BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 2122-09

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioner's Request for Special Education Due Process Hearing (Due Process Request), filed with the State of New Mexico Public Education Department on September 9, 2021. An Amended Complaint Request (Amended Due Process Request) was filed on September 30, 2021. The Petitioner's Amended Due Process Request is granted in part.

PROCEDURAL BACKGROUND

The Petitioner filed a Request for Special Education Due Process Hearing on September 9, 2021. *See* Request for Special Education Due Process Hearing, September 9, 2021 (Due Process Request). The Respondent LEA responded to the Petitioner's Due Process Request on September 20, 2021. *See* [LEA's] Response Including Prior Written Notice to Due Process Hearing Complaint, September 20, 2021 (Response). On September 20, 2021, the LEA filed a Motion to Dismiss, and in the Alternative, Notice of Insufficiency. *See* Motion of [LEA] to Dismiss, and in the Alternative, Notice of Insufficiency, September 20, 2021 (Insufficiency/Motion to Dismiss). On September 20, 2021, an Initial Scheduling Order was entered. Initial Scheduling Order, September 20, 2021. A Sufficiency Determination Order was entered on September 23, 2021. Sufficiency Determination Order, September 23, 2021.

A Prehearing and Extension Order was entered on September 27, 2021. Prehearing Order and Extension Order, September 27, 2021 (Prehearing Order). On September 30,

2021, the Petitioner filed an Amended Complaint Request (Amended Due Process Request). *See* Amended Due Process Request, September 30, 2021. The Respondent LEA responded to the Petitioner's Amended Due Process Request on October 4 20, 2021. *See* [LEA's] Response Including Prior Written Notice to Amended Due Process Hearing Complaint, October 4, 2021 (Response to Amended Due Process Request). Also on October 4, 2021, the LEA filed a Motion to Dismiss Petitioner's Amended Complaint. *See* Motion of [LEA] to Dismiss, Petitioner's Amended Complaint, October 4, 2021 (Motion to Dismiss Amended Complaint).

A *Sua Sponte* Revised Scheduling Order was entered on October 6, 2021. *Sua Sponte* Revised Scheduling Order, October 6, 2021 A Supplement to Prehearing Order and Extension Order was entered on October 14, 2021. Supplement to Prehearing Order and Extension Order, October 14, 2021.

The Petitioner responded to the LEA's Motion to Dismiss the Amended Complaint on October 15, 2021. *See* Petitioner's Response to Respondent's Motion to Dismiss the Amended Complaint, October 15, 2021 (Response to Motion to Dismiss Amended Complaint). The LEA replied to the Response to Motion to Dismiss Amended Complaint on October 19, 2021. *See* Reply of [LEA] to Petitioner's Response to Motion of [LEA] to Dismiss, Petitioner's Amended Complaint (Reply to Response to Motion to Dismiss).

On October 25, 2021 the LEA filed its Statement Regarding Issues. *See* Respondent's Statement Regarding Issues, October 25, 2021. The Petitioner also filed a Proposed Statement of Issues on October 25, 2021. *See* Petitioner's Proposed Statement of Issues, October 25, 2021.

An Order Addressing the Motion to Dismiss was entered on October 28, 2021. Order Addressing Motion to Dismiss, October 28, 2021.

Various production matters arose: *See* Respondent's Motion for Production, October 15, 2021; Petitioner's Response to Motion for Production of Records, October 20, 2021; Production Order, October 26, 20212; LEA's Uncontested Motion to Clarify and Reset Disclosure Deadline, October 26, 2021; Revised Disclosure Deadline Order, October 27, 2021; Respondent's Motion for Reconsideration of Production Order, October 27, 2021; Revised Production Order, October 28, 2021; Petitioner's Response to Revised Production Order, November 1, 2021; and Order (on Revised Production Response), November 5, 2021.

The Petitioner filed Witness and Exhibit Lists on November 12, 2021. *See* Petitioner's Witness List, November 12, 2021, and Petitioner's Exhibits (Table of Contents, with attached Exhibits, bound separately), November 12, 2021. Petitioner supplemented Exhibit RR on November 15, 2021. The Respondent filed its Exhibit List on November 16, 2021, and its Disclosure of Witnesses on November 17, 2021. *See* Respondent's Exhibits, November 16, 2021, and Respondent's Disclosure of Witnesses, November 17, 2021. Petitioner also filed Petitioner's Witness List on November 17, 2021. *See* Petitioner's Witness List, November 17, 2021.

An Administrative Order listing the issues for the due process hearing was entered on November 17, 2021. *See* Hearing Issues, November 17, 2021. A Joint Statement of Stipulated Facts was filed on November 19, 2021. *See* Joint Statement of Stipulated Facts, November 19, 2021.

The Due Process Hearing commenced on November 29, 2021, went through December 2, 2021, a recess was taken, reconvened on December 14, 2021, and adjourned

on December 15, 2021. It was held virtually. *See* Tr. pp. 1 - 1209. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on January 25, 2022. Tr. 1207. The parties jointly requested an extension to issue the Hearing Officer's decision, which was granted for good cause shown, for the filing of his decision on or before February 28, 2022. Tr. 1207-1208.

The Petitioner filed Requested Findings of Fact and Conclusions of Law on January 25, 2022. *See* Petitioner's Requested Findings of Fact and Conclusions of Law, January 25, 2022 (P's FFCL). The Petitioner also filed a Closing Argument on January 25, 2022. *See* Petitioner's Closing Argument, January 25, 2022 (P's Argument). The Respondent filed its Proposed Findings of Fact and Conclusions of Law on January 25, 2022. *See* [LEA's] Proposed Findings of Fact and Conclusions of Law, January 25, 2022 (R's FFCL). The Respondent also filed its Closing Argument with Authorities and Appendix A on January 25, 2022. *See* Respondent's Closing Argument with Authorities and Appendix A, January 25, 2022 (R's Argument).

This decision is due on or before February 28, 2022. Tr. 1208.

ISSUES

(1) Whether the LEA violated its alleged IDEA Child Find and Gifted duties by allegedly failing to identify, locate, and evaluate the Student's alleged emotional disturbance and orthopedic impairment, resulting in alleged bullying and harassment. *See* Amended Due Process Hearing Request, September 30, 2021, pp. 1-9; Petitioner's Proposed Statement of Issues, October 25, 2021, pp. 1-3; Respondent's Statement Regarding Issues, October 25, 2021, p. 3, para. 12(a).

(2) Whether the LEA violated its alleged IDEA and Gifted parental notice and participation duties by allegedly not allowing the Student's Parent an opportunity to participate in the Student's IEP meeting to address, among other things, alleged bullying and the Student's alleged medical and mental health needs. *See* Amended Due Process Hearing Request, September 30, 2021, pp. 9-14; Petitioner's Proposed Statement of Issues, October 25, 2021, pp. 3-4.

(3) Whether the LEA violated its alleged IDEA and Gifted duties by allegedly failing to appropriately create and implement an IEP, resulting in alleged bullying and harassment. *See* Amended Due Process Hearing Request, September 30, 2021, pp. 14-19; Petitioner's Proposed Statement of Issues, October 25, 2021, pp. 4-6; Respondent's Statement Regarding Issues, October 25, 2021, p. 3, para. 12(e).

(4) Whether the Petitioner's claims are barred by failure to exhaust administrative remedies by requesting changes in the Student's evaluation for giftedness or the Petitioner's Gifted IEP team meeting. *See* Respondent's Statement Regarding Issues, October 25, 2021, p. 3, para. 12(c).

(5) If procedural issues arise, then whether the Student is a student entitled to a FAPE, and, if so, whether a procedural violation impeded the Student's right to a FAPE; significantly impeded the Petitioner's opportunity to participate in the IEP process; or caused a deprivation of educational benefits. *See* Respondent's Statement Regarding Issues, October 25, 2021, p. 3, para. 12(b).

(6) What remedy, if any, should be ordered. *See* Amended Proposed Resolution to Amended Due Process Hearing Request, September 30, 2021, pp. 1-2.

(7) Whether the Student's behavior impeded learning or learning of others. S*ee* Respondent's Statement Regarding Issues, October 25, 2021, p. 3, para. 12(d).

RELEVANT LEGAL OVERVIEW

In New Mexico, a parent or public agency may "initiate" a due process hearing when: (a) the public agency "proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;" (b) the public agency "refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of FAPE to the child;" or (c) the public agency "proposes or refuses to initiate or change the identification, evaluation, or educational placement of, or services to, a child who needs or may need gifted services." ***See*** § 6.31.2.13(I)(2)(a-c) NMAC. The New Mexico rules also provide that services and procedures for students with disabilities apply to gifted students, except for, in relevant part, § 6.31.2.8 NMAC (right to a free appropriate public education), § 6.31.2.9 NMAC (responsibilities of public agencies), § 6.31.2.10 NMAC (identification, evaluations, and eligibility), ***see*** § 6.31.2.12(D)(1)(a) NMAC, requirements under 34 C.F.R. §§ 530-536 (discipline procedures), § 6.11.2.11 NMAC (disciplinary removals), and "Subsection I of 6.31.2.13 NMAC" regarding disciplinary changes of placement. § 6.31.2.12(D)(1)(c) NMAC. § 6.31.2.13 (I) NMAC relates to the entire due process hearings. Id. Thus, while either party to initiate a due process hearing for gifted students, §6.31.2.13(I)(2)(c) NMAC, § 6.31.2.13 (I)(1)(b) NMAC specifically provides that the scope of "[s]ubsection I of 6.31.2.13 NMAC establishes procedures governing impartial due process hearings for the following types of cases: (a) … [IDEA cases], and (b) claims for gifted services." § 6.31.2.13 (I)(1)(b) NMAC.

The New Mexico rules are to be constructed and interpreted in accord with New Mexico's Uniform Statute and Rule Construction Act, Sections 12-2A-1 through 12-2A-20 NMSA 1978. ***See*** §6.31.2.14(B) NMAC. In this context, giving effect to the provisions allowing hearings in § 6.31.2.13 (I)(1)(b) NMAC and § 6.31.2.13(I)(2)(c) NMAC, yet contrasted with the other exceptions for identification, evaluation and eligibility, § 6.31.2.10 NMAC, and exception for discipline, § 6.11.2.11 NMAC, it is concluded that construing them to give effect to all results in one remaining matter which may be considered in this due process hearing for a gifted student, to wit: a right to a due process hearing only for "claims for gifted *services*," under § 6.31.2.13 (I)(1)(b) NMAC (emphasis added), to address "or services to, a child who *needs* or may *need gifted services*." § 6.31.2.13(I)(2)(c) NMAC (emphasis added). ***See*** § 12-2A-10(B) NMSA, 1978.

At the district court level, pendant jurisdiction may not be exercised over state law claims if the federal claim is insubstantial. ***See*** *Carey v. Continental Airlines, Inc.*, 823 F.2d 1402, 1404 (10th Cir. 1987). This is found persuasive in this administrative proceeding where both federal FAPE and state gifted claims are alleged. As explained below, the federal FAPE claim is not insubstantial; therefore there is pendant administrative jurisdiction over the state claim for gifted services. It is concluded, therefore, that there is jurisdiction in this due process hearing to consider not only the alleged claims for denial of FAPE under federal law, but also the alleged claims for this Student who needs or may need gifted services under state law.

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, the burdens rest, therefore, with the Petitioner.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed 690 (1982). The initial inquiry is procedural; that is, whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id*. at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (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." *Endrew 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." *Endrew*, 137 S. Ct. at 1000. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. *Endrew*, 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. *Endrew*, 137

S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Endrew*, 137 S. Ct. at 999.

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. ***See*** 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i) ("child find"). The school district "bears the burden generally in identifying eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. ***See*** 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(i). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. ***See*** 34 C.F.R. § 300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. ***See*** §6.31.2.10(D)(1)(a) NMAC. Either the parent or the public agency may "initiate" an initial evaluation request. ***See*** §6.31.2.10(D)(1)(b) NMAC. The responsibility for the evaluation lies with the LEA. ***See*** *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. ***See*** *id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. ***See*** *Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8 (D.C. Conn. 2009). An LEA's failure to meet its "child find" obligation is a cognizable claim. ***See*** *Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. ***See*** *Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8th Cir.

2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150, 162 (1st Cir. 2004).

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

The public agency has 60 calendar days to conduct an evaluation after receiving parental consent. ***See*** § 6.31.2.10(D)(1)(c)(1) NMAC.

A "child with a disability" is defined as a child evaluated and determined to be eligible for, among other things, serious emotional disturbance (generally referred to as emotional disturbance) and orthopedic impairment. ***See*** 34 C.F.R. § 300.8(a). To be qualified, the child must be in need of special education and related services because of the emotional disturbance or orthopedic impairment. *Id.*

An "emotional disturbance" means a condition in which, "over a long period of time and to a marked degree that adversely affects a child's educational performance," one or more characteristics are exhibited: (a) "[a]n inability to learn that cannot be explained by intellectual, sensory, or health factors;" (b) "[a]n inability to build or maintain satisfactory interpersonal relationships with peers and teachers;" (c) "[i]nappropriate types of behavior or feelings under normal circumstances;" (d) "[a] general persuasive mood of unhappiness or depression;" and (e) "[a] tendency to develop physical symptoms or fears associated

with personal or school problems." ***See*** 34 C.F.R. § 300.8(c)(4)(i) (A-E). It excludes social maladjustment, unless otherwise meeting the emotional disturbance definition, yet includes schizophrenia. *Id.* at (4)(ii).

The definition of "orthopedic impairment" is such that it is "severe" which "adversely affects a child's educational performance," to include "impairments caused by a congenital anomaly, impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures)." ***See*** 34 C.F.R. § 300.8(c)(8).

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. ***See*** 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. ***See*** *O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. ***See*** *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. ***See*** *Sytsema v. Acad. Sch. Dist. No. 20*, 538

F.3d 1306 (10th Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. ***See*** *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order a LEA to comply with procedural requirements. ***See*** 34 CFR § 300.513(a)(3).

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. ***See*** *Timothy O.*, 822 F. 3d at 1124. Thus, for procedural violations to constitute a denial of FAPE, they must be found to seriously impair the parents' opportunity to participate in the IEP formation process, or result in an educational opportunity loss to the child, or cause a deprivation of educational benefits to the child. *Id.* Otherwise, the error is harmless. *Id.* ***But see*** *Boutelle v. Bd. of Educ. of Las Cruces Pub. Sch.,* 2019 WL 2061086, fn. 17, Civ. No. 17-1232 GJF/SMV (D.N.M. May 9, 2019)(10th Circuit has not addressed whether child-find error is procedural, although other Courts of Appeal have characterized it that way). An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. ***See*** 34 C.F.R. § 300.323(c)(1).

Written notice is required regarding issues for the identification, evaluation or placement of a child. ***See*** 34 C.F.R. § 300.503; §6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. ***See*** 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. ***See*** *Logue v. Unified Sch.*

Dist. No. 512, 153 F.3d 727 (10th Cir. Jul. 16, 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. ***See*** *Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239 (W.D. Mich. 2003). ***See also*** *Tenn. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (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 (6th Cir. 2004).

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

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

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

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

A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. ***See*** 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray*, 51 F.3d at 926. Mainstreaming to the maximum extent possible should take place if the child cannot be educated full-time in a regular education classroom with supplementary aids and services. ***See*** *L.B. v. Nebo*, 379 F.3d 966, 976-978 (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.

The IEP is to be implemented as soon as possible after the IEP meeting. ***See*** 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to

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

Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. ***See*** *CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 638 (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*** *Endrew*, 137 S. Ct. 999 (appropriate in light of the child's circumstances). Some educational benefit is required. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). ***But see*** *Endrew*, 137 S. Ct. at 999 (appropriate in light of the child's circumstances). IDEA's statutory goal is "to provide each child with meaningful access to education by offering individualized instruction and related services appropriate" to meet the student's "unique needs." *Fry*, 137 S. Ct. at 755.

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

Hearing officers have authority to grant relief as deemed appropriate based on their findings. ***See*** 34 C.F.R. §§ 300.511, 300.513. "The only relief that an IDEA officer can give

… is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753. Equitable factors are considered in fashioning a remedy, with broad discretion allowed. ***See*** *Florence County Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. ***See*** *Murphy v. Timberlane*, 973 F.2d 13 (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 v. Dist. of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. ***See*** *Meza v. Bd. of Educ. of the Portales Mun. Schs.*, Nos. 10-0963, 10-0964 (D.N.M. 2011). Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D. D.C. 2010). A student's behavior, attitude, bad habits, and attendance may be considered when addressing an equitable remedy. *Garcia Albuquerque Pub. Schs.*, 520 F. 3d 1116 (10th Cir. 2008). Once there has been a determination of a denial of FAPE, then the injured party is entitled to compensatory education, although that does not mean an award is required. ***See*** *Albuquerque Pub. Schs. v. Cabrera, and Cabrera and Silva v. Bd. Of Educ. of Albuquerque Pub. Schs., et al*, Nos. 1:20-cv-00531-JCH-LF, 1:20-cv-00532-JCH-LF (D. N.M. Dec. 7, 2021), Slip Op. at pp. 24-25.

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

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

3. In her 3rd grade year the Student was found eligible for gifted education services, Ex. LL, with eligibility subsequently noted to be in reading and written language while in the 9th grade. Ex. 9.

4. In May, 2019 the Student was a participant in the Scripps National Spelling Bee. Ex. CCC.

5. The Student attended two High Schools in the LEA during the relevant time period, CHS and High School # 2.

6. She entered CHS in her 9th grade year.

7. While in the 9th grade, the Student was a part of the CHS dance team.

8. In November 2019 the Student's physician noted that the Student had low back pain spasms, and mild scoliosis, and that the Student had to take a break from dancing. Ex. H.

9. The Student's dance coach, Coach A, became of aware of the Student's diagnosis in November 2019. Tr. 227.

10. In December 2019 the Student's Mother made the LEA aware that she felt the Student was being pushed beyond her limits, due to her scoliosis, and the Penche pose, and that it compromised the Student's medical and emotional health. Ex. B; Tr. 569-570.

11. This was during the Student's 9th grade year.

12. Prior to being involved with the dance team, the Student was bright and happy, full of self-confidence, and not depressed or anxious, Tr. 540-541; she was an asset to the dance team, with good jumping skills, and personality. Tr. 322-323.

13. Critiquing by dance captains, rather than Coach A, would take place of the younger members, including of the Student. Tr. 268.

14. Dancers were mean to the Student, and competitive, with frustrations running high. Tr. 324-326.

15. The Student was not dressed in uniform although others not competing were in uniform. Ex. J.

16. During the 9th grade year, the Student was absent quite frequently, for instance, in government class, both in class and in extracurricular activities. Tr. 944.

17. In March 2020 the LEA closed its schools due to the Covid-19 pandemic. Tr. 195.

18. In May or June, 2020, an end of year dancer's banquet took place virtually. Ex. 33. Ex. K; Tr. 32-33, 288.

19. This was the end of the Student's 9th grade year.

20. At the banquet the Student was mocked and ridiculed in a demeaning way by two upper class members of the dance team because she had scoliosis. Ex. K; Tr. 264.

21. Coach A, the CHS administrator for the program, was not, at that time, monitoring the virtual banquet, and no LEA administrator put a halt to the banquet. Tr. 264.

22. Dance is an extra-curricular activity, a physical education activity, and a nonacademic activity. Tr. 163.

23. CHS administrators were notified by the Student's Mother in December 2020 that her child was being bullied, and was anxious and stressed, because of her scoliosis. Tr. 20-21, 23-25.

24. CHS administrators let the Student's Mother know that counseling services were available for the Student, generic to all students in the LEA. Tr. 579.

25. The LEA was then on notice of suspicions of orthopedic impairment and emotional disturbance, with impact in education in the nonacademic area of dance.

26. The Student entered the 10th grade.

27. Grades began to fall, and by the 10th grade, while at CHS, her GPA had fallen to a 3.3750, from a 3.7143. Ex. 38.

28. A Gifted IEP and Sec. 504 meeting was eventually set for February 8, 2021. Ex. 11.

29. The LEA's theory was to have a Sec. 504 plan with a Healthcare Plan as part of the gifted IEP to have one document and meeting. Ex. DD; Tr. 987 - 990.

30. Originally, it was set only to discuss the Sec. 504 accommodations because of scoliosis. Ex. 11; Tr. 670-671, 986, 990.

31. The Student's Mother arrived at the meeting, but stayed for eight minutes to ten minutes – she was not prepared for an IEP, and wanted to be prepared to address anxiety, mental well-being, and physical health. Exs. A, C, D; Tr. pp. 586 - 589, 1057-1059.

32. During this time the Student's Mother was confused about the need for a Prior Written Notice to be provided prior to the meeting. Tr. 587.

33. The Student's Mother left the meeting, but the LEA continued to "finalize" the IEP Healthcare Plan and gifted services IEP. Ex. A; Tr. 1032, 1057.

34. The Student's Mother was not provided the ability to meaningfully participate in the meeting.

35. A Gifted IEP was completed, with a Healthcare Plan noting a diagnosis of scoliosis, and that the Student potentially had impaired educational and social skills because of scoliosis. Ex 13, Ex. F.

36. The Gifted IEP continued to find the Student eligible because of reading and written language, but did not consider the Student's anxiety, the nonacademic loss due to dance, and the Penche pose, and the teammate's ridicule from scoliosis; it was a Gifted IEP, it did not plan for an evaluation for either orthopedic impairment or emotional disturbance. Ex. 13, Ex. F.

37. As of February 8, 2021, there was a continued failure to evaluate the student for FAPE disabilities, with resulting documented impact on educational performance.

38. On February 8, 2021 the Prior Written Notice was finalized, and entered into the recording system. Ex. 13, pp. 18-19; Tr. 1081.

39. On February 25, 2021 the LEA offered generic counseling available to all students, one-to-one tutoring, a contact teacher, and a safe place to go, all showing the

LEA's notice of suspicion of emotional disturbance, yet without an evaluation. Ex. 40; Tr. 47, 72, 139, 1409, 990-992, 1164.

40. The generic counseling is open to all students, regardless of disability status, by a private clinic. Tr. 1067

41. As of February 26, 2021 the Student's Mother continued to seek help for the Student's scoliosis and anxiety. Tr. 1001.

42. About April 12, 2021, an IEE was completed, which concluded the scoliosis could be met with Sec. 504 accommodations, and that because the Student is intellectually gifted there was no need for an IEP. Ex. LL.

43. The IEE did not address nonacademic services such as loss of dance, emotional disturbance, or other educational losses in grades. Ex. LL.

44. An objective reading and writing assessment of the Student's reading skills, conducted several months later, however, showed the Student to be reading at the 9th grade level. Ex. 24.

45. The Student began missing assignments in March 2021. Tr. 924-925.

46. The IEE was not appropriate.

47. Despite the offer of generic counseling, the LEA did not follow up with the Student's Mother for counseling, despite the Student's Mother requesting it and explaining her concern about suicide rates and being frightened for her daughter, so she sought out a private counselor, Dr. C. Tr. 539.

48. The Student began private counseling with Dr. C, Ph.D., on March 25, 2021. Tr. 712.

49. Great weight is given to Dr. C's testimony, as a certified school counselor in the state of New Mexico, and associate professor at Texas Tech University. Tr. 707.

50. Dr. C considered the exceptionality of the Student's giftedness, as a critical thinker, so that what other people were thinking about the Student and saying about her was very significant in creating anxiety. Tr. 724.

51. The Student did not want to be a burden anyone – or to cause any problems to anyone because of her health. Tr. 751.

52. Dr. C diagnosed the Student with depression and anxiety. Exs. WW, D.

53. The Student's "emotional and psychological state is manifested in increased anxiety, self-doubt, depression, and several psychosomatic health issues, including increased stress and stomach problems that are typical manifestations of young adolescents suffering from traumatic bullying experiences." Tr. 773.

54. After the public comments from the dancers at the end of year banquet mocking the Student's scoliosis, the Student felt she lost her social connection and no longer had the confidence to go out in public again. Tr. 742.

55. The Student lost interest in things she used to love, including the current dance team. Tr. 747-748.

56. The Student no longer felt challenged in school, and began to look into going to a new high school. Tr. 758.

57. The Student left CHS on April 7, 2021, and entered High School # 2. Ex. DDD.

58. The Student remains in the 10th grade, but now in a new high school with the LEA.

59. On May 6, 2021 a consent form to evaluate the Student was provided to the Student's Mother, generally represented as a consent for gifted services, as a formality, yet stated no response was due if the Student's Mother did not request an additional evaluation, for gifted services – this was for gifted evaluations services only, not for emerging disabilities, although in one part of the form emerging disabilities is stated, rather than only gifted evaluations; the Student's Mother did not request the gifted re-evaluation Ex.36; Tr. 430.

60. On May 12, 2021, at HS # 2, another Gifted IEP meeting was held. Ex. 23.

61. This new "Gifted IEP" did not require an evaluation for either orthopedic impairment or for emotional disturbance. Ex. 23.

62. In various components of the IEP, including a Healthcare Plan, health issues were discussed including scoliosis, flexibility in seating, a pressure pass for counseling services, testing accommodations so the student could succeed, and extra time for assignments due to psychological stress and anxiety – in sum, indicators of both FAPE disabilities for orthopedic impairment and emotional distress, as well as impact on educational benefit. Ex. 23.

63. A pressure pass was issued for anxiety. Tr. 1182.

64. A pressure pass is for students with extreme anxiety. Tr. 1166.

65. Although made available, the Student did not use the pressure pass. Tr. 1166.

66. On May 12, 2021 the LEA remained on notice of a suspicion of two disabilities for which an evaluation should have been begun, but was not.

67. The Student began the 11th Grade at HS #2.

68. The Student's latest weighted GPA is 3.5429. Ex. 38.

69. This gifted Student has goals to attend university in New Mexico or out-of-state, seeking a scholarship, and eventfully pursue a career in business. Ex. 23, 000003, 000005.

70. The Student no longer wants to dance. Tr. 646.

71. The Student's Mother is credible – weight is given to her testimony. As she moved forward seeking help from the LEA she was persistent, and at times overwhelmed and confused with terminology between state gifted, federal FAPE, and Sec. 504 plans, but that did not impact her credibility.

72. Dr. C is found to be credible, and significant weight is given to his testimony, as noted in other sections of this Order.

73. Dr. AA, while found to be truthful, was impeached by Respondent's counsel asto his procedural knowledge, which impacted credibility, and thus limited weight is given to his testimony.

74. Dr. WMT, while found to be credible and truthful, had limited insight into the issues in this case, and little weight is given to her testimony.

75. JC was forthright in his answers and testified truthfully. He testified to the best of his recollection.

76. Principal SH was truthful – she admitted she could have done things differently, and Athletic Director DC is credible, and weight is given to his testimony that the Student,while in dance, was a part of the athletic programs for the LEA.

77. Dance Instructor A performed well under examination, yet was confused at times, and nervous. Particular weight is given to her testimony that she was not present,

as the dance team coach, for that portion of the video banquet where the Student was mocked for her disabilities.

78. Ms. MP testified that she did not refer to the Student as being on the Autism spectrum, with the only evidence presented by the Petitioner as hearsay statements from some other parents. Weight is given to Ms. PL's sworn testimony that she never made the comment.

79. Assistant Principal VM is found to be credible.

80. Ms. HS's credibility is questionable on the issue of giving the Student's Mother a re-evaluation form with competing interests for a gifted student compared with an emerging disability evaluation – the form speaks for itself in that there is one sentence which addresses a suspected emerging disability, compared with the remainder of the reassessment form discussing waiver of an additional gifted reevaluation. Weight is given to Ex. 36, and the Student's Mother's testimony on the issue.

81. DP is truthful, credible.

82. SR is credible, although of little weight because he did not come into his position until July 1, 2021. Tr. 1119.

83. JT is truthful, credible.

84. LH is found to be credible.

85. Nurse PJ is found to be credible, truthful.

86. JS is credible.

87. Weight is given to the more objective reading and writing assessment by Mr. M and the grade point averages, rather than individual course grades which did not fully show the grades at the times for the classes under the grading systems, with school

becoming virtual due to Covid, and a subsequent struggle with a change in schools, as referenced by MS, *e.g.* Tr. 944, CF, *e.g.* Tr. 970, VJ, *e.g.* Tr. 1157, and LM, *e.g.* Tr. 1136, and who are found to be credible.

88. Weight is given to the Student's Mother's testimony, and the IEPs, and the diagnosis by Dr. C, in looking at the unique needs of the Student, over that of the how the Student presented herself in school functions, since, as Dr. C notes, the Student is a complex, gifted student, who is concerned about what others think of her, and thus a reasonable inference is that she sought to put her best efforts toward trying to "fit in." To this extent, while there is evidence that the Student was happy and had friends at HS # 2, Tr. 350, 352-353, weight is given to the Student's unique needs. As noted earlier, Ms. HS's credibility is suspect, as well – for instance, she was of the opinion the Student was academically thriving and doing great, Tr. 353, when, as noted elsewhere in this Order, the academics had faltered and the Student was experiencing pain, stress, and anxiety.

89. There is evidence presented of a resolution session, Tr. 1096, occurring because of a subsequent automobile accident – no weight is given to this event.

90. Weight is given to what was written in the IEPs, overall. ***See*** *Sytsema*, 538 F.3d at 1316 (focus on text of the documents).

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

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

ANALYSIS AND LEGAL CONCLUSIONS

Child Find

This relates to Issues No. 1, 4, and 5.

The first challenge presented by the parties relates to child find – that is, identification and evaluation for eligibility. This challenge relates to the IDEA federal disability contentions regarding alleged child find breaches because of failure of the LEA to timely identify and evaluate the Student for an orthopedic impairment, bullying because of the orthopedic impairment, and subsequent emotional disturbance, also unidentified or not evaluated . 34 C.F.R. § 300.111(c)(1)(child find, suspicion of disability, in need of special education, "even though advancing from grade to grade").

In review of this case, it has gone through a number of allegations and challenges as to what is, and what is not, relevant under the IDEA. Sec. 504 matters became involved with gifted student matters, coupled with alleged bullying by dance teammates with a competitive edge and alleged unresponsiveness by the LEA. The relevant question which arises through all of this, however, is about whether a failure to identify and evaluate, and to use known data during an evaluation, about anxiety, depression, and the impact on the Student's scoliosis had on the Student's extracurricular dance activity, eventually results in a denial of FAPE. Looking at the issue in this way leads to the determination that under this Student's unique circumstances at the times involved, ***see*** *Endrew*, 137 S. Ct. at 1001, the LEA breached its duty to identify and evaluate the Student for special education eligibility. That is, this gifted Student, uniquely, as a Student not wanting to be stigmatized by a disability, was unable to perform some extracurricular school dance functions due to scoliosis, was then mocked by dance teammates because of it, and suffered emotional

consequences. Although the Student's Mother made these matters known to the LEA, they were not considered as identification or evaluation criteria for special education eligibility; rather, the LEA used her status as "gifted" to show that her education was not impacted by a disability and provided her with some Sec. 504 accommodations for scoliosis and anxiety. This all took place while the Student was on a "Gifted Student IEP," during which times there were IEP meetings at two different high schools because the Student left the first high school because of, among other things, bullying. The focus of this decision, therefore, is who this Student is in part because of the incidents, uniquely, and how they are relevant to rise to a suspicion for identification and evaluation, yet were not considered by the LEA. This is about this unique Student and how the LEA breached its duties to identify and evaluate this Student.

Under 34 C.F.R. § 300.111(c)(1), the first prong of child find is for a child "suspected of being a child with a disability under § 300.8." Id. A child with a disability under 34 C.F.R. § 300.8 includes orthopedic impairment, 34 C.F.R. § 300.8 (c)(8), and emotional disturbance. 34 C.F.R. § 300.8 (c)(4)(i). The second prong of 34 C.F.R. § 300.111(c)(1) is that the child must also be suspected of being in need of special education, even though advancing from grade to grade. Id.

The Student has a diagnosis of lumbar scoliosis. Ex. G, Ex. H, Ex. LL, Ex. 7, Ex. 11, Ex. 41 (originally seen 5/18/18, with X-rays diagnostic review noting concave left lumber scoliosis). The Student is also suffers from depression and anxiety, based on the Student's "repeated and unrelenting bullying behaviors focused on her from school coach and peers," and examination of cyber bullying. Exs. WW, D (Dr. C). The focus of this issue is only on the federal IDEA claim, *see* 34 C.F.R. § 300.111(c)(1) – no state "gifted student" claim for

orthopedic impairment and emotional disturbance is actionable under this "child find" issue. ***See*** § 6.31.2.13(I)(2)(c) NMAC (due process hearing and pendant action in context only for gifted services).

By way of background, the Student was deemed eligible for gifted services in the 3rd grade. Ex. LL. Her eligibility, noted on February 10, 2020, when she was in the 9th grade, is in reading and written language. Ex. 9. On October 18, 2018 the Student's Parents went to school to discuss their concerns with Teacher KY about the Student's anxiety. Ex. 31 000001. On and about May 29, 2019 the Student, at age 14, was chosen, and competed in, the Scripps National Spelling Bee in Oxon Hill, Maryland. Ex. CCC.

CHS SUSPICION EMOTIONAL DISTURBANCE

The Student had been dancing since the 7th and into the 8th grades; she loved to dance. Tr. 541.

U-Hospital drafted an orthopedic clinic order on November 4, 2019, that due to the Student's low back pain, spasms, and mild scoliosis, the Student had to take a break from dancing, to return on November 25, 2019. Ex. H. In November 2019 the Student's dance coach, Coach A, learned that the Student had been diagnosed with scoliosis. Tr. 277-278, 566. The Student was on the CHS dance team, with Coach A paid to be the dance coach through a stipend with the Athletic Department. Tr. 277, 315.

In December 2019 the Student's Mother noted her concerns about the dancers being pushed beyond their limits, and pressure to perform the Penche Pose, which compromised the Student's medical condition and mental health. Ex. B; Tr. 569-570. The Penche Pose is a pose where the dancers' legs are raised toward a vertical position, right leg on the ground and left leg raised upward, with arms outstretched. Ex. I. The Student's Mother

raised her concern that the upper class member dancers were critiquing her daughter's dancing. Tr. 266. Coach A stated "we are a dance team. We are judged. It's called judging at state." Tr. 267. Coach A was aware that with the dancers tensions rise when going to state competition. Tr. 270. The critiquing would sometimes take place from the team captains. Tr. 268. Dancers would need to move faster and make sure toes are pointed. Tr. 268. The student to student critiquing was eventually abolished, after two parents brought it to the attention of CHS. Tr. 267, 318-320. When questioned about the other dancers being "mean," Coach A was of the opinion that fellow dancers were frustrated when they had to make adjustments due to the Student's participation, or lack of participation, in preparation for dance competition. Tr. 324-326. Coach A said the Student never told her she was uncomfortable doing certain moves for tryouts. Tr. 317. The Student did not participate in the competition. Tr. 383. Then Student's Mother notified Mr. C about what was happening in closed practices in December 2019. Tr. 557, 563, 567. .

In January 2020, the Student did not appear in her dancer's outfit for competition. Ex. J. She sat out the competition with her parents. Tr. 321. Coach A was unsure if the Student would be able to compete since they were working on their pom routine, and was unsure if the Student could adapt. Tr. 320-321.

On or about May or June, 2020, there was an honors banquet for the dance team, of which the Student was a member, held virtually. Ex. 33. Ex. K. Tr. 32-33, 288. While the dance team was an extracurricular activity, it was a school event, with a dance coach and students from CHS attending, as well as being open to the public. During the banquet, two senior students ridiculed the Student because of the Student's disability. Tr. 264. The event was recorded. One statement was "[I]'m kind of down for scoliosis," while

another statement was "[Y]ou were [the Student's name] but now you're [the Student's name] a-a-a-a-a-a-." Ex. K. Laugher ensued. Tr. 264. The LEA administration did not put a halt to the banquet. Tr. 264 (Coach A would have addressed it had she been present at that time). Significant weight is attached to the video copy of the event. It mocks and ridicules the Student because of her disability, in a demeaning way. Ex. K.

On or about October 6, 2020, it was mentioned that the "whole team" knows about the Student's scoliosis. Ex. HH.

A "gifted student" is subject to stress, burnout, perfectionism and may become depressed, and with social isolation, among other things. Ex. T. pp. 41-45 (NM PED Gifted Technical Assistance Manual, 2019).

Before these CHS dance team incidents the Student was self-confident, a "go-getter," content, without anxiety or depression. Tr. 540.

In December 2020 the Student's Mother notified CHS Principal SH that the Student was being bullied as reflected in a video clip of the end of year banquet and another about a teacher who she alleged told parents that her daughter was Autistic. Ex. P; Tr. 20-21, 23-25. The teacher, Ms. MP, testified, and is found to be credible. She disputes under oath that she made alleged comments about the Student being Autistic. Weight is given to her testimony. It is found that this is not a part of the alleged "bullying."

Nonetheless, the Student's Mother reached out the school – she was crying for help because her daughter had told her she was not internally well. Tr. 562. The Student's Mother spoke with CHS Principal SH and let know about the cyberbullying banquet incident and that it had destroyed her daughter … '[t]hey destroyed her – her well-being." Tr. 578. The Student's Mother told Principal SH she did not recognize her daughter any

longer, and that her daughter was not the same person anymore. Tr. 579. CHS Principal SH responded that there could be counseling services available. Tr. 579. Principal SH was aware that the Student's Mother told her that her daughter was feeling very anxious and stressed. Tr. 58. The Student's Mother saw it reflected in the Student's gifted educational program, in that she had been an honors student, that she was conscientious and knew grades would reflect where she could attend college, and that after the honors banquet incident she started having self-doubt and was struggling. Tr. 635-636. After the video dance team incident, the Student's GPA fell from 3.7143, to 3.3750. Ex. 38. Tr. 635.

Thus, at least as of mid-December 2020, the LEA, through its administrators, was put on notice that there was an emotional condition affecting the Student that the Student's Mother stated resulted from the public video mocking the Student due to scoliosis and other dance team related incidents. Rather than undertaking an IEP Team Meeting, Principal SH stated that counseling services could be available, and by doing so acknowledged her awareness of an emotional condition which may exist. The Student's ability to participate in her extra-curricular dance team sport was compromised and her overall grades were impacted.

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

are placed on notice of behavior likely to indicate a disability. ***See*** *Wiesenberg*, 181 F. Supp. 2d at 1311.

At least as of mid-December 2020 the LEA was on notice to suspect that symptoms of a disability were displayed by the Student, via parental concerns, inability to participate in her extra-curricular activity, ***see*** 34 C.F.R. § 300.107 (nonacademic service considered) and falling grades because of emotional disturbance. The disability was emotional disturbance, specifically "[i]nappropriate types of behavior or feelings under normal circumstances;" "[a] general persuasive mood of unhappiness or depression;" and "[a] tendency to develop physical symptoms or fears associated with personal or school problems." ***See*** 34 C.F.R. § 300.8(c)(4)(i)(C-E). Dr. C, found to be credible, and to whom weight is given to his testimony, tied in retrospectively the emotional condition theStudent was under because of the incidents, and why, during this period. In his first meetings in March and April of 2021 with the Student, he diagnosed a BDI screening of borderline depression, "with a significant amount of mental energy focused on a situationthat arose recently concerning personal health issues ….[as reported] repeated and unrelenting bullying behavior focused on her from school coach and peers." Ex. WW. He noted the Student even then had slightly higher depression and that she missed dance and past experiences such as the spelling bee, and reported psychosomatic issues when she saw people in public. Ex. WW. The Student noted she felt inferior due to her rejection from coach and teammates, and questioned how her teammates found out about her disability. Ex. WW. Thus, this meets the criteria of suspected disability for emotional disturbance, specifically "[i]nappropriate types of behavior or feelings under normal circumstances;" "[a] general persuasive mood of unhappiness or depression;" and "[a]

tendency to develop physical symptoms or fears associated with personal or school problems." ***See*** 34 C.F.R. § 300.8(c)(4)(i)(C-E). The Student in mid-December of 2020 should have been suspected of being a child with a disability under § 300.8, and in need of special education, and should have been evaluated, but was not. 34 C.F.R. § 300.111(c)(1).

The burden is on the Petitioner to prove the claim, ***see*** *Schaffer v. Weast*, 546 U.S. 49, although the burden is on the LEA to identify an eligible student under the IDEA. *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). Thus, the issue is whether the Petitioner has proved by a preponderance of evidence that the LEA did not meet its burden to suspect a disability of the Student as of around mid-December 2020. It is concluded that the Petitioner has met the first step of this procedural burden. 34 C.F.R. § 300.513(a)(2). ***See*** *Timothy O.*, 822 F. 3d at 1124 (child find, procedural violation).

The LEA should have begun child find procedures to begin an evaluation for the federal FAPE IDEA disability, yet did not do so within a reasonable time, after notice of suspicion arose. As a result, there is a procedural violation. 34 C.F.R. § 300.513(a)(2). Persuasive authority is found in the Southern District of New York District Court's decision in *Avaras v. Clarkstown Central Sch. Dist., et el*, No. 15 CV 9679 (NSR), 73 IDELR 50 (S.D.N.Y., September 28, 2018). As the Court explained in that case: "By the time the evaluation was performed, and a CSE meeting held, the entirety of Plaintiff's first grade year, except for three (largely administrative) days, had passed (citations deleted). This Court finds that the District violated its Child Find obligation." 73 IDELR 50, at p. 20. Similarly, in this case, although there appears to be a subsequent evaluation for

scoliosis, noted below, the evaluation did not review the Student's loss of extra-curricular dance activity due to scoliosis, or any evaluation at all for emotional disturbance. It only reviewed scoliosis, and because the Student was in a "gifted program" she was deemed to not be in need of other special education. Ex. LL. Thus, as of the date the due process hearing was filed (September 9, 2021), nine months had expired and there was no evaluation for the Student's anxiety, depression, fears associated with school problems, and inappropriate types of feelings, that is, for emotional disturbance.

The next step is to determine if the procedural violation of failure to identify and evaluate an emotional disturbance resulted in a violation of FAPE. 34 C.F.R. § 300.513(a)(2). To do so, the procedural violation must be found to significantly impede the parents' opportunity to participate in the decision-making process of a FAPE, or impede the child's right to a FAPE, or cause a deprivation of educational benefits to the child. *Id.* Considering these factual and legal underpinnings, and persuasive authority, and the expiration of about nine months from the time a suspicion arose to the time a due process hearing was filed, it is concluded that the Petitioner has met her burden that the failure to timely evaluate the Student impeded the Student's right to a FAPE for a failure to timely evaluate the Student for emotional disturbance, and caused a deprivation of educational benefits to the Student. 34 C.F.R. § 300.513(a)(2)(i)(iii). There was a violation of a FAPE.

SCOLIOSIS AND THE FEBRUARY 8, 2021 CHS IEP

On January 26, 2021 an IEP for February 3, 2021 was set. Ex. 11. On February 2, 2021, inquiry with student health services was made to see if doctor's orders regarding

scoliosis had been received. Ex. 30 000002. On February 2, 2021 the Student's Mother requested a copy of the last IEP from CHS. Ex. AA.

On February 2, 2021 CHS Assistant Principal VM wrote to the Student's Mother that scoliosis is a physical condition, rather than "academic/medical," and because she was receiving services as a gifted student, "a health care plan included within the IEP will ensure that all her needs are met with one document …" Ex. DD.

On February 2, 2021 the Student's Mother requested that an IEP scheduled for the next day would not also have Sec. 504 accommodations, to which Assistant Principal VM replied that since the Student only qualifies for gifted services, she has to have health plan for scoliosis in an IEP, rather than a 504 Plan. Ex. 11. On February 8, 2021 an IEP meeting was held, resulting in an IEP of February 8, 2021. Ex. 13. The February 8, 2021 IEP found the Student eligible for gifted in reading and written language, yet did not find, or discuss, eligibility for orthopedic impairment (scoliosis), or emotional disturbance (depression and anxiety). Ex. 13. Whereas the February 8, 2021 IEP discussed health considerations and stated that the Student had no health issues at the time, Ex. 13 (00006), a Healthcare Plan was attached to it with the diagnosis of scoliosis. Ex. 13 (000014). Similarly, although the February 8, 2021 IEP stated additional information considered by the IEP Team could include evaluations provided by the parent and psychological educational evaluations and eligibility determinations, there were no service providers noted, or strengths, or concerns and recommendations. Ex. 13 000006. A Prior Written Notice of Proposed Actions was entered on February 8, 202 1, accepting a proposal by the Parent that 504 accommodations be considered for the Student's (unnamed) medical condition. Ex. 13 (000018). Ex. F. The team would meet and update the IEP following an outside review of medical

documentation. Ex. 13, Ex. F. Also on February 8, 2021, a Health Care Plan was drafted, noting, in relevant part, that the Student has the potential for "impaired educational, social, and coping skills related to diagnosis of Scoliosis and Musculoskeletal Pain." Ex. 13, Ex. F.

The Student's Mother sought to re-set the meeting because she was not prepared for it, and stayed about eight minutes. The IEP Plan was then finalized.

Nursing intervention was to communicate the health care plan to the Student's teachers, allowing the Student to sit and stand during class as need to reduce pain and "the teachers may need to adjust educational assignments as needed due to pain from scoliosis." Ex. G. The school nurse followed up with the Student's Mother "concerning [the Student's] pain from scoliosis and that it will be attached to the IEP … Adjust educational assignments as needed due to pain." Ex. 30 000002. On March 4, 2021 healthcare provider FNP-BC VS reported that Student had been diagnosed with scoliosis, that she needs seating accommodations, and periodic visits with the school counselor, in addition to her outside counselor. Ex. C.

At issue once again is a failure to evaluate a suspected disability, this time being scoliosis. The LEA was aware of scoliosis at least as of November 4, 2019, when U-Hospital drafted an orthopedic clinic order on November 4, 2019, that due to the Student's low back pain, spasms, and mild scoliosis, the Student had to take a break from dancing, to return on November 25, 2019. Ex. H. Coach A was made aware of it during that time frame. Tr. 277-278, 566. The Student's Mother subsequently let Coach A know that the Student was being pushed beyond her limits, with pressure to perform the Penche Pose,

which compromised the Student's medical condition and mental health. Ex. B; Tr. 569-570.

The Gifted IEP of February 8, 2021, Ex. 13, with the incorporated Health Care Plan, failed to address the Penche Pose, or seek an evaluation under FAPE, rather than simply an IEP for a gifted student under state law. Ex. DD. Contrary to CHS Assistant Principal VM's conclusion that because the Student was gifted and not in need of special education services, the corresponding documents associated with it raise a suspicion otherwise. The IEP Health Care Plan in and of itself shows that: (1) there was a potential for "impaired educational, social, and coping skills related to diagnosis of Scoliosis…" Ex. 13, Ex. F; (2) educational assignments should be adjusted as needed because of scoliosis pain, Ex. G; and (3) additional seating accommodations along with periodic visits with the school counselor, in addition to her outside counselor. Ex. C. What is more, the LEA was also aware, as expressed above in the emotional disturbance context portion of this issue, that the Student's nonacademic services in dancing might not be met due to the Penche Pose and the competitive nature of the dance teammates toward the Student and their ridicule toward her, because of her disability. 34 C.F.R. § 300.107. This all impacts education benefits and a need for special education.

Development of dance skills are a part of physical education. 34 C.F.R. § 300.39(b)(2)(i)(B). Specially designed services if necessary must be made available to child with a disability. 34 C.F.R. § 300.108(a). Nonacademic services include athletics and extracurricular activities. 34 C.F.R. § 300.107.

A severe orthopedic impairment arises when it "adversely affects a child's educational performance," to include "impairments caused by a congenital anomaly,

impairments caused by disease (e.g., poliomyelitis, bone tuberculosis), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns that cause contractures)." ***See*** 34 C.F.R. § 300.8(c)(8). The Health Care Plan documents attached to the Gifted IEP give rise to a suspicion, on which the LEA is on notice, that the Student's scoliosis pain requires adjustments in educational assignments, the potential for impaired educational, social, and coping skills, seating accommodations, and visits to the school counselor. In addition, the Student's Mother notified Coach A that the Penche Pose was pushing the Student beyond her limits, which impacted her medical condition. In other words, these amount to a suspicion that symptoms of disability are displayed by the child for which an evaluation is required. ***See*** *Timothy O*, 822 F. 3d at 1120 (persuasive in this context, yet not binding). It is concluded that a procedural violation occurred. 34 C.F.R. § 300.513(a)(2).

Although the Health Care Plan makes note of the concerns, it is not harmless. This especially comes to light with the concern about the nonacademic Penche Pose, where the Student was being pushed beyond her limits. In other words, an IEP under FAPE may arise if the Student is evaluated and found to have a severe orthopedic impairment which impacts the Student's educational performance, which, given the Student's love of dance and inability to engage in dance, may also be impacted. This is an unknown. There was, however, a suspicion which had arisen. It is concluded, that just as with the emotional disturbance analysis, above, the failure to evaluate impeded the child's right to a FAPE, and caused a deprivation of educational benefits to the child. 34 C.F.R. § 300.513(a)(2). From November 4, 2019, through April 12, 2021, there was no evaluation based on scoliosis. As explained below, once the evaluation was completed, it failed to address the

possible nonacademic loss of educational benefit due to the Student's inability to perform in Coach A's competitive extracurricular dance team.

The April 12, 2021 IEE

On April 12, 2021 the LEA issued a letter notice from an Independent Educational Evaluation (IEE), including an educational diagnostician, and doctor of physical therapy, among others, which concluded that reviewing the Student's scoliosis, and the Student's strong academic grades as a gifted student, from an evaluative standpoint, there was not an emerging special education exceptionality, yet left it up to the IEP Team to ultimately determine exceptionality. Ex. LL. The Student was noted to be in the 10th grade at CHS. Ex. LL. The evaluation concluded that the Student's scoliosis could be addressed by 504 accommodations and modifications,such as adaptive seating devices, standing and sitting alteration, and consolation with a general education counselor. Ex. LL. The IEE did not address the Student's extracurricular activity of dance and the impact scoliosis had on it, or any emotional context after the May or June, 2020, honors banquet incident. Ex. LL.

In a related context, the United States Court of Appeals for the Eighth Circuit held, in 2020, that because a student is intellectually gifted does not foreclose a need for an eligibility determination. ***See*** *Independent Sch. Dist. No. 283 v. E.M.D.H.,* 960 F.3d 1073 (8th Cir. 2020). The same is true with this Student – the evaluator's reliance on the Student's strong academic grades and exceptionality as being a gifted student does not foreclose the need for child find evaluation.

It is concluded that although there was an evaluation for scoliosis, it did not review the nonacademic impact which may be relevant due to the Student's extracurricular dance activities when looking at special education needs. Additionally, the evaluation did not

address emotional disturbance. As a result, although there was an evaluation, it was not complete - it was not appropriate. It did not waive the need for an evaluation for emotional disturbance and Student's scoliosis, the nonacademic extracurricular dance activities, and diminished written language and reading levels (as explained below) activities when looking at special education needs.

Ongoing Child Find at High School # 2

On April 7, 2021 the Student left CHS, and on April 8, 2021 the Student entered HS #2. Ex. DDD. Another gifted only IEP was developed, now at HS #2, on May 12, 2021. Ex. 23. Health issues included scoliosis, Ex. 23 000004, and parental concerns were noted to be "an unusual amount of stress beyond Covid," with accommodations "due to her scoliosis anxiety and self-doubt … [where the Student] needs to feel safe at school … [and] have the right people be a part of the process of 'building her back up'." ***See*** Ex. 23 000006. In this Gifted IEP of May 12, 2021, health considerations to be addressed included following "the health plan outlined in the medical portion of the IEP," and as for additional information for eligibility, included the Student's gifted initial evaluation and past scores from 03/2014. Ex. 23 000007. The Student was provided nursing services of "5 min./as needed." Ex. 23 000012. Additionally the Student was to be given an extra set of books so she would not have to carry books home, as well as flexibility in seating, use of an elevator key, a pass to the nurse or AES office when in pain, the ability to move in the classroom, breaks as needed, and standing at the desk as need, to accommodate her physical issues. Ex. 23 000013. As for her psychological stress and anxiety, the Student is given extra time for assignments, and a pass to the nurse, AES office, and guidance office (the pressure pass); she would engage in small group testing and would have extended

time due to the psychological stress and anxiety (the pressure pass). Ex. 23 000013. According to the Prior Written Notice of Proposed Action regarding the May 12, 2021 IEP meeting, "[b]ased on the external review for scoliosis diagnosis, the IEP Team accepts the need for classroom testing accommodations so [the Student] can succeed," and thus the LEA proposed that the Student be deemed eligible for a 504 plan with accommodations to be a part of the IEP. While at HS#2 a counseling pressure pass was provided to allow the Student to go to the counselor between May 12, 2021 through May 26, 2021. Exs. 20 and 21. HS # 2 also sent an Email to teachers accommodate physical issues and psychological stress and anxiety. Ex. 22. Nonetheless, under the May 12, 2021 IEP, the Student was still noted to only be "a gifted student with no disabilities." Ex. 23 000004.

The LEA's contention that because the Student's Mother was asked for consent to re-evaluate in an Email on May 6, 2021, from Ms. HS, to which she responded that she did not want a re-evaluation, that she waived any further disability FAPE evaluation, is not persuasive. Ex. 36 000040 (Email from HS to Student's Mother, and reply). This Email is read in context of the whole document. Ms. HS wrote to the Student's Mother that the three year evaluation point was approaching, and "as a formality," a request was made to for a response for approval or disapproval for further testing. Id. The Email stated thatif no reassessment was requested then the Student would continue to be eligible for AES services under the category of gifted, yet that if the Student is re-evaluated and does not qualify as gifted then the Student would be ineligible for gifted services. Id. In all areas the document speaks about gifted services, except in one sentence, where it generally states, beginning with the "as a formality" language, that "we are required to ask if you wish to have her re-assessed for an emerging ability or disability." Id. In yellow blocked

and red underlined and bolded letters, it further states "[i]t is not necessary to have any additional formal testing for AES," and then the color blocks are discontinued and put into standard black lettering by ending with the word "services." Id. Ms. HS then asks for a simple "yes" or "no" Email response as to whether additional testing is requested. Id. On May 6, 2021, the Student's Mother replied that she does not "want a re-evaluation … [s]o that's no." Id.

During the hearing, the Student's Mother testified that her understanding was that the Email from Ms. HS relates only to re-testing for gifted, and if no test was requested, then the gifted student eligibility would continue. Tr. 637. Her intent was not to waive any other FAPE disability based evaluations.

Reading the Email chain as a whole, and in context, coupled with the Student's Mother's intent, it is concluded that she did not intend to waive, or not have, further testing for other disability-related FAPE matters. She only agreed that she did not request a re-evaluation for gifted eligibility. Ms. HS's testimony otherwise is not persuasive. Tr. 430.

Once again, the burden is on the Petitioner to prove the claim, ***see*** *Schaffer v. Weast*, 546 U.S. 49, although the burden is on the LEA to identify an eligible student under the IDEA. *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). Thus, the issue is whether the Petitioner has proved by a preponderance of evidence that the LEA (the new High School, HS #2) did not meet its burden to suspect a disability of the Student at least as around May 12, 2021, for both orthopedic impairment and emotional disturbance. It is noted that the suspicion has been an ongoing event, from CHS, now into HS#2, yet as for HS#2, at least as of the IEP of May 12, 2021, it should have suspected

emotional disturbance and orthopedic impairments from a disability and educational context, as the IEP itself shows. It is concluded that the Petitioner has met the first step of this procedural burden. 34 C.F.R. § 300.513(a)(2). ***See*** *Timothy O.*, 822 F. 3d at 1124 (child find, procedural violation).

Once again, it is concluded that the failure to evaluate impeded the child's right to a FAPE, and caused a deprivation of educational benefits to the child. 34 C.F.R. § 300.513(a)(2). From May 12, 2021 through the date of filing the Due Process Complaint, on September 9, 2021, there was no evaluation from HS#2, despite the IEP of May 12, 2021, which addressed emotional and orthopedic educational characteristics. While the "embedded" Health Care Plan in the Gifted IEP did address options help ease the Student's educational day, it remains that the services were still Sec. 504 services under a Gifted IEP, rather than whether the Student was entitled to eligibility under FAPE, and, if so, what FAPE may provide. Four months had passed. As the educational records show, while at HS#2 and despite being in 11th grade, the Student's instructional reading level remains at the 9th grade level, with the Student best being served with instructional materials at the 9th grade level. Ex. 24 00001. This 11th Grade Student, however, is eligible as a "gifted student" based on written language and reading, although she only now reads at the 9th grade level. Ex. 23 000001. It is recalled that in May of 2019 this Student was a Scripps National Spelling Bee competitor in Oxon Hill, Maryland. Ex. CCC. There is a disconnect between then and now.

Bullying

As noted at the outset, the focus is on the Student's unique needs, particularly after the incident where she was mocked and ridiculed by dance team members at the end of

year banquet. In this context, whether the Student was "bullied," as by defined by the U.S. Education Department in its 2013 *Dear Colleague Letter, **see** Dear Colleague Letter,* 61 IDELR 263 (OSERS/OSEP 2013), will not be decided. The issue in this IDEA matter is not what may have, or may not have, caused the Student's stress, anxiety, and depression, among things, but whether this Student, unique with these characteristics, should have been identified and evaluated by the LEA's schools for emotional disturbance after the incidents. In the Dear Colleague letter, *supra*, the Education Department characterized bullying as aggression in a relationship with more perceived power in the aggressor rather than in the aggressor's target, and whether the aggression is repeated, or otherwise has the potential to be repeated. Id. While Dr. C's testimony and conclusions are given great weight, and he is found credible, he based his professional judgments on, among other things, repeated and unrelenting bullying from a coach and peers. Ex. WW. He reflects that this is what he gathered from the Student, and that one of the concerns of the Student was that one of her prior middle school dance coaches, MP, had engaged in disparaging comments about the Student. What has been found, however, based on the sworn testimony of Ms. MP, is that she did not comment about the Student being on the Autism spectrum, and that laughter in the video recorded about the end of year dance banquet was not attributed to her. This does not mean that the Student is not suffering from depression, anxiety, and other stressors because of the banquet and other incidents, as Dr. C concludes, but only that a factor of that stress was not proved in this hearing. The focus, then, is on the Student's emotional condition, rather than whether it is because of relentless and repeated bullying. As noted, this gifted Student's emotional condition, reported by the Student's Mother, coupled with the LEA's knowledge of what happened

during the video banquet, among the other matters noted above, were sufficient to put the LEA on suspicion of an emotional disturbance, whether or not the evidence at the hearing can classify it as "bullying" under the Education Department's characterizations.

Internal Exhaustion

In context, the Student's Mother brought the emotional disturbance issues to the forefront with the LEA various times, discussing anxiety, mental health needs, her concern about perceived bullying, and other associated activity, as well as orthopedic impairment, with the discussion of a Sec. 504 plan and concern about the Student's special needs, including in gifted IEP meetings. It is now concluded that the Petitioner met her duty to bring the matters to the attention of the LEA administrators and therefore to the IEP Team, with the knowledge she held, akin to exhaustion in the administrative context, recognizing that the duty in the first place is on the LEA to identify and evaluate. ***See*** *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1275-1279 (10th Cir. 2007)*; Cudjoe*, 297 F.3d at 1065 - 1067.

Parental Participation and Prior Written Notice

This issue relates to Issue 2, which disposes of the Issue. It seeks a determination of whether the Student's Parents received notice of, and participated in, the Gifted IEPs. As discussed regarding Issue 1, above, the FAPE claims had not yet ripened for any FAPE IEP meetings – the claims remained at the identification and evaluation stages, they had not gone to a meeting stage. Thus, the only issues now are for alleged parental notice and participation at the Gifted IEP meetings.

While, as at the outset, it was concluded that there may be jurisdiction to entertain a claim in a due process hearing in a limited exception for a gifted service violation, as a

pendant state claim, it is concluded that only the limited State gifted claim may be heard, to wit: "claims for gifted services," under § 6.31.2.13 (I)(1)(b) NMAC to address "or services to, a child who needs or may need gifted services." §6.31.2.13(I)(2)(c) NMAC . §6.31.2.12 NMAC is speaks of educational "services" for gifted children. Id. These educational services include child find procedures, analysis of data for gifted identification, information about the child's abilities from other sources regarding the child's performance, identification standards, and the applicability of rules and exceptions, including procedural safeguards and "services" for students under FAPE. Id. at A-D. "Educational services" for children with disabilities, under FAPE, are found in §6.31.2.11 NMAC. These services include, among other things, notice and the opportunity for the parent to participate at the IEP meeting. §6.31.2.11(B)(2) NMAC. With this background, there is administrative jurisdiction to entertain the procedural prior written notice claim and the parental participation claim. In doing so, persuasive, although not binding, authority will be used in federal FAPE interpretations.

Prior Written Notice

The allegation from the Petitioner is that because a prior written notice of proposed action was received on the date of the relevant IEP meetings, that is on February 8, 2021 for that IEP (Ex. 13), and May 12, 2021 for that IEP (Ex. 23), then it was not a "prior notice" of a meeting, and, therefore, insufficient. This is not persuasive.

While written notice is required regarding the placement of a child, 34 C.F.R. § 300.503, the prior written notice is be provided before 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. Jul. 16, 1998). The prior written notice is notice of the proposed change

before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. ***See*** *Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239 (W.D. Mich. 2003). ***See also*** *Tenn. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Thus, while the Student's Mother may not have received notices before the meetings, the notices were provided prior to any changes. While Dr. AA, an advocate and educator, may have a different opinion on the standard practices of the LEA, or when a prior written notice should be provided, the issue determined is as a matter of law. As a result, there were no violations of state gifted "services." § 6.31.2.12 NMAC; § 6.31.2.13 (I)(1)(b) and (I)(2)(c)NMAC.

Parental Participation

Under FAPE, an IEP is to be developed in accord with 34 C.F.R § 300.320 through § 300.328. §6.31.2.11(B)(1) NMAC. Education services for gifted students are found to be those under the FAPE service rules. §6.31.2.121(D) NMAC. A FAPE IEP under 34 C.F.R § 300.320 through § 300.328 addresses in relevant part the development of an IEP. 34 C.F.R § 300.324. Among other things, the IEP Team is to consider the strengths of the child, academic, developmental, and functional needs of the child, as well as the parental concerns for enhancing the child's education. 34 C.F.R § 300.324(a)(i)(ii)&(iii). In federal interpretation, the IEP is reviewed for being appropriate. *Endrew F.,* 137 S. Ct. 988, 999 (2017).

On February 2, 2021 CHS Assistant Principal VM wrote to the Student's Mother that scoliosis is a physical condition, rather than "academic/medical," and because she was

receiving services as a gifted student, "a health care plan included within the IEP will ensure that all her needs are met with one document …" Ex. DD.

On February 2, 2021 the Student's Mother requested that an IEP scheduled for the next day would not also have Sec. 504 accommodations, to which Assistant Principal VM replied that since the Student only qualifies for gifted services, she has to have health plan for scoliosis in an IEP, rather than a 504 Plan. Ex. 11. On February 8, 2021 an IEP meeting was held, resulting in an IEP of February 8, 2021. Ex. 13.

The Student's Mother attended only about eight minutes of the meeting. Tr. 586. She expressed her concern that she was unaware that it was to be an IEP meeting, thinking it would be about a 504 plan being "embedded" into the existing IEP. Tr. 587. She was confused, as well, thinking she was first entitled to a Prior Written Notice, prior to the meeting. Tr. 587. The Student's Mother wanted to make sure scoliosis and anxiety were to be included in the meeting. Tr. 589. The IEP meeting took place in the morning, with a Prior Written Notice submitted to the Student's Mother around 1:30 p.m. The IEP was then finalized.

On February 10, 2021 the Student's Mother expressed her concern about an IEP meeting being held when she had asked to extend the time frame for the IEP meeting so 504 paperwork could be completed. Ex. A. A Prior Written Notice was provided to the Mother by Ms. LH, the Special Education Lead at CHS, saying a meeting was set on Monday since the Mother was unavailable on Friday, and that she was in attendance for the LEA, but that a meeting had to take place then to complete an IEP and Prior Written Notice. Ex. A. The LEA' position was that a meeting had to be held at that date and time, ignoring the Student's Mother's concerns, because it had to "continue to service [the

Student] as a Gifted student." Ex. A. That is, the LEA held the meeting to complete the task, rather than to give the Student's Mother the opportunity for meaningful participation. A mutually agreeable time was ignored, since the Student's Mother needed more time to review the documents for the IEP, 34 C.F.R. § 300.322(a)(2), and the LEA did not hold the meeting with the Student's Mother's absence only after it was unable to convince her to attend. 34 C.F.R. § 300.322(d).

At least under federal law, parental participation is significant. The issue is meaningful parental participation -- that is, that parents must be given "an opportunity for meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate." *Honig v. Doe,* 484 U.S. 305, 311-122 (1988). In a recent federal law interpretation case from the District of Columbia, the District Court found that parental rights were significantly impeded where the LEA had scheduled a meeting, the parents sought to reschedule the meeting, thinking it was abandoned, yet the LEA nonetheless continued to finalize the meeting and the IEP parental participation, despite the parent's request that they be allowed to participate. ***See*** *B.D. v. Dist. of Columbia,* No. 15-1139 (D.D.C. Dec. 21, 2021), 80 IDELR 38, 121 LRP 42573. Using this federal authority persuasively, it is concluded in this state gifted matter that there was a failure to provide gifted services because the continued meeting significantly impaired parental participation. §6.31.2.12 NMAC; §6.31.2.11(B)(2) NMAC.

As further explained in *B.D. v. Dist. of Columbia*:

> Where an LEA has caused a FAPE denial due to improperly excluding parents, it bears a heavy burden in remediating this procedural violation. *See Doug C.*, 720 F.3d at 1047; *Gaston v. District of Columbia*, Case No. 18- cv-1703, 2019 U.S. Dist. LEXIS 130566, 2019 WL 3557246 (D.D.C. Aug. 5, 2019) ... What it fails to incorporate is that the Davises were entitled to participate in the

> full creation of B.D.'s IEP for the 2013-14 school year. *See Doug C.*, 720 F.3d at 1047. This requires more than some after-the-fact participation, which is all DCPS offered here through the October 1 meeting. *See* id. (holding "after-the-fact parental involvement" is insufficient to cure a FAPE denial caused by excluding a parent from an IEP meeting because "the IDEA contemplates parental involvement in the creation process" (cleaned up)); *Gaston*, 2019 U.S. Dist. LEXIS 130566, 2019 WL 3557246 ("[A] subsequent adequate course of action cannot sanitize a prior inadequate decision.").
>
> ... This limited review was insufficient to cure the prior deficiencies, resulting in a continued FAPE denial through the next time the IEP team convened in July 29, 2014. *See Doug C*., 720 F.3d at 1047; *Gaston*, 2019 U.S. Dist. LEXIS 130566, 2019 WL 3557246.

See *B.D. v. Dist. of Columbia,* Slip Op. at 19-20.

The Student's Mother did not meaningfully participate – thus she did have the meaningful ability to bring her concerns to the IEP Team, thus precluding her ability to first bring the matter to the LEA and IEP Team for internal administrative exhaustion. Similarly, as a procedural violation, it significantly impeded the Student's Mother's opportunity to participate in the meeting. 34 C.F.R § 300.513(2)(ii). Had this occurredin a federal IEP for FAPE then it would result in a violation of FAPE – there is no reason to conclude that a different result should be reached because it is a state gifted violation. Therefore, there was a violation of Student's services under the gifted exceptionality. §6.31.2.12(D) NMAC.

Appropriate Dual Exceptionality IEPs

This addresses Issue 3.

The two relevant IEPs are the gifted CHS IEP of February 8, 202 1, and the gifted HS #2 IEP of May 12, 2021. As concluded earlier, because the LEA did not identify or evaluate the Student under the federal claims, then there is no federal "appropriate IEP"

action to be considered, and no federal claim regarding implementation. The FAPE action remains in the evaluation and identification stage.

The IEP claims framed by the Petitioner for appropriateness and implementation are for "dual exceptionality" claims, where the FAPE claimed exceptionality is directly tied into the state claim for gifted services. As stated in the introduction of the Petitioner's Issue III:

> [The LEA] violated its IDEA and Gifted duties by failing to appropriately create and implement an IEP that addresses the dual exceptionality educational supports [the Student] requires based on [the Student's] gifted designation and [the Student's] scoliosis condition and emotional disturbance stemming from the disability-based harassment and bullying [the Student] endured at [the LEA], leading to a denial of FAPE.

P's FFCL, p. 15, Argument, p. 25.

Review of the Petitioner's allegations relate only to a failure to create and implement a "dual exceptionality" IEP during the Gifted IEP meeting, considering the FAPE scoliosis and emotional disturbance, and alleged bullying. P's FFCL, pp. 15-17, Argument, pp. 25-30. Thus, the "Gifted IEP" focus is only relating to the dual exceptionality (federal FAPE combined with state gifted) the Petitioner alleges should have occurred in the first place. Id. Before appropriateness, or implementation of, the alleged "dual exceptionality" IEPs arises, however, the first step is whether the Student is eligible not only under the state gifted IEPs, but also under the FAPE orthopedic impairment and emotional disturbance exceptionalities. Because eligibility has not been established under FAPE, then a determination cannot be made about whether the IEPs are appropriate, or what implementation should arise, for "dual exceptionality." As a result, there is neither denial of FAPE nor a denial of state gifted services on this issue.

Due to this ultimate conclusion, there is no need to discuss internal administrative exhaustion. Similarly, there is no need to address a procedural violation and resulting consequences.

Behavioral Interventions

This relates to Issue 7.

While this issue was broadly framed by the Respondent, *see* Respondent's Statement Regarding Issues, October 25, 2021, p. 3, para. 12(d), it has not been addressed by the Petitioner as an issue. Respondent's proposed conclusion of law number 18 is that the Petitioner failed to meet her burden of proof that the Student required positive behavioral interventions and supports. R's FFCL, No. 18, p. 21. From the Petitioner's argument, and Proposed FFCL, Petitioner is not arguing this as an issue. *See* P's FFCL and P's Argument. It is a nonissue. Alternatively, to the extent it may be an issue, it would arise in the appropriateness of the IEPs, which is only raised in the dual exceptionality context, P's FFCL, p. 15, Argument, p. 25, and thus considered premature, above, because there have been no evaluations for orthopedic impairment or emotional disturbance.

Remedy

This addresses Issue 6.

A remedy is awarded. As explained recently in *Albuquerque Public Schools v. Cabrera*, Nos. 1:20 cv-00531-JCH-LF and 1:20-cv-00532-JCH-LF (D.N.M. Dec. 7, 2021) once a plaintiff has established an IDEA violation and a subsequent denial of FAPE, then she has carried her "'burden of proving entitlement to a properly crafted compensatory award under *Reid*.'" Id., Slip Op. at 24, (citing *Phillips ex rel. T.P. v. D.C.*, 736 F.Supp. 2d

240, 247 (D.D.C. 2010)). As concluded, the LEA violated FAPE. The Student is entitled to a properly crafted compensatory award.

The underlying focus is qualitatively what services would put the Student in a place she would have been absent the denial of FAPE, and what the Student's needs would be in the new environment to allow her to undertake the proposed services. ***See generally*** *Reid*, 401 F.3d at 523-24 (qualitative compensatory education relief test).

First, persuasive authority is found for relief in granting tutoring due to a loss of educational benefit based on a FAPE child find violation, which included a gifted child where emotional disturbance was not identified or evaluated, much like this case, under the broad discretion standard for equitable relief. ***See*** *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073 (8th Cir. 2020). The Eighth Circuit Court of Appeals affirmed an award of tutoring until the student earned the credits expected of his same age for the credit deficiency due to the child find violation of FAPE. *Id.* at 1085. Given this authority, it is concluded that the Student is entitled to tutoring in written language and reading to bring her to her 11th grade reading level from her current 9th grade reading level, consistent with her gifted abilities. This is a remedy not only for the denial of FAPE under failure to evaluate under child find, but also for the denial of state gifted services due to the Student's Mother's inability to meaningfully participate in the gifted state February 8, 2021 IEP. ***See*** *B.D. v. Dist. of Columbia,* Slip Op. at 19-20 (to remedy FAPE issue only). The LEA at HS#2 will provide the tutoring. Although HS#2 has violated procedural and substantive matters, it has also been the new school for the Student to attend, after she left CHS. AES Teacher Mr. M performed the evaluative criteria finding the Student to be at the 9th grade level while at HS #2. Thus, it is appropriate for HS #2 to now provide tutoring services in

written language and reading to bring her back to that level she should be as a gifted AES student in the 11th grade absent the denial of FAPE due to failure to evaluate. Because the actual amount of time for the services will be fluid to bring the Student back to the level she should be but for the FAPE (and gifted procedural) violations, the LEA is ordered to first proceed with two hours a week tutoring, at separate dates, either before or after the school day, one-on-one with the Student, until the Student reaches her expected level of reading and written language which she lost due to the child find and parental participation violations. The tutoring will be while school is in session during the standard school calendar, and will also include ESY (summer) services, with the exception of time the Student may seek to be absent due to, for instance, summer camps, or family travels. The LEA is responsible for the costs. The tutoring will be by a licensed High School New Mexico Public Education educator with a language arts endorsement, and with an understanding of the Student's special educational needs such as anxiety, depression, scoliosis, and stress. This is tied into both the parental participation (Mother could not voice concerns about stress and anxiety not being met to seek a twice exceptional IEP), and the failure to evaluate for orthopedic impairment and emotional disturbance, with the gifted reading and writing at 9th grade level remaining stagnant after the dance team episodes, and subsequent failures to evaluate, beginning in the 9th grade. The special educational needs will remain confidential between the LEA, tutor, and the Petitioner, just as IEP information remains confidential – the underlying purpose of the tutoring will not be disclosed.

To be clear, the tutoring will be in person, if consistent with LEA policy at the time due to Covid restrictions, and one-on-one. It will not be through a generic "tutoring lab"

or "resource room" available to all students or to gifted students. The tutoring is akin to private tutoring, yet it may be by contract LEA educators.

The Student is no longer interested in dance; thus, compensatory services to make up for the extracurricular activity loss are not awarded, considering who the Student is now.

An Independent Educational Evaluation (IEE) for emotional disturbance and orthopedic impairment is now ordered. 34 C.F.R. § 300.502. There are two avenues to order the Respondent to pay for an educational evaluation. The first is if the evaluation is an Independent Educational Evaluation (IEE). ***See*** 34 C.F.R § 300.502. The other is as a remedy for a denial of a FAPE. ***See*** *M.M. v. LaFayette Sch. Dist.*, 116 LRP 31747 (N.D. Cal. July 27, 2016). In this case there is a denial of FAPE for failure to evaluate.

Within 10 days from the entry of this Order, the LEA will provide the Student's Parents with a list, in writing, of three independent educational evaluators located in or about the community where the Student resides. The Petitioner will then have 10 days to select the evaluator and to communicate the choice to the LEA in writing or by Email to the Respondent's counsel. The evaluation will be set within 20 days of the date the LEA receives notice of the Petitioner's choice of the evaluator. The evaluation costs will be paid by the LEA, consistent with community standard costs for an IEE. It will employ the procedures and requirements under 34 C.F.R § 300.300 through 34 C.F.R § 300.305. The evaluation will consider, among the other components, the Student's loss of nonacademic dance, her declining academic GPA, her counseling with Dr. C, and all other matters the evaluator deems appropriate. The evaluation will also consider if the Student is "twice exceptional," that is, for both gifted and disability. The evaluation will be completed using

due speed. On completion of the evaluation, the LEA and the Student's Parents will review it for the Student's eligibility under 34 C.F.R. § 300.306, through a facilitated IEP meeting so to allow open and effective communication to eligibility. § 6.31.2.7(C)(1) NMAC.

The LEA is not ordered to pay for Dr. C's past counseling fees as to emotional disturbance. While the past cost could be a remedy, ***see*** *Roxanne J. v. Nevada County Human Services Agency*, (D.C. E.D. Cal. Nov. 28, 2006), 46 IFELR 280, 106 LRP 69393, there is no evidence in the record of Dr. C's fees and costs.

Future counseling is awarded, however, as related compensatory services to make up for the deficiency of counseling services in order to put the Student where she should be absent the timely failure to evaluate and parental participation. This, too, is fluid and will continue until the Student reaches that place where she should be absent the deficiency due to the child find violation of FAPE. ***See*** *E.M.D.H.*, 960 F.3d at 1085 (for ability to award tutoring credit services as basis for this expansion into counseling services). Services will be provided by New Mexico licensed counselors currently under contract with the LEA. The services will not be "generic to all students" – rather, the counseling services will be for the Student's individual, unique needs, such as anxiety, stress, and depression, to support her past loss of educational benefits, and will be provided by a counselor with the skill, education, training, and experience in these areas of mental health. The services will not just be "made available" for the Petitioner to navigate, as in the past. The LEA is ordered to proactively undertake the task to initially contact the service provider, being aware to maintain the confidentiality of all the medical information, and will provide the Petitioner a single point of contact for the provider to

give the Student access to services, with the cost to be paid by the LEA. This will be done within 10 days from the entry of this Order.

Other remedies requested by the Petitioner, as contained in her Closing Argument, are denied. *See* P's Argument, pp. 32-34. First, the Petitioner's theory that "there is no need for a barrage of standardized tests," Id. at p. 32, is not persuasive. As explained herein, evaluations are now ordered for orthopedic impairment and emotional disturbance. Next, the Hearing Officer cannot not retain jurisdiction, as requested by Petitioner, P's Argument, p. 32, because jurisdiction is lost after this Order is entered. 34 C.F.R. § 300.516. The request for the LEA to contract with an expert to create a training plan to work with twice-exceptional students, among other things, and to have that expert undertake other future action, and for the Hearing Officer to postpone any other final remedy, is not persuasive. P's Argument, p. 33-34. First, as noted above, jurisdiction is lost after this Order is entered. Second, this case is not at the point of twice-exceptionality being established – it remains at the evaluation and then eligibility stages, so the requests are premature. Finally, this Order will speak for itself in that the LEA has denied FAPE in the identification and evaluation stages, and into gifted meetings, where suspicions of disability and educational need under FAPE arise.

ADMINISTRATIVE ORDER

Therefore, for the reasons noted above, the Petitioner's Amended Due Process Request is granted in part and is denied in part.

In summary, the Petitioner met her burden proving two violations of FAPE under federal law, with both procedural violations amounting to substantive violations, based on a failure to identify and evaluate the Student for orthopedic impairment and for emotional

disturbance. There was an additional failure to provide service violation under gifted services for the state only action because of lack of meaningful parental participation, using federal law as persuasive guidance. The current violations are ordered to be remedied by tying the Student's 9th grade year, through the 10th grade year, into her 11th grade year to make up for reading and writing skills based on the objective evaluation criteria of the Student's reading and writing now at the 9th grade level as a gifted student although she is in the 11th grade. The grade point averages show, as well, a more objective standard of academic performance and loss, rather than using the more general fluctuating grades with changes in schools. Since the Student no longer wants to dance, then there is no remedy to make up for the lost dance skills. The fluid compensatory education components for tutoring in written language and reading, and specific counseling services, are designed to put the Student back into the place she should be absent the FAPE failures to evaluate and the state denial of lack of parental participation. Evaluations for orthopedic impairment and emotional disturbance are also ordered by an independent evaluator.

What this educational case does is focus on the Student, on notice of suspected disabilities, and educational needs. It does not venture into the cause of why, and what, circumstances erupted with the dance team, with investigations, local practices, and the LEA. The focus of what happened with the dance team is relevant in context to how it placed the LEA on notice of suspicions of disabilities with educational needs, and the actions it failed to take. The focus is on the gifted Student, a former Spelling Bee champion now concluding her 11th grade year, with one more year before applying for colleges, and the lack of evaluations and parental participation. This case is about who she is, and her

need for education. This is the purpose of this forum.

Any claims or defenses otherwise raised which are not specifically addressed herein, will be, and hereby are, denied. To the extent any witnesses are not specifically named for credibility then they are found credible.

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)(23) NMAC. Any such action must be filed within 30 days of receipt of the Hearing Officer's decision by the appealing party.

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

It is so administratively ordered.

/s/ electronic

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MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: February 23, 2022

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent via Email PDF attachment only to Vanessa de Leon, Amy Orlando, Susana Macias Munoz, and Evelyn Howard-Hand, Esqs., as counsel for the parties, and to D. Poulin, Esq., for the Secretary of Public Education, at their respective Email addresses of record, all on this 23rd day of February 2022.

/s/ electronic

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