NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER

IN THE MATTER OF

Petitioner

v.

Respondent DPH #0607-13

DUE PROCESS HEARING DECISION

Muriel McClelland
Due Process Hearing Officer

May 7, 2007

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DUE PROCESS HEARING
DPH #0607-13

DECISION

This matter coming before the Due Process Hearing Officer (DPHO) at a hearing commencing on February 27, 2007 and continuing through March 1, 2007; Petitioner (Parent) represented by Debra Poulin, Attorney at Law; Respondent (District) represented by Jacquelyn Archuleta-Staehlin, Attorney at Law, and the DPHO, having heard the testimony of witnesses, and having reviewed the exhibits and memoranda of law submitted by the parties, enters the following Findings of Fact, Conclusions of Law, and Decision.

STATEMENT OF PROCEDURE

Parents filed a request for due process with the New Mexico Public Education Department (NMPED) on December 5, 2006, alleging denial of FAPE under IDEA[1] on substantive and procedural grounds. *[DPHO Exhibit 1]* The DPHO was appointed on December 6, 2006. *[DPHO Exhibit 2]*

The first Pre-Hearing Scheduling Conference was held telephonically on December 19, 2006. *[DPHO Exhibit 5*] Respondent submitted an Offer of Judgment on February 13, 2007 which remains sealed as part of the record herein. *[DPHO Exhibit 6]* A second Pre-Hearing Conference was held on February 14, 2007, at which time the parties notified the DPHO that mediation was unsuccessful. *[DPHO Exhibit 7]* The parties submitted respective Statements of Issues on February 21, 2007. *[DPHO Exhibits 8, 9]* Sufficiency of the complaint was not

[1] The Statute of Limitations pursuant to *IDEA 2004* dates back to December 5, 2004.

challenged. An extension of time limits was granted at the request of both parties.

Following the close of Respondent's case on March 1, 2007 the DPHO issued an Order Re: Individual Health Plan, to take effect immediately. The Order was entered March 4, 2007. *[DPHO Exhibit 15]* At a telephone conference held on May 1, 2007 the DPHO allowed the record to be supplemented with admitted *Exhibit R* and *Exhibit 45*. This Decision is timely entered on May 7, 2007.

ISSUES PRESENTED

1. Whether District denied Student FAPE by failing to provide Student with an educational program and individualized health plan (IHP) that accommodates her educational needs;

2. Whether District has denied Student FAPE by failing to evaluate Student's educational needs;

3. Whether District has denied Student FAPE by failing to provide Student with an educational program and related services consistent with Student's needs;

4. Whether District denied Student FAPE by failing to provide Student with services and extracurricular activities in the least restrictive environment (LRE);

5. Whether Parent was denied meaningful opportunity to participate as a result of District's failure to measure and document Student's progress and to provide progress reports; failure to explain Extended School Year (ESY) requirements, treating Student as a truant, reporting Parent to Children, Youth and Families Department (CYFD); and failure to provide complete educational records when requested for a period exceeding six months.

FINDINGS OF FACT

General Findings

1. Student is ten and a half years old (date of birth July 2, 1996) and presently is a fifth grade student at District's elementary school, which she has attended since the fall of 2004 when she was in the second grade. *Jt. Exhibit 4*

2. Student was diagnosed with Type I diabetes in 1997 and a seizure disorder (epilepsy) in 1998. Student qualifies for special education services based upon her eligibility as Other Health Impaired (OHI). *Jt. Exhibit 4, Exhibits 11, 24*

Individual Health Plan

3. Student's medical needs are extensive and require a high level of supervision. *TR 226-227*

4. District was operating under a *de facto* health plan (or plans) devised by the school nurse, J.C-R, and further amended by Parent and JB, the principal of the elementary school, but not one developed by the IEP team with the assistance of Student's medical providers. *Jt. Exhibit 23, Exhibits B, C, D, E, 23, 26*

5. The school nurse, experienced in acute care (including the treatment of diabetes patients), acknowledged that Student's IEP stated Student did **not** require a health plan as a related service. She developed Student's IHP in mid-November 2004 from a school nursing guideline book. She later amended the IHP, in consultation with Student's endocrinologist (contrary to wishes of Parent). This is the plan that still is in effect. *Jt. Exhibit 2, p.12, Exhibit B;TR 36-37, 88, 90-91, 96, 104-107, 122-123*

6. The school nurse checked on Student's blood sugars before she made her rounds to

the other elementary schools in the LEA. She returned to her office, located at Student's school, at between 12:30 and 1 PM to again check on Student. *TR 23, 26,29*

7. In the 2004-2005 school year there was no consistent assignment of responsibility for Student's sugar monitoring between Student's special education teacher, MC, and the school nurse. *TR 42-43*

8. The school nurse has sole responsibility for 900 elementary students spread over eight elementary schools and develops the IHPs for students with special needs. Student is currently the only child in her charge with an IHP. *TR 23-28.*

9. The school nurse was not always available to assist with Student's medical needs. *TR 236, 238-239, 267, 660*

10. Backups for the school nurse did not know how to inject the insulin or to calculate the carbs. *TR 34*

11. The IHP was not followed with respect to calling Parent when blood sugars were above 300 or below 8, ketone testing, measures of food intake, and carb count. *Jt. Exhibit 16;TR 52-60, 76-80.*

12. Different versions of the health plan containing contradictory instructions are in circulation. *Exhibits B, C, D, 23; TR 38-41, 852-860, 1114-1118*

13. The IHP was not consistently attended by staff, in any case. A number of teachers were either unaware of the existence of a health plan, did not have a copy of the health plan, did not know what to do with the health plan if they had one, or just didn't follow it. Staff responded to Student's blood sugar variations in an inconsistent manner. *Exhibits C, D, 23; TR 228-229, 250, 268, 312, 332-333, 335, 403, 409, 727-734, 738, 904-907, 935, 939, 941*

14. At the time of the hearing Student was being seen and/or treated by at least ten different medical providers (not including independent evaluators) including, but not limited to: two endocrinologists, podiatrist, opthamologist, primary care physician, neurologist, ENT specialist, dermatologist, physical therapist, and nutritionist. *TR* 776-780

15. Parent provided select and incomplete information to District with respect to Student's health condition because Parent wanted to preserve the doctor/patient confidentiality relationship and did not believe complete disclosure was relevant. For the same reasons, Parent did not provide releases which would enable District to access to Student's medical providers. *TR 91, 111-112, 115-116, 270-271, 689, 775-776, 770, 820-821, 975-976*

16. Student's relationship with the person hired to assist with monitoring the IHP was not good. *Exhibit 3, p. 20; TR 284, 289*

17. Student had many excused absences for medical reasons (documentation of which was in possession of MC, and not turned over to administrative officials), and some unexcused absences, amounting to approximately 30% of a school year. Parent received a Notification of Noncompliance with Compulsory School Attendance Law. District's social worker also referred the family to the New Mexico Children, Youth and Families Department for educational neglect, charges which were found to be unsubstantiated and dismissed. District policy with respect to Student's absences was not followed. *Jt. Exhibits 9, 10; TR 92, 114, 297, 340-342, 356-357, 417-418, 466-467, 722-723, 725, 841*

18. There was a notable breakdown in communication between the school nurse, Student's special education teacher and Parent in the 2004-2005 school year, as well as with the 2nd grade special education teacher and the general education teacher. *TR 234-235*

19. Parent's diabetes expert, Elaine Montano of LifeCare Health Services, a nurse practitioner and an expert in diabetes management, impressed the DPHO as a very knowledgeable and credible expert on the subject of diabetes and its treatment. Her clinic provides education classes in diabetes self-management and monitoring of blood glucose and dietary changes, in consultation with treating physicians. *Exhibit 34;TR 14-15*

20. Student's medical condition compels a comprehensive and consistent meal plan and diabetes treatment while in the school setting. *TR 154-158, TR 161-163,177-178*

21. Diabetes management consists of keeping the blood sugar level between 70 and 150 and does not mean intervention in crisis situations only. *TR 140, 142*

22. Staff interacting with Student require comprehensive diabetes management training which they have not received to date. *TR 165-166*

23. Although Student was not symptomatic for ketone (even with blood sugars over 300), it is necessary to test for ketosis. *TR 101, 124-127, 145-146*

24. Student's current 5th grade general education teacher, TM, did not know that Student had epilepsy, believed she was diagnosed as diabetes Type II, and was otherwise uninformed about management of Student's diabetes and epilepsy. He described Student as very bright and capable of being responsible for her own food intake and sugar levels. *TR 904, 907, 915*

25. No one in the school was aware that Student may be exhibiting symptoms of an eating disorder or pre-anorexia. *TR 610, 727*

26. Treatment of Student's diabetes at home and in school varied and both deviated from the treatment recommended by the diabetes expert.

27. Student can test her blood sugar some of the time and is now able to self-inject

but still requires supervision. *TR 34, 841, 862-864*

28. District's health plan for Student was woefully inadequate, for whatever reasons. *Exhibit D; TR 476-479*

Evaluations

29 Student was last evaluated in March, 2004 at her former school when she was in first grade and was due for a triennial reevaluation by March 2, 2007. *Exhibit 5; TR 239.*

30. In 2004 it was documented that Student "exhibits a severe deficit in reading," the evaluator recommending that Student receive B-level special education services in a regular education classroom. Classroom modifications comprised preferential seating, peer tutor, repetition of directions, one-on-one attention and instruction, extended time requirements on assignments and tests, read tests to Student (except reading comprehension.) with instruction presented in an oral presentation mode. *Exhibit 5*

31. Student was tested independently by Dr. Russell, a neuropsychologist with the Behavioral Health Institute of New Mexico, in February, 2006. Parent requested and received a revised report and the amended report was provided to District. *Jt. Exhibit 5; TR 614, 813*

32. This evaluator recommended intensive tutoring in math, reading and writing, noting significant deficits in these areas, and further psychological evaluation. *Jt. Exhibit 5, TR 614*

33. In December, 2006 Student was again tested by an independent evaluator (Dr. Le Captain, a clinical neuropsychologist) without school input, although input was requested by the evaluator. Testing indicated that Student had difficulty reading at even a first grade level. *Exhibit 6*; *TR 163, 867-868*

34. This evaluation diagnosed Student as having dyslexia and a cognitive disorder,

NOS (not otherwise specified), as well as ADHD, in addition to her medical diagnoses. *Exhibit 6*

35. Student was not referred for a psychological evaluation as of the date of the hearing despite the November, 2005 IEP recommendation and Parent's subsequent requests. *TR 292, 630-631, 805*

36. Parent claims, and it is a credible claim given Parent's active participation in her daughter's educational program, that she requested numerous evaluations (OT/ sensory integration, educational diagnostic, reading, PT, S/L, psychological) numerous times since Student has been in attendance in the LEA. These requests, however, are not reflected in Student's IEPs and Prior Written Notices (PWNs), with the exception of the psychological evaluation. *Joint Exhibits 1, 2, 3, Exhibits 11, 12, 14; TR 610-612, 616, 617, 626, 628, 804-806, but cf. 1024-1027*

37. During the 2005-2006, 2006-2007 school years Parent had independent educational evaluations (IEEs) performed through the Medicaid DD Waiver Program at no cost to District (educational diagnostic, neuropsychogical (2), speech/language). District was made aware only of the February, 2006 neurological evaluation, which was discussed at the May 25, 2006 IEP meeting but never acted upon. *Jt. Exhibit 5; TR 983-984*

38. Although no significant progress was reported during Student's attendance at District's elementary school (2004-2005, 2005-2006, and 2006-2007 school years), District never sought reevaluation earlier than the triennial required in March 2, 2007, despite strong indications that Student was not making academic progress in several areas, notably reading, written expression and math skills. *Jt. Exhibits 1,2,3,4, Exhibit 1; TR 612, 980-981*

39. Student has been diagnosed with dyslexia or showing characteristics of dyslexia by independent evaluators (Speech/Language, neuropsychologist and educational diagnostician),

requiring an intensive and differentiated scientific-based reading program and S/L services. *Exhibit 6; TR 210, 516*

40. The most critical and informative of the IEEs is the educational evaluation performed by Julianne Glinski, an educational diagnostician who impressed this DPHO as an extremely credible and knowledgeable expert, whose diagnoses and recommendations commend adoption. *Exhibit 28; Testimony of JG, TR 491-607*

Appropriateness of Student's Educational Plan

41. The same modifications and accommodations used in Student's previous school in 2004 (Finding #30, above) are reflected in all of Student's IEPs developed at her present school. *Joint Exhibits 1, 2, 3, 4; Exhibit 5.*

42. Student's IEPs in the relevant time period document very little progress, if any, in Student's academic performance. In fact, PLPs in two years are identical (including misspellings) carried over word-for-word to subsequent IEPs, indicating no measurable gains for the year. *Jt. Exhibits 1-4, Exhibit 40; TR 280-283, 535, 537-539, 547*

43. Changes in Student's schedule were made in both the 2004-2005 and 2005-2006 school years that are not reflected in Student's IEPs. One significant schedule change (placing Student in the general education classroom more than 50% of the school day) was made in September, 2005 by the principal, unilaterally as an administrative decision to foster inclusion and without team input, to be ratified at a later date by the IEP team on November 7, 2005 (the principal's statements notwithstanding). *Jt. Exhibits 3, 4, p. 15, Exhibit G; TR 242, 246, 263-265, 389-397*, 677, *but cf. 1097-1100*

44. In the 2006-2007 school year Student progressed from the 3rd grade to the 5th

grade so that she could attend school with age appropriate peers (having been retained in 2nd grade). *TR 379-388*

45. The IEP teams meeting in 2004-2005, 2005-2006 and 2006-2007 did not discuss or make any determination whether Student was eligible for ESY or whether an Assistive Technology (AT) evaluation was appropriate for Student. *TR 253-255, 274-275, 481, 990*

46. Parent requested a Physical Therapy (PT) evaluation in 2005, a request that was corroborated by one member of the IEP team. A recent independent PT assessment indicates that Student would benefit from PT services. *Exhibits 14, 30, 33: TR 803, 1013-1014, 1027-1028*

47. The IEP team discussed tutoring as a means of providing educational services to Student while she was absent from school, but never acted upon this as a means of dealing with Student's medical absences. *TR 318, 351, 361*

48. Student may require a behavior assessment and social work services in the form of direct services *TR 336-338, 364-365, 481-482*

49. In addition to the S/L services provided by Medicaid and the one hour per week provided by the LEA, Student could benefit from additional S/L services. *TR 213-217, 220-221*

50. As of March, 2006, in addition to reading programs used in her regular education class (Success, Soar to Success), Student also accessed a reading intervention program in her special education classroom (Reading Mastery). *TR 376*

51. While MC, Student's special education teacher for grades 2 and 3, stated she had concerns about Student's educational program with respect to the exceptionality designation of OHI exclusively and concerns about the related services provided to Student, she never voiced these concerns in an IEP meeting even though she was Student's case manager and, as such, was

responsible for documentation of IEP discussions and actions. She noticed that Student made some academic progress but mostly improved her social skills while in her classroom. *TR 430-449*

52. Although MC believed it to be important, Specific Learning Disability (SLD) has never been identified on Student's IEPs as a exceptionality. *TR 309, 606*

53. District's elementary reading programs, while scientifically-based, were not utilized consistently or effectively for the special education students they were intended to serve. *TR 452-457*

54. Student's IEPs had the same goals and objectives for three years without revision because Student had failed to master them. *TR 462-463*

55. Communication between Parent, teachers, and administrative staff was strained at best and often at cross-purposes. *TR 468-470*

56. In an independent evaluation performed by JG, an educational diagnostician and a knowledgeable and credible expert in her field, testing results on the Woodcock-Johnson indicated that while Student had an average IQ (around 100), Student's reading abilities were extremely low and deficient scoring in the 2nd percentile, far below the average range expected for a child with Student's cognitive functioning. Student's math skills were also very low (4th percentile). Broad language skills tested in the 3rd percentile. *Exhibit 28; TR 504-506*

57. The diagnostician's conclusion drawn from Student's responses on the Comprehensive Test of Phonological Processing was that Student demonstrated characteristics of dyslexia, a Specific Learning Disorder (SLD). *TR 516*

58. Student's academic skills progressed from a grade level rating of 1.5 (when Student was in 2nd grade) to 2.1 (when Student was in 5th grade), a five month gain over a three year

period, considerably below her expected achievement based on her IQ level. Evaluation results were consistent among all evaluators. *Jt. Exhibit 5, Exhibits 5, 6, 28*

59. The eligibility of OHI does not adequately address the SLD needs of Student. *TR 534*

60. Goals and objectives developed by the IEP team did not provide an adequate academic program for Student given her cognitive abilities and her learning deficiencies. *TR 539*

61. Student did not show any measurable or substantial gain, or meaningful educational benefit from her IEP goals and objectives. *TR 539*

62. The most recent assessment by JG recommended a reading program that is a systematic, research-based, multisensory, sequential approach to reading and writing skill development, with reading instruction continued through middle school, delivered in a 3:1 student teacher ratio with students of the same skill level. *TR 541-542, 547-549, 550*

63. In addition to Reading Mastery core curriculum differentiated instruction (Tier One Intervention), Student needs and would likely benefit from an additional layer of instruction in the 3:1 ratio daily for 30 minutes (Tier II Intervention) each day. Level of words should be specifically addressed as part of any future IEPs. *TR 551-552, 554, 574*

64. JG also recommended a referral for an AT assessment to assist Student with her very low writing skills, as well as a S/L evaluation. *TR 556,* 576

65. JG further recommended that Student's learning deficiencies in the area of math be addressed by daily instruction for one hour each day on a 3:1 ratio. *TR 564*

66. According to this expert, compensatory education in all areas could be provided with three hours daily of Extended School Year (ESY) for ten weeks during the summer. *TR 569*

67. All of the above recommendations of the educational diagnostician are not designed to provide optimal educational opportunity but to provide FAPE for this Student. *TR 607*

68. Student's absenteeism is a contributing factor in her low academic achievement, but not the determining factor. *TR 594*

69. Retention is not recommended. *TR 602-604*

70. Student received OT services in ESY in the summer of 2006 in addition to OT services provided during the previous school year. Student continues to require OT services and would benefit from compensatory OT services during the summer months. *Jt. Exhibit 7;TR 644*

71. Parent objected to the therapist providing OT services pursuant to Student's IEPs, and District agreed to replace him. Student is not receiving OT services as of the date of the hearing and is entitled to receive compensatory OT services (which District acknowledges). *Jt. Exhibits 3, 8; TR 691-695, 986-970*

72. Student's health problems often dominated discussion topics at IEP meetings. As a result Student's educational program was secondary and often deferred. *Jt. Exhibit 3; TR 695-696; 973-974*

73. The IEPs of May 24 and August 18, 2006 were "tabled." By letter dated November 10, 2006, Parent revoked the IEP dated October 4, 2006, which District contends finalized the August 18, 2006 IEP. District did not schedule another IEP meeting in the 2006-2007 school year. *Jt. Exhibits 1, 2, 4, Exhibits P, Q, 34, 37; TR 315, 718-721,782, 828-831, 963-964, 1024*

74. The Director of Special Education, CL, as well as several teachers, did not know which IEP was operable. *TR 1020-1022*

75. The last operable IEP is dated February 22, 2006. *Jt. Exhibit 2, Exhibit 34; TR 886-889, 959-962*

76. There is no annual IEP in place for the 2006-2007 school year due to actions taken by both Parent and District.

77. As a result of the February 22, 2006 IEP meeting, Student was placed in the special education classroom all day, except for activities, for the balance of the 2005-2006 school year. Her IEP stating that she would receive special education services 16 hours a week is erroneous. *Jt. Exhibit 2; TR 714-715*

78. In the 2006-2007 school year Student has been served in a general education placement for 20 hours per week and a special education classroom for 10 hours per week.

79. Based upon the testing and evaluation results obtained by Parent in IEEs, Student received little to no educational benefit while in attendance at the elementary school, particularly in the general education classroom, except perhaps for improved social skills (District's not very credible claims to the contrary). *TR 700-703*

Least Restrictive Environment

80. During the 2004-2005 school year Student at times ate in the special educational classroom or fifteen minutes earlier than other students in the school cafeteria. While Student was included in Wednesday afternoon activities available to the general education students, she was not included in activities scheduled during the times she was assigned to the special education resource room, despite her IEP which specified participation in all general education activities. *Jt. Exhibit 3; TR 287, 302-305, 422-425, 472-473, 705-707*

81. After the August 18, 2006 IEP meeting Student participated in all extracurricular

activities. *Exhibit 20; TR 737*

82. District's position is that Student may be well-served by a homebound program, which is the most restrictive environment. *TR 977*

83. It is not clear from the record whether IEP teams considered LRE based upon Student's unique educational needs or upon an administrative policy of inclusion.

Access to Records; Parent Participation

84. Parent and her attorney had difficulty in obtaining educational records in possession of District. *Exhibit 39*

85. Parent was a very active participant in Student's educational process, notwithstanding referrals made to the truancy officer and CYFD, failure to evaluate properly, and the deficiencies in Student's IEPs.

CONCLUSIONS OF LAW

1. The DPHO has jurisdiction over this matter pursuant to the Individuals with Disabilities Improvement Act (IDEA 2004), *20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006),* and the New Mexico Special Education Regulations, *6.31.2.13(I) NMAC (2005).*

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

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

4. Parent bears the burden of proving that Student's IEPs were not reasonably calculated to confer educational benefit by a preponderance of the evidence and that Student has

been denied FAPE. *Schaffer v. Weast, 126 S. Ct. 528 (2005), 44 IDELR 150; Johnson v. Independent School Dist. No. 4 of Bixby, 921 F. 2d 1022 (10th Cir. 1990).*

5. The applicable time limit under the Statute of Limitations for IDEA actions is two years from date of filing the request for due process, in this case from December 5, 2004.

6. The DPHO has no jurisdiction over claims asserted by Parent under the Americans with Disabilities Act or 42 U.S.C. § 1983.

7. Student is eligible to receive special education and related services under IDEA as Other Health Impaired (OHI) and Specific Learning Disability (SLD). *34 CFR § 300.8(a) and (b)(9) and (10).*

8. Student's health plans were internally inconsistent, subject to several interpretations and not uniformly implemented by staff.

9. Access to medical records is essential in order to devise a complete and adequate health plan for Student.

10. In order for Student to benefit from her academic program, an informed and consistent, updated health plan (IHP) needs to be in place.

11. Student's IEPs were inadequate in that they copied goals and objectives from previous IEPs *verbatim*, did not reflect actual levels of performance, did not show progress towards objectives, and, in general, fell far short of the criteria established by *34 CFR § 300.324; 20 U.S.C. § 1414(d)(1)(A)(i)(I) and (II)(2004)*

12. Student's IEPs were not implemented. *Fisher v. Stafford Tp. Bd.of Educ.*, 2007 WL 674304 (D. N.J. 2007); *State of Hawaii v. Cari Rae S.*, 158 F.Supp. 2d 1190 (D. Hawaii 2001)

13. The inadequacy of Student's IEPs is a procedural denial of FAPE. *34 CFR §*

300.320

14. District denied Student FAPE by failing to place her in the LRE for lunch and extracurricular activities enjoyed by general education students, contrary to her IEP.

15. Student's medical condition does not preclude her from attending school in the LRE, allocating her educational program between the general education (with appropriate modifications and accommodations) and the special education program.

16. Under IDEA a student's educational placement must reflect unique and individual needs and not an administrative policy.

17. Student has been diagnosed with SLD, in addition to her special education eligibility as OHI, which must be addressed in future IEPs. *Bd.of Educ.of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd.of Educ., 21 F. Supp. 2d 862 (N.D. Ill. 1998)*

18. District has failed to properly evaluate Student's educational needs. The failure to evaluate is a substantive denial of FAPE. *Id.*

19. In order to receive meaningful educational benefit Student requires an educational program which will take into consideration her absences resulting from her medical condition, providing her with the opportunity to work at home.

20. Parent failed to prove by a preponderance of the evidence that District's referrals for truancy and educational neglect or the defects in Student's IEPs negatively impacted Parent's opportunity to meaningfully participate in the educational process.

21. Student has not derived educational benefit consistent with the criteria established in the *Rowley* decision. *Bd. of Educ. of the Hendrick Hudson Sch. Dist. v.. Rowley*, 458 U.S. 176 (1982)

22. Parent has proved by a preponderance of the evidence that Student was not properly evaluated, and did not receive meaningful educational benefit from her numerous but defective IEPs, resulting in a denial of FAPE.

23. Student is entitled to an award of compensatory education.

DISCUSSION

Individual Health Plan

District is correct in its assertion that neither IDEA 2004, state, and federal regulations, require an LEA to design or implement an IHP, nor is there a standard to follow. District is incorrect if it is asserting that an IHP is not an element of FAPE, however. IDEA has always recognized special education eligibility based upon chronic or acute health conditions – *Other Health Impairment, 34 CFR § 300.8(c)(9).* Student's eligibility as OHI is not at issue here; neither is the fact that Student cannot attend school without some medical assistance for her condition. In cases where a Student cannot access the educational system without a health plan, as in the instant case and in the cases of medically fragile children, an IHP is integral to the provision of FAPE.

IDEA (and its predecessor EHA) has long recognized that medical services may be provided to children as a related service in order for the child to receive FAPE. As Chief Justice Burger writing for the Supreme Court stated in <u>*Irving Independent School District v. Tatro*</u>, *555 IDELR 511 (1984):*.

[redacted][2]

The Court went on to conclude that "supportive services" includes CIC and nursing assistance or other qualified person (not a physician) as a related service necessary for a child to derive educational benefit and receive FAPE.

"A child who is medically fragile and needs school health services or school nurse services in order to receive FAPE must be provided such services, as indicated in the child's IEP." *Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46574 (August 14, 2006).* The formalization of that requirement is a health plan, as courts obviously have recognized. *Henderson County (NC) Public Schools, 34 IDELR 43 (OCR 2004), Maine Sch. Admin. Dist. #25 20 IDELR 1354 (OCR 1993).* The New Mexico Public Education Department in its

[2] CIC is "clean intermittent catheterization." [redacted]:

[redacted]

The present IDEA definition, recognizing the *Tatro* decision, expands upon the earlier definition: "Related services also include school nurse services, social work services in schools, and parent counseling and training." *34 CFR § 300.34(a).*

instructional manual to LEAs has adopted the development of an IHP as part of the IEP process, even indicating a place to note on the IEP form whether an "individualized health plan or other school health services as a related service" is deemed necessary for a child to receive educational benefit from an IEP. *New Mexico State Department of Education Technical Assistance Manual: Developing Quality IEPs, p. 56.*

In this case the IHP devised by the school nurse in consultation with one of Student's doctors (always with parental control and oversight), left much to be desired in terms of Student's diabetes management in the educational setting. There was considerable confusion reflected in the record regarding the correct health plan or if there was a health plan in existence at all, proscribed and amount of foods, times for sugar testing, food intake logs, and calls to Parent, to indicate that staff training on the contents and administration of the health plan presently in place has been inadequate to confer FAPE. The record also indicates an expert-designed health plan that would be consistently followed, and comprehensive staff training and administration of this health plan, is essential in order for Student to receive FAPE in the educational setting.

Evaluations/Identification

Evaluations are critical to the determination of how a student's disabilities affect academic performance and what services must be provided to meet a child's unique educational needs. *Portland Sch. Dist. No. 13, 33 IDELR 143 (SEA Ore. 1998)*; *Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F. 3d 755 (6th Cir. 2001).* The purpose of an educational evaluation is to determine eligibility and to provide sufficient information to the IEP team so it can construct an appropriate IEP. It is essential for the IEP team to consider all diagnoses a child might have, not just a single eligibility category. *Bd.of Educ. of Oak Park, op .cit.; Grapevine v. Colleyville Indep. Sch.*

Dist., 28 IDELR 1276 (Tex. SEA 1998). Failure to evaluate is a substantive denial of FAPE. *Bd.of Educ.of Oak Park, op. cit.*[denial of FAPE where district failed to evaluate child for SLD]; *Amanda J. v. Clark Co. Sch. Dist., 260 F. 3d 1160 (9th Cir. 2001)*[denial of FAPE where school district failed to disclose to parents that their child had been identified as possibly having autism and was in need of further evaluation]; *Gerstmyer v. Howard County Public Schools, 20 IDELR 1327 (1994)* [failure to timely evaluate and develop IEP for child with SLD denied child FAPE]; *Azle Indep. Sch. Dist., 26 IDELR 931 (Tex. 1997)*[denial of FAPE where district failed to assess the child for autism].

District's position was that Student would receive the triennial re-evaluation when due (March 2, 2007) and that the evaluation performed in another LEA some three years earlier (even though District only had an incomplete copy of same) would suffice to direct Student's IEPs while attending District's elementary school. Even with one independent neuropsychogical evaluation that clearly pointed to a reading, written expression, and math disorder in its possession, District did not revise Student's educational program to reflect any of the recommendations. The cases addressing the use of independent evaluations have held that nothing in IDEA or its implementing regulations require the LEA to conduct the evaluation or to corroborate IEE results before using them. *Hudson v. Wilson, 828 F. 2d 1059 (4th Cir. 1987); Wirta v. District of Columbia, 859 F. Supp.1 (D.D.C. 1994).*

The LEA has a duty under IDEA to reevaluate a student sooner than the required three years if that student has not made significant progress and may be suspected of having a specific learning disability (SLD), or if the LEA determines that "the educational or related services needs, including improved academic achievement and functional performance of the child, warrants a reevaluation," or if requested by a parent or a teacher. *34 CFR § 300.309(c)(1)(2); 34 CFR §*

300.301. The record indicates that Parent made considerable efforts to have Student reevaluated by means of IEEs. The record also indicates that District did not make any effort to do so, even when on notice that Student was experiencing *de minimus* educational progress. Student has been denied FAPE as a result of District's failure to act.

Appropriateness of IEPs

True, the primary and sometimes the only concern of IEP teams was Student's health plan while she was in attendance in the LEA. Parent shares some of the responsibility for the shift in focus to the health plan at the expense of the educational program. If medical information is not shared it is next to impossible for a school to devise a health plan satisfactory to all stakeholders.

While numerous IEP meetings were conducted, there were no revisions or amendments to Student's IEPs that were meaningful in terms of Student's goals and objectives. Levels of performance were simply repeated from year to year. A fifth-grader with average cognitive functioning reading at beginning second grade level should have been a big red flag. While Student's frequent absences have contributed in no small measure to Student's lack of academic achievement, there is no excuse for *verbatim* repetition of goals and objectives and all other informational parts of an IEP. *Escambia County Bd.of Educ. v. Benton, 44 IDELR 272 (2005)*[lack of information about present levels, meaningful, measurable goals and objectives, and dates for mastery resulted in a denial of FAPE]. By endorsing the same IEPs year after year, District has admitted zero progress without investigating the reason.

But that is not all that is defective in District's IEPs. While the most notable problem is that IEP mandates existed on paper only and were not followed, there were other deficiencies: related services in the form of OT was not provided; a psychological evaluation was never

performed; general education extracurricular activities were not always available to Student; the hours of Student's placement in the general or special education environment shifted back and forth several times without IEP team approval, all of which resulted in a denial of FAPE. Finally, the Director of Special Education could not say which IEP was in effect, not that it mattered under the facts of the case.

Educational Benefit

The standard for FAPE as enunciated in *Bd. of Educ. of the Hendrick Hudson Sch. Dist. v.. Rowley, 458 U.S. 176 (1982)* is defined as "the basis floor of educational opportunity," which consists of "access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *458 U.S. at 176, 201.* A child has received FAPE if a LEA has complied with the procedural requirements of IDEA and if the IEP was reasonably calculated to enable the child with disabilities to receive meaningful educational benefit. *Id*. at ¶65.

The provision of FAPE is accomplished through the IEP. *20 U.S.C. § 1414(d).* The standard as stated in *Houston Indep. Sch. Dist. v. Bobby R., 200 F. 3rd 341* (5th Cir. 2000) is that an IEP:

> ... need not be the best possible one, nor one that will maximize the child's educational potential; rather it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit [a child] to benefit from the instruction. In other words, the IDEA guarantees only a basic floor of opportunity for every disabled child, consisting of specialize instruction and related services which are individually designed to provide educational benefit. Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimus; rather, an IEP must be likely to produce progress, not regression or trivial educational achievement. In short, the educational benefit that an IEP is

designed to achieve must be meaningful. (Internal citations omitted)

The standard established in *Rowley* is lost when a school district fails to adequately evaluate and identify a child's educational needs and further fails to implement its own seriously defective IEPs. Student here did not receive the basic floor of opportunity and neither did she receive educational benefit sufficient to overcome the conclusion that she was denied FAPE.

Access to Records/Parental Participation

Parent and her attorney have been denied access to records due to the delay in providing records and the inability to locate some teacher records showing present levels of performance. Parent revoked the IEPs designed to cover the 2006-2007 school year (IEP of October 4, 2006 and its predecessors), leaving no IEP in place as required by IDEA. *20 U.S.C. § 1414(d)(2)(A).* To the extent that there is no valid IEP in place for the 2006-2007 school year, Parent has been denied participation, however, she and District equally share responsibility for this violation of the statutory requirement that an IEP be in place at the beginning of the school year.

ORDER

WHEREFORE IT IS HEREBY ORDERED THAT:

1. The Individual Health Plan ordered by the DPHO on March 4, 2007 (and completed on May 1, 2007) is adopted by the DPHO and incorporated herein by reference. All provisions of the "Diabetes Medical Management Plan"/IHP developed by Ms. Montano of LifeCare Health Services shall be followed by District and Parent. Any amendments shall be in writing, by

agreement of the parties, and with the express approval of Ms. Montano.

2. Student is entitled to receive compensatory services for OT services not provided in the 2006-2007 school year equal to one hour for each week the service was not provided, in addition to OT services in her IEP, such therapy to be provided as soon as a therapist is available (including during the summer months).

3. Student is entitled to receive compensatory education from April, 2006 to the present (calculated from the date of the first neuropsychological IEE putting District on notice plus sixty days – a reasonable time to review and develop an appropriate IEP or seek further evaluation), at the rate of three hours per week for every full and/or partial regular session school week within those dates. Compensatory education shall be in the areas of math and reading and shall be delivered in accordance with the recommendations of the educational diagnostician, Julianne Glinski.

4. District shall immediately commence a reading program for Student to be effected in Extended School Year (ESY) in the summer of 2007 and continuing through middle school, pursuant to the recommendations of Ms. Glinski (i.e., a reading program that is a systematic, research-based, multisensory, sequential approach to reading and writing skill development, with reading instruction continued through middle school, delivered in a 3:1 student teacher ratio with students of the same skill level utilizing Tier I and Tier II programs). Student's reading program shall also be made available to Student when confined to home for illness for two days or more, as well as during the summer months.

5. An IEP team including Julianne Glinski, the psychologist who evaluated Student pursuant to the DPHO Order entered March 4, 2007, and all staff members of the middle school who will be responsible for effecting Student's middle school educational program, shall be convened in a

facilitated MDT/ IEP team meeting as early as possible prior to the beginning of the 2007-2008 school year. The psychological evaluation shall be completed prior to the IEP meeting. District shall pay the attendance costs for the educational diagnostician and the psychologist. Parent shall choose the facilitator from the NMPED list of qualified facilitors.

6. The IEP team shall consider all IEEs and recommendations, shall address Student's eligibility determinations of specific learning disorder (SLD) and deficiencies in reading, math and written expression, and devise an IEP appropriate for Student's continuing educational needs in the middle school setting.

7. The IEP team shall provide for an AT evaluation and provide services within four weeks of the date the evaluation is completed, if services are recommended.

8. The IEP team shall review the recommendations of the physical therapist evaluating Student and provide PT services, as needed.

9. The IEP team shall contract with a speech/language therapist to provide S/L services to Student, as recommended by the IEE.

10. The IEP team shall address an educational program for Student to be implemented during the times she is absent from school for medical reasons. This program may consist of ESY, homebound services, homework assignments, and tutoring, or any combination of the above, as determined by the IEP team.

11. The IEP team shall consider a behavioral assessment and social work services, as necessary.

12. The IEP shall be reviewed every four months in the 2007-2008 school year and revised by the IEP team as appropriate.

13. Continuing health concerns shall be addressed at IHP staff meetings separate from the IEP meetings, in consultation with Ms. Montano at times initiated by Ms. Montano.

14. District shall comply with IDEA, its regulations and state regulations in the development of all of Student's future IEPs.

Appeal

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to *20 U.S.C § 1415(I)* [illegible] *34 CFR § 300.516.* [illegible] (30) [illegible] *6.31.2.13I(25) NMAC.*

Entered: May 7, 2007

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Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

[illegible] 7[illegible], 2007: Debra Poulin, Esq., 1225 South St. St. Francis Drive, Suite B, Santa Fe, New Mexico 87505; [illegible], [illegible].; [illegible], [illegible]., Cuddy, Kennedy, Albetta & Ives, LLP, P. O. Box 4160, Santa Fe, New Mexico 87502-4160; [illegible], 300 [illegible], [illegible] 87501-2786.

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