

**NEW MEXICO PUBLIC EDUCATION DEPARTMENT
PROCEEDINGS BEFORE THE DUE PROCESS HEARING OFFICER**

In the matter of:

[REDACTED],

Parent,

on behalf of D. R., Student,

Petitioners,

v.

Case No. DPH 1516-28

**CREATIVE EDUCATION
PREPARATORY INSTITUTE,
and NEW MEXICO PUBLIC
EDUCATION DEPARTMENT,**

Respondent.

FINAL DECISION OF THE DUE PROCESS HEARING OFFICER

**Jane B. Yohalem, Due Process Hearing Officer
January 12, 2017**

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STATEMENT OF THE CASE

INTRODUCTION

This due process proceeding was filed by Parent on her own behalf and on behalf of Student complaining that Creative Education Preparatory Institute, known as “CEPi,” a state-chartered school which was located in Albuquerque, New Mexico, and which is now defunct, denied Student a free appropriate public education (FAPE) during the 2015-2016 school year. Petitioners named CPi, the New Mexico Public Education Department (NMPED), and the Albuquerque Public Schools (APS) as respondents.

Shortly before Student’s due process complaint was filed on May 19, 2016, the New Mexico Public Education Commission entered a decision revoking CPi’s charter, effective June 30, 2016. Because CPi was a state-chartered school, it was its own local education agency (LEA) under New Mexico law. When its charter was revoked, the school and its governing board simply ceased to exist, leaving no LEA against which Parent and Student could continue to pursue their pending due process complaint.

Relying on the Tenth Circuit’s decision in *Chavez v. NMPED*, 621 F.3d 1275 (10th Cir. 2010), the NMPED filed first a motion to dismiss and then a motion for summary judgment, claiming that it was not a proper party to the due process complaint because it had not directly provided educational services to Student. The hearing officer denied both the NMPED’s motion to dismiss and its related motion for summary judgment, holding that the IDEA, as construed by the Tenth Circuit in *Chavez*, requires the State Education Agency (SEA), which in New Mexico is the NMPED, to step in as a party-respondent to a student’s due process complaint when the LEA which provided direct services no longer exists and where, therefore, due process procedures would not otherwise be available to the parent and student. As discussed more fully below, the hearing officer held that this case presents

the exceptional situation described by the Court in *Chavez* which requires SEA participation as a party to a due process proceeding. *Chavez* held that where, without SEA intervention, a student and parent have no hope that their complaint will initiate a process leading to a resolution and a remedy for the deprivation of FAPE, then SEA intervention as a party to the due process proceeding is required.

Following the denial of the NMPED's motions to dismiss and for summary judgment, the due process hearing proceeded with the NMPED as the responding party. (Petitioners and APS had reached a settlement and CEPi's counsel was permitted to withdraw.) The hearing focused on the special education and related services Student was provided by CEPi during the 2015-2016 school year, when Student was a fourteen-year-old ninth grader. The record shows that, prior to the time he enrolled at CEPi, Student had been identified by APS, the district where Student resides, as eligible for special education and related services in the categories of Speech-Language Impairment and Other Health Impaired (ADHD). A diagnosis of high-functioning autism had been suggested by a private provider, but had not yet been confirmed.

Parent brought to CEPi a March 20, 2015, IEP for Student which had been prepared by an IEP team at APS. The IEP provided for extensive special education and related services for Student, including special education in a small setting for all of Student's core classes, as well as speech and language and social work related services. The hearing officer found that CEPi denied Student a FAPE: (1) by initially failing to provide the services or similar services to those specified in Student's March, 2015, IEP; (2) by arbitrarily modifying that IEP to cut out the provision of all but a few hours a week of special education without considering Students' special needs arising from his disabilities and

without involving either Parent or appropriate professionals in the IEP process; (3) by adopting an IEP that was not reasonably calculated to provide Student with educational benefit; (4) by failing to provide special education and related services reasonably calculated to enable Student to make educational progress; and (5) by reducing the length of Student's school day below the minimum set by the State. Student was denied FAPE throughout his entire ninth grade school year by CEPi.

The parties have sought very different remedies for the denial of FAPE. Parent wants the hearing officer to establish a \$50,000 trust fund set up and funded by the NMPED from which Parent can draw to provide additional educational and related services to Student, in addition to the special education and related services he is now receiving from APS, where he is now enrolled in high school. The NMPED has agreed to provide compensatory services for Student, although it has not conceded that the hearing officer is correct in holding that it must do so as a matter of law. The PED has asked the hearing officer to allow it to use one of two funding mechanisms established by state law for providing school districts with extra special education funding. The hearing officer has rejected both the Parent's and the NMPED's approach: Parent's because such a trust fund, at least in this case, is essentially an award of money damages, something beyond the hearing officer's authority; the NMPED's because the IDEA requires an SEA to fund compensatory services where there is no LEA to do so and because the hearing officer's jurisdiction does not extend to allow her to select a specific state funding mechanism. Under the IDEA, the NMPED must ensure that the services ordered by the hearing officer are provided and paid for.

FINDINGS OF FACT

The Hearing Officer's Jurisdiction over the NMPED.

1. Student was born in April 2001 and is currently 15 years old. **1 TR. 21.**
2. Student and Parent have resided at all relevant times in Albuquerque, N.M. Immediately preceding the events at issue in this proceeding, Student attended the Albuquerque Public Schools (APS), his local district, completing the eighth grade in the 2014-2015 school year. Student returned to APS at the beginning of the current school year (2016-2017), after having attended school at CEPi in 2015-2016. He is currently a tenth grade in an APS high school. (He will have to retake the courses for the second semester of ninth grade at a later time). The provision of services to Student by APS is not at issue in this proceeding. APS was originally a party to this proceeding, but was dismissed with prejudice the hearing officer at the request of Petitioners based on a settlement agreement. It is undisputed that APS never had any responsibility for or control over CEPi's provision of special education to Student.
3. It was undisputed in this proceeding that Student is a student with a disability who, at all relevant times, was eligible for special education and related services pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400, *et seq.* (2004) (IDEA).
4. Petitioners filed a due process complaint on May 19, 2016, against three Respondents: CEPi, APS, and the NMPED. **RP 1.**
5. At the time the due process complaint was filed in this matter CEPi was a state chartered school. Under New Mexico law, each state-chartered school serves as its own

LEA. NMSA 1978, § 22-8B-4(T). The IDEA provides that a state's designation of a charter school as an LEA will be recognized for IDEA purposes. 34 C. F. R. § 300.28(b)(2).

6. It is settled law, not disputed by the parties, that IDEA all of the IDEA requirements applicable to a traditional school district apply to state-chartered schools identified under state law as an LEA. 34 C. F.R. § 300.209(d); NMSA 1978, § 22-8B-4(T). Such charter schools are responsible for providing each student with a disability a free appropriate public education (FAPE). They are responsible, as well, for arranging for and providing the due process procedures required by the IDEA when a complaint is filed. 20 U.S.C. § 1415(a); 34 C.F.R. § 300.500.

7. Pursuant to these principles of law, during the 2015-2016 school year, CEPi was the LEA responsible for providing direct services to Student under the IDEA.

8. The NMPED is the SEA for New Mexico under the IDEA.

9. In February, 2016, the NMPED took over the CEPi Board of Finance due to mismanagement of finances. **Ex. 25, ¶¶ 24-25.** The NMPED began to act as both the school's board of finance and its fiscal agent. **See NMSA 1978, § 22-8-39.**

10. On February 8, 2016, the NMPED recommended to the NM Public Education Commission that CEPi's charter be revoked based on the PED's investigation of the school, which revealed financial mismanagement, violation of State educational standards (including failure to provide the minimum number of hours of education required by the State), and governance issues. **Ex. 16; Ex 25.**

11. After an evidentiary hearing on March 22, 2016, the Commission revoked CEPi's charter, effective June 30, 2016, pursuant to NMSA 1978, § 22-8B-12(K). **Ex. 25, at 1, 10.** It is undisputed that, as of June 30, 2016, the school closed, CEPi's Board

disbanded, and CEPi no longer existed. It is also undisputed that CEPi has no successor in interest. Finally, it is undisputed that no closure protocol was prepared by the State assigning on-going responsibilities to CEPi during the dissolution process. The State took over the dissolution process. Although CEPi originally appeared through counsel in this due process proceeding, after June 30, 2016, counsel for CEPi sought and was granted permission to withdraw. Counsel represented that she no longer was in touch with her client.

12. It is undisputed that the public agency which provided direct educational services to Student during the 2015-2016 school year at issue in this proceeding was CEPi, and that the NMPED did not provide direct services to Student during that time.

Findings Concerning CEPi's Denial of a FAPE to Student.

Student's March, 2015, IEP.

13. During the time Student was enrolled at APS, APS evaluated Student and found him eligible for special education services as a student with a Speech and Language and Other Health Impairment. **Ex. 13; Ex. 1.** He was diagnosed with ADHD and dysphonic dyslexia, and also had an unconfirmed preliminary diagnosis of high-functioning autism from a private clinician. **1 TR. 37-38.**

14. The last annual IEP developed for Student by APS was dated March 20, 2015. It was prepared near the end of Student's eighth grade year. **Ex. 1.** Student's March, 2015, IEP included goals in speaking and listening, in reading fluency and comprehension; in writing fluency and word choices, in math reasoning skills; in computation and math fluency; as well as social, emotional and functional goals, including demonstrating attention

and productivity in classroom work and homework and learning to plan and manage time.

Ex. 1, at 6-7.

15. Student's IEP provided for specialized instruction in a segregated small group setting for Student's English and Language Arts, Math, Science, and Social Studies classes. Specialized instruction in each subject area was to be provided for slightly over four hours a week, totaling approximately 17 hours of specialized instruction in a small group setting each week. The IEP team found that Student needed these special education services in order to make progress in the general education curriculum. Student's IEP team provided, as well, for eight hours a semester of speech and language therapy, and 6 hours a semester of social work counseling. The IEP team concluded that these services were needed to support Student's academic progress, to assist him in learning skills to cope with stress, and to improve his communication and social functioning. **Ex 1, at 8; 1 TR. 35-37.**

16. In the spring of 2015, Parent asked APS to retain Student in eighth grade. She felt that he was not ready socially, emotionally and academically for the high school placement proposed by APS. **1 Tr. 23.** Parent reported that Student was not yet reading full books, was still working on multiplication and division in math, and could not write complete sentences, divide paragraphs or use punctuation correctly. **Id.** When Student was in a crowded setting, he would become so anxious he would be unable to function. **1 TR. 23, 36-37.**

Parent places Student at CEPi.

17. When Parent was told by APS that the plan for Student remained a high school placement, Parent began looking at local charter schools as an alternative. **1 TR. 25.** She had heard of the Creative Education Preparatory Institute, known as "CEPi," a state-

chartered school which served as its own local education agency (LEA) and which provided computer-based instruction. *Id.* Shortly before the start of the new school year, Parent enrolled Student at CEPi. **1 TR. 26.**

Procedural violations of the IDEA by CEPi.

18. Parent completed Student's registration at CEPi on July 29, 2015. **Ex. 7.** She gave CEPi a copy of Student's March, 2015, IEP and signed a release so that CEPi could get Student's special education records from APS. **1 TR. 29-31.** She told school personnel that Student's IEP provided for quite a few hours of special education as well as speech therapy and other related services and asked if those services would be available at CEPi. CEPi told her all of these services were available. **1 TR. 29.**

19. A week before school started, Parent again spoke with staff at CEPi to be sure that everything was set for Student and that speech and language and social work therapies were in place. Parent explained at this time that Student was on the autism spectrum, had ADHD, and was also phonologically dyslexic. **1 TR. 37-38.** Parent was again assured that the school would meet his special education requirements. **1 TR. 39.**

20. Once the school year began, CEPi staff continued to assure Parent that Student was getting everything he needed. **1 TR. 39.** Parent assumed the school was implementing Student's IEP. **1 TR. 43, 44.** CEPi never provided progress reports toward IEP goals to Parent. **1 TR. 57.** Parent was never sent even the two progress reports found in **Ex. 4,** and did not know that Student was having great difficulty staying on task, that he required constant redirection, that he was not able to complete his work without constant adult support, and that he had made no progress in life skills and social skills. **Ex. 4; 1 TR. 42, 64-66.**

21. On October 21, 2016, approximately three months into the school year, CEPi met with Parent. **1 TR. 43.** Parent did not understand at the time that the school viewed this as an IEP meeting. A school administrator who was licensed as a special education teacher (Ms. Bohannon) was the only CEPi employee who attended the meeting. **1 TR. 48-49.** See **Ex. 2, at 4** (this list of attendees is not accurate: the only CEPi employee present was Ms. Bohannon).

22. At the October 21, 2016, meeting, Ms. Bohannon reported to Parent that Student was behind on his work. **1 TR. 46.** Parent told Ms. Bohannon that Student seemed “frustrated all the way around.” **1 TR. 47.** Student’s special needs were not discussed.

23. Although Parent attended the October 21, 2016, meeting, she was not shown a draft IEP and was not told that the school was changing Student’s March 2015 IEP, dramatically reducing Student’s hours of special education from approximately 17 hours a week to four. IEP. **Exs. 1 and 2; 1 TR. 44-45, 48.** The October, 2016 CEPi IEP provides that Student will receive 1 hour each of group math, group reading and group written language special education instruction a week in a regular school setting, rather than the slightly more than four hours of each of these classes provided by Student’s March 2015 IEP. It provides for an hour of speech therapy weekly and for a half-hour of social work weekly, each in a pull-out setting. **Ex. 2, at 24.**

24. CEPi did not provide the Parent with prior written notice the Student’s special education services were being reduced to less than one-quarter of his previous services, nor did it explain how that reduction was calculated to meet Student’s special needs. **Ex. 2, at**

27. No explanation of the reduction offered at the meeting with Parent. **Ex. 2; 1 TR. 44-45, 48, 61.**

25. The IEP purports to list progress levels for Student. Some of these progress levels make no sense in light of Student's disabilities and his prior levels of achievement. **1 TR.50.** Student, for example, is shown to be at grade level in mathematics when only a few months earlier he had not yet mastered multiplication and division: something generally taught in elementary school. **1 TR. 50.**

26. Parent was not sent a copy of the IEP after the meeting and never signed the IEP. **1 TR. 48-49; Ex. 2.**

27. The procedural violations of the IDEA described in ¶¶ 20-26 impeded Student's right to a FAPE and significantly interfered with the Parent's participation in the decisionmaking process about Student's education. As Parent began to understand that Student was being denied the special education and related services he needed, Parent took action to force the school to provide appropriate services. Parent would have been able to act far sooner if the procedural requirements of the Act had been followed by CEPi.

Failure to provide related services.

28. Student did not receive either speech and language or social work services during the first semester in more than *de minimus* amounts. **1 TR. 49; Ex. 2, at 12; Ex. 11.** In the second semester, he received, at best, speech and language therapy between mid-February, 2016, and April 5, 2016, when he left the school. **1 TR. 75.** The evidence showed that the school did not at that point was unable to find Student's IEP, so any speech and language services would not have been keyed to Student's goals and objectives in any event. **1 TR. 80-81.**

29. For the remainder of the first semester, approximately six weeks, Student attended both morning and afternoon sessions in an attempt to catch up with his course work. **1 TR. 47, 76.**

30. The only assistance or special help Student was provided with his academic; classes was provided by an educational assistant who would sometimes sit in as he worked on the computer and attempt to help him. **2 TR. 58.** The educational assistant testified that she was not aware of the nature of Student's disabilities and was not told by the special education teacher how to work with Student given his special needs. **2 TR. 60-62.** She described Student as distracted and having trouble focusing. **2 TR. 61.** **Exhibit 4** includes a December 15, 2015, progress report that was never shown to Parent. It states that Student is "only able to finish his course work with the support of the educational assistant sitting with him the entire duration of the session. He needs to learn to be more independent." **Ex. 4, at 10; 1 TR. 64.**

31. At the end of the first semester, Ms. Bohannon, the only special education teacher on staff, left the school. **1 TR. 67, 69.** In January, 2016, there was no special education teacher at the school.

32. In January, 2016, the charter school division of the PED conducted an investigation of CEPi at the request of the Public Education Commission. Many complaint letters from both parents and teachers had been received by the Commission and the PED claiming the school was not complying with its state charter. **1 TR. 109.** A team was sent to the school to conduct a site visit. **1 TR. 108.** They observed in classrooms and reviewed records. **1 TR. 110; Ex. 16.**

33. The State has stipulated to the accuracy of the findings made by the Commission following a hearing. **Ex. 25; 1 TR. 114-15. Ex. 16; Ex. 25, ¶¶ 9-10.** The team's observations in the classrooms at CEPi were consistent with the findings of the Commission and with the findings of the hearing officer in this case. The team found that students were minimally monitored by staff, and that during instructional time, many students were using their phones or reading unrelated material without interference by staff. **Ex. 16, at 6.** Attendance was not taken and many students simply did not attend. **Ex. 16, at 4-5.** The schools hours of instruction were well less than the minimum required by state law. **Ex. 25.**

34. Parent, alerted to the team's findings and concerned about the absence of a special education teacher, spoke to the media at a February, 2016, meeting organized by the Public Education Commission to report its findings and discuss revocation of the school's charter with parents and school officials. **1 TR. 67-70; Ex. 17.** From then on, there was tension with the school and reprisals directed at Student. **1 TR. 69-70, 72, 88.** Although someone (without certification) was hired to attempt to address special education at the school, that person never managed to find Student's IEP. He complained to Parent about aspects of Student's behavior and speech that arose from Student's disabilities. **1 TR. 80-81. See Ex. 5, at 4** (list of expectations for Student).

35. On April 5, 2016, Student and Parent were asked to leave the school. **TR. 83-84.**

36. Student did not receive credit for the second semester of ninth grade. He was unable to enroll in APS for the remainder of the school year because he was told by APS that he needed CEPi to provide his grades and to process the paperwork showing that he was no

longer registered at CEPi. CEPi never provided the necessary paperwork. **1 TR.88-89.** Student did not begin to attend school again until the beginning of the 2016-1017 school year, when he was successful in enrolling at APS.

37. The reports on Student's progress at CEPi and the testimony of the educational assistant who worked with Student established that Student failed to make progress toward the IEP goals specified in his March, 2015, IEP during the 2015-2016 school year. **Ex. 4; 2 TR. 78-80,83, 87.**

CONCLUSIONS OF LAW

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, et seq. (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, § 6.31.2.13(I) NMAC (2009).

2. The SEA is a proper party to this due process proceeding pursuant to the decision of the federal Court of Appeals for the Tenth Circuit in *Chavez v. NMPED*, 621 F.3d 1275, 1290 (10th Cir. 2010). In *Chavez*, the Tenth Circuit held that when the public agency responsible for providing direct services to a student with a disability plainly cannot implement the central procedural protections of the IDEA, the SEA must step in as a party to the due process proceeding pursuant to its role as the party ultimately responsible for compliance with the IDEA.

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

4. At the request of both parties, extensions of time for entry of the decision in this matter have been granted until January 11, 2017.

5. The party challenging the IEP bears the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). The burden of proof, therefore, is on Parent and Student in this proceeding.

6. The statute of limitations for due process hearings under the IDEA is two years prior to the date the due process complaint is filed. 20 U.S.C. § 1415(f)(3)(C) (2004). The entire 2015-2016 school year, which is the period at issue here, is within the statutory period.

7. At all relevant times, Student was eligible for special education and related services under the IDEA as a student with a disability in the eligibility areas of Speech and Language impairment and Other Health Impaired. 34 C.F.R. § 300.8(c)(1). An independent neuropsychological evaluation, completed after the 2015-2016 school year, showed that Student is eligible also as a student with autism. *Id.*

8. Children with disabilities who attend public charter schools and their parents retain all rights under Part B of the IDEA, including the right to a FAPE and to the IDEA's due process procedural protections to complain and obtain a remedy for a denial of FAPE. 34 C.F.R. section 300.209(a).

9. Student's October 21, 2015, IEP was not reasonably calculated to provide Student some educational benefit. In addition, the services provided by CEPi pursuant to that IEP did not provide Student educational benefit. Student, therefore, was denied a FAPE during the 2015-2016 school year, in violation of 20 U.S.C. § 1414(d)(1)(A)(i)(IV); *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 1760 (1982); *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (10th Cir. 2015) (question in the Tenth Circuit is "whether the IEP is reasonably

calculated to guarantee some educational benefit, determined at the time it is offered to student).

10. CEPi's failure to obtain Student's educational records from APS and to follow the existing IEP for Student as required by 34 C.F.R. § 323(e); CEPi's failure to convene an IEP team to revise Student's IEP in October, 2015, which included teachers and others knowledgeable about Student's needs, as required by 34 C.F. R. § 321; CEPi's failure to measure Student's progress toward IEP goals and regularly report to Parent on that progress, as required by 34 C.F. R. § 300.20(a)(3); CEPi's failure to give Parent a copy of his IEP and to obtain her signature approving it; and CEPi's failure to provide Parent Prior Written Notice of its dramatic change in the nature and amount of special education services being offered to Student and of Parent's procedural safeguards if she disagreed with the changes, as required by 34 C.F.R. § 503; are all procedural violations of the IDEA.

11. Merely identifying a procedural deficiency does not automatically entitle a family to relief. Here, however, Parent carried her burden of establishing that these procedural errors both impeded Student's right to a FAPE and significantly interfered with the Parent's participation in the decisionmaking process concerning the provision of special education and related services to Student. *See Endrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d at 1335.

12. The failure of CEPi to provide reports to Parent on Student's activities in school and on his progress or lack of progress and to otherwise share information with Parent significantly impeded Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student. Student was, therefore, denied a

FAPE on this basis as well. *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

13. CEPi denied Student a FAPE by failing to provide Student the speech and language therapy provided for in both his March, 2015, IEP and in his subsequent October 21, 2015, IEP. 34 C.F.R. §§ 300.34; 300.17.

14. CEPi denied Student a FAPE when it failed to provide special education and related services which were necessary for Student to make some educational progress. *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (2015).

15. CEPi denied Student a FAPE when it failed to provide Student the minimum number of hours of education mandated by state educational standards. *See* 34 C.F. R. § 300.17 (b).

16. Compensatory education is an equitable remedy for a denial of FAPE to a student with a disability and, under appropriate circumstances, to that student's parent. In determining what relief is appropriate, the hearing officer must consider all of the circumstances. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005). The hearing officer cannot delegate to others, whether independent consultants or an IEP team, the decision on what remedy is appropriate to remedy the educational deficit created by a denial of FAPE. *M.S. ex rel. J.S. v. Utah Sch. for Deaf & Blind*, 822 F.3d 1128, 1133-36 (10th Cir. 2016).

17. Given the State's determination revoking CEPi's charter, the NMPED, as the SEA, is legally responsible for ensuring that Student receives the compensatory services for the denial of a FAPE ordered by the hearing officer. 20 U.S.C. § 1413(g) plainly provides

that when an LEA is unable or unwilling to provide services required by the IDEA, the SEA must step in and provide services either directly or by contract. *See Chavez*, 621 F.3d 1275. Unlike the situation in the *Chavez* case, where a functioning LEA was in place, here the State of New Mexico has revoked the charter of CEPi, following a full hearing. The hearing officer notes that the IDEA specifically permits an SEA to use funds that would have been available to an LEA to provide direct services to students with disabilities when an LEA, for any reason, is unable or unwilling to establish or maintain such programs. Plainly a charter school which has been decommissioned for failure to meet state educational standards satisfies this requirement and allows the PED to fund compensatory services pursuant to 20 U.S.C. § 1413(g) and 34 C.F.R. § 300.227(a).

18. Indeed, the IDEA provisions specifically addressing charter schools appear to recognize and address this situation. The IDEA provides that, so long as a public charter school is an LEA of the state which receives funding under the IDEA, that charter school is responsible for ensuring that the requirements of Part B of the IDEA are met. 34 C.F.R. § 209(c). If a public charter school is neither an LEA receiving IDEA funds, or a school that is a part of an LEA receiving federal Part B funds, then the SEA is responsible for ensuring that the requirements of the IDEA are met for the students who attend or attended that school. 34 C.F.R. § 209(d). Where no LEA is responsible, the IDEA provides that the SEA has the ultimate responsibility for ensuring compliance with Part B of the IDEA, consistent with 34 C.F.R. § 300.149. *See* 34 C.F.R. § 300.209(d)(2).

19. In the alternative, even where an LEA remains in place and continues to provide educational services, the Tenth Circuit Court of Appeals has held that the SEA has a responsibility to contribute funds for particularly expensive services for a child with a

disability which the LEA could not otherwise afford to provide. *Chavez*, 621 F.3d 1275, 1289 (holding that in the case of the IDEA, it is well-established that the SEA is potentially financially responsible for an LEA's failure to comply with its responsibilities).

20. The specific mechanism established by state law to channel funds for these purposes, and the administrative details by which those funds are accessed, is not an issue relating to the "identification evaluation or educational placement of a child or the provision of a free appropriate public education to [a] child [with a disability]," and is, therefore not within the jurisdiction of the hearing officer. 20 U.S.C. § 1415(b)(6)(A). The hearing officer has the authority to award an equitable remedy. It is up to the PED to determine how it will achieve compliance with the hearing officer's order. *See Chavez*, 621 F.3d 1275, 1289; *citing with approval, St. Tammany Parish School Bd. v. State of La.*, 142 F.3d 776, 784-785 4th Cir. 1998). *Gadsby by Gadsby v. Grasmick*, 109 F.3d 940, 955-56 (4th Cir. 1997).

21. Pursuant to a mediation agreement with APS, Student received an independent neuropsychological evaluation this fall. **1 TR. 132-134.** The parties have stipulated to the admission of this evaluation into evidence. *See Ex. 26.*

22. The neuropsychological report makes specific recommendations concerning specialized services which will enable Student to make progress in the areas affected by his disability, including communication skills, social skills, reading fluency and other areas, most of which were targeted by his March 2015 IEP. The hearing officer has relied both on the testimony and exhibits in the record which describe what Student needs, and on the expert's report, which the hearing officer finds to be consistent with the other evidence in

the record, but which offers the hearing officer a deeper understanding of both Student's needs and the resources available in the community..

23. In light of Student's needs and his abilities, the hearing officer finds that, to be effective, compensatory services are best provided during the summer, when Student's schedule is not full.

DISCUSSION

The NMPED's Motion to Dismiss.

The NMPED previously filed a motion to dismiss in this case. Relying on the Tenth Circuit's decision in *Chavez v. NMPED*, 621 F.3d 1275 (10th Cir. 2010), NMPED argued that the due process hearing officer lacks jurisdiction over an SEA. The NMPED claimed that *Chavez* limits a hearing officer's jurisdiction to complaints against the educational agency which is providing direct services to the student. Since it is undisputed that CEPI, and not the NMPED, was the direct provider of services to Student, NMPED claimed that the hearing officer was required to grant its motion to dismiss.

The due process hearing officer carefully considered the NMPED's arguments and then denied its motion to dismiss. While agreeing with the NMPED that generally the SEA is not a proper party to a due process proceeding alleging a denial of FAPE by an LEA, the hearing officer held that this case comes within an exception recognized by the Tenth Circuit in *Chavez*. When the public agency responsible for providing direct services to a student with a disability plainly cannot implement the central procedural protections of the IDEA, *Chavez* recognizes that the SEA must step in. Under these circumstances, the SEA is a proper party to a due process proceeding. *Chavez v. NMPED*, 621 F.3d at 1290.

The Tenth Circuit explains this exception to its ruling that the SEA is generally not a proper party to a due process proceeding as arising out of the Court's concern about the unusual situation where the procedural protections of the Act cannot be relied on to resolve a parent's complaint. If a parent cannot file a due process complaint, be heard in a reasonable amount of time, get a decision, obtain an order requiring provision of a remedy, or exercise his or her right to appeal to the district court, the SEA is required to step in: the "failure [requiring SEA intervention] is, however, if the administrative process breaks down and the student languishes without any hope that a process set in motion by either the parents or some other party may lead to a solution." *Chavez*, 621 F.3d at 1287. The Court holds that when "faced with a straightforward parental demand for SEA intervention combined with an obvious failure of the system," the State must act. *Chavez*, 621 F.3d at 1290 (SEA is responsible to step in when the IDEA's procedural remedies have "run off the rails").

The hearing officer held that this case presents the exceptional situation described by the *Chavez*: without SEA intervention, Student and Parent have no hope that their complaint will initiate a process leading to a resolution. Moreover, by including the SEA as a party, the parent has made a straightforward demand for SEA intervention.

The NMPED is also a proper party to this due process proceeding pursuant to 20 U.S.C. § 1413(g), because CEPi, the relevant LEA in this case, is unable to provide a free appropriate education. It is settled law that when this situation arises, the SEA must take over the provision of the necessary services. 20 U.S.C. § 1413(g). Indeed, in this case, the NMPED has already determined, after a full evidentiary hearing, that CEPi cannot meet state educational standards, and has revoked its charter. This is exactly the situation

contemplated by 20 U.S.C. § 1413(g), where notice has been given to the LEA and it has been found unable to meet the statutory requirements. The SEA, therefore must step in and assume the responsibility to provide both the procedural protections and the compensatory services, if any, ordered by the hearing officer.

Substantive Requirements.

Congress enacted the IDEA, in part, “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. § 1400(d)(1)(A). The United States Supreme Court has held that a FAPE “consists of educational instruction specially designed to meet the unique needs of the handicapped child, ... supported by such services as are necessary to permit the child to benefit from the instruction.” *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Although there is currently a controversy about whether the IDEA requires the provision of specialized instruction and related services sufficient to enable the Student to make “meaningful” educational progress, or merely “some educational progress,” *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (10th Cir. 2015), *cert granted*, ___ U.S. ___ (2016), this controversy does not affect the decision in this case. The hearing officer has found that neither Student’s IEP nor the services provided to Student were reasonably calculated to enable him to make even some educational progress. Not surprisingly, Student did not make such progress.

Procedural Requirements.

Whether an IEP offers a Student a FAPE depends as much on whether the procedural protections of the Act concerning the development of the IEP were followed as it does on evaluating the program developed under the Act's substantive standards. Of particular importance to the Congress are the procedural protections the Act provides to parents, so that they can actively participate with school staff in planning their child's education. *Rowley*, 458 U.S. 176, 205-06 ("[i]t seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents ... a large measure of participation ... as it did upon the measurement of the resulting IEP against a substantive standard").

In addition to the substantive denial of a FAPE, described above, the hearing officer has found that CEPi's failure to comply with the central procedural requirements of the IDEA prevented Parent both from effectively participating in the development of Student's educational program and denied her the information which would have allowed her to invoke her rights to insist on provision of a FAPE to Student early in the school year. These procedural violations – the failure to provide information on Student's progress, to inform Parent prior to radical changes to his IEP, to consult with Parent on Student's needs – both interfered with the provision of a FAPE to Student and significantly impeded the Parent's opportunity to participate in the decisionmaking process regarding the provision of a FAPE. *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

Remedy.

Having determined that Student was denied a FAPE throughout the 2015-2016 school year, the remaining question for the hearing officer is remedy.

A hearing officer is authorized to order the provision of educational and related services to remedy the harm done to a student by the deprivation of FAPE. In determining the nature and the amount of additional compensatory services, the hearing officer must consider all the circumstances. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

Because the denial of a FAPE to Student resulted in an entire school year during which Student made no progress toward his IEP goals, the hearing officer has determined that additional compensatory services beyond the minimum required by the IDEA for Student in the current year are appropriate as compensatory services. These services will meet Student's current needs and effectively speed Student's progress in improving his communication skills, social skills, study skills, and reading fluency. areas in which Student has deficits arising from his disability. The compensatory services ordered will help him to regain some of the ground he lost during his ninth-grade school year. The hearing officer has been guided by Student's recent neuropsychological evaluation, **Ex. 26**, as well as other evidence in the record concerning Student's current needs.

The hearing officer has also found that Parent's request for training concerning Student's needs based on his disability, and also concerning the role of the Parent under the IDEA, are well taken. These services will allow Parent to better assist Student in working toward his IEP goals and in advocating for Student in the education system. Parent counseling and training are related services under the IDEA: they are also appropriate

compensatory services where a parent has been prevented fully participating in the development of her child's IEP, itself a denial of FAPE.

In this case, Petitioners have asked the hearing officer to establish a \$50,000 trust fund which Parent can draw on to provide compensatory services for Student. Although a hearing officer have authority to award injunctive relief, to provide reimbursement for services previously paid for by a parent or to order future compensatory services, a hearing officer does not have authority to award damages. Petitioners request for a large fund is effectively a request for damages. It is therefore denied.

The PED, on the other hand, has asked the hearing officer to get involved in choosing the funding mechanism pursuant to one of several provisions of state law. The hearing officer has concluded that the choice of funding mechanism is up to the PED. IDEA requires that funds be made available so that the services ordered can be timely provided. The hearing officer has no authority to address the funding requirements of state law and the state budgeting process.

IT IS HEREBY ORDERED:

1. Mother and Student may attend one nationally recognized conference which offers information and training to teenagers who are on the autism spectrum and their parents. Mother may also attend one training on the IDEA and the role of parents under the IDEA. The IDEA training should be in New Mexico. The autism conference may be out of state. Mother's and Student's expenses to attend these conferences will be paid, including reasonable travel costs and overnight costs for a multi-day conference.

2. Student will attend one session of Camp Rising Sun or a comparable program for teens with autism if Camp Rising Sun is unavailable for any reason during both the summer of 2017 and the summer of 2018.
3. Student will be provided tutoring in reading and mathematics by a teacher knowledgeable about teaching techniques for students with high-functioning autism, including the techniques and learning strategies described in Student's neuropsychological evaluation, **Ex. 26, at 12-13**. The individual providing tutoring in reading need not be the same individual who tutors Student in math. This tutoring shall be provided for one hour a week in each subject area (2 hours per week in total) for two semesters, beginning as soon as a tutor can be hired.
4. Student will be provided six weeks, three hours a day, five days a week of ABA therapy in his home and/or in community setting during the summer of 2017. Parent can choose a qualified ABA therapist from an autism program in Albuquerque.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I) (2004), 34 C.F.R. § 300.516, and § 6.31.2.13(I) (25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

THIS DECISION ENTERED THIS 12th DAY OF JANUARY 2017.

Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this Final Decision of the Due Process Hearing Officer was sent by certified mail, return receipt requested, on January 12, 2017, to Hanna Skandera, Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and by e-mail in PDF format as well as by certified U.S. Mail to the following counsel of record in this proceeding.

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Jane B. Yohalem
Due Process Hearing Officer