NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 0708-04

FINAL DECISION

Statement of the Case

Parents filed a Due Process Complaint ("Complaint") with the New Mexico Public Education Department ("NMPED") on August 24, 2007, alleging that District denied Student, a high school senior, a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA 2004") 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. More specifically, the Parents allege the District failed to adequately evaluate Student's reading and writing needs and, correspondingly, failed to provide Student with needed related services, specialized instruction and assistive technology. Parents also contend District failed to comply with procedural requirements before imposing disciplinary action which has resulted in Student's placement in an interim alternative educational setting ("IAES") rather than the least restrictive environment ("LRE"). The Due Process Hearing Officer ("DPHO") was without jurisdiction to hear Parents' additional claim that Student was harassed by other students on the basis of his disability and that District failed to protect him from that harassment.[1]

Parents originally captioned their Due Process Complaint to include the Superintendent of the District, individually, in her official capacity. As reflected in the Summary of Pre-hearing Conference, Parents agreed to withdraw their Complaint against the Superintendent. The parties also agreed at the

[1] Parents lodged the same or similar complaints of peer harassment with the U.S. Department of Education, Denver Office for Civil Rights ("OCR"), in June 2006. By letter, dated June 27, 2007, the OCR found the alleged incidents did not amount to disability-based harassment. The OCR letter is attached to the District's Motion for Partial Dismissal of record October 22, 2007.

conference to identify District by the Board of Education as the proper party respondent. Although a written withdrawal was not received of record, the parties' pre-hearing conference agreements control and the proper caption for these proceedings excludes the Superintendent as is reflected on the cover page for this Decision.

District did not challenge the sufficiency of the Complaint and the parties' attempt to settle through mediation failed. District sought partial dismissal contending several issues were barred by either collateral estoppel or *res judicata* principles due to the aforementioned OCR investigation and two NMPED investigations of Parents' state complaints. The parties were allowed to brief and orally argue their positions and the motion was denied by Order dated November 20, 2007. The parties sought extensions of the deadline and this Decision is timely filed if mailed to NMPED and the parties no later than January 7, 2008.

The procedural history of this Complaint is otherwise not remarkable or substantive and need not be related further. The due process hearing was held on December 4 and 5, 2007. Parents and Student were present throughout and represented by counsel. The District's Director of Special Education ("SE Director") and Superintendent were present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Parents were identified by numbers. The Joint exhibits were identified by letters. District did not submit separate exhibits. 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 of record at September 26, 2007.

1. Whether District timely and/or adequately evaluated Student's reading and writing needs.
2. Whether Student required certain related services to receive FAPE and, if so, whether District failed to provide the specified related services.
3. Whether District provided adequate transition services.
4. Whether Student required specialized instruction to receive FAPE and, if so, whether District provided Student with adequate specialized instruction to confer FAPE.
5. Whether Student required, and if so, whether District has ensured that adequate AT devices and services were made available to Student.
6. Whether Student's behavior impacted his ability to derive benefit from his educational program and, if so, whether District adequately addressed Student's behaviors.
7. Whether IDEA imposes upon the District a duty to prevent other students from harassing Student on the basis of his disability and, if so, whether District adequately protected Student from peer harassment.
8. Whether District complied with IDEA procedural requirements when imposing discipline upon Student.
9. Whether Student was failing to adequately progress toward annual goals and, if so, whether the individualized education programs ("IEP") developed for Student by District provided him with adequate special education and related services to confer FAPE.
10. Whether District has educated Student in the LRE.
11. Whether Parents interfered with Student's educational process.

12. Whether the Complaint Resolution Reports issued by the NMPED have res judicata implications for any of the issues identified for hearing.

Issue 7 was not heard due to lack of subject matter jurisdiction as indicated above and Issue 12 was determined by the aforementioned Order of record at November 20, 2007.

Findings of Fact

The parties submitted requested findings of fact and conclusions of law before the hearing and supplemented those requests 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 ___" and references to pages in the transcript of the hearing by "Tr ____."

Historical Facts

1. Student is 17 years old and at all material times has attended District schools and/or received services from District programs.
2. Student is, and has been, eligible for special education and related services as specific learning disabled ("SLD") since second grade. Exh D; Tr 37-38, 476-478.
3. Student resides with his Parents within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency ("LEA").
4. Student was permanently expelled from District's high school in June 2006. Exh Q.
5. Since his expulsion, Student has, except for several weeks at the beginning of the 2006-2007 school year, been enrolled in and received all services from the District's IAES program.

6. Prior to his suspension and expulsion, Student was enrolled in District's high school full time. He attended regular education classes and received special instruction on both an inclusion and resource basis in reading, math, English and science. His IEP also provided for social work and behavioral support services. Exhs P and W.

7. Student is expected to complete all necessary credits and graduate in May 2008. Tr 190.

Issues 1, 4 and 9 – Adequacy of Evaluations and Educational Program

8. Although the evaluation itself is not of record in these proceedings, reference was repeatedly made to an educational evaluation conducted by the District's diagnostician in January 2005. Exh O, p. 12; Tr 475-476.

9. Student's IEP team relied upon this evaluation in its triennial review conducted on March 22, 2006, to conclude that Student still qualified for special education as SLD. Exh O, p. 12.

10. At Parents' request, another evaluation was performed by an independent diagnostician, not employed by the District, in May 2007. Exh D.

11. The same diagnostician for the District reviewed the independent evaluation, agreed with its conclusions and recommendations and reported that they were consistent with those found in the January 2005 evaluation. Tr 477-478.

12. The independent evaluation confirms Student's eligibility as SLD, noting weaknesses in reading, math and written expression skills. Exh D; Tr 474-495.

13. Both evaluators found Student's verbal reasoning abilities to be better developed than his nonverbal reasoning abilities. Exh D, Tr 474-495.

14. The independent evaluator reviewed Student's educational records and, specifically noting the reading program employed by District, found that Student demonstrated significant academic underachievement despite "sustained, high-quality, scientific, research-based instruction and intervention." Exh D, pp. 1 and 8.

15. Student's IEP team proposed a psychological evaluation in March 2005 but Parents refused consent. Exhs S and U.

16. A psychological evaluation was conducted in April 2006. Exh C. See also Findings listed under Issues 6 and 8 – Behavior and Disciplinary Procedures.

17. The team reviewed the psychological evaluation in its disciplinary IEP meeting of May 10, 2006, and, on the school psychologist's recommendation, determined that Student did not qualify for the disability category of emotionally disturbed. Exh N, pp. 2 and 5.

18. The two annual IEPs conducted on behalf of Student during the statutory period under review contain present levels of performance, goals and objectives for reading, writing and behavior, a schedule of services, modifications and accommodations and prior written notice. Exhs K and O.

19. Since August 2005, District has provided Student with reading instruction using the Sopris West Language program ("Sopris"), a scientific, research-based, multisensory program. Tr 370-371, 374-376, 410.

20. Student has been taught Sopris by qualified and adequately trained instructors. Tr 406, 519.

21. Sopris is an appropriate methodology for Student's needs and age. Tr 376, 482-484, 532.

22. When Student was participating in the Sopris program, he made adequate progress and received educational benefit. Tr. 372-373.

23. In addition to Sopris, District currently delivers instruction to Student in Resource English IV, Earth Science, Gov/Econ, Math and Art, all with intensive modifications. Exh K, p. 8-9; Tr 519-520.

24. Student's IEP calls for modifications and supports (including, but not limited to, extra time, modified assignments, word banks/vocabulary lists, assistive technology, one-on-one instruction and peer assistance) that are provided to him in IAES. Exh L, p. 11; Tr 521-523, 534-535.

25. The educational services provided to Student in IAES enable Student to participate in the general curriculum and to progress toward meeting the goals set out in his IEP. Tr 295, 489.

26. The educational services provided to Student prior to his removal to IAES were reasonably calculated to and did confer meaningful educational benefit.

27. On August 18, 2006, Student's addendum IEP team proposed to meet its obligation to provide Student with FAPE during expulsion by delivering Interim English II (primarily Sopris) for 1.5 hours per week in IAES and the remaining courses by "homebound correspondence course work." Exh M.

28. On November 27, 2006, the IEP team met again and conceded that the homebound correspondence course was not appropriate because all the available programs exceeded Student's ability level. Exh L, p. 8; Tr 62-63, 126, 182, 217-218.

29. Other than 1.5 hours of Sopris instruction per week, Student received no instruction or services from the beginning of the school year to November 28, 2006. Exhs L and M; Tr 62-64.

30. To compensate Student for this lapse in services, District and Parents agreed that District would provide Student with a driver's education course and a block schedule. The mechanics of the block schedule were not explained of record other than to indicate that it would allow Student to accelerate his program over the traditional schedule. Parents later retracted their agreement to the block schedule and relied solely on the driver's education course to compensate Student for the lapse. Exh J, p. 5; Tr 98-99, 218-219.

Issue 2 – Related Services

31. Although not listed as a related service on Student's IEPs, Student has received weekly psychological counseling from the school psychologist since his psychological evaluation in April 2006. Tr 290-292.

32. Student has had the support of a behavior specialist for approximately four years. The behavior specialist was assigned when Student's first incidents of aggressive behavior emerged and, at that time, the behavior specialist taught Student a social skills curriculum called "Skill Streaming," emphasizing a segment entitled "Skill Alternatives to Aggression." Tr 426-428.

33. The behavior specialist has assisted Student's IEP teams to develop and modify Student's behavior intervention plans ("BIP"). Tr 428-430.

34. The behavior specialist continues to provide related services by consulting with Student's teachers and directly with Student to monitor Student's behavioral progress. Tr 428-429.

35. Student has also had social work services for approximately four years. The social worker is responsible for developing social work goals and objectives, consulting with Student's teachers and assisting with implementation of Student's BIP. Tr 431.

36. Student has received and continues to receive supportive services as are required to assist him to benefit from special education.

Issue 3 – Transition Services

37. The two annual IEPs conducted on behalf of Student during the statutory period under review contain student profiles and schedules of transition services. Exhs K and O.

38. The District's transition specialist has conducted at least one interest inventory with Student and his family. Tr 162-163.

39. The District secured the attendance of a representative from the Department of Vocational Rehabilitation at one of Student's IEPs, who explained the services available from that agency upon Student's graduation and invited the family to make an appointment with the Agency to undergo an interest inventory in preparation for his graduation. Tr 77-78, 163.

40. The District arranged for Student and other students in IAES to visit the local community college and tour post-graduation programs and programs that might be available for dual credit while Student was still in high school. Tr 92-93, 113-114, 227-228.

Issue 5 – Assistive Technology and Services

41. Although items of assistive technology have been provided to Student throughout the statutory period in question, he was not formally evaluated for assistive technology needs until April 13, 2006. Exhs B and O, p. 13.

42. Consistent with the recommendations made in the April 2006 assistive technology evaluation, Student has had a Franklin Speller available to him. He has also been provided with the Kurzweil reading software and books on tape and/or CD. Exh B; Tr 501-502.

43. Student has received assistance with keyboarding skills in IAES. Tr 77.

44. Using a calculator properly was an objective/benchmark under Student's math goals for the 2005-2006 school year. Exh U.

Issues 6 and 8 – Behavior and Disciplinary Procedures

45. See also Findings listed under Issue 2 – Related Services.

46. Although Exhibit W which is the IEP for May 16, 2005, states that a BIP dated May 13, 2005, is attached, the same could not be found of record. However, credible evidence indicated that Student was implementing the terms of this BIP successfully during the 2005-2006 school year prior to the subject altercation. Exhs O, p. 14 and P; Tr 363-364.

47. Student's IEP team reviewed and modified the BIP during its March 2006 meeting and the result was incorporated in Student's disciplinary IEP of May 10, 2006. The BIP was further reviewed and modified in the November 2006 addendum IEP and the June 2007 annual IEP. Exhs K; L; N, p. 3; and O, pp. 13 and 17.

48. Student's BIPs include a combination of positive supports and consequences. Exhs K, L and N; Tr 287-288.

49. The primary focus of Student's psychological counseling is continuing to reinforce and develop social skills. Tr 290-292.

50. The disciplinary infraction giving rise to Student's expulsion was an altercation that occurred on or about March 15, 2006. Exhs N and O; Tr 59.

51. The evidence presented at the due process hearing did not suggest that a weapon was involved or that serious bodily injury was inflicted during the subject altercation.

52. Student was placed on short-term suspension immediately following the altercation until his IEP team was convened on March 22, 2006. Exh O, p. 15.

53. The IEP team met on March 22, 2006, to conduct a manifestation determination review ("MDR") to decide whether Student's behavior was a manifestation of his disability but deferred the decision until a psychological evaluation could be administered. Exh O.

54. Over Parents' and Student's objections, the IEP team then ordered that Student be removed to IAES effective April 3, 2006, on a five day per week schedule, with 30 hours per week in instruction and related services, pending completion of the psychological evaluation. Exh O, pp. 11, 15 and 18.

55. The reason offered for this removal to IAES was the "safety of the Student." Tr 217.

56. Parents objected to Student's removal to IAES but no other setting was offered. Exh O, p. 18; Tr 48-49.

57. At least one member of the March 2006 IEP team did not understand that a student could not be removed from his or her current placement for more than ten days without a manifestation determination. Tr 434.

58. Although there was no direct evidence on the subject, it is assumed that Student did not attend classes at all from the date of the altercation until April 3, 2006.

59. No evidence was offered that the parties agreed to any form of compensation for the period from April 3, 2006, to the date of Student's expulsion, when Student was unlawfully removed to IAES.

60. The psychological evaluation was completed by the school psychologist in April 2006 and the IEP team reconvened on May 10, 2006, to conduct the MDR. Exhs C and N.

61. Attendees at the May 2006 MDR meeting included the school psychologist who conducted the psychological evaluation; Student's special and regular education teachers; the District's behavior specialist; the District's assistive technology coordinator; the Principal, the SE Director and the Superintendent; Student, Parents and their advocate. Exh N.

62. The psychological evaluation, which was reviewed by the May 2006 MDR team, noted Student's weakness in nonverbal reasoning abilities and included a recitation of some of the literature concerning the potential relationship between behaviors and nonverbal learning disabilities. Exh C, p. 6; Tr 294-295, 379.

63. The school psychologist concluded that "many of the behaviors I see are possibly, if not probably, outside the nonverbal learning disability." Tr 295, lines 2-4.

64. The team also reviewed the incident report of the altercation prepared by District's administrative staff. Tr 187, 235-236, 556-557.

65. Student was present at the May 2006 MDR and available to participate in the discussion and provide information concerning the altercation. Exh N.

66. During the May 2006 MDR meeting, Parents reported, for the first time, that Student might have what they described as a genetic disorder called neurofibromatosis ("NF") and claimed that, according to their understanding of the disorder, it could cause some of Student's behavior problems. Parents came to this lay diagnosis due to the actual diagnosis of at least one of Student's siblings and, in the Parents' opinion, Student's presentation with many of what they understand to be characteristics of the disorder. Tr 317-318, 377-378.

67. There was no evidence of record that Parents sought evaluation of Student for NF in any IEP meeting convened to determine Student's eligibility, or otherwise, prior to this MDR process in 2006, although Father testified to having done "seven years' worth of research on this disorder." Tr 317, l. 16 thru 318, l. 8.

68. After the MDR meeting, Parents presented the SE Director with a copy of a doctor's prescription slip dated May 17, 2006 (one week post-MDR meeting), referring Student to a genetic clinic with the notation "Dx: Neurofibramatosis." Exh 1.

69. Parents also gave the SE Director a December 13, 2006, letter from a Colorado health care provider that makes no mention of NF at all. Exh 1, p. 2.

70. The SE Director had never heard of the disorder prior to Parents mention of it at the May 2006 MDR meeting but did look it up on the Internet after the meeting. While examining the SE Director about this, counsel for Parents read a list of behavior characteristics and asked whether the witness had learned that these were typical of a child with NF. The witness agreed that some but not all were consistent with what he had read on the Internet. Neither the attorney nor the witness disclosed the source of their information of record. Tr 171-174.

71. Parents did not offer into evidence any scientific documentation concerning the nature of the disorder nor did they present any expert testimony to explain the condition or its implications for a child's ability to benefit from special education.

72. The psychological evaluation reviewed by the MDR team was sufficiently broad to identify and evaluate the NF characteristics suggested by Parents during witness examination. Exh C.

73. Parents concerns about the possibility of NF were duly considered and noted by the MDR team while deliberating their decision. Exh N, p. 8; Tr 211-212, 364-365, 441-443, 460.

74. The MDR team reasonably concluded that the behavior that gave rise to the altercation and resulting code violation was not a manifestation of Student's disability. Exhs H and N; Tr 208, 360-362, 364-365, 369, 440, 459, 507-508.

75. The District has not, to the date of hearing, received any confirmation of a NF diagnosis from Parents or any health care provider. Exh 1, p. 2; Tr 183-184, 212.

Issue 10 – Least Restrictive Environment

76. See also Findings under Issues 1, 4 and 9 – Adequacy of Evaluations and Educational Program.

77. Student's circumstances, in particular his expulsion from the high school, make the typical LRE inquiry inapplicable.

78. Nevertheless, the small group setting affording Student significant one-on-one attention, without the stress of passing periods or other extraneous student interaction, is an appropriate

environment for Student to receive services as a child removed from his current placement due to disciplinary action. Tr 215, 229-232,

Issue 11 – Parental Involvement in the Educational Process

79. Parents have attended all of the IEP meetings subject to review in these due process proceedings.

80. The IEP meeting notes indicate that Parents participate in team discussions extensively.

81. Parents have supported Student's decision to refuse Sopris instruction. Tr 74-75, 90, 121-123, 249-251, 253, 329-330.

82. District has offered services in the IAES setting five days per week but Student, with the support of his Parents, has elected to attend only four days per week. Tr 49, 83, 89-90, 261.

83. Parents supported Student's decision to refuse to participate in the Community College program tour. Exh A, p. 8, Tr 92-93.

Conclusions of Law

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A).

2. The burden of proof, by a preponderance of the evidence, rests with Parents, the parties 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 IDEA 2004, its implementing regulations, and the New Mexico Special Education Regulations.

4. This decision is timely filed on January 7, 2008, within the extensions granted by the DPHO at the requests of one or both of the parties

5. Student is qualified and eligible for special education and related services as Specific Learning Disabled. 34 CFR § 300.8 (a) and (c) (10).

6. Parents did not meet their burden of proving that the District failed to timely and adequately reevaluate all areas of suspected disability.

7. Parents did not meet their burden of proving that procedural deficiencies in Student's IEPs, if any, rose to the level of a substantive violation of IDEA 2004.

8. Parents did not meet their burden of proving that the District failed to provide Student with specialized instruction.

9. Parents did not meet their burden of proving that the District failed to provide Student with related services that were required to assist Student to benefit from special education.

10. Parents did not meet their burden of proving that the District failed to provide Student with adequate transition services.

11. Parents did not meet their burden of proving that District failed to provide Student with adequate assistive technology devices and services.

12. Parents did not meet their burden of proving that District failed to adequately identify or address Student's behavioral concerns.

13. The special instruction and related services provided to Student prior to the altercation in March 2006 were reasonably calculated to and did confer meaningful educational benefit.

14. The services delivered to Student in the IAES setting since November 2006 are sufficient to enable Student to continue to participate in the general education curriculum and to progress toward meeting the goals set out in his IEP.

15. Parents agreed to accept a driver's education course, rejecting other District offers, in compensation for the lapse in services in the fall of 2006 and no further compensation is appropriate.

16. Parents did not meet their burden of proving that their concerns regarding the possible diagnosis of NF constituted a suspected area of disability requiring assessment by the District.

17. Parents did not meet their burden of proving that the MDR decision that Student's behavior was not a manifestation of his disability made in May 2006 should be overturned.

18. District violated rights protected to Student as a child with a disability by removing him to IAES without complying with the provisions of 20 U.S.C. § 1415(k) in the spring of 2006 from the date of the altercation until his expulsion.

19. Parents failed to meet their burden of identifying appropriate compensatory relief for the violation of Student's protected IDEA 2004 rights.

Discussion and Legal Authority

Parents' claims, arising after August 24, 2005, are governed by the provisions of IDEA 2004; however, the implementing federal regulations did not go into effect until August 2006. The only federal regulations available prior to August 2006 were the 1999 regulations, also found at 34 CFR Part 300. To the extent that the 1999 regulations conflicted with IDEA 2004 during that period, the parties regulated by the Act were required to comply with the statute. Citations in this decision are to IDEA 2004, the 2005 state regulations and the 2006 federal regulations, unless indicated otherwise.

The Obligation to Provide FAPE

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. In order to develop appropriate programs the school district must evaluate and reevaluate children with disabilities to determine their eligibility and the appropriate content of their educational programs. 20 U.S.C. § 1414(a)(2), (b) and (c). IDEA 2004 also calls for the provision of assistive technology and related services when appropriate. 20 U.S.C. § 1414(d)

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 (5th 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 IDEA 2004, including whether the IEP document conformed to the Act's requirements. The components that must be included in the IEP document are defined in 20 U.S.C. § 1414(d)(1)(A) and 34 CFR § 300.320. 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 (10th Cir. 1998) ¶59 1998.C10.565 VersusLaw.com This limitation on procedural issues is now codified in IDEA 2004 at 20 U.S.C. § 1415(f)(3)(E)(ii).

In this proceeding, Student was initially receiving services under the "normal" circumstances contemplated by the Act and then under the provisions related solely to disciplinary actions. The standards for review of the program delivered after Student's expulsion will be discussed below. The statutory period under review runs from August 24, 2005, through the date of Parents Complaint. The IEP that controlled Student's program from the beginning of the 2005-2006 school year to March 15,

2006, falls outside the statutory period. Hence, the IEP document and procedures utilized in that meeting were not reviewed but the evidence of the services actually delivered to Student pursuant to that IEP were examined. An annual review and IEP was developed on March 22, 2006, immediately prior to Student's expulsion, and contemplated delivery of all services in IAES.

With the one exception noted below and the lapse in services in Fall 2006, Parents generally did not prove by a preponderance of the evidence that District failed to comply with the Act's procedural requirements in the development of Student's IEPs. The burden was also not met with respect to proving that the program delivered prior to his expulsion was not reasonably calculated to confer meaningful educational benefit. In the case of his IEPs post-expulsion, Parents failed to prove that Student has not received services so as to enable him to continue to participate in the general education curriculum and to progress toward meeting the goals set out in his IEP.

Parents were not specific in their complaints about Student's program (ie. Tr 310-312) beyond stating that they thought he did not read at the level the teachers claimed and that he ought to be able to read better than he does and the school ought to "do more." Tr 80-81, 325-327. The preponderance of the evidence, as noted in the Findings of Fact, is rather that District timely conducted educational, psychological and assistive technology evaluations during the statutory period under review. Further, the preponderance of the evidence indicates the materials used for Student's special instruction are suited to his needs and age and the District employs sufficient related services and supports and accommodations to assist Student to benefit from his educational program.

Placement in IAES

The primary goal of Parents' due process complaint on behalf of their son is to have him returned to the regular high school campus to attend a program similar to that in place prior to his suspension and ultimate expulsion in spring 2006 with the additional support of continuous adult supervision to prevent further altercations. Following the MDR decision that Student's behavior was not a manifestation of his disability, Student was subject to relevant disciplinary procedures applicable to children without

disabilities. District maintains that those procedures mandated Student's expulsion and accorded Student a hearing and appeal to review the expulsion decision. This DPHO is without jurisdiction to review that disciplinary decision or the disciplinary procedures employed.

The MDR decision is, however, subject to review and, if the Parents had met their burden to overturn that decision, Student could not have been removed from his then current placement without compliance with extensive procedural requirements governing disciplinary actions involving disabled students. 20 U.S.C. § 1415(k)

Specifically, a child with a disability who violates a code of student conduct may be removed from his or her current placement for not more than ten school days. Removal in excess of ten days constitutes a change of placement. Within ten days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the child's IEP team must conduct a MDR. 20 U.S.C. § 1415(k)(1)(E)(i) If the behavior that gave rise to the violation of the school code is determined to be a manifestation of the disability, the IEP team shall, among other things, "return the child to the placement from which the child was removed, unless *the parent and* the local education agency agree to a change of placement as part of the modification of the behavioral intervention plan." 20 U.S.C. § 1415(k)(1)(F)(iii) (emphasis added)

If, however, the behavior that gave rise to the violation of the school code is determined NOT to be a manifestation of the child's disability, "the relevant disciplinary procedures applicable to children without disabilities may be applied to the child *in the same manner and for the same duration* in which the procedures would be applied to children without disabilities . . ." 20 U.S.C. § 1415(k)(1)(C) (emphasis added) However, a child who is removed from his or her placement under this clause shall continue to receive educational services "so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP . . ." 20 U.S.C. § 1415(k)(1)(D)(i) In this circumstance, the setting where the child receives

these services is determined by the IEP team, without reference to a parent's agreement, and can be IAES. 20 U.S.C. § 1415(k)(2)

The District's responsibilities to determine manifestation are set out at 20 U.S.C. § 1415(k)(1)(E). The LEA must convene the parent and relevant members of the IEP team to review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents and answer the following questions.

1. Was the conduct in question caused by, or did it have a direct and substantial relationship to, the child's disability; or
2. Was the conduct in question the direct result of the LEA's failure to implement the child's IEP.

If either question is answered in the affirmative, the conduct shall be determined to be a manifestation of the child's disability.

At the time of Student's May 2006 MDR, District had not yet updated its forms to reflect the inquiry described above. Exh H; Tr 211. Instead, Student's MDR team answered nine questions addressing the criteria found in the previous authorization of IDEA. The first three questions established the MDR team's conclusion that Student's IEP was appropriate and implemented as written which will be construed herein to constitute a negative answer to IDEA 2004's second question. In answer to the first question, the form states, above the signature lines, that "it is the opinion of this committee that the behavior was not caused by the student's disability."

Parents failed to prove by a preponderance of the evidence that the MDR team did not review all required information, including the information provided by Parents. Parents also did not meet their burden to prove that there was insufficient basis for the determination reached by the MDR team.

This DPHO was able to discern two bases for Parents' argument that the MDR determination should be overturned. The first is that this determination was a "sudden" change from prior MDRs where Student's fighting behaviors were determined to be a manifestation of his disability. Exhibit I is a

timeline summary of Student's IEPs since November 13, 2003, which date is the first mention of fighting in Student's IEP records. The exhibit reflects a total of four MDRs, including this one, and all three of the previous MDRs were conducted prior to the effective date of IDEA 2004. Without discussing the changes further, it is noted that IDEA 2004 did significantly change the inquiry that must be followed to determine manifestation. With little or no explanation of the reasoning, the summary reports that the first two MDRs (both in 2004) were determined to be disability related. However, the third, in 2005, was not and Student was suspended for 45 days, again receiving services in IAES. Hence, Parents' argument of "sudden" change is not supported by the evidence.

The second asserts that District could not proceed to determine manifestation without a full evaluation of Parents' concerns regarding the alleged *possible* presence of NF conveyed to the team at the May 2006 MDR. Simply put, Parents fell far short of presenting a preponderance of evidence in support of this theory. Parents suggest that the mere mention of a medical condition imposes on the District an obligation to conduct a full evaluation before determining manifestation. This is not supported by the law.

The Office of Special Education Programs' ("OSEP") *Letter to Williams* published March 14, 1994, at 21 IDELR 73, instructs that the Act does not require that a school district conduct a medical evaluation for the purpose of determining whether a child has a given medical condition. However, if a public agency believes or State law requires that a medical evaluation by a licensed physician is needed as part of the evaluation to determine whether a child suspected of having a given medical condition meets the eligibility criteria of the Other Health Impaired category, or any other disability category under Part B, the school district must ensure that this evaluation is conducted at no cost to the parents.

It should be noted that Parents, by their own testimony, have long-standing knowledge of this potential diagnosis that spans all of Student's previous MDRs back to the period when Student's aggressive behaviors first emerged in late fall 2003. Nevertheless, they offered no credible evidence by which to evaluate the existence or physiology of the alleged disorder. The laundry list of behavior

characteristics that Parents incorporated in their witness examinations, without identifying the source, included some behaviors that were specifically addressed in Student's psychological evaluation. Exh C. Others were not. At best, Parents offered another, highly speculative explanation for behaviors of which District has long been aware and which have been evaluated and addressed in Student's IEPs since 2003. Exh I

Consequently, the MDR decision is upheld and Student was lawfully subject to the relevant disciplinary procedures applicable to children without disabilities in the same manner and for the same duration up to and including expulsion.

However, the preponderance of the evidence indicated that Student's removal from his then current placement to IAES over his and his Parents' objections, from the date of the altercation to the May 2006 MDR and ultimate expulsion, violated Student's rights under IDEA 2004. The prohibition of the unilateral removal of children with disabilities is a bedrock principle of IDEA arising out of the Supreme Court's emphatic direction in *Honig v. Doe*, 484 U.S. 305 (1988) 1988.SCT.40449 VersusLaw.com, that removal of children with disabilities from the school setting for behaviors related to their disabilities can be "accomplished only with the permission of the parents or, as a last resort, the courts." *Id*. at ¶ 38

District asks that this deprivation be considered a technical violation resulting in no harm to Student as he received the same services in IAES that he would have received had the MDR decision been made within ten days rather than deferring the decision until the psychological evaluation could be accomplished. There was no evidence to refute this contention, however, this DPHO is reluctant to characterize this rather blatant disregard for the clear proscription from both Congress and the Supreme Court and the Parents' express objections to removal as harmless.

While a violation of Student's rights is found herein, this DPHO is without basis for fashioning any compensatory relief. The focus of Parents' challenge was to overturn the MDR decision. The only claim relating to the disciplinary actions in Parents' Complaint reads, "The District inappropriately and

unfairly deprived [Student] of due process in its disciplinary proceedings and discriminated against him by punishing him when he was the victim of aggression by other students." Although this claim sounds primarily in subjects outside IDEA due process jurisdiction, this DPHO read the claim liberally to fashion Issue 8 - Whether District complied with IDEA procedural requirements when imposing discipline upon Student. The Parents' lack of interest in this violation is reflected in the fact that they did not address this errant removal in their Requested Findings of Fact (of record at November 20, 2007) other than to mention, at Finding 68, that Student "was placed back in the IAES pending the outcome of the evaluation." The Parents also sought no Conclusions of Law reflecting the unlawful removal to IAES in either the November requests or the Supplemental Requests submitted after the hearing, of record at December 18, 2007.

The primary goal of Parents' Complaint is to extend District's obligation to educate Student beyond May 2008, Student's projected date of graduation, but *only* if he is returned to the regular high school setting with continuous adult supervision. Tr 94-95, 123-124. Restoring Student to the high school setting is not within this DPHO's purview, given that the manifestation determination is upheld herein, leaving Student's expulsion intact. Another goal of Parents is to require the District to provide Student with a "different" reading program and "different" AT that will "work better" for Student but the preponderance of the evidence was that the reading program and AT, both of which they only vaguely complain, are appropriate and the Parents offered no evidence of alternative reading programs or AT that could be considered when designing compensatory relief.

ORDER

Given Student's expulsion and expected graduation, this situation is unlikely to present itself again. Nevertheless, District is hereby ordered to diligently and strictly comply with all disciplinary provisions of IDEA 2004 when administering discipline to Student for the remainder of his eligibility.

All remaining claims raised in Parents' Due Process Complaint are hereby dismissed with prejudice.

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 and facsimile to the following persons this 7th day of January 2008:

F. D. Moeller, Esq., P. O. Box 15249, Farmington, NM 87499-5249.

Jacquelyn Archuleta-Staehlin, Esq. of Cuddy, Kennedy, Albetta, Ives & Archuleta-Staehlin, 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 7th day of January 2008:

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