

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

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

**Case Number: NMPED DPH 1112-29**

**FINAL DECISION**

*Statement of Proceedings*

Student filed a Due Process Hearing Notice (“Complaint”) with the New Mexico Public Education Department (“NMPED”) on April 26, 2012, and amended that Complaint on August 16, 2012, alleging that District denied him 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 rules (6.31.2 et seq. NMAC, effective June 29, 2007 amended through February 29, 2012) and federal regulations (34 CFR Part 300, effective August 14, 2006, and amended through December 1, 2008).

District did not challenge the sufficiency of the Complaint and, in spite of two extensions of the deadline and the amendment of the Complaint taking the suspension of the timeline through the summer, the parties’ attempt to negotiate a settlement failed. No substantive prehearing motions were submitted by either party. Two discovery motions resulted in Orders to Compel entered on October 5 and October 15, 2012. A Motion for Leave to File Second Amended Due Process Hearing Request was withdrawn. A Motion to Amend District Proposed Post Hearing Findings and Conclusions was denied by electronic mail dated December 14, 2012. The order allowing the amended Complaint set the two year statutory period under review to begin August 16, 2010. Several requests to extend the deadline within which a decision must be entered, including two due solely to scheduling conflicts and time constraints of the DPHO, were granted over the Student’s objection and this Decision is timely filed if delivered to NMPED and the parties no later than January 18, 2013.

The due process hearing was held October 22-26, and October 30, 2012. Student attended only briefly for a demonstration and brief testimony having executed an unchallenged power of attorney allowing his Parents to make all educational decisions for him. Father attended only to provide testimony through an interpreter. Mother spoke English, attended throughout the hearing and was represented by counsel. The District's Director of Special Education was intermittently present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Student were identified by numbers. District exhibits were lettered. Joint exhibits were identified by numbers preceded by the letter J. 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 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 September 7, 2012.

1. Whether appropriate Health Care Plans were timely developed and implemented for Student for the 2010-2011 and 2011-2012 school years.
2. Whether Student received the required 1:1 assistant during the beginning of the 2010-2011 school year.
3. Whether District was obligated to provide homebound or other educational services in the home when Student was absent if not requested of the IEP team.

4. Whether the individualized education programs (“IEP”) developed for Student for the 2010-2011 and 2011-2012 school years were sufficient to confer FAPE generally and in particular for addressing transition and graduation plans.
5. Whether Student was educated to the maximum extent appropriate with children who are nondisabled.
6. Whether Student was afforded an opportunity to participate in a physical education program.
7. Whether the transportation services offered by the District were adequate to assist Student to benefit from special education.
8. Whether District failed to deliver all the related services of occupational therapy, physical therapy and speech and language therapy required by Student’s IEPs and, if so, whether Student is entitled to compensatory education. In a related question, whether District is obligated to make up related services sessions missed when Student is absent due to his disabilities.
9. Whether District offered Student extended school year services for the summer of 2011 and 2012.
10. Whether District kept Student’s parents adequately informed regarding the provision of related services.
11. Whether District adequately addressed Student’s behavioral issues and, if not, whether District was required under the IDEA to conduct a functional behavior assessment (“FBA”) or develop a behavioral intervention plan (“BIP”).

In relief, Student seeks a final decision determining that District’s actions and omissions constitute substantive and procedural violations of IDEA and an Order directing the District to provide appropriate services and compensatory education. District asks that the DPHO dismiss Student’s Complaint

### *Summary of Essential Evidence*

The testimony of 17 witnesses was received and 69 exhibits were admitted into evidence during six days of hearing. The witnesses heard were Student; both Parents; Student's special education teacher ("Teacher"); two of Student's instructional assistants; Student's speech-language pathologist, occupational therapist and physical therapist; the principal at Student's high school ("Principal"); the District's diagnostician, behavioral specialist and contract bus driver; the District's Special Education Director; the high school nurse ("Nurse") and the Parents' expert witness for positive behavioral supports and the technician who produced two of Parents' exhibits. 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. \_\_\_\_" and references to pages in the transcript of the hearing by "Vol. \_\_\_\_, p. \_\_\_\_."

At the time of the due process hearing, Student was almost 19 years old. His medical history is significant and complex with diagnoses of Fetal Alcohol Syndrome, severe seizure disorder or epilepsy<sup>1</sup> and Attention Deficit Hyperactivity Disorder ("ADHD") combined type. All the evaluations of record indicate that Student's intellectual and physical abilities are significantly delayed resulting in marked deficits in cognitive abilities, receptive and expressive language, fine and gross motor functioning and overall adaptive behavior. Exs. 20, 28, 29, J-11, J-12. Hence, Student has been eligible for special education and related services since at least 2003 as having Multiple Disabilities ("MD") (34 C.F.R. §300.08(c)(7)), the concomitant impairments being Other Health Impaired and Mental Retardation. Evaluators have also noted Speech and Language Impairment as concomitant as well. See Jt. Stip. of Facts, generally and Ex. 20. Student's eligibility is not disputed.

The following IEPs, developed on the dates indicated, controlled the delivery of services to Student during the period under review: October 13, 2009 (Ex. 27); addendum of September 16, 2010 (Ex.J-1); November 9, 2010 (Ex. J-3); January 26, 2011 (Ex. J-4); addendum on April 7, 2011 (Ex. J-5);

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<sup>1</sup> Student's first seizure was observed at two months of age. Vol. 3, p. 155.

and January 26, 2012 (Ex. J-6). Throughout the statutory period Student has attended school half days in the morning at District's only high school campus.<sup>2</sup> There is no dispute that a half day program delivered in the morning is appropriate for Student due to fatigue and declining ability to control his behavior. Vol. 4, p. 14. At all times relevant to this Request, Student was enrolled in Teacher's self-contained, "D-level" classroom for low-incident disabilities housed at the high school. Vol. 2, pp. 103-104; Jt. Stip. of Facts No. 3. The graduation pathway selected for Student by his IEP team is the Ability Option. Ex. J-6, p. 18.

### **Health Plan**

The IDEA does not direct the development or content of or otherwise address individual health plans ("IHP"). Nevertheless, all of Student's IEP's agree that his medical condition requires an IHP. The dispute arises as to whether and when he had one and whether it was adequately implemented. Those factual questions are answered generally in favor of the District as Student failed to carry the burden of proof.

Student contends that although he had been enrolled with District for most of the previous year, there was no IHP developed for him at the beginning of the 2010-2011 school year. Complaint, ¶¶4-20. The IEP in force at that point was developed in October 2009 and can be found at Exhibit 27. Page 16 of that exhibit is headed "Medical/Significant Health Information" and its content continues on the back of the page labeled page 17. Parent complains that this was nothing more than Mother's handwritten notes. Nevertheless, it contains most of the material information included in the IHP prepared by the nurse in Student's previous district (Ex. 24, pp. 2-5) and the IHPs later developed by District's Nurse in consult with Mother. Exs.J-14, J-15 and F. Specifically, it lists Student's medical conditions, describes his seizures and notes one or more of the precipitating events; his medications are identified; emergency phone numbers are listed; the same protocol/interventions are described and immediate notification of the school nurse is required.

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<sup>2</sup> When Student was enrolled in another district, his educational planners found that he could not tolerate full day school attendance and his program was reduced to half day in May 2008. Ex. 24, pp. 6-7.

The standard protocol for Emergency Treatment for Seizures can be found on page 4 of Exhibit J-4. Under “Management of a seizure is limited to preventing injury,” item number 3 states, “Do not force anything between teeth or place any object in mouth.” Student’s protocol contradicts this standard practice by directing that three drops of a “rescue remedy” are to be placed under or on his tongue with a dropper and a bulb syringe is to be employed to clear saliva. Also unique to Student is the direction to rub or wave alcohol around his face. Vol. 3, pp. 96-97. Student carries the “rescue remedy,” dropper, bulb syringe and alcohol in his back pack with corresponding written instructions. Ex. 11, pp. 2-8. There is no medical documentation of record to support these departures from standard seizure protocol. The last IHP of record, effective date January 26, 2012, provided that the Nurse would be responsible for administering the nonconforming elements of Student’s protocol. Ex. J-6, p. 2.

On September 9, 2010, Student tripped and fell (“2010 Fall”) while being escorted by one of the classroom IAs<sup>3</sup> and another student to the parent pickup area. Student had injuries to his face and mouth from the fall and immediately began to seize. The only evidence available in the record concerning the facts of this incident is Father’s testimony (Vol. 1, pp. 41-53, 56-60) and the written record prepared by the IA the same day of the incident. Ex. 6. There are contradictions between these two accounts and the written record from the IA was found to be generally more credible and reliable because it was recorded contemporaneously, apologetic in nature and not created in the context of this dispute. Father’s reliability is questionable given the passage of time (more than two years) and the fact that he has picked up his son in this fashion on many occasions before and after this incident and he may simply be mistaken in his recollection. Father’s credibility must also be suspect as his account was negative in the extreme and he changed his testimony definitively when he recognized that his previous, spontaneous testimony might not be favorable to his position.

Father adamantly claimed that the IA did nothing to assist Student. Vol. 1, p. 50. This contradicted the IA’s recollection who reported that he immediately ordered the other student to go get

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<sup>3</sup> It is undisputed that this IA was not assigned to Student individually but rather was the 1:1 assigned to the Student that was with them during the escort.

the Nurse and repeated that request to security when they arrived. The IA then worked against panic and remembered what Teacher had told him about Student's condition. He put Student on his side and opened the alcohol bottle that Student carried with him to use around Student's face. The IA does not record whether the Nurse responded to the scene but Father testified that she was there and was again adamant the Nurse was of no assistance either. Although the Nurse testified at the hearing, no one asked her any questions about her role in responding to this emergency and there were no nursing records in evidence that reflected her role in the incident. The conclusion of this DPHO, however, is that it is unlikely that the Nurse did nothing if she was there.

The point taken from the record of the 2010 Fall is that an IHP was in place and the IA responsible for escorting Student to the parking lot was aware of its contents, having learned about it from Teacher. The IA implemented the standard seizure care contained in the IHP to get the Nurse and put the victim on his or her side but he also implemented one element of the protocol unique to Student's IHP of using alcohol. Thereafter, Student's IHP was revised at least once each year, distributed to all the staff that worked with him and the emergency protocol was implemented on the only other occasion when Student experienced a seizure at school on October 24, 2011 ("2011 Fall"). Exs. F, J-14, J-15, J-16 and 33; Vol. 2, p. 81; Vol. 3, p. 101.

### **One-on-One Aide**

All of the identified IEPs provided that a one-on-one ("1:1") aide referred to as an Instructional Assistant ("IA"), would be assigned to Student individually. It is undisputed that no IA was assigned to Student individually until after the 2010 Fall. There is scant information in the record about how Student's program was administered up to that point. Although assigned to another student, the IA involved in the 2010 Fall described himself as working with Student "a lot and closely" for the two and

half weeks of school that preceded the 2010 Fall. Ex. 6, p. 3. There is also no information in the record regarding other staffing, if any, in Teacher's classroom during this short period.<sup>4</sup>

### **Home Instruction**

The evidence indicates that Student had a significant record of absenteeism. Exs. 34 and 35. With the exception of two rather long blocks of time, the absences over the two years were sporadic. The first block followed the 2010 Fall described above. The IEP team convened one week after the 2010 Fall on September 16, to discuss changes to Student's educational program prompted directly by the fall. No mention was made of home instruction in the IEP. Ex. J-1; see also Vol. 3, pp. 191-195. The only mention of Student's absence is in the prior written notice on page 5 and states, "[Student's] attendance will not count against him." There is also no evidence that Parents requested home instruction at this IEP meeting or at any time during either extended absence.

It is undisputed that there was a period of time beyond the point where Student was well enough to return to school that Mother did not allow Student to return to school because she was not satisfied that the District had sufficiently implemented the provisions of the September 16 IEP, specifically, providing Student with a helmet and an IHP developed by the Nurse. Exs. 2 and 5; Vol. 3, pp. 200-202. Consequently, Student missed school from September 9, 2010, to October 12, 2010. There was no evidence that District excluded Student from attending school during this time or that it proposed a change to Student's placement. Vol. 3, pp. 205-206. There was also no medical documentation in evidence of any inability on the part of Student to attend school at any time following the 2010 Fall.

The second block of lost attendance followed the 2011 Fall. Student was refusing to eat lunch with the now IEP-required helmet on, so he was allowed to sit in a regular chair without the helmet to eat lunch. A subsequent seizure resulted in Student hitting and gashing the back of his head. He was transported to the hospital where he received 12 staples but was not admitted. With no discernible

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<sup>4</sup> In 2011-2012, Teacher had three IAs, including Student's 1:1, and six students for a ratio of four adults to six children. Vol. 1, p. 170.



explanation as to why in evidence, Student was kept home until December 12, 2011. Ex. 43, pp.21-22; Ex. 35, p. 1. Again, there was also no medical documentation in evidence of any inability on the part of Student to attend school at any time following the 2011 Fall.

This second long absence is in sharp contrast to the way a similar head injury was handled immediately prior to the 2011 Fall. On Tuesday, September 20, 2011, Mother sent Student to school reporting in the communication log that Student had missed the previous Monday because a seizure he had at home over the weekend resulted in six staples on the right side of his head. She sent him to school without the helmet explaining that it could not be worn because of the injury. Student attended school each day thereafter (except September 27<sup>th</sup> when he was absent to attend a funeral). District staff asked Mother to send in the helmet as required by the IEP on September 29. She sent the helmet in with the instruction that it was not to be used so as to allow the wound to continue healing. Student was allowed to use the helmet again on October 4, 2011. Ex. 43, pp. 8-16.<sup>5</sup>

### **Sufficiency of IEPs and Transition**

District's IEPs for this Student are, to put it mildly, disappointing. Only the OT and PT goals are stated in measurable terms. The remaining goals are vague and unhelpful to understanding the program that should be implemented for Student. Exs. J-3, J-4, J-6 and 27. The progress reports utilized by Teacher convey little to no helpful information. Ex. J-20. Each of these IEPs contains several pages purported to address Student's transition needs. There is no evidence of any vocational assessment beyond asking Student and his Parents what Student would like to do when he is done with high school. The only postsecondary goal identified is working with his Father in a paint and body shop.<sup>6</sup> There is no evidence that many of the Needs and Activities were ever incorporated into Student's educational program; for instance, no development of a vocabulary book, no field trips for community based

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<sup>5</sup> It should be noted that Student has suffered many more falls and injuries in care of his Parents than in the care of District personnel. Vol. 2, p. 32; Exs. 42 and 43.

<sup>6</sup> The much more realistic transition goal identified by Student's previous district was, "After high school, his family would like [Student] to be able to work on a limited basis in a supported employment placement living semi-independently." Ex. 26, p. 2.

instruction, no work-based learning field trips and no visits to community facilities geared for severe and developmentally delayed students. Ex. J-3, p. 9; Ex. J-4, p. 11; testimony of Diaz, Vigil and Maestas, generally.

### **Physical Education**

It is undisputed that Student's October 2009 IEP (Ex. 27, p. 10) provided that Student would receive four years of adaptive physical education ("APE") as a component of his transition services. His January 2011 IEP (Ex. J-4, p. 11) repeated that commitment to extend through June 2012. It is also undisputed that APE was not available to Student through the District. Ex. G. Instead, District argued that APE was provided by the PT. Ex. 27, p. 16; Vol. 1; pp. 269-271. The records from Student's previous school district persuasively demonstrate that APE was an appropriate and constructive educational strategy for Student. Ex. 26, p. 3, 5, 7, 15. In fact, his PT in that district recommended that he attend APE more frequently. Ex. 26, pp. 18-20.

### **Transportation**

Another undisputed point is that all of the IEPs indicate that transportation would be provided. 34 C.F.R. §300.34(16). The dispute arises as to whether the transportation that was available to the family was inadequate and thus deprived Student of FAPE. For the two years in question, District contracted with a private bus company for only one special needs bus with driver and aide. Vol. 3, pp. 132, 136, 139, 145. The driver had two fixed morning routes and only one was for high school kids.<sup>7</sup> That route would require Student to be picked up at about 7:00 a.m. to arrive at the high school campus at about 7:30 a.m. Vol. 4, pp. 134-137. There were two problems with this route. It conflicted with Student's medication schedule as he has several that must be taken at 7:30 a.m. Ex. J-14, p. 3; Ex. J-15, p. 4. Also, the arrival time puts him at the high school an hour before his scheduled day begins which,

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<sup>7</sup> The other was for preschoolers that needed to arrive at the elementary school by 9:00 a.m.

according to the bus driver, was 8:30 to 12:30.<sup>8</sup> Vol. 3, p. 140. The bus driver estimated the travel time from pickup to the school to be just under 30 minutes. Vol. 3, p. 152. To resolve these conflicts, Parents provided all of Student's transportation to school with Student typically being dropped off sometime between 8:00 and 8:15. Vol. 1, p. 167.

Student apparently did utilize the bus going home to some unclear extent. Vol. 3, p. 175. There is conflicting evidence about when Student typically departed the school on the bus. (Bus driver reported 11:45 a.m., Vol. 3, pp. 139-141; IA reported 12:25 to 12:30 p.m., Vol. 1, pp. 167-168.) However, it appears that Parents also routinely picked Student up from school and the examples in the record suggest they picked him up around noon. Vol. 1, p. 43. The District has never provided Student with door-to-door transportation because the driver contends the condition of the road to the house is impossible for the bus to pass. Vol. 3, pp. 143, 150-151. The bus driver was not aware of any request for door-to-door and reported that the Parents always offered to meet Student at the drop off point and never questioned the arrangement. Vol. 3, pp. 143, 151. No record of a request for door-to-door service could not be found in the record.

The interval between Student's medication requirements and the start of his school day is sufficient to allow the less than 30 minute ride needed to transport him to school. The morning transportation schedule offered by District was not reasonable under the terms of Student's IEP.

### **Related Services**

All of the identified IEPs provided that Student would receive the related services of occupational ("OT"), physical ("PT") and speech and language ("SLP") therapies at the rate of one hour per week each. Ex. J-4, p. 17; Ex. J-6, p. 31. There is no dispute that Student required these related services to benefit from special education. 34 C.F.R. §300.34. A careful review of the related services logs and the attendance records conclusively shows that District failed to deliver the related services required. Exs. 13

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<sup>8</sup> A reference to specific times of day could not be found in Student's IEPs. The schedule of services provided for 20 hours per week or four hours per day without further specification.

and 14. Accounting for holidays and absences, Student should have received 23 hours of each service in 2010-2011. He received only 19 hours of OT, 16.5 hours of PT and 5.25 hours of SLP. In 2011-2012, Student should have received 14 hours of each service. He received only 4.5 hours of OT, 18.5 hours of PT and 6.5 hours of SLP. Student also claims that District was obligated to makeup related services he missed being absent due to his disability. Student was asked to provide authority for this claim and failed to do so. Hence, it will be deemed waived.

### **Extended School Year Services**

District must ensure that extended school year (“ESY”) services are available as necessary to provide FAPE. 34 C.F.R. §300.106; *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 17 IDELR 170 (10<sup>th</sup> Cir. 1990), *cert. denied* 110 LRP 38025. It is undisputed that Student’s IEP team concluded he needed services for the 2011 and 2012 summer breaks. Ex. J-4, p.14; Ex. J-6, p. 15. It is also undisputed that there were no ESY services available for Student to attend either of those summers. Vol. 1, p. 111; Vol. 2, p. 72-74; Vol. 3, pp. 233-234, 264-265; Vol. 4, pp. 200-201. In fact, none of the District witnesses could recall ESY services for any student in the District during either of these two summers. Vol. 1, pp. 112, 203, 246; Vol. 2, pp. 224-225; Vol. 3, p. 94; Vol. 4, pp. 165-166, 199, 233-234. The only excuse District offered for the lack of available ESY services was a claim that Student was absent and unavailable to plan the services for the last two weeks of year. Attendance records contradict that assertion. Ex. 34, p. 2; Ex. 35, p. 2. Furthermore, there was no evidence that the District convened or even sought to convene an IEP meeting for the purpose of developing an ESY program either of the two years in question.

### **Behavior and Mobility**

The evidence reflects that Student exhibited behaviors that impede his learning and that of other students. 34 C.F.R. §300.324(a)(2)(i). Conducting a FBA and developing a BIP is required in certain disciplinary proceedings under the IDEA (34 C.F.R. §300.530(d) and (f)) that do not apply to the

circumstances of Student's claim. Because Student's IEP team ordered that both a FBA and BIP were to be completed (Ex. J-4, p. 14), this decision will not engage in an analysis of whether IDEA requires them in Student's circumstances. No written FBA or BIP was offered or received in evidence during these proceedings but the IDEA does not require that either document be in writing. However, there was evidence of an IEP meeting called in addendum "to review the data collected through the FBA" and make changes to the "Health Plan." Ex. J-5, p. 1. In spite of the fact that Student and his Mother attended this meeting as evidenced by their signatures, he suggests that because there was no written FBA produced by the District and Mother cannot recall being interviewed as part of the data collection, District fabricated this meeting to cover up a failure to conduct a FBA. This suggestion is rejected.

The focus of this inquiry is whether District reasonably addressed Student's behavioral issues. Apart from seizure activity, the problem behaviors were the most frequent topic related in the communication log that passed between the Mother and District staff on a daily basis. Exs. 42 and 43. They are described as spitting, yelling, loud outbursts, rudeness, cursing, grabbing at other students, throwing objects, clapping and banging on furniture. Student engaged in these behaviors when resisting staff's efforts at instruction and provision of services thereby impeding his own learning. And the behaviors were loud and intrusive impeding the learning of the other students in the class. Exs. 25, 26, 39, 40, 41, 42 and 43. The primary, mostly unsuccessful, response to these behaviors was to remove Student from the situation, sometimes walking him around the campus or taking him to the library to try to interest him in a book or magazine. More intense behaviors typically resulted in a visit to an administrator or a call to the Parents. Hopefully, it was attempted more frequently but the communication log reports only one occasion when Student was successfully given a new activity to occupy his interest. Ex. 43, p. 50. Mother agreed that all of these tactics were appropriate tools for managing Student's misbehavior. Vol. 4, pp. 70-72.

Following the 2010 Fall, Student's mobility was increasingly restricted by the provisions of his IHP and IEP. It should be noted that in spite of Student's significant medical history and its impact on his

ability to access an education, the only medical record offered in evidence is a short letter dated October 11, 2010, from Student's neurologist. (Ex. 18) Student's doctor advocates for a 1:1 aide and "appropriate surveillance" but says nothing about a helmet or confining Student to a wheelchair. The IEP that was held within a week of the 2010 Fall does not mention a helmet but requires that supervision will be no more than an arm's length away at all times. It also provided that Student would use a wheelchair to move from class to class and noted the ancillary staff's concern that he should use the wheelchair only when needed. Ex. J-1. The last IHP of record provides that Student remain in his wheelchair at all times and his helmet cannot be removed. The only exceptions to these provisions are accorded to Student's PT and the school Nurse. Ex. J-15. The IEP team is responsible for these decisions but the Mother's domination of the team on these questions in the face of the reservations of at least the PT, OT and Nurse was apparent. Vol. 2, pp. 18-19, 222, Vol.3, pp. 121-124.

This arrangement is in stark contrast to Student's mobility at his previous district where he walked throughout the campus. There was no helmet or wheelchair mentioned in his IEP. Student participated in APE and walked a half mile with his class each day. Vol. 3, p. 159; Ex. 7; Ex. 26, p. 32. Mother reported that he had a 1:1 aide there but the IEP did not specify that service. He was placed in their contained classroom for medically fragile where all of the staff were "fully trained" on Student's condition and health plan, with the statement, "[Student] needs to be supervised at all times for safety due to seizures." Ex. 26, pp. 1a, 15. Student enjoyed this mobility in spite of the fact that the nurse reported Student had seizures on 13 different days that year, three of which lasted more than five minutes prompting corresponding 911 calls. Ex. 26, p. 15. The PT there reported "He has had no incidents of falls on the school grounds this year, *unless accompanied by a seizure.*" (emphasis added) This, of course, suggests that there were falls associated with seizures. Injuries, if any, were not described. Ex. 26, p. 32.

Student offered Michael P. O'Leary, Ph.D. as an expert in 1) special education with emphasis in positive behavior supports and planning and 2) educational programming for students with multiple

disabilities. The expert was allowed to offer opinions only on the topic of positive behavioral supports. The expert reviewed a long list of documents and records, some of which were not of record to the proceedings (Ex. 16, pp. 5-7) and visited with Student and his family in the home for approximately one and half hours. Vol. 2, p. 177.

There were two significant problems with the opinions he offered. 1) His “sense” was that generally, Student’s behavior problems occur at school. Vol. 2, p. 157. This observation is overwhelmingly contradicted throughout the record with Mother reporting problems at home to this District and Student’s previous school district. Ex. 25, pp. 3, 6 and 10; Exs. 42 and 43. 2) He offers the opinion that Student’s behaviors trigger seizures and if the behaviors are reduced, seizure activity will be reduced. This opinion is disregarded because the expert does not have the medical expertise to offer such an assessment and there was no other evidence of record suggesting that conclusion. Most of the evidence, especially from Mother, was that the behavior was antecedent to seizure activity and should be considered a warning that a seizure is coming. Student’s PT, who has worked with Student on a weekly basis for the last three years, offered an observation that is more consistent with a review of the evidence saying, “The behaviors that are antecedent to his seizures are similar to behaviors that he has all the time. They just get more intense.” Vol. 2, p. 38. And, finally, the words “antecedent” and “trigger” mean the same thing to the expert. Vol. 2, p. 199. Beyond that, the expert’s rambling review of what he had read and very general suggestions regarding behavioral supports were of little to no assistance in resolving Student’s claims.

The most instructive evidence available in the record regarding Student’s behavior and appropriate management thereof was found in the records from Student’s previous school district. This information suggests what is believed to be the greatest weakness in District’s services for Student which is a marked lack of physical activity. Student exhibited equally difficult behaviors at his previous district and in the Fall of 2007, was sent home twice for hitting other students or staff. Ex. 25, p. 10. But his behavior drastically improved over the next year and a half, reduced primarily to excited laughing and

yelling and knocking on objects. Id. These behaviors resonate with the fact that Student's cognitive and functional abilities are restricted to a preschool age equivalency. Student's behavior during his enrollment with District has greatly deteriorated as noted above.

There is little excuse for this because the District had access to and Teacher read the extensive and well-written IEP and other documents from Student's previous school district. Vol. 2, p. 107; Exs. 24, 25 and 26. Although these records reflect that this district also had conflicts with Mother (Ex. 26, pp. 15-16), she reports that Student was happy in this program and did well and she was generally pleased with that district's performance, including with their behavior intervention and health plans. Vol. 3, pp. 156-164.

The District is directed to take note of and incorporate the following observations made by staff at the previous district into its instructional strategies for Student:

"[Student] does best with highly structured activities that involve a physical component." Ex. 25, p. 8.

"[Student] performs best in a high structured activity that includes a gross/fine motor task with a clear beginning and ending. Paper/pen tasks create more distractive group behaviors." Id.

"When behaviors increase he responds well to clear boundaries and/or shifting to a short physical task. After completion, he is more ready to participate in the small group." Ex. 25, p. 10.

"Activity increases his ability to stay focused and complete his work." Id.

"[Student] loves being helpful and does well with physical activities (gardening, chores, etc.)." Ex. 25, p. 11.

"[Student] has a special quiet room adjacent to the classroom with a reclining chair, mats on the floor, a stereo for music and headphones, and his favorite toys when he is not feeling well, or is bothered by noise." Ex. 26, p. 15.



### ***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 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 Parents within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency.
2. Student, a multiply disabled young man, suffers from a severe seizure disorder and other medical conditions and has moderate to severe deficits in cognitive ability, receptive and expressive language, gross and fine motor skills and overall adaptive behavior.
3. An adequate IHP was present in Student's IEP at the beginning of 2010-2011 and the District staff members who worked with Student were informed as to its provisions.
4. Student's IHP was appropriately revised annually and distributed to staff working with Student.
5. An IA was not assigned to Student individually until after the 2010 Fall.
6. There was insufficient evidence to indicate Student was medically unable to attend school for more than ten consecutive school days and therefore required home instruction.
7. Other than those for PT and OT, goals and objectives in Student's IEPs were vague, unmeasurable and failed to convey the information needed to design appropriate special instruction.
8. The nature of Student's disability, in particular that he has severely limited cognitive abilities and marked deficits in receptive and expressive speech and overall adaptive behavior, is such that

education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

9. Student was educated with nondisabled peers to the maximum extent appropriate.
10. Student's related services, his 1:1 aide, his transition services and APE and ESY services were all material components of his IEP.
11. Student did not have a 1:1 aide for the first two and half weeks of the 2010-2011 school year.
12. District failed to provide Student with special education in the form of APE.
13. Student did not receive other transition services that were required by his IEPs.
14. Student is in need of an appropriate evaluation or evaluations to assist in his transition planning.
15. Student did not receive the OT, PT and SLP services prescribed for him in his IEPs.
16. Student exhibited behaviors that impeded his learning and that of other students.
17. Student's behavior has deteriorated with the educational program provided by District.
18. Student requires more physical activity to enable him to access educational benefit and modify his behavior.
19. District failed to develop or deliver ESY services required by Student's IEP for the 2011 and 2012 summers.

### ***Discussion***

#### ***Home Instruction and LRE – Issues 3 and 5***

District must ensure, to the maximum extent appropriate, that children with disabilities are educated with children who are nondisabled. 20 U.S.C. §1412; 34 CFR §300.114. However, where a student's individualized needs are so extensive that they may not be appropriately met in an educational setting with students who are not disabled, a school district may properly provide services in a more restrictive setting. *Bd of Educ of Township High Sch. Dist. No. 211 v. Ross*, 44 IDELR 36 (N.D. Ill. 2005), affirmed 486 F.3d 267 (7<sup>th</sup> Cir. 2007).

Student failed to meet the burden of proving that his education could be achieved satisfactorily in regular classes with nondisabled peers with the use of supplementary aids and services. Student also failed to prove that he was not educated with children who are nondisabled to the maximum extent appropriate. Student's standard score for nonverbal intelligence was 63 which translates to an age equivalency of less than six years, the lowest age equivalency available on the instrument used, giving him a less than one percentile rank. Ex. J-11, p. 9. He can distinguish letters from other objects but when asked to identify a specific letter in a group of six letters, he was unable to do so. Testing of his Auditory Comprehension and Expressive Communication in January 2012 found his age equivalency for these abilities to be two years, six months. Ex. J-12. There is no evidence that beyond just visiting during activities involving nondisabled peers in very limited, appropriate settings<sup>9</sup> that Student's needs can be met in other than a highly structured, small group and often no more than 1:1 setting. Even lunch in the cafeteria was contradicted by Student's disability. The loud noise in the cafeteria tends to excite Student risking a seizure. Vol. 2, pp. 272-273. Student's records are replete with reports that he is easily distracted and needed 1:1 to effectively deliver most of his instruction and services. Due to the volume, only a few representative references will be cited. Vol. 2, pp. 8, 23; Ex. 25, p. 11; Ex. 26, p. 13.

School districts are required to ensure that a continuum of alternative placements is available to meet the needs of disabled children. 34 C.F.R. §300.115. Home instruction is included in that continuum but is recognized to be perhaps the most restrictive setting. Nevertheless, homebound placement may be necessary for a student with a disability who is unable to attend school for medical or psychological reasons. *Tindell v. Evansville-Vanderburgh Sch. Corp.* 805 F.Supp.2d 630, 57 IDELR 71 (S.C. Ind., 2011). However, homebound placement based solely on parent preference is not appropriate. *Cheyenne Mountain Sch. Dist. #12*, 110 LRP 44427 (SEA CO 2010).

The decision of whether to place Student on homebound instruction had to be made by the IEP team. "It has long been the Department's [U.S. Dept. of Educ.] position that when a child with a

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<sup>9</sup> For instance, his IAs reported that Student worked on gardening activities with nondisabled peers as part of their science class two to three times per week in the spring. Vol. 2, pp. 256-258, 286-288.

disability is classified as needing homebound instruction because of a medical problem, as ordered by a physician, and is home for an extended period of time (generally more than ten consecutive school days), an IEP meeting is necessary to change the child's placement and the contents of the child's IEP, if warranted." *Questions and Answers on Providing Services to Children with Disabilities During an H1N1 Outbreak*, 53 IDELR 269 (OSERS 2009). Student does not claim that District refused home instruction, only that it did not unilaterally offer it. Vol. 3, pp. 205-206.

Student failed to prove by a preponderance of the evidence that District had a reasonable basis for anticipating that either of the absences in question would warrant Student's IEP team to unilaterally consider a change in placement to homebound instruction.

#### ***FAPE and Adequacy of the IEPs – Issue 4***

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). 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. Once a child turns 16, the IEP must include appropriate measurable postsecondary goals based upon age appropriate transition assessments related to training, education employment, and, where appropriate, independent living skills. 34 C.F.R. §300.320(b).

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 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.

In reviewing the adequacy of an IEP, the inquiry must 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, 28 LRP 4876 (10<sup>th</sup> Cir. 1998). This limitation on procedural issues is codified in IDEA at 20 U.S.C. § 1415(f)(3)(E)(ii). However, nothing in this limitation precludes the DPHO from ordering District to comply with procedural requirements. 20 U.S.C. § 1415(f)(3)(E)(iii).

As noted in the Summary above, the evidence reflected deficient goals and objectives for all areas of need other than PT and OT. There was insufficient evidence to determine that these procedural violations caused a violation of Student's right to receive FAPE.

At least four circuits have also recognized that the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, , 502 F.3d 811, 822 (9th Cir. 2007) ("[A] material failure to implement an IEP violates the IDEA."); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) ("[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit."); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) ("[A] party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."). And, most recently, *Sumter County Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4<sup>th</sup> Cir. 2011) ("Accordingly we conclude that a

material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.”) The Tenth Circuit does not appear to have addressed this question as yet.

As noted in the Summary above, several essential elements of Student’s IEPs were not implemented: 1:1 aide (for the first two or three weeks of 2010-2011), APE and other transition needs and activities, the full schedule of related services and ESY. The absence of these essential elements in Student’s educational program deprived him of FAPE.

### ***Physical Education – Issue 6***

Physical education is specifically identified as special education and included in the definition thereof. 34 C.F.R. §300.39(a)(1)(ii). Furthermore, physical education specifically includes APE. 34 C.F.R. §300.39(b)(2)(ii). The definition is found at 34 C.F.R. §300.39(b)(3) and provides:

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

One year of physical education, which is taught on a daily basis, is required in high school to meet graduation requirements in this jurisdiction. Additional physical education is available to all children as an elective. Vol. 1, pp. 243-245. As noted in the Summary, Student was entitled to four years of APE under his IEP.

Physical therapy is distinguished from APE as a related service that is required to assist a child with a disability to benefit from special education (34 C.F.R. §300.34(a)), and refers to services provided by a qualified physical therapist. 34 C.F.R. §300.34(b)(9). Accordingly, the APE teacher is a direct service provider, not a related service provider. District’s attempt to satisfy Student’s right to APE through his related service of PT delivered one hour per week deprived Student of FAPE.

## ***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 (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 special instruction and related services that should have been delivered in accordance with his IEP, the DPHO will attempt to fashion a remedy based on the evidence of record. Unfortunately, the expert evidence was insufficient to guide the effort but DPHO believes that Student should not be denied relief if other evidence can suggest an appropriate remedy. Therefore, the DPHO will look to the evidence of effective services delivered by Student’s previous school district and the evidence available from District’s own records and direct and related service providers that testified.

As is apparent from the body of this decision, it is the DPHO’s opinion that the restrictions on Student’s mobility make it difficult to deliver FAPE. Nevertheless, this decision should NOT be interpreted to require any reduction in Student’s confinement to a wheelchair or use of a helmet from the current conditions imposed in Student’s most recent IEP. If Parents cannot be persuaded to trust the skills and judgment of the direct and related service providers assigned to Student’s program and consent to them modifying those restrictions to enhance his educational program, then the relief designed below must be delivered to Student to the best of District’s staff’s ability while Student remains in the wheelchair wearing a helmet.

The District must immediately convene an IEP team meeting to develop an appropriate educational program for Student. Unless Student, through his Parents by virtue the Power of Attorney or authority as Student’s duly appointed guardians, consents in writing to any specific alternatives proposed

by the IEP team, the educational program developed for Student for the remaining 2012-2013 and 2013-2014 school years shall, at a minimum, contain the following special instruction and/or 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 and/or related services in addition to those identified herein.

1. Student will continue to receive one hour per week of individual PT. In addition to this individual PT, the therapist will provide the consult time necessary (but a minimum of 30 minutes per adult) to train every adult who is assigned to work in Student's classroom and every adult who is assigned to provide Student with direct or related services, in techniques to physically assist Student in ambulation and protect him from falls. This training can be done in a group with appropriate individual participation in administering the techniques. This consultation and training is required even if Parents do not consent to a change in Student's mobility restrictions. This training should begin immediately and should be provided to new personnel, if possible, before they are assigned to work with Student or in his classroom. The therapist will also provide 30 minutes per month of consultation time to work with Student's classroom staff to develop ways that Student's physical readiness for learning can be improved particularly if he continues to be completely confined to a wheelchair and/or his APE teacher.
2. Student will also continue to receive a minimum of one hour each of individual OT and SLP per week.
3. District is not ordered to provide Student with ESY in the summer of 2013, unless his IEP team determines that ESY is necessary for the provision of FAPE. If the IEP team does so, an appropriate program and placement must be timely developed and provided to Student.
4. If District has an APE class, Student must be enrolled in that class immediately. If District does not already have an APE class available in which Student can be immediately enrolled, District is ordered to take all steps necessary, including retaining licensed, qualified personnel, to develop such a course as soon as possible but no later than the start of the 2013-2014 school year. Student is to be enrolled in an APE class for the remainder of his eligibility.



5. District must provide Student with compensatory related services. He is entitled to 13.5 hours of OT, 6.5 hours of PT and 25.25 hours of SLP. District must confer with Parents on the timing and location for the delivery of these services. Student's 20 hours of special education services cannot be offset to facilitate the delivery of these compensatory services without the written consent of Parents. Consent is also required to offset ESY services, if any are provided.
6. District must conduct one or more evaluations or assessments, selected in consideration of Student's severe cognitive and functional deficits, to assist in Student's transition planning. This evaluation or assessment must be completed within 60 days of the date of this Final Decision.
7. Student's IEP will provide and his educational program must include activities consistent with the results of the above referenced evaluation, including at least two field trips per semester for community based instruction, work-based learning field trips and/or visits to community facilities geared for severe and developmentally delayed students.
8. Student's future IEPs must include measurable annual goals and his progress reports must effectively and meaningfully apprise his Parents of his educational program and progress.
9. To compensate Student for the failure to provide essential elements of his IEP, in particular ESY and APE, Student's eligibility for special education will be extended for one year beyond his statutory eligibility.
10. District must reimburse Parents the reasonable costs of providing Student's transportation to school in the mornings on the days he actually attended school for the last two years using the standard mileage rate for personnel. If Student's IEP continues to provide transportation as a related service and District is still unable to provide a reasonable morning schedule, reimbursement of Parents must be provided on a monthly basis.

### ***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 Student, 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 or before January 18, 2013.
5. Student is qualified and eligible for special education and related services as a child with multiple disabilities. 34 CFR §300.8 (a) and (c) (7).
6. Student failed to prove by a preponderance of the evidence that the District deprived him of FAPE by failing to develop and implement an IHP at the beginning of 2010-2011.
7. Student failed to prove by a preponderance of the evidence that District did not educate him with nondisabled peers to the maximum extent appropriate.
8. Student did not prove by a preponderance of the evidence that he was denied homebound instruction in violation of IDEA.
9. Student proved by a preponderance of the evidence that a 1:1 aide, ESY, APE and other transition services and the designated related services were material and significant components of his educational program.
10. Student proved by a preponderance of the evidence that he was denied these essential elements of his IEP resulting in a deprivation of FAPE and entitling him to compensatory education.
11. Student proved by a preponderance of the evidence that he did not receive the OT, PT and SLP services required in his IEP and he is entitled to compensatory services.
12. Student proved by a preponderance of the evidence that his Parents should be reimbursed for transportation services provided to school in the mornings.


### **ORDER**

IT IS HEREBY ORDERED as follows:

1. District will conduct evaluations or assessments consistent with the provisions of this Decision.
2. District will convene an IEP meeting consistent with the provisions of this Decision.

3. District will ensure that Student's IEP includes specialized instruction and related services consistent with the provisions of this Decision.
4. District will provide Student with compensatory services consistent with the provisions of this Decision, including extending his eligibility for one full year beyond his statutory eligibility.

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

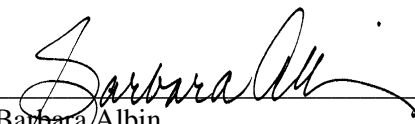
#### CERTIFICATION

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via electronic mail to the following persons this 18<sup>th</sup> day of January 2013:

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

Charlotte H. Hetherington, Esq. of Scheuer, Yost & Patterson, P.C.; P. O. Box 9570; Santa Fe, NM 87504-9750; and 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