

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

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 1213-38

FINAL DECISION

Statement of the Case

Parent filed a Request for Due Process Hearing Against the Local Education Agency (“Request”) with the New Mexico Public Education Department (“NMPED”) on April 19, 2013, alleging that District denied Student, a ninth grader, a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) 20 U.S.C. §§ 1400 et seq. and implementing state (6.31.2 et seq. NMAC, effective June 29, 2007, amended through September 28, 2012) and federal (34 CFR Part 300, effective August 14, 2006, amended through December 1, 2008) regulations. More specifically, Parent contends Student has a hearing impairment that renders him incapable of developing spoken language, that District has ignored the educational impact of Student’s hearing impairment and that Student has been deprived of access to meaningful educational benefit because District has failed to address his needs for deaf education.

District did not challenge the sufficiency of the Request. District attempted to resolve the dispute through Resolution Session but contended that Parent did not participate appropriately. District moved to dismiss Parent’s Request for lack of jurisdiction on several grounds or, in the alternative, for an order directing Parent to “complete” the Resolution Session. District’s motion was denied with the exception of any claim arising out of a single incident of alleged improper physical restraint. These orders were entered in the record on June 17, 2013. The procedural history of this Complaint is otherwise not remarkable or substantive and need not be related further. A request by one or both of the parties to extend the deadline for entry of a final decision was granted and this Decision is timely filed if delivered to NMPED and the parties no later than August 27, 2013.

The due process hearing was held on five days between July 9 and July 16, 2013. Parent was present almost throughout and represented by counsel. Student did not appear. One of the District's Special Education Directors was present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Parent were identified by numbers. District's exhibits were identified by letters. The Joint exhibits were identified by double letters. Page numbers on all exhibits refer to the pagination in the center or lower right-hand corner.

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

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 June 17, 2013.

1. Whether the instruction and accommodations District has incorporated into Student's program are adequate and appropriate to address his individual needs.
2. Whether Student's placement in the District's "intensive support program" is adequate to confer FAPE.
3. Whether Student has been educated with nondisabled peers and had access to the general curriculum to the maximum extent appropriate.
4. Whether Student was timely and adequately reevaluated to identify all areas of disability and, if not, whether the failure to do so has resulted in a substantive denial of FAPE.
5. Whether the reading and deaf education instruction provided to Student was appropriate to address his individual needs.

6. Whether the accommodations and specialized instruction delivered under Student's IEP were adequate to address Student's communication needs.
7. Whether District has provided appropriate related services, in particular speech and language and physical therapies, to assist Student to benefit from special education or appropriate assistive technology services and/or devices to address Student's functional capabilities.
8. Whether District is required to have deaf education-related personnel at Student's IEP meetings and, if so, whether District failed to do so and, if so, whether the failure to do so resulted in a substantive deprivation of FAPE.
9. Whether District is required to and, if so, whether it has appropriately addressed deaf education considerations required by IDEA and state law.
10. Whether District was required to provide additional training and support to staff and parents in order to confer FAPE.

It is undisputed that Student exhibits significant delays in receptive and expressive language. Parent maintains that this is due to the District's alleged failure to identify Student as Deaf/Hard of Hearing ("D/HH") and to develop his educational program accordingly, in particular, the failure to have placed him in the District's D/HH program with concomitant instruction in and development of American Sign Language ("ASL") as Student's primary language. The District contends that Student has sufficient usable hearing to develop language; that Student's intellectual disability is the source of his communication delays and his placement throughout the statutory period is appropriate to his needs. Consequently, the overarching question that directs the inquiry on most of the identified issues is does Student's language disability derive primarily from the Student's documented deficits in hearing or his documented cognitive deficits? As will be explained below, the preponderance of the evidence of record herein suggests Student's communication skills are primarily, if not wholly, the result of his intellectual disability.

Summary of Essential Evidence

The testimony of 16 witnesses was received and 57 exhibits were admitted into evidence during five days of hearing. The witnesses heard were Parent; six of Student's special education teachers; District's audiologist; District's diagnostician; two of Student's Speech Language therapists ("SLP"); the District's two expert SLPs; the Special Education Director; the Assistant Principal of the high school that houses District's high school level D/HH program; and the Parent's expert on deaf education. The following is a summary of the evidence relevant to the decision herein found to be established by a preponderance of the evidence unless otherwise indicated. References throughout this decision to exhibits admitted into evidence at the hearing are indicated by "Ex. ___," references to pages in the transcript of the hearing by "Tr. ___" and references to the Joint Stipulation of Facts by "Jt. Stip. ___."

Student is a 15 year old who will attend tenth grade at one of the District's high schools for the 2013-2014 school year. Jt. Stip. 2 and 3. He was born in 1997 with Down Syndrome and is eligible for special education and related services as intellectually disabled ("ID"). Jt. Stip. 4 and 5. For all school years relevant to this Request, Student was placed in the District's intensive support program ("ISP") which is a self-contained classroom serving multiply or intellectually disabled students. Last year, there were five children in Student's class. Three of the children were identified as verbal and two also had hearing deficits. Student was included in both groups. Tr. 31-38.

Down Syndrome is a chromosomal abnormality that impacts physical growth and characteristics and typically impairs cognitive ability resulting in developmental disabilities ranging from mild to moderate. Tr. 1388-1390. The first attempt to assess Student's cognitive ability of record was conducted in 2000 when he was 37 months of age. The evaluator utilized the Bayley Scales of Infant Development – Second Edition ("BSID-II"). Only the Mental Scales were used. The raw score derived from the test translated to an age score of 18 months. Exh. BB, p. 3. The BSID-II was administered again in 2003 at 64 months of age. Student then exceeded the age included in the normative sample so a standard score

could not be obtained. With that and other reservations, a developmental age was computed demonstrating an overall skill level of 19 months. Exh. DD, p. 3.

Unfortunately, the report generated from an evaluation apparently conducted in 2006 is not of record. However, the summary provided in the most recent evaluation indicates a Woodcock-Johnson III achievement test was administered at that time. Only the results are reported in the later summary without any description of the context or setting. Exh. UU at p. 3. The results were:

Basic Reading Skills SS=25 - Very Low
Math Reasoning SS=17 - Very Low
Academic Knowledge SS=19 - Very Low

Vineland Adaptive Behavior Scales were administered in Student's initial evaluation of 2000 and the reevaluations done in 2003, 2006 and 2013 using interviews of Parent and Student's then current teachers. The Vineland measures adaptive behavior in four domains: Communication, Daily Living Skills, Socialization and Motor Skills. Exh. B, p. 3. In 2000 (age 37 months), his Adaptive Behavior Composite yielded an overall age equivalent of 18 months. In 2003 (age 64 months), he achieved an age equivalent of 26 months. The Adaptive Behavior Composite was not reported of record for 2006 or converted to an age equivalent in 2013 but all domains reported in those two evaluations were in the first percentile or less. In 2000 and 2003, Daily Living was Student's strongest domain. Exhs. BB, p.3; DD, pp. 4-5; UU, pp. 3 and 8. Without explanation, standardized testing was not administered for the reevaluation conducted in 2009. Exh. GG, p. 1.

Student's receptive language skills were consistently measured to be either greater than or at least equal to his expressive language skills. Exhs. BB, pp. 4-5; DD, pp. 6-7; UU, p. 3; GG, p. 4. District's expert SLP relied on this finding and her experience working with Down Syndrome children to conclude that Student hears well enough to understand language. Tr. 1512, 1514-1515.

Student was due for a three year evaluation in May of 2012 but it was not undertaken until January 2013. The testing was done in February 2013 and the report issued on March 8, 2013. This evaluator was the District diagnostician who testified at the hearing. He attempted to administer a

standardized test to determine Student's cognitive ability. He testified in detail regarding his efforts to administer the test and explained that he was unable to succeed due to Student's severely limited communication skills. He relied on his review of the previous evaluations and the information he was able to obtain from the classroom in concluding that Student "continues to be functioning at a pre-primer level in all academic areas. . . . [Student] will continue to require significant intervention and assistance in all areas of his school day." Exh. UU, p. 8.

The IEP team also reviewed the Functional Communication Severity Rating Scale completed by Student's ninth grade SLP and teachers at Student's reevaluation IEP meeting on April 9, 2013. Exh. WW, pp. 3 and 10. This instrument asks the rater to evaluate the student's skills in five areas of communicative interaction. Student was rated to have moderate difficulties with various expressive communication tasks and mild-moderate difficulties with comprehension. The conclusion drawn was that his difficulty with communication has "only a mild adverse effect on educational performance, suggesting that he is usually successful in comprehending what others say and that his communication skills are adequate for participation within the ISP educational setting." Exh. WW, p. 3; Tr. 817-819.

Finally, the Audiology Evaluation Report conducted on February 8, 2013, (which is discussed elsewhere in this decision) was also addressed by the reevaluation IEP team. Exhs. TT and WW, p. 3.

Consistent with these results reflecting significant delays in all academic and functional areas, Student was identified by District first as a child with developmental delays and received early intervention services and later as ID.¹ Exh. BB. Student has been enrolled in District's programs and schools throughout his education. Jt. Stip. 2.

Similarly, Student's hearing loss was identified early by the District. The first audiology report of record was done as a routine part of the general education evaluation conducted when Student was 37 months old and reflected a mild hearing loss due to middle ear fluid bilaterally. The audiologist therein recommended medical treatment. Exh. AA, p. 1.

¹ Student's IEPs and evaluations prior to 2012 identified his eligibility as Mental Retardation, the precursor to ID.

In October 2001, Student's doctor diagnosed persistent otitis media with effusion secondary to Down Syndrome. Since then, Student has had ventilation tubes inserted in his ears on four different occasions. Exh. A, p. 8. The first such surgery, in October 2001, also removed his tonsils and adenoids. Exh. A, pp. 11-13. The last surgery of record was performed in June 2009. Exh. A, pp. 4-7. The last note of record from Student's doctor is dated October 25, 2011, and recommends tympanoplasty in the spring. Exh. A, p. 1. There is no evidence in the record to indicate whether or not this procedure was performed.

Student's hearing loss has been closely followed and, between his doctors and the schools, he has had numerous (probably at least one a year) audiology studies performed over the years. The loss has been consistently described as mild to moderate, fluctuating in degree depending on the status of his middle ear. Exh. 7. It has always been recognized as educationally significant by District's audiologists. They have consistently reported to Student's IEP teams and the staff that work with Student that he can be expected to have difficulty hearing normal conversational level speech particularly in the presence of background noise. Exhs. A, P, EE, FF, TT, 11 and 12.

The District audiology reports of record recommend that Student's teachers should optimize the listening environment reducing background noise as possible; be in close proximity, face Student and be sure to get his attention when speaking to him to facilitate the best reception and to allow him to make use of visual cues. They further recommend that Student should have preferential seating close to the teacher or source of instruction at all times. Each of the six teachers who appeared at the hearing testified to his or her compliance with those recommendations.

The audiologists also recommended the use of FM amplification which has been provided by the District and maintained as part of Student's audiology services. Exh. P. His eighth grade teacher reported the most consistent and wide-ranging use of the FM system. Tr. 437-439. His ninth grade sponsor teacher rarely used the FM system finding it incompatible with his teaching method. He instead relied upon direct techniques for confirming Student's attention and understanding. Tr. 42-43. Student

utilized the FM system on a wider scale with his ninth grade prevocational skills teacher. In that class, the FM system was also used outside of the classroom to monitor and direct Student's participation in mail delivery, one of the functional tasks for the students in that class. Tr. 1484-1487. The ninth grade art teacher did not use the FM system because she worked in such close proximity with Student that feedback became an issue. Tr. 1426-1427.

Three individualized education programs ("IEPs") fall within the period under review. Exhibit JJ dated May 11, 2011, addressed eighth grade for the 2011-2012 school year. Exhibit NN dated April 20, 2012, addressed ninth grade for the 2012-2013 school year. Exhibit WW dated April 9, 2013, will direct Student's tenth grade placement for 2013-2014. It is undisputed that none of the IEPs identify Student as D/HH. It is also undisputed that no one from the District's D/HH programs attended any of the IEPs. Each IEP placed Student in one of the District's ISP classrooms and directed the District to provide Student with speech language therapy services, adapted physical education ("APE") and audiology services.

Although the May 2011 IEP excluded service in regular classrooms (Exh. JJ, p. 25), and did not list art as an activity with students without disabilities (Exh. JJ, p. 26), Student was apparently given the opportunity to participate in general education art. The only information available about this was a brief teacher report in the Student Profile during the April 2012 IEP that noted as follows: "[Student] loves to draw. He is always excited to show his work/drawing. I ask class to help him draw or do some art and [Student] performs his best work for them students. His current average grade is A." Exh. NN, p. 4. See also Tr. 435. No other information is available regarding Student's participation or the supplemental aids and services were required to accommodate his attendance.

Student's ninth grade program had four components which provided Student would move to a different classroom with a different teacher for three separate 50 minute blocks of time. The components were art, reading and prevocational skills. The rest of the day was spent with Student's sponsor teacher working on the rest of the academic curriculum and daily living. All were taught by ISP teachers. One

day a week Student attended APE with the APE teacher. However, the APE teacher testified that it would be possible for Student to attend APE every day but the Parent has not made such a request. Tr. 954.

Several different reading programs were used by Student's various teachers over the course of the statutory period. Level 1 PCI was used in eighth grade and by the sponsor teacher in ninth grade whose goal was to increase Student's recognition of sight words to five words. Tr. 142. The ninth grade reading teacher, who did not testify at the hearing, apparently used PCI Environmental Print, an evidence and research-based visual program for nonverbal and severely disabled students using symbols mapped to every word. Exh. L; Tr. 176-177.

The testimony of the teachers and the progress reports contained within the IEP exhibits reflect that Student made progress in a number of areas. In eighth grade APE, Student's participation level was noted to have increased without constant prompts to stay busy and he was observed to be more cooperative and compliant. Exh. JJ, pp. 14 and 23. He actually met some of his goals in physical therapy such as increasing his ability to keep up with peers when walking around campus and becoming independent on the stairs using a handrail. The following IEP team discontinued physical therapy as a related service for ninth grade finding that Student "demonstrated adequate strength, balance, endurance and mobility skills necessary to access his school environment and participate in all gross motor activities." Exh. NN, p. 37.

Student's eighth grade SLP reported progress in both language and vocabulary noting a "very good" response to signed communication with "very good" accuracy or approximation imitating and recalling signs. Exh. JJ, pp. 17 and 20. In eighth grade Math, Student was observed to progress from having no 1:1 correspondence to being able to sign and count numbers 1-3 with 1:1 correspondence with 100% accuracy. Written language, reading and math received reports of "progressing" without further observations or measurable progress data. Exh. JJ.

Student's ninth grade SLP observed that Student was improving communication and interaction, verbalizing more and responding well to articulatory cues. She reported Student signed and verbalized a

three word utterance independently (“I want bathroom”). But signing shown to be inconsistent and frequently inaccurate and speech intelligibility still typically less than 50% Exh. NN, p. 25. Student’s ninth grade sponsor teacher provided no observations or measurable progress data and merely reported “progressing” or “limited progress” for the other academic subject areas. Exh. NN. In testimony, the sponsor teacher reported progress copying his phone number but not in memorizing it. Tr. 109. However, Student was observed to be inconsistent with identifying and making 1:1 correlation. Tr. 115. In reading, the ninth grade sponsor teacher explained that while Student did not accomplish recognizing four other sight words, he retained the ability to recognize “my” and in his view, retention is progress. Tr. 144. This teacher did not conduct any data collection and could provide only anecdotal information on progress. Tr. 144.

On the other hand, the ninth grade prevocational skills teacher (“PVT”), did have data reflecting his students’ performance. Tr. 1488. PVT has been teaching ISP programs for District for 17 years. His degrees are in Business Administration and special education. Tr. 1449. He teaches the vocational component of the ISP program at this high school which Student attends for 50 minutes each day with three other students. PVT had three educational assistants. The class delivers mail for 65 teachers at the high school and collects and destroys special education office documents by shredding. They also worked on functional tasks such as assembly, disassembly, sorting, matching, and identifying objects, basic letters and numbers. Tr. 1451.

PVT confirmed that audiology visited the staff at the beginning of the year to explain Student’s hearing loss and train them on the appropriate accommodations to optimize Student’s communication environment. PVT also utilized an iPad with a communication app called Sono Flex that was loaded with 15 real photographs for Student to select to generate a verbal output. Student’s ability to use the iPad and Boardmakers for communication improved through the year. Tr. 1453-1454. PVT and the staff would model signs for Student but it was hard for Student to copy or model and he preferred to respond verbally. Tr. 1460.

PVT documented significant progress by Student over the course of the year. Improvements were seen in time on task, number of tasks performed, initiating work, following directions and reduced resistance. Tr. 1452. His ability to match shapes improved from only matching six of ten numbers at the beginning of the year to being able to match all ten at the end. They began working on matching alphabet shapes in March and by the end of the year, Student could match seven letters. Tr. 1481-1483. From his experience with Student in ninth grade, PVT believes Student would be well-suited for sheltered workshop or supported employment with intense supervision for safety and his needs. PVT did not think Student would ever be fully independent. Tr. 1461. This witness was found to be knowledgeable and credible.

Findings of Fact

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

1. Student resides with his Parent within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency.
2. Student, now 15 years old, was born with Down Syndrome which has rendered Student severely delayed in all academic and functional development.
3. Secondary to Down Syndrome, Student also has a history of chronic otitis media causing middle ear dysfunction that produces a mild to moderate fluctuating hearing loss.
4. Student exhibits severe delays in language, expressive more so than receptive.

5. The preponderance of the evidence suggests that it is more likely true than not that Student's language delays are primarily, if not wholly, due to his cognitive deficits rather than his hearing loss.
6. The preponderance of the evidence suggests that Student's placement in the District's ISP program confers FAPE.
7. Student has received more than *di minimus* educational benefit from the specialized instruction and related services provided by District throughout the statutory period.
8. The preponderance of the evidence suggests that the severity of Student's disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Tr. 976-980; Tr. 1413-1416.
9. Student's three year reevaluation was overdue, however, the delay constitutes a procedural error and the preponderance of the evidence suggests that the error did not compromise Student's right to FAPE, substantively hamper Parent's right to participate in the process or cause Student to be deprived of educational benefit.
10. The preponderance of the evidence indicates that Student made more than *di minimis* progress toward his IEP goals during the statutory period.

Discussion and Legal Authority

The Obligation to Provide FAPE

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

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

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

Parent contends that Student’s IEP teams were also required to consider the special factors found in 20 U.S.C. §1414(d)(3)(B)(iv) which reads:

. . . the communication needs of the child, and in the case of a child who is deaf or hard of hearing, consider the child’s language and communication needs, opportunities for direct communications with peers and professional personnel in the child’s language and communication mode, academic level, and full range of needs, including opportunities for direct instruction in the child’s language and communication mode[.]

In reviewing the adequacy of an IEP, the inquiry must then begin by asking whether the school district complied with the procedures of IDEA, including whether the IEP document conformed to the Act’s requirements. The components that must be included in the IEP document are defined in 20 U.S.C. § 1414(d)(1)(A) and 34 CFR § 300.320. However, procedural violations do not give rise to relief unless they compromised a child’s right to FAPE, substantively hampered a parent’s right to participate in the process or caused a child to be deprived of educational benefit. *O’Toole v. Olathe District Schools*

Unified School District No. 233, 144 F.3d 692, 701 (10th Cir. 1998) ¶59 1998.C10.565 VersusLaw.com

This limitation on procedural issues is now codified in IDEA at 20 U.S.C. § 1415(f)(3)(E)(ii).

The finding in this decision is that Parent failed to prove that Student's hearing loss rose to the level of a disability recognized under IDEA. Hence, the requirement to consider special factors for deaf or hard of hearing was not triggered. Nevertheless, a quick scan of the Summary of Evidence and the record as a whole demonstrates that consideration of Student's communication needs which are believed to be primarily, if not wholly, the result of Student's cognitive deficits, was central to District's educational planning for Student.

Least Restrictive Environment – Issue 3

District must, to the maximum extent appropriate, ensure 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 (7th Cir. 2007). *Murray v. Montrose Co. Sch. Dist.*, 51 F.3d 921 (10th Cir. 1995) establishes that the District can house highly specialized programs in one location rather than attempting to duplicate those special services in each child's respective neighborhood school. District herein complied with this mandate

Reevaluation – Issue 4

The District must ensure that Student is assessed in all areas related to the suspected disability. 34 C.F.R. §300.304(c)(4) Parent contends District has not conducted a timely or sufficiently comprehensive reevaluation because no testing or assessment by a specialist in deaf education was included. The conclusion herein is that such an assessment was not appropriate or necessary.

As noted above, an audiologist from the District testified at the hearing and was the only audiologist to do so. She is licensed in educational audiology and has served this District in that capacity for 18 years testing the hearing of students of all ages and levels of intellectual ability with the exception of students in the D/HH programs. Service for those programs requires fluency in ASL which she does not have. She tested Student in 2003 and again in 2013. She also reviewed Student's audiology records maintained at the District and the records from at least one of Student's doctors.²

The audiologist acknowledged that it would be difficult to determine whether the limitations on Student's ability to understand instruction are due to his hearing impairment or his intellectual disability. Tr. 634-635. Nevertheless, she explained that while Student has a hearing impairment, he still has a lot of usable hearing and it did not concern her that his teacher and his Speech Language Therapist ("SLP") identified spoken language as Student's main communication mode. Tr. 642. On the contrary, it was her considered opinion that Student's intellectual disability is a "huge component" of Student's communication difficulties. She explained beginning at line 24 on page 643 of the transcript:

He has a hearing deficit, but he has a hearing deficit of hearing loss that fluctuates – has fluctuated from mild to moderate. And with proper accommodations, he should . . . all other things being normal, such as intellectual disability not being there, he should . . . be able to develop a lot of speech.

She based this opinion on Student's test results over the years and her experience generally. She explained that audiograms measure reception of pitch (frequency) and loudness (decibels). A speech reception threshold of 20 decibels ("dB") or less is considered normal hearing. Severe hearing loss would exhibit a speech reception threshold of 75 or 80 dB; profound, 100 to 110 dB. Tr. 851. Student's initial audiogram in 2000 measured speech awareness threshold at 35 dB. Exh. AA, p. 1. He has also had an audiogram with thresholds as low as 15 and 30 dB in the right and left ears, respectively, on October 25, 2011, by Student's doctor (see Exh. A, p. 1), ranging upward to the 45 and 35 dB, right and left, found by the witness on February 8, 2013. This loss was exhibited across all the speech frequencies. Exh. TT.

² It should be noted that Student's doctor makes no reference to educational impact or acquisition of language. No advice to the Parent for seeking any educational response much less enrollment in a D/HH program. The only reference to the school is a request that it cease audiometric testing. Exh. A generally and p. 1.

With these audiogram results, the witness would expect Student to hear most of what a teacher said in a one-on-one setting with normal ISP classroom background noise. Tr. 852-854. This opinion was based on her extensive experience testing other similarly situated students. She related several examples of students with comparable hearing loss, with and without Down Syndrome, that have well developed speech. Tr. 900-902. This opinion was consistent with the experience reported by Student's teachers who for the most part reported delivering instruction to Student in a one-on-one setting. This witness was found to be both knowledgeable and credible.

District's diagnostician began his career in education with the District thirty years ago as a special education teacher teaching all levels from the most severe with multiple needs to gifted. After about eight years in the classroom, he moved to the position of special education coordinator. He became a diagnostician in 1993 after acquiring his license to do so and has worked for the District in that capacity since. Tr. 1059-1061. His standard testing practices were compatible with optimizing the listening environment for Student. The test was administered in a very quiet environment away from classrooms in a one-on-one setting with Student sitting right across the table from him. He found Student to be very attentive throughout and to put forth good effort. Tr. 1074-1075.

The diagnostician firmly believed that Student understood what was being asked of him. He observed that Student was able to understand what the diagnostician was asking as long as the question was within his cognitive ability to understand. Tr. 1093-1094. To demonstrate this observation, the diagnostician referred to the protocols to select several of the test questions and explained in detail what visual and auditory prompts were used to administer the questions, the cognitive skill being addressed and described Student's ability to perform. Tr. 1096-1107. Then using the manual, the diagnostician showed the test material used for several picture matching series and explained that Student would be able to correctly answer the first one or two in each series but could not continue with correct answers as the series would get progressively more abstract and difficult. Tr. 1113-1118.

The diagnostician concluded, “[Student’s] communication skills I believe are a direct result of his intellectual disability. The things that he understood, he understood. The things he did not understand, he just did not understand.” Tr. 1075, lines 16-19. This witness was found to be knowledgeable and credible.

The Special Education Director who represented the District throughout the hearing and testified is, among other things, responsible for the administration of the District’s D/HH programs. She has served the District in that capacity for four years and brings to that position a wealth of experience. She began her career as a teacher of the disabled in 1974 and spent three years teaching deaf/blind children and went on to teach the disabled in a variety of settings. She came to the District in 1985 as an educational diagnostician and for 12 years focused on evaluating preschool, deaf, blind and multiple disabilities. In 1997, she moved into administration as the sensory impairment coordinator providing support to the District programs for the visually impaired and D/HH. Tr. 914-916.

Her Bachelor’s degree is in language arts education with a minor in special education and she has a Master’s degree in special education with emphasis in visual impairment and intellectual disability. She has attended numerous short-term courses, conferences and workshops addressing the education of deaf children. She has taken nine university credit hours in ASL and attended the New Mexico School for the Deaf’s week-long ASL immersion program three times. She served on a statewide task force to address the education of D/HH students in 2003. Tr. 917-918.

Based on her experience working with, assessing, interacting with probably several hundred individuals with hearing loss similar to or even worse than Student’s who have developed language, the Special Education Director also believes that Student has sufficient hearing to develop language. She further believes that he has developed limited language. Tr. 1327. This witness was found to be knowledgeable and credible.

The opinions cited above are consistent with the factual evidence throughout the record of instances where Student was observed to be hearing accurately. Only sample citations will be attempted.

During the BSID-II evaluation in 2000, he pointed to body parts on a doll, including the mouth, hands, eyes and feet. Exh. BB, p. 3. For the BSID-II in 2003, he could point to five pictures when given the name of the picture and named one picture and one object. Exh. DD, p. 3. During another assessment, he put toys away when asked and was described as understanding simple, familiar commands, identifying several body parts on himself and pointing to pictures when named. Exh. BB, p. 4. In eighth grade, the SLP reported that Student averaged 80% or more success in responding to staff questions. Exh. NN, p. 5. Student was observed to accurately follow verbal commands in his ninth grade prevocational skills class in a less than optimum listening environment. Tr. 1460. PVT found that Student usually was able to fulfill his verbal requests. Tr. 1484-1485. His ninth grade art teacher recalled Student initiating a verbal exchange in which he was seeking her help to pronounce a word correctly. Tr. 1412-1413.

The tests and evaluations considered by the reevaluation IEP team as described in detail above were adequate to identify all areas of suspected disability.

Related Services – Issues 6 and 7

District is further obligated to provide Student with the related services required to assist a child with a disability to benefit from special education. “Speech-language pathology” services are identified at 34 CFR § 300.34(c)(15) and include at subparagraph (iv), “Provision of speech and language services for the habilitation or prevention of communicative impairments.”

In this case, Parent has focused the claim on behalf of Student on the contention that the language deficits he exhibits are due to an inability to acquire language through the auditory channel and her request that he be placed in a D/HH program and immersed in a visual language, to wit, ASL. Parent raised the issue of adequate SLP services but then failed to adduce sufficient evidence to challenge the District’s provision of SLP services.

This record is clear that Student has a severe communication impairment that needs habilitation. The District’s response to this need has been only three hours per month of SLP services in eighth grade to include direct AND indirect services and missed sessions due to SLP absence will not be made up.

Exh. JJ, pp. 26 and 34. This level of service was reduced in ninth grade to only eight hours per semester. How much of that was direct is not of record without pouring through the logs. But all of the direct was delivered in a group setting. The only instruction Student gets in functional signing is what the staff person he's working with happens to know. Student's preference for verbal/oral communication is repeated throughout this record. His eighth grade SLP advised the April 2012 IEP team: "Given [Student's] strong desire to communicate orally, he would benefit from continuing to work on improving the intelligibility of his speech, in addition to supporting his knowledge and use of an alternative communication means, whether that be sign language, picture/symbol materials or a device." Exh. NN, p. 5. The record herein will not allow a finding of inadequacy but it sure invites questions.

One last comment regarding Parent's proposal for relief – Parent offered the expert testimony of Dr. Laurel Standley in support of her proposal. She was accepted as an expert in the interpretation of ASL and was allowed to testify at length about the acquisition of language and the characteristics of ASL. It should be noted that she has not met Student and has not done any independent evaluation of him. The testimony focused on explaining the impact that loss of hearing will have on the acquisition of language was not in dispute. Her argument in essence was even if Student's communication deficits are due to his intellectual disability, the deficits might not interfere with his acquisition of language via a visual channel. She recommended a complete immersion in ASL and closed by saying, "I think that it's worth trying through a completely different channel to see if language can be acquired through the visual system at a much higher success rate than through the auditory channel." Tr. 739, lines 18-22.

This testimony did not overcome the extensive evidence that the educational program currently in place for Student is appropriate. Quoting the Special Education Director from page 1335 of the transcript beginning at line 10:

I believe that with most children and . . . certainly most children receiving special education services, that using a multisensory, multimodal approach is best practice, is substantiated by research, and I believe that providing exposure to [Student] through auditory channel, through visual channel, and using tactile kinesthetic channels is appropriate to provide instruction. So I believe that it is best for him to have language presented verbally supported with some sign and using pictures.

Paarent would ask that the weight of evidence be disregarded citing the U.S. Department of Education's 1992 Policy Guidance's observation: "Because deafness is a low incidence disability, there is not widespread understanding of its educational implication, even among special educators." The theory is that unless the educator has documented expertise in deaf education, he or she must be presumed to have inadequate understanding. Furthermore, Parent contends that Student should have been referred to the District's D/HH programs, to include instruction and immersion in ASL, throughout his education based on the audiologists' finding that he would be expected to have difficulty hearing conversational speech in the presence of background noise. This theory is proposed without regard for the degree or character of the hearing loss, its fluctuating nature or the potential recovery of hearing function possible from medical intervention. The Hearing Officer is asked to reject all of this testimony and evidence as ignorant or deceitful generated to justify what the District has done. Tr. 1585. This Hearing Officer did not hear or see any evidence to support Parent's accusations.

Conclusions of Law

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A).
2. The burden of proof, by a preponderance of the evidence, rests with Parent, the party challenging the IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) 2005.SCT.0000166 VersusLaw.com.
3. This proceeding has complied with all procedural safeguards required by IDEA, its implementing regulations, and the New Mexico Special Education Rules.
4. This decision is timely if delivered to NMPED and the parties on August 27, 2013.
5. Student is eligible for special education and related services as ID. 34 CFR § 300.8 (a) and (c) (6); Jt. Stip. 5.
6. Parent failed to prove by a preponderance of the evidence that Student is a child with a disability of deafness or hearing impairment as those terms are defined in IDEA. 34 CFR § 300.8 (a) and (c)(3) and (5).

7. Parent failed to prove by a preponderance of the evidence that District was required to address deaf education considerations, if any, found in the IDEA and/or state law. Alternatively, if District was so required, Parent failed to prove by a preponderance of the evidence that it did not do so.
8. Parent failed to prove by a preponderance of the evidence that the District was required to have deaf education-related personnel at Student's IEP meetings.
9. District's failure to timely conduct Student's three year reevaluation was a procedural error that did not rise to the level of a deprivation of FAPE.
10. Parent failed to prove by a preponderance of the evidence that Student's reevaluation in 2013 was not adequate to identify all areas of disability.
11. Parent failed to prove by a preponderance of the evidence that placement in District's D/HH program would be appropriate.
12. Parent failed to prove by a preponderance of the evidence that deaf education instruction was appropriate to address Student's individual needs.
13. Parent failed to prove by a preponderance of the evidence that the instruction and accommodations District incorporated into Student's program were inadequate and/or inappropriate to address Student's individual needs.
14. Parent failed to prove by a preponderance of the evidence that Student's reading instruction was not appropriate to address his individual needs.
15. Parent failed to prove by a preponderance of the evidence that the accommodations and specialized instruction delivered under Student's IEPs were not adequate to address his communication needs.
16. Parent failed to prove by a preponderance of the evidence that the related services provided to Student, in particular SLP and physical therapies, were not appropriate to assist Student to benefit from special education.

17. Parent failed to prove by a preponderance of the evidence that the assistive technology services and/or devices appropriate to address Student's functional capabilities were not provided.
18. Parent failed to prove by a preponderance of the evidence that District should be required to provide additional training and support to staff and parents in order to confer FAPE.
19. Parent did not meet her burden of proving that the District failed to provide Student a FAPE throughout the statutory period.

ORDER

IT IS HEREBY ORDERED that Parent's Request for Due Process Hearing Against the Local Educational Agency be dismissed with prejudice.

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.



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 27th day of August, 2013:

Gail Stewart, Esq.; 3800 Osuna Road NE, Suite 1; Albuquerque, NM 87109.

Evelyn Howard-Hand, Esq. of the Walsh Law Firm; 500 Marquette Avenue NW, Suite 1360; Albuquerque, NM 87102-5316

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



Barbara Albin