

**BEFORE THE PUBLIC EDUCATION DEPARTMENT**

**DPH No. 2324-20 (Santa Fe Public Schools)**

**HEARING OFFICER'S**

**MEMORANDUM DECISION AND ORDER**

THIS MATTER arises on the Petitioners' Amended Special Education Due Process Hearing Request (Amended Due Process Request), filed with the State of New Mexico Public Education Department on July 1, 2024. The Amended Due Process Request was preceded by the initial Special Education Due Process Hearing Request (Due Process Request), filed on March 27, 2024. The Petitioners' Amended Due Process Request is granted in part.

**PROCEDURAL BACKGROUND**

In relevant part, the Petitioners filed the Due Process Hearing Request on March 27, 2024. *See* Amended Due Process Request, March 27, 2024. On April 4, 2024 a Prehearing Order and Extension Order were entered. *See* Prehearing Order and Extension Order, April 4, 2024. The Respondent LEA responded on April 8, 2024. *See* [LEA's] Answer to the Complaint for Due Process, April 8, 2024 (Response). On June 6, 2024 the Respondent filed a request to vacate the hearing date, see Motion to Vacate Current Hearing Date, and Reschedule, June 6, 2024, which the Petitioners; opposed, *see* Petitioners' Response in Opposition to Respondent's Motion to Vacate Current Hearing Date and Reschedule, June 10, 2024, and, after a hearing on June 11, 2024, was granted. *See* Vacate and Extension Order, June 12, 2024.

Prior the hearing being vacated, the Petitioners' filed a Motion for Collateral Estoppel. *See* Motion for Collateral Estoppel, June 10, 2024. That motion was denied on July 17, 2024. *See* Order Denying Motion for Collateral Estoppel, July 17, 2024.

Before the Collateral Estoppel Motion was denied, a Notice of Stipulation of Amendment was filed, *see* Notice of Stipulation of Amendment, July 1, 2024, upon which the Amended Due Process Request was filed, with an administrative order thereafter entered. *See* Administrative Order, July 2, 2024. A new prehearing conference was held on July 9, 2024, resulting in a Prehearing Order being entered on July 9, 2024. *See* Prehearing Order, July 9, 2024. The Respondent answered the Amended Due Process Request on July 19, 2024. *See* Answer to Amended Complaint, July 19, 2024.

On August 6, 2024, the Petitioners' filed a Second Motion for Collateral Estoppel. *See* Second Motion for Collateral Estoppel, August 6, 2024. An Order Denying Petitioners' Second Motion for Collateral Estoppel, with a *Sua Sponte* Order, was entered on August 14, 2024. *See* Order Denying Petitioners' Second Motion for Collateral Estoppel, with a *Sua Sponte* Order, August 14, 2024.

The Petitioners filed an issue statement for the hearing issues on August 6, 2024. *See* Petitioners' Statement of Issues for Amended Complaint, August 6, 2024 (Ps' Issues). Respondent relied on its issues submitted on May 27, 2024. Tr. 6. *See* LEA's Statement of Issues, May 27, 2024 (R's Issues).

Witness and Exhibit Lists were timely filed. *See* LEA's Witness List, June

10, 2024, LEA's Exhibit List, June 10, 2024, Petitioners' Witness List, June 10, 2024, Petitioners' Exhibit List, June 10, 2024, LEA's Exhibit List August 18, 2024, LEA's Witness List, August 18, 2024, Petitioners' Witness List, August 18, 2024, and Petitioners' Amended Exhibit List, August 18, 2024. Stipulated facts were filed on June 10, 2024. *See* Stipulation of Facts, Joint, June 10, 2024.

The Due Process Hearing commenced on August 26, 2024, and concluded on August 29, 2024. Tr. Vols. 1-4. The parties, counsel, and the hearing officer appeared in person. *Id.* At the conclusion of the hearing a joint request was granted to extend the decision date through November 12, 2024. *See* Tr. 1105-1106.

At Petitioners' request, the deadline to submit Proposed Findings and Conclusions, and Argument, was extended, *see* Emails between counsel and Lyman, October 10 -11, 2024, as well as Petitioners' request for additional page limits for Argument and Proposed Findings and Conclusions. *See* Emails between counsel and Lyman, October 14, 2024. Petitioners' Proposed Findings of Fact and Conclusions of Law, and Argument (Closing Argument), were timely filed on October 15, 2024. Respondent's Proposed Findings of Fact, Proposed Conclusions of Law, and Argument (Post-Hearing Brief) were timely filed on October 14, 2024.

This decision is due on or before November 12, 2024. Tr. 1105-1106.

## **ISSUES**

1. Whether the LEA failed to ensure the Student's IEP team developed a plan for Student's placement in the interim alternative educational setting from January 29, 2024

to March 4, 2024, resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all three. Ps' Issues 1, 18, 19.

2. Whether the LEA failed to provide the Student with an interim alternative educational setting that was appropriate for Student and in which he could access the 4<sup>th</sup> grade general education curriculum and gifted education and progress toward IEP goals from January 29, 2024 to March 4, 2024, resulting in a substantive denial of FAPE. Ps' Issues 2, 17.

3. Whether the LEA failed and has refused to implement Student's December 13, 2023/February 2, 2024 IEP from December 13, 2024 to the present, resulting in a substantive denial of FAPE. Ps' Issues 3, 17.

4. Whether the LEA failed to provide Student with the 1:1 EBHA or Aide required by the December 13, 2023/February 2, 2024 IEP, resulting in a substantive denial of FAPE. Ps' Issues 4, 17.

5. Whether, beginning in early November 2023, the LEA failed to provide Student with a Board Certified Behavior Analyst (BCBA) and Behavior Support Services required by the March 15, 2023 and December 13, 2-23/February 2, 2024 IEP, resulting in a substantive denial of FAPE. Ps' Issues 5, 17.

6. Whether the LEA failed to provide Student with the Social Skills Group required by his March 15, 2023 IEP and December 13, 2023/February 2, 2024 IEP. Ps' Issue 6.

This Issue has been withdrawn by Petitioners in their Closing Argument, and will not be addressed. *See* Petitioners' Closing Argument, fn. 1.

7. Whether the LEA failed to comply and deliberately attempted to circumvent the Hearing Officer's decision in DPH 2324-14 by unilaterally changing the Student's IEP in violation of the IDEA requirements and refusing to return the Student to the placement from which he was suspended on January 29, 2024, resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all three. Ps' Issues 7, 18, 18.

8. Whether the LEA failed to comply with IDEA notice requirements for the March 4, 2024 IEP meeting by not disclosing that the purpose was to change Student's placement, resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all three. Ps' Issues 8, 18, 19.

9. Whether the LEA materially changed significant parts of Student's IEP and created a new annual IEP dated March 4, 2024, without notice to Parent, without the participation of Parent, and outside the IEP team process, resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all three.

Ps' Issues 9, 18, 19.

10. Whether the LEA unilaterally predetermined and changed Student's placement to a Behavior Unit at Sweeny Elementary School and disenrolled Student from Pinon Elementary School in March 2024, resulting in a substantive denial of FAPE, or resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all four. Ps' Issues 10, 17, 18, 19.

11. Whether the LEA's change of Student's placement to a Behavior Unit at Sweeny Elementary School violated Student's rights to be educated in the least restrictive environment, resulting in a substantive denial of FAPE. Ps' Issues 11, 17.

12. Whether the LEA failed to review and amend Student's Behavior Intervention Plan during the 2023-24 school year, resulting in a substantive denial of FAPE. Ps' Issues 12, 17.

13. Whether the LEA discontinued Student's Occupational Therapy services without evaluation, failed to implement the recommendations in Student's Occupational Therapy Independent Educational Evaluation, and failed to provide Student with services to address his known sensory processing and executive functioning needs, resulting in a substantive denial of FAPE. Ps' Issues 13, 17.

14. Whether the LEA failed to provide Student with Extended School Year Services for the summer of 2023, including by not ensuring development of a plan for ESY services

by the IEP team and by failing to provide any ESY services to Student during that summer or failing to provide compensatory services during the 2023-2024 school year, resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all three. Ps' Issues 14, 18, 19.

15. Whether the LEA failed to provide Student with Extended School Year Services for the summer of 2024, including by not ensuring development of a plan for ESY services by the IEP Team and by failing to provide any ESY services to Student during the summer of 2024, resulting in a substantive denial of FAPE, or resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all four. Ps' Issues 15, 17, 18, 19.

16. Whether Petitioners are entitled to have the independent educational evaluation of Student conducted by Dr. Lauren Parks to be provided at public expense by the LEA, resulting in a substantive denial of FAPE, or resulting in a procedural into substantive violation of FAPE by significantly impeding the parents' opportunity to participate in the decision-making process regarding FAPE to Student, or by impeding the Student's right to FAPE, or by causing a deprivation of educational benefit, or all four. Ps' Issues 16, 17, 18, 19.

17. Whether Student is entitled to a remedy for a denial of FAPE and, if so, what

remedy is appropriate. Ps' Issue 20.

18. Whether Student is entitled to compensatory education services for a denial of FAPE. Ps' Issue 21.

19. Whether Parent is entitled to reimbursement for educational services obtained for Student since January 29, 2024. Ps' Issue 22.

20. Whether the Petitioners' interference with the provision of special education services to Student are the root cause of the Student's behavior problems. R's Issue 1.

21. Whether the Petitioners' efforts to have the Student identified with numerous areas of alleged disability are interfering with the LEA's efforts to provide educational services. R's Issue 2.

22. Whether the Petitioner's persistent efforts to communicate with school staff even after hours and on weekends was an unreasonable invasion of personal time and space of school personnel. R's Issue 3.

23. Whether the Petitioner and her partner's failure to impose any consequences for Student's violations of school rules impacted the LEA's ability to provide Student with educational opportunity. R's Issue 4.

24. Whether the demand for the provision of services by a BCBA was reasonable in light of Student's identified areas of exceptionality. R's Issue 5.

25. What specific areas of exceptionality under the IDEA does the Student have a



specific up-to-date diagnosis. R's Issue 6.

26. What areas of exceptionality did the IEP team find the Student to require specialized instruction in as identified by the IDEA? R's Issue 7.

27. Whether the Petitioners' refusal to send Student to the program at Desert Sage after the disciplinary matter waived any claim for missed services during that relevant time. R's Issue 8.

28. Whether Petitioners' refusal to send Student to the program at Sweeny Elementary School following the IEP team decision to change his placement to a behavior program waives any claim by Petitioners for missed services from the date of the IEP to the time Parent chooses to return Student to public school in accordance with the current IEP. R's Issue 9.

29. Whether Petitioners had an affirmative duty to request stay put and challenge the IEP developed on March 4, 2024, and, if so, if that waived any claim for compensatory relief. R's Issue 10.

30. Whether Petitioners' demand for a daily communication log from all of the Student's teachers, with the ability to challenge each entry, is a reasonable accommodation based on Student's areas of exceptionality. R's Issue 11.

31. Whether Petitioners' request for reimbursement is reasonable in light of a failure to submit the request for reimbursement prior to incurring the expense, and as required by the IDEA. R's Issue 12.

32. Whether Petitioners can require a specific method of social services to be provided to Student in the form of social skills group involvement. R's Issue 13. Note, because the underlying issue has been withdrawn by Petitioners, see Issue 6, then this issue is deemed withdrawn as well.

33. Whether it is reasonable for the Petitioner to require a BCBA attend non-school related summer programs with the Student. R's Issue 14.

34. Whether Petitioners can require the provision of special education services from individuals holding qualifications or certifications not issued by the Public Education Department, such as a BCBA or RTC. R's Issue 15.

35. Whether Petitioners can choose which IEP to comply with, and which can be ignored, if there is disagreement with the team decision. R's Issue 16.

36. Whether Petitioners can prevail in the claims for a denial of FAPE. R's Issue 17.

### **RELEVANT LEGAL OVERVIEW**

The burden of proof rests with the party challenging the IEP. *See Schaffer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10<sup>th</sup> Cir. 1990). In this action, the burdens rest, therefore, with the Petitioner.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed 690 (1982). The initial inquiry is procedural; that

is, whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. “The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the ‘free appropriate public education’ mandated by the Act.” *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10<sup>th</sup> Cir. 1995). “[A] child is entitled to ‘meaningful’ access to education based on her individual needs.” *Fry v. Napoleon Cmty. Sch.*, 580 U.S. \_\_\_, 137 S. Ct. 743, 753-754 (2017).

“To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_, 137 S. Ct. 988, 999 (2017). The educational program offered by the IEP must be “appropriately ambitious in light of [the child’s] circumstances.” *Andrew 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.

All children with disabilities who are in need of special education and related

services are to be identified, located, and evaluated. *See* 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i) (“child find”). The school district “bears the burden generally in identifying eligible students for the IDEA.” *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10<sup>th</sup> Cir. 2002). All children residing in the local educational agency’s (LEA) jurisdiction must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 300.111(a)(i). This “child find” obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. *See* 34 C.F.R. § 300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. *See* §6.31.2.10(D)(1)(a) NMAC. Either the parent or the public agency may “initiate” an initial evaluation request. *See* §6.31.2.10(D)(1)(b) NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenbergh v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8 (D.C. Conn. 2009). An LEA’s failure to meet its “child find” obligation is a cognizable claim. *See Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9<sup>th</sup> Cir. 2010). Eligibility for special education benefits may be considered, as well. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8<sup>th</sup> Cir. 2011). A “difficult and sensitive” analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4 (1<sup>st</sup> Cir. 2007)(quoting *Greenland Sch. Dist. v.*

*Amy*, 358 F.3d 150, 162 (1<sup>st</sup> Cir. 2004).

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

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10<sup>th</sup> Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10<sup>th</sup> Cir. 2008). A hearing officer may order a LEA to comply with procedural requirements. *See* 34 C.F.R. § 300.513(a)(3).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 C.F.R. § 300.503; §6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student’s parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student’s free appropriate public education. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10<sup>th</sup> Cir. Jul. 16, 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239 (W.D. Mich. 2003). *See also Tenn. Dep’t. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (6<sup>th</sup> Cir. 1996) (failure to provide notice of “stay-put” not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student’s placement and services does not allow the student’s parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109 (6<sup>th</sup> Cir. 2004).

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

The IEP team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general education curriculum; and (iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. *See* 34 C.F.R. § 300.321.

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

A child’s unique needs in obtaining a free appropriate education, as well as the

services to meet those needs, are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray*, 51 F.3d at 926. Mainstreaming to the maximum extent possible should take place if the child cannot be educated full-time in a regular education classroom with supplementary aids and services. *See L.B. v. Nebo*, 379 F.3d 966, 976-978 (10<sup>th</sup> Cir. 2004). Parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208.

The IEP is to be implemented as soon as possible after the IEP meeting. *See* 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp.2d 960, 970 (D. Kan. 2003).

Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. *See CJN v. Minneapolis Pub. Sch.*, 323 F.3d 630, 638 (8<sup>th</sup> Cir. 2003) (persuasive, citing *Rowley*, 458 U.S. at 202). Although not dispositive of whether an IEP was reasonably calculated to confer educational benefit, past progress is strongly suggestive that the current IEP continues to provide that trend. *Thompson R2-J Sch. Dist. V. Luke P. Ex rel. Jeff P.*, 540 F.3d 1143, 1153 (10<sup>th</sup> Cir. 2008). Educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10<sup>th</sup> Cir. 1998). *But see Andrew F.*, 137 S. Ct.999 (appropriate in light of the child's circumstances). Some educational benefit is required. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008). *But see*



*Andrew F.*, 137 S. Ct. at 999 (appropriate in light of the child’s circumstances). IDEA’s statutory goal is “to provide each child with meaningful access to education by offering individualized instruction and related services appropriate” to meet the student’s “unique needs.” *Fry*, 137 S. Ct. at 755.

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

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.* (10<sup>th</sup> 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 (2<sup>nd</sup> 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.

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 34 C.F.R. §§ 300.511, 300.513. "The only relief that an IDEA officer can give... is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753. Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence County Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1<sup>st</sup> Cir.

1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid v. Dist. of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza v. Bd. of Educ. of the Portales Mun. Schs.*, Nos. 10-0963, 10-0964 (D.N.M. 2011). Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D. D.C. 2010). A student's behavior, attitude, bad habits, and attendance may be considered when addressing an equitable remedy. *Garcia Albuquerque Pub. Schs.*, 520 F. 3d 1116 (10<sup>th</sup> Cir. 2008).

Once a plaintiff has established an IDEA violation and a subsequent denial of FAPE, then she has carried her “burden of proving entitlement to a properly crafted compensatory award under *Reid*.” *See Albuquerque Pub. Schs. v. Cabrera, and Cabrera and Silva v. Bd. Of Educ. of Albuquerque Pub. Schs., et al*, Nos. 1:20-cv-00531-JCH-LF, 1:20-cv-00532-JCH-LF (D.N.M. Dec. 7, 2021), Slip Op. at pp. 24-25. Once there has been a determination of a denial of FAPE, then the injured party is entitled to compensatory education, although that does not mean an award is required. *Id.* Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the student's education. *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10<sup>th</sup> Cir. 2010).

## **FINDINGS OF FACT**

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

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

3. Administrative judicial notice is taken of the factual findings found in the Hearing Officer's Manifestation Memorandum Decision and Order on Appeal, entered on March 15, 2024, and contained in Exhibit 1.

4. The District is the Local Educational Agency (LEA) for Student. Ex. 1  
Student is a 9-year-old who has attended 4<sup>th</sup> grade at the District's P Elementary School, and is now 10 years old. Exs. 1, 5.

5. Student has been identified as a student with disability eligible for receipt of special education services since preschool. Student has had IEPs since then. Ex. 1.  
Student has been identified as eligible for special education on the basis of Other Health Impairment. Ex. 1.

6. Student has also been identified as a Gifted Student since kindergarten. Ex. 1.  
Parent is a 4<sup>th</sup> grade teacher in the District at an elementary school other than P Elementary. Ex. 1.

7. Stepparent (JC) is also an employee of the District who works in the assessment

department, with State assessments that take place for all district-wide accountability. Tr. 541, 951.

8. In the fall of 2022, the District proposed removing occupational therapy services from Student's IEP. Ex. P.3 at pp. 41-42. The reasons were that Student no longer needed the support of an OT for organization and that OT data indicated that Student was successful in the regular education classroom when completing executive functioning tasks. Ex. P.3 at pp. 15, 41-42. The basis for the proposal was that Student "is able to demonstrate legible and function fine motor/handwriting skills. His abilities allow him to participate in the general education curriculum without the specialized support of occupational therapy." Ex. P.3 at p. 41. An occupational therapy evaluation of Student before proposing to remove these services from his IEP was not done, yet supported by work samples, observation, and teacher report. *Id.*

9. Parent objected to the removal of occupational therapy services from Student's IEP because of Student's ongoing motor skills deficits and unmet sensory needs. Ex. P.3, pp. 41-42.

10. Parent noted Student had sensory processing needs, identified on his IEP in the identified areas of need as Sensory Processing Delay, at the IEP team meeting when service removal was proposed. Ex. P.3 at pp. 15-16, 42.

11. Parent proposed an IEE for a formal occupational therapy evaluation, which was accepted. Ex. P.3 at p. 44.

12. Parent later obtained an independent formal occupation therapy evaluation from Cara Heckler of We Need to Talk and More in Albuquerque, New Mexico. Ex. P.14; Tr.

844. The independent evaluator opined that Student had deficits in fine motor, visual motor, and gross motor skills of balance and coordination. It was also concluded that Student had significant difficulties in sensory processing skills and that “these difficulties are impacting [Student’s] ability to maintain attending during class, interact with his peers in an appropriate manner, stay regulated when in crowded areas such as the lining for the cafeteria, student’s visual skills and regulation skills and participation in ADLS such as grooming and dressing.” Ex. P.14 at p. 5. Student also demonstrated difficulties with executive functioning skills. *Id.*

13. The occupational therapy evaluation (OT IEE) recommended a plan of care to include skilled occupational therapy services to address the identified needs. The occupational therapist recommended that Student be provided with OR “1-2X/week over the next 6 months with functional therapeutic activities and parent education as primary treatment strategies.” Ex. P. 14 at pp. 6-7.

14. The District paid for the OT IEE. Tr. 844.

15. Student’s IEP team reviewed the OT IEE at the December 13, 2023 IEP team meeting. Tr. 844, 845. The OT IEE was interpreted by a District OT. Based on the OT’s impression, the results in the IEE concerning fine and gross motor were flawed. The results concerning executive functioning were not discussed. A school-based sensory processing evaluation to examine Student’s sensory processing skills in the school environment was then to be conducted. Ex. P.4 at p. 39; Tr. 845, 846.

16. A sensory processing evaluation of Student was not conducted prior to Student’s January 29, 2024 suspension. Tr. 122, 123, 846.

17. Student did well behaviorally at the beginning of the 2023-2024 school year. Tr. 282.
18. Behavior began to change in October to November, 2023. Tr. 282.
19. The District attempted to hold an IEP meeting in November 2023 because Student's behavior issues had increased in frequency and disruptiveness, yet did not move forward due to an issue with the presence of counsel. Tr. 111-114, Ex. 44.
20. The assigned BCBA was concerned that Student had been through a big change by changing schools and was emotional about the change. She was concerned that his socio-emotional state, an area outside her area of competence, was contributing to his behaviors. Tr. 252, 257.
21. Student was suspended on January 29, 2024, which was Student's 11<sup>th</sup> day of suspension for the current school year. Ex. 1.
22. The District convened a manifestation determination review (MDR) that same day. Ex. 1.
23. The District determined that Student's January 29, 2024, behavior was not a manifestation of his disability: that the behavior was neither caused by, nor in direct, substantial relationship to Student's disability, nor a direct result of the District's failure to implement Student's IEP. Ex. 1.
24. The District referred Student for a disciplinary hearing and placed him in the District's Interim Alternative Education Setting starting immediately. Ex. P.9, p. 3.
25. The results of the disciplinary hearing returned Student to Student's prior

placement at P School with the IEP Team to address accommodations, prior to a manifestation appeal determination. Ex. P. 18.

26. Parent filed an expedited due process to challenge the January 29, 2024, MDR. Parent challenged the MDR on two grounds: (1) Student's behavior on January 29, 2024, was caused by, or in direct, substantial relationship to Student's disability, and (2) Student's behavior on January 29, 2024, was a direct result of the District's failure to implement Student's IEP. Ex. 1.

27. The description of the behavior was documented in the MDR form discussed and completed at the meeting. Ex. 1.

28. On January 29, 2024, Student's behavior began with refusal to engage in math work in the general education classroom. At this time, Student was in his general education math class, with 19 other students and one general education teacher. There was no other adult or assistant in the general education classroom. Although the teacher attempted to engage Student, Student did not respond by engaging in the classroom instruction. Student left the classroom, laid on the floor in the hall outside of the classroom, and began to hold the door of the classroom closed. At that point, the teacher called for assistance, and the principal responded, followed by the school social worker. Student agreed to go with the social worker to her office where he stayed for 2 one-half hour sessions of social work with other students. Ex. 1.

29. When the social worker tried to walk Student and her other student back to class, Student began turning lights on and off in the hallway and closing doors. The social worker agreed to take Student for a 15-minute recess since he had missed recess. After 15



minutes, Student refused to come in from recess, even when given an extra 5 minutes.

The social worker called for assistance from the assistant principal.

The assistant principal asked Student to come in, stating they would have to call his parents if he wouldn't come back inside, and he refused, yelling that he did not want to go home. Student got upset and started throwing woodchips at the assistant principal. The assistant principal asked the social worker to call Student's Parent. At that point, Student ran inside to the social worker's room, grabbed her phone from her hand, got under her desk and licked her phone. Ex. 1.

30. After this, Student went to the school's main office area and engaged in a series of behaviors:

- Hanging up the secretary's phone as she was trying to call Parent.
- Using the secretary's phone to call Parent and speak with her for about 3 minutes.
- Going under another secretary's desk and unplugging all of her technology.
- Grabbing the assistant principal's radio off a table and throwing it in the garbage.
- Forcefully pushing the assistant principal from behind in the back when she went to grab her radio out of the trash.
- Stapling papers together using a stapler on a table.
- Using the stapler to shoot staples at the social worker.
- Office staff were fearful of the Student's action.
- The only deescalation appeared to be allowing the Student continue with his behaviors.

- Grabbing scissors and cutting the secretary's balloon strings, setting the scissors down, then going outside. Ex. 1.

31. Once outside, student let the balloons go. He then began throwing rocks at 6<sup>th</sup> graders and hit another student with a rock. He also was walking on high walls outside. Student's stepfather arrived, and Student came inside with him. Ex. 1. District staff called Parent during the behavior, requesting that she come and pick Student up from school. Soon after the first call, Parent received a call from Student. Student told Parent that he didn't want her to come get him, he did not want to be suspended, he did not know what was going on and that the school just wanted to send him home. Parent arranged for Student to be picked up by his stepfather. Ex. 1.

32. Student has difficulties with social skills with peers. Ex. P.27 at pp. 1-3; Tr. 217, 575, 578, 587-588, 599-600, 849.

33. In December 2023 several members of the behavior team informally observed Student to see if they could make recommendations and design interventions regarding escalating behavior. Tr. 92-93.

34. Student has friends but struggles to understand how to connect with them. Tr. 575.

35. Student has difficulties with social skills when interacting with adults. Ex. P.39 at pp. 6-7; Tr. 598, 599.

36. Student's relevant IEP with an amendment date of March 15, 2023 documents that he is a Student with an Other Health Impairment with identified areas of need of Facioscapulohumeral muscular dystrophy (FSHD), Sensory Processing Delay, ADHD –

Predominantly hyperactive/impulsive presentation, Other Specified Disruptive Impulse-Control Disorder with difficulties including noncompliance, temper outbursts, argumentativeness and labile mood, Executive Functioning Organization, Behavior Functional Communication, Behavior Decrease Challenging Behaviors, Written Language, and Auditory Processing. Ex. 1.

37. A subsequent IEP dated December 13, 2023, documents that he is a Student with an Other Health Impairment with identified areas of need of Facioscapulohumeral muscular dystrophy (FSHD), Sensory Processing Delay, ADHD – Predominantly hyperactive/impulsive presentation, Other Specified Disruptive Impulse-Control Disorder with difficulties including noncompliance, temper outbursts, argumentativeness and labile mood, Executive Functioning Organization, Behavior Functional Communication, Behavior Decrease Challenging Behaviors, Written Language, Auditory Processing, and Anxiety. Ex. 1.

38. ADHD-Predominantly Hyperactive/Impulsive Presentation and Other Specified Disruptive Impulse-Control Disorder with difficulties in non-compliance, temper outbursts, argumentativeness and labile mood have been included in Student's IEPs since the end of preschool. Ex. 1.

39. The December 13, 2023 IEP provided that Student would have the following special education and related services: 1342 minutes weekly of 1:1 assistance in the regular classroom, 130 minutes weekly of gifted instruction in a special education setting, 60 minutes of social work services by a social worker in a special education and regular classroom setting, 20 minutes monthly of audiology services by an audiologist in a special education setting, 120 minutes weekly of support in executive functioning by a special

education teacher in a regular classroom setting, and 180 minutes weekly of behavior support by a Behavior Support specialist. Ex. P.4, pp. 34-35.

40. Before the MDR on January 29, 2024, no one at the District had ever advised Parent that Other Specific Disruptive Impulse-Control Disorder could not be considered part of Student's disability for special education purposes. Ex. 1.

41. Student was diagnosed with ADHD-Predominantly Hyperactive and Impulsive Presentation (ADHD) and Other Specific Disruptive Impulse Control Disorder (Disruptive Impulse-Control Disorder) as a result of a 2020 neuropsychological evaluation conducted at the University of New Mexico Hospitals, Center for Neuropsychology Services, Department of Psychiatry (UNM Neuropsychological Evaluation). Ex. 1.

42. The UNM Evaluation Report noted that “[c]o-occurring behavioral concerns are extremely common among children with ADHD, likely due to high rates of difficulties in impulse control and self-regulation in ADHD.” Behavioral concerns noted at that time included “frequent tantrums and non-compliance, as well as occasional aggression.” Ex. 1.

43. Parent understood that Student was diagnosed with ADHD and Impulse-Control Disorder as co-occurring diagnoses. Ex. 1.

The UNM Neuropsychological Evaluation report is contained in Student's records and has historically been part of the basis of his Other Health Impairment and disability for the purposes of the IEP. Ex. 1.

44. In October 2022, the District conducted a comprehensive psychoeducational re-evaluation of Student by a school licensed educational diagnostician, AG. That evaluation noted the diagnoses of ADHD and Disruptive Impulse Control Disorder in the

2020 UNM Neuropsychological Evaluation but did not do any evaluations related to those areas of Other Health Impairment/disability. The District's evaluation focused on academic functioning and achievement. In the reevaluation report, however, the evaluator noted that Student "continues to meet criteria as a student with an Other Health Impairment and Gifted." Ex. 1.

45. In a Reevaluation Eligibility Determination after the 2022 psychoeducational evaluation, the Eligibility Determination Team determined that Student continued to be eligible for special education under the category of Other Health Impaired and that the team did not require additional information to make that determination. Ex. 1.

46. Parents requested an Independent Educational Evaluation (IEE) of Student in response to the evaluation by Ms. G because it did not provide a comprehensive picture of Student's struggles. Tr. 850, 851. The District agreed to this request. Ex. P.3 at p. 44.

After the District agreed to this IEE, Parents communicated with the District to obtain the District's IEE criteria. Exs. P.41, P.42; Tr. 59, 61, 62, 67, 68, 69, 854-857.

In response, over a three-month period, Parents received two different sets of IEE criteria. *Id.* The two sets of IEE criteria differed in terms of distance of the evaluator and qualifications of the evaluator. Ex. P.41 at pp. 12-13, Ex. P.42 at p. 9.

47. Parent attempted to follow the District's IEE criteria. She requested a list of possible evaluators from the District and sought confirmation from the District as to whether certain individuals could do the IEE. Ex. P. 41 at pp. 5-9. The requested IEE in response to Ms. G's psychoeducational evaluation was never approved.

48. In late 2022, the District conducted an autism evaluation by a school

neuropsychologist, Dr. Alison Le Grand. As part of this evaluation, Dr. LeGrand administered the Behavior Assessment System for Children-3 (BASC-3) rating scales to Parent and Student's teacher. Dr. LeGrand concluded that Student was rated in the Clinical Range of Externalizing Problems which included Hyperactivity, Aggression, and Conduct Problems. Specifically, the evaluation reported:

Hyperactivity was rated as a clinical concern by the teacher and parent, consistent with his previous diagnosis of ADHD. Aggression was rated in the at-risk (teacher) to clinical (parent) ranges, suggesting that [the Student] has trouble with self-regulation and lashes out at others when upset. Conduct problems were rated in the clinical range by both the teacher and parent, suggesting difficulties for Student with following rules and acting out when frustrated at home and school.

Ex 1.

49. Dr. LeGrand further reported that Student's BASC-3 ratings indicated clinical concerns with the Student externalizing problems overall, and specifically hyperactivity and conduct problems, which were consistent with the diagnosis of ADHD-Predominantly Hyperactive/Impulse Presentation and Other Specified Disruptive Impulse-Control Disorder. According to Dr. Le Grand, the Student was rated by teacher and parent as in the clinical range of same-aged peers in terms of the Behavioral

Symptoms Index which consists of Hyperactivity, Aggression, Depression, Attention Problems, Atypicality, and Withdrawal scales and reflects the overall level of problem behavior of the child. Ex. 1. Dr. Le Grand also referred to the UNM evaluation report as the source of the medical diagnosis for these two conditions and did not request an updated medical diagnosis from Parent. Ex. 1.

50. The New Mexico Technical Assistance in Evaluation Manual (TEAM) does not require a medical diagnosis to support Other Health Impairment eligibility and does not require a new medical diagnosis upon reevaluation. Ex. 1.

51. Parents requested an IEE in response to Dr. Legrand's autism evaluation. Specifically, Parents disagreed with Dr. Legrand's evaluation because (a) based on information provided by Parent and by Student's gifted teacher, Dr. Legrand seemed to indicate that Student met autism criteria under the DSM-5 then faded that from her analysis, and (b) it was unclear where the results from the Childhood Autism Rating Scale, 2d Ed. (CARS-2 HF) portion of the evaluation came from or how they were obtained. Tr. 852, 853; Ex. P.13 at pp. 8, 10-11.

52. Parent's proposal for this IEE was rejected by the District, stating its belief that it had "adequately evaluated the student and identified exceptionalities and stands by the evaluation results." Ex. P.3 at p. 46; Tr. 853, 854.

53. The District did not, however, file for a due process hearing to claim that its evaluations were adequate pursuant to 34 C.F.R. § 300.502(b)(2)(i). Tr. 208, 854.

54. Dr. Lauren Parks is licensed psychologist who specializes in pediatric

neuropsychology. She has a private practice in Santa Fe, New Mexico. According to Dr. Park's website, she "specializes in neuropsychological assessment, consultation, and intervention with children, adolescents and young adults with a wide variety of medical, psychological, and neurodevelopmental disorders." Ex. P.48, p. 1. Her website further describes that she provides pediatric neuropsychological evaluations using a private interview and standardized testing ... and provide a comprehensive report that discusses results, diagnoses, and recommendations." *Id.* at p. 2. Her evaluations include testing for intellectual function, learning and memory, attention, executive functioning, language, visual spatial skills, fine motor skills, academic achievement, emotional functioning, behavior, and adaptive/self-care skills." *Id.*

55. On January 11, 2023, Parent requested that the District provide information about whether Dr. Lauren Parks met the District's criteria for an IEE. The District did not provide Parent with this information. Ex. P.41 at p. 11.

Parent chose Dr. Parks because her close proximity (Santa Fe), reports from others who had gone to her practice for evaluation, recommendation from a UNM neuropsychologist who previously evaluated Student, and information available on Dr. Parks' website. Tr. 857.

56. Parent arranged for Dr. Parks to evaluate Student and paid for the evaluation. Parents paid a total of \$2,975.47 to Dr. Parks for the independent evaluation, \$279.78 as a deposit on April 19, 2024 and \$2,704.69 for the balance on June 11, 2024. Ex. P.40. After time on a waiting list, Dr. Parks evaluated Student in May 2024. Tr. 861.

57. Although the results of Dr. Parks' evaluation were allowed to be discussed at the



due process hearing through Mother's interpretation of the evaluation, they were not in the form of a report because the report was not timely disclosed, and Dr. Parks did not testify; the interpretation of what Dr. Parks may have found or concluded as related through Parent as a lay witness, such as autism, vocal tic disorder, anxiety and ADHD, is given no weight.

58. The District's criteria and procedures for IEEs (Ex. P.42) do not include a requirement that the proposed evaluator be reviewed and recommended by the District diagnostic team. Ex. P.42 at p. 9; Tr. 720.

59. The District did not file a due process claiming that its evaluations were adequate pursuant to 34 C.F.R. § 300.502(b)(2)(i). Tr. 208, 854.

60. The School District could either file, or fund. It did neither.

After the MDR, Parent provided the District with SFPS Physician Statement of Student Health Need Form completed by Student's pediatrician. The Health Need Form documented that Student continues to be diagnosed with ADHD, Disruptive Impulse Control Disorder, and Anxiety. Parent provided the information on the SFPS Physician Statement of Student Health Need Form completed by Student's pediatrician as it was the form provided to her by the District's nurse for this purpose. Ex. 1.

61. Parent provided the District SFPS Physician Statement of Student Health Need Form completed by Student's pediatrician in the spring of 2023 documenting that Student had been diagnosed with anxiety. Ex. 1.

62. Students with ADHD with impulsivity and Impulse-Control Disorder, like Student, have a hard time self-regulating and can have aggression, elopement, and

inappropriate verbal communication. Ex. 1.

63. Student's disability causes Student to be impulsive. Once Student escalates in his behavior, it can be hard to get him to self-regulate. If he is frustrated and not able to self-regulate, then he becomes highly impulsive. He will do things without thinking and will go from thing to thing. Ex. 1.

64. Historically, Student has had a lifetime struggle with transitions from preferred to nonpreferred tasks and from a less structured setting to a more structured setting. Student's struggles with transitions include returning to class after social work services or PE. Ex. 1.

65. Behaviors in the school setting have included noncompliance or noncooperation which could lead to tantrums, elopement, lying on the ground, screaming, throwing objects (e.g., pencils), vocal agitation and physical aggression. Ex. 1.

66. Student's IEP reflects the importance of addressing these disability-related behaviors:

- a. The Present Levels of Functional Performance section of Student's IEP details the social/emotional and behavior area of identified need for Student resulting from his disability.
- b. Student's IEP includes goals and objectives for self-regulation, communication, elopement, and aggressive behavior. Student is not able to independently access self-regulation strategies when he is frustrated or escalated.

c. The Prior Written Notices for Student's IEP document that he needs "explicit instruction in self-regulation and self-awareness." Ex. 1.

67. Student has had Functional Behavior Assessments and a Behavior Intervention Plans (BIP) as part of his educational program. Student's most recent Functional Behavior Assessment is dated February 25, 2023. His most current BIP is also dated February 15, 2023. Ex. 1.

68. Student's BIP identifies target behaviors of refusal, verbal aggression, and physical aggression. Student's elopement is related to refusal. Ex. 1.

69. Student's IEP includes services designed to address Student's behaviors and to support staff who work with Student, such as the supplementary aid and service of District Behavior Support staff, behavior support from a special education teacher in the regular education classroom, social work services, and a 1:1 educational aide assigned to Student. Ex. 1.

70. In late October/early November 2023, Student's behaviors began to escalate in frequency, and he also began to elope. From the time that Student's behaviors began changing and escalating in the fall of 2023 through January 29, 2024, the District did not conduct a new FBA or develop a new BIP to assess and address his behavior. Tr. 346.

71. When the District raised concerns about communications from Parent, Parents did attempt to communicate with the District Superintendent to resolve the concerns. Ex. P.50.

72. Student's regular education teacher had never had to do a communication log before. Tr. 446. She found the log completion as requested by Student's Parent, in context

of her general education duties without the assistance of an aide, to be take excess time and she began to feel overwhelmed. *Id.* at 465, 470.

73. From the beginning of the school year until March 1, 2023, Parent communicated in the communication log occasionally, approximately 19 times over 8 months. *See* Ex. P.29, pp. 41, 42, 49, 50, 51, 68, 69, 72, 73, 76, 77, and 78.

74. In the next school year, most of the communications were Parent's attempts to support the teachers with information about Student, including notes about what had worked in the past and what had not worked. *See, e.g.,* Ex. P.25 at 4.

75. Parents' communication were routed through a staff, although the communications were not restricted. Tr. 1080-1083.

76. Prior Parent communications with staff in the 2022-2023 school year resulted in intervention by the school principal due to staff feeling uncomfortable and under attack, with issues such as body language being aggressive, slamming binders, and not letting staff finish their thoughts. Tr. 1080-1083.

77. Parents did not withhold consent for any evaluation of Student. Parents did not refuse or reject services or supports the IEP team determined Student needed—including BCBA, Behavior Specialist, and 1:1 Aide services. Although Parent provided input about behavior interventions (such as coloring, computer use, or tangible rewards) which had been used unsuccessfully in the past, she did not refuse to allow the District to use those interventions. Tr. 879, 880, 881, 1047, 1048.

78. At the March 4, 2024 IEP team meeting, the FBA document that was presented and reviewed omitted review of important sources of information about Student, such as

anecdotal information from Parents, diagnostic evaluations (including evaluations by outside agencies), and discipline records. Tr. 140, 141, 142, 143, 352.

79. There was no discussion or decision about a new BIP on March 4, 2024. Tr. 357, 358.

80. Student's behaviors periodically escalate and occur with more frequency. The last FBA of Student acknowledged that Student's behaviors could escalate after winter break. Student has escalations after most breaks of extended weekends. Student has been determined eligible for ESY on the basis of his regression in behaviors after breaks in school. This can include vacations in the school year, like the winter, spring, or summer break, or over long weekends. Ex. 1.

81. The antecedent to Student's January 29, 2024 behaviors was the math instruction and practice he refused to engage in initially when he first left the classroom and is part of the behaviors that are addressed in Student's IEP and BIP. After attending the two social work sessions, Student refused to return to his general education classroom and engaged in a series of behaviors to avoid returning to the classroom. At the point when Student was in the office area on the floor with the chair over him, the assistant principal described him as "already kind of escalated to where if I said anything to him, I think it just upset him more." She described Student's "escalation" as "a point where you can't really say anything to [Student] without him saying no and he's not going to do it." Usually by the time she was called to intervene with Student's behaviors, "he's already escalated to the point where he kind of refuses to listen to anybody." Ex. 1.

82. In a 2/1/24 Present Level note in Student's IEP, Student was described by the

school social worker as having erratic behavior and as “[h]e doesn’t understand why he escalates situations or why he comes physically aggressive with others.” Ex. 1.

83. Additionally the social worker voiced her impression that the Student did not feel there would be consequences to his actions other than being sent home from school. Ex. 1.

84. During the January 29<sup>th</sup> incidents, in response to his social worker’s questions about why he was behaving as he was, he gave thought to the question but told her “he didn’t know why he was doing those things.” Student’s “difficulty with reasoning/problem-solving skills negatively interferes with his ability to generate possible solutions.” Ex. 1.

85. Student’s pushing of the assistant principal was a major concern of the District’s in terms of Student’s behavior on January 29, 2024. Aggression has long been treated as a disability-related behavior that is the subject of his IEP and BIP. Ex. 1.

86. The December 13, 2023, IEP was developed on December 13, 2023, with the exception of a few items that were addressed at a follow up meeting on February 2, 2024. At the conclusion of the December 13, 2023, IEP meeting, the IEP team had a few minor things to complete, a question by Parent about a goal, reviewing the Prior Written Notice, and a progress documentation page. Ex. 1.

87. At the December 13<sup>th</sup> IEP meeting, the District told Parent that they would move forward with implementing the December 13<sup>th</sup> IEP. The District was implementing the December 13, 2023, IEP after the meeting that day. Ex. 1.

88. The IEP in force at the time of the Student's conduct was the December 13,

2023 IEP -- not the March 15, 2023 IEP -- it is the December 13, 2023 IEP upon which implementation will be measured. Ex. 1.

89. Historically, Student started the current school year without having had the ESY services. Ex. 1.

90. At the December 13, 2023, IEP meeting, the District agreed to provide Student with one hour of Behavior Support services from District staff for 22 weeks as compensatory education for ESY. Ex. 1.

91. At the December 13th IEP team meeting, the District proposed that an hour each week of services could be provided by either a District behavior specialist or the Behavior Program Administrator (TS). Tr. 804, 808.

At the December 13, 2023 IEP team meeting, the team discussed ESY for the summer of 2024. Tr. 76, 77, 806, 807, 810, 811. The IEP team agreed that Student was eligible for ESY. EX. P.4 at p. 12.

92. The IEP discussed, but did not decide, an ESY plan and services for Student, and deferred that decision until later in the school year. Tr. 77, 806, 807, 811.

93. At another IEP team meeting on February 2, 2024, the IEP team again deferred the decision about what ESY would be provided to Student. TR Vol. 3 (AO), p. 811, lines 5-15.

94. In late February 2024, Parent for received a copy of an ESY Addendum dated February 2, 2024. Tr. 810. The Plan was to provide Student with 30 minutes of social work services per week in an unknown setting. Ex. P.4a.

95. The Addendum was not a document that was discussed or agreed upon by Student's IEP team and was developed without the team or Parent's participation. Tr. 810, 811.

96. At the March 4, 2024 IEP, the IEP team did not discuss the 22 hours of compensatory education services by its BS that it previously agreed to provide Student or address how Student would be provided those compensatory services. Ex. P. 5. There is nothing in the March 4th PWN that addresses these changes. Tr. 928.

97. The IEP team never decided on a plan for Student for the summer of 2024. Tr. 810.

98. Prior to the summer of 2024, the District did not contact Parents to develop a plan for ESY services for Student. Tr. 840.

99. ESY services were not provided to Student during the summer of 2024. Tr. 841.

100. The supplementary aid and service of a BCBA had been included in Student's IEP since kindergarten, until the December 13, 2023, IEP. Ex. 1.

In the fall of 2023, Student was provided with the IEP-required BCBA services until approximately November 7, 2023. Ex. 1.

101. The IEP for Student in 2022-2023 provided that Student would have, as a supplementary aid and support, 180 minutes weekly of services and support from a BCBA. Ex. P.3, p. 36.

102. BCBA services were through a contract BCBA (MMG) from LSG Associates. The BCBA had worked with Student in the summer of 2022, the 2022-2023 school year,



and from the beginning of the 2023-2024 school year to approximately November 7, 2023. Tr. 88, 214, 243, 249.

103. The BCBA first worked with Student in the summer of 2022, when, as part of ESY, she supported him in a summer soccer camp he attended. Tr. 215. The BCBA observed Student in camp and used behavioral strategies to support him to be part of the team at the camp. Tr. 216. She also modeled strategies for the coaches and explained the strategies that she was using and why. Tr. 216. The BCBA observed that Student had difficulties participating in the group, taking turns, and would get upset if he did not get to play the position that he wanted. Tr. 217. Student would step out of the area where they were playing and say he did not want to play anymore. Tr. 217.

When the BCBA began providing services to Student, support included providing parent training. She would meet with Parent for about an hour each week to talk about Student's behaviors, answer Parent's questions about his behaviors, and recommend behavior strategies that she could use with Student. Tr. 220.

104. In the 2022-2023 school year, the BCBA provided training to the school staff and administrators at A Elementary on Student's BIP because they all worked with Student in some capacity. Tr. 237, 238; Ex. P.10a, p. 61. The BCBA observed Student in the school setting on a weekly basis, consulted with Student's teachers and special education case manager, modeled interventions for teachers and other school staff, and provided training to Parents. She also reviewed and tracked data and communicated it to Parents. Tr. 220, 221, 222.

105. The BCBA worked directly with Student including by redirecting Student,

talking with him on expected behaviors, and supporting him in the classroom. Tr. 231, 233.

106. The BCBA met with school staff would show them behavior strategies. Tr. 222, 223.

107. The BCBA tracked Student's behaviors and provided that information to Parents and District staff as a weekly report to summarize his behaviors for the week. Tr. 223.

108. Parent training by the BCBA was stopped in the spring of 2023, until a new BIP for Student, so Parents could be trained on the new BIP. Ex. P.3, p. 44; Tr. 1058, 1059.

109. The District did not offer parent training after the FBA and BIP were updated, and did not include parent training in Student's IEPs again. Tr.1059.

110. The District did not notify Parents that Student would no longer be receiving BCBA services and that the BCBA had stopped working with Student, even though it is the District's normal practice to notify parents when a related service in their child's IEP is no longer available. Tr. 98, 99.

111. Parents have twice taken a parenting program recommended by a UNM neuropsychologist. Tr. 1060.

112. Parents do not impose consequences on Student at home in response to his behaviors at school, but instead recognize the natural consequences for him. Parents focused on trying to understand Student and trying to find ways to support him. Parents do discuss with Student what he could do differently next time, who he could reach out to,

and what was he feeling at the time. Tr. 1059.

113. Under the March 15, 2023 IEP, BCBA support ended on November 21, 2023.

Ex. 1.

114. Student was suspended nine times between November 8, 2023 and January 29, 2024. Ex. P.39; Tr. 895. Student was also sent home informally three times. Tr. 896. Student was sent to the conference room adjacent to the Principal's office. Tr. 884, 885, 886.

115. At the December 13, 2023, IEP meeting, the District proposed to continue consultation services, training, and modeling by Behavior Support (not by a BCBA) through SFPS staff. The was "[b]ased on data collected by BCBA and captured in the Functional Behavior Analysis (FBA), this is required to meet the student's needs as articulated in his Behavior Intervention Plan (BIP)." The service was proposed because the District wanted to help Student continue to find success and be successful within the school setting." Ex. 1.

116. Parent requested that a BCBA be used to provide this supplementary aid and services which has been a support identified in Student's IEP. The District noted that "[a]t this time, the District does not have a BCBA, so the terms behavior support is being used in place. If and when the district can get a BCBA again, the team can reconvene and add BCBA to the wording." Ex. 1.

117. During this same period of time, Student's removals from school in the form of suspensions increased and Student's behaviors were escalating. Ex. 1.

118. After December 13, 2023, the District had winter break until January 3, 2024.

The assigned District Behavior Support staff (CA) did not have any contact with Parent either before or after the December 13, 2023, IEP meeting, the January 29, 2024, MDR, or the February 2, 2024, IEP meeting. Ex. 1.

119. As of the date of the due process hearing, the Behavior Specialist had completed the coursework and fieldwork necessary to receiving BCBA certification and was scheduled to take the certification exam. Tr. 323.

120. The Behavior Specialist worked at P School during the 2023-2024 school year providing support to the special program classroom at the school. The special program was a classroom for students with cognitive deficits who needed more support. Tr. 326.

121. The Behavior Specialist was not invited to Student's December 13, 2023 IEP meeting. Tr. 330. She did not attend the MDR meeting for Student or the February 2, 2024 IEP meeting for Student. Tr. 341, 342, 343; Ex. P.9, p. 4. The only IEP meeting for Student that she attended was on March 4, 2024. Tr. 342, 343.

122. The Assistant Director (CM) contacted the Behavior Specialist right before the holiday break to help assist Student's IEP team. Tr. 328. The Assistant Director explained that Student was having difficulties, and the school needed support. Tr. 330.

123. The Behavior Specialist did not begin any work on Student's case until January 5, 2024 when she met with Student's Second Teacher (RB) and the Principal (DA). Tr. 328, 331.

124. Student returned to school the first week of January with the other students. Ex. P.25, p. 25.

125. The Behavior Specialist's first entry in her log showing her work with Student was dated January 16, 2024. Ex. P.28, p. 1.

126. The Behavior Specialist never talked with nor shared information with Parents about Student before the March 4, 2024 IEP. Tr. 899, 900, 328, 329, 357, 358.

127. The Behavior Specialist provided service for Student for one hour fifteen minutes on January 5, 2023, two hours on January 16, 2024, and one hour and fifteen minutes on January 23, 2024. Ex. P.28. The totality of documented service is four and one-half hours by the Behavior Specialist in January prior to Student's January 29, 2024 suspension. *Id.* She did not work with Student again after he was suspended. Tr. 341.

128. Student's December 13, 2023 IEP required 3 hours (180 minutes) each week of service and support by the Behavior Specialist. Ex. P.4, p. 35. On January 5, 2024, the Behavior Specialist and the Assistant Director decided that the Behavior Specialist would provide one hour of service per week. Tr. 333. The effort of the Behavior Specialist to provide at least one hour of service to Student was impacted by a snow delay in January and Student's suspension on January 29th. Ex. P.28, p. 1-2; Tr. 341.

For the period between November 7, 2023 and when school resumed in January, there were 5 and a half weeks (25 days) of school. Tr. 162.

129. CA had not begun working with Student until after the holiday break. Tr. 328, 330, 633.

130. Compensatory education services were begun after the winter break, for services not provided in the summer of 2023. These were compensatory education services, not the supplementary aid and services intended by the IEP's requirement of

three hours of Behavior Support designed to provide consultation and modeling for the team and providing weekly tracking and analysis of behavior to be provided to Parent and Student's case manager. Ex. 1.

131. On December 13<sup>th</sup>, Parent was asked to sign consent for a new FBA. She took the consent form home for review. Parent signed the consent and returned it to school with Student that day and put a note in Student's planner for his special education teacher. Ex. 1.

132. The District did not receive the consent form signed by Parent and did not follow up with Parent. Ex. 1.

133. Parent first learned that the District had not received the consent form at the MDR. Parent was given another consent form during the 2/2/24 IEP, which she signed. Ex. 1.

134. In January 2024, Student's general education teacher (RB) created her own behavior tracking form for Student to track the behaviors of concern related to Student's disabilities. The behaviors she tracked were consistent with Student's BIP target behaviors: verbal aggression, physical aggression, refusal, and elopement. This information was not shared with Parent. Ex. 1.

135. In the 2022-2023 school year, Student had a 1:1 Aide for part of the school year. The 1:1 Aide was trained by the BCBA. Tr. 1075. The 1:1 Aide kept track of Student's behaviors and supported him with redirection to stay on task. Tr. 227, 228, 797. She also supported him in unstructured settings, such as lunch and recess. Tr. 985, 986, 1075, 1076.

136. After the first half of the 2023-2024 school year, the District removed the support of the 1:1 Aide from Student's IEP over Parents' objection. Tr. 794.

The December 13, 2023, IEP requires that Student be provided with a 1:1 aide, an Educational Behavioral Health Assistant (EBHA), for 1342 minutes weekly. The plan was to have the 1:1 EBHA with Student at all times during the school day. The IEP indicated that the services were to start on December 13, 2023, and continue to December 13, 2024. Ex. 1.

137. The proposal for the EBHA was made by the District. The reason for acceptance of the proposal is explained as "the team agrees that a 1 to 1 EBHA is needed to support [the Student] at this time due the (sic) behaviors he is exhibiting in the school setting. The EBHA will be trained by the district behavior specialists in implementing the IEP and BIP as well as strategies that work well with him. As [Student's]'s behavior improves, the EBHA will be decreased, but will remain in the school setting in case they are needed for a behavioral outburst." Ex. 1.

138. At the IEP meeting, the team discussed that an aide would allow Student to remain in the general education setting and acquire skills that were lagging. The team discussed that the aide would be trained similarly to what was done in the past which included training of the aide by the BCBA on the BIP, IEP, and Student's behaviors so they could support Student and other school staff who interact with Student on a regular basis. Ex. 1.

139. The Aide was intended to be proactive and not reactive, and to ensure that the Student did not reach the point of elopement. The Aide could notice the precursor

behaviors, agitated vocals, increased fidgeting or spinning. Ex. 1.

140. At the time that the IEP team determined that Student's IEP would include the 1:1 EBHA, Student was refusing to do work, eloping, leaving class without permission, running around campus, and having incidents of aggressive behavior. These were the types of related behaviors addressed in Student's IEPs intended to be addressed by the provision of a 1:1 EBHA. Ex. 1.

141. At the December 13<sup>th</sup> IEP meeting the District acknowledged that it was not able to provide the EBHA as there currently was not one available and one would have to be hired. Ex. 1.

142. There was no discussion at the IEP Team about what other support would be provided to the Student due to the inability of the District to provide the needed and required EBHA. Ex. 1.

143. The District did not provide Student with the required 1:1 EBHA between December 13, 2023, and January 29, 2024, the date of the MDR and still does not have an EBHA for Student. Ex. 1.

144. Student did not have a 1:1 EBHA on January 29, 2024, the date of the incident leading to the MDR. The District was attempting to hire a 1:1 EBHA for Student but had not done so yet. At the MDR meeting, the District acknowledged it was still trying to hire the 1:1 EBHA. Ex. 1.

145. Student had a 1:1 aide in prior school years. The aide was intended to help support Student and the teacher to help reinforce functional communication and on-task behavior. The aide was a successful service for Student, and he showed substantial



improvement when it was in place. Ex. 1.

146. The District and Parent considered the December 13, 2024, IEP to be the operative IEP for Student after December 13<sup>th</sup>. Ex. 1.

147. The Social Worker (PS) for the 23-24 school year found that Student, except when behavior had already been escalated in crisis mode, would respond well to her 1:1 guidance and corrections in the moment when he was interacting with peers, prior to escalation. Ex. P.27, pp. 1-7; Tr. 581, 582, 583, 583, 584, 590, 59.

148. Some social work services were provided to Student in group settings, classroom setting, and individually. Tr. 115-116, 573-576.

149. At the time Student's January 29, 2024 behaviors began, he was in his general education classroom with 19 other students. There was no assistant in the classroom to support Student. Ex. 1.

150. While at A School in 2022-2023, Student was supported with a data collection EA for about two hours a day, for part of the year. Tr. 80-82.

151. District witnesses claimed that there was adequate assistance for Student without an EBHA because other staff attempted to assist Student's general education teacher as their schedules allowed. Ex. 1.

151. The general education teacher was overwhelmed by these classroom dynamics.

152. While District witnesses were under the impression after the fact at the manifestation determination appeal hearing that an EBHA would not have contributed to reducing the Student's action on January 29, 2024, these impressions are not based on

underlying supportive data, rather, they are general impressions and are given little weight -- the underlying basis is that the IEP of December 13, 2023 required a EBHA, and this requirement by the IEP Team cannot be deemed minimal or not a direct result of a failure to implement the December 13, 2024 IEP. Ex. 1.

153. In the February 2, 2024 IEP meeting, after Student was suspended, the team did not remove the EBHA service from Student's IEP, and the District represented that it was still trying to find and hire an EBHA for Student. Tr. 124, 204; Ex. P.4, pp. 41-43.

154. The District never hired the required 1:1 Aide/EBHA support for Student or provided this support to Student at any time before his January 29th long-term suspension or any time before the March 4, 2024 Reentry/IEP team meeting. Tr. 123.

155. Upon being long-term suspended, after the School District concluded the behaviors were not a manifestation of Student's disability, but before the Manifestation Appeal reversed that decision, Student was removed to a setting named the Interim Alternative Education Setting (IAES), for students in special education who are suspended, at DSA School, the District's online school. The IAES is a separate classroom within DSA School. Tr. 402, 403.

156. The IAES teacher is a licensed special education teacher, and there is an aide to assist. Tr. 421.

157. The IAES is a multiage classroom with students who can be from kindergarten to 12<sup>th</sup> grade. There are two options for instruction while a student is placed in IAES, online or in person instruction. The instructional options are limited to 15 hours per week. Tr. 406, 407.

158. The IAES Special Education Teacher (LAH) typically attends manifestation determination reviews for students who are placed in the IAES. She is there to get and provide information regarding transportation, the learning platform, and to provide information for parents. Tr. 404.

159. The IEP team makes the decision about services for a student being placed in the IAES, including the schedule of services and what services the student will receive while on suspension. Tr. 405. An IEP explaining what the IEP team decided for a student's educational program while placed in IAES is supposed to be developed and provided to the IAES Special Education Teacher. Tr. 405.

160. The removal of Student to the IAES was done without an IEP developed for the IAES. Tr. 900. At the MDR meeting, Parent was told only that there was an online or in-person option for IAES and that the IAES Teacher (LAH) would call her. Tr. 900. There was no discussion of the services that Student would receive in IAES, or even the hours that he would attend IAES. Tr. 900.

161. At the time that the IAES teacher contacted Parent, the teacher had not seen any IEP for Student, did not understand what kind of services Student had received, and was not contacted about developing an IEP for Student. Tr. 409.

162. According to the IAES Teacher, an IEP for the IAES typically would come with a student being placed in the IAES on a disciplinary removal. This would identify the services that the student was to receive and instruction that the student needed. Tr. 405. The IEP would provide for 15 hours per week of instruction and the related services that the student would receive in the IAES. Tr. 408.

163. Student's regular school schedule was Monday through Thursday, from 8 to 3, and Friday, from 8-1. Tr. 905. The IAES offered only 3 hours of in person educational opportunity. Tr. 406. For Students receiving in-person instruction, instruction in general education subjects was done through packets provided by the Student's home school, which students completed with the help of the IAES teacher. Tr. 422, 423, 902.

164. Parents did not send Student to IAES. Tr. 903. Parents did not then unilaterally enroll Student in another school which might provide appropriate services. Student received no education during this time after Parents' removed Student from school. The District did not drop Student from enrollment.

165. On February 2, 2024, Student's IEP team met to review a few remaining items from the December 13, 2023 IEP. No changes were made to the IEP with the exception of completing "a few minor things...a question by Parent about a goal, reviewing the Prior Written Notice, and a progress documentation page." Ex. P.1.

On February 2, 2024, the IEP team did not make any changes to the December 13th IEP's Schedule of Services. Ex. P.4, pp. 34-35, 38-43.

166. An expedited appeal of the January 29, 2024 MDR determination was filed on February 8, 2024. Tr. 903.

167. The Manifestation Appeal decision returning Student to prior placement at P School was entered on March 15, 2025. Ex. 1.

168. Prior to the Manifestation Appeal decision being entered, yet after the long term suspension placed Student back at P School, the School District reached out to Parents seeking to hold another meeting, which was an IEP meeting and a reentry

meeting. Parents attended that meeting with counsel.

169. The meeting was held on March 4, 2024. Tr. 910.

170. The stated written purpose of the meeting was to review the IEP, and to add behavior supports to Student's accommodations and modifications, yet it did not specifically state it was to that it would also include a change of placement. Ex. P 5a, pp. 1, 3.

171. The Behavior Specialist was under the impression the meeting was to conduct a new FBA. Tr. 344.

172. FBA matters were discussed, among other things, as well as a new placement at a different school site for the Behavioral Program classroom. Tr. 879, 880, 881, 912, 1048.

173. At the IEP team meeting on March 4, 2024, there was no review or discussion of Student's disability or identified areas of need. Tr. 925. Student's IEP was changed by removing the following identified areas of need: Other Specified Disruptive Impulse-Control Disorder with difficulties including noncompliance, temper outbursts, argumentativeness, and labile mood, Executive Function: Organization, Behavior Functional Communication, and Behavior Decrease Challenging Behaviors. Ex. P. 4, p. 1, Ex. P.5, p. 1; Tr. 1061, 1062.

174. At the meeting, the Behavior Program Administrator, TS, discussed the Behavior Program at S School. Tr. 634.

175. Prior to the March 4, 2024 IEP team meeting, the Behavior Program Administrator did not have any information about Student. He was not in attendance as a

deciding member of Student's IEP team. Tr. 634, 635, 637.

176. Mother did not agree to change any "stay put" while awaiting the Manifestation Determination Appeal decision.

177. At the March 4, 2024 IEP team meeting, Parent requested an opportunity to visit the Behavior Program proposed by the District. A visit was set up for the afternoon of March 4, 2024. TR 915, 916, 295.

178. Parent, with counsel, participated in the meeting, and voiced opinions contesting a change of placement, among other things.

179. Parent objected to any change of placement and proposed that Student remain in his current placement at P School with the full implementation of his December 13, 2024 IEP. Ex. P.5, p. 33.

180. Parent wanted the District to implement Student's December 13, 2023 IEP with the supports and services in that IEP, a new FBA and a new BIP, in his placement back at P School. Tr. 913.

181. An immediate decision was made to remove Student from P School and place Student in the Behavioral Program.

182. Historically, the Behavior Program has used a leveled system approach to behavior management. This approach had stunted students' abilities to get out of the Program. Tr. 619.

183. The Behavior Program had recently changed to allow for individualization of the opportunities for inclusion and mainstreaming available to students in the program

that were not based on the strict adherence to the leveled point system used in the past, yet the IEP team did not address this individualization for Student. Tr. 922, 923, Ex. P.5, p. 30.

184. The IEP, however, specifically provided that Student would be in the leveled system, which the Behavior Administrator found to be inappropriate for instruction. Ex. P.5, p. 30.

185. In practice, in the middle of the school year after the holiday break in December, 2023, a new approach focused on behaviors identified in a student's BIP that prevent students from being in the regular education setting. Tr. 619. The Behavior Program still uses a daily point system to measure a student's progress, or lack of progress, and this is communicated to parents. Tr. 623.

186. The March 4, 2024 IEP provided that the Student would have all of his services in a special education setting. Ex. P.5. Although there was a general discussion about the Behavior Program at S School during the March 4th meeting, the IEP team did not specifically address an individualized program or plan for Student, including whether he would have access to any instruction, specials, or activities in the regular classroom setting, or whether Student would be allowed to go to lunch or recess. The IEP team did not discuss or determine these specific IEP requirements for Student. Tr. 922, 923; Ex. P.5, pp. 32-34.

187. The March 4, 2024 IEP also removes the previous support of a BCBA or Behavior Support Specialist. Ex. P.5, p. 29, Ex. P.4, p. 35, and Ex. P.3, p. 36. In addition to removing this support for purposes of Student's ongoing program, the District did not

address whether it would provide Student with the compensatory behavior support services that it had agreed upon at the December 13, 2023 IEP team meeting. Ex. P.5. These changes to the IEP services provisions were not discussed with Parents or the IEP team. Ex. P.5, pp. 32-34; Tr. 926, 927, p. 928.

188. The IEP also removes the previous support of 1:1 support in a general education setting. Although the March 4, 2024 IEP reflects Individual and/or Group Setting Behavior Support for 462 minutes weekly in a special education setting, this support was not discussed with the IEP team and Parents. Tr. 926, 927, 928.

189. Although the March 4, 2024 IEP states that Student would have activities with typically developing peers including lunch/breakfast, library, computer lab, assemblies, electives, extracurricular activities and others, the IEP contradicts other evidence including the LRE section of the IEP. Tr. 388. Students in the Behavior Program are in a self-contained program and have to work toward more opportunities and freedom. *Id.* at p. 389, lines 2-5.

190. The March 4, 2024 IEP includes a statement explaining why placement in a general education setting is reduced or limited and what is being done to reintegrate the student back to a general education setting. That statement was not discussed by the IEP team with Parent. The statement says:

[d]ue to behavioral concerns, [Student] benefits from direct instruction in a positive behavior support classroom in a self-contained setting. Team will reconvene to discuss classes in general education when he/she reaches the end of level four in



the leveled classroom point system that reflects his/her progress on five specific behavioral goals that are targeted in the classroom for instruction. Upon reintegration, team will monitor his/her ability to generalize the skills in the new setting and more time in general education will be gradually address based on his/her ability to generalize these skills while continuing to earn points and maintain/move up in levels. Each class our will be monitored for up to nine weeks before another class is added.

Ex. P 5, p. 30.

191. There was no discussion with the IEP team about whether this leveled classroom point system was appropriate as a behavioral intervention and positive support plan for Student. There had been no review of Student's BIP and there was no discussion about the five specific behavioral goals that would be targeted in the classroom for instruction. Ex. P.4, pp. 13-24, Ex. P.5, pp. 16-20 (no change in goals); Ex. P. 5, p. 33 (no review of BIP); Tr. 680.

192. The IEP was not amended to reflect the appropriate services to be provided to Student under the program not using the leveled system; that is, the IEP is what the educators would rely on in their services for Student, not on the opinion of the Behavior Administrator.

193. The District rejected Parent's proposal to remain under the IEP of December 13,

2023, and failed to state any reason for its rejection in the Prior Written Notice. Ex. P.5, p. 33. The District also rejected its own proposal of one-on-one support for Student without stating any reason for its rejection in the Prior Written Notice. *Id.*

194. The IEP team meeting ended with the District advising Parent that the District would move forward with changing Student's placement to the Behavior Program. Tr. 961. Parent was not provided with a PWN or new IEP at the end of the IEP team meeting and was not aware that the District had developed a new IEP for Student during that meeting. Tr. 919.

195. The new March 4, 2024 IEP became the IEP, and Student was to attend the Behavior Program next day, although there was not clarity about the level system and its application, the lack of a new BIP, and the lack of a decision about Student's participation in specials. Tr. 921.

196. At the March 4, 2024 IEP team meeting, the District did not ensure any IEP team discussion of what instruction Student would receive at the Behavior Program, whether he would be able to go to lunch or recess with peers without disabilities, whether he would receive the services in the December 2023, or what to do about the lack of a new BIP. Tr. 922.

197. Parent attended the meeting, however, not knowing what the Manifestation Appeal would hold – she attended voluntarily with counsel, and although she stated she wanted the December 13, 2023 IEP to remain in place, she did not refuse to participate, she remained open to options, voiced her opinions as a Team member, and later took a tour of the proposed site, and thus implicitly agreed to waive any “stay put” that might

otherwise arise should the Manifestation Determination Appeal result in Student's favor.

198. The Behavior Program Administrator (TS) was not contacted about Student until a day or two before the March 4, 2024 IEP team meeting. Tr. 633. He was not told about the pending MDR appeal. Tr. 635.

199. The Behavior Program Administrator did not know anything about Student as of March 4, 2024, and had never been asked to observe Student at P School. Tr. 635.

The Behavior Program has moved locations for each of the past several years. It has been located in various schools, and in the 2023-2024 school year, the Behavior Program was located at S School, and is now physically located at G School. Tr. 610.

200. While at S School, due to inadequate space, it was easy for the students in the program to become dysregulated by their close proximity. Tr. 611. This was a problem throughout the school year. Tr. 612.

201. The S School campus lacked security, and it was difficult to manage elopement of students because of the doors and lack of an alarm system to help with monitoring. Tr. 612, 613.

202. S School staff were not in agreement with the Behavioral Program being located at the school and not welcoming to the Behavior Program students. S School staff were "kind of targeting [Behavior Program] kids." Tr. 613.

203. Parent met with the Behavior Program Administrator and saw the 4th grade classroom when she visited the program late in the afternoon on March 4, 2024 IEP. Her impression was that it looked like a room that was not in use. There were no educational

materials on the walls or on the shelf. There were no books. There was no color. There was a table and 4 chairs. Tr. 916. There were holes in the wall of the classroom, where a student had thrown a table into the walls. Tr. 917.

204. At the time of the visit, the District had already disenrolled Student from P School and enrolled him at S School's Behavior Unit without providing prior written notice to Parents, or notice to the Behavioral Program Administrator. Ex. P. 21; Tr. 640, 921.

205. On March 4, 2024, while Parent was visiting the Behavioral Program, she learned that the District had made significant changes to Student's IEP that day. Tr. 918, 919. The Behavioral Program Administrator showed Parent the new IEP that had already been entered into the computer system for the District. Tr. 919.

206. In the Spring of 2024, most of the students in the Behavioral Program did not eat lunch with their peers outside of the Program. Tr. 645. No students in the Behavioral Program had recess with general education or special education peers outside of the Program and the Program had its own recess times. Tr. 635.

207. There were no gifted students in the Behavioral Program in the 2023/2024 school year. Most of the students in the program were several grade levels behind. Parent was told during her visit that there had never been a gifted student in the Program. Tr. 645.

208. In the Spring of 2024, the Behavior Program used SRA Corrective Reading for their reading instruction and ALEKS math program for math instruction, which are special education programs. Tr. 918, 641, 642.

209. The Program also used n2y, a program that covered all subject areas and was predominantly designed for students with learning disabilities. Tr. 642. These programs are used for all students in the Behavior Program for ongoing remediation. Tr. 644.

210. The Behavior Program also would reach out to the regular education teachers to obtain their current curriculum. Students in the Behavior Program receive components of the regular education classes in addition to the special education programs. Tr. 643.

211. Student is a gifted student. His IEP does not require specialized instruction in reading, math, or any other subject, and his IEP goals address executive functioning, behavior, social/emotional, and critical thinking/creativity/problem solving (gifted). Ex. P.4, pp. 15-30, 34; Tr. 902. Student reads at or above grade level, generally enjoys reading, and reads independently. Ex. P.15, pp. 8, 10; Tr. 877. The March 4, 2024 IEP does not include any plan for Student to have any opportunity to participate in the regular education curriculum outside of the special education curriculum. Tr. 918; Ex. P.5, pp. 28-29. Student would be assessed using the SRA Corrective Reading and ALEKS math to determine whether he was on grade level and if so, then be provided with some regular education curriculum by the Behavior Program staff if he had no deficits. Tr. 44.

212. Parents did not send Student to the Behavior Program after March 4, 2024. Tr. 920, 922, 923. Much like with their actions at IAES, Parents exited Student from school but did not then unilaterally enroll Student in another school which might provide appropriate services. Student received no appropriate formal education in a new school during this time after Parents' refused to allow Student to attend the Behavior Program, although he did receive some private tutoring resources at the Homeschool Classroom is a learning center in Santa Fe, a math tutoring program in Santa Fe called Mathnasium, and

therapy from Center for Dynamic Practice in Santa Fe.

213. The District did not drop Student from enrollment.

214. The Homeschool Classroom is a learning center in Santa Fe for children ages 5-14 which provides direct instruction in Math, Language Arts, and Social Emotional Learning. Ex. P.31, p. 1. Parents chose the Homeschool Classroom in part because there were very limited choices at that point in the school year, and in part because of the flexibility of its monthly payment structure, allowing an easy return to Piñon. Tr. 945, 969, 970.

215. Student attended the Homeschool Classroom in April and May 2024. Tr. 932, Ex. P.31, p. 1. He was in a mixed-age classroom of both neuro-divergent and typically developing peers. Tr. 940, 941; Ex. P.31, p. 1. Student's daily schedule included morning jobs (short tasks independently requiring both Math and Language skills), Classroom Meeting (whole class gathering where kids report on their Morning Job), Snack, Lunch and Recess (monitored down time for kids to play and eat), Math, Language Arts, Social Emotional lessons, Martial Arts and Silent Reading. Ex. P.31, p. 1. Student worked independently, paired with peers, with his whole class, and 1:1 with a teacher. *Id.*

216. The Homeschool Classroom report noted Student made progress over his two months with the school, especially in developing skills for self-regulating, one of his IEP goals, so that he was able to remain in the educational setting and avoid being sent home early. Ex. P.31, p. 2. Parent confirmed that the Homeschool classroom made a really positive difference for Student, where social emotional learning was incorporated throughout the students' day. Tr. 940.

217. The total cost for the two months of services Student received at the Homeschool Classroom was \$668. Tr. 933; Ex. P.31, pp. 3-4.

218. Another educational service Parents obtained for Student in April 2024 is a math tutoring program in Santa Fe called Mathnasium. Tr. 929.

219. Parents obtained services for Student at Mathnasium because math was an area that had triggered Student's refusal behavior at school and as a result, there was concern about his math skills and whether the rigor of math was triggering behaviors. Tr. 448. Parents also hoped Student would gain confidence in math and receive some of the math instruction he had missed. Tr. 934.

220. Student attends ten tutoring sessions per month at Mathnasium. *Id.*, at 936, lines 6-8. As of the date of the hearing, Student had received nearly five months, or approximately 40 sessions from Mathnasium.

221. Mathnasium records include a report about Student's progress from Mathnasium Center Director Sarah Gray, as well as Student's learning plan, which contains detailed information about Student's progress toward the math skills he was working on. Tr. 935, 936; Ex. P.32, pp. 1-3. Records indicate that Student had initially been assessed at 55% on the third grade level on March 28, 2024. *Id.*, p. 1. As of August 15, 2024, with services ongoing, student had progressed halfway through his learning plan, roughly equating to a beginning of fourth grade instruction. *Id.*

222. At Mathnasium, Student is described as "a diligent student who listens to instructions and works hard to understand the material," and that "[i]t's fun working with him, his face lights up and he's super excited when he learns new math skills." Ex. P.32, p.

1.

223. The total paid by Parents to Mathnasium for Student's tutoring for the months of April through August 2024 is \$2,168.35, which includes a cost of \$391.87 per months, plus a required lifetime enrollment fee of \$209. Ex. P.32, p. 8; TR Vol. 4 (AO), p. 936, lines 15-25.

224. A third service Parents obtained for Student in April 2024 was therapy from Center for Dynamic Practice in Santa Fe, provided by [title] therapist Scott Chapman. Tr. 929, 941.

225. Parents sought therapy for Student because he was feeling very unsuccessful, struggling to feel connected, needed someone to talk to, and needed trusting relationships with adults who could support him, which Parents found really beneficial for Student. Tr. 942.

226. Parent considered the therapy to be a substitute for school social work services, where Mr. Chapman, like Student's social worker (PS) in her lunch bunch, helps Student process things as they come up. Tr. 942. Notwithstanding Parent's consideration, therapy is not a substitute for social work services.

227. Student participates in play therapy, which has provided a setting where the client can communicate what they need to, through the context of play and the relationship in the play. The therapist provides a container where the child gets to communicate instead of answering questions. Tr. 772.

228. Through play therapy, Student has been able to communicate about his fears and relationships, how he develops trust, feelings of feeling stuck or unable to participate,



concerns about how he is seen by others, self-esteem, conflict and conflict resolution, and other issues. Tr. 773, 774, 776, 777. Student has also been able to establish a therapeutic relationship with Mr. Chapman. *Id.* at p. 775.

229. Parents paid the Center for Dynamic Practice for ten sessions billed from April through July 2024 at \$72.68 per session, for a total cost of \$726.80. Ex. P.33.

230. Dr. MS, MG, CB, CAA, LAH, VT, JP, PS, Dr. TS, SS, SC, AO (Mother), KD, and DAS are all deemed credible; that is, they were truthful in their testimonies. As for weight, Mother's testimony is given weight over that of JP on details, since JP is an administrative director and has a number of students and educational matters he is involved with, whereas AO is finely tuned to the facts regarding Student. The educators to some extent did show a bias toward the processes used, and that is considered, although, as noted, they are deemed truthful and credible.

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

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

### **ANALYSIS AND LEGAL CONCLUSIONS**

There is personal and subject-matter jurisdiction to entertain this case.

As found in the Manifestation Determination Appeal, the operative IEP for the

Student was December 13, 2023. The facts in that hearing are noticed in this action, as well. Nothing has changed. An IEP met, and an IEP was developed on December 13, 2023.

For a backdrop, in relevant part, the IEP required a Behavior Support Specialist to perform services for Student for 3 hours per week. However, services were not begun until January 16, 2024, and those were for one hour per week with Student, although some time was also spent without Student being present. Student began to digress, and his behaviors became increasingly and progressively elevated to a point where he caused disruption among staff in the principal's office and safety to students and staff around him.

His escalating behaviors were known to the District, his inability to transition was known to the District, his need for one on one support was known to the District. IEPs addressed his unique behavioral issues, and called for social work services, and BCBA services, and supports, given his gifted plus neurodivergent abilities. The Student engaged in extreme inappropriate behaviors. The District suspended him, and placed him in a behavior classroom, IAES, yet which Parent refused to allow him to attend. The Student was then fully out of a school setting. A manifestation determination appeal was held.

A synopsis of the behaviors presented at the manifestation determination appeal hearing is as follow:

In summary, as the factual findings show more fully, the Student subsequently went on winter break, returned from that transition, and engaged in erratic behavior on January 29, 2023. With only a general education teacher, and no EBHA, in a classroom of 19 pupils, on January 29, 2024, he refused to engage in math work in the general education classroom. The Student left the classroom and laid on the floor in the hall outside of the classroom, and began to hold the door of the classroom

closed. The principal and social worker came to the event, and then he went with the social worker for about 2 one-half hour sessions of social work with other students. After he left that classroom, he began turning lights off and on, and shutting doors in the hallways.

Student was provided an outside recess, then refused to come in, and the assistant principal arrived on the scene, where she told him she would call his parents if the Student did not come inside, and the Student then began yelling that he did not want to go home, and began throwing woodchips at the assistant principal. When the social worker was asked to call the Student's parents, the Student ran inside to the social worker's room, grabbed her phone from her hand, and got under her desk and licked her phone.

The erratic behavior continued. Thereafter, the Student went to the school's main office area and hung up the secretary's phone as she was trying to call Parent, went under another secretary's desk and began unplugging all of her technology after the Student spoke with his parents, grabbed the assistant principal's radio off a table and threw it the garbage, sat on the floor, then, while the assistant principal's back was turned against him, the Student oddly arose from behind her as she was retrieving her phone from the garbage can and pushed her. The Student then began stapling papers together using a stapler on a table and shooting staples at the social worker, placing office staff in fear, and then grabbed scissors and cut balloon strings for balloons on a secretary's desk, and finally left the office area, and began to throw rocks at students, hitting a student, and then walked on a high wall before the Student's step-father arrived.

Having reviewed the video from the incident in the office, the Student was at times complacent, and then suddenly and randomly becoming fully disruptive and in escalation, there appeared to be no intent to develop a plan, or to consider actions, they sporadically occurred, as noted in the IEP about tantrums, noncompliance, temper outbursts, argumentativeness and labile mood. These actions were consistent with the December 13, 2023 IEP in which it was concluded that behavior support, a one-to-one EBHA, trained by behavior specialists to strategies and implementation of the BIP and IEP, consultation services, training, and modeling by behavior support by staff and parents, were required.

Ex. 1, pp. 29-30.

As a side note, the Manifestation Determination Appeal was based on the Petitioners' request for a hearing, rather than a School District's request for a hearing had it contended that maintaining Student's current placement was substantially likely to result in injury to Student or others. See Ex. 1, p. 26. See 34 C.F.R. § 300.532(a).

While the Manifestation Determination Appeal was being processed, the local

administrative suspension officer placed Student back in P School, and thus became the acting authority for the District's interim alternative educational setting. Based on the local administrative suspension officer's action, although Student was no longer to be placed in IAES, Student was still in an interim alternative educational setting, but now back at P School, because there was an ongoing manifestation determination appeal. Under 34 C.F.R. §300.533, Student is required "stay put" in the interim alternative educational setting pending the decision of the hearing officer in the manifestation determination appeal. The Parent and the District could "agree otherwise," however. 34 C.F.R. §300.533. The District then had a new IEP meeting prior to the Manifestation Determination Appeal's decision. While at the meeting, Parent chose to participate, explore options, and consider matters, and voice objections – she did not, however, "agree otherwise" to void the stay put provision for the interim alternative educational setting at P School pending the Manifestation Determination Appeal's decision. 34 C.F.R. §300.533. This found to be a procedural violation of FAPE. 34 C.F.R. § 300.513(a)(2). Given the framework of what transpired thereafter, with Student being immediately placed in the behavior classroom in a new school under its behavior program, which Mother was unaware of until she visited the new school later in the day, this procedural violation impeded Student's right to FAPE, and caused a deprivation of educational benefit. Thus, this procedural violation amounts to a substantive violation of FAPE. 34 C.F.R. § 300.513(a)(2)(i)&(3). Issues 3, 7, 27, 28, 29, 35, 36.

Before a decision could be reached on the manifestation determination appeal, a new IEP meeting was held in March 2024, as noted, at the behest of the School District. Parent voluntarily attended the meeting with counsel, and, although the notice for the

meeting did not specifically state a change of placement was to be considered, Parent participated in the meeting and voiced her opposition to any placement change, and sought implementation of the December 13, 2024 IEP. Had the December 13, 2024 IEP been implemented then, among many other things, there would have been a one on one aide, an EBHA, because that's what the IEP required. An aide could not be found by the District, the former BCBA had left, thus leaving the job to a behavior specialist, and the Student transgressed in his behaviors amounting to the January 29, 2024 suspension.

Nonetheless, at the March 2024 IEP meeting, a change of placement to an off-site behavior program classroom was considered. Parent wanted to look at the behavior program classroom, and when she arrived later in the day, she was shown an IEP that had been completed, without prior written notice given to her, noting the Student's new placement would be in the behavior program. It was immediate. Parent refused to send Student to the behavior program. Student continued to be without education.

Meanwhile, the manifestation determination appeal was later entered, placing Student back in his December 13, 2023 setting, although the March IEP had already placed Student into the behavior program, from a meeting which Parent voluntarily attended with her counsel, with both parties not knowing what the manifestation determination appeal would eventually hold.

Getting to this point was filled with challenges. Independent education evaluations were either agreed to, yet with post processing review never performed, or not accepted, with the School District neither filing for due process nor funding the IEE. The District contends the Parent is at fault for not imposing consequences in the home setting, yet the supports for Parents in the home were discontinued.

The District's position was that a one on one aide would have been provided if one could be found, but one could not be found. The Student engaged in extreme behaviors without an aide to assist. The general education teacher, without assistance, was becoming overwhelmed by the classroom circumstances. Rather than finding an aide, by trying to first give Student the opportunity to be in the general education, which was the least restrictive environment, the District placed him in a behavior unit. Nonetheless, both the behavior unit and the suspension IAES classrooms had the prospect of providing some education to the Student, yet the Parent rejected them entirely and left the Student without any formal education.

Unless amended, the IEP is to be followed. 34 C.F.R § 300.324. The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Sytsema*, 538 F.3d at 1316. Factually, however, implementation failure must be "material," that is, reviewing the amount of services withheld and the importance of those services to the child. *See L.J. v. Sch. Bd. of Broward Co., Fla.*, 74 IDELR 185 (11<sup>th</sup> Cir. 2019)(persuasive). Reviewing in context what the services the December 13, 2023 IEP required, particularly with the need for an educational one-on-one assistant to be trained by a behavioral specialist, and determined by the Team to be "needed," yet not supplied, and Student's behavioral actions during the time period without these supports, along with Student's prior benefit from similar services, it is concluded that there was a material failure to implement the December 13, 202 IEP. Viewing this as a procedural violation, it is concluded the School District's inactions impeded Student's right to FAPE, and caused a deprivation of educational benefit, thus resulting in a violation of FAPE. *See* 34 C.F.R. § 300.513(a)(2)(i)&(iii). Issues 3, 4, 5,

The School District's position that staffing precluded implementation is unpersuasive. 34 C.F.R. 323 (c) requires services to be implemented. There is nothing that refers to lack of staff being an exception to implementation. *Id.* Moreover, given the material failure to implement standard, inability to provide staffing may result in a denial of FAPE. *See Hempfiled Sch. Dist. V. S.C., 124 LRP 3142* (E.D. PA Jan. 31, 2024)(persuasive). Although in the ADA and Sec. 504 context, OCR found that Albuquerque Schools could not rely on lack of bus drivers as an excuse to not provide transportation services to students in need of those services. *See Albuquerque Public Schools, 123 LRP 17105* (OCR March 21, 2023)(persuasive, in context). The December 13, 2023 IEP required needed educational services. They were not provided, resulting in a material failure to implement, denying FAPE, as noted above. An inability to find staff in Santa Fe, New Mexico, is not persuasive. Issues 3, 4, 5.

This same approach is taken with lack of material implementation with the IEPs for the BCBA and EBHA. It is to be stated that the implementation is because the IEPs required the services of the BCBA and EBHA – the Teams determined the services to be needed for the Student's education, yet they were not fully provided. The Teams concluded these services were necessary to provide FAPE, and named them as the BCBA and EBHA, rather than an aide or behavior specialist. The Teams found the need for these specialists to serve the Student, yet they were not fully provided. The EBHA was never provided. The BCBA stopped working. Behaviors escalated after the BCBA discontinued services. Thus, material failures to implement, *see L.J. v. Sch. Bd. Of Broward Co., Fla., 74 IDELR 185*, resulting in a denial of FAPE. Issues 3, 4, 5.

The District's position is well-taken that Parent cannot require a Board Certified

Behavior Analyst (BCBA) and an Education Behavior Health Associate EBHA under the IDEA. Districts have the choice to provide a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208. Thus, to the extent there are claims for denial of FAPE for not having a BCBA or EBHA, then those claims are denied. Issues 3, 4, 5, 24. However, as noted, the IEP Teams wrote IEPs which had BCBA's and EBHA's as service providers, so that the issue is not whether they are required under the IDEA, but whether failures to provide them are failures of material implementation claims, as noted above. This applies as well to IEP past summer services of a BCBA, rather than future services, and whether Petitioners can demand special education services from providers not qualified or certified the Public Education Department. Issues 33, 34.

Similarly, the School District's argument that the parents interfered with provision of services, thus waiving them, is unpersuasive as a defense. Mother was viewed during the course of these proceedings. Her demeanor and testimony were consistent with a parent advancing her child's educational environment under the IDEA, consistent with her credibility finding. Mother was herself a fourth grade teacher, and her partner, Student's step-parent, was a School District staff member. The general education teacher may have felt that Mother was overbearing, and that she contacted her after hours on internet formats, but this not evidence that it amounted to Mother not engaging in supports or denying offers of services, although she may have had disagreements with staff. Their testimony was that Mother could be aggressive, and demanding, but this should not amount to a denial of services, for it can be solved by a go-between communication staff representative, as the District provided. It is concluded



that Mother did not engage in parental obstructionism. Parent generally actively participated in the IEP developments, and she sought to fully cooperate in the collaborative IEP processes. *Cf. C.G. ex rel. A.S. v. Five Town Community Sch. Dist.*, 513 F.2d 279, 282 (1<sup>st</sup> Cir. 2008)(compensatory education and reimbursement may look at parental obstruction). The defense of a waiver due to parental obstructionism is denied. Parental actions regarding removal of Student from the school settings will be reviewed, however, in the compensatory education award, as explained in the Remedies section, below. Issues 17, 18, 19, 20, 21, 22, 23, 27, 28, 29, 30, 31, 35, 36.

From the time Student was suspended, on January 29, 2024, through March 4, 2024, when the new IEP was proposed, the Student was to continue to receive services under the December 13, 2023 IEP. However, he was removed from the general education environment with his classroom setting at P School into the interim alternative educational setting (the school for suspended students) due to the suspension. Student did not go to that school setting. The services offered in the new setting did not comport with the services required by the December 13, 2023 IEP. However, since the Student failed to attend the new school, there is insufficient information on which to gauge a material failure to implement the December 13, 2024 IEP, should he have attended. As a result, Petitioners have not met their burden of a material implementation failure with the interim setting while suspended; therefore it is concluded there is no violation of FAPE. *Schaffer v. Weast*, 546 U.S. 49 (2005). Neither is there a procedural violation of FAPE found to arise because there was not a new plan developed while Student was supposed to attend the interim setting while suspended. As noted, the December 13, 2023 Plan remained in effect. Issues 1, 2, 3, 17, 18, 19, 27, 31, 35, 36

Mother was given notice of the March 2024 meeting, which subsequently changed placement, yet the notice did not include notice that it was to be for a change of placement. This lack of purpose in the notice of meeting is a procedural violation. *See* 34 C.F.R. §300.322(b)(i)(purpose, time, and location to be noted). The underlying theory of 34 C.F.R. §300.322 is to afford parents the opportunity to participate. *Id.* Mother, with counsel, as noted above, attended the meeting, where the behavior unit school was discussed, Mother voiced her opposition, and participated. Thus, although the notice of the meeting was a procedural violation, in this context it did not result in a substantive violation of FAPE under the three part test. *See* 34 C.F.R. § 300.513(a)(2). Issues 7, 8, 9, 17, 18, 19, 27, 28, 36.

After the meeting, Mother was given the opportunity to visit the Behavior Unit program that afternoon, which she did. Mother's impression was that the IEP had not yet become effective. She only realized that a new IEP with a placement change took place when she met staff that afternoon at the Behavior Unit. Importantly in this analysis, the School District never provided Mother with a Prior Written Notice that placement had been changed a reasonable time before the new IEP was to become effective. That is, the new IEP became effective immediately at the conclusion of the IEP meeting, without a reasonable period of time to allow Mother to consider rights she might be entitled to, as contained in procedural safeguards that should also be provided. This results in a procedural into a substantive violation of FAPE. 34 C.F.R. § 300.513(a)(2).

Prior written notice is required regarding the placement of a child, 34 C.F.R. § 300.503, to be provided before of any change in the provisions of a student's free appropriate public education. ***See Logue v. Unified Sch. Dist. No. 512***, 153 F.3d 727 (10<sup>th</sup>

Cir. Jul. 16, 1998). A Prior Written Notice must be provided a reasonable amount of time prior to the District's proposal for a new placement. 34 C.F.R. §300.503(a)(1). For example, as a matter of law, had the Prior Written Notice been given a reasonable amount of time prior to the IEP becoming effective, then, after Mother's immediate meeting with the Behavioral Unit, she could have filed for due process. Since the March 2024 IEP would not yet be effective (a reasonable time not having expired), then filing for due process would have required stay put and kept the Student at P School under the Student's December 13, 2023 IEP provisions, since that would have been the then effective IEP (which the Manifestation Determination Appeal subsequently determined to be the proper placement). By the School District's use of Prior Written Notice to become effective immediately at the conclusion of the IEP meeting, rather than providing for a reasonable time, (the Student had immediately been disenrolled by the School District from P school that afternoon), it changed the placement upon which stay put was predicated. As a result of the School District's action, the new IEP of March 2024 became the IEP upon which the District sought to gauge stay put placement, which was the Behavioral Unit, although, as noted elsewhere in this decision, "stay put" really was in P School because the manifestation appeal decision was still pending.

This example shows how important a procedural violation of Prior Written Notice becomes a substantive violation under the three part analysis. The opportunity to file for due process to keep Student at the prior placement of the December 13, 2023 IEP under stay put was denied *ab initio* because there was no reasonable notice of when the IEP would become effective.

While reasonableness is not a "one size fits all," in this instance it was not

reasonable. Indeed, the School District was well aware of Mother's desire to have the Student reinstated in his placement at P School as expressed at the March 2024 IEP meeting, although she acted in good faith to explore the option at the Behavioral Unit. That the request for due process hearing was filed several weeks later has no impact – the March 2024 IEP became effective immediately, *ab initio*. There was no time to initiate due process action prior to effectiveness. The local suspension administrative officer ordered the Student to be reinstated in classroom at P School after the suspension ended. The Due Process Hearing Officer had not yet entered an opinion in the rapid Manifestation Determination Appeal, which subsequently ordered the Student to be placed in P School under the December 13, 2023 IEP. The IDEA roadmap was not followed by the School District, reasonable notice prior to effectiveness was not provided, and FAPE was denied the Student. This procedural violation is concluded to amount to a substantive violation by significantly impeding the parent's opportunity to participate in the decision-making process regarding the provision of FAPE to Student, by impeding Student's right to FAPE, and by causing a deprivation of educational benefit, thus resulting in a violation of FAPE. *See* 34 C.F.R. § 300.513(a)(2)(i)(ii)&(iii). Issues 7, 9, 10, 17, 18, 19, 28, 29, 31, 35, 36.

Moreover, the March 2024 IEP was flawed significantly. It removed a number of provisions for services, placed the Student in a behavioral unit in a new placement classroom, and contained incorrect information about the "levels system" for the Student's behavior strategies, although the behavioral unit director testified at the hearing that the levels system process would not be used. Importantly, the reason the Student was placed in this new behavioral unit setting at a different school was because of the Student's

behavior. The March 2024 IEP is the guidepost for providing services to the Students, not the behavioral unit director's theory on approach. *Systema, supra*, requires use of the IEP to measure the services to be provided, upon which service providers and teachers for the Student are to develop their educational implementation. The IEP is the tool accessible to the teachers and related service provides. 34 C.F.R. §300.323(d). This "levels system" IEP statement is not a harmless scrivener's error; it is consequential. This resulted in a substantive denial of FAPE, since it did not provide for appropriate services. That is, the IEP was not reasonably calculated to enable Student to make progress appropriate in light of Student's circumstances. *Andrew F.*, 137 S. Ct. 999. Issues 7, 9, 10, 11, 17, 18, 19, 27, 28, 29, 36.

The March 2024 IEP, which removed Student to the behavioral unit placement, violated the Student's least restrictive environment. Historically, the December 2023 IEP demanded, among other things, a one on one paraprofessional to support Student's educationally related behavioral needs. The School District was unable to find a one on one paraprofessional – as found in this Order, it did not implement the December 2023 IEP. Mainstreaming to the maximum extent appropriate should first take place in a regular education classroom with supplementary aids and services. *See L.B. v. Nebo*, 379 F.3d 976-978. As a result, the School District did not try a less restrictive setting for Student on the continuum of placement options prior to placing Student in the behavioral unit. 34. C.F.R § 300.115. That is, to the maximum extent appropriate, the March 2024 IEP did not first employ the use of the supplementary aids and services of the December 13, 2023 IEP to determine if they could not be used satisfactorily prior to removing Student to a separate school and away from his peers. 34. C.F.R § 300.114(a)(2). This is a

procedural violation amounting to a substantive violation by impeding the Student's right to FAPE and causing a deprivation of educational benefit. 34 C.F.R.

§300.513(a)(2)(i)&(iii). Issues 9, 10, 11, 17, 18, 19, 27, 28, 29, 35, 36.

It must be remembered (and is found) that this is a student who is neurodivergent, under other health impaired, as well as gifted. This address Issues 25 and 26. Math and reading are strong points in Student's educational capabilities. Yet the behavioral unit employs remedial teaching techniques for these subjects. The behavioral unit is composed of class sizes with varying degrees of ability and age. Although TS stated he would follow the IEP for gifted needs, he admitted that there had never been a gifted student in the behavior unit while he was there. The March 2024 IEP was not reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Andrew F.* 137 S. Ct. 999. This is a substantive violation of FAPE. Issues 3, 9, 10, 11, 17, 18, 19, 28, 29, 31, 35, 36.

Despite the FAPE violations, noted above, the Petitioners have not met their burden that there was a unilateral predetermination of placement. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109 (6<sup>th</sup> Cir. 2004) (predetermination does not allow parents meaningful participation). Mother participated at the March 2024 IEP meeting, with counsel, voiced objections, and was heard, and her objections noted. The claim as to unilateral predetermination is denied. Issues 3, 7, 9, 10, 11, 17, 18, 19, 28.

Schools must either fund an IEE or file for due process. 34 C.F.R. §300.502(b)(2)(i) and (ii). The District did neither after the request for an IEE regarding the adequacy of Dr. LeGrand's evaluation. Action must be taken by the District without unnecessary delay. *Id.* The District did not take action, as was its duty, but forced Petitioners to explore internal

District criteria for evaluations, placing the burden on the Petitioners to prove criteria were met. This is backward. The duty is on the District to either fund the evaluation, or to file for due process. Parent then paid for its own IEE from Dr. Parks. Dr. Parks' fee is \$2,975.47. As a result, this amounts to a procedural violation of FAPE. *Id.* This procedural violation impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student, and caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2). Issues 16, 17, 19, 34, 36.

Petitioners did not have Dr. Parks testify, and her report was not timely disclosed. No weight is given to Mother's interpretation, as a lay witness, of what Dr. Parks' findings and recommendations may consist. Although weight is given to what was paid for the evaluation by Parent, no weight is given otherwise to the substance of that testimony. Thus, to the extent there is a claim that the evaluation by Dr. Parks should be substantively considered for a violation of FAPE, *see* Issue 16, that claim is denied because Petitioners did not meet their burden of proof. *See Schaffer v. Weast*, 546 U.S. 49 (2005).

The District's failure to follow its representation that it would follow up with its own sensory evaluators after an IEE regarding occupational therapy under the December 13, 2023 IEP was provided is found to be a substantive violation of FAPE. This is for a related service to allow the Student to benefit from special education. 34 C.F.R. §300.34. Failing to provide for the sensory evaluation follow-up amounts to a substantive violation of FAPE, that is, by failing to follow-up, it did not allow the March 2024 IEP Team to explore the "unique circumstances" of the Student for whom the IEP was created. *Andrew F.*, 137 S. Ct. at 1001. Issues 13, 17, 18, 19, 35, 36.

The District's failure to develop an IEP team plan for ESY services in the summers of 2023 and 2024 when Student had been determined eligible for those services, the failure to provide ESY services in those summers, and the unilateral creation of an ESY Addendum in 2024 outside of the IEP team process and without Parents violated Student's rights under the IDEA. 34 C.F.R. §300.106. These services are necessary to provide FAPE to Student. Student has great difficulties with transitions, and without ESY there will be substantial regression with limited recoupment ability. Substantial regression, time to recoup, and behavior problems are consideration for extended school year services. *Johnson v. Ind. Sch. Dis. No. 4 of Bixby*, 17 IDELR 170 (10<sup>th</sup> Cor. 1990). This amounts to a procedural violation of FAPE. *Id.* This procedural violation impeded the Student's right to a FAPE, significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of FAPE to Student, and caused a deprivation of educational benefit. 34 C.F.R. §300.513(a)(2). Issues 14, 15, 17, 18, 19, 33, 34, 35, 36.

The Petitioners did not meet their burden to prove a BIP and FBA are required services under the IDEA. The only reference to a functional behavior assessment is under disciplinary procedures relating to a manifestation of disability. *See* 34 C.F.R. §300.530(f)(1). The matter raised by Petitioners is a failure to review and amend the behavior intervention plan for 2023-2024 school year, and placed in context in their proposed conclusions of law, however, relate to a BIP from November 2023 through March 2024, and presumably an FBA coming from it, which are interpreted to be a claim for an inappropriate or untimely BIP because it is alleged that not having a BIP left Student without an IEP adequate to address behavior changes. *See* Issue 12 *with*



Proposed Conclusion of Law 5 and 6. Thus, it is not a claim raised under the disciplinary contention, but rather under general BIP/FBA terms. In any event, as a result, the Petitioners have not met their burden to prove a lack of a BIP/FBA, or lack of revised BIP/FBA, resulted in a denial of FAPE. *See Schaffer v. Weast*, 546 U.S. 49 (2005). It is *sua sponte* found, however, that the Manifestation Determination Appeal did find Student's behavior to be a manifestation of his disability, so that a FBA/BIP should be developed thereafter, and will be ordered as a part of equitable relief. *See* 34 C.F.R. §300.530(f)(1)(i)&(ii).

Petitioners did not meet their burden of proof for reimbursement of piecemeal educational services for the Homeschool Classroom, Mathnasium, and Center for Dynamic Practice. There is a procedure for reimbursement if there is a contention that the educational services offered by the District are inappropriate, to wit, enrollment of Student in a private school and seek tuition reimbursement. *See Elizabeth B. v. El Paso County Sch. Dist.* (10<sup>th</sup> 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). Other than with this procedure, costs arising out of unilateral placement are not shifted. *Roland M. v. the Concord Sch. Committee*, 910 F.2d 983 (1<sup>st</sup> Cir. 1990). Petitioners have not met this burden for costs arising from piecemeal unilateral placement in various programs. That claim is denied. Issues 17, 18, 19, 28, 36.

To the extent not already explained and concluded, the District's contentions are unpersuasive that defenses to FAPE arise such that parental interference is the root cause of behaviors, that parental interference for need identification impacts the District's ability to provide educational services, and that lack of home parental consequences impact Student's educational opportunities. The Student is taken by the District where it finds the Student. That is, the "unique circumstances" of the Student determine the adequacy of the offered IEP. *Andrew F.*, 137 S. Ct. at 1001 (unique circumstances determine adequacy). Issues 20, 21, 23.

To the extent not already explained and concluded, the District's position is well-taken that Petitioners have not met their burden to prove that a daily communication log from all of the Student's teachers, with the ability to challenge each entry, is a related service required to assist Student to benefit from special education. 34 C.F.R. §300.34. To the extent there are any claims that a daily communication log is required then they are denied. Issue 30.

Any claims or defenses not otherwise disposed of herein are denied based on failure to meet the burden of proof. *See Schaffer v. Weast*, 546 U.S. 49 (2005).

## **REMEDIES**

Educational remedies are awarded.

Independent psychological services are ordered to administer psychological and educational testing, and other assessment procedures, with interpretation, consultation with other staff members, and to manage and plan a program for psychological services for the purpose of developing positive behavioral intervention strategies. *See* 34 C.F.R. §

300.34 (c) (10). The focus of Student's function of behavior has been noted to be task avoidance. Nonetheless, Student, viewed through the lens of a neurodivergent gifted student rather than a neurotypical student, continues to misbehave. Something is not working. The record contains other instances of what the function of the behavior may consist of, for instance, that Student did not feel welcome in group dynamics and felt others did not like him, tr. 1070, a fear of failure, tr. 1069, safety and transitions, tr. 875, fear of not being believed by school personnel, tr. 803, anxiety about how Student believes others see him, tr. 776, and a "social-emotional state," tr. 252, among other things. For instance, math class disturbances, in which Student had traditionally enjoyed math as a subject, had been considered by the District to support its functional assessment of task avoidance, rather than looking at why he sought to avoid the tasks, that is, the function of behavior. These services are required to assist the Student to benefit from special education. 34 C.F.R § 300.34(a). That is, the service is necessary to assist the student to benefit from special education. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984). The service provider will be provided a copy of this Order.

Within 10 days from the entry of this Order, the School District will provide the Student's Mother with a list, in writing through her counsel, of three independent psychological service providers who meet School District criteria, located in or about the community where the Student resides. The related service provider conducting the evaluation must be qualified in a discipline for State approved or State recognized certification or licensing, or comparable requirements applicable to others in that professional discipline. 34 C.F.R § 300.156.155 (b) (1). The Petitioner will then have 10 days to select the provider and to communicate the choice to the LEA in writing or by

Email to the Respondent's counsel. The provider will begin assessments within 20 days of the date the LEA receives notice of the Petitioners' choice of the provider. The evaluation costs will be paid by the LEA, consistent with community standard costs for similar providers. The evaluation will be completed using due speed.

After receipt of the psychological service provider's report, within 20 days a FBA will be conducted considering the results of the report, and a new BIP will be developed, as a part of the post-manifestation determination process. *See* 34 C.F.R § 300.530(f)(1)(i)&(ii).

Student is to be returned to P School, under the terms of the December 13, 2023 IEP, with modifications and exceptions imposed by this Order, within 10 days from the date of entry of this Order.

Neither a "BCBA" nor an "EBHA" are ordered in the future. However, a one-on-one fulltime paraprofessional educational assistant is ordered for classroom, transition from classes, and activities (including nonacademic settings, like recess, lunch, and extracurricular services (*see* 34 C.F.R § 300.117), as a supplementary or related service. 34 C.F.R. § 300.320(a)(4). A behavior specialist is also ordered. *Id.* These providers must be qualified in a discipline for State approved or State recognized certification or licensing, or comparable requirements applicable to others in that professional discipline. 34 C.F.R § 300.156 (b)(1). These supplementary or related services will enable Student to be educated with nondisabled children to the maximum extent possible. *See* 34 C.F.R § 300.114(a)(2)(i). These supports and strategies are to address Student's behavior, which impedes Student's learning. *See* 34 C.F.R § 300.324(a)(2)(i).

The fulltime classroom one-on-one paraprofessional will be trained and supported by the behavior specialist. These services are required to assist the Student to benefit from special education. 34 C.F.R § 300.34(a). That is, the services are necessary to assist Student to benefit from special education. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984).

Parent counseling and training is also ordered, to be provided during non-work hours by qualified School District staff disciplined in behavior, consistent with parent schedules. It is to include both Mother, and if agreeable to step-parent and Mother, then to step-parent as well. 34 C.F.R. § 300.34 (c) (8)(i). It is to help the parents acquire the necessary skills to allow them to support the implementation of the Student's IEP. *Id.* at 8(iii). Parental supports had been used in the past and were successful, although they were subsequently ended. This also becomes relevant to the School District's argument that parental activities contributed to the Student's overall misbehavior at school. Training will be for one hour every two weeks, to commence within four weeks of the date of this Order, until the 2024-2025 school year is over. These services are required to assist the Student to benefit from special education. 34 C.F.R § 300.34(a). That is, the service is necessary to assist the student to benefit from special education. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984). The related service staff member providing the training must be qualified in a discipline for State approved or State recognized certification or licensing, or comparable requirements applicable to others in that professional discipline. 34 C.F.R § 300.156.155 (b) (1).

Being mindful that parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher,

*Rowley*, 458 U.S. at 207-208, the Petitioners' request for Student to be placed in a classroom at P School with a different general education teacher is denied. Although Student will be placed once again at P School, the particular teacher is left to the discretion of the School District, recognizing that the teacher must be appropriately and adequately trained and prepared through qualifications with content knowledge and skills to serve Student. *See* 34 C.F.R. § 300.156.

Future communications between the District general education teacher and Parent will move forward through a School District representative, rather than directly between the parents and the teacher. The School District will assign a qualified staff member within P School's administration to act as the "go-between" between the parents and general education teacher. This supplemental service support or related service is an aid in addressing Student's behavior which impedes Student's learning, *see* 34 C.F.R § 300.324(a)(2)(i), by allowing communication management between parents and teacher, to meet Student's educational needs and to progress and advance toward educational goals in the IEP. *See* 34 C.F.R § 300.320(a)(1)(B)&(4)(i). This service is required to assist the Student to benefit from special education. 34 C.F.R § 300.34(a). That is, the service is necessary to assist the student to benefit from special education. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984).

Extended school year services will be provided for the summer of 2025. They are necessary to provide a FAPE to Student based on severe regression and recoupment problems. 34 C.F.R. §300.106.

As explained in *Albuquerque Public Schools v. Cabrera*, Nos. 1:20 cv-00531-JCH-LF and 1:20-cv-00532-JCH-LF (D.N.M. Dec. 7, 2021), once a plaintiff has established an

IDEA violation and a subsequent denial of FAPE, then he has carried his “burden of proving entitlement to a properly crafted compensatory award under *Reid*.” *Id.*, Slip Op. at 24, (citing *Phillips ex rel. T.P. v. D.C.*, 736 F.Supp. 2d 40, 247 (D.D.C. 2010)). As concluded, the LEA violated FAPE. The Student is entitled to a properly crafted compensatory award.

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

Compensatory education services are awarded for the time Student was not attending P School to some extent. What is considered in the equitable award calculation will, however, consider the Student’s refusal to go to school under the options presented by the District. As noted above with unilateral placement, the unilateral choice given a student is to find an appropriate placement should the current placement be inappropriate, and enroll in a new school - it is a risk. The IDEA does not provide that the Student discontinue with school altogether because the parents disagree with the placement, and then seek compensatory services while the student is out of school even if the current placement is subsequently found to be inappropriate. The exception to not continuing in the District’s proposed school placement is the unilateral placement option and enrollment in a new school providing an appropriate education, which did not arise here. Parent did not place Student in another school. Compensatory education will not be awarded for the time Parent voluntarily removed Student from an educational setting.

Student is a bright, gifted student with behavior difficulties. It is concluded he will be able to engage in and benefit from additional compensatory educational services, in addition to his ongoing school schedule. Compensatory education services are not imposed punitively against the District.

Because a BCBA was required under the IEP, but the service not provided, then Student is awarded 15 hours of BCBA services due from November 8, 2023 through December 13, 2024. A behavior service provider was also required to provide services, not received, from December 14, 2023, through January 29, 2024 for 6 hours. These hours were not provided, and are now awarded. Two summer of ESY services are now awarded, for 44 hours, with six hours of summer services for BCBA and behavior support services during those time periods. These services are closely related to services lost, although are viewed qualitatively to put Student back to the place he should have been had he been provided those services, considering the Student's needs and age. Considering the Student's age and needs, as well as the future educational placement, compensatory education hours will be given after normal school hours, at the school site while school is in session, two days a week for an hour each day, until completed. If transportation services are necessary to benefit from these special education services then transportation will be provided by the District.

Parent's refusal to allow Student to attend the IAES and Behavior Unit Programs, thus keeping Student away from any educational services, amounts to an unreasonable approach to the collaborative process under the IDEA. When a parent disagrees with the proposed plan, believing it to be inappropriate, then a risk may be taken to stop attending the school, finding another placement which may be able to provide appropriate services,



placing the student in that setting, and then filing for due process. Otherwise, a student should be in school even if the parent contends the services are inappropriate, and file for due process with the option to seek compensatory relief for the inappropriate services, if any. In this case, however, Parent would not let Student go to school, and did not enroll Student in another school. As a result, compensatory education services for the periods Student did not attend school programs at IAES and the Behavior Unit are denied due to this unreasonable conduct. *See C.G. v. Five Town*, 513 F.3d 288-289 (persuasive due to unreasonable action and compensatory education).

Within 30 days from the entry of this Order, all District staff and educators acting as a part Student's IEP Team will undergo four hours of training on how to draft an IEP so that it can be successfully implemented with fidelity, the FAPE roadmap of procedure, and "stay put." *See Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025 (9th Cir. 2006) (compensatory education in the form of staff training). The District will notify the New Mexico Public Education Department, Office of Special Education Division, after the training occurred, by providing a signed roster of participants.

Given the discord between the parties, 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.

### **ADMINISTRATIVE ORDER**

Therefore, for the reasons noted above, the Petitioners' Amended Due Process Request will be, and 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.

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

It is so administratively ordered.

/s/ electronic

Morgan Lyman

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MORGAN LYMAN  
IMPARTIAL DUE PROCESS  
HEARING OFFICER

Entered: November 12, 2024

**CERTIFICATE OF SERVICE**

I certify a true copy hereof was sent via Email PDF attachment only to D. Poulin, L. Nesbitt, and J. Archuleta-Staehlin, Esqs., as counsel for the parties, and to M. Lozano, Esq., for the Secretary of Public Education, at their respective Email addresses of record, all on this 12th day of November 2024.

/s/ electronic  
Morgan Lyman

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