

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT  
OFFICE OF SPECIAL EDUCATION**

**PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER**

**Case Number: NMPED DPH 0607-14**

**FINAL DECISION**

*Statement of the Case*

Parent filed a request for due process (“Request”) with the New Mexico Public Education Department on January 16, 2007, alleging that Student, a tenth grader, had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEIA”) 20 U.S.C. §§ 1400 et seq. (which took effect July 1, 2005) and implementing state (6.31.2 et seq. NMAC, effective July 29, 2005) and federal (34 CFR Part 300, effective August 14, 2006) regulations. The Request specifically contends the District failed to timely evaluate and identify Student as eligible for special education and, once eligible, failed to develop and implement an adequate Individual Education Program (“IEP”).

Parent’s Request seeks an order requiring the District to conduct a comprehensive, independent, diagnostic evaluation (“IEE”) of Student, however, there was no evidence offered at the hearing indicating a need for an IEE and no mention of an IEE could be found in Parent’s Memorandum of Law or Proposed Supplemental Findings of Fact. Consequently, the request for an IEE is hereby deemed abandoned.

The Request also asks that the District be ordered to develop an individual health plan and an IEP that addresses all of Student’s areas of need, in particular, the provision of instruction when Student is unable to attend school. Parent also seeks compensatory education consisting of one-on-one instruction and provision of related services. At closing, Parent’s attorney expanded on these requests and added a request for a facilitated IEP.

District timely denied Parent's allegations, generally, and contended its evaluation and identification of Student as eligible for special education was timely; that Student's IEPs were reasonably calculated to confer educational benefit and asked that all of Parent's claims be dismissed.

The procedural history of this Request is otherwise not remarkable or substantive and need not be related further. The due process hearing began on March 26, 2007, and continued through March 28. Parent and Student were present throughout and represented by counsel. The District's Director of Special Education was present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Parent were identified by numbers. The District exhibits were identified by single letters. Joint exhibits were identified by double letters. Page numbers on all exhibits refer to the hand-written or typed pagination in the lower right-hand corner.

The DPHO, having heard the oral testimony of all witnesses, having reviewed the exhibits admitted as evidence, having considered all argument and citations of authority submitted and the parties' requested findings of fact and conclusions of law and being otherwise advised in the premises, makes the following findings of fact, conclusions of law and orders.

### *Statement of Issues*

After extended discussion at the pre-hearing conference of the parties' claims and defenses, the DPHO identified the following specific issues to be determined at the due process hearing in the Summary dated March 6, 2007.

1. Whether District timely evaluated Student within the statutory period and, if not, whether such failure thereby deprived Student of FAPE.
2. Whether District timely determined Student's eligibility for special education services as a student with disabilities.
3. Whether District provided Student with an adequate IEP, including documentation of present levels of performance, identification of goals and objectives and provision of services

adequate to meet Student's educational needs, specifically Student's need to receive services during, or to offset the impact of, Student's absences due to her disabilities.

4. Whether District is required to provide intermittent homebound services and, if so, whether District adequately met that obligation.
5. Whether the special education and related services called for in Student's IEP were adequately delivered by the District, in particular, monitoring by a special education teacher, social work and psychological services, adaptive physical education and accommodations.
6. Whether District was required to develop an Individualized Health Plan for Student and, if so, whether District failed to do so.

### ***Findings of Fact***

The parties submitted requested findings of fact and conclusions of law after the hearing. To the extent that such requested findings are inconsistent with or contradict the findings and conclusions below, they are denied. If requested findings and conclusions are not addressed in the findings and conclusions that follow, they were found to be not applicable to the issues determined in these proceedings or contradicted or not supported by the evidence presented at the hearing. All conclusions of law implicit in the following findings of fact are to be considered the conclusions of law of this DPHO. References throughout this decision to exhibits admitted into evidence at the hearing are indicated by "Exh. \_\_\_\_," references to pages in the transcript of the hearing by "Tr. \_\_\_\_" and references to the parties Joint Statement of Stipulated Facts (Tab No. 15, Record Proper) by "Stip \_\_\_\_."

### **Personal History Facts**

1. Student was born July 19, 1991, and is 15 years old at the time of this hearing, attending tenth grade at WLVHS, District's high school, for the 2006-2007 school year. Exh. KK.
2. Since approximately fifth grade, Student has born the diagnoses of asthma and Type II diabetes. Stip. 2; Tr. 386, 393-394.

3. More recently, Student has also been diagnosed with a major depressive disorder and posttraumatic stress disorder. Stip. 3; Exhs. 2 and HH.
4. Student's asthma is in the moderate category and is "fairly well" controlled. She requires medication for both control and rescue and can expect three to five exacerbations a year. She may experience less exercise tolerance, fatigue and cough. She is more susceptible to other illnesses. Tr. 386-388; 423-424.
5. Student's diabetes requires maintenance insulin injections at least once per day while at school. Student must test her blood sugar level before administering the insulin and she is able to perform these tasks without assistance.
6. Student's diabetes is not well controlled and she can experience both high and low blood sugars during the school day. Symptoms associated with high blood sugar are fatigue and nausea. Student also describes feeling sleepy and disoriented. Treatment for high blood sugars requires testing to confirm and administration of insulin therapy by injection, accordingly. Low blood sugars cause paleness, diaphoresis, dizziness and can render the patient unconscious. Treatment for low blood sugars also requires testing to confirm and glucose or sugar therapy, specifically, immediate access to orange juice. Tr. 357, 395-398.
7. Effective management of Student's diabetes in the school setting requires appropriate diet, testing for blood sugars, administration of therapies and activity. Tr. 394-395.
8. Student may not be able to return to class immediately after experiencing an episode of high or low blood sugars but Student's primary health care provider would expect that, in most cases, she could return after a relatively brief period of recuperation. Tr, 367-368, 397-398.
9. Student has been under the care of a privately engaged psychologist since May 2004 for the diagnoses and treatment, through psychotherapy, of her psychological disorders. The Private Psychologist prepared a detailed report concerning her diagnosis and treatment of Student entitled Psychological Services Report dated January 3, 2005 ("Report"). Exh. 2; Tr. 805-806.

10. The psychological disorders manifest in Student with symptoms of fear; hyper vigilance and strong/exaggerated startle response; inability to focus; social anxiety; fear of being in the school environment among staff and peers; and inability to cope with the classroom environment. Exh. 2; Tr. 818.

### **School History Facts**

11. Student has attended District schools since at least the fifth grade when she was placed on a Section 504 plan. She remained on Section 504 plans through the end of ninth grade for primarily asthma and diabetes. Stips. 6 and 7.
12. Student's Section 504 plans for the seventh and eighth grades provided that she was on "homebound status." Stip. 8; Exh. BB.
13. Homebound status consisted only of teachers compiling assignments that Parent picked up for Student to complete at home, without any instructional assistance, and return by the designated deadlines. Exh. BB; Tr. 338, 535-536; 619, 630.
14. By the third nine-weeks during eighth grade, Student was failing most of her classes on homebound status as described above. Exhs. CC and 4.
15. To help Student pass eighth grade, the Section 504 plan developed on April 20, 2005, added an accommodation that Student would receive tutoring in an after school program; however, that service was never delivered. Exh. FF; Tr. 538-539, 638-639.
16. Student also had to, and did, go to summer school to make up credits before she could be promoted to ninth grade. Exh. FF; 544-545.
17. Parent was confused about Student's educational program as Student started ninth grade and she did not know whether she wanted Student homebound or to attend school. Tr. 547-548.
18. The report from the Section 504 meeting held August 22, 2005, signed by Parent, clearly contemplates Student attending school by providing modifications allowing her to use the phone and leave class as necessary. Exh. GG, p. 1.

19. Student was enrolled in a full schedule of classes for the first semester of ninth grade which started by August 26, 2005, but by September 13, 2005, she had attended only two days. Exh. 7.
20. On September 1, 2005, Parent requested homework which was compiled by the HS Counselor. HS Counselor at that time requested a doctor's note for Student's absences. Parent promised a note the following week but none was received as of September 13, 2005. Exhs. B and 7.
21. Sometime shortly after September 13, Student was referred to truancy for the excessive, unexcused absences. A meeting between Parent, the Principal, the truancy officer and HS Counselor concerning the truancy resulted in Principal persuading Parent to have Student come to school on a modified schedule of only three periods consisting of English, peer tutoring (which gave her credit for Spanish I) and office aide in the Library. Exhs. QQ, pp. 1-2 and C; Tr. 540-542, 547-548, 696-700.
22. In response to a phone call from Parent requesting that Student be tested for special education, HS Counselor immediately prepared a form Prior Notice and Consent for Comprehensive Evaluation on November 14, 2005. Due solely to District procedural requirements, the consent packet was not complete until January 11, 2006. Tr. 708-712, 745-747; Exh. 18.
23. In the spring semester of ninth grade, Student was enrolled in a full schedule of freshman classes with modifications as indicated in her Section 504 plan. Exhs. GG and QQ, p. 3.
24. Student underwent a Multidisciplinary Evaluation in February and March 2006. Exh. II.
25. A psychological evaluation was conducted in April 2006. Exh. HH.
26. Student was found to be eligible for special education and related services in May 2006 as emotionally disturbed ("ED") and other health impaired ("OHI"). Exhs. JJ and KK.
27. An IEP, developed on May 22, 2006, ("May IEP") directed the special education and related services Student was to receive for the remainder of ninth grade and tenth grade. Exh. KK.
28. Student enrolled for a full schedule of classes for both semesters of tenth grade. Exh. QQ, p. 4.
29. Significant absenteeism continued during tenth grade. Exhs. NN and QQ, p. 4.

30. Student's teachers generally report that Student is capable and does well when she is in class.
31. The May IEP was amended on November 15, 2006, ("Fall IEP") at Parent's request. Exhs. 25 and LL.

### **Issues 1 and 2 – Timeliness of Evaluation and Identification**

32. Parent presented the Report to the MS Counselor and Student's Section 504 committee meeting on January 12, 2005. Exh. 2 and BB; Tr. 530-533.
33. The Section 504 team discussed the Report at length and incorporated language from the Report directly into Student's Section 504 plan. "Check into Spec. Ed. referral" was listed as an accommodation "the team recommends as necessary to ensure the child's access to all district programs." Exh. BB.
34. The preponderance of the evidence indicates that either Parent requested that Student be referred for special education or one or more members of the January 12, 2005, Section 504 team recommended the referral on that date.
35. The SE Director did not receive a referral on Student's behalf until November 2005. Tr. 57-58.
36. Although the SE Director acknowledges being aware of the existence of the Report, she testified that her office has never received a copy of the Report for Student's files. Tr. 59-60.
37. The SE Director attended the April 20, 2005, Section 504 meeting. Exh. FF; Tr. 50-51
38. Parent asked the SE Director to use the Report as the basis for identifying Student as eligible for special education services and the SE Director refused. Tr. 61-63, 539-540 and 618.
39. Parent also asked the SE Director about the status of Student's referral. Tr. 549-551.
40. Student was ultimately referred for evaluation and found to be eligible for services over a year later on the basis of the same information that was available to the District in January 2005.
41. The School Psychologist who ultimately performed the Psychological Evaluation, recalled "the issue" of psychological testing being informally raised "several" times in 2004-2005. Exh. HH, p. 1; Tr. 174.

42. The School Psychologist, who evaluated Student to meet the criteria of ED, found the Report to be sufficient to identify Student as ED. Tr. 176-178. He went on to say, "I would be very surprised if the 504 committee got ahold of this report and didn't alert the special ed director. I would be very surprised." Tr. 240-241.
43. On January 17, 2005, District sent Parent notice that Student was failing two classes. Exh. CC.
44. The content of the Report, in and of itself, constituted a reasonable basis to suspect that Student had a disability that required special education and related services in January 2005. Furthermore, the information in the Report was coupled with Student's long-term attendance problems due to her medical conditions that were the subject of District Section 504 plans since fifth grade and District's notice to Parent of Student's failing grades under the Section 504 plan in effect at that time.
45. The MS Counselor responsible for the implementation of Student's Section 504 plan, without credibility, denied that Parent ever requested a special education referral and claimed the Section 504 team considered the Report only as documentation to justify absences. Tr. 617-618.
46. Although the MS Counselor concedes Exhibit BB, Student's Section 504 Plan from January 12, 2005, is written by her, she has no idea why the Plan includes a recommendation to check into a special education referral. Tr. 649.
47. District did not begin an evaluation of Student until February 2006, more than a year after a reasonable basis to suspect that Student had a disability in need of special education and related services was readily apparent. Exh. II.
48. District did not determine Student's eligibility or provide Student with an IEP until May 22, 2006. Exhs. JJ and KK.
49. A reasonable amount of time to conduct an evaluation is sixty (60) days. 20 U.S.C. § 1414 (a) (1) (C); 34 CFR § 300.301 (c).

50. A reasonable amount of time to develop an IEP after eligibility is determined is thirty (30) days.  
34 CFR § 300.323 (c).
51. Allowing for a reasonable amount of time to conduct an evaluation and develop an IEP, District's failure to timely evaluate and identify Student as eligible for special education and related services deprived Student of FAPE from April 12, 2005, until May 22, 2006.

### **Issue 3 – Adequacy of Student's IEP**

52. No one who could explain Student's medical disabilities to the IEP team was present at either meeting for Student's May or Fall IEPs.
53. The May IEP contains only one brief paragraph identified as a Present Level of Performance ("PLP"). The area of need indicated is "Other: Emotional Issues." It then states, "Student has had difficulties attending classes due to Emotional Disturbance. She is currently failing three classes." Exh. KK, p. 7.
54. The IEP includes no description of Student's disabilities beyond the two eligibility labels (ED and OHI) and a notation "Diabetic" next to OHI on the front page. Exh. KK.
55. The IEP has no description of Student's medical conditions or explanation of the unique health care needs imposed due to her medical conditions or explanation of how they impact Student's ability to access the general education curriculum.
56. There is no explanation of Student's psychological conditions or how they impact Student's ability to access the general education curriculum.
57. There is no mention of Student's low scores in math skills on educational diagnostic evaluation.  
Exh. II.
58. The PLP described above falls short of the regulatory prescription (34 CFR § 300.320(a)(1)) to state how Student's disability affects her involvement and progress in the general education curriculum.

59. The IEP contains Annual Goals and Short-Term Objectives or Benchmarks (“G & O”) for only one area of need designated as “Behavior.” The two goals are “(I) Student will attend school on a regular basis at least 50% of the time. (II) Student will complete and turn in assignments at least 75% of the time.” Exh. KK.
60. No other need areas are identified for G & O in Student’s May IEP.
61. The Instructional Accommodations or Modifications make no mention of any accommodations Student needs to manage her medical conditions at school. Exh. KK, p. 16.
62. Parent requested the Fall IEP and asked the District to develop an emergency plan to address Student’s health needs and to review and confirm the academic modifications required by the IEP. Exhs. 25 and LL; Tr. 569-575.
63. All of Student’s teachers attended the Fall IEP. Exh. LL.
64. While still in violation of the procedural requirements of the Act, the Fall IEP attempts to provide Student’s teachers with some information about Student’s disability and needs.

#### **Issue 4 – Homebound Services**

65. As of the due process hearing in this matter, homebound would not be an appropriate placement for Student. Tr. 137-138, 215-216, 526-527, 825-826, 834-835.
66. The regular classroom with supports and modifications and accommodations is an appropriate placement for Student.
67. Other than the G & O that Student should attend school at least 50% of the time, the May IEP fails to establish any attendance standard or policy that applies to Student and her disability needs. Exh. KK.
68. It is undisputed that Student’s medical conditions result in more frequent absenteeism than occurs among non-disabled peers due to the processes of the diseases themselves and because of increased vulnerability to other illnesses.

69. However, there was evidence scattered throughout the hearing suggesting that not all of Student's absences could be attributed to medical causes.
70. Parent is an elementary school special education teacher with the District. Tr. 530.
71. With notable regularity, Parent has allowed Student to miss school although Student is well enough to and does accompany Parent to her classroom and, on one occasion, to a training seminar. Tr. 139-140; 473-474, 485-487, 561-562, 579.
72. Student has missed school to attend, not only her own out of town doctor appointments, but those of her siblings as well. Tr. 515-516.
73. One of the reasons given for modifying Student's schedule in ninth grade was Parent's report that she could not get Student up in the morning in time to get her to school. Tr. 697-698, 733.
74. Parent's attorney reported at the pre-hearing conference that Student would attend the hearing only as necessary to testify. See Summary at Tab 10 of the Record Proper.
75. Student attended all of the three-day hearing over the objection of District who wanted her to attend class instead, and, notably, against the advice of her Private Psychologist. Tr. 31-32, 843.
76. Student explained that she stays home from school when her blood sugars are low and she feels bad. She will stay home for more than one day, if she cannot get the blood sugar level "back up" the next day. She in fact used, as an example, exactly that condition of low blood sugars occurring on the first day of the hearing. She reported feeling "bad pretty much all night. And then this morning, it was still low." Nevertheless, Student did not absent herself from the hearing. Tr. 521.
77. Student on occasion keeps appointments with her Private Psychologist on days that she has missed school. Tr. 522.
78. Student sometimes does not come to school because she is upset and depressed. Tr. 523.
79. The School Psychologist reports that Student struggles with coming to school due to a host of non-medical factors. Tr. 195-196.

80. The evidence suggests that at least some of Student's absenteeism may be due to behaviors that could be amenable to intervention and modification.
81. A functional behavioral assessment ("FBA") to investigate Student's absenteeism and identify positive intervention strategies would assist Student's IEP team to determine an appropriate attendance policy and services for Student.

### **Issue 5 – Implementation Issues**

82. Student's May IEP sets out a Schedule of Services. The Special Education & Related Services are listed as .5 hours/week each for "Monitoring, Psych, Social Work" to be provided in a segregated location. Exh. KK, pp. 14-15.
83. Psychological services were delivered as required in the IEP. Exh. 17.
84. There was no provision in the IEP that required District to make up psychological counseling sessions missed due to Student's absence and Student did not ask to make up sessions. Tr. 522.
85. There was no explanation in the May IEP of what was meant by "Monitoring" or identification of the person responsible for delivering the service.
86. "Monitoring" is not an identified related service under the IDEIA. 34 CFR § 300.34.
87. SE Teacher assumed that the Monitoring provision was her responsibility and involved typical caseload management tasks, which was consistent with Parent's impression of the service to be provided under "Monitoring." Exh. 28; Tr. 274, 564-565.
88. SE Teacher distributed written notice of Student's special education status and accommodations and modifications to all of Student's teachers in the fall of 2006. Tr. 277-278.
89. When Parent complained about IEP compliance, SE Teacher promptly convened a meeting to amend the May IEP and had all of Student's teachers, as well as other IEP team members, attend. Exh. LL; Tr. 272-274, 279-280, 283-284.
90. SE Teacher intervened to help Student with at least one school project. Tr. 313, 461-462.

91. SE Teacher told Student that she was available to assist Student with any problems or questions during SE Teacher's third period prep time. Student never accepted the invitation to seek assistance. Tr. 313.
92. SE Teacher conducted several grade and attendance scans. Tr. 294-296.
93. SE Teacher was one of the people designated to provide Student assistance if she became ill. Exh. LL.
94. The School Psychologist spoke with SE Teacher about the services he was providing to Student on several occasions. Tr. 198-199.
95. School Psychologist would also intervene to help Student when she questioned whether her accommodations and modifications were being followed. Tr. 195.
96. Parent failed to meet her burden to prove that Student did not substantially receive the services identified as "Monitoring" in the May IEP.
97. There was no evidence of record that the services of a social worker were offered to Student and/or Parent on either a direct or consultative basis at any time.
98. There is insufficient evidence of record for this DPHO to make a determination of what services were intended by the IEP team or what services, if any, are appropriate for Student to meet the requirements of FAPE.
99. Parent failed to meet her burden of showing that the failure to provide Student with social work services deprived Student of FAPE.
100. Student's May IEP included a list of instructional accommodations and modifications to be implemented by Student's teachers. Exh. KK, p. 16. Those accommodations and modifications were modified somewhat by amendment in the Fall IEP. Exh. LL.
101. Teachers received written notice of Student's IEP required accommodations and modifications. Exhs. 20; 29, p. 5 and MM.

102. Student's math teacher for the fall 2006 semester received notification of Student's accommodations and modifications and substantially implemented the provisions. Tr. 771-775.
103. Student's science teacher for the spring 2007 semester received notification of Student's accommodations and modifications and attended Student's 504 meeting to learn more about Student's conditions and is substantially implementing the provisions. Tr. 435-445
104. Both the School Psychologist and Student's Private Psychologist agreed that the instructional accommodations and modifications extended to Student were appropriate and neither had anything to add. Tr. 244-245, 835-838.
105. Parent failed to prove by a preponderance of the evidence that District did not substantially deliver the instructional accommodations and modifications provisions of Student's May IEP.

#### **Issue 6 – Individual Health Plan**

106. Student's May IEP team acknowledged that Student required an individualized health plan or school health services as a related service. The IEP goes on to require that the plan should be attached to the IEP or the services indicated on the Schedule of Services, neither of which was done on the May IEP. Exh. KK, p. 12.
107. The District stipulated that no individualized health plan was developed for Student and no nursing services were provided to Student as a related service. Tr. 28-29.
108. There is no nurse permanently, or even regularly present, on the WLVHS campus. Nursing services are only available to WLVHS students on an as-needed basis or at the middle school campus which is separate and a short distance from the WLVHS campus. Tr. 104.
109. Student occasionally would prefer assistance injecting the insulin in a site other than her stomach but she has not requested the nurse's assistance to do that while a Student at WLVHS. Tr. 491-492.
110. Although WLVHS was designed to have a nurse's office, the space is being used for something else. Consequently, there is no dedicated area for sick or injured children, including Student, to

lie down for a period of recuperation or to wait for nursing, medical, emergency or parental intervention. The only bed or bed-like furniture in the whole school is located in the teachers' lounge and the life skills classroom, both areas intended for regular school functions. Tr. 162-164.

111. The girls' bathrooms at WLVHS are not an appropriate setting for Student to test blood sugar levels and administer insulin. Tr. 201-202, 403-404, 427-428, 831-832.
112. Through her own resources, Student has established a routine of using a room in the library to attend to her diabetic therapy needs and she uses the library whenever she can. Tr. 358-360, 367-368.
113. District has adequately addressed Student's needs for a supply of snacks and a private, secure place to store snacks and medical supplies. Exh. MM; Tr. 283-284, 367-368, 517, 519-520, 769.
114. Student's IEP team has not had sufficient information about Student's medical conditions and resulting needs available to it to lawfully determine appropriate special education and related services. A medical evaluation would provide the needed information.

### ***Conclusions of Law***

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A) (2004).
2. The burden of proof, by a preponderance of the evidence, rests with Parent, the party challenging the IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) 2005.SCT.0000166 VersusLaw.com.
3. This proceeding has complied with all procedural safeguards required by the IDEIA, its implementing regulations, and the New Mexico Special Education Regulations.
4. This decision is timely filed on April 27, 2007, within the extensions granted by the DPHO at the request of the District.
5. Student is qualified and eligible for special education and related services as a child with an emotional disturbance and as other health impaired. 34 CFR § 300.8 (a) and (b)(4) and (9).

6. District failed to timely evaluate and identify Student in January 2005 when District knew or should have known there was a reasonable basis to suspect that Student was a child with a disability in need of special education and related services. 34 CFR § 300.125 (a)(2)(ii) (1999); 34 CFR § 300.111 (c)(1) (2006).
7. District's failure to timely evaluate and identify Student deprived Student of FAPE.
8. Allowing ninety (90) days for a reasonable time to conduct the evaluation, determine eligibility and develop an IEP, Student is entitled to compensatory education for the loss of FAPE from April 12, 2005 to May 22, 2006, at the rate of three hours per week for every full and/or partial regular session school week within those dates. The 2005 summer session is not to be included in this calculation.
9. The compensatory education shall consist of one-on-one instruction from a fully licensed and certified teacher. This compensatory education service must be available to Student during the regular school day as directed by Student's IEP team. The compensatory education service must also be available to Student while confined to home for illness. The compensatory education service must also be available to Student during the summer at Parent's election. Parent must make the election to use the compensatory education service in the summer no later than April 15<sup>th</sup> of each year and provide District with the desired summer schedule at that time. The rate at which the compensatory education hours are expended should be determined by Student's IEP team in consultation with Parent. Any hours that have not been used through no fault of the District's when Student graduates or is no longer eligible for special education will expire without further compensation to Student.
10. Student's May IEP failed to conform to the requirements of the Act and the omissions therein constitute procedural violations of the IDEIA. 34 CFR § 300.320.
11. Parent failed to prove by a preponderance of the evidence that the procedural violations impeded Student's right to a FAPE; significantly impeded Parent's opportunity to participate in the

decision-making process regarding the provision of FAPE to Student; or caused a deprivation of educational benefit. 34 CFR § 300.513 (a)(2).

12. District is ordered to comply with the procedural requirements of the Act in the development of all of Student's future IEPs.
13. To assist in the prevention of future procedural deficiencies, District shall retain the services of a state approved IEP facilitator to assist Student's IEP team with her next annual review.
14. District must also obtain a medical evaluation of Student, pursuant to 34 CFR § 300.34(c)(5), and an individual who can interpret the instructional and related service implications of the medical evaluation results shall be included as a member of Student's next annual review IEP team.
15. District must obtain a functional behavioral assessment of Student's absenteeism and the results of the assessment must be made available to Student's next annual review IEP team
16. Parent failed to prove by a preponderance of the evidence that District did not substantially implement the provisions of Student's IEP or that any failure to do so deprived Student of FAPE.
17. Parent failed to prove by a preponderance of the evidence that the educational program the District actually delivered to Student for the 2006-2007 school year did not confer meaningful educational benefit.

### ***Discussion and Legal Authority***

Parent's claims, arising after January 16, 2005, span the effective dates of both the IDEIA and the Individuals with Disabilities Education Act of 1997 ("IDEA") (the predecessor of IDEIA found at the same codification). For the most part, the relevant provisions of the two Acts are identical or substantially identical, although the numbering may have changed in some instances. Citations in this decision are to the 2004 Act, the 2005 state regulations and the 2006 federal regulations, unless indicated otherwise.

*Issues 1 and 2 - District's Obligation to Evaluate and Place*

Both the IDEIA and its predecessor IDEA, through implementing state regulation 6.31.2.9 (A) NMAC, require that all children residing within the jurisdiction of District are “identified, located and evaluated.” 20 U.S.C. § 1412(a)(3)(A). This imperative includes “Children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade.” 34 CFR § 300.125(a)(2)(ii) (1999); 34 CFR § 300.111(c)(1) (2006). *Dep’t of Educ., State of Hawaii v. Cari Rae S.*, 158 F.Supp.2d 1190 (D, Haw. 2001) 2001.DHI.0000030 VersusLaw.com. Neither the IDEIA, nor its predecessor, IDEA, requires that the District test all children for whom an evaluation is requested. *Pasatiempo v. Aizawa*, 103 F.3d 796 (9<sup>th</sup> C, 1996) 1996.C09.40191 ¶62 VersusLaw.com. Rather, the District is obligated to evaluate when there exists a reasonable basis for suspecting that a student has a disability that requires special education and related services. In the presence of such a suspicion, the District must conduct an evaluation without undue delay. “Therefore, under Part B, an LEA may refuse to conduct an evaluation only if the LEA does not suspect that the child has a disability.” *Letter to Williams*, 20 IDELR 1210 (OSEP 1993).

The period in dispute is the spring semester of the 2004-2005 school year. The preponderance of the evidence, as reflected in the Findings of Fact derived from that evidence under Issues 1 and 2, establishes that Parent presented the District with the Report found in Exhibit 2 from Student’s Private Psychologist that, in the opinion of District’s own School Psychologist, accurately diagnosed Student’s significant psychological deficits and explained their impact on Student’s ability to attend school. Tr. 177-178. He testified at Tr. 178, line 8, “I think it [the Report] would form the basis for a very good reason to admit her as an emotionally disturbed student.” Tr. 177-178. Parent not only requested an evaluation of Student at the January 2005 Section 504 meeting, Exh. BB, but she also requested that the Report be used as the basis for finding Student eligible for special education. She repeated that request at the April 2005 Section 504 meeting as well. Tr. 533, 539-540.

District alternatively argues that either Parent did not request an evaluation at all; or, if she did, the request “was not specific, and it was not adequate enough to put the district on notice that the child needed to be tested.” Tr. 902. Neither defense was supported by the evidence. Neither defense addresses whether there existed at that time a reasonable basis to suspect Student was a child with a disability in need of special education and related services independent of whether Parent requested an evaluation.

District offered Exhibit A, a form prepared by MS Counselor that purports to be conference notes from the Section 504 meeting held on April 20, 2005. Therein is a note, “Mom stated she did not want referral to SE.” There are two problems with District’s reliance on this evidence. First, it is inconsistent with the preponderance of the evidence on this issue. It is inconsistent even with portions of MS Counselor’s own testimony. When asked if she recalled Parent asking that Student be referred for special education services, her answer was, “The only thing I recall is that she stated that she wanted to talk to [SE Director] about that.” Tr. 618, lines 11-15.

Secondly, the January 2005 Section 504 committee’s extensive review of the Report and its resulting recommendation that they check into a referral for special education cannot be ignored. Even if the content of the Exhibit A note were accepted as accurate, the fact remains that the District failed to evaluate Student “without undue delay” in the face of a reasonable basis to suspect Student was a child with a disability in need of special education and related services. The District was obligated to seek Parent’s consent and evaluate under the circumstances of this case. There was no evidence of record that Parent’s consent was ever sought and refused during the spring 2005 semester.

District also points to the fact that the referral process was promptly initiated upon Parent’s phone call to the HS Counselor in November 2005 and argues that there must not have been a request from Parent prior to that time because the same thing would have happened. The defensive, protective, even obstructive tenor of MS Counselor’s testimony prevented any real examination of why no further action was taken on the January 2005 Section 504’s referral recommendation. MS Counselor clearly should have responded in the same fashion as the HS Counselor did. But, just as clearly, she did not. The SE

Director had an opportunity to remedy that failing when apprised of the Report and through her attendance at the April 2005 Section 504 meeting but she also failed to act. Consequently, Student was deprived of FAPE.

As a side bar, since this period is subsumed in the District's failure to timely evaluate during the previous spring, the DPHO merely notes that District turned getting Parent's written consent into a tortuous process. Exh. 18; Tr. 708-712, 745-747. HS Counselor initially filled out the consent form on November 14, 2005. In spite of the documentation of Student's obvious disability in the possession of the District since January 2005 and Student's long history with Section 504 interventions, District did not individualize the referral process. Due to procedural requirements of the District, the consent form was not submitted for Parent's signature until December 13, 2005. Parent signed, authorizing all of the testing identified on that date. Nevertheless, the District sent the form back a month later requiring that Parent initial certain, specific provisions in the consent, which Parent did on January 11, 2006. In all, it took 58 days to complete the consent form. This constitutes an unreasonable delay in obtaining Parent's consent and is not consistent with state regulations at 6.31.2.10(C)(1)(c) NMAC.

In another side bar, at least two of District's witnesses admitted reading a report that contained substantially the information reflected in the Report (January 3, 2005, Psychological Services Report offered in evidence as Parent's Exhibit 2). Inexplicably, each of these witnesses questioned whether Exhibit 2 was the report each had read. Tr. 176-177; Exh. HH; Tr. 616-617, 645-647, Exh. BB. While suggesting that this might not be the report, each agreed the report that was reviewed by them was part of Student's records. Nevertheless, no other report was ever offered by District as the "real" report these witnesses had read. Although not understanding the point of this challenge to the credibility of Exhibit 2, this DPHO feels it necessary to observe that the notes made by the MS Counselor during the January 12, 2005, Section 504 meeting (Exh. BB) specifically identify a report from Student's Private Psychologist dated January 3, 2005; list the diagnoses found in the Report; and quote language verbatim found in the Report. Also, the School Psychologist's reference to a 2005 report by Student's Private Psychologist

describes the same history, treatment and diagnoses as is found in the Report. The DPHO, therefore, finds that the Report contained in Exhibit 2 was the subject of the January 12, 2005, Section 504 meeting and was the report referenced in the School Psychologist's evaluation.

### *Issue 3 - Adequacy of Student's IEP*

States and local school districts receiving federal funds for education must provide all disabled children residing within their boundaries with FAPE. 20 U.S.C. §§ 1412(a)(1)(A) and 1413(a)(1). FAPE is defined in 20 U.S.C. § 1401(9) to mean special education and related services that are provided at no charge and in conformity with an IEP.

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, established a floor for the level of education to be accorded children with disabilities to achieve compliance with the IDEA saying, "We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at ¶55. A child has received FAPE if the school district complied with procedural requirements and the IEP was reasonably calculated to enable the child with disabilities to receive meaningful educational benefit. *Id.* at ¶65.

The vehicle for provision of FAPE is the IEP, the package of special educational and related services designed to meet the unique needs of the child with disabilities. 20 U.S.C. §1414(d). The standard 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 him to benefit from the instruction. In other words, the IDEA guarantees only a basic floor of opportunity for every disabled child, consisting of specialized 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 minimis; rather, an IEP must be likely to produce progress, not regression or trivial educational advancement. In short, the educational benefit that an IEP is designed to achieve must be meaningful. (Internal citations omitted.)

*Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000) ¶44 2000.C05.0042035 VersusLaw.com.

In reviewing the adequacy of an IEP, the inquiry must then begin by asking whether the school district complied with the procedures of the IDEIA, including whether the IEP document conformed to the Act's requirements. However, procedural violations do not give rise to relief unless they compromised a child's right to FAPE, substantively hampered a parent's right to participate in the process or caused a child to be deprived of educational benefit. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 701 (10<sup>th</sup> Cir. 1998) ¶59 1998.C10.565 VersusLaw.com. This limitation on procedural issues is now codified in IDEIA at 20 U.S.C. § 1415(f)(3)(E)(ii). Nothing in the case law or statute prohibits a due process hearing officer from ordering a school district to comply with procedural requirements. 20 U.S.C. § 1415(f)(3)(E)(iii).

Next, a determination must be made as to whether the IEP was reasonably calculated to enable the student to receive meaningful educational benefit. *Rowley*, supra. Finally, even if the IEP did not meet procedural requirements and/or was not reasonably calculated to enable the student to receive educational benefit, the DPHO must examine whether the services actually provided nonetheless conferred such benefit. If so, the student would not have suffered a denial of FAPE. *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10<sup>th</sup> Cir. 1999) 1999.C10.0043586 VersusLaw.com.

A child's IEP must include several components as defined in 20 U.S.C. § 1414(d)(1)(A) and 34 CFR § 300.320. Student's May IEP did not conform to these requirements. To the extent an IEP is to provide Student's educators and service providers with information about her disabilities and needs and a baseline from which to measure progress, this May IEP was wholly deficient

While a health care provider is not a statutorily-identified required member of an IEP team (34 CFR § 300.321), it is hard to imagine how an IEP team for this Student could make sound decisions about appropriate school health and other related services, physical education, attendance policy or accommodations without input from a person with knowledge and special expertise to explain Student's health related needs. The lack of such a person on Student's IEP team may explain, in part, the resulting inadequacies.

Although Parent failed to meet her burden of proving that the technical procedural violations found in the May IEP rose to the level of a substantive deprivation of FAPE (see also Findings and Discussion for Issue 5), the profound failure of the May IEP to conform to IDEIA requirements warrants a prospective order compelling the District to comply with all federal and state procedural requirements in developing future IEPs for Student. To assure that compliance, the District is ordered to retain the assistance of a state-approved IEP facilitator of Parent's choice to facilitate Student's next annual review IEP meeting. The facilitator's services must be continued for as many meetings as is required to complete the annual review. In addition to diligent adherence to procedural requirements, the IEP team, with the assistance of the facilitator, is directed to develop a process or procedure to assure that all staff that provide the IEP-directed services to Student are fully informed of the IEP's provisions and trained or instructed as to its implementation.

#### *Issue 4 – Homebound Services*

Homebound service is generally recognized as the most restrictive placement available on the continuum of alternative placements. 34 CFR §§ 300.39(a)(1) and 300.115. Homebound is not an appropriate placement for Student at this time. It is the hope of this DPHO that Student's absenteeism can be improved with the implementation of the provisions of this Final Decision. Nevertheless, it is imperative that the IEP team clarify the confusing provisions intended to address Student's absenteeism in the current IEP. Specifically, the IEP team must develop a clear and understandable attendance standard or policy for Student. The IEP team is directed to start with WLVHS's attendance policy for all students and modify as the IEP team deems appropriate with the benefit of the functional behavior assessment, medical and psychological evaluation results, PLPs from Student's current teachers and service providers and input from Student and Parent.

The IEP team must also clarify the basis for Student's grade. Some interpretations of the current modification seem to suggest that Student can only be graded on the work she completes and turns in without any reference to work not done (which Parent construes as punishing Student for her disability).

Theoretically, Student could complete and turn in only one assignment out of 20 or 30 assignments required of other students and receive the grade on that assignment as her grade for the whole course. Unfortunately, the IEP team's intent is impossible to discern but such a result would hardly enhance Student's access to the general educational curriculum. Student is not served by a program that passes her through the grades with no mastery of the standard curriculum. The IEP team must establish clear and understandable modifications to accommodate Student's frequent absence from school utilizing the same resources identified above.

#### *Issue 5 – Implementation of the IEP*

The District must have an IEP in place for Student at the beginning of each year and must implement all provisions therein. 20 U.S.C. § 1414(d)(2)(A). The IEP must be accessible to all teachers and others responsible for implementing its provisions and each teacher must be informed of his or her responsibilities related to implementing the IEP. 34 CFR § 300.232(d).

As established in the relevant Findings of Fact and Conclusions of Law, this DPHO found that the Parent failed to prove by a preponderance of the evidence that the District did not substantially implement the provisions of the IEP or that any failures to do so resulted in a deprivation of meaningful educational benefit. The evidence concerning whether teachers were properly informed of the accommodations and modifications was conflicting. But Parent offered only hearsay evidence on this issue and did not call the offending teachers to testify. The evidence from the only two post-IEP teachers called to testify established that the modifications identified in Student's May and Fall IEPs, as well as the accommodations and modification discussed throughout the hearing, were substantially implemented in these two classrooms. Even Student's own testimony indicated substantial compliance with the identified accommodations and modifications as she could only report occasional small failures. When she did have significant complaints, they were addressed and corrected by the School Psychologist or the SE Teacher.

*Issue No. 6 -- Individualized Health Plan*

District is obligated to provide Student with the related services required to assist a child with a disability to benefit from special education. In this case, the pertinent related service is school health services and school nurse services which “means health services that are designed to enable a child with a disability to receive FAPE as described in the child’s IEP.” 34 CFR § 300.34(c)(13).

It is uncontroverted that Student suffers from several medical and psychological conditions including diabetes, asthma, heart palpitations, depression and post traumatic stress disorder. Student's capacity to attend class is dependent on effective management of these conditions.

The evidence at hearing focused on management of Student's diabetes in the school setting and the need to test for blood sugar levels and administer insulin at least once during each school day just prior to lunch. The evidence indicated that Student is, for the most part, able to perform these tasks herself without assistance. Student also needs to maintain a prescribed diet at lunch and have ready access to appropriate snacks and her medical supplies during the school day. Because Student’s diabetes is not currently well controlled, she frequently experiences symptoms related to unstable blood sugar levels during the day with a resulting need to administer additional insulin or glucose therapy and recuperation. If severe enough, she needs to leave school. If Student is to receive FAPE, District must provide accommodations and services that support her in her effort to keep her diabetes in check while at school. This DPHO believes the definition of school health services is broad enough to address these needs.

Parent argues that District has failed to provide the assistance Student needs to benefit from special education and participate in the general education curriculum in several regards as follows. District has failed to provide Student with an appropriate setting, affording privacy, hygiene and safe disposal of needles, for testing and insulin administration. This DPHO is also concerned that Student does not appear to have a quiet, private setting where she can rest comfortably to recuperate from an

exacerbation and, hopefully, return to class or wait for Parent to pick her up or receive nursing or emergency medical services, if necessary.

Student indicated a need for assistance with her insulin injection on those occasions when her most accessible site (the stomach) is too sore to use comfortably. Parent maintains that District must have someone qualified to give an injection available to Student on those occasions and does not. But Student has not requested that the nurse provide such assistance and there is no evidence that the nurse would not if asked.

Student needs to be accommodated by her classroom teachers allowing her to leave the classroom regularly for approximately 10 minutes before lunch. She must also be allowed to leave the classroom as necessary to deal with exacerbations of her blood sugar levels or other health conditions. Parent contends that Student's teachers have denied her that accommodation, however, Parent failed to prove this allegation by a preponderance of the evidence. The preponderance of the evidence indicates that District's food service has supplied Student with appropriate snacks and the District has assigned Student a private locker for storage of the snacks and medical supplies she requires.

District has agreed to prepare the lunch Parent has requested for Student and there is no dispute that Student is entitled to this service. However, there was evidence suggesting the lunches have not been regularly available to Student due to District's failure to accurately inform food services of Student's presence at or absence from school. Student was apparently directed to notify the cafeteria at the beginning of each day that she was present so that they could prepare her lunch. Tr. 474-475. This DPHO finds no basis in the IDEIA for placing this responsibility on the Student and none was cited by the parties. It is the opinion of this DPHO that responsibility for informing the cafeteria of Student's presence or absence rests with the District. Lunches should be made and available for Student unless the attendance office notifies food service that Student is absent. Any lunch not eaten, because either the attendance office failed to notify food service of Student's absence or because Student did not avail herself of the service, does not relieve the cafeteria from preparing the lunch for the following day.

While these were the accommodations that were the subject of the hearing, it is the opinion of this DPHO that the IEP team needs more information than it has had to date to determine the services necessary to satisfy the District's obligation to provide educational and related services, including school health services, under the Act. To that end, District shall obtain, pursuant to 34 CFR § 300.34(c)(5), a medical evaluation to determine and identify Student's medical disability or disabilities that result in her need for special education and related services. At a minimum, questions concerning appropriate school health services, physical education modifications and classroom accommodations should be directly addressed in the evaluation. The physician or health care provider performing the evaluation should also be asked specifically for information regarding the nature and frequency of Student's probable absenteeism due to illness to assist the IEP team in developing an appropriate attendance policy for Student, in addition to assistance in the identification of needed educational and related services. An individual who can interpret the instructional and related service implications of the evaluation results must be included as a member of Student's IEP team.

While District correctly argues that there is no provision in the IDEIA or its implementing regulations that mandates the District develop an individualized health plan for Student, the use of such plans is certainly recognized as a sound practice to coordinate school services related to the complicated health care needs of students. Furthermore, Student's IEP team found that Student was in need of an individualized health plan. Exh. KK, p. 12. Therefore, the District shall instruct Student's IEP team to develop an appropriate individualized health plan as a component of Student's next IEP. The medical evaluator should also be asked to identify Student's critical and/or emergent care needs that should be addressed in such an individualized health plan.

## **ORDER**

IT IS HEREBY ORDERED as follows:

1. District will provide Student with compensatory education in the form of one-on-one instruction consistent with the provisions of this Final Decision.
2. District will retain the services of a state approved IEP facilitator to facilitate Student's next annual review IEP consistent with the provisions of this Final Decision.
3. District will obtain a medical evaluation of Student consistent with the provisions of this Final Decision.
4. District will obtain a functional behavior assessment of Student's absenteeism consistent with the provisions of this Final Decision.
5. District will comply with all federal and state statutory and procedural requirements in the development of Student's future IEPs.

Any party aggrieved by this decision has the right to bring a civil action in a state or federal district court pursuant to 20 U.S.C. §1415(i) and 34 CFR §300.516. 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.

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Barbara Albin  
Impartial Due Process Hearing Officer

**CERTIFICATION**

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via electronic mail to the following persons this 27th day of April 2007:

Debra D. Poulin, Esq., 1225 S. St. Francis Drive, Suite B, Santa Fe, NM 87501.

Jacquelyn Archuleta-Staehlin, Esq. of Cuddy, Kennedy, Albetta & Ives, LLP, P. O. Box 4160, Santa Fe, NM 87502-4160.

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via facsimile to the following person this 27th day of April 2007:

Dr. Veronica C. Garcia, Secretary of Education, New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, NM 87501-2786.

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Barbara Albin