THE STATE OF NEW MEXICO
BEFORE THE PUBLIC EDUCATION DEPARTMENT

No. DPH 1213-05

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Against the Local Education Agency, filed with the State of New Mexico Public Education Department on August 2, 2012. *Due Process Request, August 2, 2012 (Due Process Request)*. The Petitioner's Request for Due Process is granted in-part.

Procedural Background

The Respondent LEA responded to Petitioner's Due Process Request on August 22, 2012. *[LEA's] Response to Petitioner's Request for Due Process Hearing, August 22, 2012 (Response)*.

The parties filed a Joint Statement of Issues on September 10, 2012. *Statement of Issues, September 10, 2012 (Statement of Issues)*. Issues raised in the preliminary Joint Statement of Issues, yet not subsequently presented in the parties' proposed Findings-of-Fact and Conclusions-of-Law, are considered abandoned. The parties timely filed their respective Witness and Exhibit Lists. *See Petitioner's Exhibit List, September 14, 2012; Petitioner's Witness List, September 14, 2012; Respondent's Witness List, September 19, 2012; Respondent's Exhibit List, September 19, 2012; and Respondent's Proposed Joint Exhibit List, September 19, 2012*.

On September 21, 2012, Respondent filed a Motion to Exclude Testimony of Dr. A. T., Executive Director of the [LEA's] Special Education Department. *Respondent's Motion to Exclude Testimony of Dr. A. T., Executive Director of the [LEA's] Special Education Department, September 21, 2012*. On September 24, 2012, Respondent filed a Motion to

Exclude Testimony of K.M., Teacher at C. Elementary. *Respondent's Motion to Exclude Testimony of K.M., Teacher at C. Elementary, September 24, 2012*. The motions were heard on September 24, 2012, at the commencement of the due process hearing. *See Transcript (Tr.),* pp. 8-24.

The due process hearing commenced on September 24, 2012, and concluded on September 28, 2012. *Tr., Vols. 1-5*. Both parties were well-represented by their respective trial counsel -- Ms. Adams and Ms. Kern for the Respondent, and Ms. Stewart for the Petitioner. Proposed Findings-of-Fact and Conclusions-of-Law, with written argument, were ordered due on November 30, 2012. *Tr*. at 1439. Respondent requested an extension for issuance of the hearing officer's decision, which was granted, for filing on or before January 11, 2013. *Id*.

On November 28, 2012, Respondent made an unopposed request to extend submission of proposed Findings-of-Fact and Conclusions-of-Law, with written argument. *Respondent's Letter Request to Extend, November 28, 2012*. An extension was ordered for filing of the proposed Findings-of-Fact and Conclusions-of-Law, with written argument, to on or before December 3, 2012. *Letter Order, Extension, November 28, 2012*.

The Respondent filed its proposed Findings-of-Fact, Conclusions-of-Law, and argument, on December 3, 2012. *Respondent's Findings of Fact, Conclusions of Law and Closing Argument, December 3, 2012*. The Petitioner filed her proposed Findings-of-Fact, Conclusions-of-Law and argument, on December 3, 2011, as well. *Petitioner's Requested Findings of Fact and Conclusions of Law and Petitioner's Closing Argument, December 3, 2012*.

On December 12, 2012, Respondent filed a Motion to Strike Petitioner's Undisclosed,

Post-Hearing Requests for Relief. *[LEA's] Motion to Strike Petitioner's Undisclosed, Post-Hearing Requests for Relief, December 12, 2012.* Petitioner responded in opposition to the motion to strike on December 18, 2012. *Response in Opposition to [LEA's] Motion to Strike, December 18, 2012.* On December 26, 2012, the Respondent filed its reply in support of its motion to strike. *Respondent [LEA's] Reply in Support of Motion to Strike Petitioner's Undisclosed Post-Hearing Requests for Relief, December 26, 2012.* An order granting in-part the Respondent's motion to strike will be entered simultaneously with this Memorandum Decision and Order.

This decision is due on or before January 11, 2013. *Tr. at 1439.*

Issues as Presented by the Parties

1. Whether the current 2012-2013 placement denies the Student a free, appropriate public education?

2. Whether Respondent considered Dr. Campbell's evaluation?

3. Whether the 2011-2012/2012-2013 school year special education services are reasonably calculated to provide meaningful educational benefit to the Student?

4. Whether the Respondent has provided appropriate specialized instruction in the key academic skills for reading/writing/spelling and math?

5. Whether the Student was denied a free, appropriate public education by Respondent's failure to conduct an FBA and a BIP during the 2012-2012 and 2012-2013 school years?

6. Whether a free, appropriate public education was denied the Student by reliance on the Student's relatives to intervene (on the telephone or in person) to assist in the Student's school day behavior during the 2011-2012 and 2012-2013 school years?

7. Whether a free, appropriate public education was denied the Student by failing to provide sufficient hours of 1/1 direct related services to meet the Student's unique needs in the areas of speech therapy, occupational therapy and social work?

8. Whether a free, appropriate public education was denied the Student by failing to consider and provide assistive technoloy as an aid to written communication and expression or as a tool for learning?

9. Whether a free, appropriate public education was denied the Student by failing to develop a discrete trials training program to address the Student's deficits in communication and social skills?

10. Whether a free, appropriate public education was denied the Student by use of punishment rather than positive behavior supports during the 2011-2012 and 2012-2013 school years?

11. Whether equitable relief should be awarded, as follows: (a) change of placement to a self-contained classroom; (b) increased direct 1/1 services of speech and language therapy; occupational therapy and social work; (c) assistive technology evaluation; (d) 1/1 direct instruction and practice in social skills according to Dr. Campbell's report; (e) an FBA to be conducted by Respondent's behavior consultation staff person, or Dr. Brian Lopez, followed by a BIP to include positive behavioral supports rather than punishment with the assistance from Respondent's behavior consultation staff person, or Dr. Brian Lopez; (f) an assessment of present levels of performance in reading/writing/spelling and math by Respondent's reading and math instructional specialists for a determination of the appropriateness of current instructional methods and curriculum for those core skills?

12. Whether the relief requested is consistent with the least restrictive environment?

13. Whether Petitioner has standing?

See Statement of Issues.

Legal Overview

The burden of proof rests with the party challenging the IEP. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005). *Johnson v. Independent School Dist. No. 4 of Bixby,* 921 F.2d 1022 (10th Cir. 1990). In this action, the burden rests, therefore, with the Petitioner.

Exhaustion of administrative measures counsels that parents first turn to educator professionals to remedy disputes regarding a child's education. *Cudjoe v. Independent School Dist. No. 12,* 297 F.3d 1058, 1065-66 (10th Cir. 2002)(student must first assert right to be evaluated for IDEA eligibility before making demand for hearings and procedures to address IDEA claim).

A two-fold inquiry is demanded to determine if a child has been provided with FAPE. *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 156 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the "free appropriate public education" mandated by the Act." *Murray v. Montrose County School Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). Academic progress is an important factor in determining if an IEP was reasonably calculated to provide

educational benefits. *See CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 638 (8th Cir. 2003)(persuasive, citing *Rowley*, 458 U.S. at 202). Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). Some benefit and meaningful benefit are similar, although not synonymous. *See Los Alamos Public Schools v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Sytsema v. Academy School District No. 20*, 538 F.3d 1306 (10th Cir. 2008) stating that the test is some benefit as compared with meaningful benefit). *See also Meza v. Board of Education of the Portales Municipal Schools*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide "some educational benefit").

Pursuant to 20 U.S.C. § 1415(b)(3), "a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's education." *Murray v. Montrose County School Dist. RE-1J*, 51 F.3d at 925. As a result, a "parent wishing to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency." *Id.*

Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). An IEP is to be in place at the beginning of each school year. *See* 34 C.F.R. § 300.342(a). The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.342(b)(ii). An appropriate plan considers the particular needs of the child and the child's potential, while providing meaningful learning, and must be calculated to provide educational benefit at the time it is offered and developed. *Id.* A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs,

are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray v. Montrose County School Dist. RE-1J*, 51 F.3d at 926. Parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208.

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v. Academy School Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

Among other things, when the child's behavior impedes his or her learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 CFR § 300.24(a)(2)(i); 6.31.2.11(F)(1). The New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBSs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. A student may be removed from his regular classroom if necessary to protect his or her safety or the safety of other students. *See* 20 U.S.C. § 1412(a)(5); *Rowley*, 458 U.S. at 181, n. 4.

A hearing officer's determination must be generally based on substantive grounds as to whether a child received a free, appropriate public education (FAPE). 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a FAPE only if the procedural inadequacies: (1) impeded a child's right to a FAPE, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a

FAPE; or (3) caused deprivation of educational benefit. *Id*. at (a)(2).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 C.F.R. § 300.503; 6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the District provide them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's FAPE. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Community Schools*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dept. of Mental Health and Mental Retardation v. Paul B., et al*, 88 F.3d 1466 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the District of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004). Misinformation provided to parents may prevent them from meaningfully participating in the IEP process. *Bell v. APS*, 52 IDELR 161 (D.N.M. 2008).

Related services include transportation and psychological services. *See* 34 C.F.R. § 300.24(a).

Procedural defects are insufficient to set aside an IEP unless a rational basis exists

to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, comprised the student's right to an appropriate education, or caused a deprivation of educational benefits. *O'Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of FAPE. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. APS*, 520 F.3d 1116 (10th Cir. 2008).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence County Sch. Dist. Four v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia,* 401 F. 3d 516 (D.C. Cir. 2005); *Meza v. Board of Education of the Portales Municipal Schools*, D.N.M. Nos. 10-0963, 10-0964 (2011). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza*, *id.* Indeed, even with a FAPE denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue

services and expenses, and particularly if the proposed relief would have no effect on the in the student's education. *Chavez v. New Mexico Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). An order requiring the training of district personnel or for the district to hire outside consultants may exceed hearing officer authority. *See* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act, An Update*, Journal of the National Association of Administrative Law Judiciary, 31-1, pp. 28-33 (Spring 2011).

Findings-of-Fact

1. The Student is 9 years of age. *Ex. 1.*

2. He is qualified eligible for special education services under the developmental delay disability category (DD), with DD eligibility expiring as of November 11, 2013. *Id.*, *Ex. 2.*

3. The relevant Individual Education Plans (IEPs) dated 11/23/2010, *Ex. 2*, and 01/17/2012, *Ex. 1*, find Student eligible only for developmental delay purposes.

4. The Request for Due Process was filed on August 2, 2012, *see* Appointment Letter, August 3, 2012; therefore, the material time period to consider in these proceedings is from August 3, 2010 onward. *See* 6.31.2.13(I)(18)(b) NMAC.

5. The Request for Due Process was filed by and through Student's aunt, acting as guardian. [1]

6. The relevant IEPs involved in this action are those dated 11/23/2010, *Ex. 2*, and 01/17/2012, *Ex. 1.*

[1] Although the Respondent initially attacked the standing of Student's aunt to bring this action, it subsequently withdrew its objection.

7. Student presently attends C Elementary School, as a third grade student, (2012-2013 school year), and was in the second grade during the 2011-2012 school year. *Id*.

8. The present school year began on July 23, 2012, *tr*. at 76, 274, based on a 30 hour attendance week, with a ½ hour lunch break during school days. *Tr*. at 712-713.

9. The Student's 11/23/2010 IEP commenced on 11/24/2010 and ended on 11/24/2011, *Ex. 2*, p.19, yet was in effect until January 12, 2012. *Tr*. at 165.

10. Under the 11/23/2010 IEP the Student was to receive 21.5 "segregated hours" per week of special education services in math, reading and written language in some combination of regular classrooms and segregated classrooms, with 2 "segregated hours" per month of social work, 1.25 "segregated hours" per week of speech and language services, and 1 "segregated hour" per week in occupational therapy. *Ex. 2*, p.19.

11. Additionally, the team was to consider and develop strategies, including the use of positive behavorial interventions, strategies, and supports to address the Student's behavior with the use of an FBA (functional behavorial assessment) and BIP (behavior implementation plan) to document the interventions.

12. The second grade class had five students and consisted of a special education primary classroom. *Tr*. at 77-80.

13. Student was provided 21.5 weekly hours of special education services in math, reading and written language in some combination of regular classrooms and segregated classrooms while in the five member student, special education classroom, as well as the 2 hours per month of social work, 1.25 hours per week of speech and language services, and 1 hour per week in occupational therapy from 11/24/10 and through the date a revised IEP was completed, which was on 01/17/2012.

14. In July, 2011, the special education hours during this time were increased from what was written in the IEP to 24.5 hours by Ms. BB for the purpose of academic support. *Tr*. at 169-170; 280-281; 284; 696.

15. The IEP team did not consider and develop strategies, including the use of positive behavorial interventions, strategies, and supports to address the Student's behavior through the use of an FBA and BIP to document the interventions, as required by the 11/23/2010 IEP, for the period of 11/24/2010 through 01/16/2012. This results in a violation of a free, appropriate public education.

16. Commencing on 01/17/2012, and ending on 06/30/2012 -- under the current IEP -- the Student is to receive 24.5 "segregated hours" per week of special education services in math, reading and written language in some combination of regular classrooms and segregated classrooms, with 6 "segregated hours" per semester of social work, 4 "segregated hours" per month of speech and language services, and 1 "segregated hour" per week in occupational therapy. *Ex. 1*, p.18.

17. Then, commencing on 07/01/2012 and ending on 01/17/2013, under the current IEP, the Student is to receive 21.5 "segregated hours" per week of special education services in math, reading and written language in some combination of regular classrooms and segregated classrooms, with 4 "segregated hours" per semester of social work, 4 "segregated hours" per month of speech and language services, and 1 "segregated hour" per week in occupational therapy. Ex. 1, p.19.

18. The current IEP considered the goals benchmarks in reading, as reflected in the 11/23/2010 IEP, and concluded that Student made large gains in his ability to read, as reflected in the Fall, where he could only read 1/10 words in the pre-primer level, whereas

a week before the IEP, he could read 3/10 words; as of 5/24/2012 the Student has mastered reading "cvc" words, with short "i" at 91% accuracy and word short "o" at 85% accuracy. *Ex. 1*, pp. 2-3, p.8. He has met part of his previous reading goals. *Ex. 1*, p.2.

19. The current IEP considered the goals benchmarks in math, as reflected in the 11/23/2010 IEP, and concluded that Student had met his previous math goal with a 80% accuracy to understand place-value structure under a base-ten number system. *Ex. 1*, p.3.

20. The current IEP considered the goals benchmarks in written language, as reflected in the 11/23/2010 IEP, and concluded that although the Student continues to struggle with some words in written language, *see Ex. 1*, p.3, as of 5/24/2012, he was "getting better and better" in using capitals and punctuation, that he is writing in complete sentences, and that he is spelling short "i" and short "i" words with 87% accuracy. *Id*. at p. 12.

21. The current IEP considered the goals benchmarks in social work, speech and language services, and occupational therapy, as reflected in the 11/23/2010 IEP, and concluded that although the Student's progress had been slow, he has made social work progress, *see Ex. 1*, pp. 3, 6; he has made occupational therapy progress (participation in about 70% of opportunities; significant improvement as of 5/22/2012), *see Ex. 1*, pp. 3, 13; and has made "dramatic gains" in speech intelligibility. *Ex. 1*, p. 4.

22. The Student made academic progress and received some and meaningful educational benefit commencing on 11/24/2010 and through the end of the 2011/2012 school year.

23. The 11/23/2010 IEP, *Ex. 2,* is appropriate.

24. The current IEP did not include a provision for the use of positive behavorial

interventions, strategies, and supports to address the Student's behavior with the use of an FBA and BIP to document the interventions, as did the prior (11/23/2010) IEP. *Ex. 1*, p. 1.

25. The current IEP found that the Student's behavior did not impede the Student's learning of the learning of others. *Ex. 1*, p. 1.

26. Nonetheless, around May 3, 2012, a meeting to discuss an FBA or to partially draft a BIP took place, tr. at 221, and subsequently a draft FBA was completed, yet which was never signed or implemented, which indicated the Student was non-compliant to teacher directives 2-5 times a day in the classroom and that the Student may shut down for 15 minutes as being non-responsive. *Ex. 31*.

27. The second grade teacher, Ms. BB, had her own behavior plan she was using, which did not, in her educator's role, require an FBA/BIP. *Tr*. at 100.

28. At times the Student would shut down during class; that is, put his head down and not speak for a while. *Ex. 31*; *Tr*. at 1041-1043.

29. The second grade teacher, Ms. BB, in her classroom educator's role, did not believe an FBA/BIP was appropriate, because she had her own positive behavior system in place in which the Student was asked to re-direct and he complied (these were incidence of initial non-compliance noted in the draft FBA, but after a couple of requests he would comply); similarly although Student may have shut down, it only happened a couple of times -- thus, in her educator's role, the second grade teacher did not see the behavior non-compliance as frequent enough to warrant a BIP. *Tr*. at 96; 381; 416.

30. The second grade classroom teacher, in her classroom educator's role, had assistance from co-worker's with regard to her strategies toward behavior, which were positive, and she never found the Student's behavior to be unmanageable. *Tr*. at 269.

31. Ms. BB, the second grade classroom teacher, used a class-wide star or number system, with positive motivation used as the catalyst. *Tr*. at 344-345.

32. The Student's Guardian felt the Student disrespected Ms. BB, *tr*. at 1167, and felt the Student engaged in aggressive behavior.[2] The Guardian preferred the Student's prior teacher, who was a male, with a stronger voice. *Tr*. at 1273.

33. It is an IEP team decision to decide if a BIP should be drafted, not up to the teacher or social worker. *Tr*. at 98.

34. The term "segregated hours" is not defined in either the 11/23/2010 IEP or the 01/17/2012 IEP, but it is a term located in a box defined as a "setting," which thus includes three settings – "Regular Ed Hours," "Segregated Hours," and "Rel Serv." *See Ex. 1*, pp.18, 19; *Ex. 2*, p. 19.

35. The social work is prescribed under the setting of "Rel Serv" as individual, with the speech/language and occupational therapy prescribed in both individual and group settings. *Ex. 1*, p. 18; *Ex. 2*, p. 19.

36. None the services are defined under the box for regular education hours. *Id*.

37. Despite the box phrase "segregated hours," the 21.5/24.5/21.5/ special education services in math, reading and written language are detailed in greater definition to take place in a "small group setting." *See Ex. 1*, p. 28.

38. Thus, the hours for special education services in math, reading and written language, are not to be in segregated classrooms, but rather in small group settings, with

[2] For reasons later described in this Opinion, the Guardian's credibility is suspect; thus, significant weight is given to Ms. BB's (the second grade classroom teacher's) consideration of possible behavioral factors.

the phrase "segregated hours" referring to services outside of the regular education hours.

39. Both the 11/23/2010, *Ex. 2*, and 01/17/2012, *Ex. 1*, IEPs prescribed recess, art, lunch/breakfast, library, music, and PE to be with students without disabilities, *see Ex. 1*, pp. 18, 19; *Ex. 2*, p. 20; with the 01/17/2012 IEP expanding services with non-disabled peers to include assemblies. *Ex. 1*, pp. 18, 19.

40. At the conclusion of the second grade, on May 24, 2012, Ms. BB, the second grade teacher, wrote to the Student's parent/guardian stating that the Student would be moved from her class (the primary special education, 5 student classroom) consistent with changes in her classroom environment, to Ms. H's classroom, commencing the next year, to comply with the least restrictive environment; reading, writing, and math instruction would continue in a small group setting with the second grade teacher, yet the Student will transition to the new class setting for lunch, recess, science, social studies, and all pull-outs. *Ex. 30.*

41. All of the students previously in Ms. BB's class were now placed on other class lists. *Tr.* at 116-117.

42. The IEP in place, dated 01/17/2012, did not allow for the Student's academic instruction in the general education setting for the third grade. *Ex. 1*; Tr. at 1350, 1352.

43. The IEP Team did not prepare or otherwise modify an IEP allowing a change outside of the small group setting to Ms. H's general education home room.

44. The Student was placed in Ms. H's home classroom, under the terms of the May 24, 2012 letter, for the 2012/2013 school year, which commenced on about July 23, 2012. *Tr.* at 480.

45. Ms. H's home classroom general education population during the 2012/2013

school year fluctuated by between 24 students to 28 students, and then down to 18 students. *Tr.* at 473-474.

46. Ms. H used a three strike behavorial system, plus instant strike, which was applicable to all students, which consisted of placing the offending student's name on a board, to allow a change in behavior as Strike 1; the placement of an "X" next to the offending student's name with loss of five minutes of recess and issuance of an orange slip for parent signature as Strike 2; an "X" next to the offending student's name, a call to the family, with recess spent in the office or at the fence, and a behavior contract to be signed by the offending student and his parent under Strike 3; and finally severely bad behavior (for instance, cussing, name calling, vandalism, hitting, kicking, fighting) resulted in an Instant Strike 3, where the offending student would be sent to the principal's office with immediate family notification. *Ex.* 33.

47. The Student did not exhibit problem behavior which impeded his learning or that of others during the 01/17/2012 IEP period.

48. The current IEP did not require FBE/BIP behavior plans, *see Ex. 1*; therefore, the behavior strategies developed by Ms. H and by Ms. BB were not required by the current 01/17/2012 IEP; similarly, the lack of a prescribed behavior plan for the current 01/17/2012 IEP is appropriate. *Ex. 1.*

49. Neither Ms. BB's behavior strategies nor Ms. H's behavior strategies relied on punishment of the Student, rather than positive behavioral supports during the relevant time periods. *See id.*

50. Although the Student's guardian was part of the behavior processes employed by Ms. BB and Ms. H, neither Ms. BB's behavior strategies nor Ms. H's behavior strategies

relied on the Student's relatives for intervention and management of the Student's behavior. Tr. at 399-400, 1253; *Ex. 26*.

51. While in Ms. H's home classroom, the Student's schedule included participation with his third grade peers at the start and end of the day, at certain times for grammar instruction, and for lunch, recess, and pull-outs. *Tr*. at 320-322.

52. The normal Student's educational day in the life in Ms. H.'s home classroom was reading with Ms. BB from 8:05 a.m. to 9:45 a.m. in her classroom, then general education recess to 9:55 a.m., then from 9:55 a.m. to 10:40 a.m. pull-out PE or library or science with Ms. H's general education class (one time a week for 45 minutes), then writing instruction in Ms. BB's class from 10:40 to 11:08, lunch with Ms. H's home room class until 11:40 a.m., then back to Ms. BB's room for read-aloud and response until 12:00 noon, then from noon to 1:10 the Student works in Ms. BB room for math, with Student sometimes returning to Ms. H's class for grammar (with Ms. H at the back of the room) from 1:50 p.m. to 2:00 p.m. (one to three times a week, or alternatively doing something else in Ms. BB's room), with the last ten minutes back in Ms. H's home room classroom doing homework and preparing to go home. *Tr*. at 319-321.

53. While in Ms. H's classroom, the special education services in math, reading and written language are detailed in greater definition to take place in a "small group setting." *Tr*. at 123, 187, 251-254.

54. While in Ms. H's home room classroom environment, the Student received academic instruction in the general education setting and did not receive 21.5 hours per week of special education services in math, reading and written language in a "small group setting," s*ee Ex. 1*, p. 28, as required by the 07/01/2012 – 01/17/2013 portion of the current

IEP. *Ex. 1*, p.19.

55. However, for those time periods when Student was (and is) under the small group setting instruction under the direction of Ms. BB in her classroom, the Student received specialized, individualized and appropriately delivered instruction in reading (SPIRE, research based), *tr*. at 399-412; math, *tr*. at 301-305; and writing, *tr*. at 254-256, under the school's chosen methodologies.

56. Ms. BB teaches Student using S.P.I.R.E. and Flyleaf methodologies, not the Wilson program. *Tr*. at 198-199, 228.

57. Although the Student's reading is less than optimal, *tr*. at 232-236, 249-250, he nonetheless has made academic achievement under the S.P.I.R.E. and Flyleaf methodologies. *See Exs. 1, 2*.

58. Despite the interruption in the Student's schedule due to his various displacements, the Student managed to make academic and non-academic progress under the 2012-2013 schedule – staying on task, doing his work, listening well and making friends. *Tr*. at 326-327. As noted earlier, the Student made academic and non-academic progress under his 11/23/2010 IEP and his 01/17/2012 IEP. *See Exs. 1, 2*.

59. The Student's schedule changed on September 12, 2012 – the Student began at 7:50 a.m. in Ms. H's classroom, then went to Ms. BB's classroom, then went to lunch with Ms. H's class, with science in Ms. H's class, and pull-outs in PE, health and library, and from 1:50 p.m. to 2:00 p.m. back in Ms. H's classroom.[3] *Tr*. at 324-326.

60. There has not been a preponderance of the evidence established that the

[3] Apparently this change took place due to some type of agreement reached between the parties. Tr. At 324.

Student has not made academic or non-academic progress since his change in schedule on September 12, 2012.

61. Ms. BB, as the primary educator, did not consider assistive technology as an issue for the Student. *Tr*. at 273.

62. The Student does not need pictures to explain himself. *Tr*. at 368-370.

63. The Student does not need a visual schedule and can learn a new schedule in a few days. *Tr*. at 366-368.

64. The Student does not need assistance to write. *Tr*. at 1066-1067.

65. Although the Student is slow in his copying time, *tr*. at 272, and some type of assistive technology could produce a more robust written product, *tr*. at 454, there has not been a preponderance of the evidence established that the Student was not making progress without the use of assistive technology as an aid to written communication and expression or as a tool for learning and are thus not necessary to aid the Student to benefit from special education.

66. Although the Student's primary special education teacher, *tr*. at 193-194, and speech therapist might not understand what discrete trial training is, *tr*. at 193-194, and that staff may be unclear as to what social scripts are, *tr*. at 1034-1036, there is still not a preponderance of the evidence established that the Student was denied a free, appropriate public education because a discrete training program and social scripts were not developed. As noted, the Student made academic and non-academic progress under his 11/23/2010 IEP and his 01/17/2012 IEP, *see Exs. 1, 2*, and there has not been a preponderance of the evidence established that the Student has not made academic or non-academic progress since his change in schedule on September 12, 2012.

67. The discrete training program and social scripts are preferences for a particular methodology.

68. On January 20, 2012, Dr. Richard Campbell, Ph.D., and Erica Montague, M.S., issued a Neuropsychological Evaluation Report based on a referral from the Student's pediatrician – it was guardian-initiated private evaluation. *Ex. 9*.

69. Student's Guardian provided pages of the report to the Respondent, yet refused to provide the Respondent a full copy of the report until it was provided to Respondent's counsel after litigation had begun. *Tr.* at 411, 527, 547, 587, 590, 764-772, 1082, 1085, 1143, 1398-1400, 1406-1407, 1412-1413.

70. Although the Student's Guardian testified that she had left a full copy of the report with the Respondent's staff, it is found that the Guardian's testimony is not credible, when compared with the testimony of staff members, the Guardian's impeachment by Respondent's counsel, her prior disruptive behavior at the school showing her self-serving interests, as well as the unreasonableness of her testimony when considered in light of all the other evidence in the case.

71. Respondent staff were willing to convene a meeting and/or an IEP to discuss the report, should the Guardian give them a complete copy. *Tr.* at 641, 666, 1421-1422.

72. An IEP was set meeting was set to commence in May, 2012, yet the Guardian cancelled the meeting. *Tr.* at 1404-1406.

73. Since there were only pages of the report provided to the Respondent, and since Respondent did not have the opportunity to bring the report to the IEP and commence a team meeting, then the Respondent did not have the internal opportunity in the first instance to exercise its discretion to evaluate its contents and to determine if it would

concur with the recommendations of the Student's guardian-initiated evaluation; similarly, an IEP team did not have the chance to evaluate the report.

74. On August 22, 2012, the Respondent answered the due process request and asserted that since it had received the private evaluation after the litigation process had begun that it "is not opposed to further considering the Dr. Campbell's complete evaluation." *Response*, p.5. Therefore, the issue of IEP team consideration of the report remains ripe.

75. All of Respondent's testifying administrators, educators and staff are found to be credible.

Analysis, Conclusions-of-Law, and Award

1. Jurisdiction properly lies over the parties and over the subject-matter. 34 C.F.R. § 300.507(a); 6.31.2.13(I)(1) and 6.31.2.13(I)(3) NMAC.

2. The statute of limitations period begins two years from the date the initial request for due process was filed; therefore, the material time period to consider in these proceedings is from August 3, 2010 onward. *See* 6.31.2.13(I)(18)(b) NMAC.

3. The 11/23/2010 IEP was reasonably calculated to provide the Student with some and meaningful educational benefit. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 156 (1982).

4. The Respondent did not, however, implement the FBA/BIP portion of the of the 11/23/2010 IEP, which is an essential element of the IEP, resulting in a material, substantial and significant failure, thus amounting to a violation of a free, appropriate public education. 34 C.F.R. § 300.342(a) &(b)(ii). Teachers are statutorily required to follow an IEP plan specifically approved by the IEP team. *See Couture v. Board of Educ.*

of Albuquerque Pub. Sch., 535 F. 3d 1243, 1252 (10th Cir. 2008)(42 USC § 1983 action collaterally referring to IEP). The Respondent did not follow the IEP.

5. The Respondent, through Ms. BB, modified the special education services to be provided under the 11/23/2010 IEP from 21.5 hours to 24.5 hours; yet Petitioner has not shown that it is anything more than a "de minimis failure" – the Student continued to make academic and non-academic progress as reflected in both IEPs; therefore, there was no violation of a free, appropriate public education. *See CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 638 (8th Cir. 2003)(persuasive, citing *Rowley*, 458 U.S. at 202). *See also Couture v. Board of Educ. of Albuquerque Pub. Sch.,* 535 F. 3d at 1252 (citing *Houston Indep. Sch. Dist. V. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000)).

6. The 01/17/2012 IEP was reasonably calculated to provide the Student with some and meaningful educational benefit. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 156 (1982).

7. The Respondent, however, discontinued the implementation of the 01/17/2012 IEP's special education services in math, reading and written language in a "small group setting," yet, given the Student's academic and non-academic progress during that time period, as well as his rapid, subsequent replacement into a small setting classroom environment under the direction of Ms. BB, the discontinued implementation of the IEP from July 23, 2012, through September 12, 2012, resulted in a "de minimis failure," and did not violate a free, appropriate public education. *See Couture v. Board of Educ. of Albuquerque Pub. Sch.,* 535 F. 3d at 1252 (citing *Houston Indep. Sch. Dist. V. Bobby R.*, 200 F. 3d 341, 349 (5th Cir. 2000)).

8. Petitioner did not prove by a preponderance of the evidence, unless otherwise

found and concluded, that a free, appropriate public education was denied the Student by failing to provide sufficient hours of 1/1 direct related services to meet the Student's unique needs in the areas of speech therapy, occupational therapy and social work.

9. Although positive behavior strategies were considered during the 01/17/2012 IEP period, the Petitioner did not prove, by a preponderance of the evidence, that there was problem behavior by the Student which impeded his learning or that of others during that time; therefore, positive behavioral analysis and an FBA/BIP were not required for that period encompassed under the on-going 01/17/2012 IEP, and there is no violation of a free, appropriate public education. *See* 34 CFR § 324(a)(2)(i); 34 CFR § 300.530(f); 6.31.2.11(F)(1) NMAC. Therefore, the Petitioner did not prove, by a preponderance of the evidence, that punishment was used instead of behavorial supports; thus, there is no violation of a free, appropriate public education. *Id*.

10. Similarly, the Petitioner did not prove, by a preponderance of the evidence, that Student's behavior was a problem which had to be managed by relatives' intervention to avoid impeding his learning or that of others; thus, there is no violation of a free, appropriate public education. *Id*.

11. Petitioner did not prove by a preponderance of the evidence that assistive technology for written and auditory work is necessary for the Student to benefit from special education services. *See Irving Indep. Sch. Dist. v. Tatro*, 104 S. Ct. 3371 (1984). Therefore, there is no violation of a free, appropriate public education.

12. Petitioner did not prove by a preponderance of the evidence that the educational services performed under IEPs of 11/23/2010 and 01/17/2012 were inappropriate because the discrete trials program and social scripts were not employed. *See M.M. v. Sch. Bd. Of*

Miami-Dade County, Fla., 437 F.3d 1085, 1103 (11th Cir. 2006)(appropriate, rather than best, methodology to be employed). The discrete trials program and scripts are preferences for the Petitioner's chosen methodology. *See O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998)(best methodology, not placement). *See also Sytsema v. Academy Sch. Dist. No. 20*, 538 F. 3d 1306 (10th Cir. 2008)(discrete trial setting but one of several methodologies included in IEP; methodology left to LEA).

13. Petitioner did not prove by a preponderance of the evidence that the educational reading services performed under IEPs of 11/23/2010 and 01/17/2012 employing the S.P.I.R.E.S. and Flyleaf reading programs were not reasonably calculated to allow the Student meaningful educational benefits under his intellectual potential. *See Ridley v. Sch. Dist. V. M.R.*, 680 F.3d 260 (3rd Cir. 2012)(persuasive, optimal level of peer reviewed research is not required).

14. Petitioner did not exhaust the procedures by first submitting Dr. Campbell's January 20, 2012 report to the IEP Team. *Cudjoe v. Independent School Dist. No. 12,* 297 F.3d at 1065-66 (10th Cir. 2002). "[O]ther benefits flow from requiring exhaustion of administrative remedies, such as allowing the agency to exercise its discretion and correct its own mistakes, and to develop technical issues and a factual record fully prior to court review." *Id.* at 1065. Therefore, Dr. Campbell's report is not considered.

15. Respondent, however, answered the Petitioner's request for due process and asserted that since it had received the private evaluation after the litigation process had begun that it "is not opposed to further considering the Dr. Campbell's complete evaluation." *Response*, p.5. Thus, it is ordered that the IEP Team meet and consider Dr. Campbell's January 20, 2012 report. *See* 34 CFR § 300.502(c)(1). Due to the difficulties the

parties have with one another, it is ordered that the IEP is to be "facilitated," and that within 10 days of this order that the parties notify the New Mexico Public Education Department of this provision requesting a facilitator to be appointed with due speed, with the Facilitated IEP Team to meet no later than 14 days after the assignment of the IEP facilitator. *See* 6.31.2.13(I)(8)(b) NMAC.

16. The request for Dr. Campbell's personal attendance to explain his report is denied. The report speaks for itself, just as it was submitted to speak for itself at this due process hearing.

17. The request for Dr. Campbell to direct implementation of his report and to oversee UNM staff for on-site training is denied; this decision is clear in that the report is now to be considered by the IEP Team.

18. The Petitioner did not prove by a preponderance of the evidence that Student's current 2012-2013 placement denied him a free, appropriate public education.

19. The request for compensatory education services is denied. Although a free, appropriate public education was found lacking because the FBA/BIP was not implemented under the 11/23/2010 IEP, Petitioner did not establish evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza v. Board of Education of the Portales Municipal Schools*, D.N.M. Nos. 10-0963, 10-0964 (2011). Petitioner simply requests the LEA "to provide compensatory education ... in the areas of reading, science, and speech and language therapy with incorporation of hands on learning and manipulatives for all science instruction." *Petitioners' Requested Findings of Fact and Conclusions of Law and Petitioner's Closing Argument, December 3, 2012, p. 24.* Petitioner presents no evidence in support of what amount, if any, of compensatory services

should be to compensate for the past violation due to failure to implement the FBA/BIP. Petitioner has failed to adequately catalogue services and expenses. *Chavez v. New Mexico Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010).

20. Any claims or defenses otherwise raised which are not specifically addressed herein, and due to the order and remedy, are denied.

Order

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioner's request for due process is granted in-part.

Review

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) (24) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

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MORGAN LYMAN, ESQ.
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: January 11, 2013

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by facsimile transmission only to G. Stewart, T. Ford, S. Adams, M. Kern, M. Carrico, and A. Gonzales, Esqs., and via certified mail only to the Petitioner, all on this 11th day of January, 2013.

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