

NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of

Petitioners

v.

RESERVE INDEPENDENT SCHOOLS

Respondent

DPH #1213-27

DECISION

June 12, 2013

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DECISION
DPH 1213-27

DECISION

This matter coming before the due process hearing officer (DPHO) at a hearing held on April 22-25, 2013; Petitioners (hereinafter “Parents”) represented by Gail Stewart and Tara Ford, Attorneys at Law; Respondent (District) represented by Jacquelyn Archuleta Staehlin and Karen Kilgore, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

STATEMENT OF PROCEDURE

Parents filed their third request for due process on January 8, 2013. *[DPHO Exhibit 1]* The same parties were the subjects of a previous DPHO Decision entered in DPH 1112-14 on January 30, 2012. Parents in their complaint alleged the District was not performing, and was incapable of performing, the remedies ordered by the previous hearing officer. Parents also alleged that the NMPED was, or should be, responsible for providing direct services under these circumstances.

The NMPED in a special appearance challenged the jurisdiction of the hearing officer to hear claims against NMPED and moved to dismiss. *[DPHO Exhibits 5, 6]* The DPHO ordered that the NMPED be dismissed as a party based upon the Tenth Circuit ruling in *Chavez v. NMPED*, 621 F. 3d 1275 (10th Cir. 2010). *[DPHO Exhibit 10]* The DPHO did allow Parents to call NMPED witnesses for purposes of testifying as to monitoring and supervision, and as to what actions, if any, the NMPED took to assist with compliance. NMPED objected to the portion of the DPHO Order with respect to NMPED witnesses, filing a Motion for Reconsideration. *[DPHO Exhibit 13]* This

Motion was denied, in part, and granted, in part. *[DPHO Exhibit 16]* Testimony of NMPED witnesses was limited to the SEA's supervisory and monitoring responsibilities under IDEA only. *[DPHO Exhibits 16, 17]*

Statements of Issues were filed on February 8, 2013 *[DPHO Exhibits 11, 12]*; Exhibit and Witness Lists were exchanged on February 15, 2013 in anticipation of the Due Process Hearing scheduled for February 22-25, 2013 and later amended. *[DPHO Exhibits 21-27]* At District's request, and for good cause shown (medical emergency), the hearing had to be vacated and could not be reset any earlier than April 22-26, 2013 to accommodate attorney schedules. *[DPHO Exhibit 20]* The hearing took place on April 22-25, 2013.

District's oral motion for summary judgment on April 24, 2012 was summarily denied. Memoranda of law, requested findings of fact and conclusions of law were timely filed. *[DPHO Exhibits 28, 29, 30]* This decision was entered on June 12, 2013. *[DPHO Exhibit 31]*

ISSUES PRESENTED

Petitioners have identified the following issues for determination by the hearing officer:

1. Whether the LEA fully and timely complied with the order and remedy awarded by the Due Process Hearing Officer in DPH 1112-14?
2. Whether as a result of the LEA's noncompliance with the order and remedy awarded in DPH 1112-14 Student has been denied FAPE since February, 2012?
3. Whether the LEA denied Student FAPE by failing to return him to a full school day after expiration of the IAES placement in January, 2012?

4. Whether the LEA has denied Student access to the general curriculum and FAPE since February 2012 by its continued reliance on school exclusion in lieu of appropriate special education and supports?

5. Whether the LEA interfered with Parents' procedural rights to participation in the IEP process by erratic scheduling of meetings, failure to provide sufficient notice, and scheduling of meetings which ignore Parent's work schedule?

6. Whether the LEA has denied Student education in the LRE and FAPE by failing to provide necessary direct instruction and practice in social skills?

7. Whether the LEA has denied Student FAPE by failing to eradicate bullying of Student by some peers, some staff, and some school board members?

8. Whether the LEA had denied Student FAPE by its failure to have and implement an appropriate Behavior Intervention Plan (BIP)?

9. Whether the LEA has denied Student FAPE by failure to implement evidence-based instructional strategies in the areas of reading, writing, math and behavior/social skills?

10. Whether the LEA has denied Student FAPE by its failure to properly train support staff assigned to work with Student in order to meet his unique needs?

11. Whether the LEA denies Student FAPE by providing related services of speech language therapy and occupational therapy based on administrative convenience (availability of providers) rather than individualized needs of Student?

12. Whether the SEA has monitored or otherwise been involved in the LEA's efforts regarding compliance with the order and remedy in DPH 1112-14 and the facts of the SEA's involvement in denial of FAPE to Student?

13. Whether the LEA is capable of providing Student with FAPE?
14. Whether Student and Parents are entitled to equitable remedy?
15. Whether the SEA should be determined responsible for ensuring delivery of FAPE to Student in this LEA through implementation of 20 U.S.C. § 1413(g) or some other mechanism?

Respondent has submitted to following issues to be determined by the DPHO:

1. Whether Parents cooperated with District in carrying out orders in scheduling and/or attending the independent evaluations for Student?
2. Whether Parents cooperated with District in complying with the order in DPH 1112-14?
3. Whether Parents continue to interfere with District's efforts to provide Student with FAPE?

FINDINGS OF FACT

General Findings

1. Student is an eleven-year old 6th grade student attending enrolled in a regular education class with eight other students. *II, 641; III, 970*
2. The LEA is a rural school district with approximately 166 Students in the District, total. The school is on a four-day schedule. *I, 19, 58*
3. A due process hearing on November, 2011 resulted in a decision issued on January 30, 2012 finding the LEA to have violated FAPE with respect to Student and resulting in an Order enumerating specific remedies to be followed by District (hereinafter "Order"). *Exh. 1, p.21*

4. Student was identified as eligible for special education services by Dr. Molina at the third year re-evaluation conducted in the fall of 2012 due to Other Health Impaired and Learning Disability. According to Parents Student has also been diagnosed with PTSD and ADHD. *Exhs. 3, 4; I, 191*

5. As a result of the September 5, 2012 IEP, Student's schedule is for a full day in the regular education class with a two-hour pullout for special education instruction in math and reading and other pullouts are required by his IEP (OT, S/L therapy and social skills instruction, all provided by regional service providers under contract with the LEA). Student also has an educational assistant (EA) who only assists him in the classroom setting "most of the time," along with two other special education students. *Exh. 3*

6. Student was suspended in November, 2011 and placed in an IAES; the IAES placement which was to last 45 days expired in January, 2012. Student only returned to school as a full time 5th grade student in May, 2012. *Exh. 2; I, 51*

7. The IEP team (Parent included) which met on January 12, 2012 determined that Student should return to school on a gradual schedule beginning with two hours a day, increasing as his behaviors improved. Student attended school from 2-4 PM each day until May, 2012, with Parents' assent. *Exh. 2; I, 51-52*

8. Since January, 2012, Student has experienced numerous disciplinary measures as a result of his noncompliant and aggressive behaviors directed towards teachers and other students and for running away.

9. Student has not attended school since April 17, 2013 at his Parents' behest.

10. All action in this case has effectively been on hold since January 8, 2013, the date

the most recent due process hearing request was filed. *I, 131-132*

Due Process Hearing Order January 30 , 2012

11. Contested portions of the Order provided in part (paraphrased): a) District will immediately conduct a functional behavioral assessment of Student with the assistance of a psychologist and a professional with expertise in behavior management in school settings. Both shall, in consultation with staff working with Student, prepare a BIP and measurable IEP goals for Student. District may rely on, “if available,” Dr. Rowlinson, District’s then BIP specialist, and Dr. Merta, District’s then psychologist. The EA was specifically singled out for training on how to follow the behavioral plan; b) District will select, with Parents’ approval, a UNM clinical psychologist to perform an evaluation; the person selected will have been provided the above experts’ reports on student’s behaviors as observed by staff. *Exh. 1, p. 2-4; I, 50, 141*

12. Special education director, J.D, . was charged with implementation of the Order by the LEA’s prior school superintendent, since replaced in the spring of 2012. She has fourteen years experience as a special education teacher, as well as experience as an administrator . *I, 17-18, 23-24, 299-300*

13. Parents canceled the first scheduled meeting with the school psychologist in January, 2012 , the purpose of which was to explain the BIP process to Parents and to establish a method for the collection of FBA information. They also missed the second scheduled meeting in March. According the Parents, they did not want to attend a meeting until a behavioral specialist was on board and wanted to attend meetings together (not always possible because of father’s variable work schedule); according to District, Parents had previously rejected Dr. Merta as a member of the IEP team and he would not start the FBA process without their consent to his

participation. *Exhs. 1, 24, p. 3; I, 23, 31-33, 36, 38-39*

14. The school's previous contract behavior specialist, Dr. Rowlinson, resigned in January, 2012 and referred the special education director to CARE in Denver. *I, 27, 39-40*

15. The Order did not state that Student observations by the psychologist and the FBA specialist had to be conducted at the same time. *Exh. 1, p. 2; I, 35, 45-46*

16. Data collection for the FBA began as early as January, 2012, but was not particularly useful to the behavior specialist because this data reported just incidents and responses and not antecedents. *Exh. 28; I, 234-235, IV1048-1050*

17. Tutoring after school was provided by a teacher working on a special education degree (with Parents agreement) for two hours each week from March to May, 2012. District also provided tutoring during the four weeks of summer school. Parents cannot be heard to complain if they so consented. *Exhs. I, 2, 15, 17; I, 27, 51, 56, 185-190, 202, 207, 294*

18. The Order was modified at times to conform to Parents' wishes (e.g., staff, tutoring/ summer school hours). *Exhs. 31, 32; I, 187-188*

IEPs and Behavior Intervention Plan

19. Because of his schedule, the earliest the FBA specialist, Dustin Holcomb, could start was May, 2012. For two days onsite he observed Student, met with Parents, and trained staff resulting in his report dated May 14-15, 2012. He also consulted with LEA staff, Parent and grandmother via Skype on March 11, 2012 regarding a playground incident which resulted in changing Student's recess times. *Exhs. 29, 62; I 132-133; III, 728; IV, 1047.*

20. Mr. Holcomb is a Board Certified Behavior Analyst (BCBA) who utilizes applied behavior analysis (ABA) in his practice with autistic children and the development of school

behavior plans. The science of ABA looks at environmental factors to understand the causes of socially significant behavior and utilizes environmental manipulations to improve that behavior by the use of positive reinforcement and other techniques as opposed to a negative/disciplinary approach. Mr. Holcomb is a highly qualified expert and his testimony is credible. *I, 40, 42, 44; IV, 1040-1046*

21. Mr. Holcomb identified two of Student's behaviors that needed to be addressed by a BIP as noncompliance (refusing to do what teachers asked) and disruptive behavior (loud noises, leaving venues without permission including running off school grounds). Mr. Holcomb begins his analysis with a hypothesis statement about the behaviors and then attempts the least intrusive approach using ongoing feedback as the specific behavior occurs. *I, 47; IV, 1058, 1072*

22. Mr. Holcomb was also onsite in August, 2012 to provide training on positive behavioral supports and to teach replacement behaviors. He was again onsite in October, 2012. He participated in the November 14, 2012 IEP meeting and other meetings, by telephone or Skype. He was in frequent telephone contact with the special education director. Mr. Holcomb spent a total of eight days in the LEA (he was contracted for six days only in the 2012-2013 school year). More time was contemplated for the spring of 2013 but was never formalized. By September 5, 2012 District complied with that portion of the Order mandating a BIP/FBA developed by a behavioral specialist. *Exhs. 1, 3, 7, 29, 53; I, 50, 60, 68, 112, 124-128, 132-133, 175, 271-272; II, 324-325; IV, 1054, 1122-1123, 1130*

23. Mr. Holcomb's reports formed the basis for the BIP adopted by the IEP team on September 5, 2012. Mr. Holcomb and the LEA anticipated ongoing assessments. *Exh. 3, p. 9; Exh. 29, pp. 1-12*

24. A psychologist did not participate in the development of the IEP nor has one been actively involved in the BIP, contrary to the Order. Mr. Holcomb did not consult with both school psychologists for any meaningful period of time, nor did he need to in order to develop a FBA/BIP. Mr. Holcomb did not require the BIP to be changed following the psychological evaluation performed by Dr. Molina in the fall of 2012. *I, 68, 123; IV, 1131*

25. The BIP for the 2012-2013 school year provided that Student check in with J.D. before school started and again after school. The BIP developed and revised for Student, based upon the recommendations of the behavior specialist, emphasized positive behavior strategies utilizing “take a break”cards, punch card points and a reward system, use of swings in the playground and other preferred activities, space and time, choices, appropriate social skills teaching, modeling, role play, common language, to name a few examples. The crisis plan used primarily for noncompliant safety or run away incidents involved calling Parents to pick Student up, and, if necessary, law enforcement. *Exh. 7; I, 74-75, 86, 92, 104-109; II, 331, 395-396, 464*

26. Student’s teaching assistant as well as the P.E. teacher, classroom teacher, and special education teacher were to observe and keep behavior rating scale forms which measured progress. At Mr. Holcomb’s direction several different forms were used for tallying Student’s behavior. Behavior was tracked on a daily basis although not with consistency. *Exh. 18, p. 60; Exhs. 19, 20, 21; I, 90-93, 112, 119; II, 328-329, 336-355, 366*

27. The EA (also District’s school bus driver) received training through a CD course by Jane Bluestein but did not physically attend an intensive summer program pursuant to the Order. She did attend staff training conducted by Mr. Holcomb, but he did not guide, direct, closely supervise and train her. *II, 327-332, 355-359; IV 1114*

28. All staff involved with Student were informed of the BIP and all staff were to work on building social skills. *Exh. 18, p. 60; Exhs. 19, 20, 21; I, 90-93, 278-279; II, 524-525, 540*

29. As a result of improvement in behavior, District does not intend to use Mr. Holcomb's services after the 2012-1013 school year; if Student's behaviors change, his expertise would again be used. Mother believed staff listened to Mr. Holcomb's recommendations and that it would be in Student's interest to keep the behavioral specialist involved in Student's education in the future. Funding is an issue. *I, 113-115, 277-278; III, 941*

30. Mr. Holcomb does not believe he has been in the LEA sufficient time to ensure that the BIP is being implemented with fidelity but does not have any information that suggests the BIP is not being implemented with fidelity. Implementation is the responsibility of District. *IV, 1113, 1133-1140*

Evaluation

31. District's attempts to comply with the Order requiring District to select a UNM clinical psychologist to be approved by Parents ran into obstacles, to say the least, and as of the date of this due process hearing was still not effected. Roadblocks: 1) An expert selected by District in the spring of 2012 agreed and then declined after hearing this matter was the subject of litigation; 2) the initial UNM department contacted by District was ruled out due to conflict (the head of this department is married to one of Parents' attorneys); 3) a psychologist who had previously evaluated Student was not approved by Parents because he had no ties to UNM, contrary to statements made to the special education director. Hurdles aside, confusion abounded.

In August, 2012, District identified Dr. Andrea Sherwood, who also was previously acquainted with Student and who was available to conduct an evaluation through UNM Health

Sciences Department. Approval from Parents was not immediately forthcoming. When she was finally approved at the IEP meeting held November 14, 2012, her earliest availability at that time was in July, 2013. No appointment was made because there was confusion (due to UNM policies beyond the control of either Parents or the LEA) about who was to make the appointment and payment arrangements. This stalemate continued through the date of the due process hearing commenced on April 22, 2013. *Exhs. 8, 24, 27; Exh. 30, p. 5, Exhs. 55, ZZ; I, 152-154, 161-163, 169, 170-177, 312; III, 835-841, 845-848, 851-854, 875*

32. On April 24, 2013, at the direction of the DPHO and over father's objection --he did not know what his work schedule would be that far in advance -- an appointment was made with Dr. John King (a UNM psychologist in Dr. Sherwood's group) for August 19, 2013, the earliest availability for any specialist in that group. The remainder of the Order specifying video conferencing would have to be approved by UNM's legal department to see if can be accomplished. *I, 311; III, 855-862*

33. The Order gave Parents the approval of District's choice of evaluator, in effect, a veto power. Cooperation between District and Parents, strained to begin with, was nonexistent with respect to compliance with the portion of the Order mandating that Student be evaluated by a "UNM psychologist." *Exhs. 24, 30, 55; I, 173-177*

34. While District had submitted necessary paperwork, UNM required that Parents make the actual appointment. Parents' attorney represented that father could not commit to the suggested July, 2013 date because "he did not know his work schedule that far in advance." Father also wanted to be reimbursed for missed days of work. *I, 170-173, 183*

35. The special education director is highly qualified as both an administrator and

special education teacher; she presented as a credible witness with respect to these events. *I, 299-300*

Other Remedies Ordered in DPH 1112-14

36. Student received both tutoring and summer school instruction as compensatory education, per the Order. *Exhs. I, 31; I, 186-190*

37. Due to the unavailability of a S/L contract provider from October, 2011 to February, 2012, District increased the amount of therapy time to twice a week to compensate for this shortfall and also provided speech therapy during the summer of 2012. *Exhs. 11, 24; I, 194-198, II, 495-496, 500-503.*

38. Student's present speech pathologist has 25 years experience. She provides contract services at the LEA twice weekly for about 21 students, in both individual and group therapy sessions. Since August, 2012, she has provided individual S /L therapy to Student once a week for 30 minutes. *Exh 11; I, 194-196; II, 495-497, 500-503*

39. The contract occupational therapist (OT) has been seeing Student one hour a month since November, 2012; she first met Student in September 2012. She is at the LEA twice a month for eight hours each day. Several other OTs provided services for Student prior to this date. *Exh. 67; II, 585, 602-602*

40. Mr. Holcomb envisioned social skills instruction (involving modeling, role-playing, common language) throughout the teaching staff and related service providers. This was done for the most part. *IV, 1061-1062, 1067, 1124*

41. As ordered, Student received specific social skills instruction although not to the extent anticipated. T.C. came to the school twice monthly to assist seven students. She worked with

Student on social skills on a 1:1 basis and his regular education teacher worked on social skills in a group context. T.C. met with Student a total of five hours in the 2012-2013 school year. Student missed four ½ hour sessions because of his school absences; one session was missed by the therapist due to weather. The social worker had excellent rapport with Student. Student received social skills instruction, per the Order. *Exh. 1; I, 192-103, 284-285; IV, 1006-1007, 1013, 1023, 1037*

42. Student participated in the general assessments. *I, 294*

43. Student's IEP was revised consistent with the school psychologist's report. *Exh. 4; I, 294*

Safety, Bullying, Health Issues

44. Student's problems in P.E. were the result of Student not understanding personal space and shouting, according to the gym teacher. Student did not complain to her about bullying. *III, 995-996*

45. Parents do not let Student bring his asthma inhaler to school since several have gone missing. Although he enjoyed P.E., Student cannot participate in regular P.E. without his asthma inhaler. *Exh. 23, p. 10; II, 444, 466-467, 479; III, 890-895, 921, 989*

46. Parents report Student doesn't feel safe at school and is being bullied. Father stated that Student was pushed and grabbed by other students resulting in bruising. *I, 102-103; II, 441-445*

47. Bullying occurred in the cafeteria at breakfast and lunch times, and in the playground during recesses, but not in the 6th grade classroom. Several incidents in the cafeteria and fights in the playground during recesses may be attributed to hostile family interactions outside the school setting which spill over into the school setting. *II, 460, 483, 490-494*

48. The principal followed the BIP in the incident involving Student sitting at the 4th grade lunch table (instead of his assigned 6th grade table) by giving Student a choice and then rightfully exerting her authority as school principal responsible for the safety of all students in her charge. *II, 403-416*

49. Student locked himself in the bathroom refusing to come out and has refused to leave the cafeteria during a fire drill, both safety issues. Noncompliance involving the safety of all students correctly call for crisis intervention after Student is given a choice according to the BIP. *Exh. 34, p. 5, Exh. 70; II, 449-451; IV 1097-1098*

50. Parents most recent complaint was that the BIP was not being followed with respect to an incident in the classroom. According to father, M.H. grabbed Student's Weekly Reader out of his hands because he initially refused to follow her directions. This rendition of the facts is disputed by both the teacher and the EA present at the time. The BIP was followed. *Exh. 7, p.8, Exh. 23, p. 10, Exh.63; I, 234-235, 239-240, 252; II, 673-674, 676, 678-679; III 896-900, 938*

51. As a result of this incident, Parents removed Student from school on April 17, 2013 (six days before the hearing) because they felt that the LEA created a hostile environment for both family and Student and that Student was not safe in the school environment.

52. Student has expressed to teachers and staff on several occasions he doesn't have to do what the principal, teachers or staff including the superintendent tell him to do; his parents support this behavior. According to the behavior specialist, Student hears one thing at home and another thing at school. *Exh. 34; I, 249; II 431-432, 435-437, 546-547; IV 1090*

53. The S/L pathologist has observed that Student is not always credible and will make up something if he is angry and can't explain why. He exaggerates. He offers two

explanations when he doesn't want to do something—"I don't want to do it" or "I am angry/upset and can't think through the process." Student sometimes interacts with his peers and sometimes doesn't – it depends on the day. *II, 512-513, 529, 539, 551*

54. Student reports to mother that Students bully him by name-calling, hitting him with a ball and otherwise. When mother has reported these incidents to the principal, C..S. looked into them and responded as mother would have her respond. *III, 954-955*

55. District's superintendent has been informed of investigations by C.S. into allegations of safety and bullying. According to him, the complaints are unsubstantiated. *III, 825-826*

56. Student does not go to recess when his classmates go, and then he goes only with a few hand-picked peers. There is now more supervision at recess and a restructured recess with students released at staggered times for different age groups. *II, 458; III, 727, 951, 972-974*

Parental Participation

57. Parents' participation at meetings was sporadic and sometimes occurred without father due to his work schedule. *I, 48; III, 830*

58. District provided several dates to Parents around what they believed to be father's work schedule. District then sent notices of meetings by certified mail because Parents stated they were not receiving notices in a timely manner. *Exh. 24, p. 8; I, 48*

59. The relationship between District personnel (especially the LEA superintendent) and father have deteriorated to the point of toxicity. Mother's relationship with school staff is not much better. Accordingly to her, Student loves school; he wants to return to school, he wants the bullying to stop and he wants to be respected. *III, 821-822, 943, 945-946; IV, 1087-1088*

60. Father makes unannounced visits to the school “pretty often” because “he doesn’t see his son that much” and because he wants to advocate for him. *III, 915, 917, 924*

61. Father receives all his information about happenings at school from Student; he admits Student may distort the truth at times but that he “can tell when he’s lying.” On one occasion Student reported to father that J.D. watched him have an asthma attack and did nothing, however, J.D. was not at the school at the time. *III, 919, 922, 925*

62. Student has a cellphone which he uses frequently to call home without permission as originally agreed with Parents, usually reporting on incidents at school and requesting he be picked up. *I, 110-111; III, 747*

Role of the New Mexico Public Education Department

63. The NMPED Education Administrator, Tomas Lopez, was under the impression that according to federal regulations when a LEA “is found noncompliant with any particular issue, they do have one year to correct.” *Exhs. 53/YY; III, 740-741, 766*

64. Mr. Lopez offered assistance in the form of providing contact names to the special education director to aid her in locating a UNM psychologist, otherwise, his role in this matter was to supervise and monitor implementation of the Order. *III, 749, 756*

65. Testimony from the two NMPED witnesses (Tomas Lopez, Education Administrator, and Karen Fesdeso, Interim Special Education Director), both of whom were in contact with District staff regarding the Order, was limited to this role.

66. After one year of monitoring, Mr. Lopez declared District to be in compliance with the Order with the exception of acquiring a UNM psychological evaluation. *Exh 53/YY, p. 10; Exh. 61; I, 202; III, 732-733, 736, 763-765, 795-799*

67. Ms. Fedesco was unresponsive to the superintendent's inquiry about an alternate school setting outside of District except to suggest an IAES. This "help" did not answer the question posed, was clearly uninformed, and negligible. *III, 771-774, 795-799*

Educational Benefit

68. As a result of the September 5, 2012 IEP Student's schedule is for a full day in the regular education class with a two-hour pullout for special education instruction and other pullouts for related services. *I, 71*

69. As of October, 2012, Student missed 13 out of 39 days of school (two weeks vacation and one week because of his grandfather's death). The behavior specialist is of the opinion that absences have a negative impact on the effectiveness of a BIP. *IV, 1134, 1138*

70. According to Mr. Holcomb, although the support model he provided to District is a successful one, Student's progress towards his behavioral goals have been inconsistent; there was considerable variability in the data collected. *IV, 1113, 1133, 1139*

71. The special education director concluded that Student made "great gains," earning more points as the year went on. Student's peers are willing to interact with him, his interactions with teachers are mostly appropriate, and he self-corrects; he does not run away as much. *I, 115-116, 229-230*

72. Even though there were still behavior incidents, improvement was noted by staff across the board. *I, 229-231, 247; II, 363, 366, 379-380, 384-386, 481; IV, 1104*

73. M. H., a teacher with over 25 years experience and Student's 6th grade regular education teacher presented as a credible witness. M.H. does not have problems with Student's behavior in her class that she cannot manage because she has a very structured day with defined

expectations. She employs academic differentiation as recommended in the educational evaluation, allowing Student to engage in choice-making and task analysis. Student's behavior in the classroom has improved this school year. M.H. reports he is not as rude, speaks to her with kindness and respect, and treats his peers well. *Exh. 5; III, 973; IV, 1107-1108, 1127*

74. The EA has seen improvement; Student is not as rude, he has learned to control noises and movements, and his fleeing behaviors have diminished. He is getting along better with peers. *II, 379-380, 382, 385, 388.*

75. The S/L pathologist, a credible witness, believed that Student had a very good year and is now recommending to the IEP team and Parents that Student no longer receive S/L therapy because his language skills are good and he no longer meets the qualifications for these services. He is doing "amazing." *II, 507, 526, 534, 545*

76. The OT, even with seeing Student just nine hours per year, observed a positive benefit increase in Student's ability to choose sensory motor strategies that assisted in regulating his behavior. *Exh. 67; II, 616*

77. The social skills instructor is a licenced social worker with a master's in social work (M.S.W.) Mr. Holcomb was consulted about the social skills book she was using (Ready to Use Social Skills Lessons and Activities, Ruth Weltmann, editor), instead of the one he recommended, and concurred it would be effective for Student's one-on-one sessions. She has observed progress in Student's social skills in that he can verbalize better and make appropriate choices. *IV, 1007-1008, 1014, 1024*

78. The principal of the elementary school has observed that Student's behavior and social skills have improved since the fall semester. *II, 481-482*

79. Father concedes that Student received educational benefit in the 2012-2013 school year but believes District can do more. Mother observed educational benefit in the 2012-2013 school year in reading and math subjects and in Student's ability to stay on school grounds. Mother believes that the BIP developed by Mr. Holcomb has worked well with Student. *III, 910, 937, 941, 947, 949*

80. District provided a sufficient amount of time for Student to benefit from his educational program, even when his reduced schedule and frequent absences are taken in to consideration. *I, 286-287, 293*

81. There were fewer behavior issues as a result of the shortened day in the spring of 2012; Student at that time could not have handled a full day because his behavior impeded his learning. *I, 294*

82. Student performs at the 2nd and 3rd grade levels in language arts and math but he is showing improvement. He made both academic and behavior gains in the 2012-2013 school year as a result of his BIP. *I, 288-289; II, 384*

83. The LEA superintendent suggested to Parents and to the NMPED in a letter dated March 18, 2013 that Student may benefit more being home-schooled or in a different school setting (even one out of state), stating "[L]arger districts have more access to programs that could be beneficial, and there are also state-sponsored school settings that might offer a better learning environment for [Student]." *Exh 64; I, 304; III, 940*

84. Parents state they cannot provide adequate education for their son in a home-school setting. Father prefers that Student remain in a public school setting because of his continued need for social skills instruction. *III, 914*

85. District's superintendent (since July 1, 2012) expressed his belief that an order resulting from a due process hearing means the LEA is "supposed to follow through on that and do the best we can." The superintendent admitted that in rural New Mexico it's "hard to get the services you need on the dot." He also testified "we have to find ways to meet the IEP." According to the superintendent the LEA does not consult NMPED with a request for direct services when it has trouble locating a provider, but does consult with the SEA on licensure, financial and other areas in which they have expertise. The LEA contacts the Cooperative Education Service (CES) and the Regional Education Cooperative (REC) for assistance in looking for contract providers for related services. The LEA does not look to the NMPED to provide services. *Exh 24, p. 17; III, 702, 705-706, 709, 712, 714*

DISCUSSION

Equitable Tolling

The due process hearing was originally scheduled for February 22-25, 2013, 45 days following the filing of the complaint. This setting had to be continued until April 22, 2013 with a decision due by June 14, 2013. In the interest of fairness to all parties, this DPHO *sua sponte* amended pleadings to conform to evidence which related to matters just preceding the hearing date. Testimony and exhibits were admitted over the continuing objection of District based upon the principle of equitable tolling. *Cezar Carvajal v. Pride Industries., Inc. U.S. District Court, Southern District of California, 113 LRP 17468*

Jurisdiction and Enforcement of Previous Order

Much of what are raised as due process issues in this case centers on the Order in

DPH 1112-14. Petitioners complaint may be summarized as District's failure to comply with that Order, thereby denying Student FAPE in the 2012-2013 school year. Several remedy provisions in the previous case did fail to meet the mark as intended by the hearing officer, however, most of these failures are minor and do not affect the actual provision of FAPE.

The jurisdiction afforded a DPHO under IDEA is limited to the identification, evaluation, and educational placement of a child with a disability or the provision of FAPE. *34 CFR § 300.503*. The job of a DPHO is to determine whether FAPE was or was not provided based upon the following inquiries: were IDEA procedures followed, was the IEP designed to confer educational benefit, did student receive educational benefit in the statutory period under review. Compliance with a previous order is a part of the determination, but only to the extent that any failures in effecting the order contributed to or caused a denial of FAPE.

Student did not return to a regular school schedule until May, 2012, some three months after the 45 day IAES expired and after the issuance of the Order, The decision to have Student attend only two hours per day plus tutoring was made on January 12, 2013 by all members of the IEP team, including Parent. All agreed that Student's reentry into a full-time schedule would be dependent upon improvement in Student's behaviors. *Clyde v. Puyallup Sch. Dist., 21 IDELR 664 (9th Cir. 1994)* Only when the behavior specialist was actually in place did parties agree Student could handle a full-time schedule; Mr. Holcomb assisted with transition. Uncontroverted testimony from staff concluded that the shortened day did not impede Student's academic performance.

Student received tutoring, speech/language therapy, occupational therapy, compensatory education, summer school program, and participated in the general assessments, as ordered. Parents participated to the fullest when they, after being provided alternative dates, chose

to do so. Areas that deviated from the Order included social skills instruction, consultation between the school psychologist and the behavior specialist, training of the EA in the BIP, selection of a UNM psychologist and evaluation, and consistent adherence by District staff to the BIP. *20 U.S.C. § 1415(f)(3)(C)(2004)*. But the crucial question is: did these areas that did not follow strict adherence to the Order result in a denial of FAPE? While failure to implement a BIP or inconsistent adherence to one may result in a denial of FAPE, that is not the case here. *Jefferson County (KY) Public Schools, 43 IDELR 144 (OCR 2004); Greenwich (CT) Bd. of Educ., 54 IDELR 265 (OCR 2009); but cf. Canyons (UT) Sch. Dist., 58 IDELR 264 (OCR 2011)* [district personnel exercised reasonable judgment in following the steps in the BIP and, therefore, did not deny the student FAPE.]

Student succeeded in his academic performance despite his behavioral issues. An appropriate public education does not mean the absolute best or “potential-maximizing” education, but the basic floor of opportunity designed to provide educational benefit. *Lathrop R-II Sch. Dist. v. Gray, 611 F. 3d 419 (8th Cir. 2010); Seattle School Dist. No. 1, 82 F. 3d 1493, 1500 (9th Cir. 1996)*.

Training: Staff was trained by the behavior specialist in a satisfactory manner to ensure the BIP was followed. The exception to a rigid adherence to the BIP (wait ten minutes and ask again if Student would comply, advise Student he had a choice, etc.) were instances which involved the safety of Student and other students (in the case of the fire drill – all students).

The EA was not trained in an extensive off-site behavior program as anticipated the Order for a good reason. She did not inform the LEA until the commencement of the 2012-2013 school year in August, 2013 that she would be coming back to the school as an EA. While other means of training (attending Mr. Holcomb’s group training sessions, reviewing a CD certification

program), may not have been up to *par*, the involvement of the EA in Student's program was always under the direct supervision and monitoring of the classroom teacher and special education director to whom she reported on a regular basis. The EA's contact with Student occurred in the classroom in which Student exhibited few, if any, of his past behavior problems.

Deviations from BIP: Student exhibited disruptive behaviors in the 6th grade classroom (and the BIP was followed), but not the noncompliant, outright refusal to do what the teacher, the principal, and school superintendent told Student to do. Most noncompliant and running away behaviors occurred in the playground at recess times or in the cafeteria at breakfast and lunch time. Most, if not all, instances of the BIP not being followed by staff occurred in exigent circumstances involving other students: fire drill, sitting at teachers' table, sitting at 4th grade table. Common sense dictates that the concern and responsibility for the safety of all students trumps the BIP for an individual student. Discipline was warranted under all these circumstances, even if Student exhibited behaviors related to his disability that are subject to the manifestation determination process. Special education students are not exempt from school discipline and school disciplinary rules. *34 CFR § 300.530(e); Couture v. Board of Educ. of the Albuquerque Pub. Schs., 50 IDELR 183 (10th Cir. 2008) [Time out room appropriate when student posed a physical and emotional threat to his classmates]* Rules are important and not arbitrary. Apparently Parents prefer to pick Student up from school as opposed to in-school suspension and District has to date allowed them that alternative.

Evaluation by UNM psychologist: Events are covered by Findings, *supra*. Allowing Parents' to approve District's choice effectively gave them a veto over any choice and thwarted implementation. No specialist waits for confirmation of a work schedule before they set

appointments. Doctors offer appointment times months out beginning with their next availability, like it or not. Scheduling has nothing to do with whether the person requesting the appointment is an individual or a school district, local or distant. No one should have the expectation that an individual's days off from work has much bearing on a specialist's availability. It is also an unreasonable expectation that missed days of work should be reimbursed by District.

The evaluation was ordered because it is in Student's best interest. Both parties share blame for delays, however, the delays after November, 2012 were based for the most part on frivolous reasons resulting in the fact that no appointment made until April 24, 2013 –during the hearing-- and set then for August 19, 2013, some 19 months after the Order was entered. This is inexcusable.

SEA Involvement

SEA involvement in this case is covered by Findings and Conclusions, *supra*.

In addition to supervision and monitoring duties under IDEA, the SEA also has the responsibility to ensure that "LEA noncompliance is remedied in a timely manner." *34 CFR § 309.149*. Identification of noncompliance comes through state complaint resolutions under *34 CFR §§ 300.151 -300.153* or due process hearing decisions under *34 CFR §§ 300.511-300.515*." *Letter to Copenhaver, OSEP, October 31, 2008*. Complaints alleging a LEA's failure to implement a due process hearing decision must be resolved by the SEA. *34 CFR § 300.152(c)(3)*.

The SEA's supervisory role is not to be taken lightly. One district court analogized the failures in a SEA's supervisory role to a "lack of centralized supervision," further stating that "dereliction of this supervisory duty constitutes a violation of the Act in and for itself." "[The] fact that local agencies are not performing up to *par* or that parents are not fulfilling their duties becomes

irrelevant. It is the state's obligation to ensure that the systems it put in place are running properly and that if they are not, to correct them." *Brian Corder et al, v. Pennsylvania Department of Education and the Commonwealth of Pennsylvania*, 795 F. Supp. 1352; 18 IDELR 1099

Although some states permit suit against a SEA in the context of an IDEA due process hearing, and the state must be made a party for exhaustion purposes, these states are not in the 10th Circuit.¹

Remedies

Petitioners request remedies involving primarily the SEA, asserting that this LEA is too small and too rural to effect a comprehensive IEP involving related services and professionals who are not employees of the LEA. IDEA provides for direct services by the SEA when a LEA cannot or will not meet its responsibilities, but that is a SEA determination. 34 CFR § 300.227; 34 CFR § 300.223.

Petitioners are correct that IDEA requires fashioning of the remedy for denial of FAPE based on current evidence about "specific educational deficits resulting from ...loss of FAPE." *Reid ex rel Reid v. Dist. of Columbia*, , 401 F. 3d 516, 526 (D.C. Cir. 2005). Petitioners request equitable remedies to meet Student's needs as follows: a state delivery system assuring the availability of state-employee itinerant related service providers, including social skills instructor and BCBA professionals, commencing in the summer of 2013 to assist in Student's transition planning.

¹ See, for example, *P.W. and Patricia W.v. Delaware Valley Sch. Dist., and Pennsylvania Department of Education*, 53 IDELR 289 (2009); *G.M. v. Drycreek Joint Elementary Sch. Dist ; California Department of Educ.* 55 IDELR 281 (2011); *Gadsby v. Grasmick*, 109 F.3d 621 (4th Cir. 1997), 25 IDELR 621.

In the alternative, order District to hire Mr. Holcomb or another certified BCBA on an open-ended contract which would provide that the BCBA take all necessary steps (including hours and onsite consultations) to ensure uniform implementation of Student's BIP commencing in the 2013-2014 school year.

Petitioners assume that larger school districts in the state have service providers on staff and, to some extent, that may be the case, however, these employees are itinerant providers within the LEA, servicing a large number of students scattered among many different schools within that district.² It would be ideal if all LEAs had unlimited resources and could hire full-time therapists to work onsite but that is not the usual case. Most of the school districts in New Mexico contract out services--this LEA is not unusual in that respect. While locating related service providers and turnover is a problem for LEA's large and small throughout the state, at this point in time this is not now an SEA concern under the ruling in the *Chavez* case. *Chavez, v. NMPED, supra*. This DPHO has no choice but to follow Tenth Circuit precedent.

Other Issues

Any other issues raised in the request for due process are covered in the Findings of Fact and Conclusions of Law.

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

² Larger districts also do not have 6th grade classes with only nine students, three of whom are mainstreamed special education students, with one teacher and an aide..

Mexico Special Education Regulations, 6.31.2.13(I) NMAC.

2. The jurisdiction of a due process hearing officer is limited to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. *34 CFR § 300.503(a)(1), (2)*.

3. The DPHO has no jurisdiction over third parties (e.g., UNM) or the SEA. The SEA was dismissed from this matter by order entered February 13, 2013. *Chavez v. NMPED, supra; DPHO Exhibit 14*

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

5. At the request of District, for good cause shown, an extension of time for entry of the decision has been granted until June 14, 2013. This decision is timely filed on June 12, 2013.

6. Parents bear the burden of proof by a preponderance of the evidence. *Schaffer v. Weast, 546 U.S. 49, 58 (2005)*.

7. The statute of limitations for due process hearings under the IDEA is two years prior to the date the due process complaint was filed. The complaint in this matter was filed on January 8, 2013. The statutory period in this case is less than two years, however, beginning after January 30, 2012. *20 U.S.C. § 1415(f)(3)(C)(2004; 34 CFR § 300.507(a)(2)*.

8. Because of the long delay in setting a hearing date, based upon the principle of equitable tolling and in the interest of judicial economy, the DPHO *sua sponte* admitted evidence (over District's continuing objection) relating to issues raised in the complaint but occurring after January 8, 2013. All of the claims addressed in this decision arose within the statutory period which was extended to April 22, 2013. *34 CFR § 300.511(d); Cezar Carvajal v. Pride Industries., Inc.*

U.S. District Court, Southern District of California, 113 LRP 17468 (April 22, 2013).

9. Pleadings were amended to conform to the evidence presented.

10. At all relevant times, Student was eligible for special education and related services under the IDEA as a student with a disability. *34 CFR § 300.8(c)(6) and (9) (2006).*

11. Student's most recent IEP was developed on November 14, 2012 with Parents in attendance and the BCBA appearing by teleconference. IDEA procedures were followed.

Exhibit 4

12. The BIP developed for Student by the BCBA was successful; Student's behavior improved remarkably in the 2012-2013 school year, although there continued to be incidents involving the safety of Student and others.

13. Student by all accounts made progress in his academic program and received educational benefit in the statutory time frame.

14. Both Student's IEP and BIP were reasonably calculated to allow 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).*

15. District in concert with the behavioral expert revised Student's BIP to better address behavioral incidents as they occurred. The LEA is required to re-evaluate when there has been a substantial change in a student's educational, related service, or behavioral plan, as evidenced by a change in a Student's functional performance. *34 CFR § 300.303(a)(2006); 34 CFR § 300.324(a)(109)(ii); O'Toole v. Olathe Distr. Schs. Unified Sch. Dist. No. 233, 144 F. 3d 692, 702 (10th Cir, 1998).*

16. The evidence in the record established that Student's BIP and special education

and related services directed to behavioral goals were reasonably calculated to enable Student to make educational progress. *Rowley, supra*; *CJN v. Minneapolis Public Schools*, 323 F. 3d 630, 638 (8th Cir. 2003); *K.E. v. Independent School Dist. No. 15, No. 10-2176* (8th Cir. 2011); 20 U.S. C. § 1414(d)(3)(B)(i).

17. Parents participation in Student's IEPs and other meetings met FAPE requirements. 34 CFR § 300.501; *O'Toole v. Olathe, supra*.

18. District's actions in investigating and addressing claims of bullying and harassment were appropriate. Bullying did not interfere with Student's academic progress. *M. L. v. Federal Way School Dist.*, 394 F. 3d 634, 650 (9th Cir. 2005); *Southmoreland Sch. Dist.*, 111 LRP 50995 (SEA PA 2100); *El Paso County Sch. Dist. 3, Widefield*, 60 IDELR 117 (2012); *Clark County Sch. Dist.*, 59 IDELR 30 (2012).

19. The LEA does not have to maximize academic potential but is obliged to provide a basic floor of opportunity designed to confer educational benefit. *Rowley, op.cit.*; *A.W. By and Through N.W. v. Northwest R-1 Sch. Dist.*, 813 F. 2d 158, 163-164 (8th Cir.); *Seattle Sch. Dist.*, *supra*.

20. The failure to obtain a UNM psychological evaluation may be attributed to both District and Parents but does not result in a denial of FAPE under the facts of this case.

21. The failure to have the school psychologist consult with the behavioral expert specialist is not fatal to the provision of FAPE; the behavioral specialist did not need or want any assistance from the school psychologist in developing the FBA/BIP.

22. Any other deviations from the Order entered in DPH 1112-14 are not critical infractions and did not interfere with Student receiving educational benefit and FAPE.

23. The superintendent's suggestion that Student attend another school or be home-schooled was inappropriate and, along with his statements regarding the implementation of DPHO orders, demonstrates a serious lack of understanding of IDEA mandates.

24. DPHO orders are effective when entered. There is no one-year grace period for implementation or compliance.

25. Hearing officers do not have unbridled discretion in fashioning equitable relief. Relief must be tied to the record. *Meza v Bd. of Educ. of Portales Municipal Schools*, 56 IDELR 167 (2011).

26. Because the SEA does not provide direct services to the LEA, relief under the facts of this case is governed by the 10th Circuit decision in *Chavez v. NMPED*. *Chavez, supra*.

27. Parents failed to meet their burden of proof that the actions or inactions of District denied Student FAPE in the least restrictive environment.

28. Parents failed to carry their burden by a preponderance of the evidence that Student was not provided FAPE and did not receive educational benefit during the months he attended school on a shortened or other schedule. 20 U.S.C. § 1412(a)(1)(2004); 34 CFR § 300.530(d)

29. Parents have exhausted administrative remedies with respect to claims involving the SEA.

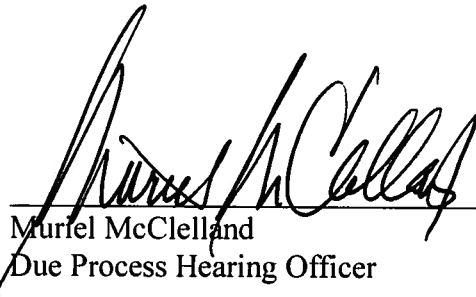
ORDER

WHEREFORE IT IS HEREBY ORDERED THAT the Request for Due Process filed herein on January 8, 2013 is dismissed with prejudice.

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 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.

THIS DECISION IS ENTERED THIS THE 12TH DAY OF JUNE, 2013


Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I emailed and mailed
by US mail a copy of the foregoing Decision
on June 12, 2013 to the following persons:

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