

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

**PARENT,
on behalf of STUDENT,**

Petitioners,

v.

Case No. DPH 0910-25

ALBUQUERQUE PUBLIC SCHOOLS,

Respondent.

FINAL DECISION OF THE DUE PROCESS HEARING OFFICER

**Jane B. Yohalem, Due Process Hearing Officer
July 30, 2010**

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STATEMENT OF THE CASE

In this due process proceeding, Parents of a Student who qualifies for special education based on autism seek reimbursement for tuition for private services as well as compensatory education. Parents claim that their unilateral placement of Student in private schools and services was necessitated by the District's failure to provide Student a free appropriate public education (FAPE) in the least restrictive alternative setting. Parents filed their request for due process with the New Mexico Public Education Department on February 26, 2010, alleging that Student, now six years old, had been denied a FAPE under the Individuals with Disabilities Education Improvement Act of 2004 (IDEA) during a portion of two pre-school years as well as a kindergarten year.

The due process complaint focuses on Parents' claims that, from February 27, 2008, when the statutory period commences, through the end of the 2009 school year, the District failed to develop IEP's reasonably calculated to provide Student a FAPE, consistent with peer-reviewed research on education of children with autism; the District failed each year to place Student the least restrictive alternative setting appropriate to meet his needs; the District failed to provide necessary supports to staff; and the District failed fully implemented each of Student's IEPs. In addition, Parents allege that, in the 2009-2010 school year, the District failed to collect data necessary to adequately measure Student's progress; the District excluded Student from school beginning after November 6, 2009, and failed to convene an IEP meeting at that time; during all three summers at issue, the District denied Student necessary Extended Year Services (ESY); the District inappropriately used headphones on Student and refused to discontinue their use; and the District failed, in all three years, to provide 25 hours per week of active intervention and the necessary Applied Behavioral Analysis (ABA) recommended for children with autism. Finally, Parents also

challenge the failure of the District to provide, free of charge to the Parents, an educational assistant necessary for Student to access the Kindergarten Plus summer program during the summer of 2009.

The District has claimed for the first time in its proposed findings and conclusions that Student is not eligible for services under the Act because his ability to score at grade level in reading and math means that he does not need special education.

A due process hearing was held over a six-day period, resulting in a voluminous transcript with many exhibits. Rather than detailing the exhibit numbers admitted and objections made here, the hearing officer has included an annotated list of exhibits in the record in this case.

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

FINDINGS OF FACT

The 2007-2008 School Year

1. The period in dispute here begins on February 27, 2008, when Student was a three-year old Student attending a District developmental preschool.

2. Student was first identified as eligible for special education services by the District in July, 2007, based on severe deficits in expressive language, deficits in speech, difficulty maintaining eye contact, difficulty changing routines, difficulty asking relevant questions and difficulty participating in activities with peers. Ex. AA, pp. 2-5. Student was placed by the District in a developmental preschool where he was provided ten hours a week of educational services and one hour per week of speech and language therapy (SLT). Ex. AA, p. 9.

3. In July, 2007, Parents had arranged for Student to be privately evaluated a clinic for children with developmental disabilities. The clinic's medical evaluation, completed sometime after the July evaluation date, diagnosed Student with autism. Ex. P2. Although the evaluation found

delays in all areas of development, it also identified a number of strengths including an ability to learn from imitation and a desire for social approval, strengths not found in children with more severe forms of autism. Ex. P2.

4. In November, 2007, Student's IEP team convened to revise Student's IEP in light of the diagnosis of autism. The team found Student eligible for services under the Act as a child with autism. The team found that Student had communication and social delays which affected his participation in regular preschool activities. Ex. BB, p. 3. Throughout all relevant time periods, the District's multi-disciplinary and IEP teams continued to find Student eligible for services under the Act as a Student with autism. Exs. BB-GG; Ex. II (multi-disciplinary team notes that Student's communication and social deficit "greatly impacts his learning in the classroom setting). Overwhelming evidence in the record establishes that Student's autism significantly impacted his educational performance in all areas.

5. Mother participated as an active member of the IEP team in the development of Student's educational program. See P7, pp. 7-18 (Mother's written submission and request for services to the team) and Ex. BB, pp. 15, 17-18. A member of the District's autism resources team who had observed Student in class, Student's teacher, a diagnostician, and Student's speech and language therapist (SLT) and occupational therapist (OT) also participated in the team meeting. Ex. BB, p. 15.

6. The team identified goals and objectives for Student. These included participating more with peers, turn-taking, initiating social exchanges, improving intelligibility of speech, learning to ask questions, as well as toilet training and fine motor skills improvement in drawing lines and shapes. Ex. BB, pp. 6-10. The team provided Student one hour per week OT and one hour SLT, rejecting Mother's request for several additional hours of individualized OT and SLT services based on the team's conclusion that the additional OT and SLT provided in the preschool in groups of

various sizes, with the developmental preschool's focus on communication skills would meet Student's needs. Ex. BB, pp. 12, 17-18. Finally, the team provided for 1:1 teaching sessions focused on discrete skills (Discrete Trial Training), a form of Applied Behavior Analysis (ABA), in order to assist Student in learning new skills. Ex. BB, p. 17. This therapy was offered two to three times a week for 1 and 1/4 hours per session. TR. 1271; Ex. SS.

7. The team also discussed what placement would be the least restrictive placement for Student. Although a regular school placement was not explicitly discussed at least in part because the District does not have a regular preschool, the team's conclusion that Student could not be appropriately educated in a regular classroom setting because he needs special education programs and extensive therapy was supported by the evidence in the record. Ex. BB, p. 11; Ex. AA, pp. 2-7; Ex. MM, p. 24; Ex. P2, pp. 4, 6; TR. 222, 224, 1650. There was discussion among the team members as to whether Student should be placed in an "autism specific class" given his need for an intensive, focused one on one program, or remain in a developmental preschool class. Ex. BB, p. 17; TR. 221.

8. The District's autism specific placement is a highly restrictive setting with a class size of four or five students all of whom have a diagnosis of autism, with no peer models. Children in this program receive highly individualized and intensive one on one instruction for most of the day, including several hours of discrete trial training or other ABA therapy every day. TR. 279-281. The developmental preschool class in which Student was placed in August, 2007, was a class of seven to eight children with developmental needs along with three "peer models," typical preschool children without special needs. TR 187. Only one other child was on the autism spectrum. TR. 188. The class was taught by an experienced special education teacher who was assisted by an aide. *Id.*, TR. 180-83, 255. An SLT was in the class on Monday and Thursday, an occupational therapist (OT) was in class on Tuesday and Friday, and a physical therapist (PT) was there on Tuesday, providing

services in the classroom. Ex. P13, p. 12. The class was highly structured, with an emphasis on language, communication and social interaction. TR. 217, 419. Teaching involved intervening directly with individual children to bring them into the group activity and keep students on task. TR. 217, 248, 255-56. OT and SLT strategies were implemented by the classroom teacher during the week. TR. 163.

9. Based on the progress Student had made in his developmental preschool class since the beginning of the school year (improving his attention span in a group, using a visual schedule and approaching other children) and taking into account Mother's strong preference for a developmental preschool with exposure to typically developing peers, rather than an autism specific class, the team continued Student's placement in the developmental preschool, despite the concerns of several team members that Student needed the highly individualized and structured autism specific program. TR. 161-62; 217, 220, 256-257; Ex. BB, pp. 11, 17. The team agreed that Student could be provided an appropriate education in the Valle Vista Developmental Preschool program. TR. 347-48, 362, 419-20, 1654.

10. Student's IEP was prepared in conformity with the procedural requirements of the IDEA and was reasonably calculated to enable Student to make educational progress. Ex. BB, Findings, *supra*.

11. Significant appropriate support from autism experts was provided to classroom staff prior to Student's withdrawal from school in February, 2009. TR. 196-99, 210, 290-94, 300-01, 318, 1259-1263; 1271, Ex. SS; Ex. RR; P8, p. 2.

12. In January, 2008, Mother requested an IEP team meeting. Student had been out of school due to illness and the holidays most of the time since the November 27, 2007, IEP team meeting. TR. 155-56; 218. Mother became concerned during this period that there was insufficient planned and guided peer interaction in the classroom and insufficient data collection. TR. 1485-86,

1489-90. In preparation for the meeting, Mother prepared a letter to the IEP team requesting additional SLT and OT services to facilitate Student's social interaction as well as preparation of charts by school staff documenting Student's trials, successes and failures, which would be sent home each day. Ex. P. 26-28; TR. 1558-60, 1565.

13. An IEP meeting was begun on February 12, 2008, with the participation of Student's teacher, therapists, autism resource team staff, representatives of the district, some of Student's private therapists and Mother in attendance. TR. 229-30. The team had a lengthy discussion about Student's needs. The team again considered whether Student needed placement in an autism specific class to meet his needs, but rejected this placement based in part on Mother's objection to it and on the team's conclusion that he could be served appropriately in a developmental preschool with additional supports and services. TR. 1688, TR. 354, 357-59. The team ran out of time after a lengthy meeting and the IEP was scheduled to be continued on February 21, 2008. TR. 1689. Prior to the resumption of the IEP meeting on February 21, Student's teacher rescheduled the IEP for a week or two later and asked Mother to come in for a regularly scheduled parent-teacher conference to discuss how to best restructure the classroom program to provide the extra OT and SLT services and data collection without disrupting services to other children. TR. 233-34. Teacher and the therapy team was willing to provide most of the services requested but wanted to discuss with Mother the specifics of how those services could be provided in a way which worked for Student, met Mother's needs for information on Student's progress, and made sure the staff could also meet the needs of the other children in the classroom. TR. 239-40; 1561, 1666-67.

14. Afraid that teacher and the IEP team would insist on placement in an autism specific classroom or would refuse to provide the requested services, Mother refused to attend the parent-teacher conference, refused to participate in a rescheduled IEP meeting, and withdrew Student from school. TR. 1494-95, 1563-1566; Ex. P3, pp 2-3; Ex DD, p. 6. Student was already attending a

speech and language therapy program at UNM. (There were five students, all with special needs. The program provided primarily intensive one to one therapy, with very limited group social interaction) TR. 249, 1503-04, 1573-74. Mother did not inform the school that she would be seeking reimbursement for the UNM program when she withdrew Student from school. *Id.*

15. School staff stayed in touch with Mother even after she withdrew Student from Valle Vista, spending many hours advising her. Ex. 8, pp. 2-6; TR. 53-55. Mother was emphatic after February 21, 2008, that she did not want to discuss a return to Student's developmental classroom placement. TR. 874, 878. The District, faced with Parents' refusal to allow the team to complete Student's February 12, 2008, IEP and their decision to place Student in a private therapy program, conducted an IEP on April 3, 2008. Ex. DD; TR. 877-879. This IEP provides liaison services and support for Student's private therapy programs, one hour of SLT, and District-provided and funded discrete trial training. Ex. DD. Both Parents and the District treated the placement as a unilateral private placement by the Parents. *Id.* No request was made by Mother at this IEP for payment for Student's UNM therapy placement.

2008-2009

16. In the spring of 2008, District staff had extensive discussions with Mother about a class placement for Student for the 2008-2009 school year and Mother visited a variety of District programs, including both autism-specific classes and developmental preschool classes. TR. 838, 847-48, 875-76; Ex. KK. Mother also hired Dr. Brian Lopez, a well-qualified and highly credible expert in the education of children with autism to consult with her on Student's needs. An IEP team meeting was held for Student on May 20, 2008. Both Dr. Lopez and Mother attended and actively participated in the meeting, as did 8 or 9 others, including District Autism Resource Team members familiar with Student and other District staff who had worked with Student. Ex. EE, p. 13.

17. Student's 2008-2009 IEP provided for 12.5 hours of special education instruction; 2 hours of SLT; 1 hour of OT; 1:1 directed instruction (discrete trial training); and consultation with the autism resources team to help develop instructional strategies and plan the discrete trial training program. Student's annual goals included appropriate communication and social goals, as well as articulation and fine motor skills goals. Mother's request for additional individual support for teaching social play was rejected because this type of support was already available within the program. Various means of data collection, including charts and logs for some goals were included in the IEP. The team also agreed to work with Mother to devise a communication system and allow her weekly to review the data collected by teachers and staff. Ex. EE.

18. Once again, both an autism-specific small group setting and a developmental preschool setting were discussed by the team and once again there was disagreement on the team about which setting was the least restrictive for Student. Mother again opposed placement in the autism-specific program. A regular preschool class was not discussed at least in part because of the District's mistaken view that it need not consider a regular preschool. Ex. EE, p. 10. The team determined that placement in a developmental preschool class was the least restrictive environment appropriate for Student. Ex. EE, pp. 15, 10.

19. There were 9 students in the developmental preschool class in which Student was placed. Five of these students had special needs and 4 were typically developing peer models. There was no other student who qualified for services in the area of autism in the class. TR. 695.

20. The class was staffed with an experienced special education teacher, two educational assistants with special education experience. An OT was in the class on Mondays and Thursdays and an SLT on Tuesday and Friday to work with students both individually and in small groups. TR. 700.

21. In August, 2008, Student was attending the UNM therapeutic preschool three mornings a week, and was attending the District's developmental preschool only two mornings a week. He arrived late to school on those two mornings. Student's failure to attend school regularly interfered with the District's ability to provide appropriate services. Student was only in school 6 or 7 days before being withdrawn by Parents. TR. 1504, Ex. P16.

22. Parents failed to carry their burden of establishing that the IEP was not being implemented during the first three weeks of school in the fall of 2008 (before Parents withdrew Student from school). TR. 697-98 (daily notebook home); 700-01 (structured observations of Student); 311-15, 331-32, 702 (consultation with autism research team members); TR. 698-99700-01 (redirection and direct instruction provided); TR. 715-16, 724-25 (SLT and OT); TR. 710-11, 719-20, 739-40 (research-based preschool curriculum). Teacher's upcoming three-week medical leave, in the absence of any evidence the substitute was not qualified, does not justify an assumption that Student would not be provided the services required by his IEP during teacher's absence. TR. 711, 1501-02, 1506. To the extent that some of the services required by the IEP were not yet fully in place during those three weeks (discrete trial training had not yet started, data collection logs not yet developed), the delays were reasonable given the complex nature of the services being offered to Student, the need to get to know Student and assess his needs, and Student's many absences. TR. 707, 1504; Ex. P16.

23. During the 2008-2009 school year, the developmental preschool placement selected by the IEP team was the least restrictive alternative setting for Student. The benefits of a small group setting with a high teacher to student ratio; speech and language therapists who were able to provide services individually and in small groups; a program developmentally appropriate for Student; greater integration of Student into the class activities with the other children; the participation of all of the classroom staff in addressing Student's needs, engaging him and integrating him into both

academic and developmental activities; Student's ability to function in the class without the constant presence and attention of an individual adult aide, together with the presence of nearly 50% typically developing peers, along with consultation by staff with autism expertise, on balance, outweighed the advantages for Student of being in a preschool setting with 100% typically developing peers. TR. 1783, 1808, 668, 1819-20, 1832-34, 1819-20, Ex. HH, pp. 5, 7, Ex. UU, p. 13.

24. Student's inclusion in the regular education class depended entirely on substantial accommodations made by his one on one therapist and on substantial verbal and physical prompting by her. Student continued to need substantial interventions throughout the year, continuing to have difficulty with repetitive and avoidant behaviors. Placement in the regular class, in the opinion of Dr. Lopez, Parents' highly credible expert witness, Student's behaviors interfered with his ability to access education at Eastern Hills, even with the one-to-one assistance of his therapist. TR. 1791-1801, 1819. Dr. Lopez also found that the large group setting in the private preschool placed stress on Student. TR. 603-04.

25. Mother did not inform teacher or District staff of her dissatisfaction before withdrawing Student from class despite Mother's visits to class and regular communication with teacher during this time period. Nor did Parents inform the District that they intended to seek reimbursement from the District for Student's pre-existing placements at the UNM therapeutic preschool and at Eastern Hills, a private preschool. TR. 730-32, 1505; Ex. P16.

26. During the 2008-2009 school year after Student was withdrawn from the District's developmental preschool and placed in private preschool programs by Parents, the District provided liaison services and SLT appropriate for a unilaterally-placed private school student. Ex. FF.

2009-2010

27. Student's IEP team first convened on May 14, 2009, to develop Student's kindergarten IEP. Ex. GG. The District had conducted a full diagnostic evaluation of Student prior

to the IEP meeting. Ex. HH. The diagnostician participated in the IEP meeting, Mother attended with Dr. Lopez to assist her, District staff familiar with Student's needs were present, including members of the Autism Resources Team. In all 18 persons attended all or part of the three sessions conducted to develop Student's IEP, including SLT's, OT's, PT's, a regular education teacher, two special education teachers, Student's preschool liaison and his therapist/educational assistant. Ex. GG, p. 22-24; TR. 1358.

28. Student's diagnostician reported that Student showed some signs of progress in social and communications skills, although social interaction and peer participation were just emerging. Ex. HH, p. 4. Although the diagnostician found that Student showed a wide range in cognitive abilities, he tested at an age-appropriate level in reading and math. Ex. HH, p. 12. The diagnostician recommended placement in a regular education kindergarten with the assistance of a 1:1 educational assistant.

29. Although there was again disagreement on the IEP team about the setting appropriate to meet Student's needs, the team consensus was that Student should be placed in a regular kindergarten classroom. Parents strongly supported that decision and do not challenge it in this proceeding. Ex. GG, p. 20.

30. Student's May 14, 2009, IEP was reasonably calculated to allow Student to make meaningful educational progress. Student was provided the assistance of a 1:1 aide who was assigned to assist him in all activities during the school day. Ex. GG., p. 20. He was provided 1 hour per week of SLT in a pull-out setting; 3/4 of an hour of OT a week to address fine motor skill deficits; data collection for each goal; information to parent ahead of time about lessons; consultation with the autism resources team and with Dr. Lopez for the classroom staff on effective ways to teach Student; and PT to address gross motor needs. The development of a program for discrete trial

training toward academic goals was left to the autism resource team after staff and the team gained familiarity with Student's performance in class. Ex. GG.

31. Student's program was consistent with research-based strategies on the education of children with autism. The moment-by-moment interventions of Student's educational assistant to prompt Student to engage with peers and with activities in the classroom and to redirect Student if inappropriate behaviors arose, together with the anticipated development of a discrete trial training program on an academic/communication goal and the methods used by Student's therapists and teaching staff, were both individually designed to meet Student's needs and consistent with research-based practices on educating children with autism. Ex. GG,

32. When school began in August, 2009, Student was making progress. TR. 1064, 1073-75, 1078-81, 1083, 1105-06, 1109-10, 1132, 1021, 1218-19, 1603. Student's educational assistant had worked with Student over the summer and had been trained during that time in appropriate methods of prompting and redirecting Student. TR. 948-49, . She also had experience in providing ABA therapy to children with behavior problems and relied on that training in working with Student. TR. 1142-48, 1230. When an autism resource team member visited the class in September, 2009, she was favorably impressed by the educational assistant's skill in working with Student. Ex. 13, pp. 21-23; TR. 791-92, 798-99. The classroom team was implementing Student's IEP, including the provision of SLT and OT therapies, and had structured the class to support Student's active participation. TR. 983-87. Although the IEP was written for a full school day, Mother brought Student to school late and removed him from class at 12:30 p.m. each day. TR. 1076-77.

33. During the first few months of the school year, Mother was very involved in Student's education. She visited the classroom regularly, talked with the school principal, Student's teacher daily, spoke with Student's educational assistant three times a day, as well as at night and on weekends, and spoke with Student's therapy providers frequently as well. TR. 1021, 1172-73, 1194-

95, 1530. Mother requested and received journals from Student's educational assistant reporting on each of Student's activities during the day. Ex. TT. The school recognized that Mother knew a tremendous amount about Student's needs and about how to work effectively with him, and rightly valued her input. Ex. HH, p. 20-21.

34. In October, 2009, Mother became concerned that school staff were not collecting sufficient quantified data on Student's progress and that the daily journals prepared by Student's educational assistant did not include enough entries and enough detail to allow Mother and the staff to monitor Student's progress. TR. 1522, 1524-25. Mother was also concerned that she was not being adequately informed ahead of time about all class lessons so that she could prepare Student to more fully participate. TR. 1518; Ex. QQ, p. 67-68. Data collection was required by the IEP, but the methodology was left to school personnel. Ex. GG. Priming, or informing Mother ahead of time about classroom activities so Student could be prepared, was also included in the IEP. *Id.*

35. The record shows that school staff was regularly communicating with Mother and were keeping track of Student's progress. TR. 747-49, 1021, 1023, Ex. P14, pp. 4-10 (OT data), Ex. D10 (SLT data); Ex. TT (journal). Mother's demands for more and more detail in the journal prepared by Student's educational assistant were interfering with her ability to provide the services Student needed. TR. 1159, 1166, 1227, 1524. In terms of priming, Mother had been provided the teacher's curriculum and Student's educational assistant regularly informed her of the plans for the next day. TR. 1067, 1069, 1181-82, 1166, 1517-18.

36. At the end of beginning of November, the teachers, therapy staff and autism resource members working with Student met and put together a plan for data collection for Student and for communication with Mother. TR. 1026-1028; Ex. P11, Ex. P13, P14. The staff informed Mother that they would continue communication with her but that simpler methods of communication would be used, including periodic meetings. Student's educational assistant would no longer prepare a

contemporaneous journal to send home. QQ, p. 46; TR. 989. Mother's communication with staff after hours and with the OT and SLP were also limited. *Id.* The autism resource team agreed to prepare forms for simpler methods of data collection and to visit and observe in Student's class as the team determined was best without needing prior permission. Ex. QQ, p. 45. Mother was assured that communication would not end, it would just be done differently. TR. 1000.

37. Ending minute by minute journaling and devising simpler methods of data collection is consistent with research in the field. Dr. Lopez recognized the potential for data collection interfering with the provision of services and recommended preparation of journal entries at the end of the day. TR. 646-47; 668-669; 610. Parent's expert described methods of data collection that would be limited to a 10-minute sample interval, and counting responses in that time. TR. 462.

38. Parents withdrew Student from school days after the staff's decision to limit data collection and journaling. The basis for the withdrawal was the changes in data collection and journaling and the limits imposed on Mother's access to staff. TR. 1609-10; QQ p. 67. Mother described feeling excluded from Student's education by the changes. Ex. QQ, p. 29, TR. 1438, 1528, 1609-10.

39. The District made repeated efforts to set up a meeting between Mother and staff. TR. 1374-1384, 1388, 1404-1406. Parents chose not to return Student to school after November 6, 2009, even though the District continued to offer Student appropriate services and continued to be willing to meet with Mother to attempt to resolve her concerns. Ex. QQ, pp. 29-35; TR. 968, 997. The District was not required to convene a formal IEP meeting for Student since the existing IEP, which had been prepared with great effort only six months earlier, was appropriate to meet Student's needs and the District stood ready, willing and able to provide the services in the IEP if Parents returned Student to School. Ex. EE. Sending police to check on Mother's and Student's welfare when Student did not return to school was understandably upsetting, but it does not justify Parents refusal

to return Student to school. Ex. PP, p. 1; TR. 964-65. The other actions taken by the District to get Student to return to school were required by the State's school attendance laws. NMSA 1978, § 22-12-2; TR. 964-67, 971-73; Ex. JJ. Parents' decision to exercise their right to delay Student's kindergarten attendance by one year was a voluntary decision by Parents. TR. 969, 972. Unlike older children, the State cannot force the parents to enroll Student in either a public or private school if they choose not to. *Id.*

40. In her due process complaint, Mother also complained about the frequency of visits by the autism resource team and the failure of the team to bring in Dr. Lopez to meet with the classroom staff. Although there were several visits by at least one team member, the evidence conclusively shows that Mother actively discouraged visits by other members of the team until late September, 2009. TR. 1018-19, 1303, 1'221, 1230. It was undisputed that scheduled visits were cancelled at Mother's request. Tr. 1185-86. Mother testified that she was concerned that the team might limit her access to the classroom and her influence over the provision of services to Student and that she was unhappy with the observations of an important team member. TR. 1598-99. The IEP provides for consultation with the autism resources team. Their absence from the classroom is a denial of FAPE in that respect. However, the evidence does not show that the delay until the end of September for the commencement of these visits had a significant impact on the services provided to Student and, in any event, no compensatory services are appropriate because of Mother's active role in discouraging team visits.

41. Parents' also complain that, in the fall of 2009, the District used headphones on Student, which muffled speech and were therefore inappropriate for Student and refused to abandon their use. The evidence in the record does not support Parents' claim. The record shows that the OT once used earmuffs on Student in an attempt to reduce pain from an infected ear. TR. 1118-1120.

The one-time use of earmuffs to reduce ear pain was appropriate and did not interfere with Student's education.

ESY

42. Parents failed to carry their burden of demonstrating that Student would suffer regression which he would be unable to readily recoup without the provision of ESY services in the summers of 2008, 2009, and 2010. Although Student had some difficulty returning to his routine after an absence, there was no evidence showing significant regression. TR. 637, 678. In Student's May, 2008 and May, 2009, IEP's, the IEP team found that Student did not show regression and recoupment issues. EE, p. 17; Ex. GG., p.16 (no severe or substantial regression which cannot be recouped). Finally, the record shows that ESY was offered in the summer of 2008, but that Mother refused the services, preferring the private program Parents had put in place to address Student's needs in the home environment. Ex. OO; TR. 1785.

43. Student attended a five-week summer program on the campus of his kindergarten placement during the summer of 2009, just prior to entering preschool. The summer program, called Kindergarten Plus, is a pilot program funded in selected schools through a grant from the Public Education Department. Its goal is to prepare children in low-income areas for kindergarten. In order to participate in this program, Student needed the assistance of a 1:1 educational assistant. The program refused to provide Student with an educational assistant or with any other type of accommodation necessary to allow him to participate in and benefit from the program. Student's parents provided and paid the salary of an educational assistant so that Student could attend. TR. 943-47; 975-76; 1045-1047.

Research-based Instruction

44. Parent also claims that the District was required to offer Student 25 hours of active engagement each week, year around; to provide services in a regular classroom, and to provide more

ABA services to Student than were provided each year. Parents failed to establish that the services offered by the District were not reasonably calculated, consistent with the existing expertise and research in the field, to meet Student's needs. Dr. Lopez, Parents' own expert, testified that he did not think it was appropriate "to count hours." TR. 533. The services he designed for Student at Eastern Hills private preschool did not provide 25 hours per week. Similarly, Dr. Lopez did not believe that year-around schooling was required for all students on the autism spectrum. TR. 637, 677-78. As to the research on serving all children with autism in a regular class, Dr. Lopez clarified that the research Dr. Koegel cited to support this proposition was conducted in class settings specially designed and modified by the researchers, and that experts in the field did not agree about whether the benefits found by Dr. Koegel could be duplicated in regular school classrooms, particularly where, as here, a district could not simply restructure the delivery of education in that classroom. TR. 679 (Lopez), 483 (Koegel). Finally, as set forth above, Parents did not carry their burden of showing that the programs offered to Student were not reasonably calculated to meet his unique needs and were not consistent with relevant research in the field.

CONCLUSIONS OF LAW

1. With the exception of Parents' claim for reimbursement for expenses necessary to allow Student to participate in the Kindergarten Plus summer program, the due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, *et seq.*, (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2007).

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

3. The New Mexico Public Education Department did not refer Parents' claims against the State agency to the hearing officer. Parent did not challenge this decision. These claims were not considered in this proceeding.

4. Extensions of time for entry of the decision in this matter have been granted until July 30, 2010, at the request of the parties. This decision is timely filed.

5. Parents bear the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

6. The statute of limitations for due process hearings under the IDEA is two years. 20 U.S.C. § 1415(f)(3)(C) (2004). The statutory period began on February 27, 2008. Only claims arising within the statutory period have been considered by the hearing officer.

7. Student is qualified for special education and related services under the IDEA as a student with a disability in the eligibility area of autism. 34 C.F.R. § 300.8(c)(1) (2006).

8. During all three school years at issue in this proceeding, Student was provided a FAPE by the District, with the sole exception of the District's failure to fully implement the provisions in Student's May, 2009, IEP for consultation with the autism resource team in the early fall, 2009.

9. The LRE requirements of the IDEA and its implementing regulations apply to the District's placement of preschool children eligible for services under the Act. *L. B. v Nebo School District*, 379 F.3d 966, fn.17 (10th Cir. 2004) (*Nebo*). Student's IEPs for the 2007-2008 and 2008-2009 school years placed him in the least restrictive alternative environment appropriate to meet his needs. 20 U.S.C. § 1412(a)(5)(A).

10. The District was not required to convene an IEP meeting to revise Student's May, 2009, when no new needs had been identified since the preparation of the IEP less than six months earlier. 34 C.F.R. § 300.324(b).

11. Parents failed to carry their burden of establishing by a preponderance of the evidence that ESY services were necessary for the provision of FAPE to Student. 34 C.F.R. § 300.106(a)(2).

12. Parents failed to carry their burden of establishing by a preponderance of the evidence that the District failed to measure progress toward goals or collect data necessary to provide appropriate special education and related services to Student during the 2009-2010 school year. 20 U.S.C. § 1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.107(b); 34 C.F.R. § 300.320(a)(3)(ii).

13. With the sole exception of the District's failure, in the fall of 2009, to provide all of the supports for staff specified in Student's May, 2009, IEP Parents failed to carry their burden of establishing by a preponderance of the evidence that the District failed to provide the supports for staff necessary for provision of FAPE to Student. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

14. Compensatory education is an equitable remedy and may be reduced or denied altogether in light of all the circumstances. Because Mother interfered with the provision of services and there was no showing of lasting harm to Student, no compensatory services are appropriate for the denial of FAPE to Student from the brief delay in visits from the autism research team in the fall of 2009. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

15. The one-time use of ear muffs or headphones on Student in the fall of 2009 did not amount to a denial of FAPE.. 20 U.S.C. § 1401(26).

16. Because the District at all times offered and provided Student a FAPE, reimbursement for private school tuition or services is not appropriate. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1996). Such an award would also be inappropriate because of Parents' failure to inform the District prior to withdrawing Student from school (or at any time prior to initiating due process proceedings) of their intent to seek reimbursement for Student's pre-existing private placements. *Forest Grove School District v. T.A.*, 129 S.Ct. 2484 (2009) (all relevant factors

must be considered); 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(d)(2); *Linda W. v. Indiana Department of Education*, 200 F.3d 504 (7th Cir. 1999).

DISCUSSION

FAPE: Parents' primary claim here is a denial of FAPE to Student in each of the three school years.

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 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 in all areas affected by the child's disability and develops an appropriate, individualized education program. 34 C.F.R. § 300.346(a)(1); 34 C.F.R. § 300.347. Whether an IEP offers a Student a FAPE depends as much on whether the procedural protections of the Act concerning the development of the IEP were followed as it does on evaluating the program developed under the Act's substantive standard. *Rowley* at 458 U.S. 176, 205-06 ("[i]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents ... a large measure of participation ... as it did upon the measurement of the resulting IEP against a substantive standard").

In this case the IEP process by which Student's IEP was developed prior to the start of each school year was exemplary. Mother (and sometimes Father as well) participated in each IEP meeting

as a full member of the IEP team. Their judgment as to what was best for Student was respected in each IEP meeting. On a number of important decisions, including the particular school placement and even the class and teacher, the team heavily weighed Parent preference in reaching their decision. Parents were permitted to bring outside experts and private service providers to each IEP meeting, and the advice of these experts was embraced by the team. Student's IEP team had appropriate diagnostic data available to them. The District's diagnostician attended and participated in team meetings. District experts in autism, related services providers, teachers and principals participated in the team meetings. Student's May, 2009, IEP meeting was conducted over a three-day period, with a total of 19 professionals and both parents participating for all or part of the meeting. Team members expressed their professional opinion, sometimes disagreeing about what service or placement was appropriate for Student and adopted a plan which, in their professional judgment, was appropriate for Student.

In order to evaluate whether an IEP offers a child a FAPE, in addition to determining that the Act's procedural requirements were satisfied, the hearing officer is also required to determine whether the Act's substantive standard was met. In order to meet the Act's requirement for specialized instruction individually designed to provide educational benefit to the child, the Supreme Court has decided that a district must provide a program calculated to provide meaningful educational benefit to the child, in light of the child's individual needs. The services offered need not be designed to maximize the educational potential of the child, but neither does the Act permit a school district to adopt a plan which will provide only minimal benefit. The Act contemplates that the educational plan for a particular child take into account that child's particular needs and potential and provide services designed to allow the child to make meaningful progress. *Id.*

Since the *Rowley* decision, the Congress has added an admonition to school districts to base the special education and related services and supplementary aids and services provided in an IEP on

peer-reviewed research “to the extent practicable.” 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This provision does not supercede the Act’s requirement that services be individually designed to provide meaningful educational benefit. Judgments must still be made about the applicability of the research to the particular needs of the student.

In this case, Parents claimed that the National Research Council’s recommendation for 25 hours of services a week for children with autism must be followed by the District. Parents, however, failed carry their burden of establishing that this general standard, even if based on peer-reviewed research, was appropriate for Student. The evidence in the record established that the needs of children on the autism spectrum vary widely. Parents’ own highly credible expert, Dr. Lopez, testified that he did not count hours when developing a program for a child. He testified further that the program developed for Student by the IEP team in May, 2008, which provided 12 hours of services, was appropriate to meet Student’s needs. Indeed, none of the many witnesses with autism expertise who were familiar with Student testified that Student needed 25 hours of educational services.

As to Parents claim that the District did not offer adequate 1:1 ABA instruction, there was no disagreement that 1:1 instruction using ABA principles was appropriate for Student. The evidence did not support Parents’ claim that a particular type of ABA instruction was required for Student. Again, Dr. Lopez testified that either discrete trial training or pivotal response could work for Student. Finally, the evidence also showed that ABA principles were applied by Student’s one-to-one educational assistant in Student’s kindergarten year, much as they had been the previous year in Student’s private placement.

The hearing officer is mindful that Parents want to do everything possible for their son. Parents’ active involvement in Student’s education and their high expectations have served Student well. The hearing officer, however, is bound by the requirements of the law and finds that, although

not perfect, the education offered to Student by the District was reasonably calculated to provide Student meaningful educational benefit and adequately incorporated research-based practices appropriate to meet Student's individual needs.

LRE

Parents allege that the LRE for Student in both of his years in preschool, 2007-2008, and 2008-2009, was a regular preschool with 100% typically developing peers. The primary issue concerns the 2008-2009 school year.

The Tenth Circuit Court of Appeals has recently made clear that the LRE requirements of the IDEA apply to preschool children, even if the District does not have available a "regular educational environment" within the public schools. The District has no obligation to create its own public preschool for the general community, however, it must, where necessary to meet the LRE require, place a child in a private preschool or a public program run by another agency. *Letter to Nevelidine*, 16 IDELR 739 (1990).

The LRE continuum for all students, including preschool students, is measured by the extent to which a child is educated with typically developing children. Congress has required that children with disabilities be educated "to the maximum extent appropriate ... with children who are nondisabled." 34 C.F.R. § 300.114(a)(2)(i) (2006). The law also specifies that "removal of children with disabilities from the regular education environment occurs only if the nature or severity of the disability is such that education in regular classes cannot be achieved satisfactorily". 34 C.F.R. § 300.114(a)(2)(ii) (2006).

In determining whether the LRE mandate has been violated, the hearing officer is required to first determine whether education in the regular classroom with the use of supplemental aids and services can be achieved satisfactorily. The answer to this question requires a weighing of the academic and non-academic advantages and disadvantages of each setting, among other factors. The

balance tips in favor of a somewhat more segregated setting when the benefits of mainstreaming for a particular child are outweighed by the educational advantages of a more focused, specialized program. *Nebo*. Although the District's failure to recognize its obligation to consider a private preschool placement weighs against the District, the other factors are far more important. *Id.*

When this analysis is made for Student during the 2007-2008 and 2009-2010 school years, the hearing officer concludes that the balance tips against the regular preschool and in favor of the developmental preschool placement offered by the District. The evidence established that the academic benefits of the District's placement were significantly greater than Student would receive from participation in a mainstream classroom. "Academic" benefits in a developmental preschool are not limited to reading and math but include communication, social skills, and other age-appropriate developmental skills.

As indicated in the findings of fact, the evidence showed that the benefits of a small group setting with a high teacher to student ratio; speech and language therapists who were able to provide services individually and in small groups; a program developmentally appropriate for Student; greater integration of Student into the class activities with the other children; the participation of all of the classroom staff in addressing Student's needs and engaging him and integrating him into both academic and developmental activities; Student's ability to function in the class without the constant presence and attention of an individual adult aide, together with the presence of nearly 50% typically developing peers, on balance, outweighed the advantages for Student of being in a preschool setting with 100% typically developing peers.

Unlike the preschool student in *Nebo*, Student's inclusion in the regular education class depended entirely on substantial accommodations made by his one on one therapist and on near-constant verbal and physical prompting by her. As the year went by, the therapist was unable to phase out her involvement with Student. Student was present in the regular class room, but remained

largely unable to participate with his peers. Therefore, the evidence established that the developmental preschool was the LRE for this Student in 2008-2009.

Reimbursement for Private School and Services

Reimbursement for private school tuition or for private supplemental services is an available under the IDEA. Reimbursement, however, is only available where a district has failed to provide a FAPE, where the private placement is appropriate to meet the student's needs, and where equitable factors support the granting of such relief. *School Comm. of Burlington v. Department of Ed. of Mass.*, 471 U.S. 359 (1996). Since the hearing officer found that Student was at all times offered a FAPE by the District, Parents' request for reimbursement for Student's private services is denied.

Equitable factors also cut against reimbursement: Student was attending the private schools and therapy programs for which Parents now seek reimbursement while he was enrolled in District programs. Prior to removing child from school, Parents failed to inform the District of their intent to seek reimbursement for Student's private services. Indeed there was no evidence which showed that they informed the District at any time prior to filing their due process complaint, well after Student had completed a school year in the private school. *See Forest Grove School District v. T.A.*, 129 S.Ct. 2484 (2009) (all relevant factors must be considered); 20 U.S.C. § 1412(a)(10)(C); 34 C.F.R. § 300.148(d)(2) (reimbursement may be reduced or denied for failure to inform public agency prior to removal from school of intent to enroll their child in a private school at public expense).

ESY

In the Tenth Circuit, ESY services must be provided when "the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months." *Johnson Independent School District # 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990). The Tenth Circuit requires the IEP team to consult with the parent and to consider not only regression-recoupment issues, but the child's situation at home and in his

community in terms of the opportunities to preserve progress. Under these standards, ESY services plainly were not necessary to preserve Student's progress in any of the three summers at issue.

The Kindergarten Plus Summer Program

Finally, Parents complain that the District failed to provide the supports needed by Student in the Kindergarten Plus program offered on a voluntary basis to pre-kindergarten students. Although the program is run on a school campus, the program is not part of the District's provision of a free appropriate public education. It is offered outside the mandated school year as a pilot program and is funded through a competitive grant. Finally, Student's IEP did not find this program necessary to provide a FAPE to Student. Therefore, unlike Student's claim of eligibility for extended school year services, this program is not related to Student's educational placement, or provision of FAPE to Student. See e.g. *Mentor Exempted Village (OH) Schs.*, 32 IDELR 243 (OCR. 2000). The hearing officer, therefore, lacks jurisdiction to decide this claim.

RIGHT TO APPEAL

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

THIS DECISION ENTERED THIS 30th DAY OF JULY, 2010.

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 July 30, 2010, to the Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and by e-mail in PDF format as well as by first class U.S. Mail to the following counsel of record in this proceeding.

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Due Process Hearing Officer