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

In the Matter of PARENTS, on Behalf of STUDENT,

Petitioners,

v. **Case No. DPH 0607-07**

RIO RANCHO PUBLIC SCHOOLS,

Respondent.

DECISION OF THE DUE PROCESS HEARING OFFICER

Jane B. Yohalem, Due Process Hearing Officer
February 26, 2007

Counsel for Parents and Student:

Rachel L. Fetty
1720 Louisiana Blvd. NE Ste. 204
Albuquerque, NM 87110

Counsel for Rio Rancho Public Schools:

Jacquelyn Archuleta-Staehlin
Shana Baker
Cuddy, Kennedy, Albetta & Ives
P.O. Box 4160
Santa Fe, NM 87502-4160

STATEMENT OF THE CASE

Parents filed a request for due process with the New Mexico Public Education Department on September 22, 2006, alleging that Student, a four-year old, had been denied a free appropriate public education (FAPE) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA). The due process complaint focused primarily on whether the proposed placement in the District's preschool, serving primarily (but not exclusively) students with disabilities, would provide Student FAPE in the least restrictive environment. Parents sought placement instead in a private preschool where Student would be in a class with virtually 100 % typically developing children. In addition, Parents alleged the District had improperly delayed the preparation of an individual Education Plan (IEP) for Student and sought reimbursement for private school tuition, for the services of an aide, and for private therapies during the period services were delayed.

A due process hearing was begun on December 11-13, 2006, and continued on January 17 and 18, 2007. Joint Exhibits A-P were admitted into evidence, as were Parents' Exhibits 2, 3, 7, 21, 23(a), 23(b), and 24. Parents' Exhibit 9 was offered, but admission was denied. No other exhibits were offered. An extension of time until February 26, 2007, to enter a decision in this matter was granted at the parties' request. This decision is timely filed on that date. Having heard the testimony of the witnesses, and having reviewed the exhibits and memoranda of law submitted by the parties, the Hearing Officer enters the following Findings of Fact, Conclusions of Law, Decision and Order.

ISSUES PRESENTED FOR DECISION

1. Whether placement in the District's preschool in a classroom with a mix of typically developing children and children eligible for special education offered Student a free appropriate public education in the least restrictive environment (LRE).

2. Whether the District was required to offer preschool children the full continuum of services listed in 34 C.F.R. § 300.115 (2006).

3. Whether the District was responsible for ensuring that Student's transition from the Family Infant and Toddler Program (Part C) to Part B services under the IDEA was initiated timely.

4. Whether the District made a free appropriate public education available timely, and, if not, whether Parents are entitled to reimbursement of private preschool tuition costs from March 8, 2006 to May, 2006, the costs of an aide in the classroom; and therapies paid for by Parents during that time period, as well as to other compensatory services.

5. Whether Student was wrongly denied the Extended School Year (ESY) services during the summer of 2006.

FINDINGS OF FACT

1. The period in dispute here begins with Student's third birthday, on July 29, 2005, and concerns Student's preschool placement. TR. 49.

2. Student was born with Trisomy 21 (Down Syndrome) and has significant speech, fine motor and gross motor delays, as well as other developmental delays. She qualifies for special education services in the category of developmentally delayed. Ex. J, pp.1, 3; Ex. M; TR. 59-60.

3. Student began receiving early intervention services shortly after birth. Following her family moved from Illinois to New Mexico in 2004, Student's early intervention services continued in New Mexico through the New Mexico Family, Infant and Toddler Program (FIT) run by the Department of Health. Although FIT services normally would have ended at Student's third birthday (in July, 2005), when Student became eligible for Part B services, because of a delay in initiating FIT services, Student continued to receive compensatory services through the FIT program until March 7, 2006. The Health Department delayed scheduling a formal transition meeting for Student until December 15, 2005. Normally, a transition meeting

would have been scheduled in April, 2005, a minimum of 90-days before Student became eligible for Part B services. TR. 181-82, 187-189, 196-200, 204-05, 207, 215, Ex. J., p. 3.

4. Under the IDEA regulations, Student was entitled to a FAPE under District auspices when school began in August, 2005. 34 C. F. R. § 124(b) (2006). State regulations require the District to schedule an IEP meeting a minimum of 15-days before the start of school. 6.31.2.11(A)(3)(g) NMAC (2004). The District, however, waited for the transition meeting to be scheduled and conducted by the Health Department. This delay came about because both the District and the Parents mistakenly believed that the family had to choose between FIT services and Part B services and could not receive both. In fact, because the FIT services were compensatory services, Student was entitled to both. TR. 62, 444-45. The evidence established that the error was made by the District in good faith, in a situation which was quite confusing, and without any intent to deny services to Student. TR. 545-46; 551-52. Nonetheless, the effect of the error was that Student was improperly denied a FAPE during the 2005-2006 school year.

5. The December 15, 2005, transition meeting (continued on January 3, 2006), offered an opportunity to clear up the confusion regarding Student's entitlement to services. The District, however, never asked the Parents or the FIT providers why Student was not receiving educational services and did not offer immediate services or the immediate preparation of an IEP at the transition meeting. TR. 412-419.

6. At the December 15, 2005, transition meeting, Parents informed the District that they believed that a private preschool offering a regular education setting would provide Student an appropriate education in the least restrictive setting (LRE). TR. 84-88. The District responded by claiming that the LRE requirement did not apply to preschool students because

there were no general education publicly-funded preschool settings in New Mexico. TR. 414, 433-34, 437-38, 560-61. The District urged placement in the District's preschool program for children with disabilities and claimed that the inclusion of an average of two typically developing students in each class, along with six to eight students eligible for special education services, met the LRE requirements for preschool students. TR. 412-14.

7. The initial IEP meeting for Student was not held until April 26, 2006. The meeting was repeatedly postponed from January until late April, 2006. The postponements were due to difficulties in arranging the attendance of Student's service providers at the times District staff were available. TR. 803-04. Parents worked in good faith to schedule the meeting. *Id.* The District was not particularly flexible in making arrangements for the IEP meeting. TR. 829-31.

8. On March 8, 2006, when Student's FIT services ended, Parents placed Student at the Montessori of the Rio Grande Preschool, the private preschool in Albuquerque that they had proposed to the District at the December 15, 2005 transition meeting. Ex. K, pp. 4, 6.

9. At the April 26, 2006, IEP meeting, Parents sought reimbursement for the Montessori preschool, including the cost of an aide necessary to enable Student to safely participate in the program. Parents also sought continuing placement of Student at the Montessori preschool, claiming the school provided Student an appropriate education in the LRE. The District again insisted that the LRE requirements did not apply in the preschool context, that there was no regular educational setting for preschoolers, and that, therefore, the District was not required to consider Parents' proposed placement for Student. Ex. K, p.6; Ex. J, p. 17; TR. 838-39.

10. The evidence in the record established that Student was doing well at the Montessori preschool in March and April of 2006. Student was participating with other Students in circle and other group activities. She was making progress in fine motor skills like bead stringing, matching and size sequencing and using a fork and spoon. She was beginning to speak in longer phrases. She had also made progress in gross motor skills. She had learned to follow the structure of the class. She was not disruptive to the class in any way, but did need the assistance of an aide periodically with simple motor tasks to ensure her safety and to enable her to fully participate on the playground and in handling activity trays used in the school. TR. 232-39, 965-69; Ex. A.

11. Based on the information presented by Parents about Student's success in a general education setting, the District staff initially decided that Student was not eligible for special education. Ex. K, p. 4; TR.499-500. The District concedes that this decision was in error and that the Illinois evaluation and the reports of Student's therapists (all available at the April 26, 2006, IEP meeting) plainly established Student's eligibility. TR. 673-75; District Brief, p.8. The District's confusion stemmed, in part, from its misunderstanding of the LRE requirements as applied to preschool students. TR. 674.

12. No educational services were offered to Student at the end of the April 26, 2006, IEP meeting. Ex. J. The IEP meeting was continued on May 19, 2006. At the conclusion of that meeting, the District offered Student either placement in the District's Shining Stars Preschool with occupational, physical and speech and language therapies, or these therapies alone, with no educational component, at Parents' option. The therapy-only option was later withdrawn at the May 25, 2006 IEP meeting and only placement in the District's preschool,

together with therapies, was offered. Exs. J, K. The District continued to claim that general education preschool was simply not part of the LRE continuum for preschoolers. Ex. P, p. 1.

13. An additional IEP meeting was scheduled for May 26, 2006, to consider the provision of Extended School Year (ESY) services to Student in the summer of 2006. Parents claimed ESY services were needed to prevent regression over the summer. At the May 26, 2006, meeting, the District and Parents agreed that Student needed ESY services in the areas of occupational therapy and speech and language therapy. The Parents and the District also agreed on the setting and amount of time ESY services would be provided to Student: one hour per week, in a natural setting, from May 31, 2006, through June 29, 2006. Ex. C; Ex. D; Ex. L, p. 8.

14. On May 26, 2006, Parents were asked to sign the District's "Consent for Initial Special Education Services" form. Ex. B. That form offered two choices: unconditional agreement with all services offered, or disagreement, which the form equated with a refusal to consent to initial services. The form informed Parents that if they disagreed with the IEP, they had a right to due process procedures or mediation. Parents rejected both choices on the form, simply noting their agreement at the bottom of the form to the initial provision of special education and related services during the summer. They also preserved their due process rights by noting their disagreement with other aspects of the IEP. Ex. B: TR. 338-39; 440-43.

15. Despite its agreement with Parents as to ESY services, the District refused to provide these services in the summer of 2006. The District representative treated Parents' failure to agree unconditionally with all services offered for the following school year as a refusal to consent to initial services. TR. 338-39; 440-43.

16. From March 8, 2006, through the end of the summer of 2006, Parents paid for at

least some physical, occupational, and speech and language therapy for Student. TR. 340-41. The evidence establishes that each of these therapies for one hour once a week was necessary to provide a FAPE. Exs. J, p. 20; Ex. L, p. 8.

17. At the May, 2006, IEP meeting, Parents requested a re-evaluation of Student. Ex. B. This request was granted and a diagnostic reevaluation of Student was completed during the summer of 2006. Ex. A. The evaluation was performed at the District's Child Find Center and included observations of Student at meetings at the District's Shining Stars Preschool as well as observations at the Child Find Center. No observations were made at the Montessori Preschool. Ex. A, pp. 4, 5. In addition to confirming Students' fine and gross motor and speech and communication deficits at more than two standard deviations below the norm, the evaluation also showed that Student was functioning in the mental retardation range, with a full scale IQ of 64. Ex. A, p. 6. The diagnosticians concluded that Student had made significant progress in the fine and gross motor and speech and communication areas since her prior evaluation in Illinois in November, 2004. Ex. A, p. 12. Despite this progress, however, the new evaluation showed significant delays across the board. Ex. A; TR. 790; 667-672.

18. On September 13, 2006, an IEP meeting was held and a new IEP for the 2006-2007 school year was prepared, based, in part, on the new diagnostic data. The September IEP added cognitive-academic goals and objectives and additional language and play objectives to the fine and gross motor skills and speech and language objectives included in the May, 2006, IEP. Ex. O, pp. 6-7, 13-15. The Parents and the District agree that the goals and objectives included in the September 13, 2006, IEP are appropriate for Student. Ex. O; TR. 1012-13.

19. The IEP team recommended placement at the District's Shining Stars Preschool in

a class of eight students. Three to four of the eight would be typically developing students. TR. 818-19; 611-12. The class is taught by a trained and experienced special education teacher and trained and experienced teaching assistant. The testimony of District staff established that Student needed a highly structured program provided by a teacher expert in the developmental needs of preschool students with disabilities who is able to incorporate Student's special needs and IEP goals and objectives into the teaching methods used. Student was described as needing: (1) a very low student-teacher ratio (the District program had two staff for eight children compared to two staff for twenty-one children at the Montessori preschool); (2) direct, individualized instruction keyed to Student's identified needs and IEP goals and objectives; (3) a teacher able to ensure that skills were taught as part of a developmental continuum; and (4) the participation of occupational, physical and speech and language therapists in the classroom. These services are needed by Student to address the significant delays in all areas of development identified by the August, 2006, reevaluation. Student is expected to begin kindergarten in August, 2007, just after her fifth birthday, and the intensive preparation for this transition offered by the District's placement would be especially beneficial to Student. TR. 672, 790, 794, 798-99, 862, 864-66, 877, 879-885.

20. Parents have sought the provision of hydrotherapy and hippotherapy for Student. The evidence does not establish that these particular methods of therapy, although appropriate, are necessary for Student to benefit from her education. The therapy offered by the District is reasonably calculated to ensure that Student makes progress. TR. 454-55; 366-67.

CONCLUSIONS OF LAW

1. The due process hearing officer has jurisdiction over this matter pursuant to the

IDEA, 20 U.S.C. §§ 1400, *et seq*., (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2005). The citations in this decision to the federal regulations are to the regulations which went into effect on October 12, 2006. Both parties have relied on the 2006 regulations and the hearing officer has found no significant difference between the 1999 and 2006 regulations on the matters at issue in this proceeding.

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

3. Extensions of time for entry of the decision in this matter have been granted until February 26, 2007, at the request of both parties. This decision is timely filed.

4. Parents bear the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 126 S. Ct. 528 (2005).

5. Beginning with her third birthday on July 29, 2005, Student qualified for special education and related services under the IDEA as a student with a disability in the eligibility area of developmentally delayed. 34 C.F.R. § 300.8(b) (2006).

6. The Department of Health has been designated as the lead agency in New Mexico for Part C early intervention services and is the agency responsible for scheduling the transition meeting to Part B services. 34 C.F.R. § 300.124(c) (2006). Although it would have been a good practice for the District to question the delay in scheduling that meeting, the legal responsibility for the delay rests on the Health Department, not on the District.

7. Whether or not the Health Department timely conducted a transition meeting, the District was responsible for scheduling an IEP meeting for Student a minimum of 15-days before

the start of school in August, 2005 – the beginning of the school year following Student's third birthday that summer – and for ensuring that an IEP was timely developed and implemented for Student by the beginning of the 2005-2006 school year. 34 C.F.R. § 300.124(b) (2006); 6.31.2.11(A)(3)(g) NMAC (2004). The District failed to meet these requirements, denying Student a FAPE.

8. The District offered Student no program whatsoever during the time period from March 8, 2006, through May, 2006.

9. Whether or not the Montessori program met State education agency standards, Parents are entitled to reimbursement so long as the program they selected provides Student a reasonably appropriate education. The Montessori school offered Student an education reasonably calculated to enable her to make education progress. Therefore, Parents are entitled to reimbursement of the costs of tuition and the costs of the aide needed to assist Student so she could safely participate in the school program. Parents are also entitled to reimbursement for one hour per week each of occupational therapy, physical therapy, and speech and language therapy from March 8, 2006, until the end of the school year but only to the extent they actually paid for these services: Parents are entitled only to reimbursement of expenses, not to damages.

10. The District is not required to operate its own regular education preschool program for typically developing children in order to satisfy the LRE requirement. *Letter to Neveldine*, 16 IDELR 739 (1990).

11. Nevertheless, the District is required to comply with the LRE requirements of the IDEA and its implementing regulations. If placement in a regular class is the LRE for a preschool child, the District must make arrangements for such a placement with a private or

public program. *L. B. v Nebo School District*, 379 F.3d 966, fn.17 (10th Cir. 2004) (*Nebo*).

12. The LRE continuum for all students, including preschool students, is measured by the extent to which a child is educated with typically developing children. Congress has required that children with disabilities be educated "to the maximum extent appropriate ... with children who are nondisabled." 34 C.F.R. § 300.114(a)(2)(i) (2006). The law also specifies that "removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily". 34 C.F.R. § 300.114(a)(2)(ii) (2006).

13. In determining whether the LRE mandate has been violated, the hearing officer is required to first determine whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily. The answer to this question requires a weighing of the academic and non-academic advantages and disadvantages of each setting, among other factors. The balance tips in favor of a somewhat more segregated setting when the benefits of mainstreaming for a particular child are outweighed by the educational advantages of a more focused, specialized program. *Nebo.*

14. Applying the appropriate LRE analysis to the 2006-2007 school year, the evidence establishes that the integrated classroom program offered by the District in its preschool was the LRE for Student during the 2006-2007 school year in light of Student's reevaluation indicating increased academic needs, Student's need to prepare for kindergarten in the fall of 2007, and the higher proportion of typically developing children included both in Student's classroom and in the District's preschool overall compared to the previous year. Providing physical, occupational and speech and language therapy in this environment is appropriate, as well, to meet

Student's needs.

15. The evidence establishes that although Student benefits from hippotherapy and hydrotherapy, these therapies represent particular methodologies, not services essential to provide FAPE to Student. Occupational, physical and speech and language therapy integrated into Student's preschool environment, as specified in Student's September 13, 2006, IEP offers Student a FAPE in the LRE.

16. Parents consented to the initial provision of special education and related services prior to the summer of 2006. Student was, therefore, entitled to receive the ESY services which both the Parents and the District agreed were appropriate for her in the summer of 2006. Parents are entitled to reimbursement for one hour of occupational therapy and one hour of speech and language therapy for five weeks provided during the summer of 2006, to the extent they paid to obtain these services privately.

17. Student is entitled to compensatory education services, in addition to reimbursement for tuition at the Montessori Preschool, for services denied during the 2005-2006 school year and during the summer of 2006. To the extent Student did not receive reimbursable private therapy services from March 8, 2006, through the end of the school year and during the summer, Student is entitled to compensatory therapy services. Compensatory education is equitable relief, not one-to-one substitution for services denied.

DISCUSSION

The LRE Requirements and Their Application to Student

Parents' primary contention in this matter is that the placement offered by the District to Student did not satisfy the IDEA's requirements for placement in the LRE.

There has been significant confusion in this case about whether the LRE requirements apply to preschool children and, if they do, how they apply where the State does not offer a public preschool education to typically developing children and, therefore, does not have available a "regular educational environment" within the public schools. First, it is settled law that school districts are not required to establish their own public preschools which serve typically developing children simply to satisfy the LRE requirement. *Letter to Neveldine*, 16 IDELR 739 (1990). To the extent Parents contend this is required by the regulations mandating that each school district offer a full continuum of placements, Parents reading of the regulations is incorrect and is rejected. *See* 34 C.F.R. § 300.551 (re: continuum of alternative placements).

The fact that the District has no obligation to create its own public preschool for the general community, however, does not relieve the District from meeting the LRE requirements by placing a child in a private preschool or a public program run by another agency. *Letter to Neveldine*, 16 IDELR 739 (1990). The federal regulations extend the LRE requirements to "preschool children with a disability," and explicitly require that the placement of a preschool child be "made in conformity with the LRE provisions," including 34 C.F.R. §§ 300.114 and 300.120 (2006).

The District has taken the position at Student's IEP meetings that an integrated environment with some typically developing peers in the classroom is the LRE for preschool students. The District claimed that there is no "general education environment" at the preschool level and that the percent of typically developing children should not matter as long as Student is exposed to typical peers. Although the District's argument makes logical sense, it conflicts with the definition of LRE in the IDEA and its regulations. Congress has defined what is meant by

the LRE in terms of educating children with disabilities "to the maximum extent appropriate ... with children who are nondisabled." The regulations also require that "removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily." 34 C.F.R. § 300.114 (2006). Thus, evaluating the LRE based on the extent to which a child is educated with typically developing children, the approach urged by Parents here, has its foundation in the law. Although the mixed environment offered by the District at its Shining Stars Preschool is certainly less restrictive than a completely segregated setting, it is simply one step on the continuum – somewhere between a segregated setting and a regular preschool environment. The regulations require the District to place a preschool child eligible for special education services in the LRE. If the LRE is the regular preschool environment for a particular child, then the District is required to place the child in a private preschool. *Nebo.*

The remaining question posed here for decision is whether a mainstream preschool environment is the LRE for Student, or whether partial integration constitutes the provision of services in the LRE "to the maximum extent appropriate" for her. *See Nebo*, 379 F.3d 966, fn.17. How this determination is to be made has recently been addressed by the Court of Appeals for the Tenth Circuit, the Circuit which includes New Mexico, in its decision in *Nebo.* The Court in *Nebo*, in the context of a dispute about whether a regular education private preschool with appropriate supports is the LRE for a preschool child with autism, sets out the analysis to be applied in the Tenth Circuit to all LRE disputes. Although the Court is aware both that the Nebo District does not have a mainstream preschool and that the district provides a mixed preschool environment incorporating typical children into its preschool classes (much like

the District here), the Court pointedly draws no distinction between preschool-age students (where no public regular educational environment is mandated) and elementary and secondary students (where public regular education classes are readily available), for purposes of its LRE analysis. *Nebo*, 379 F.3d 966, fn. 1.

In determining whether the LRE mandate in the IDEA has been violated by a school district, *Nebo* requires that a determination first be made as to whether the Student can be satisfactorily educated in a regular classroom with the use of supplemental aids and services. In making this assessment, hearing officers are directed to look to a number of factors, including (1) the steps the district has taken to determine whether the child can be accommodated in the regular classroom; (2) the comparison between the academic benefits the child will receive in the regular class and those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; (4) the effect of the child's presence on the regular class, as well as other factors that may be relevant in the particular case. *Nebo*. These factors help determine when the benefits of mainstreaming are overcome by the advantages of a somewhat more segregated special education program, which may be better able to focus services on meeting the child's unique needs. *Daniel R. R. v. State Board of Education*, 874 F.2d 1036, 1045 (5th Cir. 1989).

When this analysis is made for Student during the 2005-2006 school year, it appears that the Montessori School was the LRE for Student in that year. The first *Nebo* factor weighs heavily against the District. The District, because it failed to understand that it was legally obligated to provide preschool education in a regular, mainstream preschool setting if that was the LRE for Student, failed to consider this option. The District never sent a staff person to

observe Student at the Montessori of the Rio Grande, or to observe the services and environment there, nor did the District consider any other private preschool for Student. The District also made no effort to determine what services it might provide so that Student could be accommodated in the private preschool environment. The second factor is whether the academic benefits outweigh the benefits of the Shining Stars Preschool. On balance, given that Student's identified needs in the 2005-2006 school year were in the areas of fine and gross motor skills, speech and language and socialization; that the evidence at Student's reevaluation showed that Student made progress in these areas; and that Parents introduced evidence showing that Student learned motor skills and social skills, at least in part by mimicking the behavior of those around her, any greater academic benefits through Shining Stars during this school year were outweighed by the social benefits of the regular preschool. The evidence shows that Student's progress was so good in the regular education environment that the IEP team briefly concluded (in April, 2006) that Student needed no specialized instruction. Finally, there was undisputed evidence that Student fit well at the Montessori Preschool and that her presence there was not disruptive so long as she received assistance from an aide in lifting items and climbing safely on school equipment.

When the *Nebo* analysis is made for the school year 2006-2007, however, the balance tips against placement of Student in a regular preschool setting. For this year, the evidence established that the academic benefits of the District's placement were significantly greater than Student would receive from participation in a mainstream classroom. Parents presented no expert in early childhood education to explain how the Montessori program could match the benefits of the far smaller student-teacher ratio in the District's program, the teaching provided

by someone with expert knowledge of the impact of various disabilities on early childhood development, the specialized instruction aimed at the needs identified in Student's IEP, and the integration of physical, occupational and speech therapy into Student's school day. The evidence presented by the District about the extent of Student's needs and about the methods by which these needs could be met established that Student would receive greater academic benefit at Shining Stars Preschool. In addition, Shining Stars Preschool was better suited to preparing Student to enter kindergarten in August, 2007.

In terms of non-academic needs, the benefit of exposure to a mainstream environment is outweighed by the significantly greater academic benefits offered by the Shining Stars Preschool. The improved ratio of typically developing students to students eligible for special education in Student's proposed placement in the 2006-2007 school year (nearly one-half of the class) gives Student the benefit of significant exposure to typically developing peers without depriving her of the significantly greater academic benefit provided at Shining Stars Preschool. Therefore, the evidence established that an integrated environment was the LRE for this Student in 2006-2007.

The Delay in the Provision of Part B Services to Student During the 2005-2006 School Year

Parents argue that Student was deprived of a FAPE in school year 2005-2006 by the District's failure to ensure that a transition meeting from Part C to Part B occurred timely, as well as by the District's failure to timely schedule an IEP meeting and complete an IEP before the start of school in 2005. Student turned three on July 29, 2005. The first IEP meeting was held on April 26, 2006, and an IEP was completed on May 26, 2006, at the end of the school year. The District contends that the delays described here were excused by the Parents' choice to continue exclusively with Student's Part C program and then by Parent-caused delays in

scheduling the IEP meeting.

New Mexico has designated the Health Department as the lead agency in providing FIT services. This agency is responsible for scheduling the transition meeting, not the District. The District, however, has an obligation to conduct an IEP and begin to provide a FAPE when a child turns three, whether or not there has been a transition meeting. 34 C.F.R. § 300.124(b) (2006); 6.31.2.11(A)(3)(g) NMAC (2004). There is no dispute this did not occur here. The District is relieved of this responsibility only if the Parents affirmatively chose to receive only the FIT compensatory services through March 7, 2006, and if the delays after March 7, 2006, were due to the Parents' failure to cooperate. The evidence does not establish either of these two excuses for delay.

Given that Student was not offered appropriate services in March through May of 2006, and that the Montessori of the Rio Grande offered reasonably appropriate services to Student, reimbursement of both tuition and the expenses of Student's aide is proper under the law. *School Comm. of Burlington v. Dept. of Ed. of Mass.*, 471 U.S. 359 (1985); *Florence County School District Four v. Carter*, 510 U.S. 7 (1993) (parents are entitled to reimbursement so long as the placement is reasonably appropriate, even if it does not meet State agency standards); *Frank G. v. Bd. of Ed. of Hyde Park Central School Dist.*, 459 F.3d 356 (2nd Cir. 2006) (where a district has the opportunity to provide appropriate services and fails to do so, equitable principles support reimbursement whether or not the student has previously received special education and related services).

Parents' Consent to ESY Services

The District improperly denied Student the ESY services which both the District and

Parents agreed she needed in the summer of 2006. The District based its denial of ESY services on what it described as the Parents' failure to consent to the provision of initial special education services. Although the law clearly requires initial parental consent, the consent which is required is simply to the provision of special education services and related services. The District need only inform Parents of what is meant by special education and related services and of the types of services that might be found to be needed for their child, in order to obtain informed consent to initial services. 34 C.F.R. § 300.300(b) (2006); 71 Fed. Reg. 46634 8/11/06 (Department of Education interpretation). Agreement with each of the terms of an IEP, especially agreement with services that will not be provided until months later, is not required. The Parents' signed note here agreeing to provision of all special education and related services offered by the ESY IEP for the summer of 2006, adequately indicated parental consent to initial provision of special education and related services. The requirement implicit in the District's form: that Parents waive their due process rights to contest the appropriateness of the services offered for the fall in order to qualify for initial services in the summer, is not consistent with the initial consent requirement of the Act. Services cannot be conditioned on a waiver of due process rights. Parent's refusal to check either of the two items on the form was, therefore, justified and could not properly be interpreted as a refusal of initial ESY services.

Compensatory Education

Compensatory education is an equitable remedy which requires the hearing officer to take into account all of the factors surrounding the denial of services, as well as the current situation of the Student. *Bd. of Education of Oak Park and River Forest High School District 200 v. Illinois State Bd. of Ed.*, 79 F.3d 654 (7th Cir. 1996). Often simple replacement of the services

denied is not the appropriate remedy when the current needs of the Student are taken into account. Compensatory services are not restricted to services necessary for Student to derive some educational benefit: the hearing officer may consider what services would best remedy the delay in Student's development caused by the denials in the past. Applying these principles here, the following relief is ordered:

ORDER

IT IS HEREBY ORDERED:

1. Student should immediately begin to attend the Shining Stars Preschool and receive all of the educational and related services specified in her IEP for the remainder of this school year.

2. In addition, as a supplement to the services provided pursuant to Student's IEP, until the end of this school year, Student may, at Parents' option and the District's expense, also attend the Montessori School of the Rio Grande a maximum of three half-days a week, so long as Student's schedule there does not conflict with Student's IEP program. The District shall also arrange and pay for Student's attendance for the full summer session at the Montessori of the Rio Grande in the summer of 2007, and, at the Montessori of the Rio Grande's summer kindergarten program in the summer of 2008. This shall be in addition to any ESY services which are provided by the District through Student's IEP in each of those years. An aide will be provided at District expense, if Student continues to need such assistance to participate safely in the Montessori program. The District will work with the staff at the Montessori School to assist the school in coordinating its instruction with Student's goals and objectives in the District's preschool program.

3. The compensatory education awarded in ¶ 2 of this order (attendance at the Montessori of the Rio Grande) is conditioned on the Student's full participation in the program specified in Student's September 13, 2006, IEP. The compensatory services awarded here are appropriate only as a supplement to and in coordination with the intensive preschool program and therapies included in Student's IEP. The Montessori program on its own will not assist Student to remedy the delays caused by the denial of educational services in the 2005-2006 school year. In the absence of coordination with the District program and with Student's IEP, these services might even be detrimental to Student's progress.

4. Parents are entitled to reimbursement for ten hours of occupational therapy and ten hours of speech and language therapy during the summer of 2006. In addition, Parents are entitled to reimbursement for eleven hours of SLT, eleven hours of OT, and eleven hours of PT a week for the period from March 8, 2006, through May 26, 2006. In order to receive this reimbursement, Parents shall provide bills, statements or summaries prepared by the therapists documenting the dates, type of services, and the amounts paid by Parents (not by the FIT program). If Parents do not document provision of and payment for these services in the spring and summer of 2006, then compensatory services in the same amount shall be substituted for all or part of this reimbursement.

5. Student shall receive as additional compensatory services 20 hours of hippotherapy at Skyline Therapies at times which do not conflict with the other services provided to Student by the District.

6. Tuition paid and the fees for Student's aide in the Montessori School from March through May, 2006, in the amount of $1588 (tuition) and $576 (aide) shall be reimbursed to

Parents by the District.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004) and 6.3.2.13(I) NMAC (2004). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

THIS DECISION ENTERED THIS 26th DAY OF FEBRUARY, 2007.

_____
Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Decision of the Administrative Appeal Officer* was sent by certified mail, return receipt requested, on February 26, 2007, to Dr. Veronica C. Garcia, Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and to the following counsel of record in this proceeding:

Counsel for Parents and Student:

Rachel L. Fetty
1720 Louisiana Blvd. NE Ste. 204
Albuquerque, NM 87110

Counsel for Rio Rancho Public Schools:

Jacquelyn Archuleta-Staehlin
Shana Baker
Cuddy, Kennedy, Albetta & Ives

P.O. Box 4160
Santa Fe, NM 87502-4160

_____

Jane B. Yohalem
Due Process Hearing Officer

20