

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

Due Process Hearing No. DPH 2021-17

HEARING OFFICER'S FINAL AMENDED MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing Against Two Local Education Agencies (Due Process Request), filed with the State of New Mexico Public Education department on April 26, 2021. The Petitioners' Request for Due Process is granted in part and denied in part.

PROCEDURAL BACKGROUND

The case was assigned to the Due Process Hearing Officer (DPHO) on April 29, 2021. *See* Letter Assignment, New Mexico Public Education Department, April 29, 2021. A Pre-hearing Conference was held with counsel for the Petitioners and for the two Respondents, [REDACTED] ([REDACTED] the School District, or the District) and The New Mexico Public Education Department (NMPED) on May 4, 2021. *See* Amended Initial Scheduling Order dated May 17, 2021.

The Respondent LEA responded to Petitioners' Due Process Request on May 6, 2021. *See* [REDACTED] Answer to Complaint for Due Process, dated May 6, 2021.

Respondent NMPED filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction and Memorandum in Support on May 6, 2021. Petitioners filed their Response in Opposition to NMPED's Motion to Dismiss for Lack of Subject Matter Jurisdiction on May 14, 2021. NMPED filed its Reply to Petitioners' Response to the Motion on May 18, 2021.

The DPHO issued an Order Granting NMPED's Motion to Dismiss for Lack of Subject Matter Jurisdiction on May 25, 2021, finding that there is no administrative subject matter jurisdiction to adjudicate Petitioners' claims against NMPED, and dismissing the claims made against NMPED.

On May 28, 2021, Petitioners filed a Motion for Reconsideration and Reinstatement of NMPED as a Respondent. NMPED filed its Response to the Motion for Reconsideration and Reinstatement on June 2, 2021. Petitioners filed a Reply to the Response on June 3, 2021. The DHPO issued an Order Granting Petitioners' Motion for Reconsideration and Reinstatement of NMPED as Respondent on June 4, 2021. The Order reinstated NMPED as a Respondent in this case.

On June 10, 2021, NMPED filed a Motion for Clarification and Amendment of the June 4, Order Granting Motion for Reconsideration and Reinstatement of NMPED as a Respondent. The Petitioners' filed Parents' Response to NMPED's Motion for Clarification and Amendment on June 12, 2021. NMPED filed a Reply to the Parents' Response on June 14, 2021. The DPHO issued an Order Granting NMPED's Motion for Clarification and Amendment of June 4, 2021, Order Granting Motion for Reconsideration and Reinstatement of NMPED as a Respondent. The DPHO ruled therein that (1) the claims in the Petitioners' Complaint against NMPED remain dismissed for lack of jurisdiction; (2) the only claims to be litigated in the case are the claims asserted against [REDACTED]; and (3) NMPED has been added as a party only because NMPED presently has legal authority for

█ due to the suspension of the █ School Board and to ensure provision of a remedy, if any, for █ denial of FAPE to the Student.

The parties timely filed their Witness Lists on June 18, 2021.

The parties timely filed their Exhibit Lists on June 18, 2021. Exhibit binders were also timely exchanged and provided to the DPHO.

The Petitioners and █ timely filed their respective Statements of Issues for the due process hearing on June 18, 2021.

The Due Process Hearing took place on June 28 through July 1, 2021, as a virtual hearing. All parties were by their respective counsel at the hearing.

Petitioners submitted Parents' Opening Statement of Law on June 27, 2021. This was not submitted at the DPHO's request. However, █ was given the opportunity to file a response. It did not submit a separate response, but it did submit a written Closing Argument on August 16, 2021. On that date Petitioners also timely submitted a written Closing Argument, as did the NMPED. All parties also timely submitted Proposed Findings of Fact and Conclusions of Law on August 16, 2021. In addition, the parties submitted Stipulations of Fact on August 16, 2021.

This decision pursuant to the DPHO's August 16, 2021, Order Extending Post-Hearing Deadlines, was due on or before September 17, 2020. The DPHO's Memorandum Decision and Order was filed and served on counsel for the parties on September 17, 2021. There were two post-Decision motion filed thereafter. On September 21, 2017 Petitioners filed a Motion for Modification of Decision. The Motion asked the DPHO to

remove the remove the final paragraph of the Memorandum Decision and Order, which advised the parties of their right to appeal, on the grounds that the Decision was not a final order. The DPHO granted that Motion in his Order Granting Petitioners' Motion for Modification of Decision, dated September 22, 2021, on the grounds that the Memorandum Decision and Order was not a final order for appeal. The DPHO issued his Amended Memorandum Decision and Order on September 22, 2021, with the paragraph regarding the right to appeal removed.

█████ filed a Motion for Clarification on September 22, 2021, seeking clarification of the basis for continuing jurisdiction on the case following the issuance of the Memorandum Decision and Order, and arguing that either the basis for such jurisdiction be provided or seeking the issuance of a final decision. Petitioners filed their Response to LEA's Motion for Clarification just prior to a telephonic status conference that occurred on September 24, 2021. After hearing the argument of counsel for █████ on the Motion, Petitioners' counsel requested an opportunity to file an Amended Response to LEA's Motion for Clarification. That request was granted and the Petitioners' filed their Amended Response on September 29, 2021. █████S filed Responded █████ School Board of Education's Reply on October 1, 2021. NMPED also filed its Reply to Petitioners' Response to District's Motion for Clarification and Request that DPHO Enter a Final Decision on October 1, 2021. The DPHO granted the Motion for Clarification on October 5, 2021 and agreed with the arguments of █████ and NMPED that the relevant legal authorities do not

provide a basis for the continuing jurisdiction of the DHPO after the date set for issuing a final decision on September 17, 2021.

After issuing the Order Granting the Motion for Clarification on October 5, counsel for Petitioners reminded the DPHO that she was given a deadline of October 5 to file a response to NMPED's Reply. See email from the DPHO dated September 30, 2021, in which Petitioners were allowed that opportunity. The deadline was overlooked because it had not been placed on the DPHO's calendar. The DPHO apologized to Petitioners' counsel for the oversight, and gave her the opportunity to file a response, and told her he would consider the additional brief. She chose not to file another brief.

EXHIBITS

The following exhibits were admitted into evidence at hearing:

- Petitioners' Exhibit Nos. 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 38, 39, 41, 42, and 44.
- Respondent [REDACTED] Exhibit Nos. 4, 13, 14.

Any other exhibits which appeared on the parties' Exhibit Lists which are not included above were either withdrawn, not offered, or rejected in evidence, and have been removed from the parties' Exhibit Binders.

ISSUES¹

¹ Issue No. 1 is taken from Petitioners' Closing Argument. Issue Nos. 2-13 are taken from Petitioners' Requested Findings of Fact and Conclusions of Law. Issues Nos. 14-23 are taken from [REDACTED] Statement of Issues.

1. Whether Petitioners' claims related to events prior to April 26, 2019, when Petitioners filed their due process Request are time-barred by the statute of limitations for IDEA cases found in 20 U.S.C. 1415(f)(3)(C).

2. Whether, during the period from October 2017 and continuing, the LEA provided the Student with IEP goals for academics, specialized instruction, and access to the general curriculum.

3. Whether, during the period from October 2017 and continuing, the LEA provided the Student with education which met state standards, including the failure to provide him with full day/full week/full school year education.

4. Whether the LEA failed to write IEPs which met the Student's unique needs or which described present levels of performance for the period of October 2017 to present.

5. Whether the LEA failed to provide the Student with sufficient hours of speech language therapy (direct and consult) for the period from October 2017 to present.

6. Whether the LEA failed to acquire knowledge and understanding about mosaic Angelman Syndrome necessary for its staff to meet the Student's unique needs for special education for the period from October 2017 to present.

7. Whether the LEA failed to provide education which is "free" and instead depended entirely on a Parent's continuous participation for the period from October 2017 to present.

8. Whether the LEA wrote inaccurate and incomplete IEPs and PWN, which impaired the Parent's ability to participate in the IEP team and enforce the Student's rights to FAPE for the period from October 2017 to present.

9. Whether the LEA failed to provide the Student with education in his LRE and excluded him from contact with age peers for the period from October 2017 to present.

10. Whether the LEA falsified IEP documents to disguise its failure to provide the Student with education from October 2017 to present.

11. Whether the LEA failed to implement an appropriate IEP for the Student for the period from October 2017 to present.

12. Whether the LEA failed to conduct timely three-year reevaluations for the Student even though it claimed ignorance about his present levels of performance for the period from October 2017 to present.

13. Whether there has been interference with the efforts of the school district to provide educational services to the Student.

14. Whether the IEP's developed by the District for the relevant time are designed to confer educational benefit under *Endrew F. v. Douglas County School Dist. RE-1*, 137 S. Ct. 988 (2017).

15. Whether the IEP's implemented by the District during the relevant time did confer more than a modicum of educational benefit in light of the Student's disabilities.

16. Whether the immediate return of the student to a full school schedule is appropriate given his response to the services provided.

17. Whether the gradual reintegration of the student into a school setting with the supports of a BCBA and other ancillary services providers is the appropriate placement consideration in light of the student's present levels of performance.

18. Whether based on previous behavior of the Student towards staff and students in a school setting poses a danger to the safety and well-being of the Student and others.

19. Whether the qualifications including training and licensure by the state of New Mexico are the standard of required experience and ability to provide services in an educational setting to any child with a disability.

20. Whether a full day of attendance at school is mandatory in all circumstances.

21. Whether compensatory services are warranted given the facts of this case.

22. Whether compensatory services would benefit the Student. If so, to what degree?

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 (10th Cir. 1990). In this action, therefore, the burdens rest, with the Petitioners.

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.*, 458 U.S. at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). "[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.

Further, “[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement.” *Andrew*, 137 S.Ct. at 999. “The goals may differ, but every child should have the chance to meet challenging objectives.” *Andrew*, 137 S.Ct. at 1000. The U.S. Supreme Court has stated that there is no formula for analyzing an IEP. *Id.* However, “the standard is markedly more demanding than the ‘merely more than *de minimis*’ test applied by the Tenth Circuit.” *Id.*

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 (8th 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 (10th 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 (10th Cir. 1998). *But see Andrew*, 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 (10th Cir. 2008). *But see Andrew*, 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 students’ “unique needs.” *Fry*, 137 S.Ct. at 755.

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.*

An IEP is to be in place at the beginning of each school year. *See* 34 C.F.R. § 300.323(a). 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. 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. 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 Irving Ind. Sch. Dist. v. Tatro*, 468 U.S. 883 (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 (10th 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.

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. 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 (10th Cir. 2002).

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 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dept. of Mental Health and Mental Retardation v. Paul B., et al.*, 88 F.3d 1466 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Circ. 2004).

The IEP is to be implemented as soon as possible after the IEP meeting. 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. 960 (D. Kan. 2003).

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Id.*

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. 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, comprised the student's right to an appropriate education, or caused a deprivation of educational benefits. *O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. Bd. of Educ. of*

Albuquerque Pub. Sch., 520 F.3d 1116 (10th Cir. 2008). “The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE.” *Fry*, 137 S.Ct. at 753.

Hearing Officers have authority to grant relief as deemed appropriate based on their findings. 34 C.F.R. § 300.511, 300.513. 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 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005). 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.*, D.N.M. Nos. 10-0963, 10-0964 (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 (10th 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 (10th Cir. 2010).

FINDINGS OF FACT

1. [REDACTED] are the parents of the Student, a 10th grade student who is assigned to [REDACTED] School in the [REDACTED] Schools. Stipulations of Fact No. 1; Request for IDEA Due Process Hearing (Request) at ¶ 1; [REDACTED] Board of Education Answer to Complaint for Due Process (Answer) at ¶ 1.

2. Student was born in [REDACTED]. Stipulations of Fact No. 1; Request at ¶ 2; Answer at ¶ 1.

3. Student has Angelman Syndrome and has been identified as a student with a disability eligible under IDEA for special education since preschool. Stipulations of Fact No. 3; Request at ¶ 3; Answer at ¶1.

4. Student was diagnosed with Angelman's Syndrome after parent's noticed that he was not "meeting certain milestones of development" around the age of four. TR 1 at 41:1- 41:21; TR 1 at 90:25-91:1.

5. Angelman Syndrome (AS) is "a rare neuro-genetic disorder that occurs in one in 15,000 live births or 500,000 people worldwide. . . . AS shares symptoms and characteristics with other disorders including autism, cerebral palsy and Prader-Willi

Syndrome Common characteristics of AS include developmental delays, happy demeanor (“frequently laughing, smiling and easily excitable”), sleep problems and lack of speech. See “What is Angelman Syndrome” on the website for the Angelman Syndrome Foundation at <https://www.angelman.org/what-is-as>. Mosaic Angelman Syndrome signifies milder symptoms of AS. Stipulations of Fact No. 3; Request at ¶ 4; Answer at ¶ 2.

6. L.S. was determined to be eligible for special education while in pre-school with eligibility of Other Health Impairment and Intellectual Disability. Petitioners’ Exhibit 8 at 3.

7. Student is a nonspeaking individual who communicates with Augmented Alternative Communication (AAC), gestures, some signs, and use of technology, using an iPad or other portable device, loaded with Proloquo2Go, which allows him to combine icons and words to convey meaning, wants, and needs, as well as to answer questions. Stipulations of Fact No. 4; Request at ¶ 6; Answer at ¶ 1.

8. Student qualifies for related services of speech language therapy, occupational therapy, and physical therapy; he also has social work service listed on his IEP. Request at ¶ 7; Answer at ¶ 1.

9. Student’s parents, per the April 4, 2017, IEP Addendum, rejected services being provided in their home. The District subsequently offered “Homebound Services” for Student “Monday through Thursday at the Bosque Farms Tennis Courts.” Petitioners’ Exhibit 15 at 1.

10. Student was determined to be eligible for special education on while in Pre-school with eligibility of Other Health Impairment and Intellectual Disability See Petitioner's Exhibit 8, Page 3.

11. The Parents filed an IDEA due process request against [REDACTED] (DPH 1718-05) in September 2017 which was settled. Stipulations of Fact No. 5.

12. The Parents filed an IDEA state complaint (CR 1920-13) against [REDACTED] in December 2019 which resulted in a determination of denial of FAPE and a Corrective Action Plan (CAP) in January 2020. Stipulations of Fact No. 6.

13. [REDACTED] is the Student's Local Educational Agency (LEA). Request at ¶ 16; Answer at ¶ 1.

14. New Mexico school campuses were ordered closed by public health order at the end of March 2020. Request at ¶ 40; Answer at ¶ 1.

15. Student's assigned school, [REDACTED], had a schedule during the 2020-2021 school year for remote instruction for high school students from 8:00 a.m. to 2:30 p.m. Beginning April 6, 2021, "all" students had the option of returning to the campus for instruction from 7:40 to 2:30 each school day. Request at ¶ 44; Answer at ¶ 1.

16. Student's last IEP is dated May 1, 2020, along with an Addendum which was done on August 25, 2020, and a PWN done in April 2021. Stipulations of Fact No. 8; Request at ¶ 45; Answer at ¶ 1.

17. Student's May 1, 2020, IEP provided for 360 minutes of Speech Language Pathology ("SLP"), Physical Therapy ("PT"), Occupational Therapy ("OT") and Social Work in a special education setting per semester. Student was also provided with and iPad with Proloquo2Go app, visual supports and a visual schedule as needed. Petitioner's Exhibit 22 at 1 and 8.

18. Student's May 1, 2020, Prior Written Notice ("PWN") indicated that District proposed to start supports for Student with a Board-Certified Behavior Analyst (BCBA) through a local agency for 300 minutes per week once the mandated social distancing ended. *See* Petitioner's Exhibit 23 at 4.

19. Student's May 1, 2020, PWN also indicated that District proposed to accept the schedule of services and parent requested that they notify the District "if they wished to begin services;" District agreed to that request. *See* Petitioner's Exhibit 23 at 5.

20. Student expresses himself primarily through sign language and his adaptive device, Proloquo2Go, software downloaded onto his iPad. TR 1 at 46:11- 47:1.

21. Student began pre-school at [REDACTED] and remained there until middle school. Student was assigned to [REDACTED] but never attended. He did however visit [REDACTED] on two separate occasions in August of 2018. TR 1 at 98:2-98:23; and TR 1 at 107:15-108:5.

22. At various times throughout Student's education, Student's teachers and other school employees observed Student exhibiting behaviors that disrupted the classroom environment, such as, on one occasion, disrobing, defecating, and throwing

feces over a file cabinet. TR 1 at 82:2-82:18; TR 1 at 235:26-236:1; and TR 4 at 891:13-891:15.

23. The District contracted with Erin Sheldon, M. Ed. who had extensive experience with students diagnosed with Angelman Syndrome to provide training to teachers and staff on Angelman Syndrome. Ms. Sheldon provided a report of recommendations for Student. *See* Petitioner's Exhibit 11 at 6; Petitioner's Exhibit 31.

24. During the 2020-2021 school year, Student's IEP provided for 360 minutes of Social Work per semester for a total of 720 minutes for the year. Student was provided 1, 015 minutes total by his Social Worker, who co-treated Student in conjunction with the Speech Language Pathologist. Petitioner's Exhibit 22; Respondent's Exhibit 13; TR 3 at 690:21 – 692:15.

25. The District contracted with an outside service provider, PRISM, to provide Student with services. TR 2 at 375:7-375:12.

26. Student missed a significant number of days of school and was automatically dis-enrolled, per school policy, after having missed ten (10) or more consecutive days. Student was dis-enrolled on October 10, 2017. TR 3 at 641:19-642:9; TR 2 at 583:16-583:20.

27. Student only attended approximately half of his scheduled Physical Therapy sessions. TR 3 at 748:1-748:5.

28. Despite being provided the virtual class link and despite Student being unable to log into class on his own, Parent did not log him in stating that she had other

things to do and that it was the Student's responsibility or his one-on-one aid or his teacher to sign him on to a remote class he was attending at home. TR 1 at 200:25-201:4; and TR 1 at 223:1-227:1.

29. [REDACTED] 2021-2022 school year began on August 4, 2021. Stipulations of Fact No. 9.

30. Student has not received education on a school campus since the 2016-2017 school year. Stipulations of Fact No. 2.

31. L.S. has not been provided any education on a school campus for more than four school years (2017-18; 2018-19; 2019-20; 2020-21).

32. [REDACTED] has no current IEP for L.S. and no plan for his receipt of education during the current (2021-22) school year which began in the District for other students on August 4, 2021.

33. In 2018, [REDACTED] wrote an IEP for L.S. which provided for a shortened day/shortened school week based on his behaviors. Petitioners' Exhibit 21 at 37; TR 2 at 422-423.

34. Although schools in New Mexico were allowed to provide in-person small group instruction for students with disabilities during the entire 2020-21 school year, the [REDACTED] Board of Education "would not let [schools] bring back students until the beginning of February [2021] in small groups" which referred to students in CEL (Community Enhanced Learning) classrooms. TR 2 at 424-427, 455-456, 458, 474-475; Petitioners' Exhibit 29 at 1.

35. All students in [REDACTED] were allowed to return to in-person learning on April 6, 2021. TR 2 at 428, 474.

36. The District does not know which students with disabilities were not successful with remote learning and does not know what it will do for students who were not successful. TR 2 at 460-461.

37. This due process hearing, filed on April 26, 2021, is Parents' third attempt to obtain FAPE for L.S. using the dispute resolution mechanisms described by IDEA as made available in New Mexico through the SEA, NMPED. Petitioners' Exhibit 6; TR 1 at 58-62, 66; Petitioners' Exhibit 8; Petitioners' Exhibit 12.

38. The LEA's Director of Special Education, [REDACTED], retired effective May 1, 2021, a few days after this Request for Due process was filed on April 26, 2021. Petitioners' Exhibit 14 at 15; TR 2 at 381-382.

39. During all relevant years, [REDACTED] was the Parents' main contact at [REDACTED] and the designated administrator for L.S.'s education. TR 1 at 141-142; Petitioners' Exhibit 6 at 3; Petitioners' Exhibit 21 at 38; TR 1 at 157-158; TR 2 at 410-411, 415 ("all correspondence and all documentation definitely lay with [REDACTED]."), 422, 515-517. She was also the main contact for PRISM Therapy during the 2020-21 school year. TR 4 at 925.

40. The LEA maintained it did not know how to reach [REDACTED] and she was not made available to testify at the 4-day hearing in June/July 2021. TR 1 at 13-15; TR 2 at 400-402, 510-512.

41. The current Director, [REDACTED], who moved into the position on May 1, 2021, has not done any work on L.S.'s education except for attending a Zoom meeting with NMPED's CAP monitor and reading some documentation. TR 2 at 402-403. She is "curious to see and hear from PRISM about [L.S.'s] progress." TR 2 at 404, 406. She has not been assigned any particular role or duties with regard to his education. TR 2 at 408. However, apparently, she is currently responsible for being "the point of contact." TR 2 at 565-566. She has not tried to figure out what needs to happen for L.S. to return to school. TR 2 at 421-422. She thinks that the School District "has done the very best it can with [L.S.]." TR 2 at 505-506. She does not know if the District will need help if there is a finding against it in the DPH. TR 2 at 506.

42. The District's former superintendent, [REDACTED], was ordered to appear and give testimony through a DPHO-issued Administrative Order to Appear. Through counsel, [REDACTED] declined to appear and testify since the Administrative Order to Appear issued by the IDEA DPHO was unenforceable. TR 1 at 115-122; TR 2 at 297-298; Petitioners' Exhibit 44.

43. As a result of Angelman Syndrome, Student does not communicate orally with words, and instead communicates through use of an AAC device aided by gestures, vocalizations, and some use of signs. TR 1 at 51, TR 2 at 317; TR 3 at 803. He has good receptive language and "understands many, many things." TR 1 at 45. L.S.'s expressive communication is more limited. *Id.* However, he "talks all day long" through the

Proloquo2Go device to his mother or anyone else who will slow down and “listen” and learn about how to encourage L.S.’s use of Proloquo2Go. TR 2 at 318.²

44. Two-way communication with L.S. can be slow and his conversation partners must be both patient and familiar with Proloquo2Go. *See, e.g.*, TR 1 at 45-47. If the educator/adult is not educated in use of Proloquo2Go and/or is unwilling to use it, there is only one-way communication by L.S. who will feel ignored. TR 2 at 348. Ignoring L.S.’s communication, talking about him instead of to him, and failing to understand him, can lead to frustration for L.S., just as it would for anyone.

45. Parents have consistently emphasized that [REDACTED] staff need to be supported by a BCBA in attendance with L.S. and that [REDACTED] staff needs to “receive extensive training in the use of this augmentative communication device, his specific app, as well as augmentative communication and Angelman Syndrome.” TR 2 at 332-333, 344. At least some of District administration understand that a BCBA at school needs to be in place for L.S. to attend, but the District has not contracted with any BCBA to work with L.S.’s staff during the 2021-22 school year. TR 2 at 486-487.

46. According to Andrea Montoya, CEO, BCBA and an SLP for PRISM, PRISM did not have a lot of ongoing communication with [REDACTED] Schools after the contract was put in place; PRISM was never asked to provide any recommendations by the District and

² “[H]e tells me what his needs are. He tells he talks about feelings. He talks about things that are fun. He talks about his friends. He talks about places he’d like to go. He talks about things in books. He talks about anything. It’s a robust communication system [Proloquo2Go].” Testimony of [REDACTED], TR 2 at 318.

understood the contract was in place because PRISM could provide some face-to-face service at its clinic during the period District's campuses were closed. TR 4 at 925-926. PRISM has never been asked to visit school campuses to identify an appropriate physical classroom space for L.S. TR 4 at 938-939.

47. According to [REDACTED], in order for the [REDACTED] District to provide education to L.S., school staff would need to be supported by 1) a BCBA who knows L.S.; 2) expert(s) in Angelman Syndrome and 3) in work with persons who rely on augmentative communication devices. TR 2 at 346.

48. Of the staff who have worked with L.S. since some services were initiated in summer of 2020, [REDACTED] the SLP, who originally worked with L.S. in 2013-15 and who received training on Proloquo2Go at that time and also has worked with other students who use the same program. TR 3 at 803-809.

49. Currently, L.S. has a strong vocabulary and the SLP is working with him on building of sentences. TR 3 at 810-815. L.S. may have difficulty sometimes using his device to show all of his knowledge due to lack of physical coordination in selecting/showing the correct answer. TR 3 at 814-816, 855-856.

50. The SLP [REDACTED] uses visual schedules and cues with L.S. TR 3 at 820-821. She believes L.S. needs a classroom with small group instruction (3 or fewer students) with a visual schedule, visual supports, motor breaks. TR 3 at 822-824. She does not know if the high school CEL classroom is an appropriate placement for L.S. TR 3 at 824.

51. [REDACTED] states that small group instruction allows L.S. to use his communication device and have turn-taking with communication. TR 3 at 832-833. [REDACTED] also states that it is very important that a 1/1 Educational Assistant assigned to work with L.S. receive training on use of Proloquo2Go. TR 3 at 841-842. [REDACTED] further state that it is possible to teach nondisabled peers or peers who do not use AAC to use Proloquo2Go. TR 3 at 833-834.

52. According to [REDACTED], even for L.S., the use of the device requires a lot of effort and concentration and time. TR 3 at 839-841.

53. The AAC device can voice L.S.'s communications to his conversation partner(s). TR 3 at 850-854.

54. According to [REDACTED], it would be important that when L.S. attends school all staff who work with him have a device loaded with Proloquo2Go and that they receive training and support on how to use that to communicate with L.S. TR 3 at 828-831. "[O]ne of the things we learn with the AAC is to be patient and provide a waiting time, which can be hard. It can be hard for a variety of people to provide the waiting time." TR 3 at 831. Proper use has to be practiced and encouraged. Id. Failing to wait for a student to respond can make the student "feel dismissed. They can feel not heard, frustrated." TR 3 at 831.

55. The School District's current Director of Special education, formerly the Director of Compliance, [REDACTED], has never had a special education teacher license;

at one time, she had an "alternative license", but she allowed that to expire. TR 2 at 398-400.

56. According to [REDACTED], the District asked for but never received any progress notes from PRISM even though they contracted with PRISM to provide L.S. with BCBA services since October 2020. TR 2 at 404, 490-491, 518-520.

57. [REDACTED] School has about 1200 students. TR 2 at 417-418.

58. [REDACTED] Schools reported inaccurate information about which school L.S. was attending to NMPED through STARS about L.S.'s school attendance and services. See Petitioners' Exhibit 5 and TR 439-440.

59. According to Andrea Montoya, Applied Behavior Analysis (ABA) is a method of assisting in skill acquisition and the management of behavior (including but not limited to maladaptive behaviors). TR 4 at 885. Registered Behavior Technicians (RBT) provide the direct service of ABA overseen by the BCBA. TR 4 at 885-886. ABA is very systematic and dependent on school staff knowing the principles to prevent interventions which go against ABA and the student's program. TR 4 at 908.

60. Ms. Montoya further states that, for L.S., consistent implementation of services is a prerequisite to success. TR 4 at 915.

61. Ms. Montoya also states that any school staff who work with L.S. need "intensive training and ongoing support." TR 4 at 898. According to Ms. Montoya, the staff would need to be working alongside PRISM staff to be trained and learn strategies and that can happen concurrent with L.S. returning to school. TR 4 at 899-900. Before

school staff work alongside PRISM, they would need to receive pre-training and demonstrate competency in the prerequisite skills. TR 4 at 908-909

62. Ms. Montoya states that, in order to support L.S. behaviorally, there is a need to start with “a very specialized person initially” and then, from that person, incorporate generalization to other school staff. TR 4 at 910. She also states: “[I]t’s all about staff proficiently demonstrating implementation of a plan that is written.” TR 4 at 912.

63. Ms. Montoya states that she would support ancillary services being provided to L. S., initially staffed by PRISM RBT. TR 4 at 914.

64. PRISM Therapeutic Services (PRISM) began working with L.S. in October 2020, pursuant to a contract with ██████████ Schools that lasted for the school year, until sometime in May 2021. TR 4 at 884, 887, 929. At that time, no students attended ██████████ ██████████ campuses and PRISM was able to provide services to L.S. at its clinic, working on reduction of maladaptive behaviors and development of skills for replacement behaviors. TR 4 at 887-889.

65. Hours of service to be provided by PRISM to L.S. were determined by the School District, as well as when Parent could transport and stay with L.S. at PRISM. TR 4 at 889-890 (“Mom was present at every session.”) TR 4 at 893-896. The hours of service were clinically inadequate. TR 4 at 898. There was some discussion initially about having L.S. be on Zoom to a District class but that did not happen, and the District never instructed PRISM on that or inquired about it. TR 4 at 928-929.

66. PRISM contracts with [REDACTED] and cannot control what the School District does or does not do with reference to any of its recommendations. TR 4 at 930-931.

67. The BCBA from PRISM, Ms. Montoya, recommends an intensive ABA program of 40 hours per week for L.S. TR 4 at 896, 903. ABA services can be provided "in conjunction with academics or school-based." TR 4 at 897. Provision and type of ABA service would need to be responsive and appropriate to current level of need and changes that occur. TR 4 at 897. Ms. Montoya recommends that at the beginning, services in the school environment would be less than 40 hours with a goal of titrating up to 40 hours based on analysis of data. TR 4 at 903-904. Ms. Montoya states that there would need to be a designated School District employee on the campus who could coordinate with PRISM on a daily, ongoing basis for unexpected events as well as carrying out of plans. TR 4 at 932-933.

68. At time of due process hearing, PRISM did not have staff (RBT, BCABA, BCBA) in place to provide the school-based program to L.S. and would need to hire additional personnel. TR 4 at 905-906. Any school staff assigned to work with PRISM and receive intensive training in working with L.S. would need to first have "generalized knowledge of ABA and what [PRISM's] doing" and some "pre-training." TR 4 at 907-908. Then other staff in the area would also need to have general knowledge of ABA principles to ensure that they did not respond to L.S. out of ignorance and cause escalation. TR 4 at 923-924. The teacher, who will "guide the ship" needs to be trained. TR 4 at 924.

69. Ms. Montoya recommends that provision of ABA services needs to be at the school building environment on a campus with age peers to allow L.S. to generalize his transition. TR 4 at 900 (“I would recommend services being delivered in the environment where we see him staying long-term, due to generalization.”) - 901, 917-918.

70. Ms. Montoya states that “one of the most important things that we can do for [REDACTED] is build his trust.” TR 4 at 899. Ms. Montoya believes that Mother’s physical presence at the school site when L.S. is there working with the RBT/staff is needed until L.S. develops solid trust of providers/staff in the new environment, with Mother’s role to be faded out as a distinct primary goal. TR 4 at 919-920.

71. The DPH Settlement Agreement provided that a BCBA would begin assessing and working with L.S. and staff in November 2017 and continuing until January 1, 2019. Petitioners' Exhibit 6; TR 1 at 135.

72. After the first BCBA started there were a series of CBAs who worked with L.S. at home or private therapy settings. TR 1 at 135-142, TR 2 at 544-546 (the District was “extremely frustrated” according to [REDACTED], the former [REDACTED] Assistant Superintendent of Special Services, by the turnover in CBAs it contracted with); TR 2 at 584-597 (history of District contracting with various CBAs).

73. Although some of the CBAs wrote different Functional Behavior Assessments (FBA), it is not clear that they were ever shared with the IEP team. *See,*

e.g., [REDACTED] Exhibit 4³ (8/1/18 FBA by Taeja Kluge) and Petitioners' Exhibit 21 (11/5/18 IEP claims the FBA was attached); Petitioners' Exhibit. 28 (6/20/19 FBA Addendum).

74. The FBA which had been written prior to the [REDACTED] School visits in August 2018 explained that L.S. was more likely to exhibit challenging behavior "in environments with *rigid structure, high demands, and restricted access to preferred items and activities, unstructured time, and or highly stimulating environments.*" [REDACTED] Exhibit 4 at 8; TR 3 at 619. Insistence on compliance with adult directions was not an effective strategy as that could simply backfire by reinforcing the challenging behavior.

[REDACTED] Exhibit 4 at 24; TR 3 at 621.

75. The November 2018 IEP (Petitioners' Exhibit 21 at 8) has no information on present levels of academic achievement. This IEP was in effect until the [REDACTED] created a new IEP in May 2020 (end of 8th grade year). Petitioners' Exhibit 21, Petitioners' Exhibit 22; TR 1 at 167-168; Petitioners' Exhibit 8.

76. BCBAs contracted by [REDACTED] to work with L.S. provided no academics. TR 1 at 150, 176, 185, 221-223; TR 2 at 493.

77. L.S. received no instruction for reading, math, written language during 6th, 7th, 8th grades. TR 1 at 168, 214-215.

³ The School District's exhibits were also identified by numeral. To avoid confusion, any School District exhibit is called "[REDACTED] Exhibit [numeral]."

78. Although assigned to [REDACTED] School for the 2020-21 school year (9th grade), L.S. has never been to [REDACTED] School. TR 1 at 186; Petitioners' Exhibit 22.

79. Although the May 2020 IEP states that the IEP team would be reconvened when schools reopened, that never happened. TR 1 at 180-181; Petitioners' Exhibit 22 at 23. When school campuses were reopened in April 2021 (following public health orders limiting in-person school attendance and requiring remote or hybrid learning), according to [REDACTED], Parents were never contacted to initiate L.S.'s attendance at [REDACTED] School or to schedule an IEP. TR 1 at 180-181. The Director of Special Education does not know why the District did not schedule L.S.'s annual IEP before its due date on May 1, 2021. TR 2 at 430.

80. The last IEP which was done when L.S. was attending school on a campus is from March 2017. Petitioners' Exhibit 19; TR 1 at 204-205.

81. In early April 2017 (end of 5th grade), [REDACTED] Schools substituted 30 minutes "at the [REDACTED] Tennis Courts" for full day schooling on a school campus, as was provided to other students. Petitioners' Exhibit 15 at 1; TR 1 at 56, 105; TR 2 at 302, 577; TR 3 at 669-670. The Tennis Courts were a completely enclosed "caged" space outside. TR 1 at 105. This happened after school staff were unsuccessful in providing education to L.S. who they were confining in a closet/storage room and then suspending from school. TR 1 at 82-83, 103-105; TR 2 at 324-326.

82. [REDACTED] described staff's confinement of L.S. during 5th grade:

I walked into a classroom it wasn't even a classroom; it was more like a closet room where they kept storage stuff. And the window was covered with paper so you couldn't see in from the outside.

I walked in to see my son boxed in a corner with high shelves and one lower, with an aide and a teacher sitting at a table far away just looking at him. He was fully undressed, having a meltdown and trying to get attention. He had nothing back there. He was just back there all by himself.

TR 1 at 103-104.

83. At the time L.S. was going to Tennis Court school, he would not let his mother leave him there without her being present. TR 1 at 105. According to his mother, the District's use of confinement had a negative impact for L.S. at the time and since then.

TR 1 at 182-183.

84. Not attending school for 4+ years has created learned behavior for L.S. of not being in school. TR 4 at 934-935.

85. As result of DPH 1718-05 Settlement Agreement with [REDACTED] in fall 2017, L.S. was to attend [REDACTED] School for 6th grade. TR 1 at 106; Petitioners' Exhibit 6 at 2. However, the LEA never created an IEP which provided for his attendance at [REDACTED], and he never attended there as a student for 6th, 7th, or 8th grades. TR 1 at 106-107.

86. Parents' position has always been that L.S. is entitled to full day, every day, education like other students receive. TR 1 at 156; TR 1 at 218-219. They report that they have repeatedly provided staff with knowledge about how to engage him and to

prevent behavior escalations. TR 1 at 236-237; TR 2 at 472. They assert that they have been “trying and working for four years” to get education from [REDACTED] for L.S. TR 2 at 341-342.

87. Since the 2017-18 school year, the LEA never offered or provided full day education for L.S. Instead, the LEA wrote IEPs which describe a reduced schedule, and then did not implement those or provide any hours of education. Petitioners' Exhibit 21 at 37 (Nov. 2018 IEP states 2 day a week attendance from 8:30-11:30); TR 1 at 155-157.

88. After NMPED determined that [REDACTED] had denied Student a FAPE (based on investigation of Parents' 2019 state complaint), the Superintendent of [REDACTED] wrote to NMPED Director of Special Education to complain that the finding of denial of FAPE was not supported by evidence or that “the findings of the investigation are. . . beyond the scope of providing FAPE.” Petitioners' Exhibit 13.

89. The District never provided NMPED with written assurance that it would abide by the Corrective Action Plan ordered. TR 2 at 368-369.

90. During the 2020-21 school year when public health orders limited on-campus instruction, New Mexico school districts always had the power to bring small groups of students with disabilities back to the school campus. TR 3 at 657-660; Petitioners' Exhibit 29 at 1, 3. That never happened in [REDACTED] which apparently brought no students with disabilities to campuses for in-person learning until some students at the elementary level came back 2 days in February and then middle school/high school beginning for some students in March. TR 1 at 275-277.

91. L.S. was provided no instruction from a teacher during the 2020-21 school year, either during remote learning or when students returned to campus.

92. L.S.'s parents were given a Zoom link by Special Education Director [REDACTED] to a daily living class which they understood they could turn on but were given no more information including any information about the teacher or curriculum or why the instruction would meet L.S.'s needs. TR 1 at 186-187, 200-201; Petitioners' Exhibit 15 at 5.

93. [REDACTED] did not ever turn on the Zoom link because she had other things she needed to do and L.S. was at the clinic as well. TR 1 at 200-201.

94. The LEA has not conducted an FBA or written a Behavioral Intervention Plan (BIP) for L.S. since he was 10 years old. TR 1 at 202-203; Petitioners' Exhibit 18. At that time, the District's plan for L.S. relied on use of physical restraint which Parents oppose. TR 1 at 203-204. FBA documents found in the due process exhibits were created by BCBA's who saw L.S. in the home environment or in the private clinic; no FBA was ever done for L.S. by a BCBA assessing him in a school setting. TR 2 at 310-312.

95. L.S. loves physical activities (basketball, kicking balls, swinging, swimming), being outdoors, outings, and joining in on activities with others. TR 1 at 38-40, 49-50; Petitioners' Exhibits 1, 2 (videos of L.S.). He is very outgoing, friendly, and helpful. TR 1 at 38-40, 49-50, 97-98; Petitioners' Exhibits 1, 2. He has learned to safely drive the family's four-wheeler around the 2-acre yard. TR 1 at 52-53; Petitioners' Exhibit 1.

96. L.S. is generally very happy and frequently reaches out to touch and hug people, including those he does not know. TR 1 at 54, 97.

97. L.S. is "eminently teachable." TR 1 at 57. He loves the reading lessons his mother is presenting based on Don Johnson curriculum for teaching sounds and letters. TR 1 at 217-218 ("He's absolutely learning." "He loves it.")

98. Parents routinely put together information about L.S. for staff and the IEP team, to aid people in getting to know him and understand him. *See, e.g.,* Petitioners' Exhibit 2, Petitioners' Exhibit 3; TR 1 at 159-162.

99. On paper, L.S. was "assigned" to the Community Enhanced Learning (CEL) classroom at [REDACTED] for the 2020-21 school year; classes available were: Daily Living Skills, Functional Academics, Job Competency and Work Study. TR 1 at 251-252. The class had approximately 28 students who were in all grades, ninth through twelfth; seven of whom were taught in person and the rest were taught through Zoom. TR 1 at 252-253, 259. Educational Assistants assigned to the class included up to 7 adults, when all students were in attendance before COVID. TR 1 at 270-271. Not all of her students were verbal. TR 1 at 259.

100. The CEL teacher knows nothing about L.S.'s communication except that he is nonverbal and "uses a device." TR 1 at 259-261. She thinks L.S. could have communicated during Zoom classes through use of the "chat feature." TR 1 at 260-261.

101. The teacher did not contact Parents at the beginning of the school year when she contacted other parents, although she might have sent them an email, because

L.S. did not “show up” on her caseload until later in the school year. TR 1 at 254-256. She did attend a Zoom Addendum IEP meeting for him in August 2020, in which the only document created was PWN; no IEP was created at the meeting. TR 1 at 256-257, 277-278; Doc. 25. She said nothing during the meeting. *Id.* After the IEP meeting, she never had any contact with PRISM, the private BCBA provider. TR 1 at 258-259. She has never talked with Parents about L.S. or her class. TR 1 at 277.

102. The CEL teacher has never seen L.S.’s current, May 1, 2020, IEP. Petitioners' Exhibit 22 at TR 1 at 269-270, 278. She does not believe there are any records available on L.S. in the District’s electronic files. TR 1 at 285-286.

103. When New Mexico schools returned to in-person learning in April 2021, about 7 of the CEL classroom students attended. TR 1 at 266. The teacher did not provide any notice to Parents that L.S. could attend school at [REDACTED]. TR 1 at 266-267.

104. The [REDACTED] special education teacher testified that “a full-time BCBA, that’s like a dream of every teacher to have a full-time BCBA in the classroom.” TR 1 at 274.

105. Staff at the high school are ready to support L.S. in his academics, but not his behavior, according to the current District Director of Special Education. TR 2 at 500-501.

106. L.S. did not have trouble understanding directions during occupational/physical therapy sessions. TR 3 at 758-759. However, those therapists had

limited understanding of how L.S. used his device for expression and did not know how to engage back and forth with him. TR 3 at 759-762.

107. Proloquo2Go is loaded onto various portable devices which L.S. can then use to communicate. He operates the program by opening various screens, categorized by purpose or content, which allow him to “find” the words/icons to express his thoughts/wants/needs/ questions/statement/comments in phrases or complete sentences. TR 1 at 46-49; 76-77; 84-85. The device is L.S.’s “voice”. TR 2 at 328.

108. Reliance on AAC loaded with Proloquo2Go for communication is not easy; it takes work. TR 2 at 337 (“I would challenge anyone to have their device and not talk all day and use it to talk and communicate with everybody around them.”). When L.S. visited ██████████ in 2018, it was chaotic and so he could not use his device to respond or have reciprocal conversation with the many school staff present. TR 2 at 415.

109. Parents purchased Proloquo2Go for L.S. TR 2 at 329-330. They also purchased the Proloquo2Go app to load onto one elementary school teacher’s iPad when the District failed to provide that for the teacher. TR 2 at 330.

110. According to ██████████, in order to support L.S.’s communication needs, “everybody who’s talking and interacting with [L.S.] should have their own device. . . . that way, they can model”; there should be multiple devices in L.S.’s educational environment so that each adult can model and elicit direct communication with L.S. TR 2 at 327-328. In practice, the only ██████████ employee who has ever had a device loaded with

Proloquo2Go to allow for 2-way direct communication with L.S. has been the SLP. TR 2 at 329.

111. Although [REDACTED] contracted with various BCBA providers to work with L.S. since 2018, the District never provided the BCBA providers with devices loaded with Proloquo2Go which would have supported L.S.'s functional expressive communication. TR 2 at 328-329.

112. While the November 2018 IEP (Doc. 21) records that Student used Proloquo2Go for communication, according to [REDACTED], no staff at [REDACTED] or any District school staff, or related services staff (other than the SLP) was familiar with or had been trained on use of Proloquo2Go through the time of due process hearing (June 2021). TR 1 at 146-148; TR 2 at 335-337.

113. According to [REDACTED], no one worked on the November 5, 2018, IEP communication goal, ever. TR 1 at 150-151; Petitioners' Exhibit 21.

114. According to [REDACTED], L.S. received no speech language therapy services during 6th, 7th, or 8th grades; SLP services did not begin until therapy delivered through Zoom beginning in summer 2020. TR 2 at 318-319; Petitioners' Exhibit

115. The SLP originally assigned to work with L.S. for the 2020-21 school year had never worked with a student who uses Proloquo2Go, prior to working with L.S., and has no formal training in Proloquo2Go. TR 3 at 681, 684.

116. The supervising Physical Therapist understood from the SLP that L.S. "liked using his speech program on the iPad" but apparently received no training on

Proloquo2Go; she observed that L.S. was pretty sociable and liked to greet staff. TR 3 at 790-792.

117. It was "tricky" to use Proloquo2Go in remote learning because when the staff showed L.S. their device, he could not also see them and what they were directing him to do. TR 3 at 793.

118. After the May 2020 IEP when [REDACTED] initiated limited services over Zoom in the summer of 2020 and intermittently during the 2020-21 school year, the SLP was co-treating with the social worker. TR 1 at 177, 180, 248; TR 3 at 690-692. The social worker has never worked with a student who communicated through an assistive device; he has received no training on Proloquo2Go. TR 3 at 701, 708. He would plan to read or show L.S. books or social stories and work on simple greetings; he is uncertain how much L.S. would comprehend. TR 3 at 702. He knows that L.S. can already use his device to greet people but thinks maybe that would change when on a campus. TR 3 at 703-704.

119. The SLP originally assigned by [REDACTED] school to work with L.S. during the 2020-21 school year had no knowledge about AS and had never worked with a student who communicated through Proloquo2Go before L.S. TR 3 at 680-681.

120. Elizabeth Cassell from NMPED stated that she assumes that [REDACTED] knows about Angelman Syndrome since the District was responsible for providing education to L.S. a student with AS. TR 2 at 394-395. NMPED has no resources for families or school districts on Angelman Syndrome. TR 3 at 654-655.

121. Although L.S.'s father, [REDACTED], is a board-certified internal medicine physician, he had no familiarity with AS when L.S. was born/diagnosed. TR 1 at 36, 40-41. Although [REDACTED], L.S.'s mother, was trained as a teacher, she had no knowledge about AS when L.S. was born/diagnosed. TR 1 at 90-91.

122. Parents have had to learn about AS and L.S.'s needs on their own and have devoted significant resources and dedication to understanding AS, L.S.'s needs and providing for his needs at home and in his community. TR 1 at 41-44; 92-94.

123. Parents shared information and resources about mosaic Angelman Syndrome with the School District and L.S.'s school/teachers/staff. TR 1 at 44-45; 91-92; TR 2 at 342.

124. Part of the information shared by the family was providing connection to Erin Sheldon, an educator in Canada knowledgeable about AS, who came twice to [REDACTED] [REDACTED] to provide training on AS and recommendations for L.S. TR 1 at 77-78, 242-243; Petitioners' Exhibit 31; TR 2 at 413-414, 513, 579-580; Petitioners' Exhibit 31. Parents state that they never saw that the School District or school staff embraced or acted on the information they provided or made available regarding AS. TR 1 at 45, 57; TR 2 at 342 ("What have they [the District] learned about Angelman Syndrome and how to support someone with Angelman syndrome in an education?")

125. According to [REDACTED], [REDACTED] received information about AS from Erin Sheldon whom it contracted with most recently in summer 2017, but the School District never incorporated or relied on the information about AS and L.S.'s needs that she

provided to the District over several visits/reports. TR 1 at 199, 210-214; Petitioners' Exhibit 32; Petitioners' Exhibit 33.

126. According to [REDACTED], Parents have never been provided any information from School District concerning AS or the education of students with AS. TR 1 at 93-94.

127. L.S. is himself wherever he is; his symptoms of AS will not go away or disappear or be "fixed." L.S. responds to the environment where he is based on how people understand him, treat him, and support him. TR 1 at 95. He is generally very positive and excited to be with people who treat him with respect and allow for 2-way communication. TR 1 at 96-97.

128. Parent believes that staff need an RBT level of training because they have been unable to work successfully with L.S. TR 1 at 239-242.

129. At home and in the community, Parents anticipate and support L.S.'s needs, including such things as unwillingness to transition from one setting to another. TR 2 at 319-322. Parents believe that school staff, who have not ever worked with L.S. or seen him on a school campus for 4+ school years, will need a behavior support plan to provide them guidance on what to look for and how to support him in a school environment. TR 2 at 319-321.

130. The social worker assigned to work with L.S. during the 2020-21 school year believes that when L.S. attends school in person, social work service would focus on "simple greetings" and "being able to kind of just stay in a chair for a certain amount of

time” and teaching L.S. self-advocacy skills. TR 3 at 696-697. The social worker believes possible new IEP goals for L.S. would be staying in his seat and following a teacher’s visual prompts. TR 3 at 716-722. The social worker lacks knowledge about Angelman Syndrome. TR 3 at 720-721. Since he has 30-plus students, he has limited time to attend any trainings related to L.S. TR 3 at 732-733.

131. In order to support their son, who requires 24/7 care, [REDACTED] believes that there needs to be direct support and care for L.S. as well as extensive ongoing research and outreach, to obtain information about AS and provision of education to students with AS. TR 1 at 94.

132. Beginning in summer 2020, Parents began working with an online group called AAC Voices, and through that connection also began to have L.S. work in a reading curriculum called Readtopia which was taught by both his mother and supported through online AAC Voices. TR 1 at 172, 214-218, 228-232; Petitioners' Exhibit 4 (videos with Parent in April 2021 show them working on reading “homework” from Readtopia curriculum); TR 2 at 299-301 (Readtopia classes ended in May); TR 2 at 333-335.

133. While [REDACTED] agreed to reimburse Parents and pay for the Readtopia and AAC Voices online sessions, that agreement was only for up to 184 hours and was limited to [REDACTED] seeking to “provide” the 184 hours of compensatory education ordered by NMPED as its CAP. TR 2 at 349-350, 443-445; Petitioners' Exhibit 15 at 7.

134. When [REDACTED] initiated some Zoom instruction and therapies for several weeks in summer 2020, L.S.’s ability to attend to the screen and to participate depended

entirely on his Parent's minute-by-minute attention and direction. TR 1 at 177-179, 227-228. The online instruction from a [REDACTED] teacher during summer 2020 was required Parent's full-time involvement. TR 2 at 350-351.

135. According to [REDACTED], staff assigned to work with L.S. over Zoom for limited times in summer 2020 could not communicate successfully with L.S., with exception of the SLP. TR 1 at 179.

136. After the May 2020 IEP, Parents were told that they had to "enroll" L.S. TR 1 at 187. They experienced multiple difficulties getting L.S. enrolled in 2020 and never understood until that time that the District had apparently "disenrolled" L.S. at some point in the past which they claim was without notice to them. TR 1 at 187-188, 206-207; Petitioners' Exhibit 24; TR 2 at 330-331.

137. The Zoom link provided by email to Parents in fall 2020 for a classroom at the high school was not used by Parent because she could not take the time to sit there with L.S. for that and also because he was at the BCBA clinic during that time. TR 1 at 200-201, 224-227.

138. IEPs for L.S. lack present levels of performance information. *See, e.g.*, Petitioners' Exhibit 22 at 11; TR 3 at 752-753; Petitioners' Exhibit 21.

139. The November 2018 IEP indicated that L.S. received 5 hours per week of special education which was untrue at the time the IEP was written and during all time that the IEP was in effect. TR 1 at 151-152; Petitioners' Exhibit 21 at p. 27.

140. The November 2018 IEP inaccurately recorded that L.S. received “100%” of his education in a special education setting which was inaccurate and untrue at the time the IEP was written and during all time that the IEP was in effect. Petitioners' Exhibit 21 at 27; TR 1 at 152.

141. The November 2018 IEP inaccurately recorded that L.S. received his special education at his neighborhood school. Petitioners' Exhibit 21 at 28; TR 1 at 152-153.

142. The May 2020 IEP cut and pasted the communication goal from the November 2018 IEP, which had never been implemented and after L.S. had been provided no speech language therapy service during 2 full school years (2018-19; 2019-20). TR 1 at 173-174; Petitioners' Exhibit 22 at 15, *and compare*, Petitioners' Exhibit 21 at 12.

143. The May 2020 IEP included 2 goals about accessing the school environment which have never been worked on; Student has never been to his “school,” the campus of ██████████ School. TR 1 at 174-175; Petitioners' Exhibit 22 at 17-18.

144. The November 2018 IEP recorded that the District psychologist, the contracted BCBA, and parents would create a “support plan” for L.S. to be reviewed by the IEP team. TR 1 at 153; Petitioners' Exhibit 21 at 36. The LEA never moved forward to have anyone create a support plan and there was never a support plan created or considered by the IEP team. TR 1 at 153-154.

145. ██████████ never provided explanation or PWN about why it was not having L.S. attend school or provide him with education; when IEPs were written, the documents falsely stated that L.S. was receiving education and, in some cases, tried to create an

impression that he was receiving a full school week ("100%") of special education when he was not in school and was not receiving any hours of education. *See, e.g.*, Doc. 21 (11/2018 IEP) and TR 1 at 156-157.

146. The May 2020 IEP states that instructional strategies are "ongoing," when L.S. has not been in school and was not receiving any instruction from [REDACTED] teachers. TR 1 at 175-176; Petitioners' Exhibit 22 at 19.

147. After [REDACTED] had received the Corrective Action Plan (CAP) from NMPED, it provided minimal instruction (about 3 weeks of several days a week for 30 minutes) over Zoom from a teacher for several weeks in summer 2020 along with some related service time, by therapists "co-treating." TR 1 at 176-178. L.S. was unable to participate independently and his access depending on his mother being available to support him at all times. TR 1 at 176-179.

148. The May 2020 IEP "accepts" Parents' proposal that L.S. begin school with a full day schedule with a full time BCBA alongside staff until such time as parents and the LEA agreed that staff were competent to deliver education to L.S., but then also states that the proposal was up for discussion at a later time. TR 1 at 185-186; Petitioners' Exhibit 22 at 33; TR 2 at 446-449.

149. [REDACTED] School recorded Student's nonattendance on Zoom classes during the 2020-21 school year as "special circumstances." TR 1 at 264-265.

150. L.S. loves people and enjoys being with people. TR 1 at 38. Parents have always wanted him to be educated with peers including typical peers as much as possible. TR 1 at 157, 171.

151. During elementary school in [REDACTED] (preschool through 4th grade), L.S. was a full member of the school community who was well-liked by and enjoyed his peers. TR 1 at 70, 99-102, 232 (“He did it (full school day attendance) all the way from being three years old to 10.”)

152. Parents believe that L.S. should be in school full time with peers; he craves the interaction with both adults and other students. TR 1 at 69, 94.

153. Not having any school to attend for 4.5 years has been very isolating for L.S. TR 1 at 218-219.

154. In December 2019, in response to Parents’ state level IDEA complaint, [REDACTED] claimed that its goal was “to transition [L.S.] back into a school setting. . . .” but the District which never took any steps before or after to transition L.S. to a school setting. Petitioners' Exhibit 11 at 7; TR 1 at 199-200.

155. At the May 2020 IEP, Parents proposed that L.S. attend school on a full-day schedule, 5 days per week with a full time BCBA to assist staff learn to meet L.S.’s needs. TR 1 at 72, 170-171; Petitioners' Exhibit 22 at 5, 33. This request is consistent with their longstanding belief that he should be able to go to school and supported by staff who are knowledgeable about AS and Student’s needs; and that staff need to learn from a BCBA strategies to support L.S., including any challenging behaviors. TR 1 at 94-95.

156. The District reported to NMPED, in STARS data, that L.S. was an 8th grade student at [REDACTED] School for the 2019-20 school year, when L.S. has never been assigned to or attended that school. Petitioners' Exhibit 5 at 1; TR 2 at 521-523. The District reported to NMPED, in STARS data, that L.S. was not a student who received special education in the 2019-20 and 2017-18 school years. Petitioners' Exhibit 5 at 1-2; TR 3 at 634-635. The District reported to NMPED in STARS data, that L.S. was in a general education setting 40-79% of the school day during 2020-21 school year. Petitioners' Exhibit 5 at 17, 20; TR 3 at 635-636.

157. After L.S.'s two visits to [REDACTED] in August 2018, the District cancelled the scheduled IEP to address L.S.'s placement and education at [REDACTED]. TR 1 at 126; Petitioners' Exhibit 15 at 2.

158. No IEP was written or implemented which provided for a BCBA to work with L.S. and his staff at school so that staff could learn how to support L.S. TR 1 at 134-135.

159. The FBA written by BCBA in June 2019 was never relied on or used by the School District. TR 1 at 209-210; Petitioners' Exhibit 28.

160. The LEA does not employ BCBA's on staff. TR 2 at 454. To implement the DPH settlement agreement with Parents (Petitioners' Exhibit 6), the LEA contracted with several agencies who supplied a BCBA, but those agencies had multiple staffing changes which resulted in 1) lack of continuity; 2) gaps in any BCBA service; 3) never accomplishing the L.S.'s education at school with staff and L.S. supported by a BCBA who

had educated staff about ABA principles and supports for L.S. in any challenging behaviors. TR 1 at 135-141, 144.

161. After the November 2018 facilitated IEP (Petitioners' Exhibit 21), the LEA did not conduct an IEP for L.S. until May 2020. (Petitioners' Exhibit 22). Neither of the IEPs provided for delivery of specialized instruction by the LEA. *Id.*

162. Although the November 2018 IEP (Petitioners' Exhibit 21) states that L.S. would receive speech language therapy, physical therapy, occupational therapy and social work, the LEA did not provide any of those related services during the 2018-19 school year and the 2019-20 school year. Petitioners' Exhibit 21 at 1; TR 1 at 143-145.

163. Although the November 2018 IEP provides for development of a support plan for L.S., that has never happened. Petitioners' Exhibit 21 at 36; TR 2 at 421.

164. The actions outlined in the August 2020 Addendum to the May 2020 IEP have not been carried out. TR 2 at 493-496; Petitioners' Exhibit 25.

165. Although the District had some system of automatic "survey" emails sent to families regarding return to school campuses in April 2021, the District does not know whether those emails were sent to the [REDACTED]; the school site [REDACTED] had responsibility for following up if responses were not received. TR 3 at 615.

166. In 2018, the [REDACTED] District disenrolled L.S. at some point and reported to the State that he was not attending school and also that he had been dropped due to 10 consecutive days of absence and his whereabouts was unknown. Petitioners' Exhibit 5 at 54; TR 3 at 640-641.

167. The LEA's most recent evaluation of L.S. is from September 2014. TR 1 at 169-170; Petitioners' Exhibit 22 at 4; Petitioners' Exhibit 16. The LEA has conducted no evaluations of L.S. for nearly 7 years (as of September 2021). TR 1 at 170. The May 2020 IEP documented that the LEA had no information about L.S.'s present levels of academic achievement, performance, physical or occupational therapy needs or communication skills. TR 1 at 172-173; Petitioners' Exhibit 22 at 10-11.

168. Reevaluations need to be completed every 3 years. TR 2 at 568.

169. The May 2020 IEP (Petitioners' Exhibit 22) states that the District needed the 3-year evaluation to be able to ascertain L.S.'s present levels of performance. Petitioners' Exhibit 22 at 29-30; TR 1 at 183-184. No one at [REDACTED] ever initiated an evaluation for L.S. since the May 2020 IEP indicated reevaluation was needed to determine L.S.'s present levels. TR 1 at 183-184.

170. L.S. did have an independent Assistive Technology evaluation, pursuant to the settlement agreement in DPH 1718-05, in 2018. Petitioners' Exhibit 20; TR 1 at 205; TR 2 at 304-305.

171. There was never a Functional Behavior Assessment (FBA), or a behavior support plan created to support L.S. at school since he was never allowed to attend school and no assessment or plan could be created to support him in an environment that he was not a part of. TR 2 at 310-313.

172. Student's parents, per April 4, 2017 IEP Addendum, rejected services being provided in their home. The District subsequently offered "Homebound Services" for

Student "Monday through Thursday at the [REDACTED] Tennis Courts." *See* Petitioner's Exhibit 15.

173. Student's May 1, 2020, IEP provided for 360 minutes of Speech Language Pathology ("SLP"), Physical Therapy ("PT"), Occupational Therapy ("OT") and Social Work in a special education setting per semester. Student was also provided with an iPad with Proloquo2Go app, visual supports and a visual schedule as needed. *See* Petitioner's Exhibit 22.

174. Student's May 1, 2020, Prior Written Notice ("PWN") indicated that District proposed to start supports for Student with a BCBA through a local agency for 300 minutes per week once the mandated social distancing ended. *See* Petitioner's Exhibit 23, Page 4

175. Student's May 1, 2020, PWN also indicated that District proposed to accept the schedule of services and parent requested that they notify the District "if they wished to begin services;" District agreed to that request. *See* Petitioner's Exhibit 23, Page 5

176. At various times throughout Student's education, Student's teachers and other school employees observed Student exhibiting behaviors that disrupted the classroom environment, such as, on one occasion disrobing, defecating, and throwing feces over a file cabinet. TF 1 at 82:2-82:18; Vol. 1, TR 1 at 235:26-236:1; TR 1 at 236:1; TR 4 at 891:13-891:15.

177. The District contracted with Erin Sheldon, M. Ed. who had extensive experience with students diagnosed with Angelman Syndrome to provide training to

teachers and staff on Angelman Syndrome. Ms. Sheldon provided a report of recommendations for Student. *See* Petitioner's Exhibit 11, Page 6; Petitioner's Exhibit 31.

178. During the 2020-2021 school year, Student's IEP provided for 360 minutes of Social Work per semester for a total of 720 minutes for the year. Student was provided 1, 015 minutes total by his Social Worker, who co-treated Student in conjunction with the Speech Language Pathologist. *See* Petitioner's Exhibit 22; Respondent's Exhibit 13; TR 3 at 690:21 – 692:15.

179. The District contracted with an outside service provider, PRISM, to provide Student with services. TR 2 at 375:7-375:12.

180. Student missed a significant number of days of school and was automatically dis-enrolled, per school policy, after having missed ten (10) or more consecutive days. Student was dis-enrolled on October 10, 2017. TR 3 at 641:19-642:9; TR 2 at 583:16-583:20.

181. Student only attended approximately half of his scheduled Physical Therapy sessions. TR 3 at 748:1-748:5.

182. Despite being provided the virtual class link and despite Student being unable to log into class on his own, Parent did not log him in stating that she had other things to do and that it was the Student's responsibility or his one-on-one aid or his teacher to sign him on to a remote class he was attending at home. TR 1 at 200:25-201:4; TR 1 at 223:1-227:1.

183. The Hearing Officer held prior to the due process hearing that he does not have jurisdiction over the IDEA claims asserted against NMPED.

184. On May 25, 2021, NMPED was dismissed from the case due to the lack of jurisdiction over the claims against the NMPED. *See Order Granting NMPED's Motion to Dismiss for Lack of Subject Matter Jurisdiction* dated May 25, 2021.

185. On June 4, 2021, NMPED was "reinstated" to the case solely due to the NMPED suspension of the District's School Board. *See Order Granting Petitioners' Motion for Reconsideration and Reinstatement of NMPED as a Respondent* dated June 4, 2021.

186. On June 16, 2021, an order was issued clarifying that (1) the claims in the Complaint against NMPED remain dismissed for lack of jurisdiction; (2) the only claims to be litigated in the case are those asserted against the District, and (3) NMPED has been added as a party only because the NMPED presently has legal authority for the District due to the suspension of the District's School Board and to ensure provision of a remedy, if any, for the District's denial of FAPE to the Student. *See Order Granting NMPED's Motion for Clarification and Amendment of June 4, 2021 Order Granting Motion for Reconsideration and Reinstatement of NMPED as a Respondent* dated June 16, 2021.

187. The Board of Education of [REDACTED] Schools (BOE) was suspended by the State Educational Agency (SEA), New Mexico Public Education Department (NMPED), effective May 26, 2021.

188. In July 2021, NMPED appointed members to a [REDACTED] Public Schools Governing Council to fulfill the role of the Board pending the suspension. However, the

NMPED Secretary retained legal authority over the Governing Council during the Board's suspension.

189. Since the effective date of the BOE suspension, the Superintendent of [REDACTED]

[REDACTED] Schools reports directly to the NMPED Secretary of Education.

190. The District's School Board remains under suspension. A hearing on the Board's suspension took place on July 28, 2021 and was scheduled to be completed on August 24, 2021.

191. On August 24, 2021, NMPED Secretary Designate Kurt Steinhaus made permanent the May 25, 2021, suspension of the [REDACTED] school board. See "August 31, 2021 Release: PED Secretary Affirms [REDACTED] Board Suspension."⁴

192. The District has continued to be represented in this case by its counsel, Jacquelyn Archuleta-Staehlin and Maryann Roman.

193. NMPED has not taken a position on the merits of this case, allowing the due process proceedings to proceed between the Petitioners and District as intended by the IDEA. However, NMPED objects to issuance of an order that requires NMPED to provide direct services to Student, as opposed to monitoring the implementation of the due process hearing decision.

⁴ The Press Release is found in the binder of email correspondence for the case, attached to an August 31, 2021, email message to the DPHO and all counsel.

194. On January 31, 2020, the NMPED issued a Complaint Resolution Report in response to an IDEA state complaint against the District submitted by Petitioners. Petitioner's Exhibit 12.

195. NMPED's investigation resulted in a conclusion that the District has failed to develop and implement an IEP to meet Student's needs and that Student has been denied a free appropriate public education (FAPE). *Id.* at p. 6.

196. NMPED ordered the District to take corrective action and monitored the implementation of the corrective action. This was over the course of the school closures due to the COVID-19 pandemic.

197. As of the time of the hearing in this case, most of the corrective action had been completed, including the provision of compensatory education services to Student. *See Testimony of Dr. Elizabeth Cassel.*

198. There is no evidence that the District will refuse to or fail to comply with any relief ordered by the Hearing Officer.

199. There is no evidence that NMPED will not monitor the implementation of the relief ordered, if any, or that it needs to be ordered to do so.

ANALYSIS AND LEGAL CONCLUSIONS

This case presents two very different views of the experience of this Student in the ████████ Schools system. Both parties opened their written Closing Arguments with fairly detailed overviews of the case. These arguments of the parties (which are followed by

more specific arguments about the issues, which are addressed below after the DPHO's discussion of the statute of limitations) are summarized as follows:

Petitioners' Overview of the Case in their Closing Argument

The Petitioners argue repeatedly in their Closing Argument that the Student has been excluded inappropriately and unlawfully from public education on a school campus for the last four school years in violation of IDEA. Petitioners' Closing Argument at 1-7. They argue that the evidence is undisputed that [REDACTED] accepted that the Student and the staff who would work with him needed the consistent and ongoing services of a BCBA, and that [REDACTED] was frustrated that it could not secure private BCBA providers who could provide uninterrupted services. They further argue that the District never engaged an AS expert for the four school years that it did not provide the Student with an education on campus. They also assert that, other than the SLP, no staff who worked remotely with the Student during the 2020-2021 school year were knowledgeable about how to use Proloquo2Go with the Student.

Petitioners argue that enforcement of IDEA is not the responsibility of the parents of students with disabilities. They argue that this is their third attempt to use the formal dispute resolution process to secure FAPE for their son. They argue their son has been in the [REDACTED] Schools since preschool and has always been a student with Angelman Syndrome. Consequently, they argue, there is no excuse in 2021 for not understanding how to meet his needs and provide him with FAPE.

Petitioners assert that no provision in IDEA allows the school district to refuse to create and provide FAPE for any child who is eligible for special education and leave the child to sit at home. They argue that [REDACTED] has skirted its obligations under IDEA to the Student, and now defends its “rights” to exclude him. Petitioners assert that the testimony of school district witnesses suggests a belief that the district has a right to be ignorant and rely on staff who lack understanding of AF and a lack of the skills necessary to support the Student. Specifically, they argue that the school district emphasizes that licensure standards for staff do not require any specialization beyond a general special education qualification and note that the state had failed to create licensure for BCBA’s.

Furthermore, Petitioners argue that [REDACTED] is asserting, without basis, that IDEA does not give the Student the right to attend full day public school and receive FAPE and that attendance is a privilege that the Student must earn “by shedding his disability at the schoolhouse door. Petitioners’ Closing Argument at 5.

Petitioners assert that the school district takes the position that writing deficient and untimely IEPs that are untimely and would not work is sufficient, ignoring the resulting failure to provide FAPE. They argue that the failure to provide consistent BCBA direction and support, as well as ignorance about AS and the Student’s use of AAC has resulted in him not being in school for over four years, and that is the measure that must be considered in determining whether FAPE has been provided.

They assert that that have attempted over and over to educate [REDACTED] about AS, and connected the School District to Erin Sheldon, an expert in AS who meet twice with staff

and provided a report with her recommendations. They note that the Student will always have AS, with its accompanying features, and the District must reform itself to meet his needs. They argue that IDEA does not require the Student to meet the District's needs; it requires the District to meet the Student's needs, citing 20 U.S.C. § 14401(1). They argue that they had no knowledge of AS when their son was diagnosed, but they became knowledgeable about it and learned to help their son learn how to communicate with AAC and encouragement. They argue that the School District cannot abandon him because AS is an unknown or complex disability, or because delivery of his education requires significant knowledge, training, and support.

The District's Overview of the Case in its Closing Argument

The District argues in its Closing Argument that the unrefuted and unchallenged evidence presented at hearing clearly demonstrates that the program of services developed, delivered, and proposed for the Student were "reasonably calculated to confer educational benefit" and the District has complied with all applicable regulations for the provision of educational services under federal and state IDEA law. █████ Closing Argument at 1-2. █████ argues that the evidence at hearing established the differences of opinion with regard to the appropriate scope and type of services necessary by those who work with the Student and the family who presented no evidence of a different approach. *Id.* at 2. The █████ argues that there is no evidence of wrongdoing on the part of the District and no evidence that FAPE was not provided. It argues that the Student has

received educational benefit from his educational program despite parental interference and student indifference. *Id.*

The District also argues that Petitioners have failed to meet their burden of proof, including their burden of persuasion, in this case. *Id.* at 2-3.

Statute of Limitations

The claims raised by the Petitioners include claims dating back to October 2017. Petitioners filed their Request for Due Process Hearing on April 26, 2021. They acknowledge that the statute of limitations for IDEA is two years, which encompasses the period dating back to April 26, 2019. 20 U.S.C. § 1415(f)(3)(C). Petitioners argue in their Closing Argument that, at that time, the Student had been out of school for the prior two school years beginning in the fall of 2017 and then continued to be out of school for the following two school years through the spring of 2021 (with limited related services and ABA services.) Petitioners' Closing Argument at 7-9.

The parents assert that the District's failure to comply with the DPH 1718-05 settlement agreement results in an exception to the imposition of the two-year statute of limitations. *Id.* at 8. They cite 20 U.S.C. § 1415(f)(3)(D)(i) which provides an exception to the limitations period "due to specific misrepresentations by the local education agency that it had resolved the problem forming the basis of the complaint." *Id.*

Petitioners assert that the October 2017 settlement agreement provided that the District would contract with a BCBA "as soon as possible" who would meet with the Parents and the Student, meeting with the District to obtain staff input about to how to best assist

the Student to integrate him into school on a full time basis, and create a written report with recommendations for reintegration of the Student into school and schedule services for provision of support to the Student and staff training. Petitioners argue that there is no evidence that the District ever contracted with a BCBA to perform any of the foregoing tasks, or that it ever told the various BCBA's about these expectations.

Petitioners further argue that the settlement agreement required [REDACTED] to conduct an IEP meeting within one week of the issuance of the BCBA's recommendations to create a reintegration plan with an IEP date of no later than January 1, 2018, and that did not occur until November 2018. Further, the IEP did not contain a reintegration plan for full time attending and only provided for 5 hours which would not begin until the entire team reviewed a support plan for the Student, which never occurred.

Petitioners argue that they were led to believe that the District was moving forward, acting in good faith, and intended to comply with the requirements to get L.S. back to school. However, they argue that it became apparent in 2019 that the District was stalling and not acting to return the Student to school. Consequently, they filed their state complaint with NMPED, asking the NMPED to order action to get L.S. to school. When that filed, COVID hit and school campuses shut down. Petitioners argue that this resulted in new excuses by the District for failing to provide education.

The District argues in its Closing Argument that the applicable statute of limitations bars any claims for any time period before April 25, 2019. Closing Argument at 4. Thus, it argues that the school years at issue in this proceeding begin with May of the 2018-

2019 school year, the 2019-2020 school year, and the 2020-2021 school year through April 26, 2021. The District also argues that these time periods must be considered in light of distant learning environments during spring 2020, from August 2020 through February 2021, and a hybrid model from February through May 2021. The District does not address the issue of whether the exception to the statute of limitations found in 20 U.S.C. § 1415(f)(3)(D)(i) applies. The District also did not propose any Conclusions of Law related to the effect of the statute of limitations or exceptions to it.

The DPHO finds that the allegations Petitioners make in support of their argument that the exception to the statute of limitations found in 20 U.S.C. § 1415(f)(3)(D)(i) serve to make the exception applicable. Consequently, the DPHO will consider the claims and allegations of the Petitioners dating back to October 2017.

The Effect of COVID on this Case

Petitioners acknowledge that school districts across New Mexico were closed to students for in-person learning in March 2020 as a consequence of the COVID pandemic. They also assert, however, that by August 2020, New Mexican schools were encouraged to prioritize the learning needs of students with disabilities and provide small group instruction for them on school campuses. Petitioners' counsel argued in her opening statement that federal and state guidance was that students with disabilities were most at risk and many students with disabilities should be attending in small groups, but [REDACTED] never offered that service. Petitioners do not specify the "guidance" they rely upon for this argument.

Petitioners argue that [REDACTED] opted to offer no in-person instruction for students with disabilities until some students were allowed to participate in small group instruction in February 2021, and “all students” returned to in-person learning in April 2021. They argue that during this time period, [REDACTED] failed to reach out to L.S.’s parents to convene an IEP team and write an IEP, which was due on May 1, 2021, for him at the high school.

The District acknowledges the closure of schools due to the COVID pandemic, and states it provides one of the reasons that L.S. has not been in school, but it does not address specifically the Petitioners’ argument that L.S. could have participated in small group instruction beginning in April 2021 (other than its argument that full-time in-person schooling is not appropriate for this student.)

The evidence related to this issue has not been well-developed. There is evidence, for example, the testimony of [REDACTED], SLP, that L.S. should be in a classroom with small group instruction of no more than three students when he returns to school. FOF 54. However, any return to school for L.S. must be carefully considered and planned, and the decision to do so must be made in the context of an independent educational evaluation as discussed below in the Relief section of this Memorandum Decision.

Denial of FAPE

Petitioners argue that L.S. has never been provided education by any teacher or therapist on a school campus with other students for more than four years. They argue that the minimal related service minutes by Zoom, dependent on parent participation, for summer 2020 and the 2020-2021 school year; the BCBA clinic time divorced from any

school goals, has not been provided in his LRE and has not provided meaningful education, allowed him to meet challenging objectives, or given him any access to his peers, in violation of decisions in *Andrew F. v. Douglas Co. Sch. Dist.*, ___ U.S. ___ 137 S.Ct. 988, 1000 (2017), and *L.B. v. Nebo School Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). Petitioners argue that it is impossible to conclude that FAPE has been provided for the last 4+ years under the facts of this case. Petitioners' Closing Argument at 12.

The District argues that any claim of failure to provide FAPE must be weighed against the foregoing efforts by the District, the Parents' delays in response, and the Parents' demand for full school day attendance despite a different recommendation from the outside provider. The District argues that there was "no evidence tendered either documentary or testimonial that supported the claim that the student should attend school fulltime from the moment he began to receive services." [REDACTED] Written Closing Argument at 5.

The District argues that there is a two-part test for the determination of the issue of whether a student has an appropriate educational plan, as follows:

- 1) Has the state complied with the procedures set forth in the IDEA?
- 2) Is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? *See Bd. of Educ. V. Rowley*, 458 U.S. 176, 206-207(1982).

In discussing the application of the foregoing test, the District first addresses the composition of the IEP Team. The Student's IEP Team, according to the District, included

District personnel with ample qualifications, information, and knowledge to design an appropriate educational program to meet the Student's educational needs. The District argues that school districts are not required to include an expert on the Parent's "preferred exceptionality" on the IEP team. [REDACTED] Written Closing Argument at 8. It further argues that the Parents were fully entitled to invite an expert with some other expert opinion to attend the IEP meeting if they so desired.

In response to the Parents' argument that the District had no staff with expertise in Angelman's Syndrome, the District notes that all District personnel who work with this Student are amply qualified to deliver appropriate services. It argues that the appropriateness of the Student's IEP depends largely on the qualifications of the people who are designing and delivering the education program, and the District's staff possesses the necessary experience, knowledge, and expertise. *Id.* at 8-9. The District further argues that where additional expertise was not available or additional support needed, the District went outside of internal resources and secured the services of a BCBA at District expense. *Id.* at 9.

Turning to the *Rowley* test to determine whether FAPE has been provided, the DPHO must determine whether (1) the school has complied with the procedures set forth in the IDEA, and (2) whether the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefits? *See Bd. of Educ. V. Rowley*, 458 U.S. 176, 206-207(1982).

The failure of the District to provide any classroom education to L.S. for a period of more than four years, beginning with the 2017-2018 school year, amount to a failure to provide FAPE. This failure amounts in part to both a procedural failure (by failure to complete the annual IEP that was due in May 2021), and a failure to meet the requirement that IEP procedures were reasonably calculated to enable the Student to receive educational benefits (by failing to provide the Student with a classroom education for over four years).

The failure to conduct an IEP by May 1, 2021, was a violation of 34 C.F.R. § 300.323(a).

The DPHO agrees with Petitioners that the ancillary service minutes in the summer of 2020 and the 2020-2021 school year and the BCBA clinic time divorced from any school goals has not been provided in his LRE and has not provided meaningful education, allowed him to meet challenging objectives, or given him any access to his peers, in violation of decisions in *Andrew*, 137 S.Ct. 988, 1000 (2017), and *L.B. v. Nebo School Dist.*, 379 F.3d 966, 976 (10th Cir. 2004). In failing to provide classroom education, the IEPs developed by the District were not “appropriately ambitious” for this Student, in violation of the principles established in the *Andrew* case. 137 S.Ct. at 1000. Further, in failing to have a clear plan for getting L.S. into school the District failed to implement an IEP that reasonably aimed to enable L.S. to make progress. *Id.* at 999.

The District appears to be making little or no effort to rectify this failure to plan for and achieve a return to school for L.S. in addition to the lack of a current IEP, the

testimony of [REDACTED], the Director of Special Education for [REDACTED], indicates that she has not done any work on L.S.'s education except for attending a Zoom meeting with NMPED's CAP monitor and reading some documentation. She has not been assigned any particular role or duties with regard to his education. She has not tried to determine what needs to be done for L.S. to return to school. FOF 41.

In addition, the following are some additional key facts support related to whether the District has denied FAPE to the Student:

- L.S. has not been provided any education on a school campus for more than four years (2017-18; 2018-19; 2019-20, 2020-2021.)
- [REDACTED] has no current IEP for L.S. and no plan for receipt of education for the 2021-22 school year, which began on August 4, 2021.
- The LEA did not provide L.S. with IEP goals for academics and access to the general curriculum.

In addition, the expert report of Erin Sheldon, M. Ed. supports the conclusion that L.S. is capable of a more challenging learning environment. Petitioners' Exhibit 31 at 9. She stated that Erin lacked an appropriately challenging and engaging academic curriculum. *Id.*

In short, the failure to provide a classroom education for over four years is not reasonable. *Andrew F.* 137 S. Ct. at 999. Further, the District's explanations for why that occurred do not justify the fact that L.S. is not participating in any classroom experience. In response to the District argues that any claim of failure to provide FAPE must be

weighed against the efforts by the District, the DPHO finds that the District's argument is not persuasive. Deference is to be given to the expertise and exercise of judgment by school authorities, and parents are given the opportunity to fully air their opinions. *Andrew*, 137 S.Ct. at 1001. The efforts made by the District have been considered, but the DPHO finds that they were not appropriately ambitious. The failure to provide a classroom education for over four years cannot simply be accounted for by factors like the Parents' delays in response, the Student's attendance issues, or the Parents' demand for full-day classroom attendance. First, any delays in response must also be considered in light of [REDACTED] extensive participation in L.S.'s experiences with ancillary services on Zoom.

To be clear, it has not been established that it would be appropriate for L.S. to return to a *full-time* classroom today. That issue should be considered in the context of an independent educational evaluation pursuant to 34 CFR § 300.502(d), as discussed below in the discussion of remedy. Nevertheless, it is not reasonable to conclude that the failure to provide classroom education for over four years was appropriately ambitious. The record does not include any serious efforts by [REDACTED] to get L.S. back in the classroom. The DPHO recognizes that there were, for example, behavioral issues with L.S. but those experiences do not justify keeping out of school for extended periods of time. It is troubling that L.S. has had no classroom in-person instruction over the last four years from [REDACTED] in reading, math, and written language. It is also troubling that the District has not conducted an FBA or BIP for over four years, and that there has not been a

comprehensive assessment of the Student since 2014. These issues also contribute to a determination that FAPE has been denied.

Thus, the Petitioners have met their burden on the issue of the denial of FAPE.

Related Services and BCBA Services

Petitioners assert that by definition, FAPE includes “related services.” 20 U.S.C. § 1401(9). Petitioners argue that the only related services L.S. has received on a campus since 2016-2017 are speech, occupational therapy, social work, physical therapy provided remotely through Zoom, beginning in the summer of 2020. Some of the individuals providing therapy lacked the ability to use AAC and allow L.S. to communicate with them, and all were dependent upon Parent’s attendance to redirect and re-instruct L.S. on any given task. They further argue that the purpose of related services is to allow students to make progress in the general curriculum and participate in education with other children, under 20 U.S.C. § 1414(d)(1)(A)(i)(IV)(bb) and (cc). Petitioners argue that these purposes were not served by the therapy. Petitioners’ Closing Argument at 10-11.

Petitioners argue that each school year that was lost meant that L.S. was deprived of 1080 hours per year. Petitioners argue that [REDACTED] should not be allowed any “credit” for therapy offered through Zoom, which they assert was totally reliant on the participation of the Parent and divorced from any other access to education during summer 2020 and the 2020-2021 school year. *Id.*

Petitioners also argue that BCBA services given to the Student in the past should not be given “credit” for [REDACTED] and the district’s long-standing failure to provide FAPE.

They argue that the private BCBS services █████ sought were for the purpose of creating the façade that L.S. received FAPE because he worked with BCBA's in private clinics. Petitioners assert that the services were divorced from the provision of education by the District and never resulted in L.S.'s receipt of education, and thus did not confer FAPE. Petitioners' Closing Argument at 11-12.

Petitioners argue that the involvement and support of a BCBA are critical for the provision of FAPE, but that must occur in the educational setting, with educators learning from a BCBA and a plan for L.S.'s full time education. *Id.*

The District disputes Petitioners' claims regarding the education L.S. has received. It states that prior to the beginning of the 2018-2019 school year, it contracted with Dr. Mancil of Autism Learning Partners, who later left that agency and was replaced by Taeja Kluge, who continued to work with L.S. until she left Autism Learning Partners during the spring of 2019.

The District asserts that it has made efforts to secure a BCBA but hiring processes were delayed due to turnover which were not controllable by the District. However, the District states that in December 2019, it was able to secure services from PRISM. The District states that efforts were made to schedule an IEP meeting to begin services. An IEP meeting was not held; instead, Petitioners filed a state complaint against the District in December 2019 and a corrective action plan was issued in January 2020.

The District states that it thereafter contracted with Autism Learning Partners to work with L.S. again. However, it states that "it is unclear what happened" and the District

turned to PRISM again. ██████ Written Closing Argument at 5. PRISM was scheduled to work with L.S. after spring break 2020. The District states that it was thereafter shut down and did not return to school campuses for the rest of the school year.

Continuing the chronology of educational services, the District states that during the summer of 2020 it provided SLP services and other ancillary services along with functional skills in a remote fashion. Finally, the District states that upon the start of the 2020-2021 school year, the Student was offered ancillary services: speech, BCBA services, and access to classroom services in the CEL program.

The District acknowledges that there were gaps in the provision of services; they argue that the gaps were the result of lack of BCBA support services and availability and parental demands that anything short of a full school day was not acceptable. The District argues that it made “every effort to secure what the IEP team determined was the best support services for the student and throughout offered services either remotely or when safe in person. ██████ Written Closing Argument at 5.

It appears likely that ancillary services for L.S. should continue. However, the precise contours of those services are dependent in part on the recommendations arising out of the individual education assessment ordered by the DPHO.

Remedy for Denial Under FAPE

Petitioners note that the last comprehensive evaluation of L.S. took place in 2014; with the addition of some more current information related to communication and technology in the Assistive Technology evaluation in 2018 as part of the due process

settlement in 2017. Thus, Petitioners argue that what is needed is more current information about L.S. from persons with expertise in his disability of Angelman Syndrome in order to devise and implement an informed and supported educational program. They argue that what is needed is an AS expert to work directly with L.S. to assess and write up descriptive and accurate information about his current educational needs, splinter skills, assets, and challenges, and include observations of L.S. in a school environment. Petitioners' Closing Argument at 12-15.

Petitioners argue that the DPHO has the power to order an assessment by an AS expert under 20 U.S.C. § 1415(b)(1) and 34 CFR § 300.502(d). Petitioners request that the DPHO make findings of fact and conclusions of law that L.S. was denied a FAPE, but that information about his current needs is lacking and a plan to develop school district infrastructure is lacking and necessary. Thus, Petitioners seek an order from the DPHO that █████ obtain an evaluation of the L.S.'s current needs by an expert in AS and education for students with AS to report on L.S.'s current profile as a learner, and what the staff, support, and school environment are necessary to meet his needs. Petitioners' Closing Argument at 12-15.

Petitioners further argue that the District should contract with PRISM to design a plan for █████ staff to obtain RBT training and demonstrate competence in basic ABA principles, and then work with PRISM staff at █████ School with L.S. in attendance on a schedule that can be managed by Parent, once the AS expert report

makes recommendations and the DPHO issues a final order on remedy. Petitioners' Closing Argument at 12-15.

The District disputes Petitioners' claims that L.S. should be receiving in-person education in a classroom setting. The District argues that L.S. has a significant disabling condition, with a significant cognitive impairment as well as adaptive behavior skills which are far below average. It argues that placement in a general education setting without supports or even with supports would not be appropriate, and that L.S. would be best served in a classroom known as community enhanced learning (CEL). Tr. At 573-574.

The District argues that the evidence shows that the family was interested in receiving services at a time convenient for them. It argues that this is indicated for example when the Student was kept at home due to a medical procedure. The District states that it was told the removal would be for only a few weeks. However, the Student was not returned, and no reason was given. The family also took a vacation in the summer of 2021 and so the Student was not available to begin any form of educational programming until September despite the opportunity to begin in August like the other students. The District also argues that there was no effort to access any of the academic work offered in the CEL class during the 2020-2021 school by the Parents. The District notes that the class at its maximum size would have included 20 children with 7-9 adults for students to receive support in the educational program.

Thus, District argues, if there is a deficiency in the Student's education program, his attendance issues and its adverse impact on his performance must be considered. The

District argues that the unchallenged opinion of the educational personnel was that the lack of attendance can and has had a detrimental effect on the Student's performance and progress. It further notes that even when students were invited back to school there were no response from the family despite repeated notifications of the reopening of the schools from several sources.

The District asserts that the dispute in this matter is one of choice of method in providing services as well as where those services should take place. It notes that the Parents seek full day, full time attendance, as well as the option to take the Student out of school for undetermined amounts of time to engage in family-related matters.

The District argues that it has proposed a gradual reentry into school, with a need for consistency in attendance and response to behaviors and level of skills. The District argues that the dispute in this matter has given rise to the Student's removal from school by the Parents, despite the filing of a previous due process case and a state complaint, with a resolution to each, and the District making efforts to fulfill those obligations. The District further argues that BCBA supports are an ancillary service intended to support a student's education program and that personnel and methodology decisions are left to the District. It argues that case law supports the argument that parental preference cannot be the basis alone for compelling a school district to provide a particular educational plan for a child with disabilities. *Id.* at 10.

The District asserts that the IDEA requires that placement:

- 1) Be based upon the child's IEP;

- 2) Allow for the implementation of the IEP;
- 3) Be as close as possible to the child's home;
- 4) Is, to the extent appropriate, in the age-appropriate general education setting;
- 5) Is in the least restrictive environment;
- 6) Is, unless the IEP requires another arrangement, in the school that he or she would attend if not disabled.

34 CFR § 300.116(b)(2) and 34 CFR § 300.114(a)(2).

The District argues that it may consider the category and significance of the child's disability, the availability of special education and related services, the configuration of the service delivery system, the availability of space, and administrative convenience, but it may not allow such concerns to dictate the child's placement on the LRE continuum. *See citations, Id.* at 11-12.

The District cites 34 CFR § 300.116(a)-(e) for the proposition that, in determining educational placement of a child with disability, the public agency must ensure that (1) the placement decision is made by a group of people, including the parents and others, who are knowledgeable about the child, the meaning of the evaluation data, and the placement options in conformity with the LRE provisions of the CFRs; (2) the placement decision is determined at least annually, based on the child's IEP, and is as close as possible to the child's home; (3) the child is educated in the school that he or she would attend if nondisabled, unless the child's IEP indicates otherwise; (4) consideration is given

to any potential harmful effect on the child or on the quality of services that the child needs; and (5) the child is not removed from education in age-appropriate regular classroom solely because of needed modifications in the general education curriculum.

The District also states that school districts must offer a continuum of alternate placements for students who require special education. It argues that the continuum should provide the range of potential placements in which the child's IEP can be implemented, beginning with the regular classroom, and getting more restrictive at each placement on the continuum, citing 34 CFR § 300.115(a). The District argues that the IEP team for L.S. considered the level of services needed for him and the programs available to him and determined that his current placement was appropriate in light of the intervening factors, including securing a BCBA and school closure due to COVID.

The District argues that while parental preference is a factor in considering placement, it is not the overriding or predominant factor. However, it also argues that a district must show that it came to the IEP meeting with an open mind and was receptive and responsive to the parents' position. See ██████ Closing Argument at 13-14. The District also argues that hearing officer, as well as courts, "must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible. See *Gill v. Columbia 93 School Dist.*, 217 F.3d 1027, 1038 (8th Cir. 2000).

The District argues that related services are services that are required to assist a child with a disability to benefit from special education, citing 34 CFR § 300.34(a). It argues that while the Parents may have a methodological present for a therapeutic type of service, their preferences neither define nor supplant legal requirements. The District argues that it has the right to select a program and service provider, as long as they are able to meet the child's needs, and IDEA does not authorize the parents to make unilateral decisions about programs funded by the public. See citations in ████████ Written Closing Argument at 15-16.

The District argues that the holding of *Deal v. Hamilton County Dept. of Education*, 259 F.Supp. 2d 687, 46 IDELR 45 (E.D. Tenn. 2006) should govern this matter, and includes the following points:

- A court's job is not to resolve issues of methodology;
- Evidence of progress in a home-based ABA program does not establish that ABA is the only way for a student to be educated, or that it is unreasonable to suppose that a student could receive meaningful benefits from a program that does not include ABA.
- The question under IDEA is not whose expert opinions are more reasonable, or whose program is better in some ultimate sense. The question is whether the school district's proposed IEP was reasonably calculated to provide meaningful educational benefits to the student.

- Local educators deserve latitude in determining the IEP most appropriate to a child with disabilities, and great deference must be paid to the educators who develop the IEP.

Finally, the District notes that the court in *Deal* declined to review the appropriateness of the parents' program, because it found the district's program appropriate, stating: "Were [the district's] programs as good as the education programs the parents developed for [the student], which included significant hours of one-on-one intensive ABA instruction? Perhaps not. But that is not the relevant question."

In conclusion, the District argues that before an IEP can be set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process or caused a deprivation of educational benefit." *Citing O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). Further, it argues that technical deviations do not render an IEP entirely invalid, and to hold otherwise would exalt form over substance. *Id.*

The DPHO has considered the arguments of counsel regarding the issue of relief and finds that the approach proposed by Petitioners, with respect to the goal of returning the Student to a classroom setting, has the most merit. The preponderance of the evidence indicates that significant efforts need to be made to return L.S. to a classroom experience. It is clear, given the lack of comprehensive evaluation of this Student since

2014, that it is important that he be evaluated now in order, prior to this hearing officer making a decision on final remedy.

Taking into consideration the arguments of the parties, the DPHO hereby finds as follows:

The DPHO agrees that a comprehensive evaluation of L.S. be performed by a person with expertise in Angelman Syndrome and education in order to develop an appropriate educational program for L.S. The District argues that parental preference should not be the only factor in determining an expert to work with the Student. The DPHO recognizes that parental preference is not the only factor here. The record in this matter makes it clear that Angelman Syndrome is a significant factor in the challenges faced in providing FAPE to the Student. It is also clear that AS is a little-known condition and that many of the people involved in L.S.'s life have had little or no experience with it prior to their experience with L.S.

Thus, the DPHO, pursuant to 20 U.S.C. § 1415(b)(1) and 34 CFR § 300.502(d), will order (as set forth below in the Order at page 78, that an independent educational evaluation be performed at the cost of the LEA.

Significant efforts should be made to return L.S. to a classroom setting. Those efforts should include the specific provisions designed to achieve that goal, as set forth in the Order section of this Decision below.

Other equitable remedies requested by the Petitioners that are not disposed of in this Decision and Order should be deemed denied.

Conclusions of Law

1. [REDACTED] Schools denied L.S. a FAPE for the 2017-18, 2018-19, 2019-20, 2020-21 school years by failing to develop an appropriately ambitious plan to return L.S. to in-person classroom education, and that denial of FAPE is continuing.

2. The failure to conduct an IEP by May 1, 2021 was a violation of 34 CFR § 300.323(a).

3. The DPHO has the authority pursuant to 20 U.S.C. § 1415(b)(1) and 34 CFR § 300.502(d) to order an independent educational evaluation of L.S.

4. Exception under 20 U.S.C. § 1415(f)(3)(D)(i) to the 2-year statute of limitations found in 20 U.S.C. § 1415(f)(3)(C) exists based on the School District's misrepresentations to Parents about its intentions and commitments in the original DPH Settlement Agreement (Petitioners' Exhibit 6).

5. The Hearing Officer has the authority to order relief against the District if the Hearing Officer finds violations that warrant relief.

6. NMPED, pursuant to its general supervisory responsibility under 34 CFR §§300.149 and 300.600, must ensure that the District implements the hearing officer's decision in a timely manner, unless either party appeals the decision.

7. Compensatory education for a period of 4 school years is due and should consist of the District taking all steps required (direction and consultation from experts; collaboration between AS expert, BCBA and SLP knowledgeable about Proloquo2Go and L.S., IEPs which reflect knowledge about L.S. and appropriate academic and functional

goals) to provide L.S. with appropriate specialized instruction and related services on a school campus with peers, for full school day/full school year attendance.

ORDER

Therefore, for the foregoing reasons, the Petitioners' Request for Due Process Hearing Against the LEA (██████) is hereby granted in part, as follows:

1. A denial of FAPE occurred because ██████ failed to make reasonable efforts to provide in-person classroom education to L.S. over the last four plus years.

2. The DPHO orders that a comprehensive independent educational evaluation (IEE) of L.S. be performed, pursuant to 20 U.S.C. § 1415(b)(1) and 34 CFR § 300.502(a) and (d) by a person with expertise in Angelman Syndrome and education in order to develop and recommend an appropriate educational program for L.S. This evaluation should be conducted without unnecessary delay, within 30 days of notice from the District of the independent educational evaluation process.

3. Notice of the evaluation will be provided within 30 days of this Decision.

4. ██████ will, without unnecessary delay, provide Petitioners with information about where and with who the IEE will be obtained. *See* 34 CFR § 300.502(a)(2).

5. The IEE will be conducted by a qualified examiner not employed by ██████, pursuant to 34 CFR § 300.502(a)(3)(i).

6. The independent educational evaluation shall be paid for by the LEA, pursuant to 34 CFR § 300.502(a)(3)(ii).

7. The IEE will be provided to the parties.

8. An IEP should be completed without undue delay after completion of the independent educational evaluation.

9. Compensatory education services shall be provided for four years by the District for the lack of appropriate services over the last four years, and the Student's eligibility for IDEA services shall be extended beyond age 22.

10. The placement of the Student should be based upon the IEE report.

11. The IEP should be facilitated by the expert who performs the IEE.

12. The District shall hire a full-time BCBA and a Registered Behavior Technician and other needed personnel to work with the Student in the school setting to ensure that the Student has the support needed to successfully transition and attend school full-time.

13. The District shall provide training by experts for school staff, including in Angelman Syndrome and Proloquo2Go.

14. The District shall provide Proloquo2Go software to the Student and staff who work with him.

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.

IT IS SO ORDERED.



CRAIG T. ERICKSON
Impartial Due Process Hearing Officer

Entered: October 6, 2021

I HEREBY CERTIFY that a true and correct copy of the foregoing pleading was sent via e-mail to the following counsel this 6th day of October, 2021:

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