

**BEFORE THE PUBLIC EDUCATION DEPARTMENT  
DPH No. 1920-11**

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

THIS MATTER arises on the Petitioner's Request for IDEA Due Process Hearing With the Local Education Agency (Due Process Request), filed with the State of New Mexico Public Education Department on November 26, 2019. The Petitioner's Due Process Request is granted in part.

**PROCEDURAL BACKGROUND**

The Respondent LEA responded to the Petitioner's Due Process Request on December 9, 2019. *See* [LEA's] Answer, December 9, 2109 (Response). The Prehearing and Extension Order was entered on December 12, 2019. *See* Prehearing and Extension Order, December 12, 2019 (Prehearing Order). On January 24, 2020, the parties filed a Combined Statement of the Issues. *See* Petitioner and Respondent's Combined Statement of the Issues, January 24, 2020 (JSI). The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioner's Exhibit List, January 29, 2020 (P's Ex. List); Petitioner's Witness List, January 29, 2020 (P's Witness List); [LEA's] List of Witnesses, January 27, 2020 (R's Witness List); [LEA's] Exhibit List, January 27, 2020 (R's Ex. List). The parties also filed their respective Amended Witness Lists. *See* Petitioner's Amended Witness List, January 30, 2020 (P's Amended Witness List); [LEA's] Amended List of Witnesses, January 30, 2020 (R's Amended Witness List).

The Due Process Hearing commenced on February 3, 2020, and concluded on February 6, 2020. *See* Tr. pp. 1, 5, 993, 1301. Both parties were well-represented by their

respective trial counsel. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on April 3, 2020. Tr. 999. The parties jointly requested an extension to issue the Hearing Officer's decision, which was granted for good cause shown, for the filing of his decision on or before May 3, 2020. Tr. 999.

The record was partially held open for production of Ms. NM's notes by February 20, 2020. Tr. 1298-1300. On February 11, 2020, the behavior card was admitted as Ex. 39, by agreement of the parties. *See* Email Chain, Stewart, Lyman, and Staehlin, February 11, 2020.

The Petitioner filed her Requested Findings of Fact and Conclusions of Law on April 3, 2020. *See* Petitioner's Requested Findings of Fact and Conclusions of Law, April 3, 2020 (P's FFCL). The Petitioner also filed her Closing Argument on April 3, 2020. *See* Petitioner's Closing Argument, April 3, 2020 (P's Argument). The Respondent filed its Proposed Findings of Fact on April 3, 2020. *See* [LEA's] Proposed Findings of Fact, April 3, 2020 (R's FF). It filed its proposed Conclusions of Law on April 3, 2020. *See* [LEA's] Proposed Conclusions of Law, April 3, 2020 (R's CL). The Respondent also filed its Post-Hearing Memorandum of Law on April 3, 2020. *See* [LEA's] Post-Hearing Memorandum of Law, April 3, 2020 (R's Argument).

This decision is due on or before May 3, 2020. Tr. 999.

## **ISSUES**

(1) Whether the LEA denied the Student a FAPE by violating its child find duty by either failing to identify the Student with a disability, or by the LEA not evaluating the Student for a disability, until May 18, 2019. (JIS, P's # 1, R's # 1).

(2) Whether the LEA denied the Student a FAPE by failing to conduct evaluations in all areas of suspected disability, including whether the LEA knew or suspected the Student could have Tourette's Syndrome or Tic Disorder based on available evidence during the time period referenced in the Complaint. (JIS, P's # 2, R's # 2).

(3) Whether the LEA denied the Student a FAPE by using inaccurate information that the Student was an English Language Learner to delay its duty to evaluate and provide special education, including whether the LEA denied the Student a FAPE when it determined the Student was an English Language Learner based on information then known to the LEA. (JIS, P's # 3, R's # 3).

(4) Whether the LEA denied the Student a FAPE by failing to provide specialized reading/writing/spelling instruction to meet the Student's needs based on characteristics of dyslexia, including whether the LEA denied the Student a FAPE by not incorporating certain reading and spelling instruction desired by Parent into the IEPs. (JIS, P's # 4, R's # 4).

(5) Whether the LEA denied the Student a FAPE by writing reading and math goals which do not address his individual, identified skill deficits and do not reflect evidence-based practice for delivery of instruction for the Student with his specific learning disability profile, including whether the LEA established writing, reading, and math goals which address the Student's individual, identified skill deficits, and reflect evidence-based practices for delivery of instruction for the Student with his specific learning disability profile. (JIS, P's # 5, R's # 5).

(6) Whether the LEA denied the Student a FAPE by failing to intervene and stop disability-based harassment and bullying by peers, including whether the Student was

subject to disability-based harassment and bullying by peers and, if so, whether the LEA failed to take appropriate action. (JIS, P's # 6, R's # 6).

(7) Whether the LEA denied the Student a FAPE by failing to provide Assistive Technology services and equipment to aid the Student's written work production, including whether the LEA denied the Student a FAPE by determining that Assistive Technology services and equipment were not needed to aid the Student's written work product. (JIS, P's # 7, R's # 7).

(8) Whether the LEA denied the Student a FAPE by either failing to train, or not training, school staff at MMS School about Tourette Syndrome. (JIS, P's # 8, R's # 8).

(9) Whether the LEA denied the Student a FAPE by either failing to provide, or not providing, supplemental aids and services to Student and staff to develop an understanding of Tourette's Syndrome and best practices for the educational setting. (JIS, P's # 9, R's # 9).

(10) Whether the LEA denied the Student a FAPE by not having other people, other than those at the IEP meetings, who could interpret the instructional implications of the LEA's evaluation as to instructional strategies and accommodations necessary. (JIS, P's # 10, R's # 10).

(11) Whether the LEA denied the Student a FAPE by either failing to provide, or not providing, audio versions of texts and books used in class, and, if so, whether that denied the Student access to the general curriculum based on reading disability. (JIS, P's # 11, R's # 11).

(12) Whether, in the absence of any other professional diagnosis or evaluation, the LEA is required to take the Petitioner's word that Student has a particular disability. (JIS, R's # 12).

(13) Whether the LEA denied the Student a FAPE by evaluating Student and providing services to Student that directly addressed Student's behavior, rather than his alleged diagnosis alone. (JIS, R's #13).

(14) Whether the Due Process Hearing Officer has jurisdiction under the IDEA to hear Petitioner's claim for \$ 4,000.00 that the Student distributed at the school, and, if so, whether the LEA was under any duty to reimburse Petitioner for the loss of the same. (R's # 14).

### **RELEVANT LEGAL OVERVIEW**

The burden of proof rests with the party challenging the IEP. *See Schaffer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990). Once a subject-matter jurisdictional challenge is made, the responding party has the burden to establish jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed. 2d 351 (1992). In this action, the burdens rest, therefore, with the Petitioner.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed 690 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is

properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the ‘free appropriate public education’ mandated by the Act.” *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10<sup>th</sup> Cir. 1995). “[A] child is entitled to ‘meaningful’ access to education based on her individual needs.” *Fry v. Napoleon Cmty. Sch.*, 580 U.S. \_\_\_, 137 S. Ct. 743, 753-754 (2017).

“To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 (2017). The educational program offered by the IEP must be “appropriately ambitious in light of [the child’s] circumstances.” *Andrew*, 137 S. Ct. at 1000. The “unique circumstances” of the child for whom the IEP was created determine the adequacy of the offered IEP. *Andrew*, 137 S. Ct. at 1001. Deference is given to the expertise and exercise of judgment by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Andrew*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Andrew*, 137 S. Ct. at 999.

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. *See* 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(I) (“child find”). The school district “bears the burden generally in identifying eligible students for the IDEA.” *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10<sup>th</sup> Cir. 2002). All children residing in the local educational agency’s (LEA) jurisdiction must be identified, located and evaluated. *See* 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. *See* 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. *See* §6.31.2.10(D)(1)(a)&(b), NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (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. 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 (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, 1183-84 (9<sup>th</sup> Cir. 2010). Eligibility for special education benefits may be considered, as well. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8<sup>th</sup> 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, 4 (1<sup>st</sup> Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150, 162 (1<sup>st</sup> Cir. 2004).

A disability is suspected, under persuasive authority from the Ninth Circuit, when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F. 3d 1105, 1120 (9<sup>th</sup> Cir. 2016). Notice may come in the form of expressed parental concerns about a child’s symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

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. *See* 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 “other health impairment” definition of a 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 hyperactivity disorder and Tourette syndrome. *See* 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).

A hearing officer’s determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child’s right to a free appropriate public education, (2) significantly impeded the parent’s opportunity to participate in the decision-making process for a provision of a free appropriate public education; 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, compromised the student’s right to an appropriate education, or caused a deprivation of educational benefits. *See O’Toole*, 144 F.3d at 707. In other words, technical deviations

alone are insufficient to establish a denial of free appropriate public education. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10<sup>th</sup> Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order a LEA to comply with procedural requirements. *See* 34 CFR § 300.513(a)(3).

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. *See Timothy O.*, 822 F. 3d at 1124. Thus, for procedural violations to constitute a denial of FAPE, they must be found to seriously impair the parents' opportunity to participate in the IEP formation process, or result in an educational opportunity loss to the child, or cause a deprivation of educational benefits to the child. *Id.* Otherwise, the error is harmless. *Id.* An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. *See* 34 C.F.R. § 300.323(c)(1).

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 provides 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 free appropriate public education. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10<sup>th</sup> Cir. Jul. 16, 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 Cmty. Schs.*, 39 IDELR 239 (W.D. Mich. 2003). *See also Tenn. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (6<sup>th</sup> 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 (6<sup>th</sup> Cir. 2004).

Pursuant to 20 U.S.C. § 1415(b)(3), “a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's education.” *Murray*, 51 F.3d at 925. As a result, a “parent wishing to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency.” *Id.*

The IEP team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general education curriculum; and (iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional

implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. *See* 34 C.F.R. § 300.321.

An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional needs of the child. *See* 34 C.F.R. § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *Id.* Related services are such “developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education . . .” 34 C.F.R. § 300.34(a). *See also Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984)(services to aid student to benefit from special education).

A child’s unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray*, 51 F.3d at 926. Mainstreaming to the maximum extent possible should take place if the child cannot be educated full-time in a regular education classroom with supplementary aids and services. *See L.B. v. Nebo*, 379 F.3d 966, 976-978 (10<sup>th</sup> Cir. 2004). 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 implemented as soon as possible after the IEP meeting. *See* 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to

implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp.2d 960, 970 (D. Kan. 2003).

Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. *See CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 638 (8<sup>th</sup> Cir. 2003) (persuasive, citing *Rowley*, 458 U.S. at 202). Although not dispositive of whether an IEP was reasonably calculated to confer educational benefit, past progress is strongly suggestive that the current IEP continues to provide that trend. *Thompson R2-J Sch. Dist. V. Luke P. Ex rel. Jeff P*, 540 F.3d 1143, 1153 (10<sup>th</sup> Cir. 2008). 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 (10<sup>th</sup> Cir. 1998). *But see Endrew*, 137 S. Ct. 999 (appropriate in light of the child's circumstances). Some educational benefit is required. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008). *But see Endrew*, 137 S. Ct. at 999 (appropriate in light of the child's circumstances). IDEA's statutory goal is "to provide each child with meaningful access to education by offering individualized instruction and related services appropriate" to meet the student's "unique needs." *Fry*, 137 S. Ct. at 755.

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema*, 538 F.3d at 1316. The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Id.*

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 34 C.F.R. §§ 300.511, 300.513. "The only relief that an IDEA officer can give ... is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753. Equitable factors are considered

in fashioning a remedy, with broad discretion allowed. *See Florence County Sch. Dist. 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 (1<sup>st</sup> 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 v. Dist. of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza v. Bd. of Educ. of the Portales Mun. Schs.*, Nos. 10-0963, 10-0964 (D.N.M. 2011). Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D. D.C. 2010). A student's behavior, attitude, bad habits, and attendance may be considered when addressing an equitable remedy. *Garcia Albuquerque Pub. Schs.*, 520 F. 3d 1116 (10<sup>th</sup> Cir. 2008).

Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the student's education. *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10<sup>th</sup> Cir. 2010).

### **FINDINGS OF FACT**

1. There is jurisdiction over the parties and of the subject-matter only for matters raised contesting a free appropriate public education (FAPE) under the IDEA, unless otherwise found or concluded that the matter was not first exhausted.

2. In an attempt to avoid duplicity in these numbered findings and in the Analysis section, the numbered findings are supplemented by the Analysis section findings, so the numbered findings are generally an overview, with the more specific factual issues relative to the preserved arguments in the P's FFCL noted in the Analysis section below.

3. The relevant statutory period begins on November 27, 2017. *See* §6.31.2.13(M).

4. The Student was born on December 7, 2006, and is now 13 years old. *See* Ex. 11.

5. In relevant part, the Student attended JKA School in the 5th grade, during the 2017-2018 school year. Ex. 1.

6. During the 2018-2019 school year the Student attended MMS School for his 6th grade school year. Ex. 1.

7. For the 2019-2020 school year, the Student attended and attends MMS School for the 7th grade. Ex. 1.

8. While in the 5th grade, while at JKA School, the Student's teacher, Ms. LUM, completed a Dyslexia Characteristics Checklist noting difficulties the Student was having in auditory memory, reading, written language, with work and study habits, and with frustration. Ex. 4, pp. 6-7.

9. An initial SAT Tier 1 Classroom Improvement Plan began on September 13, 2017, with it ending after six weeks on October 24, 2017, noting the Student to be an English Language Learner (ELL), with reading, writing, and math interventions. Ex. 4, p. 1.

10. An initial Student Assistance Team (SAT) Meeting took place on October 26, 2017, which noted the Student to be an English Language Learner, to which the Student's Mother objected to the misidentification, and that he was being medicated for ADHD. Ex.

4, pp. 10-12. Based on a recommendation for screening for language issues, the Student's Mother gave permission to screen. *Id.* at p. 12.

11. On October 26, 2017, the Student's Mother gave her permission for an assessment. Ex. 4, p. 38.

12. Eight weeks of Tier 2 intervention had an end date of January 17, 2018, and began on October 24, 2017. Ex. 4, p. 13. The deficit areas of concern were in reading comprehension, math number sense, and writing expression. *Id.* It was concluded that the Student did not display significant and positive response to the intervention in deficit areas. *Id.* p. 15.

13. During the first of January 2018, the Student's Mother was told by Ms. LUM that the SAT packet was ready and that it had been sent to the Diagnostician. Ex. 33, p. 3.

14. A Follow-Up SAT Meeting was held on January 24, 2018. Ex. 4, p. 16. Testing showed he had decreased in reading from 458 on August 24, 2017 to 454 on January 12, 2108, and in math from 429 on October 17, 2017, to 424 on January 19, 2018. *Id.*, p. 17.

15. About February 2, 2018, see Ex. 4, p. 22, Initial Tier 1 Considerations noted that the Student began to learn English at 18 months, and has been learning English for 9.5 years, and had received six years of educational instruction in English, yet that his proficiency in English was questioned. Ex. 4, p. 20. However, it was also concluded that he had no academic instruction in a language other than English. *Id.*

16. The Student was considered as an English Language Learner, with different challenges, including being easily distracted, difficulty categorizing, classifying or summarizing, and a loss of home language proficiency. Ex. 4, p. 21. Compare this, however,

to the prior statement that there was no other home language other than English. Ex. 4, p. 20.

17. Despite it being unknown what the Student's ability to use his home language was (and it not being stated what the home language was), or his ability to use social home language, or the language the Student speaks with others who speak that home language, and that he only speaks English with peers and adults at school, the Student was considered to be an ESL learner (meaning English as a second language), and "sheltered content" was required. Ex. 4, p. 22.

18. Sheltered content required for the ESL Learner, among other things, was to identify language and content objectives for the lesson, identify key terms, words, and visual representations, identify key language structures and usage, adapt written content materials, interpret curriculum to reflect that learning moves from whole to part, and to plan opportunities for problem solving, prediction, organization, summarization, categorization, evaluation, and self-monitoring. Ex. 4, p. 28. Cooperative learning, with flexible groupings, was for participation, with classroom routines to be developed and maintained, with a "language rich environment, including home languages, cultures, and student work," with a focus on assessment of content rather than language proficiency. Id. Instruction was to post objectives, activities, assignments and test dates, to provide request summations of salient points of the lesson, provide modeling to clarify expectations for assignments, with demonstration and hands-on activities, regalia and graphic organizers, and "examine through listening and speaking, then expand through reading and writing," pacing the lesson, allowing wait time, and with negotiation of meaning through student to student and teacher to student dialogue. Id.

19. Cultural differences and language differences were discussed, and ESL services were being provided. Ex. 4, p. 26.

20. The referring teacher, Ms. LUM, then considered referral to Tier 2, noting since the Student was learning English as a second language, he did not appear to demonstrate the typical challenges of an EL student, and that under his ACCESS scores he did not appear to make progress toward English language proficiency in listening, speaking, reading, or writing. Ex. 4, p. 29.

21. The Student was referred for a special education evaluation because, when compared with other Spanish speakers learning English, his English academic language proficiency was below or well below as rated by a teacher and when compared with other ELs who have been learning English for a similar period of time, a teacher rated the Student as below or well below in English academic language proficiency. Ex. 4, p. 35.

22. The Student did not demonstrate a typical EL profile in reading, writing, and math, and his learning behaviors could not be explained by typical challenges in EL students in reading, writing language, and math. Ex. 4, p. 36.

23. On April 26, 2018, the Student's Mother filed a Special Education Complaint with the New Mexico Public Education Department. Ex. 33.

24. Among other things, she objected to the Student being classified as a Spanish speaker. Ex. 33, p. 3.

25. Thus, despite a classification of the Student as an EL by the LEA, the Student's Mother put the LEA on notice that the Student was not an EL student as the IDEA process began.

26. A Multidisciplinary Evaluation Team (MET) Report resulted from a MET meeting on May 18, 2018. Ex. 6, p. 1. The Student's primary language was described as Spanish, with his home language as Spanish, both determined on July 9, 2012. Id. Sheltered content strategies in planning, instruction, participation, classroom routines and assessment are required, noting that consideration of ELD was due to a report that the Student was an English Learner, yet "it was later documented English was his primary language." Id., p. 10. A classroom observer was noted to have reported that the Student talked loudly, indicated he did not have enough time, that the Student moved about the room and made noise and tapped on his desk, that he talked to a nearby student, blurted out frustrations about needing additional time, had verbal outbursts, and physical movement as classroom activity behavior, that the Student did not appear to be aware of his movement, that he openly indicated he did not understand the activity or remember verbal instruction, and that he appeared immature compared to other classmates. Id., p. 12. The Student was tested in English. Id., p. 18. Eligibility was concluded to be Specific Learning Disability consistent with characteristics of Dyslexia. Id., pp. 20, 22.

27. The Observer's report was disclosed at the Due Process Hearing, which went into depth about behaviors that the Student exhibited, like sudden brief movements, and slower and more purposeful movements such as touching, tapping, and jumping, and made sudden sounds or noises, and shouted, and made animal noises, and used words or phrases that often occur out of context, like palilalia (repeating own words), and echolalia (repeating words from others). Ex. 38, p. 4.

28. On May 16, 2018, the Student's Mother signed a Consent for Special Education, yet the form was dated May 7, 2018. Ex. 16, pp. 1-2.

29. On May 18, 2018, an IEP was developed. Ex. 8.

30. He was deemed eligible for special education services under Specific Learning Disability, with the primary cause code being Dyslexia. Ex. 8, p. 1.

31. The Student was still in the 5th grade, with Ms. LUM as the teacher. Id.

32. Like in the MET Report, the Student's primary language was described as Spanish, with his home language as Spanish, both determined on July 9, 2012. Ex. 8, p. 1.

33. He was determined to be an English Language Learner. Ex. 8, p. 3.

34. The MET diagnostics were accepted, and the Student was found to be eligible under Specific Learning Disability in the areas of basic reading, reading fluency, math calculations, and math problem solving (reasoning), and demonstrated characteristics of Dyslexia. Ex. 8, pp. 1, 11.

35. Goals in language arts for Grade 06 were by the end of the year to read and comprehend literature, including stories, dramas, and poems, "in the grades 6-8 text complexity band proficiency," and with "scaffolding as needed at the high end of the range." Ex. 8, p. 5. Within one year, he was to independently read and comprehend a variety of literature genres, identifying character, setting, main idea, and details, with the author's purpose, and the theme, and will make inferences, with increasing complexity with an 80% accuracy rate measured by assessments and the teacher's log. Id. His start date was May 18, 2018. Id. His score in DRA 2 Progress monitor of 5/2018 was a 40 passage 1, with an iReady reading composite of 473 level 1 for Spring 2018. Id., p. 5.

36. His goals in math, for Grade 06, were for the number system, to compute fluently with multi-digit numbers and to find common factors and multiples, to fluently add, subtract, multiply, and divide multi-digit decimals using the standard algorithm for

each operation. Within one year, he was to independently solve multi-operational problems to include whole or partial numbers and multi-digit values with 85% accuracy rate measured by formal and informal assessments. Id., p. 5. His start date was May 18, 2018. Id. His score in iReady math was composite of 430 level 2, with him nearing proficiency with basic operations by in-class assessment. Id. The Student was able to apply operations to problems with multi-digit values and scaffolding in small groups. Id.

37. As for career readiness goals, by Grade 07, he was to model behaviors which demonstrate active listening, with a goal to participate in grade level conversations in all academic settings, by demonstrating appropriate listening and speaking skills with 90% accuracy evidenced by teacher logs. Id. His start date was May 18, 2018. Id. His score was described as being very verbal in most academic settings, and that he frequently misses instructions. Id. By Grade 07 he was also to treat people with respect, by using appropriate language, volume, and tone of voice, and use appropriate choice of topics with a 90% accuracy evidenced by staff observations, reports and teacher logs. Id. The start date again was May 18, 2018. Id. His score was described as being distracted by peers and that he chooses to speak loudly and off topic in a variety of academic settings. Id.

38. He was to receive 300 minutes per week of the special education services in the general education setting for SE-ELA and SE-Math for the remainder of the 5th grade. Ex. 8, p. 11.

39. The Student was to receive 550 minutes in special education per week for the 6th grade. Ex. 8, pp. 9, 11. They were to be in the special education setting for SE-ELA and SE-Math, general education for the remainder of his courses. Ex. 8, p. 11.

40. Accommodations in relevant part included allowing the Student extra time for assignments, to demonstrate understanding through drawings, models, skits, and video, to use visual aids, to provide models and specific examples and demonstrations, to verbalize information written on the blackboard, to provide frequent and immediate feedback, to emphasize major points and ideas, to use small groups and individual instruction, to use short distinctive directions, to repeat, rephrase, and simplify directions and instructions, to have the Student repeat instructions orally, and to summarize the information and directions orally, to gain the Student's attention before speaking, to check for understanding of instructional words, and to reinforce and frequently review new words. Ex. 8, p. 7.

41. On May 18, 2018, the Student's Mother consented to the initial special education services, noting that she agreed with the recommendations of the IEP team and stating she gave her permission for the Student to receive the recommended services. Ex. 16, p. 3.

42. On June 25, 2018, a Complaint Resolution Report was issued by the New Mexico Public Education Department responding to the Student's Mother's Complaint of April 26, 2018, in cause number C1718-57, directing the LEA to train all teachers and service providers on child find obligations and the obligation to obtain parental consent to begin an evaluation within a reasonable period of time, and to offer the Student 20 hours of tutoring in reading and math, for about 10 hours in each subject, in compensatory education. Ex. 34, pp. 2, 11-12.

43. On August 30, 2018, an Amended IEP was completed. Ex. 9.

44. The Student was in the 6th grade, with Mr. DJ as the Cross-Cat teacher. Ex. 9, p. 1.

45. The school attended at this period was MMS School. Ex. 9, p. 1.
46. He continued to be deemed eligible for special education services under Specific Learning Disability, with the primary cause code being Dyslexia. Ex. 9, p. 1.
47. Once again, the Student's primary language was noted to be Spanish, determined on July 9, 2012, although it was now stated his home language was now English, also determined on July 9, 2012. Ex. 9, p. 1.
48. The Student's Spring iReady scores were again noted to be math composite at 430, level 2, and reading composite at 473, level 1. Ex. 9, p 2.
49. The Student was classified as an English Language Learner. Ex. 9, p. 2.
50. Goals were once again in language arts, mathematics, and career readiness. Ex. 9, p. 6.
51. As for career readiness goals, by Grade 07, once again he was to model behaviors which demonstrate active listening, with a goal to participate in grade level conversations in all academic settings, by demonstrating appropriate listening and speaking skills with 90% accuracy evidenced by teacher logs. Id. His start date was May 18, 2018. Id. His "score" was described as being very verbal in most academic settings and that he frequently misses instructions.
52. Once again, his goals in math, for Grade 06, were for the number system, to compute fluently with multi-digit numbers and to find common factors and multiples, to fluently add, subtract, multiply, and divide multi-digit decimals using the standard algorithm for each operation. Ex. 9, p. 6. Within one year, he was to independently solve multi-operational problems to include whole or partial numbers and multi-digit values with 85% accuracy rate measured by formal and informal assessments. Id. His start date was

May 18, 2018. Id. His “score” in iReady math was composite of 430 level 2, with him nearing proficiency with basic operations by in-class assessment. Id. The Student was able to apply operations to problems with multi-digit values and scaffolding in small groups. Id.

53. Once again, goals in language arts for Grade 06 were by the end of the year to read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range.” Ex. 9, p. 6. Within one year, he was to independently read and comprehend a variety of literature genres, identifying character, setting, main idea, and details, with the author’s purpose, and the theme, and will make inferences, with increasing complexity with an 80% accuracy rate measured by assessments and the teacher’s log. Id. His start date was May 18, 2018. Id. His “score” in DRA 2 Progress monitor of 5/2018 was a 40 passage 1, with an iReady reading composite of 473 level 1 for Spring 2018. Id.

54. The Student would receive 550 minutes per week of special education, with 275 minutes per week in SE English Language Arts, and 275 minutes per week in SE Math, both in the Special Ed setting. Ex. 9, pp. 7, 10.

55. Once again, accommodations in relevant part include allowing the Student extra time for assignments, to demonstrate understanding through drawings, models, skits, and video, to use visual aids, to provide models and specific examples and demonstrations, to verbalize information written on the blackboard, to provide frequent and immediate feedback, to emphasize major points and ideas, to use small groups and individual instruction, to use short distinctive directions, to repeat, rephrase, and simplify directions and instructions, to have the Student repeat instructions orally, and to summarize the information and directions orally, to gain the Student’s attention before speaking, to check

for understanding of instructional words, and to reinforce and frequently review new words. Ex. 9, p. 8.

56. In the Prior Written Notice of Proposed Actions, the Student was to be offered 20 total hours of tutoring by the LEA in reading and math, for about 10 hours in each, pursuant to a Corrective Action Plan arising from PED Complaint No. 1718-57. Ex. 9, p. 13.

57. However, the services were rejected because the IEP Team reviewed the current classroom performance, state assessment, parent input, and student and staff information, and concluded that the Student was making progress in all of his classes and that he did not require the compensatory education services. Ex. 9, p. 13.

58. About four-and-a-half months later, on January 16, 2019, another IEP resulted. Ex. 10.

59. The Student continued to attend MMS School. Ex. 10, p. 1.

60. The Student was in the 6th grade, with Mr. DJ as the Cross-Cat teacher. Ex. 10, p. 1.

61. He continued to be deemed eligible for special education services under Specific Learning Disability, with the primary cause code being Dyslexia. Ex. 10, p. 1.

62. Once again, the Student's primary language was noted to be Spanish, determined on July 9, 2012, although his home language was English, also determined on July 9, 2012. Ex. 10, p. 1.

63. The Student's Spring iReady scores were again noted to be math composite at 430, level 2, and reading composite at 473, level 1. Ex. 10, p. 3.

64. The Student was classified as an English Language Learner. Ex. 10, p. 5.

65. As for English Language Development, the Student increased his iReady scores from Grade K to Grade 3. Ex. 10, p. 4.

66. Goals were once again in language arts, mathematics, and career readiness. Ex. 10, p. 6.

67. As for career readiness goals, by Grade 07, he was to model behaviors which demonstrate active listening, with a goal to participate in grade level conversations in all academic settings, by demonstrating appropriate listening and speaking skills with 90% accuracy evidenced by teacher logs. Id. His start date was January 16, 2019. Id. His “score” was described as improving on the goal, and that he will work toward the goal, with a report by the Social Studies teacher that the Student did not complete paragraph 5 on his essay on Egypt, and that he refused to give a short presentation on Egypt in front of the class. Ex. 10, p. 6.

68. For his goals in math, for Grade 06, they had changed, and were now for expressions and equations, to reason about and solve one-variable equations and inequalities, to understand solving an equation or inequality as a process of answering a question, such as which values from a specific set, if any, will make the equation or inequality true, and to substitute to determine if a given number in the set makes an equation or inequality true. Ex. 10, p. 6. Within one year, he was to reason and solve one-variable equations and inequalities with 80% accuracy rate measured by classwork, tests, and teacher observation. Id. His start date was January 16, 2019. Id. His “score” was that test results indicate the Student would benefit from intensive intervention focused on skills and concepts related to quantitative reasoning and representation, based on instruction that connects understanding of number relationships, computation, and problem solving

skills to strengthen his math abilities across all domains. Id. His iReady diagnostic results from December 2018 showed a Grade 3. Ex. 10, p. 4.

69. For goals in language arts, they had been changed to reflect Grade 07, for reading and informational texts with key ideas and details to determine two or more central ideas in the text and to analyze development over the course of the text, and to provide an objective summary of the text, and within one year to independently read and comprehend informational text in content areas with a 75% accuracy rate as measured by teacher log and varied assessments. Ex. 10, p. 6. His start date was January 16, 2019. Id. His “score” was that he had raised his iReady scores, yet he needed further improvement for success in other content areas. Id. The iReady diagnostic results from December 2018 showed an overall score of 525 (3<sup>rd</sup> grade). Ex. 10, p. 4. As for reading in literature, range of reading, and level of text complexity, by the end of the year the Student would read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range.” Ex. 10, p. 6. He was to independently read and comprehend a variety of literary genres, including identifying character, setting, main idea, details, author’s purpose, the theme and to make inferences, and do so with increasing complexity with 80% accuracy as measured by assessments and teacher log. Id. His start date was January 16, 2019. Id. His “score” was that although he continued to make improvement, the Student continued to score below grade level. Id.

70. The Student would receive 550 minutes per week of special education, with 275 minutes per week in SE English Language Arts, and 275 minutes per week in SE Math, both in the Special Ed setting. Ex. 10, pp. 7, 12.

71. Similar accommodations in relevant part included allowing the Student extra time for assignments in one class period that he use visual aids, to provide models and specific examples and demonstrations, to verbalize information written on the blackboard, to provide frequent and immediate feedback, to emphasize major points and ideas, to use small groups and individual instruction, to use short distinctive directions, to repeat, rephrase, and simplify directions and instructions, to have the Student repeat instructions orally, and to summarize the information and directions orally, to gain the Student's attention before speaking, to check for understanding of instructional words, and to reinforce and frequently review new words. Ex. 10, p. 8.

72. In the Prior Written Notice of Proposed Actions, it was now proposed, and accepted, that due to characteristics of Dyslexia, with deficits in reading, reading fluency, math calculations, and math problem solving, the Student required "specialized direct instruction" in a "specialized setting" in order to provide "multi-sensory content, individual pacing, and increased opportunities for repetition" which could not be addressed in the general education setting. Ex. 10, p. 12. Thus, 550 hours in special education services in math and English were proposed. Id.

73. During the 7th grade year, a pupil with whom the Student associated referred to the Student's chest area and described him as feminine. Tr. 987-988.

74. The Student was large in stature. Ex. 30.

75. In September 2019 the Student was handing out large sums of money to classmates while in school. Tr. 317-318.

76. On September 30, 2019, the Student's Mother reported to the police that the Student had taken about \$4,000.00 in cash from her. Ex. 22.

77. The Student reported that he committed the offense because his friends were rich and because he wanted to fit in. Ex. 22, p. 2.

78. On October 1, 2019, the Student's Mother reported to the LEA's police representative that the Student had been bullied because of the Student's chest and that the only way the bullying would stop would be to pay the alleged perpetrator money. Ex. 22, pp. 3-4. The alleged perpetrator admitted to taking some money, but that he did not ask for it, and suggested that it was a coordinated theft between friends. Id., p. 5.

79. On November 15, 2019, the Student's Mother signed a consent for the Student to receive additional testing for a social work assessment. Ex. 12, p. 1. Underlying incidents for the social evaluation consisted of the Student being in a conflict with another pupil which escalated into shoving on October 24, 2019, with one day of in school suspension imposed, and a threat by the Student to hit another pupil in the computer lab on November 6, 2019. Id., p. 3.

80. On November 19, 2019, the final relevant IEP was developed. Ex. 11.

81. The Student continued to attend MMS School. Ex. 11, p. 1.

82. The Student was in the 7th grade, with Mr. DJ continuing in this grade as the Cross-Cat teacher. Ex. 11, p. 1.

83. He continued to be deemed eligible for special education services under Specific Learning Disability, with the primary cause code being Dyslexia. Ex. 11, p. 1.

84. The Student was now 12 years old. Ex. 11, p. 1.

85. Once again, the Student's primary language was noted to be Spanish, determined on July 9, 2012, although his home language was now English, also determined on July 9, 2012. Ex. 11, p. 1.

86. The Student's Spring iReady scores were again noted to be math composite at 430, level 2, and reading composite at 473, level 1, referring to the Spring 2018 testing. Ex. 11, p 4.

87. The Student was classified as an English Language Learner. Ex. 11, p. 7.

88. Goals were once again in language arts, mathematics, and career readiness. Ex. 11, p. 8.

89. As for career readiness goals, Grade 07, he was to treat people with respect, and will within one year independently treat adults and peers with respect by not challenging them nine out of ten opportunities or better, evidenced by teacher or peer reports. Ex. 11, p. 8. His other Grade 07 goal was to employ conflict identification and resolution to achieve organizational goals and objectives, and within one year to independently identify when conflicts begin and be willing to resolve it by himself, or with assistance of an adult, in nine out of ten opportunities or better, evidenced by teacher or peer reports. Id. His start date on both was November 19, 2019. Id. His "score" for both was described as when his behavior was corrected in class he would often be defiant or argumentative. Ex. 11, p. 8.

90. For his goals in math, for Grade 07, they had changed, and were now for the number system, to apply and extend previous understandings of operations with fractions to add, subtract, multiply, and divide rational numbers, by applying and extending previous understandings of addition and subtraction to add and subtract rational numbers, and to represent addition and subtraction on a horizontal and vertical line diagram. Ex. 11, p. 8. Within one year, he was to increase his ability to add, subtract, multiply, and divide rational numbers with 80% accuracy rate measured by classwork, tests, and teacher observation. Ex. 11, p. 8. His start date was November 19, 2019. Id. His "score" was that test results

indicate the Student would benefit from intensive intervention focused on skills and concepts related to quantitative reasoning and representation, based on instruction that connects understanding of number relationships, computation, and problem solving skills to strengthen his math abilities across all domains. Id. His iReady diagnostic results from August 2019 showed a score of 393 Grade 1. Ex. 11, p. 4.

91. For goals in language arts, they were similar for Grade 07 for reading informational texts, to independently read and comprehend informational text in content areas with a 75% accuracy rate as measured by teacher log and varied assessments. Ex. 11, p. 8. As for reading in literature, range of reading, and level of text complexity, by the end of the year the Student would read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range.” Id. His start date was November 19, 2019. Id. His “score” was that he had not acquired fundamental decoding skills and that he requires instruction in Phonics. Ex. 11, pp. 4-5, 8. Additionally, his vocabulary was a cause for concern, with gaps in grade-level word knowledge, placing him in Instructional Grouping Profile 1. Ex. 11, p. 8. The iReady diagnostic results (undated) show overall Grade 3 (505). This is the first IEP to address decoding skills and Phonics. Id.

92. The Student would receive 550 minutes per week of special education, with 275 minutes per week in SE English Language Arts, and 275 minutes per week in SE Math, both in the Special Ed setting. Ex. 11, pp. 9, 15.

93. Similar accommodations in relevant part included allowing the Student extra time for assignments in one class period that he use visual aids, to provide models and specific examples and demonstrations, to verbalize information written on the blackboard,

to provide frequent and immediate feedback, to emphasize major points and ideas, to use small groups and individual instruction, to use short distinctive directions, to repeat, rephrase, and simplify directions and instructions, to have the Student repeat instructions orally, and to summarize the information and directions orally, to gain the Student's attention before speaking, to check for understanding of instructional words, and to reinforce and frequently review new words. Ex. 11, p. 10.

94. In the Prior Written Notice of Proposed Actions, it was now proposed, and accepted, that due to characteristics of Dyslexia, with deficits in reading, reading fluency, math calculations, and math problem solving, the Student required "specialized direct instruction" in a "specialized setting" in order to provide "multi-sensory content, individualized pacing, and increased opportunities for repetition" which could not be addressed in the general education setting. Ex. 11, p. 15. Thus, the 550 hours in special education services in math and English were proposed. Id. A REED requesting testing was submitted. Id. A social work referral was initiated. Id.

95. Scaffolded content is an ESL support, which means that the content of the curriculum is broken down piece by piece; for example a picture may be used, to make reading easier to access. Tr. 39, 40, 166-167.

96. Sheltered language is an ESL support, which means speaking at a pace appropriate to a pupil's language development; for example using images and small groups. Tr. 39, 166-167. Sheltering strategies are scaffolding strategies, to help support students to acquire a second language. Tr. 417.

97. All of the IEPs included scaffolding in SE-ELA language as a goal. Ex. 8, Ex. 9, Ex. 10, and Ex. 11.

98. ESL students require many things, like listening, speaking, and comprehension. Tr. 892.

99. One of the Student's ESL Classrooms was multi-grade, with sixth, seventh, and eighth graders, with has 11 students in the class, Tr. 873, with some of the Students as Arabic speakers, some speaking "Asian languages," and some Spanish speakers, although some of them are primarily English speakers who speak other languages. Tr. 962-963.

100. All of the IEPs had the Student placed in a restrictive setting of SE-LEA, that is, as an English Language Learner, with other English Language Learning students. Exs. 8, 9, 10, and 11.

101. The Student's Mother (CC) and Step-Father (VS) are both found to be truthful, credible. Weight is given to CC's testimony particularly regarding the misidentification of the Student as an English Language Learner. While she does have some self-serving tendencies, she held up well under cross-examination. She is believable.

102. Ms. LUM is the Student's teacher who initially brought up the issue of possible characteristics of Dyslexia to the Student's Mother, and eventually to the MET and the IEP Team. She is credible.

103. Ms. JTR is the Diagnostician. While information she had used was not disclosed until the Due Process Hearing that does not impact her truthfulness. The document was kept by the SAT person at the elementary school, not Ms. JTR. Tr. 1262. She is credible.

104. Ms. SO came off as a bit confused at times, but spoke truthfully; she is credible.

105. Principal TC is truthful. She admitted confusion in Ex. 21. She is credible.

106. Teacher DJ is a former military officer. He readily admits that there were things he could not remember. This does not reflect adversely on him. He is found to be credible.

107. Teacher KST was the social studies teacher at MMS School. He was truthful and is credible.

108. Teacher AG was open with responses to questions, and he took time to develop his answers. He was thoughtful. He is credible.

109. Teacher BJ, a 7<sup>th</sup> grade science teacher, is credible. He was honest, truthful.

110. LR was the LEA's TS Resource Administrator. She answered questions presented and did not try to avoid testimony. She is found to be credible.

111. AO spoke of screenings for Dyslexia under state law. She is credible.

112. CG could only testify to what she knew, she would not speculate, which added to her truthfulness. She is credible.

113. KM was the SCS at MMS School. There were lost records. She was a bit excited, having come in for the hearing from the mountains after a snowstorm to testify that day. Nonetheless, she is credible; truthful.

114. SL was a leadership instructor. She was truthful and forthright. Credible.

115. NM, a health teacher at MMS School. She was truthful.

116. CMG, a social worker at MMS School. She is soft spoken, and is credible.

117. There was really no finding or conclusion to be reached based on any individual who was not considered credible. Weight is given to what was written in the IEPs, overall. *See Sytsema*, 538 F.3d at 1316 (focus on text of the documents).

118. Should there be a difference in testimony between competing testimony and the factual findings then it is found that credibility and weight are given to the testimony supporting the factual findings.

119. Factual determinations indicated in the Analysis and Conclusion section, below, if not stated above, are also by reference deemed as Findings, as are Conclusions if better described as Findings, and vice-versa.

## **ANALYSIS AND LEGAL CONCLUSIONS**

### **LEA as a Party**

As a preliminary matter, the LEA objected to being named in the Due Process Request only as [LEA] Public Schools, rather than the Board of Education, and thus stated that it was not the proper party. *See* Response, unnumbered page, Second Affirmative Defense. This issue was raised at the outset of the Due Process Hearing, Tr. 25-28, and by agreement of the parties that the LEA is one and the same as the Board of Education, Tr. 28, the LEA would not continue with a challenge on that point. Tr. 26.

### **Motion for Judgment on the Pleadings**

On the final day of the Due Process Hearing, after the Petitioner presented her direct testimony witnesses, the LEA moved for a judgment on the pleadings. Tr. 1190. Essentially, the LEA argued that the burden of proof is on the Petitioner to establish her case, and that the Petitioner had not met that burden. Tr. 1182-1190. The Petitioner opposed the LEA's motion. Tr. 1191. The Hearing Officer took the matter under advisement. Tr. 1191.

The request for judgment on the pleadings is denied.

The Due Process Hearing was convened to allow both parties the opportunity to present evidence in their cases-in-chief through witnesses they either call initially, or through their subsequent examination. That is, for expediency, to refrain from both parties calling the same witness at separate times, each is given the ability to present its case with that witness at the same time, notwithstanding which party calls the witness initially. As a result, what is normally considered direct testimony from the witness can be elicited no matter which party is the first to call the witness. The other party can cross-examine the witness on the direct testimony the first party presents, as well as to present its direct testimony at the same time. On this basis, the request for judgment on the pleadings should be denied. There is no real division of the evidence at this stage, and no record of the proceedings available, which at this time was on day four of the hearing. The procedural avenue provided by the IDEA does not speak of a motion for judgment on the pleadings – rather, it contains hearing rights such as the opportunity to present evidence, and the ability to confront and cross-examine witnesses. *See* 20 U.S.C. § 1415(h)(2); 34 C.F.R. § 300.512(a)(2). In other words, there is nothing within the administrative scheme which specifically provides for the relief the LEA seeks. *See S.W. and J.W. v. Florham Park Bd. of Educ.*, No. 15-7842 117, LRP 21203 (D.N.J., May 24, 2017)(due process hearing procedural safeguards). Even if the LEA’s motion may come within a procedural framework, a deferred ruling allows the fact-finder to consider all evidence if the moving party subsequently enters additional evidence. *See S.E.C. v. Razmilovic*, 822 F. Supp. 2d. 234, 257-258 (E.D.N.Y. 2011). After the matter was taken under advisement, the LEA then presented witnesses JD, NM, and CMG. Tr. 1193-1289. As a result, the LEA waived its request.

## **Child Find**

This relates to Issue No. 1.

The first challenge presented by the parties is whether the LEA failed to timely identify the Student as a Student with a disability until May 18, 2018. *See* Issue No. 1. Two occurrences took place on May 18, 2018: (1) the Multievaluation Team (MET) Report, *see* Ex. 6, and an Individualized Education Program (IEP). *See* Ex. 8. Thus, the May 18, 2018 occurrences define the disabilities under this portion of the child find issue. It is further defined by the Petitioner's FFCL, which preserves the arguments continuing to be ripe at this stage in these proceedings. *See* P's FFCL, pp. 2-6. Thus, this issue regards child find relating to characteristics of Dyslexia under SLD. The issue of child find for Tourette's Syndrome under OHI will be discussed below under Issue 2. ADHD is not a preserved issue.

This MET Report determined the Student had an exceptionality which adversely impacted educational performance, requiring specially designed instruction, based on the criteria of Specific Learning Disability Eligibility (SLD). Ex. 6, p. 22. The Student's diagnostic profile was consistent with the characteristics of Dyslexia. Ex. 6, p. 20. It was also reported that the Student had a medical diagnosis of ADHD, yet eligibility for Other Health Impairment (OHI) was not considered because the Student's behaviors were not an area of concern at the time of the referral. Ex. 6, p. 20.

When the Student was in the 2nd grade he was medically diagnosed with ADHD, after the Student's Mother expressed her concerns that he was unable to focus. Tr. 854 - 855. She reported it to the schools. Tr. 855. The Student was taking medication. *Id.* The

LEA was aware of the medical diagnosis of ADHD. Tr. 64. ADHD is not an issue in dispute in these proceedings, but is used for background information.

In September or October of 2017, the Student's Mother became aware that the Student may be showing signs of characteristics of Dyslexia. Tr. 834-836. 5th grade teacher Ms. LUM called the Student's Mother and asked if she knew what dyslexia was. Tr. 835. The Student was in an English as a second language (ESL) class in Ms. LUM's classroom. Tr. 38. While in Ms. LUM's class she noticed that while he was in a small group setting the Student was able to read at grade level text, and work through mathematics with scaffolding, yet she became concerned about the Student academically when she noticed the Student would skip a word he did not know. Tr. 34. As a result, Ms. LUM initiated a Student Assistance Team (SAT) process – where data is begun to be tracked and at least two meetings take place with a SAT team and the parents to try to work through the issues presented. Tr. 47. A packet is then completed and the matter is referred to an educational diagnostician for evaluation of special education eligibility. Tr. 47. Tier 1 SAT intervention had begun on August 30, 2017, in writing and math, and on September 13, 2017, in reading. Ex. 4, pp. 1-2. Ms. LUM completed a Dyslexia Characteristics Checklist on October 25, 2017. Ex. 4, p. 6. Tr. 56. The LEA was moving toward Tier 2 intervention at the time. Tr. 56-57.

The core of this first portion of the Petitioner's claim is that the LEA's duty under child find arose at some point before Ms. LUM noticed that the Student would skip over words and then became concerned about him academically. In evaluating this concept, the initial function is to review the period of limitations of this action – the relevant statutory period begins on August 10, 2017. Thus, in theory, the Petitioner contends that on August

10, 2017, through some time prior to October 25, 2017, the LEA should have suspected characteristics of Dyslexia.

The burden is on the Petitioner to prove the claim, *see Schaffer v. Weast*, 546 U.S. 49, although the burden is on the LEA to identify an eligible student under the IDEA. *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10<sup>th</sup> Cir. 2002). Thus, the issue is whether the Petitioner has proved by a preponderance of evidence that the LEA did not meet its burden to suspect a disability of the Student as of around August 10, 2017, through some time prior to October 25, 2017. It is concluded that the Petitioner has not met the first step of this procedural burden. 34 C.F.R. § 300.513(a)(2). *See Timothy O.*, 822 F. 3d at 1124 (child find, procedural violation).

Suspicion arises when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O.*, 822 F. 3d at 1120 (persuasive in this context, yet not binding). That “notice” may be expressed by parental concerns about a child’s symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121. *See Wiesenberg*, 181 F. Supp. 2d at 1310. Identification and evaluation are to be within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See Wiesenberg*, 181 F. Supp. 2d at 1311.

The Petitioner contends that their proof of suspicion is the following: (1) the Student’s Parents always knew the Student struggled to read and sound out words (Tr. 865); (2) that the Student read at the 3rd grade level when he began the 5th grade, and was assumed to know how to decode by then (Tr. 36-37, 50); (3) that he had struggled with math fluency (Tr. 52-53); (4) that after the Dyslexia Characteristics Checklist was completed

it showed characteristics of Dyslexia based on limited spelling, reduced reading fluency, basic reading, and word skills (Ex. 4 at 6; Tr. 56-58, 113, 235, 236); and (5) that an eventual evaluation completed on May 18, 2018 showed that the Student had a learning disability in basic reading, reading fluency, mathematical calculations, and math reasoning (Ex. 6 at 19-20; Tr. 226-227, 234-235). See P's FFCL, pp. 2-3.

Read in context, the Petitioner's claimed facts are unpersuasive. The evidence is that the first indication that the LEA was on notice of a suspicion of disability was when Ms. LUM noticed the Student, in the 5th grade, was having trouble skipping over words. She then began an internal process to see if the Student did meet criteria for a disability. Although on the dates of Ms. LUM's concerns, and subsequent testing or evaluative requests, put the LEA on notice of symptoms of a disability at those times, this does not translate to evidence of notice to the LEA preexisting those time periods – that is, the LEA was not on notice before Ms. LUM's suspicion at the beginning of the 5th grade year. As stated, there was no violation of FAPE.

The next part of this issue is whether the Petitioner has proved, by a preponderance of the evidence, that after the suspicion arose, whether there was a timely evaluation. Once again, this evaluation contention raises a child find procedural issue. *Timothy O.*, 822 F. 3d at 1124. 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 *Wiesenberg*, 181 F. Supp. 2d at 1311. Although this may relate to Issue 2 as well as Issue 1, the Petitioner preserves her arguments as part of Issue 1, see P's FFCL, pp. 3-4, and it will be addressed now in this issue, although it also may be a part of Issue 2, under the Issue 2 statement of evaluations in "all" areas of suspected disability. See JIS #2. In any event, it

is now addressed in this part of the decision, in connection with how it is approached by the Petitioner in her FFCL.

In New Mexico, in accord with 34 C.F.R. § 300.37, a three tiered model of student intervention is required for identifying children with perceived specific learning disabilities. §6.31.2.10(c), NMAC. Characteristics of Dyslexia are defined as specific learning disabilities. 34 C.F.R. § 300.8(c)(10). Once a child is suspected of a SLD, a group is to consider data during the implementation of Tiers 1 and 2 to make an eligibility determination. §6.31.2.10(C)(1)(a), NMAC. During any time in this SAT process a parent may request an initial special education evaluation. §6.31.2.10(C)(1)(d)&(D)(1)(c)(iv), NMAC. The time limit the New Mexico rules impose is that an evaluation has to be conducted within 60 days after the parental consent. §6.31.2.10(D)(1)(c)(I), NMAC. Thus, within this SLD Characteristics of Dyslexia legal framework, the following will be considered in examination of the Petitioner's claim: the date of the suspected disability, the SAT process, and what is a reasonable time for the evaluation after the LEA's notice of the suspected disability.

At least as of August 30, 2017, the Tier 1 SAT intervention began. Ex. 4.; Tr. 47. Tier 1 is the instruction all students receive – the core instruction of the classroom. Tr. 48. On October 11, 2017, the Tier 1 ended. Ex. 6, p. 3. On October 24, 2017, Tier 2 interventions began. Ex. 6, p. 4. On October 25, 2017, Ms. LUM completed a Dyslexia Characteristics Checklist, Ex. 4, p. 6, Tr. 56, because the LEA was moving toward Tier 2 intervention at the time. Tr. 56-57. On October 26, 2017, the initial SAT meeting took place. Ex. 4, p. 10. On January 17, 2018, the Tier 2 interventions ended. Ex. 6, p. 4. On January 24, 2018, the second SAT meeting (follow-up) took place. Ex. 4, p. 16. Also, on January 24, 2018,

Observer JM observed the Student's classroom for the SAT process. Ex. 38; Tr. 208. It was indicated to the Student's Mother that the SAT process would take months, because there was a waiting list, and the Student's Mother stated that she was concerned that months could go into middle school. Tr. 837. The Student continued to be educated in Ms. LUM's ESL 5th grade class. See Ex. 5, pp. 11-14. On May 7, 2018, a consent form was prepared for the Mother's eventual signature, Ex. 16, which was the date Diagnostician JTR reviewed the file. Tr. 193. Ms. JTR received the referral in May. Tr. 194. The Student's Mother signed the consent form for an evaluation on May 16, 2018. Tr. 192, Ex. 16, p. 3. On May 17, 2018, a SLD and eligibility decision was made determining the Student meets the New Mexico TEAM criteria for the category of specific learning disabled. Ex. 7. The MET Report determined eligibility on May 18, 2018, for an exceptionality which adversely impacted the Student's educational performance for specific learning disability, based on characteristics of Dyslexia. Ex. 6, pp. 20, 22. An IEP meeting took place on the same day, where the Student was determined eligible for a specific learning disability, with the primary cause code being Dyslexia. Ex. 8, p. 1. Thus, it took about seven months from the date Ms. LUM completed the initial Dyslexia Characteristics Checklist noting her suspicions, and about four months since the Tier 2 interventions ended, before the eventual evaluation, and IEP, which determined the Student to be eligible for special education under SLD because of characteristics of Dyslexia. That is, the Student almost missed a full calendar year of the 5th grade for school services for SLD characteristics of Dyslexia from the time Ms. LUM suspected the characteristics of Dyslexia to the time the Student was evaluated, which found him eligible because of the characteristics of Dyslexia.

It is concluded that the evaluation did not take place within a reasonable time. This amounts to a procedural violation. 34 C.F.R. § 300.513(a)(2). Persuasive authority is found in the Southern District of New York decision of *Avaras v. Clarkstown Central Sch. Dist., et al*, No. 15 CV 9679 (NSR), 73 IDELR 50 (S.D.N.Y., September 28, 2018). As the Court explained in that case: “By the time the evaluation was performed, and a CSE meeting held, the entirety of Plaintiff’s first grade year, except for three (largely administrative) days, had passed (citations deleted). This Court finds that the District violated its Child Find obligation.” 73 IDELR 50, at p. 20. Similarly, in this case, by the time the evaluation was performed from the time a suspicion arose, it was almost a full school calendar year. Even considering the Tier interventions required under New Mexico rules, from the date the Tier 2 intervention ended until the evaluation was performed then almost four months had passed.

The next step is to determine if the procedural violation resulted in a violation of FAPE. 34 C.F.R. § 300.513(a)(2). To do so, the procedural violation must be found to significantly impede the parents’ opportunity to participate in the decision-making process of a FAPE, or impede the child’s right to a FAPE, or cause a deprivation of educational benefits to the child. *Id.*

The LEA’s position appears to be that even if the evaluation may be untimely, the Student still received appropriate educational services in the 5th grade because, among other reasons, services were provided based on the Student’s need, not based on eligibility, and that the Student’s additional supports as an English Language Learner student such as with scaffolding, sheltering language, small group work, and visual tests, provided a multi-sensory and tailored educational approach to address the Student’s needs. R’s FF, pp 1, 4.

In other words, their position is that if there was a procedural violation, it was harmless.

A specific learning disability is defined as “a disorder in one or more of the basic psychological processes involved in understanding or in using language, written or spoken,” which manifests itself in “the imperfect ability to listen, think, speak, read, write, spell ... including conditions such as ... dyslexia.” 34 C.F.R. § 300.8 (c)(10).

New Mexico Regulation §6.31.2.7(B)(6) NMAC, under definitions, reads:

(6) "Dyslexia" means a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.

During the 5th grade, as an English Language Learner, he received scaffolded content, sheltering language, small group work, and visual texts, *see* Tr. 39-40, 41-42, 79, 164-167, but this does not paint the entire picture. The Student was classified as an English Language Learner, or English as a second language, which will be discussed in additional detail in another part of this decision. However, that was a misidentification. He was an English speaker. The techniques used in the ESL classroom included those services for ESL students. Tr. 39. For instance, scaffolding means that the content of the curriculum is broken down into pieces. Tr. 40. It can include using pictures. *Id.* Sheltering is speaking at a pace appropriate to a child’s language development, like using vocabulary the class might be studying, and allowing connections, with access points and pre-teaching so a student will know what is being listened for. Tr. 41. Learning English was not the barrier, there were other factors. Tr. 78-79. Although Ms. LUM worked with the Student on

reading fluency, Tr. 164, and the Student made gains and was nearing proficiency in academics, Ex. 2, p. 7; Tr. 163, during the 2017-2018 school year, the underlying concern for Ms. LUM to make the referral in the first place was for language processing. Tr. 174. In other words, the academic program was based on an ESL student rather than focusing on this non-ESL Student's neurological origin unique needs, relating to difficulty with accurate or fluent word recognition, poor spelling and decoding abilities, and a deficit in the Student's phonological component of language. See §6.31.2.7(B)(6), NMAC. A student progressing through school, with difficulties in reading, and unidentified dyslexia, will continue to have reading and self-esteem problems. Tr. 786-787. By this analysis, there is not an attempt to step into the shoes of the educator, but rather to view the evidence during the period for which the Student had not been evaluated. Considering this, the Petitioner has met her burden that the failure to timely evaluate impeded the Student's right to a FAPE, and caused a deprivation of educational benefits to the Student. 34 C.F.R. § 300.513(a)(2)(i)(iii). There was a violation of a FAPE.

In this context, as well, regarding a procedural violation due to an untimely evaluation, and resulting denial of a FAPE, the District Court in *Avaras, supra*, concluded that the untimely evaluation in that case deprived that student the opportunity to obtain special education services earlier in his education, because had the LEA in that case sought the evaluation in a timely manner, it would have determined, "as it inevitably did," that the student should be classified as learning disabled and correctly received special education services. *Avaras*, 73 IDELR 50, at p. 20.

Considering these factual and legal underpinnings, and persuasive authority, it is concluded that the Petitioner has met her burden that the failure to timely evaluate the

Student impeded the Student's right to a FAPE, and caused a deprivation of educational benefits to the Student. 34 C.F.R. § 300.513(a)(2)(i)(iii). There was a violation of a FAPE.

### **Tourette's Syndrome Evaluation**

Issue Number 2 addresses the alleged failure to evaluate for "all" suspected disabilities, including Tourette's Syndrome (TS) or Tic Disorder. JIS, P's # 2, R's # 2. It also addresses JIS, P's # 8, R's # 8, which relate to an alleged failure to train staff at MMS School about TS. *Id.* The evaluation for characteristics of Dyslexia has already been addressed, above, in Issue 1. Thus, further definition of what the Petitioner continues to contend by "all" suspected disabilities will be refined by the Petitioner's FFCL, which preserves the arguments continuing to be ripe at this stage in these proceedings. These portions of the FFCL relate to a claim regarding TS, or Tic Disorder. *See* P's FFCL, pp. 4-11. That is what will be addressed. This will also dispose of JIS, R's # 12. ADHD is not a preserved issue.

TS arises under the eligibility of Other Health Impairment, or OHI. *See* 34 C.F.R. § 300.8(c)(9). This means that the child has "limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli" which results "in limited alertness with respect to the educational environment" that is due to chronic or acute health problems, such as, among other things, Tourette Syndrome, which affects a child's educational performance. *Id.* Given this definition, the Tic Disorder will also be deemed to arise under OHI.<sup>1</sup>

---

<sup>1</sup> "TS is part of the spectrum of similar conditions known as Tic Disorders. Motor and vocal tics are the main characteristics described in a TS diagnosis." Ex. 29, p. 2.

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. *See Timothy O.*, 822 F. 3d at 1124. 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 (D.C. Conn. 2009). Suspicion arises when the district is put on notice that symptoms of disability are displayed by the child. *See Timothy O.*, 822 F. 3d at 1120 (persuasive in this context, yet not binding). That “notice” may be expressed by parental concerns about a child’s symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

The question to be addressed in this portion of the decision, therefore, is whether the Petitioner has met her burden by a preponderance of the evidence to prove the LEA was on notice of symptoms of TS or Tic Disorder to rise to a suspicion of disability for further identification and evaluation of the Student under OHI. It is concluded that Petitioner has met this burden. As a result, it is concluded there was a procedural violation. 34 C.F.R. § 300.513(a)(2).

At the outset, it is noted that a school psychologist, or other medical expert, did not testify. The MET was prepared by an educational diagnostician, among others. Ex. 6, pp. 22-23. It did not consist of a neurological evaluation. *Id.* Neither party presented expert witnesses. Thus, the evidence for identification characteristics of TS or Tic Disorder are found in Ex. 29 (Navigating Tourette Syndrome, An Educator’s Guide to Planning and Support, by the Tourette Association of America), generally, with reference to testimony of educators and the Student’s Mother. LR, the LEA’s Exceptional Student District Specialist, who oversees support services and trainings for the LEA’s special education staff, and who

is also the LEA's Tourette Resources Administrator, was familiar with Ex. 29, and used it in her duties with the LEA, as well as other Tourette Association materials. Tr. 668-671, 696-697. A large part of this part of the decision, finding that Petitioner has met the preponderance of evidence regarding "suspicion," is based, therefore, on comparison of the testimonial facts with the identification characteristics in Ex. 29. With this analysis, the issue to be resolved is not whether the Student is eligible for OHI under Tourette's Syndrome, but whether there was a "suspicion" that arose for further action to evaluate the Student for TS or Tic Disorder. For reference, given the evidentiary basis in Ex. 29, TS will be considered under the spectrum of Tic Disorders, Ex. 29, p. 2, and is viewed in that context, rather than TS or Tic Disorder as separate disorders.

TS is neurodevelopmental disorder, with vocal and motor tics as the main characteristics. Ex. 29, p. 2. Common cooccurring conditions with TS include ADHD and obsessive-compulsive disorder (OCD). *Id.* Simple motor tic examples include sudden brief movements, such as eye blinking, head shaking, face grimacing, shoulder shrugging, abdominal tensing, and arm jerking, with more complex motor tic examples being movements that are slower and may seem more purposeful in appearance, such as touching, tapping, hopping, squatting, skipping, jumping, and copropraxia (obscene gestures). *Id.* Simple vocal tic examples include sudden sounds or noises, such as sniffing, coughing, spitting, grunting, throat clearing, snorting, squeaking, shouting, and animal noises, with more complex vocal tic examples being words or phrases that often occur out of context, like syllables, words or phrases like "shut up" or "stop that," comprolalia (uttering obscenities), palilalia (repeating own words), and echolalia (repeating words from others). *Id.*

TS education difficulties may become more apparent in middle and high school years because intellectual abilities may disguise themselves in elementary school, yet in higher grades symptoms may begin interfering with demonstration of true intellectual performance, and because students in higher grade levels put more emphasis into suppressing or masking symptoms for social acceptance. Ex. 29, p. 4. Common education-related difficulties a student with TS may exhibit include challenges with transitions, difficulty with completing homework, difficulty following directions, discrepancy between verbal and performance scores, disorganization and executive function deficits, dysgraphia (handwriting issues), dysinhibition, explosive behaviors at home or at school, impulsivity, and oppositional behavior. Id. Other educational difficulties include interference with paying attention, perfectionism, sensory issues, social communication deficits, and stress and anxiety. Ex. 29, p. 5.

A TS diagnosis is to be by a healthcare provider, with some neurological medical background. Tr. 692, 709. Nonetheless, although there has been no medical diagnosis in this case, for a diagnosis, from an educator's training viewpoint, there would have to be both a vocal and a motor tic, Tr. 710, diagnosed clinically by looking at a pattern over a period of time, with one or more vocal tics and one or more motor tics over a period of a year. Tr. 736-737.

Related services include "medical services for diagnostic or evaluation purposes." 34 C.F.R. § 300.34(a). The Student has not been referred for diagnostic or evaluative medical services for TS.

On January 24, 2018, Observer JM observed the Student's classroom for the SAT process in math. Ex. 38; Tr. 208. She reported in writing a number of observations, which

are deemed relevant to TS suspicion: (1) While the classroom is mostly quiet, the Student loudly speaks out that he does not have enough time; (2) while writing, he self-talks through the task; (3) he loudly says he is done; (4) he moves around the room; (5) he makes bird sounds; (6) he taps loudly on his desk; (7) he makes a face and slaps his hand on his desk; (8) he repeats everything the teacher says; (9) his repetition turns to chatter sound; (10) he blurts out that he needs more time, and “Oh God, Ms. M,” and “Oh no, Ms. M”; (11) he pats the student next to him and uses physical animation to show the student his work; (12) he taps both hands on his desk like a drum; (13) he makes vocal sounds with his mouth; (14) he loudly states “have to be on the carpet,” and repeats that phrase two more times; (15) the principal is in the room, and asks the Student to sit, yet he is “totally unaware that he is not complying with the request”; (16) he shouts “yeah” when asked if he can see the board; (17) he sits in a chair and puts his head in his hands after the teacher whispers to him; (18) he stares off into the distance with a sad look on his face; (19) he runs his fingers through his hair; (20) he grabs a stool and puts a plastic object on it and rocks the stool back and forth until the object falls off; (21) he continues to rock the stool, and responds that he is not paying attention, when asked; (22) he makes vocal sounds and repeats what the teacher is saying; (23) he picks up the stool and slaps it back and forth in his hands; (24) he loudly says individual words like inches, centimeters, decimeters, when given a ruler; (25) he loudly repeats what the teacher has told him and states “twenty billion centimeters”; (26) the Observer’s cell phone rings and the Student yells “you’ve got mail”; (27) he blurts out “is this the hiking trail?” when the teacher gives directions; (28) while in transition, the Student makes loud gorilla sounds; (29) he walks about the room flapping the ruler with his wrist until it flies out of his hand; (30) he picks up the stool, puts it on his

shoulder, and drops it and hits it with his foot; (31) he loudly blurts out to the others that “I’m part of your crew now”; (32) he loudly states “I have the yarn”; (33) he roams the room with the yarn and makes inappropriate comments or statements to different groups; (34) he stands on the stool, attempts to stand up straight and put out his arms, and when he sees the Observer look at him it has no “apparent impact”; (35) when the students are told to write their names on their work he loudly states that he will do so. Ex. 38, p. 4. Observer JM’s impression was that she was not sure if the Student was self-aware of his actions and constant vocal outbursts; that he was impulsive, loud, and physically more active than his peers, and that he acted younger emotionally, socially, and developmentally than his peers. Id. Observer JM’s written observations were disclosed toward the end of the Due Process Hearing, Tr. 1263-1264, and were not part of the diagnostician’s SAT folder, but were kept by the “SAT person at the elementary school,” in her personal files. Tr. 1262. In the MET Report of May 18, 2018, reference was made to JM’s formal observation, Ex. 6, pp. 11-12, although in much less detail than the comments Observer JM’s reported. Ex. 6, p. 12. The MET Report states the Student indicated he did not have enough time, that he moved about the room, made noise, tapped on his desk, talked to a nearby student, blurted out frustrations about needing additional time, and that he did not appear to be aware of his movement, or understand the activities, or remember verbal instructions, and that he appeared immature compared to his classmates. Id.

The Student had the common cooccurring condition of ADHD. The Student showed signs of simple motor tics such as sudden brief movements, and more complex motor tic signs with movements that are slower and may seem more purposeful in appearance, such as touching, tapping, and jumping. Id. He showed signs of simple vocal tics like sudden

sounds or noises, and by shouting, and making animal noises, and more complex vocal tics with words or phrases that often occur out of context, palilalia (repeating own words), and echolalia (repeating words from others). While 5th grade teacher LUM found some of the things noted at hearing as an attempt to be silly or to distract, Tr. 177, her testimony took place before Observer JM's written observations could be used in examination. Although Observer JM did not testify, weight is given to her very detailed report, compared with Teacher LUM's observations that she felt the Student was trying to be silly, at least for the 5th grade. This amounted to a procedural violation of FAPE. 34 C.F.R. § 300.513(a)(2).

As for the 6th grade, at this point in time an IEP had been put in place. Ex. 8. The Student was sullen, Tr. 590, talked across the class, Tr. 587, was frustrated, Tr. 587, had self-esteem problems, Tr. 589, and would not perform his work with the rest of the class. Tr. 587. In the 7th grade, the Student would talk loudly, and talk across the room to get someone else's attention. Tr. 558. He would yell the same name over, if the other person did not respond. Tr. 559. He would throw pieces of paper, and pens and pencils, to get the attention of other students. Tr. 559. At one time he collected a stack of eight to ten textbooks and pushed them off the desk one at a time. Tr. 566. The Student would repeat Teacher KST's commands in a mocking voice. Tr. 566. The Student would shred notebooks – which became more of a process than an incident, where he would begin by peeling the cover, then tear parts off the cover, then pull pages out, in a daily escalation, making a giant mess of the classroom. Tr. 576-577. The Student would wander around the classroom consistently, Tr. 1093, and get up from his seat about ten to fifteen times during an hour long class period. Tr. 1095. He had a difficult time staying on task, where the only things that kept him through class were team assignments. Tr. 1099. He would pick up objects

and act like he was going to strike other students with them. Tr. 1107. He would slam books onto the floor in front of people he had cornered, and would pick up assignments and tear them or make paper airplanes out of them, or play basketball with them. Tr. 1107-1109. He would break pencils in class. Tr. 1109. He would make sexual moaning sounds. Tr. 1211. He would scream. Tr. 1214. He would grab stuff off of other people's desks. Tr. 1217. He would always yell out the names of other students to get their attention. Tr. 1247. He would make weird faces. Tr. 1250-1251.

While these behaviors in the 6th and 7th grades may not, when viewed independently, amount to a suspicion, when viewed as a whole, and particularly when considered as connected with the history in the 5th grade by Observer JM, they cannot be ignored in rising to a suspicion for an evaluation. Some of the behaviors may be consistent with an adolescent simply "acting up." However, the history reflected in Observer JM's observation notes is important. Therefore, when viewed holistically, there was notice of symptoms of TS or Tic Disorder to rise to a suspicion of disability for further evaluation of the Student under OHI. This continues to relate back to January 24, 2018. It is concluded that as of January 24, 2018, and thereafter, the LEA was on notice of symptoms of TS or Tic Disorder to rise to a suspicion of disability for further identification and evaluation of the Student under OHI. This amounted to a procedural violation of FAPE. 34 C.F.R. § 300.513(a)(2). *See D.O. v. Escondido Union Sch. Dist.*, No. 3:17-cv-2400-BEN-MDD, 73 IDELR 180 (S.D.C.A., Dec. 17, 2018)(persuasive, although not binding, of suspicion as procedural violation).

The next step with a procedural violation in the FAPE analysis is to determine if it significantly impeded the parents' opportunity to participate in the decision-making

process of a FAPE, or impeded the child's right to a FAPE, or caused a deprivation of educational benefits to the child. 34 C.F.R. § 300.513(a)(2).

The LEA's position is that the educational model for the Student, should he have TS, would be the same as it was without TS is unpersuasive. Ms. LR, the LEA's Exceptionalist Student District Specialist, testified that interventions and strategies for dealing with TS and behaviors in general are very similar, with the only consideration being consideration of tics. Tr. 709. The issue here, however, is not what educational needs are ultimately required for this Student should he eventually be diagnosed with TS, but whether there was suspicion for a referral for an evaluation. Without knowledge of whether this Student has TS, then interventions and strategies for an educational Plan – unique to this Student and his particular needs – cannot be developed. That is, the Plan would have to be unique to this Student should he have TS, rather than only following a general formula that the services offered the Student should he have TS would be the same as if he did not have TS, with the addition of considering “tics.” *See Andrew*, 137 S. Ct. at 1001. The Student's unique needs in the educational setting must be considered. *See Preciado v. Bd. of Educ. of Clovis Mun. Schools*, No. 19-cv-0184 SMV/KRS, 76 IDELR 67 (D.N.M. March 11, 2020).

On November 19, 2019, the Student's Mother expressed her concern at the IEP Meeting that she wanted her child tested for TS. Ex. 11, p. 6. Tr. 856 - 860. She explained that she was concerned, that she investigated TS on the internet, as and a result of her concerns, she arranged an appointment with a doctor for medical testing for TS. Tr. 856-859; 1069-1071. The private doctor sent a referral to UNM for an appointment, and as of the date of the Due Process Hearing, the Student was on a waiting list for the evaluation.

Tr. 857. The IEP Team told the Student's Mother to bring the results of the testing back once she receives them. Tr. 859-860.

The Student's Mother therefore raised the TS evaluation issue before the IEP Team. She raised her concerns with the information available to her – she was unaware of Observer JM's prior classroom observation during the SAT process in math. That information was with the LEA independently. As a result, two duties arise with the evaluation process. The first is the duty on the LEA to evaluate, and the second is the duty on the Petitioner to request the evaluation. As explained above, the LEA breached its duty to timely evaluate the Student based on a suspicion for which it was on notice. It is now concluded that the Petitioner met her duty to bring the matter to the attention of the IEP Team, with the knowledge she held, akin to exhaustion in the administrative context. *See Cudjoe*, 297 F.3d at 1065 - 1067; *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1275-1279 (10th Cir. 2007).

Like in *D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180, the failure to assess (in *D.O., Id.*, there was an eventual assessment, unlike in this present action) was due in part to skepticism on the part of staff. *Id.* In this present action, the Student's actions were suspected of being misbehavior, or being silly, by some classroom teachers. But there was never an evaluation, despite data contained in Observer JM's SAT observation report, to which significant weight is given. Although there was an eventual educational diagnostic MET Report concluding characteristics of Dyslexia, there was no mention of TS. This was an educational diagnostic report, however, based on a submission for characteristics of Dyslexia, not a complete evaluation for disability services. *See, e.g.*, 20 U.S.C. §

1414(a)(1)(E)(a screening by teachers or specialists to determine instruction is not an evaluation for services).

*D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180, concluded that an educational benefit was denied the child by the procedural violation of failure to timely assess for autism, and thus a denial FAPE because, following the analysis in *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d at 1124, 1126, the Petitioner need not definitely show that absent the error educational placement would have been different, but rather that the failure to obtain mandated medical information about the autistic child in that case violates the goals of the IDEA and renders the achievement of FAPE impossible. *D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180. Concluding the goals of the IEP were “likely inappropriate” without sufficient evaluative information about the capabilities of a potentially autistic child, the court found a deprivation of educational benefit due to the procedural violation and concluded there was a denial of FAPE. *Id.* In this case, with this Student, there is likely something more with future appropriate educational needs for this Student, should he have TS, than simply regarding behaviors in general as very similar, with the additional consideration of “tics”. Tr. 709. The Petitioner’s proof is otherwise – as Ex. 29 explains, common education difficulties with TS include challenges with transitions, difficulty with completing homework, difficulty following directions, discrepancy between verbal and performance scores, disorganization and executive function deficits, dysgraphia, dysinhibition, explosive behaviors at home or at school, impulsivity, oppositional behavior, interference with paying attention, perfectionism, sensory issues, social communication deficits, and stress and anxiety. Ex. 29, pp. 4-5.

Although not bound by the United States District Court in California in *D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180, or the Ninth Circuit Court of Appeals in *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, their analysis is found to be persuasive in the context of this action. Commencing on January 24, 2018, when Observer JM put the LEA on notice of suspicions of TS, and onward through the filing of the Petitioners' Request for Due Process, without the sufficient evaluative information which an assessment for TS can provide, the Student's right to a free appropriate public education was impeded, and he was deprived educational benefit. 34 CFR § 300.513(a)(2). It is concluded that this amounts to substantive harm. *See O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d at 707 (procedural harm into substantive violation).

The Petitioner also generally raises issues in its allegations of failure to provide staff with training on TS. *See P's FFCL*, pp. 20-22. Her theory is that because staff had not been trained in identification of TS then FAPE was violated. *Id.* This relates to JIS P's # 8, R's # 8.

The LEA has a Tourette Syndrome Resources Administrator, which is Ms. LR. Tr. 671. She continues with education in TS, Tr. 675, and trains educators and staff in school settings on TS after suspicions of TS arise, although no training is provided to educators and staff in the schools before TS is suspected. Tr. 677. In other words, the training on TS is post-symptom, rather than training in what the symptoms may be.

In this part of the TS "suspicion" analysis, that is, in a failure to train, the Petitioner has not met her burden to prove that failing to train, or not training, MMS School staff about potential TS symptoms denied the Student a FAPE. 34 C.F.R. § 300.513(a). Although, among other things, the fact that it might be helpful to have training in signs of

TS to help staff and educators recognize TS signs in a suspicion context, the failure to do so under these circumstances does not equate with a denial of FAPE. As concluded, a “suspicion” of TS had arisen by Observer JM’s written observations, which were considered by Diagnostician JTR for the MET, although not disclosed in detail until the Due Process Hearing. Additional classroom behaviors, which might not have otherwise been suspicious when viewed individually by teachers DJ, KST, AG, BJ, SL, JD, and NM only rose to suspicions when they corroborated Observer JM’s written observations. That material was disclosed to Diagnostician JTR. The Petitioner has not proved the other educators were aware of it. Thus, the Petitioner has not established that the lack of training as to what could be TS symptoms to the MMS School teachers and staff would have individually influenced “suspicion” in these circumstances. 34 C.F.R. § 300.513(a).

This TS evaluation suspicion issue still does not end here, however. As of the Due Process Hearing, there was an ongoing evaluation request for an evaluation with UNM, and the Student was placed on a waiting list for the evaluation, as requested by the Student’s Mother. Ordering an evaluation as a remedy at this time would, therefore, become redundant. *See Boutelle v. Bd. of Edu. of Las Cruces Pub. Schs.*, Civ. No. 17-1232 GJF/SMV, 74 IDELR 130 (D.N.M., May 9, 2019). As a result, although it is concluded there was a violation of FAPE for failure to evaluate, an additional independent LEA evaluation is not ordered as a remedy.

### **English Language Learner, Dyslexia, and Goals**

In relevant part, an “English learner” is an individual aged 3 through 21, who is enrolled or preparing to enroll in an elementary or high school, and who was either not born in the United States or whose native language is other than English, and whose

difficulties in speaking, reading, writing, or understanding the English language may be sufficient to deny the individual the ability to meet challenging State academic standards, or to deny the individual the ability to successfully achieve in the classroom where the instruction is in English, or to deny the individual the opportunity to participate fully in society. 20 U.S.C. § 7801 (20). The issue presented is whether this Student, after coming within the parameters of the IDEA, had been misidentified as an English Language Learner (ELL), and, if so, whether the Petitioner has proved by a preponderance of the evidence that this denied the Student a FAPE. *See* JIS, P's # 3, R's # 3. This goes to both evaluation and provision of services. *Id.* Issue 4 will also be addressed in connection with this heading, regarding instruction relating to characteristics of Dyslexia and its impact on the Student being classified as an ELL. *See* JIS, P's # 4, R's # 4. Issue 5, the goals relating to the Student's unique special needs, is addressed in this portion as well. *See* JIS, P's # 5, R's # 5. This also disposes of JIS, R's # 13. Essentially, because the Student was misidentified as an English Language Learner, and his special education needs were based on the foundation of being in classrooms with a primary focus to teach English, then what flowed thereafter from the misidentification resulted in a substantive violation of FAPE, except for a MET evaluation, which used the appropriate English language standard despite the misidentification.

On May 17, 2018, the Eligibility Criteria for this Student for SLD indicated that on July 9, 2012, his primary language was determined to be Spanish, and that his home language was determined to also be Spanish. Ex. 7, p. 1. Nonetheless, he was evaluated in English for the MET Report. Ex. 6.; Tr. 196. The Student had always had instructions in the English language. Tr. 197. The MET evaluator determined the Student should be

evaluated in English only, under his ACCESS scores, since it was the language most used by the Student at home and in school and because the Student received his academic instruction only in English. Ex. 6, p. 10. It was determined that the Student's difficulties were not due to limited English proficiency. Ex. 6, p. 11. Tr. 205 (5 is considered fluent, and Student was at level 5). The educators in Tier 1 used the ELD standards to address the Student's needs, which included sheltered content in planning, instruction, participation, and in classroom routines and assessment. Ex. 6, p. 10.

When the first IEP was created on May 18, 2018, it continued to find the Student to have a primary language of Spanish, and a home language of Spanish. Ex. 8, p. 1. It concluded that the Student was an English Language Learner, with limited English proficiency. Ex. 8, p. 3. He was in the 5th grade. Ex. 8, p. 1. For language arts, the Student's goals were to use scaffolding at the high end of the range. Ex. 8, p. 5. Although the IEP concluded the Student to be eligible for services under SLD with characteristics of Dyslexia, the services for the Student in his 6th grade year were 550 minutes per week for services in SE-ELA and SE-Math, with the remainder in the general education environment. Ex. 8, p. 11. ELA is English Language Arts. Tr. 879. ESL means English as a second language. Tr. 874 - 875. ESL is the instruction used, but ELD is how it is applied to the Student. Tr. 874. However categorized, the Student's IEP instruction in the SE-ELA is under the umbrella of ESL. Tr. 878-879 (7th grade teacher, yet relevant to definition). His special education instruction in language is as an English Language Learner.

The Amended IEP of January 16, 2019, continued to find the Student to have limited English proficiency, although it was noted that his score allowed him to "test out" of ELD services. Ex. 10, p. 5. Nonetheless, for language arts, he was to continue with scaffolding

as needed at the high end of the range. Ex. 10, p. 6. Special education in English language arts was to be 275 minutes per week, with him in the 6th grade. When the Student was in the 7th grade, the IEP of November 19, 2019, continued with SE-ESL, Ex. 11, p. 6, and continued to find him to be a student with limited language proficiency, although his ACCESS score continued to find him eligible to test out of ELD services. Ex. 11, p. 7. Special education language arts again stayed at 275 minutes per week in the special education setting. Ex. 11, p. 9. The ELD classroom was taught by a teacher with TESOL endorsement to allow the students access to English as a second language. Tr. 345.

If ESL was dropped, then the general education language arts course and the self-contained special education language arts course would be applicable. Tr. 909. Ms. KM's ESL Classroom has eleven students in the class with three grade levels, Tr. 873, with some of the Students as Arabic speakers, some speaking "Asian languages," and some Spanish speakers, although some of them are primarily English speakers who speak other languages. Tr. 963.

The Student's Mother objected to the misidentification of the Student as a Spanish speaker. Ex. 4, p. 12. The Student's Mother was a product of the LEA's English as a second language program. She was adamant that her son would not be in the same program. She testified that "I took ESL when I was here ... so I kind of know what ESL does, because I took that class so many years." Tr. 1060. She notes that she might not have perfect English now, but that the Student reads, understands, and speaks English. Tr. 1060. The Student's Mother explains that she did not process the Student out from ESL services by stating "[w]ell, I'm confused. Because, first of all, why do I need to process him out just because I speak Spanish? I don't think he should be carrying my background, my language, if he

doesn't – that's not his first language.” Tr. 1063. The LEA's required form to process out a student from ESL states that, despite the LEA's recommendation that a child receives ELD services, the parent has to agree, among other things, that the school believes that ELD services are recommended to be most academically beneficial for the child. Ex. 37. The Student's Mother would not sign the form. Tr. 1179. As the Student's Mother explained, the Student heard and spoke English from infancy. Tr. 823. The MET evaluation was in English. Ex. 6. However, because there may be other languages other than English used to communicate with a family member in the home (the Student's stepfather is a Spanish speaker), then the LEA's view is that the Student is classified as an ELL, because the child also speaks a second language. Tr. 343.<sup>2</sup>

Given this foundation, it is concluded that once the Student became eligible for special education services under the IDEA then he stepped into the definition of an English learner under federal law, notwithstanding any form or procedural requirement the LEA may have otherwise required. Thus, on May 18, 2018 (date becoming eligible under IEP, SLD), Ex. 8, there was no evidence that the Student was not born in the United States, or that his native language was other than English. 20 U.S.C. § 7801 (20). The Student was misidentified as an English Language Learner.

As explained earlier, failure to evaluate issues are deemed to be procedural. *See Timothy O.*, 822 F. 3d at 1124. The Student was evaluated in English, notwithstanding the LEA's own classification of him as ELD. Thus, as for the claim that there was a procedural

---

<sup>2</sup> For example, based on a statement on the LEA's form about languages, if a military dependent spoke a language other than English while overseas then he or she could be considered an English Language Learner. Tr. 343. “I do not make the rules. I can only say that if another language is indicated on this, then yes.” Id.

violation because he was classified as ELL for evaluation purposes, it is concluded that despite the procedural misidentification error of ELL, there was not a substantive denial because the evaluation did take place in English, as the Student's correct language. It did not impede the Student's right to a free appropriate public education, (2) significantly impede the Student's Parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) cause deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). There was no violation of FAPE.

The resulting IEPs and special goals and services because of misidentification are more complicated, however, substantively. It is concluded that the misidentification did result in a violation of FAPE in these circumstances. 34 C.F.R. § 300.513(a). The IEPs, goals, and the services provided in those IEPs were based on a misnomer – that the Student was an English Language Learner. He was placed in a classroom for language special education services as an English Language Learner in a restricted environment of, at one time, about eleven students with speakers of other languages such as Arabic speakers, speakers of “Asian languages,” and Spanish. The underlying principle with these classes was to teach English, despite that they could also help a student with characteristics of Dyslexia read.<sup>3</sup> To do so, they teach based on scaffolding and sheltering. Tr. 40-41. While these tools might be consistent for an ELL to learn English, and even as an English Language Learner to advance with a special education program, it is difficult to conclude that this program with a predominant basis of teaching English, compared with this Student's needs based on characteristics of Dyslexia who was not an English Language

---

<sup>3</sup> The ESL class focuses on listening and speaking skills. Tr. 892. Student with characteristics of Dyslexia require decoding skills. §6.31.2.7(B)(6) NMAC.

Learner, was “appropriately ambitious in light of [the child’s] circumstances.” *Andrew*, 137 S. Ct. at 1000. Simply put, a primary “unique circumstance” of this Student was that he was not an English Language Learner. *See Andrew*, 137 S. Ct. at 1001. He was an English speaker, and an English reader, and an English writer, yet he was placed in a non-English language environment where the purpose was to first learn English. Everything that flowed from placing the Student in an English Language Learner educational environment, be they the IEPs, or services offered in the classrooms, becomes suspect since the predicate on which all the programs was based was that he was an English Language Learner placed in a more restrictive environment for English Language Learners, when he was not, or who had goals placed in other educational environments based on the initial predicate that he was an English Language Learner, when he was not. As a result, it is concluded there was a substantive violation of FAPE as to special education services for characteristics of Dyslexia and resulting IEP goals and services. 34 C.F.R. § 300.513(a).<sup>4</sup>

More specifically, in the 5th grade, the IEP had goals in language arts for grade 06 to read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range.” Ex. 8, p. 5. The Student was to independently read and comprehend a variety of literature genres, identifying character, setting, main idea, and details, with the author’s purpose, and the theme, and will make inferences, with increasing complexity with an 80% accuracy rate measured by assessments and the teacher’s log. *Id.* His goals in math, for Grade 06, were for the number system, to compute fluently with multi-digit numbers and

---

<sup>4</sup> Case law on the issue of misidentification arises under IDEA exhaustion prior to any other relief which might be sought in a court. *See Reyes v. Bedford Central Sch. Dist., et al*, 16-CV-2768 (KMK), 70 IDELR 223 (S.D. N.Y. Sept. 27, 2017).

to find common factors and multiples, to fluently add, subtract, multiply, and divide multi-digit decimals using the standard algorithm for each operation. Within one year, he was to independently solve multi-operational problems to include whole or partial numbers and multi-digit values with 85% accuracy rate measured by formal and informal assessments. Id. p. 5. The Student was able to apply operations to problems with multi-digit values and scaffolding in small groups. Id. His career readiness goals, by Grade 07, were to model behaviors which demonstrate active listening, with a goal to participate in grade level conversations in all academic settings, by demonstrating appropriate listening and speaking skills with 90% accuracy evidenced by teacher logs. He was also to treat people with respect, by using appropriate language, volume, and tone of voice, and use appropriate choice of topics with a 90% accuracy evidenced by staff observations, reports and teacher logs. Id. The start date again was May 18, 2018. Id. His score was described as being distracted by peers and that he chooses to speak loudly and off topic in a variety of academic settings. Id. As such, there were no goals in the IEP addressing the characteristics of Dyslexia. See §6.31.2.7(B)(6) NMAC (decoding, phonological component). The Student was served in the English Language Learner class in the language context, with scaffolding as needed.

Later, while in the 6th grade, goals for career readiness goals, by Grade 07, were to model behaviors which demonstrate active listening, with a goal to participate in grade level conversations in all academic settings, by demonstrating appropriate listening and speaking skills with 90% accuracy evidenced by teacher logs. Ex. 9, p. 6. Goals in math, for Grade 06, were for the number system, to compute fluently with multi-digit numbers and to find common factors and multiples, to fluently add, subtract, multiply, and divide multi-digit decimals using the standard algorithm for each operation. Id. Within one year, he was to

independently solve multi-operational problems to include whole or partial numbers and multi-digit values with 85% accuracy rate measured by formal and informal assessments. Id. His goals in language arts for Grade 06 were by the end of the year to read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range” and within one year to independently read and comprehend a variety of literature genres, identifying character, setting, main idea, and details, with the author’s purpose, and the theme, and will make inferences, with increasing complexity with an 80% accuracy rate measured by assessments and the teacher’s log. Once again, there were no goals in the Amended IEP addressing the characteristics of Dyslexia. *See* §6.31.2.7(B)(6) NMAC (decoding, phonological component). The Student was served in the English Language Learner class in the language context, with scaffolding as needed.

Continuing onward, into the January 16, 2019 IEP, for career readiness goals, by Grade 07, the Student was to model behaviors which demonstrate active listening, with a goal to participate in grade level conversations in all academic settings, by demonstrating appropriate listening and speaking skills with 90% accuracy evidenced by teacher logs. Ex. 10, p. 4. His math goals had changed, and were now for expressions and equations, reason about and solve one-variable equations and inequalities, to understand solving an equation or inequality as a process of answering a question, such as which values from a specific set, if any, will make the equation or inequality true, and to substitute to determine if a given number in the set makes an equation or inequality true. Id. Within one year, he was to reason and solve one-variable equations and inequalities with 80% accuracy rate measured by classwork, tests, and teacher observation. Id. Language arts goals had been changed to

reflect Grade 07, for reading and informational texts with key ideas and details to determine two or more central ideas in the text and to analyze development over the course of the text, and to provide an objective summary of the text, and within one year to independently read and comprehend informational text in content areas with a 75% accuracy rate as measured by teacher log and varied assessments. Ex. 10, p. 6. As for reading in literature, range of reading, and level of text complexity, by the end of the year the Student would read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range.” Id. He was to independently read and comprehend a variety of literary genres, including identifying character, setting, main idea, details, author’s purpose, the theme and to make inferences, and do so with increasing complexity with 80% accuracy as measured by assessments and teacher log. Id. By this time there were indications of a different approach for “multi-sensory content, individual pacing, and increased opportunities for repetition.”<sup>5</sup> Ex. 10, p. 12. “Multi-sensory content” allows the opportunity to offer the content in a variety of learning styles. Tr. 934. The Student, however, remained in the restricted English Language Learner class, with scaffolding as needed.

By the final relevant IEP of November 19, 2019, characteristics of Dyslexia were given some more consideration. Ex. 11, p. 8. For goals in language arts, for reading informational texts, the Student was to independently read and comprehend informational text in content areas with a 75% accuracy rate as measured by teacher log and varied

---

<sup>5</sup> The “multi-sensory” content approach is included for reading, and reading fluency, not just in math; however, the services were still based on the underlying principle that he was an English Language Learner in an English language learning educational environment. Ex. 10, p. 12.

assessments. Id. As for reading in literature, range of reading, and level of text complexity, by the end of the year the Student would read and comprehend literature, including stories, dramas, and poems, “in the grades 6-8 text complexity band proficiency,” and with “scaffolding as needed at the high end of the range.” Id. His “score” was that the results did indicate he had not acquired fundamental decoding skills and that he requires instruction in Phonics. Ex. 11, pp. 4-5, 8. Additionally, his vocabulary was a cause for concern, with gaps in grade-level word knowledge, placing him in Instructional Grouping Profile 1. Ex. 11, p. 8. As for career readiness goals, Grade 07, he was to treat people with respect, and will within one year independently treat adults and peers with respect by not challenging them nine out of ten opportunities or better, evidenced by teacher or peer reports. Ex. 11, p. 8. His other Grade 07 goal was to employ conflict identification and resolution to achieve organizational goals and objectives, and within one year to independently identify when conflicts begin and be willing to resolve it by himself, or with assistance of an adult, in nine out of ten opportunities or better, evidenced by teacher or peer reports. Id. Math goals, for Grade 07, had also changed, and were now for the number system, to apply and extend previous understandings of operations with fractions to add, subtract, multiply, and divide rational numbers, by applying and extending previous understandings of addition and subtraction to add and subtract rational numbers, and to represent addition and subtraction on a horizontal and vertical line diagram. Ex. 11, p. 8. Within one year, he was to increase his ability to add, subtract, multiply, and divide rational numbers with 80% accuracy rate measured by classwork, tests, and teacher observation. Id. His “score” was that test results indicate the Student would benefit from intensive intervention focused on skills and concepts related to quantitative reasoning and representation, based on

instruction that connects understanding of number relationships, computation, and problem solving skills to strengthen his math abilities access across all domains. *Id.* This November 19, 2019 IEP included goals to meet characteristics of Dyslexia, *see* §6.31.2.7(B)(6) NMAC (decoding, phonological component), yet in practice the Student remained as an English Language Learner for language in a restrictive class environment for English Language Learners, when he was not an English Language Learner.

In the 7th grade, the iReady method was used to teach, to allow students to come close to Common Core standards. Tr. 890. The Student was in an overall 3rd grade level. Tr. 890. The Language and Cultural Equity component of LEA dialoged with teacher KM to use the iReady curriculum for “this group of students, special education ESL.” Tr. 891. However, the LEA otherwise uses structured literacy programs for other students who display characteristics of Dyslexia with curricula in Wilson Reading System, S.P.I.R.E., and Sounds Sensible. Ex. 27, p. 10. The Student was bunched with special education English Language Learners for group teaching because of language and cultural issues, although this Student was not an English Language Learner, rather than based on his unique structured literacy needs, for “systemic, explicit instruction that integrates listening, speaking, reading, and writing and emphasizes the structure of language across the speech sound system ... and the organization of spoken and written discourse.” Ex. 27, p. 9. While methodology is left to the LEA, *Rowley*, 458 U.S. at 207-208, this goes to the inappropriate group SE ELA language and cultural educational program provided to this Student, rather than methodology, as not based on the Student’s specific unique needs, and is found to violate FAPE. 34 C.F.R. § 300.513(a).

The LEA's position that diagnostic labels should not be the determinative factor is not ignored. This does not mean, however that services should not be tied to the diagnostic label once the determination of eligibility based on the diagnosis has been made. *See William V., et al, v. Copper Cove Ind. Sch. Dist.*, No. 6:17-CV-00201-ADA-JCM, 75 IDELR 124 (W.D. Tex. October 22, 2019). In *William V., id.*, the District Court explained that, in reviewing Fifth Circuit precedent, the argument about labels is misunderstood because the cases hold that a child with SDL who was not specifically "labeled" should not be denied services because lack of a label, rather than, as the Defendant suggested in that case, that a school does not have to provide the services once a condition such as dyslexia is diagnosed. *Id.* This reasoning is followed in this present action – while the educational setting in SE ELA may have encompassed some services generally for this Student with characteristics of Dyslexia, the underlying theme for the services was to teach English, rather than this Student's unique needs for characteristics of Dyslexia.

For the foregoing reasons, it is concluded that the Petitioner has proved that the IEPs and their goals in the SE ELA environment, as well as the educational services provided under those IEPs, were not reasonably calculated to enable the Student to make progress appropriate to his unique circumstances. *See Andrew F.*, 137 S. Ct. at 999. As a result, it is concluded that there was a violation of FAPE. 34 C.F.R. § 300.513(a).

### **Bullying and the IDEA**

A claim for a denial of FAPE may arise because of bullying. In a "Dear Colleague Letter" from the Office of Special Education Programs, bullying of a student with disability, which results in the student not receiving meaningful educational benefit, can constitute a denial of FAPE. *Dear Colleague Letter*, Office of Special Education Programs, 61 IDELR

263, August 20, 2013. Bullying arises when aggression in a relationship is used where the aggressor has more real or perceived power than the target, with repeated aggression, or with the ability for repeated aggression over time. *Id.* In this case, it is concluded that there was no bullying of the Student; thus, there was no violation of FAPE. 34 C.F.R. § 300.513(a).

\$4,000.00 was missing from the Student's Step-Father, which was kept at home, around September 30, 2019. Ex. 22. The Student's Mother filed a report against her son with the police. *Id.* The police investigated and concluded that another pupil implied it may have been a coordinated theft between the Student and him, as friends. The Student stated to the police that he committed the offense because his friends were rich and because he wanted to fit in. Ex. 22, p. 2. The Student subsequently told his Mother that "the real reason I took the money from your drawer" was because another pupil embarrassed him in front of his friends, and grabbed his chest, and said he looked like a girl. Tr. 987-988. The Student's Mother then reported to the LEA's police representative that the Student had been bullied because of the Student's chest and that the only way the bullying would stop would be to pay the alleged perpetrator money. Ex. 22, pp. 3-4.

LEA representatives noticed that pupils at MMS School had \$50.00 bills, which was unusual. Tr. 317-318. The LEA investigated, and found that the Student and another pupil were passing out the money to the other students. Tr. 318 -320. The LEA then sought to reacquire the money the Student had passed out, and was able to get \$650.00 back. Tr. 323. The Student's Mother requested consequences for her son, and the Student was given community service in the cafeteria. Tr. 325.

Again on October 22, 2019, the Student was touched on the chest and was called a girl by another Student. Ex. 21, p. 4. Tr. 382. This is the same pupil the Student had given the money to earlier. Tr. 384.

The Student is a tall young man, Tr. 988, with a heightened stature. Ex. 30. The Student himself would corner other specific pupils and hold objects from the classroom like he was to strike another pupil. Tr. 1107. The Student's behaviors were considered to be borderline bullying, where he was the aggressor. Tr. 1118. A behavior contract had to be completed to keep the Student away from the other pupil. Tr. 1123. Other incidents arose where the Student would misbehave. Ex. 21.

Although aggression happened twice with the chest incident, it cannot be found that the other pupil had more real or perceived power than the Student. The other pupil stated the reason he touched the Student was because the Student touched him, and it was "back and forth on the behavior." Tr. 436. Taking the money from his Parents and handing out the bills to classmates was something the Student did to try to fit in, according to the initial statement to the police. The LEA immediately took action and tried to retrieve the money back. The other pupil was given an immediate consequence. Tr. 436.

Viewing this evidence, the Petitioner has not met her burden to prove that the Student was bullied to form a denial of FAPE. For instance, facts where a FAPE denial could arise are referred to in *Shore Regional High School Bd. of Edu. v. P.S.*, 381 F. 3d 194 (3d Cir. 2004). There, the student was teased by other children, and was called "girlish," but was also referred to by numerous homophobic names in a degrading context, had rocks thrown at him, was hit with a padlock, and he became depressed, with schoolwork suffering.

*Id.* The facts of this case with this Student do not rise to that level. There was no denial of FAPE. 34 C.F.R. § 300.513(a).

As for a claimed remedy to have the LEA pay the Student's Parents \$4000.00, it is denied. First, there was no denial of FAPE so to award a remedy. Even if so, second, there is no jurisdiction to award damages. *See Wenger v. Canastota Cent. Sch. Dist.*, 208 F. 3d 204 (2<sup>nd</sup> Cir. 2000)(IDEA does not provide for money damages).

### **Assistive Technology and Audio Texts**

This addresses JIS, P's # 7, R's # 7, and JIS P's # 11, and R's # 11. The allegations relate to an alleged failure to provide assistive technology and audio books. *Id.*

As for assistive technology, as preserved in the Petitioner's FFCL, it relates to assistive technology for the Student's handwriting, and this is what will be addressed. *See* P's FFCL, pp. 19-20.

Among other things, the IEP Team must consider whether the child "needs" assistive technology devices and services. 34 C.F.R. § 324(a)(2)(v). An assistive technology device is a piece of equipment, among other things, used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 C.F.R. § 300.5.

The IEP of May 18, 2018 stated that the Student did not have assistive technology needs. Ex. 8, p. 3.

The Amended IEP of August 30, 2018 stated that the Student did not have assistive technology needs. Ex. 9, p. 4.

The IEP of January 16, 2019 stated that the Student did not have assistive technology needs. Ex. 10, p. 5.

The IEP of November 19, 2019 stated that the Student did not have assistive technology needs. Ex. 11, p. 7.

As a result, it is concluded the IEP Teams considered whether the Student needed assistive technology devices.

The burden is on the Petitioner, therefore, to prove otherwise. *See Schaffer v. Weast*, 546 U.S. 49 (2005).

The Petitioner's theory is that handwriting is impacted because of TS. However, there has been no finding of TS. The only conclusion reached is that TS may be a suspicion for which an evaluation was required. In this regard, the claim is not ripe.

Nonetheless, the Petitioner represents that because the Student did well with keyboarding and because his Mother thinks he could do more if he could dictate and have a computer holds little weight. *See P's FFCL*, pp. 19-20, and cites to the record. This is insufficient. *See R.B., et al, v. District of Columbia*, No. 18-662 (RMC), 75 IDELR 102 (D.C. September 30, 2019)(a psychological evaluation recommended it, among other things). In sum, the Petitioner has not met her burden to establish, even absent TS and should it relate to characteristics of Dyslexia, that there was not some appropriate progress under the circumstances relative to the severity of the Student's disabilities. *See Andrew F.*, 137 S. Ct. at 998-999. There was no denial of FAPE. 34 C.F.R. § 300.513(a).

As for audio books, once again this goes to whether the Petitioner has met her burden of proof to show that they are needed to allow the Student to receive a FAPE. 34 C.F.R. § 324(a)(2)(v). None of the IEPs provide for audio books. *See Exs. 8, 9, 10, and 11.* The question is not whether the audio books are commonplace across the country, *see Tr.* 268, as they might be, for reading programs for students with characteristics of Dyslexia,

but whether the Petitioner has proved that the Student needed the audio book, and that absent the audio version he could not make appropriate progress to meet his unique needs. *See Andrew F.*, 137 S. Ct. at 998-999. Important in this consideration is the MET Report, which suggested to provide books on CD. Ex. 6, p. 21. While Diagnostician JTR is of the opinion that the Student's learning could be enhanced by the use of books on CD, Tr. 239, the need to use or not use audio books is based on the classroom teacher's assessment of the appropriate tool to use to acquire the access to the information. Tr. 258-259. Therefore, giving deference to the classroom educators, *Andrew*, 137 S.Ct. at 1001, it is concluded the Petitioner has not met her burden to establish that audio books were "needed" to provide the Student with a FAPE. 34 C.F.R. § 300.513(a).

Although Book Share may be available for a LEA student with characteristics of Dyslexia, it depends on the child. Tr. 788. While it might be available, it is up to the individual teacher and IEP Team. Tr. 789, 791. When delving into the specifics for this Student, however, and his particular needs for audio books, the Petitioner failed to clear the burden of proof hurdle. As Ms. CG, the Director of the LEA's Special Education Department, Student Achievement, testified, when focusing on this Student rather than students as whole, "I don't even know who this student is, honestly." Tr. 796. The burden of proof relating to this Student and his unique needs has not been met. As a result, there was no denial of FAPE. 34 C.F.R. § 300.513(a).

### **TS Training and Services**

This addresses JIS, P's # 9, and R's # 9. The allegations relate to an alleged failure to provide supplemental aids and services to the Student and to the staff to develop an understanding of TS and its best practices. *Id.*

The Petitioner generally raises issues in her allegations of failure to provide staff with training on TS, and to provide aids and services to develop an understanding of TS and its best practices. *See* P's FFCL, pp. 22-23. Her theory is that aids and services could give them an understanding of "motor tics," and impacts on behaviors, and educational programs. *Id.*

As concluded, what has denied FAPE for this Student, based on his unique needs, was due to no evaluation for TS after suspicions arose. The Petitioner contends that the "Student would 'need something different' if he is a student with TS. Tr. vol. 2 at 431. With a TS diagnosis, a student would get different supports, accommodations. Tr. vol. 2 at 376." The foundation for the argument is for services upon a diagnosis of TS. *Id.* Yet there has not been a conclusion that the Student is eligible for services because of TS. As a result, it is concluded that there was no violation of FAPE as the issue is raised. 34 C.F.R. § 300.513(a).

### **IEP Staff for Interpretation**

This issue addresses JIS, P's # 10, and R's # 10. The allegation is essentially that someone else should have been at the IEP meetings to interpret the LEA's evaluation. *Id.* She contends that Diagnostician JTR, as the author of the MET Report, should have been at the meetings to address the Student's Mother's questions about reading instruction, and to address possible assistive technology, audio texts, and multi-sensory instruction. *See* P's FFCL, p. 23. The issue raised is under the characteristics of Dyslexia, and not suspicion of TS. *Id.* Petitioner does not point to any evidence as to why the educators not present at the IEP meetings were incapable of interpreting the results of the MET Report for reading. *Id.*

In relevant part, the IEP team for a child with a disability is to include the parents, a general education teacher, a special education teacher or provider, qualified district representative who is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities, is knowledgeable about the general education curriculum, and is knowledgeable about the availability of district resources. *See* 34 C.F.R. § 300.321. An individual who can interpret the instructional implications of evaluation results is a team member, as well, although this person may also be one of the other IEP members. *Id.*

The LEA argues that the “Student’s IEP team was composed of District personnel who possessed ample qualifications, information and knowledge as to design an appropriate educational program individualized to meet this student’s needs.” *See* R’s Argument, p. 9. However, the LEA cites to no factual elements in the record to support this assertion. *Id.* *See also* R’s FF.

Of the testifying witnesses, LUM was at the first IEP of May 18, 2018. She was the regular education teacher, who brought the possible characteristics of Dyslexia issue up in the first place. *Ex. 8; Tr. 30-184.* DJ was the Cross-Cat teacher for the Amended IEP on August 30, 2018, and SO attended as well. *Ex. 9; Tr. 268-303, 446-522.* DJ was at the January 16, 2019 IEP, where he also acted as the evaluation representative. *Ex. 10.* At the November 19, 2019 IEP, DJ, NM (regular education teacher), and CMG (social worker) were present. *Ex. 11; Tr. 1208-1296.* The burden is on the Petitioner to prove that those present could not interpret the MET evaluation. She has not pointed to any evidence that the other team members could not interpret the instructional implications. Similarly, she has not pointed to evidence that they were not knowledgeable about LEA resources. *See* 34

C.F.R. § 300.321. She only proposes that Diagnostician JTR was not present to address services related to characteristics of Dyslexia.<sup>6</sup> As a result, it is concluded that the Petitioner has not met her burden to prove that this resulted in a procedural violation. 34 C.F.R. § 300.513(a)(2). There is no need to address the second step as to whether it resulted in denial of FAPE.

### **Relief**

The Petitioner seeks equitable relief for two years in compensatory education to be made up by daily 1/1 Wilson Reading for one period each day beginning in the 8<sup>th</sup> grade year, with the Wilson teacher to participate in IEP meetings along with a LEA staff person qualified to be a Wilson teacher. P's FFCL, p. 13. This is denied. There is nothing which ties in the proposed compensatory education hours qualitatively with the Student. It is a request for services without showing qualitatively how those services would put the Student in a place he would have been absent the denial of FAPE, and what the Student's needs would be in the new environment to allow him to undertake the proposed hours for services. *See generally Reid*, 401 F.3d at 523-24 (qualitative compensatory education relief test). However, by this decision, the Student will no longer be classified as an English Language Learner, and the LEA is now ordered to correct that error.

Petitioner also requests assistive technology and audio texts due to their assistive technology and audiobook claims. P's FFCL, p. 13. This is denied. Petitioner was not successful in proving a denial of FAPE in those claims.

---

<sup>6</sup> Note that the issue raised was Diagnostician JTR's presence for characteristics of Dyslexia, not for TS suspicion, and that is the only issue now addressed.

Petitioner seeks the LEA to pay for the pending neurological evaluation at UNM Pediatric based on the denial of FAPE for failure to evaluate for TS. P's FFCL, p. 13. This is granted. There are two avenues to order the Respondent to pay for an educational evaluation. The first is if the evaluation is an Independent Educational Evaluation (IEE). See 34 C.F.R § 300.502. The other is as a remedy for a denial of a FAPE. See *M.M. v. LaFayette Sch. Dist.*, 116 LRP 31747 (N.D. Cal. July 27, 2016). In this case there is a denial of FAPE for failure to evaluate.

Petitioner next seeks the LEA to conduct a new MET Team to consider OHI based on ADHD and TS. P's FFCL, p. 13. This is denied. Initially, as explained in the Analysis Sections of Issues 1 and 2, ADHD was not preserved as an issue in this case. The Issues were evaluated by the Petitioner's reference to TS in the FFCL, and to characteristics of Dyslexia and alleged dates, and traced back to occurrences. ADHD was not preserved as an issue. It was used for background information only. Secondly, since no evaluation has taken place, then it is unknown if the Student will be diagnosed with TS. There will be no presumption. Thus, the claim for a new MET Meeting is not ripe as for TS.

Petitioner next requests, for TS, for the teachers, staff, and peers to be trained at MMS School by the Tourette Association, to have ongoing consultation and support from the LEA's Tourette Syndrome Resource Administrator, including training for all of the Student's 8<sup>th</sup> grade teachers, and for the LEA's Tourette Syndrome Resource Administrator to participate in all IEP Meetings through the Student's graduation from high school. P's FFCL, p. 13 - 14. This is denied. The violation of FAPE was a failure to evaluate. The next step is the evaluation, and the LEA is ordered to pay for it. Once again, since no evaluation

has taken place, then it is unknown if the Student will be diagnosed with TS. There will be no presumption. Thus, the request is denied.

The Petitioner next seeks the LEA to reimburse the Student's Parents for outstanding losses due to the Student's distribution of money at school to prevent alleged bullying. P's FFCL, p. 14. This is denied. There was no denial of FAPE in this claim; therefore, there is no remedy. Secondly, there is no jurisdiction to order the money viewed as damages, as concluded earlier in this decision.

### **ADMINISTRATIVE ORDER**

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioner's Request for Due Process Hearing With the Local Educational Agency is granted in part and is denied in part.

In summary, the Petitioner met her burden proving three violations of FAPE – two procedural violations amounting to substantive violations, and one substantive violation. The procedural violations were an untimely MET evaluation and resulting IEP for characteristics of Dyslexia, and the lack of an evaluation based on suspicion of TS. Both procedural violations resulted in substantive violations of FAPE. There was also a substantive denial of FAPE – the IEPs for services focused on the Student as a SE English Language Learner, when he was not. An additional evaluation procedural violation occurred (English Language Learner classification, yet evaluation was in English), which did not result in a denial of FAPE. The Petitioner did not meet her burdens to prove other claimed violations of FAPE, as otherwise detailed in this decision. Those claims will be, and hereby are, denied.

Respondent's Issues 12 and 13 (JIS, R's # 12 & # 13) have been considered and by

implication are included in the various relevant parts of the Analysis sections.

Any claims or defenses otherwise raised which are not specifically addressed herein, will be, and hereby are, denied.

**REVIEW**

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

With concurrence from the parties as to use of Email for filing, service of a copy of this decision will only be by PDF attachment to Email addresses to counsel of record.

It is so administratively ordered.

/s/ electronic

---

MORGAN LYMAN  
IMPARTIAL DUE PROCESS  
HEARING OFFICER

Entered: May 3, 2020

**CERTIFICATE OF SERVICE**

I certify a true copy hereof was sent via Email PDF attachment only to G. Stewart, J. Archuleta-Staehlin, and Paul Roybal, Esqs., and D. Poulin, Esq., for the Secretary of Public Education, at their respective Email addresses of record, all on this 3rd day of May 2020.

/s/ electronic

---