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

Final Decision, No. DPH 0607-08
Rendered June 25, 2007

PROCEEDINGS

Petitioners filed their request for due process hearing on October 5, 2006, and Respondent filed its answer on October 16, 2006. The parties waived the resolution meeting, although they did attempt mediation, which proved unsuccessful. Various requests to extend the final deadline were properly requested and granted by the Due Process Hearing Officer (DPHO), and a pre-hearing conference was held on February 2, 2007. Over Petitioners' objections, the hearing was held in Gallup, New Mexico (as opposed to Ramah, New Mexico). *See Order Denying Petitioners' Request for Reconsideration of Hearing Location, February 26, 2007.* The hearing was held from April 23-25, 2007, and counsel timely submitted their written closing arguments, proposed findings of fact, and conclusions of law on June 4, 2007.[1] For good cause shown, the DPHO granted a motion to extend the final deadline through June 29, 2007; this decision is timely if rendered on or before that date.

ISSUES AND DETERMINATION CONCERNING HOW THE TWO-YEAR STATUTE OF LIMITATION SHOULD BE APPLIED

Petitioners assert that Respondent (also "the district") violated the student's rights under the Individuals with Disabilities Education Act (IDEA)[2] and denied her a free appropriate

[1] The DPHO specifically required that proposed findings be tied to the transcript. *TR 886; Order Concerning Post-Hearing Deadlines (April 26, 2007).* Petitioners complied. Only one of Respondent's proposed findings was supported by citation to the record. The DPHO was therefore required to expend additional time tracking down relevant portions of the transcript. The DPHO remarks on this aspect of the proceedings due to complaints by New Mexico school districts concerning the costs associated with payment of DPHOs.

[2] Congress amended IDEA 1997 by means of the Individuals with Disabilities Education Improvement Act of 2004, and new federal implementing regulations became effective October 13, 2006. *34 CFR Sec. 300.1 et seq. (2006).* IDEA 2004 became effective July 1, 2005, and so IDEA 1997 is applied to the 2004-05 school year, while IDEA 2004 is applied to the 2005-06 school year. The previous set of federal IDEA regulations, which

public education (FAPE). Specific issues identified by Petitioners in their request for hearing are as follows:

- Whether the district failed to develop and implement an individualized education program (IEP) that provided the student with FAPE for the 2004-05 and 2005-06 school years
- Whether the district failed to include (in the student's educational program) special education and related services needed to address all areas of the student's educational needs, including:
    - communication
    - daily living skills
    - fine and gross motor deficits
    - sensory deficits
    - visual impairment, and
    - behavior
- Whether the district failed to develop goals and objectives that were specific and measurable, and whether the district failed to document progress as required by the student's IEPs
- Whether the district failed to provide the student with services in the least restrictive environment (LRE)
- Whether the district failed consistently to implement IEP requirements for
    - use of a walker (also referred to as a "stander")
    - classroom staffing and training concerning proper use of the walker
    - related services (including training of classroom aide by related service providers)
- Whether the district failed to provide the student with extended school year services (ESY)
- Whether the district failed to develop and/or consistently implement an individualized health plan (IHP) for the student (including blending of foods), and
- Whether the district failed to develop and/or implement a meaningful transition plan and services for the student.

Respondent denied Petitioners' allegations and asserted eleven affirmative defenses.[3]

---

are applied here to the extent that they do not conflict with IDEA 2004 provisions, are published at Title 34 of the Code of Federal Regulations (CFR), Part 300 (1999). The New Mexico Public Education Department's special education regulations are published at Title 6, Chapter 31, Part 2 of the New Mexico Administrative Code (6.31.2 NMAC).

[3] Specifically, the district asserted that the parents were no longer legal guardians, as the student had attained majority (Petitioners provided a copy of an order appointing the student's mother guardian); failure to state a claim upon which relief can be granted; failure to mitigate damages; no damages could be attributed to the district/school board; no statutory or constitutional deprivation of rights; if any damage occurred, the Petitioners were responsible in whole or part for those damages; Respondent exercised good faith and acted in accordance with the law; Respondent violated no constitutional or statutory privilege or right of Petitioners; the

Another issue raised by Petitioners' allegations (and Respondent's answer) is whether the IDEA's two-year statute of limitation gives a DPHO the authority to review and remedy, if applicable, deficits in a student's educational program that extend back two ***school years*** or whether the DPHO's authority is limited to two ***calendar years***. Petitioners' claims cover two school years; applying a strict two-year calendar statute of limitation would preclude Petitioners' claims that are focused on essentially August of 2004 (when school began) up until October 5, 2004. The DPHO asked that counsel submit legal argument on this issue in their closing arguments and/or proposed findings of fact and conclusions of law.

Petitioners argue that the DPHO should treat those few months at issue as a form of "continuing violation," which, they argue, would permit the DPHO to examine and remedy any deficits that precede the two-calendar-year time period. *Petitioners' Closing Argument at 26-27.* Petitioners further assert that the continuing violations doctrine can be applied to a "'practice of discriminatory activity'" that began prior to the applicable statute of limitation. *Id. at 27 [citation omitted].* The district did not provide the DPHO with any legal argument specifically focused on this issue.

In the past, this DPHO has, under limited circumstances, tolled the application of the statute of limitation; Petitioners make no tolling argument in this case. IDEA is silent as to whether or not its two-year statute of limitation refers to school or calendar years, but it is reasonable to consider the "plain meaning" of the language:

> The due process complaint must allege a violation that occurred not more than two years before the date the parent or public agency knew or should have

---

DPHO did not have jurisdiction to hear claims asserted under Section 504 or the Americans with Disabilities Act (the DPHO notes that Petitioners did not assert these claims); the statute of limitations bars any claims extending beyond two years from the date of the complaint; and the student had "aged out" and thus was no longer eligible for IDEA protections. *Respondent's Answer to Complaint, October 16, 2006.* The DPHO provided the Respondent with an opportunity to file a pre-hearing motion with respect to its assertion that the student had aged out, but Respondent chose not to avail itself of that opportunity. *Scheduling Order, paragraphs 1-2, February 5, 2007.*

> known about the alleged action that forms the basis of the due process complaint….

34 CFR Sec. 300.507(a)(2) (2006). The language implies calendar as opposed to school years. (When school days as opposed to business days or calendar days are counted, the regulations so specify. *See, e.g., id. at Sec. 300.530.*) The DPHO does not foreclose the possibility that there may be circumstances sufficiently compelling as to demonstrate a continuing violation that would justify enlarging the limitation period. However, in this instance, the DPHO declines to find that a continuing violation justifies inching the two-year statute of limitation back approximately one and one-half months. Thus, this decision is limited to an examination of the student's educational program from October 5, 2004 through May 2006.[4]

FINDINGS OF FACT

General and Stipulated Facts

1. The parties filed a joint statement of stipulated facts establishing that:

    a. The student is a 22-year-old woman who has been diagnosed with cerebral palsy, seizure disorder, mental retardation, visual impairment, sensory deficits, speech and language disorders, and fine motor deficits.
    b. The student uses a wheelchair for ambulation and is largely non-verbal, although she expresses basic needs through the use of sign language, vocalizations, and other gestures.
    c. The student resides with her parents within the boundaries of the school district, and the student's mother is the student's sole legal guardian.
    d. Respondent is a local educational agency (LEA) and receives federal funds.
    e. The student was first found eligible for receipt of special education services in 1987.
    f. The student received special education services from Respondent from ages 3 through 22; in May 2006 the district exited the student from services.
    g. The student's educational placement for the 2004-05 and 2005-06 school years was a self-contained special education classroom for 100% of her school day.
    h. The district conducted "triennial" re-evaluations of the student in November 1997 and May 2005. *[quotation marks supplied by DPHO]*

[4] Citation to earlier IEPs and other educational records should not lead to the inference that the DPHO based her decision on facts or events that took place outside of the statutory period; rather, when such citation appears, it is used to provide context.

i. In March 2006 the district agreed to provide the student with independent educational evaluations including psychoeducational, occupational therapy (OT), physical therapy (PT), and speech language (SL); the evaluations were conducted as follows: OT (March 2006); PT and SL (between July and September 2006).

2. All requested findings of fact not specifically adopted are denied.

3. The district provided the student with a standard high school diploma during the hearing. *Transcript (TR) at 717-719;887-888.*

4. IEPs applicable to these proceedings include the following joint exhibits: May 11, 2004 (May 2004 IEP; Jt. Exh. DD); September 21, 2004 IEP (September 2004 IEP; Jt. Exh. CC); May 19, 2005 IEP (May 2005 IEP; Jt. Exh. BB); and January 30, 2006 IEP (January 2006 IEP; Jt. Exh. AA).

5. The student's IEPs lack academic goals, but credible evidence demonstrates that it would not be appropriate to focus on academic goals with this student. *Jt. Exh. AA-DD; Jt. Exh. RR at 2; TR 291.*

Communication and Assistive Technology Needs

6. The student's medical condition renders speech difficult, if not impossible. She is responsive to voice and demonstrates receptive language abilities. *TR 319-321.* At all times relevant to this matter, the student required educational programming and services to address her communication needs.

7. Credible evidence establishes that the student has a demonstrated (although no doubt ultimately limited) potential to use adaptive equipment designed to enhance her communicative abilities, including but not limited to a sequenced message voice output communication aid (VOCA). *TR 323-328.*

8. The May 2004 IEP acknowledges the student's communication needs (*Jt. Exh. DD at 1*) but includes no goals or objectives designed to address those needs, and Prior

Written Notice of Actions Proposed (PWN) associated with the IEP fails to address any team considerations of proposals associated with the student's communication needs. *Jt. Exh. II.*

9. The September 2004 IEP (Addendum) minimally acknowledges the student's communication needs (*Jt. Exh. CC at 4*) but fails to provide any educational or related services designed to address those needs. The IEP contains a goal to improve social and communication skills, along with two short-term objectives. *Jt. Exh. CC at 5.* The goal and objectives are neither sufficiently specific nor measurable, and it is unclear as to which district staff were responsible for implementing this goal. These shortcomings render the goal meaningless.
10. The only IEP progress reports in evidence for 2004-05 relate to PT services; there is no IEP progress report relating to any communication goal and/or SL services. *See, e.g., Jt. Exh. XX (PT report of progress toward annual IEP goal, the only 2004-05 progress report included as an exhibit).*
11. The district failed to implement even the minimal communication goal/objectives of the student's September 2004 IEP.
12. The May 2005 IEP indicates that the student will "continue to participate in daily activities at school that will enhance and build upon her development of…communication skills." *Jt. Exh. BB at 4.* The IEP fails to include any specific, measurable goal designed to address the student's communication needs, fails to assign any staff person responsibility for providing any communication services, and fails to address in any meaningful way the student's communication needs.
13. PWN associated with the May 2005 IEP repeatedly reports that in making its decision concerning the student's graduation pathway, the team felt it was "more

beneficial to concentrate on her…communication needs"—although again, there is no provision for addressing the student's communication needs. *Jt. Exh. GG at 1-2.*

14. A three-year re-evaluation report dated May 16, 2005 rates the student's communication skills at "1**," a measurement that "indicates a serious level of concern." *Jt. Exh. PP at 2.* Yet, the author of the report makes no recommendation regarding communication skills, other than to indicate without any supporting detail that these needs seem to be addressed by classroom staff. *Id. at 3.*
15. The January 2006 IEP contains numerous references to the parent's concerns regarding the student's communication needs. *See, e.g., Jt. Exh. AA at 1-4.* The IEP was apparently tabled prior to completion, and communication needs were not addressed in any concrete manner. *Id. and TR at 343.*
16. In May of 2003, the student's IEP team determined that the student needed a SL evaluation; the district did not ever conduct that evaluation. *Exh. 4 at 18-19.*
17. The student's SL therapist (through the Developmental Disabilities Medicaid Waiver program, **not** the district) performed a SL evaluation in September of 2006 and made specific recommendations concerning SL services and adaptive equipment. *Jt. Exh. OO.*
18. The student has feeding and swallowing issues related to her disability and which fall under the professional umbrella of a SL therapist for evaluation and associated recommendations. *TR at 344.*
19. As long ago as May 13, 1998, it was recommended by the student's multidisciplinary team that she be evaluated for feeding and swallowing needs. *Exh. 5 at 3.* The district failed to follow through on this recommendation.

20. As long ago as April of 1997, it was recommended to the district that the student be provided with tangible system for communication, including a VOCA and switches with a PowerLink device (to permit the student to access the radio and to control other aspects of her environment). *Exh. 13.*

21. A December 1997 multidisciplinary team report noted with respect to communication that the area "still needs to be worked on" and that while the student needed communicative, adaptive equipment, it was "not available at this time." *Exh. 19 at 2.* There is no indication that anyone was assigned responsibility for following up on this student need, and the record demonstrates that the district failed to address this need.

22. In March of 2006 district staff requested that a PowerLink device be ordered. By May of 2006, the district had yet to receive the device. *Exh. BBB at 6.*

23. Credible evidence demonstrates that the district was cognizant of the student's communication needs since prior to 1997 and that it failed to meet those needs or to address them in any professional, meaningful manner, during the time period relevant to this matter.

24. Credible evidence demonstrates that the district was cognizant of the student's adaptive equipment needs prior to 1997 and that it has failed to meet those needs or to address them in any professional, meaningful manner, during the time period relevant to this matter.

IHP

25. An IHP, which is a related service (typically developed in collaboration with the school nurse), must be documented in the IEP service schedule as a related service or support, and the document should be included and/or attached to the IEP.

26. The May 2005 IEP notes the student's need for an IHP, but no IHP is attached to the document. *Jt. Exh. BB at 14.*

27. Evidence is conflicting as to whether the student requires a pureed diet, whether at times she can manage small bites, or whether she may be fed food that has been softened by pouring hot water over it; evidence demonstrates that she does exhibit a tendency to choke and have difficulty swallowing, and that care must be taken in feeding the student. *Jt. Exh. BB; and see e.g., TR 62-68; 388-389;391;430.*

28. There is insufficient evidence upon which to base a determination that any constipation the student may have experienced (and any resulting hospitalization) was due to any action or inaction on the part of the district.

29. While better practice would have been to ensure that a consistent practice was followed with respect to presentation of the student's food, and that any chopping or blending was done based upon established medical needs, there is insufficient evidence upon which to base a finding that the district failed to provide the student with adequate or sufficient health-related services.

Related Services (PT and OT), Use of the "Walker" and Staff Training Concerning Use of the "Walker" [5]

30. The May 2004 IEP schedule of services indicates that the district was to provide the student with:

    a. one session per month of PT on a consultative basis, for fifteen minutes;
    b. four sessions per year of OT at the rate of one hour, on a consultative basis; and
    c. fine and gross motor skills services for fifteen (unspecified as to minutes, hours) per week in a segregated environment by an assigned aide (passive range of motion, sitting on the edge of the mat table, and standing). *Jt. Exh. DD.*

[5] The student has used devices that permit her to stand and "walk." These devices are referred to in records and by witnesses as walkers and/or standers, sometimes interchangeably.

31. PWN associated with the May 2004 IEP indicates the student needs PT but the form is otherwise incomplete ("The team agrees that these services are needed…and the team agrees with the [remainder is blank]."). *Jt. Exh. II.*

32. The May 2005 IEP indicates that the student is to receive:

    a. PT one time per month for 30 minutes on a consultative basis;
    b. OT four times per year for one hour on a consultative basis; and
    c. fine and gross motor skills services delivered by "SpEd Staff" in a segregated setting at the rate of 15 hours per week for a total of 30 hours per week (passive range of motion, standing). *Jt. Exh. BB.*

33. Contact logs indicate that the OT provided services to the student:

    a. two times, for 30 minutes, from May through June of 2004;
    b. six times between September 2004 and February 2005;
    c. eleven times during the 2005-06 school year (consult). *Jt. Exh. BBB.*

34. Present Levels of Educational Performance (PLEPs) included in the May 2004 IEP indicate that the student continued to "tolerate" the walker, with braces. *Jt. Exh. DD at 2, 7, 9.* The IEP included an objective calling for the student to be able to tolerate standing for 30-45 minutes, monitored by assigned assistant. *Id. at 8.*

35. The September 2004 IEP notes a need for training of the student's aide with respect to PT and OT matters, including lifting techniques and correct use of the walker. *Jt. Exh. CC at 8.* Progress notes included in this IEP do not document any implementation of the standing goal/objective from the May 2004 IEP.

36. PWN associated with the September 2004 IEP indicates the parent requested that the stander no longer be used, but that a new walker should be used by staff. *Jt. Exh. HH at 1-2.* There is, however, no goal or objective associated with use of the walker. *Jt. Exh. CC and HH.*

37. The May 2005 IEP documents the parent's preference that the student use the walker and district staff's perception that the walker was an impractical way for the

student to practice weight bearing. *Jt. Exh. BB at 2.* PLEPs document difficulties with the walker, including the student's tolerance for the activity. The IEP includes an objective requiring use of the walker for 15 minutes each day, with progress measured by the teacher or therapist (although there are no parameters upon which reports of "progress" will be based). *Id. at 12.*

38. PWN for the May 2005 IEP indicates that an addendum IEP meeting would be conducted once a PT re-evaluation was completed. *Jt. Exh. GG at 4.* No meeting was conducted until January 2006, some eight months later. *Jt. Exh. AA.* The parent voiced concern at the January 2006 meeting that the student was not using the walker on a daily basis; there is no indication that any PT re-evaluation had been conducted or that any such evaluation was discussed by the team. *Id.*
39. The classroom aide who provided services to the student from August 2004 until January 2006 was not able to implement portions of the student's IEPs calling for use of the walker, as she could not safely transfer the student by herself. *TR 30,75-78.*
40. The staff person responsible for using the walker with the student from February through May of 2006 used it approximately 3-4 times a week, but inconsistently. *TR 113-116.*
41. Credible evidence indicates that PT and OT staff did instruct the student's direct care staff in the use of the stander and walker; adjustments to the equipment were properly left to the therapists. *See, e.g., TR 114.*
42. Credible evidence demonstrates that the student's needs for PT and OT were not met, and at best goals and objectives associated with these areas of need were inconsistently implemented.

43. The district implemented the PT and OT consultative therapy portions of the student's IEPs; however, the level of PT and OT provided for in the IEPs was inadequate to meet the student's needs.

Behavior

44. The student engages in some self-stimulatory, self-injurious behavior (hand biting), some kicking and screaming. However, Petitioners' assertions that the district failed to address behavioral concerns adequately or in a proper manner were not addressed by means of any proposed findings of fact or conclusions of law (other than a reference to a failure to conduct a functional behavioral assessment presented in the context of a requested finding relating to an alleged failure to evaluate, unsupported by citation), and are deemed abandoned.[6]

Staff Training and Qualifications

45. The student attended school in a self-contained classroom with one other student for the entirety of her school day. *Jt. Exh. AA, BB, CC, DD; and see Stipulated Facts, supra.*

46. From August 2004 until January 2006, a classroom aide, as opposed to a special education teacher, held primary responsibility for the student. *TR 30.*

47. During the majority of the time relevant to this case, the special education teacher assigned to the student's classroom was also assigned to another classroom and spent most of his/her time in the second classroom, not in the student's classroom. *TR 35, 102-104, 404.*

48. The daily logbook of the student's activities shows little variation in the student's daily routine from August 2004 through February 2006. *Jt. Exh. AAA.*

[6] See Petitioners' Requested Finding numbered 84 and footnote 7, infra.

49. Credible evidence demonstrates that special education teachers assigned to the student's classroom had little to no meaningful involvement with the student or in the student's educational environment, in developing goals or objectives for the student, or in supervising and providing assistance to or inspiration for aides who provided the totality of services received by the student.

ESY

50. Credible evidence demonstrates that the student experiences significant regression over regularly scheduled breaks during the school year and requires a significant amount of time to recoup previously learned skills. *Jt. Exh. BB at 15; DD at 13; Exh. 5 at 2; TR 414-415.*

51. Although the May 2005 IEP indicates that the student experiences significant regression over regularly scheduled breaks during the school year and requires a significant amount of time and effort to recoup skills (*Jt. Exh. BB at 15*), PWN for that IEP indicates that the student does not qualify for ESY because "he [sic]does not display significant regression…, does not have a significant regression in abilities." *Jt. Exh GG at 3.*

52. The information in the student's records concerning ESY is conflicting (although testimony supports regression/recoupment that would call for ESY), and notice provided to the parent regarding ESY (through PWN) was misleading and inadequate.

53. The district does provide some ESY services to students, but no ESY services were provided to the student during the relevant time period. *TR 725-729.*

54. The student qualified for receipt of ESY services during the summer of 2005.

Least Restrictive Environment

55. Prior to February 2006, the student ate breakfast and lunch in her segregated classroom. *TR 71.*

56. While some attempts were made to have the student attend school assemblies, the noise level bothered the student and so staff stopped taking her to the assemblies. *Jt. Exh. BB at 19; DD at 18; TR 71-72.*

57. The student's mother includes the student in community activities, including running in races, restaurants, picnics, and other family outings/activities. *Exh. 1; TR 611-615, 620-621.*

58. From February until May of 2006, the student was permitted more involvement with her peers, including meals in the cafeteria, physical education classes, and library visits. *TR 121-122.*

59. At all other times relevant to this matter, while the student was in school she was isolated and deprived of the opportunity to experience social connections and the modeling of appropriate behaviors.

Transition Planning and Services

60. The student became eligible for transition services on her 14th birthday (May 13, 1998). *See, e.g., Jt. Exh. RR at 1 [for student's birthday].*

61. The student's IEPs for 2004-05 and 2005-06 do not contain any transition goals/objectives. *Jt. Exh. BB-DD.* No evaluation was conducted.

62. On February 15, 2005, a district diagnostician recommended a transition evaluation be conducted, as the student was to turn 21 on May 13, 2005. *Jt. Exh. RR at 2.*

63. The transition plan included in the May 2004 IEP does not assign any responsibility to the district for any services or planning but instead places responsibility on outside agencies and the student's family. *Jt. Exh. DD at 5-6.*

64. The portion of the September 2004 IEP designated for transition planning is blank. *Jt. Exh. CC at 3.* Even though this IEP is an "addendum" IEP, inclusion of a blank transition form within the IEP is misleading and fails to communicate properly with those responsible for IEP implementation.

65. The May 2005 IEP assigns some responsibility for transition services to district staff, including the special education and counseling departments and the school social worker. *Jt. Exh. BB at 5-8.* The student's special education teacher did not implement any of the provisions of this transition plan. *TR 409-414.* The school social worker failed to implement the transitional plan in any meaningful way. *TR 781-786.*

66. Implementation of a transition plan, in which specific staff responsibilities are designated, is the responsibility of the district; it is not the parent's responsibility to prod district staff into action and to ensure implementation. *See, e.g., TR 787-788.*

67. The January 2006 IEP was tabled without any team consensus regarding transition planning/services. *Jt. Exh. AA.*

68. The district failed to provide the student with any meaningful transition services.

Evaluations

69. Petitioners' requested findings relating to evaluations are specifically denied, as no claim for a failure to evaluate was properly raised in the request for due process

hearing. *See, Request for Hearing and Petitioners' Requested Findings at 13-14.*[7] In their request for hearing, Petitioners requested evaluation as a form of remedy, and to the extent a remedy of evaluation is appropriate, it is addressed herein.

Remedies

70. The DPHO specifically finds that the testimony and reports of Petitioners' expert MOL were unpersuasive, insufficiently supported by expertise, observation, data, and unrealistic. *See Exh. 11, 11A; TR 488-609 [and in particular, at 607-609].* MOL's recommendation that the student receive five years of compensatory services is specifically rejected on these bases.

71. Credible evidence demonstrates that the student presently is in need of direct SL services in the amount of one hour per week, as well as consultative services once a week to ensure that the student's team, including her family, properly employs therapy strategies and appropriately uses adaptive equipment. *TR 322.*

72. Credible evidence demonstrates that the student is presently in need of adaptive equipment including: a VOCA device and a PowerLink switch. *Exh. 13, 19, and Jt. Exh. BBB.*

73. The student is in need of direct OT services, including continued skill development in the areas of sensory processing and assistive technology use. *Jt. Exh. MM.* The record fails to reveal how often direct OT services should be provided to the student. *Id. and see TR at 380-381.*

74. The student is in need of PT services that would meet her needs for positioning, range of motion, use of assistive devices, decreasing self stimulatory behaviors, and family education. *Jt. Exh. NN at 4-5.* She is in need of a standing program, written

[7] Petitioners' requested Findings numbered 83-84 while indicating a need for citation to the record do not include such citation.

by a PT and implemented by willing staff, including safe transfer strategies; and a positioning program implemented by persons who have been properly trained. *TR 186-210.*

75. After the student was exited from services, the district provided the student with one hour per week of direct PT services for approximately six months. *TR 310-211.* Any award of compensatory PT services should be reduced in acknowledgement of this provision of services.

76. The student is in need of transitional services in the form of:

    a. performance of a vocational assessment of the student by an individual who is knowledgeable about skills and opportunities for individuals with functioning levels similar to that of the student;
    b. contact with relevant agencies for provision of age-appropriate services, including day programs and/or vocational programming
    c. ensuring that the student and her family have an opportunity to visit proposed settings; and
    d. ensuring the coordination of services (including therapies) and smooth transition into chosen program(s).

CONCLUSIONS OF LAW

1. All conclusions of law implicit in the foregoing findings of fact are deemed to be the conclusions of law of the DPHO.

2. All findings of fact implicit in these conclusions of law and the following "Reasoning" section are deemed to be the findings of fact of the DPHO.

3. All requested conclusions of law not adopted are denied.

4. The DPHO has jurisdiction of the parties and the subject matter. *20 U.S.C. Section 1415(b)(6) (2004); 34 C.F.R. Section 300.507(a) (1999); NMAC 6.31.2.13(I)(1)(b) (2000) and 6.31.2.13(I)(3) (2000).*

5. This decision is timely filed; extensions of the deadline were granted upon the motion of one or both parties, and for good cause shown. *NMAC 6.31.2.13(I)(14)(c) (2000).*

6. The procedures utilized at the due process hearing were consistent with due process and with the procedural requirements of IDEA and federal and state regulations.

7. The burden of proof rests with Petitioners, by a preponderance of the evidence. *Johnson v. Independent School Dist. #4 of Bixby, 921 F.2d 1022 (10th Cir. 1990); Schaffer v. Weast, ___ U.S. ___, 126 S.Ct. 528,105 LRP 55797 (2005).*

8. The applicable statute of limitation is two calendar years.

9. Children with disabilities who reside in New Mexico have the right to FAPE made available by public agencies (school districts) in accordance with applicable federal and state laws. *NMAC 6.31.2.8(A) (2000).*

10. Given the fundamental importance of the human need to communicate and the fact that nearly all other educational and daily living skills experiences for this student were dependent upon at least receptive language and communication, the district's failure to properly address the student's communication needs, alone and without reference to any other failings as detailed herein, resulted in a denial of FAPE.

11. Districts are required to develop and implement appropriate policies, procedures, programs and services to ensure that children who reside within the district are identified, evaluated, and have access to FAPE in compliance with applicable federal and state laws. *NMAC 6.31.2.8(B) (2000).* The district failed to adhere to these legal requirements and denied the student FAPE from October 2004 through May 2006.

12. An appropriate educational program must: 1) be designed to meet the student's unique needs; 2) be designed to provide the student with some educational benefit; and 3) be provided in the least restrictive environment. *Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982); Poway Unified School Dist., 34 IDELR 79 (CA SEA 2000).* The district denied the student FAPE in that it failed to provide:

- educational and related services to address the student's communication needs (including needed adaptive equipment)
- appropriate transition services
- IEPs with meaningful, measurable goals in all areas of need
- services in the student's LRE, and
- sufficient levels of needed related services (PT and OT).

13. "School health services" are a form of related service provided by a school nurse or other qualified person. *34 CFR Sec. 300. 24(a)(12) (1999)—Related services.* While the monitoring of the student's food intake may not require a high level of medical expertise, the DPHO finds that it is nevertheless a school health service.

14. There was no deprivation of FAPE based upon any failing with respect to documentation of an IHP or implementation of feeding/swallowing precautions, although better practice would have been to include in the student's IEP an IHP outlining the exact requirements and agreements concerning the student's food and how she would be fed, as well as clear PWN to the parent regarding this issue.

15. Education of children in the least restrictive environment is recognized as "one of the IDEA's most important substantive requirements". *L.B. and J.B. v. Nebo School District, 379 F.3d 966, 41 IDELR 2002 (10th Cir. 2004) [citation omitted].* Courts examine 1) what steps a school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; 2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; 3) the child's overall educational experience in regular education, **including non-academic benefits**; and 4) the effect on the regular classroom of the disabled child's presence in that classroom. *Id., citing Daniel R.R. v. Board of Education, 874 F.2d 1036 (5th Cir. 1989) [emphasis added].* In this case, the IEP team consistently failed to engage in a meaningful discussion of LRE requirements and considerations, failed to make

any real, concerted attempt at providing the student with any experiences outside of her sequestered classroom, and the district failed to educate the student in the LRE from October 2004 – February 2006, thus denying her FAPE.

16. "Related services" are supportive services required to assist a child with a disability to benefit from special education. *34 CFR Sec. 300.24(a) (1999).* They include PT and OT services. *Id. at (b).* The district denied the student FAPE from October 2004 through May 2006 by failing to provide her with sufficient PT and OT services on a consistent basis.

17. Districts are obligated to ensure that assistive technology devices or services, or both, are made available if required as part of the student's educational program. *34 CFR Sec. 300.308 (1999).* The district denied the student FAPE by failing to provide her with sufficient assistive technology devices. *See also East Penn School District v. Scott B, 29 IDELR 1058 (U.S. D. E.D. Pa. 1999).*

18. Prior to IDEA 2004 (effective date July 1, 2005), a school district's obligations with respect to a student's transition planning and services began when the student reached age 14. *34 CFR Sec. 300.347(b)(1) (1999).* Transition services are a coordinated set of activities that are designed within an outcome-oriented process that promotes movement from school to post-school activities. *34 CFR Sec. 300.29 (1999).* The services are provided based upon the student's individual needs and include, *inter alia*, instruction, related services, community experiences, objectives related to employment and other post-school adult living concerns; they may include daily living skills and functional vocational evaluation. *Id.* They may address such areas of concern as lifelong learning, workplace readiness, money management, social skills, and specific occupational skills. *See, e.g., Mason Community School District, 21 IDELR 241 (IA SEA 1994).*

19. New Mexico has recognized that post-secondary transition planning for students with disabilities is **essential**. *NMAC 6.31.2.11(G)(2) (2000) [emphasis added].* Districts are required to provide transition services designed to meet the individual needs of each eligible student. *Letter to Hamilton, 23 IDELR 721 (OSEP 1995).*

20. Districts are required to include in a student's transition plan a statement of interagency responsibilities or needed linkages with such agencies. *34 CFR Sec. 300.347(b) (1999).* Transition planning is considered of such importance that the law requires a school district to provide parents with notice of those outside agency representatives who will be invited to attend the student's IEP meeting. *34 CFR Sec. 300.345(b)(3) (1999).* Districts are expected to take a leadership position in contacting agencies that will provide services to a student once she exits the school system. *See, Letter to Bereuter, 20 IDELR 536 (OSEP 1993).*

21. A district **may not** fulfill its transition-related responsibilities by simply communicating the kinds of agencies in the community that may be able to help the student in the future – school districts cannot delegate their transition responsibilities to parents. *See Yankton School District v. Schramm, 23 IDELR 42 (D.S.D. 1995), affirmed, 24 IDELR 704 (8th Cir. 1996), and In re Child with Disabilities, 21 IDELR 624 (CT SEA 1994).* Even when an outside agency fails to provide services as promised, the school district remains ultimately responsible to the student for ensuring that transition services included in the IEP are implemented. *See, e.g., Martinsville (VA) City Public Schools, 16 IDELR 1088 (OCR 1990).*

22. The district denied the student FAPE by failing to provide her with transition services/planning when she reached age 14, by thereafter failing to provide her with any meaningful, individualized transition planning, and by failing to implement what meager transition planning had been included in her IEPs. The district further denied the student FAPE in the context of transition planning by essentially delegating its transition planning

duties to the parent and/or other, outside agencies that had not been included in or invited to IEP team meeitngs. *See Yankton School, supra.*

23. Districts are required to ensure that ESY services are available as necessary to provide FAPE – districts are not permitted unilaterally to limit the type, amount, or duration of services. *34 CFR Sec. 300.309(a) (1999).* ESY services are to be provided in accordance with the student's IEP and at no cost to the parents. *Id. at (b).* The district denied the student FAPE when it failed to make a coherent, individualized ESY decision based upon documented data and accurate observations of the student's regression/recoupment, and when it provided conflicting reasons for its denial of such services.

24. Federal law provides that a hearing officer may grant such relief as she determines is appropriate based on the findings. *Anaheim Union High School Dist., 34 IDELR 192 (Hearing Officer Decision, 2/16/01); Hacienda La Puente Schools v. Honig, 976 F.2d 487 (9th Cir. 1992).*

25. In determining how compensatory education should be measured, courts have observed that compensatory education is a form of equitable relief intended to cure the deprivation of a child's statutory and regulatory rights. *See, e.g., Murphy v. Timberlane, 973 F.2d 13 (1st Cir. 1992); Manchester School District v. Christopher B., 807 F.Supp. 860, 19 IDELR 389 (D. N.H. 1992).* A hearing officer should look at the length of the inappropriate placement. *Id. and cases cited therein.* The concept of equitable relief also requires that the conduct of both parties be reviewed. *Corpus Christi Independent School District, 31 IDELR 41 (TX SEA 1999), citing Parents of Student W. v. Puyallup School District No. 3, 31 IDELR 723 (9th Cir. 1994).*

26. None of the claims asserted by Petitioners through counsel were frivolous.

REASONING

The district has defended any lapses on its part by arguing that this student is essentially so low functioning that little to no progress can be expected, that given the

expectation of little progress not much needed to be done in terms of providing services (or evaluating the provision of services on any regular basis), and that even if there were errors, it doesn't much matter—no harm occurred because this is a student who just would not benefit from provision of services. *See, e.g., TR at 218, 395-397,877-886; Respondent's Post-Hearing Legal Memorandum at 13.* Added to those arguments is a caution that the DPHO bear in mind courts' proscriptions concerning replacing the expertise of educators with hearing officer preferences. *Respondent's Post-Hearing Legal Memorandum at 7 [and cases cited therein].* The DPHO is advised to defer to the expertise of the district's educators.

Respondent's first argument, that the student couldn't ever make much progress and that providing more services at this point in time would be useless and a waste of resources, is a public policy argument more properly made to legislators—it is not what the law provides. As long ago as 1989, the First Circuit Court of Appeals affirmed a hearing officer's determination that a student's ability to benefit from education was irrelevant to an eligibility determination. *Timothy W. v. Rochester, New Hampshire, School District, 441 IDELR 393, cert. denied, 493 U.S. 983 (1989) [cited by the Tenth Circuit Court of Appeals in A.E. v. Independent School Dist. No. 25, 936 F.2d 422 (1991)].* In that case, the student was severely impaired; he could move his head toward a person speaking his name and had learned to activate a switch. There was testimony that acquisition of new skills by the student was "very unlikely."

The appellate court reviewed the legislative history of the Education for All Handicapped Children Act (predecessor to IDEA), and repeatedly noted that the Act was designed to ensure that "**all** handicapped children," no matter the severity of disability, be provided with educational programs and opportunities. *Id. [emphasis in original].* The court then elaborated on its perspective that the Act even gave *priority* to those children with the

most severe handicaps. Although provision of special education and related services was not guaranteed to result in any particular outcome, services nevertheless had to be provided to all children with disabilities. Other particularly applicable language quoted by the appellate court includes:

> …[t]he language and legislative history of [the] Act simply do not admit of the possibility that some children may be beyond the reach of our educational expertise.
>
> and
>
> …assumptions about their inability to learn and develop are inaccurate….
>
> and
>
> ..profoundly retarded residents must be afforded education and training services to the same extent as mildly retarded residents, even though the teaching methods might be different….
>
> and
>
> ..the concept of education is necessarily broad with respect to severely and profoundly handicapped children, and where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point.

Id. [citations and internal quotation marks omitted]. If the court's language today appears antiquated and "politically incorrect," that is likely because these concepts (that all children are to be provided with services no matter the severity of their qualifying condition and no matter the pace at which progress can be achieved), are now old, established concepts. Congress long ago examined the arguments Respondent makes and found those arguments unpersuasive.

A month following the *Timothy* decision, the Puerto Rico Circuit Court of Appeals discussed the suspension of a student's speech therapy based upon a teacher's conclusion that the student was not making progress and would not make progress. *Quintana ex rel. Padilla v. Dept. of Education, 30 IDELR 503 (Puerto Rico Ct.*

App. 1998). The court emphasized the importance of educational efforts designed at helping the student to communicate: "[such efforts] would contribute to his development as a human being, which is the ultimate purpose of education." *Id.* The court awarded the student **eleven years** of compensatory education.

The potential benefit of a given educational service is a pertinent consideration in designing a student's IEP. *Natchez-Adams School Dist., v. Searing, 918 F. Supp. 1028, 23 IDELR 982 (S.D. Miss. 1996).* This is not a case, however, in which parents are asking for the moon, demanding unrealistic services for their child; it is, instead, a case in which they ask that fundamental services be provided in an *individualized*, professional, consistent manner, that the student be provided with more than stagnant caretaking. Progress for this student will be different than that measured for a general education student or even other students who receive special education services. This student's progress and educational benefit must be measured in relation to her intellectual and functional capabilities. *See, e.g., T.J.W. v. Dothan City Schools, 26 IDELR 999 (M.D. Ala. 1997).* Her incremental progress, at whatever pace it occurs and no matter ultimate expectations, cannot serve as an excuse for failing to serve her as the law requires.

The DPHO is similarly disinclined to adhere to the district's assertion that its educators' decisions are sacrosanct and must remain inviolate. Rather, the record supports the following conclusions with respect to district educators' expertise: in the case of this student educators were spread too thinly (one special education teacher to cover two classrooms); aides were ill-informed and unsupervised; evaluations were recommended but never provided; equipment was requested but never provided; LRE considerations were misunderstood and essentially ignored;

ESY concepts were poorly understood and described in conflicting ways to the parent; and transition planning was ill conceived and uninspired. The decisions made (and negligent lapses in provision of services) for this student were not made by professionals exercising their professional judgment in a considered manner. No deference is due.

Finally, whether or not the student will be able to make any measurable progress during or following the provision of compensatory services is irrelevant to the award and design of an appropriate remedy. That, again, is not what the law provides. Compensatory education is an equitable remedy designed to provide a student with services she should have received pursuant to the requirement that a district provide FAPE. *See, e.g., Lester H. v. Gilhool, 16 IDELR 1354 (3rd Cir. 1990), cert. denied, 499 U.S. 923 (1991).* Generally, compensatory education is awarded under the express authority granted by IDEA to "grant such relief as the court determines appropriate." *Burlington School Committee v. Massachusetts Dept. of Education, 556 IDELR 289 (1985); and Letter to Kohn, 17 IDELR 522 (OSEP 1990).* The quality of "appropriateness" further emphasizes the equitable nature of the remedy. Equitable remedies grew out of a recognized need for flexibility, out of a recognition that certain cases necessitate the use of discretion and judgment and call for "principles of justice and conscience rather than rigid 'legal' rules". *Dobbs on Remedies, at 28 (1973).* Thus, a hearing officer has the authority to be flexible in determining an appropriate remedy, and a hearing officer is instructed to use her discretion and judgment in making that determination.

The Order that follows reflects these considerations.

ORDER

IT IS HEREBY ORDERED THAT within 45 days of the date of this Order, Respondent must consult with Petitioners and have in place arrangements, including a schedule for delivery of services, for provision of the following compensatory education and related services:

1. The district shall pay for the student to receive direct SL services from a qualified speech-language pathologist (SLP) of Petitioners' choice in the amount of one hour per week (to include consultative services to ensure that the student's family properly employs therapy strategies and appropriately uses adaptive equipment). These services shall be provided for a total of 52 weeks from initiation, to be delivered at a rate tolerated by the student and determined by the parents in consultation with the SLP.

2. The district shall pay for the student to receive direct OT services, including continued skill development in the areas of sensory processing and assistive technology use. These services are to be delivered by a qualified occupational therapist of Petitioners' choice in the amount of one hour every other week, for a total of 26 sessions/hours from initiation and shall be delivered at a rate tolerated by the student and determined by the parents in consultation with the occupational therapist.

3. The district shall pay for the student to receive direct PT services that meet her needs for positioning, range of motion, use of assistive devices, decreasing self stimulatory behaviors, and family education. PT services, which should also include a standing program with safe transfer strategies and a positioning program, are to be delivered and/or supervised by a qualified physical therapist of Petitioners' choice. These services are to be delivered in the amount of one hour every week for a period of six months from initiation (i.e., 24 sessions/hours).

4. The district shall pay for and ensure that the student receives the following transitional services (to cease only after completion of the following):

    a. Within 60 days of the date of this Order, performance of (and payment for) a vocational assessment of the student by an individual of Petitioners' choice who is knowledgeable about skills and opportunities for individuals with functioning levels similar to that of the student;
    b. Contact by an assigned district staff person with relevant agencies for provision of age-appropriate services, including day programs and/or vocational programming;
    c. Arrangements made in consultation with the family by an assigned district staff person ensuring that the student and her family have an opportunity to visit proposed settings; and

d. Coordination of the student's services (including therapies) and smooth transition into chosen program(s) by a knowledgeable, assigned district staff person.

5. Should any disputes arise regarding the implementation of this Order, the district shall pay for the services of a mediator, to be mutually agreed upon by the parties, who will be responsible for assisting the parties in resolving their differences. The district is responsible for funding the services of a mediator for a maximum of 60 hours, plus expenses and reasonable costs.

APPEAL

Any party aggrieved by this Final Decision may bring a civil action in a state or federal district court pursuant to 20 U.S.C. Sec. 1415(i) and 34 CFR Sec. 300.516 (2006). Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party. *6.31.2.13.I(25) NMAC (2000).*

Rendered this 25th day of June, 2007.

_____

Elizabeth J. Church
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I emailed (6/25/07) and mailed (6/25/07) a copy of the foregoing to counsel for Petitioners and counsel for Respondent, and mailed a copy (6/25/07) to Dr. Veronica C. Garcia, Secretary of Education.

By: _____
Elizabeth J. Church