

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

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 1011-33

**FINAL DECISION
(with Clerical Corrections)**

Statement of Proceedings

Parents filed a Request for Due Process Hearing Against the Local Educational Agency ("Request") with the New Mexico Public Education Department ("NMPED") on March 24, 2011, alleging that District denied their son a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA") 20 U.S.C. §§ 1400 et seq. (which took effect July 1, 2005) and implementing state rules (6.31.2 et seq. NMAC, effective June 29, 2007, and amended through December 31, 2009) and federal regulations (34 C.F.R. Part 300, effective August 14, 2006, and amended through December 1, 2008).

The mandated resolution session was not timely conducted having been held on the last day of the 30-day suspension of the due process timeline thus substantially curtailing the opportunity to explore settlement. There was no suggestion or evidence that District was unable to obtain the participation of Parents in a resolution session. The only prehearing motion was submitted by the District seeking to compel Parents to release Student's private mental health records. This motion was denied by Order entered May 12, 2011. The parties were unable to complete the hearing on the merits as projected. The parties indicated they would explore settlement during the ensuing two week recess. The hearing reconvened for one more day for presentation of the District's case. District's request to keep the record open beyond that date to take the testimony of one more witness that had been available during the initial week of hearing was denied. Tr. 1453-1456.

District requested an initial extension of the 45-day due process timeline, without objection from Parents. The expansion and recess of the hearing and post hearing work conflicts necessitated granting

further extension requests and this decision is timely filed if delivered to NMPED and the parties no later than August 1, 2011.

The due process hearing was held May 23-27 and June 14, 2011. One or both Parents were present throughout and represented by counsel. One of District's Directors of Special Education was intermittently present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. The parties timely submitted a Statement of Stipulated Facts as required by 6.31.2.13(I)(14) NMAC. Exhibits offered by Parent were identified by numbers. District's single exhibit was identified by a letter. Joint exhibits were identified by double letters. Page numbers on all exhibits refer to the pagination in the 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 at the prehearing conference of the parties' claims and defenses, the DPHO identified the following specific issues to be determined at the due process hearing in the Summary of Prehearing Conference of record at April 26, 2011, and modified of record on May 6, 2011.

1. Whether the District was obligated to evaluate Student during the 2009-2010 school year.
2. Whether the District's decision to exit Student from special education in February 2010 was appropriate.
3. Whether District provided Student with appropriate special education and/or related services in all areas of need during the 2009-2010 school year.
4. Whether District inappropriately relied on Parents to assist in managing Student at school and providing instruction at home during both school years in question and, if so, whether such reliance amounted to a deprivation of FAPE.
5. Whether the evaluation done of Student in December 2010 was timely conducted.

6. Whether the evaluation done of Student in December was sufficiently comprehensive to address all of Student's alleged areas of disability and need.
7. Whether District is required by IDEA to provide staff for instruction and evaluation with expertise in Autism and, if so, whether it did so.
8. Whether District provided Student with appropriate special education and/or related services in all areas of need during the 2010-2011 school year.
9. Whether District required Parents to obtain outside services or service providers for Student that should have been provided by District as FAPE.
10. Whether District has adequately provided Student with access to the general education curriculum.
11. Whether the individualized educational program ("IEP") developed for Student in January 2011 was reasonably calculated to enable Student, with his disability and individual needs, to receive educational benefit.
12. Whether the District timely conducted the functional behavior assessment ("FBA") called for in Student's IEP and whether the goals identified therein, specifically to have Student attend school 4.25 hours per week, were inadequate in the context of least restrictive environment.
13. Whether District is obligated to provide assistive technology and other approaches to delivering curriculum to Student in the home in order to confer FAPE.
14. Whether Parents' conduct has interfered with District's ability to provide Student with FAPE.

Summary of Essential Evidence

The testimony of 20 witnesses was received and 51 exhibits were admitted into evidence during five and a half days of hearing. The witnesses heard were Parents; Parents housekeeper; three of Student's regular education teachers; Student's Home Hospital teacher; the Home Hospital Supervisor; Student's special education teacher; the middle school Head Special Education Teacher; two District Speech and Language Pathologists ("SLP"); the middle school Nurse; the middle school Counselor; the District's Educational Diagnostician; the District's school psychologist; the District's Executive Director of Instruction and Accountability; Student's treating psychiatrist; Parents' clinical psychologist; and a psychologist from the UNM Center for Development and Disability. The following is a summary of the evidence 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 Statement of Stipulated Facts by “SSF No. ____.”

Student was 11 years old at the time of the hearing and enrolled in sixth grade at his neighborhood middle school administered by District. (SSF No. 1 and 2) Prior to that, he attended his neighborhood elementary school since kindergarten. (SSF No. 3; Tr. 1172-3) The period under review in these proceedings commences two years prior to the date Parents’ request was entered on March 24, 2009, which falls in the spring of Student’s fourth grade school year.

At that time, Student was receiving speech and language services pursuant to an IEP for impaired articulation. 34 C.F.R. §300.8(c)(11) He was placed in a fourth grade general education classroom and pulled out for small group therapy with the SLP. District provided two thirty-minute sessions per week throughout third and part of fourth grade finding him eligible in May of second grade. Ex. 2, pp. 2-14. At the IEP meeting held March 19, 2009, that service was reduced to one 30-minute session per week in anticipation of him “graduating” from speech therapy at the next annual review. Ex. EE. The only accommodations expected of the general education teacher was to help Student make up for any work he missed while in pull-out (Tr. 1398) and to allow Student extra time for oral response (Ex. EE, p. 8).

Student was exited from speech therapy on February 17, 2010. Ex. GG. There were three IEPs developed to address Student’s impaired articulation: May 4, 2007 (Ex. BB); April 10, 2008 (Ex. 26) and, as noted above, March 19, 2009 (Ex. EE). The annual goal in each was that Student would produce the target sounds with 90% accuracy during speech therapy sessions and in the classroom. All three IEPs provide that Student’s progress will be evaluated by the therapist’s session notes. Ex. BB, p. 4; Ex. 26, p. 4; Ex. EE, p. 3. The SLP explained that Student’s performance and progress were measured and evaluated at each session; that her session notes comprise a performance evaluation and such evaluation was sufficient to provide the information needed for Student’s reevaluation and ultimate exit from special education. Ex. 2; Tr. 40-41 and 66-71. In addition to the therapy sessions, the SLP would also observe

Student's articulation in the cafeteria (Tr. 42) but it is undisputed that the SLP did not observe or otherwise rate Student's articulation in the classroom. It is also undisputed that no standardized test was administered to Student on reevaluation prior to exiting special education. Tr. 40.

Since at least November 3, 2010, Student has been under the care of the psychiatrist, who appeared at the due process hearing, for the treatment of generalized anxiety and panic disorder with agoraphobia that has, according to his doctor, rendered Student "almost completely homebound, barely able to leave home for medical/therapy appts." Ex. KK, pp. 25-26; Ex. 10, p.41. The psychiatrist described Student's disorder as very severe or extreme anxiety and he is working to manage multiple anti-anxiety medications. *Id.*; Ex. HH, p. 4; Tr. 471-475, 491. Student's previous psychiatrist had prescribed anti-depressants that were found to make Student worse and were discontinued. Tr. 474. Student has also received counseling from privately engaged therapists off and on for his anxiety-related behaviors since first grade. Ex. WW, p. 2.

The primary and most relevant component or symptom of Student's anxiety is what has been euphemistically referred to as school refusal. Parents are divorced and Student lives with his Mother, however, Father as often as he can makes himself available to help get Student to school in the mornings. The behavior starts at home with Student's uncontrollable crying and screaming at the suggestion to leave for school and continues with flailing arms and legs and grabbing fixed objects to resist being carried or forcibly removed from the house. Ex. 24; Ex. MM, p. 4; Ex. LL, p. 9; Tr. 841-842; Tr. 1070-1072; Housekeeper and Parents' testimony generally, Vol. 4. These persistent physical struggles easily explain the disheveled appearance described by the fourth grade teacher and others for both Student and his Mother. Ex. WW, p. 5; Tr. 1343 and 1445. Parents have been physically forcing Student to go to school since Kindergarten. Ex. WW, p. 2. When Parents are unable to overcome Student's resistance, he misses school. This, coupled with typical childhood illnesses, has resulted in absenteeism that averaged 40 to 50 days per year throughout elementary school. Ex. XX, p. 14; Ex. YY, p. 4; Ex. UU.

Once at school, Student's physical resistance continued, including on at least one occasion holding onto the door frame to resist entering the classroom; on other occasions, refusing to get out of the car at all. Tr. 1407-1408. Sometimes Student was delivered to the principal's office rather than the classroom in an effort to calm him down enough to join his class. Tr. 1404 and 1406. Other symptoms of Student's anxiety are and were somatic complaints, in particular stomachache and nausea (Ex. QQ); crying (Tr. 1400-1403); attachment to Mother inappropriate to age (Tr. 849-850); and frequent retreats from the classroom to the restroom or administrative offices (nurse, principal or counselor) (Ex. QQ; Tr. 1390).

The impact on Student's ability to learn and access education was apparent throughout the record but will be examined in detail only from third grade forward. The third grade teacher noted Student's excessive absences in her comments on his report card. She also opined that Student needed to do more work at home asking that he practice both math problems and spelling. Her last comment read, "[Student] continues to need help with social aspects of attending school. Attendance continued to be a concern." Ex. SS, p. 4. During one of several visits to the school nurse with somatic complaints that year, the nurse noted "ongoing anxiety issues with school," and went on to describe the discussion with Student intended to sooth his anxiety and allow him to return to class. Ex. QQ, p. 6.

The fourth grade teacher tried to anticipate Student's problems by getting detailed information from Student's third grade teacher. In particular, she addressed the difficulty Student had separating from his Mother when delivered directly to the classroom. This was apparently the fourth grade teacher's practice generally rather than a tactic employed solely to address this problem but she had all her students line up in the courtyard and wait there till she escorted them into the building. Tr. 1360. By this method, Mother did not come into the classroom with her son. The teacher claimed this change made the separation go smoothly and that Student did not cry in her class once throughout the year. Tr. 1324-1326, 1355 and 1359. She further claimed that the only anxiety she observed was Student being worried about his Mother which she handled by redirecting his attention. Tr. 1354 and 1356. She also claimed that she

“never” received any of the make up work sent home for Student. Tr. 1347-1348. This testimony is frankly less than credible in light of the teacher’s overall perspective and the record as a whole.¹

In stark contrast to the record as a whole, this teacher apparently dismissed the already well-recognized school-related anxiety and suggested Student’s Mother was keeping him home for personal reasons to the point she sought permission to report the family to this state’s child welfare agency for neglect but was told that the absenteeism was being handled by the administration. She still displayed little sympathy for the situation when a significant number of Student’s absences in the second trimester were incurred for a tonsillectomy and pneumonia. Tr. 1339-1343.

Nevertheless, the impact of Student’s absenteeism in the fourth grade was apparent. The teacher’s message on his report card for the first trimester read, “He needs to make sure that he attends school regularly so that he is able to fulfill his class-work responsibilities.” Student missed so much time in the second trimester that the comment read, “Due to extreme absences, it is impossible to evaluate [Student] in these areas.” Ex. SS, p. 5. She and the principal ultimately decided to abandon having Student make up the class work for the second trimester, relying on the fact that Student “showed growth” on school wide testing. By letter dated March 2, 2009, from the fourth grade teacher, Parents were told that the District would “just have [Student] continue from this point on until the end of the school year.” She added, “It is imperative that he attend regularly this trimester so that he will not fall behind and alternative options need to be considered.” Ex. DD. He still missed 11 days in the third trimester. He was promoted to the fifth grade with the teacher’s warning that he needed to work on his math facts and continue to read during the summer. Ex. SS, p. 5. Teacher noted Student to be weak in fourth grade division which was attributed to missing so much of the work in multiplication. Tr. 1353.

Student’s fifth grade teacher more fully appreciated Student’s disabling anxiety. This teacher generally described a good deal of effort spent just keeping Student in class. See fifth grade teacher’s testimony generally at Tr. 1378-1452. The fifth grade classroom was located at the back of the campus

¹ For instance, the fifth grade teacher reported that Student “always caught up his work,” (Tr. 1384-1385) and described Student’s difficulty controlling crying in the classroom. Tr. 1400-1403.

and the teacher observed that Student would build up a lot of anxious anticipation on the long walk through the building, often being side tracked at the principal's office to calm down. Tr. 1404-1405. To solve this problem, the fifth grade teacher got permission from the principal for Mother to park in the rear of the campus, much closer to the classroom without going through the building. Tr. 1405. Their mutual goal was for Mother to be able to just drop Student off for school but that never happened. Tr. 1410. This teacher also collaborated with Mother to give Student rewards for attendance with some but minimal success. Tr. 1409.²

Academically, the fifth grade teacher reported that Student had to be watched carefully in the classroom and prompted to keep busy when working independently or he would get distracted watching the clock and getting what she called that "I want to go home" feeling. Tr. 1389-1390. She worked with him one-on-one frequently to help him with material he missed during absences and found that he worked well in that setting. Tr. 1384, 1444. She also observed him to work well in small groups. Tr. 1388. She described Student as a smart, hard worker but she and Student were always under the pressure of catching up. Tr. 1414. Her sole comment on Student's report card read, "[Student] is a very hard worker. It seems to be difficult for him to keep up. His absences are a very big factor, especially with classroom responsibilities." Ex. SS, p. 6. She believed that the absences affected both his academics and his ability to bond with other students. Tr. 1413-1414. She consistently described his grades as "nearing proficient" and explained that meant he was below grade level but "not falling way behind." Tr. 1385-1386, 1388, 1415. She believed Student "could have done a lot better" and needed tutoring. Tr. 1415. Her testimony was that she offered to do that but Mother did not recall receiving such an offer. Tr. 1415, 1245. She also suggested the Parents consider private school. Tr. 1439.

As early as third grade, the District responded to Student's situation by submitting his "case" to the Health and Wellness Team ("H & W"). Both the fourth and fifth grade teachers refer to meeting with

² The entries in the nursing office records tailed off significantly in fourth and fifth grade because the teachers were instructed to send Student to the principal's office for his somatic complaints so the principal could encourage him to stay in class. Ex. QQ; Tr. 224, 1432.

the “wellness committee” which is presumed to be the same thing but the only documents reflecting such meetings of record come from the third grade. Ex. CC. This team appears to be a standing committee with fixed membership whose function was not explained in the record. The documents contain a brief description of Student’s problems and a few of his strengths and then lists a number of recommendations all directed at the Parents save one lone suggestion that the teacher be “gentler with him.” Ex. CC, p. 2. When the team returned for a second meeting, Mother reported that Parents had arranged for Student to work with a new counselor on his anxiety using “anxiety cognitive techniques.” The team noted that, “Teacher says it’s gotten quite dramatic. Relieved to find out about counseling.” Ex. CC, p. 5. As described above, the principal was well aware of Student’s extreme situation. Furthermore, Mother raised her concerns about Student’s difficulties with school attendance at every IEP meeting held for speech therapy, asking that improved attendance be a goal. Ex. BB, p. 2; Ex. 26, p. 2; Ex. EE, p. 2.

Both the fourth and fifth grade teachers did not believe that it was appropriate to refer Student for special education unless the child was failing academically and both thought the emotional component was being handled by the principal and school counselor. Tr. 1351-1354, 1429-1430. The fifth grade teacher explained, “My understanding of referring them to special ed would be because they were lacking, really, really lacking, beyond or behind grade level.” She also used the phrase “totally lacking in his academics.” Tr. 1429. The fourth grade teacher also thought the absences disqualified him from special education, explaining, “. . . one of the first things that gets a prospective student booted out of the system, one of the considerations is excessive absences. So with his absences, he couldn’t have done it, anyway . . .” Tr. 1351.

Nothing was done by the District to transition Student from the elementary setting to the middle school beyond the usual preparation for all fifth grade students. If Student had been identified and had an IEP for his disabling anxiety, a progression IEP would have been held at the end of fifth grade to address his placement in sixth grade. A representative from special education would have attended this IEP to develop an understanding of Student’s needs and help determine the best placement. That person would

act as a bridge between fifth and sixth grades for Student. They specifically would have anticipated his anxiety about the new setting and had him contact one or more of his teachers and tour the campus in advance of school starting. And finally Student's teachers would be notified that he had an IEP before he arrived. Tr. 96-103. Instead, as could be readily predicted (and was predicted by Student's fifth grade teacher³), Student's attempt to embark on middle school failed. Mother described a meltdown on the first day of school for sixth graders which was an orientation day called Jumpstart. Tr. 1181. Student's reaction to this was so severe that Mother took Student to the Children's Psychiatric Hospital where he was assessed but not admitted. Tr. 1185.

The doctor's recommendations were to "continue weekly therapy and medication management. Request an IEP with you [sic] home school." Ex. HH, p. 1. Mother immediately took the written recommendation and her request for an IEP to the middle school's head special education teacher who demanded more information that she provided a few days later. Tr. 113 and 1186. Mother thought she signed a consent to evaluate on August 20, 2010, but there was no form of record for that date. Tr. 1187. The first written consent of record is dated September 22, 2010. Ex. MM, pp. 1-3. Mother's repeated requests for an IEP and this consent were rejected with the explanation that Student had to go through the Student Assistance Team ("SAT") process first. Ex. 7, p. 2; Tr. 114.

The "SAT process" was not convened until October 13, 2010. District did not undertake to evaluate Student until it received a referral from Student's SAT on October 15, 2010. The evaluation was as complete as the District was going to conduct at that point sometime in mid December and interpreted for Parents on January 5, 2011, at the Eligibility Determination Team ("EDT") meeting. Ex. LL. The District characterized this as an expedited evaluation.

³ When asked how Student would do in middle school without the support she was giving him, she answered, in part, "I knew that he would need encouragement to keep going. I was hoping that over the summer, he would mature a little bit more, because he was – he is little. I mean, to me he was little. He was a little boy." Tr. 1436. She added, "So my understanding of [Student] and my knowing [Student], I knew he was going to have problems if they didn't get the help that he needed. Q. Who is "they"? A. His parents." Tr. 1438.

For almost all of these early days of sixth grade, Student was unable to control his anxiety enough to attend school. On the few occasions when Mother could get him to the school, he would rarely make it through the day, spending a lot of time in either the counselor's or the nurse's office. Ex. RR, pp. 1-13; Ex. UU, pp. 31-32; Ex. XX, pp. 3-8; Ex. 7, p. 4. Nurse and Counselor's testimony generally, Vol. 1. The following are a few descriptive comments from his sixth grade teachers: "constantly feeling ill" (Ex. XX, p. 8); "complaining he doesn't feel well or his stomach hurts" "When he is upset he has a very difficult time regaining his composure" (Ex. HH, p. 10); "always ill" (*Id.* at p. 11); "leans over on top of desk crying" (Ex. 30, p. 2). But see also "When he is in class having a 'good day' he participates in class and associates w/ peers." Ex. HH, p. 10.

On October 1, 2010, when Mother reported to the counselor that Student made the statement that he wanted to disappear, the counselor arranged a same-day screening assessment under a suicidal intervention protocol.⁴ Tr. 277. The assessment came back that Student was high risk and this resulted in District developing a suicide intervention plan. Ex. JJ.

After observing Student's extreme anxiety first hand through the month of September and upon Mother receiving a prescription for homebound services from Student's health care provider, the nurse began investigating options for educating Student at home. Ex. RR, pp. 11-16; Tr. 209, 1197-1198. Student was not eligible for homebound services, District's label for specialized instruction conducted in the home (34 C.F.R. §§300.39(a) and 300.115(b)(1)), because he had not yet been evaluated for special education. District maintains a regular education program called Home Hospital ("HH") to deliver instruction to students medically required to be absent from school more than 11 days but expected to return to school in less than four to six weeks. Ex. KK, pp. 5 and 18. The above referenced H & W Team determines whether a student is eligible for these services. Student was initially denied October 6, 2010, because his condition was long-term having impacted him since Kindergarten and therefore unlikely to resolve within the time limit of four to six weeks. Ex. KK, pp. 17-18. H & W reversed its decision on

⁴ The counselor also learned that Student had tried to exit a moving vehicle. Tr. 277.

October 25, 2010, after being convinced that HH was an appropriate intervention while Student underwent diagnostic testing and multi-disciplinary review. Ex. KK, p. 19 (addendum at bottom of page).

Student was officially enrolled in HH and the HH teacher, a regular education teacher, began delivering instruction to Student in the home on October 27, 2010, in four of his sixth grade classes: Language Arts, Social Studies, Math and Language. Classes that required lab work or special equipment (Science, computer class and art) and Physical Education were not addressed. District terminated HH services January 5, 2011, upon Student's eligibility determination even though an IEP was not developed until January 20th. Clearly not grasping the gravity of the situation, the head special education teacher's response when challenged on the lack of services during the period was to say that Student could have come to school and attended his regular education schedule until his IEP was developed. Tr. 170.

In the meantime, Parents obtained a psychological evaluation from the clinical psychologist that was called as one of District's expert witnesses. His report was issued October 19, 2010. Ex. HH, pp. 25-30. In brief summary, he found Student's general cognitive ability to be in the high average range with general working memory and general processing speed being in the average range. Academic skills in reading, mathematics and writing were predominantly in the average range with weakness in math calculation, particularly multiplication and division and written language. He also administered the Autism Spectrum Rating Scales and found that both parents identified Student with a number of behavioral characteristics consistent with possible autism spectrum disorder ("ASD"). District relied on at least the IQ test from this evaluation. Ex. 29.

The District's evaluation also incorporated SL assessment (Ex. 31) and a Psychological Consultation (Ex. WW). District did not include an evaluation for ASD explaining concerns about evaluating in the home and electing to defer until Student was more stable and in the school setting. Ex. YY, p. 3; Tr. 768-771, 787. Evaluation for ASD was not performed although Student underwent the other testing in the school setting in December (Tr. 798-800) and attended school for partial days under his IEP placement during February and March 2011. Tr. 839.

The school psychologist found that Student presents with symptoms of anxiety but has little to no insight into his emotional difficulties. "Due to his lack of insight he also lacks significant coping skills and is emotionally immature. Furthermore, his parents admit that [Student] has learned to 'manipulate' the situation. The combination of these variables appears to undermine his parents' ability to get [Student] to school consistently." Ex. WW, p. 7. She found Student met the criteria for Emotional Disturbance in that he has exhibited inappropriate types of behavior or feelings under normal circumstances and a tendency to develop physical symptoms or fears associated with personal or school problems over a long period of time and to a marked degree. 34 C.F.R. §300.8(c)(4) She recommended that the family continue the private services she understood them to be currently receiving, specifically individual counseling, medication management, behavioral management and social work services and dog therapy, at the family's "choice and responsibility." The only service that she proposed the District might supply was school social work services and recommended a social work assessment. Ex. WW, p. 8.

The school psychologist's core recommendation to address Student's anxiety was that his individual therapist should employ cognitive behavioral therapy. ("CBT") This recommendation was echoed by District's expert witnesses, the treating psychiatrist and the private clinical psychologist (Tr. 564), and Parents' expert clinical psychologist. Tr. 346-347. With the exception of some concern that, at Student's age, he might lack the requisite cognitive development (Tr. 494, 508-509), this recommendation was unanimous among the experts as the evidence-based therapy of choice for the treatment of anxiety generally and for persons with ASD and anxiety. Tr. 346-347, 360-361.

Student's scores on the tests administered for the speech and language evaluation were in the average or above average range of functioning and the SLP concluded that functioning did not negatively impact his ability to function in an academic environment. She further found, "[h]owever, his pragmatic skills appear to significantly negatively impact his ability to function in the general education academic setting." Ex. 31, p. 7.

The diagnostician found that Student had above average cognitive ability and standardized academic scores in reading, math and writing were within the average range. However, some weakness in math calculation and sentence writing was observed that the diagnostician related to Student's pattern of excessive absences since early elementary school. Ex. LL, p. 21. He concluded that Student's evaluation results met the established test criteria for the eligibility of specific learning disability ("SLD") due to a significant discrepancy between ability and achievement in Math calculation and Written Expression. Ex. LL, p. 25-26.

Student's Eligibility Determination Team ("EDT") met on January 5, 2011, and issued an Eligibility Determination Report of the same date. Ex. NN. Student was determined to be SLD with a need for services for the primary eligibility of Emotional Disturbance ("ED"). No secondary eligibility was identified.

An initial IEP was developed for Student by his IEP team on January 20, 2011, based on the eligibility of ED. Ex. OO. Present levels of performance and annual goals were identified for Math and Written Language. Ex. OO, pp. 8-11. The development of a behavioral goal was deferred until completion of a functional behavior assessment and behavior intervention plan which was not scheduled to occur until March 21, 2011. Ex. OO, p. 14. The Summary of Services provided for 4.25 hours per week of special education in a segregated setting and .5 hours of school health. No psychological, speech and language or social work services were offered. Ex. OO, p. 13.

The prior written notice of proposed actions ("PWN") (Ex. OO, pp. 21-22) rejected homebound services because Student "cannot be enrolled in dual programs."⁵ There was no proposal for either psychological or speech and language services. A consult for BMS (which is believed to stand for Behavioral Management Services) was accepted due to "concerns with environmental adjustment." A social work referral was accepted for "social and emotional concerns identified during the initial evaluation process."

⁵ The other "program" in which Student was apparently enrolled was not identified.

Finally, the PWN included no proposal to refer Student to Autism Resource Services or any other entity for evaluation of Student's potential eligibility of Autism. Rather, the following comment was made under the topic "Considerations for the next reevaluation" at page 5 of Exhibit OO:

Due to [Student] not possessing a definitive diagnosis on the Autism Spectrum (ASD) and his Home Hospital placement, it was recommended after consultation with [District] Autism Resource Services that further discussion regarding ASD be deferred until [Student] is more stable and would warrant a reevaluation."

Hence, District's intent regarding evaluation of this suspected disability was unclear.

The IEP did not identify the segregated setting in which these services would be delivered but the District placed Student in the middle school's ED classroom. Both of District's expert witnesses opined that this was not an appropriate setting for Student's severe anxiety and unique needs. Tr. 503-504; 589-590. Immediately after the meeting to determine eligibility, Mother sought advice regarding the determination from the N.M. Disability Rights Organization and conveyed her concerns about the ED eligibility to the diagnostician on January 6, 2011. She expressed her concern specifically that the District would place him in the ED classroom and questioned his ability to succeed there given his fragile state. Ex. 10, p. 10. Even the ED classroom teacher questioned the placement stating, "Perhaps this is not the best placement for him." Ex. 11, pp. 12-13. Again, demonstrating an inability to understand the intensity of Student's disability, the head special education teacher advised the principal on January 26, 2011, "now that we have an IEP in place to deal with attendance, [Student] should be marked unexcused absence if he is not here at school for his one hour per day." Ex. 10, p. 51.

The ED teacher met with Parents on January 27, 2011, but Student did not attend his class until February 7th and he only attended a total of 16 days. The ED classroom had three students full time when Student was added to the roll and one educational aide was assigned full time to the class as a whole. All the students were eligible as ED and older than Student as he was the only sixth grader. Tr. 609. There were behavioral difficulties among the other students and at least one outburst during the brief time Student was there. Tr. 650-651.

Physically, the classroom had a separate, smaller room where Student chose to stay with few exceptions. Tr. 694-695. Except for two days of school wide testing which were the last two days Student attended, Mother remained with Student throughout each session also with few exceptions. Mother complained about the class work provided and the availability of either the teacher or aide. Teacher complained that either Student or Mother rejected most of their efforts to provide academic instruction and Mother interfered with his ability to work with Student. Ex. TT; Ex. 11. Student's last day in attendance was April 6, 2011, a day of testing. Thereafter, Mother reported that Student's anxiety about the testing caused a major regression and she could no longer overcome Student's resistance to school without assistance for fear of injuring Student or herself. She further specifically demanded an educational plan that recognizes and addresses Student's school refusal. Ex. 13. Student received a C for his time in the ED classroom and there does not appear to be any foundation in the record for this grade. Ex. SS, p. 8; Ex. TT.

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 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 necessary or applicable to the issues determined in these proceedings or contradicted or 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 Mother within District's jurisdictional boundaries and has attended District schools at all times relevant to this Request. There is no dispute that District is Student's local educational agency ("LEA").
2. Student's SLP in elementary school was a qualified professional who determined that additional data beyond the performance evaluation was not required to determine whether Student continued

to require therapy for impaired articulation and notified Parents of that determination. Parents did not request an assessment prior to the proposed change in eligibility.

3. Student's teaching staff and the administrative personnel at his elementary school were well informed by at least third grade of Student's disabling anxiety and its impact on Student's attendance and his ability to perform in the classroom when he did make it to school.
4. Student's teaching staff and the administrative personnel at his elementary school were informed that Student was receiving private counseling beginning at least in third grade and observed no improvement in attendance or performance in the subsequent grade levels.
5. District's efforts to manage Student's behaviors during fourth and fifth grades solely in the regular education setting without specialized instruction and related services were inadequate to meet Student's unique needs.
6. Student was in need of specialized instruction and related services throughout fifth grade.
7. It was unreasonable to promote Student to middle school without the foundation of an appropriate IEP directing his placement, specialized instruction and related services.
8. District obtained Mother's written consent to evaluate on September 22, 2010, but did complete and deliver an evaluation to Parents until January 5, 2011, a period that exceeded 60 days.
9. The District used a variety of assessment tools and technically sound instruments that were administered appropriately by trained and knowledgeable personnel.
10. Autism is a suspected disability warranting further assessment due to the screening results reported by Student's private evaluation.
11. District failed, without good cause, to evaluate Student in all suspected disabilities, specifically Autism. Tr. 374-381, 384-388.
12. Student has exhibited inappropriate types of behavior or feelings under normal circumstances and a tendency to develop physical symptoms or fears associated with personal or school problems

over a long period of time and to a marked degree consistent with the disability category of ED.

34 C.F.R. §300.8(c)(4)

13. In light of Student's psychological consultation and the recommendations of Student's evaluators, the IEP developed on January 20, 2011, was not reasonably calculated to confer educational benefit because it failed to provide Student with psychological services.
14. Student was unable to make progress with the services he was provided pursuant to the IEP developed on January 20, 2011, and, in fact, severely regressed in his ability to cope with school anxiety.
15. Parents could not have interfered with District's ability to deliver FAPE because the IEP developed by District was not reasonably calculated to confer FAPE. Prior to second semester sixth grade, District was not attempting to deliver FAPE.
16. Student needs compensatory education to remediate his severe anxiety and school refusal, his academic deficits in Math and Written Expression, his pragmatic speech and the management of his classroom behavior.

Discussion

Student's anxiety disorder has been patently manifested in the school setting since Kindergarten with symptoms observed by District staff as described in the Summary of Essential Evidence above. Exs. LL, pp. 3-4; WW, pp. 2 and 7. Although well known to District staff, Student's disabling anxiety did not drive his educational planning until this most recent school year. And then the District's response was not timely or adequate to meet Student's unique needs therefore depriving him of FAPE. All the issues identified by the parties have been consolidated into three major inquiries: 1) Did District meet its child find obligations to identify and evaluate Student as a child with a disability prior to the 2010-2011 school year? 2) Once identified, did District timely and appropriately evaluate Student? 3) Did District design and deliver an educational program reasonably calculated to confer educational benefit? The answer to all three questions is no.

The Child Find Obligation – Issues 1, 2 and 3

The IDEA is a funding statute. 20 U.S.C. §1411. In order to receive federal funds under this Act, States must meet certain eligibility criteria. 20 U.S.C. §1412. One of these conditions is that the State has in effect policies and procedures which ensure that all children with disabilities residing in the State are identified, located and evaluated. 20 U.S.C. §1412(a)(3). This is known as the child find obligation implicated in Issues 1 through 3. The regulations broaden this responsibility to include identification of children who are suspected of being a child with a disability and in need of special education even though they are advancing from grade to grade. 34 C.F.R. §300.111(c)(1); *Compton Unified School Dist. v. Addison*, 598 F.3d 1181, 54 IDELR 71 (9th Cir. 2010). See also *Cudjoe v. Independent School Dist. No. 12*, 297 F.3d 1058, 37 IDELR 91 (10th Cir. 2002).

This inquiry is intensely fact driven. *Richard S. v. Wissahickon School Dist.*, (Not Precedential) 52 IDELR 245 (3rd Cir. 2009); *Anello v. Indian River School Dist.*, (Not Precedential) 53 IDELR 253 (3rd Cir. 2009); *D. K. v. Abington School Dist.*, 54 IDELR 119 (E.D. Pa. 2010). The evidence adduced in these proceedings, taken as a whole, were sufficient to ascribe a reason to suspect Student was a child with a disability in need of special education thereby triggering District's child find obligations.

Parents' claim that Student was improperly exited from speech therapy is included under this topic because it is based, in part, on the theory that had the District conducted the exit as Parents contend would be proper, Student's disabling anxiety should have been identified and addressed rather than exiting him from special education. On this separate question, the Parents failed to prove by a preponderance of the evidence that Student was improperly exited from speech therapy.

Specifically, Parents failed to show that the District's reliance on the SLP's performance evaluations and the notification of District's intent to exit Student contravened the provisions of 34 C.F.R. §300.305(e) entitled, "Evaluations before change in eligibility" and provides, in pertinent part: "a public agency must evaluate a child with a disability in accordance with Secs. 300.304 through 300.311 before determining that the child is no longer a child with a disability." In regards to reevaluation, the IEP team

and other qualified professionals may, after a review of the available evaluation measures, determine that no additional data are needed upon notification of the child's parents. 34 C.F.R. §300.305(d). In this case, Parents were notified of District's intent to exit in early December. Ex. EE, p. 4; Ex. GG, p. 2. As noted in the Summary of Essential Evidence, the IEP specified evaluation by session notes. Parents had ample opportunity to demand more formal assessment pursuant to 34 C.F.R. §300.305(d)(1)(ii) and (d)(2). There is no evidence of record that either did.

District's defense to this claim, that Student's anxiety and attendance issues did not adversely affect his academic progress, is belied by the results of the evaluation that it ultimately conducted. District's requested findings on this issue direct attention to the sparse evidence in the record, misstate other evidence suggesting a lack of academic impact and ignore all the contrary evidence; in particular, the evidence of all the accommodations and interventions District employed without appreciable effect. To suggest that Student's condition did not meet the definition of a child with a disability warranting the District's attention until he was in serious danger of harming himself in sixth grade is not a position that this hearing officer will endorse. It is acknowledged that there is evidence of record that documents Student performing well on many occasions over the course of fourth and fifth grades and even a few occasions in sixth grade. The unspoken suggestion seems to be that if he can do it on those occasions, he can do it all the time and just chooses not to. That argument simply does not comport with the preponderance of the evidence found in the record as a whole and is rejected.

Timeliness and Adequacy of Evaluation – Issues 5 and 6

District is required to conduct a full and individual initial evaluation in accordance with applicable federal and state regulations before the initial provision of special education and related services. 34 C.F.R. §300.301(a). The evaluation must be completed within 60 days of receiving parental consent for the evaluation. 34 C.F.R. §300.301(c). No time limit can be found in the statute or the regulations for the time that may elapse between the referral for evaluation and the acquisition of parental

consent but it is presumed that the purposes of the IDEA would be frustrated if consent is not sought within a reasonable time.

Mother came in with a request for special education services on the first day of school and did not have an evaluation until the end of the first semester. Remarkably, District characterized this evaluation as an expedited process. Since District failed use the evaluation to develop an appropriate IEP, any denial of FAPE cause by the delay is absorbed in the subsequent deprivation. The delay may actually have extended Student's access to HH which turned out to be the only reliable delivery of the general curriculum that Student received that year.

District is also required to ensure that Student was assessed in all areas of suspected disability. 20 U.S.C. §1414(b)(3)(B). It is undisputed that, as of the hearing, District had not conducted an assessment of Student's potential eligibility for Autism. District's defense to this claim was untenable. On the one hand, District explained that it needed to be able to observe Student in the school setting to get a reliable assessment and assured the hearing officer this would be done when the IEP for ED enabled Student to be "stable" and attend school. This, of course, ignores that the diagnosis of Autism may be critical to inform the content of the IEP necessary to achieve Student's stability in school but it was also discredited by both clinical psychologists. Tr. 384, 597-598. On the other hand, District's examination of its employees and the expert witnesses suggested District's attempt to override the ASD scale results obtained by the clinical psychologist with the employees' opinions that Student did not exhibit what they believed to be characteristics of ASD and rule out an evaluation for Autism at all. That premise was also refuted by Parents' clinical psychologist. Tr. 375-377. It was District's psychologist who administered the scales. Neither of these defenses excuses District's failure to evaluate Student in all areas of suspected disability.

The Obligation to Provide FAPE – Issues 7, 8, and 10 thru 14

States and local school districts receiving federal funds for education must provide all disabled children ages 3 to 21 residing within their boundaries with FAPE. 20 U.S.C. §§ 1412(a)(1)(A). 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.

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, set out the seminal case defining 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 benefits. *Id.* at ¶65. See also *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th 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 typically composed of the student’s parents and educational professionals (20 U.S.C. §1414(d)(1)(B)) who must consider the strengths of the child; the concerns of the parents; the results of the child’s evaluation; and the academic, developmental and functional needs of the child. 20 U.S.C. §1414(d)(3)(a). The IDEA requires that the IEP specify the supports that will be provided for the child “to be involved in and make progress in the general education curriculum . . .” 20 U.S.C. §1414(d)(1)(A)(IV)(bb).

District is further obligated to provide Student with the related services required to assist a child with a disability to benefit from special education. In this case, there are two pertinent related services that the District omitted from Student’s IEP: 1) Psychological services, including psychological counseling for children and parents;” (34 C.F.R. §300.34(c)(10)) 2) Speech-language pathology services which include “Provision of speech and language services for the habilitation or prevention of communicative impairments.” 34 CFR § 300.34(c)(15).

District's defense to the claim that it failed to provide FAPE is that Parents interfered with District's ability to deliver FAPE. First of all, District made no attempt to deliver FAPE to Student until January 20, 2011. All assertions that Parents interfered prior to that date are immaterial and will not be considered further. The thrust of District's defense after implementation of the IEP argues that due to Mother's "seemingly co-dependent"⁶ relationship with her son, she remained in the ED classroom and hindered the staff's instructional efforts. It is undisputed that Mother remained in the classroom the majority of the time. It is also undisputed that she registered her objection to placement in an ED classroom more than two weeks before it was done. There is no reference to the Parents' probable objections in the IEP itself but there is also no mention of the ED classroom placement. Ex. OO. There is credible evidence that Mother inserted herself into the instructional setting and hindered the staff's work. If FAPE was being delivered in that setting, the District might have a credible argument. However, the Student's IEP team failed to develop an educational program that was reasonably calculated to confer FAPE.

Four experts in the diagnosis and treatment of anxiety testified. All four persuaded this fact finder that Student could not reasonably be expected to participate as a student in a classroom setting without appropriate and effective psychotherapy. The Parents' psychologist and the school psychologist were emphatic that CBT is the evidence-based therapy of choice for anxiety in all children. Tr. 347-348, 1032. As noted in the Summary, District's expert witnesses had reservations about Student's maturity but both still unequivocally recommended that CBT be employed. Student's IEP made no provision for psychological services whatsoever. The team did not even follow the school psychologist's lead to at least confirm that Student was indeed receiving the critical component of a reasonable educational plan from his private therapist.

CBT is a psychological treatment that is focused on identifying the thinking patterns and behavior patterns that maintain a disorder and address them through intervention. The focus is to alter the

⁶ A word search of the transcript found the only reference to an alleged co-dependent relationship was in the opening statement of counsel for the District.

dysfunctional thinking styles and build new strategies for managing behavior to stop the avoidance behaviors. Tr. 347. Both the Parents' clinical psychologist and the school psychologist testified at length regarding how they administer the treatment and how the diagnosis of Autism can require certain adjustments. Their testimony will be relied upon in fashioning a remedy. See generally Martins testimony, Vol. 2; Davidson testimony, Vols. 3 and 4.

The IEP team also failed to address the SLP's finding that Student's pragmatic language skills significantly negatively impact his ability to function in the general education academic setting. It is also notable that Student performed well in the small group setting employed to deliver his speech therapy previously. There was no provision in Student's IEP for speech and language services to address this identified deficit.

Issues 4 and 9

A brief comment is included here on the other two issues raised by Parents that censure District for allegedly relying on Parents to assist in Student's education both at home and in school and allegedly requiring Parents to acquire related services from outside sources, respectively. Collectively, these issues arise out of the course Student's disability and Parents' relationship with the District have taken over the years. It can certainly be understood that Parents could conclude that if they did not do these things, they would not get done. And, there is no question that District staff have consistently encouraged and helped the family to find and utilize sources other than the District for many services. And, finally, there is no question that District has used the existence of the outside services to shirk its responsibilities. But Parents did not meet their burden of proving by a preponderance of the evidence that District required the acquisition of outside services or inappropriately relied on them. On issue no. 4, the greater weight of the evidence was that District staff would prefer Student's presence in school, receiving instruction there; and the staff's consistent goal was to reduce Student's dependence on his Parents. District just failed to provide the special education supports necessary to accomplish that.

Remedy

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 (10th 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.*

Student’s teachers and administrative staff in elementary school clearly acknowledged that Student was in need of assistance and made limited and ineffectual efforts to improve Student’s attendance. However, just as clearly, District has deprived Student of a FAPE by consistently failing to evaluate and address the underlying anxiety that causes the absenteeism. Parents have asked for a finding that Student was deprived of FAPE from February 17, 2010, the date Student was exited from speech therapy to January 5, 2011, the date District determined Student was eligible as ED, a period of approximately 30 regular year school weeks, based on District’s failure to exercise its child find obligations. This DPHO will acknowledge that finding but will rely on the evidence adduced in the hearing in the attempt to fashion an award of compensatory education that will secure Student’s right to FAPE denied by District’s three deprivations: 1) failure to meet its child find obligations to Student in fifth grade; 2) failing to timely evaluate Student in all areas of suspected disability; and 3) District’s failure to develop and implement an IEP reasonably calculated to confer educational benefit.

Parents seek an order requiring the District to contract with the University of New Mexico Center for Development and Disability (“UNM CDD”) to assess Student for Autism, and assuming he is determined to be Autistic, to retain the services of a particular member of the UNM CDD staff to take over management of Student’s educational program and deliver the psychological services. If he is not found to be Autistic, Parents seek an order requiring the District to contract with whatever independent

provider the UNM CDD recommends to similarly take over management of Student's educational program and provide psychological services. This request is denied.

The District must immediately convene an IEP meeting to develop an appropriate educational program for Student. Given the long standing acrimony between District and Parents, District will obtain the assistance of an IEP facilitator. Parents must agree to the facilitator chosen for this purpose. The facilitator so chosen must be retained to facilitate all IEP meetings conducted for Student for a period of one year from the date of initial facilitated IEP ordered by this Decision. District shall respond promptly to convene an IEP at the request of any IEP team member, including Parents, to review, correct or change the provisions of the IEP. All costs of the facilitator shall be borne by the District. If the parties cannot agree to the selection of the facilitator, they shall immediately submit the dispute to NMPED for resolution by mediation or, in the alternative, the parties may submit the dispute to binding arbitration at the District's expense.

If the District has not already acted on its expressed intent, it will immediately conduct an appropriate assessment or evaluation of Student for eligibility in the disability category of Autism. Because District has known of the need for this evaluation since October 2010, it will be in violation of the terms of this Final Decision if the evaluation is not complete within thirty (30) days of the date this Decision is entered.

Unless the custodial Parent or the Parent with court-ordered authority to make educational decisions for Student consents in writing to any specific alternatives proposed by the IEP team, the educational program developed for Student shall, at a minimum contain the following special instruction and related services. To the extent any of these services exceed what Student's IEP team deems to be an appropriate educational program for Student, they are to be considered compensatory education to which Student is entitled under this Decision. This Final Decision does not prohibit the IEP team from providing specialized instruction or related services in addition to those identified herein.

1. One-on-one instruction with a certified special education teacher ("SE Teacher") to provide Student with specially designed instruction to afford Student access to the

general curriculum and remediate his deficits in Math and Written expression for a minimum of two hours per day, five days per regular school week. This level of service can be increased as Student can tolerate to a maximum of 3.5 hours per day, however, any increase above the minimum two hours per day must be to instruct Student in academics rather than allowing Student to self-select non-academic activities. The curriculum content and grade level which the SE Teacher will deliver will be determined by the SE Teacher after appropriate instructional screening and upon consultation with Student's IEP team. The instruction will be delivered in a quiet, easily accessed setting with readily available restroom facilities whenever Student's doctor permits his attendance and Student can be safely transported to the setting. Otherwise, it will be delivered in the home. This one-on-one instruction will be available to Student through the first semester of 2011-2012.

2. Direct, individual psychological services providing Student with an appropriate psychotherapy plan to include at least the following components:
 - a. If the services cannot be delivered by the school psychologist who appeared at due process, the designated psychologist must have equivalent or greater training and experience with CBT, including treating children with anxiety and ASD. If a properly trained and experienced psychologist is not available on staff, District must acquire the equivalent, appropriate services from a non-District source.
 - b. Initial parent training on tools and strategies necessary to provide home support for CBT for a minimum of two one hour sessions.
 - c. A minimum of two hours per week, in two or more sessions per week at the discretion of the psychologist, of individual CBT and an additional two hours per month of indirect services to assist Student's teacher and Parents to effectively support CBT.
 - d. An interim parent training approximately one to two weeks after individual CBT has been initiated for a minimum of one hour which is not included in the monthly allotment of indirect services. Additional one hour interim parent trainings can be delivered as the psychologist deems necessary and appropriate.
 - e. After the completion of six weeks, including make up sessions for any sessions missed due to Student's disability, service can be reduced to one hour individual per

week and one hour per month of indirect, but only if in the considered opinion of the psychologist such reduction is appropriate.

- f. Once reduced to one hour per week, that level of individual service must continue for a minimum of ten weeks. Thereafter, service can be reduced to three hours per month combination individual and indirect as appropriate in the opinion of the psychologist but only if in the considered opinion of the psychologist such reduction is appropriate. Once so reduced, services must continue at that level for a minimum of one year.
 - g. Because Student's school refusal begins in the home at the suggestion to go to school and manifests as a physical resistance to leaving the home and attempts to escape during transport, CBT must include addressing school refusal-related aversives in the home and on the route to school.
 - h. Conducting a FBA and development of a behavior intervention plan should be deferred until accurate information regarding Student's disability can be derived from the CBT.
3. Once Student is able to reliably attend his one-on-one instruction away from home, District will provide Student with speech-language pathology services in a school-based setting to consist of a minimum of 1.5 hours per week small group therapy (no more than four students total) in two 45 minute sessions and another one half hour per week direct, individual therapy to remediate Student's deficits in pragmatic skills and any residual articulation impairment. The SLP is encouraged to evaluate Student to inform the content of the therapy and to determine if additional services are required but the service level of 1.5 hours per week small group therapy and one half hour per week of individual is mandated by this Decision for a minimum of one year from the date the service commences.
4. If Student's CBT has progressed sufficiently in the opinion of the psychologist and Student's IEP team by the end of first nine-weeks of the fall semester, Student's enrollment in the nine-week elective course Info Tech 6 for the second nine weeks of the fall semester should be considered.
5. If Student's CBT has progressed sufficiently in the opinion of the psychologist and Student's IEP team by the winter break, Student's enrollment in an appropriate segregated small classroom setting with a very low pupil to teacher ratio should be

considered. The ED classroom is not an appropriate setting for Student. If Student has been found ineligible for the disability category of Autism, but one of the middle school's Autism classrooms is appropriate to meet his needs, Student's eligibility classification cannot be used to deny him enrollment in the appropriate placement.

6. If Student's CBT has not progressed sufficiently to support Student's enrollment in the small classroom setting in the second semester, the one-on-one instruction by the SE Teacher will continue on the same basis as mandated for the first semester of 2011-2012. In that event, enrollment in the semester long elective course Info Tech 7 should be considered for second semester.
7. If Student has not been able to achieve completion of seventh grade level general curriculum through the end of the year, District will provide Student with another six weeks of SE Teacher instruction on the same basis in the summer of 2012.
8. If Student has not already been enrolled in a small classroom setting, such enrollment should be considered for the Fall 2012.
9. It is assumed that the District will assign a case manager to handle Student's services. If so, the middle school head special education teacher that appeared before this DPHO cannot be given the responsibility of Student's case management or used to provide Student or the family with any special education services without the written consent of the Parent. If consent is given, Parent has the right to withdraw that consent at any time he or she believes it is in the best interest of Student to do so.
10. The personnel selected to provide these mandated services and any other personnel providing services to Student will coordinate their efforts between each other by conferring at least once a month to be sure their services are complementary.

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 Parents. *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 August 1, 2011.

5. Parents failed to prove by a preponderance of the evidence that District improperly exited Student from special education services to address his impaired articulation in February 2010.
6. Parents proved by a preponderance of the evidence that District knew or should have suspected that Student might be a child with a disability in need of special education throughout the 2009-2010 school year and that District's failure to identify and evaluate Student deprived him of FAPE.
7. The absence of a comprehensive evaluation for special education eligibility prior to the referral by Student's SAT team in October 2010, deprived Student of FAPE.
8. District violated its child find obligations with respect to Student.
9. Parents proved by a preponderance of the evidence that District's evaluation was not timely conducted in violation of 20 U.S.C. §1414(a)(1)(C).
10. Parents proved by a preponderance of the evidence that the District failed to ensure that Student was assessed in all areas of suspected disability in violation of 20 U.S.C. §1414(b)(3)(B).
11. Student is qualified and eligible for special education and related services as ED. 34 C.F.R. §300.8(a) and (c)(4).
12. Parents proved by a preponderance of the evidence that the IEP developed on January 20, 2011, deprived Student of FAPE.
13. Student is entitled to compensatory education to replace the special education and related services District failed to provide and to secure Student's right to FAPE.

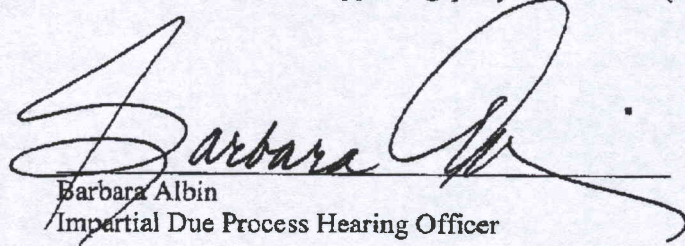
ORDER

IT IS HEREBY ORDERED as follows:

1. District will immediately convene a facilitated IEP consistent with the provisions of this Decision.

2. District will ensure that Student's IEP includes specialized instruction and related services consistent with the provisions of this Decision.
3. District will provide Student with compensatory services consistent with the provisions of this 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 C.F.R. §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.


Barbara Albin
Impartial Due Process Hearing Officer

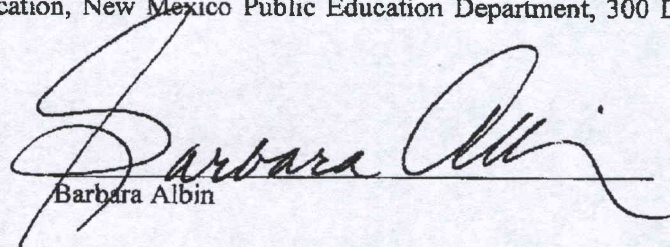
CERTIFICATION

I, Barbara Albin, certify that a copy of the foregoing corrected decision was transmitted via electronic mail to the following persons this 25th day of August, 2011:

Gail Stewart, Esq.; 1400 Central SE, Suite 3300; Albuquerque, NM 87106 and Tara Ford, Esq.; 3201 Fourth Street NW; Albuquerque, NM 87107.

Michael J. Carrico, Esq. and Dahlia R. Dorman, Esq. of Modrall Sperling Roehl Harris & Sisk, P.A.; P. O. Box 2168; Albuquerque, NM 87103-2168.

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


Barbara Albin