

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

In the Matter of :

PARENT,

Petitioner,

v.

Case No. DPH 1011-11

ALBUQUERQUE PUBLIC SCHOOLS,

Respondent.

FINAL DECISION OF THE DUE PROCESS HEARING OFFICER

**Jane B. Yohalem, Due Process Hearing Officer
April 11, 2011**

Counsel for Petitioner:

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

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

Counsel for Albuquerque Public Schools

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

INTRODUCTION

In this due process proceeding pursuant to the Individuals with Disabilities Education Improvement Act (IDEA) 20 U.S.C. § 1400, *et seq.*, Parent alleged that the District used seclusion and restraint to control and punish Student's aggressive behavior, rather than providing Student special education and related services which were both consistent with peer-reviewed research on education of children with autism and reasonably calculated to allow Student to make meaningful educational progress. Parent filed her due process complaint with the New Mexico Public Education Department on October 27, 2010. The complaint concerns Student's third and fourth grade school years (the 2009-2010 and 2010-2011 school years).

The District has denied that Student was at any time denied a free appropriate public education (FAPE) under the IDEA. In addition to claiming that appropriate autism-related services were provided, the District claimed that Student's primary needs were in the area of emotional disturbance. The District further contended that Student's outbursts were physically managed only when Student's conduct put Student, staff or other students in immediate danger of physical harm, and that physical management was never used for punishment. The District requested that the hearing officer order an independent neuropsychological reevaluation of Student in order to help resolve the controversy between the parties about Student's eligibility and the nature of the services appropriate to meet his needs. The District also asked the hearing officer authorize the District to place Student in the District's Behavior Intervention Program, a program primarily for students with behavior problems arising from emotional disturbance. The Parent strongly opposed this placement, contending that Student requires more intensive research-based interventions for children with autism, together with greater exposure to typical peers.

At the conclusion of the hearing, with the agreement of both parties, the hearing officer ordered that an independent neuropsychological evaluation be conducted. The report from that

evaluation has been made part of the record. H.O. Ex. 1. Because it was not available to the parties during the period covered by the complaint, the hearing officer does not rely on it in determining whether there was a violation of the IDEA, but does consider the new evaluation data in determining what remedy is appropriate.

FINDINGS OF FACT

The Identification and Initial Evaluation of Student

1. Student first was evaluated by the District in the spring of 2008, when he was in the first grade. The referral for special education was generated by the District based on concerns about Student's severe behavior problems, frustration and aggression. Pet. Ex. 14. Incidents of physical aggression, often including throwing objects, and sometimes hitting or kicking others, was occurring two to three times a day or more. Ex. LL, p. 6.

2. The 2008 multi-disciplinary evaluation included observations by a member of the District's Autism Resources Team (ART) and by a school psychologist. *Id.* The team determined that Student was eligible for special education in the category of emotional disturbance. *Id.*; Jt. Ex. LL, p. 7. The evaluation recommended the use of a highly structured positive and consistent behavior system in a small group setting; adult support and positive attention; active teaching of social skills using social stories and small group interaction; occupational therapy interventions to help Student learn to regulate his behavior; use of a highly consistent behavior intervention plan (BIP); social work support; and active collaboration between medical providers, school staff, and Parent. Pet. Ex. 14, p. 9.

3. Following the evaluation and the preparation of a draft Individual Education Plan (IEP), Parent declined services under the emotional disturbance eligibility category. Jt. Ex. LL, p. 7.

Dr. Lopez's Neuropsychological Evaluation

4. In November, 2008, at Parent's request, and with the District's agreement, Student was referred to Dr. Brian Lopez for an independent neuropsychological evaluation. Jt. Ex. AA. Dr. Lopez is a well-respected neuropsychologist and certified school psychologist with special expertise in the evaluation and provision of services to children with neuro-developmental disabilities and autism spectrum disorders. TR. 1814, 1819; 652-53.

5. During the hearing, both sides acknowledged and relied on Dr. Lopez's expertise. TR. 1814; *Parent's Proposed Findings*, ¶ 47 (proposing that the hearing officer find that the recommendations in Dr. Lopez's November, 2008, evaluation were reasonably calculated to meet Student's unique educational needs).

6. The hearing officer found Dr. Lopez's testimony to be highly credible. TR. 1814-18.

7. After a thorough evaluation of Student which included testing, interviews with Student and Parent, review of school records, review of the reports prepared by District evaluators, observations of Student with other children, and observations of several District programs, Dr. Lopez found that Student met eligibility criteria under the IDEA for both autism and emotional disturbance. TR. 1815-18, 1820-21; Jt. Ex. AA, p. 13 (recommending that the District find Student eligible in one or the other or both). Dr. Lopez diagnosed Student with an autism spectrum disorder (Pervasive Developmental Disorder – Not Otherwise Specified), and with Disruptive Behavior Disorder, a neuro-developmental disability. Jt. Ex. AA, pp. 9-11. In Dr. Lopez's opinion, both diagnoses impacted Student's behavior, and both should be taken into account in designing an appropriate educational program for Student. TR. 1820-21 (it's not one or the other; Student needs a mix of services for both).

8. Dr. Lopez's recommendations for educational services for Student were extensive. Jt. Ex. AA, pp. 12-15. They included placement in a special education classroom with a small student to teacher ratio; a structured and predictable classroom environment with orderly transitions; the use of consistent positive behavioral supports; modifications to academic instruction, including breaking down tasks into simple, concrete steps, explaining and rehearsing each, providing positive feedback and using multi-modal instructional methods; the use of positive behavioral management interventions; occupational therapy and sensory interventions to teach and facilitate self-regulation; speech and language therapy to work on deficits in communication; participation in a social skills group; use of verbal scripts to improve social behavior; direct instruction on social expectations; the use of video-modeling to teach social and communication skills; provision of direct adult assistance with peers during gym, lunch, recess and other large group activities; and consultation with the District's ART for assistance in implementing positive behavioral support interventions and research-based instruction for children on the autism spectrum. *Id.*

9. Dr. Lopez's November 2008 evaluation recognizes that Student needs a classroom setting "able to manage behavioral outbursts while maintaining [Student's] safety and other student's safety." Jt. Ex. A, p. 13.

10. Dr. Lopez also highly recommended to Parent that she obtain ongoing mental health services for Student, including behavior therapy, and psychiatric consultation to determine whether medication would be helpful. Jt. Ex. AA, pp. 11, 12. He urged a collaborative approach with school staff, Student's psychiatrist and behavior therapist, and with Parent, to provide wrap-around behavioral support for Student. *Id.*

11. Dr. Lopez testified that the recommendations he deemed most important for Student were those highlighted in his report's summary: (1) the recommendation for a collaborative approach

with school staff, Student's psychiatrist or other mental health provider, and Parent; and (2) the recommendation for the use of positive behavioral supports in the classroom. TR. 1831-32; Jt. Ex. AA, p. 11.

12. Dr. Lopez defined positive behavioral supports to include everything that is effective in preventing incidents of aggression from occurring. TR. 1834, 1838. The three critical parts to positive behavioral supports are: (1) that they is founded on an analysis of the function of the behavior so that the positive behavioral support serves the same function as the behavior; (2) the interventions are systemically implemented; and (3) they include biomedical support, if necessary, to help decrease anxiety or otherwise help Student to regulate his behavior (Dr. Lopez correctly recognized that medication cannot be provided or required by the school, but he strongly recommended that Parent consult with medical providers and authorize them to work with school staff). TR. 1834-35.

13. Finally, Dr. Lopez recommended that Student be re-evaluated "in a few years" because, with a diagnosis of a neuro-developmental disorder, it is common for a child's symptoms, behavior, and needs and even diagnosis to change over time as the child grows and develops. Jt. Ex. AA, pp. 11, 12-13; TR. 1826-27; 1828.

Student's Initial IEP and Supplemental Documents

14. On January 8, 2009, the District conducted both a multi-disciplinary team (MDT) meeting to make an eligibility determination and developed an initial IEP for Student. Pet. Ex. 3. The MDT determined that Student's primary eligibility was autism and secondary eligibility emotional disturbance. *Id.* at 17. The IEP team placed Student in a neighborhood Emotional Disturbance (ED) self-contained classroom selected because the team concluded that it provided the small group, highly structured setting, consistency, predictability and positive behavioral supports

recommended by Dr. Lopez as appropriate for Student. *Id.* Parent disagreed with the ED classroom placement, seeking exploration of placement in a regular class with ART support and a full time educational assistant, or placement in a autism-specific private placement. *Id.* at 18. An ART member was present at this IEP meeting to interpret Dr. Lopez's recommendations and to participate in the placement decision. *Id.* at 15.

15. During the spring of 2009, the IEP was supplemented with social work services and occupational therapy (OT) services. Pet. Ex. 4, p. 1. OT services addressed sensory motor functioning deficits and social work services were recommended to increase Student's social skills, coping skills, and provide case management services. *Id.* The social worker would support Student's communication goal with small group and one-to-one social skills sessions, as well as provide case management. *Id.* at 7. Adaptive physical education, to be provided during the first semester of Student's third grade year, was added to the IEP in May, 2009,. Jt. Ex. BB. Finally, in October, 2009, transportation was added because the program was no longer in Student's neighborhood school. Jt. Ex. DD; TR. 34-35.

16. On May 21, 2009, a Functional Behavioral Assessment (FBA) was done. Jt. Ex. HH. Student's BIP (Jt. Ex. II) was modified to address behavioral gains made by Student in the spring of 2009. Pet. Ex. 4, p. 12. The BIP provided for environmental modifications (removing distractions and providing structure, offering opportunities to take a break, using visual supports to teach appropriate reactions); curriculum modifications (using simple, concrete steps, repeating instructions, providing immediate positive feedback, using multi-modal instruction methods, providing direct instruction in social skills; and providing positive supports (verbal praise, earning points, stickers, adult support, visual supports, giving choices, avoiding power struggles, giving time and space to make choices and calm down). Jt. Ex. II, p. 1. The presumed function of Student's

aggressive behavior was identified as escaping excessive stimulation, releasing frustration, and gaining control of situations Student found unfair. *Id.* Desired replacement behaviors included using problem-solving strategies with peers and requesting a break. *Id.* at 2. Positive reinforcers for good behavior were listed. Consequences included time out. Finally, a crisis plan provided for the use of de-escalation techniques, but also permitted physical restraint if Student became physically aggressive and his safety or the safety of others was threatened. *Id.* at 2. Parent, at all times, objected to the use of physical management with Student.

17. Parent has not challenged the IEP or the services provided to Student during his 2008-2009 school year. Parent's complaint focuses exclusively on the services provided during Student's 2009-2010 and 2010-2011 school years.

2009-2010: Provision of Autism-Specific Interventions

18. Parent contends that during the 2009-2010 school year, Student was not provided the autism-specific interventions recommended by Dr. Lopez in his evaluation of Student and that teaching and related services staff was not provided sufficient support by the ART or by other experts in the education of children with autism. As a result, Parent contends that Student was not provided research-based interventions for children with autism designed to meet his needs. The evidence concerning Student's education in his third grade class during the 2009-2010 school year simply does not support Parent's claims.

19. Student was placed in a neighborhood ED classroom in the fall of 2009 which had a low student-teacher ratio, provided a highly structured and consistent environment, and was overseen by a very experienced special education teacher. TR. 26-28, 80; 1351, 1930. Teacher worked hard to win Student's trust and succeeded in developing a good relationship with Student. TR. 152, 1349, 1359, 1401. A visual schedule and a choice board were developed for Student with

help from the ART. TR.78-79, 197. Student carried “rehearsal cards” with him on a key ring to remind him of what to do in social situations and teacher reviewed these with him before an activity began. *Id.*; TR. 89-90. Student was provided direct instruction in communication and social skills by his teacher, by the social worker, and by the speech and language pathologist (SLP). TR. 90, 92-93, 94, 95, 120-21, 1655-56; Jt. Ex. EE, pp. 4, 12. Student participated in a social skills group run by a social worker. Modeling, role playing and games, as well as social stories or scripts were used to teach social skills. Jt. Ex. EE, p. 5; TR. 1650, 1658-59, 1669-70. Student was affirmatively taught behavior skills and rewarded with praise and constant reassurance he was doing well and with a positively-oriented point system, approved by an ART member. TR. 73, 76, 84-85, 245, 1650. Social stories were used to assist Student in learning to interact with his peers. TR. 89, 92-93, 1650, 1930-31. Student was prepared for transitions. TR. 97, 200; 1266-67, 1409-10. Teacher provided one-to-one support in transitions and large group situations like the lunch room or playground. TR. 202, 256, 318, 1651-53. Teacher was in contact with Parent. Parent viewed teacher as someone who listened to her concerns and tried to address them. TR. 106, 261-64, 1358, 1369, 1386.

20. In addition to these autism-specific, research-based educational approaches recommended by Dr. Lopez’s report, other recommended supports were also introduced. Student’s environment was modified to allow him space to regroup and to use sensory techniques taught by the OT. TR. 80, 195-97. Earphones and other techniques were used to minimize noise and other distractions. TR. 259-60; Jt. Ex. EE, p.4. If he began to escalate, Student would be offered the opportunity to go for a walk, to take a break in a protected place in the classroom, or to choose to be at his desk. TR. 126, 196-97. Student was successfully taught to push away his book as a way of asking for a break. TR. 238, 1267. Student was permitted to choose to use the time out room to calm down. TR. 206, 1655. Other de-escalation techniques were taught to Student. TR. 268-69.

21. The ART and other autism experts were actively involved in providing support to teacher. The teacher reviewed Dr. Lopez's recommendations at the beginning of the year. TR. 340. Dr. Lopez observed in the classroom in December of 2009. He concluded that Student's program was appropriate and Student was making good progress. TR. 88. A member of the ART team came to observe and consult with teacher twice in the fall. TR. 78-79, 1930. Teacher continued to consult with the team member over the phone after that. TR. 78-81, 1931. Based on these observations and conversations, the ART member (a highly skilled expert in autism) concluded that teacher understood Student's needs and was meeting them. TR. 1932. A member of the ART who was fully capable of explaining the educational implications of Dr. Lopez's report was present at Student's IEP, supplemental IEP, FBA and BIP meetings in the spring of 2008. Pet. Ex. 3, p. 15; Pet. Ex. 4, p. 2; Jt. Ex. HH, p. 4, Jt. Ex. II, p. 3.

22. Parent questioned the witnesses repeatedly throughout the hearing about whether video-modeling had been used with Student. Video-modeling was included as one of the list of instructional recommendations in Dr. Lopez's reevaluation report. Jt. Ex. AA, p. 13. The evidence establishes that video-modeling was not used at any time during either the 2009-2010 or 2010-2011 school years. TR. 176, 475, 1159, 1516, 1300, 1926. However, the evidence also establishes that Dr. Lopez did not expect every item in his list of recommendations of teaching techniques to be adopted by the District. TR. 1830-31, 1888. Moreover, the evidence showed that several District staff members discussed with Dr. Lopez whether video-monitoring was a necessary service for Student and were assured by him that social stories and cards were an effective substitute for Student given his unusually good verbal skills. TR. 473-74; 1926-27.

23. The hearing officer finds that interventions appropriate for children with autism and consistent with Dr. Lopez's recommendations as well were used consistently throughout Student's third grade year.

24. Student made academic progress during the 2009-2010 school year. TR. 152 (good gains academically from beginning to end of school year); 235-36 (Parent concedes Student made academic progress); Jt. Ex. FF, pp. 3-4 (gains in reading, writing, math). He also made progress on communication and social skills. TR. 240 (complying with oral directives); 315-16 (teacher able to step back some); 332 (Student learning from situations, but still needs a lot of support; 1544, 1551 (fewer aggressive incidents than in first grade); Jt. Ex. FF (Student developing self-regulation and coping strategies, but not always using them); Jt. Ex. FF, p. 4 (eye contact, body posture, acknowledging another's perspective improved); 244 (Student's ability to express needs verbally improved when calm).

District Consultation in the Spring, 2010

25. Despite the use of appropriate autism-specific interventions, beginning in January, 2010, after the Christmas break, Student's level of aggression began to escalate. TR. 1544. Student's aggression was paradoxically escalating at the same time as Student was making progress both academically and in communication skills. TR. 240-42, 244. Student began to threaten and attack staff and also, for the first time, showed some self-injurious behavior. TR. 144, 253, 1474, 1470-80.

26. Student's teacher requested a District Consultation. TR. 229-30, 1554. A District Consultation brings together teachers, related services providers, consultants, and the student's parent to look at the student's needs, the services being provided, to consider why the student is not making expected progress, and to consider solutions. TR. 1545. The goal is to bring everyone to

the same page in preparation for an IEP meeting. TR. 1556-57. The consultation for Student was facilitated by a highly qualified and experienced school psychologist, Jeannie Collin-Smith. TR. 1541, 1556-57. Prior to the April 1, 2010, consultation meeting, Ms. Collin-Smith reviewed and summarized the information in Student's file, including Student's evaluations and extensive educational history, interviewed each member of Student's educational team, interviewed Parent, and observed Student in the classroom. *Id.*; Jt. Ex. LL, p. 17; 1555-57. She summarized this information at the consultation meeting. Dr. Lopez's recommendations were read and summarized. TR. 1551. Student's whole IEP team was at the consultation, including the social worker, SLT, Student's teacher, an administrator from Student's school, an autism expert who is an ART member, and Parent. TR. 229-30, 1542-43, 1545-46, 1481-82.

27. The consensus of the consultation team was that Student's autism needs had been adequately addressed in the ED classroom. TR. 1542-44; Jt. Ex. LL, p. 17. The team reviewed the extensive positive behavioral supports being provided to Student. TR. 1553; 1558 (IEP and BIP being implemented). The interventions used had been successful in keeping the number of aggressive incidents far below the two or three daily seen in the first grade. TR. 1543-44; 1551.

28. Most team members, with the exception of Parent, agreed that Student's primary needs at the moment were in the behavioral health area: helping him to self-regulate. TR. 239-40; 1566, 1570-72. The hearing officer found the testimony of Marci Laurel, an autism expert and District ART member who attended the District Consult, explaining the reasons for this conclusion highly credible. *See* TR. 1938, 1970, 1974, 1977.

29. There was concern by the team that Student had stopped receiving the therapy and psychological or psychiatric consultation at UNM Programs for Children recommended by Dr. Lopez

in December, 2009 (a time of stress when Student's twin sisters were born). TR. 1547; 1425-27, 1449. Parent was interested in resuming these services, and a referral was made. TR. 1547-48.

30. The consultation concluded with a decision that at Student's upcoming IEP team meeting, the team would consider placement in the District's Behavior Intervention Program. TR. 1558.

May, 2010 IEP

31. At the May 21, 2010, IEP meeting, the team considered both continuing Student in his current ED classroom with additional supports and placing him in the District Behavior Intervention Program, a more intensive and also more restrictive program for student's with behavior problems. Most, but not all students in the Program had an eligibility of emotional disturbance. Because of the difficult trade-off between being able to provide more intensive behavioral supports, on the one hand, and but necessarily placing Student together with other children with severe behavioral problems, as well as some uncertainty about the depth of Student's behavioral needs, the team hesitated to impose the Behavior Intervention Program placement in the face of Parent's objections. TR. 1556-59, 1569-70, 1595, 1598-99; 1975. The team decided to continue Student in his current ED classroom, but put in place a four-week trial period during which Student's teachers and related services providers would consult with the ART, implement more intensive autism interventions, collect additional data on Student's aggressive behaviors and their antecedents; revise Student's BIP, and then, if there was no improvement, meet again to consider the District Behavior Intervention Program. TR. 1597-98; Jt. Ex. FF, p. 30.

Change in Placement in August 2010

32. During the summer of 2010, Parent moved to a different neighborhood. This meant that Student's neighborhood ED program was no longer at the same school. TR. 1722. Had this

move not occurred, Student would have remained in the same classroom with his third-grade teacher (the class was a multi-level class for the 3rd, 4th and 5th grades). Moreover, the school housed the District Behavior Intervention Program, providing for an easy transition. The IEP team's four-week trial of more intensive autism-related services and data collection clearly contemplated Student remaining in a stable placement where his needs were known and his IEP was being fully implemented, and the focus could be on tweaking the program and collecting data on the impact of the changes made. Jt. Exs. FF, LL; TR. 1632-35, 1597-99, 1602-03, 1621-23, 1632-35, 1637. Despite the principal's participation in the May 21, 2010, IEP team and her knowledge of the intent of the four-week trial period, the principal called Parent when she learned of the move and left a message informing her that Student would be going to another school. TR. 1606. Although the school principal asked Parent to call back, and, in her view, did not completely close the door to continuing Student in his current ED classroom, neither she or other District staff notified Parent that there was any other option or convened an IEP meeting. *Id.*; TR. 1279, 1314.

Student's Fourth Grade Year: 2010-2011

33. The difficulty created by Student's placement in an entirely new class in a new school with a new teacher and new related services providers was exacerbated by initial staffing difficulties at Student's new neighborhood ED program. Student was initially placed in an over-crowded ED classroom for the first two weeks of school. TR. 581, 585-86, 1682, 1279-1281. His behavior deteriorated. Jt. Ex. XX. That placement was followed by a move to a newly created ED class with a newly hired teacher.

34. Teacher was unfamiliar with Student and his complex needs, with the elementary school curriculum, and with specific programs for teaching children with autism, a central part of the District's four-week intervention. TR. 814-15, 838. Almost immediately, District staff

misinterpreted Student's behavior, concluding that he was psychotic and suicidal. *Id.*; TR. 1768, 1775-76, 1791; TR. 646, 650, 698-99 (Dr. Davis rules out psychotic or suicidal behavior, as well as conduct disorder). Although the school psychologist had been involved in Student's evaluation in early 2008, before Dr. Lopez evaluated Student, she had no contact with Student or his providers during his third grade year. TR. 361, 376. The school psychologist never conducted an observation of Student in the classroom, but relied entirely on the teacher's description of Student and of events in the classroom to determine what interventions worked and what did not work. TR. 391, 402. By her own admission, she did not get to know Student and was not aware of the frequency of incidents requiring physical management, a measure of how quickly Student's behavior was deteriorating. TR. 393, 400.

35. The first visit to the school by a member of the ART was on September 21, 2010, five or six weeks into the school year. Pet. Ex. 21, p. 3. The team member did not observe Student in class for more than a few minutes. Pet. Ex. 21, p. 18. She recommended that teacher put in place visual supports, suggesting these could be social stories, and recommended using a board for Student to request a break, strategies which had previously been tried in Student's third grade class with limited success. *Id.*; ¶ 19, *supra*.

36. Student's behavior continued to deteriorate, a sign that the services Student was receiving were not meeting his needs. Teacher documented 65 acts of physical aggression between September 9, 2010, and October 29, 2010, a level almost as high as the two to three times a day reported during Student's first grade year. Jt. Ex. GG; Jt. Ex. NN. Student was physically restrained 16 times during this brief period. Jt. Exs. GG, NN. The evidence shows that teaching staff was overwhelmed and was reduced to reacting each time Student began to escalate. Staff never put in place the classroom structure and positive behavioral supports necessary to prevent, or at least

reduce, the number or intensity of Student's escalations. TR. 598, 608, 916-18, 919-20, 922-23, 939, 947, 956, 1201-02, 1182, 1201, 1208, 1225-26, 1684-86, 1698-1701, 1778, 1853, 1857. (Even after staff was added in December, 2010, and the use of restraint reduced, it was apparent from the testimony that these were stop-gap measures and that the reduction in the use of restraint did not reflect an increase in Student's ability to regulate his behavior and emotions. *Id.* and TR. 1690-03, 1695, 1698, 1752, 1780.)

37. Communication between Parent and school staff became increasingly strained. Parent did not feel that teacher was responsive to her concerns. TR. 1370, 1375. There was tension between Parent and the fourth grade social worker who was convinced that Student's behavior arose from a major psychiatric illness, a conclusion with which Parent adamantly (and correctly) disagreed. TR. 1768, 1775-76, 1791. Because of animosity engendered by this conflict, social worker was not able to effectively serve as a liaison between school staff and Parent, as required by Student's IEP. Jt. Ex. FF, p. 29.

Collection and Analysis of Data

38. Reams of data were collected on Student and his behavior. *See* Jt. Exs. NN, WW, RR, and SS. The weight of the evidence does not establish that more data was the key to providing Student appropriate services. In 2009-2010, teacher had an understanding of Student and credibly testified that he had enough data to determine what was working and what was not. TR. 337, 334, 336. In the 2010 through 2011 school year, especially prior to the filing of the due process complaint, there was extensive data collected. Jt. Exs. RR, SS and WW. What was missing was an understanding of Student, what his deficits are, and how those impact interventions. Dr. Lopez testified that these were more important than data collection in designing appropriate interventions.

TR. 1897, 1881. It was plain without the collection of elaborate data that what was being done in early 2010 was not teaching Student how to self regulate. TR. 1852.

Use of Physical Restraint

39. Parent made two allegations concerning the District's use of physical restraint with Student: (1) that physical restraint was used by the District as punishment for behaviors related to Student's disability or as "specially designed instruction"; and (2) that the use of restraints was improper because it was necessitated by the District's failure to provide appropriate evidence-based instruction and positive behavioral supports.

40. The hearing officer finds that the first of these allegations – that physical restraint and time out were used as a punishment or as a teaching tool – lacks support in the record. Overwhelming evidence in the record establishes, that, at all relevant times, the District had in place an appropriate policy on the use of both time-out and restraints and trained all staff who participated in managing aggressive or violent behavior to use enforced time out or physical restraint only as a last resort. Staff were trained extensively in the use of de-escalation techniques and were taught to pursue de-escalation first before resorting to restraint. The District followed its restraint policy with Student, using de-escalation techniques first, and restraining him only when necessary to prevent injury to himself, to another student, or to a staff member. Restraint was not used as a consequence or punishment for Student's behavior or to teach Student to improve his behavior, but solely to ensure the safety of Student and those around him. TR. 145, 164, 182-83, 188-89, 267, 280, 398, 893, 930-32; 1140, 1029, 1152, 1164, 1190-91; 1210-12, 1491, 1497, 1501; 1609, 1613, 1846-47.

41. The second of Parent's claims – that restraints were required because the District failed to provide Student with appropriate educational services – is answered by the hearing officer's findings on whether Student was receiving appropriate services. In the 2009-2010 school year,

where the hearing officer has found that appropriate services were provided, there were only six occasions on which physical restraint was required to be used with Student, four of them in the first semester and only two in the second semester. In contrast, in the fall of the 2010-2011 school year, when the services provided to Student were not appropriate, both Student's aggressive behavior and the use of restraints significantly increased. Jt. Ex. NN, GG (65 incidents of aggressive behavior between August 25, 2010, and October 27, 2010, 16 of which required physical restraint).

Failure to Provide Parent Sufficient Information on the Use of Physical Restraints

42. Parent has claimed that the District failed to provide her sufficient information each time Student was restrained to enable her to fully participate in IEP team decisions. The evidence shows that Parent was provided extensive information each time restraint was used with Student, including a telephone call from Student's teacher in 2009-2010, and a description included in the daily log sent home with Student every day. TR. 117, 119, 261-64, 610, Jt. Ex. WW (daily logs). Parent was sometimes contacted by other school staff as well. TR. 140, 204, 206.

43. Parent communicated her concerns about the use of physical restraint to school staff both in IEP and BIP meetings and outside those meetings. Ex. O, p. 2; 53, 204-06, 1374, 1375, 1415, 1488, 1550. Although the use of restraints was not included in the Prior Written Notice form in Student's 2009-2010 IEP's, it was included in that form in Student's May, 2010, IEP. Jt. Ex. FF, p. 29.

Failure to Meet and Revise the IEP and BIP

44. Parent failed to show that the District delayed revision of Student's IEPs or BIPs inappropriately. In 2009-2010 school year, a new IEP was prepared for Student on January 15, 2010. Jt. Ex. EE. It was also well within a year after substantial revisions were made to Student's IEP to reflect Dr. Lopez's recommendations. Pet. Exs. 3, 4; Jt. Exs. BB and DD. At the time the IEP was

prepared, it was at most two weeks after Student began to show an increase in aggressive behavior. TR. 1544. It was too soon at that point to know whether these problems would continue. When the difficulties persisted, teacher timely requested a District Consultation, rather than scheduling an IEP meeting. ¶ 25, *supra*. The District Consultation provided significant assistance to the IEP team (all of whom attended) in evaluating Student's needs. It also provided a forum to air disagreements about Student's relative need for interventions for emotional disturbance versus interventions for autism. The format of the consultation encouraged Parent's full participation. A new IEP was prepared immediately following that consultation, only four months after the last IEP. Jt. Ex. FF. Delaying the preparation of the new BIP to the beginning of school was should not have affected Student's education, assuming, as the team did, that Student would remain in the same classroom he had been in for third grade, with a teacher who knew him well, and that a new BIP could be prepared promptly in consultation with the ART.

45. Beginning September 27, 2010, the District attempted to schedule an IEP team meeting both to revise Student's BIP and IEP. Jt. Ex. SS, pp. 26-28. A meeting was scheduled for October 5, 2010, but Parent had a child care emergency which required rescheduling. *Id.*, TR. 909-10, 979; Jt. Ex. SS, p. 8. The meeting was rescheduled for October 14, 2010. Parent did not attend. TR. 912, 980. A rough draft of a BIP was prepared by staff at that meeting, but, as Ms. Laurel, the ART representative testified, the BIP could not be completed without Parent's input to help evaluate the purpose of Student's behavior. Jt. Ex. JJ; TR. 1936. Another meeting was scheduled for November 1, 2010. Jt. Ex. SS, p. 28; TR. 913.

46. On October 27, 2010, Parent filed the due process complaint in this proceeding. From the filing of the due process complaint, the District was prevented, as a matter of law, from changing Student's placement. 20 C.F.R. §300.518(a) (stay-put). Placing Student in the District Behavior

Intervention Program, as many members of Student's IEP team testified they believed was the appropriate placement for Student, would have been a change of placement, and was not permitted without the agreement of Parent.

Access to the General Curriculum in 2010-2011

47. The evidence shows that the instruction Student was provided in 2010-2011 was consistent with the general fourth grade curriculum. TR. 818-19, 817-18, 814-15, 1682, 1684.

Student's Sensitivity to Sound

48. The evidence showed that Student's sensitivity to noise was addressed in both school years. TR. 259-60, 871-74; Jt. Exs. EE, p. 4 and FF, p. 5.

Participation in Activities with Non-disabled Peers

49. This issue was not clearly raised in Parent's due process complaint. On the merits of this claim, Student in both school years participated in physical education, lunch and recess with typical peers. Pet. Exs. 3; Jt. Exs. EE and FF; TR. 844, 849. Although Student made progress in developing social skills with typical peers, the evidence showed that the large group settings found in regular classrooms were especially difficult for Student, even with 1:1 support. Jt. Exs. HH (majority of aggressive incidents Student's third grade year occurred during physical education, recess or music – mainstreamed settings); WW; TR. 1355 (Parent seeks regular classroom setting, but acknowledge Student would need 1:1 aide); TR. 1911-12 (Dr. Lopez: Student dysregulates in an unstructured environment; 1:1 assistance does not help Student maximize his independence).

Behavior Intervention Program Appropriate for Student

50. District staff who were most familiar with Student uniformly testified that Student could best be served in the District's Behavior Intervention Program. The hearing officer finds the rationale offered for this placement by the District's witnesses persuasive. As set forth above, the

evidence showed that Student had received appropriate autism-related instruction and that this instruction had succeeded in improving Student's ability to communicate his needs and to relate to his peers. Yet, despite these improvements, and the many positive behavioral supports provided by Student's teacher and related services providers, the intensity of Student's aggressive behavior increased beginning in January, 2010. Student's need for adult attention and support had increased beyond what could reasonably be provided in the ED classroom setting. Under these circumstances, the hearing officer agrees that the additional services available in the Behavioral Intervention Program, including a program structured around developing appropriate behaviors, a highly structured class with a lower student-teacher ratio, program psychologists who meet regularly with teaching staff, a full-time social worker, flexibility in matching student both with teachers and peers, would have been an appropriate placement for Student in October, 2010. TR. 29-32, 142, 154, 175-76, 198, 199, 270-71, 877-78, 898-99, 1496, 1562-63, 1567, 1595, 1640, 1770-72, 1229-30, 1496, 1954, 1972-74.

CONCLUSIONS OF LAW

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

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

3. At the request of both parties, extensions of time for entry of the decision in this matter have been granted until April 11, 2011. This decision is timely filed on April 11, 2011.

4. Parent bears the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

5. The statute of limitations for due process hearings under the IDEA is two years prior to the date the due process complaint is filed. 20 U.S.C. § 1415(f)(3)(C) (2004). The statutory period began on October 27, 2008. All of the claims made by Parent arose within the statutory period.

6. At all relevant times, Student was eligible for special education and related services under the IDEA as a student with a disability in the eligibility areas of autism and emotional disturbance. 34 C.F.R. § 300.8(c)(1) and (4) (2006).

7. Student was provided a free appropriate public education (FAPE) by the District during his third grade school year, 2009-2010. The Student's IEP was reasonably calculated to enable Student to make meaningful educational progress, the services in the IEP were provided by skilled teachers and staff, and they were based on peer-reviewed research to the extent practicable. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982); 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

8. Student was not provided a FAPE by the District during his fourth grade school year, 2010-2011.

9. Parent failed to carry her burden of establishing by a preponderance of the evidence that the District failed to collect sufficient data during the 2009-2010 school year and 2010-2011 school years to enable staff to adequately measure Student's progress. 20 U.S.C. §1414(d)(1)(A)(i)(III); 34 C.F.R. § 300.320(a)(3)(ii).

10. Parent failed to carry her burden of establishing by a preponderance of the evidence that the District failed to timely meet and consider revisions to Student's educational program when Student failed to make expected progress. 34 C.F.R. § 300.324(B)(i) and (ii); *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

11. The District did not violate the IDEA by its use of de-escalation techniques and its reliance on physical restraint only when necessary to prevent injury to Student or others. (No IDEA provision directly addresses this issue). However, in Student's 2010-2011 school year, the District's failure to provide an appropriate program of special education and related services, including positive behavioral interventions contributed to the need to restrain Student, and denied him a FAPE. 20 U.S.C. §1414(d)(3)(B)(i).

12. Parent failed to carry her burden of showing that the District's failure to note Parent's objection to the use of restraints in the Prior Written Notice section of Student's IEP denied Student educational benefit, interfered with the provision of appropriate educational services, or significantly impeded Parent's participation in the decisionmaking process. 34 C.F.R. § 300.503; 34 C.F.R. § 300. 513(a)(2).

13. Parent failed to carry her burden of showing that the extensive information she received from the District concerning the circumstances surrounding the use of physical restraint with Student was not sufficient to enable her to fully participate in the IEP and other decisionmaking processes concerning Student's education. 34 C.F.R. § 300.503; 34 C.F.R. § 300. 513(a)(2).

14. The hearing officer has found no legal authority (and Parent has cited none) supporting Parent's claim that parental consent is required before a child can be restrained when the restraint is necessary to prevent imminent harm to the student or to others.

15. Parental consent is required for a student to receive special education and related services under the Act and a parent may revoke consent to the provision of special education services at any time. 34 C.F.R. §300.300(b)(4) (2008). (However, following revocation of consent, the district's regular discipline procedures would apply. 52 IDELR 231 (OSERS 2009). The District uses physical restraint with typical students when necessary to prevent imminent harm.) A parent,

however, may not single out one aspect of an IEP and withdraw consent solely for that aspect or service. The parent must use due process procedures to challenge the service as inappropriate and must abide by the hearing officer's decision. *IDEA Part B Supplemental Regulations, Non-Regulatory Guidance* (2009).

16. The District failed in the fall of Student's fourth grade year to provide timely and sufficient support from the District's ART, as required by Student's IEP, and to provide appropriate support from a school psychologist to assist in revising Student's Functional Behavioral Assessment and BIP, as required by Student's May, 2010, IEP. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

17. Parent failed to carry her burden of demonstrating that Student's IEP team failed to include one or more individuals capable of interpreting the instructional implications of Student's evaluation results. 20 C.F.R. §300.321(a)(5).

18. Parent failed to carry her burden of establishing by a preponderance of the evidence that Student was denied appropriate access the general curriculum. 20 U.S.C. § 1414(d)(1)(A)(i)(II) (aa).

19. Parent failed to carry her burden of establishing by a preponderance of the evidence that Student was denied appropriate access to services and supports, including occupational therapy services, designed to address and mitigate the impact of his sensitivity to sound. 20 U.S.C. § 1401(26) and (29).

20. Parent failed to meet her burden of establishing that Student was denied appropriate involvement and interaction with typical peers. 20 C.F.R. §§ 300.116 and 300.117. To the extent Parent is referring to the fact that one of Dr. Lopez's recommendations was participation in a social group, preferably with typical peers, Parent did not establish that the failure to include typical peers

in the social skills group provided by the District, a single aspect of one of many recommendations, resulted in the denial of FAPE to Student.

21. Although a change in the location of an educational program is generally not a change in placement, where, as here, the IEP team designed a program dependent on maintaining Student in his current placement, and where a change in location and staff would require revision of the IEP to provide for a transition, the change in location was a change in placement, requiring that the IEP team be reconvened or Student be permitted to remain in the program contemplated by the team. *Sherri A.D. v. Kirby*, 975 F.2d 193 (5th Cir. 1992) (a change in educational placement results if there is a change in or elimination of a basic element of the program); *Letter to Wesssels*, 16 LRP 840 (OSEP 1990) (IEP team can identify a particular classroom or teacher if that is important to the program).

DISCUSSION

A major focus of the controversy in this matter centered on what eligibility – autism or emotional disturbance – was primary for Student. Despite the sometimes heated disagreement between the parties on this question, there was overwhelming consensus among the experts and educators who testified that Student’s needs during the time period at issue spanned both areas and that an appropriate education program for Student could not ignore either disability. Student’s multiple and complex needs required both specialized instruction and related services to assist him in developing social and communication skills (services appropriate for a child with autism), a highly stable and consistent classroom environment with positive behavioral supports, as well as social work, psychological and psychiatric support.

The testimony also was in agreement that Student had many strengths, including high intelligence, the ability to interact successfully when in a community setting, good athletic ability,

an ability to be interested and engaged in topics he enjoys, and to share his knowledge and interest with others, to name a few. Student shows much promise for the future if he receives the services he needs.

The hearing officer has found that despite the provision of appropriate services by the District during Student's third grade school year, Student did not make the progress anticipated for him in learning to regulate his behavior. The reasons for this lack of progress are not entirely clear. The absence of the therapy and psychiatric supports in the community which had been provided to Student in the fall semester may explain some of the lack of progress and increased difficulties in self-regulation seen by Student's teachers and related services providers.

The District's response to Student's regression in self-regulation skills and his increasingly intense aggressive behavior in the spring of 2010 was appropriate. Student's IEP team was brought together with the assistance of a highly qualified school psychologist to review all the available information concerning Student's needs. Although the majority of Student's IEP team concluded that placement in the District's Behavior Intervention Program, with an IEP which would include some autism interventions, was the appropriate placement for Student, the team was reluctant to override Parent's strong objection to this placement without making a last attempt to provide more intensive autism interventions and consultation and to see if these interventions could result in a significant improvement in Student's ability to regulate his behavior. The team decided that Student would continue in his multi-level classroom, a four-week trial including additional autism interventions and reevaluation of Student's BIP would take place, and, if improvement was not seen, the team would reconvene to consider a change in placement to the District-level Behavior Intervention Program.

When Student and Parent unexpectedly moved to a different neighborhood in the summer of 2010, this plan fell apart. Rather than either allow Student to remain in his current classroom, the placement intended by the IEP team, or convene an IEP team meeting to determine whether the planned trial could properly be conducted in a new classroom, given Student's high need for stability and consistency, the school principal left a message for Parent telling her that Student had a new neighborhood school. It appears that there may have been some miscommunication. The school principal testified that she asked Parent to call back to talk about Student's placement. Parent admitted that she did not return the call, but assumed that she was required to enroll Student in his new neighborhood school.

The first few months at the new school were extremely difficult for Student. The hearing officer has found that he was not receiving appropriate services to meet his needs, and certainly was not receiving the kind of controlled trial set up by the IEP team. Student's aggressive behaviors became more frequent and more intense. Neither a consistent environment nor positive behavioral supports designed to meet Student's needs were being provided. Student **was** threw furniture, attacked his teachers and other students, and sometimes attempted to run away. By November 1, 2011, Student had been physically restrained 16 times by school staff.

The hearing officer has found that the restraints were used solely when necessary to prevent injury to Student or others. Nevertheless, the District was far from faultless in their use. Student's behavior deteriorated to the point that physical restraints were necessary for his own safety and that of others because he was not provided appropriate educational services by the District.

To its credit, the District attempted to convene Student's IEP team to consider a change in placement. Had the IEP been conducted when scheduled, Student would likely have been denied a FAPE for only a few months. As it was, the filing of the due process complaint left the District

unable to change Student's placement. Although the District attempted to reduce the need for restraints by increasing staff in the classroom, and although this was at least partially successful in reducing the incidents of aggressive behavior and in dramatically reducing the need for physical restraint, the District was not able to put in place an appropriate program to assist Student in learning to regulate his behavior.

Student has now spent seven months without appropriate educational services.

Remedy

Having determined that Student was denied a FAPE during the 2010-2011 school year, the remaining question for the hearing officer is remedy.

Appropriate relief under the IDEA is injunctive relief designed to ensure that Student is appropriately educated going forward. The hearing officer can also provide additional services to compensate Student and more quickly remedy the harm done by the inappropriate placement and the deprivation of appropriate services. In determining the nature and the amount of additional compensatory services, the hearing officer must consider all the circumstances, including whether there were factors outside the district's control, which delayed or interfered with the district's efforts to provide FAPE. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

Here, the imposition of the stay-put rule clearly prevented the District from changing Student's placement to the Behavior Intervention Program, an appropriate placement at the time for Student. Nevertheless, the District was permitted to provide more effective and appropriate services in Student's current placement without running afoul of the stay-put provision, and did not do so. Because the denial of a FAPE to Student had severe consequences, resulting in significant deterioration in Student's ability to regulate his behavior and in the repeated physical restraint of

Student, the hearing officer has determined that some additional services beyond what would otherwise be required by the Act are appropriate compensatory services.

The hearing officer has required the District to allow Student to remain in a single school until he finishes elementary school and has required that Student be provided a social skills group with typical peers, interventions which Dr. Lopez's new evaluation (H.O. Ex. 1) has identified as particularly helpful in improving Student's ability to regulate his behavior and in maintaining the gains he makes. With the exception of these compensatory services, the remedy ordered is required to provide Student a FAPE.

One further point merits emphasis here. The hearing officer is not required to award Parent the relief she seeks simply because the hearing officer has agreed with Parent that there was a deprivation of FAPE by the District. The hearing officer is obligated to determine what relief is appropriate to meet Student's needs at the current time, in light of all of the circumstances. Indeed, in this case the central relief ordered by the hearing officer: the placement of Student in the District's Behavior Intervention Program, was requested by the District and opposed by Parent.

IT IS HEREBY ORDERED:

1. Student will be placed in a fourth-grade classroom (or multi-level class which includes the fourth grade) at the District's Behavior Intervention Program. Student's IEP team will be convened and this change in placement made as quickly as possible, consistent with ensuring that the services and supports needed by Student to make a successful transition are in place;
2. A facilitated IEP meeting will be conducted by the District with Jeannie Collin-Smith serving as the facilitator (or, if she is not available, another District facilitator agreeable to Parent), and with Dr. Lopez attending to explain the results of Student's recent reevaluation and the educational implications to the IEP team;
3. Student's IEP team will include, along with others required by the IDEA, Student's third grade teacher, a fifth grade general education teacher in the school where the Behavior Intervention Program is located, and a teacher, psychologist and social worker associated with the Behavior Intervention Program (preferably the teacher, psychologist and social worker who will be working with Student, if they can be identified prior to the meeting);
4. Student's eligibility will be changed consistent with Dr. Lopez's evaluation to reflect Student's continued needs for special education and related services in the eligibility area of emotional disturbance alone, with Student's autism-eligibility removed;
5. A social worker working in the Behavior Intervention Program will be assigned to facilitate communication and coordination among Student's school-based service providers (especially Student's teacher and the psychologist and social worker working with Student), Student's outside therapists and medical providers working with Student in the community and at home, and Parent. Parent will be treated as a full member of Student's educational team;

6. A Functional Behavioral Assessment (FBA) and BIP will be prepared for Student by Behavior Intervention Program staff with the assistance and involvement of the program psychologist and social worker working with Student and in consultation with Dr. Lopez;
7. Student's progress shall be monitored and, if Student does not show improvement in his ability to regulate his behavior so that the use of restraint is reduced or eliminated within two months after the FBA and BIP are prepared, the FBA and BIP team shall be reconvened, and shall revise the FBA and BIP to address Student's needs, again in consultation with Dr. Lopez;
8. The IEP shall include objective methods of measuring Student's progress toward both behavioral and academic goals;
9. Student shall be provided transportation to the Behavior Intervention Program from his home;
10. The IEP team shall reconvene no later than December, 2011, to evaluate Student's progress, determine whether Student is ready to transition to either the self-contained emotional disturbance classroom taught by his third grade teacher (assuming the teacher is still at the school), or to a general education classroom, and, in any event, to make modifications to Student's IEP and BIP to address any lack of progress. If the team decides that a less restrictive placement is not appropriate in December, this issue shall be revisited at an IEP meeting near the end of the 2011-2012 school year;
11. So long as Student continues to reside within the District, the District will allow Student to complete his elementary education at the school where the Behavior Intervention Program is located, and will provide transportation to and from that school;

12. Student will be provided opportunities to interact with typically developing peers, including participation in physical education and recess with typical peers. As a compensatory service, Student will be participate in a social skills group during the 2011-2012 school year which includes typical peers either in the school setting, or at the IEP team's option, in a community setting reimbursed by the District;

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 THE 11th DAY OF APRIL, 2011.

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, to the Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and to the following counsel of record in this proceeding by e-mail in PDF format, as well as by first class U.S. Mail, on April 11, 2011:

Counsel for Parent and Student:

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

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

Counsel for Albuquerque Public Schools:

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

Jane B. Yohalem
Due Process Hearing Officer