

THE STATE OF NEW MEXICO
BEFORE THE PUBLIC EDUCATION DEPARTMENT

No. DPH 1011-44

HEARING OFFICER'S
MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process, filed with the State of New Mexico Public Education Department on June 3, 2011. *Due Process Request, June 3, 2011*. It is concluded that the Student is eligible for special education services as a child with a disability under the criteria for "emotional disturbance" and for "other health impairment." The Petitioners' Request for Due Process is, therefore, granted in-part.

Procedural Background

The Petitioners' Request for Due Process was filed on June 3, 2011. *Due Process Request, June 3, 2011*. The LEA filed its response on June 13, 2011. *LEA Answer, June 13, 2011*. The LEA averred in its response, among other things, that the Petitioners' Request for Due Process was insufficient. *Id.* A sufficiency determination concluded the Due Process Request to be sufficient on June 20, 2011. *Sufficiency Determination Order, June 20, 2011*.

On June 21, 2011 it was ordered that there was administrative jurisdiction over the subject matter and the parties except for requested attorneys' fees and costs, which were ordered administratively dismissed as outside the context of the administrative portion of the IDEA. *Pre-Hearing and Extension Order, June 21, 2011*. The due process hearing was set to commence on September 26, 2011. *Id.* The hearing was vacated and reset to commence on November 1, 2011. *Hearing Continuance and Extension Order, September 1, 2011*. A issue statement was timely filed on October 18, 2011, *Joint Statement of Issues, October 18, 2011*, after an extension to do so had been granted. *Issue Due Date Extension*

Order, October 12, 2011.

Respondent's Hearing Exhibit List was timely filed on October 27, 2011. *Respondent's Hearing Exhibit List, October 27, 2011.* Petitioners' Witness List and Petitioners' Exhibit List were timely filed on October 27, 2011. *Petitioners' Witness List, October 27, 2011 and Petitioners' Exhibit List, October 27, 2011.* Respondent's Witness List was filed on November 1, 2011. *Respondent's Witness List, November 1, 2011.*

The due process hearing commenced on November 1, 2011, and was concluded with the evidentiary record closed on November 4, 2011. *Transcripts of Record (Tr.), Volumes I-IV.* Finding-of-Fact, Conclusions-of-Law and argument were ordered by extension order to be submitted on or before December 15, 2011. *Extension Order, November 23, 2011.*

The Petitioners timely filed their Closing Argument and proposed Findings-of-Fact and Conclusions-of-Law on December 15, 2011. *Petitioner's Closing Argument, December 15, 2011 and Petitioner's Proposed Findings-of-Fact and Conclusions-of-Law, December 15, 2011.* The Respondent timely filed its argument, proposed Findings-of-Fact and proposed Conclusions-of-Law on December 15, 2011. *Respondent (LEA's) Post Hearing Legal Memorandum, December 15, 2011, Respondent's Findings of Fact, December 15, 2011, and Respondent (LEA's) Proposed Conclusions of Law, December 15, 2011.*

This decision is due on or before January 25, 2012. *Extension Order, November 23, 2011.*

Legal Overview

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

A twofold inquiry is demanded to determine if a child has been provided with FAPE. *Bd. of Edu. of Hendrick Hudson Central Sch. 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. 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 Schools v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Systema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008) (stating that the test is some benefit as compared with meaningful benefit).

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 Wiesenbergh 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 F.3d 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 pervasive 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 a emotional disturbance. *Id.* at § 300.8(c)(4)(ii).

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)). Indeed, adolescence is a time of social maladjustment, and teenagers are a “wild and unruly bunch.” *Id.* 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.

An “other health impairment” definition of child with a disability requires “limited strength, vitality, or alertness, including heightened alertness to environmental stimuli” resulting in “limited alertness with respect to the educational environment” and which is due to chronic or acute health problems including, among other things, attention deficit disorder or attention deficit hyperactivity disorder. 34 C.F.R. § 300.8(c)(9). The chronic or acute health problem must adversely impact the child’s educational performance. *Id.* at § 300.8(c)(9)(ii).

An adverse impact on education performance does not require the impact to be substantial, significant, or marked. *See Mr. I. v. Maine Sch. Admin. Dist.*, No. 55, 480 F.3d 1, 11-12 (1st Cir. 2007). Although taken in part from Maine’s educational regulatory scheme¹, nonetheless, in *Mr. I. v. Maine Sch. Admin. Dist.*, *id.*, educational performance was found to be based on the underlying notions that children are qualified for services to target all their special needs, be they academic, physical, emotional and social. *Id.* at 12 (quoting *Lenn v. Portland Sch. Comm.*, 998 F.2d 1083 (1st Cir. 1993)). Academic progress does not become the sole measure of FAPE. *See Alleyne v. New York State Edu. Dept.*, 691 F.Supp. 2d 322, 344 (N.D.N.Y. 2010)(citing First, Second and Seventh Circuit cases considering impact on social and other behaviors). California’s educational scheme, however, primarily gauges educational performance through academic measures. *See R.B. v. Napa Valley Unified Sch. Dist.*, 496 F.3d 932 (9th Cir. 2007). As noted, New Mexico does not have a definition of educational performance. *See* 6.31.2.1, *et seq.* NMAC. Thus, the New Mexico regulations are in accord with the Federal Regulations in their lack of definition of educational performance. *See* 34 CFR 300.1 *et seq.* According to the federal Office of Special Education Programs (OSEP), the IDEA and federal regulations “clearly

¹ New Mexico’s special education regulations do not have a definition of “educational performance.” *See* 6.31.2.1, *et seq.* NMAC. Educational administrative regulatory guidance is found, however, in Ex. 55, *the Technical Evaluation and Assistance Manual*, New Mexico Public Education Department, April 2007, which discusses an inability to be attentive, ready to understand, and to continue academic or social performance. *Id.* at 101. Petitioners cite Ex. 55, p. 90 (*see Petitioner’s Closing Argument, December 15, 2011, p.8*) for additional State guidance, but page 90 is not part of the administrative record. However, Ex. 56, p. 90, *the Technical Evaluation and Assistance Manual*, New Mexico Public Education Department, July 2011, characterizes the phrase “adversely affects educational performance” as not limited to academic performance, and cites as controlling authority for this standard OSEP’s *Letter to Lybarger*, 17 IDELR 54, OSEP 1990. *Id.*

establish that the determination about whether a child is a child with a disability is not limited to information about the child's academic performance." *Letter to Clarke*, 48 IDELR 77, 107 LRP 13115 (OSEP March 8, 2007)(eligibility for speech and language impairment if adversely affecting educational performance). "It remains the Department's position that the term "educational performance" as used in the IDEA and its implementing regulations is not limited to academic performance." *Id.* Each case is to be evaluated independently. *Id.* Given this foundation, in this present case, factual review of an adverse impact on educational performance will look at more than only academic grades and testing performance.

An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. 34 C.F.R. § 300.323(c)(1).

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). 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).

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 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 Schools*, 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).

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). Nonetheless, 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. The IEP is to be used in analysis of whether a free appropriate public education has been or is being provided. *Systema v. Academy School Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

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

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). 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).

Findings-of-Fact

1. Student has been attending school in the LEA since 2003 and is currently in the 8th grade.

2. In September 2002, he was identified as eligible for special education services, while in pre-school in LEA, based on developmental delay, with concerns around social behaviors, attention and communication. *See Ex. D-1*, pp. 4-6 (Dr. B-A) (historical background).

3. An initial evaluation concluded on November 28, 2005 by the LEA's diagnostician (Dr. B-A) found that the Student displayed behaviors consistent with ADHD and other clinical behaviors which could fit the emotionally disabled exceptionality. *See Ex. D-1*.

4. It was noted that the Student's behaviors created a major disruption in the classroom, and he displayed ADHD behaviors "and some clinically significant behaviors which could fit" the emotionally disturbed exceptionality. *Id.*, p. 29.

5. In March 2006, while in second grade at the LEA, Student was identified for services as a gifted student, and thus other special education services were discontinued. *Tr. Vol. II*, 205, 213-214; *Ex. D-1*.

6. Another evaluation (a re-evaluation) by Dr. B-A was completed on October 8, 2009. *Ex. D-4*.

7. The October 8, 2009 re-evaluation noted that the Student fidgeted with a toy and seemed lethargic. *Ex. D-4*, p. 7.

8. The October 8, 2009 re-evaluation (*Ex. D-4*) considered the May 5, 2009

Neurobehavioral Evaluation by completed by Dr. W. (Ex. 15), and opined that the Student did not meet the criteria for the gifted exceptionality (not an issue in this case), and did not meet the criteria for specific learning disability (not an issue in this case), yet that based on Dr. W.'s ADHD diagnosis, one part of the other health impaired exceptionality was present so that classwork, standard testing, and current academic testing must be reviewed by the committee to determine academic need. D-4, p. 12.

9. Dr. B-A, while concluding that the Student was no longer qualified for the exceptionality of gifted, noted that she was aware of a prior diagnosis of ADHD. Vol. II, Tr. 219.

10. The purpose for Dr. B-A's evaluation was to evaluate the Student for continued receipt for the gifted exceptionality, as well as for specific learning disability. Vol. II, Tr. 216.

11. Dr. D-A's October 8, 2009 re-evaluation, although indicating that her initial 2005 evaluation reviewed criteria for gifted, other health impaired and emotional disturbance, Ex. D-4, p.8, did not assess, consider, or otherwise evaluate the exceptionality of a serious emotional disability. D-4, p. 12.

12. Dr. W's May 5, 2009 Neurobehavioral Evaluation diagnosed the Student with ADHD, combined hyperactive and inattentive; communication disorder NOS, previously diagnosed and apparent in her examination; and developmental communication disorder, previously diagnosed and apparent from case history, OT reports, and observation. Ex. 15, p. 12.

13. Dr. W. noted a social work evaluation performed on April 2, 2009 where issues were disclosed about the Student's suicidal thoughts when frustrated, trouble with being

bullied, heightened emotional sensitivity, low frustration tolerance, diminished self-esteem, anxiety and possible depression. *Id.*, p. 7.

14. Reviewing a teacher's records, Dr. W. noted that the Student had trouble with fidgeting, failed to finish work, failed to sustain attention in tasks or fun activities, left his seat, did not listen when spoken to, did not follow through on instructions, and avoided work which required a sustained mental effort, which affected the Student's completion of class work, behavior and interaction with peers. *Id.*, p. 8.

15. Dr. W. found that the Student's deficits interfere with his ability to get the most from his educational opportunities, and found that intensive intervention is needed. *Id.*, p. 12.

16. On October 27, 2009 the Student was exited from the gifted program. Ex. B-9.

17. The Multi-Disciplinary Meeting of October 27, 2009 was for conducted for a gifted three-year evaluation and for possible disability. Ex. B-9, p. 4.

18. The Determination for Eligibility for Special Education Services (Eligibility Determination) (B-9) noted that the Student's parents sought consideration of OHI (other health impairment) under ADHD, with auditory processing and sensory integration. Ex. B-9, p. 4.

19. The Eligibility Determination relied on, among other things, the Psycho Educational Report by Dr. B-A, *id.*, p. 1, and the Neurobehaviorial Evaluation by completed by Dr. W. *Id.*, p. 2.

20. The Eligibility Determination discussed the ADHD under the other health impaired exceptionality. See Ex. B-9, p.4.

21. The Eligibility Determination concluded that Student was performing at or above

grade level, that ADHD did not impact his education and, that, as a result, he did not meet the second qualifying prong for OHI exceptionality. *Id.*

22. It was determined that, despite the disagreement from Student's parents, the Student was not eligible for services for a disability. *Id.*

23. The Eligibility Determination did not address the issue of a serious emotional disturbance. Ex. B-9.

24. The Student's parents did not specifically ask for emotional disturbance to be determined, *see* Ex. B-9, yet the child find duty is not placed on the parents, but on the LEA.

25. During the IEP of February 4, 2010 it was determined that the Student was no longer eligible for special education services. B-6.

26. After the Student was exited from special education services, his sixth grade teacher had more difficulty with him. Vol. II, Tr. 136.

27. The Student then began to refuse tasks. *Id.*, Tr. 123.

28. Dr. W. Finds that due to the ADHD, the Student has difficulty modulating his own behavior, planning, organizing, shifting set, and with emotional control. Vol III, Tr. 256.

29. Due to his executive functioning deficits, according to Dr. W., the Student has difficulty modulating his own behavior. *Id.*, Tr. 253.

30. On April 17, 2010 the Student was assessed by Dr. F. Ex. 12; Vol. II, Tr. 14.

31. Dr. F. concluded that the Student had unspecified developmental delays with emotional and behavioral problems. Ex. 12, p. 6.

32. She diagnosed him with ADHD, Combined Type, Oppositional Defiant Disorder, Communication Disorder NOS, and Developmental Coordination Disorder, NOS. *Id.*

33. Dr. F. concluded that Student could not cope with stress, as evinced by his frequent visits to the nurse's office, suicidal threats and crying in class. Vol. II, Tr. 38.

34. She found that Student had problems regulating himself and problems with peer relationships. Tr. Vol. II, 88-89.

35. Since the Student was in the gifted range, according to Dr. F., then it is difficult for others to see the emotional issue – the Student is clearly distressed. Vol. II, Tr. 36.

36. She finds the Student's response to educational distress is to blow up the school and to feel non-human. Vol. II, Tr. 30-31.

37. Dr. F. finds that the Student exhibits emotional dyscontrol, problems focusing, monitoring and completing tasks, with a structured environment. *Id.*, Tr. 21.

38. Social connection is important, *id.*, tr. at 28, and academics are impacted by missing class while Student is in the nursing office. *Id.*, Tr. 47.

39. Dr. F. concludes that Student is at a critical time where he now is in need of special education services, such comprehensive antecedent strategy, which are front loading interventions for support and to create an environment to reduce possibility of the behaviors. *Id.*, Tr. 36, 54, 21, 32.

40. According to Dr. F., the Student does not show the criteria in New Mexico education manuals for social maladjustment. *Id.*, Tr. 90-91.

41. On June 23, 2010 the Student began treatment with Dr S., a licensed psychologist in New Mexico, who received his Ph.D. in clinical psychology in 1974, and who has significant private and organizational practice, including with the U.S. Army, with a focus on clinical and child clinical psychology. Ex. 10.

42. On September 17, 2010 the LEA conducted a suicide intervention based on the

Student's suicidal threat and suicidal ideation. Vol. I, Tr. 56-57. See Ex. 28.

43. Among other things, the Student stated he was hated by everyone, that he was upset over the divorce of his parents, and that he wanted to kill himself. *Id.*

44. Student also said he practiced self-destructive behavior by scratching himself, although he would not draw blood. Ex. 28, p. 12.

45. The LEA's social worker did not think the Student was suicidal. Vol. I, Tr. 82.

46. Student received treatment from Dr. S. See Ex. 10.

47. Dr. S. reviewed the report from Dr. W. and concluded that, on October 11, 2010, in addition to the assessments made by Dr. Williams, the Student showed signs of adjustment disorder with mixed anxiety and depression, and a sense of hopelessness in meeting his academic and social expectations exacerbated by, among other things, a failure to meet school work expectations, and deteriorating social relationships, which includes bullying by peers. *Id.*, p. 2.

48. At some time thereafter the principal of the LEA's middle school which Student attended received a copy of Dr. S.'s October 10, 2010 assessment. Vol. II, Tr. 315.

49. On or about October 23, 2010 the LEA middle school principal which Student attended received a letter from the Student's primary care physician, Dr. S.C., which noted a diagnosis of ADHD and sensory integration, with a request for an IEP. Ex. 9. Vol. II, Tr. 280.

50. On October 26, 2010 a meeting was held for a Sec. 504 determination in which the diagnosis of ADHD was noted, as well its impact on the Student's concentration and thinking. Ex. 4, p. 3.

51. On October 27, 2010 the Student once again threatened suicide, to which police

and emergency service providers responded. Vol I, Tr. 67; Vol. II, Tr. 323; Vol. III, Tr. 153.

52. On October 27, 2010 the LEA suicide intervention interviewer found that Student had pressure at school from bullies, teachers and Ms. B., of feeling hopeless in school, concerns with the divorce of parents, that he only has 75% of support from the school, that he has changes in sleeping habits, that he neglects his school work, that he is withdrawn and unwilling to communicate, that he cries, that he has unusual thoughts and perceptions, that he self-mutilates by scratching, and that he has anger issues with bullies and the divorce of his parents. Ex. 27.

53. The LEA was aware that the parent had expressed concerns about the Student being bullied and peer problems. Vol. II, Tr. 152, 156-157.

54. On October 29, 2010 Dr. S. reviewed the self harm indicators and opined that although Student may return to school, Student's increased anxiety and depression indicates that he is deteriorating and that his increased depression is directly affecting his school work. Ex. 11.

55. Credibility is attached to Dr. S's skill, education and experience, coupled with his thoughtful demeanor and comprehensive analysis in answering questions at the due process hearing, and his opinions are heavily weighted.

56. Dr. S. found the attention deficit disorder to impact the Student's ability to complete and progress with school work. Vol. III, Tr. 43.

57. The Student does not do well with his peers because of his anxiety, according to Dr. S., which leads him to feel threatened and to avoid response. *Id.*, 60.

58. As a result, according to Dr. S., the Student exhibits a fight or flight response. *Id.*, Tr. 22-23.

59. The Student has a small Lego man (a toy) he brings class, which is atypical behavior for a Student his age, resulting in being teased, according to Dr. S. *Id.*, Tr. 36-37.

60. The Student reported to his mother that he was being bullied and made fun of because of his Lego men. Vol. III, Tr. 126.

61. The Student's parents' divorce is a cause of the Student's anxiety. *Id.*, Tr. 17.

62. The acrimonious relationship between the LEA and the Student's mother contributed to the stress the Student was experiencing. *Id.*, Tr. 33.

63. Although, among other reasons, the Student's anxiety and stress relate in part to the Student's parents' divorce and acrimonious relationship between the Student's mother and the LEA, nonetheless, the question in these proceedings is whether the tests for emotional disturbance and other health impairment are met – not the cause of the underlying emotional disturbance and other health impairment.

64. Dr. S. opines that anxiety and depression lead the Student to miss classroom instruction and avoid school work. Vol. III, Tr. 45-46.

65. The Student's ability to learn is adversely impacted, according to Dr. S., based on the Student's school performance and nurse visits. *Id.*, Tr. 23.

66. According to Dr. S., the Student misses instruction time by going to the nurse numerous times, because he is unable to constructively manage his anxiety, and for receiving grade zero for missing school work. *Id.*, Tr. 23, 24, 31.

67. The Student is in need of services, according to Dr. S., to get him from point A to point B. *Id.*, Tr. 25-26.

68. Without special education or related services the Student may drop out of school, according to Dr. S. *Id.*, Tr. 25.

69. The Student is in need of a predictable environment and a central school person to coordinate information and help the Student and his teachers, according to Dr. S. *Id.*, Tr. 19, 47-48.

70. Ms. U-H, an expert in educational diagnostics, finds that the Student's problems with attention and interactions, which are problems affecting his friendship skills at school, sustaining attention, leaving his seat, avoiding work, failing to finish work, fidgeting – all affect completion of his work and affect his behaviors and interactions with his classmates. Vol III, Tr. 178.

71. Ms. U-H opines that the Student's internalizing of behaviors, depression and somatic complaints are consistent with emotional disturbance. *Id.*, Tr. 180-182.

72. Ms. U-H's record review did not show that the Student was socially maladjusted. *Id.*, Tr. 189, 196-197.

73. Educational impact looks at more than grades, explains Ms. U-H, such as with transitioning, maintaining focus, and completing assignments. *Id.*, Tr. 204-205.

74. The LEA was aware that the Student felt hopeless in school. Vol. I, Tr. 69-70.

75. The LEA was aware that the parent said the Student had anxiety in the sixth grade. Vol. II, Tr. 159-160, 163-164.

76. On November 2, 2010 the Student's parent requested testing for special education services. Ex. A-10.

77. District staff met to discuss the Student's eligibility without parents being present. Vol II, Tr. 317, 319-323.

78. On November 12, 2010, the LEA responded by denying the request for additional testing based on reasons set forth in the various IEP/EDT meetings, 504 meetings, SAT

meetings and a review of documents regarding the Student. Ex. A-12.

79. On November 15, 2010 the Student was in the general education environment in which he became part of a general education student assist team (SAT), which is unassociated with special education, yet in which the LEA continued to be aware of the Student's anxiety and depression, with absences, nurse visits and two suicide ideations, and attendance was poor and infrequent, with math significantly impacted. Ex. 3, pp. 2-3.

80. A behavior support plan was developed for the general education curriculum for the 2010-2011 school year, which included coping skills and independent thinking skills, among other things. B-16

81. A functional behavior assessment was prepared on January 18, 2011, which noted anxiety manifesting in school absences, illness, nurse visits, parental calls, chewing on nails and cuticles, blurting out comments, concerns about grades, rocking back and forth in desk, making snapping sounds, taps fingers on teeth, rubs face and head. Ex. 2, pp. 1-2.

82. The Student had negative social interaction with his peers, he becomes upset with his teacher. *Id.*

83. The LEA was aware of the Student being disorganized in the classroom. Vol. I, Tr. 169, 171-173.

84. The LEA was aware of the Student having problems taking direction from teachers and difficulty with transition. *Id.*, Tr. 191-192.

85. The LEA was aware of the Student having misperceived teacher's expectations. *Id.*, Tr. 171.

86. The LEA was aware that the Student was unable to interpret social cues. *Id.*, Tr. 204.

87. The LEA was aware that the Student frequently missed work assignments. *Id.*, Tr. 183.

88. The LEA was aware that the Student needs significant teacher time. *Id.*, Tr. 173-175.

89. The Student has had twelve absences from language arts in the last semester. Vol. IV, Tr. 59-62.

90. The Student had twelve absences from science class. Vol. III, Tr. 125-126.

91. The Student had 43 visits to the nurse's office in the 2009-2010 school year and missed 21.83 school hours, during the 2010-2011 school year went to the nurse 103 times resulting in missed school work of 138.87 hours, and from August 4, 2011 through October 21, 2011, the Student missed 39.57 school hours by going to the nurse for 35 visits. Exs. 21-26, 29-31. Vol. I, Tr. 115-116, 120-121, 129.

92. Few of the visits to the nurse's office were for demonstrable illnesses. Vol. I, Tr. 143.

93. The Student complained, however, of stress, stomachaches, headaches and cramps. *Id.*, Tr. 109-110.

94. The LEA school principal was aware of Student's numerous nurse visits. Vol. II, Tr. 287.

95. Not only would the Student have numerous nurse visits, he would visit the principal. *Id.*, Tr. 287, 289.

96. The principal would help the Student complete the missed assignments due to their visits. *Id.*, Tr. 291.

97. Once the Student leaves class, the teacher has to prompt the Student to finish his

work and sometimes even write answers for him. Vol II, Tr. 362-364.

98. The Student then falls behind in class. *Id.*, Tr. 365.

99. Missing assignments impacts the Student's grades and work. *Id.*, Tr. 290.

100. The Student's behavior impacted his Tiger Pride rewards, which is based on rewards for non-academic behavior. *Id.*, Tr. 340-346.

101. According to the LEA, attendance is important because it impacts academic instruction. Vol. II, 167-168.

102. On February 9, 2011 a notification was sent to Student's parents to inform them that the Student had five unexcused absences. Ex. 4.

103. There is no evidence of juvenile delinquent actions by the Student, or unprescribed drug use or overuse.

104. On March 29, 2011, the Student's mother notified the LEA that her son was victimized by students during school hours. Ex. G-73.

105. The LEA responded on April 15, 2011 by stating the school was safe. Ex. G-74.

106. On October 13, 2011 the Student was removed from school due to anxiety attacks. Ex. G-77.

107. No team of educators has found the Student to have a disability or for which specialized instruction was necessary to access a general education curriculum, yet the matters to be resolved in these proceedings are for a determination of special education -- not for general education environment; therefore, since the LEA denied eligibility for special education services then the due process hearing protections under the IDEA are the appropriate avenue for a determination of the special education issues.

108. No team of educators has found the Student eligible for services or supports

under Section 504, yet the matters to be resolved in these proceedings are for a determination of special education -- not for a Section 504 eligibility; therefore, since the LEA denied eligibility for special education services then the due process hearing protections under the IDEA are the appropriate avenue for a determination of the special education issues.

109. The LEA and the Student's mother have a hostile relationship with one another.

110. The Student's mother is an advocate for a Parents Reaching Out, yet this does not impact her credibility.

Conclusions-of-Law

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

2. There is no jurisdiction over Section 504 matters (29 U.S.C. § 794). 6.31.2.13(I)(1) NMAC.

3. There is no jurisdiction over the Student Assist Team (SAT) matters. 6.31.2.13(I)(1) NMAC.

4. The statute of limitations period is post two-years from the date the request for due process was filed against the LEA – that is, the period begins on June 3, 2009. 6.31.2.13(I)(1)(b), NMAC.

5. The burden of proof rests with the Student in this action. *See Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005).

6. The “child find” duty is placed on the LEA. 34 C.F.R. §300.111(c)(i).

7. The LEA met its child find obligation for suspected specific learning disability (which is not in issue in these proceedings) and other health impairment under the ADHD

issue, but did not meet its child find duty for serious emotional disturbance, upon which there was notice of behaviors likely to indicate a disability showing a suspicion of the disability, as these findings indicate. 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. §300.111(a)(i). 6.31.2.10(A), NMAC. *See Wiesenberg*, 181 F. Supp. at 1311 (quoting *W.B. v. Matual*, 67 F.3d 848, 501 (3rd Cir. 1995)). *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009).

8. The LEA met its evaluation obligation for suspected specific learning disability (which is not in issue in these proceedings), and other health impairment under the ADHD issue, but it did not meet its evaluation obligation for serious emotional disturbance, as these findings indicate, although it was placed on notice of behaviors likely to indicate a disability showing a suspicion of the disability. 34 C.F.R. §300.301. 6.31.2.10(D), NMAC. *See Wiesenberg*, 181 F. Supp. at 1311 (quoting *W.B. v. Matual*, 67 F.3d 848, 501 (3rd Cir. 1995)). *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009).

9. The failure to identify and evaluate for serious emotional disturbance did not comply with the procedures set forth in the IDEA, was not reasonably calculated to provide the Student with some and meaningful educational benefit, violated FAPE and impeded the Student's right to a FAPE, and caused a deprivation of educational benefit to the Student. *See Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). *See also Los Alamos Public Schools v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Systema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008) (stating that the test is some benefit as compared with meaningful benefit).

10. The Student is a child with a disability based on a serious emotional disturbance

and other health impairment. 34 C.F.R. § 300.8(a).

11. The Student is in need of special education and related services because of the emotional disturbance and other health impairment. *Id.*

12. Over a long period of time and to a marked degree that adversely affected the Student's educational performance, both singularly and in a combination, the Student was: unable to learn not explained by health, intellectual or sensory factors; unable to maintain or to build satisfactory interpersonal relationships with peers or teachers; had behaviors or feelings which were inappropriate under normal circumstances; had a pervasive mood of unhappiness or depression; and had 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).

13. The Student's conduct was not social maladjustment. *Id.* at § 300.8(c)(4)(ii).

14. The Student has had limited strength, vitality, or alertness, including heightened alertness to environmental stimuli resulting in limited alertness with respect to the educational environment, due to the chronic or acute health problem of attention deficit hyperactivity disorder (ADHD). 34 C.F.R. § 300.8(c)(9).

15. The ADHD adversely impacted the child's educational performance. *Id.* at § 300.8(c)(9)(ii).

16. Adverse impact on the child's performance is based on the Student's special needs, academic, physical, emotional and social, and is not required to be substantial, significant, or marked. *See Mr. I. v. Maine Sch. Admin. Dist.*, No. 55, 480 F.3d 1, 11-12 (1st Cir. 2007)(persuasive, under Maine regulatory scheme, and combined with no definition in New Mexico with OSEP's federal guidance, as noted in Legal Overview, above).

17. There is no element in the child with a disability test which requires

consideration of a stigma of becoming a special education student. *See* 34 C.F.R. § 300.8(a).

18. There is nothing in the child with a disability test which requires that causation of a disability be considered as either as an element of the claim or as a defense to the claim. *See* 34 C.F.R. § 300.8(a).

19. Because the LEA determined the Student to be ineligible for special education services for a child with a disability under the serious emotional disability and other health impairment sections under the IDEA, as noted above, then there was no individualized educational program developed reasonably calculated to enable the child to receive some and meaningful educational benefits, which violated FAPE and impeded the Student's right to a FAPE, and caused a deprivation of educational benefit. *See Bd. of Edu. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). *See also Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Systema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008) (test is some benefit).

20. Compensatory education services are denied. The Student's request for 200 hours of services for "direct instruction/tutoring in areas impacted by his disabilities, including academic subjects impacted by lost instructional opportunity in which [Student] expresses a need for assistance, organization/initiation/planning and social skills" because he was in the nurse's office, *see Petitioner's Proposed Findings of Fact and Conclusions of Law, December 15, 2011*, is unsupported by the record to prove what services the Student should have received had the LEA provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005)(persuasive authority under the qualitative approach). It is noted (yet without finding) that, now given the determination of

eligibility, subsequent placement may remedy the prior violation. *See Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

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

Order

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process, *Due Process Request, June 3, 2011*, is granted in-part. The Student is eligible for special education services as a child with a disability, and needs special education and related services. A meeting to develop an IEP will be conducted within 30 days of this date of this order. *See* 34 C.F.R. § 300.323(c)(1). Given the hostile and acrimonious relationship between the parties, the IEP is to be facilitated by a New Mexico Public Education Department (PED) facilitator, under the standard procedures the PED employs for a facilitated IEP arising as part of the due process proceedings.

Review

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 (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

MORGAN LYMAN, ESQ.
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: January 17, 2012

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by facsimile transmission to D. Poulin, T. Ford, J. Staehlin, and A. Gonzales, Esqs., on this 17th day of January 2012. I certify that a true copy was placed in the U.S. mail to the Student's mother, at her address of record.
