

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of  
JOE SAENZ, as parent of  
V.S., Student  
Petitioner  
v.

SILVER CONSOLIDATED SCHOOLS

Respondents

DPH #1718-20

**DECISION**

September 12, 2018

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Muriel McClelland  
Due Process Hearing Officer

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**DPH 1718-20**

**DECISION**

**STATEMENT OF PROCEDURE**

The request for due process was filed on April 19, 2018. [DPHO Exh 1] The Due Process Hearing Officer was appointed April 23, 2018. [DPHO Exh 2] Respondent for District entered her appearance by letter dated April 24, 2018. [DPHO Exh 3] Attorney for Respondent NMPED entered her Special Appearance April 24, 2018, [DPHO Exh 4] District's Response was entered May 1, 2018. [DPHO Exh 5] NMPED filed a Motion and Memorandum to Dismiss for Lack of Jurisdiction which was entered in the record on May 1, 2018. [DPHO Exh 6] A Pre-Hearing telephone conference was held on May 1, 2018 and the Pre-Hearing Order entered on May 5, 2018. [DPHO Exh 7]

Petitioner entered his Response in Opposition to the NMPED Motion to Dismiss on May 6, 2018. [DPHO Exh 8] The Due Process Hearing Officer's Decision and Order Dismissing NMPED was entered into the record on May 16, 2018. [DPHO Exh 9]

Respondent District filed a Motion for Production by Petitioners [sic] and for Issuance of Order to Produce Documents, entered herein on May 16, 2018. [DPHO Exh 10] Petitioner's Response in Opposition to LEA's Motion for Production and his Supplemental Response were entered on June 20, 2018 and June 23, 2018 respectively. [DPHO Exhs 11, 12] A requested telephone conference was held on June 22, 2018. Having reviewed the Motion and memoranda, the DPHO entered her Decision and Order Denying the Production of Documents on July 1, 2018. [DPHO Exh 13]

Respondent LEA filed a Motion for Continuance of the scheduled hearing on July

5, 2018 over Petitioner's opposition. This Motion was granted for good cause shown following a telephone conference on July 6, 2018 explaining the circumstances for the Motion. The DPH originally scheduled for July 16, 2018 and succeeding days was rescheduled for August 6-10, 2018. [DPHO Exhs 14, 15]

Petitioner's Statement of Issues and Statement of Relief Requested and Respondent's Statement of Issues were timely filed on July 2, 2018. [DPHO Exhs 16, 17, 18] Eric Rodriguez, Attorney at Law, entered his appearance on behalf of the LEA. Respondent's Disclosure of Potential Witnesses and Exhibits was timely filed on July 23, 2018. Exhibits were exchanged on that date. [DPHO Exhs 19, 20, 21] The parties stipulated to Exhibits 1-32. All other exhibits that were admitted during the course of the hearing were so marked by the DPHO in the exhibit notebooks. The Due Process Hearing commenced August 6 and continued through August 10, 2018. The transcript was delivered on August 24, 2018. Closing Arguments, Findings of Fact and Conclusions of Law were timely filed on September 4, 2018. [DPHO Exhs 22, 23, 24, 25] The Decision of the Due Process Hearing Officer was entered herein on September 12, 2018. [DPHO Exh 26]

## **ISSUES PRESENTED**

### **Petitioner's issues for determination by the DPHO are:**

1. Whether the LEA failed to provide Student with public education during the statutory period and continuing;
2. Whether the LEA failed to provide Student with related services of speech language therapy, occupational therapy and assistive technology in amounts and intensity sufficient to meet his needs;

3. Whether the LEA failed to write and implement an appropriate IEP with goals supported by evidence-based instruction for students with autism;

4. Whether the LEA had failed to provide appropriate instruction, based on ABA and a current ABLLS or other comparable measure, to Student to meet his needs as a student with autism;

5. Whether the LEA has failed to provide appropriate special education and services to meet Student's unique needs in functional communication, social communication, and nonconforming behaviors such as refusal to engage, inability to transition and tendency to elope;

6. Whether the LEA failed to conduct a FBA or implement a BIP despite the many ways in which Student's nonconforming behaviors impeded his learning and despite his clear need for a highly structured, consistent approach to shaping behavior;

7. Whether the LEA failed to implement the November 14, 2017 IEP or the December 13, 2017 IEP addendum each and every day it made no education available to Student;

8. Whether the LEA failed to have an adequate IEP in place for Student at the beginning of the school year;

9. Whether the LEA failed to provide education which was free, instead relying on Parent to meet Student's educational needs;

10. Whether the LEA failed to provide Parent with prior written notice (PWN) that it intended to withhold education from his son and to refuse to provide special education services which failure impeded Parent's ability to seek FAPE for Student;

11. Whether Student was denied FAPE by any of the actions/inactions identified above;

12. Whether Student and Parent are entitled to equitable remedy including

compensatory education which will achieve FAPE going forward;

13. Whether the necessary remedy is available without SEA's intervention and involvement.

**Respondent's issues for determination by the DPHO are:**

1. Whether District denied Student FAPE by failing to provide educational services required by his IEP during the statutory period;

2. Whether District denied Student FAPE by failing to provide related services of speech language therapy, occupational therapy and assistive technology designed to meet Student's unique needs;

3. Whether District denied Student FAPE by failing to develop and implement an appropriate IEP with goals supported by evidence-based instruction for students with autism with Student's profile designed to meet his unique needs;

4. Whether District denied Student FAPE by failing to provide appropriate instruction, based on ABA and a current ABLLS or other comparable measure, to Student to meet his needs as a student with autism;

5. Whether District denied Student FAPE by failing to provide him with appropriate special education and services to meet Student's unique needs in functional communication, social communications and nonconforming behaviors such as refusal to engage, inability to transition and tendency to elope;

6. Whether District denied Student FAPE by failing to provide him with a FBA or implement a BIP;

7. Whether District denied Student FAPE by failing to have an appropriate IEP in place for Student at the beginning of the 2017-2018 school year;

8. Whether District denied Student FAPE by failing to provide him with appropriate education which is “free” and by allegedly relying extensively on Parent to provide supports and services in lieu of District meeting Student’s educational needs;

9. Whether Student is entitled to an equitable remedy for denial of FAPE and what that remedy should be;

10. Whether Petitioner is entitled to reimbursement for his unilateral placement of Student at Bernalillo Academy, or other private services, in light of Parent’s failure to comply with notice requirements of IDEA, as set forth in 34 CFR § 300.148(d)(1), and due to Parent’s failure as follows: to give District notice that FAPE was at issue, that Parent was rejecting the placement proposed by District, and that Parent intended to enroll Student in a private school because he was concerned about FAPE and sought to request reimbursement for private placement;

11. Whether any procedural errors impeded Student’s right to FAPE, significantly impeded Parent’s opportunity to participate in the IEP process, or caused a deprivation of educational benefits;

12. Whether the Hearing Officer lacks jurisdiction of Parent’s claims alleged discrimination;

13. Whether the Hearing Officer lacks jurisdiction over Parent’s claims arising under Section 504;

14. Whether the Hearing Officer has jurisdiction to award damages, including reimbursement for mileage, hotels, and insurance deductibles;

15. Whether the Parent’s claims are barred by the doctrines of waiver, estoppel and/or laches; and

16. Whether the Hearing Officer lacks jurisdiction over claims arising after the

date the Complaint was filed.

## **FINDINGS OF FACT**

1. Student is a nonverbal eleven-year-old entering sixth grade whose eligibility for special education services is autism. *TR IV, 880*

2. Student was diagnosed with autism as the result of an evaluation performed in September, 2009, when he was 3 years old. *TR I, 220; TR IV, 881; Exh 1*

3. Student attended schools in the LEA sporadically since the 2014-2015 school year and for short periods of time before. Student has been eligible for services in the LEA during the statutory period and continues to be eligible for special education services in the LEA. *TR I, 260, Exhs 11, 17*

4. Student is a happy, healthy child who enjoys physical movement and activity, especially outdoors, and who requires a consistent, structured, quiet environment in order to benefit from education. *TR I, 46, 139; TR IV, 881, 1016-1017*

### **2016-2017 School Year**

5. Student was placed in an self-contained cross-categorical classroom in the 2016-2017 school year with six other students of varying grade levels, five of whom were also diagnosed with autism. *TR I, 23*

6. Prior to September 26, 2016, no special education teacher had been hired for this classroom although school had been in session for over a month. M. Acuna, designated to teach this class, started in August and left in September, 2016. He was not a qualified teacher. The class was run essentially by two unqualified “paraprofessionals”/Instructional Assistants (IAs or EAs) and substitutes, until T. Feeley, a qualified special education teacher, was hired September 26, 2016. She was placed on administrative leave on February 23, 2017 for rough handling of a

student. She was replaced by E. Alvarez for the remainder of the school year; his status was as a permanent substitute. He did not have a teaching license and had no experience with special education students. *TR I, 23-25, 30-31, 40, 65, 96; TR III, 620, 624-626, 628, 631-633*

7. Student attended school on a shortened schedule suggested by Parent from 8:30 to 11:30 two days a week (reduced from 27.5 hours a week), always with Parent or with a surrogate Parent had hired. Parent volunteered to be in the classroom to keep Student on task, calm his outbursts, and prevent his elopement from the classroom. *TR I, 27, 30, 33-34, 102, 115; TR II, 351, 364-365; TR IV, 912, 921-923; Exhs 17, 18, 32, 33*

8. Before Parent was present in the classroom he was called on a frequent basis to pick Student up because of Student's classroom disruptions. The aides would leave when Parent arrived, leaving the teacher to handle the six other special needs children alone. *TR I, 72*

9. There was frequent turnover of staff in this classroom ("a revolving door" according to one witness) in the 2016-2017 school year. Student's behavior became more dysregulated with unfamiliar staff. A BIP was not included in his IEPs of August 15, 2016, and October 20, 2016. *TR II, 337, 403-404, 461; Exhs 17, 18*

10. Neither one of the IAs with high school education and limited classroom experience was qualified to instruct or control students in this class. B.S. testified that the students watched kid movies every day after lunch ("they enjoyed watching movies"); B.B., the other IA in the classroom, testified they watched movies once or twice a month. She did not recall much about Student stating she was primarily assigned to another student in the classroom. The IAs did not present as credible witnesses. *TR I, 90-112, 136-139*

11. The atmosphere in the classroom was chaotic. Staff needed a lot of support from other District personnel in order to control the classroom. *TR I, 137-139; TR III, 802*

12. District used an informal PEC system to communicate with Student, described as a modified picture support system. According to the Speech Language pathologist (SLP), Student's use of PEC never progressed beyond the need for hand-over-hand assistance. This witness supervised some video training in PECS AFIRM (Autism Facilitated Intervention Modules) for Student's classroom staff in the 2016-2017 school with limited or no classroom effect. *I, 271; II, 294-300, 309-316*

13. Student needed help with toileting, shelving items, completing an assignment, social interaction, communication. Student had the ability to learn and was making progress with writing letters, typing letters, and other skills such as signing, repeating words, counting to twenty. *TR I, 70-71, 266; II, 305; Exh 17*

14. For the four months when there was a special education teacher in the classroom Student showed growth in repetitive tasks including typing, opening a computer, circle time activity, independent small quiet work . He was also showing some limited progress with the use of PECS or other visual supports. *TR I, 82, 270; TR II, 410, 476, 477; Exh 18*

15. The SLP recalled Student as having severe/profound communication disorder with high needs. *TR II, 293*

16. The OT worked with Student on transitioning goals, utilizing utensils for eating, washing hands, using visual supports. Student showed some improvement in these areas. His dysregulation and elopement activity improved as well. The SLP worked together with the OT on goals in the 2016-2017 school year. Their time with Student was limited to ½ hour each every week. *TR II, 479-481, 503-504, 507-511, 513-514, 521; Exhs 17, 18, 19*

17. During the 2016-2017 school year, several related service providers in the LEA were provided ABLLS (Assessment of Basic Language and Learning Skills) training

through UNM CDD (Center for Development and Disability) to establish baselines for date collection and to assess students' skills; also training on how to set up classrooms for autistic students. R. Miller, District's head Speech/Language Pathologist (SLP) was responsible for Student's school, but her training never carried over to classroom staff. Recommendations made specifically for Student by UNM CDD observers could not be located. *TR II, 341*

18. The LEA's school psychologist, S.T., and the LEA's SLP on January 4, 2017 administered a modified ABLLS, revised profile on Student with Parent as the primary reporter. ABLLS specific guidelines were not used to assess Student. The results were shared with related service providers but not the teaching staff. There were no other evaluations except for an Occupational Therapy Evaluation completed in October 14, 2014. The REED (Re-Evaluation Eligibility Determination) report of March 25, 2015 merely copied exact wording from previous reports, as did the succeeding IEPs for Student. *TR I, 216, 220, 256; II, 331, 361, 392-393; Exhs 3, 4, 5, 9, 10, 11, 17, p. 2, 18, p. 2*

19. District referred Parent to CYFD, falsely accusing him of being an unfit parent. *TR I, 45*

20. Parent withdrew Student from school on April 11, 2017 because of the CYFD referral and the severe regression and depression Student was experiencing. *TR I, 45; TR IV, 893-898; Exh 36, p. 1*

21. Parent placed Student in Bernalillo Academy, a residential treatment facility in Albuquerque, for a period of one month starting in May, 2017 in an effort to get help for the child. This placement was paid for by Medicaid. *Exh 66*

### **2017-2018 School Year**

22. In the 2017-2018 school year District hired E.Alvarez, the permanent

substitute from the previous semester, as Student's teacher on an alternative license waiver. He was licensed as an EA. His status changed back to full-time sub when he decided not to go through the teaching licensure process. He did not have any teaching or special education credentials. In September/October, District hired E. Andazola, a qualified special education teacher who resigned in December, 2017. Mr. Alvarez replaced her again as a permanent sub for the remainder of this school year. *TR I, 253-254; TR II, 538-540, 633*

23. At District's request Student did not attend school in the fall semester of school year 2017-2018 until after the November 14, 2017 IEP meeting, and then for only eight hours a week. Again, Parent was called on a frequent basis to come pick him up. *TR II, 555; TR III, 714-715; TR IV, 930; Exh 19*

24. Parent requested another meeting which took place on December 13, 2017. At this meeting the IEP team decided that Student's placement would be homebound. The PWN stated, "Home-based therapy was discussed for the time being until we have programming and recommendation from UNM reviewed." Homebound services never took place. No teacher was then available to provide homebound services. *TR I, 249-251; TR II, 381-381, 565-569; Exh 20*

25. Parent preferred that Student be in school but agreed to homebound services after the special ed teacher, Ms. Andazola, left in December, 2017, taking a large amount of schoolroom materials with her (trashbags full), presumably including educational records and the missing UNM CDD notebooks for Student. Parent did not return Student to school after this teacher left, fearing the problems in the classroom had returned. *TR III, 638-639; TR IV, 998-1000, 1003-1004, 1009*

26. In the summer of 2017 Parent engaged M. Cook of BCI (Behavior Change Institute), to provide ABA services in the home for four hours a day, 5 days a week.

Student has shown improvement with this 1:1 therapy he has been receiving. *TR IV, 940-942, 1005, 1009, 1085*

27. These services may be discontinued with the start of the 2018-2019 school year because the BCI ABA teacher is employed elsewhere. In addition to ABA Student received services from outside providers (BCI [BCBA, RBT, social worker], Bernalillo Academy, UNM CDD). All of the above-mentioned services, as well as SLT and OT services, were paid by Medicaid, and not by the LEA. *TR II, 380; TR III, 713, 717, 941*

28. Ms. Diggs-Ruff, the LEA's Special Ed Director, testified that she made numerous attempts following the Christmas break to contact Parent to set up homebound services, but received no response from Parent. This assertion is not credible based upon Parent's history of involvement and his own testimony. *TR II, 566-567; TR III, 720-721*

29. Parent reported that there was no followup by District to commence homebound services and stated his address was the same and that he could always be reached by telephone and email. *TR IV, 1004*

30. Parent withdrew Student from school on February 11, 2017. District unilaterally disenrolled him from the LEA February 19, 2018 without notification to Parent. *TR IV, 937, 967-971, 1004; Exh 36*

31. District reported Student's attendance at 38.5 days for the period ending March

1, 2018 for purposes of funding, which was not the case. There was also a discrepancy in District's reporting in the 2016-2017 school year resulting in more funding than District was entitled to. *TR II, 581-582; TR IV, 981-983, 993; Exhs 37, 47*

32. The SLP was unaware of the UNM CDD evaluation received by District in February, 2018. Student's needs with respect to language and communication were identified as

“urgent.” Student’s CDD ABA notebooks could not be located by District. *TR II, 382-387,444;*

*Exh 7*

***Special Education Services Generally During the Statutory Period***

33. Although staff tried different strategies including a reward system to address Student’s behaviors (e.g., chewing his shirt), District never performed a Functional Behavior Assessment (FBA) on Student, despite his elopement and disruptive behaviors. A BIP (Behavior Intervention Plan) was not included in Student’s November 14, 2017 or the amended IEP of December 13, 2017, his last IEP in the LEA. *TR I, 131; II, 365; Exh 18*

34. An evaluation assessing Student’s need for assistive technology (AT) as a related service was addressed and rejected by the IEP team. District did provide Student with an iPad in the 2016-2017 school year which was employed as a learning tool. District also purchased a new iPad for Student in the 2017-2018 school with ABA apps but it was never put to use. *TR II, 302-303, 320-323, 354-355; Exh 18, p.4*

35. Staff used a “gait belt” when transitioning Student for safety concerns, contrary to state law prohibiting the use of mechanical restraints and other means to control Student’s voluntary movements. Student did not have a problem walking. The gait belt was used by the OT to restrict his movements. Parent reluctantly agreed to the use of the gait belt. *TR I, 233; II, 353, 367-368, 466-470; IV, 931*

36. Social work services were never provided by the LEA as a related service although social work services are typical for autistic students. Report cards and progress reports for Student were nonexistent. Parent was provided quarterly summaries. NMPED’s Eleven Considerations for Autism were hardly considered. *TR II, 344, 356; TR III, 730, 761, 779-782; Exhs 47, 52*

37. The SLP, R. Miller, a credible witness with many years experience in the field, opined that Student, “given his ability to attend school regularly under consistent conditions with follow through---- given the staff at hand, an unknown at this time. Would there be some measurable progress over the next two years? I see no reason why there wouldn’t be given the conditions that I just mentioned.” The witness also recommended the ABLLS program or the STARS curriculum as specially designed instruction for Student, overlapping into the functional levels of communication. She never provided ESY services in speech and language to any student in the LEA, but was aware that such services were available to students. *TR II, 387-388, 390, 414-415, 559; III, 698-701*

38. According to the OT, Student was not offered ESY because “It just didn’t seem like it would be beneficial.” *TR II, 487-488*

39. The NMPED contracted with UNM CDD to evaluate classrooms throughout the state. District, along with other LEAs in New Mexico, participated in training and assessment to greater or lesser extent with UNM CDD in conjunction with the PED New Mexico Autism Project in school years 2016-2017 and 2017-2018. *TR III, 669-684; Exh 44*

40. The Special Ed Director, Ms. Diggs-Ruff, negotiated a contract with UNM CDD on February 27, 2018 to perform a FBA on Student. A FBA was to be performed for Student between June 1, 2018 and May 31, 2019. The contract, which centers on supervising RBTs (Registered Behavior Tech) recruited from the District’s teaching and related services staff, has yet to be authorized by the LEA administration; the exiting director has been assured that this contract will be effected. *TR II, 571-572; TR III, 659-665, 687-693; Exhs 42, 43*

41. The LEA does not have a BCBA to create and direct Applied Behavioral Analysis (ABA) services to any child with autism. The Special Ed Director’s efforts to recruit

candidates from staff to be certified as BCBA's was in vain. Other efforts to obtain the services of a BCBA were also unsuccessful. To date, a BCBA was never hired by District to assist with Student's nonconforming behaviors. *TR I, 196; TR II, 571-572; TR III, 659-665, 684-685, 687-693:*

*Exhs 42, 43*

42. In the fall of 2017 Ms. Diggs-Ruff provided brief limited training on the TEACCH program, STAR curriculum and the Styer-Fitzgerald Functional Academics Training, which she stated was attended by staff who worked with Student. *TR III, 817-821*

43. At the hearing Ms. Diggs-Ruff recommended that ABA (Applied Behavior Analysis) services be provided Student, pursuant to instructions from the UNM CDD staff in their report of February, 2018, as well as an Assistive Technology evaluation. She also proposed a full day schedule for Student so that he could receive these services. *TR III, 839-841, 1001-1002; Exh H*

44. The LEA's superintendent testified that the main problem the LEA had was in finding qualified special education teachers. *TR III, 959*

45. Turnover at this LEA was frequent at all staff levels, including administrative, presenting formidable learning curves for new personnel (teacher, principals, superintendents). The present director for special education, is retiring August 31, 2018, signaling more changes. The superintendent, highly qualified in autism education and special education, often lacked authority with respect to this classroom, despite her efforts to make changes.

46. The LEA never applied to the SEA (NMPED) for additional funding through Puente para los Ninos, the SEA's high cost fund, nor did it ask for the SEA's help in any way.

The LEA administration viewed difficulties in hiring qualified staff as a local problem. *TR III*, 862-865;

*Exh 51*

## **DISCUSSION**

The facts of this case speak for themselves. The Director of Special Education for District supported the testimony of District witnesses that Student's classroom was not properly staffed and that *bona fide*, certified special education teachers were teaching for only very short periods of time during the statutory period. District's response is that it tried.

Educational assistants are not, and can never be highly qualified special education teachers. At best they are support staff. While the ratio of teacher and students at 1:7 with two aides was appropriate, that ratio anticipated a highly qualified special education teacher, not Instructional Assistants on waivers or permanent substitutes.

There was no thought given to progress or goals with respect to Student. Cutting and pasting the exact language found in previous IEPs demonstrates District's failure to identify and respond to Student's unique, individual educational needs.

It does not matter that specialized staff such as the SLP, OT and Special Ed Director received training related to the education of autistic students if this training was not absorbed by classroom personnel. Attempts to train staff were meager at best and even unsuccessful. UNM CDD intervention once a month could be helpful, but not if recommendations were not implemented by classroom staff. Attempts to remedy the shortcomings after the complaint was filed are laudatory but still smack of too little, way too late.

The LEA demonstrated its total inability to provide special education of any educational benefit to this Student, even *de minimus*. *Endrew F. v. Douglas County*, 580 U.S. \_\_\_\_;

*137 S.Ct., 988* The LEA's recruiting methods to attract qualified special education teachers need major incentives. The methods currently in force are obviously insufficient. It is the responsibility of the LEA, and if it cannot meet the challenge of finding qualified instructors in rural southwest New Mexico, then the SEA's responsibility to remedy this failure under its supervision and monitoring mandates to oversee that students are provided FAPE. Parent cannot be faulted for removing his child from a warehouse setting at best where Student experienced more regression than benefit.

## **CONCLUSIONS OF LAW**

1. The DPHO has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA 2004). *20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2004).*

2. All procedural safeguards required by IDEA and implementing regulations, and the New Mexico Special Education Regulations have been complied with.

3. The DPHO does not have jurisdiction over § 504 or § 1983 claims.

4. Extensions of time limits have been granted at the request of one or both of the parties.

5. Parent bears the burden of proof that Student was denied FAPE. *Schaefer v. Weast, 126 S. Ct. 528 (2005), 44 IDELR 150; Johnson v. Independent School Dist. No. 4 of Bixby, 921 F. 2d 1022 (10<sup>th</sup> Cir. 1990)*

6. The applicable time limit under the Statute of Limitations for IDEA actions is two years from date of filing the request for due process, in this case from April 19, 2018. Any findings or exhibits admitted with respect to information prior to that date is for historical purposes

only.

7. Eligibility of Student to receive special education and related services under IDEA as ASD (Autism Spectrum Disorder) is not at issue. *34 CFR § 300.8(a); 34 CFR § 300.8 (b)(9) and (10)*

8. Parent availed himself of the opportunity to participate in the IEP meetings once they were scheduled.

9. Parent's grievances are not barred by the doctrines of waiver, estoppel and/or laches.

10. IDEA does not contemplate or endorse the presence of a parent in the classroom in order for a child to received FAPE.

11. IEPs failed to provide appropriate specialized instruction for Student based upon NMPED's "IEP Considerations for Students with Autism Spectrum Disorders." *Exhibit 52*

12. The LEA failed to write and implement Student's IEPs with appropriate goals supported by evidence-based instruction for students with autism.

13. SLT and OT services at the combined total of 45 minutes to one hour per week were not sufficient to meet Student's individual needs. District failed to provide a social worker for Student. District failed to perform an Assistive Technology evaluation although the need for one was apparent. District failed to refer Student for ESY services although both instructors and Parent were fully aware of his regression.

14. The LEA does not have a BCBA on site to create and direct ABA services to any child with autism in the District, including Student.

15. The LEA did not provide any consistent special education teacher in Student's classroom during the statutory period and, in fact, hired unqualified substitutes and IA's without

waivers for the majority of the statutory period. Special education teachers were only present for very short periods of time in the 2016-2017 and 2017-2018 school years. Parent cannot be faulted for withdrawing Student from this classroom under these circumstances.

16. The use of a gait belt and physical restraints has been prohibited by state law.

*NMSA 22-5-4 § 12(A)(1),(B)(2),(3), (I)(2),(4)*

17. District failed to provide FAPE to Student during both the 2016-2017 and 2017-2018 school years.

18. Student did not receive even *de minimus* educational benefit while attending District's school. *Endrew F. v. Douglas County*, 580 U.S. \_\_\_, 137 S. Ct. 988 *et. seq.*

19. Student is entitled to receive compensatory education for the two school years he was denied FAPE. IDEA does not contemplate reimbursement for Parent's expenses in seeking outside services for his child.

## **ORDER**

1. The IEP dated December 13, 2017 which recommended homebound services is Student's last IEP. An updated IEP is required.

2. Student's placement is still homebound unless it can be demonstrated that a qualified certified, licensed special education teacher is in charge of the classroom at all times. The IAs in Student's classroom during the statutory period should be replaced if they haven't already been.

3. The LEA shall work with BCI and UNM CDD to provide Student a 1:1 ABA teacher in the home effective immediately. District is ultimately responsible for ensuring that Student receives 1:1 ABA instruction in the home for at least 4 hours per day.

4. The LEA Superintendent shall execute the contract with UNM CDD to provide

a FBA for Student. The LEA shall follow recommendations outlined by the UNM CDD and the BCBA performing the FBA. A BIP shall be included in Student's IEP to take effect when and if Student returns to school.

5. The IEP team shall meet to determine, based upon Student's unique educational needs, whether SLP and OT services need to be increased to provide educational benefit and where they will be provided – in the home or at the school.

6. District shall provide Student with an independent Assistive Technology evaluation and supply any and all devices recommended in the evaluation.

7. The IEP team shall consider the need for a social worker and shall provide ESY based upon the Student's documented regression. In the event District cannot provide ESY which includes a continuation of ABA instruction, Student shall receive summer services at Jump Start in Albuquerque or in Las Cruces at District's expense, including Parent's reimbursable expenses, in order to effect a summer program from which Student receives educational benefit.

8. District shall maintain accurate educational records for Student pursuant to IDEA requirements, including goals, progress reports and report cards.

9. Parent shall determine if and when Student is ready to return to school on a transitional part-time schedule and on a full-time schedule.

10. Student is entitled to one year of public education beyond the date at which Student would age out as compensatory education.

THIS DECISION IS ENTERED THIS THE 12<sup>TH</sup> DAY OF SEPTEMBER, 2018

/s/

Muriel McClelland

Due Process Hearing Officer

**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 U.S.C. § 1415(i)(2004), 34 CFR § 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.

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed  
by US mail a copy of the foregoing Decision  
on September 12, 2018 to the following persons:

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Christopher N. Ruszkowski, Secretary of Education  
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/s/ \_\_\_\_\_  
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