

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION**

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 1011-37

FINAL DECISION

Statement of Proceedings

Parents filed a Request for Due Process Hearing ("Request") with the New Mexico Public Education Department ("NMPED") on April 27, 2011, alleging that District denied their son a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA") 20 U.S.C. §§ 1400 et seq. (which took effect July 1, 2005) and implementing state rules (6.31.2 et seq. NMAC, effective June 29, 2007 amended through December 31, 2009) and federal regulations (34 CFR Part 300, effective August 14, 2006, and amended through December 1, 2008).

District did not challenge the sufficiency of the Complaint and the parties' attempt to settle through mediation failed. No prehearing motions were submitted by either party. Nor did the parties submit a Joint Statement of Stipulated Facts as required by Paragraph I (14) of 6.31.2.13 NMAC. One or more requests to extend the deadline within which a decision must be entered, including one due to scheduling conflicts and time constraints of the DPHO, were granted and this Decision is timely filed if delivered to NMPED and the parties no later than August 19, 2011.

The due process hearing was held July 11-13, 2011. Parents were able to attend only intermittently due to work and child care issues and were represented by counsel. Student was not present. One of the District's Directors of Special Education was intermittently present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Parents were identified by numbers. District did not offer any separate exhibits. Tr. 972-973. Joint exhibits were identified by double letters. Page numbers on all exhibits refer to the pagination in the lower right-hand corner.

The DPHO, having heard the oral testimony of all witnesses, having reviewed the exhibits admitted as evidence, having considered all argument and citations of authority submitted and the parties' requested findings of fact and conclusions of law and being otherwise advised in the premises, makes the following findings of fact, conclusions of law and orders.

Statement of Issues

After extended discussion of the parties' claims and defenses at the prehearing conference, the DPHO identified the following specific issues to be determined at the due process hearing in the Summary of Prehearing Conference of record at June 21, 2011.

1. Whether the speech and language ("SL") services delivered to Student during the 2010-2011 school year were adequate to address his unique needs in communication and deliver FAPE.
2. Whether District was required to staff Student's classroom with only specially trained staff. If so, whether it did so. If not, whether the failure to do so violated the District's obligation to educate Student in the least restrictive environment.
3. Whether District was obligated to convene Student's IEP team to address the impact, if any, of alleged inappropriate touching and assess need for additional services.
4. Whether District was obligated to provide Parents with the results of its investigation. If so, whether it did. If not, whether the failure to do so impeded Parents' ability to participate in the development of their son's educational programming.
5. Whether the staffing in Student's classroom after January 2011 was adequate to provide Student with FAPE.
6. Whether District's failure to provide extended school year ("ESY") services in June deprives Student of FAPE.
7. Whether District's failure to reevaluate Student within three years of his last evaluation has deprived Student of FAPE.

8. Whether District has used restraints or other aversives. If so, whether the use denied Student FAPE. And whether Parents' ability to participate is impeded if the District fails to document use of restraint.
9. Whether the failure to identify an annual goal for toileting although toileting is a significant aspect of Student's programming amounts to anything more than a procedural error.
10. Whether District's process for the provision of assistive technology services was sufficient to confer FAPE and whether the District is required to conduct an assistive technology evaluation.

In relief, Parents seek a final decision determining that District's actions and omissions constitute substantive and procedural violations of IDEA and an Order directing the District to provide appropriate services and evaluations. District asks that the DPHO dismiss Parents' due process complaint

Summary of Essential Evidence

The testimony of 10 witnesses was received and 31 exhibits were admitted into evidence during three days of hearing. The witnesses heard were both Parents; Student's first grade teacher ("Teacher"); three of Student's educational assistants ("EA"); one of Student's speech-language pathologists ("SLP"); the principal at Student's elementary school ("Principal"); one of District's Instructional Managers; and the District's Lead Autism Resource Teacher. The following is a summary of the evidence relevant to the decision herein found to be established by a preponderance of the evidence unless otherwise indicated. References throughout this decision to exhibits admitted into evidence at the hearing are indicated by "Ex. ____" and references to pages in the transcript of the hearing by "Tr. ____."

At the time of the due process hearing, Student was almost seven years old and attending a District administered ESY autism-specific summer program.¹ For the 2010-2011 school year, Student was enrolled in one of three autism-specific classrooms housed at one of District's elementary schools

¹ Relying on an evaluation conducted by the University of New Mexico Center for Development and Disability ("CDD") in October 2007 (Ex. HH), District convened a multidisciplinary team in April 2008 which concluded that Student was eligible for special education and related services under the category of autism. Ex. 1. Student's eligibility is undisputed.

(not Student's neighborhood school) identified as the Primary Autism-Specific Classroom ("Autism Class"). At all times relevant to this Request, Student has been enrolled in self-contained special education programs at schools administered by District and has attended ESY summer programs in 2009 and 2010. Tr. 31; Exs. AA, II and DD.

District has approximately 52 autism-specific, self-contained classrooms district-wide at all grade levels. To provide support to this network of classrooms, District maintains a district-level administrative service called the Autism Resource Team ("ART"). The Lead Resource Teacher from ART explained ART's function generally to plan and provide autism-specific training for school staff and to provide direct assistance upon referral on both a classroom and individual student basis to include observation, consultation and training. Tr. 421. ART is composed of four resource teachers, including the lead teacher, two behavior management specialists, one SLP and one diagnostician. Tr. 434. An instructional manager is in charge of the team which is part of the Special Education Department. Tr. 419-420. Each autism-specific classroom in the system has a resource teacher from ART assigned to it as the classroom's primary consultant who is responsible for visiting each of their assigned classrooms intensively over the first six weeks of the school year. Tr. 423. The Lead Resource Teacher is one of only a dozen board-certified behavior analysts in the state which means she has certified expertise in applied behavioral analysis ("ABA"), a behaviorism-based system of instruction believed to be especially effective for children with autism that employs reinforcement, conditioning and outside stimuli to modify behavior and improve and generalize skills. Tr. 198 and 425-426.

Student is described as nonverbal, exhibiting no spoken language with marked impairment in the use of compensating, nonverbal behaviors (ie. pointing, eye gaze or gestures) to communicate as well. Ex. 12, p. 3. He also presents with significant developmental delays in fine motor skills, sensory processing abilities, cognitive impression, reciprocal social interaction and symbolic or imaginative play. His gross motor skills were scattered with some skills age appropriate, such as jumping and reciprocal stair climbing, and others delayed such as kicking and throwing. His hearing, vision and oral motor skills

are believed to be within normal limits. (Ex. HH) Student is successful with some self help skills such as feeding himself with a utensil and drinking from an open cup. Parents report that Student still needs toilet training at home, however, his classroom staff report that he is able to spend most of his days at school in regular pants with minimal accidents. Parents also report that Student does not dress himself.

At the time of the due process hearing, Student had just completed first grade in a classroom of seven children with the same eligibility category staffed with a licensed special education teacher and at least two EAs, and, for parts of the year, three EAs. Tr. 39-42. Teacher employed ABA techniques to structure the classroom and both ABA and TEACCH (which stands for Treatment and Education of Autistic and Communication related handicapped CHildren) techniques for delivery of special instruction. Tr. 198-201.

Teacher was not asked to relate her education at all or her prior experience beyond her experience at this particular school, spanning three years, and with autism, specifically. She is licensed to teach special education kindergarten through 12th grade and regular education kindergarten through 8th grade with math certification. Tr. 293. Prior to her assignment to this Autism Class, she taught cross-categorical and emotionally disturbed classes. Tr. 29-31. After probably a full day of formal training from the ART, Teacher taught the pre-K autism-specific ESY program for the summer of 2009. That classroom was also staffed with two EAs that had previous experience in autism classrooms, including a District EA who was responsible for the Discrete Trial Training (“DTT”), a specific ABA method of teaching, delivered to the students that summer. Tr. 34-35.

Sometime during the Fall of 2009, District decided to split off another Autism Class with Teacher at the helm at the beginning of second semester. Tr. 31-32. In preparation, Teacher spent 30-45 minutes each day for a month observing and assisting in the existing autism class and met with that teacher for mentoring each Wednesday afternoon after the students left for early dismissal. During this time she also received individual coaching from an ART member on the delivery of DTT and practiced the technique under supervision with one of the students in that autism class. Tr. 87, 221. She received a review of the

DTT skills with an ART member at the beginning of 2010-2011 as well. Tr. 71-72. She did not receive further structured training from ART prior to launching the Autism Class but one or more ART representatives visited with her and gave her relevant books and materials. Tr. 32-33. She has also read materials and observed videos that she has researched on her own. Tr. 50, 92-93 and 213-214. Teacher also attended a series of autism workshops, totaling approximately 24 hours of training, presented by ART in January 2011. Ex. GG. And finally, Teacher was trained to the basic skills level as an instructor of the Picture Exchange Communication System ("PECS") in October 2010. Tr. 52-53.

At the beginning of the year, three EAs were assigned to Student's classroom. One of those EAs had to leave near the end of the semester for medical reasons. Another EA filled in for the remainder of first semester. There is no evidence of record regarding the training or experience of either of these first semester only EAs. The senior of the two EAs that remained in the classroom for the entire year had almost 12 years total experience working as an EA in various special education settings. This was her third year working as an EA in autism-specific classrooms. Tr. 343-345. In that capacity, she attended multiple workshops, the majority of which were specific to strategies for autism, including training related to DTT. Tr. 346-347; 384-385.

This was only her second year working as an EA for the junior of the two remaining EAs. The prior year was in a classroom with "MR" students which is assumed to refer to the category of mental retardation. Tr. 478. Prior to beginning her assignment in Student's classroom, the junior EA attended a full-day of in-service training on autism and instructional strategies. Tr. 480. She also attended one of the six-hour autism workshops offered in January 2011. Ex. GG, p. 2. Both EAs received further training and direction during meetings of all the autism-specific classrooms staff on Wednesday afternoons, the day students were regularly dismissed early. Tr. 367, 385.

A third EA was again placed in the Autism Class sometime in January 2011. She was a licensed regular education elementary school teacher who had recently resigned from a teaching position with District. Ex. 16. Although not licensed in special education, her resume from 2002 lists most of her prior

teaching experience in special education classrooms, the most recent being two years teaching developmentally delayed preschool. Ex. 16, p. 8. She had no prior experience or training in teaching autistic children prior to her placement in the Autistic Class. Tr. 672-673. She worked under the supervision of Teacher, attended at least one of the Wednesday autism class staff meetings and read some literature that was provided to her.

In mid-March 2011, this third EA was accused of inappropriately touching Student a month or so before the accusation. The District immediately placed the EA on administrative leave pending an investigation by the District's school police which was also undertaken immediately. Ex. 37; Tr. 529-530. According to the witness, the alleged touch was brief and glancing, applied while the EA was removing Student's soiled pull-up during toileting. Tr. 395. The witness did not observe any reaction from Student, saying, "I don't even think he understood. I just think that he thought that someone was changing him." Tr. 401. She and the rest of the Autism Class staff also did not observe any changes in Student's behavior following the incident. Tr. 290-292; 396. Parents began noticing a change in Student's behavior beginning about mid-January that involved him taking his pants off and wanting his bottom rubbed. The behavior apparently just as spontaneously stopped in the first week of March. Tr. 864-865 and 876-877. There is no evidence that Parents sought an IEP meeting to discuss this behavior observed only at home or the impact of the alleged inappropriate touching.

Student's Autism Class utilized a visual schedule directing the students through highly structured activities that were conducted in an organized, concrete environment with separate spaces that were set up to convey clear expectations of the activity to be conducted there. Tr. 199-200. Each morning, the students would join nondisabled peers in regular education classrooms called specials for about 30 minutes. Student's specials rotated through P. E., Music, Art, Computers and Library and he participated in each as much as possible with the assistance of his EAs and/or Teacher. Ex. DD, p. 19; Tr. 45-46, 181-183 and 266-269. He also took lunch in the cafeteria with nondisabled peers at least four days a week.

Tr. 182. Student also received the related services of occupational therapy which is not at issue in these proceedings and SL which will be discussed in more detail below. Ex. DD, p.18; Tr. 48-49.

DTT was utilized with Student to provide ABA-based instruction and data collection on one-to-one correspondence in math, recognizing his own name in reading and a behavior modification tactic. There was considerable controversy in the record about who was responsible for administering DTT to Student with the more senior EA who described at length working with Student (Tr. 347-355) and Teacher who gave conflicting testimony on the subject. Tr. 71, 75-76, 941-942 and 961-962. This controversy took on importance when it became clear that the two approaches were quite different. However, both accounts related a second adult to stand behind Student for prompting. This role in both accounts was filled by the junior EA. The credible testimony of the junior EA was that she worked only with Teacher and never prompted with the senior EA. Taking the record as a whole, the DPHO concludes that it is more likely than not that all of Student's DTT in 2010-2011 was delivered by Teacher. Ex. FF; Tr. 484-485; 941-945 and 962-963.

The CDD evaluation emphasized the "imperative" need to develop a functional communication system, specifically suggesting PECS (Ex. HH, p. 6), necessitating intensive SL intervention, throughout the report. Ex. HH, pp. 6, 17, 18 and 20. Student's IEP for the 2010-2011 school year required that Student receive one hour of SL services per week without specifying whether the service was to be individual or group therapy. Ex. DD, pp. 18 and 24. That was left to the discretion of the SLP. Tr. 145-146. SLP testified that the IEP was in error and should have called for 1.5 hours per week and that she delivered 1.5 hours throughout the year despite the IEP provision. Tr. 616-617. The annual goal set for him was to "express his wants and needs with gestures, pictures or words by improving expressive and receptive vocabulary with 70% accuracy as measured by SLP therapy logs." Ex. DD, p. 14. There was no mention of the development of a functional communication system.

District's SLP logs begin March 5, 2009, which is the spring of Student's second year of preschool. At that time, Student received 3.5 hours of SL therapy twice a week in a mixture of individual

for PECS and vocabulary training; small group of two students and group of four or more students. The log reports that Student was working on PECS Phase II but the degree of success is difficult to discern. Ex. 15, pp. 1-5. On May 11, 2009, the preschool SLP reported limited progress for both receptive (“Requires physical assistance to follow routine one-step directions”) and expressive communication (comment on Exhibit 12, pp. 6 and 11 provided detailed description of Student’s abilities). Ex. 12, pp. 1, 3, 6 and 11.

The kindergarten SLP began the year providing all of Student’s SL services in a group of more than four students for 30 minutes, three times per week. The activity consistently described matching picture to photo and did not mention PECS. Ex. 15, pp. 6-11. Beginning in December 2009, every other session was individual. This would be sometime after Teacher began observing this class in preparation for taking over the spinoff class after winter break. Ex. 15, p. 12. Group therapy was abandoned entirely after Student moved into Teacher’s Autism Class and thereafter Student received individual therapy assisted by Teacher for two-on-one services for 30 minute sessions at least twice a week. Ex. 15, pp. 14-15; Tr. 145-146. The activity still involved matching and did not mention PECS until February 22, 2010, when the SLP records, “Consult with teacher about lack of progress. Will start PECS.” Ex. 15, p. 16. Student progressed rapidly through Phases I and II which could be expected given the work in preschool. The kindergarten SLP’s log provided a detailed record of the progress through Phases IIIA and IIIB, identifying icons used to develop discrimination and recording the performance. Ex. 15, pp. 16-22. At the end of kindergarten, Student was described as progressing “on phase 3B. He is able to look inside his book and with minimal supports find the picture of the items he is requesting.” Ex. II, p. 5.

In spite of this history and baseline information, the SLP assigned to Student for first grade elected to deliver his SL services in a group format only with all seven children in the class participating in two 45 minute sessions per week. She acknowledged that she was focused on academic vocabulary

acquisition and the group therapy only gave Student an opportunity to use PECS. Tr. 611 and 647. The actual instruction in PECS was left to Teacher² and classroom staff. Tr. 644-645.

Teacher questioned the applicability of the group SL activity to Student's needs and raised her concerns with the SLP. In response, the SLP made some adjustments, largely in the nature of the objects he was asked to match that were more suited to his interests, but kept the same basic group format and activity. Tr. 57-59. Teacher observed some improvement in Student but his ability to attend the group setting never exceeded four to five minutes. Ex. 15, pp. 23-33; Tr. 775. Then he would be allowed to leave the circle to visit other parts of the room and had to be coaxed to return for his next turn. Tr. 57 and 649-650.

Teacher also believed that Student would benefit from a communication device. When she approached ART about acquiring something for Student, she was told that the SLP had to make a referral for an assistive technology ("AT") assessment. The SLP refused to make a referral until she saw evidence that Student was able to communicate more effectively with his PECS book. Tr. 49-52.

Teacher applied for private donor grants at the beginning of the year to acquire a device for Student despite the SLP's opposition and the "Go-Talk" was delivered in February 2010. Teacher and her EAs began employing the Go-Talk with Student immediately in the classroom where it was used exclusively and Student used his PECS book only during group therapy. This relatively simple device was quite limited and only had nine pictures. Tr. 172. Given Student's success with Go-Talk, Teacher was confident he could be successful with a device with more capacity and approached SLP again about an AT evaluation.

Beginning April 6, 2011, SLP finally agreed to work with Student individually for 30 minutes once a week to try to develop his skills sufficiently to qualify for an AT evaluation. After observing his increased joint attention in the individual setting and his ability to use the Go-Talk, SLP finally agreed to

² Teacher was not certified to teach PECS until October 2010. Tr. 52-53.

refer him for an AT evaluation which is supposed to be completed in the fall of 2011. Student received only four 30 minute sessions of individual SL therapy for the entire year.

There are no records of PECS instruction during first grade in evidence other than the SLP's cursory notes from group therapy. If Teacher spent individual time working with Student on PECS rather than just using PECS in the classroom, she either failed to collect data of the work or it was not offered of record. The anecdotal evidence establishes that Student made no progress in PECS for the year. Student's present levels of performance in September 2010 put him at phase IIIB. SLP's logs are not helpful as they do not provide any detail about content of PECS work or performance. For instance, on April 5, she writes, "Still focusing though on IIIA-discrimination for increased vocabulary." Then without any interim explanation, she writes on April 21, "Phase IV-80% accuracy." The last progress report of record from SLP is dated March 9, 2011, and does not mention PECS. Ex. 12, p. 42.

District concedes that toilet training was not included as an area of need in Student's IEP although Father identified it as a parent goal. Ex. DD. Nevertheless, ample evidence was introduced of record that toilet training was a prominent and successful component of Student's educational program. It included detailed toileting procedures, careful scheduling and lots of prompting to promote as much independence as possible in the task. In the school setting, Student was able to wear regular pants with minimal accidents and, absent a bowel ailment, wore pull-ups only for transportation.

Findings of Fact

The parties submitted requested findings of fact and conclusions of law before the hearing and Parents supplemented those requests after the hearing. To the extent that such requested findings are inconsistent with or contradict the findings and conclusions below, they are denied. If requested findings and conclusions are not addressed in the findings and conclusions that follow, they were found to be not applicable to the issues determined in these proceedings or contradicted or not supported by the evidence presented at the hearing. All conclusions of law implicit in the following findings of fact are to be considered the conclusions of law of this DPHO.

1. Student resides with Parents within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency.
2. Student, a disabled child with autism, is nonverbal with significant to severe deficits in fine motor skills, sensory processing abilities and social interaction.
3. District concedes that it failed to timely conduct Student's reevaluation due October 2010 and the parties agreed that the process was underway. Tr. 223-224.
4. To the date of the hearing, District had not formally evaluated Student's SL impairments and Student is in need of a complete SL evaluation.
5. SL therapy is certainly a material, if not critical, component of Student's IEP.
6. Student did not receive the SL services prescribed for him in his September 2010 IEP. Ex. DD.
7. Student is in need of an AT evaluation.
8. The nature of Student's disability, in particular that he has severely limited receptive and expressive speech, is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.
9. By participating in specials and lunch, Student was educated with children who are nondisabled to the maximum extent appropriate.
10. The preponderance of the evidence is that neither Student's behavior in the school setting nor his ability to benefit from his educational program were impacted by the alleged unlawful touching.
11. Teacher's use of manual restraint in April 2010 was reasonable under the circumstances and adequately documented.
12. The preponderance of the evidence is that District intended to provide Student with ESY services in the summer of 2011 just as it had in 2009 and 2010, and the failure to so indicate that intent in the September 2010 IEP was no more than a procedural error.

Discussion

Speech and Language Services – Issues 1 and 10

States and local school districts receiving federal funds for education must provide all disabled children residing within their boundaries with FAPE. 20 U.S.C. §§ 1412(a)(1)(A). FAPE is defined in 20 U.S.C. § 1401(9) to mean special education and related services that are provided at no charge and in conformity with an IEP. Children with disabilities must be evaluated to determine their eligibility and the appropriate content of their educational programs. 20 U.S.C. § 1414(a)(1)

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, set out the seminal case defining compliance with the IDEA saying, “We therefore conclude that the ‘basic floor of opportunity’ provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.” *Id.* at ¶55. A child has received FAPE if the school district complied with procedural requirements and the IEP was reasonably calculated to enable the child with disabilities to receive educational benefit. *Id.* at ¶65. See also *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008) 2008.C10.0001086 VersusLaw.com. District relies on this basic framework of special education law and contends that it is entitled to dismissal of this Request if there is evidence that the program in question conferred educational benefit.

At least four circuits have recognized that the failure to implement a material or significant portion of the IEP can amount to a denial of FAPE. See *Van Duyn ex rel. Van Duyn v. Baker Sch. Dist. 5J*, , 502 F.3d 811, 822 (9th Cir. 2007) (“[A] material failure to implement an IEP violates the IDEA.”); *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022, 1027 n.3 (8th Cir. 2003) (“[W]e cannot conclude that an IEP is reasonably calculated to provide a free appropriate public education if there is evidence that the school actually failed to implement an essential element of the IEP that was necessary for the child to receive an educational benefit.”); *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (“[A] party challenging the implementation of an IEP must show more than a de minimis failure to

implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP."). And, most recently, *Sumter County Sch. Dist. 17 v. Heffernan*, 642 F.3d 478 (4th Cir. 2011) ("Accordingly we conclude that a material failure to implement an IEP, or, put another way, a failure to implement a material portion of an IEP, violates the IDEA.") The Tenth Circuit does not appear to have addressed this question as yet.

The vehicle for provision of FAPE is the IEP, the package of special educational and related services designed to meet the unique needs of the child with disabilities. 20 U.S.C. §1414(d) The IEP is developed by a team composed of the student's parents and educational professionals (20 U.S.C. §1414(d)(1)(B)) who must consider the strengths of the child; the concerns of the parents; the results of the child's evaluation; and the academic, developmental and functional needs of the child. 20 U.S.C. §1414(d)(3)(a). The IEP must specify the supports that will be provided for the child "to be involved in and make progress in the general education curriculum . . ." 20 U.S.C. §1414(d)(1)(A)(IV)(bb).

District is further obligated to provide Student with the related services required to assist a child with a disability to benefit from special education. In this case, Parents allege that the SL services delivered by the District failed to address Student's unique needs in communication and deprived him of FAPE. "Speech-language pathology" services are identified at 34 CFR § 300.34(c)(15) and include at subparagraph (iv), "Provision of speech and language services for the habilitation or prevention of communicative impairments." District denies these allegations but contends that even if SL services were not adequate, the record reflects that the Student progressed in most if not all areas of his program and that is sufficient to confer FAPE. District's defense fails in the face of the record herein.

The preponderance of the evidence in these proceedings established that the SL services delivered during 2010-2011 did not comply with the provisions of the Student's IEP and were inadequate to meet Student's undisputed need for a functional communication system due to the severe deficits caused by his disability. There was really no evidence of record that supported delivery of this service to this Student in a group setting of seven children as being appropriate to his needs. But assuming for the sake of

argument that it was, Student did not even receive the IEP allotted amount of group therapy. The evidence was uncontradicted that Student's severely limited attention span impacted his ability to remain in the group and he sometimes was able to attend no more than two minutes at a time. Ex. 15, particularly pp. 23-27. Furthermore, SLP reported that each child in the group had different vocabulary, as well as different vocabulary knowledge so each had to be given different objects and pictures to match. Tr. 612-613. Ostensibly, the benefit to Student would be learning to take turns and observing and perhaps imitating hopefully successful behaviors. However, Student spent more time out of the circle than in and SLP would try to do several turns with Student in one turn in an effort to sustain his attention. Tr. 650. Simple math discloses that 45 minutes divided equally among seven students yields less than seven minutes of individual attention for Student.

SLP conceded that she had no success in adding any vocabulary to Student's knowledge base via the matching exercises conducted in group. She could identify only two words added through her PECS work also done only in group: magnets and bubbles. However, it is noted in the SL logs that Student requested bubbles with his communication book at the very first session SLP had with him on August 31, 2010, strongly suggesting that acquisition of that word was not due to her work. Ex. 15, p. 23. In summary, SLP's expectation that Student sit through and observe six other children work on vocabulary that had even less meaning to him than the vocabulary with which he was not successful was SLP's apparent attempt to help Student learn turn taking. Tr. 774-776. By any account, group therapy was a documented failure for Student and SLP readily acknowledged Student's increased attention span and performance when he was finally given the opportunity to work individually with SLP and Teacher. Tr. 646-654, 724-725.

SLP continued Student in this group work in the face of these disappointing results and her efforts were devoted to finding more and different reinforcements in an effort to keep him sitting in the group. Tr. 774-775. This ignored Student's need to develop a functional communication system. On her review of the logs from kindergarten, SLP acknowledged even working two-on-one for all of second semester

kindergarten that, “They were struggling to establish a means for him to communicate . . .”

The evidence suggested that the incorporation of Go-Talk into Student’s program would likely enhance his communication skills within the parameters of its limited capacity. But, other than the four short individual SL sessions at the end of the year, the impact of the Go-Talk on Student’s program has not been measured. What is clear from the evidence is that Student had the Go-Talk in spite of his SLP, not because of her. Teacher is commended for her initiative on behalf of Student in the face of this blithe resistance. Student’s response to the Go-Talk confirms that it was a disservice to refuse Student a referral for an AT evaluation until he showed the SLP improvement while confining Student to a situation (group therapy) where he could not possibly demonstrate to her the prerequisite improvement.

District defended this claim by offering evidence of progress in other annual goals. Suffice it to say that the evidence indicated meaningful progress in some goals, ie. the undisputed reduction in Student’s aggressive behaviors and picking his name from a field of three. But other areas, such as writing, the progress, if any, appears to be less than trivial, as the two progress reports of record describe it as limited and the comments are word for word the same with little distinction from the original present level. Ex. 12, p. 35-36. Nevertheless, this DPHO will not find that evidence of progress will relieve District from liability for omitting a crucial part of Student’s program. In this case, District deprived a nonverbal autistic student of SL services needed to develop a functional communication system that clearly was required to assist the student to benefit from special education.

Staff Training and LRE – Issue 2

District must, to the maximum extent appropriate, ensure that children with disabilities are educated with children who are nondisabled. 20 U.S.C. §1412; 34 CFR §300.114. However, where a student’s individualized needs are so extensive that they may not be appropriately met in an educational setting with students who are not disables, a school district may properly provide services in a more restrictive setting. *Bd of Educ of Township High Sch. Dist. No. 211 v. Ross*, 44 IDELR 36 (N.D. Ill. 2005), affirmed 486 F.3d 267 (7th Cir. 2007). *Murray v. Montrose Co. Sch. Dist.*, 51 F.3d 921 (10th Cir.

1995) establishes that the District can house highly specialized programs in one location rather than attempting to duplicate those special services in each child's respective neighborhood school.

Parents' theory of this claim is that because District's placement removed Student from both the regular classroom and his neighborhood school for the express purpose of supporting him in the classroom with specially trained staff, if the staff, as they contend herein, is not specially trained then Student's right to be educated in the LRE is violated.

District offered persuasive authority that the IDEA does not require that teachers be trained in specific disability areas. *T.W. v. Unified Sch. Dist. No. 259*, 43 IDELR 187 (10th Cir. 2005) (Unpublished) (rejecting the parents' demand that their child's teachers be specifically trained to work with Down Syndrome children, the Tenth Circuit stated "the IDEA . . . does not require special education service providers to have every conceivable credential relevant to every child's disability," quoting *Hartmann v. Loudoun County Bd of Educ.*, 118 F.3d 996, 1004 (4th Cir. 1997); see also *B.V. v. Dept. of Educ.*, 451 F.Supp.2d 1113, 1129 (D. Ha. 2005), affirmed 514 F.3d 1384 (9th Cir. 2008) (it was not necessary for a skills trainer/aide to have the same level of expertise as the teacher in order to meet the needs of a student with autism).

In this case, District provided both the Teacher and the two permanent EA's specialized training in the education of children with autism as described above. Parents complain at their Requested Finding No 18 that Teacher and EA's training related to Autism is "limited." However, no evidence of record or authority is offered to support their complaint or suggest what level of training is not "limited."

Parents also complain that Student developed a mannerism described as "hand-flapping" by mimicking another member of his class, again suggesting that his placement in the Autism Class was not LRE. Req. FF No. 10. This allegation was not borne out by the record as a whole. Teacher's assessment is that Student's hand-movement (a twisting motion of his wrist) is not similar or a copy of the other child's behavior (a loud smacking hands together). The only common denominator is the two movements

involve the hands. Tr. 113. Rather, Teacher believes the movement is of Student's own invention for self-stimulation and is less evident when they can keep him engaged. Tr. 113-114.

Further, when evaluating Student's cognitive ability of imitation, the CDD noted he demonstrated "limited interest in imitating any of the physical or verbal prompts that were provided to him during the evaluation." Ex. HH, p. 4. Student's failure to follow modeled behavior was also noted in other testimony and records throughout the hearing. Notably, the CDD, in its 2007 evaluation, observed Student to spontaneously engage in motor activities, including "some hand posturing," that were identified as sensory-seeking behaviors. Ex. HH, p. 8. They listed Student's "motor movement of full extensor tone with *twisting of his hands*" as an example of stereotyped and repetitive motor mannerisms characteristic of autism. Ex. HH, p. 13. This appears to be the evaluator's description of the behavior Parents reported and called, "riding his motorcycle." Ex. HH, p. 3. These references would suggest that Student has engaged in repetitive hand movements long before attending the Autism Class.

Physical Restraint – Issue 8

"[I]n the case of a child whose behavior impedes his or her learning or that of others," the IDEA requires the IEP team to "consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior[.]" 20 U.S.C. §1414(d)(3)(B)(i); 34 CFR §300.324(a)(2)(i). Otherwise, the IDEA leaves the selection of specific disciplinary techniques to the states and school districts. *School Bd. Of Indep. Sch. Dist. No. 11 v. Renollett*, 440 F.3d 1007, 45 IDELR 117 (8th Cir. 2006).

Parents seek a finding (Req. FF No. 24) that District has denied Student FAPE in its alleged failure to properly administer Student's behavior intervention plan ("BIP"). While Parents' Request and the prehearing conference issues identify a claim based on the use of physical restraint and its incorporation in the BIP, they did not raise the broader issue regarding administration and updating Student's BIP. Hence, the broader allegations asserted in their Requested Findings and Conclusions regarding the BIP are not properly before the DPHO and will not be addressed beyond the comment that

Student's educational staff unanimously reported that the unwanted behaviors diminished dramatically over the course of the year and the intervention strategies of the BIP were credited with that result. Tr. 102-103, 107, 416 and 496. Further comments regarding the adequacy of the BIP will be restricted to the claim and issue properly identified regarding the use of physical restraint.

Parents' Requested Finding No. 25 references NMPED guidance on this subject that was not offered in evidence during the due process hearing. It is a memorandum from the State Director of Special Education dated March 14, 2006, subject line "Use of Physical Restraint as a Behavioral Intervention for Students with Disabilities." The memorandum is a public record that can be readily accessed at the following link: <http://www.ped.state.nm.us/SEB/law/Restraint.Policy.pdf> At page 2, therein, the Director states, "Manual restraint (also known as 'therapeutic holding') involves one or more people using their bodies to restrict the student's body movement." On page 2, she adds, "We note that escorting a student (touching and/or holding a student without the use of force) is **not** considered a form of physical restraint." Student's BIP does provide for the use of therapeutic de-escalation "[i]f aggressive behavior becomes extreme." Ex. CC, p. 2. The guidance requires the following steps for authorization of physical restraint:

1. Approval by Student's IEP team. Ex. DD.
2. Express written agreement of the parent. Ex. CC, p. 3.
3. Addressed in Prior Written Notice of Actions Proposed ("PWN"). Ex. DD, p. 24.
4. Mental Health Professional "needs" to be member of the IEP team.

As noted in the cites to the record for 1, 2 and 3, Father signed off on the BIP which was approved by the IEP team and addressed in the PWN. There is insufficient evidence to determine whether a mental health professional was involved. There is no participant specifically identified as such on the signature page of Exhibit DD but there is an unidentified signature on the BIP itself.

Teacher described only one de-escalation that required therapeutic holding which occurred in April 2010 and was documented at Exhibit 3. The behavior involved biting, scratching and kicking staff and other students. Tr. 270-271. Numerous non-physical interventions were tried before Student was

restrained in a therapeutic hold. Unfortunately, Student bit his lip during the ordeal and was taken to the nurse's office when sufficiently calmed. The incident was immediately reported to Parents. Ex. 3.

One of Student's EA's described how she would take Student to his rest area when he would throw himself on the floor. This happened "quite often" at the beginning of the year but not towards the end of the year because Student had stopped the unwanted behaviors. When needed, she would reach under his arms and carry him by his stomach from the back. She was familiar with Teacher's therapeutic hold and emphatically denied ever attempting to use such a technique. Tr. 495-497.

Lack of Daily Living Goal – Issue 9

In reviewing the adequacy of an IEP, the inquiry must begin by asking whether the school district complied with the procedures of IDEA, including whether the IEP document conformed to the Act's requirements. The components that must be included in the IEP document are defined in 20 U.S.C. § 1414(d)(1)(A) and 34 CFR § 300.320. However, procedural violations do not give rise to relief unless they compromised a child's right to FAPE, substantively hampered a parent's right to participate in the process or caused a child to be deprived of educational benefit. *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 701 (10th Cir. 1998) ¶59 1998.C10.565 VersusLaw.com This limitation on procedural issues is codified in IDEA at 20 U.S.C. § 1415(f)(3)(E)(ii).

The failure to include toilet training as an area of need was, at most, a procedural error that did not cause Student to be deprived of educational benefit nor did it substantively hamper Parents' right to participate in the process. Parents' concerns were heard and addressed in the school setting.

Remedy

Courts and, correspondingly, due process hearing officers are empowered to "grant such relief as [it] determines is appropriate." 20 U.S.C. §1415(i)(2)(C)(iii). "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (citations omitted) *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10th Cir. 1999) 199.C10.0043586

VersusLaw.com at ¶32. Appropriate relief includes the award of compensatory education when necessary to secure the student's right to FAPE. *Id.*

Having found that Student was deprived of the SL services that should have been delivered in accordance with his IEP, the DPHO will attempt to fashion a remedy based on the evidence of record. Unfortunately, there is no relevant expert evidence to guide the effort and DPHO agrees that Parents and Student should not be denied relief because they could not afford those costs. Therefore, the DPHO will look to the evidence of more effective services delivered by Student's previous SLPs and the Lead Resource Teacher's and Teacher's guidance on best practices.

Parents seek an order requiring District to contract with outside non-educational providers to evaluate Student and to design and direct his educational program. The evidence disclosed that there are untapped resources within District that should be available to Student through the District and District will be allowed an opportunity to utilize these resources in meeting its obligation to remediate this deprivation.

District must complete a formal assessment of Student's SL deficits to be conducted by the ART SLP within 21 calendar days of the date of this Decision. If District cannot make the ART SLP available to timely conduct this assessment, District must contract with the SLP of Parent's choice to conduct the formal assessment unless any delay is caused by Parent's failure to cooperate with scheduling or failure to deliver Student as scheduled without good cause. Parent's outside SLP will not be subject to a deadline. If an outside contractor is retained due to District's failure to timely evaluate, the resulting report will not be subject to District's Private Evaluation Review Committee prior to being employed by Student's IEP team and the District will be responsible for any costs or fees associated with assuring the outside SLP's attendance at Student's eligibility determination and IEP team meetings.

If it has not already done so, District must complete an AT evaluation within 21 calendar days of the date of this Decision. If District cannot timely complete this evaluation, District will again retain an outside provider of Parent's choice on the same terms as provided for the SL evaluation. Further, the

District will bear any and all costs necessary to expedite the purchase, construction, if necessary, and delivery of any AT device(s) that the IEP team elects to utilize in Student's program on the AT evaluation's recommendation.

If it has not already done so, District must complete the overdue three-year reevaluation within 21 calendar days of the date of this Decision.

The District must immediately upon completion of the evaluations identified above convene an IEP team meeting to develop an appropriate educational program for Student. Unless Parents consent in writing to any specific alternatives proposed by the IEP team, the educational program developed for Student for the 2011-2012 school year shall, at a minimum, contain the following special instruction and/or related services. To the extent any of these services exceed what Student's IEP team deems to be an appropriate educational program for Student, they are to be considered compensatory education to which Student is entitled under this Decision. This Final Decision does not prohibit the IEP team from providing specialized instruction and/or related services in addition to those identified herein.

1. Student will receive a minimum of four 45-minute sessions per week of individual therapy with an SLP with experience serving autistic children. This therapy will focus on the acquisition of a functional communication system. Any individual therapy that is necessary to initially train Student, Teacher and Parents in the use of any AT device shall be delivered in addition to the minimum individual therapy and indirect services ordered herein.
2. Student will also receive a minimum of one 45-minute SL therapy session per week in a group of two students to address turn taking and other appropriate social skills.
3. Student will receive an additional three hours per month of indirect SL services to be used to consult with Student's Teacher to support deploying the communication system in the classroom and to train Parents to provide support and utilize the communication system at home.
4. Student's first grade SLP, who appeared as a witness in these proceedings, cannot be used to deliver the services identified in this Decision without the written consent of the Parents. If consent is given, Parents have the right to withdraw that consent at any time

they believe it is in the best interest of Student to do so.

5. Although Teacher is fully qualified to teach Student's Autism Class and is conscientious, well-motivated and specially trained, the evidence suggested that she would benefit from the direction and consultation of more experienced autism educators. Teacher appeared frustrated with the DTT process (Tr. 79-80, 162, 175-178, 278, 318-319, 946-950) and one objective of this consultation should be to make sure that the DTT trials are effectively designed and deployed to meet Student's needs.³ Another area of concern to be addressed is the lack of data collection for the other modes of instruction Teacher employs, especially in light of her limited use of DTT and the data collection it generates. To that end, District will deliver a minimum of 10 hours of consultation with an ART resource teacher to be delivered over the first six weeks of the 2011-2012 school year. Together Teacher and the ART resource teacher will evaluate Student's areas of need and goals and collaborate to develop effective instructional strategies to accomplish the goals. Thereafter, the ART resource teacher will meet with Teacher a minimum of one hour per month for the remainder of the school year to assess Student's progress and modify strategies as necessary.
6. As compensatory education, Student will receive a minimum of three one hour sessions per week of individual therapy with an SLP with experience serving autistic children for eight weeks during the summer of 2012, in addition to Student's full autism-specific ESY program and any SL services offered therein. This is not ESY and the acquisition of a functional communication system must continue to be the focus of this therapy.

³ The Lead Resource Teacher's testimony suggested that Teacher may not have designed or deployed an effective DTT for Student's math instruction.

Conclusions of Law

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A).
2. The burden of proof, by a preponderance of the evidence, rests with Parents, the parties challenging the IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) 2005.SCT.0000166 VersusLaw.com.
3. This proceeding has complied with all procedural safeguards required by IDEA, its implementing regulations, and the New Mexico Special Education Rules.
4. This decision is timely if delivered to NMPED and the parties on or before August 19, 2011.
5. Student is qualified and eligible for special education and related services as autistic. 34 CFR §300.8 (a) and (c) (1).
6. Parents failed to prove by a preponderance of the evidence that Student's placement in the Autism Class was not appropriate.
7. Parents failed to prove by a preponderance of the evidence that District did not educate Student with nondisabled peers to the maximum extent appropriate.
8. Parents failed to prove by a preponderance of the evidence that Student's Teacher and two predominant EAs were not specially trained.
9. Parents failed to prove by a preponderance of the evidence that the Autism Class was inadequately staffed.
10. Parents proved by a preponderance of the evidence that Student's SL services were a material and significant component of his educational program.
11. Parents proved by a preponderance of the evidence that District did not deliver the SL therapy that Student's IEP required and that Student was thus deprived of FAPE.
12. Parents failed to prove by a preponderance of the evidence that the alleged unlawful touching had an impact on Student's educational program or that it warranted a unilateral convening of the IEP team by the District.

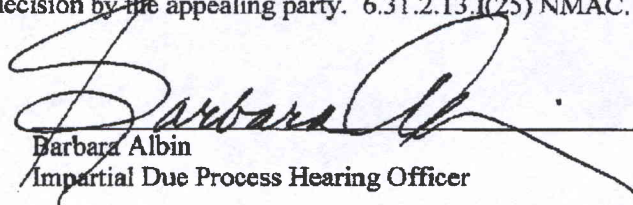
13. Parents failed to prove by a preponderance of the evidence that the record(s) of the criminal investigation conducted of the alleged unlawful touching constitute educational records or that the records are relevant or necessary for Parents to participate in Student's educational planning leaving the DPHO without any authority to order their production.
14. Due process hearing officers are without authority to direct a school district's personnel decisions.
15. District's failure to identify toilet training as an area of need was no more than a procedural error.
16. Parents failed to prove by a preponderance of the evidence that the touching used to carry Student to the rest area rose above allowable escort to the level of manual restraint.
17. Parents failed to prove by a preponderance of the evidence that the incorporation of therapeutic de-escalation in Student's BIP was improper under NMPED guidance or in violation of IDEA.
18. Parents failed to prove by a preponderance of the evidence that Teacher's use of therapeutic de-escalation or the record thereof deprived Student of FAPE.
19. Parents failed to prove by a preponderance of the evidence that the ESY services provided by the District deprived Student of FAPE.

ORDER

IT IS HEREBY ORDERED as follows:

1. District will conduct and/or complete evaluations consistent with the provisions of this Decision.
2. District will convene an IEP meeting consistent with the provisions of this Decision.
3. District will ensure that Student's IEP includes specialized instruction and related services consistent with the provisions of this Decision.
4. District will provide Student with compensatory services consistent with the provisions of this Decision.

Any party aggrieved by this decision has the right to bring a civil action in a state or federal district court pursuant to 20 U.S.C. § 1415(i) and 34 CFR § 300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party. 6.31.2.13.I(25) NMAC.



Barbara Albin
Impartial Due Process Hearing Officer

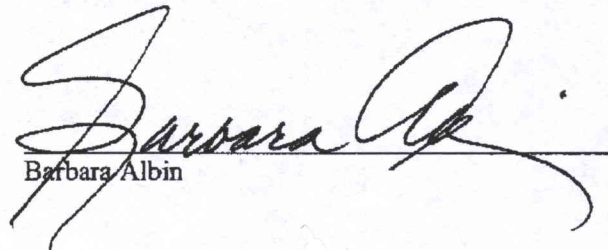
CERTIFICATION

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via electronic mail to the following persons this 17th day of August, 2011:

Gail Stewart, Esq., 1400 Central SE, Suite 3300, Albuquerque, NM 87106.

Michael J. Carrico, Esq. and Christina Sheehan, Esq. of Modrall Sperling Roehl Harris & Sisk, P.A.; P. O. Box 2168; Albuquerque, NM 87103-2168.

Hanna Skandera, Secretary of Education, New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, NM 87501-2786.



Barbara Albin