

**BEFORE THE NEW MEXICO
PUBLIC EDUCATION DEPARTMENT**

DPH No. 2324-09 (Santa Fe Public Schools)

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

THIS MATTER arises on the Petitioners' Request for Due Process Hearing with Local Education Agency, filed with the State of New Mexico Public Education Department on October 27, 2023. **See** Request for Due Process Hearing with Local Education Agency, October 27, 2023 (hereinafter Request for Due Process). The Petitioners' Request for Due Process is granted in part.

PROCEDURAL BACKGROUND

The Respondent LEA responded to Petitioners' Request for Due Process on November 6, 2023. **See** Answer to Complaint, November 6, 2023 (hereinafter Answer). The Respondent also filed, on November 6, 2023, its Notice of Insufficiency of Complaint. **See** Notice of Insufficiency, November 6, 2023 (hereinafter Notice of Insufficiency).

On November 8, 2023, a Sufficiency Determination Order was entered. **See** Sufficiency Determination Order, November 8, 2023 (hereinafter Sufficiency Determination Order). The Due Process Complaint was found to be sufficient upon which to proceed to hearing. **Id.**

A PreHearing Conference was held on November 10, 2023, which resulted in a PreHearing and Extension Order also being entered on November 10, 2023. **See** PreHearing and Extension Order, November 10, 2023 (hereinafter PreHearing Order). Among other things, the PreHearing Order granted the joint request by the parties to

extend the date for the due process order decision until February 12, 2024, subject to subsequent extensions should the matter be revisited. **See** PreHearing Order. The due process hearing was set to commence on January 8, 2024, by personal appearances, for approximately six days. **Id.**

The parties filed their Joint Statement of Issues on December 6, 2023. **See** Joint Statement of Issues, December 6, 2023 (hereinafter Joint Statement of Issues). The Petitioners filed their proposed Statement of Issues on December 6, 2023. **See** Petitioners' Statement of Issues, December 6, 2023 (hereinafter Ps' Issues). Respondent also filed its proposed Statement of Issues on December 6, 2023. **See** Respondent's Proposed Statement of Issues, December 6, 2023 (hereinafter R's Issues).

The parties timely filed their respective Witness and Exhibit Lists. **See** Petitioners' Witness List, December 29, 2023; Petitioners' Exhibits, December 29, 2023; Respondent's Santa Fe Public Schools Board of Education's Witness List, December 29, 2023; and Respondent's Witness List, December 29, 2023. Respondent subsequently filed an amended witness list. **See** Santa Fe Public Schools Board of Education's Amended Witness List, January 1, 2024. On January 3, 2024, the parties jointly filed a Joint Statement of Issues & Joint Statement of Facts. **See** Joint Statement of Issues & Joint Statement of Facts, January 3, 2024 (hereinafter Joint Statement of Issues and Facts).

The Respondent filed, prior to the hearing, proposed findings of fact and conclusions of law. **See** Santa Fe Public Schools Board of Education's Proposed Findings of Fact and Conclusions of Law, January 3, 2024. The PreHearing Order did not require that working proposed findings of fact and conclusions of law be submitted

prior to the hearing, although they were not prohibited either. **See** PreHearing Order.

As noted, the Due Process Hearing was set to begin in person on January 8, 2024, in Santa Fe, New Mexico. **See** PreHearing Order. However, a snow storm was predicated to make travel conditions unsafe for personal appearances. **See** Email Lyman to Parties, January 5, 2023. After a telephone conference with the parties, and with their concurrence, the Due Process Hearing setting was amended to begin on January 9, 2024, at 8:30 a.m., to be held virtually. **See** Amended Hearing Setting, January 8, 2024.

The Due Process Hearing convened virtually on January 9, 2024, and continued through January 12, 2024. Tr. Vols. 1-4. The Respondent's counsel personally appeared with Respondent's representative, JP, at their administrative offices in Santa Fe, New Mexico, with a virtual broadcast from that location. The Court Reporter worked virtually from her office space. The Hearing Officer appeared virtually, as did Petitioners and their counsel. Witnesses appeared virtually. Online cameras and video screens allowed the participants to view, hear, and speak with one another simultaneously.

Both parties were well-represented by their respective trial counsel. Although the record transcript does not reflect post-hearing dates, tr. 960, Findings of Fact, Conclusions of Law, and Argument were ordered to be submitted on or before February 23, 2024. Proposed Findings of Fact and Conclusions of Law were not to exceed 25 pages. Argument was not to exceed 20 pages. Based on joint request from the parties, an extension for this decision was granted to be entered on or before March 23, 2024. These post-hearing dates and the extension were entered by subsequent order on

February 11, 2024. **See** Administrative Order, F&C and Extension, February 11, 2024. Another administrative order was entered on January 17, 2024, regarding the contents of the official record as being the digital versions, although the Hearing Officer used working hard-copy binders. **See** Administrative Order, January 17, 2024.

The Respondent filed its first proposed Findings of Fact and Conclusions of Law on January 3, 2024. [LEA's] Proposed Findings of Fact and Conclusions of Law, January 3, 2024 (R's F&C, No. 1). The Respondent subsequently filed another set of proposed Findings of Fact on February 23, 2024. [LEA's] Proposed Findings of Fact, February 23, 2024 ([LEA's] Proposed Findings of Fact, February 23, 2024 (R's F). Respondent also filed a separate proposed Conclusions of Law on February 23, 2024 [LEA's] Proposed Conclusions of Law, February 23, 2024 (R's C). On February 23, 2024, the Respondent filed its Closing Brief. [LEA's] Closing Brief, February 23, 2024 (R's Argument).

The Petitioners filed requested Findings of Fact and Conclusions of Law on February 23, 2024. Petitioners' Requested Findings of Fact and Conclusions of Law, February 23, 2024 (Ps' F&C). The Petitioners also filed their Closing Argument on February 23, 2024. Petitioners' Closing Argument, February 23, 2024 (Ps' Argument).

This decision is due on or before March 23, 2024. **See** Administrative Order, F&C and Extension, February 11, 2024.

ISSUES PRESENTED BY THE PARTIES

1. Whether the District failed to provide the Student with a FAPE during the statutory period while enrolled in the Santa Fe Public Schools. **See** Joint Statement of Issues and Joint Statement of Issues and Fact.

2. Whether the Petitioners should be reimbursed for the cost of enrolling their child in a private school. **See** Joint Statement of Issues.
3. Whether some portion of the claim for reimbursement falls outside of the statutory time limit. **See** Joint Statement of Issues.
4. Whether the Student's attendance at MIMS, a school of choice, allows for the LEA to modify the special education provided to the Student. **See** Joint Statement of Issues and Fact.
5. Whether the District failed to provide the Student with a FAPE, and whether the private M School did provide a FAPE (summer 2022, 2022-23 school years), and whether the Parents should be reimbursed for the Student's private placement at the M School for the 2022-2023 school year, and for summer 2022 instruction. **See** P's Issues.
6. Whether the LEA refused to provide the Student with specialized reading instruction supported by research and necessary as a student with severe dyslexia in middle school (ATC, DSA), and high school (MIMS). **See** P's Issues. P's Issues.
7. Whether the LEA failed to provide the Student with access to the general curriculum, including through failure to provide the Student with audio texts/audio access for assigned grade level content learning. **See** P's Issues.
8. Whether the LEA has failed to provide the Student with education that meets state standards. **See** P's Issues.
9. Whether the LEA has failed to provide education to the Student which is free. **See** P's Issues.

10. Whether the LEA has failed to provide necessary related services, including Assistive Technology (AT) and Cognitive Behavior Therapy (CBT). **See** P's Issues.

11. Whether the LEA failed to implement the Student's IEPs. **See** P's Issues.

12. Whether the LEA failed to create individualized IEPs for the Student by ways including writing IEPs which do not reflect understanding of dyslexia or the instructional implications of the Student's evaluations and by using "cut and paste" to generate IEPs which are not based on knowledge of the Student's current needs. **See** P's Issues.

13. Whether the LEA has failed to understand and appropriately act on its responsibility for transition planning and services as set out in IDEA and state law and has made no meaningful transition planning or services available to the Student including absence of post-secondary goals in her IEPs and lack of understanding on how to create and support such goals. **See** P's Issues.

14. Whether the LEA has denied the Student a FAPE. **See** P's Issues.

15. Whether an equitable remedy should be awarded for denial of FAPE. **See** P's Issues.

16. What equitable remedy is appropriate. **See** P's Issues.

17. Whether the District is required under the IDEA to make all program services available at all of its school sites. **See** R's issues.

18. Whether it is permissible for the District to create magnet schools with specific academic criteria for participation. **See** R's Issues.

19. Whether the District has the responsibility for the actions or inactions of a charter school in its district. **See** R's Issues.

20. Whether a District's liability for failure to provide a FAPE only applies to the time the student is enrolled in the public school. **See** R's Issues.

21. Whether Petitioners seeking reimbursement for private school tuition are required to provide notice to the District prior to placement of the Student in the private school. **See** R's Issues.

22. Whether the District is required to modify a program of study to accommodate the Student on the IEP so the program requirements are diluted to such an extent that it no longer meets the program requirements. **See** R's Issues.

23. Whether the M School reading program was beneficial if the Student is only reading at a fourth grade level. **See** R's Issues.

24. Whether the District is required to provide Cognitive Behavior Therapy to the Student. **See** R's Issues.

25. Whether frequent changing of schools has an adverse impact on the Student's progress towards goals and objectives. **See** R's Issues.

26. Whether the Petitioners named all necessary parties in their Complaint, and whether they are required to name those parties. **See** R's Issues.

RELEVANT LEGAL OVERVIEW

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

challenging appropriateness. **See** *D.A.B. v. New York City Dep't of Educ.*, 66 IDELR 211 (2nd Cir. 2015)(unpublished, used persuasively). In this action, the burdens rest, unless otherwise noted, with the Petitioners.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.*, 458 U.S. at 207. “The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the ‘free appropriate public education’ mandated by the Act.” *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). “[A] child is entitled to ‘meaningful’ access to education based on her individual needs.” *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743, 753-754 (2017). “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). This requires a “prospective judgment by school officials . . . informed not only by the expertise of school officials, but also by the input of the child’s parents or guardians.” *Id.* at 999-1000.

The educational program offered by the IEP must be “appropriately ambitious in light of [the child’s] circumstances.” *Andrew F.*, 137 S. Ct. at 1000. The “unique circumstances” of the child for whom the IEP was created determine the adequacy of the offered IEP. *Andrew F.*, 137 S. Ct. at 1001. Deference is given to the expertise and exercise of judgment by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Andrew F.*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Andrew F.*, 137 S. Ct. at 999. Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O’Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

For unilateral placement tuition reimbursement, falling under 20 U.S.C. § 1412(a)(10)(C)(ii), if a school district fails to provide a FAPE, then the parents may enroll their child in a private school and seek tuition reimbursement. **See** *Elizabeth B. v. El Paso County Sch. Dist.* (10th Cir. December 16, 2020, No. 19-1299)(unpublished, persuasive only). The tuition reimbursement test requires a determination, first, of whether the school district failed to offer the child a FAPE prior to private enrollment, and, if so, whether the student’s placement in a private school is appropriate. 34 C.F.R. § 300.148. **See** *Florence Cnty. Sch. Dist. Four v. Carter ex. rel Carter*, 501 U.S. 7 (1993); and *Burlington Sch. Comm. v. Massachusetts Dep’t of Educ.*, 471 U.S. 359 (1985).

In the context of unilateral placement reimbursement, 20 U.S.C. § 1412(a)(10)(C)(iii) provides additional limitations:

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);

(II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

Id.

Equitable considerations regarding parent actions in the unilateral placement process may allow discretionary denial of tuition reimbursement. ***See Neske v. A.N. New York City Dep't of Educ.***, 123 LRP 37531 (2nd Cir.2023).

Under New Mexico rules, when FAPE is at issue for children placed in private schools, then the matter is governed by the requirements of 34 C.F.R. § 300.148. §6.31.2.11(N)(5) NMAC. The requirements of 34 C.F.R. § 300.148 are consistent with 20 U.S.C. § 1412(a)(10)(C)(iii), noted above.

Extended school year services must be “necessary” to comply with FAPE beyond the normal school year. 34 C.F.R. § 300.106(a)(2) & (b). “OSEP recognizes that a child’s IEP for ESY services will probably differ from the child’s regular IEP, *since the purpose of the ESY program is to prevent regression and recoupment problems.*”

Letter to Myers, Office of Special Education Programs, December 18, 1989, 16 IDELR 290. **See** *Johnson v. Ind. Sch. Dist. No. 4 of Bixby, et al*, 921 F.2d 1022 (10th Cir. 1990)(past and future regression and recoupment, among other things).

Charter schools which are public schools of the LEA (local educational authority, also known as the school district) must provide children with disabilities and their parents all rights and in the same manner as the LEA serves children in its other schools, including for supplementary and related services on site at the site of the charter school, just as it would have a policy or practice of providing services on the site of other public schools. **See** 34 C.F.R. § 300.209 (b)(1)(i). An LEA which receives funding under 34 C.F.R. § 300.705 is responsible for ensuring compliance, unless otherwise provided by state law. **See** 34 C.F.R. § 300.209 (b)(2)(i). This is consistent with New Mexico's rules. **See** §6.31.2.11(I)(2) (c) (iii) NMAC. The responsibility rests on the LEA, not the charter school. **See** Letter, Sumter County (FL) School District, 79 IDELR 19 (Office for Civil Rights, Southern Division, Atlanta (Florida), March 16, 2021)(persuasive, although not binding).

A charter school which is its own LEA and receives funding under 34 C.F.R. § 300.705 has the duty, rather than the school district, to ensure the law is met. **See** 34 C.F.R. § 300.209 (c) . If a charter school which is neither a part of the school district LEA, nor its own LEA, then the SEA (also known as the state public education department) is responsible for ensuring the law is met. **See** 34 C.F.R. § 300.209 (d).

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’s) jurisdiction must be identified, located and evaluated. **See** 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(1). This “child find” obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. **See** 34 C.F.R. § 300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. **See** §6.31.2.10(D)(1)(a)&(b) NMAC. The responsibility for the evaluation lies with the LEA. **See** *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. **See** *Id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. **See** *Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (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 F.3d. 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.

A "child with a disability" is a child evaluated and determined to be eligible for, among other things, a specific learning disability. **See** 34 C.F.R. § 300.8(c)(10). Because of that, the child must be in need of special education and related services. **See** 34 C.F.R. § 300.8(a).

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

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

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

As noted, meeting this definition of dyslexia is not a stand-alone concept – the student must be in need of special education or related services because of it. **See** 34 C.F.R. § 300.8(a).

In New Mexico, teachers are to be trained to provide appropriate specialized reading instruction for eligible identified students with dyslexia. **See** NMSA 1978, § 22-13-32(E).

Accelerated programs like advanced placement and international baccalaureate programs are not excused from providing special education services for a denial of FAPE, and the providers of such special education services cannot condition enrollment on “forfeiture of needed special education or related aids and services ...” **See** Dear Colleague Letter, United States Department of Education, Office of Civil Rights, December 26, 2007 (Ex. 40).

A “child with a disability” is a child evaluated and determined to be eligible for, among other things, emotional disturbance, which adversely affects the child’s educational performance. **See** 34 C.F.R. § 300.8(c)(4). As a result, the child must need special education and related services. **See** 34 C.F.R. § 300.8(a). Anxiety has been considered as an emotional disturbance. **See, e.g.,** *M.S. and D.S. v. Randolph Bd. of Educ.*, 75 IDELR 103 (D.N.J., Sept. 30, 2019)(persuasive, although using New Jersey rules as well). This is true for anxiety which may be caused, or exacerbated, by a charter school’s failure to evaluate or to shape a student’s education in accord with the student’s unique disabilities. **See** *Tilley v. Thomas Edison Charter School North*, 123 LRP 36531 (D. Utah, No. 1:22-cv-00105-TS-CMR, Dec. 12, 2023)(persuasive, yet issue waived as not properly raised, or no abuse of discretion in not ordering compensatory services).

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 v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. **See** *Urban v. Jefferson Cnty. 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 C.F.R. § 300.513(a)(3). "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753.

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. Similarly, improper implementation of an IEP can run afoul of the procedural requirements demanded by the IDEA. **See** *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432 (9th Cir. 2010)(citations omitted). 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, 1998 WL 406787, *3 (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, 103 LRP 37950 (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 Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (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.*

Physical education in New Mexico for a student receiving special education supports and services may be waived only when appropriate medical documentation is in the IEP, from a health care provider finding that the student has a chronic or permanent condition that does not permit physical activity. §6.29.1.9 (K)(12) NMAC.

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, and 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).

As articulated in *Tatro, Id.*, to be a related service, the child must have a disability to require special education services under the IDEA, the service must be necessary to aid the child with the disability to benefit from the special education, and the service must be performed by a non-physician. *Id.* The IDEA’s definition of “related service” is “relatively broad.” *Jefferson Co. Sch. Dist. v. Roxanne B.*, 702 F.3d 1227, 1236 (10th Cir. 2012).

Post-secondary transition planning is required in the first IEP to be in effect when a student turns age 14. §6.31.2.11(G)(3).

The child is to be educated in the least restrictive environment (LRE) – the child is to be educated in a regular classroom to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). Removal from the regular education classroom can occur only when the nature or severity of the child’s disability is such that regular classroom education cannot be achieved satisfactorily with the use of supplementary aids and services. *Nebo* 379 F.3d at 976(citing 20 U.S.C. § 1412(a)(5)(A)). Education in the least restrictive environment is a substantive requirement as a statutory mandate. *Id.* That is, substantive provisions are violated if the LEA either (1) fails to provide FAPE to the child, or (2) if FAPE is provided, then it is not to the maximum extent appropriate in the least restrictive environment. *Id.* at fn. 13.

The LRE test in the Tenth Circuit is, initially, whether education in the regular classroom, with the use of supplemental aids and services, can be satisfactorily achieved. *Id.* at 976. Non-exhaustive factors used to make this determination include: (a) the steps the LEA has taken to accommodate the student, including consideration of a continuum of placement and support services, in the regular classroom; (b) a comparison of the student's academic benefits he or she will receive in the regular classroom with those to be received in the special education classroom; (c) the overall educational experience of the student in the regular education classroom, which includes non-academic benefits; and (d) the effect of the student's presence in the regular classroom. *Id.* Then, if found that the student's education in the regular classroom can be satisfactorily achieved with the use of supplemental aids and services, whether the LEA has mainstreamed the student to the maximum extent appropriate. *Id.*

The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to implement it as well. ***See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233***, 316 F. Supp. 960 (D. Kan. 2003).

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. ***See Sytsema v. Acad. Sch. Dist. No. 20***, 538 F.3d 1306 (10th Cir. 2008).

Although administrative exhaustion, at least when requiring matters to be brought before a due process hearing prior to court action, remains jurisdictional in the Tenth Circuit, its clarity in analysis in whether exhaustion should continue to be a jurisdictional matter has been questioned. ***See Muskrat v. Deere Creek Pub. Schs.***, 715

F.3d 775, 783 (10th Cir. 2013). “Exhaustion,” in very general terms, usually applies in context of the IDEA when a matter is sought to be brought before the court on review that was not first raised at due process. **See** *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1275-1279 (10th Cir. 2007). *Ellenberg, id.*, states that before relief may be sought in federal court, the party “must first request an IEP for the disabled child, or seek a change to a current IEP if one exists.” *Id.* at 1267. Note that this addresses exhaustion for relief in federal court, yet in context it is concluded to be applicable at the due process hearing level to determine if the party has first requested an IEP, or if it first sought to change the current IEP if one exists, as a matter of administrative exhaustion.

Hearing officers have authority to grant relief as deemed appropriate based on their findings. **See** 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. **See** *Florence Cnty. Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student’s rights while reviewing the length of the inappropriate placement. **See** *Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. **See** *Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005); *Meza*, D.N.M. Nos. 10-0963, 10-0964. There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. **See** *Meza, id.* 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). 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. **See** *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008).

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. **See** 34 C.F.R. § 513.

2. Because of inclement weather and travel safety concerns, the Due Process Hearing took place virtually over a Zoom platform.

3. Other procedural hearing factual matters are noted in the Procedural Background, above, and incorporated by reference herein.

4. The virtual Due Process Hearing allowed the parties to be represented by their respective counsel and communicate with their counsel, and they could present evidence (both written and testimonial) and confront, cross-examine, and compel the attendance of witnesses. The interactive video broadcast on personal webscreens and cameras allowed the parties and the Hearing Officer to see one another generally from mid-section and face presentation, and full room presentation. In all settings the participants could hear one another and communicate. Credibility could be assessed.

5. In an attempt to avoid duplicity in these numbered findings and in the Analysis section, the numbered findings are also supplemented by findings in the Analysis section.

6. The relevant statutory period for substantive consideration commenced two years prior to October 27, 2023. **See** §6.31.2.13(M) NMAC.

7. The Student was born on January 3, 2008. **See** Ex. 1.

8. Historically, Student has attended eight LEA schools since Kindergarten. Tr. 881-884.

9. Student has been qualified for special education services in the area of dyslexia since elementary school. Tr. 50.

10. The relevant academic school years for the Student within the statutory period are the Student's Seventh, Eighth, and Ninth grade years (2021-2022, and 2022-2023). Exs. 1, 2, 3, 4.

11. The relevant schools attended within the statutory period are ATC, DSA, and MIMS. Exs. 1,2,3,4.

12. School TE, while within the attendance school chain, is not a party to this action, and will not be addressed. Tr. 14-15.

13. Within the relevant scope of these proceedings, Student attended charter school ATC from the beginning of the statutory period(October 27, 2021) with relevant IEPs for applicable services of August 27, 2021 as modified on September 20, 2021 (Ex. 1), then a transfer to DSA, a charter on-line school with IEPs for applicable services on April 11, 2022 with modifications through April 29, 2022, and an amendment on August

24, 2023 (Exs. 2, 3), then to the private M school, then to TE (Ex. 4), and then a transfer to magnet school MIMS, with an IEP of September 29, 2023 (Ex. 5).

14. Student is a bright dedicated student with severe dyslexia, **see** Exs. 1, 2, 3, 4 and 5, with testing in October 2022 showing a measured verbal comprehension score of 130 at 98 percentile, although she had a reading score of below the first percentile. Ex. 12 at 7, 11. Tr. 48, 704.

15. Student qualifies for the receipt of special education services in the area of specific learning disability, specifically dyslexia and impacts on reading, reading fluency, reading comprehension skills, and written expression skills, tr. 39, 60; Exs. 1, 2, 3, 4, and 5, with the most recent identified areas of need in reading, writing, math, career readiness, auditory processing, and social work. Ex. 5.

16. “Dyslexia is a specific learning disability that is neurobiological in origin. It is characterized by difficulties with accurate and/or fluent word recognition and by poor spelling and decoding abilities. These difficulties typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction. Secondary consequences may include problems in reading comprehension and reduced reading experience that can impede growth of vocabulary and background knowledge.” Ex. 41 at 10.

17. Dyslexia is a lifelong condition in which early intervention uses “an evidence-based, multi-sensory structured literacy program taught by a highly trained specialist” to allow students to move forward, sometimes with one-on-one help at their pace, and

“with a great deal of structured practice and immediate , corrective feedback to develop automatic word recognition skills.” Ex. 41 at 12.

18. Structured literacy, as evidenced by the New Mexico Public Education Department’s Dyslexia Handbook, Ex. 41, is built on the scientific theory which requires two components for dyslexic readers: (1) decoding, and (2) language comprehension, also known as linguistic comprehension. Ex. 41 at 8.

19. Structured literacy gives a student with dyslexia a solid foundation in reading and writing which includes phonics and phonology, orthography (sound-symbol), syllables, morphology, semantics, syntax, and pragmatics. Ex. 41 at 8-9. It includes explicit instruction, systematic and cumulative instruction, diagnostic instruction, and multi-sensory instruction. Ex. 41 at 9.

20. Student is currently a ninth grader at MIMS. Tr. 884.

21. Student seeks to attend college, with a career in forensic science, with strengths in creativity, scientific thinking, and technology. Ex. 5.

22. Student struggles with an ability to use phonemic awareness for decoding and sounding out and reading words. Tr. 835.

23. Because of decoding difficulties, Student has difficulty with reading materials and comprehending materials at grade level. Tr. 836.

24. While a seventh grader in the 2021-2022 school year, she attended ATC, and then transferred to DSA, a virtual online learning charter school. Tr. 435, 926.

25. ATC is a charter school, which is a public school in the LEA, and the LEA holds it out as an LEA charter school. Ex. 18. Tr. 449-452.

26. The LEA is a “pass-through” for certain funds to ATC. Tr. 929.

27. ATC cannot directly apply for a federal grant as its own LEA. Tr. 928.
28. The LEA withholds two percent of ATC's per-pupil allocation for services and oversight. Tr. 953.
29. ATC falls under the umbrella of the LEA schools. Tr. at 955.
30. No specialized reading instruction was provided to the Student while at ATC to address dyslexia or decoding deficits. Tr. at 846-847.
31. The computer system Fast Forward was requested by the parents, for independent work. Tr. 846-847.
32. Although the IEP in effect at the time, the IEP of August 27, 2021, amended September 9, 2021, discusses the need for phonics based instruction for the Student, there is no evidence that it was provided. Ex. 1 at 9.
33. The 2021 ATC IEP noted identified issues as reading fluency, reading decoding, and reading comprehension, with instructional strategies as "direct, systemic in instruction in phonological awareness skills." Ex. 1 at 2, 9.
34. No language arts decoding goals were addressed in the that 2021 ATC IEP. Ex. 1 at 13, 22.
35. The 2021 ATC IEP lacked transition planning although Student was to be 14 in January 2022. Ex 1.
36. The transfer to DSA from ATC was made because of health concerns due to the Covid 19 pandemic. Tr. 800.
37. The Student began attending DSA charter on-line school in the Spring of 2022. Tr. 119, 122.

38. The ATC August 27, 2021 IEP was in effect after the transfer to DSA school through April 29, 2022, when a new IEP was finalized through DSA school. See Exs. 1, 2.

39. Although the August 27, 2021 IEP noted the need for specialized instruction with decoding and phonological awareness, Ex. 1 at 2, 9, the record does not show specialized reading instruction while at DSA school.

40. While a Student at DSA virtual school, there was no specialized reading instruction for dyslexia provided to the Student, tr. 848-850, with the curriculum provided through “Edgenuity,” which is an online learning curriculum, with special education supports provided only during scheduled meetings where the Student could ask questions. Tr. 848-850.

41. The IEP in April 2022 rejected, while at DSA, the Student’s parents request for direct reading instruction using Orton-Gillingham for students with dyslexia, a notation was made that direct reading instruction would “fundamentally change the essential nature of the school,” and that after school support tutoring available to all students would be available to the Student. Ex. 2 at 34. Ex. 3 at 38, 42-43.

42. The April 2022 IEP did not note information from the assessment performed by MR, which stated that the Student had “significant difficulties with reading fluency and reading automaticity,” for which “targeted/strategic phonics instruction” was recommended. Tr. 121, 126-127. Ex. 2; Ex. 9 at 2.

43. The DSA school IEP of April 2022 noted time management and comprehension with reading goals, with a written expression goal that did not include spelling. Ex. 2 at 18, 21, 26.

44. Students with dyslexia in a group setting require the group to be at the same level, tr. 147, with one on one recommended if group instruction is not feasible and the student is years behind in reading. Tr. 146.

45. During the school year of 2021-2022, commencing about October 1, 2021, while the Student attended ATC and DSA, the Student's parents employed the services of a tutor, Ms. O. Ex. 44 at 1, 22. Tr. 644-653.

46. Ms. O had once been the Student's prior special education teacher while the Student attended an LEA district elementary school not associated with these proceedings. Tr. 641.

47. While at ATC and DSA, Ms. O tutored the Student with help in completing homework, projects, and reading and written assignments. Tr. 644-653.

48. Ms. O did not provide direct reading instruction to the Student. Tr. Tr. 642-647, 669-674, 684, 717-718.

49. Ms. O was a licensed New Mexico educator, and consulted on the Student's behalf about the Student and her services, including at IEP meetings. Tr. 679-684.

50. Ms. O is not an expert in reading, and provides general academic support to the Student with homework and assignment, considering her needs as the Student with characteristics of dyslexia. Tr. 478, 507-510, 683-689.

51. At \$25.00 an hour, Ms. O provided 210 hours of tutoring to the Student for a total of \$ 4, 450.00, October 1, 2021 through July 29, 2022. Ex. 44 at 1 - 11, 22.

52. The IEP in place from April 29, 2022 through the summer of 2022 did not provide for extended school year services for reading services, with the Student's parents' request for Orton-Gillingham direct reading rejected. Ex. 2 at 6, 29, 34.

53. On May 3, 2022 the Student's parents notified the LEA that they would seek reimbursement for a private Orton-Gillingham reading program to begin on May 14, 2022 with a private tutor because the LEA was not providing the Student with program instruction designed specifically for dyslexia, and thus not meeting the Student's educational needs. Ex. 22.

54. Although the summer tutoring Orton-Gillingham reading program is noted by Petitioners as a request for reimbursement for program services, this is interpreted to be request for reimbursement for a summer program to assist with reading, that is, for extended school year services, using a specific methodology, rather an independent educational program or unilateral placement to replace regular school year services alleged to be inappropriate.

55. The LEA did not respond to the Student's parents May 3, 2022 10-day notice letter. Tr. 776.

56. Student began receiving the private Orton Gillingham summer tutoring program, virtually, from an out-of-state provider, on May 16, 2022, for 29 sessions, until August 11, 2022. Ex. 26. Tr. 825-830.

57. The out-of-state instructor was qualified to provide Orton Gillingham services. Ex. 26 at 3. Tr. 825-826.

58. According to the summer tutor's assessment, progress was made in reading skills with the summer program with the reading level with one whole grade, as well as phonemic awareness skills, and mastering 15 new site words and blends, syllables, and sounds, yet the summer tutor's assessment is suspect, as noted below. Ex. 26 at 1. Tr. 828-830.

59. Student's Parents paid the instructor the sum of \$2,320.00, at a rate of \$80.00 per hour. Ex. 26 at 2.

60. Although the summer instructor suggests in her assessment that Student made progress with the Orton Gillingham summer reading program methodology, the Petitioners presented no evidence of regression or recoupment as necessary elements to support a need for extended school year services with the summer reading provider, despite that the services for the regular school year at DSA may be inappropriate in-part. Tr. 661-662, 824-830.

61. Similarly, the summer school tutor's assessment of progress is diminished by the subsequent assessment by AM of M school, who found that at the beginning of the regular semester at M school after the summer program that the Student was basically a non-reader. Tr. 606.

62. Student no longer continued at DSA for the next school year, with the last day attended on May 25, 2022, Ex. 27, and enrolled at the M School, a private school serving severe students with dyslexia, for the 8th grade, with an enrollment agreement entered on June 22, 2022. Ex. 25.

63. The Student's parents provided a 10-day written notice to the LEA on May 3, 2022 that they would seek reimbursement for the Student's attendance beginning the next regular semester at the private M school for the 2022-2023 school year because the LEA was not providing the Student with program instruction designed specifically for dyslexia, and thus not meeting the Student's educational needs. Ex. 22.

64. The LEA did not respond to the Student's parents' May 3, 2022 10-day notice letter, or convene an IEP within 10 days. Tr. 498, 776.

65. Although informal discussions took place with Mr. P of the LEA, they were not in response to the 10-day letter, nor was any formal educational proposal timely documented in an IEP regarding specialized reading instruction to address dyslexia. Tr. 452, 498-504, 533 - 534.

66. An Amendment IEP arose on August 24, 2022. Ex. 3.

67. The Amendment IEP was about 3 and ½ months after the notice provided to the LEA of private school reimbursement. Ex. 3.

68. By that time, the Student's parents were already contractually bound to have the Student attend the M school, having entered into a contract with M school on June 2, 2022, for the Student's attendance for the 2022-2023 school year. Exs. 23, 24, 25.

69. The Amendment IEP noted the request for reimbursement, yet it was rejected by the LEA's representatives. Ex. 3 at 44. Tr. 131.

70. The LEA proposed at the August 2022 Amendment IEP meeting that if the Student re-enrolls in the future at DSA or her home school that it would provide 1:1 reading instruction from an LEA teacher who had been trained at the M school. Tr. 128-131. Ex. 3 at 44.

71. The August 2022 Amendment IEP retained the prior reading goals, and did not address decoding, time management, spelling, or mechanics of writing. Ex 3, 15-18, 23-26. Tr. 467.

72. Student entered the M school for her 8th grade year, the 2022-2023 school year, and received specialized reading instruction, which met the Student's learning needs, and in which the Student made progress. Tr. 594-629. Exs. 23, 29, 30.

73. In October of 2022 a private evaluation found that the Student had difficulties in reading, spelling and written language, which were influenced by the lack of consistency in phonological processing abilities, which included difficulties in fluency or automaticity with phonemic encoding and spelling. Ex. 12 at 23.

74. This October 2022 private evaluation stated that research and teaching practices indicate that those individuals diagnosed with dyslexia “require a very structured approach to reading remediation that is explicit, systematic and sequential and is best addressed on an individual basis (one-on-one) with the student and a trained therapist or instructor.” Ex. 12 at 23.

75. This October 2022 private educational diagnostic evaluation noted that since the Student was then attending the M school, then its highly structured approach was available to the Student during school hours. Ex. 12 at 33.

76. On April 27 and 28, 2023, a Neuropsychological Evaluation and Consultation was created, in which Student was diagnosed with anxiety. Ex. 13 at 6. Depression and anxiety are coexisting factors with having a disability. Tr. 345.

77. Cognitive behavioral therapy, CBT, is an effective form of treatment to assist anxiety and treatment for the Student’s coping skills. Ex. 13 at 6.

78. On her entry at M school, for decoding skills, the Student “was basically a non-reader.” Tr. 606.

79. When the Student arrived at M school, she was very much behind. Tr. 605.

80. When the Student arrived at M school it was very difficult for her to write a complete sentence, much less a paragraph. Tr. 605.

81. Due the Student's past experiences in her prior schools which did not adequately support severe dyslexia, she would get stuck on spelling by developing a strategy that in order to avoid repeated reprimands for misspelled words, she had to see that she spelled each word perfectly, which prevented her from expressing her ideas in writing. Tr. 623. Ex. 29 at 5.

82. Resulting from this lack of dyslexia supports in past schools, the Student had to learn to worry less on initial spelling of the first draft, with later proofreading to allow edits. Tr. 623.

83. M School conducted various assessments, with an initial assessment report on June 1, 2022. Ex. 23.

84. Ongoing reporting took place from the M school for Fall 2022, Winter 2023, and Spring 2023. Ex. 29.

85. The M school completed a Standardized Assessment Report, dated May 12, 2023, showing, among other things, reading levels between May 2022 and May 2023, spelling between May 2022 and April 2023, written expression between May 2022 and April 2023, and math between May 2022 and April 2023. Ex. 30.

86. The comparative data facially contained in the May 12, 2023 Standardized Assessment Report is not a straight across single level of progress or performance, rather, it is normed and averaged based on the Student's age and grade level. Tr. 667.

87. That is, according to AM, the founder and director of the M school, upon whom substantial testimonial weight is given, tr. 594, the progress is not measured in the assessments as what may appear flat, but rather because norms are shifted for the

Student's age in 2022 with her age and grade level at the time are again normed and averaged according to the Student's age and grade level in May 2023. Tr. 607.

88. A norm shift shows a year's worth of growth. Tr. 607.

89. When evaluating educational progress for the Student, based on the insight from AM, bench-marking is done throughout the entire school year, and combined with standardized assessments, along with daily assessment by the classroom teachers, with timed readings, word list readings, spelling assessments, weekly paragraphs, and similar captures of performance combined with the assessments. Tr. 621-622.

90. When viewed as a whole, relying on the progress as interpreted by AM, the Student while at M school was very committed, hard-working, creative, intelligent, and well-behaved, who made "some quite significant progress" while there as a student, despite coming into the program "very much behind." Tr. 605.

91. Ms. O did not provide tutoring services during the time the Student attended M school. Tr. 662. Exs. 44 at 1-22.

92. M school lasted through the Student's 8th grade year – the school did not provide services to students for grades 9 and above.

93. Within the statutory period while at ATC and DSA, the LEA failed to offer the child a FAPE prior to private enrollment at M school, and subsequent placement in the private M school was appropriate for this Student with severe dyslexia.

94. For background purposes, Student then began TE school in the 2023-24 school year, although TE is not named in these proceedings, and Ms. O began tutoring again, although a claim is not made for the tutoring services while at TE. Tr. 1 at 62-63.

95. Student attended TE for about six weeks, until notified of her lottery admission at MIMS.

96. During the 2023-24 school year the Student attended MIMS, a magnet school in the LEA's district, which she began attending on September 18, 2023, after notification she had received a lottery acceptance admission. Tr. 791.

97. Student has attended MIMS since mid-September 2023. Tr. 884.

98. There are no admission requirements for MIMS – it is an open Spring LEA lottery for all students in grades 7-12. Tr. 885. Ex. 37 at 3, 4.

99. MIMS employs the International Baccalaureate Programme (IB) curriculum, which also provides all course work for New Mexico high school graduation, allowing a student to graduate with a New Mexico High School diploma, or also with an IB certificate for the full IB diploma. Tr. 300, 365, 381, 556-562. Exs. 36, 37, 38.

100. A New Mexico high school diploma requires 24.5 credits, yet MIMS offers certificates for the IB program with the ability to obtain 30-35 credits. Tr. 375, 376-377, 402, 408, 581-582.

101. In order to receive the IB diploma, every student must follow the prescriptive curriculum every year. Tr. 263.

102. The program includes, among other things, 150 hours of specialized service and a 4,000 word-research paper, and a Theory of Knowledge project. Tr. 588-590.

103. The IB curriculum at IB requires high-level and intensive reading and writing for its students to achieve success. Tr. 875.

104. Student is on the standard diploma pathway. Ex. 5 at 10. Tr. 70.

105. MIMS is a public school in the LEA chosen by the Student and her parents based on lottery acceptance. Tr. 512-517, 746-747, 885-886.

106. Staff at MIMS consider that there is little flexibility in the ability to provide special education related services for Student's dyslexia because it has to follow the IB curriculum. Tr. 216-217, 532.

107. MIMS is an IB school servicing students in grades 7-12, with about 300 students. Tr. 755.

108. MIMS is the only stand alone IB public school in New Mexico. Tr. 524, 529.

109. About one third of the students at MIMS receive special education services, although most of these are gifted, with about 10% of that number based on disabilities. Tr. 217-219.

110. An IEP meeting was held on Student's admission to MIMS, and a plan was created. Tr. 102, 889-891. Ex. 5.

111. An IEP was completed at MIMS school on about September 29, 2023. **See** Ex. 5.

112. The MIMS September 2023 IEP, which was accepted, tr. at 91, includes supports for reading to as inclusions support in an ELA (that is, English Arts class), direct reading support during study skills time, auditory processing programs, and modifications and accommodations listed in the IEP. Ex. 5. Tr. p. 91.

113. At that time the Student's reading skills as assessed were at the second grade level, although she was at the 98 percentile in terms of listening and vocabulary, 99 percent verbal comprehension index. Tr. 58. Ex. 12 at 8,11.

114. Although the IEP stated in a benchmark rubric under the IB program that the Student had a written language goal of level 4 or higher (Level 4 being interpreted as a 5th grade reading level), tr. 104, Ex. 5 at 15, this is inconsistent with the REED (Review of Existing Evaluation Data) of the same date of September 29, 2023, which referenced the Student's broad reading, writing, and spelling scores to be below the first percentile. Ex. 10 at 4.

115. Nonetheless, based on a Treasurer's fluency test given to the Student on day one or day two of her enrollment there, MIMS special educator AT found that the Student had a reading fluency level at a sixth grade level, with both general education and special education using the Treasures test, with slow and accurate reading, with a high comprehension. Tr. 189 - 190.

116. The REED of September 29, 2023, concluded, however, that the Student's basic reading skills, reading fluency skills, and reading comprehension skills showed reading comprehension when read aloud to her, but that the Student "struggles with basic reading and fluency which negatively impacts her ability to comprehend text without accommodations." Ex. 11 at 2.

117. As for written expression skills, the REED of September 29, 2023, concluded that "the underdevelopment of basic phonological processing abilities is affecting both decoding (sounding out unfamiliar words) as well as her ability to encode or spell unfamiliar words. This compromises her ability to access her notably strong verbal skills." Ex. 11 at 2.

118. Other testing by Southwest Neuropsychology and Behavioral Health, in a report dated October 3, 2022, reflects depressed reading scores in reading and written

language suggesting difficulties in development of basic phonological processing abilities which affect both decoding (which is sounding out unfamiliar words), and the ability to encode or spell words unfamiliar to the Student. Ex. 12 at 12.

119. Weight is given to the REED of September 29, 2023, and the Educational Diagnostic Evaluation of October 3, 2022, (rather than the informal Treasure's fluency test given by special educator AT).

120. The LEA's reading specialist assessment indicated that the Student "likely is to benefit most from systemic direct and intensive phonic instruction." Tr. 735. Ex. 9, p. 2.

121. Scheduling, staffing concerns, and the rigors in the IB program generally limit the Student's special education services provided at MIMS to a "push in" setting of 240 minutes a week, and including a study skills class. Tr. 381-384, 394-397, 515.

122. The study skills special program (which is the special education program offered by MIMS to all students with special education needs) became available to MIMS students, including this Student, during the 2023-2024 school year. Tr. 141-143, 152-154.

123. The 2023-2024 school year is the first year where students with special education needs receive resource time in their IEPs. Tr. 141.

124. This election for services in study skills was not provided by prior written notice to Student's parents, it was simply a statement in an email memo to special education parents that they could elect either special education services, or take physical education. Ex. 35.

125. The special education services study skills program requires all special education students, including this Student, to elect to receive special education services at study skills, rather than take physical education, as a required course, and are based on scheduling concerns. Ex. 35. Tr. 252-262, 403-405.

126. Since the Student attends the study skills class she must miss a class required to graduate with an IB diploma. TR. 260, 261.

127. Under Student's MIMS IEP (Ex. 5), she is to receive 120 minutes of special education services per week in an individual or group setting. Ex. 5 at 24.

128. Similarly, the Student is to receive 30 minutes of auditory support monthly, 30 minutes per week of social work services, and 45 minutes per week of direct classroom support from a special education teacher. Ex. 5 at 24. Tr. 89.

129. At the MIMS open house it was explained that there is a rigorous environment, tr. 572, 585, although there is no prior written notice that MIMS could not meet the Student's special education needs. Tr. 430-431.

130. If a student suffers from severe dyslexia, as this Student does, then the Principal of MIMS is of the opinion that MIMS may not be the right environment for her. Tr. 576-577, 588.

131. According to the MIMS Principal, only "push-in" modifications and supports can be offered to the Student because if the Student requires specialized reading instruction for dyslexia then the Student cannot be successful at MIMS. Tr. 734, 736, 739-740, 746-748.

132. The study skills resource class consists of a study skills period with two teachers working with all students in small groups for class assignments, with the

students and special education teachers working toward all the students' struggles. Tr. 211-215.

133. The study skills resource class has about five to seven students in it, with two teachers. Tr. 212, 574.

134. The study skills session resource room generally starts with a bloc asking what questions arise from class assignments, like in math, physics, logging in, check-in, and then it is up to the students to tell the teachers what they are struggling with, like help requested for a math problem, meeting three times a week, composed of both eighth and ninth graders. Tr. 213-215.

135. According to the school's principal, "[i]f a student needs one-on-one reading instruction, I don't believe that when you say the least restrictive environment, that [MIMS] is the right environment for a student based on what the International Baccalaureate is asking teachers to teach." Tr. 576.

136. A small group setting for students with dyslexia, or one-on-one setting, is dependant on a number of factors, as if a student is many years behind, then one-on-one would be appropriate, and with the group setting, if a group setting is of three to twelve students, then the group must be on the same learning level and as close as possible. Tr. 146.

137. According to the LEA's Program Support Specialist for reading, if students in a small group are struggling in different areas than the other members of the group then individual needs could not be assessed, because they all have to be on the same level. Tr. 147.

138. Although it was in the prior school year at M school, a small very small group setting with students with characteristics of dyslexia using Sequential English Education, a program designed to improve reading, writing and spelling skills of students every day, proved of educational benefit to the Student while at M school in the 8th grade, which is persuasive for MIMS school. Tr. 603, 605.

139. Although it was in the prior school year at M school, the very small group at M school for children with dyslexic special needs is defined as from one-on-one to six students, which is persuasive for MIMS school. Tr. 613.

140. While at M school the Student made progress and gained educational benefit in a very small group setting, which is persuasive when compared with the MIMS setting. Tr. 603 - 605.

141. The group setting for the study skills class consisted of all special education students in one group at MIMS, rather than individuals of the same dyslexic reading needs as those of the Student. See Tr. 212-215.

142. Study skills special educators assist with scribing, and help with reading or assignment instruction in general education classes, and reading tests to the Student by educators AT and WK. Tr. 180, 239, 206-211.

143. According to the LEA's Director of Exceptional Student Services, the Student could receive the additional supports and services at a comprehensive high school in the LEA, rather than at this specialized school of choice. Tr. 513.

144. While at MIMS school, the reading programs employed by the school include SRA Corrective Reading, and a computer based Lexia reading program. Tr. 23-24, 175, 182.

145. SRA is a program which provides direct instruction in reading. Tr. 138.

146. SRA uses workbooks relying on a publisher's script, with minimal training to the providers, which is a type of direct reading instruction taught in a small group. Tr. 175, 185-187, 822-824.

147. This Student, however, received only instruction in Lexia, tr. 176, although the program support specialist for reading with LEA was unfamiliar with the Student receiving Lexia services. Tr. 139.

148. Lexia is a computer access program where the Student wears headphones with on-line instructions in grammar, word study, and comprehension, with word study encompassing spelling and phonics. Tr. 90, 175-176, 294.

149. If a student faces trouble working independently, then one-on-one lessons are provided to the teacher to assist with the lesson. Tr. 138.

150. The Student's resource teacher is receiving training in LETRS, which explains how to design instruction and differentiate instruction for student with dyslexia. Tr. 119, 122.

151. A special education instructor monitors the Student and what is being worked on, although the Student is hesitant to log onto the Lexia program, and has not made much progress on it. Tr. 178-179.

152. Lexia is a reading intervention program, where the student logs in, and then clicks on grammar, word study, or comprehension, and then matches the syllables with the sounds on the computer, or builds syllables to build a word. Tr. 294-295.

153. The Student, according to the LEA's reading specialist, is likely to benefit most with extensive practice in variant vowels, complex low-frequency vowel and

consonant spelling patterns, mixed syllables with consonant-le, base words with inflectional and common suffixes, and multisyllabic words, with targeted strategic phonics instruction with blends like pr, bl, gl, and doubles, like maddest. Ex. 9 at 2.

154. The record does not reflect that Lexia encompasses the phonetic needs of the Student, except for assistance with the computer program.

155. The record does not reflect that the Student was in a small group setting of similarly situated dyslexic students with similar reading decoding and comprehension needs.

156. According to the special education instructor monitoring Student's use of Lexia, the reason for lack of progress is "she just doesn't really enjoy reading," and because of placement tests, which the Student did not enjoy. Tr. 179, 180.

157. It is significantly noted, however, that Southwest Neuropsychology and Behavioral Health, in a report dated October 3, 2022, referenced that the Student does not like to read because it is "extremely labor-intensive for her" because "additional processing required to decode unfamiliar words slows her reading speed/rate and eventually affects her overall comprehension as text becomes more complex." Ex. 12 at 13.

158. Similarly, as for written language, the Student's score is well below the average range, based on the "underdevelopment of basic phonological processing abilities" which affect decoding and an ability to encode or spell words unfamiliar to her. Ex. 12 at 13.

159. Since Lexia is not working, the special education instructor, who has had Wilson training and some specific dyslexia training, uses texts the Student can access

during the day, with supports, such as sometimes reading the text to the Student and helping the Student read the text independently to access the text. Tr. 180.

160. The Lexia program is used during the time block for study skills. Tr. 178.

161. The Student has a Bookshare account to access certain audio books and texts. Tr. 7.

162. Although some materials were provided to the Student at the instructional level, like text to speech software like Read Aloud which reads materials to the Student, tr. 56, the Student, with characteristics of dyslexia, “struggles with basic reading and fluency which negatively impacts her ability to comprehend text without accommodations.” Ex. 11 at 2.

163. As described in the October 2002 Educational Diagnostic Evaluation, the Student had difficulties with fluency or automaticity regarding phonemic encoding or spelling, ex. 11 at 23, thus, the Student may comprehend, but has educational difficulties and educationally needs decoding.

164. Audio text and audio books build upon the Student’s comprehension, despite her struggles to decode, which allow her to meet grade level work, otherwise, if forced to decode, she loses comprehension. Tr. 878.

165. There is no goal in that IEP focusing on decoding. Ex. 5 at 13-14. Tr. 104-110.

166. The reading goals for the Student are those goals required for the IB curriculum applicable to all 9th grade students. Tr. 229-232.

167. The MIMS IEP notes a learning disability in math, Ex. 5 at 1, although the REED did not disclose a learning disability in math calculation or problem solving, Ex. 11 at 3.

168. The purpose behind the math goal was to assist with the Student's reading and comprehension of math word problems, rather than a goal for math calculation, because her fluency (i.e., dyslexia) impacted her overall score for the cluster, thus the need identified for math word problems as an identified area for need. Ex. 5 at 17. Tr. 84, 195-196.

169. The October 3, 2022 Southwest Neuropsychology and Behavioral Health report considered the Student's math skills as falling in the lower end of the average range, not because of her calculation skills, but because her fluency was significantly depressed, where the need for extended test time rather than in a timed setting will allow her to likely function in her own grade level. Ex. 12 at 13.

170. The written expression goal only provides for the Student's special education teachers to help the Student in her classes and in study skills. Tr. 233-234.

171. M school's principal, RG, directed the Student's parents that to find audio versions of books for assignment, for instance, for the *Maus* assignment, that they should go to YouTube for a version. Tr. 731-732.

172. The Student's parents sought audio versions of texts. Tr. 795-799.

173. CBT was begun through social work services a few weeks prior to the due process hearing of January 9, 2024, using workbooks, although the social worker had never used the workbook before, and without direction from a service provider such as a psychologist. Tr. 335-336, 349.

174. The social work services were added because of the Student's anxiety and depression. Tr. 201-204.

175. The MIMS IEP PWN noted need for social worker services to learn and implement stress reduction strategies. Ex. 5, 28.

176. Although the social worker providing CBT is a licensed social worker, tr. 331, the Petitioners have not met their burden to show that her licensure, whatever it was, was insufficient to provide CBT. *See, e.g.*, § 16.63.9.9 NMAC (LRSW generalist), and § 16.63.10.9 NMAC (LMSW, master social worker with diagnostic, preventative, and treatment services).

177. Ms. O continued with tutoring the Student while at MIMS, beginning in about September 26 through December 1, 2023, for a sum of \$ 862.50, at \$ 25.00 an hour. Ex. 44 at 24. As noted, October 27, 2023, was the date the due process request was filed, so any reimbursement request would be limited through that date for past services ($6 + 2.25 + 2.75 + 5.75 + 4.75 = 21.5 \times 25 = \537.50).

178. Ms. O, as a tutor, works with the Student virtually, and at her home, and will go to the school with the Student at times, and tutor after school hours. Tr. 663.

179. Student prefers to work tasks with her tutor, rather than with school teacher support. Tr. 321.

180. The Student obtains general educational and dyslexia reading assistance from the private tutoring services of Ms. O, the tutor, yet these services border on the ideal, and generally maximize the potential of the Student over that which may be appropriate.

181. Generally, all witnesses are considered to be truthful. Credibility, and weight, is not only limited to truthfulness, however. Bias, self-serving interests, reasonableness of testimony, witness memory, and other matters may be considered. **See** NM UJI, Civil, Instruction 13-2003 (persuasive use). Principal G's testimony reflected that he has concerns that the Student, if supports and accommodations are ordered, can ever be successful in his high school program. Similarly, other staff at MIMS, while truthful, were inclined to favor the existing program and what can be done with it with their limited resources. MIMS has a self-interest in preserving the status quo for its school and the special education program it currently provides the Student. On a pendulum, this swings against the weight their testimony provides.

182. Limited weight is given to AT's testimony, for reasons noted in other areas of this Order, including some impeachment on knowledge of goals.

183. WK, RB, PS, and JM are truthful, otherwise credible, except as noted, and fairly forward in their testimony.

184. Weight is given to the testimony of the LEA's Program Support Specialist for Reading, MR, particularly with her opinion that individual needs of the Student cannot be addressed in a group setting with members of the group struggling in different areas, so that all members of the group would have to be on the same level. Tr. 147. She is well-qualified, and came off as knowledgeable, perceptive, and responded well to questions.

185. JP, the LEA's executive director of exceptional students, was truthful, with significant background in education. However, he had to fill the void left by CH, and

how the facts of this case came into focus because of her absence, which is considered with the weight accorded.

186. LP-O, assistant director of the LEA's special education services under JP, is truthful, credible, although a bit short with counsel when asked for reasons of rejection for reimbursement, which impacts weight a bit with that issue.

187. Significant weight, as well, is given to AM, the director of M school, for reasons noted in other areas of this Order.

188. Parents JoR and JuR are credible. They presented well, JuR being an educator herself, and JoR well-versed in technology, moving through obstacles they encountered with trying to provide services to the Student, so there is some self-serving interests, including for relief. Weight is given to their testimony as people well-versed in their Student's severe dyslexia disabilities, as well as her significant intellectual and personal abilities.

189. TO, the private tutor is truthful, credible, and had knowledge of the Student.

190. Should there be a conflict in testimony by credible witnesses, then weight is given to the testimony which fits the Finding of Fact in the issue.

191. Should a Finding be more applicable as a Conclusion, or *vice versa*, then it is to be interpreted under the proper classification.

ANALYSIS AND LEGAL CONCLUSIONS

Jurisdiction

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

Hearing Held Virtually

Because of weather related issues, the parties agreed to hold the hearing virtually. States may permit hearings on due process complaints to be conducted through video if concluded that the hearings are consistent with the State's practices. 34 C.F.R. § 300.511(c)(1)(iii). Such a hearing must ensure the parent's right to an impartial due process hearing consistent with the requirements in 34 C.F.R. §§ 300.511 through 300.515. **See** United States Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, IDEA Part B Dispute Resolution Procedures (June 22, 2020). There is nothing prohibiting virtual due process hearings under the New Mexico Rules. **See** §§6.31.2.13(I)(9) through 6.31.2.13(I)(20) NMAC.

The Hearing Officer has the authority to exercise control over the parties, the proceedings, and according to his own practices. **See** §6.31.2.13(I)(9) NMAC. The Hearing Officer is to exercise control over the parties and the proceedings to further the ends of the circumstances in the case under the practices he deems appropriate, while striving to maintain a reasonable balance between giving the parties a fair opportunity to "vindicate" their IDEA rights and the financial and human costs otherwise involved in the proceedings. **See Id.**

Therefore, it is concluded that the Due Process Hearing held virtually was in accord with the State and Federal directives, that the hearing afforded all parties the rights contained under 34 C.F.R. §§ 300.511 through 300.515, that credibility could be assessed, and that holding the hearing virtually was not inconsistent with State rules.

Burden

The burden is on the Petitioners to prove their claim. *See Schaffer v. Weast*, 546 U.S. 49. The burden will be by a preponderance of the evidence. Affirmative defenses, however, shift to the party asserting the defense. *See Surlles v. Andison*, 678 F.3d 452, 458 (6th Cir. 2012). Respondent (the District) has raised that ATC is not a Charter school under its responsibility. This will be viewed as an affirmative defense. *See* Fed. R. Civ. P 8 (used persuasively).

ATC CHARTER SCHOOL STATUS

It is concluded that the District has not met its burden to prove its affirmative defense that it is not responsible for ATC charter school, that is, it has not proved that ATC is not a public school of the LEA (the District). 34 C.F.R. § 300.209(b).

There are three types of charter schools arising within the regulatory scheme. The first is a charter school, which is a public school within the LEA. *Id.* The second is a public charter school which is its own LEA. *Id.* at (c) . The third is a charter school which is neither its own charter school receiving funding under 34 C.F.R. § 705, nor a part of an LEA receiving funding under 34 C.F.R. § 705. *Id.* at (d). While much of the testimony at the hearing centered around a contractual agreement and special education services under an agreement with the LEA, *see* Ex. 15, tr. 943 - 948, the relevant emphasis is funding. The LEA is “pass-through” for certain funds to ATC. Tr. 929. ATC cannot directly apply for a federal grant as its own LEA. Tr. 928. The LEA withholds two percent of ATC’s per-pupil allocation for services and oversight. Tr. 953. ATC falls under the umbrella of the LEA schools. Tr. at 955.

Given this evidentiary foundation, the LEA District has not proved that ATC is not a public school of the LEA District. 34 C.F.R. § 300.209(b). Alternatively, should

the burden shift be inapplicable, the Petitioners proved their case that ATC is an LEA charter school. Thus, the LEA District must serve the Student. *Id.* at (b)(i).

This portion is relevant to Issues 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 25, and 26.

INAPPROPRIATENESS AT ATC AND DSA

Substantial weight is given to the testimony of AM, private M school's founder and executive director. She received her undergraduate degree from American University in Washington, D.C., with a major in literacy and a minor in education, a Master's Degree from St. John's College in Santa Fe, New Mexico, an MFA in writing from Arizona State University, and is certified through the Shelton School in Dallas, Texas, which is accredited by the International Dyslexia Association, as an Instructor of Certified Academic Language Practitioners. *Tr.* 620. The Shelton School is the largest school for children with learning differences in the world. *Tr.* 597.

M school was in the place to review how the Student came into its program – when the Student began M school as a student in the 8th grade she was “basically a non-reader.” *Tr.* 606. The Student would get stuck in spelling because, due to past experiences in schools, she hoped to avoid repeated reprimands she received for misspelled words. *Tr.* 623.

Reference is made to the numerous factual findings in this decision which otherwise support that ATC and DSA were not offering or providing appropriate education for the Student's educational needs. ***See*** Findings of Fact, above. Suffice to note, however, that it is significant that this Student with severe dyslexia came into the M school program as an 8th grader almost as a non-reader, despite being in school at

both ATC and DSA under IEPs, and in fear of reprimand for misspelling words. Because of the Student's severe dyslexia, she needed special education or related services that were not appropriately provided. **See** 34 C.F.R. § 300.8(a). It is concluded that neither ATC, nor DSA, provided the Student with a FAPE during the statutory period. That is, they did not provide meaningful access to education based on the Student's individual needs, **see** *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743 at 753-754, and did not "offer an IEP reasonably calculated to enable [the Student] to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). These are substantive violations.

This portion is relevant to Issues 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 25, and 26.

EXTENDED SCHOOL YEAR TUTORING

In context, the Petitioners request for summer tutoring services outside of the regular school year, upon which notice was given seeking reimbursement, is essentially a request for reimbursement for extended school year services, by using a particular methodology. Tutor C provided summer tutoring services to the Student between her 7th and 8th grade school years. Petitioners did not have her testify at trial. Her resume was provided, and she made an undated written statement to whomever it may concern that the Student made great progress, and that the Student improved by one whole grade. Techniques or standards the summer school tutor used to determine progress are not known. But that is not the test to be employed.

The question is whether extended school year services were needed, because of regression and recoupment, to comply with FAPE beyond the normal school year. 34

C.F.R. § 300.106(a)(2) & (b). OSEP notes the ESY services are probably different from the child's regular IEP, due to regression and recoupment. **Letter to Myers**, Office of Special Education Programs, December 18, 1989, 16 IDELR 290. **See Johnson v. Ind. Sch. Dist. No. 4 of Bixby, et al**, 921 F.2d 1022 (10th Cir. 1990)(past and future regression and recoupment, among other things). While it may be speculated that ESY services were required because of the lack of appropriate services for the Student's severe dyslexia during the regular school sessions while at ATC and DSA, there is no evidence to meet Petitioners burden that the Student would have regressed or needed recoupment because those additional extended school year services of some sort were needed and not offered. In fact, that speculation would be inconsistent with M School's executive director, AM, to whose testimony weight is given, that when the Student entered M school she was basically a non-reader, which was after Tutor C's summer services. Thus, although the Petitioners appear to argue that the summer school reading program was to counter an inappropriate IEP for the normal school year, it was, in fact, a challenge to the IEP's lack of ESY services, which applies a different initial test, for which the Petitioners did not meet their burden. Moreover, the summer program employed a certain methodology, Orton Gillingham. Methodology is left to the LEAs. *Rowley*, 458 U.S. at 207-208. As a result, it is concluded there is no violation of FAPE for lack of ESY services. 34 C.F.R. § 300.106(a)(2) & (b). Alternatively, given AM's assessment of the Student when she began her program, the tutoring services were not appropriate. Thus, the request for reimbursement to Tutor C is denied.

This portion is relevant to Issues 1, 2, 3, 9, 10, 14, 15, 16, 20, 21, 25, and 26.

APPROPRIATENESS OF M SCHOOL AND REIMBURSEMENT

Having concluded the ATC and DSA programs were inappropriate and denied the Student a FAPE, the next step is to determine if the M School's services were appropriate. 34 C.F.R. § 300.148.

Just as weight is given to AM's testimony in the inappropriateness of services with ATC and DSA, weight is also given to her testimony with the appropriateness of the M School's program. The Student started there essentially as a non-reader. Through classes with on-going assessments and testing, including in decoding, comprehension, and writing, the Student was provided meaningful access to education based on the Student's individual needs, *see Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743 at 753-754, and was able to make progress appropriate in light of the child's circumstances. *Andrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). Specifically, not only was this proved by written compilations of scores and comments by the educators as reflected in M School's ongoing reflection of skills and grades for Fall, Winter, and Spring semesters, Ex. 29, tr. 625, but also by the normed results from the standardized test report of May 12, 2023 reflecting progress from May 2022 to April and May 2023. *See* Ex. 30. When normed, Reading (Dibels 8th Edition), Written Spelling (TWS-5), Written Expression (KTEA-3), and Math (KTEA-3), show appropriate progress based on the Student's individual needs. Ex. 30. While a facial reading may appear to show flat performance, the chart only reflects a somewhat flat curve because they are normed under the age and level of the Student at the time. Tr. 607. The norms change due to the age and grade of the Student. Tr. 607. Thus, progress is measured not just against where the Student was in May 2022 to the following year,

but was based on an increase in the norms as the Student progressed. Tr. 607. They show a year's worth of growth.

It is concluded that the M School's services were appropriate, and that reimbursement should be granted. 34 C.F.R. § 300.148. It is also concluded that limitations on reimbursement are inapplicable for reduction or denial of reimbursement, because, among other things, the Student's parents gave a 10-day notice to the LEA of their intent to enroll the Student at a private school at public expense. 34 C.F.R. § 300.148(d)(1)(ii). In fact, the LEA did not schedule an IEP to address the move until about 3 1/2 months after notice was provided to it. At that IEP meeting with amendment dated August 24, 2022, the LEA rejected the Student's Parents' request for reimbursement. Ex. 3. This was after the June 28, 2022 agreement between the Student's Parents and M school for enrollment and tuition, Ex. 25, and after the Student's August 11, 2022 withdrawal from the LEA schools to attend M school. Ex. 27. The LEA's apparent position that it is not responsible for reimbursement since the Student had disenrolled with the LEA after the Student's Parents noticed the LEA that FAPE was being denied and that they were seeking reimbursement is unpersuasive. The Student was enrolled at the LEA's school when notice was provided.

Having concluded that reimbursement should be ordered, it is now administratively ordered that the LEA reimburse the Petitioners for the cost of placement at M school in the sum of \$23, 150.00. Ex. 25.

This portion is relevant to Issues 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 19, 20, 21, 23, 25, and 26.

MIMS FAPE

The primary issue at the MIMS is whether the Student, in her short period of time at MIMS prior to filing the due process complaint, has been denied a FAPE because of the study skills resource room program in her IEP for all special education students at MIMS in an educational conglomerate setting, and services provided in that setting, to meet the Student's special education needs due to severe dyslexia. It is concluded that the Student's special education needs are not met as a student with severe dyslexia by the make-up of the study skills resource room class to provide services, and by the services and service providers. It is a substantive violation of FAPE. 34 C.F.R. § 300.513(a). Simply put, for this Student's unique needs with severe dyslexia and decoding, phonics, as well as comprehension issues, the IEP placing her within a multi-group setting, although fairly small in a group with two educators, with other special needs children at the school of varying needs, skills, and levels in a study skills resource room class three times a week, and the use of a computer program with limited assistance in phonics and decoding, as well as in comprehension, is not "appropriately ambitious in light of [the child's] circumstances." *Andrew F.*, 137 S. Ct. at 1000. The Student has severe dyslexia. She has to learn to decode. Then she needs help comprehending. In the past she was in fear of reprimand by other school authorities at other schools because she did not spell correctly in the first place. She needs individual one-on-one or a small group setting with other students with dyslexia with a trained educator to assist her with decoding, and phonics, the sounding of out of the words, to watch moving lips and mouth patterns, and then in developing comprehension skills.

That the MIMS principal believes the Student cannot meet the rigorous requirements of the MIMS program because she has special needs, given the lack of

individual supports and modifications the IDEA requires, reflects poorly on the credibility not only of the principal, but on staff that came under his authority at the hearing. **See, e.g.**, NM Jury Instructions, Civil, 13-2003 (credibility and weight include any interest or bias the witness may have). While the members of the MIMS are generally truthful, their internal interests in maintaining the school under the IB curriculum without having to provide extensive dyslexia supports to this Student is apparent through testimony.

It must be recalled that this Student is highly intelligent. She was at 98 percent in terms of listening and vocabulary, and 99 percent in terms of the verbal comprehension index. To have her precluded from the rigors of the IB program because she also requires support services to help her to decode and comprehend the rigorous materials runs contrary to the IDEA. It is concluded, therefore, that the MIMS IEP is not “appropriately ambitious in light of [the child’s] circumstances.” *Andrew F.*, 137 S. Ct. at 1000. This results in a substantive violation of FAPE.

The principal’s position that if the Student seeks additional special education services than what are currently being offered at MIMS then she should be in a more restrictive environment at another high school in the LEA is unpersuasive. Tr. 576, 741-743. Following the test articulated in *Nebo* 379 F.3d at 976(citing 20 U.S.C. § 1412(a)(5)(A)), it is concluded that education at the MIMS school can be satisfactorily achieved, considering a continuum of placement and appropriate support services, at the MIMS. *Id.* at 976. Although *Nebo, supra*, reflected on the use of the regular education classroom LRE and environment, its analysis is persuasive for LRE with the MIMS school principal’s impression that if the Student wanted more supports then she should

go to another school in the LEA. The MIMS with a continuum of placement and appropriate support services in their school, if appropriately provided in the future, can accommodate the Student's special education dyslexia needs, the Student will not be able to receive the IB curriculum in a regular high school in the LEA, and her overall educational experiences can be provided at MIMS, including the effects of her presence in the IB curriculum. *Id.* Thus, the Student' education at MIMS can be satisfactorily achieved with the use of appropriate supplemental aids and services at the MIMS. ***See id.*** Once again, although *Nebo, supra*, reflects on mainstreaming in the regular education environment, its application for LRE between the MIMS and its IB program and another high school as the LRE is persuasive. As a result, it is concluded that the MIMS school is the LRE for the Student, rather than the principal's suggested removal of the Student to another "regular" LEA high school if MIMS is ordered to provide appropriate service services. 34 C.F.R. §§ 300.114, 115.

In a similar mode, it is concluded that the LEA's argument is without merit that because MIMS offers an IB curriculum, following international IB standards, then it is unique and does not have to come under the umbrella of the IDEA. It is concluded that MIMS must abide by the IDEA for this Student.

Analysis begins with recognizing that the IDEA does not guarantee a particular type of substantive education. ***See Ellenberg v. New Mexico Military Institute***, 478 F.3d 1262, 1276 fn. 12 (10th Cir. 2007)(***citing*** *Rowley*, 458 U.S. at 207). Nonetheless, *Ellenberg, supra*, viewed a number of factors distinctive from the Student's case now being reviewed, although the case was decided ultimately on administrative exhaustion. *Id.* at 1282. For instance, MIMS is not a military school. *Id.* at 1271.

As well, in *Ellenberg, supra*, distinctive features are that the New Mexico Military Institute (NMMI) is a publically funded boarding military high school, which receives state funding, although not considered to be a part of the free public schools' system under the New Mexico Constitution. *Id.* It charges tuition. *Id.* It is exempted from New Mexico Public Education Department's (PED's) general oversight and control. *Id.* It is governed by a Board of Regents, specifically created under statutory authority. *Id.*

MIMS, however, is a magnet school which is part of the public school LEA. As such, it does not charge tuition. Rather, it is open to all students in the LEA District, being chosen by lottery. There is no GPA requirement, or admissions testing. The LEA, being an LEA in New Mexico, is under the PED's oversight and control, it is noticed. It is part of the LEA's public schools of New Mexico, rather than a stand-alone entity. Moreover, the Student in this proceeding had already been admitted and is receiving education at MIMS, whereas the student at NMMI had not yet had that opportunity. These factual distinctions weigh in favor of MIMS falling under the umbrella of the IDEA, when viewed under *Ellenberg, supra*. As such, it is concluded that the LEA's argument that MIMS need not follow the IDEA is without merit because of its uniqueness, rigorous standards, notice at the open house of the standards, and its international IB curriculum. **See** Dear Colleague Letter, United States Department of Education, Office of Civil Rights, December 26, 2007 (Ex. 40)(persuasive, international baccalaureate not excluded from FAPE).

The LEA's position that it need not follow the IDEA with MIMS because the Student's parents chose to place her in the magnet MIMS school, rather than the neighborhood high school, is also concluded to be without merit. Once again, MIMS is a

public school lottery admission high school available to all in the LEA fortunate to win the lottery. As noted in *Ellenberg, id.* at 1268-1269, citing 34 C.F.R. § 300.116(a)(1) (now § 300.116 (c)), the student is to be educated in the school she would attend if nondisabled. *Id.* An open lottery allows this Student to be educated in school she would attend if nondisabled.

For these reasons, MIMS comes under the IDEA umbrella, another “regular” high school is not the appropriate LRE, and MIMS has engaged in a substantive violation of FAPE. *Andrew F.*, 137 S. Ct. at 1000.

As reflected in the remedies portion of this order, one-on-one direct structured reading in a small group setting with similarly situated dyslexic students with educators specifically trained in dyslexia, for decoding, phonics, and comprehension, in a special classroom each school day will be ordered. For consistency, it will be daily for school days. These are not study skills sessions, but one-on-one reading, just like the LEA proposed in its untimely DSA IEP PWN of August 24, 2022, Ex. 3, p. 44 (revisions 4 and 5). PE, or other mandatory graduation required courses, will not be displaced because of it. In addition, trained educators in dyslexia by the LEA’s reading specialist will be available to assist the Student with decoding, phonics, and comprehension in her general education setting, not one-on-one, but on an individual class check-in basis, with the duty placed on the special educator to seek out the Student and then provide needed assistance in the general education environment with decoding, comprehension, and phonics.

It is noted that this ruling applies only to this Student – it is not a systemic finding or conclusion, but is based solely on this individual Student’s needs. **See** 34 C.F.R § 300.8(a) (child needs special education and related services).

This portion is relevant to Issues 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 22, 24, 25, and 26.

MIMS PWN AND PE

It is similarly concluded that MIMS violated FAPE by failing to provide a prior written notice to the Student’s family about the change in the program to a resource room, using instead an email to all parents of special needs students at MIMS. 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.” *Id.* 34 C.F.R. § 300.503 provides written notice (PWN) to the parent of the student for a change in the educational placement of the student, with a description of the action, an explanation for the action, an underlying basis for the action, protections, parental sources for assistance, other IEP Team options, and other factors. **See** 34 C.F.R 300.503 (a) & (b). The email to the Student’s parents by the LEA did not meet these requirements – it simply said that the parents could keep either their child in physical education, or the child could go to the resource room for special education services. This results in a procedural violation of FAPE. **See** 34 C.F.R. § 300.513. The Student’s parents had the Student attend class in the resource room, as shown in the facts and analysis in this case so far. Thus, at first glance, the use of the email without the required components in it did not impede the Student’s right to a free appropriate public education or cause deprivation of educational benefit. *Id.* at (a)(2). However, the LEA made the decision of

what it was going to do prior to the email notice, that is, a predetermination. A predetermination significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education. *Id.* at (a)(2)(ii). **See** *Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (predetermination results in substantive harm). Thus, it is concluded that this PWN is a substantive violation of FAPE. 34 C.F.R. § 300.513 (a)(2).

Analysis with the PE issue trade for special education services does not end with procedural PWN, however. PE in New Mexico for a student receiving special education supports and services may be waived only when appropriate medical documentation is in the IEP, from a health care provider finding that the student has a chronic or permanent condition that does not permit physical activity. §6.29.1.9 (K)(12) NMAC. There is no evidence in this case that a healthcare provider excluded the Student from PE. The evidence shows that MIMS unilaterally changed the physical education program attendance because the Student needed special education services. This results in a substantive violation of FAPE. That is, beyond the procedures and notice, trading in PE to allow the Student to have special education services is not an individualized educational program reasonably calculated to enable the Student to receive educational benefits. **See** *Rowley*, 458 U.S. at 207. It is a substantive violation of FAPE. 34 C.F.R. § 300.513 (a)(1).

In summary, then, for PWN and PE, the email notice was a procedural violation that arose to a substantive violation, and the underlying choice to either forego PE to receive resource room special education services or forego resource room special education services to have PE substantively violated FAPE.

This portion is relevant to Issues 1, 4, 6, 7, 8, 9, 14, 15, 16, 17, 18 and 22.

MIMS COGNITIVE BEHAVIOR THERAPY

The Petitioners have raised that the Student's cognitive behavior therapy while at MIMS must be performed by a psychologist. They have not met their burden on this issue. In an article by Cara Nissman, dated April 15, 2021, titled Tips to Engage Young Student with Autism in Cognitive Behavioral Therapy, copyright LRE publications, no other cite, yet available on Special Ed Connection, the author notes that school psychologists or other staff trained to deliver CBT (cognitive behavioral therapy) adjust the pace of the therapy, break down thoughts, use a multi-sensory approach, draw on the child's interests, and involve the parents. *Id.* Although this Student is not diagnosed with Autism, the article is used to show that in the educational environment cognitive behavioral therapy may be provided by staff trained to deliver it. *Id.* As well, although the social worker delivering CBT to the Student used a workbook she had never used before, and that she did not receive direction from a psychologist, there is no evidence that her licensure precluded her from providing the therapy, or that she had not been otherwise trained to deliver the therapy. ***See*** §16.63.10.9 (LMSW master social worker can provide diagnostic, preventive, and treatment services), and §16.63.9.9 NMAC (entry level generalist LRSW). Petitioners did not meet their burden that the social worker, not a psychologist, was unable to provide CBT. There is no violation of FAPE. 34 C.F.R. § 300.513.

This portion is relevant to Issues 1, 4, 6, 7, 8, 9, 10, 11, 14, 22, 24, and 25.

MIMS LEXIA, SRA, AUDIO BOOKS, AND YOUTUBE

Methodology is left to the LEA. *See Rowley*, 458 U.S. at 207. It is concluded that the Petitioners have met their burden that the reading program Lexia, the LEA's methodology, is not working with the Student, thus resulting in a violation of FAPE. It is not appropriate to meet her unique needs. *Andrew F.*, 137 S. Ct. at 1000. Testimony has arisen that SRA, a program that provides direct reading instruction may be available at MIMS, but that is speculative at this juncture, and it is a methodology issue for the LEA. Suffice to find that Lexia has not worked and results in a violation of FAPE. 34 C.F.R. § 300.513(a)(1).

The inability to access audio books and related technologies was raised by the Petitioners. They have met their burden that the services required under the MIMS IEP for instructional accommodations and modifications, Ex. 5, p. 12, for read aloud text to speech materials, have not been met. That is, the IEP has not been implemented. The Student's parents were instructed to search the worldwide web, and even YouTube, to find instructional read aloud materials for the Student. The duty is not on the Student's parents to find the materials, but on the LEA to provide those materials. This is concluded to be a procedural implementation violation of FAPE, 34 C.F.R. § 300.513(a)(2), which results in a substantive violation because it impeded the Student's right to a free appropriate public education, and caused a deprivation of educational benefit. *Id.* at (a)(2).

This portion is relevant to Issues 1, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 22, 25, and 26.

SPECIALIZED READING INSTRUCTION

In a similar contention as that above, as the findings indicate, neither the ATC, DSA, nor MIMS IEPs provided that specialized reading instruction appropriate to meet the Student's unique reading needs as a student with severe dyslexia. *Andrew F.*, 137 S. Ct. at 1000. This results in a substantive violation of FAPE. 34 C.F.R. § 300.513(a)(1).

This portion is relevant to Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 18, 19, 22, 25, and 26.

TUTOR O's COSTS

Tutor O, found to be credible, that is, forthright and truthful, helped the Student with general academics, as well as with skills in reading and dyslexia, and in some sense as an advocate at meetings with the LEA. While Tutor O has in the past been both a special education teacher and a general education teacher, tr. 639, lacking one class to obtain her special education license, tr. 640, she has worked with the Student for a number of years, privately, to help guide the Student in her work. Tr. 665. Among other things, during the Student's education at MIMS school, Tutor O helps her with ELA, science, math and theater, and works with the Student after school hours. TR. 663. She would also help the Student try to gain access to books, like *Maus*. Tr. 664. Student prefers to work tasks with her tutor, rather than with school teacher support. Tr. 321. Tutoring support is generally at the end of the school day, after school hours. Tr. 663.

Presumably, the Petitioners present this claim as one for related services. **See** 34 C.F.R § 300.34. Without concluding as a matter of law that tutoring may be a related service in all instances, it is nonetheless concluded that Ms. O's tutoring of the Student was not required to assist the Student to benefit from special education. 34 C.F.R §

300.34(a). That is, the service must be necessary to assist the student to benefit from special education. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984).

The Petitioners have not met their burden to prove that the services of Tutor O are necessary for the Student to have benefitted from special education while in the LEAs schools, be they ATC, DS, or MIMS. 34 C.F.R § 300.34(a). Moreover, the IDEA does not require an ideal plan. *Andrew F.*, 137 S. Ct. at 999. Similarly, an IEP does not have to maximize the Student’s potential. *O’Tolle v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). The IDEA guarantees an appropriate education, not a perfect one. ***See H.L. v. Allen Indep. Sch. Dist.***, 123 LRP 36970 (E.D. Tex. 2023). The claim for Tutor O’s tutoring services is denied.

This portion is relevant to Issues 1, 2, 3, 5, 6, 9, 14, 15, 16, 19, 20, 25, and 26.

NUMEROUS SCHOOLS

The LEA’s contention that the Student’s change of schools impacts her learning, and thus, impacts a denial of FAPE, or acts as an equitable consideration in granting reimbursement, is without merit. ***See*** R’s Closing Brief, p. 3, 7-8. This is unpersuasive. Students move and change schools, for instance, in military and farm worker families. This Student changed schools, lived abroad, and went through the process of on-line education due to Covid. It is concluded that the IDEA takes the Student at the time it finds her and under the unique circumstances then of the Student for FAPE. The “unique circumstances” of the child for whom the IEP was created determine the adequacy of the offered IEP. *Andrew F.*, 137 S. Ct. at 1001 (unique circumstances determine adequacy). MIMS finds the Student where she is, including with her unique circumstances due to changing schools. This does not impact the denial of FAPE.

Similarly, it does not, in this instance, impact any equitable considerations which might arise since there is nothing to suggest the Student's parents did not cooperate in trying to have the Student educated in an appropriate environment in the LEA.

This portion is relevant to Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 21, 22, 24, 25, and 26.

IEP TRANSITIONS

Four IEPs are relevant for transition: ATC of 8/27/21, DSA of 4/29/22, DSA of 8/24/22, and MIMS of 9/29/23. The Student turned 14 years of age while under the ATC 8/27/21 IEP.

New Mexico rules provide that the first IEP in effect when the child turns 14 then measurable post-secondary goals, updated annually, must be included in the IEPs. §6.31.2.11(G)(3) NMAC. The goals include age appropriate transition assessments related to training, education, employment, and independent living skills (if appropriate); transition services including courses of study to assist the child in reaching those goals, and a statement that the child has been informed of the rights which will transfer at the age of majority. *Id.* at (a), (b), and (c) . Measurable post-secondary goals are those goals the child seeks to achieve after high school. *Id.* a (4).

The ATC of 8/27/21 IEP, Ex. 1, p. 24, has a transition page, but it is silent with regard to the §6.31.2.11(G)(3) NMAC goals, except stating "field trips and business partners." *Id.* The DSA IEP of 4/29/22 and the DSA IEP of 8/24/22 contain the same language. ***See*** Ex. 2, p. 26, Ex. 3, p. 30, and Ex. 5, p. 21. The community experiences are noted to be field trips and business partners, with activities to register to vote, list three community clubs of interest, attend a (dance, sporting event, concert) with friends or

family, and participate in field trips, with independent daily living and self help skills to take a driver's ed course and open a bank account. *See Id.* Post-secondary education and instruction activities and strategies are to visit three colleges on-line, take the ACT, and attend ACT/SAT test prep. No involvement from outside agencies, no mental health services, no post-vocational rehabilitation including support services, no independent living services, and no post-secondary education service blocks were all checked. *See Id.* In addition, there are DD waiver checked boxes for "no." *Id.* That is the extent of the transition services. MIMS IEP of 9/29/23 has much of the same language, yet includes participation in a career fair and memorizing a social security number, identify and visit community mental health agencies, and register to vote. Ex. 5, p. 21.

The MIMS IEP of 9/29/23 has another page for measurable post-secondary goals, which include receiving a BS in forensic science, and then pursue a career in criminal investigation, with transition assessment to include investigative, artistic, realistic, social, enterprising, and conventional goals based on a student interview. Ex. 5, p. 9. Similarly, the DSA IEPs of 04/29/22 and 8/24/22, Ex. 2, p. 7, and Ex. 3, p. 8, list a number of measurable post-secondary goals, with pursuit of a degree in quantum physics or forensic science, with transition assessment based on a O'Net Career Interest Profile of 4/2/2022 noting realistic, investigative, artistic, social, enterprising, and conventional, with artistic and creative interests in work which may be performed without following a set of rules. *Id.* The ATC IEP of 8/12/21 does not, however, have a page containing measurable post-secondary goals.

In sum, the DSA and MIMS IEPs contain age appropriate transition assessments related to training, education, employment, although they do not include courses of study

to assist the Student in reaching those goals. They do not include, on the transition pages, a statement rights information. The ATC IEP is silent on any required goals, as noted. As a result, it is concluded that these omissions result in a procedural violation of FAPE. 34 C.F.R. § 300.513(a)(2). The Petitioners have not met their burden, however, to show that these procedural violations resulted in substantive violations. *See Id.* That is, they have not proved 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).

As for relief, procedural errors may be ordered to be corrected. 34 C.F.R. § 300.513(a)(3). MIMS is ordered to revisit its IEP and correct its procedural error.

This portion is relevant to Issues 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 19, 20, 25, and 26.

MATH

Petitioners contend that because the Student does well with mathematical calculations then special needs in mathematics are inappropriate. This is unpersuasive. The Student requires math assistance with reading skills for story problems for her educational needs. There is no violation of FAPE by adding math to the IEP. It will be retained in the MIMS IEP.

This portion is relevant to Issues 1, 4, 5, 6, 8, 9, 11, 12, 14, 15, 18, 22, 20, 25, and 26.

NECESSARY PARTIES

The LEA contends that the Petitioners did not raise necessary parties in this action, interpreted to mean that due to the LEA's challenges to ATC charter school status then the charter school should have been individually named. Having concluded that ATC is a charter school of the LEA, then the LEA is the correct party, as correctly pleaded, rather than the charter school individually.

This portion is relevant to Issue 26.

OTHER MATTERS

Any claims or defenses, including those for remedies below, not otherwise addressed in this order are denied.

REMEDIES

There were substantive violations of FAPE with the ATC and DSA special educational programs. They were not appropriate. Unilateral enrollment at M school was appropriate. Thus, Petitioners are ordered to be reimbursed for M school's program for the sum of \$23, 150.00. The LEA is to make payment to Petitioners on or before April 22, 2024.

Compensatory services for the FAPE violations at ATC and DSA, which are equitable, are not awarded, since the Student's private enrollment at M school, with reimbursement to the Petitioners from the LEA now ordered. The M school services are a subsequent type of placement, in essence, making up for past lost educational opportunities by ATC and DSA during the statutory period.

MIMS denied the Student a FAPE with its special education reading program. It is ordered to begin, on or before April 22, 2024, a structured literacy program according to the New Mexico Public Education Department's Dyslexia Handbook, Ex. 41, to include

one-on-one direct structured reading in a small group setting with similarly situated dyslexic students, if any, with special educators and reading specialists specifically trained in dyslexia, for decoding, phonics, and comprehension, in a special classroom one hour a day each school day. These are not study skills sessions, but one-on-one reading, just like the LEA proposed in its untimely DSA IEP PWN of August 24, 2022, Ex. 3, p. 44 (revisions 4 and 5). PE, or other mandatory graduation required courses, will not be displaced because of it. In addition, trained educators in dyslexia by the LEA's reading specialist, *see* NMSA 1978, § 22-13-32(E), will be made available to assist the Student with decoding, phonics, and comprehension in her general education setting, not one-on-one, but on an individual class check-in basis, with the duty placed on the special educator to seek out the Student and then provide needed assistance in the general education environment with decoding, comprehension, and phonics. These services will be provided on site at MIMS.

On or before April 22, 2024, training is ordered for staff providing special education and related services to the Student, including administrative staff, and the principal at M school, on structured literacy according to the New Mexico Public Education Department's Dyslexia Handbook, Ex. 41.

The dyslexia training, to not run afoul of *Rowley, supra*, will not be ordered to be by a specific provider, although it is noted that the provider will follow guidance reflected by the May school, which is a resource in the LEA's geographic area.

Similarly, all educators providing educational services to the Student as a part of the Student's IEP Team are ordered to receive training, on or before April 22, 2024, on drafting IEPs and PWNs, with the training provided by a third-party source or by the

Public Education Department. This includes training on the correct use of assistive technology for the Student's special education educators. 34 C.F.R. § 300.6(f).

In the meantime, prior April 22, 2024, educators AT and WK will with due speed read, or if they have been read before then reread, the educational and psychological assessments and evaluations of record for the Student, and with due speed will read, or if they have been read before then reread, the New Mexico Public Education Department's Dyslexia Handbook.

Audio books, or other reference materials for homework and for school work, will be made available to the Student by MIMS on or before April 22, 2024 – the duty is on the LEA to provide, and to follow through on the receipt of the provision, of the services. It will not be delegated to the Student's parents to find the sources, like on the worldwide web, or YouTube.

The methodology to provide assistive technologies for the Student is left to the LEA; however, it is noted that the use of Lexia through educator AT has been determined to be inappropriate.

Compensatory services for the FAPE violations at MIMS are ordered to place the Student in the place she should have been absent the FAPE denials, specifically, the structured literacy one-one direct reading programs by special educators appropriately trained to provide dyslexia services, as noted above. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). The relevant time period for the MIMS compensatory services is from when Student began her educational program at MIMS on September 18, 2023, through the date the Petitioners filed their Request for Due Process on October 27, 2023. Lost services are not only those which were found to be

inappropriate for the services provided, but also those found to be inappropriate due to the needed one hour a day each school day of special services for this Student with severe dyslexia. Thus, 30 hours of compensatory one-on-one direct structured literacy reading in a small group setting with similarly situated dyslexic students, if any, with special educators and reading specialists specifically trained in dyslexia, for decoding, phonics, and comprehension, are ordered. These services are to commence on or before April 22, 2024.

Given the concerns expressed by the MIMS school principal about the Student not being able to complete her education at MIMS, then the next IEP is ordered to be facilitated through the New Mexico Public Education Department to assist the IEP Team to communicate openly and effectively. **See** §6.31.2.7(C)(1) NMAC. The next IEP is scheduled to arise on or before September 29, 2024, Ex. 5, unless a new meeting is held before then. The next IEP will be facilitated by an independent, state-approved, state funded, trained IEP facilitator. §6.31.2.7(C)(1) NMAC.

This portion is relevant to Issues 1, 2, 3, 5, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 20, 21, 23, 25, and 26.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process, filed on October 27, 2023, with requested relief, is granted in part and denied in part.

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.

/s/ electronic

MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: March 20, 2024

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by Email attachment transmission only to Attorney G. Stewart (for the Petitioners), and to Attorneys J. Archuleta-Staehlin and L. Castille the Respondent, on the 20th day of March 2024, with the parties having agreed to service of documents by Email attachment, and with a copy to Attorney Lozano, which also acts as the copy forwarded to the New Mexico Secretary of Education.

/s/ electronic

MORGAN LYMAN