

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of

Student,

Petitioners

v.

BELEN CONSOLIDATED SCHOOLS

Respondent

DPH #1314-08

DECISION

January 10, 2014

Muriel McClelland
Due Process Hearing Officer

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**DEPARTMENT OF EDUCATION
SPECIAL EDUCATION BUREAU**

DECISION

This matter coming before the due process hearing officer (DPHO) at a hearing held on December 2-4, and December 10, 2013; Petitioners (hereinafter “Parents”) represented by Gail S. Stewart and Tara Ford, Attorneys at Law; Respondent (District) represented by Mia L. Kern and Arthur D. Melendres, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

STATEMENT OF PROCEDURE

Parents filed a request for due process on October 11, 2013. *[DPHO Exhibit 1]* Parents in their complaint alleged the District was not providing FAPE by failing to provide specialized instruction likely to give educational benefit to Student, specifically in the areas of reading and written expression and by not following Student’s IEPs. District’s Response in the form of the a Prior Written Notice was entered on October 29, 2013 *[Exhibit 2]* A Joint Statement of Issues was timely submitted on November 11, 2013. *[DPHO Exhibit 3]* Exhibit and Witness Lists were exchanged on November 22, 2013. *[DPHO Exhibits 4, 5, 6, 7]* The hearing took place over the course of three and one-half days on December 2-4 and December 10, 2013. In the course of the hearing, District proffered as an exhibit the report of NMPED summarizing its complaint investigation in October, 2012. Petitioners then requested that the entire complaint record be introduced into evidence. *[TR Vol. II, pp. 415-416, 419]* The record was examined *in camera* and was ruled not admissible based on the fact that the complaint record was cumulative, not relevant, immaterial, and outside the parameters of the due process hearing. *[TR Vol. III, p. 686]*

ISSUES PRESENTED

The Joint Statement of Issues submitted by the parties has identified the following issues, all occurring within the statutory period dating from October 11, 2011 to October 11, 2013 , for determination by the hearing officer:

1. Whether the LEA failed to provide specialized instruction to meet Student's unique needs and whether such failure denied Student FAPE?
2. Whether the LEA substituted reliance on accommodations and modifications for necessary specialized instruction during the statutory period?
3. Whether the LEA failed to provide research-based instruction in decoding and encoding?
4. Whether the LEA failed to provide accommodations specified in the controlling IEPs and whether the LEA failed to provide all necessary accommodations resulting in a denial of FAPE?
5. Whether the LEA failed to provide the modifications specified in the relevant IEPs and whether the LEA failed to provide all necessary modifications resulting in a denial of FAPE?
6. Whether the LEA failed to provide Student access to the general curriculum as required for Student to receive FAPE?
7. Whether the LEA failed to provide Student with necessary transition services and planning which failure denied Student FAPE?
8. Whether the LEA failed to have meaningful goals in place in Student's IEPs which failure(s) denied Student FAPE?

9. Whether the LEA failed to report on progress toward goals in any meaningful way at least every grading period which failures resulted in a denial of FAPE?

10. Whether the LEA failed to provide trained staff able to provide Student the specialized instruction in reading, spelling and math, and other learning supports such as instructional coaching for mnemonic and other learning strategies necessary for Student to meet her transition goal of post-secondary education, thereby denying Student FAPE?

FINDINGS OF FACT

General Findings

1. Student is a fourteen-year old 9th grade special education student enrolled in District's high school. *Exh 1, p. 1; Exh 2, p. 1; Exh 7, p. 1*

2. Student has been identified by District as a student requiring special education services since the third grade based on speech and language deficiencies (SLD), specifically in reading, written expression, and math. *Exh 2, p. 1*

3. Since eligible, Student has experienced several modes of delivery of special education services along the special education continuum. At present she is in regular education classes for 80% to 100% of the time and receives special education services in SLD in a special education elective class known as Reading Intervention. *Exh 8*

4. Parents have been strong advocates for their daughter's special education services. Their relationship with the LEA has deteriorated over the years.

5. Student is a good student, highly motivated, and a hard worker. She is attentive, participates in class discussion and has no behavior issues. She aspires to post-secondary education and training to become a veterinarian. *II 449, 493, III 964-968, 979; Exhs 7, 8, pp. 5, 9,10; Exh 31*

2011-2012 IEP

6. **Student's IEP for the 2011-2012 school year** provided for 5.6 hours of special education services and instructional accommodations. The level of service was moderate (11%-49% of the school day). At that time (September 21, 2011), the IEP team reported that Student was working at a fifth to sixth grade level. Her accommodations for the school year were: *instructional presentation mode*: emphasis on major points, multisensory presentation; *instructional materials*: manipulatives, highlighted notes as needed; *instructional strategies*: step by step directions; built in daily routines that can be followed in class, repeat instructions and check for understanding; *assignments/homework*: use of assignment sheet or planner to help with organization skills; *student response mode*: repeat instructions; testing in class: small group for all district and state testing, read aloud, services to be provided with pullouts if necessary. Annual goals to be achieved with 90% mastery were enumerated as follows: read and interpret information, demonstrate competence in skills and strategies of the writing process including competence in applying grammatical and language conventions, enabling [Student] to progress in the general curriculum in a regular setting with minimal assistance using material at her skill level measured by short-term assessments. Parents concurred with this plan. *Exh 10, pp.1, 4-7, 9-10, 11, 13, 16*

7. The IEP for Student's 7th grade is not being challenged.

8. **Student's IEP of September 27, 2012** called for SLD minimum special education services (less than 10% of school day) or 1.0 hours. per week in the regular classroom, instructional accommodations in the areas of reading, spelling, written language, English, math, science, social studies, other, noting "Results of DEA [Discovery Educational Assessments] indicate that [Student]

is demonstrating proficiency in the area of reading. SBA assessments taken in the Spring indicate that [Student] with a score of 238 is two points away from proficiency.” The IEP further noted that SBA testing showed skills related to strategies and comprehension, critical thinking and understanding of literary text were on track but showed weaknesses in her understanding of informational text. IEP goal: Student “will acquire reading strategies and will increase overall reading level ... beginning 9/27/2012 with progress by 9/27/2013.” With 80% mastery, Student will read assigned material, identifying the main idea, significant details, correct sequence of events, and will be able to answer related comprehension questions and she will demonstrate knowledge of context and vocabulary sufficient to understand informational text. Statewide (SBA) exams are to be read aloud. *Exh 9, pp. 1, 3, 5-8, 10-11*

For *Instructional Accommodations and Modifications* the 8th grade IEP specified *multisensory instructional presentation mode*: in the regular classroom with emphasis on major points; *strategies*: repeat, clarify and restate instructions as needed, check for understanding, pre-teach vocabulary; *student response mode*: opportunities for both oral and written responses; *instructional materials*: guided notes as needed; *homework*: use of assignment sheet or planner as needed; *testing in classroom*: small group and read aloud. Progress reports to Parents would be issued each grading period. *Exh 9, p. 12*

9. Parent requested that services be delivered in a special education setting only. This proposal was rejected by District as too restrictive, not in Student’s best academic interests, and that services only need to address slight delays in the areas of reading and comprehension. Services the IEP team accepted would be delivered in the corrective reading regular classroom on a monitor basis. Parent signed off on this IEP but soon after filed a complaint with the NMPED. *II, 415-419;*

Exh. 9, pp. 10, 18

10. **Student's IEP of April 24, 2013** (end of 8th grade) continued to call for one hour per week of services because DEAs indicated that Student was showing proficiency in the area of language arts. Her goals for 9th grade were to “demonstrate competence in the skills and strategies of the reading process as implemented by the classroom teacher, enabling [Student] to progress in the curriculum achieving an accuracy of 80%. Objectives were to increase fluency, comprehension and insight through meaningful and comprehensive reading instruction “by using specific strategies to clear up confusing parts of a text (e.g., re-read the text, consult another source, ask for help.”)

Exh 8, p. 7

11. There were numerous procedural errors in the current IEP. This IEP included behavior goals for “improved work behaviors” which did not apply to this student. *Graduation Options* were confusing in that two options were noted – standard option and career readiness option. Student's *Transition Plan* listed only Student as the responsible agency among other omissions, an admitted error. *III 884-885, Exh 8, p.8*

12. While acknowledging deficiencies in the areas of spelling, writing and reading, District proposed exiting Student from special education. Parents objected to this proposal, requesting instead 1:1 Ortho-Gillingham instruction as compensatory education for hours not delivered in the 2012-2013 school year. After consultation with the special education director by telephone the IEP team rejected this proposal on the grounds that the LEA is charged with choosing methodology, not the Parent. *Exh 8, p.22, Exh 2, pp. 3-5*

ADDENDUM TO THE 2013-2014 IEP

13. Student's IEP was amended only as to modifications and accommodations as follows: preferential seating, modify assignments to grade level skill level as needed,¹ access to guided notes and or notebook and copying of lecture notes, extended time for completion of assignments and tests, extra time to process ideas before answering orally, pre-teach vocabulary, Spellcheck, repeat, clarify and restate instructions and use of assignment sheet or planner, as needed, retesting in the general education classroom. Parents' request to have Student in the Vocational Agriculture elective, as previously specified, and enrollment in computer application courses was denied. All other provisions of the IEP of April 24, 2013 were to remain in force. The IEE recommendations for specialized, individualized SLD programs were ignored by the IEP Team. *Exhs 1, 7, p. 2; Exh 8, p.20*

EVALUATIONS

14. The IEP for 9th grade was based upon the school diagnostician's early re-evaluation performed October 25, 2012 at the request of Parents (her 3-year reevaluation was due June 30, 2013). Student's results in the Woodcock- Johnson assessment indicated that Student had made progress since her first evaluation at the end of second grade. Student now scored in the low average range on Standard Scores (SS)² and below the grade equivalent level (G.E.),³ for example, broad reading, 87 SS, 5.5 G.E.; broad written language, 86 SS, 5.4 G.E. Student's subtests show

¹An admission that grade levels represent a consideration for IEP teams if not for evaluations for eligibility determinations performed by the school diagnostician.

² SS average range is 85 to 115 with a standard deviation of 15 points.

³The school diagnostician points out in her report that "[a]ge equivalents and grade equivalents mean that the student has answered the same number of test questions as the students in the norm group of the age or grade indicated. They do not necessarily mean that the student does academic tasks at the stated age or grade level." *Exh. 2, p. 4*

areas of strength (e.g., math) and areas in which testing indicate serious weaknesses in both SS and G.E. scores. Her G.E. scores were in the 3.0, 4.0 and 5.0 ranges and even lower (e.g., memory for words, auditory working memory, visual auditory learning, basic reading skills, verbal ability, spelling word attack, spelling sounds, phoneme/grapheme knowledge, passage comprehension, all of which tested below average).⁴ Cognitive efficiency measures were referenced back to an evaluation performed approximately two years, four months earlier but were not expected to change much. *Exh 2, pp. 3-5, 7, 21; Exh 3, p. 4*

15. An IEE was performed August 6, 2013 by Julianne Hancock, MA, qualified as an expert educational diagnostician, which became the subject of the Addendum IEP meeting held on September 6, 2013. The IEE scores are very close to the testing scores in the school's evaluation performed at the beginning of the 2012-2013 school year, and show minimal improvement and continuation of serious delays as a result of Student's underlying SLD.⁵

16. Both evaluators concluded from their respective test results that Student has learning difficulties in the areas of broad reading and basic reading skills, including reading comprehension, broad written language, written expression (which includes spelling) and oral

⁴ The scores in the IEE performed 10 months later were basic reading SS 87, G.E. 5.1; broad written language SS 81, G.E. 5.2; written expression SS 81, G.E. 5.2

⁵Definitions provided in the IEE report: Grade Equivalent (G.E.) – “A score which compares test performance with grade groups....A G.E.is not the same as an instructional level; the set sampling is too small.” Standard Score (SS) – “A standard score is a measure of a student's standing compared with others of the same age. Standard scores have a mean of 100 and a standard deviation of 15. Average standard scores typically fall between 90 and 100.” Percentile (%ile) – “A score that gives the rank of a student compared with others of the same age, e.g. a percentile of 70 means that the student's score is equal to or greater than 70 out of 100 students of the same age.” Student's G.E. levels scored in the 4.0 to 5.0 range and 20%-30%ile in several critical learning areas. *Exh 1, p. 3*

expression. The IEE also noted significant problems with cognitive efficiency, memory and recall of information that hinders Student's learning. *II 578, Exh 1, p. 5*

17. Ms. Hancock concluded that despite weaknesses in cognitive efficiency, Student "appears to have the necessary cognition to acquire academic functioning skills, particularly when repetition and overlearning techniques are utilized." Student has the ability and desire to learn with good instruction -- "she is beginning to close the gap, which is what we are looking for and what we want." While Student shows some slow, steady progress overall the "goal for Student should be to have her function in the average range [90-110]," as opposed to the low average range. *IV 1073; Exh 1, p. 5*

18. The school diagnostician, while making recommendations for teaching tools and accommodations in the areas of spelling, reading vocabulary and directed thinking activity, specifically noted in her report that adoption of her recommendations is a decision made by the IEP team and they are offered only as suggestions. She could not recall if they were discussed by the IEP team or, if so, to what extent. Because Student tests in the low average range (which she considers to be the same as average range), she did not believe Student required any specialized instruction, only accommodations in the regular education classroom. This diagnostician relied heavily on Standard Score and discrepancy analysis which is used for eligibility determinations. *II 538, 596, 603, 620, 654; Exhs 1, pp. 2, 8-9*

19. The IEE evaluator recommended continued specific special educational services and accommodations and modifications to address Student's SLD needs such as keyboarding skills, mnemonic strategies, extra time for work completion, access to a computer, preferred seating, minimize classroom distractions, small class setting if available, separate copy of books for home

use, use of a recording device for class lectures and instruction, and individualized directions and instructions. Ms. Hancock also made recommendations to improve retrieval skills, for example, overlearning, frequent review, immediate feedback, and steps to help organize and facilitate recall and memory aids (e.g., mnemonic strategies). *IV 1044-1045; Exh 1, pp.12-13*

20. This expert testified that Student would do well in a program such as Alphabetic Phonics or other one-on-one explicit reading instruction in the areas of reading spelling, verbal expression and listening. *IV 1044-1045, 1063-1066; Exh 1, pp.12-13; Exh 33*

21. While testing showed that there was considerable progress from 7th to 8th grade when the October 27, 2012 evaluation was completed, a comparison of the October 27, 2012 evaluation with the July, 2013 IEE did not demonstrate significant progress at all. Scores were largely the same with many falling in the low average range or even below average in the subtests. *II 595-598; Exhs 1, 2, 3*

22. The school diagnostician, unlike the IEE diagnostician, did not provide a percentile ranking in her Bell Curve analysis, relying primarily on Standard Scores which showed Student testing in the low average range. According to this witness, the LEA does not consider G.E. levels when it determines a student's eligibility; they are included in her reports as "visuals." Grade levels are, however, considered for IEP purposes and for teacher edification. *Cf. Exh. 2, p. 11 with Exh. 1, p. 6, 11; Exh 7, p. 2; Exh 21*

23. The use of percentile rankings shows that Student tests in the low percentiles when compared to students her age. *Exh 1, pp. 5-6; IV 1071*

24. According to the IEE evaluator, the low average range is not be equated with an

average range because percentiles are much lower in the low average range.⁶ *IV 1071*

SPECIAL EDUCATION SERVICES 2012-2013

25. Pursuant to the IEP of September 27, 2012 Student was to receive special education services for 1.0 hour per week (although there is some confusion about that), cut from 5.6 hours the year before when Student received extensive services in summer school. When the assigned special education teacher retired in October, 2012, with Parents' consent Student was moved into an 8th grade Reading Resource class taught by a regular education teacher. *II 341-350, 412-414, III 969-972; Exh 9, p.10; Exh 16*

26. Student worked independently on a computer-based curriculum (Fast Forward) while the teacher was instructing regular 8th students in the general curriculum. Student received some accommodations for the general 8th grade course materials. *II 348-350, 412-415, III 969-972, IV 1094-1095, 1154-1155; Exh 9, pp. 9, 10, 13-14, 18-19; Exh 16*

27. According to the IEE diagnostician, a very credible witness, computer-based instruction for specific learning disabilities is not supported by research and does not replace a teacher who can analyze scores and provide focused, individualized instruction. *IV 1006-1007*

SPECIAL EDUCATION SERVICES 2013-2014

28. After Parents resisted District's intention to exit Student from special education based upon her Standard Scores in the school's evaluation, the IEP developed April 24, 2013 by the

⁶ For example, the score of 90-110 represents 50% of the population; a low average score of 80 represents a percentile ranking of 10%; a low average score of 89 is a percentile ranking of 24%. *IV 1071*

IEP team for the 2013-2014 school year addressed Student's SLD needs by placing her in a Reading Intervention special education class, taught along with seventeen other students with varying reading abilities or disabilities. *I 18, 27-28, 32, 298-299, 397-399*

29. The Reading Intervention teacher also teaches two English classes which include special education students (one for sophomores and one for seniors), as well as acting as the head coach for boys' basketball. He has been licensed to teach special education since 2005, receiving SLD instruction when he attended New Mexico State in the years 2000-2005. *I 17-18 22-23, 29-30; Exh 23*

30. The fall of 2013 was the first time this teacher taught this course; he previously taught English to non-English speaking students. He had two to three weeks notice of this assignment prior to the commencement of the fall semester. He was not listed on the high school's website as one of the school's special ed teachers for 2013-2014 school year. He was not aware of a Reading Intervention class being offered in the 2012-2013 school year and did not share course materials with any other teacher. *I 17, 19, 22-23, 26-28, 30, 38-39, 42-43; Exh 22, p. 3; Exh 23; Exh 28, pp. 6, 8*

31. He devised the curriculum for Reading Intervention based upon purported research-based strategies he looked up on "readingintervention.com (or [.org](http://readingintervention.org))," Bell work, a KIM worksheet (key idea, information, memory clue), and ACE (answer, cite, expand/explain). Instruction in this class consists of "seat work" which was periodically checked as the teacher walked around the classroom. There is an EA assigned to the class who assists him with differentiated instruction by reading to a small group who read at a "much lower level" than the reading material that is used. On occasion, Student has asked the EA for help. *I 31-34, 36-37, 43-*

48, 78, 88, 122

32. He testified he has been implementing the IEE evaluator's recommendations for the most part. *I 134-137; Exh 24*

33. Student functions at a higher level than most students in this class, some of whom are at first and second grade reading levels. *I 160-161*

34. Student reports that the teaching atmosphere in this class is very lax. "Everybody gets inside, does their Bell work, and there is [sic] usually kids that – his kids that he teaches for basketball or other kids, I guess they have a different class, and they always go to our classroom, they always socialize with the teacher or other students, and he is usually texting on his phone."

I 43-48, 78, III 979-982

35. The Reading Intervention teacher does not measure progress on Student's reading goal and does not dispute that Student spells at a 3rd grade level; he does not know her current reading level. He has reviewed her grade level scores in reading and written language. The class has no tests. There is no textbook, There is no homework. Progress is measured on DEAs (short term assessments) only. *I 61, 109, 139, 147, 153; Exhs 25, 26, 31*

36. According to this teacher, who did not present as credible, Student has made "tremendous gains this year; she is "coming along, progressing just like she needs to" according to DEAs. *I, 53; 108; Exh 24; Exh 26*

37. The Special Education Director for District believes Student is receiving appropriate specialized instruction in the Reading Intervention class. *I 308*

38. In Student's regular education English class (comprised of approximately 28 students, two or three of whom have IEPs under various eligibilities), Student was permitted to take

open books tests, she is not penalized for spelling, novels are read aloud, she receives extra time or is excused from assignments. Grading in this class is not based upon Student's performance or achievement towards goals. *II 436,451, 486-489, 468*

39. The regular education teacher applies the instructional mode and strategies specified in Student's IEP for all students in her class. *II 500-509, 515, 520-523; Exh 8, p. 19*

40. Students in this classroom read at all levels, some very low. There is no expectation that students will be reading at grade level by the end of the year. *II 525*

41. Following the report of the IEE to the IEP team Student received some additional accommodations in the Reading Intervention class and in her core classes consistent with the IEP Addendum, but not all accommodations and not always. *II 449-452, 487-489, 498-509, 546-547, Exh 7*

42. Student reports that reading and spelling present her most difficult areas of learning. Her writing is marked by nonstandard English usage, poor spelling, failure to use complete sentences, failure to accurately punctuate and dumbed down vocabulary. She stated she compensates for her SLD by using simpler forms of expression. *I 70-71, II 573-574, III 968, 974; Exhs 30, 31*

FAPE CONSIDERATIONS

43. Two summer programs taught between the 2008-2009 and 2009-2010 school years consisted of five hours each day of individualized instruction. Student made demonstrable academic progress as a result of these summer sessions as indicated in her June 30, 2010

evaluation by the school diagnostician. *II 591-592, III 975-976, IV 1104-1105; Exh 3, p. 2; Exh 9, p. 10*

44. Deficiencies contrary to IDEA requirements abound in the present IEP as written: the transition plan is incomplete and was done on the fly without regard to IDEA requirements, goals are vague and not measurable in meaningful detail. Behavior goals and life skills are not applicable to Student. There is no provision for research-based individualized reading instruction. *III 855-860; Exhs 7, 8, 38*

45. Implementation of the current IEP is substantively deficient. Performance levels were not measured by either the Reading Intervention teacher or the regular education teachers sufficient to comply with IDEA requirements. Parents were not provided with accurate, timely or meaningful reports on performance and progress towards goals. The progress report to Parents was completed in anticipation of the hearing and lacks any meaningful information relating to Student's progress. The case manager's untimely report to Parents in November, 2013 was actually intended for another student, apparently in preparation for the due process hearing. The DEAs and the grades given by the regular education teachers do not represent meaningful reports on Student's performance and progress towards goals. *I 93, 109-110, 116-119, 172-174, II 371-372, III 842-855; Exh 8, p. 7; Exhs 14, 18, 38*

46. Even though discouraged as not representative of learning achievement by the school diagnostician, grade level equivalencies in Student's file are recorded and distributed to teachers in the *IEP At A Glance* form. *II 383-386, 562-569; Exh 21*

47. Student has not received individualized research-based special education instruction in the Reading Intervention class or any other class addressing her unique SLD needs.

IV 1027; Exh 1, p. 6; Exhs 7, 8

48. The IEP requirement that standard tests be read aloud is an admission that Student cannot read with sufficient acumen to perform in standard-based statewide testing at her grade level. *Exhs 7, 8, p. 19; Exhs 9, 10*

49. The LEA provides transition planning and services primarily in the senior year.

50. Student does not have dyslexia according to the diagnosticians. *II 633; Exh 1*

51. A student is not penalized for spelling errors in state-administered tests. *I, 55*

52. Student has previously benefitted from one-on-one instruction in her weak areas of reading, writing, spelling when a research-based program was administered to her over the course of two summers. *II 591-592, III 975-976*

53. Assistive technology was not considered by the IEP team. Student may benefit from an Assistive Technology Evaluation to assist in developing her computer skills, but not for purposes of providing special education instruction for her disability as a substitute for a research-based SLD methodology. *III 904, IV 1066, 1093*

DISCUSSION

Rowley Standard

In 1982, the Supreme Court rendered its seminal decision construing EHA (predecessor to IDEA) and the scope of a free appropriate public education in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982). The Supreme Court established a two-part test to determine whether a state has provided a free appropriate public education. Has a state complied with the procedures set forth in the Act? Is the individualized educational program developed through the Act's procedures

reasonably calculated to enable the child to receive educational benefits? States must provide a "basic floor of opportunity" to disabled students, not a "potential-maximizing education." *Id. at 197, 200.* "Congress did not impose upon the States any greater substantive educational standard than would be necessary to make such access meaningful." *Id. at 192.* A free appropriate public education must include special education and related services tailored to meet the unique needs of a particular child, and be reasonably calculated to enable the child to receive educational benefits. *Rowley, op cit. at 207; E.S. and M.S. o/b/o/ B.S. v. Katonah-Lewisboro School District, 55 IDELR 130; Mamaroneck Union Free Sch. Dist., 554 F. 3d 247 (2d Cir. 2009); Deal v. Hamilton Cty. Bd.of Educ., 392 F. 3d 849 (6th Cir. 2004); 20 U.S.C. § 1401(a)(18)*

Specific Learning Disability

IDEA definition: "A specific learning disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, that may manifest itself in the imperfect ability to listen, think, speak, read, write, spell or to do mathematical calculations.... *34 CFR § 300.8(c)(10)*

Eligibility criteria is described in 34 CFR § 300.309: To be eligible for special education services under the category of SLD a group of qualified professionals and the parent must determine if the child does not achieve adequately for the child's age or did not meet state-approved grade level standards in one or more of the following areas ... oral expression, listening comprehension, written expression, basic reading skill, reading fluency skills, reading comprehension, mathematics calculation, and mathematics problem solving *and* the child does not make sufficient progress to meet age or state-approved grade-level standards in one or more of the above areas....*or* the child exhibits a pattern of strengths and weaknesses relevant to the determination of a specific learning disability.....consistent with 34 CFR § 300.304 and 34 CFR

§ 300.305” *Letter to Zirkel, 47 IDELR 268 (OSEP 2007); Letter to Prifitera, 48 IDELR 163 (OSEP 2007); Letter to Zirkel, 48 IDELR 192 (OSEP 2007)*

Student first qualified as SLD eligible in 2005 and continues to be so identified by her IEP team. Student’s recent testing by two experienced diagnosticians shows demonstrable academic deficiencies in several critical areas affecting her ability to learn and progress to grade level. While some courts have allowed students to be deemed no longer eligible for special education services under IDEA based upon testing that shows a student is at average or above-average scores and is at grade level, those are not the facts of this case. See, for example, *H.M. by her Parents, B.M. and R.M. v. Haddon Heights Board of Education, 822 F. Supp. 2d 439 (U.S. Dist Ct., NJ 2011); Hood v. Encinitas Union School Dist 5, 107 LRP 18924 (9th Cir. 2007)* This is a student who continues to require specialized, individualized instruction to address significant delays as a result of SLD. She should not be exited from special ed merely because she performs, at best, in the low average range in some areas.

Special Education Services

The severe discrepancy model is consistent with New Mexico law and federal law for the **identification** of SLD eligibility, along with RT.I. models.[*emphasis mine*] *M.M. & E.M. v. Lafayette Sch. Dist., (U.S. Dist Ct., Northern Dist. Of California 2012), 58 IDELR 132* New Mexico regulations state: “In identifying children with specific learning disabilities in grades 4 through 12, the public agency may use the dual discrepancy model as defined and described in the New Mexico Technical Evaluation and Assessment Manual (New Mexico T.E.A.M.) or the severe discrepancy

model as defined and described in New Mexico T.E.A.M.⁷ 6.31.2.10(C)(4) NMAC; 20 U.S.C. § 1414 (b) (6); IV 1097

Procedural Failures

There are numerous procedural errors in the two relevant IEPs: no goals, no performance levels, no systematic or meaningful reporting, a really faulty transition plan . The Tenth Circuit in *Sytsema* held that procedural failures may not necessarily result in a denial of FAPE. There must be a showing that the procedural failures resulted in substantive educational harm to the student or his parents, deprived the student of an individualized education program or resulted in the loss of an educational opportunity. *Sytsema, op.cit.* See also *Garcia v. Albuquerque Pub. Schs*, 520 F. 3d 1116 (10th Cir. 2008) [*Even though the LEA failed to develop and have in place an annual IEP, there was no substantive harm since student would not avail herself of compensatory education in any case*]; *Knable ex rel Knable v. Bexley City Sch. Dist.*, 238 F. 3d 755 (6th Cir. 2001); *Urban ex rel Urban v. Jefferson County Sch. Dist. R-1*, 89 F. 3d 720 (10th Cir. 1996) A glaring omission may be found in the IEP’s transition plan. The plan paid no attention to state regulations that provide

⁷ “As noted in NM TEAM, the use of a discrepancy in performance on standardized assessments in the areas of cognitive ability and academic achievement is only utilized when looking at the Severe Discrepancy method of eligibility determination. Under the Dual Discrepancy method, the results of cognitive assessments should be utilized for information purposes, not for any type of discrepancy determination. You will notice that the NM TEAM does not provide specific guidance regarding a required cognitive assessment score necessary to make an eligibility determination under the category of SLD. It is up to the EDT to consider all of the evaluation data to determine the most appropriate eligibility category for an individual.

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a transition plan be in place by age 14. *NMAC 6.31.2.11(G)(3)*⁸ Transition planning is essential in early years for a student who aspires to post-secondary education.

The question becomes whether the procedural violations resulted in the denial of FAPE. In the instant case, procedural errors that were largely technical could be corrected without educational harm and did not result in the denial of FAPE. *Garcia, op.cit.; Urban, op.cit*

Substantive Failures

The errors that do involve a denial of FAPE are those which do not conform to federal criteria for IEPs. IDEA requirements for an IEP are: a description of specially designed instruction to meet the unique needs of a child with a disability, including instruction conducted in the classroom and in other settings, and provision of accommodations, modifications and supports as needed, including necessary supports for school personnel. *20 U.S.C. § 1414(d)(1)(A)(IV)* The IEP must include “a statement of the child’s present levels of academic achievement and functional performance, includinghow the child’s disability affects the child’s involvement and progress in the general education curriculum.” *20 U.S.C. § 1414(d)(1)(A)(i)(I)(aa)* Also “a statement of measurable goals, including academic and functional goals designed to -- (aa) meet 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 (bb) meet each of the child’s other educational needs that result from the child’s disability.” *20 U.S.C. § 1414(d)(1)(A)(i)(II)(aa) and (bb)* And “a description of how the child’s progress toward meeting the annuals goals will be measured.” *20 U.S.C. § 1414(d)(1)(A)(i)(III)*

⁸ Federal law provides that a plan be in place by age 16 or younger if appropriate. *20 U.S.C. § 1400(d)(1)(A), 20 U.S.C. § 1401 (34); 20 U.S.C. §§ 1414(d)(1)(A)(i)(VIII); 34 CFR § 320(b)*

FAPE Analysis

District's argument is largely that IDEA does not require Cadillac educational services, merely Chevrolet services. *Doe v. Board of Educ. of Tullahoma City Sch.*, 20 IDELR 616 (6th Cir. 1993); *Hoffman v. North Lyon Cnty Sch. Dist. (U.S. Dist. Ct. Kansas 2009)* Based upon the school diagnostician's scoring and testimony, despite her SLD Student functions in the *low* average range given her cognitive ability, showing no great discrepancy between ability and achievement (and certainly no severe discrepancy). District's position is that Student has made steady gains as determined by her standardized test scores, grades in her general education classes, and teacher observations. That is sufficient for the LEA to conclude that her need for services is negligible so long as she shows some gains.

The Tenth Circuit has weighed in on the *Rowley* mandate for meaningful educational benefit/ some educational benefit. *Sytsema v. Academy School District No. 20*, 538 F. 3d 1306 (10th Cir. 2008). This case held that the applicable standard by which to determine educational benefit is "some educational benefit" and not one "guaranteed to maximize the child's potential," as District correctly points out.⁹ *Sytsema*, 538 F. 3d at 1313; *Urban, op.cit*; *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F. 3d 692

It is clear IDEA does not require an LEA to provide potential maximizing services and these Parents should not entertain those expectations for their daughter. *J.L. Mercer Island Sch. Dist*, 575 F 3d 1025 (9th Cir. 2009) The LEA is not charged with guaranteeing students post-

⁹It is noted that the cited case centers on private school reimbursement (a Cadillac by anyone's standard), however, not on public school services necessary to meet a student's unique needs.

secondary success or a career of their choosing. The Tenth Circuit, applying the “some benefit” standard of *Rowley* notes, however, that the educational benefit be more than *de minimus*. The *Sytsema* court “has interpreted the *Rowley* standard to require an educational benefit that is more than *de minimus* We have also recognized, however, that the Act focuses on providing disabled children access to public schools, and thus, does not require an education ‘guaranteed to maximize the child's potential.’....As a result, we apply the ‘some benefit’ standard the Supreme Court adopted in *Rowley*. “ *Sytsema*, 538 F.3d at 1313 (citations omitted).

The question to be determined is whether the educational gains in this case are consistent with some meaningful educational benefit and not just *de minimus* gains.¹⁰ District would have the FAPE standard satisfied if a student receives any benefit no matter how trivial, but this is not the standard expounded in *Rowley* and *Sytsema*.

Student’s progress in the curriculum during the 8th grade and 9th grade to date has been, if at all measurable, *de minimus*. Her IEPs, as incomplete and inadequate as they are, were not appropriately implemented. Witnesses testified she was excused from assignments that may have presented challenges, that she was expected to re-do and re-do. No meaningful progress reports were ever produced, short-term assessments were questionable. And she did not show any meaningful academic benefit. The fact that she tests in the low average range in some areas and is “almost proficient” is not an indication that she has received some educational benefit. Low average range is not a pass on providing special education services based upon a student’s unique,

¹⁰ Other circuits have adopted the “material benefit” standard. The 9th Circuit in *Van Dyne* stated that “the materiality standard does not require that the child suffer demonstrable educational harm in order to prevail. However, the child’s educational progress, or lack of, may be probative of whether there has been more than a minor shortfall in the service provided. *Van Dyne ex rel v. Baker Sch. Dist.* 5J, 502 F. 3d 811 (9th Cir. 2007)

individualized needs. Neither should it be an arbitrary cutoff point.

With District proposing exiting Student from special education, it is hard not to conclude that District had predetermined outcome at the April, 2013 IEP meeting and ignored Student's significant delays and need for continued specialized instruction. A classroom with seventeen other students experiencing varying reading abilities/disabilities is not individualized instruction. There should be something more in the educational continuum besides exiting and a one-size-fits-all classroom approach to SLD *Deal v. Hamilton Co. Bd.of Educ, op.cit.; P.C. v. Milford Exempt Village Schools, 2013 WL 209478 (S.D. Ohio 2013)*

IEP teams are not required to follow IEE recommendations but there is no indication in the Addendum IEP of September that the report and further input from the IEE evaluator at the Addendum meeting was even considered except perhaps to expand accommodations. Accommodations are not a substitute for an individualized educational program.

While IDEA regulations provide that the LEA is responsible for choosing methodologies, winging it should not be not one of them. There were significant substantive failures in the IEP (e.g., no individualized, specialized plan addressing Student's SLD needs) and failure to implement same (e.g., measuring goals, progress reports, ignoring the vocational agriculture elective), in addition to content failures in the IEP, which resulted in educational harm to Student and a denial of FAPE.

Other Issues

All other issues raised by the parties in their Joint Statement of Issues [DPHO Exhibit 3] have been addressed in the Findings of Fact and Conclusions of Law herein.

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.

2. The jurisdiction of a due process hearing officer is limited to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. 34 CFR § 300.503(a)(1), (2).

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

4. Parents bear the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

5. The statute of limitations for due process hearings under the IDEA is two years prior to the date the due process complaint was filed. The complaint in this matter was filed on October 11, 2013. 20 U.S.C. § 1415(f)(3)(c)(2004); 34 CFR § 300.507(a)(2).

6. Pleadings were amended to conform to the evidence presented with respect to an assistive technology evaluation. While assistive technology was not enumerated as an issue for determination by the parties, testimony from the AT evaluator for the LEA is material as to remedy.

7. At all relevant times, Student was eligible for special education and related services under the IDEA as a student with a disability. 34 CFR § 300.8(c)(6) and (9)

8. The LEA does not have to maximize academic potential but it is obliged to provide a basic floor of opportunity reasonably calculated to confer some meaningful and not *de minimus* educational benefit. *Rowley, op.cit.*; *Sytsema, op.cit.*

9. Special education services in the 2011-2012 school year are not being challenged.
10. District did not provide services performed by a special education teacher commencing in October, 2012.
11. Parents' consent does not excuse the fact that Student was denied FAPE in the 2012-2013 school year due to the absence of an individualized program delivered by a special education teacher.
12. The IEP of April 24, 2013, by placing Student in a Reading Intervention elective class without appropriate instruction, was not reasonably calculated to provide for Student's unique, individualized educational needs.
13. IDEA procedures were not followed in the development of the IEPs for the 2012-2013 and 2013-2014 schools years resulting in a denial of FAPE.
14. Substantive failures in Student's IEPs for the 2012-2013 school year resulted in a denial of FAPE.
15. District did not provide FAPE in the 2013-2014 school year to date in that an IEP was not developed based upon Student's unique needs.
16. District did not provide an IEP from which Student can likely receive educational benefit.
17. District did not provide Student with FAPE in that she received *de minimus* educational benefit in the 2012-2013 school year. *Sytsema, op cit.*
18. Student is entitled to compensatory education based upon the LEA's failure to appropriately develop and implement Student's IEPs in the period dating from October 2012, when District did not provide services performed by a special education teacher, through October, 2013

when services were provided in the Reading Intervention class.

19. Hearing officers do not have unbridled discretion in fashioning equitable relief. Relief must be tied to the record. *Reid ex rel Reid v. District of Columbia Public Sch.*, 401 F.3d 516 ; *Meza v Bd.of Educ.of Portales Municipal Schools*, 56 IDELR 167 (2011).

20. Appropriate relief does not have to be hour-for-hour relief but is relief that is designed to ensure that a student is receiving appropriate education within the meaning of IDEA, designed to meet a student's unique needs. *Reid, op.cit*; 20 U.S.C. § 1414(d)(1)(A)

22. Parents carried their burden by a preponderance of the evidence that Student was not provided FAPE and received *de minimus* educational benefit during the challenged statutory period. 20 U.S.C. § 1412(a)(1)(2004); 34 CFR § 300.530(d)

ORDER

WHEREFORE IT IS HEREBY ORDERED THAT

1. In consideration of Student's unique educational needs, Student is entitled to receive compensatory education delivered either in a small group context or one-to-one tutorial using an appropriate, explicit, research-based reading program that addresses Student's unique educational needs. This program will be consistent with the IEE evaluator's recommendations submitted both in her report and in her testimony at the due process hearing, the specific program to be selected by the IEP team considering the expertise available to the LEA to teach this type of program.

2. The program shall be delivered outside of the regular education classroom either during the school year or during the summer months in 2014, consistent with the program's

directives, as decided by the IEP team.

3. District will immediately arrange for an Assistive Technology Evaluation.

4. A FIEP will be conducted with fifteen days following the completion of the AT evaluation utilizing a facilitator provided by the NMPED and agreed to by the parties. Both the IEE evaluator and the AT evaluator will be present at this IEP meeting at District's expense. The charge to the IEP team will be to develop an IEP that is consistent with federal guidelines for the content of IEPs, to develop a transition plan conforming with state and federal standards, and to select the type and times a comprehensive research-based reading program administered by a qualified instructor in same will be provided to Student as compensatory education based upon this Order.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I)(2004), 34 CFR § 300.516 and 6.31.2.13(I)(25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

THIS DECISION IS ENTERED THIS THE 10th day of JANUARY, 2014



Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I mailed by US mail a copy of the foregoing Decision on January 10, 2014 to the following persons:

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