in consultation with Student and his parents will evaluate and decide whether to set an individualized level of academic (grade) requirements that would be appropriate for Student as a requirement for participation in school sports teams, balancing the benefit of participation (including as an incentive) with the shortcomings of Student's educational progress to date, and, if necessary, petition New Mexico Athletics Association for a waiver, based on disability, for Student's participation.

**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 C.F.R. 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.

ENTERED this 7<sup>th</sup> day of November, 2016.

  
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Earl Mettler  
Due Process Hearing Officer

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of this Hearing Officer’s Findings of Fact, Conclusions of Law and Decision was served by electronic mail upon legal counsel for each of the parties on this 7<sup>th</sup> day of November, 2016. The signed original will be forwarded to the New Mexico Public Education Department.

  
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Earl Mettler