

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
OFFICE OF SPECIAL EDUCATION**

**PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER**

**Case Number: NMPED DPH 1213-19**

**FINAL DECISION**

*Statement of the Case*

Parent filed a Due Process Hearing Notice (“Complaint”) with the New Mexico Public Education Department (“NMPED”) on November 15, 2012, alleging that District denied Student, a sixth grader, a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) 20 U.S.C. §§ 1400 et seq. and implementing state (6.31.2 et seq. NMAC, effective June 29, 2007, amended through September 28, 2012) and federal (34 CFR Part 300, effective August 14, 2006, amended through December 1, 2008) regulations. More specifically, the Parent alleges the District failed to provide Student, who is legally blind, with needed specialized instruction, related orientation and mobility (“O&M”) services, assistive technology (“AT”) services, extended school year (“ESY”) services and access to instructional materials.

District did not challenge the sufficiency of the Complaint. After Parent unilaterally withdrew from and refused to engage in mediation on the last day of the 30-day suspension of the timeline, it was determined that the District would not waive its right to attempt resolution. Accordingly, the 30-day suspension was restarted but the subsequent resolution session failed to dispose of the dispute. Parent’s Motion for Leave to File Amended Due Process Hearing Request was denied by Order entered on December 31, 2012. No substantive prehearing motions were asserted by either party. Parent asserted two Motions to Compel, both of which were addressed in an Order entered on January 31, 2013. The procedural history of this Complaint is otherwise not remarkable or substantive and need not be related further. A request by one or both of the parties to extend the deadline for entry of a final decision was

granted and this Decision is timely filed if delivered to NMPED and the parties no later than March 15, 2013.

The due process hearing was held on February 11 through 14, 2013. Parent was present throughout and represented by counsel. Student appeared briefly but did not testify. The District's Director of Student Services was present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Parent were identified by numbers. District's exhibits were identified by letters. The Joint exhibits were identified by double letters. Page numbers on all exhibits refer to the stamped or typed pagination in the center or lower right-hand corner.

The DPHO, having heard the oral testimony of all witnesses, having reviewed the exhibits admitted as evidence, having considered all argument and citations of authority submitted and the parties' requested findings of fact and conclusions of law and being otherwise advised in the premises, makes the following findings of fact, conclusions of law and orders.

### ***Statement of Issues***

After extended discussion of the parties' claims and defenses at the prehearing conference, the DPHO identified the following specific issues to be determined at the due process hearing in the Summary of Prehearing Conference of record at January 25, 2013.

1. Whether Student's individualized education programs ("IEPs") provide sufficient services by a teacher of the visually impaired ("TVI") to confer FAPE and whether District's delivery of those services by an intern TVI with mentoring from a certified TVI complies with his IEP and is sufficient to confer FAPE.
2. Whether Student has received adequate instruction in the expanded core curriculum of compensatory skills, in particular, Braille and Nemeth Code, to confer FAPE.
3. Whether Student has received adequate instruction in O&M skills to confer FAPE.

4. Whether Student has had access to regular classroom texts and consumable materials sufficient to confer FAPE.
5. Whether District has provided Student with AT devices and services required by his IEP and sufficient to confer FAPE.
6. Whether District has conducted a timely and sufficiently comprehensive reevaluation of Student and whether District adequately reviewed existing evaluation data as part of the reevaluation in compliance with IDEA.
7. Whether the ESY services District has provided Student are sufficient to confer FAPE.
8. Whether Student has been able to participate, as appropriate, in the general education curriculum, including electives, sufficient to confer FAPE and whether Student's IEP team has had an opportunity to address any claim that he has not.
9. Whether Student is entitled to compensatory education.

### *Summary of Essential Evidence*

The testimony of 15 witnesses was received and 27 exhibits were admitted into evidence during four days of hearing. The witnesses heard were Parent; Student's special education teacher for fifth and sixth grade; Student's special education teacher for fourth grade; the two certified TVI's responsible for mentoring Student's special education teachers; two of Student's instructional assistants; Student's O&M specialist; four of Student's sixth grade regular education teachers; the District's Director for Special Services; the technology consultant for the New Mexico School for the Blind and Visually Impaired ("NMSBVI"); and Parent's expert in special education for the visually impaired. The following is a summary of the evidence relevant to the decision herein found to be established by a preponderance of the evidence unless otherwise indicated. References throughout this decision to exhibits admitted into evidence at the hearing are indicated by "Ex. \_\_\_\_," references to pages in the transcript of the hearing by "Tr. \_\_\_\_" and references to the Joint Stipulation of Facts by "Jt. Stip. \_\_\_\_."

At the time of the hearing, Student was a 13 year old sixth grader at the District's only middle school and eligible for special education and related services as visually impaired. His eligibility is not in dispute and the District concedes that the IEP teams convened to develop Student's educational program must consider the special factors identified by the IDEA for the visually impaired found in 20 U.S.C. §1414(d)(3)(B)(iii). There is no contention that the District or Student's IEP teams have determined that instruction in Braille or the use of Braille is not appropriate for Student. Jt. Stip. 5 and 6.

Student's severe vision loss is the result of congenital optic nerve hypoplasia which is described as the under development of the optic nerve. The condition is stable meaning what vision Student was born with has not changed and is not expected to change in the future. Tr. 442-443 Student has no light perception in the left eye and only 40 degrees in the right. This means Student can perceive light through only a small tubular area along the nasal side of his right eye. He also has uncontrollable eye movements known as nystagmus, reducing his ability to focus what light perception he does have as would be necessary to track and/or scan. Exh. HH; Tr. 780. Student has another congenital disorder of osteogenesis imperfecta, also known as "brittle bone." As a result, Student's bones fracture more easily than normal and he has suffered a number of broken bones in the course of his life. Tr. 737-738.

Parent's expert suggests that Student's residual vision, while not academically functional, "creates extraordinary complications" in his attitude toward the acquisition of compensatory skills. She explained that Student "has enough vision for his neurology to be driven to try to use his vision to see." Tr. 781. This portends Student's resistance to learning and using compensatory skills such as Braille and the long cane. So profound is this drive that Student must be commended for overcoming it to learn to read Braille at all which he has done. Nevertheless, the evidence is clear that he prefers to receive written materials in audio than read it in Braille (Tr. 924) and refuses to use his cane in school. The evidence of his aversion to working diligently at improving these skills is certainly at least a contributing factor in his below grade Braille fluency and cane skills that will be discussed in more detail below.

Student first received services from District as an infant/toddler and was enrolled with the District for preschool and kindergarten. Parent's expert was the certified TVI provided to the District on an itinerant basis by NMSBVI to deliver those services to Student, first in the home, then at preschool and kindergarten for a total of four years. Consequently, Student received a sound foundation of TVI support through kindergarten. Tr. 887-889.

Thereafter, Parent enrolled Student at NMSBVI's residential campus in Alamogordo, New Mexico, for first grade. Student remained a residential student at NMSBVI from the fall of 2005 through the spring of 2010 attending first through fourth grades, repeating the fourth grade in 2009-2010. Thereafter, Student returned home to attend school with the District. Parent's expert was retained directly by District for the 2010 summer to work with Student on Braille fluency and O&M in ESY. Tr. 776-778.

In the fall, Student was enrolled with District to again repeat fourth grade for the 2010-2011 school year. Apparently, the reason Student was retained for two years in fourth grade was that his Braille reading fluency, the speed with which he is able to read literary Braille, was significantly below grade level. The August 23, 2010, IEP (Ex. 2) identifies Student as a transfer from NMSBVI (at p. 1) and references that agency's IEP of May 18, 2010 (at p. 14). Consistent with 34 C.F.R. §300.323(e), District adopted the May 18, 2010, NMSBVI IEP as the educational program for Student for 2010-2011. Tr. 156-157. The May 18, 2010, IEP from NMSBVI is not of record in these proceedings.

The August 23, 2010, IEP committed District to providing Student with the NMSBVI IEP mandated ten hours per week of TVI support. (Ex. 2, p. 10; Tr. 157) It is undisputed that District did not have a licensed TVI on staff during the 2010-2011 school year. It is also undisputed that District did not provide Student with TVI services of any nature until October of that school year.<sup>1</sup> At that point, District retained a special education teacher, who worked full time for another nearby school district and was an intern TVI, to provide Student's direct and indirect TVI services after school. As an intern TVI, she had

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<sup>1</sup> This period is not at issue in these proceedings as it predates the two-year IDEA time limitation (20 U.S.C. §1415(f)(3)(C)) and Student's claim for this period was resolved in a mediated settlement of a state complaint brought by Parent at the time. Ex. FF; Tr. 709.

completed all of the required coursework toward certification and was working on her internship under the guidance of a certified and experienced TVI mentor. Tr. 701, 703 and 822. Pursuant to the August 23, 2010, IEP, she provided six hours per week working directly with Student teaching compensatory skills, including Braille, and about four hours per week of indirect services transcribing materials into Braille. Tr. 703-704.

Parent chose to focus the evidence regarding Student's fourth grade year with the District on her allegations that the District's intern TVI for that year was not adequately qualified and generally did a poor job of providing those services.<sup>2</sup> Consequently, there is very little information in the record to reflect what level of educational benefit was conferred or Student's progress during this school year. It is known that Student was promoted to fifth grade in the fall of 2011. The summary of present levels of performance ("PLP") taken from NMSBVI reflected in the August 23, 2010, IEP, reports that Student's Braille fluency rate was 10 words per minute ("wpm") with 90% comprehension. The next written report of reading speed is found in the PLP of his November 15, 2011, IEP. It states, "[Student] is doing very well with his literary braille and contractions. He is able to read 30 words per minute which is about at the beginning third grade level."

The August 23, 2010, IEP also committed District to providing Student with the NMSBVI IEP mandated one hour per week of O&M related services. (Ex. 2, p. 10). It is undisputed that District did not employ an O&M specialist on any basis for the 2010-2011 school year. It is also undisputed that any claim Student had for these omitted services is not at issue in these proceedings as it was addressed in the delivery of 36 hours of compensatory O&M services during the summer of 2011. Ex. FF.

Student's IEP team met on June 2, 2011, and prepared an addendum which stated: "The IEP Team for this student met on this date 06/02/11 to review the IEP developed on 08/23/10 (date of most recent IEP) and recommends the following changes: Other: ESY Services." Ex. FF. Although Student's IEP Team, by this document "recommended" ESY services, it is undisputed that the only services Student

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<sup>2</sup> These allegations are, of course, disputed by the intern TVI and the District. Tr. 722-729

received during the 2011 summer were the hours required to compensate him for the TVI and O&M services denied him during the previous regular school year. Ex. FF; Tr. 709,

For Student's fifth grade year, District asked Student's fourth grade case manager to assume the responsibility for delivering Student's TVI services. Hereinafter, she will be referred to as Student's "VI Teacher." VI Teacher had begun taking classes for TVI certification in the fall of 2010 and continued her studies while she undertook Student's instruction as an intern TVI. Tr. 152-154. As was true with the fourth grade TVI, she was mentored by a fully certified and experienced TVI. Tr. 172-173 and 471. Unlike the fourth grade TVI, the clear preponderance of the evidence indicated VI Teacher had the requisite skills to deliver the needed specialized instruction and performed these services for Student well. Ex. AA, p. 6; Tr. 474-476

During fifth grade, VI Teacher was assigned a visually impaired preschooler who required service on a homebound basis. She was also expected to provide case management and assorted special education services for several non-visually impaired disabled students. Tr. 184-185. Again, Parent's case regarding fifth grade focused on this personnel situation rather than eliciting information regarding the educational benefit conferred or Student's progress. However, relatively detailed progress reports are available for the period controlled by the November 15, 2011, or fifth grade, IEP that will be discussed below. Ex. JJ

In an effort to assess Student's service needs and assist his IEP team, VI Teacher and her mentor conducted a Vision Severity Rating Scale in October 2011. Ex. 7. The scale requires the TVI to rate the student's needs in eight different categories involving status of vision, reading medium, assistive technology, materials preparation, collaboration with staff and compensatory skills. The ratings range from mild (0-2) to profound (11-12). Student was scored as having profound needs in all eight categories. The total score from the category ratings is then applied to the scaled table to determine frequency and model of service delivery which range from monitoring to comprehensive. Student's maximum score placed him in the comprehensive model of service delivery. Ex. 7, p. 3

The instructions for completing this scale are found at Exhibit X. The comprehensive model is defined on page 4 of that exhibit. The frequency of service for that level is 5+ times per week or 240 minutes (four hours) minimum to 600 minutes (ten hours) maximum. This contemplates “almost total intervention” and includes adaptation/preparation of materials, assisting the student with “high technology,” and consultation with school personnel. Ex. X, p. 4

Apparently disregarding the clear parameters of the scale upon which they were relying, VI Teacher and her mentor concluded that Student required ten hours of direct intervention plus ten hours of what was described as indirect service to represent the time needed to adapt and prepare materials and three hours of consultation with staff for a total of 23 hours per week, more than twice the maximum allotted on the scale. Tr. 180; 488-489 The IEP team directed that Student would receive 20 hours per week. Ex. AA, pp. 21 and 26; Ex. BB, pp. 17 and 23; Tr. 495 and 500 Parent asks that District be found to have deprived Student of FAPE for failing to accept and adopt the recommended 23 hours per week.

The evidence suggests that a good deal of time and energy was expended in a campaign by and on VI Teacher’s behalf to get District administration to reduce her caseload, contending that it interfered with her ability to provide the services required by Student’s IEP. A “caseload review” was prepared and several meetings with District administrators were held. Exs. 5 and 6; Tr. 185-191, 477-483 and 491-493 It is undisputed that District did not reduce VI Teacher’s caseload during fifth grade. Tr. 662-664 VI Teacher kept a daily log for fifth grade (Ex. 22) but had not tabulated her hours. Nevertheless, she testified that she was never able to deliver the number of hours the IEP required due to her other responsibilities. Tr. 221 Parent asks that District be found to have deprived Student of FAPE by failing to reduce VI Teacher’s caseload.

No report cards or other written reports of Student’s grades were offered in evidence. Student was promoted to the sixth grade for the 2012-2013 school year. Student’s classroom and Spanish teachers reported his present levels of academic achievement in the general curriculum subject areas. Ex. BB, pp. 11 and 13. The reports are generally positive and reflect his grasp of the respective subject

matters. Several notes reflecting the creative modifications used to make the materials accessible for Student are recorded. In Social Studies, the teacher noted the impact of Student's low Braille fluency on his ability to find answers in the text.

VI Teacher's quarterly reports on Student's progress toward his IEP goals in the expanded core curriculum during fifth grade are also available. Ex. JJ The first four pages of this exhibit address Student's progress on ten objectives in the area of Braille literacy. Notably, Student's Braille reading fluency improved from 20 wpm to 41 wpm. Although only three of the ten objectives were actually met (correct Braille contraction use in writing, accurate resumption of tracking and Braille reading legibly), "huge improvements" were reported on using Braille rules and contraction when writing and spelling at the fifth grade level and progress was reported on all of the remaining six objectives.

Page 5 of Exhibit JJ reflects VI Teacher's reports on three objectives in Nemeth literacy. Nemeth is the Braille code for math. Student met the goal of using Brailled graphs "and is now able to create his own graphs in braille." She reports that Student has done very well with his abacus skills and experienced great success using a Braille ruler and measuring objects and the protractor to measure angles.

Page 6 of Exhibit JJ addresses Student's use of AT. District provided Student with an Apex BrailleNote which appears to be similar in size and function to a laptop but in Braille. It has the capacity to convert the work Student is doing in Braille to regular print and send it to a monitor that the teacher can view during class. All of his objectives in AT were related to this device. Student met the goal of successfully creating, saving and printing Word documents for his teachers. He made progress using the agenda on his Apex but progress was sketchy on the goal of keeping Student on task when using the Apex while it is not being monitored by the teacher as he is apparently distracted from his work by all the features on the Apex.

Pages 7 and 8 of Exhibit JJ address Independent-Self Determination Skills and reflect Student's weakest performance. The objectives involve being responsible for his backpack, organizing and printing

homework, staying on and completing assignments and note taking. Student was observed to require a lot of verbal prompting from his one-to-one aide and the teachers; otherwise he tends not to follow through on these tasks and is “wasting too much time.”

Student’s IEP for fifth grade continued the provision O&M services at the NMSBVI rate of one hour per week which totals 36 hours for the school year. Ex. AA, pp. 21 and 26 Parent criticizes District for failing to have the O&M specialist present at this IEP meeting and contends the failure constitutes a procedural violation. However, IDEA does not mandate the attendance of related service providers. See generally 34 C.F.R. §300.321(a); see also *U.S. Dept. of Educ. Educating Blind and Visually Impaired Students; Policy Guidance*, Fed Reg., Vol. 65, No. 111 (2000) at p. 36588 The O&M specialist’s progress notes regarding the compensatory services delivered in the summer of 2011 were available to the IEP team on November 15, 2011. Therein, she recommends that Student continue to receive O&M training without suggesting any change in the level of service. Ex. GG, p. 3 She further testified that an hour per week of O&M services were appropriate during the second semester of 2011-2012. Tr. 388

The O&M specialist was retained to provide these services on an itinerant basis. She did not deliver the services on a weekly basis but rather in blocks of time longer than an hour permitting the advantage of providing Student with community travel training. The O&M specialist explained that one hour segments are not adequate to train Student in skills related to street crossing, route planning and distinguishing landmarks. Ex. GG; Tr. 389-390 Although, the O&M specialist did not begin providing services during fifth grade until January 2012, Student received a total of 48 hours of O&M services for the year, which includes conducting the evaluation discussed below and attending the May 2012 IEP. This level of service compensated Student for the time missed in the first semester and the month of February. Ex. 8

The O&M specialist conducted an evaluation of Student’s need for O&M services in May 2012 (Ex. DD) that was relied upon by the May 11, 2012, IEP team to continue Student’s O&M services. Ex. BB, pp. 17 and 23. The O&M specialist did not recommend any change in the level of service. Ex. DD,

p. 6 Nor did she recommend the acquisition of a GPS device or software. Tr. 431-432 Hence, Student's IEP team has not had an opportunity to consider whether GPS capacity is appropriate for Student's educational program.

The O&M specialist reported improvement in Student's travel skills such as scanning, detection of obstacles, turns, cardinal directions, distinguishing between clues and landmarks and indoor and outdoor numbering systems. Ex. DD; Tr. 392-393

The May 11, 2012, IEP team concluded that Student required ESY services for the summer of 2012 (Ex. BB, p. 16) and specified that he receive two hours of O&M services and two hours of TVI services per week for six weeks for a total of 24 hours of ESY services. Ex. BB, p. 23 and Ex. 13. However, in spite of Parent's efforts to get ESY started in a timely manner (Tr. 920-921), District did not deliver any ESY services to Student until after an Addendum IEP was completed on July 25, 2012. Ex. 13 Student's ESY services were then compressed into the less than three weeks remaining before teachers had to report for the 2012-2013 school year. The O&M specialist recalls providing those services in August 2012 but there is no record of those services in evidence – no invoice for services rendered and no progress notes. Tr. 403-404 The fourth grade intern TVI also recalls providing services working on Braille literacy only. Tr. 714-720 Again, there is no written record of this work in evidence.

VI Teacher continued as Student's sixth grade TVI for the 2012-2013 school year. The May 11, 2012, IEP controlled Student's transition to middle school. That IEP retains the total TVI service level at 20 hours per week<sup>3</sup> with 4.2 hours of direct service to be delivered in the TVI classroom as Student's home room class. Ex. BB, p. 23 This year, Student was the only visually impaired student VI Teacher had on her caseload but she was again responsible for other non-visually impaired special education students. VI Teacher again complained that she did not have sufficient time to deliver the hours required by Student's IEP.

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<sup>3</sup> VI Teacher and her mentor again recommended 23 hours of TVI services to the IEP team.

The middle school day was divided into eight “mods” of approximately 50 minutes per mod (home room first mod was 55 minutes). Under this format the students attended longer school days for only four days per week having every Friday off. Tr. 17 VI Teacher’s daily log for this school year showed that the first five mods of every day were dedicated to direct and indirect services for Student. Ex. 23 Student attended first mod one-on-one in VI Teacher’s classroom as his home room class. VI Teacher then used one of the other four mods dedicated to Student’s services to rotate through each of Student’s classes trying to attend each of his classes once a week. Tr. 245

Unfortunately, most of VI Teacher’s testimony was devoted to her complaints about her work load and her personnel issues with the District. If VI Teacher prepared a progress report for Student before Parent’s Complaint was filed, it was not offered in evidence. The last notation reflecting a measure of Student’s Braille fluency is dated November 20, 2012, and reported 48 wpm which is an improvement over the 40 wpm reported at the end of fifth grade. Ex. 23, p. 92 The daily log reflects substantial instruction in the use of Braille throughout. It also reflects substantial instruction in Braille.

It is undisputed that the two workbooks that Student’s Math teacher uses for his Math class were provided to Student in Braille (Tr. 79-80), as was the History book used in his History class (Tr. 50). His Spanish workbooks were Brailled for him on an as needed basis. The remainder of his textbooks were either available in audio, Brailled for him on an as needed basis or read to him by his one-on-one aide. Tr. 13-147. The Math teacher used a Math textbook only as a resource and it was not distributed to her sighted students. Tr. 79-82. The Spanish teacher also used a textbook as a resource and the exercises in it were modeled orally for all students during class. Her sighted students were not expected to study from the textbook. Tr. 20-23

All of Student’s sixth grade regular education teachers testified that Student was doing well in their classes, that he had access to the materials needed for instruction in and a good grasp of the subject matter of each given class. Tr. 13-147.

It is undisputed that O&M services were not available to Student in August, September or most of October of 2012. Tr. 405. There is an email reflecting a session with Student on October 27, 2012, but no corresponding invoice could be found of record. Ex. 23, p. 68 The O&M specialist could not find a reference to this visit in her planner either. She did find a planner entry for November 10 that was cancelled due to snow. Tr. 406 The first invoice for O&M services in the 2012-2013 school year shows a service date of December 21, 2012. Ex. 8, p.7

Parent complained that Student was being denied access to his elective art class because he is regularly pulled out for social work services that are prescribed for only .25 hours per week on an as needed basis. Ex. BB, pp. 17 and 23 The argument is that he should not have to miss his art class for a service he is not supposed to be getting on a regular basis. However, there are also several references in the evidence that Student is upset at being blind, crying and in crisis and discouraged with a negative self-concept. Ex. 23, pp. 33, 35-36 and 68; Tr. 794-795. Hence, the DPHO will not attempt to address this claim herein and it will be deferred to Student's IEP team.

### ***Findings of Fact***

The parties submitted requested findings of fact and conclusions of law before the hearing and supplemented those requests after the hearing. To the extent that such requested findings and conclusions are inconsistent with or contradict the findings and conclusions below, they are denied. If requested findings and conclusions are not addressed in the findings and conclusions that follow, they were found to be not applicable to the issues determined in these proceedings or contradicted or were not supported by the evidence presented at the hearing. All conclusions of law implicit in the following findings of fact are to be considered the conclusions of law of this DPHO.

1. Student resides with his Parent within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency.
2. Student is, and has been at all times material to these proceedings, eligible for special education and related services as visually impaired. Jt. Stip. 1

3. Student has been severely visually impaired since birth due to congenital optic nerve hypoplasia.  
Exh HH
4. During fourth grade District systematically and regularly provided Student with instruction in Braille and the use of Braille. Tr. 703-704
5. District provided Student with at least one fourth grade textbook and some portion of the other printed materials in Braille. Tr. 158, 704-705
6. The adequacy of Student's fourth grade intern TVI's training and the quality of her skills to provide Student's TVI services were disputed in the evidence.
7. There was insufficient evidence in the record to determine the degree to which educational benefit was or was not conferred or the extent to which Student did or did not progress in the curriculum during the 2010-2011 regular school year.
8. Student was entitled to and did not receive ESY services in the summer of 2011.
9. The preponderance of the evidence indicates that the educational program developed and implemented for Student during the 2011-2012 regular school year conferred more than *di minimus* educational benefit.
10. The preponderance of the evidence indicates that Student made more than *di minimis* progress toward his IEP goals and in the general academic curriculum during the 2011-2012 regular school year.
11. Student received all the hours of O&M service to which he was entitled during the 2011-2012 school year.
12. The preponderance of the evidence indicates that Student made more than *di minimis* progress in his O&M skills during the 2011-2012 school year.
13. District failed to provide Student with six weeks of ESY services in the summer of 2012 as called for in his May 11, 2012, IEP. District's unreasonable delay in delivery of ESY services resulted

in Student receiving whatever services he got in less than three weeks almost superimposed on the regular school year.

14. District provided Student with Braille note taking devices (a PacMate in fourth grade and an Apex in fifth and sixth grades), a Perkins Brailier, an abacus, Braille measuring devices and a Braille globe. During the summer of 2011, District acquired an embosser to facilitate Brailing Student's materials.
15. The preponderance of the evidence indicates that District failed to provide Student with the O&M services required by his IEP in the fall of 2012.
16. The preponderance of the evidence indicates that the educational program developed and implemented, with the exception of omitted O&M services, for Student during the fall of 2012 conferred more than *di minimus* educational benefit.
17. The preponderance of the evidence indicates that Student made more than *di minimis* progress toward his IEP goals and in the general academic curriculum during the fall of 2012.
18. The preponderance of the evidence indicates Student received systematic and regular instruction in Braille from knowledgeable and appropriately trained personnel during the fourth and fifth grade regular school years and the fall of sixth grade, consistent with U.S. Department of Education guidelines for *Educating Blind and Visually Impaired Students*, *supra* at p. 36589.
19. Student was reevaluated for visual impairment on November 9, 2011. Ex. CC
20. No goals and objectives for O&M services were included in Student's IEPs. Exs. AA, BB and 2; Tr. 401
21. The O&M specialist had goals for Student's O&M services that were reflected in her progress report and her evaluation. Tr. 421-422 If she were called upon to prepare goals and objectives for Student, they would be consistent with the services she has delivered to him to date. Tr. 432

## ***Discussion and Legal Authority***

### *The Obligation to Provide FAPE*

States and local school districts receiving federal funds for education must provide all disabled children residing within their boundaries with FAPE. 20 U.S.C. §§ 1412(a)(1)(A) and 1413(a)(1). FAPE is defined in 20 U.S.C. § 1401(9) to mean special education and related services that are provided at no charge and in conformity with an IEP. In order to develop appropriate programs the school district must evaluate and reevaluate children with disabilities to determine their eligibility and the appropriate content of their educational programs. 20 U.S.C. § 1414(a)(2), (b) and (c). IDEA also calls for the provision of AT and related services when appropriate. 20 U.S.C. § 1414(d)

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, established a floor for the level of education to be accorded children with disabilities to achieve compliance with the IDEA saying, “We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at ¶55 A child has received FAPE if the school district complied with procedural requirements and the IEP was reasonably calculated to enable the child with disabilities to receive educational benefit. *Id.* at ¶65; See also *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10<sup>th</sup> Cir. 2008) 2008.C10.0001086 VersusLaw.com.

The vehicle for provision of FAPE is the IEP, the package of special educational and related services designed to meet the unique needs of the child with disabilities. 20 U.S.C. §1414(d) The IEP is developed by a team composed of the student’s parents and educational professionals (20 U.S.C. §1414(d)(1)(B)) who must consider several factors: 1) the strengths of the child; 2) the concerns of the parents for enhancing the education of their child; 3) the results of the most recent evaluation of the child; and 4) the academic, developmental and functional needs of the child. 20 U.S.C. §1414(d)(3)(A) In the case of a blind student, there are special factors that the team must address. Specifically, the team

must provide for instruction in Braille and the use of Braille unless the team determines after an appropriate evaluation that it is not appropriate for the child. 20 U.S.C. §1414(d)(3)(B)(iii)

In reviewing the adequacy of an IEP, the inquiry must then begin by asking whether the school district complied with the procedures of IDEA, including whether the IEP document conformed to the Act's requirements. The components that must be included in the IEP document are defined in 20 U.S.C. § 1414(d)(1)(A) and 34 CFR § 300.320. However, procedural violations do not give rise to relief unless they compromised a child's right to FAPE, substantively hampered a parent's right to participate in the process or caused a child to be deprived of educational benefit. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 701 (10<sup>th</sup> Cir. 1998) ¶59 1998.C10.565 VersusLaw.com This limitation on procedural issues is now codified in IDEA at 20 U.S.C. § 1415(f)(3)(E)(ii).

The statutory period under review runs from November 12, 2010, through the date of Parent's Complaint. The IEP that controlled Student's program for the 2010-2011 school year (Ex. 2) was developed on August 23, 2010, and falls outside the statutory period. Hence, the IEP document and procedures utilized in that meeting were not reviewed but the evidence of the services actually delivered to Student pursuant to that IEP was examined.

#### *Licensure – Issue 1*

Parent contends that District's utilization of an intern TVI to deliver those services required by Student's IEP contravenes state educational standards and licensing regulations and constitutes a deprivation of FAPE. The licensure of persons seeking to be teachers of students with blindness and visual impairment is governed by 6.61.10 NMAC. However, the state also provides for alternative licensure (6.60.3 NMAC), Internship Teacher licensure (6.60.3.10 NMAC) and finally Mentorship Programs (6.60.10 NMAC). The IDEA recognizes these alternative processes as well. 34 C.F.R. §300.18(b)(2). Given the complexity of a state's licensing requirements and procedures, due process such as the proceeding herein is not an appropriate forum to challenge a given teacher's credentials. The IDEA recognizes this in denying students a right of action based on this premise. 34 C.F.R. §300.18(f)

Accordingly, Parent's request that the District be found to have deprived Student of FAPE on this basis will be denied.

*Reevaluation – Issue 6*

The District must ensure that Student is assessed in all areas related to the suspected disability. 34 C.F.R. §300.304(c)(4) Parent contends District has not conducted a timely or sufficiently comprehensive reevaluation because no cognitive testing has been performed since 2006 (Ex. 12) and there is no record that he has ever undergone any achievement testing. The 2006 evaluation was done for NMSBVI for the specific purpose of determining whether Student was eligible for gifted services. Gifted eligibility in New Mexico at that time required a baseline score on intelligence and achievement tests. When Student failed to meet that baseline on the intelligence test, additional testing for achievement was not indicated. Ex. 12, p. 3

Parent failed to offer evidence of any area of suspected disability other than visual impairment. VI Teacher was not concerned that Student had any learning issue other than visual impairment that might be impacting his ability to acquire reading skills. Tr. 224 The only reason offered for imposing an obligation to conduct a comprehensive evaluation on the District came through Parent's expert who felt the assessment in Exhibit 12 did not accurately reflect Student's intelligence and that a current assessment was needed "[t]o make sure that people have appropriate expectations for both [Student] and for themselves to put in place an appropriate academic program in which he can learn and proceed to higher-level learning." Tr. 864. This is not the standard for determining appropriate reevaluation testing under IDEA.

*Extended School Year Services – Issue 7*

Each school district must ensure that ESY services are available as necessary to provide FAPE. 34 CFR §300.106 ESY services "means special education and related services that -- (1) Are provided to a child with a disability -- (i) Beyond the normal school year of the public agency; (ii) In accordance with

the child's IEP; and (iii) At no cost to the parents of the child; and (2) Meet the standards of the SEA.” 34 CFR §300.106(b) A state rule establishing any standards for eligibility for ESY services in this state could not be found and none was cited by the parties.

### *Compensatory Services*

Courts and, correspondingly, due process hearing officers are empowered to “grant such relief as [it] determines is appropriate.” 20 U.S.C. §1415(i)(2)(C)(iii). “Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA.” (citations omitted) *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10<sup>th</sup> Cir. 1999) 199.C10.0043586 VersusLaw.com at ¶32. Appropriate relief includes the award of compensatory education when necessary to secure the student's right to FAPE. *Id.*

Having found that Student was deprived of FAPE by virtue of not receiving ESY and O&M services that should have been delivered in accordance with his IEP, Student is entitled to relief in the form of compensatory education. Consistent with the recommendation of Parent's expert, Student is awarded two summers (2013 and 2014) in a comprehensive summer program. Tr. 868 Absent a written agreement from Parent to the contrary, the summer program must be an overnight, support program for the blind and visually impaired and must last a minimum of six weeks each of the two summers. Parent must approve, in writing, of the program selected to provide this compensatory education. Ideally, the parties should collaborate to select an appropriate program and the search for a program should begin immediately upon entry of this decision. If the District has not proposed a program that meets with Parent's approval by April 30, 2013, Parent may unilaterally select a program within the continental United States and District will be responsible for all costs associated with Student's attendance at the program, including reasonable travel expenses.

Since the DPHO did not find a deprivation of FAPE based on Parent's allegation of inadequate TVI services, she is without authority to direct District's provision of services in the future beyond the award of compensatory education for the deprivation that was identified. Nevertheless, DPHO will take

the liberty to comment on some of the evidence and argument proffered during the hearing. Instruction in Braille and the use of Braille has been conclusively established as appropriate for Student and has not of record been disputed by District. Hence, it is of concern to this DPHO that the District's Director of Special Services testified that visually impaired students can be provided, apparently all of their special instruction as a generic matter, by a teacher certified only in special education. Tr. 657 Her opinion was without regard for a given student's individual needs or a given special education teacher's knowledge of expanded core curriculum of compensatory skills. She added, "I think it – it would be nice to have a certified TVI teacher." Tr. 657, l. 3-4

District also suggested that "Instruction in Braille is but a small part of what the education program might need to be for a blind child." Tr. 1010 Without citation to authority although specifically asked to provide authority, District further argued that Braille instruction is an ancillary service. Referring District to 34 C.F.R §300.39 which defines special education to mean specially designed instruction which is further defined at 34 C.F.R. §300.39(b)(3):

Specially designed instruction means adapting, as appropriate to the needs of an eligible child under this part, the content, methodology, or delivery of instruction –

- (i) To address the unique needs of the child that result from the child's disability; and
- (ii) To ensure access of the child to the general curriculum, so that the child can meet the educational standards within the jurisdiction of the public agency that apply to all children.

District is also referred to the U.S. Department of Education guidelines cited herein. An expanded core curriculum of compensatory skills is widely, if not universally, recognized for the successful education of blind and visually impaired children. Braille instruction is the cornerstone of that expanded core curriculum. District would be well advised to reconsider the approach to education of the visually impaired expressed above. Even though Student has progressed and improved his Braille fluency while in District's program, he is still two years below grade and the evidence established that this fact is impacting his access to the academic curriculum. A cavalier attitude toward the services required to meet his needs could prove costly to both Student and the District.

### *Conclusions of Law*

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A).
2. The burden of proof, by a preponderance of the evidence, rests with Parent, the party challenging the IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) 2005.SCT.0000166 VersusLaw.com.
3. This proceeding has complied with all procedural safeguards required by IDEA, its implementing regulations, and the New Mexico Special Education Rules.
4. This decision is timely if delivered to NMPED and the parties on March 15, 2013.
5. Student is eligible for special education and related services as visually impaired. 34 CFR § 300.8 (a) and (c) (13); Jt. Stip. 1.
6. The fact that VI Teacher and Student's fourth grade intern TVI were not licensed TVIs did not deprive Student of FAPE.
7. Whether Student's IEP conferred more than *di minimis* educational benefit determines the presence, or lack thereof, of FAPE, not the relative qualifications or skill of the teacher employed to implement the IEP.
8. Parent failed to prove by a preponderance of the evidence that District's educational program and services conferred less than *di minimis* educational benefit or that Student did not progress in the curriculum during fourth grade.
9. Parent failed to prove by a preponderance of the evidence that District failed to implement a substantial and material element of the Student's IEP during fourth grade other than the omission of O&M services for which he has already received compensatory services.
10. Parent did not meet her burden of proving that the District failed to provide Student a FAPE in fourth grade.
11. District failed to provide Student with ESY services in the summer of 2011 which deprived Student of FAPE.

12. Parent failed to prove by a preponderance of the evidence that the IEP team's decision to provide 20 hours of TVI services rather 23 hours as recommended by VI Teacher and her mentor deprived Student of FAPE.
13. VI Teacher's alleged failure to deliver all the TVI service hours prescribed in Student's fifth and sixth grade IEPs did not constitute a failure to implement a substantial and material element of Student's IEPs.
14. Providing Student O&M services in blocks of time larger than one hour and in increments of less than once a week did not deprive Student of FAPE.
15. Parent failed to prove by a preponderance of the evidence that Student was deprived of FAPE during the 2011-2012 regular school year.
16. District's failure to provide Student with six weeks of ESY services and its unreasonable delay in arranging for ESY services in the summer of 2012 deprived Student of FAPE.
17. District's failure to provide Student with O&M services in the fall of 2012 deprived Student of FAPE.
18. Other than the failure to provide O&M services, Parent failed to prove by preponderance of the evidence that the educational program and services provided by District in the fall of 2012 deprived Student of FAPE.
19. Parent failed to prove by a preponderance of the evidence that Student was deprived of a FAPE due to the District's inability or failure to provide all of Student's classroom books in Braille.
20. District's failure to include goals and objectives for O&M services in Student's IEPs was a procedural error that did not rise to the level of a deprivation of FAPE.
21. Parent failed to prove by a preponderance of the evidence that District's reevaluation of Student on November 9, 2011, was not timely or not sufficiently comprehensive.

22. Parent proved by a preponderance of the evidence that Student is entitled to appropriate compensatory education to remedy the deprivation of FAPE due to District's failure to provide ESY and O&M services.

**ORDER**

IT IS HEREBY ORDERED that District will provide Student with compensatory education in the form of comprehensive summer programming consistent with the provisions of this Final Decision.

Any party aggrieved by this decision has the right to bring a civil action in a state or federal district court pursuant to 20 U.S.C. §1415(i) and 34 CFR §300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party. 6.31.2.13.I(25) NMAC.

  
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Barbara Albin  
Impartial Due Process Hearing Officer

**CERTIFICATION**

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via electronic mail to the following persons this 15<sup>th</sup> day of March 2013:

Debra Poulin, Esq.; 440 Cerrillos Road, Suite 4; Santa Fe, NM 87501.

Jacquelyn Archuleta-Staehlin, Esq. of Cuddy & McCarthy, LLP; P. O. Box 4160; Santa Fe, NM 87502

Hanna Skandera, Secretary of Education, New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, NM 87501-2786.

  
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Barbara Albin