

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER

IN THE MATTER OF

GRANDPARENTS,
as Grandparents of M.C.,

Petitioners

DPH 0910-10

v.

ALBUQUERQUE PUBLIC SCHOOLS
and
NEW MEXICO PUBLIC EDUCATION DEPARTMENT

Respondents

DECISION OF THE DUE PROCESS HEARING OFFICER

Muriel McClelland, Esq.
Due Process Hearing Officer

November 19, 2009

Attorney for Petitioners (Grandparents):

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**DUE PROCESS HEARING
DPH 0910-10**

DECISION

The matter coming before the due process hearing officer (DPHO) at a hearing held on October 27-28, 2009; Petitioners (Grandparents) represented by Gail Stewart, Attorney at Law; Respondent (District) represented by Michael L. Carrico, Attorney at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

STATEMENT OF PROCEDURE

Parents filed a request for due process with the New Mexico Public Education Department (NMPED) on September 18, 2009, alleging denial of FAPE under IDEA and naming the District and NMPED as Respondents. *[DPHO Exhibit 1]* This hearing officer was appointed on September 21, 2009. *[DPHO Exhibit 2]*. The NMPED neither appearing nor entering a special appearance, but stating in the letter of appointment dated September 21, 2009 that the NMPED (SEA) pursuant to *6.31.2.13(I)(3)(d) NMAC* “declines to appoint a hearing officer for the claims against it because an IDEA due process hearing is not the appropriate forum for consideration of such claims.”

At the pre-hearing telephone conference held on September 28, 2009 the hearing officer scheduled the due process hearing for October 27-28, 2009, to accommodate attorney and hearing officer schedules. Extensions requested by the parties were granted for good cause shown. *[DPHO Exhibit 3]* Statements of issues were submitted on October 12, 2009. *[DPHO Exhibits 4, 5]*

Exhibits and witness lists were exchanged on October 19, 2009. *[DPHO Exhibits 6, 7, 8]* The parties timely submitted requested findings of fact and conclusions of law. *[DPHO Exhibits 9, 10]* This decision is timely entered on November 19, 2009. *[DPHO Exhibit 11]*

ISSUES PRESENTED

Petitioners have identified the following issues for determination by the hearing officer:

1. Whether District is providing appropriate reading instruction to Student or whether the failure to provide appropriate reading instruction to Student is a denial of FAPE?
2. Whether District is providing appropriate math instruction to Student or whether the failure to provide appropriate math instruction is a denial of FAPE?
3. Whether District's 2009-2010 IEP for Student is reasonably calculated to confer educational benefit?
4. Whether District's delivery of educational services to Student is in compliance with his IEP and is reasonably calculated to confer educational benefit to the Student?
5. Whether District has denied Student FAPE by suspending him for behavior in the absence of a FBA and BIP as mandated by his IEP?
6. Whether District's failure to supply Student with auditory texts for the 8th grade general curriculum is a denial of FAPE and whether District denied Student FAPE by failing to provide him access to the 8th grade general curriculum provided to nondisabled students?
7. Whether District during the 2009-2010 school year has any workable system for timely delivery of auditory texts to Student?
8. Whether District's failure to provide Prior Written Notice (PWN) to Petitioners compromised Petitioners' ability to participate in the IEP process resulting in a denial of FAPE?

9. Whether District denied Student FAPE by allowing his 8th grade special education teacher to have a “no homework” policy?

10. Whether Student is entitled to equitable remedy and what remedy would be appropriate?

Respondent submits the following Statement of Issues:

1. Whether the reading instruction that District has provided Student is appropriate to meet his needs?

2. Whether the math instruction that District provided Student is appropriate to meet his needs?

3. Whether District is providing Student with auditory versions of textbooks and other text material to assist Student in assessing the curriculum that is being provided to his peers?

4. Whether District denied FAPE by not completing a FBA/BIP at the time Petitioners filed their request for due process?

5. Whether a one-day suspension, with or without a FBA/BIP, is a violation of IDEA 20 U.S.C. 1415(k)(1)(B)?

6. Whether the hearing officer should exclude evidence of alleged systemic issues?

7. Whether District has the discretion to choose among appropriate educational methodologies?

8. Whether the relief requested by Petitioners regarding an evaluation is ripe for review when Student is not due for a three-year re-evaluation and when no request for same was made prior to the due process hearing?

FINDINGS OF FACT¹

1. Student is a thirteen-year-old boy who has been identified as eligible for special education services as a result of specific learning disability (SLD) and emotional disturbance (ED).

Jt. Exh 1; TR 10

2. Student has been diagnosed with severe dyslexia and ADHD. *Pet's Exh 20; TR 210, 268, 273, 419, 468*

3. Student has been enrolled in the 8th grade at District's middle school since August 20, 2009. *TR 38*

4. Student currently resides with his maternal grandparents, Petitioners herein, in the LEA. *TR 21*

5. Student attended District's schools until third grade when he moved to Texas. While residing in Texas from 2004-2009, Student attended local schools and was home-schooled by his parents. *TR 32-33, 465-466*

6. Student was placed in a Texas residential treatment center ("The Oaks") due to his behavior and depression just prior to his move to New Mexico. *Jt. Exh 2; TR 466-467*

7. Student suffers low esteem resulting in an attitude of inability to perform and learned helplessness ("I can't do it"). *Pet's Exh 20; TR 33-34, 159-162, 268-269, 287, 423*

8. Student's Texas IEP dated April 22, 2009 noted that Student's behavior impedes

¹ To the extent that the following findings of fact contain conclusions of law or that the conclusions of law are findings of fact, they should be so considered without regard to the given labels. *Bonnie Ann F. v. Callahan Independent School Bd.*, 835 F. Supp. 340 (1993). All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent that these contentions are in accordance with the findings and conclusions stated herein, they have been accepted. To the extent that they are inconsistent, they have been rejected or deemed irrelevant or not necessary to a proper determination of the issues presented.

his learning and that of others. *Jt. Exh 2; Pet's Exh 20; TR 92-93, 149*

9. Student's three year re-evaluation is due October 21, 2010. *Jt. Exh 1, Pet's Exh 20; TR 87*

10. District is willing to move the re-evaluation up to the 8th grade (rather than the 9th); Grandparents do not oppose. *TR 474*

11. Grandparents rejected the implementation of the Texas IEP. *TR 68-69*

12. Student's 2007 evaluation concluded that he performed as high average in the WISC IV, Verbal Comprehension Index, but that he had extreme difficulty with decoding abilities, requiring an individualized reading intervention program. *Pet's Exh 20*

13. Student demonstrated a 45-point discrepancy between his cognitive ability score and achievement score for basic reading skills and significant discrepancies in the areas of reading comprehension, math calculation and written expression. *Pet's Exh 20*

14. Student reads at a 1st to 2nd grade level, based upon his previous school reports and evaluations. This assessment was adopted in his current IEP and was supported by testimony in this case. *Jt. Exh 1; TR 48, 50, 117, 132*

15. Based upon an evaluation performed in October, 2007 when Student was in the 7th grade, Student was performing math at the 1st or 2nd grade level. This assessment was adopted in his current IEP and was supported by testimony in this case. *Jt. Exh 2; TR 147*

16. An IEP committee was formed immediately upon Student's enrollment in middle school. The MDT/IEP team meeting was convened on August 20, 2009, one day after the beginning of the 2009-2010 school year; the IEP was finalized on August 21, 2009. *Jt. Exh 1, Pet's Exh 5*

17. Student's grandmother participated in this IEP meeting and signed off on the IEP.

Jt. Exh 1, Pet's Exh 5; TR 98, 177, 475-478

18. The final IEP did not attach Grandparent's written notice of nonconsent to the use of time-out and restraint, or grandparent's request for a safe go-to person. *Jt. Exh 1; TR 74-75, 181*

19. Student's IEP provides for modifications and accommodations, including visual and auditory aids, opportunity to respond orally, and limited copying from board or from books, among others. District agreed to provide a recorder and taped texts. *Jt. Exh 1; Pet's Exh 19*

20. Student's IEP called for a FBA/BIP to include positive behavioral interventions, strategies and supports to address behavior, for neuromotor evaluation and social work assessment, and noted that Student requires "extensive reading support for dyslexia.." *Jt. Exh 1; TR 54-55*

21. Several of Student's IEP provisions have not been effected, specifically the FBA/BIP, neuromotor evaluation, and social work assessment. District's excuse is that the filing of the request for due process on September 18, 2009 halted further action. *TR 83, 89-90*

22. Student was not placed in his present teacher's special education classroom until the third week of school. *TR 85, 149-150, 153, 250-251*

23. District got off to a slow start in implementing Student's IEP, waiting until he had accessed his present placement. *TR 140-144, 145-146*

24. Grandparent should not be faulted for expeditiously requesting due process four weeks after Student's enrollment, given that Student will be entering high school in the 2010-2111 school year and doesn't have time to waste. *TR 418, 436*

25. Student's grandmother is an active advocate for Student. *TR 75-76, 393*

26. Student is currently receiving special education services in the ED classroom, a

special education classroom of twelve students (6th, 7th and 8th graders) for reading, math, written language and social studies, all subjects delivered in a small group setting (4-5 students); he receives science education and physical education (P.E.) with the general education students. *Jt. Exh 1, TR 275*

27. The IEP team noted that due to Student's ADHD, he benefits from daily physical activity. Student chose P.E. as his elective. *Jt. Exh 1, TR 85-86*

28. Grandparent specifically requested P.E. for Student at the IEP meeting on August 21, 2009 because he needs physical activity for ADHD management. *TR 86, 478*

29. Student's oral abilities are good but he suffers print disabilities, necessitating accessible instructional materials to be delivered orally. The provision for recorded texts was indicated in his IEP. *Jt. Exh 1, Pet's Exhs. 12, 13*

30. The required forms for auditory texts and a Victor CD player (which adjusts speed) were not submitted to the Unified Library Services until October 6, 2009. *Pet's Exh 12; TR 61-62.*

31. District (more specifically, the head special education teacher) dropped the ball by failing to submit the necessary forms to the Unified Library Services to obtain auditory texts, depriving Student of FAPE for the first seven weeks of school. Textbooks were read to Student orally in the interim, which embarrassed Student. *TR 57-61, 64-66, 182-183, 187-189, 196-197*

32. While Student did not receive auditory texts for science as provided in his IEP, the primary delivery of science instruction was through lecture. *TR 23, 124*

33. District delayed commencing a Functional Behavior Assessment (FBA) until Student was placed with his present special education teacher, but hasn't completed the process due

to the filing of the due process hearing request. *Pet's Exh 19; TR 80-81, 83-90, 101-102*

34. The head special education teacher assumed that the filing of a due process hearing request limited District's ability to perform a FBA/BIP. *Pet's Exh 16; TR 83, 89-90*

35. The program support specialist assumed that the FBA/BIP, social work assessment and neuromotor evaluation were on hold as a result of the due process hearing request. *TR 203-204*

36. Neither party communicated with the other regarding the commencement of IEP mandated assessments. *TR 204*

37. Only at the conclusion of the due process hearing on October 28, 2009 did the parties stipulate to the scheduling of the IEP- mandated social work assessment and the neuromotor evaluation. *Jt. Exh 1; TR 56, 562*

38. Neither grandparent nor Student received any instruction on how to use the CD player, however, Student did not find that to be an impediment to its use. *TR 108, 428*

39. While complaining that she did not receive proper instruction, grandparent did not specifically request assistance in learning how to use the Victor recorder. *TR 428-429*

40. Student received private tutoring using the Lindamood Bell method (derived from Orton Gillingham) prior to his enrollment in the LEA. *TR 415-416, 441, 450, 460*

41. Student receives specialized reading instruction using the *SPIRE* program, which is one of two approved research-based multisensory reading programs used in the LEA, the Wilson Reading Program being the second. Both programs are based upon Orton Gillingham methodologies. *Jt. Exhs. 3, 4; TR 72, 244, 331-332, 339-342, 345, 348, 494 et.seq., 525, 532-533, 560-561*

42. Other reading programs based on Orton Gillingham principles include *Patterns for Success*, Lindamood Bell, *Sounds Sensible*, Spalding Reading, among others, but these programs are not available for use in the LEA as a general rule. *TR 506-509*

43. The *SPIRE* reading program incorporates all the components recommended by the National Reading Panel, including phonological awareness, phonics, fluency and automaticity, vocabulary and comprehension, as well as spelling. *Jt. Exh 4; TR 501-502*

44. *Sounds Sensible* is a program used in conjunction with *SPIRE*, but is a pre-level-1 program deemed more appropriate for younger learners. *Pet's Exh 3; TR 334*

45. According to the District's special education reading, math and learning disabilities coordinator, *Sounds Sensible* is not appropriate for older students; *SPIRE* can function as a "stand alone" program. *Jt. Exhs. 3, 4; TR 534*

46. Student's teacher is highly qualified, having thirty-four years experience teaching students who are ED and have learning disabilities. *TR 103, 207-208*

47. Teacher, a credible witness with respect to Student's educational level and needs, describes her teaching method as "collective" ["eclectic"], using a variety of strategies. She deviates from the *SPIRE* curriculum in that she has students memorize cue words that are not part of the *SPIRE* program but are consistent with the *Making Connections Intervention* program. The executive director for special education testified that a collective approach is not endorsed by District: "there's a body of research now that indicates how students should get their instruction in the systematic sequential way." *TR 239, 242-249, 258, 313-314, 358 550*

48. *Making Connections* is a literature program specifically designed for students with learning disabilities; it is an explicit and guided approach to teaching reading comprehension,

using a text level that is designed not to frustrate students with deficit reading skills. *TR 521-523*

49. District employs *Making Connections Intervention* strategies with science and social studies texts, based on the standards. *TR 522*

50. Teacher has a “no homework” policy, which is a non-issue for grandparent. *TR 309, 470-471*

51. Student receives specialized math instruction through the *TRANS MATH* program. His math program was not challenged in this hearing. *Jt. Exhs. 5, 6, TR 147, 288*

52. No evidence was presented showing that Student is unable to access the 8th grade social studies curriculum and language arts instruction, or challenging the appropriateness of his instruction in these areas.

53. Student’s IEP individualized reading instruction calls for forty-eight minute instruction in a small group setting of four students three days a week. The SPIRE program was not specifically identified. *Jt. Exh 1; TR 226, 229, 311-312*

54. The LEA’s learning disabilities coordinator endorses five days of multisensory reading instruction, a minimum of five hours per week, as recommended by the remedial reading programs. *TR 529*

55. Student’s IEP reading component did not follow SPIRE guidelines for teaching children with severe learning disabilities in that it was limited to forty-eight minute lessons three times a week (144 minutes) delivered in a small group setting, and not the specified daily sixty-minute (300 minutes total) 1:1 lessons required by the program. *Jt. Exhs 1, 4; TR 529*

56. Student desperately wants to learn to read and is highly motivated at the present time. *TR 26-27, 29, 33-34, 298-299, 316*

57. The week before the hearing, the special education teacher, at Student's instigation, offered to give up her planning period in order to give Student an additional 30-40 minutes of 1:1 individualized reading instruction 3 or 4 times a week. Student, in turn, gave up his P.E. elective the last hour of the school day. *TR 28, 307, 315-316*

58. District has the ability to formalize this arrangement with an adjustment to the teacher's contract and has indicated its willingness to do so. *TR 371-372, 375-376, 401-402, 404-408*

59. Student would benefit from 1:1 explicit and systematic reading instruction delivered five days per week. *TR 25, 445-447*

60. Student is very happy with his present teacher, calling her the best he ever had. Grandparent indicated Student liked his teacher because she told Student she would never give up on him. *TR 25, 30-31, 110, 462-463*

61. Student is making some improvement academically from his reading program and educational placement. *Pet's Exh 1; TR 289, 350, 352-353-478*

62. Student was placed in the ED classroom and was suspended for one day for failure to surrender a cell phone in the absence of a BIP. *TR 62*

63. Negative behaviors are decreasing in his present placement; overt aggressive behaviors have not been observed. *TR 268, 279-280*

64. District has taken corrective action to implement the provisions of the IEP since the filing of the request for due process by commencing the FBA/BIP, providing one auditory text, and sanctioning the arrangement between Student and teacher to increase Student's specialized reading instruction on a 1:1 basis. *TR I, II*

CONCLUSIONS OF LAW

Under the IDEA, a hearing officer's decision is reviewable by the court. 20 U.S.C. §§ 1400, et seq., (2004), 34 CFR §§ 300.511-300.514 (2006), and NMAC 6.31.2.13 (I) NMAC (2007).

2. The issue whether claims against the SEA are proper subject matter for a due process hearing under IDEA is a matter of judicial determination by the Tenth Circuit Court Appeals, given the ruling in *Chavez v. Board of Education of Tularosa Municipal Schools, et al*, No. Civ. 05-0380 JB/RLP (D.C. N.M., Nov. 11, 2008), and the SEA's appeal of that decision. Claims against the SEA were not considered in this proceeding.

3. Petitioners have exhausted administrative remedies with respect to claims against the LEA.

4. Subject matter jurisdiction in due process hearings is limited to matters relating to the identification, evaluation, and educational placement of children with disabilities, and to the provision of FAPE. Alleged systemic violations by District were not considered by the hearing officer. 20 U.S.C. § 1415(b)(6); 34 CFR § 300.507(a); *Miller v. APS*, 565 F. 3d 1231 (2009)

5. The hearing officer's decision is reviewable by the court, and the hearing officer's decision is final and unreviewable by the court.

6. The hearing officer's decision is reviewable by the court, and the hearing officer's decision is final and unreviewable by the court. 34 CFR § 300.515(c)

7. The hearing officer's decision is reviewable by the court, and the hearing officer's decision is final and unreviewable by the court.

Parents are entitled to a hearing under 34 CFR § 300.7(b)(2). Parents are entitled to a hearing under 34 CFR § 300.8(c)(9) and 300.8(c)(4)(i)(2006)

8. Parents are entitled to a hearing under 34 CFR § 300.7(b)(2). Parents are entitled to a hearing under 34 CFR § 300.8(c)(9) and 300.8(c)(4)(i)(2006)

9. Grandparents claims against the LEA were brought within the two-year Statute of Limitations. 20 U.S.C. § 1415 (f)(3)(c)(2004)

10. Grandparents met their burden of proof showing that the LEA's delivery of reading instruction to Student was inappropriate in terms of the amount of time, but did not meet their burden of proof showing that District's use of the SPIRE program, once properly implemented, was inappropriate to meet Student's individual needs.

11. District's IEP dated August 21, 2009 is not reasonably calculated to confer educational benefit in that Student's reading component is insufficient in terms of amount of time allocated for instruction necessary to meet Student's individual educational needs.

12. District's 2009-2010 IEP for Student may be reasonably calculated to confer educational benefit once the additional 1:1 instructional time 3-4 times per week is formally added to his program.

13. Student was denied FAPE by District's failure to complete a FBA/BIP as specified in his IEP in a timely manner, irrespective of the filing of a due process request.

14. District did not deny Student FAPE by suspending him for behavior in the

absence of an IEP mandated FBA/BIP.

15. District denied Student FAPE by failing to provide him with auditory texts for the 8th grade general curriculum in a timely manner, as specified in his IEP. *20 U.S.C. 1415(k)(1)(B)*.

16. Student's IEP was not fully and not properly implemented, and should have been. *Fisher v. Stafford Tp. Bd. Of Educ.*, 2007 WL 674304 (D. N.J. 2007); *Department of Education, State of Hawaii v. Cari Rae S.*, 158 F. Supp. 2d 1190 (D. Hawaii 2000); *Miller v. APS*, 455 F. Supp. 2d 1286, 1308-09 (D.N.M. 2006), *affirmed*, 565 F. 3d 1232 (2009)

17. Grandparents were not denied participation in the IEP process as a result of District's failure to provide PWN.

18. Grandparents did not carry their burden of establishing by a preponderance of the evidence that District violated IDEA's parental involvement requirements. *20 U.S.C. § 1414(d)(3)(2004)*; *34 CFR § 300.501*

19. The special education teacher's "no homework" policy is not a violation of IDEA and is not a denial of FAPE.

20. An IEP is not required to list specific educational methodologies. *20 U.S.C. 1414(d)(1)(A)(ii)(l)*; *Deal ex rel. Deal v. Hamilton County Bd.. Of Educ.*, 42 IDELR 109 (6th Cir. 2004); *Case v. Allegheny Intermediate Unit*, 49 IDELR 34 (W.D. Pa 2007)

21. District is responsible for choosing educational methodologies. *M.M. and B.M. ex rel C.M. v. School Bd. of Miami-Dade County, Fla.*, 45 IDELR 1 (11th Cir. 2006)

22. District's provision of multisensory reading instruction in the SPIRE program may confer education benefit, however, progress has not been objectively measured. It is too soon to measure progress sufficient to conclude that Student is receiving educational benefit from this

particular program.

23. Compensatory education is an equitable remedy and must be designed 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

Educational Benefit

The standard for FAPE is defined as “the basic floor of educational opportunity,” which consists of “access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” 458 U.S. at 176, 201; *Bd. of Educ. of the Hendrick Hudson Sch. Dist. v. Rowley*, 458 U.S. 176 (1982) A child has received FAPE if the LEA has complied with the procedural requirements of IDEA and if the IEP was reasonably calculated to enable the child with disabilities to receive meaningful educational benefit. *Id.* at ¶65 The provision of FAPE is accomplished through the IEP. 20 U.S.C. § 1414(d)

Because the IEP was not properly implemented, it is too early to assess whether Student is making educational progress in his placement and, therefore, premature to conclude that the IEP is reasonably calculated to confer educational benefit.

Appropriateness of District's Reading and Math Instruction

The main issue litigated in this case was whether the *SPIRE* (Specialized Program Individualizing Reading Excellence), a multisensory research-based reading program selected by District for generalized (but not exclusive use) in the LEA, is designed to meet Student's individual

educational needs. *SPIRE* is a remedial program developed for students who experience severe struggles with reading comprehension, based on the Orton Gillingham method of teaching students who function far below grade level, as is Student's case.

There was conflicting testimony as to whether *SPIRE* should be used as a stand alone program. The Florida Center for Reading Research Curriculum and Instruction outline recommends that *SPIRE* be used in conjunction with *Sounds Sensible*, an elementary beginning program, for 50-60 minute lessons five days a week, delivered 1:1 or in a small group of 3-5 students. [*Petitioner's Exhibit 3*] The testimony of District's program coordinator and Student's special education teacher was that *Sounds Sensible* was not appropriate for this Student's reading needs based upon their knowledge of the program and classroom observation of Student's performance.

Student currently receives *SPIRE* instruction in his special education classroom in a small group setting of 4-5 students. Additionally, but only very recently, Student began receiving additional 1:1 reading instruction from his special education teacher 3-4 days a week, pursuant to an informal agreement between Student and teacher sanctioned at the due process hearing by District. Teacher is having success in motivating Student, one of Student's primary problems in benefitting from reading instruction. Apart from Student's limited tutoring experience in the Lindmood Bell method, grandparents did not provide evidence why any another program would be more appropriate or benefit Student more.

The case law on methodology is clear and unambiguous. If the Student is benefitting from his or her educational services, District gets to pick the method. *Rowley, op cit.; M.M. and B.M. ex rel C.M. v. School Bd. of Miami-Dade County, Fla., op cit.; Lachman v. Illinois Bd. of*

Educ., 852 F.2d 290, 297 (7th Cir. 1988), cert. denied, 488 U.S. 925; *Pulaski County Special Sch. Dist.*, 40 IDELR 272 (SEA AR 2004) [redacted]; *E.S. v. Independent School No. 196*, 135 F. 3d 566 (8th Cir. 1998); *Miller, op cit.*

Just because the LEA chooses one methodology over another as district-wide policy does not mean that methodology is inappropriate, *per se*, or that, for that reason alone, the method fails to meet IDEA’s mandate of individualization. District may not, however, preselect one method only as “one size fit all.” *Miller, op cit.*; *Deal, op cit.* Grandparents failed to meet their burden of proof.

Student performs math at the third grade level. While his math instruction was initially raised as an issue, there was no testimony elicited that indicated Student was not benefitting from his remedial math instruction in the special educational setting.

Appropriateness of Student’s IEP

District had nine weeks to get to know Student at the time of the due process hearing. District’s failure to fully develop a FBA/BIP until they had time to assess Student’s classroom behaviors can be justified if more time was needed to observe Student’s behavior in the school setting. Using the filing of a due process complaint as an excuse for the delay is disingenuous. IDEA’s stricture for “stay-put” refers to placement and related services and should not be relied upon as an excuse not to implement evaluation and assessment provisions of an IEP, or the development of a BIP. The stay-put provision of IDEA refers to “current educational placement” and “related services,” but is not further defined. 20 U.S.C. § 1415(j); 34 CFR § 300.518(a) It is difficult to

imagine that assessments and evaluations are “services” contemplated by the regulations as subject to stay-put, even if included in the IEP. OSEP in a guideline letter stated: “In essence, OSEP has provided guidance where parents and districts cannot agree upon a proper course of action. For example, if agreement is reached in all but one area, it is suggested that the agreed upon areas be implemented immediately, the disagreement be noted in writing, and the disputed issue be resolved in accordance with accepted procedures (e.g., mediation or a due process hearing”). *Letter to Wilson, 213 IDELR 102; cf. John M. by Christine M. And Michael M. V. Board of Educ. of Evanston Township High Sch. Dist. 202, 502 F. 3d 708 (7th Cir. 2007)* Certainly grandparents’ assent could have been obtained (or at least solicited) if District thought “stay-put” impeded implementation. To the extent District failed to follow through on assessment and evaluation provisions, in addition to the unnecessary delay in providing audio texts and developing the BIP, deprived Student of FAPE. Further, District’s IEP as it presently stands is not reasonably calculated to provide an education that benefits Student, because it is inconsistent with the *SPIRE* protocols.

Other Issues

All other issues raised in the request for due process and the response have been covered by findings of fact and conclusions of law herein. Petitioners’ requested findings and conclusions involving alleged systemic issues peculiar to the LEA are specifically rejected as not relevant to the issues before the due process hearing officer.

Remedy

Grandparents request the following remedies:

1. Daily 1:1 reading instruction for at least 60 minutes for the remainder of the 2009-2010 school year continuing into his first year of high school.

2. Reading instruction daily by a reading teacher who has the highest level of training in a research-based reading intervention program appropriate for students with learning disability in reading who have experienced repeated failure and are 6-7 years behind in reading. If the parties cannot agree within 30 days on a District itinerant instructor to supply this reading instruction to begin no later than the first school day in January, 2010, the District is ordered to pay for an independent educational evaluation in reading with the evaluator to be selected by Petitioners. Provision of subsequent reading instruction by District must then be the instruction specifically identified and recommended by the IEE.

3. District should be required to conduct an audit of its system for provision of auditory texts to print-disabled students, including a) a description of the present system; b) description of the numbers of students with identified reading disability who are on IEPs; c) description of the number of print-disabled students who are provided auditory texts in the LEA this school year. The audit should be published on District's web site by July 1, 2010.

4. District should revamp its system for provision of auditory texts to print-disabled students to be fully compliant with federal law and provide for sure access to auditory texts during the 2010-2011 school year to all students with identified reading disability in the LEA.

5. District should amend Student's IEP to include grandparents' prohibition on use of physical restraint and forced seclusion or "time out" during the school day.

6. District should conduct the FBA by district level staff with behavior expertise and conduct a BIP for Student with assistance from district level staff who have behavioral expertise. The BIP should focus on positive behavioral supports and recognize the connection between Student's frustration with reading and "acting out" behaviors.

7. District should audit provision of grade level content to students receiving special education in self-contained placements at the middle school and correct any and all failures to present grade level content created by multi-age classrooms.

ORDER

 The undersigned, District Superintendent, do hereby order that the following conditions be met:

1. The neuromotor evaluation and social work assessment stipulated to by the parties shall be completed as soon as feasible.
2. District shall complete the FBA/BIP with assistance from district level staff with behavioral expertise within the next four weeks, focusing on behavioral supports.
3. The IEP shall be amended immediately to reflect a prohibition on restraint and time-out for Student’s behaviors.
4. As compensatory education, an addendum to the IEP shall be effected immediately, formalizing by contract the arrangement between Student and his present special education teacher for additional hours of 1:1 reading instruction. The amount of reading instruction delivered to Student will total 300 minutes per week, comprising both 1:1 (the arrangement between Student and teacher) and the small group reading sessions (48 minutes 3 times a week), for the remainder of the 2009-2010 school year. In the event this teacher is no longer available, District shall provide for the remainder of the 2009-2010 school year appropriate research-based multisensory reading instruction to Student, delivered by a District itinerant instructor pursuant to exact program protocols.

5. District shall convene another IEP meeting by January 5, 2010 at the latest, or earlier if possible, to review the neuromotor evaluation, social work assessment and proposed FBA/BIP, as well as to assess Student’s educational progress and goals/objectives in all subjects and, in particular, in his reading instruction.

6. District shall provide appropriate grade level curriculum to Student and ensure that Student expeditiously has auditory texts to access the general curriculum for the remainder of the 2009-2010 school year.

7. District shall commence re-evaluation by the end of the semester in anticipation of Student’s transition to high school.

Appeal

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to *20 U.S.C § 1415(l)* (2004), *34 CFR § 300.516*, and *6.31.2.13(l)(25) NMAC (2007)*. 30 days after the date of this decision, the party may file a written appeal with the Director of the Department of Education. The appeal must be filed with the Director of the Department of Education within 30 days of the date of this decision. The appeal must be filed with the Director of the Department of Education within 30 days of the date of this decision. The appeal must be filed with the Director of the Department of Education within 30 days of the date of this decision. The appeal must be filed with the Director of the Department of Education within 30 days of the date of this decision.

THIS DECISION WAS ENTERED THIS 19TH DAY OF NOVEMBER, 2009

Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that the foregoing document was served on the undersigned by the undersigned on 19, 2009, at the undersigned's residence, 300 [redacted], Albuquerque, New Mexico 87501-2786, by the undersigned on 19, 2009, at the undersigned's residence.

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Muriel McClelland
Due Process Hearing Officer

