

**DUE PROCESS HEARING
DPH #0607-05**

DECISION

This matter coming before the Due Process Hearing Officer (DPHO) at a hearing commencing on November 6, 2006 and continuing through November 8, 2006; Petitioner (Parent) represented by Michael Kaczor I, *Pro Se* ; Respondent (District) represented by Jacquelyn Archuleta-Staehlin and Shana S. Baker, Attorneys at Law, and the Hearing Officer (DPHO), having heard the testimony of witnesses, and having reviewed the exhibits and memoranda of law submitted by the parties, enters the following Findings of Fact, Conclusions of Law, and Decision.

STATEMENT OF PROCEDURE

Parents filed a request for due process with the New Mexico Public Education Department (NMPED) on September 18, 2006, alleging denial of FAPE under IDEA¹ on substantive and procedural grounds. *[DPHO Exhibit 1]* The Due Process Hearing Officer (DPHO) was appointed on September 19, 2006. *[DPHO Exhibit 2]*

The first pre-hearing scheduling conference was held telephonically on September 28, 2006. *[DPHO Exhibit 5]* The parties informed the DPHO at that time that a resolution conference would not be productive. An extension of time limits was granted at the request of both parties.

At a second pre-hearing conference held by telephone on October 23, 2006, issues were identified and narrowed, and the parties instructed that the submitted issues only would be the

¹*IDEA 2004* covers the period from July 1, 2005 to September 18, 2006.

subject of the due process hearing. *[DPHO Exhibits 8, 9, 10]* District moved to dismiss the complaint due to insufficiency of the allegations, which Motion was denied. *[DPHO Exhibits 6, 7]*

A third pre-hearing conference was held telephonically on October 26, 2006, at which time the DPHO appointed an independent evaluator to perform a reading assessment and advise as to the feasibility of a “regression analysis.” Upon stipulation of the parties the hearing dates were shortened to four days instead of the original five days allocated. *[DPHO Exhibit 14]*

The Due Process Hearing took place on November 6, 7 and 8, 2006. After Parent rested his case District made an oral Motion to Dismiss which was denied. The following exhibits were admitted during the course of the hearing: Joint Exhibits 1-30; Petitioners’ Exhibits 12, 13, 19, 20, 22, 23, 27, 39, 48, 57A, 61, 62, 67, 68, 69, 71, 78, 80, 81, 82, 85, 92, 94, 95, 117, 127, 132A (p. 455), 134A (p. 461), 135A (p. 464), 149, 150, 152, 153, 154, 155, 156, 157, 158, 159, 161, 173, 175, 176, 178, 179, 181, 182; Respondent’s Exhibits D, E. Written closing arguments and legal briefs were limited to five pages, not including supporting case law. This Decision is timely filed on December 12 , 2006.

ISSUES PRESENTED

1. Whether District has denied Student FAPE by failing to provide Student with a research-based reading program?

2. Whether District has denied Student FAPE in the 2004-2005 and 2005-2006 school years by failing to inform Student’s regular education teachers of modifications, accommodations and supports in Student’s IEP and of Student’s Behavior Intervention Plan (BIP), and by failing to properly implement same?

3. Whether District has denied Student FAPE by failing to provide related services necessary

to address language issues resulting from Specific Learning Disability (SLD)?

4. Whether District failed to provide Student with instruction by trained, qualified staff with knowledge of remediation of SLD, resulting in a denial of FAPE?

5. Whether the Manifestation Determination Review (MDR) committee meeting in January, 2006 was properly constituted and IDEA procedures properly followed, and was the disciplinary action taken by District consistent with IDEA requirements?

6. Whether District failed to provide Parents with progress reports on IEP goals and objectives and whether goals and objectives were objectively measured consistent with the requirements of IDEA?

7. Whether Student's IEP was appropriate (that is, reasonably calculated to confer educational benefit) and was FAPE provided to Student?

FINDINGS OF FACT²

General Findings

1. Student is seventeen years old and presently attends twelfth grade at District's high school, which he has attended since 2002.

2. Student qualifies for special education services based upon his eligibility as Specific Learning Disabled (SLD). Student has been eligible for special education services since 1998, although school problems were noted as early as first grade. *Jt. Exhibit 19*

3. Student had been diagnosed as moderate dyslexic and learning disabled in the

²To the extent that the foregoing findings of fact contain conclusions of law or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Bd.*, 835 F. Supp. 340 (1993).

areas of reading and writing in 1996 and 2000. *Jt. Exhibit 19*

4. Student was last evaluated in February, 2005 when he was in 10th grade by means of an independent educational evaluation (IEE) at District's expense. *Jt. Exhibit 19*

5. Student's annual review following this evaluation took place at IEP meetings held on April 25, May 12, and August 29, 2005. A Multidisciplinary Team Meeting was held on May 23, 2005. The completed 2005-2006 IEP noted annual goals and objectives/benchmarks addressing needs in written expression, reading skills (fluency and comprehension) and behavior. Present levels of performance (PLPs) were indicated. The 2005-2006 IEP provided for 16 hours of special education services, including one hour of Speech/Language (SLP) therapy per week; Extended School Year (ESY) referral; Transition Plan; Behavior Intervention Plan (BIP); and instructional accommodations or modifications. Included reading goals specified that "[Student] will increase his reading skills by two grade levels across the curriculum, utilizing language arts tools in all classes." Parents signed off on this IEP when completed on August 29, 2005. *[The parties differ as to whether the IEP meetings comprised three dates or five dates] Jt. Exhibits 3, 4; TR 233, 407*

6. Student's MDT/IEP for the 2006-2007 school year is essentially the same as the previous year's IEP with the omission of SLP services and reading goals, making Student eligible for 15 hours of special education services. *Jt. Exhibit 5*

7. According to District, Student's disability at the present time is in the area of writing only. *TR 433, 435.*

Scientific Research-Based Reading Program

8. According to the February 2005 evaluation (IEE) performed when Student was in the second semester of the 10th grade, Student was reading at the 7th or 8th grade level. *Jt. Exhibit 19;TR 435*

9. Noting reading difficulties, the recommendation of Bob Walsh, M.A., LED, NCSP (Rubin Educational Resources), a licensed educational evaluator and the independent evaluator in this case, was that “[Student’s] reading profile suggests that he should receive direct, explicit instruction that utilizes a developmental, multicomponent approach to reading instruction. [Student] will benefit from activities that develop phonological awareness skills such as syllable segmentation, and phoneme segmentation. Ongoing instruction in letter/sound relationships should include instruction in phonics, word families and whole word reading. Activities should strengthen skills in syllabic segmentation, and knowledge of morpheme patterns. [Student] needs instruction in developing fluency of word recognition. This can include repeat readings, fast reading of single word lists prior to reading text and adult-student tandem readings.” *Jt. Exhibit 19, p. 13*

10. District agrees with most of the Walsh evaluation, with the exception of recommendations directed towards a reading program. According to District, Student does not require remedial phonemic awareness approaches to improve his reading. Student’s current needs in reading are in terms of broad reading and vocabulary building, supported by assistive technology as provided by District. *TR 435-436, 492-493*

11. Mr. Walsh was not called by either party to testify at the due process hearing.

12. District opposed using Rubin Educational Resources for a further reading assessment due to alleged bias. Parents opposed using an educational diagnostician employed by the

LEA for the same reason. From the lists of suggested evaluators submitted by both parties, no one contacted was able or willing to do further assessment in this case, with the possible exception of diagnosticians at Zia Behavioral Team Builders (Dr. Freidl), whose credentials have yet to be verified. *TR 601*

13. Using the discrepancy model, Student does not meet the criteria to be eligible as reading disabled. *TR 456-460, 695*

14. Mother observed that Student is doing better with his reading. *TR 99*

15. Student volunteers to read aloud in his English class and feels somewhat comfortable about doing that. *TR 150*

16. At the hearing Student read a paragraph from District's *Exhibit B* aloud with no apparent difficulty, although slowly. *TR 155*

17. JL, Student's Study Skills teacher and case manager in the fall semester of 2005, reported that Student demonstrates proficient skills and levels in language arts and reading. He is in the upper third of his special education class, which comprises children with moderate to mild learning disabilities with a concentration in written language. *TR 203, 210*

18. JB, District's program support specialist with extensive familiarity with District's special education programs and with Student's special education program in particular, believes Student has made a great deal of progress in reading since he was first identified as a special education student; his reading skills are at such a point that a remedial reading program is not necessary at this time. *TR 401, 408-409*

19. Student has received and benefitted from scientific research-based, multisensory reading programs in the past (e.g., LANGUAGE!) and has progressed to the point where these

programs are no longer necessary to meet his educational needs. *TR 409-411, 432, 524-526*

20. Although Student does not have a qualified exceptionality in the area of SLD/reading, reading goals were established in several of his IEPs at the request of Parents. *Jt. Exhibit 4, p.24; TR 535*

21. While Student's goals in his IEP of September 29, 2005 stated that Student will increase his "reading skills by two grade levels across the curriculum utilizing language arts tools in all classes," this goal did not imply direct reading instruction. *Jt. Exhibit 4; TR 210,470-471*

23. PT, Student's special ed English teacher, a very credible witness who is most familiar with Student's language arts educational needs, does not believe Student requires specialized reading instruction. *TR 618-619, 627-628*

24. Based upon her experience with Student, PT believes Student's grade equivalencies to be higher than the test results reported in the IEE. *Jt. Exhibit 19; TR 629-632*

25. There was nothing in Student's classroom records that indicated he required the provision of special education services in the area of reading during the period in question (September, 2004-September, 2006). Despite this observation, District did provide reading services to Student. *TR 490*

26. Student did not show up for the reading assessment scheduled in July, 2006 by the independent evaluator selected by Parent (KL). The evaluator declined to do a followup reading assessment when contacted during the course of the due process hearing. *TR 733-735, 738-739*

27. Although a reading assessment was ordered by the DPHO consistent with the May 23, 2006 Prior Written Notice (PWN), Parent stipulated at the conclusion of the due process hearing that he waived an independent reading assessment. District concurred with this stipulation.

Jt. Exhibit 5;TR 781-786

Notification of Modifications/Accommodations, BIP

28. District's standard operating procedure is to place five copies of IEP modifications/accommodations into a student's folder in the summer to be distributed to a student's regular education teacher at the beginning of the fall semester. JB, the program specialist, the special ed principal, and Student's regular ed teachers meet to review a student's modifications/accommodations and BIP. *TR 477-479, 696-697*

29. JL, a very credible witness, as case manager for Student was responsible for disseminating Student's modifications/accommodations and BIP to his regular education teachers for a good portion of the 2005-2006 school year, and she did so by delivering a written list to teachers, for which they signed. *TR 179, 190, 214, 612-613-617, 683, 696*

30. According to the then department chairman for special education, DS, modifications and accommodations were disseminated to teachers at the beginning of each and every semester. *Jt. Exhibit 4; TR 521-523*

31. Student's Algebra II teacher, MP, received a list of modifications and accommodations from either JL or DS. MP allowed Student additional time to complete tests, using his notes and textbook and gave him fewer problems. Student's attendance in class was not good, including 30-40 tardies, and he did not complete assignments. *TR 669-672*

32. Contradicting his own testimony, Student admitted to receiving modifications and accommodations in several of his classes including, but not limited to, laptop use and language arts software (Inspiration!, Kurzweil), additional time or shortened assignments (for reading and writing assignments), and seating in front of classroom. *TR 126-127, 130-131, 140-143, 477, 558-*

ESY, BIP Positive Reinforcers, Related Services (SLP)

33. Student did not avail himself of ESY services in the summer of 2005, although individualized services were in place. *TR 486*

34. Student went to the ESY school site the first day, however, Student did not attend ESY in the summer of 2006 even though services were again offered by District to allow Student to recoup some of the credits he lost while he was on long term suspension. ESY services centered on writing skills and Algebra II credits. District's usual policy is to have a student attend summer school at parents' expense if a student has to makeup lost credits, and not the provision of ESY. *TR 487-489, 505, 563-566*

35. Student did not attend ESY in the summer of 2006 by his own choice. *Exhibit E; TR 157-158, 748-753*

36. Student was provided positive reinforcers pursuant to his BIP including at least one pizza party for friends on the football team. *TR 176, 202, 393, 529*

37. Driver's ed is not a related service indicated on Student's IEPs, nor did District ever promise that Parents would be reimbursed for driver's ed. *TR 272-274, 411-412, 485*

38. District did not provide Books on Tape to Student, nor were they required to under Student's IEPs. *TR 620-621*

39. Student's assistive technology, as provided for in his IEPs, was integrated into his classroom settings through use of the laptop computer provided by District. *Jt. Exhibit 14; TR 528-529, 763*

40. Student received assistive technology in the form of software (Kurzweil,

Inspiration!, Co:Writer, Write:OutLoud), equipment (scanner , laptop). *Jt. Exhibit 14; TR 765-766, 773-734*

41. The S/L evaluation performed (on short notice) in May 13, 2005, indicated that Student was eligible for SLP. S/L therapy for one hour per week was provided as a related service in Student's IEP of August 29, 2005. *Jt. Exhibits 4, p. 28; 15, p.2; TR 665*

42. While good performance was noted in the 2004-2005 school year, Student's attendance for SLP in the 2005-2006 school year was reported as poor. *TR 660*

43. As a result of the NMPED Corrective Action Report, the sole purpose of the January 26, 2006 IEP was to determine whether or not compensatory speech and language services were needed for Student. In the absence of Parent, the IEP team determined that no compensatory SLP services were necessary to makeup lost time based upon Student's present classroom performance and the offer to make services available in ESY in the summer of 2006 (which Student declined). *Jt. Exhibit 9*

44. The IEP team meeting on January 26, 2006 added an Addendum to Student's IEP of September 29, 2005, continuing future SLP services until further assessment. *Jt. Exhibit 9; Exhibit 27; TR 570.*

45. The independent S/L evaluation performed by KL on July 12, 2006 concluded that Student no longer required SLP. In reviewing this evaluation, SN (the present contract Speech/Language therapist) concurs that Student does not qualify for SLP. *Jt. Exhibit 1, p. 15; Jt. Exhibits 15, 17; TR 468-469, 729-732*

46. Based upon this evaluation, Student's IEP team meeting on September 18, 2006 concluded in its IEP Addendum that Student is no longer eligible for SLP. *Jt. Exhibits 1, 17;TR 288,*

291, 301-306, 345, 662-663

Trained, Qualified Staff with Knowledge of Remediation of SLD

47. JL is a highly qualified special education teacher, certified and licensed by the State of New Mexico, with eight years teaching experience (seven of which are teaching special education language arts). *TR 202*

48. PT is a highly qualified special education teacher, certified and licensed by the State of New Mexico, who has been teaching at District's high school for 23 ½ years; she is presently Student's special ed English teacher and was his teacher last semester as well. *TR 602*

49. MM, Student's proposed ESY one-on-one instructor for US history in the summer of 2006, is a highly qualified special education teacher with 12 years experience. MM consulted with Student's former history teacher about his proposed curriculum. *Exhibit E; TR 743*

Manifestation Determination Review Procedures/Discipline

50. Although testimony is conflicting, Student admitted to having a knife in the vehicle he drove to school and parked in student parking on school grounds on January 19, 2006. *TR 115-116, 147-148, 716, 718, 721*

51. Student admitted that he knew weapons were forbidden on schools grounds and that it was so stated in the Code of Conduct. *TR 158*

52. Pursuant to the Code of Conduct, a Student found with a weapon (which includes, by definition, a 3 ½ inch folding pocketknife) on school grounds is immediately suspended. District is then required to hold a MDR hearing within 10 days. Normally the recommendation for this offense is long-term suspension (45 days) whether the student has a disability or not. Police are notified. *TR 380-384, 387, 697-700, 704-705, 710-715*

53. Students are required to adhere to the Code of Conduct whether they (or their parents) sign for it or not. *Exhibit 155, p. 178; TR 558*

54. Student's behavior was determined not to be a manifestation of his disability. *Jt. Exhibit 8; TR 394, 425-427, 527, 699-700*

55. Parents may appeal a disciplinary decision to the Superintendent, which Parents elected not to do. *TR 384*

56. Student did not attend the IAES that was provided him for his 45 day suspension, believing it would be a waste of time. *TR 148*

57. Although noticed to same, Parent did not attend the MDR hearing. *TR 527, 534*

58. Parent requested that Student receive educational services in a homebound setting rather than the IAES. District denied this request. *Exhibit 58; TR 315-318*

59. Student received a notice of expulsion for truancy during the time he was in disciplinary suspension, which District admitted was sent in error. *TR 326, 366-371, 373, 378-379*

60. [REDACTED]

Present Levels of Performance and Objective Measurement of Goals and Objectives

61. Parents testified they did not receive "Progress towards Goal" reports. *TR 76-77, 503*

62. District did not have a uniform system in place for providing parents with quarterly progress reports. *TR 502, 519*

63. In the 2004-2005 school year, Student received daily grades in reading which

were reported in percentages as an ongoing assessment in JL's notebook to measure his short-term objectives and benchmarks, and progress was reported quarterly. Progress reports were mailed in an envelope addressed to the parents. *TR 209-210*

64. PLPs were reported in Student's IEP of August 29, 2005 by his regular education teachers. *Jt. Exhibit 4; TR 206, 214-218*

65. Quarterly PLPs for the year 2005-2006 were noted in the spaces provided on the IEP forms for that year; PLPs were reported in the IEP of May 23, 2006 and its addendum of September 18, 2006; District staff monitored progress towards goals using objective as well as subjective measurements. *Joint Exhibits 1, 5; TR 234-243, 500-501*

66. Given the number of IEP meetings that Student and his parents attended in the years 2004-2005 and 2005-2006, Parent's claims that PLPs were not reported to them in one form or another are not credible. *TR 244*

Appropriateness of Student's IEP

67. Parents filed a formal complaint with the NMPED on October 11, 2005. The complaint resolution officer directed District to address whether compensatory SLP (resulting from SLP services not provided to Student in the 2004-2005 school year) was appropriate for Student. The committee, in Parent's absence, determined Student would not benefit from compensatory services. *Jt. Exhibits 19, 20, 27*

68. Many, if not most, of Parent's complaints in this due process request are duplicative of the allegations made against District in their October 11, 2005 complaint to the NMPED. Those allegations were reviewed, investigated and found not to be supported by the evidence, requiring little or no corrective action. *Exhibit 27*

69. Student has not been determined to be deficient in the area of reading, requiring a scientific research-based reading program for the 2005-2006, 2006-2007 school years, the years such a program would have been mandated under *IDEA 2004*. *TR 211*

70. Although there were a significant number of days that Student refused to do work, still Student made progress towards his academic goals in the 2004-2005 and 2005-2006 school years. *TR 219, 246*

71. Although it took some time because receipts were not timely provided, District reimbursed Parent in full for the IEE performed by Rubin Educational Resources. *Exhibits 149, 150; 153; TR 275-276, 280*

72. Parent received the documents requested in his request for production. *Exhibit 13; TR 279*

73. The S/L evaluation performed in May 13, 2005 was part of an annual review, not requiring prior consent of the Parent. *TR 416*

74. Student had failing grades in the first semester of Algebra II because of low test scores, failure to complete assignments and his special homework, and nonattendance, even though he had the opportunity to complete assignments in his Study Skills class. *TR 538-539, 541-542*

75. Student did poorly in his Yearbook class because he stopped working on the project and had numerous absences. *TR 681-682, 685-688*

76. Student's IEP for the 2006-2007 school year is the IEP of May 23, 2006 and IEP Addendum, September 18, 2006. *Jt. Exhibits 1, 5; TR 707*

77. According to Student's special ed teacher, PT, Student's present IEP meets his educational needs and Student has been making progress towards his goals and objectives. *TR 618*

78. In the opinion of SO, the assistant principal for special education and former deputy secretary for special education for the NMPED (as well as an educational diagnostician), Student's IEPs during the time in question appropriately addressed his educational needs. *TR 692-693*

79. Student earned passing grades in all areas of the New Mexico High School Competency Exam (NMHSCE) administered in February, 2005, with the exception of math. Student meets the minimum standard proficiency necessary to receive a standard diploma when he graduates high school. *Jt. Exhibit 4, TR 202*

CONCLUSIONS OF LAW

1. The IDEA requires that IEPs be developed for each child with a disability who is eligible for special education. 20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and 6.31.2.13(1) NMAC (2005).

2. The IDEA requires that IEPs be developed for each child with a disability who is eligible for special education. 20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and 6.31.2.13(1) NMAC (2005).

3. The IDEA requires that IEPs be developed for each child with a disability who is eligible for special education. 20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and 6.31.2.13(1) NMAC (2005).

4. Parent bears the burden of proving that Student's IEPs were not reasonably calculated to confer educational benefit by a preponderance of the evidence and that Student has been denied FAPE. *Schaffer 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 student's parents were notified of the student's behavior and the consequences of the behavior. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06.

6. The student's parents were notified of the student's behavior and the consequences of the behavior. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06.

7. All students are subject to the LEA's Code of Conduct, whether they have signed for receipt of it or not.

8. Procedures governing discipline of special education students is governed by 34 CFR § 300.530 (g)(1) and were properly followed in disciplining Student.

9. The student's parents were notified of the student's behavior and the consequences of the behavior. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06. 34 CFR § 300.8(c)(10)(I)

10. The student's parents were notified of the student's behavior and the consequences of the behavior. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06. 34 CFR § 300.307, 34 CFR § 300.309 (effective October 13, 2006).

11. The student's parents were notified of the student's behavior and the consequences of the behavior. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06. *Rowley, op. cit., at 207-208.*

12. The student's parents were notified of the student's behavior and the consequences of the behavior. The student's parents were notified by letter on 11/18/04 and 11/18/06. The student's parents were notified by letter on 11/18/04 and 11/18/06.

13. Student's teachers were made aware of modifications/ accommodations and the

