

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER**

**In the Matter of
Parent of A.R.,**

Petitioner,

v.

Case No. DPH 1213-36

LAS VEGAS CITY SCHOOLS,

Respondent.

DECISION OF THE DUE PROCESS HEARING OFFICER

**Jane B. Yohalem, Due Process Hearing Officer
July 8, 2013**

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STATEMENT OF THE CASE

Parent filed a request for due process with the New Mexico Public Education Department on March 22, 2013, alleging that Student had been denied a free appropriate public education (FAPE) under the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400, *et seq.*, (2006), during the limited time period from November 16, 2012, through the end of the 2012-2013 school year. Student, who is 14 years old, completed the sixth grade on May 31, 2013. Student is legally blind and is eligible for special education and related services under the IDEA as a Student with a visual impairment.

This due process complaint was filed following the entry of a decision by another hearing officer (in DPH 1213-19) which addressed Student's education from November 16, 2010, through November 15, 2012. Parent subsequently filed this due process complaint concerning the provision of educational and related services to Student since November 15, 2012. This decision is based solely on the evidence at hearing in this matter. That evidence was strictly limited to matters occurring after November 15, 2012. Both because the two due process proceedings are based on different time periods and different evidence, and because the first proceeding is subject to *de novo* review in the district court, the parties agreed that *res judicata* does not bind the hearing officer in this case. *See Brunacini v. Kavanagh*, 117 N.M. 122, 128-29, 869 P.2d 821, 827-28 (1993).

In this proceeding, Parent claims that from November 16, 2012, through May 31, 2012, the District denied Student a FAPE by: (1) materially failing to implement Student's May, 2012, IEP; (2) by not providing Student's specialized instruction and other services through a certified Teacher of the Visually Impaired (TVI); (3) by not providing Student Braille instruction; (4) by not providing Student with Braille textbooks in all subjects; (5) by not providing sufficient other class materials in Braille; (6) by not providing Student appropriate specialized instruction in the use of assistive

technology; (7) by not allowing Student to take school-owned assistive technology devices home with him; (8) by not providing adequate Orientation and Mobility services; and (9) by providing social work services inappropriate for a student with a visual impairment. Parents also claim that the District violated the procedural requirements of the IDEA by failing to convene an IEP meeting in December, 2012, when there was a change in the staff and services provided to Student and that this failure deprived Student of educational benefits. Parents also claim that the District's decision to not allow him to take certain school-purchased assistive technology home was in retaliation for Parent's pursuit of her due process rights under the IDEA.

In response, the District claims that it has provided Student a FAPE during the time period at issue, offering sufficient modifications and accommodations for Student's visual impairment to allow him access to the regular curriculum, thereby meeting the standard set in *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), of providing some educational benefit to Student. The District claims that the resignation of Student's Teacher for the Visually Impaired and her replacement first with an educational assistant and then with a special education teacher, neither of whom could read Braille or had any training in teaching visually impaired students, was merely a change in personnel or in methodology, and not a change in either Student's placement or the provision of a FAPE to Student. Finally, to the extent services required by Student's IEP were not provided, the District contends that a strategy of providing compensatory services in the summer should be sufficient to provide FAPE.

In this final decision, the hearing officer concludes that the District denied Student a FAPE from December 13, 2012, until the end of the school year by failing to provide any specialized instruction toward Student's IEP goals in reading, composing and computing in Braille. The District's failure to provide Student his science and Spanish textbooks in embossed Braille contributed to this denial of FAPE. Although the IDEA requires only that the District meet state

personnel standards, which do not require certification to teach visually impaired students, the IDEA does require that personnel have sufficient training to be able to provide the services required by the IEP. The District's substitution of an educational assistant and then a special education teacher who could not even read Braille, let alone teach it, denied Student a FAPE and constituted a unilateral change in placement in violation of both stay-put requirements and the provision for parental involvement in placement decisions.

FINDINGS OF FACT

Background

1. Student is 14 years old and attends middle school within the Las Vegas City School District. During the 2012-2013 school year, Student was in the sixth grade. Jt. Stipulation, at 1.. This Due Process proceeding and decision address only the period from November 16, 2012, through the end of the school year on May 31, 2013.

2. Student has had a severe visual impairment since birth and is legally blind. He is eligible for special education on the basis of Visual Impairment. Jt. Stipulation, at 1.

3. Student has some very limited vision in his right eye, where he sees with a 20/800 acuity and only in a small tube-shaped field near his nose. He also has uncontrollable eye movements called "nystagmus" which limit his ability to move his eyes back and forth. Thus, to scan an image with his limited area of vision, he must move his whole body. He is not able to read print, even enlarged print. He can see colors if the field of color is large enough, and, with difficulty, can identify a very large image (an image 2 feet or more across). 2 Tr. 446-48.

4. Although Student's vision is extremely limited and not functional for most tasks, he is neurologically driven to attempt to use his vision. This makes it more challenging for Student to learn the skills used by the blind to gain access to information, to communicate in writing, and to navigate independently. 2 Tr. 448.

5. Student attended the School for the Blind as a residential student for four years, beginning in first grade. He returned to the District schools in the spring of 2010. During this period at the School for the Blind, Student learned the basics of Braille, the method by which he reads and writes, learned the basis of some voice recognition technology, and began to learn how to use a cane to navigate independently. 3 Tr. 617, 629-631.

6. Student is described by his teachers as very bright in all academic areas. 1 Tr. 134, 173; 2 Tr. 390; Jt. Ex. B, at 2, 11-12. He intends to go to college and work in engineering or science. Jt. Ex. BB, at 1.

Student's IEP.

7. The IEP in effect during the time period at issue in this proceeding is dated May 12, 2012. Jt. Stipulation, at 2; Jt. Ex. BB.

8. Student's May 12, 2012, IEP requires that Student be provided with a total of 20 hours per week of services by a Teacher for the Visually Impaired (TVI). Jt. Ex. BB, at 23. (The IEP notes that "[Student] continues to need support in the vision area through a certified TVI.") 4.2 hours of this time is identified as "Academic Success", 5.8 hours as "direct vision services" and 10 hours as "indirect/consult vision services." Jt. Ex. BB, at 17. The 4.2 hours identified as "Academic Success" are direct instruction in Braille and other compensatory access skills each day during Student's first period of the day. 10 hours are indirect and consultation services, such as meeting with Student's subject matter teachers and planning modifications and accommodations to give Student access to the instruction and materials used in his subject matter classes. The other 5.8 hours are assistance within Student's regular classes or time spent in transcribing material for the regular class. Jt. Ex. BB, at 23, 24; 2 Tr. 510-12.

9. Student's IEP also provides for 1 hour a week of Orientation and Mobility Services (O & M). The IEP notes that Student "still continues to need and qualify for O& M services. Jt. Ex. BB, at 3.

10. Although the IEP document itself does not include a section labeled goals and objectives, it does include a description of Student's identified areas of need and the progress made in his fifth grade year. Under TVI services, Student's needs are described as support in math and science classes by a TVI; production of math materials in Nemeth Code (a special form of Braille used for mathematics); tactile graphics for graphs, angles, and visual math problems; one to one instruction in literary Braille and Nemeth Code; improvement to grade level in Braille reading fluency; one to one services for assistive technology to help him use his technology to better access the curriculum; and modifications and accommodations to the core curriculum. Jt. Ex. BB, at 11.

11. Student's needs for instruction in O & M, as described in the IEP, include a focus on community and school travel, analyzing time and distance, movement, human guide, street crossings, cardinal directions, landmarks, route travel, indoor and outdoor numbering systems, safety and evacuation procedures, visual attention, scanning and guided travel. Student's challenges are described as auditory discrimination at street crossings, learning numbering systems, learning new routes, having knowledge of and ability to use a GPS to improve independent travel, and mind-mapping skills. Jt. Ex. BB, at 14. Again no specific goals and objectives or benchmarks were included in the IEP, nor were written goals and objectives developed later by the O & M teacher. Jt. Ex. BB.

12. In the social skills area, the IEP notes that Student received services in the fifth grade, including group and individual therapy. In the sixth grade year, the social worker suggested reducing services to an as needed basis, to be provided to assist Student with self-confidence and acceptance

of his disability. Jt. Ex. BB, at 14. The recommendation to reduce services to an “as needed” basis is adopted later in the IEP. *Id.* at 23.

13. The IEP also recognizes Student’s need for Braille material and textbooks, an abacus for math, audio books, an Apex (a machine which translates text into Braille and Brailled input into a text printout); a computer, and a printer. Jt. Ex. B, at 20. A subsection on homework notes that Student should be allowed to complete his homework using his Braillers (the Apex and manual Brailer). *Id.*

14. Written objectives were developed for Student by the TVI during the summer following the IEP meeting. These goals are primarily directed at learning Braille skills to improve Student’s reading speed in Braille, to improve his ability to fluently read contracted Braille, and to expand his knowledge of the specialized Braille forms that he will need to use in his academic subjects, such as Nemeth code for mathematics, Spanish coding and punctuation, literary Braille, and punctuation and formatting skills. There is an objective aimed at improving his use of the abacus, ruler, compass and protractor to compute math problems and an objective concerning improving his ability to use JAWS (Job Access for Windows) independently. (JAWS is a voice-output computer program that allows a blind student to do research for school projects and prepare Word and Power Point documents.) Jt. Ex. DD; 2Tr. 490; 3 Tr. 886-87.

15. Although no written objectives and benchmarks were prepared for Student’s work on orientation and mobility skills, the O & M instructor testified that her work with Student focused on the areas of need for O & M identified in his IEP: using his cane more consistently in all settings to insure his safety; learning to use the cane more effectively in crowds and to determine surface changes; learning to cross safely at various types of street intersections, including listening for traffic and determining when there is a safe gap, and learning new routes. Although teaching Student to use a GPS device to improve his ability to navigate was included as a recommendation in Student’s

May, 2012, O & M evaluation, and was identified as a need at the May 12, 2012, IEP meeting, the school never made a decision to purchase the GPS device for Student during the school year. Jt. Ex. BB, at 14; Jt. Ex. FF, at 11-12; 1 Tr. 49-54, 57, 102-03.

Instruction in Braille and Other Compensatory Skills for the Visually Impaired.

16. After the TVI who worked with Student resigned on December 13, 2012, the District hired a teaching assistant who worked with Student for 2 and ½ months. 1 Tr. 229, 227, 301. Teaching Assistant admitted that he had no knowledge or understanding of Braille or of any of the specialized Braille Codes, such as Nemeth or literary Braille. He was specifically told when hired that he did not have to teach Student Braille. 1 Tr. 228, 231. He gave no instruction to Student in Braille, in the use of any assistive technology, or in the use of the abacus to calculate math problems. *Id.* at 238, 244, 249. Even simple transcription of text to Braille using computer technology to translate was difficult without training. He could not transcribe into Nemeth, so most math was done by reading the problems to Student and having Student answer aloud. *Id.* at 241, 247, 253, 254, 259, 285. Not knowing the code for Spanish, he used English code. 1 Tr. 242, 266. At some point, Student reported no longer being able to understand the Spanish transcriptions. 2 Tr. 331; 3 Tr. 613, 635. Not knowing Braille, Teaching Assistant could neither identify nor address the problem. *Id.* at 486-87.

17. In March, 2013, the District replaced Teaching Assistant with a special education teacher who also had no knowledge of Braille or of the technology and other services needed by a severely visually impaired Student. 2 Tr. 343-44, 346. She too reported that she was not hired to teach Student Braille and that she was not able to do so. *Id.* at 346, 350, 356 (couldn't help him decode Braille, didn't know Braille hand position). She too resorted to reading orally to Student in math class and having him speak his answers, rather than using Braille. *Id.* at 351, 482. She could not instruct Student on the use of the abacus in math. *Id.* at 366. She did not understand the Apex

(Student's primary assistive technology device for Braille) or its limitations. *Id.* at 365-66, 369. She did not know anything about the JAWS program Student's IEP specified he was to learn to use to access research materials and prepare Word and Power Point documents. *Id.* at 370.

18. From December 13, 2012, through the end of the school year on May 31, 2013, Student did not receive any specialized instruction toward his IEP goals and objectives aimed at teaching him skills necessary to compensate for his disability. His IEP goals to improve his speed and fluency in reading contracted Braille, to expand his ability to recognize the contractions when they are embedded in words, to learn to format and punctuate his literary writing, to improve his facility with Nemeth code, to learn to use JAWS effectively for research and writing, all went by the wayside. *See* ¶¶ 17-18, *supra*.

19. Student needs a teacher who is knowledgeable and appropriately trained so that the teacher is able to provide the systematic and regular instruction in Braille and in the other compensatory access skills required by his IEP. Because Student needs instruction in such advanced Braille techniques as Nemeth and literary Braille to prepare him for higher level academics, the teacher must be knowledgeable in and able to teach these skills. 3 Tr.730-31, 920 (the District's Director of Special Education testified that she had been mistaken when she testified at the previous hearing that a general special education teacher with no special training in Braille or in teaching visually impaired students could provide appropriate instruction and support to Student).

20. Parent and the District agree that "Student requires textbooks and instructional material to be prepared in Braille." Jt. Stipulation, at 1. Although the District made some efforts to provide these materials, the District failed to provide a Brailled science textbook, a Brailled Spanish textbook, or a Brailled math textbook. 1 Tr. 242, 340, 268. The District's failure to provide the math textbook in Braille did not affect Student's education because that textbook was not used by the math teacher. 1 Tr. 118, 119, 177. The failure to provide a Brailled science text, and Brailled

science and math materials in the proper Braille code did interfere with Student's ability to make progress toward his IEP goals. 2 Tr. 469, 365, 480; 1 Tr. 268, 240, 249, 253-54, 308, 337, 362, 366-67. The failure to provide the Brailled texts resulted in his being forced to use audio access in math and science, rather than using embossed Braille. 1 Tr. 266, 269-70, 272, 275, 277; 2 Tr. 517, 594-95.

Student's Progress.

21. In the absence of specialized instruction on Braille and in other compensatory access skills, Student failed to make progress in these areas. In the fifth grade, Student was reading 40 words per minute in contracted, embossed Braille, the kind of Braille he needs to read for academic work and for standardized tests. Jt. Ex. BB, at 11. Figures for the spring of this school year ranged from 30 words per minute to 75 word per minute. 2 Tr. 359, 364, 323-24. The hearing officer does not find the time trials from this school year reliable because these tests were not based on reading of contracted, embossed Braille, free of access to audio assistance, the correct method of testing reading speed. 2 Tr. 319-20; 354; 469, 471-72, 473, 528-29, 578; 3 Tr. 897-98. More reliable is Ms. Ritchie's expert testimony and Student's former TVI teacher's testimony that without consistent instruction and practice reading embossed Braille, Student loses Braille fluency and speed. *Id.* at 453, 468, 473, 525; 3 Tr. 898 (75 words per minute not believable, could be 30 because of lack of daily practice). An indication of his lack of progress in reading contracted, embossed Braille, is also found in the nearly two-day period it took Student to complete a standardized test completed in 1 and ½ to two hours by other students. 2 Tr. 375-76; 1 Tr. 198. Student knows only 10 out of 50 Nemeth symbols, when he should be at 25 out of 50. 2 Tr. 475-76.

22. Student made progress in his academic classes. This progress was dependent upon a combination of Student's native intelligence, the use of audio technology, and the direct assistance of a human reader and writer. 2 Tr. 355, 358; Ex. K; 2 Tr. 405; Jt. Ex. HH, 21; Ex. I.

Orientation and Mobility Services.

23. Student was provided O & M instruction by a qualified O & M specialist for the number of hours specified in his IEP during the period at issue here. Although there was credible testimony that Student would be better served by more regular instruction and by having O & M training for family and peers, Student made progress toward his O & M goal in the area of street crossings, the use of his cane, and in his ability to detect traffic patterns and use gap judgment when crossing streets without traffic signals. 1 Tr. 61-62, 69, 71, 97; Ex. FF, at 1-6.

24. The O & M specialist recommended in a May, 2012, evaluation that Student be provided instruction in the use of a GPS device to improve his ability to navigate independently and, although this recommendation was discussed at the IEP meeting and apparently adopted, no goals and objectives were prepared for Student. Jt. Ex. BB, at 14; Jt Ex. DD; Jt Ex. FF; 1 Tr. 49-50, 102-03. Although informed by the O & M provider about the lack of O & M goals and objectives, the District did not reconvene the IEP team to develop or approve goals and objectives. 1 Tr. 49-50; 3 Tr. 755. The lack of clear goals and objectives resulted in the District failing to make a decision to purchase the GPS device. 1 Tr. 50, 70, 53-54; 3 Tr. 755.

Assistive Technology and Instruction in Its Use.

25. Student's IEP provides for two primary assistive technology devices: JAWS (Job Access for Windows), a voice-output computer program that allows a blind Student to do research for school projects and prepare Word and Power Point documents, and the Apex, a small computer with a refreshable Braille display that allows Student to both read and write in Braille. Jt. Ex. BB, at 20. The Apex translates the Braille typed in by Student into a text document and translates text documents into Braille or audio output. 2 Tr.489-90. Student relies heavily on the Apex to store and review his schoolwork and to complete any type of written assignment, both in class and at home.

Student, pursuant to his IEP goals, was also learning to use the Apex to keep track of his daily agenda of school assignments and events. Jt. Ex. DD, at 6.

26. There are three matters in controversy concerning assistive technology. The first, the GPS device is addressed in ¶ 24 above. The second, the JAWS program on a laptop computer was provided for Student by the District. The problem was that the instruction needed to meet Student's IEP goal related to JAWS was not provided after December 13, 2012, when the TVI teacher resigned. Jt. Ex. DD, at 6; ¶¶ 17-18, *supra*. See also, 2 Tr. 526-27. As a result, Student regressed in his ability to use JAWS. 2 Tr. 490-91.

27. The controversy about the Apex centers on a time period during the spring when the Apex was broken and needed repairs. Student was not permitted to take the Apex home during this time because of the District's concerns about the cost if either there was further damage to the broken APEX or to the Apex subsequently loaned to the District for Student's use by the School for the Blind. 3 Tr. 681, 684-85; 714-16, 923-27. The hearing officer rejects the Petitioner's claim that the District refused to allow Student to take the Apex home unless Parent accepted financial responsibility in retaliation for Petitioner's due process complaint. This claim is not supported by the evidence. *Id.*

28. Student's IEP provides that Student should be allowed "to complete his homework/class work using his brailers." (The Apex is a brailler.) Jt. Ex. BB, at 20. Up until the Apex broke in February, 2013, Student took the Apex home daily to do his homework. 3 Tr. 607, 609, 612. The record shows that he was not able to complete his homework independently without the Apex. 1 Tr. 281-82, 289-90; 2 Tr. 330, 338; 3 Tr. 717-18. Parent's expert credibly testified that Student needed home access to the Apex in order to complete his homework and to study at home. 2 Tr. 491.

29. Student requested other assistive technology including Bluetooth and KeyView, which Parent's expert testified would be helpful for him. This assistive technology was not provided by the District. 2 Tr. 537.

Social Work Services.

30. Student's IEP specified that Student would receive support services from the social worker on an as needed basis if he showed signs of being upset about his disability. The IEP specifically indicated it was making a change from the previous year's group counseling sessions. The school social worker provided Student weekly 50-minute group counseling sessions with 4 other student's with normal vision. Jt. Ex. BB, at 14, 17; 3 Tr. 771-72, 774-75. Parent testified that social work services had been discussed at the May, 2012, IEP team meeting and the team had adopted Parent's request that Student not be pulled out of class for regular group therapy sessions. 3 Tr. 620, 829-30.

Failure to Convene an IEP Meeting.

31. When Student's TVI teacher resigned and the District hired an educational assistant and then a special education teacher neither of whom had any knowledge of Braille or of the compensatory access needs of a blind or visually impaired Student or how to teach the skills needed by a visually impaired student in December, 2012, Student no longer received the one-on-one instruction in Braille, in Nemeth Code, in use of the abacus, etc., which was central to his IEP. Many other services to Student were restricted as well. The record shows that Parent repeatedly requested an IEP meeting. 3 Tr. 603, 642, 613. The previous due process proceeding was pending in December, 2012.

Reevaluation.

32. Parent and the District have stipulated to a reevaluation of Student. At the request of the parties, that stipulation is reflected in the hearing officer's order.

Remedy.

33. Parent's highly qualified expert witness, who is a certified TVI teacher and a certified O & M specialist, testified that Student would need an hour per day of services to make up for the skills either lost or not gained in Braille and in other compensatory access skills. 2 Tr. 438-44; 543-545. In her opinion, an alternative way of providing instruction sufficient to remedy the effects of the lost services would be to provide Student with a comprehensive summer program for two additional summers. *Id.* at 589.

34. Parent's expert also testified that going forward, Student would need regular, daily instruction for 30 minutes a day in Braille. 2 Tr. 453. Student would need another 15 minutes a day in Nemeth Code. 2 Tr. 484-85. The Nemeth instruction should be connected to and coordinated with his math instruction. 2 Tr. 485.

CONCLUSIONS OF LAW

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, *et seq.*, (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2007).

2. This proceeding has complied with all procedural safeguards required by the IDEA, its implementing regulations, and the New Mexico Special Education Regulations. *Id.*

3. An extension of time for entry of the decision in this matter has been granted until August 6, 2013, at the request of both parties. This decision is, therefore, timely filed on July 8, 2013. 34 C.F.R. § 300.515(c).

4. Parent bears the burden of proof on claims of denial of FAPE, and, to prevail, must show by a preponderance of the evidence that the District has failed in its obligations under the IDEA. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

5. The statute of limitations for due process hearings under the IDEA is two years. 20 U.S.C. § 1415(f)(3)(C) (2004). Only claims arising within the statutory period have been considered by the hearing officer.

6. At all relevant times, Student qualified for special education and related services under the IDEA as a student with a disability in the eligibility area of visual impairment. 34 C.F.R. § 300.8(c)(13) (2006).

7. The goals and objectives selected by the IEP team for a child must include both academic and functional goals designed to [m]eet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum;" and "[m]eet each of the child's other educational needs that result from the child's disability." 34 C.F.R. § 300.320(a)(2)(i). For a child who is blind or visually impaired, the IEP must include instruction in Braille and the use of Braille for reading and writing, unless the IEP team finds and documents that Braille instruction is inappropriate. 20 U.S.C. § 1414(d)(3)(B)(v). Student's IEP included appropriate goals and objectives in Braille and in other compensatory access skills, consistent with these requirements of the law. Student's May 12, 2012, IEP was reasonably calculated to enable Student to make educational progress.

8. Parent failed to carry her burden of establishing by a preponderance of the evidence that the District denied Student FAPE from November 16, 2012, through December 13, 2012.

9. Failure to implement substantial or significant provisions of the IEP will constitute a denial of FAPE. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Neosho R-V School District v. Clark*, 315 F.3d 1022 (8th Cir. 2003); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 822 (9th Cir. 2007). From December 13, 2012, through the end of the school year, the District denied Student a FAPE by failing to provide any specialized instruction

to implement his IEP goals in Braille and in other compensatory access skills. These goals were central to Student's IEP.

10. Shortages of trained personnel, the provision of audio alternatives, or the amount of time needed to provide a child with sufficient and regular instruction to attain proficiency in Braille, may not be used to excuse a denial of Braille instruction to a child. *Dear Colleague Letter*, 113 LRP 25708 (OSER/OSEP 06/19/13); 65 Fed. Reg. No. 111, 36589. The hearing officer rejects the District's claim that its noncompliance should be excused based on its less than vigorous, unsuccessful efforts to hire a TVI.

11. The District's failure to provide the brailled text books in science and Spanish contributed to the denial of FAPE to Student in the area of his IEP Braille goals by denying him the ability to practice in these areas and requiring audio access instead of allowing him to use Braille. Given the limited access Student had to material in advanced Braille codes after the TVI resigned in December, 2012, the failure to provide textbooks in embossed Braille code was a significant violation of his IEP.

12. The development of goals and objectives for Student by the TVI following the IEP meeting, rather than developing those goals and objectives at the IEP meeting, while a procedural violation of the IDEA, did not compromise Student's right to an appropriate education, significantly impede the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE, or cause a deprivation of educational benefit, given the reliance of the TVI on the IEP discussion of Student's progress and his needs in developing the goals and objectives. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

13. The failure to include specific O & M goals and objectives in Student's IEP resulted in the GPS goal slipping through the cracks. Although it appears that the IEP team intended to

provide a GPS device and instruction in using it, because there was no goal adopted in this area, the device was never purchased for Student. *Id.* Student was thus denied educational benefit because of this procedural violation.

14. The O & M services provided to Student were reasonably calculated to provide Student educational benefit. Any violation of the IEP in failing to deliver these services weekly did not amount to a significant deprivation of IEP services and did not significantly affect the provision of FAPE to Student.

15. Assistive technology devices used for educational purposes which are needed to provide a student a FAPE must be provided at no cost to the student. 34 C.F.R. § 300.17(a) (special education and related services must be provided at public expense, without charge to the student or his family). Whether a student must be allowed to take an assistive technology device like the Apex home free of charge depends on whether the Student's IEP provides that home use is necessary for educational purposes, to do Student's homework. *Letter to Anonymous*, 18 IDELR 627 (OSEP 1991); 65 Fed. Reg. No. 111, at 36590. Because the IEP here specified that Student needed his Braille to complete homework and read materials related to his education, permitting Student to take the Apex home without charge was required by the Act.

16. The evidence in the record does not support the Parent's claim that the District's refusal to allow Student to take the Apex home was in retaliation for filing a due process complaint.

17. The District's refusal to provide Student the Bluetooth and KeyView technology he requested did not deny Student a FAPE. The evidence did not show that he needed these devices to make educational progress.

18. The development by the social worker of a plan for services that was more intensive and somewhat inconsistent with the decision of the IEP team to reduce Student's services amounted to an insignificant violation of Student's IEP. Providing Student counseling services with other

typical peers 50 minutes a week, rather than allowing Student to attend art class that day is not a violation of the IDEA's least restrictive alternative provision.

19. Although a change in staff is not generally a change in placement, it was here, requiring the IEP team to be reconvened. The presence of a qualified teacher to provide services to Student 20 hours a week – the bulk of his school time – was an essential element of Student's IEP. Without such a qualified teacher, all specially designed instruction aimed at allowing Student to meet his IEP goals in Braille and other compensatory access skills – virtually the entirety of his IEP – came to a stop. *Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir. 1992) (a change in educational placement results if there is a change in or elimination of a basic element of the program); *Letter to Wessels*, 16 LRP 840 (OSEP 1990) (IEP team can identify a teacher (or type of teacher) if that is important to the program). To the extent an automatic stay pursuant to the stay-put provision of the IDEA was in effect, as the District has contended, the District violated the stay-put provision by unilaterally changing Student's placement without the Parent's consent. 34 C.F.R. § 300.518(a) (absent the parent's agreement, student must remain in "his or her current educational placement" during the pendency of a due process proceeding). Even without the stay-put provision, a District may not make a unilateral change in a child's placement without convening an IEP team meeting and allowing the Parent to participate in the placement decision. 34 C.F.R. §§ 300.327 and 300.501(c). Decisions on placement can be made without parental participation only if the District is unable to obtain the Parent's participation. 34 C.F.R. § 300.501(c). That was not the case here where the Parent repeatedly requested an IEP meeting.

DISCUSSION

A: The Law Governing Denial of FAPE to a Student Who is Blind or Visually Impaired.

Any discussion of whether the educational services offered to Student by the District from November 16, 2012, through the end of 2012-1013 school year were appropriate pursuant to the IDEA must begin with the undisputed fact that Student, a 14-year old sixth grader with a severe visual impairment, has not received specialized instruction toward his IEP goals and objectives in Braille and in other skills which compensate for his disability and allow him to read, write, compute and do academic research, since December 13, 2012. Parent's well-qualified expert in teaching and special education for children with visual impairments testified that instruction in these areas was essential to Student's access to and participation in the general curriculum now and in the future, as he prepares for and enters high school and college.

The District has claimed that because Student has had success in his sixth grade academic classes relying on his existing skills, intelligence, and the modifications, such as readers and audio texts provided by the District, the District has provided Student a FAPE. This position is not consistent with the law.

Congress enacted the IDEA not just to ensure access to the public schools for children with disabilities, but "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living." 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.1(a). The United States Supreme Court has held that a free appropriate public education (FAPE) under the IDEA, "consists of educational instruction specially designed to meet the unique needs of the handicapped child,...supported by such services as are necessary to permit the child to benefit from the instruction." *Rowley*, 458 U.S. 176, 188-89 (1982).

Specially-designed instruction has two parts. It must not only ensure access to the general curriculum, but it must, as well, address “the unique needs of the child that result from the child’s disability.” The IDEA regulations define “specially designed instruction” as:

adapting, as appropriate to the needs of an eligible child..., the content, methodology, or delivery of instruction –

(i) To address the unique needs of the child that result from the child’s disability; and

(ii) To ensure access of the child to the general curriculum, so that he or she can meet the educational standards within the jurisdiction of the public agency that apply to all children.

34 C.F.R. § 300.39(b)(3). The definition in the regulations is taken directly from the statute. 20 U.S.C. § 1414(d)(1)(a)(II).

The Act gives the task of developing each child’s program to an IEP team which, relying on the child’s evaluations and reports of progress, assesses the child’s level of functioning in all areas, academic, developmental and functional, and develops an appropriate, individualized education program. 20 U.S.C. § 1414; 34 C.F.R. § 300.324(a)(1). The goals and objectives selected by the team for the child must include both academic and functional goals designed to “[m]eet the child’s needs that result from the child’s disability to enable the child to be involved in and make progress in the general education curriculum;” and “[m]eet each of the child’s other educational needs that result from the child’s disability.” 34 C.F.R. § 300.320(a)(2)(i).

In addition to the general directives set forth above, Congress has also added a list of special factors that it directs the IEP team to consider. Generally, the team is left free to decide, after giving the matter consideration, whether to address each factor and how to address it, depending on the disability and the unique needs of each child. The provision dealing with children who are blind or visually impaired, however, is unique in mandating both instruction in Braille and the use of Braille

by every visually impaired child, unless the IEP Team affirmatively decides that instruction in Braille or the use of Braille is not appropriate for the child. 20 U.S.C. § 1414(d)(3)(B)(v) reads as follows:

in the case of a child who is blind or visually impaired, provide for instruction in Braille and the use of Braille unless the IEP Team determines, after an evaluation of the child's reading and writing skills needs, and appropriate reading and writing media (including an evaluation of the child's future need for instruction in Braille or the use of Braille), that instruction in Braille or the use of Braille is not appropriate for the child;

Thus, an IEP team is not free to leave out goals and objectives for a blind or visually impaired child for instruction in Braille, nor is the school free to fail to provide that instruction, absent individual extenuating circumstances which make this instruction inappropriate. Instruction in both reading and writing Braille is, by specific Congressional mandate, presumed to be an essential part of a FAPE for a blind or visually impaired child. *Id.*

The federal policy guidance from the federal Office of Special Education which provides guidance on the application of this statutory provision notes that shortages of trained personnel or the use of alternative audio access devices or readers or the amount of time such instruction takes or the difficulty of providing it regularly does not excuse the failure to meet this Congressional mandate:

Factors, such as shortages of trained personnel to provide Braille instruction; the availability of alternative reading media (including large print materials, recorded materials, or computers with speech output); or the amount of time needed to provide a child with sufficient and regular instruction to attain proficiency in Braille, may not be used to deny Braille instruction to a child.

Dear Colleague Letter, 113 LRP 25708 (OSER/OSEP 06/19/13); 65 Fed. Reg. No. 111, 36589

OSEP's position is a reflection of the extraordinary importance Congress assigns to instruction in Braille in order to allow a child who is blind or visually impaired not just access to his current academic classes, but to prepare him to access more advanced academics and to succeed in the workplace and the community. Under these principles of law, denying a child all specialized

instruction toward his IEP goals and objectives for improving his ability to read, write, and compute in Braille plainly is a denial of FAPE.

One further point merits mention. The District suggests in its brief that it should be permitted to meet Student's needs in Braille and in other compensatory access skills by providing compensatory education to Student rather than providing the regular and consistent instruction and practice in Braille and specialized Braille codes throughout the school year that his IEP team determined he needs and which Parent's expert confirms are highly important to Student's ability to function in the secondary and college academic environment as he gets older. *See also Dear Colleague Letter, supra.*, p. 3, 65 Fed. Reg. No. 111, 36589 ("Systematic and regular instruction from knowledgeable and appropriately trained personnel is essential for a child to become proficient in Braille). Compensatory education is a poor substitute for appropriate services, to be used only where a violation has already occurred and compensatory services are the best that can be done to try to remedy a denial of FAPE. They can not be the District's planned default. The hearing officer, in her order, therefore, requires the District to act proactively to put in place the personnel needed to provide appropriate services to Student throughout the school year.

B. The Law Governing Failure to Implement an IEP as Written.

The IDEA regulations provide that a District must provide special education and related services to a child with a disability in conformity with an IEP that meets the requirements of the Act. 34 C.F.R. § 300.17(d). Districts are not permitted to draft an IEP and then disregard its terms.

Although the regulation appears to be written in absolute terms, several federal appellate courts have held that minor deviation from the IEP will be considered *de minimus* and will not constitute a denial of FAPE. However, even these courts agree that failure to implement substantial or significant provisions of the IEP will constitute a denial of FAPE. *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5th Cir. 2000); *Neosho R-V School District v. Clark*, 315 F.3d

1022 (8th Cir. 2003); *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist.*, 502 F.3d 811, 822 (9th Cir. 2007).

As noted above, where Congress has created a presumption, as it has for instruction in Braille, that a service must be provided in order to provide FAPE to students who are blind or visually impaired, Congress has already made the decision that denial of these services amounts to denial of a FAPE.

C. The Law Governing Staff Qualifications.

Parent argues that Student was denied a FAPE because the District did not hire a Certified Teacher for the Visually Impaired.

To satisfy the Act's definition of FAPE, special education and related services must meet State standards, including State standards for qualification of the personnel providing those services. 34 C.F.R. § 300.17(b). Rather than imposing qualification standards on the State, the IDEA and its implementing regulations delegate to the State the responsibility to adopt suitable qualifications for licensing of special education teachers and related services personnel. 34 C.F.R. § 300.18. Although New Mexico has adopted detailed standards for teachers of students with blindness and visual impairments, there is no state regulation requiring that every blind or visually impaired Student be taught by someone with these qualifications. *See* 6.61.10 NMAC.

Although the IDEA regulations are clear that a parent cannot challenge a teacher's qualifications in a due process hearing, and must do so in a state complaint procedure, this does not mean that qualifications are not relevant to the provision of FAPE. 34 C.F.R. § 300.18(f). The provision of FAPE requires that, regardless of the label on the license, that a teacher assigned to a Student must be able to teach to the requirements of the IEP. Here, whether or not a teacher has formal certification as a Teacher of the Visually Impaired under State licensing standards, whoever teaches Student must be able to read and write Braille, must be trained in how to teach Braille to a

blind or visually impaired student, must know and be able to teach Nemeth code, must know and be able to teach literary Braille, must be able to explain and assist Student's regular education teachers to maximize Student's access to the general education curriculum, and must be able to teach Student to use assistive technology devices.

It is possible that someone nearly finished with a TVI certification program or someone who has been certified previously could meet these qualifications, perhaps with backup and supervision by an off-site TVI. Certification by the state as a TVI, however, ensures that the teacher has been tested under state standards and, in fact, has the skills necessary to teach Student. Even the District's special education director in this hearing acknowledged that Student needs a teacher who has particular skills which are not possessed by a general special education teacher. The focus is on the skills. Certification is simply a shorthand way of knowing that the person hired, in fact, possesses those skills.

The District, in its brief, suggests that providing a Teacher for the Visually Impaired is a particular methodology which is within the exclusive control of the District. Although the District is correct that the choice of methodology is left to the District, *Rowley*, 458 U.S. 176, 207-208, having a teacher who is able to teach Braille and the other skills which Student's IEP mandates be taught is not a question of the teaching method used by that teacher – it is a question of ability to provide the specialized instruction required for Student to make educational progress. The educational assistant and special education teacher assigned to teach Student in this case both admitted that they could not teach Student to use Braille or to use his abacus or to use the JAWS program or to read or write embossed Braille.

Finally, although the District's Director of Special Education has begun a search for a teacher qualified to teach Student next year, she has also admitted that she is unfamiliar with services for blind and visually impaired Students and with the way those services can be most effectively

accessed. 3 Tr. 654 (didn't know a lot about how to pull in a TVI), 663-64 (learned at the due process hearing tips about how to recruit), 687-89 (doesn't know what services are available). She has, therefore, delayed or not taken steps that experts in the field recommend as effective ways of recruiting staff. All of the witnesses with expertise in this area agreed that there is a shortage of qualified teachers and that extraordinary recruitment methods are necessary as well as flexibility in organizing the District's staffing to ensure that a teacher of the visually impaired is not serving a larger caseload than can be effectively managed and in considering creative options. 3 Tr. 852-53, 858, 870, 871, 591-92.

The hearing officer reminds the District that the IDEA is a federal law. When there is a conflict between local policy or practice and the requirements of federal law, federal law must trump those policies. *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1524 (9th cir. 1994) (policy decisions of the District are entitled to deference so long as they are not inconsistent with State and federal law). If Student's IEP needs or other requirements of the federal law cannot be met without cutting out other duties generally required of District special education teachers, the District must take this step. If the recruiting budget must be expanded to ensure that a FAPE can be provided or a salary increased to attract a qualified candidate, this must be done. The United States Supreme Court has shown that it is not sympathetic to school districts which fail to comply with the IDEA. In *Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7, 15 (1993) the Court stated as follows:

There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for private education of a disabled child can do one of two things: give the child a free appropriate public education in a public setting, or place the child in a appropriate private setting of the State's choice. This is IDEA's mandate, and school officials who conform to it need not worry about reimbursement claims.

D. Remedy.

Compensatory education and injunctive relief are both equitable remedies. The hearing officer is charged with considering all of the circumstances and with providing relief calculated to remedy the educational deficit created by a District's failure to provide FAPE. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). The hearing officer must take into account the role of the various parties, mitigating or aggravating factors, and the impact of the denial of FAPE on the student, as well as other factors. *Id.*; *Bd. of Education of Oak Park and River Forest High School District 200 v. Illinois State Bd. of Ed.*, 79 F.3d 654 (7th Cir. 1996).

In this case, Student was denied approximately 90 hours of direct instruction in Braille and other compensatory access services, as well as being provided sometimes inappropriate support services and Braille transcriptions. The remedy ordered by the hearing officer relies on the testimony of Parent's expert that providing additional services in a summer camp intensive setting for two summers would likely allow Student to catch up on the skills he has either lost or failed to acquire because of the missing instruction. The hearing officer has also provided for specific instruction in use of a GPS system, a related service included in Student's IEP which he was denied due to a procedural violation. Requiring a facilitated IEP will ensure that an appropriate IEP is developed with the participation of Parent and Student, something that was not done when Student's placement was changed by the District in December, 2012.

Perhaps the most important part of the hearing officer's order, however, is the requirement that District special education staff obtain the assistance of an expert in developing and implementing a recruitment plan to find teachers and O & M specialists qualified to teach Student. As this decision indicates, Student cannot be taught the skills he needs to provide him a FAPE without qualified personnel. It was apparent from the testimony of the District's Director of Special

Education that she is struggling to find appropriate resources. Indeed, she mentioned finding the testimony of the experts at the due process hearings a great help in suggesting resources to her. 3 Tr. 663-64. Therefore, to ensure that the District's is able to provide a FAPE for Student next year, the hearing officer has ordered the District to obtain expert assistance in developing and implementing a recruitment plan.

Finally, the order regarding private school simply repeats the existing IDEA law. If a District is not and cannot provide a FAPE for a Student, then the District must place the Student in a private school that can provide the necessary services at public expense. If they do not do so, the Parent may unilaterally make such a placement and obtain reimbursement. *Florence Cnty. Sch. Dist. Four v. Carter By & Through Carter*, 510 U.S. 7 (1993).

IT IS HEREBY ORDERED:

1. The District in accordance with the stipulation of the parties, will arrange and pay for an independent comprehensive reevaluation of Student by the New Mexico School for the Blind. The evaluation will consist of a Functional Vision Assessment; a Learning Media assessment; an Orientation and Mobility assessment; an assistive technology assessment, IQ and achievement tests; an EVALS assessment. The evaluation will be conducted to the extent appropriate in Las Vegas. Other portions such as the IQ and achievement tests and the assistive technology assessment will be conducted in Alamogordo on the campus of the NMSBVI. Arrangements will be made by the District to minimize the impact of any required absence from school during the reevaluation.
2. The District will promptly contract with an expert who is familiar with and knowledgeable about methods of and resources for recruiting qualified teachers for the visually impaired and will work closely with that expert to develop a recruitment strategy and to implement that strategy. The District will allocate staff resources and funding to this effort, establishing a

reasonable budget in consultation with the expert. The District shall also work with the expert to ensure that it is offering market rates for a teacher qualified to teach the visually impaired and that it ensures that it allows the teacher sufficient time to meet Student's IEP requirements. The District shall recruit either a single teacher qualified as an Orientation & Mobility Specialist or two separate individuals.

3. If the District does not succeed in employing or contracting with a qualified TVI teacher who is able to provide the specialized instruction in Braille and other compensatory access services required to provide Student a FAPE, then the District shall assist the family in finding an appropriate private school and shall bear the costs of the school.
4. The District will also contract with the same or another expert who will review the efforts made by the District to order Student's text books. The expert consultant will ensure that the arrangements have been made and the proper form of Braille ordered and will oversee the transcription to ensure that it is done timely and correctly. If these arrangements are fully in place and this expert assistance is not needed, then the District shall provide written confirmation to counsel for Parent documenting the arrangements and the dates transcribed materials will be provided to the District.
5. Student was deprived of many hours of instruction in Braille and in other compensatory access skills. Compensatory education is an appropriate remedy. Consistent with the recommendation of the Parent's expert as to services likely to enable Student to recoup some of his lost skills, the hearing officer awards Student two summers (in 2015 and 2016) in a comprehensive summer program with an emphasis on Braille and other compensatory access instruction for college-bound Students. The program must be an overnight support program for the blind and visually impaired and must last a minimum of six weeks each of the two

summers. Parent and Student should participate in the selection of the program each year and Parent's approval should be obtained for the selected program by April 30, 2013.

6. The District shall contract with a professional certified Braille transcriber to transcribe materials for use in Student's science and math classes. This transcriber shall be used to ensure that properly transcribed embossed Braille materials are available for Student's use.
7. The District shall provide an appropriate GPS device for Student, as recommended by the O & M specialist and shall provide Student 6 hours of training in the use of the device provided by an O & M specialist.
8. The District shall convene a facilitated IEP meeting with a NMPED facilitator selected by Parent when the Student's evaluation is completed. The District shall include one of the expert TVI's who participated in Student's evaluation in the IEP meeting.
9. Student will be permitted to take the Apex home to do homework without charge to Parent.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a state or federal court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. 300.516 (2006), and 6.31.2.13(I) (24) NMAC (2007). Any such action must be filed within 30 days of receipt via certified mail of the hearing officer's decision by the appealing party.

THIS DECISION ENTERED THIS 8th DAY OF JULY, 2013.

Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Decision of the Due Process Hearing Officer* was sent by certified mail, return receipt requested, on July 9, 2013, to Hanna Skandera, Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and to the following counsel of record in this proceeding. The decision was also e-mailed on July 8, 2013, to all Counsel.

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