

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

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 0910-26

FINAL DECISION

Statement of the Case

Student, who is 21 years old and specific learning disabled, filed a Request for Due Process Hearing (“Request”) with the New Mexico Public Education Department (“NMPED”) on March 8, 2010, alleging that District denied her a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Improvement Act of 2004 (“IDEA”) 20 U.S.C. §§ 1400 et seq. (which took effect July 1, 2005) and implementing state (6.31.2 et seq. NMAC, effective June 29, 2007) and federal (34 C.F.R. Part 300, effective August 14, 2006, and amended through December 1, 2008) regulations. Student’s Parents join in the Request seeking reimbursement for the cost of services that Parents allege should have been provided by the District.

The Request also asserted claims against NMPED directly. Relying on 6.31.2.13(I)(3)(d) NMAC, which articulates the department’s view that the IDEA has not authorized hearing officers to consider claims against state agencies, NMPED declined to appoint a hearing officer to review those claims. Nevertheless, Student asked this due process hearing officer (“DPHO”) to exercise jurisdiction to hear her claims against NMPED. NMPED entered a special appearance for the sole purpose of responding to Student’s memorandum of law on this jurisdictional question. An order declining to exercise jurisdiction to consider the claims against NMPED was entered June 4, 2010.

District did not challenge the sufficiency of the Request and the parties’ attempt to settle through mediation failed. District sought dismissal of Student’s systemic claims which was granted. District further sought an order holding the DPHO was required to comply with New Mexico’s procurement codes which was denied. An Order dated June 9, 2010 addressed these motions. Student sought to have

DPHO visit the site at which Student's program is administered. The DPHO reserved ruling on this question until the close of evidence and denied the request orally on the record. Extensions of the deadline within which a decision must be entered were requested by one or both of the parties and granted and this Decision is timely filed if delivered to NMPED and the parties no later than July 19, 2010.

The due process hearing was held June 14-17 and June 21, 2010. Student and at least one of her Parents were present throughout and represented by counsel. Student's Mother is an attorney with experience in special education law and, with the consent of District, conducted several witness examinations as well as testifying on her own and her daughter's behalf. The District's Director of Special Education was intermittently present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. The parties timely submitted a Statement of Stipulated Facts as required by 6.31.2.13(I)(14) NMAC. Exhibits offered by Student and Parents were identified by numbers. District did not offer any separate exhibits. Joint exhibits were identified by double or triple letters. Page numbers on all exhibits refer to the pagination in the lower right-hand corner.

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

The DPHO, having heard the oral testimony of all witnesses, having reviewed the exhibits admitted as evidence, having considered all argument and citations of authority submitted and the parties' requested findings of fact and conclusions of law and being otherwise advised in the premises, finds generally in favor of the District and makes the following findings of fact, conclusions of law and orders.

Statement of Issues

After extended discussion at the pre-hearing conference of the parties' claims and defenses, the DPHO identified the following specific issues to be determined at the due process hearing in the Pre-hearing Conference Summary of record at April 30, 2010, and modified by letter dated May 23, 2010.

1. Whether District has provided Student with appropriate special instruction in areas of identified need.

2. Whether District has appropriately offered Student access to the general education curriculum.
3. Whether District has provided Student with 18-22 year old education in the least restrictive environment (“LRE”).
4. Whether District is obligated to provide Student with a post high school academic program or curriculum.
5. Whether Student has received appropriate transition services.

Summary of Evidence

The testimony of 14 witnesses was received and 63 exhibits were admitted into evidence during four and a half days of hearing. The witnesses heard were Student; both Parents; Student’s two special education teachers; two of Student’s Community Support Liaisons (“CSL”); Student’s high school transition specialist; Student’s high school principal; District’s Head of Transition Services; the Executive Director of the College Internship Program (“CIP”); one of Student’s Speech and Language Pathologists; the principal for District’s Transition Outcomes Program (“TOP”); and Student’s counselor from the Department of Vocational Rehabilitation (“DVR”). No expert witnesses were offered by either party. References throughout this decision to exhibits admitted into evidence at the hearing are indicated by “Ex. ____,” references to pages in the transcript of the hearing by “Tr. ____” and references to the Statement of Stipulated Facts by “SSF No. ____.”

At the time of the due process hearing, Student was 21 years old. SSF No. 1. At all times relevant to this Request, Student has been enrolled in one of the three branches of TOP entitled Adult Centered Community Education and Support Services (“ACCESS”) serving special education students age 18 to 22 with significant transition needs. Ex. 44. Student is eligible for special education and related services as Specific Learning Disabled (“SLD”) and has received services under that eligibility from District since at least the second grade. SSF No. 1; Exs. SS, TT, XX and 8; Tr. 983.

Student has earned the number of credits required to receive a standard diploma from one of the District’s high schools. SSF No. 2 and 4. She has also passed all subtests of the New Mexico High

School Competency Exam (“NMHSCE”) with the exception of math. SSF No. 3. In May 2007, Student participated in her high school’s graduation ceremonies and received a Conditional Certificate of Transition. Ex. 23; Ex. 45, pp. 9-10; Tr. 696. The Conditional Certificate of Transition entitles Student to “continue receiving special education supports and services needed to obtain the high school diploma.” 6.29.1.9(J)(13)(i)(iv) NMAC; Ex. 45, p. 10. District placed Student in the ACCESS program after graduation for the delivery of those services.

In an effort to better understand Student’s disability and assist in developing educational programming, District obtained an independent neuropsychological evaluation done in the spring of 1999 when Student was 10 years old in the fourth grade. Ex. CC. Student was found to have a moderately severe developmental disorder most likely due to prenatal brain insult.

All cognitive functions are affected to some extent. Residual strength in language is characteristic of early brain injury, and it does not mean that the left hemisphere of the brain (the major site for verbal processing) is spared. Rather, language processes are able to relocate and crowd out nonverbal processes. Bilateral sensory and motor deficits suggest that both right and left hemispheres sustained injury.

Ex. CC, p. 6.

The neuropsychologist went on to state:

Some aspects of [Student’s] performance are consistent with Nonverbal Learning Disability (“NLD”), although individuals with this condition develop better language learning skills by the age of 10 than [Student] has, even though visuospatial coding aspects of reading may initially cause problems. Still, she is like an NLD child in that she has intact repetition skills, relies on language as the principal means for social interaction and information gathering, has better attention for auditory than visual and tactile information, and does not seek novelty. *Id.*

It should be understood that NLD is not an eligibility category defined in IDEA. 20 U.S.C. §1401(3). Nor is it a medical or psychological diagnosis that is recognized in the *Diagnostic and Statistical Manual of Mental Disorders*, 4th Edition. Ex. KKK, p. 110; Tr. 509. The literature attributes NLD to deficits in the functioning of the right hemisphere. Ex. KKK, p. 198. As noted above, Student was diagnosed with injury to both hemispheres. Despite this and the inconsistencies observed by the neuropsychologist, NLD then became Student’s operative diagnosis and it has since informed and driven her educational programming, largely through the efforts of her Parents. Ex. 16, pp. 1; Tr. 650, 679-80.

NLD has not been formally and clearly defined and accepted but the following seems to be a summary description from the literature offered in evidence:

NLD is a disorder of presumed neurological origin resulting from diminished or disordered functioning in the right hemisphere. The right hemisphere is the area of the brain which processes nonverbal or performance-based information, including visual-spatial, intuitive, organizational, evaluative and holistic input.

Three broad categories of problem are often observed in children and adults with NLD:

1. Motoric dysfunction – lack of coordination, balance problems and difficulty
2. Visual-spatial disorganization – poor visual spatial analysis, disordered spatial perception, and difficulty with spatial orientation
3. Poor social cognition – difficulty interpreting non-verbal social cues such as gestures, body language and tone of voice; difficulty adjusting to transitions.

Ex. KKK, p. 195.

It is undisputed herein that Student has significant deficits in the area of math. SSF No. 7; Ex. DD. The parties also are in agreement that the severity of these deficits requires the delivery of math instruction in a one to one teacher to student setting. SSF No. 8. There is also no dispute that Student continues to be eligible to receive FAPE as an 18-22 year old under IDEA. Only the educational and related services offered and/or delivered after March 8, 2008, through the date of Student's Request, March 8, 2010 will be reviewed for compliance with IDEA. 20 U.S.C. §1415(f)(3)(C).

The stated mission of the ACCESS program is “To provide the education, identify the supports, and make the connections young adults with disabilities need for successful employment, home and community participation.” Ex. 44, p. 58. The focus is on employment, adult services, independent living, community participation and post secondary education. ACCESS offers case management, tutoring, speech and language, occupational and physical therapy, social work/behavioral health and nursing services as individually required. The ACCESS campus consists of several portable buildings which also house the Bernalillo County Council of PTAs Clothing Bank (where ACCESS students can volunteer to experience community participation) and the headquarters for the Title I Homeless Project. Ex. 50. ACCESS does not resemble the traditional school campus in that there are no classrooms, library,

cafeteria, gym or space for students to congregate. The campus, in essence, serves as the administrative hub for the program.

Nevertheless, the ACCESS program offers an assortment of transition related classes or seminars, including but not limited to, job/employability skills, self-determination, health and nutrition, life skills, cooking, communication skills, relationships, “framing your thoughts,” functional money math, job maintenance and health, cashiering, service learning, study skills, parenting, public speaking/communication skills, post secondary prep, CNM prep skills and CNM prep computer skills. Exs. YY and 35; Tr. 1081-1095 and 1128-29. These seminars are conducted by certified teachers at community centers, churches and senior centers throughout the City. Ex. 35. The intent of dispersing the classes through the community is to help students develop skills they will need as adults such as mobility and transportation and to provide a more adult-like setting. Tr. 1079.

During 2007-2008, Student attended ACCESS-offered self-determination, drivers’ education and child care classes. Tr. 707, 709, 821-22. Although the evidence was not entirely clear, Student and Mother recalled Student also participating in the Book Club (Tr. 723) and the Girls’ Group (Tr. 718). Otherwise, Student apparently did not take advantage of other ACCESS offerings citing logistics, scheduling and lack of interest. Tr. 744, 749-50, 757-58.

ACCESS assigned a Community Support Liaison (“CSL”) who assisted Student in registering to vote, acquiring State issued identification, using the City bus service, identifying organizational needs, and safely navigating City streets on foot, among other independent living activities. Tr. 709, 794-95, 820-21. Through the CSL, ACCESS provided numerous activities and opportunities for Student to explore vocational interests. Tr. 795-807, 811-814, 931. The activities included completion of interest inventories and questionnaires, practice interviews, background research to identify career requirements, practice submitting applications, job coaching and attempts to provide work experiences consistent with the interests Student expressed.

In addition to the services and activities identified above, Student's program was individualized to include extensive one to one tutoring in math with a licensed, experienced special education teacher for five hours per week. Ex. SS, TT and XX; Tr. 403-404. Student worked from a program called Transitional Mathematics (TransMath, for short) which is research-based, structured, and sequential and designed for students who score at or below the 40th percentile in middle school mathematics. It targets the middle school student who is functioning one or more year(s) below grade level. Ex. 42.

Student's math teacher augmented the TransMath program with strategies specific to NLD learners gathered from related articles provided by Parents and her own research and consultation with other educators experienced in math instruction to learning disabled children and/or working with NLD students. Ex. KKK; Tr. 343, 363-64, 540-41, 1014. Those strategies included, but were not limited to, detailed verbal explanation of the math concepts employing progressive, structured, incremental steps; confirming Student's understanding with verbal feedback; minimizing visual presentation and always precede the introduction of visual content with detailed verbal description; use of mnemonics, rhyming and other verbal strategies; verbal review of work to correct mistakes; multisensory activities; large sheets of paper to avoid spatial clutter; and graph paper to help maintain columns. Tr. 344, 355, 407-410, 420-426, 523-28.

In spite of the intensive one to one instruction received at ACCESS in basic math using a research-based, structured, sequential program modified with appropriate strategies for the NLD learner, Student still scores at limited to very limited range on achievement tests. But while the achievement scores are low, there has been improvement: grade equivalent of 2.5 was scored on the WRAT 4 administered September 5, 2007 Ex. RR, p.1; 3.2 on August 8, 2008 and 3.7 on May 4, 2009. Ex. XX, p. 3. Measurable progress was also reported in Student's pre- and post-unit tests (56% to 85%), written class work and teacher observation.. Exs. XX, RR and AAA; Tr. 420, 427-429.

This situation is not inconsistent with either the literature admitted into evidence (Ex. KKK) or the prognosis rendered in an independent evaluation of Student's math skills conducted in August 2003

when Student was 14 years old, in the eighth grade. Ex. DD. The evaluator therein found that Student exhibited severely delayed math skills, having “developed only some very basic skills which are mainly at about a first grade level.” Ex. DD, p. 4. She concluded, “Based on her history as well as the current findings, I think it is unlikely that [Student] would make rapid progress regardless of the type or quality of instruction. This does not mean, however, that she will not make any progress.” Ex. DD, p. 5.

One reference in the literature states, “More fundamentally, they [NLD learners] have difficulty acquiring money concepts. These difficulties frequently persist into adulthood and are manifest as difficulties with budgeting, balancing a checkbook, making change, and doing comparison shopping.” Ex. KKK, p. 14. Another reference that lists many of the math strategies Student’s teacher employed says, “Great patience and verbal repetition are required to make small incremental steps.” Ex KKK, pp. 35-36.

Student also received one to one instruction from a licensed special education teacher in written language. The first year in the ACCESS program, those services were delivered by Student’s private reading instructor at Parents’ request (Ex. SS, p. 24) and paid for by DVR and Parents. In December 2008, District agreed to repay Parents for the amounts incurred upon presentation of proof of payment. Ex. 12, p. 31. Parents have not submitted receipts or other proof of payment. Tr. 660. District confirmed during the hearing that it still stands ready to reimburse. Tr. 661. There was a lapse in written language services after DVR funding ended. During the individualized education program (“IEP”) meeting held for Student in November 2008, District agreed to and did compensate Student for 64 hours of this lapse in service. Ex. TT, p. 30. Thereafter, written language tutoring was delivered by Student’s District-furnished special education teacher. Student and Mother stipulated during the due process hearing that the written language instruction and strategies employed by the special education teacher were appropriate and provided Student with educational benefit. Tr. 457-58.

Student’s program was further individualized with speech and language therapy services with an experienced speech language pathologist (“SLP”) at the rate of two hours direct service per week of

which one hour was individual therapy and the other group therapy. Tr. 859. At the November 2008 IEP meeting, Mother requested daily speech and language therapy services to focus on language skills with peers but the IEP team retained the level of service at two hours per week and offered Student attendance in the ACCESS life skills class as an opportunity to continue work and practice on communication skills with peers. Ex. TT, pp. 20 and 29.

Student's SLP for 2009-2010 provided Student with direct instruction in social skills and communication skills addressing, among other deficits, conversational turn taking; staying on topic; expressive organization; nonverbal communication behaviors, in particular eye contact; appropriate greetings; executive function strategies and physical and mental organizational skills. Tr. 862-876. The SLP observed and recorded Student's progress finding that she met one or more of her IEP goals in these areas. Ex. 53. Student's SLP for her prior years in ACCESS worked on similar issues and Parent was more than satisfied with his services. Tr. 739.

District has provided Student with extended school year services, particularly in math instruction, each summer that she has been enrolled in ACCESS.

IDEA rights reverted to Student on her eighteenth birthday in January 2007. Ex. 8, pp. 4-5. The family has consciously rejected resources available to support students with significant disabilities in post-secondary settings, in particular, the Developmental Disability Waiver and guardianship. Ex. 45, pp. 23-25; Tr. 752, 787. With the exception of the IEP meeting held in November 2009, at least one parent or the other has attended and been an active participant in all of Student's IEP meetings during the period reviewed. Ex. SS and TT.

Unfortunately, the relationship between Student's Parents and the District has been marked by persistent disputes and litigation throughout her education which include three due process complaints prior to this one, at least one state complaint and a complaint with the Office of Civil Rights. Tr. 617-619. In addition, both Parents are attorneys who regularly represent clients adverse to the District in special education and employment disputes. Tr. 602, 689. This has clearly impaired the collaborative

relationship the IDEA contemplates between a child's parents and her school district and may well be responsible for at least some of the complaints Student now has with her educational program.

Three major points of contention emerged from the issues and the record herein.

1. Student's math instruction is alleged to be inadequate or inappropriate because the program utilized was not specifically designed and research-based for the NLD learner. (Issue No. 1)
2. The ACCESS program allegedly cannot meet Student's needs unless it provides a traditional campus for 18-22 year olds and a full academic curriculum "which mirrors the wide range curriculum available in this state to students who can gain entrance to [University of New Mexico] ("UNM") and [Central New Mexico Community College] ("CNM")." (Issue Nos. 2, 3 and 4)
3. District has allegedly failed to provide transition services based on Student's unique needs. (Issue No. 5)

Student seeks compensatory education for these alleged failures in the form of two years of enrollment at the College Internship Program ("CIP") in Berkeley, California, at a cost of \$67,000 to \$70,000 plus all housing expenses (rent \$1250/month) and tuition for any college course work Student might pursue (Tr. 511), or comparable program. Parents seek reimbursement for the fees they paid to have Student audit courses at CNM while enrolled in ACCESS in the amount of \$364.00. Ex. 48. And, finally, they seek reimbursement of \$6,558 paid to have Student attend a summer program at Riverview School, a coeducational, residential school for adolescents and young adults with complex language, learning and cognitive disabilities. Ex. 16, p. 2; Exs. 47 and 48.

Findings of Fact

The parties submitted requested findings of fact and conclusions of law before the hearing and supplemented those requests after the hearing. To the extent that such requested findings are inconsistent with or contradict the findings and conclusions below, they are denied. If requested findings and conclusions are not addressed in the findings and conclusions that follow, they were found to be not necessary or applicable to the issues determined in these proceedings or contradicted or not supported by the evidence presented at the hearing. All conclusions of law implicit in the following findings of fact are to be considered the conclusions of law of this DPHO.

1. Student is a young adult of 21 years who resides with her Parents within District's jurisdictional boundaries and there is no dispute that District is Student's LEA. Student is eligible for special education and related services as a student with specific learning disability. She is enrolled in the District's ACCESS program. SSF No. 1.
2. Although not a recognized medical or psychological diagnosis or category of IDEA eligibility, the District has acknowledged NLD as descriptive of Student's learning disorder.
3. The District staff working with Student in the ACCESS program have identified and utilized strategies appropriate for the NLD learner in their delivery of instructional and related services for Student.
4. Student is on a standard program of study which means she must meet or exceed all requirements for graduation and pass all sections of the current state graduation exam, the NMHSCE. Stipulated Facts No. 4; 6.29.1.9(J)(13)(b)(i) NMAC.
5. Student has met or exceeded all credit hours required for graduation and passed all sections of the NMHSCE with the exception of the math subtest. Stipulated Facts Nos. 2 and 3.
6. At the end of her senior year in high school, Student was granted a conditional certificate of transition that requires she continue receiving the special education supports and services needed to obtain the high school diploma. Ex. 45, p. 9-10.
7. Enrollment in the District's ACCESS program with individualized instructional and related services is an appropriate placement for Student.
8. District's special education teacher and SLP are appropriately licensed, trained and experienced to provide the SLD-eligible student with individualized instruction and related services and to provide accommodations and modification needed to address Student's NLD characteristics. Tr. 340-41, 403-04, 858-59.
9. The one to one math instruction Student received at ACCESS was individually designed and reasonably calculated to and actually did provide Student with educational benefit.

10. Student did not present evidence of learning strategies that should have been implemented by District but were not.
11. Student did not present evidence that the learning strategies implemented by District were inappropriate.
12. Student failed to refute District's evidence that no research-based program designed specifically for young adult NLD learners exists. Ex. KKK; Tr. 541, 665-666, 735, See McManmon testimony generally Tr. 495-514.
13. With appropriate pretest preparation and practice, Student could be expected to significantly improve her score if retaking the math subtest of the NMHSCE at the time of this hearing. However, it is unlikely that she could accomplish a passing score because of the degree to which mathematical concepts, particularly fractions, which Student has not yet studied in tutoring, are tested in the NMHSCE. Ex. 3, pp. 8-10 (practice NMHSCE exam); Tr. 542-44.
14. Parent agreed that the written language instruction Student received at ACCESS was individually designed and provided Student with educational benefit. Tr. 457-58.
15. The speech and language therapy services Student received at ACCESS to address her deficits in social and communication skills and executive functioning were individually designed and reasonably calculated to and did provide Student with educational benefit.
16. Appropriate academic classroom instruction was offered and available to Student as an ACCESS student by enrolling in courses offered at any District high school campus or courses at CNM available without prerequisites. Ex. FFF, GGG, and JJJ
17. High school academic classes, particularly liberal arts lecture courses, were a good setting for Student's strengths. Tr. 648-649.
18. Student has already successfully completed the general curriculum. Nevertheless, District has consistently offered her access to further appropriate academic classroom instruction, including accommodations and modifications needed to allow her to receive educational benefit.

19. The preponderance of the evidence suggested that the curriculum of college level courses for which Student has not met the entrance requirements more likely than not would exceed her comprehension, written language and math skills and would not be an appropriate placement for Student to pursue academic classroom work due to the limitations of her NLD characteristics.
20. District has provided Student with ESY each of the summers she has been enrolled at ACCESS in an effort to maintain her math skills over the summer break.
21. Riverview School records from the summer of 2008 indicate that the only math instruction was “consumer math” and involved the study of banking terms and statements, mock check writing and registry entry, money skills, cost estimation, analog time, elapsed time and reading bus schedules. This content would not meet primary purpose of ESY that being to maintain basic math skills. Ex. 47, p. 10; Tr. 390-91.

Discussion

The Obligation to Provide FAPE – Issues 1 and 2

States and local school districts receiving federal funds for education must provide all disabled children ages 3 to 21 residing within their boundaries with FAPE. 20 U.S.C. §§ 1412(a)(1)(A). FAPE is defined in 20 U.S.C. §1401(9) to mean special education and related services that are provided at no charge and in conformity with an IEP. The obligation to make FAPE available continues until a child either graduates with a regular high school diploma or, if a regular diploma is not earned, the end of the school year in which the child turns 22 years of age. 34 C.F.R. §300.102(a)(3).

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, set out the seminal case defining compliance with the IDEA saying, “We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at ¶55. A child has received FAPE if the school district complied with procedural requirements and the IEP was reasonably calculated to enable the child with disabilities to

receive educational benefits. *Id.* at ¶65. See also *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008) 2008.C10.0001086 VersusLaw.com; *Lenn v. Portland School Committee*, 998 F.2d 1083 (1st Cir. 1993) 1993.C01.40306 VersusLaw.com.

The vehicle for provision of FAPE is the IEP, the package of special educational and related services designed to meet the unique needs of the child with disabilities. 20 U.S.C. §1414(d) The IEP is developed by a team typically composed of the student’s parents and educational professionals (20 U.S.C. §1414(d)(1)(B)) who must consider the strengths of the child; the concerns of the parents; the results of the child’s evaluation; and the academic, developmental and functional needs of the child. 20 U.S.C. §1414(d)(3)(a). When children reach the age of majority (which is 18 years of age in New Mexico), the rights accorded to parents under the IDEA transfer to the child. 20 U.S.C. §1415(m). Hence, at all times relevant in this case, Student was the rightful member of her own IEP team, her Parents having only a right to receive notices required under this part of the regulations. 34 C.F.R. §300.520. District relies generally on this basic framework of special education law and contends that it is entitled to dismissal of this Request if there is evidence that the program in question conferred educational benefit.

The IDEA requires that the individualized educational program specify the supports that will be provided for the child “to be involved in and make progress in the general education curriculum . . .” 20 U.S.C. §1414(d)(1)(A)(IV)(bb). However, in this case, Student has already successfully completed the general education curriculum. The barrier to her graduation and receipt of a regular high school diploma is the math subtest of the NMHSCE.

Citing *Johnson v. Ind. Sch. Dist. No. 4 of Bixby*, 921 F.2d 1022 (10th Cir 1990) 1990.C10.40032 VersusLaw.com, Student suggests that the criteria for determining whether she has received FAPE requires consideration of the factors the Tenth Circuit suggested to determine the necessity of a structured summer program. Student offers no authority for broadening the application of *Johnson* as suggested. District has provided Student with ESY each of the summers under review so there was no dispute as to Student’s need for a structured summer program.

As previously noted, Student is entitled to appropriate services needed to obtain her diploma which requires passing the NMHSCE math subtest. Her program appropriately addresses this need as well as her needs for special and individualized instruction in written language and social and communication skills with her IEP identifying present levels of performance and annual goals for each of these areas of need. Exs. SS, TT and XX.

The Obligation to Provide Services in the LRE – Issues 3 and 4

District must, to the maximum extent appropriate, ensure that children with disabilities are educated with children who are nondisabled. 20 U.S.C. §1412. In seeking relief under this theory, Student refers to “an 18 to 22 year old education” in the LRE. The problem is that there is no “18 to 22 year old education” defined in the IDEA or its implementing regulations. IDEA regulates the provision of services in preschool through high school. Student is a high school student until she is granted a regular diploma.

Student’s IEP team has determined that Student’s needs can best be met in District’s ACCESS program which is not housed in Student’s neighborhood school. But that is not Student’s complaint. She does not want services delivered in her neighborhood or any District high school. She wants District to convert ACCESS into a traditional campus with, as previously noted, a curriculum that mirrors that available at UNM and CNM, two post secondary institutions in New Mexico. Student offers no authority mandating such a course or that such a setting would constitute FAPE for Student.

Murray v. Montrose Co. Sch. Dist., 51 F.3d 921 (10th Cir. 1995) 1995.C10.40107 VersusLaw.com establishes that the District can house highly specialized programs in one location rather than attempting to duplicate those special services in each child’s respective neighborhood school. ACCESS is a program specializing in providing transition services to students still eligible for services beyond four years of high school consistent with the *Montrose* holding.

The Obligation to Provide Transition Services – Issue 5

There is no dispute that Student is entitled under IDEA to receive transition services. 20 U.S.C. §1414(d)(1)(A)(i)(VIII). There is also no dispute that the transition services should comply with 20 U.S.C. §1401(34) which provides:

The term ‘transition services’ means a coordinated set of activities for a child with a disability that—

- (A) is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child’s movement from school to post-school activities, including post-secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation;
- (B) is based on the individual child’s needs, taking into account the child’s strengths, preferences, and interests; and
- (C) includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.

Student complains that the transition services provided by District were not results-oriented and did not take into account her strengths, preferences and interests. Student would have this DPHO ignore the array of transitional services that have been afforded her, those that she has taken advantage of and those she has not, as enumerated in the Summary of Evidence. For instance, when Student expressed an interest in working with children, ACCESS enrolled her in its Child Care class. Following her completion of the class, ACCESS arranged for her to work at the UNM Child Care Center and her CSL accompanied her at all times as her job coach. Ex. 54. Student did not pursue this interest further but it cannot be said that ACCESS did not respond to her expressed interest with an appropriate approach to exploring the interest which is explicitly a transition service.

Consolidation of the Issues

The major controversy apparent in the evidence consolidates all of these issues. Student, with the assistance of her Parents, has identified CIP, a residential program in Berkeley, California, specializing in the provision of transition services to young adults (18 to 26) with “learning differences and Asperger’s.”

Refer to Ex. 27 and the testimony of Dr. McManmon (Tr. 495-514) in support of this portion of the discussion. The description of the CIP program sounded remarkably similar to the program offered in ACCESS plus the residential component. The students are provided with instruction in social, communication and living skills in a residential program while they pursue work, vocational training or academic study outside the program. Any academic classroom study must be acquired by meeting the entrance requirements and paying the tuition at one the nearby four year universities or community colleges.

A glaring and most pertinent difference between CIP and ACCESS is in the math instruction, the one component Student needs to receive her high school diploma. CIP would offer Student only consumer math and individual tutoring support of one or two hours per week for any math class she might take if she were able to meet entrance requirements. Student's IEP team believes that Student needs and District has provided five hours per week of one on one instruction by a certified and experienced special education teacher. The CIP program would come no where near satisfying that need.

As a side note, Dr. McManmon was aware of Student's NLD, and presumably her severe math deficits. He proudly boasted of two members of CIP's Board of Advisors, Michelle Garcia Winner and Dean J. M. Mooney, as foremost experts in the field of NLD. A clearly prominent feature of NLD is a daunting inability to grasp math concepts. Ex. KKK. Although he was not directly asked, he certainly did not offer while being questioned about the math offerings, or lack thereof, that these renowned NLD experts had a research-based math program for NLD learners or that there was a math class offered at one of these post secondary institutions that was specifically suited to NLD learners and meeting Student's intense instructional needs. Rather, he acknowledged that NLD is not a recognized diagnosis and when asked if any one on CIP's staff had any special credentialing in NLD teaching methods, he indicated that there was no such credentialing. Tr. 509.

This is discussed at some length because the evidence would suggest that the only post-secondary interest that Student has articulated either on her own or through her Mother over the period under review

is that District should place her in CIP because ACCESS cannot provide her with FAPE. Other than child care which was abandoned, and yoga instructor, Student has basically refused to identify any vocational interest that would guide either post-secondary academic study or vocational training, leaving little for ACCESS or CIP to do for Student in the area of transition services.

Given both the Mother's and Student's lack of concern over the inadequate math instruction CIP offers, it appears the major feature that attracts them is the social and living skills instruction and modeling imparted in the residential component of the program. However, Student has certainly failed to prove by a preponderance of the evidence that a residential program is required to provide her with FAPE. *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008) 2008.C10.0001119 VersusLaw.com.

The other allegation repeatedly raised was that CIP placement was necessary because District ignored Student's need for academic instruction in a classroom setting. This is not supported in the evidence and raises another significant difference between ACCESS and CIP: CIP cannot offer an appropriate high school setting as can ACCESS. When questioned about the education and credentials of the program's staff, Dr. McManmon emphasized that this program was not a school and the staff do not need to have degrees in special education. Tr. 507-08. ACCESS has the backing of the entire District. District has highly trained special education teachers on staff and available to Student as has been true throughout the period under review.

Student's circumstances pose a dilemma. She has completed all credits required to graduate from high school. SSF No. 2. She is not in need of credit recovery which is a reason many students between the ages of 18 and 22 continue to attend high school. However, she and her Parents have consistently expressed Student's desire to continue academic coursework at her IEP meetings. Ex. SS, TT and XX. Typically, a student with this interest and mild to moderate disabilities (Tr. 38, p.2) would attend appropriate classes at CNM. In fact, another branch of TOP, the CNM Resource program, specifically supports 18 to 22 year old students enrolled at CNM classes. Tr. 913-14, 936, 1016-1018. To be enrolled

in this program, a student must have achieved scores on CNM's entrance exam called Accuplacer that meet or exceed CNM's prerequisites for its 1000 level courses. Student has taken the Accuplacer exam three times and her scores in all subjects tested fall markedly short of CNM's prerequisites making her ineligible for the CNM Resource program. Exs, FF, GG, HH and III.

In an effort to fill the gap that she maintains exists, Mother enrolled Student to audit CNM classes for which she cannot enroll for a grade due to her Accuplacer scores. Student received help with note taking and general tutoring for at least two of these classes from ACCESS staff. Tr. 794-95. In the fall of 2008, Mother requested that ACCESS enroll Student in a self-study advanced placement ("AP") course in English Literature from Ideal-NM. Ex. PP. The evidence was not clear as to how Student did with the audited CNM classes but the AP class was a significant failure. The AP course was described as a college level class in composition intended to prepare students to take the Advanced Placement exam and required a minimum of two hours study daily outside of class time. Tr. 384.

Student's CSL was assigned to tutor her through this class. Student's special education teacher made the arrangements and served as liaison with the AP class teacher. Tr. 377-386. All of these people expended significant amounts of time and effort trying to make this course work for Student. The CSL reported Student was frequently tardy at both the beginning of class and from break; persistent texting during class; little or no homework done and a multitude of excuses to avoid work. Ex. QQ. This behavior seemed consistent with the NLD characteristic of being easily overwhelmed and shutting down in response. Ex. KKK, pp. 6-7. One of the strategies suggested for dealing with this characteristic is to eliminate all nightly homework assignments. *Id.* p. 7. Ultimately, Student was dropped from the course failing in December having completed only 3.8% of the work with a grade of 45.8% on the work done. Ex. PP, p. 15.

Enrolling Student in this class ran counter to the judgment of any of Student's educators. Tr. 380-81, 536-37. Her private reading therapist who taught Student written language in her first year in ACCESS cautioned that "Her writing activities should inform her reading comprehension, which at

[grade level] 8.3, we would also like to see improve.” Ex. SS, p. 16. It also ran contra to Mother’s own knowledge that Student did not do well with self-study. Tr. 648.

This dismal experience stood in sharp contrast to Parent’s account of Student’s high school experience in the transcript at pages 648 to 649:

You know, what worked for her best, in terms of her academic learning, were the classes she had in high school where there was lectures. . . . The classes they said, oh, those are too hard for her, we don't want her to be in Ms. Dabey's class, she's the hardest history teacher. Ms. Dabey's was an excellent teacher, and that was Tess' favorite class. And she came home very engaged about the material and the information. . . She did it -- she did do homework in high school. She did do the things that she could do. She did do her reading. She did do her memorization; if there was poetry to be memorized, she always did it. She always knew when her assignments were due. I mean, the idea that we have to have agendas, she never needed one. I mean, she couldn't read her writing, but she always knew when something was going to happen in high school.

This seems to be the genesis of this struggle as Mother goes on to explain, also at Page 648 of the transcript:

And I always thought that would translate well into a university or a college setting because she was able to get information. What some people may say, oh, a 200-person lecture class, you know, that's a bad class, or whatever, for her it's great. I mean, listening to people give information and getting it that way, and having an ability to hear classroom discussions is a good way for her to learn.

In the face of this evidence, District’s proposal that Student satisfy her desire to continue academic classroom study in the high school setting is seen as appropriate and consistent with her needs and strengths. It is unfortunate that Student and Parents did not give this option more consideration. The offer was rejected out of hand during both Parents’ testimony and likely was similarly rejected during the IEP meetings. Tr. 727-728. At hearing, Mother admitted not being interested in the high school setting but suggested that District did not sufficiently explain the arrangement. This may be true and harkens back to the difficult relationship between these parties.

There is more than one reference in the record of one District staff member telling another not to mention something to the Mother, ie. Ex. 41. But Parent also seemed blind to anything District did on Student’s behalf during the period under review. At page 33 of Exhibit 12, Parent writes to CNM in August 2009:

As you and I know, ACCESS does not provide academic remediation, and generally does not have any classes; . . . [District] places students in the ACCESS ‘program’ with no intention of providing meaningful academic remediation to 18-22 year old students with disabilities . . .

At this point, her daughter had received two years of the intensive individual instruction described herein.

It was unequivocally the Parents’ choice to enroll Student in the AP literature class. The evidence of record will not brook the proposition suggested by Student (Tr. 97, 204-205) and her counsel’s line of questions (Tr. 1071-73) wherein District is asked to support Student undertaking coursework way beyond her capacity and then is blamed for the lack of success because the tutor was not Michelle Garcia Winner or Dean J. M. Mooney or someone directly trained by them.

Conclusions of Law

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A).
2. The burden of proof, by a preponderance of the evidence, rests with Student and her Parents, the parties challenging the IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) 2005.SCT.0000166 VersusLaw.com.
3. This proceeding has complied with all procedural safeguards required by IDEA, its implementing regulations, and the New Mexico Special Education Rules.
4. This decision is timely if delivered to NMPED and the parties on July 19, 2010.
5. Student is qualified and eligible for special education and related services as Specific Learning Disabled. 34 C.F.R. §300.8 (a) and (c) (10).
6. Student failed to prove by a preponderance of the evidence that District’s ACCESS program placement deprived her of FAPE.
7. Student failed to prove by a preponderance of the evidence that she was denied access to the general curriculum.

8. Student failed to prove by a preponderance of the evidence that she was deprived of FAPE when District used the research-based, structured, sequential TransMath program to support her individualized instruction in math.
9. Student failed to prove by a preponderance of the evidence that the transition services delivered and offered to her in the ACCESS program were inappropriate and deprived her of FAPE.
10. Student failed to prove by a preponderance of the evidence that the individual and group instruction she received in social and communication skills was insufficient to confer FAPE.
11. Student failed to prove by a preponderance of the evidence that the transition services she received while enrolled with ACCESS during the statutory period failed to provide her with FAPE.
12. FAPE does not require that District create a campus dedicated solely to the academic education of 18 to 22 year olds that “mirrors the wide range of curriculum available . . . to students who can gain entrance at UNM or CNM.”
13. Student failed to prove by a preponderance of the evidence that the ESY services provided by District were inappropriate and deprived her of FAPE.
14. Student is not entitled to compensatory education.
15. Parents are not entitled to reimbursement for expenses incurred for courses audited at CNM nor for attendance at Riverview School in Massachusetts.

ORDER

IT IS HEREBY ORDERED that Student’s Request for Due Process Hearing be and hereby is dismissed in its entirety with prejudice.

IT IS FURTHER ORDERED that Parents claim for reimbursement also be and hereby is dismissed with prejudice.

Any party aggrieved by this decision has the right to bring a civil action in a state or federal district court pursuant to 20 U.S.C. §1415(i) and 34 C.F.R. §300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party. 6.31.2.13.I(25) NMAC.

Barbara Albin
Impartial Due Process Hearing Officer

CERTIFICATION

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via electronic mail and facsimile to the following persons this 19th day of July, 2010

Tara Ford, Esq., of Pegasus Legal Services, 3201 Fourth Street NW, Albuquerque, NM 87107

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

Michael J. Carrico, Esq. of Modrall Sperling Roehl Harris & Sisk, P. A, P. O. Box 2168, Albuquerque, NM 87103-2168

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via facsimile to the following person this 19th day of July 2010:

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

Barbara Albin