

DECISION

STATEMENT OF PROCEDURE

Petitioner filed a request for Due Process Hearing on August 12, 2015, two days following an IEP meeting on August 10, 2015 which determined that Student would be placed in the LEA's Autism Center. *[DPHO Exhibit 1]* Parent disputes this placement.

A Pre-Hearing telephone conference was held on August 18, 2015 and the Pre-Hearing Order entered on August 20, 2015. *[DPHO Exhibit 3]* The Response to the Petition was entered on August 24, 2015. *[DPHO Exhibit 4]* Petitioner's and Respondent's Statements of Issues were filed on September 4, 2015 *[DPHO Exhibits 5, 6]* Petitioner's and Respondent's Witness and Exhibit Lists and the draft Joint Exhibit List were submitted September 11, 2015. *[DPHO Exhibits 15, 16, 17, 18, 19]*

Initially, the DPHO ruled on a stay-put issue following the first day of hearing on September 17, 2015. Parent argued that the Jumpstart Autistic Center, the placement resulting from the amended Settlement Agreement negotiated by the parties in March, 2015, was stay-put as the last placement the Student had been in. *[DPHO Exhibit 8, 10]* District argued that the proposed LEA Autism Center (hereinafter Autism Center) placement was stay-put. *[DPHO Exhibits 7, 9, 11]* In a Decision and Order entered herein on September 27, 2015, the DPHO directed that Student be placed in the last IEP educational placement which was neither of the two placements advanced by the parties. *[DPHO Exhibit 12]* Additional IEPs were entered into the record at the request of the DPHO. *[DPHO Exhibit 14]* Student returned to school for 1:1 instruction six hours per week on October 5, 2015, pursuant to the order. *[DPHO Exhibit 13]*

The hearing on placement for the 2015-2016 school year and a determination of

FAPE was held over six days on September 17, 29, 30, October 1, 2, and 5, 2015. Two site visits were conducted – one to Jumpstart, a private autism center and one to the LEA proposed autism center (Autism Center). The final volume of a five-volume transcript was delivered on October 21, 2015. Argument, Requested Finding of Facts and Conclusion of Law were timely filed on November 13, 2015. [DPHO Exhibits 21, 22, 23, 24] This Decision was entered on November 27, 2015. [DPHO Exhibit 25]

ISSUES PRESENTED

Petitioner has enumerated the following issues to be decided by the DPHO in this case:

1. Whether Jumpstart Autism Center is Student's current educational placement and therefore his stay-put placement (*see Decision entered September 27, 2015, DPHO Exhibit 13*);
2. Whether District denies Student FAPE by refusing to implement Student's stay-put placement at Jumpstart Autism Center, particularly with the knowledge that Parent cannot afford to pay for this setting and that Student has not received education anywhere since the beginning of the 2015-2016 school year on August 13, 2015 (*see Decision entered September 27, 2015, DPHO Exhibit 13*);
3. Whether District denied Student FAPE by predetermining, outside of the IEP process and based on the sole consideration of the LEA's administrative convenience, that Student would be placed at the LEA's Autism Center;
4. Whether District denied Student FAPE by unilaterally changing his placement to the LEA Autism Center when such change in placement was a) contrary to professional knowledge and recommendations; b) result of failure to consider information about Student and his unique needs; c) result of failure to allow and consider input and meaningful participation by

Parent;

5. Whether District denied Student FAPE by writing an IEP on August 10, 2015 changing Student's placement to the LEA's Autism Center effective August 13, 2015, which unilateral change in placement failed to consider information from Parent, from the previous JumpStart Autism Center placement, and from the neuropsychologist who performed an IEE about Student's individual needs, and was based on predetermination by the LEA outside the IEP process and without consideration to Student's needs;

6. Whether District denied Student FAPE by writing an incomplete and/or inaccurate IEP on August 10, 2015 which a) failed to document Parent's and others' opposition to moving Student to the Autism Center on August 13, 2015; b) failed to document Parent's request for a transition plan from the Jumpstart placement to an appropriate District placement and c) failed to give PWN as to why District rejected the placement requested by Parent;

7. Whether District's change in placement for Student to the LEA Autism Center on August 13, 2015 denies Student FAPE based on the inability of District to meet Student's needs at the Autism Center;

8. Whether District denies Student FAPE by placing him at the Autism Center because District relies on the use of physical restraint in lieu of evidence-based practices for students with autism at the Autism Center;

9. Whether Student is entitled to equitable remedy including compensatory education.

Respondent has enumerated the following issues to be decided by the DPHO in this case:

1. What is Student's current educational placement for purposes of stay-put (*see Decision entered September 27, 2015*);

2. Is Jumpstart Autism Center (hereinafter JAC) an educational placement for Student when JAC is not a school, much less an accredited educational institution, has not used any teachers to provide academics for Student, and does not provide consistent peer-interaction for Student (*see Decision entered September 27, 2015, DPHO Exhibit 13*);

3. Should the IEP team's March 24, 2015 decision to terminate temporary services provided to Student no later than July 31, 2015 be honored (*see Decision entered September 27, 2015, DPHO Exhibit 13*);

4. Is placement at the LEA's Autism Center appropriate for Student;

5. Is Student entitled to compensatory education when the August 10, 2015 placement is appropriate and Petitioner's proposed placement is inappropriate.

FINDINGS OF FACT¹

General Findings

¹ To the extent that the foregoing findings of fact contain conclusions of law, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Bd.*, 835 F. Supp. 340 (1993).

1. All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent these contentions are consistent with the findings and conclusions herein, they have been accepted. To the extent that they are inconsistent, deemed irrelevant, or not necessary to a proper determination of the issues presented, they have been rejected.²

2. All applicable time limits have been met, waived by the parties, or extended for good cause shown.

3. Student is ten years old and in the 4th grade in the LEA in the 2015-2016 school year. He is currently eligible for special education services as Autism Spectrum Disorder (ASD), SLD (dyslexia) and, as of August 10, 2015, ED. *I, 95*

4. Educational placement in the future is at issue in this case. A Settlement Agreement dated January 5, 2015 and an Amended Settlement Agreement in March, 2015, settled and released the claims of all parties resulting from a previous request for due process. *Exhs AA, BB*

Stay-Put Placement

5. Parent advocated that the stay-put placement was JAC. District advocated the LEA Autism Center as the stay-put placement, proposed in the August 10, 2015 IEP but which Student never attended. *I, 103*

6. To resolve the stay-put issue, the DPHO requested IEPs predating the settlement agreements. *DPHO Exh 14*

7. The last educational placement Student was in pursuant to the settlement

²Parent's Exhibits are numerical, Respondent's Exhibits are by letter, Joint Exhibits are double letters, DPHO Exhibits are identified as such.

agreement between the parties dated January 5, 2015, namely the Aztec Homebound placement, was the stay-put placement, as decided by the DPHO in a Decision and Order entered on September 27, 2015. *DPHO Exh 13; Exh AA; I, 171-173*

Settlement Agreements

8. The original due process complaint and settlement came about as a result of Student's deteriorating behaviors in an LEA autism-specific program the fall of 2014. The principal of that school noted that Student "escalates most days for several hours when with his classmates in the autism classroom. De-escalation usually requires the involvement of three of our autism teachers, of several EAs who routinely work in our autism classroom, and of multiple members of our most experienced de-escalation team." This school could no longer handle him. *Exh 11, p.2; I, 89-90*

9. Originally District and Parent agreed that Student attend an autism-specific program located at his neighborhood elementary school. The agreement even identified a specific teacher, S.H. This placement was never effected. *Exhs AA, BB*

10. The placement anticipated by the two settlement agreements did not occur because District believed Student could not function in a traditional school setting, even in an autism-specific program, because of his behaviors. *Exh CC; I, 99-100, 123, 148; Exh AA; I, 52-53*

Jumpstart Autism Center (JAC)

11. The amended agreement (March, 2015) between the parties provided for temporary placement at Jumpstart Autism Center, which placement ended on July 31, 2015. Student was not in school until October 15, 2015 when the DPHO Order placed him in the LEA Homebound placement in the Aztec Complex, 6 hours per week, as his stay-put, last IEP

educational placement. *Exh AA; DPHO Exh 13; I, 22-23*

12. Student attended JAC for approximately six months. The amended agreement and IEP also provided that District staff would receive hands-on training at JAC. *Exh BB, CC*

13. At JAC Student received instruction that addressed life skills, social skills, behavior regulation and communication/language skills, as well as pre-academic skills, four hours per day. Actual educational subjects were reserved until Student again attended school in the LEA

Exh CC

14. There was no meeting of minds between District and JAC as to what the training would encompass. Much of it was superfluous with respect to autism and did not provide actual contact with Student. District made good faith efforts to comply with the training proffered. *Exh CC, p. 9; I, 95-97, 111-116, 129-130, 235-236*

15. JAC is not an educational placement. It is a therapeutic placement which caters primarily to younger students on the autism spectrum. *I, 70, 85-86, 117-119, 140, 161, 207, 225-226*

16. Student did not received educational instruction at JAC. *I, 161*

17. Student had not attended JAC since August 4, 2014. Student transitioned to several different settings in 2015 without a formal transition plan. He went directly from Homebound (six hours per week) to JAC (twenty hours per week), then to Rising Sun Camp (an overnight camp) in August without any kind of transition plan. *I, 159; III, 834, IV, 994, 1169; V, 1310-1311*

18. The main goal at JAC is to reduce challenging behaviors. Student made

significant progress with behavioral goals while attending JAC. It was understood at the August IEP meeting that, notwithstanding his progress, Student still required intensive behavior intervention. *I, 162-163, 217; III, 824-825; IV, 990, 1039; IV, 1044*

19. Children at JAC are younger than the students at the Autism Center, including preschool children. There are no high school age students at JAC as there are at the Autism Center. *IV, 1111; V, 1319-1320*

Autism Center

20. The LEA's Autism Center has a very low pupil/teacher 2:1 ratio (2 to 4 students in a class), highly trained staff, total of 18-20 students usually ranging in age from 6-18. Of the twenty students only four are verbal. The center provides a "soothing environment." The maximum number of students in a classroom is six. *I, 153-154, 185-187; II, 338, 352-353, 370, 503; III, 791; IV 949, 959-960*

21. Parent did not specifically state that she did not want her child to attend the center at the August 10, 2015 IEP meeting (a meeting which lasted seven hours with approximately twenty people in attendance), but her demeanor changed dramatically. She and the JAC case manager, M.S, expressed a strong preference for continued service at JAC since Student was happy there. The team discussed a 3 or 2-week transition period proposed by Parent and M.S. prior to a move to the Autism Center. The IEP did not specify a transition period before Student would attend school on August 13, 2015. Staff at the Autism Center anticipate an escalation in behaviors when a student first arrives and can deal with those behaviors. *I, 157-158, 163; II, 528; III 823-824; IV, 999; IV, 1002, 1009; IV, 1065-1066, 1168-1169*

22. Even if District had agreed to Parent's proposal for a three-week transition from JAC to the Autism Center, Parent would not have let him go. Parent has consistently opposed

Student's placement at the Autism Center. *IV, 1006; V, 1181*

23. M. S., a JAC employee, had never visited the Autism Center, nor had she observed S.H.'s teaching of autistic children. M.S. is a SL therapist as well as a BCBA, but not a teacher. *Exh E, pp. 2316-2318; IV, 1070-1075*

24. The Autism Center is not intended as a permanent placement. Once behaviors are under control, the goal is to "get students back to their neighborhood schools." *I, 215; II 505; IV, 954*

25. The Autism Center can be flexible about the number of hours a student spends in that facility, including a shortened school day if recommended by the IEP team. *II, 510*

26. Dr. Parks did an assessment of Student. She was noncommittal about Student's placement at the IEP meeting. *Exh FF; IV, 999-1000*

27. There are no fourth grade students at the Autism Center at the present time; there is a third grader and two fifth graders. *II, 399*

28. At no time did Parent approve a placement at the LEA's Autism Center. *I, 84-85, 132-133, 149, 151, 239-240, 265*

Restraint/Physical Management

29. Student's behaviors prior to attending JAC consisted of throwing furniture, physically aggressive behavior to other students and staff (including two minor concussions to teachers) and purposely urinating on individuals. Student experienced significant escalation behaviors when he first started at JAC, including a six hour de-escalation on one occasion. *Exhs BB, D, pp. 2294-2301; III, 779; III, 879-892; IV, 984, 108; IV 1105; V, 1213, 1345, 1356*

30. B.C., principal at the Autism Center, is an instructor in CPI (Crisis Prevention Institute). CPI uses the term, "physical management." *II, 310-311, 368*

31. JAC and the Autism Center use the same CPI techniques to restrain/physically manage students. *II, 454-456, 594-595, 597; V, 1254*

32. JAC's BIP for Student identified the use of CPI techniques such as CPI transport, CPI blocking procedures, CPI hold, CPI escort. JAC clears a room known as the treatment room to de-escalate children. *Exh LL, pp.4-19; II 459-466; IV 1091-1097; IV 1098; V, 1183*

33. If restraint/physical management is used at the Autism Center, the parent is notified by verbal and written confirmation through a student's daily agenda. *II, 372, 568; IV 942-943*

34. The Autism Center's quiet room (a small room located within the larger classroom) is used for de-escalation and self-regulation, and also as a reward. *II, 391-392; IV, 924-925, 944-946, 979*

35. The Autism Center follows the procedural directives (guidelines) enumerated in the LEA's Employee Code of Conduct should students become a risk to themselves, others, or the environment. *Exh 22, p. 8; II, 391*

36. Parent visited the Autism Center three times. On her second visit Parent observed two staff members using CPI transport to take a student to the quiet room where he screamed loudly for approximately seven minutes. According to staff, this is how this particular student de-escalates. Student had punched a teacher under his eye. Parent's perceptions of this incident differed from that of staff. *II, 541-542; IV, 1015-1017; V, 1259-1260; V, 1256-1259, 1263, 1414-1419, 1424*

37. Parent does not consent to physical restraint as an educational intervention .and opposes the use of any kind of physical restraint. *Exh DD*

38. The PWN states that District “will follow the physical management guidelines” outlined in the Employee Code of Conduct. *Exhs DD, 22*

FAPE

39. For purposes of the due process hearing only the IEP of August 10, 2015 is challenged. *II, 500*

40. The DPHO and attorneys made a site visit to the Autism Center on September 29, 2015 and to JAC on October 2, 2015.

41. According to the principal, B.C., the Autism Center can do the same things JAC does in terms of behavioral strategies, in addition to integrating academics. When questioned whether Student’s JAC goals could be duplicated, B.C. indicated that they could. *Exh. DD, p. 22; II, 408, 420; IV, 1004*

42. Student would be assigned the same teacher, S.H., that Parent and District had originally agreed to in the January Settlement Agreement. *II, 421, 529-530*

43. A Behavior Management Specialist (BMS) is a title used by the LEA. It does not require certification. *II, 432*

44. District has a continuum of services available. District has considered the Autism Center as one of several options for Student since August 28, 2014, however, that placement had not been decided until the August 10, 2015 IEP meeting. Parent is not requesting any placement other than JAC as a remedy. *Exh DD, p. 36; II, 495-499, 576; III 886-893*

45. Staff at the Autism Center regularly consult with the LEA’S Autism Resource Team (ART). ART concurred in the proposed Autism Center placement after observing

Student several times during the 2014-2015 school year. *Exhs 17, D, pp. 2294-2301; II, 554; III, 876, 879-892; IV 984*

46. There was a previous discussion between the LEA's special education compliance director, C. S-H, and Parent about placement options, including the Autism Center, the week prior to the IEP meeting of August 10, 2015. *IV, 998*

47. J.B., the LEA's BCBA (Board Certified Behavior Analyst), had been and would continue to assist Student in all his transitions. She did not believe Student needed a transition plan prior to his placement at the Autism Center. *III, 886-893*

48. S.H., had transferred employment to the Autism Center during the summer. According to this teacher, she did not learn of Student's placement in her classroom until after the August 10, 2015 IEP meeting. *III, 693-694; cf. III, 856*

49. S.H., an experienced and qualified autism teacher and a credible witness stated that, based upon her observation of Student and the voluminous information from JAC and others, the Autism Center would be the most appropriate placement for Student and the LRE at the present time. She did not believe Student would have been successful in the previously proposed placement in an autism-specific program located in a LEA elementary school. *III, 716-717, 727-728, 732*

50. M.S., Student's JAC case manager, concurred with this opinion when she visited S.H.'s elementary school classroom, but did not concur with the Autism Center placement, favoring a JAC placement in the fall of 2015. *III, 746, 802-803*

51. S.H. is able to implement the JAC BIP at the Autism Center. She is able to support all of the JAC goals in her classroom. She is able to implement JAC's recommendations and program for the time Student transitions to an academic school setting, including academic

instruction. She would support the behavioral interventions used by JAC. *Exh LL, pp. 4-16, pp. 19-28; III, 766-767, 775-778, 789, 819, 854; IV 1004; V, 1250-1251*

52. The Autism Center is able to implement a reading program addressing Student's individual needs once a reading assessment is completed when he re-enters a District school. *III, 790, 807; IV, 967*

53. A SLP assessment determined that Student's verbal ability is in the low range (59). His nonverbal ability IQ is 110. His behaviors are a form of communication. According to the SLP who did the assessment, a credible witness, "Student's difficulties with receptive and expressive language, the social pragmatic language that's inherent in the autism diagnosis and then, on top of that, an articulation disorder, they are absolutely affecting his ability to communicate effectively with both peers and adults..." *V, 1379-1380*

54. The SLP believes the best placement for Student given his severe speech disorder, communication difficulties both social and pragmatic, is the Autism Center because he needs a tremendous amount of intense support at this time so that he is able to experience some level of success communicatively. *V, 1389, 1394-1395, 1398-1399*

55. The Autism Center's SLP can duplicate the same therapy for Student that was done at JAC. *V, 1393*

56. According to Parent, as a result of Student's communication barrier he becomes increasingly aggressive when he restrained. A better method to deal with his behavior is to talk him down. *IV, 1024-1026*

57. Parent has consistently opposed the Autism Center as a placement since August 2014. When asked she stated her concerns are quality of the playground and no interaction between children and teachers while at the playground, possibility of bullying by older

typically developing children who pass by the chain link fence at the perimeters; quiet rooms are too small; doesn't like the lighting in the quiet rooms; the actually building generally (too institutional); bathroom security; the principal's personality. *IV, 1006, 1119-1130; V, 1285-1287; V, 1362*

58. Parent blames District for Student's increasingly bad behavior responses. Under the circumstances, she believe she is entitled to choose the placement. *IV, 1132*

DISCUSSION

Restraint/Physical Management

Parent points out that District has not complied with NMPED guidelines on the use of physical restraint issued in 2006, as ordered by another due process hearing officer. *Memorandum, Use of Physical Restraint as a Behavioral Intervention for Students with Disabilities, from State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, (NMPED, March 14, 2006); see also DPH 1314-14 (April, 2014) [decision applies to the facts of that case where parent was uninformed].³*

³ Dismissing the request for due process in substantial part but finding a procedural violation of FAPE, the DPHO ordered that the LEA comply with the NMPED 2006 Memorandum on restraint prospectively, citing *D.B. v. Mabank Indep. Sch. Dist., 114 LRP 16087 (D.C. N.D. Tex. 2014)* [although no substantive denial of FAPE, a hearing officer may order procedural violations to be cured]. The ruling in DPH 1314-14 does not inform the ruling in this case, the facts of which may be distinguished.

The Memorandum outlines the use of restraints: “Manual restraint (also known as “therapeutic holding”) “involves one or more people using their bodies to restrict the student’s body movement. The purpose of this type of restraint is to allow the student to reestablish self-control and/or maintain safety for others in the environment.” The Memo notes that escorting a student (touching and/or holding a student without the use of force and time-out is not considered a form of physical restraint). *Op cit.*, p. 2 “We also emphasize that nothing in this guidance would preclude a teacher or other staff member from using reasonable force to protect themselves, students, or other persons from assault or imminent, serious physical harm.” *Op cit.*, p. 2 While encouraged “to adopt this guidance at a minimum” when developing policies and procedures on restraint, LEAs are not required to follow these guidelines *verbatim*. *Op cit.*, p. 5 “The use of physical restraint must be consistent with the student’s IEP and Behavioral Intervention Plan (BIP). Applying the IDEA, the use of physical restraint is restricted to the same way the law restricts the use of other teaching or behavioral intervention methods in general. That is, it is a denial of a Free Appropriate Public Education (FAPE) if the use of physical restraint is inconsistent with the student’s IEP and BIP.” *Op cit.*, p. 1 The 2006 Memorandum further states “**In all cases**, the use of physical restraint must be approved by the student’s IEP team, documented in the student’s BIP, have the expressed written agreement of the parent or legal guardian, and be addressed in the public agency’s Prior Written Notice of Actions Proposed (PWN) provided to parents following an IEP meeting.”⁴ *Op cit.*, p. 3

⁴The revised NMPED manual appendices include the 2006 Memorandum as “important guidance.” *Technical Assistance Manual: Addressing Student Behavior- a Guide for Educators, August, 2003 (revised 2010), pp. 48-50; Appendices B, C*

The NMPED Technical Assistance Manual: Addressing Student Behavior— a Guide for Educators also provides for a Crisis/Emergency Plan: “obviously behaviors that are severe or dangerous must be addressed immediately. The school must have in place general policies and procedures to handle emergencies, such as events that threaten the safety of staff and students. All school personnel, students, and parents should be aware of these policies.” In this case, “parental input and approval should be obtained before setting up the crisis or emergency plan,” and parents should be notified. *Technical Assistance Manual: Addressing Student Behavior- a Guide for Educators, August, 2003 (revised 2010), pp. 48-50; Appendices B, C*

District in its Employee Code of Conduct endorses the use of restraint as follows:

Reasonable Restraint

There are times when it becomes necessary for staff to use reasonable restraint to protect a student from harming himself/herself or to protect others from harm.

Persons employed by the district may, within the scope of their employment, including involvement in extracurricular activities and co-curricular activities, use and apply such amount of force for such a period of time as is reasonable and necessary to accomplish to following purposes:

- To quell a disturbance threatening serious, probable and imminent bodily harm to self or others.
- To obtain possession of weapons or other dangerous objects which are within the control of a student who poses a serious, probable, and imminent threat of bodily harm to self or others.
- For protection against serious, probable, and imminent threat of harm to self and others, or destruction of property which could lead to harm to the student or others.
- Incident to a lawful arrest by certified and commissioned [school] police officers.

In the case of students receiving special education services, any restraint used beyond the four specific situations listed above shall be identified on the student’s Individual Education Program (IEP) as part of the student’s behavior plan.

With respect to the use of restraint/ physical management used specifically for special education students with behavior management problems, the CPI techniques are the gold standard. Behaviors have to be managed and these techniques have proven successful at both the private Jumpstart Autism Center and the LEA Autism Center. The two versions outlining physical restraint, NMPED and LEA, appear to be a distinction without a difference. Student's behaviors in the past have obviously engendered crisis or emergency situations requiring immediate actions to protect others. The use of CPI restraint is endorsed in the August 10, 2015 IEP. Testimony of the Autism Center staff is that they will follow JAC's BIP. *Exhibit 22* Testimony also indicated that Parent would be informed of physical management in Student's daily agenda. The LEA is not unique in using CPI techniques – they are used all over the country, including at JAC.⁵

The different perceptions and interpretations of the incident at the Autism Center are just that – different perceptions. An actual viewing of the incident by counsel and the DPHO caused the DPHO to concur with District that Student de-escalated after seven minutes as a result of the CPI techniques employed. It should not be forgotten that this particular student had just punched a teacher below his eye. It should also not be forgotten that at JAC it once took staff 6 hours to de-escalate Student when he first attended. Parent cannot make different rules for her

⁵ Parent points to unidentified studies that have indicated physical restraint may cause PTSD but these sources are unidentified, which is not to say that they don't exist or that students have not suffered harm as the result of excessive physical restraints. H.R. 4247, "Keeping All Students Safe Act," recognizing that students have been injured, specifically mandated the use of a state-approved crisis intervention training program. This bill died in the 111th Congress. See also *Restraint and Seclusion: Resource Document (ED 2012)* for other efforts to establish federal statutory rules.

child when the safety of others is at stake. Schools will always have an obligation to protect their greater population.

It is abundantly clear that Parent does not approve and will not consent to any restraints for her son's behaviors. Crisis interventions do not require her consent or approval. The use of restraints has to be balanced against safety and protection issues for those children and staff that Student may have contact with. The Employee Conduct Guidelines District follows are consistent with NMPED guidelines.

Sufficiency of August 10, 2015 IEP

Transition

Parent argues that, because the IEP of August 10, 2015 did not contain a transition plan for Student to transition to the Autism Center, it was procedurally inadequate denying Student FAPE. Student was last at JAC on August 4, 2015. Student had already transitioned out of JAC by September 13, 2015. Testimony indicated that in that time period Student had transitioned to and from other locations without the necessity of a two-or-three week transition from JAC, as Parent and her JAC representative requested at the IEP meeting. District staff, including his parental-selected teacher, made more than reasonable attempts to get to know Student while he was at JAC and were rebuffed. Based on the history of transitioning attempts in this case, the Autism Center was prepared to handle Student on August 13, 2015 without a transition plan.

Predetermination

Predetermination occurs when a district comes to a decision about placement too early in the planning process in a way that deprives parents of a meaningful opportunity to fully participate as equal members of the IEP team. *Spielberg* is the leading case on predetermination, holding that it is a procedural violation of a school's obligation pursuant to 34

CFR § 300.552 to provide FAPE if a district first determines where it intends to place a student and then develops the IEP to affirm its decision. *Spielberg v. Henrico Cnty. Public Schs.*, 853 F. 2d 256 (4th Cir, 1988) See also *R.L. v. Miami-Dade County Sch.Bd.*, 757 F. 3d 1173 (11th Cir. 2014) [discussion of alternative placements cut off by a district representative] ; *Knox County Sch.*, 315 F.3d 688 (6th Cir. 2003) [school officials are permitted to form opinions and compile reports prior to IEP meetings but must keep an open mind, willing to listen to parents]

The placement decision is based upon the child's IEP. 34 CFR § 300.116(b)

A placement decision may only be considered to have been based on a student's IEP when the child's individual characteristics, including demonstrated responses to particular types of educational programs, are taken into account. *Deal v. Hamilton County Bd. of Educ*, 393 F. 3d 840 (6th Cir. 2004); *Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F. 2d 171 (3d Cir. 1988; 20 U.S.C. § 1401(16)

Parent's position is that, because the Autism Center had been discussed on several previous occasions throughout the 2014-2015 school year, placement had been predetermined prior to the August 10, 2015 IEP meeting. On the contrary, District made every effort to accommodate Parent's wishes for an autism specific -based program at three different elementary schools within the LEA without success because of Student's increasingly uncontrollable outbursts. Parent would like to blame the District and the lack of staff training for these outbursts, however, blame is not the issue here – placement is.

The LEA provided Student with several alternative placements throughout the 2014-2015 school year. The Autism Center was the last resort on the special education continuum of services to provide Student FAPE. The LEA is not obligated to provide only the setting Parent approves. On the contrary, federal law is clear that the obligation of an LEA is to provide a free,

appropriate, public education – one that will provide some, more than *de minimus*, educational benefit. The Autism Center was always an option on the continuum of services District provided. This placement was not, however, predetermined under the facts of this case. *Knox County Sch., op cit.; Fuhrmann ex rel. Fuhrmann v. Hanover Bd. of Educ., 993 F.2d 1031 (3d Cir. 1993).*

Parental Participation

Parents must have the opportunity for meaningful participation in the Student’s IEP process. *20 U.S.C. § 1415(f)(3)(E)(ii)(I-III); 34 CFR §300.116(a)(1)* Parent asserts that her requests went unheeded because they were not represented in the PWN. *Exhibit 22, pp. 35-37*

The August 10th IEP meeting comprised 18 individuals, including Parent and JAC case manager, M.S., and lasted over 7 hours The IEP incorporates by reference information from the March 24, 2015 IEP, along with extensive JAC reports on student’s goals and progress while at JAC. The case manager’s input is noted throughout the IEP in question, as well as several instances of parental input. The team did not have to guess that this placement was not consistent with her desires because of Parent’s demeanor.

The PWN notes that parent’s request for placement at JAC for the 2015-2016 school year was rejected by the team, as well as Parent’s request for placement in a district autism program at Student’s home school. *Exh DD, pp. 35-36.* Parent did propose a transition plan, which was also rejected. The team did agree to have 10 hours of JAC consultation services to assist Student with his transition needs.⁶ The PWN also duly noted that “Parent does not consent to physical restraint,” over-ridden by District’s need to use crisis intervention techniques as necessary.” *Exh DD, p. 36*

⁶ The PWN also provides for JAC payment for one hour in the event JAC staff, in place of Parent, is requested to pick Student up from the Autism Center—another of Parent’s concerns.

The IEP for Student is more than sufficient to justify the decision to place Student at the Autism Center until such time as behavioral concerns are under control. Because Parent's proposals were rejected does not mean that she wasn't heard or did not participate. Parent participated, as did her JAC representative.

CONCLUSIONS OF LAW

1. The DPHO has jurisdiction over this matter pursuant to the Individuals with Disabilities Improvement Act (IDEA 2004), *20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2004).*

2. All procedural safeguards required by IDEA and implementing regulations, and the New Mexico Special Education Regulations have been complied with.

3. Extensions of time limits have been granted at the request of one or both of the parties.

4. Parent bears the burden of proof that student was denied FAPE. *Schaefer v. Weast, 126 S. Ct. 528 (2005), 44 IDELR 150; Johnson v. Independent School Dist. No. 4 of Bixby, 921 F. 2d 1022 (10th Cir. 1990)*

5. The applicable time limit under the Statute of Limitations for IDEA actions is two years from date of filing the request for due process, in this case from August 13, 2013. The parties further limited by a release the time period and issues to be decided in this case .in settlement agreements resulting from a previous request for due process. Any findings made with respect to information prior to that date is for stay-put considerations and historical analysis only.

6. Student is currently receiving 1:1 special education services designated by the LEA as Homebound for six hours per week as the result of a stay-put decision. *DPHO, Exhibit 13; Verhoeven v. Brunswick Sch. Comm., 207 F. 3d 1 (1st Cir. 1999)*

7. The issues in this case are placement and the sufficiency of the August 10, 2015 IEP in terms of providing Student with FAPE.

8. Student's special education eligibilities are autism (ASD), Speech/Language Disability (SLD), and Emotional Disturbance (ED). *34 CFR § 300.8(a) and (b)(9) and (10)*

9. Autism is a "low-incidence disability" as defined in IDEA. *20 U.S.C. § 1462(c)(3(c))*

10. Jumpstart Autism Center (JAC) is a therapeutic, not an educational placement. *NMSA § 22-12-2(A)*

11. Student's needs cannot be met at an autism-specific program at any elementary school at this time.

12. Student's behaviors necessitate a placement at the LEA's Autism Center at the present time. This placement is not contemplated as a permanent placement.

13. Student requires intense speech and language therapy to address his verbal and nonverbal deficiencies.

14. District has provided a continuum of services to Student prior to this placement.

Previous, less restrictive, placements in the LEA have not been successful to date.

15. The Autism Center is the LRE until Student's behavior can be mitigated.

16. The LEA is not required to maximize educational benefit for a student.

The test is whether the IEP is reasonably calculated to enable the child to receive educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. Westchester Cnty v. Rowley*, 458 U.S. 176, 206-207 (1982); *Doe v. Board of Educ. of Tullahoma City Schs.*, 20 IDELR 617 (6th Cir. 1993), *cert. denied*

17. Parents cannot dictate the location, teacher, or methods for delivery of educational services. *Urban v. Jefferson Cnty. Sch. Dist., R-1*, 870 F. Supp. 1558, 1569 (D. Colo. 1994), *aff'd* 89 F. 3d 720 (10th Cir. 1996); *White ex rel. White v. Ascension Parish Sch. Bd.*, 343 F. 3d 373, 379 (5th Cir 2003)

18. Under IDEA LEAs are permitted to allocate resources within and between a LEA in order to consolidate resources and serve students most effectively. *Urban, op. cit.*; *Schuldt v. Mankato Indep. Sch. Dist. No. 77*, 937 F. 2d 1357 (8th Cir. 1991); *Flour Bluff Indep. Sch. Dist. v. Katherine M.*, 91 F.3d 689, 694 (5th Cir. 1996)

19. Parent participated in the August 10, 2015 IEP meeting and parental input was considered by the team, consistent with IDEA requirements. 34 CFR § 300.116(a)(1); *Letter to Burton*, 17 IDELR 1182 (OSERS 1991)

20. The placement decision of the IEP team was not predetermined. Options were considered at the IEP meeting. *E.W. Rocklin Unified School District*, 45 IDELR 192 (E.D. Cal. 2006)

21. CPI escort and “time-out” rooms are not considered a form of physical restraint.

NMPED Memorandum: “Use of Physical Restraint As a Behavioral Intervention for Students with Disabilities,” p.2 (March 14, 2006); NMPED “Use of Time-Out Rooms as a Behavioral Intervention,: August 7, 2003; U.S. Department of Education, “Restraint and Seclusion Resource

Document,” (May, 2012); *B.D. v. Puyallup Sch. Dist.*, 53 IDELR 120 (W.D. Wash. 2009), *aff’d.*, 57 IDELR 211 (9th Cir. 2011); *L.M. v. Dist. 001 Lancaster County Sch.*, 60 IDELR 92 (8th Cir. 2012)

22. The use of CPI physical management is appropriate as a means of crisis intervention, consistent with NMPED and LEA guidelines on physical restraint.

23. Parent has failed to meet her burden of proof by a preponderance of the evidence.

24. The proposed IEP placement at the Autism Center provides Student FAPE.

ORDER

WHEREFORE, IT HEREBY ORDERED THAT, consistent with Student’s August 10, 2015 IEP, effective immediately,

1. Student will be placed at the Autism Center and services noted in the Prior Written Notice shall be implemented.

2. Student’s JAC BIP will be followed until changed by staff at the Autism Center.

3. The Autism Center will continue to use CPI physical management as necessary for crisis intervention.

4. The Autism Resource Team (ART) shall consult with Student’s teachers at least fifteen hours per semester to measure Student’s progress and needs and provide assistance as necessary.

5. Student’s placement at the Autism Center shall be reviewed every six months in consultation with ART until such time as Student is placed in a District autism-specific program

in the LEA.

THE REQUEST FOR DUE PROCESS IS HEREBY DISMISSED WITH
PREJUDICE.

ENTERED: November 27, 2015

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 the 27th of November, 2015 to the following persons:

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