

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER**

**Parent, on behalf of Student,
Petitioner,**

v.

DPH 0910-04

**ALBUQUERQUE PUBLIC SCHOOLS,
Respondent.**

**ABSTRACT OF DECISION OF THE DUE PROCESS HEARING OFFICER
Jane B. Yohalem, DPHO; November 12, 2009**

Parent filed a request for due process with the New Mexico Public Education Department (PED) alleging that Student, a high school junior who is eligible for special education in the category of specific learning disability, had been denied a free appropriate public education (FAPE) during his first two and the beginning of his third high school year.

The District's responsibility to address Student's absences from class and other problematic behaviors. The District claimed in response to the due process complaint that it had offered appropriate services. It attributed Student's lack of progress to what it described as Student's willful failure to attend classes and to comply with school rules. The District argued that Student's problematic behavior was not disability-related and, therefore, need not be addressed by the District under the IDEA.

The hearing officer found that the evidence established that Student's IEP team had determined that Student's behavior was related to Student's disability and had included annual goals in his IEP to address that behavior. The relevant question for the hearing officer, therefore, was not whether Student had behavioral needs which the District was required to address in his IEP: the IEP team had already determined that he did. The question, instead, was whether the team put in place appropriate instruction or behavioral supports or both which were reasonably calculated to confer meaningful education benefit on Student. The hearing officer held that this standard was not met in the spring semester of 2009, denying Student a FAPE.

The need for a full reevaluation, with diagnostic testing: The hearing officer also held that the District's decision to conduct Student's required three-year reevaluation without performing any new diagnostic testing was inconsistent with the IDEA. Diagnostic testing was plainly required in light of the six-year period since testing; the absence of reliable data on Student's progress; the uncertainty in the initial diagnostic testing; the absence of any formal assessment of the contribution of behavioral and social or emotional factors; and the increasingly large discrepancy in reading observed in Student.

The failure to provide adequate transitional services: The hearing officer concluded that, given Student's central transitional goal of graduating from high school with a standard diploma, the failure to the District to ensure that Student actually took the competency examination and to ensure, as well, that Student's class schedule addressed graduation requirements, was inconsistent with Student's transition plan, and interfered with Student's ability to achieve his transition goals.

Student was thus denied a FAPE on these three bases.

STATEMENT OF THE CASE

Parent filed a request for due process with the New Mexico Public Education Department (PED) on August 7, 2009, alleging that Student had been denied a free appropriate public education (FAPE) under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) during his ninth grade (freshman), tenth grade (sophomore), and the beginning of his eleventh grade (junior) high school years. Student is eligible for special education and related services under the Act in the category of specific learning disability.

The due process complaint focused primarily on whether the District provided Student specialized instruction and other services designed to meet Student's unique needs. Specifically, Parent alleged that the District denied Student a free appropriate public education (FAPE): (1) by failing to adequately evaluate Student's needs and develop an Individual Education Program (IEP) which reflected the instructional implications of his evaluation; (2) by using police and security intervention and punitive disciplinary measures as a substitute for an appropriate placement and services; (3) by failing to provide Student evidence-based instruction in reading, spelling and math; (4) by failing to provide Student adequate access to the general curriculum as demonstrated by the use of inappropriate benchmarks; (5) by improperly shortening Student's school day during his placement in an Interim Alternative Educational Setting (IAES), (6) by failing to provide adequate transition services reasonably calculated to allow Student to meet his IEP transition goals; and (7) by failing to provide Student's special education records to the Children's Court, as required by 20 U.S.C. § 1415(k)(6)(b). Parent also made a number of claims of systemic violations of the IDEA by the District and the PED.

In response, the District claimed that it has provided Student a FAPE during all time periods at issue. The District attributed Student's lack of progress toward his IEP and transition goals to what it described as Student's willful failure to attend classes and to comply with school

rules. The District contended that Student's problematic behavior was not disability-related and need not be addressed by the District under the IDEA.

Having heard the testimony of the witnesses,¹ having reviewed the exhibits,² and having listened to and considered the arguments of the parties and the proposed findings of fact and conclusions of law filed by both sides, the hearing officer enters the following Findings of Fact, Conclusions of Law, Discussion, and Order.

FINDINGS OF FACT

1. The period in dispute here began on August 8, 2007, and continued through October 12, 2009. Student was a ninth grader during both the 2006-2007 and 2007-2008 school years. He carried some high school credits into the 2007-2008 school year and into successive years, so he has always been somewhere between his identified grade level and the next grade. In 2008-2009, Student was categorized by the District as a tenth-grader (sophomore). This school year, Student is an eleventh-grader (junior), but needs only ten credits to graduate. Ex. D-2. The hearing officer will refer to the grade level designated by the District.

2. Student was born on May 26, 1992, and was seventeen years old at the time of the due process hearing. Ex. P-1, p.1.

3. Student qualifies for special education in the category of "specific learning disability" (SLD). Ex. P-1, Ex. C, p. 1.

¹A due process hearing was held over a two and one-half day period: October 13-15, 2009. Twelve witnesses testified, 11 for the Petitioner and one for the District.

²The following exhibits were admitted into evidence without objection: Joint Exhibits A through L; Petitioner's Exhibits P-1, P-11, P-12, P-14, P-16 through P-19, P-26 through P-29, and P-32; District's Exhibits D-2 and D-6. Only one offered exhibit was not admitted by the hearing officer: P-21 (Second Judicial District Court notices for Student).

Student's initial evaluation

4. Student was first evaluated for special education in April, 2003, when he was a 10-year-old fifth grader. He was referred for evaluation because he was having “great difficulty” staying on task and “following along with the class.” Testing revealed a severe discrepancy between Student’s intelligence and his achievement in both written expression and math, as well as some discrepancy in reading. Ex. P-1, p. 11. The evaluator noted that the deficits were “possibly” due to a deficit in processing speed. *Id.*, p. 9.

5. Student’s level of reading comprehension was at grade level on the Wechsler, but word decoding was at the 3rd grade level; math (operations and reasoning) and written expression were both at the 3rd grade level as well. Ex. P-1, p. 5.

Student's June, 2006, reevaluation

6. Student was reevaluated in June, 2006, at the end of 8th grade. Ex. P-11. The District opted for a performance-based reevaluation and no diagnostic testing was done. *Id.* at 1. In addition to confirming ongoing deficits in written expression and math, the evaluator noted that a Behavior Intervention Plan (BIP) and a Functional Behavioral Assessment (FBA) had been prepared for Student earlier in the school year to address behaviors which interfered with his progress, and recommended that these documents be regularly updated. *Id.* at 5.

Student's 2006-2007 school year

7. The 2006-2007 school year is outside the statute of limitations. Nonetheless, Student’s education in this year is relevant to evaluating whether Student was provided a FAPE during the statutory two-year period.

8. The IEP prepared for Student on September 28, 2006, following his 2006 reevaluation and just after he first entered high school, noted that Student had a high number of absences from

class. Ex. K, p. 10. This IEP included a behavior goal for Student and placed Student in a self-contained classroom to address behavior and attendance issues. *Id.* at 17.

9. During the 2006-2007 school year (Student's first 9th grade year), Student's behavior problems worsened. On February 13, 2007, a new IEP was prepared for Student. Ex. P-14. That IEP noted that attendance and tardiness problems had resulted in Student receiving failing grades. *Id.* at 3. Student was described as lacking goal direction and self-commitment and having been involved in incidents at school. *Id.* at 7. An IEP behavior goal of eliminating truancy and tardiness within a year period was adopted and development of a BIP and/or FBA was recommended by the team. *Id.* at 7, 12. The IEP concluded that due to severe behavioral and safety issues, Student needed "extensive special education support in an alternative educational setting [AES]." *Id.* at 10.

10. By an IEP addendum of May 22, 2007, Student was continued in the AES placement through the end of the school year. The IEP addendum provided that Student would receive 20 hours per week of special education in the 2007-2008 school year, and required a new IEP be developed before August 30, 2007. Ex. J.

August, 2007 through December 19, 2007 (first semester 9th grade)

11. Student was placed in a self-contained special education class in August, 2007, with one elective outside that class. Ex. I, p. 9. A new IEP was developed on October 11, 2007, six weeks after the school year began. Ex. I. Student's teacher reported that Student's attendance had greatly improved since his placement in the self-contained setting at the beginning of the school year. *Id.* The team continued this placement. *Id.* at 11. Although noting the improvement in attendance, the team included a behavioral goal. *Id.* at 9. It required Student to "analyz[e] and integrat[e] positive behavior, conduct, and social manners in a variety of settings with 100% accuracy." *Id.* Student showed improvement in academic areas, with reading comprehension, nearly keeping pace with his grade level. Although Student tested at 4th grade in math, his teacher reported that Student

was making good progress in algebra. *Id.* at 7. A math geometry goal was written because his teacher reported that Student was unable to do geometry. *Id.* A written communications goal was adopted as well. This IEP did not include a reading goal. *Id.*

12. Very little evidence was presented concerning the education provided to Student and Student's progress following the October, 2007, IEP meeting. There are some incident reports in the record showing Student missing some classes in November and December. A special education teacher testified that Student had approached her for help, telling her he did not want to get caught up in "gang stuff" and was having difficulty avoiding it. He asked if he could eat lunch in her classroom. TR. 300-01. Student was permitted to join this class both during lunch and when he felt overwhelmed in his assigned classroom. TR. 299-300.

Student's IAES Placement from December 19, 2007, until March, 2008

13. On December 19, 2007, Student's IEP was revised to address Student's placement in an IAES pursuant to 34 C.F.R. § 300.530. Ex. G. The basis for this placement was Student's possession of a controlled substance, an offense the IEP team found was not a manifestation of Student's disability. *Id.* at 4; Ex. H.

14. Although Student's hours in class were greatly reduced (to 2½ hours a day) in his IAES placement, the evidence established that Student was provided educational services sufficient to enable him to both continue to participate in the general education curriculum and to progress toward meeting the goals set out in his IEP. TR. 391-95. Student thrived in the one-on-one instructional format of the IAES, earning B's and C's in five classes, keeping up with his classes, and making progress toward both his math and written communication IEP goals. Ex. F. p. 2. Student also made progress toward his behavioral goal: he was described as abiding by his IAES contract and following all rules and regulations. *Id.* at 7.

March 4, 2008, through December, 2009 (second semester 9th grade and first semester 10th grade)

15. Student's March 4, 2008, IEP, prepared at the end of his IAES placement, describes Student as having difficulty in group reading and writing activities and continuing to need individualized instruction from special education teachers and peers to succeed in the general curriculum. Ex. F, p. 3. A new behavioral goal was written for Student by the IEP team: Student was to demonstrate the ability to positively interact in the classroom and with his peers, and to achieve goal direction, self-discipline and task commitment within a year. *Id.* His math and writing goals remaining unchanged from his October, 2007, IEP. *Id.* at 5-6. The team rejected the option of placing Student in a series of special education classes with different teachers, finding that he needed a self-contained special education class. *Id.* at 16.

16. Student was placed in a self-contained special education class for the remainder of the 2007-2008 school year and for the first semester of the 2008-2009 school year. Ex. F, p.16. The hearing officer found the testimony of Student's special education teacher about this period highly credible, showing both an understanding of Student's needs and expertise in addressing those needs.

17. Student's special education teacher testified that Student made academic progress during both semesters in this class in the areas of written communication, mathematics, and reading. TR. 320, 323, 324. Both the teacher and Student described the teacher's method of breaking algebra instruction into small steps as a successful technique, enabling Student to make progress in math. TR. 316.; Ex. P-16, p. 3.

18. In addition to academic instruction, Student received extensive behavioral support and instruction during both semesters in this class. In August, 2008, the teacher prepared a BIP and a FBA for Student. Ex. D and E. These documents focused on intervention strategies to teach Student social skills in the areas of communication, accepting negative feedback, and learning to

express his anger appropriately. Ex. D; Ex. E, p. 3. He was taught (with the use of direct intervention in the situation by a teacher or an aide) how to interact appropriately with security staff and other adults in confrontational situations. The teacher also worked with Student on learning how to transition to new people. TR. 326-28, 330, 353-54. Teacher testified that, when Student's behavioral issues were addressed, she saw him progress academically. TR. 350.

19. Student's absences from class during these two semesters were at a level which did not interfere with his education. Ex. 28; TR. 318. Absences were not addressed during this time by either Student's IEP or by his BIP. Ex. D; Ex. F.

20. Student's special education teacher described Student's academic skills as high enough to allow him to be placed in D-level special education classes, but she testified that a self-contained class was necessary to allow Student to acquire the social skills with both peers and adults he would need to successfully move from class to class. TR. 330. To change his placement before he acquired these skills would be, in her opinion, "setting him up for failure." TR. 354-55.

21. Parent may well be correct that the Student's IEP goals during this period, including his math goals focus on geometry, when Student was actually taught algebra, and the IEP's failure to accurately report on Student's present levels of achievement and track his progress toward his annual goals, violate IEP requirements. Ex. F; TR. 315-16. These violations, however, are procedural in nature and Parent has not carried her burden of proving that these procedural violations resulted in the a loss of educational benefit to Student, impeded Student's right to a FAPE, or significantly impeded the Parent's ability to participate in the IEP process.

January, 2009, through May, 2009 (2nd semester 10th grade)

22. At the end of the fall semester, 2008, Student's special education teacher took another job with the District. The spring semester began in January, 2009, with Student continuing in the same physical classroom, but with three or four different special education teachers rotating through

that classroom. TR. 53-54, 360. Sometime at the end of January, or early in February, 2009, this arrangement changed and Student's classes began to be taught in each teacher's classroom, requiring Student to change classes. TR. 379, 382.

23. There is very little information in the record about this period from January to March, 2009. Student's reading teacher reported that Student attended class regularly until the beginning of March, 2009, and that, during that time, Student was making progress in reading and earning a grade of C or higher. Her class was focused on preparing students for the high school competency exam by improving their ability to answer specific questions on the materials they read. TR. 570-75.

24. At the end of February, 2009, the District placed one of Student's teachers on leave following an incident in class. TR. 48. At this point, Student's schedule changed again. Some classes continued. In other subjects, however, Student joined classes which had been in progress since the beginning of the school year. TR. 50. These class assignments were made because the District continued to be unable to find a teacher for a self-contained special education class, not because Student's IEP team changed Student's placement based on a change in his needs. TR. 48-50, 53-54.

25. On March 5, 2009, shortly after this change in class schedules, an annual IEP was prepared for Student. Ex. C, p. 2. Student's teachers reported that Student was not attending class regularly and was not working when he came to class. *Id.* at 2. The team reviewed absence and disciplinary records for Student. TR. 183-84. The team did not have available to it information from Student's previous special education teacher about Student's progress toward his IEP annual goals, nor was information communicated to the team about the methods of academic instruction and behavioral interventions she found particularly effective with Student. TR. 180-85; 190-92. Only one of the three people present at the meeting knew or had worked with Student, and then only briefly. The regular education teacher was a physical education teacher who did not know Student.

TR. 183-84. The current levels of performance testing used different test instruments than previous testing and the team leader testified that she could not tell whether Student had made any progress toward his IEP goals. TR. 190-92.

26. The IEP team identified as “emotional/social needs” of Student attending class regularly, completing assignments, demonstrating appropriate behaviors, and developing responsible and ethical workplace behaviors. Ex. C, p. 6. To meet these identified needs, the team adopted an annual behavioral goal for Student of attending classes regularly, completing assignments and earning credit. *Id.* The IEP team determined that Student needed “positive behavioral interventions, strategies and supports to address behavior” which was impeding his progress, and determined that these interventions, strategies, and supports, should be documented in both a FBA and a BIP. *Id.* at 1. The team approved the current placement of Student because it was the available placement, not because the team made a considered determination that a self-contained class was no longer needed by Student. *See* ¶ 24, *supra.*; TR. 435 (Student was returned to self-contained placement in the fall of 2009, when a teacher was found).

27. Rather than performing a new functional behavioral assessment and creating a new BIP to address Student’s attendance, the team relied on the documents prepared by Student’s teacher in his self-contained class in August, 2008. As noted above, this FBA and BIP targeted exclusively Student’s inability to control and appropriately express his anger in confrontations with security officers and other school staff. Exs. D and E. Attendance had not been an issue for Student in the self-contained class. *See* ¶ 19, *supra.* The BIP provided for redirection, changing location, and calling Mother as the techniques for avoiding or addressing an angry confrontation. *Id.* at 2. The sole change the team made in the BIP was the addition of “possible AES setting,” as an additional technique. *Id.* No other change was made to assist Student in meeting his new IEP behavioral goal of attending classes and completing assignments. Ex. D; TR. 186.

28. The head special education teacher at the high school was aware that Student's absences continued to increase. Student was absent or tardy in March through May, 2009, at a rate nearly four times greater than his absence rate during the fall of 2008. P-16, pp. 5-6; TR. 161. Student told the head special education teacher that he was struggling and did not think he could be successful outside a self-contained class. TR. 53. An educational aide Student trusted also testified that she told the administration that Student was unable to manage his new class schedule and was floundering. TR. 368-70.

29. Student's IEP team was not reconvened in the spring of 2009, and no change was made either in Student's placement or in his behavior intervention plan. TR. 179-80; Exs. C, D and E; Ex. P16, pp. 5-6. The school's response was limited to imposing discipline, admonishing Student to attend class, and sending form letters to Student's parents. TR. 87-88; 111-12; 143-45; 149, 368, 433-36.

30. Student failed all classes in the spring of his sophomore year with the exception of a life skills class (he received a D-), credit for off-campus work, and credit for serving as an office aide. Ex. District-2. He made no progress toward his academic goals or toward his behavioral goal.³

August, 2009 through October 13, 2009 (1st semester 11th grade)

31. The District returned Student to a self-contained setting at the beginning of this school year. This change has apparently dramatically reduced or eliminated Student's absences and other incidents. TR. 435.

32. Until the head special education teacher began to address Student's class schedule the day before the hearing, some of the classes Student had been placed in since the beginning of the school year either were repetitions of previous classes or would not result in the credits needed by

³The test results reported in Exhibit 17, which purports to show significant, unexplained progress, in one or two areas, is not reliable and were not considered by the hearing officer. TR. 117-118, 226-117.

Student for graduation. TR. 64-67. These class placements were, therefore, inconsistent with Student's transition goal of graduating with a standard diploma.

33. Student's March 5, 2009, IEP remained in place at the time of the hearing. This, in part, was a result of a stay-put requirement pending a decision in this matter.

34. There have been several changes in teachers in the first six weeks of the school year. TR. 136. By the time of the hearing, the District had found a qualified special education teacher for Student's self-contained class. *Id.* There was no evidence presented concerning Student's instruction in this class other than Student's testimony which described the instruction as helpful and appropriate. TR. 510-11, 435.

The reevaluation of Student in August, 2009

35. In August, 2009, three years had passed since the District's last reevaluation of Student in 2006 and another reevaluation was required. 34 C.F.R. § 300.303(b)(2). The District opted to conduct this reevaluation without performing any new diagnostic testing. The hearing officer finds that such testing was needed in light of the length of time that had passed since the initial diagnostic testing (6 years); the absence of reliable data on Student's progress; the uncertainty in the initial testing about whether a deficit in processing speed was the primary factor in Student's learning disability; the fact that the initial testing did not assess other possible deficits; the absence of any formal assessment of Student's behavioral, social or emotional needs (despite an IEP behavioral goal and the head special education teacher's report to the diagnostician indicating that Student's behavior is related to his disability impedes his educational progress, Ex. 16, pp. 26, 27); what appeared to be an increasing discrepancy in reading levels and in written expression and math since the initial diagnostic tests; and the evident need for direction as to both effective instructional methods and effective behavioral interventions for Student. TR. 197-267; Ex. A. The District's

diagnostician agreed that she had been mistaken when she completed the evaluation without testing, without meeting with Student, and without classroom observations. TR. 240, 221-22.

36. The District has conceded that Student's reevaluation was not appropriate and has offered to redo it. The hearing officer finds that the absence of an appropriate reevaluation had a significant impact on the District's ability to develop an educational program reasonably calculated to meet Student's needs in this school year, denying Student a FAPE.

Student's arrests and encounters with school security officers

37. There is no credible evidence that Student has been unfairly singled out for disciplinary consequences or that any punishment Student received was inconsistent with the school's disciplinary policies. TR. 600-675.

38. The evidence in the record does not establish that Student's arrest on February 27, 2009, was based on the in-class incident which occurred on that date. TR. 642-50, 664. The District dealt with that incident by disciplining the teacher, and not by disciplining Student. TR. 48.

39. In neither of Student's two arrests was Parent asked to consent to the transfer of records to the appropriate authorities. The assistant principal conceded that the school does not have procedures in place to seek parental consent and, if given, to effect such a transfer of records. TR. 428-29, 606-09.

40. Although the discipline provisions of the IDEA were not violated, the need for such frequent intervention by the school's security staff and by police is persuasive evidence that the services provided to Student during the times these repeated incidents occurred, including the instruction and behavioral interventions aimed at assisting Student to achieve his behavioral goal, were not reasonably calculated to meet Student's needs.

Compliance with Student's transition plan

41. Parent's complaint adequately alleges that the District failed to comply with Student's transition plan, impairing his ability to meet his transition goals. *Complaint*, ¶ 6(g).

42. Student's primary transition goal is to graduate from high school with a standard diploma. Exs. F, p. 16; K, p.2; I, pp. 4-6; C, pp. 4-5, 16; TR. 472-73, 332-33. His specific career or post-secondary education goals after he graduates have changed over time, but all of these goals have been predicated on graduating with a standard diploma. *Id.*

43. It is undisputed that Student has not yet taken the New Mexico High School Competency Exam (NMHSCE). For a Student who is likely to have difficulty with the exam, taking it repeatedly beginning in the 10th grade increases the chances of successfully completing all six sections. The competency exam also provides a way of assessing a student's progress in the general curriculum and allows the IEP team better tailor instruction to meet Student's needs. TR. 273-74.

44. The hearing officer finds that the District failed to provide the assistance needed by Student to ensure that he took the competency exam. It is doubtful that the District even put Student on the list to take the exam during his 10th grade year. Had Student been on the list, Student's teacher in the fall of 2008 would have ensured that he took it. TR. 72-73; 333. Moreover, Student's failure to take the exam was known to his IEP team, and yet no IEP indicates any concern about or effort to provide assistance to Student in meeting this central transition goal. TR. 72-74, 181.

45. Student's desire to take an auto mechanics class has been included in his transition plan and discussed with Student in repeatedly IEP team meetings. Exs. K, p. 4; P-14, pp. 405; I, p.16; C, p.4. His IEP has consistently provided for the inclusion of this class in Student's schedule. Parent testified Student had never been scheduled for the class. TR. 545. The hearing officer does not find the contrary testimony of the head special education teacher (that he offered to schedule the auto mechanics class and that Student wanted to remain in a self-contained class) credible in light

of that teacher's admission that he had not met with Student about his current schedule until the day before the hearing (10 weeks into the semester). TR. 64-67, 51-52.

46. The evidence does not support Parent's claim that the District failed to offer Student appropriate information and assistance in learning about enrollment in CNM. TR. 278, 282-83.

The requirement to consider research based instruction

47. Parent failed to introduce expert testimony, or any other testimony for that matter, which established that there were available and practicable evidence-based techniques appropriate for Student which the District did not use, or that the instruction provided was not evidence-based. TR. 320, 322, 308.

Access to the general curriculum

48. Parent's failed to introduce any evidence which showed that the listing of benchmarks in reading, written expression, and math which reflected Student's current level of achievement in these areas was inappropriate. TR. Nor did the evidence support Parent's claim that the use of alternative texts at Student's reading level was inappropriate. Tr. 306-07.

CONCLUSIONS OF LAW

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

2. The PED did not refer Parent's claims against the State agency to the hearing officer. Parent did not challenge this decision. These claims were not considered in this proceeding.

3. The hearing officer did not consider the systemic violations alleged by the Parent. Due process hearings are limited by both statute and regulation to matters relating to the identification, evaluation, and educational placement of a child with a disability, or the provision of FAPE to that child. 20 U.S.C. § 1415(b)(6); 34 C.F.R. § 300.507(a).

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

5. An extension of time for entry of the decision in this matter has been granted until November 12, 2009, at the request of both parties. H.O. Order, 9/10/09. This decision is, therefore, timely filed on November 12, 2009. 34 C.F.R. § 300.515(c).

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

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

8. Student qualified for special education and related services under the IDEA as a student with a disability in the eligibility area of specific learning disability (SLD). 34 C.F.R. § 300.8(c)(9) (2006).

9. Parent failed to carry her burden of showing that Student was not provided a FAPE during the first semester of Student's ninth grade year, in the fall of 2007. Although Student's IEP was not revised until October 10, 2007, rather than at the start of the school year, the evidence did not show that this failure denied Student educational benefit or otherwise interfered with the provision of appropriate educational services.

10. Student's IAES placement in December, 2007, continuing until March 4, 2008, met the requirements of the IDEA for the provision of FAPE to a child with a disability who is suspended from school. 34 C.F.R. § 300.530(d)(1)(i); 34 C.F.R. § 300.101(a).

11. From March, 2008, through the end of the 2008 school year (Student's ninth grade year), and continuing during the first semester of the 2008-2009 school year (Student's tenth grade

year) Student was provided educational services which allowed him to make meaningful progress, therefore, Student was provided a FAPE, even if there were procedural inadequacies in the development of Student's IEP. 34 C.F.R. § 300.513; *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998).

12. Student was not provided with a FAPE during the second semester of the 2008-2009 school year (Student's 10th grade year).

13. From August, 2009, through October, 2009, Student was provided appropriate instruction, but was denied a FAPE by the District's failure to provide appropriate transition services, as required by his IEP.

14. Student's diagnostic reevaluation conducted in May-August, 2009, failed to adequately assess Student's areas of need and failed to provide the information necessary to allow Student's IEP team to meet his educational and behavioral needs, in violation of 34 C.F.R. §§ 300.304 and 300.305.

15. The IDEA allows State law enforcement and judicial authorities to exercise their responsibilities with regard to crimes or suspected crimes committed by students with disabilities. 34 C.F.R. § 300.535(a). It is not within the jurisdiction of the hearing officer to second guess a law enforcement official. The Act also allows the school to enforce its normal disciplinary rules against Students with disabilities, so long as they are not suspended for more than 10-days in a school year. 34 C.F.R. § 300.530-536. As to the enforcement of the school disciplinary rules against Student, Parent did not show that this discipline either violated school rules or resulted in Student's suspension for more that 10 days.

16. The District failed to meet the requirement of 20 U.S.C. 1415(k)(6) and 34 C.F.R. § 300.535 (b) following Student's arrests and the initiation of proceedings in Children's Court. These provisions require that an educational agency reporting a crime committed by a child with a

disability, after meeting FERPA requirements for parental consent, transmit copies of the child's special education and disciplinary records, to the Children's Court.

17. Parent did not carry her burden of establishing by a preponderance of the evidence that the District violated the IDEA's parental involvement requirements or that the IEP teams did not consider Parent's wishes. 20 U.S.C. § 1414(d)(3) (2004); 34 C.F.R. § 300. Parent submitted no proposed findings on this issue and, therefore, has abandoned it.

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

DISCUSSION

The obligation under the IDEA to meet Student's behavioral needs: Congress enacted the IDEA, in part, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. § 300.1(a). The United States Supreme Court has held that a free appropriate public education (FAPE) "consists of educational instruction specially designed to meet the unique needs of the handicapped child, ... supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

The Act gives the task of developing each child's program to an IEP team which, relying on the child's evaluations and reports of progress, assesses the child's level of functioning and develops an appropriate, individualized education program. 34 C.F.R. § 300.320, § 300.324. The goal of the educational program is "to meet each of the child's educational needs that result from the child's disability." 34 C.F.R. § 300.320(a)(2).

Under the IDEA, then, special education includes modifications in the environment and in the instruction used with a student to enable the student to make academic progress. It contemplates not just academic goals, but also socialization, adaptive skills, language and communication, and reduction of problematic behaviors so that a child with a disability can make educational progress. § 300.320; *Neosho R-V School District v. Clark*, 315 F.3d 1022, 1028 (8th Cir. 2003) (because the IEP's did not appropriately address his behavior problem, student was denied a FAPE). In the case of a child whose behavior impedes his learning or that of others, the IEP team is specifically directed to consider strategies, "including positive behavioral interventions, strategies, and supports to address that behavior." 34 C.F.R. § 300.324(a)(2)(i).

The central issue in this due process proceeding is whether, as the District contended, Student's absences from class during the spring of 2009, were entirely within the control of Student and unrelated to his disability. The hearing officer found that, contrary to the claims of the District, the evidence in the record establishes that Student's IEP team determined that Student's behavior was related to Student's disability, and included annual goals in his IEP to address that behavior. Student's IEP's from as early as September, 2006, and included annual behavioral goals and objectives and directed the development of behavior intervention plans as well as providing specialized instruction to address Student's needs. Most importantly for the hearing officer's decision here, Student's March 5, 2009, IEP included as an annual IEP goal for Student "attending classes regularly, completing assignments and earning credit for classes."

It is the IEP team which, under the IDEA, with the assistance of evaluation data, classroom observations, and assessments of a student's performance, which identifies a Student's needs arising from his disability and which determines appropriate goals based on these needs for each student. 34 C.F.R. § 300.324. The District's characterization of Student's behavior as entirely within his control and unrelated to his disability is directly contradicted by the determination of the IEP team.

Moreover, the record shows a clear pattern of absences and behavioral incidents drastically diminished or disappearing altogether during the period the hearing officer found that Student received appropriate special education services.

The relevant questions here, therefore, is not whether Student had behavioral needs related to his disability: the IEP team determined that he did and the evidence in the record supports that determination. The question, instead, is whether the team put in place instruction and/or behavioral supports which were appropriate to address Student's unique behavioral needs and which were reasonably calculated to confer meaningful education benefit on Student. *Rowley*, 458 U.S. 176; *Lauren P. v. Wissahickon School District*, 48 IDELR 99 (E.D. Penn. 2007), *aff'd in relevant part*, 51 IDELR 206 (3rd Cir. 2009) (where the school district had clear notice of student's behavioral problems, including tardiness and failure to complete assignments, placing the onus on the student to improve her behavior and become more responsible failed to confer meaningful educational benefit in student's tenth grade year, denying her a FAPE).

The hearing officer found that, in the spring of 2009, this standard was not met. The IEP team did not conduct a functional behavioral assessment and did not prepare a BIP to address the behavior it had identified as Student's greatest need: his absences from class. The team also changed Student's placement from a self-contained class to multiple D-level classes based on the District's difficulty finding a teacher, rather than on Student's unique needs. These failures denied Student a FAPE in the Spring of 2009.

The need for a full reevaluation, with diagnostic testing: The hearing officer also held that the District's decision to conduct Student's required three-year reevaluation without performing any new diagnostic testing, is inconsistent with the IDEA provisions concerning reevaluations. Diagnostic testing was plainly required here in light of the length of time that had passed since the initial diagnostic testing of Student (6 years); the absence of reliable data on Student's progress; the

uncertainty in the initial diagnostic testing about whether a deficit in processing speed was the origin of Student's learning disability and the fact that the initial testing did not assess other possible deficits; the absence of any formal assessment of the contribution of behavioral and social or emotional factor; and what appeared to be an increasing discrepancy in reading levels, as well as in math and written communication, since Student's original evaluation; and the evident need for direction as to both effective instructional methods for Student and as to effective behavioral interventions. The District diagnostician acknowledged that her decision not to do full diagnostic testing had been in error.

The Failure to Provide Adequate Transitional Services: The third issue central to the decision is whether Student was provided adequate transitional services. The hearing officer concluded that given Student's central transitional goal of graduating from high school with a standard diploma, the failure to the District to ensure that Student actually took the competency examination, and to ensure, as well, that Student's class schedule addressed graduation requirements, was inconsistent with Student's transition plan, and interfered with Student's ability to achieve his transition goals. 34 C.F.R. § 320(b).

Remedy: Parent requests as a remedy in this matter that the hearing officer order: (1) an independent diagnostic evaluation of Student, which includes specific instructional suggestions aimed at maximizing Student's academic growth and preparation of a new IEP guided by this information; (2) compensatory one-on-one tutoring to allow Student to complete graduation requirements within 12 months; (3) compensatory education in auto mechanics equivalent to four school years of study, taken off-campus at a post-secondary facility and paid for by the District, together with five hours of tutoring a week; (4) require the District to allow Student to participate in graduation ceremonies with his class; (5) assure that security/police "refrain from harassment" of

Student; and (6) require the District to create and implement procedures for the provision of special education records to law enforcement authorities after a student is arrested.

Compensatory education and injunctive relief are both equitable remedies. The hearing officer is charged with considering all of the circumstances and with providing relief calculated to remedy the educational deficit created by a District's failure to provide FAPE. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). The hearing officer must take into account the role of the various parties, mitigating or aggravating factors, and the impact of the denial of FAPE on the student, as well as other factors. *Id.*; *Bd. of Education of Oak Park and River Forest High School District 200 v. Illinois State Bd. of Ed.*, 79 F.3d 654 (7th Cir. 1996).

First, the hearing officer finds that the Parent's request for an independent educational evaluation is well-taken. In devising a remedy for the District's failure to conduct an adequate reevaluation, the hearing officer turns to the IDEA provision authorizing an Independent Educational Evaluation at public expense. 34 C.F.R. § 300.502. A Parent has a right to such an evaluation based on the determination of a hearing officer that the District's evaluation is inappropriate. *Id.*

The hearing officer also requires that, following the completion of the evaluation, Student's IEP team convene, with the evaluator present, to prepare a new IEP for Student.

In awarding compensatory education, the hearing officer is cognizant of the fact that Student was not entirely without blame. Although the hearing officer did not find that Student was entirely in control of his behavior as the District urged, Student was almost certainly capable of greater cooperation with school authorities and greater compliance with school rules than he demonstrated. He also is capable of taking greater initiative in ensuring that his schedule includes the classes he wants.

The hearing officer has also taken into account the staffing difficulties experienced by the District, some of which could not have been anticipated or avoided, and the fact that the District did

provide Student a FAPE during much of the period at issue in this hearing. Nonetheless, Student's needs were not addressed during the Spring of 2009 and continuing into this school year and a number of issues important to Student's transition goals were ignored since the beginning of Student's sophomore year.

The record shows that Student needs ten credits to graduate, plus he must take and pass all six sections of the competency exam. The major obstacle to Student getting the credits he needs to graduate by December, 2010, is his need to take a full year English 12 course. TR. 69-71. He cannot begin that class until he completes the previous year's English requirement. The hearing officer finds that one-to-one tutoring is an appropriate compensatory service to allow Student to complete English 12 by December, 2010. Tutoring should be provided during the summer to complete this class, provided Student and Parent agree. Some of the tutoring time should be used to assist Student in preparing for the NMHSCE. Student's transition goal of passing the competency exam and graduating with a standard diploma, should also be considered by the IEP team in setting annual academic goals for Student and in determining what specialized instruction, related services and modifications are needed to meet Student's needs during the next year.

Rather than ordering the District to allow Student to participate in graduation exercises with his class, the hearing officer requires the District to follow the recommendation of Student's IEP team. The team may, if it deems it appropriate, condition this special privilege on Student's active participation in his educational program for the remainder of this year.

Student must be scheduled for a minimum of two semesters of auto mechanics at the high school or at another appropriate District facility. Student's IEP team should consider what modifications and supports, including the assistance of a tutor or aide, are necessary to allow Student to participate successfully in this class and provide those supports.

The hearing officer cautions Student that the District is not required to guarantee that he will graduate with a standard diploma. The District can only provide appropriate services. Student's ability and hard work will determine whether he is able to meet his goal.

Finally, the hearing officer requires the District to put in place a procedure for obtaining parental consent for the release of a student's special education and disciplinary records and for their transmission, with that consent, to the juvenile court and apply that procedure to Student here.

IT IS HEREBY ORDERED:

1. The District will provide to the Parent the information about its criteria for an independent evaluation and a list of evaluators which meet District qualifications from which the Parent may select an evaluator, and such an evaluation shall proceed as provided in 34 C.F.R. § 300.502, at public expense.
2. The District shall cooperate with the evaluation, allowing classroom observations and requiring District staff to respond to requests from the evaluator for their observations concerning Student's needs and progress.
3. When the evaluation is complete, the District shall prepare a new IEP for Student, taking into account the instructional implications of the diagnostic report and considering positive behavioral interventions and supports to address behaviors which impede Student's progress and/or special education or related services to meet Student's behavioral needs, as appropriate, based on the evaluation.
4. The District shall permit the independent evaluator to participate in the IEP meeting as a full member of the team.
5. Student shall be provided 80 hours of tutoring by a qualified special education teacher to complete his remaining English requirement and to provide additional help in areas of the competency examination which Student initially fails, if any.

6. The District shall schedule Student for a minimum of two semesters of auto mechanics at the high school or at the CEC or another appropriate District facility. Student's IEP team should consider what modifications and supports, including the assistance of a tutor or aide, are necessary to allow Student to participate successfully in this class and shall provide those supports.
7. The District shall put in place a procedure for obtaining parental consent for the release of a student's special education and disciplinary records and for their transmission, with that consent, to the Children's Court.

RIGHT TO APPEAL

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

THIS DECISION ENTERED THIS 12th DAY OF NOVEMBER, 2009.

Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Decision of the Due Process Hearing Officer* was sent by certified mail, return receipt requested, on November 12, 2009, to Dr. Veronica C. Garcia, Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and to the following counsel of record in this proceeding. The decision was also e-mailed on November 12, 2009, to all Counsel.

Counsel for Parent and Student:

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

Tara Ford, Esq.
Pegasus Legal Services for Children
4916 Fourth St., NW
Albuquerque, NM 87107

Counsel for Albuquerque Public Schools:

Michael Carrico, Esq.
Samantha Adams, Esq.
Modrall Law Firm
P.O. Box 2168
Albuquerque, NM 87103-2168

Jane B. Yohalem
Due Process Hearing Officer