

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

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 0809-12

FINAL DECISION

Statement of the Case

Parents filed a Request for Due Process Hearing (“Request”) with the New Mexico Public Education Department (“NMPED”) on February 13, 2009, alleging that District denied Student, a pre-schooler on the autism spectrum, a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) 20 U.S.C. §§ 1400 et seq. (which took effect July 1, 2005) and implementing state (6.31.2 et seq. NMAC, effective June 29, 2007) and federal (34 CFR Part 300, effective August 14, 2006, and amended through December 1, 2008) regulations. More specifically, the Parents allege the District failed to provide Student with needed specialized instruction and related services.

The Request also asserted claims against NMPED directly. Relying on 6.31.2.13(I)(3)(d) NMAC, which articulates the department’s view that the IDEA has not authorized hearing officers to consider claims against state agencies, NMPED declined to appoint a hearing officer to review those claims. Nevertheless, Parents asked this due process hearing officer (“DPHO”) to exercise jurisdiction to hear their claims against NMPED. NMPED entered a special appearance for the sole purpose of responding to the Parents’ memorandum of law on this jurisdictional question. An order declining to exercise jurisdiction to consider the claims against NMPED was entered April 24, 2009.

District did not challenge the sufficiency of the Complaint and the parties’ attempt to settle through mediation failed. District sought partial summary judgment on two of Parents’ claims which was granted in part by Order dated April 30, 2009. The Parents objected to any extension of the deadline; however, the extensions requested by District, including at least one request due to scheduling conflicts

and time constraints of the DPHO, were granted and this Decision is timely filed if delivered to NMPED and the parties no later than June 22, 2009.

The due process hearing was held May 19-22, 2009. Parents were present throughout and represented by counsel. Student was not present. The District's Director of Special Education and one of its Special Education Coordinators were present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. The parties failed to submit a Statement of Stipulated Facts as required by 6.31.2.13(I)(14) NMAC. Exhibits offered by Parents were identified by numbers. District's exhibits were identified by letters. Joint exhibits were identified by double letters. Page numbers on all exhibits refer to the pagination in the lower right-hand corner.

The procedural history of this Request is otherwise not remarkable or substantive and need not be related further.

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 Pre-hearing Conference Summary of record at March 24, 2009.

1. Whether District was timely in its identification of all areas of Student's disability.
2. Whether Student has been offered and/or received appropriate SLP services.
3. Whether Parents are entitled to reimbursement for the cost of privately engaged speech and language ("SL") services.

4. Whether Student was offered and/or received an educational program reasonably calculated to confer education benefit and meet his needs as a child with ASD.
5. Whether District delivered services to Student in the least restrictive environment (“LRE”).

Two other issues were identified in the Pre-Hearing Conference Summary that are not listed here. The first, denominated No. 4 therein, was “Whether District is obligated to have persons with Autism Spectrum Disorder (“ASD”) expertise attend Student’s IEP meetings.” During the hearing on the merits, counsel for the Parents clarified that this issue was not a separate theory of liability asserted against District and that it was more of a factual allegation that contributed to District’s alleged failure to appropriately program for this Student.

The second omitted issue was denominated No. 7 in the Summary and read, “Whether District is obligated to adhere to NRC recommendations in developing and delivering an educational program for Student.” The claim framed in this issue was dismissed by Order entered April 30, 2009.

During the hearing, Parent offered two exhibits and some testimony regarding District’s summer programs. To the extent that Parents are seeking some relief from these proceedings for services beyond the regular 2008-2009 school year, the DPHO notes that no claim regarding summer services was alleged in Parents’ Request. If a dispute between the parties over 2009 summer services exists, it is not at issue in these proceedings.

At the close of evidence during Parents’ oral argument, DPHO noted the evidence indicated that District failed to convene a multidisciplinary team (“MDT”) consistent with 34 CFR §300.306 to determine Student’s eligibility as autistic and questioned why Parents did not assert this procedural failure in their Request. Tr 1103-1106. Unlike judicial proceedings in federal and state courts where amendment of the pleadings to conform to the evidence is liberally allowed (Rule 15(b)(2) Fed. R. Civ. P; Rule 1-015(B) NMRA), amendment within five days of the hearing and thereafter is proscribed under IDEA. 34 CFR §300.508(d). This restriction is consistent with the IDEA’s clear direction that the parties should

have every opportunity to resolve their dispute with alternatives to the due process hearing. Having all claims at issue disclosed is a necessary component of that goal.

Review of Parents' Request confirms that this procedural claim was not asserted therein and can only be raised at the due process hearing if District agrees. 34 CFR §300.511(d); 6.31.2.13(I)(19)(a) NMAC. Parents did not seek such agreement at the time of the hearing but requested a related conclusion of law subsequent to the hearing. District has similarly stated its objection to any amendment through related requested conclusions. Arguably, the matter would not be in question at all absent the inquiry from DPHO but to the extent the exchange can be construed as an attempt to amend the Request in contravention of 34 CFR §300.508(d)(3) or to raise an issue at hearing not raised in the Request without District's agreement in contravention of 34 CFR §300.511(e), both are denied. The lack of an MDT meeting is nothing more than another fact to consider in determining the issues properly raised for due process review and discussion regarding the same will be so limited.

Summary of Evidence

The testimony of 13 witnesses was received and 48 exhibits were admitted into evidence during three and a half days of hearing. The witnesses heard were both Parents; Student's pre-school teacher ("Teacher"); District's Director of Special Education, three of its Special Education Coordinators and the principal at Student's elementary school ("Principal"); two of Student's speech and language therapists ("SLP"); and the Autism Consultant retained by Parents. The expert testimony of two additional witnesses was heard: the clinical pediatric psychologist ("UNM Psychologist") who authored the evaluation conducted by the Neurodevelopmental Clinic in the Center for Development and Disability ("CDD") at the University of New Mexico ("UNM") and an assistant professor in special education from New Mexico State University ("NMSU Professor"). One of the District's three Special Education Coordinators mentioned above also testified as an expert. 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 ____."

At the time of the due process hearing, Student was four and a half years old. At all times relevant to this Request, Student has been enrolled in District's developmentally delayed ("DD") preschool program, which is the only preschool program of any kind that District offers. Tr 115; Exh DD. The elementary school where Student attended DD preschool also housed the local Head Start program administered by another agency to provide preschool services to typically developing four year olds that met low income eligibility requirements. Tr 409, 671-673 and 1041.

Prior to his enrollment with District, Student received IDEA Part C services pursuant to an Individualized Family Service Plan ("IFSP") written in October 2007 which is not of record in these proceedings. Student received in-home SL therapy services pursuant to this IFSP from Agency, a local family service agency, until his enrollment with District. Exh AA. The Agency conducted a Transition Assessment in February 2008 in anticipation of Student's move to District for services. Exh AA. Agency also provided District with a Transition Summary (Exh BB) which included present levels of performance and the Agency therapist that provided the services, conducted the assessment and authored the transition summary, attended the first meeting at District to develop Student's Individualized Education Program ("IEP") on August 15, 2008. Exh DD. The August IEP team also completed a Multidisciplinary Determination of Special Education Exceptionality ("MDT") finding Student to qualify as "Speech/Language Impaired." Exh DD, p. 3. The team relied on Agency's February assessment to reach this conclusion. Exh DD, p. 7.

In the spring of 2008, on advice from Student's pediatrician and the Agency therapists (Tr 737-738), Parents asked the CDD to evaluate their son for the possible presence of an autism spectrum disorder ("ASD"). After assessment by specialists from five different disciplines, the CDD concluded Student has Pervasive Developmental Disorder, Not Otherwise Specified ("PDD-NOS"), a condition on the autism spectrum. Student demonstrated significant impairment and met diagnostic criteria within the domains of social interaction and markedly restricted and stereotyped repertoire of activities, behaviors and interests. He did not meet diagnostic criteria for the domain of communication impairment so that a

diagnosis of Autistic Disorder was not indicated. Exh CC, p 14.

The CDD described Student as a child with early learning skills within the average range for his age and adaptive behavior adequate for his age and consistent with his developmental level. But Student has sensory issues, behavioral preferences for repetitive patterns and certain preoccupations. He has a strong preference for routines and difficulty transitioning that can interfere with his ability to participate in family activities, learning and his social experiences. Exh CC, p 14.

The CDD evaluation was conducted in July 2008 and resulted in a lengthy report that was provided to District's SLP by September 29, 2008. Exh CC; Exh 6, p 3. Parents were advised verbally of the preliminary results immediately after the evaluation in July (Tr 739) and Parents relayed this information verbally to District personnel at the IEP meeting in August 2008. Tr. 822. The only mention of Parents' report in the August IEP is found in the Prior Written Notice ("PWN") and all that is said there is that District agreed to "review additional outside evaluation" once it is available for compliance with education-based criteria and protocol and reconvene the IEP team after the review. Exh DD, p. 32.

The IEP developed on August 15, 2008, placed Student in the DD preschool half-day class at his home school for the morning session which runs from 8:00 to 10:45 a.m. giving Student 11 hours of instructional and related services programming per week. The class was staffed by Teacher, as the lead teacher, and one educational assistant ("EA"), and had seven children enrolled, including Student, all with the exceptionality of speech and/or language impairment. Tr. 32-33; Exh DD. The August IEP team consisted of Parents, Teacher, Principal, the Agency SLP, Student's District SLP, the District Special Education Coordinator assigned to Student's school; the District social worker and a student teacher. Exh DD, p 34 Despite Parents' persistent LRE inquiries and ultimate attendance in Head Start, there was no regular education teacher present at this or any of Student's IEP meetings.¹

The two SLPs attending the August IEP meeting disagreed on the amount of individual SL therapy required to appropriately address Student's SL impairment needs. The Agency SLP, explained

¹ Parents made no claim and none will be recognized here based on District's failure to have a regular education teacher at Student's IEP meetings in contravention of 20 USC §1414(d)(1)(B)(ii).

that Student's progress was limited with only one hour of therapy under his IFSP and that he "immediately demonstrated dramatic improvement" when the therapy was increased to two hours per week. Exh 2. In reliance on this report, Parents requested two hours per week of individual therapy.² The August team scheduled, and Student received, one hour of individual therapy in two 30 minute sessions and two 30 minute sessions of group therapy each week through December 11, 2008. Ex DD, pp 28 and 32; Ex 6.

Student's SLP took a leave of absence for personal reasons at the close of the first semester leaving District without an SLP assigned to Student's elementary school and contributing to "a severe shortage of speech-language pathology staff." Exh 12. District offered to compensate the lost SLP time by giving Parents a choice between participating in a Saturday Speech Academy, with the expectation that the lost time will be made up by the end of the school year, or a Summer Speech Camp for compensation by the end of the summer. Tr 720-721. Parents declined both options and instead hired the Agency SLP to compensate for the lost services. Student did not receive any speech language therapy services from District from December 11, 2008, through February 9, 2009, less the two week intervening Winter Break holiday. Thereafter, services were delivered by two part time SLPs on contract. Exh 6; Tr 917-918.

In addition to providing the compensatory services described above, Parents continued to employ the Agency SLP privately throughout the 2008-2009 school year to provide Student with an additional hour of therapy each week even after Student's individual therapy time was increased to two hours per week at school as noted below. The decision to continue her services after Student began attending the DD preschool on at least an interim, transition basis was made prior to the August IEP meeting. Ex CC, p 4; Tr 740-741. At the suggestion of the CDD (Ex CC, p 16), Parents also obtained SL therapy services for Student through the NMSU Speech-Hearing Clinic for the entire school year. Tr 743-744; Exh 27.

Also prior to the August IEP, Parents retained the services of the Autism Consultant who is the sole member, owner/operator of a Wisconsin-based corporation providing training for applied behavioral

² Throughout these proceedings, Parents have demanded four hours per week of individual therapy.

analysis (“ABA”) programs using the UCLA-Lovaas model. Tr 329-330. Autism Consultant initially visited Student’s home, interviewed Parents and tested Student to establish a baseline in August 2008. Tr 335. Following his guidance, Parents spent September and October 2008 recruiting and contracting with several people to be trained by the Autism Consultant and deliver ABA services to Student. Tr 750-751. Autism Consultant returned when the cadre of service providers was assembled to provide them and the Parents with one day of training on the ABA interventions. Tr 335-336. He returned once a month throughout the year to review the home-based program and provide additional training as necessary. Tr 341-342. There was no evidence that either the Autism Consultant or any of the service providers are certified to teach or provide any educational or therapeutic service in the state of New Mexico. The home-based ABA program was initiated in November 2008 and continued throughout the year with Student undergoing approximately 26 hours per week of what the Parents call ABA therapy. Ex 23. A detailed description of Student’s home-based program is contained in the Autism Consultant’s report at Exhibit 17 and Mother’s testimony generally beginning at Tr 730.

Parents seek reimbursement for all SL and ABA therapy costs incurred during 2008-2009 as itemized in Exhibit 27 and totaling in excess of \$14,000 through the date of the hearing.

The record indicates through the testimony of multiple witnesses and exhibits that the CDD report of its evaluation could not be considered by Student’s IEP team until it had been reviewed for compliance with District and NMPED protocols. District acknowledges receiving the CDD report sometime in late September or early October 2008. The only official record of the completion of District’s review is found in a January 14, 2009, letter to Parents from the District’s school psychologist “confirming” Student’s eligibility under the exceptionality of autism on the basis of the CDD evaluation conducted July 2008. Ex 10, pp 16-17. There was no evidence explaining either when Student’s IEP team was allowed to acknowledge the autism eligibility or how they knew they were allowed to do so.

There were two IEP meetings in November 2008 evidenced by IEPs found at Exhibits EE and FF. Exhibit EE’s cover page identifies autism as the primary exceptionality but has no Prior Written Notice

(“PWN”) (the list of actions proposed or refused by the District with an explanation for the decision as to each required by 20 USC § 1415(c)) and many entries that are dated “12/5/08.” Exhibit FF has no cover page and a single PWN accepting the proposal to conduct an Occupational Therapy (“OT”) evaluation.

Exhibit GG is the record of an IEP meeting conducted on December 5, 2008, and contains the first PWN to accept the CDD’s diagnosis of PDD-NOS. Although this PWN is specifically dated “12/5/08,” the two signature pages affixed to this document show dates of signature for “11/19/08” and “11/21/08,” respectively. There is no signature page dated December 5, 2008. The evidence is undisputed that no MDT team, compliant with the provisions of 34 CFR §30.306, was convened to determine the autism eligibility. Tr 694. The evidence is also undisputed that no individual qualified to interpret the instructional implications of the CDD evaluation was available to the IEP team as required by 34 CFR §300.321(a)(5). The evidence generally suggests that the only IEP team members who presented the instructional recommendations of the CDD report to the team were the Parents. Exs GG, HH, II and 13; Tr 699; Testimony of Father generally beginning at Tr 814.

The CDD recommended an “intervention program . . . guided by guidelines set forth by the National Research Council (*Educating Children with Autism*, 2002) (“NRC”) for children with autism and other pervasive developmental disorders up to the age of 8 years.” The National Research Council, an arm of the National Academy of Sciences, which is a private, nonprofit, self-perpetuating society of distinguished scholars, was organized in 1916 “to associate the broad community of science and technology with the Academy’s purposes of furthering knowledge and advising the federal government.” *Id.* at p.III.

This august organization was commissioned by the U. S. Department of Education to “integrate the scientific, theoretical, and policy literature and create a framework for evaluating the scientific evidence concerning the effects and features of educational interventions for young children with autism.” *Id.* at p. 2. The resulting report published in 2001 is still recognized as the seminal work in the field of educating young ASD children. Tr 454-455, 469; NMSU Professor generally beginning at Tr 490.

NMPED incorporated the NRC recommendations in its *Technical Assistance Manual on Autism Spectrum Disorders* published in 2004 (“NMPED Manual”), which in turn was incorporated by District in its *Autism Referral and Assessment Resource Guide for Special Education Evaluators* published in April 2007 (“District Guide”) found in Exhibit NN. It is noted that NN was a joint exhibit offered by both parties in their respective cases in chief.

Despite District’s endorsement of the NRC in the District Guide, other than recording Parents’ references to the NRC in Parental Input and rejecting the Parents’ proposals based on the NRC in the PWN, no mention is made of the NRC in any of Student’s IEPs. The IEPs reflect no reference to the NRC in making any of its programming decisions nor do they identify any basis for rejecting Parents’ proposals to adhere to the NRC except to say that Student is making appropriate progress. Exhs DD, EE, FF, GG, HH and II.

The NRC’ recommendation upon which the debate between the parties focused during Student’s IEP meetings calls for educational services that actively engage the child in intensive instructional programming for a minimum of 25 hours a week (meaning a full five-hour school day, five days a week), 12 months a year, that is systematically planned, developmentally appropriate and aimed toward identified objectives. (Ex NN, p 24; Ex 24, p. 10),

It is undisputed that at no time during the 2008-2009 school year did District’s IEP for Student provide programming for a full school day nor for five days a week. The initial four day program of 11 hours per week was increased to 15 hours per week in January 2009 but the District has consistently rejected Parents request for programming at 25 hours per week. Ex GG, HH and II. District offered Parents an option that would allow Student to transfer to a DD preschool with a full day program or to either repeat his morning session in the afternoon or to take Student to a DD preschool class at another elementary school with a different program for the afternoon session. Tr 715-716; 1043-1045. Parents declined each of those offers. There is no evidence of record that District has ever considered or offered a fifth day of programming per week. Tr 683.

Student was referred on August 19, 2008, for a Social Work (“SW”) Assessment by Teacher who expressed concerns about Student’s difficulty following directions, transitioning from one activity to another and social skills with peers. The assessment was conducted in late September 2008 and concluded that Student met the criteria for and would benefit from SW services to address the concerns identified by Teacher. Exh 7. As a result of this Assessment, SW services were added to Student’s Schedule of Services three times per month for a total of 90 minutes per month. Exh GG, p 18.

Student was referred to occupational therapy (“OT”) by his Parents who expressed concerns regarding Student’s sensory integration and play skills. An OT Assessment was conducted in late October 2008 and concluded that Student demonstrated fine motor skills consistent with his peers but that sensory processing regarding movement, touch and avoiding patterns may contribute to Student’s challenges in the classroom. Exh 8. “OT consultation services, with a focus on sensory processing needs, are recommended for [Student] to support his IEP goal that addresses demonstrating increasingly effective self regulation of behavior and emotions.” Exh 8, p 4. As a result of this Assessment, OT consultation services were added to Student’s Schedule of Services for 30 minutes per month. Exh GG, p 18 and 27.

The parties’ dispute over level of services resulted in the District convening a Complaint Assisted IEP (“CAIEP”) which was held over two days in January 2009. Exs HH and II. Thereafter, Student’s instructional program was increased by one hour per day. Half of that time was spent in individual SL therapy each day, increasing Student’s individual SLP services from one hour per week to two.³ Tr 49 and 921. During the other 30 minutes of additional time, Teacher closely supervised what has been called a small playgroup wherein usually two typically developing Head Start students joined Student in play activities. This time was intended to further develop Student’s social skills. Tr 49-50; Ex 32, pp 18-19.

Student’s program from the start provided that Student’s DD class would join the Head Start students on the playground for recess each morning. Tr 36. District began increasing Student’s interaction with these typically developing peers in late fall 2008 by inviting a Head Start student to work

³ The evidence was not clear whether Student continued to participate with the rest of his DD class in group therapy after this time.

with Student at the activity centers in his classroom two days a week. This intervention was expanded after the Winter Break and Student would go, with an EA in attendance at all times (Tr 410), to the Head Start classroom the other two days of the week and fully participate in the Head Start curricula. From March on, Student went straight from recess to the Head Start classroom for the remainder of the morning session on Mondays through Wednesdays, returning for speech therapy and small playgroup before going home. Tr. 42.

Still unsatisfied with the program developed for Student at the CAIEP meetings, Parents thereafter submitted the Request that is the subject of these proceedings.

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.

Background

1. Student resides with Parents within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency. He attends the District's DD preschool class at his home school.
2. The MDT's determination in August 2008 qualifying Student for services as speech-language impaired in articulation was appropriate.
3. A properly constituted MDT was never convened to consider Student's eligibility for the autistic exceptionality. Nevertheless, Student's primary exceptionality is identified as autistic.

4. The designation of autistic is consistent with the results of the July 3, 2008, evaluation conducted by UNM-CDD who found Student to be significantly impaired and meeting the diagnostic criteria in two of the three domains. Student's profile of symptoms was found to be consistent with the diagnosis of PDD-NOS, a condition on the autism spectrum.
5. District found that the CDD evaluation complied with all requirements and protocols of NMPED and the District and contained adequate and appropriate assessment measures. Exh 10, pp 16-17.

Timeliness of Identification – Issue 1

6. Student is identified as eligible for special education and related services in the primary exceptionality of autistic and the secondary exceptionality of speech and/or language impaired.
7. Identification of Student as speech and/or language impaired was timely made based on Agency's outside evaluation. There was no evidence of record that District required a review of the outside evaluation for compliance before it was relied upon by the MDT to make this determination.
8. Without explaining the differential treatment, District required that Student's CDD evaluation be reviewed for compliance with District standards.
9. District's "procedure for accepting an outside evaluation" unreasonably delayed Student's identification for the exceptionality of autistic.
10. Parents failed to prove by a preponderance of the evidence that the unreasonable delay had any impact on programming decisions made by Student's IEP teams.

Speech and Language Services – Issues 2 and 3

11. Parents proved by a preponderance of the evidence that two hours of individual and one hour of group SL therapy per week is appropriate to meet Student's SL impairment needs as currently known from the evaluations done to date.

12. Parents proved by a preponderance of the evidence that District's provision of only one hour of individual therapy per week from the beginning of school until December 11, 2008, deprived Student of related services that he required to benefit from special education.
13. Parents did not prove by a preponderance of the evidence that Student required four hours of individual therapy per week to benefit from special education.
14. Parents proved by a preponderance of the evidence that District's offers to compensate for SL services lost due to personnel shortages were not reasonably calculated to provide Student with the related services he required to benefit from special education.
15. Parents' decision to decline District's offer of compensatory speech-language services was reasonable as was their decision to acquire the services for Student privately.
16. The compensatory SL services Parents retained were reasonable and appropriate.
17. Parents failed to prove by a preponderance of the evidence that the SL services delivered after February 9, 2009, deprived Student of the related services he required to benefit from special education.
18. Parents are entitled to be reimbursed for the costs of one hour of individual therapy per week at the rate of \$55.00 per hour for each week from the beginning of school on August 20, 2008, through December 11, 2008; and for two hours per week at the same rate for each complete week accruing between December 11, 2008, and February 9, 2009, excluding two weeks for the intervening Winter Break holiday.
19. Parents are not entitled to reimbursement for any privately engaged SL therapy services after February 9, 2009, through the date of this hearing.
20. Parents are not entitled to reimbursement for any of the costs incurred in sending Student to the NMSU Clinic.
21. Student is in need of a complete SL evaluation assessing both articulation and pragmatic speech impairments which District has offered to conduct.

Appropriateness of Educational Program for ASD – Issue 4

22. It is more likely than not that at least Teacher and probably Principal were aware of the Student's PDD-NOS diagnosis prior to the August IEP. Exh DD, p 9; Tr 684.
23. An educational program for a child with ASD cannot be reasonably calculated to confer educational benefit if it does not include educational services that actively engage the child in intensive instructional programming that is systematically planned, developmentally appropriate and aimed toward identified objectives.
24. Student's IEPs did not specify instructional programming beyond placement in District's DD preschool program.
25. Parents failed to prove by a preponderance of the evidence that Student's placement in the DD preschool classroom was not appropriate.
26. Parents proved by a preponderance of the evidence that District's DD preschool curriculum alone was not sufficient to meet Student's unique needs as a child with ASD.
27. Parents proved by a preponderance of the evidence that failure to provide adequate staffing in Student's DD classroom during the first semester of 2008-2009 deprived Student of FAPE by inhibiting intensive one-to-one instructional programming.
28. Parents failed to prove by a preponderance of the evidence that the DD classroom was inadequately staffed during the second semester of 2008-2009.
29. Parents proved by a preponderance of the evidence that Student's disability due to ASD and resulting unique needs required instructional programming for a full five hour day, five days per week.
30. Parents proved by a preponderance of the evidence that Student's program for 2008-2009 was not reasonably calculated to confer FAPE because it did not provide for instructional programming for a full five hour day, five days per week.

31. The time constraints imposed by District's failure to program for a full five hour day, five days per week, precluded the delivery of systematically planned one-to-one intense instruction such as discrete trial training and other effective intensive instructional strategies with corresponding data collection that Student's program required to be reasonably calculated to confer FAPE.
32. Perhaps due to time constraints, the record Teacher kept of Student's progress consisted of her own unstructured and fairly infrequent anecdotal notes. Exh 32.
33. After the first of the year, Teacher began receiving training in data collection but her first attempt is essentially unintelligible without her explanation. Exh 35.
34. Parents did not remove Student from attending District's program and approved the services proposed by District in each IEP. However, they consistently and steadfastly informed District fully of their concerns that the services provided were insufficient to meet Student's needs.
35. Without District's consent but with District's knowledge, Parents contracted with Autism Consultant to develop and deliver a program of individual behavior therapy in their home based on UCLA-Lovaas methodologies commonly referred to as Applied Behavior Analysis ("ABA").
36. The program deployed in Parents' home did not meet state standards that apply to education provided by public agencies in New Mexico.
37. Parents proved by a preponderance of the evidence that the home-based program provided Student with the systematically planned one-to-one intense instruction and corresponding data collection that was omitted from District's program due to time and staffing constraints.
38. Through the combination of District's DD preschool program and Parents' home-based program, Student received an appropriate individualized educational program to meet his needs as a child with ASD.
39. It is more likely than not that Student would not have demonstrated the progress reported by Teacher, Parents or Student's service providers absent the services he received in Parents' home-based program.

40. Parents failed to prove by a preponderance of the evidence that instructional programming delivered by Teacher was not sufficiently intense to actively engage Student at appropriate levels.
41. Parents are entitled to reimbursement of the costs incurred to provide the interventional programming that District failed to provide.
42. District is entitled to offset those costs by the corresponding hours of DD preschool that District provided Student under his IEPs.
43. From November 11, 2008, the date that Parents' home-based program began delivering services to Student through the last full day of school prior to the Winter Break, Parents are entitled to be reimbursed for the cost of delivering 14 hours of behavioral therapy during each intervening complete week or proportionate share thereof for partial weeks, excluding holidays.
44. The Parents are entitled to reimbursement for the costs incurred to retain Autism Consultant to assist them in developing the home-based program. As the 11 hours of programming delivered by District represent 44% of the 25 hours required to be reasonably calculated to confer FAPE, District is entitled to an offset against the costs incurred to retain Autism Consultant in the first semester of 44%.
45. From the first day students returned to class after the Winter Break through the end of the school year, Parents are entitled to be reimbursed for the cost of delivering 10 hours of behavior therapy during each intervening complete week or proportionate share thereof for partial weeks, excluding holidays.
46. The Parents are entitled to reimbursement for the costs incurred to retain Autism Consultant to assist them in continuing the home-based program. As the 15 hours of programming delivered by District represent 60% of the 25 hours required to be reasonably calculated to confer FAPE, District is entitled to an offset against the costs incurred to retain Autism Consultant in the second semester of 60%.

47. The figures compiled by Parents on page 15 of Exhibit 27 should be used to calculate the compensatory services ordered herein.
48. There is no basis for depriving Parents of reimbursement for reasonable and appropriate compensatory services simply because the service was acquired before District developed a program for Student.
49. District's failure to provide Student with FAPE during the 2008-2009 school year is attributed to administrative decisions impacting program parameters, staffing and allocation of resources.
50. To assure that Student's IEP for 2009-2010 complies with IDEA, District must retain the services of an independent consultant with well-recognized and accepted credentials in interventional educational programming for young children ages three to eight with ASD.
51. The consultant should be retained within 30 days of entry of this order and asked, with the consent of Parents, to review all of Student's educational records and interview Parents and all of Student's service providers through District.
52. The consultant then should make recommendations to the administration regarding training, staffing and other resources required to assist Student's IEP team in developing an appropriate educational program.
53. District should make the consultant available to attend all of Student's IEP meetings for and during the 2009-2010 school year.
54. The District should retain the consultant to visit Student's classroom once a month throughout the 2009-2010 school year to monitor District's progress in implementing Student's educational program.
55. If Parents refuse their consent to allow consultant to review Student's records and/or speak with Student's providers, District will be relieved of the obligation imposed herein to retain a consultant.
56. Parents may also ask the consultant to review their home-based program at their expense.

Least Restrictive Environment – Issue 5

57. Parents failed to prove by a preponderance of the evidence that District did not educate Student with nondisabled peers to the maximum extent appropriate.
58. With the use of supplementary aids and services, District appropriately increased the time Student spent with typically developing peers in the Head Start program throughout the school year.

Discussion

Initially, the role of the NRC in this analysis must be addressed. This DPHO agrees that nothing in the IDEA supports a conclusion that a failure to provide services at the NRC’s recommended minimum is per se a deprivation of FAPE. Nevertheless, the NRC is recognized by all reputable professionals in the field and the U. S. Department of Education as the seminal resource on educating young ASD children and exhaustively analyzes the body of research conducted on the subject. Exh 24; Tr. 454-455. Both NMPED and District use the NRC to frame the technical advice they distribute on evaluating and educating young children with ASD. Exh NN.

The preeminent accomplishment of the NRC’s work is the identification of critical features common to effective educational programming. “Across primarily preschool programs, there is a very strong consensus that the following features are critical.” Exh 24, p 9. This DPHO believes that this publication is so well respected and has remained the standard in the field because it is accurate, because it correctly identified agreement and consensus in a very difficult endeavor: the education of young children on the autism spectrum.

It is difficult to see how one would gauge the reasonableness of a school district’s program for a young child with ASD without reference to the NRC. In fact, the recent state level case cited by District does just that to uphold the school’s preschool placement and reject the parents’ demand for one-to-one ABA at home at public expense. *Fremont Unified Sch. Dist.*, 49 IDELR 114 (SEA CA 2007). The placement affirmed therein was in a preschool class for autistic students five hours per day, five days per

week which included five hours per week of ABA services. The program was described as eclectic, utilizing several different methodologies with a 6:4 student/staff ratio. The ALJ found that the NRC specifically recognized eclectic programs as effective and that the school's program otherwise conferred FAPE.

This DPHO will take guidance from the NRC in reviewing the reasonableness of District's programming to address the unique needs that this young student's ASD disability presented.

Timeliness of Identification

School districts have 60 days from the date of receiving parental consent within which to complete an initial evaluation. 34 CFR §300.301 (c)(1) District relies on this provision to justify the more than 60 days they took to "review" the CDD evaluation for compliance. This, of course, ignores the fact that District was not conducting an initial evaluation and had not received Parental consent to do so. The only explanation offered for the delay was that it is "like" an initial evaluation and "the District takes those very seriously." Tr 638.

While this DPHO sees no justification in the evidence for District's unreasonable delay in reviewing the CDD evaluation and its ultimate, unconventional confirmation of Student's autism exceptionality, it must be agreed the evidence is persuasive that the eligibility determination itself likely had no impact on programming. District's eligibility determination was certainly untimely and no reasonable explanation was offered for the delay, the untimeliness of the eligibility determination did not, in and of itself constitute a deprivation of FAPE.

The Obligation to Provide FAPE - Autism

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). 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. Children with disabilities must be evaluated to determine their eligibility and the appropriate content of their educational programs. 20 U.S.C. § 1414(a)(1)

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, set out the seminal case defining 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 IEP is developed by a team composed of the student’s parents and educational professionals (20 U.S.C. §1414(d)(1)(B)) who must consider the strengths of the child; the concerns of the parents; the results of the child’s evaluation; and the academic, developmental and functional needs of the child. 20 U.S.C. §1414(d)(3)(a)

District relies on this basic framework of special education law and contends that it is entitled to dismissal of this Request if there is evidence that the program in question conferred educational benefit. The District maintains that Student’s placement in the DD preschool program conferred FAPE as it is the highest level of service offered by the District (Tr 1049) and the program was further individualized to Student’s needs through the identification of appropriate, individualized goals and objectives, specialized instruction and accommodations and related services.

The Parents, on the other hand, maintain that the NRC is the only gauge by which to judge the effectiveness of instructional programming for ASD students and that the program District developed and delivered failed to meet the NRC minimum criteria to 1) actively engage Student in intensive instructional

programming 2) for a minimum of a full school day, five days a week, totaling 25 hours per week, with a full year of programming. Tr 457-460; Exh NN, p 24; Exh 15 and Exh 25, pp 8-11.

Parents dismiss both the content and level of services offered by District. They have unilaterally designed a Comprehensive Program for Student with three components: individual behavioral therapy, speech language services and social interaction. The major component of this program is the home-based ABA therapy described above. They view the only value offered by District's program to be the social interaction component. Ex 10, p 47-48. They further believe that District should be responsible for and fund the entire Comprehensive Program they have independently designed pointing out that District has paid for the services of their Autism Consultant on previous occasions for other students. Exs 18 and 27.

As with all polarized positions, the answer lies somewhere in between the two extremes.

District contends that Parents' claims should be disallowed because Parents' reliance on the NRC seeks to impose the selection of a methodology on District, a practice long-denounced in special education law. See District's Pre-Hearing Memorandum of Law and relevant authorities cited therein. However, the NRC specifically refrains from endorsing or ranking the programs or methodologies that were the subjects of the research it compiled. Instead, as already noted, it identifies and reports the consistent agreement or consensus across comprehensive programs as to the characteristic features of effective interventions. Ex NN, p 24; Ex 24, p 8.

On the other hand, NMPED and District have recognized that teaching strategies from the field of ABA are most often utilized for teaching, and have proven effective, for a variety of children with ASD. Ex NN, p 30. The NMPED Manual goes on to explain several ABA strategies in detail. Ex NN, pp 31-38. In this DPHO's view, Parents' proposal that Student should receive services consistent with his CDD evaluation referencing the NRC and with the NMPED Manual and District Guide is not a methodology question in the traditional sense.

The question in this case centers on what must be present in the educational program to appropriately address the developmental needs caused by Student's ASD diagnosis. And the question has

two prongs: content (actively engaged intensive instruction) and amount (25 hours per week). There actually appears to be little dispute about the content question. District has embraced the NRC in its own publication on autism, the District Guide (Exh NN). It has also invested many professional hours and significant funding to educate its staff, including Teacher, in exactly the teaching strategies that the NRC reviewed as being effective interventions. Exh 6. So it remains to examine the services programmed and delivered to Student to determine if they were appropriate.

We begin with the point upon which the parties agree and that is Teacher has impeccable credentials as an early childhood instructor of the developmentally delayed. She holds a masters degree in early childhood special education from San Francisco State University, a well respected institution in the field. Tr 154; 1039-1040. She has worked five years as a DD preschool teacher in District's schools. Tr 30-31. In addition, she has seven years experience as an early interventionist for agencies providing early intervention programs servicing children birth to three with developmental delays. Tr 31-32. Parents acknowledge that Student has an excellent DD preschool teacher. Exh 10, p 48.

Although her experience with children with ASD cannot be described as extensive, Teacher has had at least three autistic children enrolled in her classrooms prior to this year with Student. Tr 81; 154-155. She has attended and will continue to attend all related professional training opportunities that are available to her and, it is parenthetically noted, the training already undertaken likely far exceeds the training in evidence for Student's home-based providers. Tr 80-81; 155; 169-170. Furthermore, early childhood developmental delays produce similar behaviors to those present in children with ASD and Teacher boasts a repertoire of strategies that are transferable. Tr 153-154.

Staffing was a factor in the services Teacher was able to deliver in the first half of the year. DD preschool requires a ratio of four students to one adult (Tr 410), a ratio of children to adults that is higher than the NRC recommended levels to address the needs of ASD children (two ASD children per adult). Exh NN, p 26. The NMPED Manual (and concurrently the District Guide), acknowledges that, not only must staffing be adequate, but that all adults in instructional settings must be adequately trained in the

ASD students' needs. Exh NN, pp 27 and 37. A second assistant was added to the DD classroom in January 2009. Tr 33-34, 45 and 410. There was little or no evidence of record concerning the training or experience of District's DD EAs. Tr 101; 798-799.

The DD preschool instructional program was composed of a series of work or activity centers that the students, in pairs selected by Teacher, would cycle through in 15 minute increments. Tr 37-39. Teacher utilized a visual calendar for all her students (Tr 37) and visual cues directed the students' activities in the centers as appropriate. Tr 38. With initial direction, students were largely expected to complete the centers independently with little or no direct adult supervision. Some centers required adult supervision but Teacher tried to restrict the number of centers that did to no more than one a day so that the other adult could float through the other centers. Tr 40-41. Student was expected to participate in the center activities developed for all the children in the class and modifications, including one-on-one modeling or direction, would be instituted if Student failed to engage on his own with only initial direction or prompting.

Taking Teacher's testimony as a whole and as the primary source for a determination of the services delivered, DPHO makes the following observations. Initially, individualization of the DD program consisted primarily of employing strategies to overcome Student's resistance to activities planned for the class as a whole or individual or small group center activities and the transitioning between those activities and prompting and directing or redirecting Student's attention to the desired activity. This intervention seemed to most closely approximate Activity Based Instruction described in District's Guide. Exh NN, p 34. Teacher also provided examples of systematically-planned instruction employed when Student was working or playing with peers. Tr 45. Other examples given approximate Functional Routines (Exh NN, p 35) and Peer Mediation/Coaching (Exh NN, p 34), among many strategies used with Student. See Teacher's testimony generally beginning at Tr 30; Exh 32.

In spite of the structural confines of limited time and staffing, Teacher did a good job of delivering effective intensive small group interventions and facilitating Student's social interactions with

peers, a real testament to her experience with early childhood disabilities and skill. The results of her work are reflected in the observations made by Parents' Autism Consultant when he visited the DD classroom in January 2009 (taken from p. 2 of Exhibit 17):

- [Student] came to each activity and center on his own without prompts, overall he transitioned well from activity to activity.
- [Student] performed & copied actions in group better than any of the other students.
- [Student] was the most verbal child in the classroom
- [Student] was the most social child in the classroom, he was willing to lead or follow when appropriate and encouraged other children to join in.
- [Student] worked well independently without assistance.
- [Student] conversed naturally using Statement-Statement format without prompts or cues.
- [Student] asked for help when appropriate and did not show any level of frustration with unknown tasks

Autism consultant also observed that Student isolated on the playground and failed to interact appropriately with children in that setting, a problem of which Teacher was well aware and addressing. Exh 32, Tr 84-85; 147.

Hence, District's preschool afforded Student an effective platform for intensive small group intervention and structured social interaction with both classmates and nondisabled peers. Teacher implemented these important aspects of Student's interventional program with great skill and success. However, Student also required systematically planned, individual one-to-one intensive instruction and there was just no place to put that with the time and staffing constraints. District should have allocated the time and staff sufficient to facilitate the provision of this NRC-recognized critical feature.

Parents' home-based program is unsuitable to serve as Student's educational placement for many reasons, among them the lack of qualified staff and severely restricted environment. However, it was a reasonable source of compensatory services to provide Student with the systematically planned individual, one-to-one instruction that was lacking in the otherwise appropriate District program.

The Parents presented the testimony of two separate experts in the field of evaluating and/or educating children with ASD. Both strenuously and unequivocally endorsed interventional programming

for Student at the NRC recommended service level of 25 hours per week. The expert for the District, on the other hand, while clear in his confidence in Teacher's skills, was equivocal in his endorsement of the District's program. When asked regarding whether he thought various aspects of Student's program were appropriate to Student's needs, he looked visibly uncomfortable and would qualify his answer. Tr 1082.

For instance, at Tr 1069:

“One of the misconceptions when I come on campus as a special ed coordinator is that I write the IEP. And I don't. I try and let the team try and work that out. I mean, I keep going back to those goals and objectives to be honest. If I wrote those goals and objectives, they would be a little bit more – worded a little bit differently. But, you know, I thought that, you know the team, [Teacher], got the gist of it.”

He was uncomfortable but clear in his agreement that Student needed discrete trial training (an intense one-to-one ABA teaching strategy) and that such training is incompatible with the typical classroom setting. Tr 1055, 1069, 1073-1074, 1077. Although District provided Teacher with some training to administer this strategy, it did not do so until March 2009. Student did not receive discrete trial in his DD classroom. Tr 102-103.

The NMPED Manual lists several criteria that should be assessed if varying the hours from the NRC recommended minimum. There is no evidence that the Student's IEP team ever considered any of the listed criteria. The only reason given for rejecting Parents' proposal to adhere to the NRC minimum was that “the ½ day DD Pre Program is appropriate based on the student's Present Levels of Performance/progress with goals and objectives.” PWN in Exh GG, p 26.

There are two problems with this defense. The first is that it did not exist in August 2008. NRC recommendation 1 is entry into intervention programs *as soon as an ASD diagnosis is considered.* (emphasis added) Exh NN, p 24. At Student's first IEP meeting, the District was fully informed, albeit verbally, not that an ASD diagnosis was being seriously considered but that it had, in fact, been made by the premier institution for the evaluation of children three years old in the state; the institution from which District acquires much of its training on the subject.

District believes it should be recognized as taking a leading role in New Mexico in terms of professional development and provision of services to students with autism as opined by the District's Director of Special Education. Tr 275-276; 380-388. The District also compiles and distributes technical advice on the subject that is grounded in the NRC. Exh NN. One would think a school district taking a leading role would have mobilized its resources to meet this challenge. District has at least two Behavioral Technical Assistants that it uses to conduct professional training in Autism. Exh 5. A referral allowing Teacher to work with a Behavioral Technical Assistant to support her in educating Student was not issued until December 1, 2008. Exh 11, p 3. Appropriate staffing was not deployed to the DD classroom until January 2009. No adjustments were made to the length of Student's instructional program until January 2009 and then only an hour per day was added. No consideration was given to adding another day.

Instead, the undisputed evidence is that, other than adopting five annual goals related to development of Student's social skills (Ex DD) (that were later determined by the team to be insufficiently measurable and replaced (Ex HH)), District made no substantive or structural changes to the DD preschool program offered to Student. No instructional accommodations were identified in Student's IEP that would call for active engagement in intensive one-to-one instructional programming. No additional staffing. No referrals for support in addressing Autism.

The second problem is that the progress now observed by both Parents and District staff cannot be cleanly attributed to the District program. Tr 1050-1051; 307; 707. Without the focused work Parents have done in the home-based program to reduce unwanted behaviors, it is most likely that Student's experience at school would have been quite different. At least ten hours a week of that work should have been done by District.

District now appears to be suggesting that Student may not be ASD at all, and that District's rejection of the NRC minimum is justified by the "minimal" nature of his impairment. District Supplemental Requested Finding No. 3. A careful review of both the CDD report and the UNM

Psychologist's testimony did not yield use of words like minimal or mild to describe Student's impairment. District was unable to get either of Parents' expert witnesses to waver on their recommendations of programming and both are well aware of Student's strengths. On the contrary, the CDD report states at Exh CC, p 14: "[Student] has many individual strengths and is developmentally age-appropriate in many areas of functioning, which is a positive prognostic indicator for his ability to benefit from intensive intervention and his ability to continue to make developmental progress." Hence, the nature of Student's symptoms actually creates a greater imperative to pursue intensive intervention because of the greater likelihood of success. An appropriate program now could save many future heartaches and untold resources.

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, its implementing regulations, and the New Mexico Special Education Rules.
4. This decision is timely if delivered to NMPED and the parties on June 22, 2009.
5. Student is qualified and eligible for special education and related services as autistic and speech and/or language impaired. 34 CFR §300.8 (a) and (c) (1) and (11)
6. Parents failed to prove by a preponderance of the evidence that District's unreasonable delay in identifying Student as autistic deprived him of FAPE.
7. Parents proved by a preponderance of the evidence that Student was deprived of SL services he required in order to benefit from special education during 2008-2009 and he is entitled to be reimbursed for the costs he incurred to obtain appropriate compensatory services.

8. Parents proved by a preponderance of the evidence that District's inadequate level of instructional programming and staffing deprived Student of FAPE and he is entitled to be reimbursed for the costs he incurred to obtain appropriate compensatory services. *Burlington v. Dept of Educ of Mass*, 471 U.S. 359 (1985)
9. The provisions of 34 CFR §300.148(d) do not apply to limit reimbursement for compensatory expenses because Parents did not reject District's placement and did not remove Student from public school.
10. Parents' compensatory services are found to be appropriate even though they do not meet State standards that apply to education provided by public agencies in New Mexico. 34 CFR §300.148(c).

ORDER

IT IS HEREBY ORDERED as follows:

1. District will reimburse Student's Parents for the costs incurred to provide compensatory SL services consistent with the provisions of this Final Decision.
2. District will reimburse Student's Parents for the costs incurred to provide compensatory special education services consistent with the provisions of this Final Decision
3. District will retain the services of a consultant to assist the District and Student's IEP team in develop an appropriate educational program for the 2009-2010 school year consistent with the provisions of this Final Decision.

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.

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 22nd day of June, 2009:

Gail Stewart, Esq., 1400 Central SE, Suite 3300, Albuquerque, NM 87106.

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 22nd day of June 2009:

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

Barbara Albin