

THE STATE OF NEW MEXICO
BEFORE THE PUBLIC EDUCATION DEPARTMENT

No. DPH 0506-01

OPINION AND ORDER

THIS MATTER arises on the Student's Request for Due Process, filed October 14, 2005. *Student's Request for Due Process, October 14, 2005.* On October 27, 2005 the District filed its Response to Request for Due Process Hearing. *Response to Request for Due Process Hearing, October 27, 2005.* On November 7, 2005 the Student's Request for Due Process was found to be sufficient to proceed to trial. *Supplemental Sufficiency Determination, November 7, 2005.* On December 8, 2005 a Decision and Order were entered after a "stay-put" hearing which granted judgment as a matter of law to the District by retaining the Student in a single classroom for the delivery of services during the pendency of these proceedings. *Decision and Order, December 8, 2005.*

Trial on the merits was held on February 8, 9 and 10, 2006. *Tr. Inclusive.* The Student filed her Proposed Findings-of-Fact and Conclusions-of- Law on March 10, 2006. *Student's Proposed Findings-of-Fact and Conclusions- of- Law, March 10, 2006.* The Student filed her written closing arguments on March 10, 2006, which included her argument for compensatory services. *Petitioner's Closing Argument, March 10, 2006.* The District filed its Proposed Findings-of-Fact and Conclusions-of-Law on

March 10, 2006. *School's Proposed Findings-of-Fact and Conclusions-of-Law, March 10, 2006.* The District filed, as well, its written closing argument on March 10, 2006. *School's Closing Argument, March 10, 2006.* On March 17, 2006, the District responded to the Student's request for compensatory relief. *Response to Request for Compensatory Services, March 17, 2006.*

Based on a request from the parties, an extension to issue this Order and Opinion was granted. *Extension Order, March 6, 2006.* This Opinion and Order is due, therefore, on April 7, 2006.

It is noted that each party was represented vigorously by competent counsel. *Tr. inclusive.*

The following exhibits were entered into the record:

Exhibits 5, 45, 17, 65, 11, 12, 27, L, P, 41, 64, 45 (1-6), 45 (7-6), 45 (10-11), 45 (14-29), 45 (30), 45 (31-32), 45 (33-34), 45 (35-37), 45 (39-41), 45 (42), 45 (46), 45 (47-48), 1, 39(a), 14, 13, 19, 46, 26, 28, 29, 30, 3, 67, 36, 54, 55, 56, 62, 63, 22, 20, 21, 44, 50, 52, 53, 51, 57, 58, 59, 60, 61, 32, 33, 24, 25, S and R.

The following proposed exhibits were withdrawn or denied:

Exhibit 45 (9), 45 (12, 13), 45 (42-45), 45 (44-45), and 18.

The transcript of proceedings contains three volumes. *Tr. Volumes One, Two and Three.*

The Student's Request for Due Process is granted in-part and denied in-

part.

I. Trial Issues

The Student avers procedural and substantive violations of the *Individuals with Disabilities Act*, 20 USC 1401, *et seq.*, ("IDEA"), as follows:

(1) Whether placement of the Student in a self-contained classroom resulted in denial of a free appropriate public education (FAPE) because it was not in the least restrictive environment. *Student's Request for Due Process, February 14, 2005.*

(2) Whether FAPE was denied to the Student because the District did not appropriately address her learning disability in written expression. *Id.*

(3) Whether FAPE was denied to the Student by denying her extended school year services. *Id.*

(4) Whether FAPE was denied to the Student due to the District's failure to include present levels of performance, goals, or objectives for spelling in her Individualized Education Program (IEP). *Id.*

(5) Whether FAPE was denied in the area of math instruction. *Id.*

(6) Whether FAPE was denied because the District failed to provide the Student with necessary speech and language therapies. *Id.*

(7) Whether FAPE was denied due to inappropriate academic instruction. *Id.*

The Student alleged, as well, violations of Section 504 of the Rehabilitation Act in issues one, two, three and seven, yet they were summarily dismissed for lack of jurisdiction. *Summary of Initial Pre-Trial Hearing Conference, October 20, 2005.* The Student's issues were otherwise found to be sufficient for trial on November 7, 2005. *Supplemental Sufficiency Determination, November 7, 2005.* The District responded to the Student's Due Process Request on October 27, 2006, with specific denials to each of the issues. *District's Response to Request for Due Process Hearing, October 27, 2005.*

The Student alleges she is entitled to past compensatory education for the denial of FAPE in issues one through seven. It is particularly noted that there is no request for the remedy of reimbursement for private school placement as contemplated in 34 C.F.R. § 300.403. *See Student's Request for Due Process, February 14, 2005.* Issue 1 seeks, as well as the noted compensatory services, a prospective order that the Student not be transferred to a self-contained classroom. *Id.* Issue 2 seeks, as well as the noted compensatory services, that the Student be provided, prospectively, word processing programs with spell checker and Dragon Dictate, keyboarding skills in accord with her IEP and with that suggested by the Sanchez evaluations and by the two doctors retained by the Student. *Id.* Issue 4 seeks, as well as compensatory services, a prospective modification of the

Student's IEP to include present levels of performance, with goals and objectives to address the Student's difficulties with spelling. *Id.* Issue 6 seeks, as well as compensatory services in general terms, speech-language therapy from December 17, 2004 to "the present[,]” apparently as part of the past compensatory education relief. Issue seven requests that the Student be provided, prospectively, future academic instruction at the appropriate grade level in all subjects. *Id.*

Summary Judgment was granted-in part as to issues 1, 2, 4 and 7 to the extent of the Student request for prospective relief. *See Opinion and Order on the District's Motion for Summary Judgment, February 3, 2006.* At trial, the Student withdrew Issue 5. Judgment as a matter of law was granted in favor of the District as to Issue 4. This decision will consider, therefore, the Student's allegations with claims for compensatory relief in Issues 1, 2, 3, 6 and 7.

II. Findings-of-Fact.

1. The Student is twelve years of age.
2. The Student presently is diagnosed under two areas for eligibility: emotionally disturbed and as having a specific learning disability.
3. Her full scale IQ is in the average range.
4. The relevant time period encompassing this action is for the school

year period for the 2004-2005 and 2005-2006 school years.

5. The Student stopped attending school in February 2006 and became registered as a home-schooled student in February 2006.

6. The Student is specifically found not to be credible.

The Student's mother is found to be credible.

The Student's mother believes her daughter and believes in her daughter, yet this does not impact on the determination that the mother is credible.

The Student's mother is supportive of her daughter and seeks what is in her daughter's best interests.

The Student has had about thirteen different types of evaluations.

The IEP team has considered at least seven different areas of disability for the Student in the past twelve months.

Some of the Student's scores showed dramatic differences, which tended to show that she could produce when she wanted to.

The Student began the 2005-2006 school year in five special education classrooms and two general education classrooms, with an average of about fifteen students in each classroom.

The IEP team determined that the Student's strengths and weaknesses could best be met with her transfer to a special education classroom, rather than in the separate classrooms.

When social skills instruction provided by various teachers in the different classrooms did not work, the IEP team considered other options and determined that moving the Student to a special education classroom was the most appropriate placement, rather than placing her in a self-contained classroom.

The special education classroom was staffed with about one adult for every two children, with an average of six students.

The majority of the Student's educational programs were provided directly by certified special education teachers.

The special education classroom allowed the teacher to provide to the Student redirection and reinforcement on a regular basis in a setting specifically modified for the Student.

The assignments given to the Student were modified to meet her specific needs.

The Student was not taught with below level books and materials as a standard level of instruction.

The books and materials were used as a supplement to assist with the educational program the teacher had in place.

They were not used as the primary teaching tools for the Student's education.

The Student's special education program was modified in many respects

to meet her specific needs from allowing her to participate in general education classes for a portion each day, to modifying the consequences or results of rule violations in the classroom, to modification in classroom requirements.

The Student's behavior intervention plan (BIP) called for redirection, explanation, checking for understanding and moving to a new setting.

A student under a BIP can be in both self-contained behavior classrooms, as well as in general education settings and any other setting in-between.

Conflict between the parent and the school staff can increase the Student's behavioral issues and diminish the likelihood of success.

The Student's mother was, at times, in conflict with the goals sought by the school staff.

The Student's behavior in the classrooms was often disruptive and inappropriate.

When the Student's behavior is escalated, she speaks disrespectfully, wants her own way and is rude.

The Student has reported incidents to her mother of misconduct in class for which police reports have been filed, yet are found to be unsubstantiated.

The Student's claims of sexual activity in the classroom are not credible.

The Student's BIP does not allow staff to place her in a time out or an isolation cubicle for simply not following a teacher's directions.

Ms. P did not always ask the Student if she understood the direction

given to her.

The Student displayed little in the way of enthusiasm and effort in her classes.

The Student has had a number of discipline referrals in her special education class.

The Student was in Ms. P's classroom to work on social skills and to catch up with her work, especially due to the need for more complex social skills if she struggled beyond the sixth grade.

Special education services provided in Ms. P's classroom are appropriate in light of concerns related to social deficits and transition difficulties.

Removing the Student from Ms. P's classroom before her behavior and social deficits had improved would generate the same set of concerns as before her transfer because the work that had been started could not be completed.

Ms. P's steps as to redirection and consequences for behavior are in accord with the Student's BIP.

The Student received occupational therapy services from the District.

The Student was able to write legibly when she wanted to, although when she chose to behave in a different way then she would not write well.

The Student met her 80% goal of cursive writing while in therapy but not while in the classroom.

The District's speech and language therapists concluded that the

Student did not meet eligibility criteria for speech and language eligibility.

Specifically, the Student scored in the average to high average range.

Non-verbal learning disabilities are not one of the thirteen recognized areas for eligibility under the IDEA.

Characteristics of nonverbal learning disability are evident early in a child's development and not after the age of five.

There was no indication that the Student exhibited any of the deficits associated with a nonverbal learning disorder.

Speech and language pathologists do not diagnose central auditory processing deficits as according to their standards, the American Speech and Hearing Association.

Ms. M is found not to be credible as a speech and language pathologist not qualified to make a central auditory deficit diagnosis.

Otherwise, a reading of test results did not indicate a referral for a central auditory processing deficit.

The Student's test scores were more in the average range.

The operating procedure employed by the District is to confirm what technology is available at the school, meet with the teacher, meet with related personnel and then observe the Student to see if there is any difficulty in assessing the educational program.

An assistive technology team, composed of an educational

diagnostician, physical therapist, occupational therapist, adaptive PE teacher and several speech pathologists, meet with the assessor to consider the findings and determine if further evaluation is needed or if assistive technology would be appropriate for the Student.

The team concluded the Student did not need assistive technology to assess her educational program.

Nonetheless, one of the District's evaluators recommended that the Student be taught keyboarding with a spell check program.

Spell check software is available at the school in a number of areas, including the special education classrooms and at the computer lab.

The Student was taught, at times, with books and other materials below her grade level when used as teaching tools for grade level projects, for specific tasks, or for focus activities.

Generally, the lessons for the Student were directed to her grade and ability levels and developed in accordance with statewide benchmarks and standards.

The IEPs for May, August, September and December 2004 list extended school year services (ESY) as approved for the summer of 2005.

The IEPs note that the Student has suffered severe regression and recoupment in the areas of math skills and written expression, as well as well as anticipated severe regression.

The District states that the reason for this notation was because the Student's mother yelled at the team and told them they wanted ESY noted and that, therefore, the team agreed to consider it.

Nonetheless, it is found that the Student's mother asked for a number of other matters, indeed, as noted in this due process proceeding, yet the District did not feel pressured to supply her with these other services.

The District's position that the only reason it noted ESY services for the summer of 2005 was because they were pressured into by the Student's mother is not found to be persuasive.

The IEPs of February, March and May 2005 reject ESY services.

According to the Student's mother, she saw regression over the summer in the Student's math.

The Student's handwriting showed regression, as well.

The Student regressed over the summer of 2005.

III. Legal Authority

The burden of proof rests with the party challenging the IEP. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *Johnson v. Independent School Dist. No. 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). In this action, the burden rests, therefore, with the student.

A twofold inquiry is demanded to determine if a child has been provided with FAPE. *Board of Education of Hendrick Hudson Central School District v.*

Rowley, 458 U.S. 156 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). When a dispute centers on whether the IEP is being properly implemented in the least restrictive environment ("LRE"), then the matter arises to whether the IEP is reasonably calculated to provide a meaningful educational benefit to the Student. *See Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 347 (5th Cir. 2000).

In determining the LRE, the Tenth Circuit requires certain non-exhaustive factors to be explored, in which no single factor is dispositive. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004). These factors include evaluation of: (1) the district's steps taken to accommodate the student in the regular education classroom, which includes consideration of the continuum of placement and support services; (2) the academic benefits the

student will receive in the regular education classroom as compared with those in a special education classroom; (3) the overall education experience, including non-academic benefits, which the student will receive in the regular classroom; and (4) the disabled student's presence on the effect of the regular classroom. *Id.* One of the most important substantive requirements under the IDEA is to educate students in the least restrictive environment in which they may receive an appropriate education. *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 926 (10th Cir. 1995).

An IEP is to be in place at the beginning of each school year. See 34 C.F.R. § 300.342(a). The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.342(b)(ii). An appropriate plan considers the particular needs of the child and the child's potential, while providing meaningful learning, and must be calculated to provide educational benefit at the time it is offered and developed. *Id.* A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. See 20 U.S.C. § 1410(20). Nonetheless, parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208.

Written notice is required regarding issues for the identification, evaluation or placement of a child. See 34 C.F.R. § 300.503; 6.31.2.13(D)

NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the District provide them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. See 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's FAPE. See *Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. See *Masar v. Bd. of Educ. of the Fruitport Community Schools*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). See also *Tenn. Dept. of Mental Health and Mental Retardation v. Paul B., et al*, 88 F.3d 1466 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the District of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. See *Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004).

Related services include transportation and psychological services. See 34 C.F.R. § 300.24(a).

Extended school year services are to be awarded when the benefits accrued to the child during the regular school year will be “significantly jeopardized” if not provided an education program during the summer months. *Johnson v. Independent School Dist. No. 4 of Bixby*, 921 F. 2d 1022 (10th Cir. 1990). Matters to be considered include retrospective as well as prospective data, as well as “circumstantial considerations of the child’s individual situation at home and in his or her neighborhood and community.” *Id.* What is deemed appropriate does not mean an education guaranteed to maximize the child’s potential. *Id.*

Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents’ opportunity to participate in the decision process, comprised the student’s right to an appropriate education, or caused a deprivation of educational benefits. *O’Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of FAPE. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. See 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. See *Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the

deprivation of the student's rights and reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, although apparently not cited by either party, there is a persuasive opinion by the U.S. Court of Appeals for the District of Columbia Circuit which explores the authority of a DPHO and an award of compensatory education. *See Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005). Specifically, under a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *Id.*

IV. Analysis

a. Jurisdiction

Jurisdiction properly lies over the parties and over the subject-matter. 34 C.F.R. § 300.507(a); 6.31.2.13(I)(1) and 6.31.2.13(I)(3) NMAC.

b. Conclusions-of Law and Rationale

Issue 1. LRE and FAPE

It is concluded that the District did provide the Student with a free appropriate public education in the least restrictive environment by placing her in the self-contained classroom. 6.31.2.7 (C)(7) NMAC.

Specifically, the District sought to accommodate the Student in the

regular education classroom until the team determined that her needs were not being met there. The academic benefits to the Student allowed greater adult/teacher access than did the general educational environment. A continuum of education placements was considered before the self-contained classroom option was exercised, including the Student's request for line of site supervision, among other things. The Student's presence on the effect of the regular classrooms was that she was disruptive, rude, and even a safety hazard to herself. Given these factors, FAPE was not denied the Student by placing her in the self-contained classroom. See *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966 (10th Cir. 2004)(LRE factors).

Issue 2. FAPE and WRITTEN EXPRESSION

It is concluded that the District did not deny a free appropriate public education to the Student by failing to appropriately address her specific learning disability in written expression because, factually, the Student does not have a specific learning disability in written expression. *34 CFR Sec. 300.308, 352*. Alternatively, if a disability did exist, then the Student was provided access to the spell check component of word processing equipment at the school. *34 CFR 300.350*.

Issue 3. EXTENDED SCHOOL YEAR SERVICES

It is concluded that the District did not provide the Student with extended school year services for the Summer of 2005. See *Johnson v.*

Independent School Dist. No. 4 of Bixby, 921 F. 2d 1022 (10th Cir. 1990). The IEPs for May, August, September and December 2004 list extended school year services (ESY) as approved for the summer of 2005. The IEPs note that the Student has suffered severe regression and recoupment in the areas of math skills and written expression, as well as well as anticipated severe regression. The District's position that the reason it noted regression and agreed to extended school year services for the summer of 2005 was because it feared the Student's mother or because it simply copied was noted before in IEPs is not found to be credible. Even if credible, it was not appropriate. As a result, it is concluded the Student met her burden of proving the benefits accrued to the child during the regular school year will be "significantly jeopardized" if not provided an education program during the summer months. *See id.*

The Student is entitled to a compensatory education award reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. District of Columbia, 401 F. 3d 516 (D.C. Cir. 2005).* Given this holding, the IEP team is ordered to reconvene within a reasonable time and to determine what extended school benefits the Student should have received had the ESY been approved and to then afford the Student those services. It is also ordered that to avoid any appearance of impropriety, the

IEP team will be “facilitated” by an independent facilitator appointed by the New Mexico Public Education Department within a reasonable time from this decision. The facilitator will be paid for by the District.

Issue 4. Dismissed

Issue 5. Withdrawn

Issue 6. Speech and Language Therapy

It is concluded that the Student has not shown, by a preponderance of the evidence, that the District failed to provide the Student with an appropriate education by failing to provide her with necessary speech and language therapies. See *Burlington v. Dept. of Educ.*, 736 F.2d 773, 778 (1st Cir.), *aff'd*. 471 U.S. 359 (1985)(what is appropriate at a given point in time).

The District’s position is persuasive in that only one witness, Ms. M, indicated there was a possible central auditory deficit, yet that this witness was not qualified to make such a diagnosis. Ms. M is found not to be credible.

Issue 7. Inappropriate Academic Instruction

The Student contends that because at times the Student’s teacher used books below the Student’s grade level that the instruction violated 34 CFR Sec. 347(a)(2) and the intent of the IDEA 2004. This is found unpersuasive.

Factually, the Student was not taught with below level books and materials as a standard level of instruction. The books and materials were used as a supplement to assist with the educational program the teacher had

in place. They were not used as the primary teaching tools for the Student's education. Indeed, 34 CFR Sec. 347(a)(2) speaks of meeting the child's needs to progress in the general curriculum. *Id.* Clearly, the Student's limited use of some below level materials did not disregard her needs or hamper her progress. Additionally, as to the intent of the IDEA --and it does not appear that this standard has changed with the 2004 authorization -- it is concluded that the teaching plan by the Student's teacher, which included some limited use of below level books and materials, provided a meaningful educational benefit, although that means neither maximizing the potential of the child nor minimizing the benefit provided. See *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998)(standard reiterated).

VI. ORDER

Of the Student's seven claims, she is successful with one of them – that is, Issue 3, the extended school year services. It is, therefore, ordered that the District compensate the Student with summer school services for the summer of 2005. It is ordered that a facilitated IEP team meet within a reasonable time from the issue date of this order to determine what extended school benefits the Student should have received had the ESY been approved and to then to provide the Student with compensatory education for those services.

It is ordered that Issues 1, 2, 6 and 7 will be, and are, dismissed with prejudice.

The Student substantially prevailed on Issues 3, whereas the District prevailed on the remaining issues.

VII. Appeal Process.

This decision is final unless a party brings a civil action in state or federal district court pursuant to 20 U.S.C. Sec. 1415(i) and 34 CFR Sec. 300.512 within thirty (30) days after receipt of this decision by the appealing party. 6.31.2.13(I)(25) NMAC.

Entered: April 7, 2006

MORGAN LYMAN, ESQ.
IMPARTIAL DUE PROCESS
HEARING OFFICER

CERTIFICATE OF SERVICE

I certify that I mailed (certified, return receipt requested), a true and accurate copy of the foregoing to counsel for the Student's parent and counsel for the District on April 7, 2006; a true and accurate copy of the foregoing was mailed to Dr. Veronica Garcia, Secretary of Education, New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 on April 7, 2006. Copies of the foregoing were transmitted by fax to counsel on April 7, 2006, as well.

Morgan Lyman