

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

**In the Matter of :**

**Parents, on behalf of Student,**

**Petitioners,**

**v.**

**Case No. DPH 1112-14**

**RESERVE INDEPENDENT SCHOOLS,**

**Respondent.**

**FINAL DECISION OF THE DUE PROCESS HEARING OFFICER**

**Jane B. Yohalem, Due Process Hearing Officer  
January 30, 2012**

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## INTRODUCTION

In this due process proceeding brought pursuant to the Individuals with Disabilities Education Act (IDEA) 20 U.S.C. § 1400, *et seq.*, (2006), Parents allege that, during Student's third, fourth, and the beginning of his fifth grade school year, the District removed Student from the general classroom setting and resorted to suspension and law enforcement to address Student's disruptive behaviors, rather than providing Student research-based special education and related services designed to meet his behavioral, social and academic needs. Parents claim that the District relied on a misguided eligibility of mental retardation, even after that eligibility was rejected by Student's IEP team in favor of "Other Health Impaired." Parents claim, as well, that the District failed to reevaluate Student as his disruptive behaviors escalated and other warning signs pointed to an emotional disturbance to determine whether he also qualifies for special education in the category of emotional disturbance.

Additional issues raised by Parents include whether the District's use of an alternate assessment, rather than the general assessment, is consistent with the IDEA; whether Student was provided a free appropriate public education (FAPE) in the Interim Alternative Educational Setting (IAES) following his suspension from school on September 23, 2011; and whether the District's temporary failure to provide Student the speech and language therapy required by his IEP because of a staffing problem denied Student a FAPE.

If Parents prevail, they ask the hearing officer to either require the New Mexico Public Education Department (NMPED) to provide direct services, or, in the alternative, to order that the District work closely with outside consultants. Parents' claim for provision of services by the NMPED is addressed in the hearing officer's decision of this date denying Parents' motion to proceed against the NMPED.

The District claims that, at all times, it has provided Student with a FAPE. The District contends that Student's behavioral difficulties are unrelated to Student's disability, that the District has provided appropriate behavior intervention plans, and that its reliance on suspension and law enforcement is a proper response to misconduct by Student which is unrelated to any disability and entirely within Student's control.

On December 8, 2011, the hearing officer issued an interim decision in this matter addressing whether Student's conduct on September 22, 2011, which culminated in Student kicking the principal, was properly punished with a 45-day suspension from school and placement in an IAES. The hearing officer concluded that Student's misconduct on September 22, 2011, did not have a direct and substantial relationship to Student's identified ADHD and was not the direct result of the District's failure to implement Student's IEP. Therefore, Student's conduct was not a manifestation of his disability. The District was entitled to suspend Student. 20 U.S.C. §1415(k)(1)(E) (2004); 34 C.F.R. §300.530(2006). That decision is attached hereto and incorporated herein.

In this final decision, the hearing officer concludes that the District has denied Student a FAPE during his fourth grade year and the first few weeks of fifth grade by failing to respond to Student's rapidly escalating behavior problems by developing behavioral goals and instructional strategies appropriate to address these behaviors and by developing a behavior intervention plan (BIP) founded on an analysis of the purpose and function of Student's behavior, so that it is reasonably calculated to meet Student's individual needs. The hearing officer finds, as well, that Student was denied important services which his IEP team determined were necessary to provide Student a FAPE (including psychological, counseling, and social skills instruction) by the District's practice of allowing Parents to unilaterally reject particular services and particular staff members assigned by the District to work with Student. The hearing officer also finds that the District failed

to heed warning signs of emotional disturbance and failed to timely reevaluate Student, as required by the IDEA. The hearing officer rejected Parents' claim that Student was denied a FAPE in the IAES, finding the evidence insufficient to establish a denial of FAPE under the special definition of FAPE applicable in the IAES setting. Parents' claim that the District improperly continued to rely on the eligibility of mentally retarded, even after Student was found eligible as Other Health Impaired, was rejected, as was Parents' claim that the District's use of an alternate assessment was not necessary to meet Student's needs. Finally, the District acknowledged that its temporary failure to provide the speech therapy provided for in Student's IEP was a denial of FAPE.

## **FINDINGS OF FACT**

### **Background**

1. Student is ten years old and in the fifth grade at the District's elementary school. Student's birth date is May 26, 2001. He is currently eligible for special education as Other Health Impaired (OHI), based on Attention Deficit Hyperactivity Disorder (ADHD). Ex. KK.

2. Student had a difficult early childhood. Prior to his foster placement and then adoption by Parents, he was neglected and abused by his birth family. He was taken into State custody and placed with Parents at age two, and then adopted by Parents when he was three years old. TR. 783-84. Parents reported that Student had been exposed to drugs and alcohol *in utero*. Ex. FF, at 2.

3. Student began to receive special education services in preschool to address developmental deficits and help him cope with the psychological impact of the abuse he suffered. *Id.* Student was diagnosed with post-traumatic stress disorder (PTSD) at age 6. Ex. FF. Parents testified that any restraint, some forms of physical contact, confinement in a small space (like a time out room), and certain smells, recall memories of trauma early in Student's life, triggering Student's

PTSD symptoms. TR. 789-90, 035. This was reported to the school by Student's private therapist in October, 2009. Ex. CCC.

### **Evaluations and Eligibility Categories**

4. In preschool, Student was identified as eligible for special education in the developmental disability category. Ex. AA, at 1. Eligibility as developmentally disabled is based on observations of delayed development in several areas of functioning. 34 C.F.R. § 300.8(b)(1). Student's eligibility in this category continued until he was in the second grade. Ex. AA, at 1.

5. The District's October, 2008, diagnostic evaluation noted ADHD, as well as severe social skills deficits, emotional/behavioral problems, and intellectual deficits (measured on the Wechsler). Ex. AA, at 1, 5-7. While acknowledging Student's other areas of disability, the District's diagnostician proposed that Student be found eligible in the category of mental retardation based on his cognitive, motor, speech and language, self care and social delays. *Id.* at 2, 15. The reevaluation found that Student's social and behavioral deficits manifested themselves inconsistently across settings. The diagnostician concluded that Student had particular problems functioning in the complex school environment with its many demands. Ex. AA, at 11. The District's diagnostician recommended that Student be placed in a general education classroom with accommodations and resource program help; that he be provided an alternative reading program focusing on phonetics and decoding; occupational therapy; intervention strategies to build social behaviors; social skills instruction in a small group; and psychological services. Also recommended was cooperation with Parents to reinforce appropriate behavior and modified instruction. Ex. AA, at 15-17. Student's IEP team adopted the mental retardation eligibility recommended by the District's diagnostician. Ex. EE, at 1.

6. Shortly thereafter, Parents filed a due process complaint objecting to the eligibility of mental retardation. The dispute was resolved with an agreement for an independent evaluation, conducted by the University of New Mexico (UNM) child development clinic. The evaluation was conducted in November, 2009. The UNM report was completed and provided to the District in February, 2010. Exs. 1, FF; TR. 792-93.

7. The UNM evaluation found that Student had significant cognitive delays across multiple domains. The UNM evaluation concluded, however, that Student was not eligible in the category of mental retardation because he had a strength in non-verbal processing slightly above the cut-off for mental retardation. Student, therefore, did not show the uniform severe delays across all domains which are required for a diagnosis of mental retardation. Ex. FF, at 12.

8. The UNM evaluation was conducted in Albuquerque in September, 2009, and did not include observation of Student in the school setting. The evaluators relied on questionnaires completed by Parents, which were necessarily based on their observations of Student's behavior at home and in the community. *Id.*, at 12, 6 (UNM evaluator notes that social skills scores based solely on Parents' observations may overestimate Student's abilities). The UNM evaluators did not contact the District concerning the school's observation of Student's strengths and needs, nor did they have available to them information about Student's increasingly disruptive behavior in school during the fall of 2009. TR. 343, 346-47. The UNM evaluation found Student eligible for special education as Other Health Impaired, based on Student's ADHD. *Id.* at 7, 10-11, 13. An autism spectrum disorder was ruled out. *Id.* at 12. The evaluation recommended significant educational supports; the use of positive behavioral strategies to improve functioning in all settings; greater structure; more defined classroom rules at school; the use of praise, combined with ignoring mild inappropriate behaviors; clear commands; breaks from school work; providing choices for Student; the use of

behavioral rewards and consequences (point and token systems were listed as examples); daily communication between home and school; the use of individual or group behavior therapy to teach social skills; outpatient counseling; and consideration by Parents, in consultation with their doctor, of medication for Student's ADHD. *Id.* at 13-14. Simplified instruction, visual aids, multi-sensory instruction, and teaching active listening were recommended as instructional strategies. *Id.* at 14-15.

9. Except for the eligibility category, the findings of the UNM evaluation as to Student's deficits and needs and the recommendations made for special education services for Student were not significantly different from the findings and recommendations included in the District's evaluation. *Compare* Exs. AA and FF. Both identified multiple deficits, both found severe intellectual deficits, and both identified ADHD. The UNM evaluation placed slightly greater emphasis on structure in the classroom and on behavioral rewards and consequences. Both agreed that Student needed direct instruction in group and individually in social skills. The District's evaluation was more specific about using specialized, research based reading instruction with Student, something later recommended by another UNM evaluation obtained privately by Parents and not shared with the District. Ex. 2.

10. Although Student plainly has intellectual deficits, particularly in abstract reasoning, the evidence in the hearing record establishes that both evaluations overstate Student's intellectual deficits. TR. 432. Apparently some of Student's abilities are not well-measured by the standardized tests relied on in both evaluations. *Id.*; 415-16.

11. The District continued to rely on both evaluations in preparing its IEP's. Given the consistency in the two evaluations, this was appropriate. The evidence did not establish that the District pigeon holed Student as mentally retarded. If anything, the District relied too heavily on

Student's ADHD diagnosis, failing to address all of Student's special needs, especially his behavioral needs.

### **Student's Third Grade Year**

12. Student's initial third grade IEP, prepared September 9, 2009, placed Student in the regular classroom with the highest level of special education services and modifications for all but three hours a week. Ex. EE, at 14. The IEP included a behavior section which required monitoring of Student's behavior and redirecting inappropriate behavior; a structured daily schedule; curriculum modified to Student's level of performance; occupational therapy to help calm Student and improve his classroom behavior; positive reinforcement for good choices; and clear and consistent consequences for inappropriate behavior. Ex EE, at 6. Although these principles were stated, there was no BIP to provide specific guidance. Ex. EE. Two functional performance goals were included in the IEP: improving Student's behavior at transitions and improving his sustained attention span. *Id.* at 10. Instructional accommodations included use of manipulatives, classroom structure and behavioral supports, preparation for transitions, positive rewards for staying on task, visual aids, short instructions, and modification of assignments. Ex. EE, at 16. Despite the findings of the District's diagnostician that Student has great difficulty in social situations and in relating to his peers in the school environment, and the recommendations in the District's evaluation for direct social skills instruction and therapy, Student's IEP did not include a social skills goal nor did it provide for a defined program of social skills instruction. Ex. EE.

13. Parents and school staff agreed that Student, who had done well in second grade, had increasing difficulty during his third grade year. TR. 379-80, 786 (2<sup>nd</sup> grade); 788 (3<sup>rd</sup> grade). Relatively early in the school year, Student began to manifest behaviors not previously seen. Student

would resist getting off the school bus when it arrived at school. He ran away from school numerous times. Student engaged in disruptive and aberrant behaviors in the classroom. TR. 380-81.

14. Upon receiving the UNM evaluation in February, 2010, District reconvened Student's IEP team, and on March 2, 2010, prepared an IEP. Ex. GG. The District adopted UNM's recommendation of OHI-ADHD eligibility for Student. *Id.* at 1, 15-16; TR. 796. The new IEP was not significantly different from the September 9, 2009, IEP described above. The instructional accommodations and modifications listed remained the same, as did the functional performance goals. As noted above, these focused on Student transitioning in the hallways without disrupting others and improving his attention span. Ex. GG, at 8, 13. The March 2, 2010, IEP did not add the social/behavioral skills therapy and direct instruction recommended by both the UNM and District evaluations. Ex. EE, at 6.

15. A Behavior Intervention Plan (BIP) was added to the IEP to address Student's behavior in running away from school. Ex. GG, at 24-26. No Functional Behavioral Assessment (FBA) was performed to assist the District in addressing Student's new and escalated behaviors. Ex. GG. The BIP identified the cause of Student's behavior as seeking attention from adults. It did not, however, point to any observations or data which supported this conclusion. Interventions adopted included redirecting Student when he became frustrated, allowing him to go to the office, and notifying Parents when he threatened to leave. "Reinforcement" was listed as the incentive. Consequences included calling Parents and denying Student recess time. The crisis plan called for notifying parents and notifying the sheriff's office. Ex. GG, at 25. If the behaviors continued, the IEP provided that staff would "meet with professionals." Ex. GG, at 26. This step was never taken. TR. 397.

16. After the March 2, 2010, IEP and BIP were adopted, school staff struggled with Student's behavior which increasingly interfered with the provision of the academic instruction demanded by his IEP. TR. 383. Mother reported being called to school repeatedly to help calm Student down. TR. 800. Mother reported that some of Student's misbehavior occurred because he wanted to be with his class, rather than going to the resource room. TR. 798-99. The record shows that as the year went on, Student spent less and less time in the classroom. He was removed from the classroom due to disruptive behavior and taken to the principal's office or the school's resource/time out room to work with the help of an aide. *Id.*; TR. 382; 390-91; 387-88.

17. A blow to Student's education occurred when a special education teacher who was particularly effective in working with Student was removed at Parent's request. Parents' raised claims about misconduct by this teacher. Student's report was patently based on a misunderstanding by Student. *See* section on Parents' refusal of services, *infra*. Nonetheless, the District acceded to Parents' request. Although the District assigned another special education teacher to Student, the new teacher's role, the amount of time she spent with Student and the effectiveness of the services provided, were significantly reduced, either because of her other responsibilities in the high school where she was assigned, or because she was not familiar with Student's needs. *Id.*

18. Sometime in the spring of Student's third grade school year, there was an incident in the school's bathroom involving Student. The record is unclear about what happened. There were allegations of sexualized behavior by Student. There were also conflicting allegations of sexualized behavior directed toward Student by another child. Student was suspended from school for a number of days and greater supervision in school bathrooms was instituted. TR 811-13; 818-19.

### **Student's 4<sup>th</sup> Grade Year (2010-2011)**

19. On August 5, 2010, Student's IEP team met and prepared an IEP for Student's 4<sup>th</sup> grade year. Ex. II. Student had made some progress in reading, had regressed in math and made no progress in writing. *Id.* at 6; Ex. HH. The 4<sup>th</sup> grade IEP made no change in Student's academic goals. Despite Student's severe behavior problems, the only social/emotional/behavioral goal included in the IEP was addressing Student's uncooperative and irritable behaviors at transitions, the same goal included in Student's two previous IEP's. There was no behavioral goal addressing Student's disruptive and distracting behavior in the classroom. *Id.* at 11. Although the district's diagnostician (who participated in the IEP) again recommended direct and systematic instruction in social skills, the IEP does not include a goal or services in this area. *Id.* at 3. The team recommended OT services to help reduce Student's movement around the classroom. *Id.* at 27. The IEP, however, indicates that Student was exited from OT at the request of Parents, so that this service was not provided. *Id.* at 34.

20. A new BIP was prepared for Student. Ex. JJ. The BIP addresses Student's behavior in running away and in threatening to run away and "inappropriate behavior in the bathroom." *Id.* at 1. Although the BIP mentions talking to the school counselor and practicing social interaction skills, there were no goals in these areas included in the IEP. Because Parent's rejected services provided by the school counselor, the recommended services were not provided. Consequences for misconduct remained calling the parents and/or the sheriff. No Functional Behavioral Assessment to determine the underlying causes of Student's behavior was performed. Ex. II, at 5.

21. Despite the warning signs of Student's rapidly escalating and increasingly strange behavior, the allegations made against the special education teacher by Student, the incident involving sexualized conduct in the bathroom, Student's continuing to flee from school, and the

increasing frequency with which Student was removed from the classroom, the District did not consider a psychological evaluation of Student either to determine whether he also qualified for services in the category of emotional disturbance or to provide direction on appropriate behavioral services. Ex. JJ.

22. The IEP and BIP developed for Student at the beginning of his fourth grade year made only the most minor of adjustments to the previous year's IEP and BIP, leaving Student's functional goals unchanged from the previous year despite the many behaviors problems which had arisen during the third grade. Exs. EE, GG, JJ and II. The District's approach to Student's behaviors in 4<sup>th</sup> grade was even less successful than the year before. Student's behavior in the classroom became so disruptive that the teacher, even with the help of an aide assigned to assist her, could not keep Student in the classroom. TR. 400. Student's behavior was described as strange and intimidating to other students. TR. 400-02. Student was described as defiant at times, and as not understanding how to interact with peers in an acceptable manner. Ex. KK, at 7. Despite the IEP's direction for instruction in the regular classroom 80% of the day, Student's behavior was so disruptive that he spent most of his time out of the classroom, working with an aide in the school's resource room. TR. 410. Mother testified that she was called into school approximately 15 times to assist with Student's behavior. TR. 804-05.

23. The District's Director of Special Education testified that Student's isolation during his 4<sup>th</sup> grade year was detrimental to his academic progress, as was the denial of recess and other time with peers as a consequence for Student's behavior. TR. 152. *See also* TR. 400; Ex. KK, at 2 (similar comment from 4<sup>th</sup> grade teacher).

### **Student's Fifth Grade Year**

24. Recognizing that things had not gone well for Student during his 4<sup>th</sup> grade year, the District resolved at the start of Student's fifth grade year to put in place a revised IEP. TR. 152-53. An initial IEP, intended to be temporary, was prepared by Student's IEP team on August 4, 2011, just before the start of school. Ex. KK, at 21. Although noting Student's serious behavioral issues and social skills deficits in the 4<sup>th</sup> grade, the August, 2011, IEP continued to include a "functional performance" goal identical to that included in Student's three previous IEP's, again focusing on Student's lack of cooperation during transitions. Ex. KK, at 11. No other behavior or social skills goals were adopted to address Student's disruptive behavior in class or running from school.

25. The August IEP did make several changes. It provided for a full time aide to work with Student in the classroom in an attempt to keep Student in the class more of the time. It provided that removal from the classroom would occur only in crisis situations, and then only until Student deescalated. Ex. KK, at 21. The IEP also provided for the school counselor to be involved both in crisis situations and in self-esteem building. This recommendation was set aside pending Parent's approval because services from the school counselor had previously been refused by Parents. Ex. KK, at 22. Parents withdrew their previous refusal of OT services and occupational therapy was reintroduced. *Id.* The special education teacher who had worked so well with Student was reassigned to Student, apparently with Parents' acquiescence. *Id.* at 23.

26. A revised IEP was adopted on September 5, 2011. This IEP noted as a concern both social difficulties and aggressive behavior. It described Student's behavior as "oppositional-defiant," suggesting an underlying emotional disturbance. Ex. NN, at 2. Student's academic level was described as varying between first and fifth grade reading, depending on "whether he wants to work." *Id.* at 6.

27. Once again, the only behavioral goal was the goal first adopted in third grade: “work to improve irritable behavior at transitions.” Ex. NN, at 11. The IEP noted that Parents refused individual counseling with the school counselor, but allowed Student to participate in the Character Counts program provided by the counselor. Ex. NN, at 23. The IEP proposed to add services from the school psychologist to work on behavior goals and anger management techniques with Student. Ex. NN, at 24. These services, however, were delayed pending Parents request to meet the psychologist before services are provided. *Id.* Finally, the IEP suggested two fall-backs if Student’s behaviors continued: 50% in the regular class and, if that does not work, shortening his instructional day. *Id.* Despite the description of Student’s behavior as “oppositional-defiant”, the IEP team did not discuss or propose an evaluation of Student to determine if the origin of his behavioral difficulties was an emotional disturbance.

28. A new BIP was also prepared for Student on September 5, 2009. Ex. OO. A complicated point system was put in place. When Student misbehaved, the primary consequence remained removal from the classroom to the resource/time out room until points were earned back. *Id.*; Ex. MM. The crisis intervention plan remained to call the Parents, to call law enforcement and to suspend Student. Ex. OO, at 3. Once again, this BIP was prepared without the benefit of the collection of data to analyze the causes of Student’s behaviors and which interventions were effective. Ex. KK, at 5; Ex. NN, at 5; TR. 242 (special education director concedes that the District has not looked at whether the response of the adults around Student is part of the problem.

29. Although Student’s fifth grade year started with some promise, within weeks Student’s behavior had again escalated. TR. 529; 546-47. The District’s IEP plan left much of the management and teaching of social and behavioral skills to Student’s educational assistant. TR. 423-25 (aide expected to tell Student his behavior is inappropriate and redirect that behavior over and

over again). The aide quickly became overwhelmed. TR. 232-33. The District then provided her with some introductory behavioral management training. Although such training is helpful, an educational assistant, even if trained in basic behavioral management techniques, cannot work effectively without oversight and assistance from psychologists and other professionals who have carefully observed Student's behaviors, determined the underlying causes and triggers, and designed and revised interventions which are effective for Student.

30. The week of September 19, 2011, there were several serious behavioral incidents involving Student. He climbed a tree in front of the school and refused to come down until the sheriff's office was called. He climbed the monkey bars on the playground, and refused to come down. Ex. YY; TR. 224-243. Finally, on September 22, 2011, after being placed in the principal's office because his Parents were not available to pick him up, he kicked the principal. Ex. XX; TR. 224-243. This incident resulted in a suspension from school and a 45-day IAES placement.

31. The hearing officer previously found that the behavior was not a manifestation of Student's identified ADHD disability, and that, therefore, the school was permitted to suspend Student as it would any other student who behaved similarly. This decision is attached hereto and incorporated herein.

#### **Failure to Reevaluate for Emotional Disturbance**

32. Student's IEP team concluded after the suspension of Student on September 23, 2011, that an evaluation for emotional disturbance is needed. Ex. RR, at 24; TR. 241-42 (special education director testified to need for psychological evaluation to determine if Student's inappropriate behavior is related to an emotional disturbance); TR. 437, 455 (special education teacher testified psychological issues are affecting Student's ability to make behavioral choices; Student needs to understand why he feels the way he does); TR. 344-45 (Superintendent testified that, based on

Student's behaviors, there might be an ED eligibility); TR. 1059 (District is planning to seek a psychological evaluation).

33. There were many warning signs that should have made the District suspect far earlier that Student was a child eligible for special education and related services as in the eligibility category of emotional disturbance. First, the District was aware of Student's early childhood trauma, prior to his adoption by Parents; of his diagnosis of PTSD; and of the ability of certain events to trigger buried memories of abuse. Ex. FF, at 2; TR. 1042-43; 935. In October, 2009, the beginning of third grade, Student's private therapist reminded the District that any physical restraint or placement in a time out space triggered PTSD symptoms for Student. Ex. CCC; TR. 789-90; 902, 920.

34. Second, the record shows that prior to third grade, Student had received school psychology services. Ex. DD. The school psychologist had consulted with District staff in the development of a behavior intervention plan for Student based on functional behavior assessment data collected at that time. The April 27, 2009, progress summary notes Student's "strongly oppositional-defiant traits", and discusses being made by school staff to address those traits. Ex. DD, at 2. Student, by all reports, did well through the 2<sup>nd</sup> grade, when the school psychologist was involved in helping classroom staff address his behavior.

35. Student's rapid and dramatic behavior changes at the beginning of 3<sup>rd</sup> grade were a clear warning sign. Student's behaviors became increasingly disturbing and aggressive from the beginning of 3<sup>rd</sup> grade through 4<sup>th</sup> grade, and finally culminating in the behaviors of the week of September 19, 2011, which resulted in Student's extended suspension from school. School staff agreed that Student's behaviors gradually took over, effectively interfering with any academic instruction. TR. 328. The incident in the bathroom was a red flag, as were the reports of Student

having nightmares about school staff. TR. 205; 811-13; 818-19; Ex. NN, at 25. At the beginning of September, 2011, the District's director of special education listed Student's disabilities as ADHD and Oppositional Defiant Disorder. Ex. NN, at 28. Even this acknowledgment of a suspected emotional disturbance did not trigger a reevaluation.

### **District's Response to Rejection of Services by Parents**

36. The record shows that Parents repeatedly rejected particular services found necessary by Student's IEP team to provide Student a FAPE, and, even more frequently, objected to the provision of services to Student by a particular staff member. TR. 382, 459 (Parents requested that a very competent special education teacher who was familiar with Student's needs and worked well with Student have no more contact with Student); TR. 199-200 (Parents rejected school counseling services); TR. 203-04; 807, Ex. II (Parents rejected OT services in 4<sup>th</sup> grade because Student objected to the particular staff member providing the service); Ex. NN, at 2, 23; TR. 183-85 (recommendation for school counselor working on social skills and aggression and individual counseling rejected by Parents); TR. 155-56 (work by COTA and counselor with Student on social skills halted by Parent's rejection); TR. 199-200 (school psychologist's services rejected); TR. 277 (Parents, in September 2011, refused offer of social skills group run by school counselor); TR. 414 (Parents objected to the reading program selected by Student's special education teacher in the IAES).

37. Parents' reasons for refusing services varied. They reported sometimes that Student's private therapist had asked them to refuse particular services or staff members (in these instances, no explanation or a cursory explanation of the basis of the request was provided to the District). More commonly, they mentioned allegations by Student of abusive behavior by staff members, or fear of staff members by Student. TR. 884, 885, 886, 887-88, 205 (Student having nightmares about staff members); Ex. 6. Parents believed Student's descriptions of incidents or the basis for his fear

to be literally true. TR. 884, 957-58. In no instance did the District find inappropriate behavior on the part of staff. The removal of staff was always purely in deference to the Parents' request. The hearing officer agreed with the District that Student's descriptions of misconduct by the staff were a product of Student's imagination and his misunderstanding of and inappropriate responses to commonplace statements and events.

38. The District's response (in fifth grade), when Parents refused services, was to put on the record the IEP team's decision that the services are needed, but, to honor the refusal. TR. 1026-28. It appears from the written records and testimony cited above that earlier school administrations also granted Parents' requests, exiting Student from services or, if the complaint was about a particular staff member, substituting staff, if that was possible. Often where the objection was to a professional where the District had only one qualified staff member or consultant, honoring Parents' objection to a particular staff member, as a practical matter, meant that Student did not receive the service. TR. 205-06.

39. Student was denied appropriate special education and related services which were necessary to meet Student's needs and allow him to make meaningful educational progress as a result of the District's decision to honor the Parents' requests.

#### **Student's Education in the IAES from September 23, 2011-January 16, 2011**

40. Student was provided services in an IAES after the District suspended Student from school on September 22, 2011, for misconduct. As noted above, the hearing officer, in a decision attached hereto, held that Student's misconduct was not a manifestation of Student's identified disabilities.

41. The evidence in the record on the IAES placement was sparse. What evidence there was showed that Student was being taught in all subject areas in the general curriculum, including

math, reading, language arts and social studies. TR. 467. The record also showed that he was making good progress in reading, with a goal of getting to grade level. TR. 485, 413. IAES instruction was being provided for three hours a week after school in a 1:1 setting with a qualified special education teacher who worked well with Student. TR. 437.

### **Speech and Language Therapy (SLT)**

42. Both Student's August, 2011, and his September, 2011, IEP provide for SLT for 30 minutes a week. Exs. KK, NN; TR. 144.

43. It was undisputed that the District's sole speech therapist resigned the end of October, 2011, without completing his contract term. TR. 139-41. The District promptly began a search for a replacement, but, at the time of the hearing, had not yet found someone. *Id.* By letter of November 2, 2011, the parents of students receiving SLT services, including Student's parents, were notified. TR. 142. The District has asked teachers to incorporate speech and language goals into their classes for the children affected. TR. 143. The District has committed to providing compensatory services to children who missed therapy sessions. TR. 139-43, 262-64; Ex. 19.

44. The District uses a standard amount of speech and language therapy for all students. TR. 144. Although the IDEA requires that the amount of services provided be individualized to meet Student's needs, there was no evidence in the record to show that Student needed more than 30 minutes a week. In fact, his progress toward his speech and language goals in September, 2011, was good. Ex. NN, at 12.

### **The Use of an Alternate Assessment**

45. Student's September, 2009, IEP, which determined that Student was eligible for special education services in the category of mental retardation, provided for the use of an alternate assessment in testing Student. Ex. EE, at 12; TR. 191. The selection of an alternate, rather than a

general assessment, was left in place by the IEP team when Student's eligibility was changed to OHI-ADHD following the UNM reassessment. Ex. GG, at 16,27; TR. 192.

46. Staff justified retaining the alternate assessment based on Student's significant cognitive deficits, which were confirmed by the UNM evaluation, even though that evaluation did not find Student eligible in the area of mental retardation. TR 192. As it has become clear that none of the evaluations accurately test Student's true cognitive abilities, and as his scores on the alternate assessment have improved, the IEP team is considering moving to a general assessment. TR. 430-31.

47. The evidence in the record does not support the Parents' claim that the District ignored the change in Student's eligibility to OHI and continued to treat him as though he was mentally retarded. Student's evaluations all showed a complex pattern of deficits which included intellectual deficits.

### **Remedy**

48. With the assistance of outside experts and consultants, the District is capable of providing Student a free appropriate public education. The special education, teachers and other staff who testified are well qualified. The remedy ordered by the hearing officer will ensure that Student is provided appropriate special education and related services reasonably calculated to meet his needs.

## 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.

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, for good cause shown, extensions of time for entry of the decision in this matter have been granted until January 30, 2012. This decision is timely filed on that date.

4. Parents bear 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 was filed. 20 U.S.C. § 1415(f)(3)(C) (2004). The complaint in this matter was filed on October 3, 2011. The statutory period, therefore, begins on October 3, 2009, during the fall of Student's third grade year. All of the claims addressed in this decision 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. Until March, 2010, the District identified mental retardation as Student's primary area of eligibility. Beginning in March, 2010, Student was found eligible as "Other Health Impaired", based on his ADHD symptoms and diagnosis. 34 C.F.R. § 300.8(c)(6) and (9) (2006).

7. Student's third grade IEP was prepared in September, 2009, outside of the two-year limitations period. The appropriateness of that IEP is, therefore, not before the hearing officer for review.

8. The IDEA issue in Student's third grade year after the statutory period commenced is whether the District appropriately responded to Student's escalating behavior problems. The hearing officer concludes that, because the District was waiting for the UNM independent evaluation, and then, with only a few exceptions, applied the results of that evaluation in revising Student's IEP in March, 2010, it was reasonable and appropriate for the District to wait to see how Student would respond to the services offered. Parents did not carry their burden of showing that the March 2, 2010, IEP was not reasonably calculated to enable Student to make meaningful educational progress. *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).

9. By the end of Student's third grade year, however, it was readily apparent that the approach the District was taking in Student's IEP and BIP were not succeeding in enabling Student to make meaningful educational progress. *Id.* Indeed, Student was visibly regressing in the behavioral and social skills areas and in some academic skills, as well. Adopting at the beginning of Student's fourth grade year essentially the same behavioral and academic goals for Student adopted in March, 2010, was no longer an approach reasonably calculated to lead to educational progress. *Id.* A district must respond to a student's failure to make expected progress by revising the Student's IEP to address this failure. 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 (10<sup>th</sup> Cir. 1998). In this case, the District was required to revise Student's IEP to address his escalating behavioral problems. 34 C.F.R. §

300.324(a)(1)(ii). This was not done. Student, therefore, was denied a FAPE in his 4<sup>th</sup> grade school year.

10. A district is required to reevaluate a student when there has been a substantial change in the student's educational or related service needs, as evinced by a change in academic performance, functional performance, or the student's disabling condition. 34 C.F.R. §300.303(a) (2006). The evidence in this case established that the District was required to reevaluate Student at the beginning of his fourth grade year.

11. The District's failure to provide Student psychological counseling, social skills instruction, occupational therapy, among other services the IEP team concluded were necessary to meet Student's needs, and its removal of qualified staff assigned to serve Student, at parental request, denied Student a FAPE in the spring of his third grade year and throughout his fourth grade school year. 34 C.F.R. §300.300(b)(4) (2008); *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F.Supp.2d 543, 550-51 (E. D. Va. 2008); *Letter to Wesssels*, 16 LRP 840 (OSEP 1990); *Tustin Unified Sch. Dist.*, 110 LRP 24125 (SEA CA 4/13/10) (parents cannot compel a district to use a specific psychologist); *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1159-60 (11<sup>th</sup> Cir. 2006).

12. In Student's fourth grade school year and at the beginning of his fifth grade school year, the evidence in the record establishes that Student's behavioral intervention plan and special education and related services directed to behavioral goals were not reasonably calculated to enable Student to make educational progress, and therefore, denied Student a FAPE. 20 U.S.C. §1414(d)(3)(B)(i).

13. Parents' failed to carry their burden of demonstrating by a preponderance of the evidence that Student was not provided a FAPE in the Interim Alternative Educational Setting beginning on September 23, 2011. 20 U.S.C. § 1412(a)(1) (2004); 34 C.F.R. § 300.530(d).

14. The IEP team is required to make an individualized determination based on Student's needs as to whether an alternate assessment is necessary. That decision may not be based solely on eligibility category. 20 U.S.C. §1412(a)(16); 34 C.F.R. § 300.320(a)(6). Parents' did not carry their burden of demonstrating that the IEP team's decision to use an alternate assessment for Student was inappropriate in light of the severe cognitive delays identified in Student's evaluations. Parents did establish that continuing to use an alternate assessment for Student given the abilities he has now demonstrated would be inappropriate if it is continued into the future.

15. The District stipulated that the failure to provide the speech and language services required by a Student's IEP during the first part of Student's fifth grade year constitutes a denial of a FAPE entitling Student to compensatory speech and language therapy. 34 C.F.R. § 300.323(c)(2) ("special education and related services must be "made available to the child in accordance with the child's IEP"). The speech and language therapy which has been provided to Student is appropriate to meet his needs and sufficient for him to make meaningful educational progress.

16. Student is entitled to compensatory education services. *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10<sup>th</sup> Cir. 1999). The purpose of compensatory education is to remedy the denial of FAPE. Compensatory education is an equitable remedy, and the measure of compensatory services is what is appropriate to meet Student's current needs and to address the ground lost by Student because of the denial of appropriate services. *Murphy v. Timberlane Regional School District*, 973 F.2d 13 (1<sup>st</sup> Cir. 1988).

17. Additional issues raised by Parents, such as the inclusion of a CYFD representative at Student's IEP meeting, were not raised in the Parents' complaint and will not be considered by the hearing officer. Even if this issue was properly raised, Parent has failed to establish a rational basis to believe that this procedural failure compromised Student's right to an appropriate education,

seriously hampered Parents' right to participate in the formulation process, or caused a deprivation of educational benefit. *O'Toole*, 144 F.3d at698.

## **DISCUSSION**

### **Student's Behavioral Needs**

The undisputed evidence at hearing established that the primary obstacle to Student making progress in school is his disruptive behavior. The hearing officer has found that the District's response to this behavior has resulted in the denial of a FAPE to Student during his fourth grade and the first few weeks of his fifth grade school year (prior to September 23, 2011).

Although Student's behavior problems began to escalate during his third grade year, the District's response during both third and fourth grade was to remove Student from the classroom. During this entire time period, and, indeed, up to the date of Student's behavior during the week of September 19, 2011, which resulted in a long-term suspension from school, the District never collected data, conducted observations in Student's classroom, or prepared a functional behavioral assessment to determine what triggered Student's behavior and how it might most effectively be addressed.

Although the IDEA does not require a functional behavioral assessment of Student, at least until after his suspension (such assessments are required only when a student's educational placement is changed for disciplinary reasons, 34 C.F.R. § 300.520), as a practical matter, sufficient information on a student's behavioral needs and patterns must be gathered to ensure that the behavior interventions used are appropriate. That was not done here, even though the behavior intervention plans developed by the District were not plainly not working for Student.

Student's IEP team failed to include meaningful behavioral and social goals in Student's IEP's, simply repeating each year the goal that Student improve his behavior during transitions. A

district must respond to a student's failure to make expected progress by revising the Student's IEP to address this failure. 34 C.F.R. § 300.324(b)(i) and (ii); *O'Toole*, 144 F.3d at 702. In this case, the District was required to revise Student's IEP and BIP when his behavior continued to escalate, making it apparent that the old goals and old approach were not working. 34 C.F.R. § 300.324(a)(1)(ii). This was not done. Not surprisingly, Student's behavior continued to deteriorate.

The evidence in the record to establish that the behavioral intervention plan and behavioral programming provided by the District was not reasonably calculated to enable Student to make meaningful educational progress. The District's behavior plans and behavioral goals during Student's fourth and fifth grade year were not appropriate to meet Student's needs.

Parents have also alleged that the use of suspensions from school and police intervention with Student were improper and violated the IDEA disciplinary rules. Although it is apparent from the record that Student's behavior well might not have occurred had Student's educational program been appropriate to meet his needs, this, standing alone, does not mean that the District violated any of the discipline provisions of the IDEA, 34 C.R.F. §§ 300.530-300.537. Federal IDEA regulations permit referral to law enforcement authorities where a crime has been committed by a child with a disability or where a student's conduct endangers the student or others. 34 C.F.R. § 300.535(a). 6.11.2.10 NMAC; *Alex G. v. Bd. of Trustees of Davis Joint Unified Sch. Dist.*, 387 F. Supp.2d 1119 (E.D. Cal. 2005).

Suspensions too may be used without violating the IDEA disciplinary rules. The IDEA specifically gives the District authority to suspend Student from school on the same grounds other students would be suspended, if the behavior is not a manifestation of the Student's disability. 20 U.S.C. § 1415(k)(1)(B); 34 C.F.R. § 300.530.

Although the discipline provisions of the IDEA were not violated, the need for suspension and police intervention is strong evidence that Student's educational services were not reasonably calculated to meet Student's needs. That, of course, amounts to a denial of FAPE, even if there was no violation of the disciplinary regulations. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982).

### **Parent's Rejection of Particular Services**

The IDEA provides that parents must be given "a large measure of participation at every stage of the administrative process." *Rowley*, 458 U.S. at 205-06. Courts have recognized that "[t]he core of the statute ... is the cooperative process that it establishes between parents and schools." *Schaffer v. Weast*, 546 U.S. at 53.

There is, however, a difference between parental involvement and parental consent. Although Congress clearly intended parents to be involved in decisions regarding the education of their child, this participation does not rise to the level of parental consent or parental veto power (except for the right to refuse services altogether). 34 C.F.R. §300.300(b)(4) (2008); *Fitzgerald v. Fairfax County Sch. Bd.*, 556 F.Supp.2d 543, 550-51 (E. D. Va. 2008) ("the IDEA is designed to ensure parental participation in decisions regarding their disabled child, but it does not ordinarily require parental consent such that parents may usurp or otherwise hinder a [district's] authority to educate and discipline disabled children"). If the parent objects to a particular service, the parent must use due process procedures to challenge the service or placement as inappropriate and must abide by the hearing officer's decision. *IDEA Part B Supplemental Regulations, Non-Regulatory Guidance* (2009).

With rare exceptions, the choice of a particular teacher or service provider is an administrative decision left up to the District. *Letter to Wesssels*, 16 LRP 840 (OSEP 1990); *Tustin*

*Unified Sch. Dist.*, 110 LRP 24125 (SEA CA 4/13/10) (parents cannot compel a district to use a specific psychologist); *M.T.V. v. DeKalb County Sch. Dist.*, 446 F.3d 1153, 1159-60 (11<sup>th</sup> Cir. 2006).

In this case, some of the services most needed by Student in order to make educational progress were denied him because of the objections raised by Parents to a particular service or service provider.

### **Psychological Evaluation of and Psychological Services for Student**

Student's rapidly escalating behavior difficulties, combined with Student's history of abuse in early childhood, the limited reports the District received from Student's therapist, and both Student's accusations about his special education teacher and the incident of sexualized behavior in the bathroom, should have put the District on notice by the beginning of Student's fourth grade year that it needed to reevaluate Student to determine whether he also was eligible for services as emotionally disturbed.

A district is required to reevaluate a student when there has been a substantial change in the student's educational or related service needs, as evinced by a change in academic performance, functional performance, or the student's disabling condition. 34 C.F.R. §300.303(a) (2006). In this case, rapid deterioration in Student's functional performance, the evident changes in his disabling condition, and the District's knowledge of Student's history of PTSD and oppositional-defiant behavior triggered the District's obligation to reevaluate Student. Moreover, Student's behavior strongly suggested an "emotional disturbance," defined by the IDEA to include "an inability to build or maintain satisfactory interpersonal relationships with peers and teachers" or "inappropriate types of behavior or feelings under normal circumstances" over a long period of time and to a marked degree that adversely affect a child's educational performance, descriptions which closely fit Student's behavior. 34 C.F.R. §300.8(a) (2006).

### **Provision of FAPE in the Interim Alternative Educational Setting**

As noted above, the hearing officer has determined in an interim decision (attached hereto) that Student's misconduct on September 22, 2011, was not a manifestation of his disability. The District, therefore, was permitted to discipline Student applying the school's disciplinary rules applicable to all students. The District's suspension of Student for 45 school days was, therefore, consistent with the IDEA requirements.

A district is not required to provide a child with a disability suspended for more than 10 school days for disciplinary reasons the same services in the same settings as they were receiving prior to the imposition of discipline. 71 Fed. Reg 46716 (2006). During the period of suspension, the IDEA requires that the District provide the student educational services which enable him to continue to participate in the general curriculum, although in another setting, and to progress toward meeting the goal set out in his IEP. 20 U.S.C. § 1412(a)(1) (2004); 34 C.F.R. § 300.530(d).

What little evidence was presented on the services being provided to Student in the IAES established that Student was receiving specialized instruction from a special education teacher which enabled him to make progress toward his IEP goals. The evidence showed that Student was making progress both in behavior and toward the academic goals in his IEP. Parents did not carry their burden of establishing that the educational services being provided did not enable Student to continue to participate in the general curriculum as well.

### **Remedy**

Having determined that Student was denied a FAPE, the remaining question for the hearing officer is remedy.

Appropriate relief under the IDEA includes injunctive relief designed to ensure that Student is appropriately educated going forward. The hearing officer can also provide additional services

to compensate Student for the denial of appropriate services in the past. Such relief must be designed to remedy the harm done by the denial of appropriate services and to enable Student to regain the ground lost. In determining the nature and the amount of compensatory services, 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. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005); *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10<sup>th</sup> Cir. 1999).

The denial of appropriate services here to Student to address his escalating behavioral and social problems have resulted in virtually complete exclusion from the classroom environment during Student's fourth grade year, and increasing isolation socially from his peers. The denial of appropriate services has had a significant negative impact on his academic progress as well.

Parents' counsel has emphasized the geographic isolation of the District and the difficulty in bringing in professionals who can provide additional services. The District has responded by committing to do what is necessary to obtain whatever assistance the hearing officer orders. Dr. Rowlinson, who works with a regional technical assistance program, testified that she would be available to spend significant time in the District, observing Student in the classroom and working with District staff to structure the classroom setting and to ensure that Student's BIP is individually designed to address the root causes of Student's behavioral problems. With the assistance of Dr. Rowlinson, and other qualified professionals who either already work with the District or who can be brought in for periods of time, participate by video-conferencing, or see Student in their location, an appropriate program, designed to enable Student to make progress in both functional behavior and academics, can be put in place.

Success for Student will require the District and Parents working together in Student's best interests. Although it was apparent to the hearing officer that both District staff and Parents have

Student's best interests at heart, there was plainly a lot of distrust on both sides. The hearing officer hopes that some of the misunderstandings were cleared up by the testimony at the hearing. No order can achieve the cooperation between Parents and school which will be necessary to ensure that Student makes educational progress (both of Student's evaluations recommended such cooperation). The parties must resolve to work together in Student's best interest.

Finally, the hearing officer's ruling that the District cannot simply defer to the Parents' choices of staff and services is not intended to result in the exclusion of Parents from important decisions for Student. Parents' extensive knowledge about Student and his needs and their deep caring for him must be taken into account. The District, however, must both obtain its own evaluation of Student's psychological needs so that this information is available to the IEP team. Absent some truly compelling reason based on Student's needs to modify a staffing or services decision, the District may not simply accede to a staffing or services request by Parents which result in the denial of services found to be necessary by Student's IEP team.

**IT IS HEREBY ORDERED:**

1. With the assistance of a psychologist and a professional with expertise in behavior management in school settings, the District will immediately conduct a functional behavioral assessment of Student. Both the psychologist and the expert in behavior management shall observe Student in his classroom setting, shall interview Student's teachers, Parents, and related services providers, review Student's records and evaluations, and conduct assessments to get a full picture of Student's behavior, the triggers and underlying causes of that behavior, so that interventions likely to be successful can be determined.
2. The psychologist and behavior management expert shall, in consultation with staff working with Student, prepare a BIP and measurable behavioral IEP goals for Student.

3. The District may rely on Dr. Rowlinson and the District's psychologist as the experts described above, so long as arrangements are made by the District for them to spend the significant time necessary to perform the tasks described in this order. If these professionals are not able to be available in the District for a sufficient period of time to perform the tasks set out herein, then the District shall contract with other qualified experts and ensure that they spend the necessary time in the District. The District shall consult with counsel for Parents in selecting experts.
4. Student's IEP team shall reconvene and shall revise Student's IEP to take into account the conclusions of the experts. The primary focus of the IEP will be on reintegrating Student into the classroom environment by addressing and remediating the inappropriate behaviors which get in the way of Student remaining in the classroom and which impede his academic progress.
5. The experts described above shall remain actively involved, returning to the District regularly to observe and measure Student's progress, and to make any changes necessary to ensure that Student's BIP, the classroom environment, Student's behavioral goals, and the services provided to meet those goals are successfully addressing Student's behavior. If Student is not making significant progress toward his behavioral goals, the experts shall make necessary changes to Student's behavioral program. The experts shall guide, direct, closely supervise, train Student's educational assistant, so that the interventions he or she implements are appropriate for Student and effectively assist him in meeting his behavioral goals. Any educational assistant hired or assigned to work with Student during the 2012-2013 school year shall be sent by the District to an intensive training program in behavior management during the summer so that they are prepared to work with Student.

6. The District shall conduct a psychological evaluation of Student. The District shall contract with a qualified clinical psychologist at UNM selected by the District with the approval of Parents to evaluate Student. The District shall make the arrangements for the evaluation, at no charge to Parents. The District shall ensure that the UNM psychologist (or evaluation team at UNM) is provided with a report of the observations and data on Student's behavior in school prepared by the experts described above. The District shall arrange for District staff working with Student to provide their observations of Student directly to the UNM evaluator. Finally, the District shall use video-conferencing technology to allow direct observation of Student in the classroom as part of the evaluation, unless the UNM evaluator or evaluators determine that video-conferencing would not be useful to them. Parents shall cooperate fully with this evaluation and shall share with the evaluator the information available to them about Student's history and PTSD symptoms and diagnosis. The District will pay for any travel expenses necessary for Student and Parents to obtain this evaluation. Reimbursement for Parents' travel expenses will be at the State per diem and mileage rate.
7. Student's IEP team shall again reconvene when the evaluation is completed to review Student's eligibility areas and to revise them in light of the new evaluation data. Changes in Student's goals, in the classroom structure and environment and in the provision of services to Student shall also be made at this time to take into account the new evaluation and the instructional implications included in that evaluation.
8. Student shall be provided tutoring after school and during the summer of 2012 to enable Student to catch-up on academic skills which were lost or which were not acquired during the period he was denied a FAPE. Three hours a week of after-school tutoring by a special education teacher shall be provided for the remainder of the 2011-2012 school year and

during the summer. If the IEP team determines that three hours a week after a full school day is too much for Student, then some of these hours can be added to the summer tutoring.

9. Student shall be provided with both the individual social skills training and the social skills group recommended by both the District's 2008 evaluation and the UNM evaluation.
10. The District shall provide compensatory speech and language therapy to Student to make up for the time missed.
11. Student shall participate in general education assessments.
12. All services found by Student's IEP team (with Parents' participation) to be necessary to provide Student a FAPE shall be provided by the District, even if Parent's object. Any parental objection to a team decision must be addressed in accordance with the procedural protections of the IDEA. The District will make all staffing decisions, so long as the staff selected by the District is qualified to provide the services needed by Student.

#### **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 30<sup>th</sup> DAY OF JANUARY, 2012.**

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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 first class mail 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 January 30, 2012:

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Due Process Hearing Officer