

ABSTRACT  
DPH 1213-27

This case centers on enforcement of a previous DPH Order issued in January, 2012 affecting the same parties. This request for due process was filed approximately one year later on January 8, 2013. The central question may be summarized: if a LEA has not complied with a previous order to the letter, does this failure automatically result in a denial of FAPE? Behind the pleadings is the desire to make the SEA liable for providing direct services in rural school districts with small school populations where locating related service providers and turnover is an ongoing challenge.

All but one of the provisions of the previous Order were performed with some minor alterations that did not affect the delivery of FAPE. All agreed (even Parents) that Student benefitted from his educational program in the 2012-1013 school year and that his behaviors, while still of serious concern, had improved. The one provision District had not complied with was that Student receive an evaluation by a clinical psychologist at UNM. There was inordinate difficulty in locating this expert, some of which was beyond the control of both District and Parents. The sticking point was the provision execution: District selects and Parents approve this selection. Then there was the question of UNM policy over which no one (including the DPHO) had authority. At the hearing, at the direction of the DPHO and over objection from Parent, an appointment with a psychologist at UNM was made some 19 month after the Order was first issued.

The SEA was dismissed from this action because of the narrow constraints of the ruling in *Chavez v. NMPED*, 621 F.3d 1275 (10<sup>th</sup> Cir. 2010)– no direct services were being provided to the LEA, therefore jurisdiction over the SEA did not vest with the DPHO. Findings with respect to NMPED monitoring and supervisory functions were made, however. While relief was requested against the NMPED (a state delivery system assuring the availability of state-employee itinerant related service providers) or, in the alternative, the LEA (order District to employ a BCBA on an open-ended contract to ensure implementation of the BIP plan), this relief could not be granted.

FAPE was provided. The Request for Due Process was dismissed with prejudice.