

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

**In the Matter of Legal Guardian,
on behalf of minor child, B.G.,**

v.

DPH 0708-02

ALBUQUERQUE PUBLIC SCHOOLS,

ABSTRACT OF DECISION OF THE DUE PROCESS HEARING OFFICER

Jane B. Yohalem, DPHO; January 28, 2008

Student is in the fifth grade and has a diagnosis of Fetal Alcohol Syndrome. The due process complaint focused primarily on whether the District provided Student the types of positive behavioral supports, assessments, and programming which are designed to meet Student's needs attributable to his disability, so that he could be expected to make educational progress. Student's guardian attributed the denial of FAPE to the District's lack of expertise in working with students with Fetal Alcohol Syndrome. The hearing officer found:

Denial of FAPE: Student was denied FAPE from August to October 20, 2006, at Duranes Elementary School, and from August 22, 2007, to October 12, 2007, at Cochiti Elementary School, but not during his third grade year or the second half of fourth grade. The hearing officer concluded that Student's IEPs did not adequately address how the District would convey the expertise gained about how to address Student's complex needs in the placements which provided FAPE to the staff who would be teaching Student the following school year. Although District staff periodically recognized that there is a need to transmit information in greater detail in order to ensure that Student's program was reasonably calculated to meet his needs, the IEP team did not provide in the IEPs a plan for an appropriate transition.

Restraints, Suspension and Police Involvement: Although it is apparent from the record that Student's aggressive behavior was a manifestation of his disability, would likely have not occurred had Student's educational program been appropriate to meet his needs, and was not an effective means of teaching Student proper behavior, these facts alone do not mean that the District violated the rules governing restraints, suspension for less than 10-days and police involvement, 34 C.R.F. §§ 300.530-300.537. Although the discipline provisions of the IDEA were not violated, the need for restraint, suspension and police intervention is strong evidence that Student's educational services during the times these actions were taken were not reasonably calculated to meet Student's needs, denying Student a FAPE.

Shortened School Day: Shortening Student's day was based on Student's needs arising from his disability, but failing to promptly lengthen it when Student was ready to return to a longer day, denied Student a FAPE. Unless a shorter day is necessary for a student to make educational progress, a student with a disability must have a school day of the length mandated by State law in order to provide a FAPE. 34 C.F.R. § 300.17(b); NMSA 1978, § 22-13-1; 6.30.2.10(H) NMCA.

Extended School Year and Remedy: ESY services were not required for Student to make educational progress. Remedies under the IDEA are equitable and require the hearing officer to both consider all of the circumstances and to devise relief calculated to remedy the educational deficit created by the District's failure to provide FAPE. Albuquerque, NM 87103-2168

STATEMENT OF THE CASE

Student's guardian (hereinafter referred to as "Parent") filed a request for due process with the New Mexico Public Education Department on August 13, 2007, alleging that Student had been denied a free appropriate public education (FAPE) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) during his third, fourth, and the beginning of his fifth grade school year. (Student was moved to a new placement after the filing of the complaint and Parent opted not to address current his placement as part of the due process hearing.) The due process complaint focused primarily on whether the District provided Student the types of positive behavioral supports, assessments, and programming which are designed to meet Student's needs (including his behavioral needs) attributable to his disability, so that he could be expected to make educational progress. Parent alleged that the District used disciplinary methods which violated IDEA discipline requirements (suspensions, police involvement, restraint); restrained Student in abusive ways; failed to include Parent and to credit Parent's knowledge of Student in the preparing Student's behavioral intervention plans and IEP's; failed to conduct educational evaluations which gave sufficient guidance to teaching staff on instructional and behavioral strategies; improperly shortened Student's school day without showing educational need; denied Student necessary Extended Year Services (ESY); improperly administered Student's medication; failed make publically-funded transportation available to Student during the spring and fall of 2007; and, in the Student's May, 2007, IEP, failed to specifically provide for Student's involvement with the general school population. Finally, Parent attributed most or all of these alleged violations of the IDEA to the District's lack of expertise in working with students with Fetal Alcohol Syndrome.

Parent asks the hearing officer to require the District to work with Parent's expert in Fetal Alcohol Syndrome, requesting that the hearing officer order the District to hire that expert and her team to evaluate Student's behavioral needs, to conduct a functional behavioral assessment, to

consult with the District on appropriate services for Student, to participate in developing an appropriate Individual Education Plan (IEP) for Student, to consult with the District in the development of Student's IEP, to assist the District in planning Student's transition to middle school, and to directly train District staff about FAS and the needs of students diagnosed with FAS.

A due process hearing was held over a four-day period, December 4-7, 2007. Joint Exhibits 1A through 3A and 5A through 37A were admitted into evidence. With the agreement of the parties, Petitioner's Exhibit 7 replaced Exhibit 4A. Petitioner's Exhibits 1, 2, 4, 7, 9, 11, 12, 13, 15, 17, 18, 19, 21, 22 (for purpose of diagnosis and date only), 24, 26, 27, 28, 31, 33- 36, 38, 39, 40, and 43-52, were admitted as well. The hearing officer denied admission of only one exhibit which was offered into evidence: Petitioner's Exhibit 39. No other exhibits were offered. An extension of time until January 31, 2008, to enter a decision in this matter was granted at both parties' request. This decision is timely filed on January 28, 2008.

Having heard the testimony of the witnesses, and having reviewed the exhibits and memoranda of law, and proposed findings and conclusions submitted by the parties, the Hearing Officer enters the following Findings of Fact, Conclusions of Law, Discussion, and Order.

FINDINGS OF FACT

1. The period in dispute here begins on August 13, 2005, at the start of Student's third grade year and continues until October 26, 2007, near the beginning of Student's fifth grade year, when Student was moved to his current educational placement at Chaparral Elementary School. Parent opted not to address Student's current placement in this due process proceeding. TR. 11.

2. It was undisputed that Student has a diagnosis of Fetal Alcohol Syndrome (FAS) and developmental disabilities. Student qualifies for special education in the category of "other health impaired." Ex. 23; Ex. 1A, p. 1; Ex. 6A, p. 1; TR. 444.

3. Student was universally described as friendly and engaging. TR. 29, 296, 518-19. Student's IEP's and evaluations find that Student has limited cognitive, language, and motor abilities. In addition, the record shows that he has difficulty focusing, staying on task, returning to task, transitioning between tasks and following multi-step directions. It is difficult for Student to follow a routine. He has little tolerance for distractions, disturbances, or changes in routine. He easily becomes frustrated, anxious and over-stimulated. Ex. 1A, pp. 2-4; Ex. 6A, p. 3; Ex. 3A, pp. 14-17; Ex. 22; TR. 29, 140-42, 902.

4. There is general agreement in the record about the characteristics of children with FAS. Although there are many differences found from child to child, Parent's expert in FAS diagnosis and provision of services described children with a diagnosis of FAS as often having difficulty staying focused on a task, determining what must be done to accomplish that task and how to do it (planning and sequencing a task), shifting attention from one task to another; retaining information or skills learned without many repetitions; handling noise, light, movement, changes in routine, and other stimuli in the environment; moving from one task to another or one environment to another; and controlling their impulses. Ex. 50; Ex. 44; TR. 590-91, 593. District staff who worked well with Student described their understanding of the nature of Student's deficits in similar terms. Ex. 22A; Ex. 32A; Ex. 6A, pp. 5-6; Ex. 37A; Ex. 12A; TR. 88, 261, 561; 669, 677-683, 920-21, 924-25.

5. The interventions recommended to assist students with FAS by those witnesses with expertise in FAS and more generally with expertise in addressing executive function deficits included structuring the environment to assist the student in navigating through tasks, using a daily schedule, using a visual schedule, minimizing distractions, teaching the student to use a quiet retreat to help calm themselves, breaking task into steps, using peer models, and establishing a reward system. TR. 601, 622-29, 647; Ex. 50.

Third Grade at Duranes Elementary School

6. In the third grade (2005-2006 school year), Student attended his neighborhood elementary school, Duranes Elementary. TR. 901. He was placed in a self-contained class taught by Dr. Gonzalez. Dr. Gonzales had an masters degree in special education and a Ph.D. in childhood education. TR. 899, 901, . She was certified in de-escalation techniques and had slight previous experience with FAS. TR. 900-01. Dr. Gonzalez's testimony described the techniques she used to address Student's special needs. She used a very structured daily schedule, placing that on the board, repeatedly going over the visual schedule with Student and making sure to remind him and to prepare him in advance for any change in his normal routine. TR. 904-05; Ex. 3A, p. 10 (class very structured). She offered him choices of activities so that he felt in control. TR. 908. She put a reward system in place where Student collected stickers based on desired behaviors and turned them in for a reward. TR. 906-07. She incorporated frequent breaks into Student's schedule. TR. 906. She modified the environment in the classroom to eliminate distractions: Student was seated far from the door; noise and even colors in the classroom were limited. TR. 919-20. Student had an educational assistant with him at all times to help him stay focused. TR. 921-22.

7. Dr. Gonzalez testified that she never used restraint with Student during that third-grade year. TR. 910-11. She found other techniques effective in avoiding the need for restraint. TR. 907.

8. Although there was a difficult period with Student in the middle of the year (which may have been due to medication changes), Student's behavior improved before the end of the year. The time period Student could stay focused on a task improved. Student's academic skills also showed some small improvement from the beginning of the year in math skills and in the fluency with which he could read aloud. Ex. 2A, p. 2; Ex. 3A, p. 13; Ex. 7, p. 5; Ex. 38A; Ex. 34A; Ex. 23,

p. 4; TR. 916-19, 981, 254-55, . Student also made gains in communication skills. Ex. 3A, p. 9; TR. 268.

9. Extended school year services for the summer of 2006 were discussed by Student's IEP team. Based on an assessment over Christmas break which showed little regression, the team concluded that ESY services were unnecessary in the summer of 2006. TR. 954-55. Parent testified that things went well for Student the first few weeks of his fourth grade year. TR. 812-13, 886.

10. The evidence showed that Student's medications were properly administered by the District's nursing staff. TR. 983-1006.

Fourth Grade

11. In the fall of his fourth grade year, at the request of Parent, Student was moved to a new class taught by a first-year special education teacher. The class was less structured and was not self-contained: students moved in and out all day. This move was made at the request of Parent, even though District staff had grave misgivings, and believed that Dr. Gonzalez's class was the placement calculated to meet Student's needs. TR. 158-59, 160-62, 287.

12. The IEP which had been prepared in March, 2006, for Student's fourth grade year, although stating annual academic goals, offered few specifics as to the environment and structure that were working for Student in Dr. Gonzalez's class, on the rationale behind them, or on how to implement that structure with Student in a new class. Ex. 3A.

13. By all accounts, Student's behavior rapidly deteriorated in the fall of 2006, the beginning of his fourth grade year at Duranes. Student began acting out, running away and acting physically aggressive toward both staff and other students. TR. 36-37, 293, 321-25, 330. Student's teacher, Ms. Tyson, admitted in her testimony that she did not understand the connection between Student's disability and his behavior. TR. 411-12, 321-22. The principal improperly attributed described Student's behavior to defiance, rather than to Student's disability. TR. 33. Ms. Tyson

described trying one strategy after another, each failing in turn. As she put it repeatedly during her testimony, “Every day was a new day.” TR. 296, 314-16, 321-22. In her view, there was never anything predictable about Student’s behavior; she had not rationale for the interventions she used. TR. 341. Student’s behavior regressed and Student made no academic progress while in her class. TR. 311-12.

14. It was during this period that the school responded by setting up a crisis intervention team, putting in place a behavior intervention plan that focused on trying to calm Student by talking to him, then calling for assistance, then removing Student from the environment, and ultimately restraining or suspending him. Ex. 14A. From September through October, 2006, there were some incidents of physical violence by Student, and a few incidents of physical restraint. Police were called after Student injured a teacher. TR. 128; Exs. 35, 36. Other times, Student was suspended or sent home. Ex. 7, p. 8. Student’s aggressive behavior was plainly attributable to the lack of an appropriate educational program and appropriate supports and modifications in the fall of 2006 at Duranes.

15. Parent did not establish that any physical contact with Student or physical restraint of Student was performed in an inappropriate or abusive manner. Parent’s claim that Student was once held with his arms behind his back was not confirmed. Other instances of restraint were performed appropriately. TR. 74-81, 99-101, 146-50, 524-29, Ex. 26. Student was not suspended more than 10-days in a school year. TR. 166-67; Ex. 15.

16. An IEP meeting was delayed in September, 2006, to allow for reevaluation of Student. The reevaluation report, although noting that addressing Student’s behaviors were a necessary precursor to any academic success, offers no insight into the relationship between those behaviors and Student’s disability which would assist the teaching staff in designing appropriate interventions and instructional strategies. Ex. 23A.

17. A new IEP on October 16, 2006, reports no academic progress by Student whatsoever. Ex. 7, p. 7. The IEP team transferred Student to the Mission cluster school which had a program for children with emotional disturbances which the IEP team hoped would provide a more structured environment for Student. TR. 91; Ex. 4A, Ex. 7, p. 13. The record also shows that Student's case manager through the developmental disabilities waiver program recommended placement in the Mission program. Ex. 22.

18. Virtually no evidence was presented concerning Student's time in the Mission program for emotionally disturbed students or concerning the nature of that program, other than a note in an IEP that the class did not meet Student's needs. Ex. 5A.

19. On January 16, 2007, Student was again transferred, this time to a cross-categorical special education class at Mission. Student's teacher at Mission, Ms. Mackie, like Dr. Gonzalez at Duranes, designed Student's environment to eliminate distractions and provide the external structure for Student recommended by both Student's and the District's experts. Teacher created a separate area for Student. The walls were clear of posters. Footsteps were outlined on the floor to keep Student focused on his goal when he came into the classroom. With advise from a district consultant, David D'Antonio, Ms. Mackie became more rigorous in the way she used a visual schedule with Student, actively using it to help him prepare for each step during the school day, as well as to remind him of the time remaining for the task at hand. She created a retreat space with a tent, and worked on teaching Student to use that space to calm himself. She eliminated harsh overhead lights. She relied on peer models, having Student work with another student. Student was offered choices of activities, rather than being directed. Consistency, calm, and quiet were the hallmarks of the classroom environment. TR. 1008-1012; Ex. 24A, p. 11.

20. A January, 2007, IEP addendum cuts back Student's time in school to 3.5 hours per day. Ex. 5A. The shortened school day was described as a temporary measure to try to assist Student in the transition to a new program and to allow him to experience success in school. TR.

1017-1022. Ms. Mackie testified she documented a decrease in Student's ability to focus on academic work in the afternoon. Mr. Morgan at Cochiti saw a similar pattern. TR. 548, 1017-1022. The record shows that the plan was to lengthen Student's school day gradually as he became able to handle more time. TR. 1072-73. A letter to Parent on March 12, 2007, indicated that Student had made sufficient progress in adjusting to the school environment to merit and increase of an hour near the end of March. Ex. 26A. This did not happen, however, because of difficulties in convening the IEP team to approve this change. TR. 1073. Student's day was not lengthened until May, 2007. TR. 1073-75; Ex. 9A.

21. It was undisputed that Parent or another relative drove Student to school most school days while the shortened day was in effect. Parent claimed that the District refused to provide transportation to school. Teacher testified that transportation was available, but that Parent offered to drive Student to make the transition easier for him. TR. 1023-24; 1069-70. Teacher's view of the situation is supported both by the prior notice form in the January, 2007, IEP addendum, which notes that transportation has been approved, and by a note to the bus driver, indicating that Parent will call if she wants Student picked up. Ex. 5A, p. 10; Ex. 31A. The record shows this same arrangement was in effect in the fall of 2007 at Cochiti Elementary. Ex. 7A, p. 32.

22. Student made progress in extending the time he was able to focus on task and to return to focus after a break. He also improved in other behavioral and social skills. Ex. 24A, p. 11; Ex. 27A; TR. 1017-21, 1057-58. Some progress was made on Student's reading levels, as measured in August, 2006. Teacher reported some improvement in math skills as well. Ex. 24A, pp. 9-13. Student's expressive language skills improved. Ex. 24A, p. 13.

23. In May, 2007, an IEP for Student's fifth grade year was prepared. Ex. 6A. Extended school year for the summer of 2007 was considered by Student's IEP team. Teacher testified that she collected data and that the data did not show regression. Ex. 6A, p. 23; TR. 1085, 1090-91.

Parent testified that Student did well the first few weeks of school both behaviorally and on academic work. TR. 886. Student's teacher at Cochiti in the fall of 2007 confirmed that Student did well the first two weeks of school, at the beginning of the fifth grade. TR. 505, 509.

24. Parent's complaint alleges a procedural violation in the May, 2007 IEP: absence of information about the extent of Student's involvement in activities with the general education population. The May, 2007, IEP provides for recess, lunch, and assemblies with the general school population. Ex. 6A, p. 17 (bottom of page). The record shows that Student was included in general physical education, although this is not mentioned in the IEP. TR. 519. No claim was made that more involvement with the general population was appropriate to meet Student's needs.

25. Although the May, 2007, IEP mentions (in the sections labeled "Student's profile") some of the modifications to Student's environment made by Ms. Mackie and some of the techniques which resulted progress in Student's behavior and his social skills, these approaches are not described with specificity and little direction is given as to how they were applied or as to the rationale for their use. The IEP also does not include behavioral goals and objectives, apart from the occupational therapy objective of increasing Student's time on task. Ex. 6A.

26. For fifth grade, Student was returned to what Parent anticipated would be Student's neighborhood school, Cochiti Elementary School. Student was placed in a cross-categorical class where there was regular movement of other students in and out, something which had been a problem for Student in the past. The teacher, Mr. Morgan, was an experienced special education teacher with special expertise in teaching reading. TR. 498-99.

27. The teacher received Student's IEP a few days after Student was placed in his class. TR. 501-02. During Student's short time at Cochiti (from August 22, 2007-October 12, 2007), his teacher described struggling to find something that worked to focus and interest Student. TR. 507-08. Behaviors previously seen at Duranes Elementary in the beginning of Student's fourth grade year

returned. Student first began to wander the classroom and hide under tables, then he started leaving the school grounds, later his behavior again became physically aggressive. TR. 504, 508-10, 512.

28. The lack of specificity in Student's IEP had a negative impact on the provision of educational services to Student. Mr. Morgan, the Cochiti fifth grade teacher testified that he understood that Student's previous teacher, Ms. Mackie, achieved better results with Student, but he did not find sufficient information about what worked for her in Student's May, 2007, IEP and the rationale for what she had done, to be able to duplicate her success. TR. 507. He reported, for example, not knowing why Student's IEP recommended less than a full school day. TR. 547-48.

29. At the District's request, Mr. Morgan gathered data on Student's behavior, observing him closely over a number of weeks, with the help of a district behavioral specialist, and prepared a functional behavioral assessment and a new Behavioral Intervention Plan for Student. TR. 510-12, 516-17, 518; Ex. 16A; Ex. 17A. He testified that despite this formal data collection, he was not able to isolate the factors that led to Student's behavior and was not able to determine what was working for Student and what was not. TR. 515-16.

30. The BIP, developed in September 2007, provided for redirection of Student, redirection with loss of privileges, and then a call to Parent or Student's aunt. Ex. 16A. The BIP failed to reflect the interventions which had been successful with Student, or those likely to work with students diagnosed with FAS, and relied on an approach which had proven unsuccessful at Duranes and which did not reflect Mr. D'Antonio, the District consultant's view of Student's needs or Parent's expert's view on the interventions likely to succeed with children with FAS. TR. 511-12. Mr. Morgan reported he did not understand the origins of Student's aggressive behavior. TR. 515-16.

31. Mr. Morgan described trying everything and anything with Student. He used sensory stimulation because behavior management staff thought it would work; he tried to reward time on task; he tried a behavior modification approach, trying to help Student link cause and effect; he

created a separate space for Student; the OT at Cochiti recommended a visual schedule and a timer, so he tried those. TR. 513-15, 526. These interventions were not undertaken with an understanding of Student's disability and his needs and were, therefore, not implemented in the consistent and rigorous way needed for them to be successful.

32. At Cochiti, despite these interventions, Student spent only 5 to 15 minutes on academics each day. This was not sufficient to enable him to make academic progress. TR. 539. Mr. Morgan testified that, had he been able to get Student to focus, he felt that he could have worked successfully with Student on reading. TR. 520.

33. On October 12, 2007, Student was moved to Chaparral Elementary School, a District intensive support program. The adequacy of this program is not at issue in this proceeding.

34. Student will almost certainly be moved to a school which serves his middle-school age group at the end of the 2007-2008 school year.

35. Parent was present at virtually all IEP meetings at the schools Student attended, and was regularly consulted by staff at each school about Student's needs. Her suggestions were taken into account by teachers and school staff, although staff was not always able to translate her suggestions into successful classroom strategies. TR. 67, 179-83, 260-61, 403, 504, 797-800, 842, 1046.

CONCLUSIONS OF LAW

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, *et seq.*, (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2007).

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

3. An extension of time for entry of the decision in this matter has been granted until January 31, 2008, at the request of both parties. H.O. Order, 10/29/07. This decision is, therefore, timely filed on January 28, 2008. 34 C.F.R. § 300.515(c) (2006).

4. Parent bears the burden of proof and, to prevail, must show by a preponderance of the evidence that the District has failed in its obligations under the IDEA. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

5. The statute of limitations for due process hearings under the IDEA is two years. 20 U.S.C. § 1415(f)(3)(C) (2004). Only claims arising within the statutory period have been considered by the hearing officer.

6. Student is qualified for special education and related services under the IDEA as a student with a disability in the eligibility area of other health impaired. 34 C.F.R. § 300.8(c)(9) (2006).

7. During his third grade year at Duranes Elementary School, Student was provided a FAPE.

8. Parent failed to carry her burden of showing that Student's medications were administered inappropriately by the District. *See* 34 C.F.R. § 300.107(b) (re: health services).

9. From August, 2006, until October 12, 2006, in the fall of his fourth grade year at Duranes, Student was denied a FAPE.

10. Student's diagnostic reevaluation conducted in September, 2006, failed to adequately assess Student's areas of educational need and failed to provide information which would assist Student's IEP team to meet his educational needs in violation of 34 C.F.R. § 300.304(a)(2) and (c)(7). This procedural violation contributed to the denial of FAPE in the fall of 2006. 34 C.F.R. § 300.513; *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998).

11. During the period from January through the end of May, 2007, Student was provided a FAPE in Ms. Mackie's class at Mission Elementary. Parent failed to establish by a preponderance of the evidence that shortening Student's school day was not reasonably necessary to meet Student's needs. Student's right to a FAPE was violated, however, by delay, for purely administrative reasons, in increasing Student's school day by an hour at the end of March, 2007. *See* 34 C.F.R. § 300.17(b).

12. Parent failed to present sufficient evidence to meet her burden of establishing by a preponderance of the evidence that Student was denied FAPE in the program at Mission for emotionally disturbed Students in the fall of 2006.

13. Parent failed to show that ESY services were necessary for the provision of FAPE to Student. 34 C.F.R. § 300.106(a)(2).

14. Parent failed to carry her burden of establishing by a preponderance of the evidence that Student was denied publically-funded transportation. *See* 34 C.F.R. § 300.107(b); 34 C.F.R. § 300.17(a).

15. Student was denied a FAPE from August, 22, 2007, through October 12, 2007. Neither Student's IEP nor the services actually provided during this time period were reasonably calculated to enable him to make educational progress.

16. Student's March 9, 2007, IEP provided for appropriate involvement with the general population. To the extent the IEP failed to include sufficient involvement, the violation was procedural only and did not deny Student a FAPE. 34 C.F.R. § 3000.513.

17. Parent did not carry her burden of establishing by a preponderance of the evidence that the District violated the IDEA's parental involvement requirement. 20 U.S.C. § 1414(d)(3) (2004).

18. Compensatory education and injunctive relief are equitable remedies, and must be designed, in light of all the circumstances, to remedy the educational deficit created by a District's failure to provide FAPE. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

DISCUSSION

The following discussion focuses on the primary claims made by Parent. Not every issue addressed in the hearing officer's findings of fact and conclusions of law is discussed here.

Denial of FAPE: Parent claimed a denial of FAPE based on the District's failure to provide the kinds of behavioral supports, interventions, and accommodations designed to meet Student's unique needs due to his disability.

Congress enacted the IDEA, in part, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.1(a). The United States Supreme Court has held that a free appropriate public education (FAPE) "consists of educational instruction specially designed to meet the unique needs of the handicapped child,...supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). This case remains good law; Congress has not changed the definition of FAPE interpreted by the *Rowley* case. Any changes in Congressional findings in the 1997 amendments to the IDEA do not change the definition of FAPE *Halderman v. Pennhurst State Hospital*, 451 U.S. 1, 19 (1981) (Congressional findings do not create enforceable rights).

Under the IDEA, schools are required to:

[adapt], as appropriate to the needs of an eligible child., the content, methodology, or delivery of the instruction – ... To address the unique needs of the child that result from the child's disability; and

34 C.F.R. § 300.39(b)(3). *See also* 34 C.F.R. § 300.320(a)(2).

The Act gives the task of developing each child's program to an IEP team which, relying on the child's evaluations and reports of progress, assesses the child's level of functioning in all areas affected by the child's disability and develops an appropriate, individualized education program. 34

C.F.R. § 300.346(a)(1); 34 C.F.R. § 300.347. The goal of the educational program is “to meet each of the child’s educational needs that result from the child’s disability.” 34 C.F.R. § 300.320(a)(2). Under the IDEA, then, special education includes modifications in the environment and in the instruction used with the student to enable the student to make academic progress, and it contemplates not just academic goals, but also socialization, adaptive skills, language and communication, and reduction of problematic behavior necessary to enable a child with a disability to make educational progress. *L.B. v. Nebo School District*, 379 F.3d 966 (Ct. App. 10th Cir. 2004) (the teaching of socialization skills and behavior intervention necessary for a child to make academic progress must be provided under the IDEA). In the case of a child whose behavior impedes his learning, the IEP team is specifically directed to consider strategies, “including positive behavioral interventions, strategies, and supports to address that behavior.” 34 C.F.R. § 300.320(a)(2)(I).

Parent here focused a great deal of attention on the alleged failure of the District to conduct a functional behavioral assessment and to prepare an appropriate behavior intervention plan. As the District correctly points out, there is no specific requirement for a functional behavioral assessment which applies to all students. 34 C.F.R. § 300.320; Commentary, 71 Fed. Reg. 46,629 (August 14, 2006); 34 C.F.R. § 300.530(f). A functional behavioral assessment or another method of gathering data may nonetheless be required if it is needed to evaluate what kinds of behavioral supports and interventions are appropriate for Student. 34 C.F.R. §§ 300.304 and 300.305.

The relevant questions here, therefore, is not whether the District conducted a functional behavioral assessment or prepared a behavior intervention plan, but whether the District put in place in each of Student’s educational placements behavioral and other supports and modifications which were appropriate to address Student’s unique needs arising out of his disability and which were reasonably calculated to enable him to make educational progress.

The record here shows a striking pattern. Teaching staff, related services providers, sometimes with the help of a District consultant, develop an educational program which is successful

in assisting Student to control his behavior, in increasing the time he is able to stay on task, and in enabling him to make educational progress. The next year, Student is moved into a different class or a different school, and the lessons learned about his needs were left behind. Student's IEP's fail to convey important lessons about the nature of Student's disability and his needs in the kind of detail needed to duplicate effective strategies in the new classroom. Although District staff periodically recognize that there is a need to transmit information in greater detail in order to ensure that Student's program was reasonably calculated to meet his needs, the IEP team did not provide in the IEP for an appropriate transition.

For example, Ms. Mackie, at the end of Student's fourth grade year, testified that she and her educational assistant offered to meet with Student's new fifth grade teacher. TR. 1083-84. Even this simple approach was not included in Student's IEP as a service necessary to ensure that Student could make educational progress in his new class. As a result, no such meeting occurred. Student's fifth grade teacher, Mr. Morgan, described being at a loss as to what interventions had worked the previous year, as to how to implement the interventions he knew about, and as to why certain decisions, like shortening Student's school day, had been made. Ms. Tyson, as well, in the fourth grade, testified that she was completely mystified about how to deal with Student's escalating behaviors. She admitted to having no understanding of the relationship between Student's behavior and his disability.

This failure to ensure that expertise gained concerning Student's complex needs, what worked to help him achieve educational progress, and how and why to implement the complex interventions necessary, meant that every time Student began a new placement, Student's program was not reasonably calculated to meet his needs. Some teachers succeeded better than others. In third grade and in the spring of fourth grade, Student was provided a FAPE. It does not appear from the record, however, that the District succeeded in conveying from one class to the next what it had learned was essential to Student's progress. Student was, therefore, denied a FAPE, as set forth in the hearing officer's findings of fact, at the beginning of both his fourth and fifth grade school years.

Shortened School Day: Undisputed evidence in the record shows that Student's school day was shortened to one-half the normal school day in January, 2007, while Student was in Ms. Mackie's class at Mission Elementary School. Student's day was lengthened by one hour near the end of May, 2007, and Student then continued on that abbreviated schedule for at least a portion of the time in Mr. Morgan's fifth grade class. The definition of FAPE in the IDEA includes a requirement that the education offered to students with a disability meet the standards of the State Education Agency applicable to all students in the state. 34 C.F.R. § 300.17(b). The New Mexico Public Education Department sets a required length for a school day. NMSA 1978, § 22-13-1; 6.30.2.10(H) NMCA. Unless a student's IEP team determines that the student's disability requires a shortened school day as a modification or accommodation necessary for the student to make educational progress, a student with a disability must have a school day of the length mandated by state law.

Parent contends that Student's day was improperly shortened for administrative convenience. The record does not support this claim. It shows instead that shortening Student's school day was supported by his teacher's observations that he lost focus in the afternoon; he began to run around the room and wasn't able to settle down and participate in any of the things he did in the mornings. The teacher thought it important to allow Student to experience success, even if for a more limited time. She believed that shortening Student's school day temporarily, and then gradually extending it again as Student's ability to focus and function in the classroom environment improved, would help him to make progress both in the behavioral and in academic realms. TR. 1017-22. Student's IEP team was convened and agreed to this modification. TR. 1017-18; Ex. 5A. The record shows that this approach worked well, and that Student's behavior and learning both improved. TR. 1017-18, 1057-58. The requirements of the IDEA were met.

The hearing officer does, however, find that the shortened day continued longer than it should have. The record shows that Student was ready for his day to be increased by an hour in March, 2007, at the end of the schools spring break, but that this increase was delayed because of administrative difficulties in reconvening the IEP team. TR. 1071-74; Ex. 26A. Because loss of time in school is a significant deprivation, delaying a increase in the time beyond what is required by Student's needs was a denial of FAPE. Student was deprived of an hour a day of educational services for approximately six weeks because of purely administrative delays. If reconvening the IEP team was difficult, this could have been addressed by authorizing in advance a gradual increase in the Student's school day as improvement was seen.

Restraints, Suspension and Police Involvement: Parent has argued that District staff applied restraint in an abusive manner. Parent did not carry her burden on this issue. Indeed, the evidence in the record overwhelmingly showed that restraint was measured and, when used, was applied appropriately, with minimal use of force.

Parent also has alleged that the use of restraint, suspensions from school, and police intervention, were improper and violated IDEA disciplinary rules. Although it is apparent from the record that Student's aggressive behavior was a manifestation of his disability, would likely have not occurred had Student's educational program been appropriate to meet his needs, and was not an effective means of teaching Student proper behavior, these facts alone do not mean that the District violated any of the discipline provisions of the IDEA, 34 C.R.F. §§ 300.530-300.537.

Federal IDEA regulations permit referral to and action by law enforcement authorities where a crime has been committed by a child with a disability. 34 C.F.R. § 300.535(a). Student's battery of a teacher here falls within this regulation. The District plainly has a responsibility to protect its students (including the student who is acting aggressively) and staff from violent behavior which could cause injury. 6.11.2.10 NMAC; *Alex G. v. Bd. of Trustees of Davis Joint Unified Sch. Dist.*, 387 F.

Supp.2d 1119 (E.D. Cal. 2005) (where state and local law permits restraint when behavior endangers others, IDEA does not preclude its use). The record here shows that restraint was used only under circumstances where Student's aggressive behavior endangered him and those around him.

Suspensions too may be used without violating the IDEA disciplinary rules. The IDEA specifically gives the District authority to suspend Student from school on the same grounds other students would be suspended, so long as the suspensions do not total more than 10-days in a school year. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530(b). It is undisputed here that Student was never suspended for more than 10-days in a given school year.

Although the discipline provisions of the IDEA were not violated, the need for restraint, suspension and police intervention is strong evidence that Student's educational services during the times these actions were taken – at Duranes in the fall of Student's fourth grade year, and again at Cochiti in the fall of Student's fifth grade year – were not reasonably calculated to meet Student's needs. That, of course, amounts to a denial of FAPE, even if there was no violation of the disciplinary regulations. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

Extended School Year Services (ESY): Parent claims a denial of ESY services in the summers of 2006 and 2007. In the Tenth Circuit, ESY services must be provided when “the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.” *Johnson Independent School District # 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). The Tenth Circuit requires the IEP team to consult with the parent and to consider not only regression-recoupment issues but the child's situation overall to determine whether his progress will be jeopardized by a break in services. *See also* 34 C.F.R. § 300.106(a)(2) (ESY services must be provided if required for Student to make educational progress).

The record shows that Student's teachers considered the provision of ESY services during both of these school years and documented that Student showed no regression either of these two years during holiday periods. Parent and District staff agreed that Student did well the first few weeks of each school year, both academically and behaviorally, and that he was eager for school to begin.

Remedy: Parent requests as a remedy in this matter that the hearing officer award expert consultation to assist District staff in designing educational services and accommodations and modifications reasonably calculated to enable Student to make educational progress. Parent also seeks compensatory education for Student. Compensatory education and injunctive relief are both equitable remedies. The hearing officer is charged with considering all of the circumstances, and providing relief calculated to remedy the educational deficit created by a District's failure to provide FAPE. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). The hearing officer must take into account the role of the various parties, mitigating or aggravating factors, and the impact of the denial of FAPE on the student, along with other factors. *Id.*; *Bd. of Education of Oak Park and River Forest High School District 200 v. Illinois State Bd. of Ed.*, 79 F.3d 654 (7th Cir. 1996).

Parent claims that the District staff simply do not understand FAS, do not understand the nature of Student's disabilities which result from FAS, have not collected sufficient data concerning his behaviors to create an adequate program for him, and that this lack of understanding and data results in an inability to devise an appropriate educational program for Student. Parent asks this hearing officer to designate Wendy Kalberg, Parent's expert witness, as a consultant for the District and assign Ms. Kalberg and her team to train District staff generally about FAS and its characteristics, to collect data on the triggers of Student's behavior, to train direct staff working with Student, to participate in the development of an appropriate IEP for Student, to meet monthly with staff, to be available for consultation, and to assist in the transition to middle school for Student. Ex. 44.

This remedy assumes that the denial of FAPE is founded on a lack of understanding by the District of the needs of students with FAS and of Student's needs in particular. Although certainly is true that certain staff, particularly in the fall of Student's fourth grade year and again in the fall of his fifth grade year, did not understand how to work effectively with Student, this was not true of District staff in general. The record shows that there was agreement among District staff, including teachers and district consultants, about the deficits commonly found in students with FAS and about the approaches which worked well with Student.

Parent's expert in FAS diagnosis and provision of services described children with a diagnosis of FAS as often having difficulty staying focused for more than a few minutes on a task; determining what must be done to complete a task and how to do it (planning and sequencing a task); shifting attention from one task to another; retaining information or skills learned without many repetitions; handling noise, light, movement, changes in routine, and other stimuli in the environment; moving from one task to another or one environment to another; and controlling their impulses. The District staff who worked well with Student described their understanding of the nature of Student's deficits in similar terms.

In the classrooms where Student made progress, the interventions used paralleled those Ms. Kalberg's research suggested should be tried. Ms. Kalberg commented favorably, for example, on the interventions in Ms. Mackie's class suggested by District educational consultant David D'Antonio. TR. 597-98, 621, 630-31. The descriptions of the modifications to Student's environment made in Student's third grade class and then in his fourth grade class at Mission Elementary School in the spring semester showed a great deal of understanding about Student's disability and his needs and about how to meet those needs.

The problem during the times Student's program fell apart and he was not provided a FAPE (from August to October 20, 2006, at Duranes Elementary School, and from August 22, 2007, to October 12, 2007, at Cochiti Elementary School) was that Student's IEP simply did not adequately

address how the District was going to ensure that the expertise gained about how to address Student's needs was transmitted to the staff who would be teaching him the following school year. The failure to include such a plan in Student's IEP led, not surprisingly, to each new teacher struggling to work with Student, beginning all over again to try to determine what accommodations should be made to meet his needs, and how to effectively implement those interventions. While new staff fumbled, Student's behavior predicably spun out of control. Although the District has on its staff persons qualified to offer training and consultation to Student's teachers, the record shows that whether or not to use these services, and whether or not to follow the advice given was left up to the teacher. Both the amount of support and the knowledge of the consultant about services in the classroom the previous year was limited. TR. 671, 687-690. Failure to provide the communication and other services needed for a smooth transition, and the failure to train new staff about how to meet Student's needs, was the underlying cause of the denial of FAPE in the fall of 2006 at Duranes Elementary School and in the fall of 2007 at Cochiti Elementary School.

In light of this understanding of the problems which led to a denial of FAPE, the hearing officer does not find that it is necessary to start over with the collection of basic data on Student. The District appears to have available to it a sufficient track record on what works to bring Student's behavior into control. Therefore, the remedy provided focuses on the District ensuring that its knowledge of Student's needs and its own expertise is brought to bear in devising an appropriate program for Student and in ensuring that it is properly implemented in the class where Student is placed. The assistance of Parent's expert – a leader in the field of FAS who happens to be located in Albuquerque – must also be used, but not for all of the functions urged by Parent.

The hearing officer, having found a denial of FAPE in the fall of 2006 and again in the fall of 2007, as well as the failure to add an hour to Student's school day in late March through mid-May, 2007, has also addressed whether compensatory education is appropriate here. The hearing officer finds that the denial of appropriate educational services during these time periods, although short in

themselves, had a significant impact on Student's education. It is apparent that Student recovered only gradually both his equanimity and the academic skills he had previously mastered.

The hearing officer has also taken into account the Parent's insistence on a change of teachers in the fall of Student's fourth grade year. Although the District remained responsible for providing Student a FAPE, Parent's strongly held view contributed significantly to the District's decision to place Student in a class which did not fit well with his needs, against its better judgment. Finally, the hearing officer also takes into account the District's relatively prompt convening of the IEP team and change of placement when it became apparent Student was not doing well, and the many resources the District devoted to Student's education.

IT IS HEREBY ORDERED:

1. The District will put in place a consultant from its staff (David D'Antonio, or should he no longer be in his current position, someone with comparable expertise in addressing the needs of students with executive function disorder) who will be assigned to work with the District staff on Student's IEP team and Student's teacher and related service providers;
2. Mr. D'Antonio will review Student's records, and meet with teachers and related services providers who have been successful with Student (including Ms. Mackie and Student's O.T. and SLT) to review with them the modifications to Student's environment and the interventions and approaches with which they have had success;
3. Mr. D'Antonio will observe in Student's classroom for at least 8 hours total initially, and will consult with Student's current teacher, educational assistant, and related services providers;
4. Mr. D'Antonio will then assist in the preparation of an new IEP for Student which will provide direction in detail as to modifications and strategies needed to the classroom environment, and as to the rationale behind those strategies and in how to implement them effectively. This will be a mediated IEP;

5. Student's IEP shall include behavioral goals, as well as academic goals, for Student, including goals for improving the time Student is able to focus on academic work, improving Student's ability to return to task after a break, the elimination or prevention of any aggressive behaviors, and assisting Student to recognize and address when he is becoming over-stimulated;
6. If Student is not currently receiving a full school day, the IEP shall include a plan to rapidly increase to a full school day the time Student is able to benefit from being in school;
7. The IEP shall include objective methods of measuring Student's progress toward both behavioral and academic goals;
8. Mr. D'Antonio will continue to check on Student through brief classroom visits after the new IEP is put in place, initially once a week, and then decreasing to once a month, so long as Student is making progress toward his behavioral goals;
9. If progress is not being made, the IEP team shall be reconvened, and the IEP revised;
10. If Student's behavior regresses significantly despite these steps, then the District shall hire Ms. Kalberg to perform an independent evaluation of Student and shall follow her recommendations for revising Student's IEP;
11. Before the end of the school year, the IEP team will put in place a plan to ensure that the staff who will work with Student next year will receive direct training and support from current staff working with Student and from Mr. D'Antonio so that the knowledge gained about Student's needs and how to meet them is not lost with each change in placement. Future IEP's will also include a transition plan prior to the end of each school year or change of placement;
12. Mr. D'Antonio and staff currently working directly with Student will be provided a one-half day training on FAS and the research on educational interventions for Students with FAS, provided by Ms. Kalberg or her staff, or a program recommended by Ms. Kalberg or her staff;
13. The District will provide a five-week program during the summers of 2008 and 2009 for Student. This program will be designed by Student's IEP team to provide additional services

to Student which are calculated to allow Student to the achieve some significant educational benefit. Services should be provided five weeks each summer, four hours per day or some variation which provides equivalent time. As during the school year, attention should be given to ensuring that appropriate modifications and accommodations are put in place to meet Students needs.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. 300.516, and 6.31.2.13(I) (25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

THIS DECISION ENTERED THIS 28th DAY OF JANUARY, 2008.

Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Decision of the Due Process Hearing Officer* was sent by certified mail, return receipt requested, on January 28, 2008, to Dr. Veronica C. Garcia, Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and to the following counsel of record in this proceeding. The decision was also e-mailed on January 28, 2008, to all Counsel.

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Due Process Hearing Officer