

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

**R. M. and R. M., Parents, on behalf of
M.M., Student,**

Petitioners,

v.

Case No. DPH 1516-22

ALBUQUERQUE PUBLIC SCHOOLS,

Respondent.

FINAL DECISION OF THE DUE PROCESS HEARING OFFICER

Jane B. Yohalem, Due Process Hearing Officer
August 31, 2016

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STATEMENT OF THE CASE

INTRODUCTION

This due process proceeding was filed by Parents on their own behalf and on behalf of Student complaining that the Albuquerque Public Schools (the District) denied Student a free appropriate public education (a FAPE) pursuant to the Individuals with Disabilities Education Improvement Act (IDEA), 20 U.S.C. § 1400, *et seq.* Student is thirteen years old. During the past school year, Student was in the sixth grade in a District middle school. Student was identified with autism when he was three years old and has been eligible for services under the IDEA as a student with a autism since that time.

Student exhibits significant delays in cognitive abilities, sensory processing, daily living skills and communication. Ex. 24, at 2. He is non-speaking. He does not yet have a developed pictorial or other communications system. Student has difficulty focusing and staying focused on academic and other tasks. He has a pattern of elopement in school, periodically running out the door of his classroom. He shows no awareness of danger.

Parents' due process complaint focuses on Student's 2015-2016 school year. Parents claim that Student was denied a FAPE during that school year both because Student's IEP was not reasonably calculated to enable him to make educational progress and because the special education and related services actually provided to him were not the research-based, peer-reviewed practices for students which autism necessary to allow Student to benefit from his education. Parents allege as well that the District failed to develop the functional behavioral analysis (FBA) required by Student's IEP and that the failure to systematically analyze Student's behavior and prepare a plan for addressing it negatively impacted Student's education and endangered his safety. Parents also claim that District staff failed to communicate adequately with Parents about Students activities and progress in school

and failed to coordinate services for Student at home and in school, also negatively impacting his receipt of a FAPE. One of the most contentious issues in this case is Parents' demand that Student be placed in a District "Emerging Autism" class, rather than in the Intensive Support Program (ISP) class the IEP team selected. Parents claim that the District cannot provide the peer-reviewed specialized instruction and related services needed by Student in the ISP class. Other issues raised by Parents include claims that Student is entitled to music therapy and extended school year services, and that the District's addition of an intellectual disability to Student's eligibility and the use of physical restraint violated the IDEA and denied Student a FAPE. Finally, Parents claim that their decision to remove Student from school on February 3, 2016, was essential both to protect Child's safety and because the educational program offered by the District denied him a FAPE.

The District claims that Student has at all times been provided a FAPE. The District agrees that Student needs evidence-based services for children with autism at least part of each day. The District claims that Student's IEP was reasonably calculated to ensure that Student made educational progress and that Student was provided evidence-based services sufficient to allow Student to make educational progress. The District admitted that an FBA was required by Student's May 18, 2015, IEP and that the FBA was never completed. It claims, however, that Student suffered no harm because the teaching staff implemented appropriate strategies, leading to an improvement in Student's elopement behavior. The District strongly contends that placement of Student in an Emerging Autism class is inappropriate based on Student's needs and that the District can properly serve him in the ISP class. Finally, the District claims that Parents' decision to pull Student out of school on the second day of a new placement designed to address Parents' concerns was not justified and that no compensatory services should be awarded for that time period.

The hearing officer finds that Student was denied a FAPE from August 15, 2015, until February 1, 2016, both because his IEP was not reasonably calculated to provide him educational benefit and because the services actually provided to Student by the District did not enable him to make educational progress. The District failed to carry its burden of showing that its failure to comply with Student's IEP requirement to develop an FBA did not impede Student's ability to benefit from his education. The hearing officer agrees with the District that the Parents' decision to withdraw Student from school was not justified and denied the District the opportunity to offer Student a FAPE in his new placement.

All of the issues raised by Parents will be addressed in detail the hearing officer's findings and conclusions below.

FINDINGS OF FACT

The Student's Evaluation and Eligibility.

1. Student was evaluated by the UNM Center for Development and Disability Early Childhood Evaluation Program in January, 2006, when he was three years old. He received a diagnosis of Autism. The evaluation noted developmental delays as well. It found that regardless of his developmental delays, Student "will benefit from intervention at the intensity level currently recommended in the literature for children with autism." Ex. 1, at 15.

2. Student's subsequent evaluations, including his most recent reevaluation in the spring of 2015, have been based on observation and performance, rather than formal diagnostic testing. Ex. 26. The multi-disciplinary team charged with assessing Student determined that "standardized testing was not needed to determine if [Student] continues to have a disability and/or to determine the educational needs of [Student] and/or to determine the continued need for special education services. Ex. 27, at 2. Parents do not challenge the District's decision to evaluate Student without standardized testing.

3. The multi-disciplinary team (MDT) summarized Student's abilities as of May, 2015, just before his transition to middle school. Ex. 27. Student is described as having "continued delays in the areas of communication, motor skills, adaptive behaviors, sensory processing, academics, and social communication and interaction. His fifth grade special education teacher reported that he requires constant adult supervision and assistance. He "often" runs off without watching for dangers around him. He moves away from a group of students and adults quickly, especially when he sees doors to the school building or to portable classrooms. Student is able to follow one to two-step commands for activities that are familiar parts of the school routine. Student does not speak and has no developed communication system for communication with persons not well known to him. One of his educational goals in fifth grade was to develop such a communication system step by step. His fifth grade speech and language pathologist (SLP) reported that he had made progress toward that goal. By the end of the year, he was "consistently able to communicate [what] he wants for a snack using pictures and giving it to an adult. He at times will request a desired toy using a picture if it is available." Ex. 27, at 6. The SLP reported that Student was progressing with his recognition of pictures of common items: by the end of the year, he was consistently able to select pictures of a handful of familiar items when offered a number of choices. Ex. 27, at 4. Finally, the SLP reported improved attention to task during the year and noted that Student did best in individual sessions with lots of rewards. By the end of the fifth grade, Student was able to sit with his peers through read aloud stories and participate in partnership with his peers some of the time. Student was able to hang up his jacket and take it off a hook to put it on. Student is only partially toilet trained and was not able to ask to go to the bathroom. Lack of visual attention and distractibility were described as interfering with his learning. Student was able to attend to activities he was interested in consistently for 2-3 minutes during fifth grade. Sometimes he attended

for 3-5 minutes. He was able to understand and enjoy the class routine. Ex. 27. Student was described as good at simple puzzles and matching, but as needing some prompting to stay on task even for these activities. Ex. 28, at 7.

4. The MDT found that Student continued to be eligible for special education and related services as a Student with a disability in the area of autism. Ex. 27.

5. Despite the MDT finding of eligibility based solely on autism, the IEP notes both autism and intellectual disability as Student's areas of eligibility on his May 18, 2015, IEP. Ex. 28, at 1. Student's eligibility was again listed as autism and intellectual disability on his January 29, 2016, IEP. Ex. 39, at 1. The District testified credibly that the addition of intellectual disability to Student's IEP was a typographical error which, because of peculiarities of its computer system, could not be fully corrected until Student is reevaluated. 4 TR. 1156, 1201. The District offered to conduct an early reevaluation, with testing, at Student's January 29, 2016, IEP meeting and again at the due process hearing. Ex. 39, at 18; 5 TR. 1367-68. Parents have not expressed interest in a reevaluation, apparently because they believe the services needed by Student would not be changed by the reevaluation. 4 TR. 1158.

6. Although Student's IEP erroneously identified his eligibility as both autism and intellectual disability, as the District conceded, the weight of the evidence does not show that this error negatively affected his educational services in any way. Ex. 28.

Student's Instructional Needs in Order to Make Educational Progress.

7. The Board Certified Behavior Analyst (BCBA) who is working with Student in his home testified credibly that Student needed an intensely focused one-on-one, very structured and consistent Applied Behavior Analysis (ABA) program in order to learn a new skill or to extinguish a negative behavior. Student requires careful choice of a defined objective which is both within his reach and functionally useful to him, collection of data

on how Student is responding to the instruction, and constant modification of the program based on Student's progress or lack of progress, as shown by the data. 3 TR. 667-68. Student needs many highly consistent repetitions to master a task, many more than most students with autism, to make progress. 3 TR. 710, 712. Student needs to be taught such skills as how to play independently, how to feed himself, how to dress, and how to respond to simple commands. 3 TR. 613. Without systematically planned and consistent instruction, Student does not make progress. With the consistency and structure provided by ABA strategies, Student is slowly able to master a task bit by bit, building his skill level until he is able to do the whole task on his own. 3 TR. 614.

8. Mother reported that the family had tried many approaches with Student, but that "nothing helped other than this program of – this systematic program of ABA." 4 TR. 898-99.

9. The multi-disciplinary team which performed Student's reevaluation found that Student "requires a cluster program with specialized instruction and supports for students with autism in order to make academic gains." Ex. 27, at 3.

10. As noted above, the UNM team that originally diagnosed Student noted that Student "will benefit from intervention at the intensity level currently recommended in the literature for children with autism." Ex. 1, at 15. The program "recommended in the literature," of course, is intensive ABA.

11. The behavior analyst who was the District's expert, Ms. Bossow, agreed that Student required very specific, systematic and defined use of research-based autism-specific strategies in order to make progress. She emphasized Student's need to develop a functional communication system so that he can communicate his needs and wants. 5 TR. 1391-92. She emphasized that although ABA strategies have been shown by research to work with children with severe autism, like Student, a school day for Student must include

both ABA and other research-based techniques as well. 5 TR. 1352, 1386. She agreed that tracking data on Student's progress and making changes in the teaching strategy if Student was not progressing were essential to enable Student to make progress. In her expert opinion, lack of data would negatively impact his education. 5 TR. 1352, 1428-29. She testified that for children with extensive needs, like Student, it is "critically important for the family and the school to work together. We need to be consistent in what we are presenting, and how we are doing things." 5 TR. 1360.

12. All of the experts who testified emphasized that the development of a communication system Student could use to spontaneously communicate his needs and wants and to communicate with those not intimately familiar with him was the top priority for his education. 5 TR. 1391-92; 2 TR. 494; 3 Tr. 639-41. It was Parents' priority for Student as well. Ex. 28, at 2.

13. Student's MDT reevaluation and report on his current functional and academic levels (in his IEP) showed that he had recently made significant progress in communication. Exs. 27 and 28. His fifth grade SLP reported that, by the end of the year, Student was "consistently able to communicate [what] he wants for a snack using pictures and giving it to an adult. He at times will request a desired toy using a picture if it is available." Ex. 27, at 6. The SLT reported that he was progressing with his recognition of pictures of common items: he was consistently able to select pictures of familiar items when offered a choice among a number of pictures. Ex. 27, at 4.

14. The District's expert, Ms. Bossow, testified that Student's continued progress in communication would require 1:1 work with an SLP who was skilled and experienced in working with non-speaking students with autism. 5 TR. 1475. Ms. Bossow emphasized the importance of the SLP having "a bags of tricks ... different strategies and methodologies to use" with students with autism. 5 TR. 1449. The SLP would need both to work directly with

Student on an individual basis and to consult with Student's teaching staff and Parents to ensure that Student's work in the classroom and at home reinforced what Student was learning in therapy. Ex. 33, at 1.

Student's May 18, 2015 IEP.

15. In describing Student's current levels of achievement, Student's May 18, 2015, IEP restated much of the MDT team's report. The IEP team put in place goals and objectives for Student in the areas of communication, letter recognition and recognition of his name, matching objects of like color and size, and improved social interaction. Ex. 27; Ex. 28.

16. Although the IEP team completed a State-agency required checklist for Students with autism, and checked "Yes" to whether teaching strategies based on peer-reviewed and/or research based practices were needed, the team did not go on to include in the IEP a statement of the peer-reviewed autism-specific strategies needed by Student to make academic progress toward each of his goals. Ex. 28, at 16.

17. The IEP team, in the prior written notice section and on the autism checklist, acknowledged that Student has "some behavior issues that impede his learning." Ex. 28, at 16, 18. The team agreed with Mother's request for a functional behavioral assessment (FBA) and a Behavior Intervention Plan (BIP) to address Student's elopement: he would frequently run out of the classroom and was obsessed with doors. The team found that an FBA, possibly followed by a BIP, were necessary both to support Student's academic success and for safety. Ex. 28, at 18.

18. The IEP team decreased Student's speech and language therapy from 720 minutes a semester in fifth grade to 600 minutes a semester. There was no discussion of this change or the reasons for it. Nor was there any discussion of the type of specialized speech and language therapy Student would need to make progress in his communication

skills. TR. 65-66. The team also did not discuss the qualifications needed to work effectively with Student, a non-speaking child on the severe end of the autism spectrum. *Id.* Student's IEP communication goal refers to using pictures or low-tech devices to answer questions "60% of the time, three out of five sessions, as measured by the SLP. Ex. 28, at 6. There was no peer-reviewed, research based approach specified, nor did the IEP specify that the SLP chosen to work with Student must have knowledge of research-based strategies for non-speaking children with autism. Ex. 28. The IEP also did not make note of the fact that low-tech devices had been tried in the fifth grade with Student and had proven ineffective. Ex. 24, at 24.

19. The IEP did not require that Student's teachers and therapists consult with the District's Autism Resource Team (ART) on how to serve Student. Ex. 28.

20. The IEP team did not include an autism expert. Ex. 27, at 1; Ex. 28, at 1. Although the law governing the composition of the IEP team does not require that an autism expert participate in each IEP involving a child with autism, the regulations do require that someone on the team be able to explain the instructional implications of the Student's evaluation to the team. 34 C.F.R. § 300.321(a)(5). The absence of a diagnostician, autism expert, or an autism-specific teacher who could play this role constitutes a procedural violation of the IDEA. Parents carried their burden of demonstrating that the other members of the team were not able to play this role. 1 TR. 36, 38,-44, 46-47; 918-919. The hearing officer finds that the absence of someone who could discuss the instructional implications of Student's autism and his severe deficits contributed to the preparation of an IEP that was not reasonably calculated to enable Student to make educational progress.

Speech and Language Therapy (SLT).

21. The SLP who worked with Student from August 2015, to February 2016, had no special training or expertise in working with students with autism. 3 TR. 807-08, 846. The SLP testified that she disregarded Student's autism entirely in deciding how to work with him because she believed that the techniques she used with other students with language deficits would work equally well with Student. 3 TR. 844-45 (that Student had autism "had nothing to do with her practice [with Student]"). See *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016) (failure to identify autism is fatal to delivery of FAPE to the student since needs of students with autism require understanding and implementation of evidence-based practice for students with autism).

22. The SLP reported that she "tried different ways of working with [Student]" and did not keep data to determine what worked and what did not. 3 TR. 809-12, 829; Ex. 54. She reported struggling throughout her sessions with Student to get his attention and to keep him in his seat, requiring the assistance of an EA at all times to help direct his attention. 3 TR. 831-32, 818, 822-23. Sessions were interrupted frequently by Student running out the door. 3 TR. 825-26 ("[Student] likes to open and close doors and will run away").

23. On November 2, 2015, when an SLP who is an expert in autism (a member of the District's Autism Resources Team (ART) visited Student's class, the expert noted with concern that Student had "no functional communication system in place." She offered assistance in setting up such a system for Student. Neither Student's teacher nor his SLP accepted that assistance. 3 TR. 832-33.

24. Student did not make progress in his communication skills during the period from August 2015, through February 1, 2016. Indeed, the SLP's testimony indicates that Student regressed: Student did not look at pictures meaningfully in the SLP's work with

him, although at the end of fifth grade, the SLP working with him reported that he was able to “consistently communicate what he wants for a snack using pictures and giving it to an adult.” 3 TR. 831-32; Ex. 24, at 5. There was a loss as well in his ability to follow one-step directions (to less than 20 percent of the time, even with hand-over-hand assistance). 3 TR. 819, 822; *compare*, Ex. 24, at 7.

25. Student’s teachers reported that Student did not spontaneously initiate any communication in the classroom and specifically was not able to use pictures to ask for a snack, a skill he was demonstrating at the end of fifth grade. Ex. 24, at 6.

26. The SLP dealt with Student’s lack of progress by changing his communication goal in January 29, 2016, to reflect Student’s lack of progress. 3 TR. 841; Ex. 39, at 8-9.

Student’s Behavior in Running from the Classroom.

27. At the beginning of the year, Student was running out of the classroom three to five times a class period: as many as 18 to 30 times a day. 1 TR 88; Ex. 30. His classroom at the beginning of the school year was just steps away from doors to the outside area where school buses pulled in. 1 TR. 42.

28. Running out of the classroom “often” was a behavior which had been identified in his IEP as a problem during fifth grade. Ex. 28, at 6. At Parents’ request, Student’s IEP called for an FBA to address his eloping behavior: a behavior which the IEP team identified as impeding his learning. Ex. 28, at 18; 4 TR. 920.

29. Despite its inclusion in Student’s IEP, no FBA was started until Mother insisted on it just before Student was transferred out of Ms. L’s class and into Ms. R’s class at the end of October, 2015. 1 TR. 85-91, 127. The FBA begun by Ms. L on October 29, 2015, was never completed. Ms. L testified that she was unable to complete the FBA because she did not have sufficient data on the circumstances and predicates for Student leaving the classroom to be able to complete the FBA. 1 TR. 90-91; Ex. 30; 4 TR. 930-31.

She asked for a consultation with the ART, recognizing that she needed the help of an autism expert. Ex. 30, at 2. Because of an administrative error and Student's transfer to another class, this consultation never occurred.

30. Student was placed in Ms. R's class on November 2, 2015. Although Ms. R collected data on the number of times Student ran from the classroom, she did not record the predicates to Student's behavior and, therefore, according to the District's expert, her data was not sufficient to prepare an FBA. 5 TR. 1381; Ex. 46, at 7. Student's FBA was never completed. *See* Ex. 39, at 18.

31. Parents were not informed about the frequency with which Student was running from his classroom. They were given vague assurances that "things are going well" or "negative behaviors are decreasing." 1 TR. 87; Ex. 44; 5 TR 1436. This lack of information prevented them from complaining about an FBA and BIP not being completed; or from seeking a consultation from the ART; or from requesting that Student's IEP team meet. 5 TR. 143-37 (the District's expert agreed that it is important to tell Parent's that Student is leaving class 10 times a day). Parents also began to distrust the District, feeling that important information about Student was being hidden from them. 5 Tr. 1437. This feeling was exacerbated by Student's inability to report to them what happened to him at school. 4 Tr. 1110.

32. As Student learned the class routine, his running behavior decreased, but it never went away. 1 TR. 134-35; 278-80. Student's running out the classroom door was noted as a problem by Student's related services and adapted physical education provider as well as by his classroom teachers. 1 TR. 88; 3 TR. 772; 3 TR. 825-26; Ex. 30; 2 TR. 577; Ex. 46, at 7; 2 TR. 467-69; 4 TR. 3 Tr. 759-60. No uniform behavior implementation plan was adopted: each teacher dealt with the behavior in her own way. *Id.* This approach was not reasonably calculated to extinguish the behavior.

Student's Lack of Progress Toward His IEP Goals.

33. Student failed to make any progress toward his IEP goals between August 2015, and February 3, 2016.

34. Student was in Ms. L's class from August 15, 2015, until Ms. L transferred to another District program on October 31, 2015. Student was then assigned to Ms. R's classroom beginning on November 2, 2015. On February 2, 2016, Student was assigned to a "hybrid" program: two hours in an Emerging Autism class taught by Ms. F, while continuing in Ms. R's class for the remainder of the day. 1 TR. 27, 165.

35. Ms. L testified that she was unfamiliar with the considerations for educating children with autism found in state regulation and District forms. *See* § 6.31.2.11(B)(5)(k) NMAC; Ex. 28, at 16. She explained that she had not studied these considerations because she was not an autism-specific teacher. 1 TR. 64-65. She believed incorrectly that these considerations, which address teaching strategies and services appropriate for children with autism, were primarily relevant to diagnosticians. 1 TR. 64.

36. Ms. L used a teaching program with Student designed for students with global learning deficits, not a peer-reviewed program for children with autism. 1 TR. 39-40; Ex. 29.

37. Ms. L, by her own report, had difficulty engaging Student in learning. Ms. L's request to the ART for help in working with Student, submitted on October 14, 2015, just before Student left Ms. L's class, describes Student as not only regularly running from the classroom, but also as restless, frequently walking around the classroom, and not joining activities. Ex. 32, at 2B.

38. Although Ms. L's notes and any data she collected were not available at the hearing, Ms. L's request for a consultation with the ART concerning Student reports on Student's then-current levels of performance. Ms. L notes that, in the area of

communication, Student is gesturing or making sounds, but not otherwise communicating. Ex. 32, at 2 B; 5 TR. 1438. Ms. L's effort to teach Student to communicate when he needs to go to the bathroom failed. Ex. 32, at 2C. This was not one of his IEP communication goals and is far more difficult for Student to learn than selecting pictures of a snack or toys, the level where Student was working. The strategies used by Ms. L were not consistent with the District's autism expert's recommendations for teaching toileting. 5 TR. 1393-94.

39. Ms. L's report that Student was following two-step directions communicated in pictures is not credible. Ms. L admitted that Student would do this only when the activity requested was part of the daily routine. She agreed that it was possible Student was only following the daily routine and was not actually following two-step picture directions. 1 TR. 113. Student's IEP notes that Student is quite good at learning and following a routine. His ability to learn a routine is not an indication of progress toward his IEP goals. Ex. 27, at 4.

40. Ms. L testified that in requesting an ART consultation, she was looking for guidance on how to teach Student academic skills, for "some direction." Ex. 32; 1 TR. 127. She had found Student not responsive to the curriculum she was using. 1 TR. 140. She did not get direction from an autism expert before Student left her class. 2 TR. 477-78.

41. The instruction provided to Student in Ms. L's class was not reasonably calculated to enable Student to make progress toward his IEP goals. Student, not surprisingly, did not make such progress.

42. In Ms. R's class, weekly data also shows no progress towards Student's IEP goals. Ex. 46, at 1-6; 5 TR. 1260-61. Ms. R failed to measure Student's progress more frequently than weekly and failed, as well, to revise teaching strategies that were not leading to progress, something the District's expert testified was essential. 5 TR. 1386-87.

43. Ms. R did not communicate with Parents about Student's lack of progress, did not know what strategies Student's therapist at home had found effective or what skills

Student was working on at home. Ex. 44; 1 TR. 257, 267-68; 4 TR. 942-43, 961; 5 TR. 1435-37, 1386. The District's expert and Parents' expert each testified that communication between home and school was essential to ensure the consistency necessary for Student to make educational progress. 5 TR. 1360; 3 TR. 695. Ms. R also did not take advantage of the ART team's offer to assist her in putting in place a communication system for Student: a priority goal in his IEP. Ex. 34, at 1; 1 TR. 227-28; 2 TR. 494-97. Finally, she did not review or use the notes and data kept by Ms. L to determine what worked or did not work with Student during the first few months of the school year. The District's expert testified that this failure negatively impacted Student's education. 1 TR. 222-23; 5 TR. 1428-29.

44. Student was capable of making progress as shown by his reported progress in communication skills in the fifth grade and the progress he made at home beginning in February 2016, with a private BCBA. Ex. 28, at 6; 3 TR. 639-41.

Student's Placement in an Intensive Support Program v. an Emerging Autism Program.

45. Student was placed in a District Intensive Support Program (ISP) at the beginning of the 2015-2016 school year. Ex. 28, at 18. Although Parents strongly preferred the District's Emerging Autism Program, the IEP team determined that placement in an ISP classroom was appropriate for Student. Ex. 28, at 17-18.

46. Parents' testified that they wanted Student placed in an Emerging Autism classroom primarily because they were concerned that the ISP teachers and related services staff did not have the training and support from experts in autism routinely provided to staff in the District's autism-specific programs. (See 4 Tr. 1145; 2 TR. 440-41, 448-49; 1 TR. 185-87.) In addition, Parents had visited Student's ISP classes and did not see Student's needs being met. 4 TR. 993. They felt Student needed a class that specifically served the needs of children with autism. Their expert agreed. Ex. 55, at 2.

47. The issue of Student's placement in an ISP class versus an Emerging Autism class came up both in the initial IEP meeting on May 18, 2015, and again when Ms. L left at the end of October 2015. 4 TR.933. Mother reported that Ms. L recommended that Student move to an Emerging Autism program on November 2m 2015, when she left. 4 TR. 1139. Parents' request that Student be moved to an Emerging Autism class prompted an ART team observation of Student to assist in determining which class was appropriate for Student. 4 TR. 1139-41; Ex. 33, at 1. On December 4, 2015, Student's IEP team reconvened to decide on classroom placement. That meeting was continued to January 29, 2016, to allow Parents to visit both ISP and Emerging Autism classrooms. 4 TR. 933-935, 939.

48. When the controversy as to Student's class placement remained unresolved at the January 29, 2016, IEP meeting, the team agreed to place Student in an Emerging Autism class for two hours a day and to have him continue in Ms. R's ISP class for the remainder of the day. Ex. 39, at 18. The team intended to evaluate which program better met Student's needs after an 8-week trial, during which data would be collected. 4 Tr. 1160-61; 4 TR. 1107-08; Ex. 39, at 18.

49. This evaluation never happened because Parents withdrew Student from school after only two days in Ms. F's Emerging Autism class. Their reason for doing so was their concern about an admittedly chaotic transition to Ms. F's class: Ms. F was told on Friday afternoon that Student would join her class Monday morning. 4 TR. 973; 1 TR. 165.172. Mother came to observe Student in Ms. F's class that Monday and again on Wednesday. The class was understaffed on at least one of those days and Mother came away with the impression that the teacher was unprepared to deal with Student and did not want him in her class. 4 TR. 973-77; 1 TR. 165-67; 169-70, 192-93. Ms. F claimed Mother's impression was incorrect and based on misunderstanding of a comment made by teacher. 4 TR. 977; 1 TR. 174-75, 189-90, 194.

50. The ISP class includes students with a variety of disabilities ranging from intellectual disabilities, to physical disabilities, to autism. Ex. 55, at 2. The ISP class moves more slowly and is able to provide more individual assistance. The Emerging Autism class is composed of exclusively students with autism. These students are generally capable of working on their own with minimal prompting. 4 TR. 1145. (Student was not working independently, even for short periods. 4 TR. 1146.) Students in the Emerging Autism class also generally have a communication system in place and know how to exchange pictures, rather than just learning to discriminate between pictures. 4 TR. 1128-32; 5 TR. 1405. The reading and writing goals of the other students in the Emerging Autism class were far higher than Student's. 1 TR. 197-98.

51. The choice of a teacher and classroom for a student is a matter within the District's discretion. However, where the issue is not simply the location or a choice between comparably trained teachers, but one which affects the educational program provided to Student, the choice must be made by the IEP team. Here a choice of program is involved, not simply a location and teacher. Student did not fit perfectly in either the program offered in the ISP classroom or the Emerging Autism class: either choice would arguably have been acceptable. 5 TR. 1401-04 (District's expert says it is not a black and white choice); Ex. 55 (Parents' expert lists pros and cons of each class). What was not acceptable, however, was the District's failure to provide the autism-specific methodologies needed by Student to make educational progress toward his goals regardless of the classroom, teacher, or program being used with other students in the class. The District claims that it has the ability to ensure that its staff in the ISP setting is adequately trained and supported to meet Student's needs. But the District staff did not meet Student's needs in his ISP classes. Because Parents pulled Student out of school on February 4, 2016,, it is unclear whether the program in the Emerging Autism class would have been a better fit for

Student, or, even if it was not, whether the District could more easily have met Student's individual needs there.

52. Parents action in withdrawing Student from school after only two day sin Ms. F's class was not justified. In implementing a "hybrid" placement for Student, the District was responding to Parents' request to place child in an Emerging Autism class where the teacher was trained and experienced in dealing with students with autism and where the ART made regular visits and provided support. 4 TR. 1145, 2 Tr. 440-41, 438-39; 1 Tr. 185-87. Although the transition to Ms. F's class was admittedly disorganized: in retrospect, more notice should have been given to Ms. F so that she and her staff could be prepared (Ex. 36, at 5), Parents' decision to immediately remove Student from school denied the District an opportunity to put in place an appropriate program for Student in the type of class requested by Parents. The later miscommunication with the District after Student was removed from school, where both parties missed telephone calls from the other, also did not justify Parents' failure to return Student to school or to meet with District staff. Ex. 36; 4 TR. 978-985; 5 TR.1434-35.

Use of Physical Restraint.

53. Parent presented no evidence that any sort of physical restraint was ever used with Student during the relevant time period. *See* 5 TR. 1311-12.

Music Therapy.

54. Although the evidence shows that Student responded to and enjoyed music, Parents presented no evidence establishing that music therapy would enable him to benefit from his special education in a way SLT and OT could not.

Occupational Therapy (OT).

55. Parents did not introduce sufficient evidence to establish that the teaching strategies and techniques used by Students' OT were not reasonably calculated to enable

Student to make some progress toward his OT goals. These goals included not only increasing attention to task, an area where there was little or not progress, but also improving functional manipulation skills, where the therapist reported some progress. Ex. 28, at 8; 3 TR. 755-56, 758-59.

Extended School Year Services (ESY).

56. The IEP team determined that Student does not require extended school year services. Ex. 28, at 18. The reason given is that “Student does not show regression or needs to recoup his skills after breaks.” *Id.*

57. There is no evidence in the record that conflicts with the team’s finding. Although it is common for students with autism to require year-around services, the determination is individualized, and in the absence of evidence, the hearing officer will assume that the decision of the IEP team was correct.

Adding a Reading Goal for Student.

58. Although Parents would like Student’s IEP to include a reading goal of teaching Student to decode words (Complaint, 5), both sides’ experts testified that such a goal would be inappropriate at this time. 5 TR. 1406; 3 TR. 725 (“Student isn’t there”). The hearing officer agrees with the expert witnesses.

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 (2007).

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

3. At the request of both parties, extensions of time for entry of the decision in this matter have been granted until August 31, 2016.

4. 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). For all issues except the District's failure to comply with the IEP's explicit requirement for an FBA (where the burden of proof is on the District as it is the party challenging the IEP), the burden of proof is on Parents.

5. 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 statutory period began on March 31, 2014. All of the claims made by Parents arose within the statutory period.

6. 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 area of autism. 34 C.F.R. § 300.8(c)(1) (2006).

7. Student's May 18, 2015, IEP was not reasonably calculated to provide Student some educational benefit and the services provided by the District pursuant to the IEP did not provide Student educational benefit. Student, therefore, was denied a FAPE from August 15, 2015, until January 30, 2016, 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 (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).

8. The District failed to carry its burden of establishing by a preponderance of the evidence that its failure to provide Student the FBA required by his IEP did not interfere with the provision of appropriate educational services to Student. Therefore, the District's

failure to complete an FBA and consider Student's need for a BIP denied him a FAPE. 20 U.S.C. § 1414(d)(1)(A)(i)(IV).

9. Parents failed to carry their burden of establishing by a preponderance of the evidence that the IEP team failed to properly consider Student's need for Extended School Year Services (ESY) or that such services are necessary for the provision of FAPE to Student. 34 C.F.R. § 300.106; *Johnson Independent School District # 4 of Bixby*, 921 F.2d 1022 (10th Cir. 1990).

10. The absence on Student's IEP team of a person "able to interpret the instructional implications" of Student's evaluation is a procedural violation of the IDEA. 34 C.F.R. § 300.321. Merely identifying a procedural deficiency does not automatically entitle a family to relief. Here, however, Parents carried their burden of establishing that this procedural error both impeded the child's right to a FAPE and significantly interfered with the Parents' participation in the decisionmaking process. *See Andrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d at 1335.

11. Parents did not carry their burden of establishing that music therapy was a related service which was necessary to enable Student to benefit from his education. 34 C.F.R. § 300.34.

12. The District failed to provide Student speech and language therapy which were necessary to assist student to benefit from his special education. 34 C.F.R. § 300.34.

13. The District failed to provide Student a FAPE when it failed to provide the research-based, peer reviewed special education and SLT related services necessary for Student to make even some educational progress. *Andrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (2015).

14. The failure of Student's teachers to provide reports to Parents on Student's activities in school and on his progress or lack of progress and to otherwise share

information with Parents denied Student educational benefit and significantly impeded the Parents' 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).

15. The District's choice of an ISP class for Student did not deny him a FAPE: Student was denied a FAPE by the failure of the District to ensure that Student was provided the research-based, systematic personalized instruction and support services required to permit him to benefit educationally, regardless of his class placement.

16. Compensatory education is an equitable remedy. In determining what relief is appropriate, the hearing officer considers all of the circumstances. *Reid v. District of Columbia*, 401 F.3d 516 (D.C. Cir. 2005).

DISCUSSION

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," *Endrew F. ex rel. Joseph F. v. Douglas County School Dist. Re-1*, 798 F.3d 1329, 1341 (2015), 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.

Since the *Rowley* decision, the Congress has added an admonition to school districts to base the special education and related services and supplementary aids and services provided in an IEP on peer-reviewed research "to the extent practicable." 20 U.S.C. § 1414(d)(1)(A)(i)(IV). This provision does not supercede the Act's requirement that services be individually designed to provide meaningful educational benefit. Judgments must still be made about the applicability of the research to the particular needs of the student.

These requirements come together in this case where the evidence establishes that Student needs research-based, peer reviewed educational strategies for children with autism in order to make even some educational progress. Student's needs, described in the hearing officers findings, plainly arose out of his disability and could not be adequately addressed without the use of research-based practices for student's with autism. Student required intensive, research-based instruction and related services in order to make even incremental progress toward his goals.

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 is 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 the District’s failure to comply with the IDEA’s procedural requirements (especially the provision governing the composition of the IEP team and the requirement for informing parent’s so that they can fully participate in developing and modifying their child’s educational program), both interfered with the provision of a FAPE to Student and significantly impeded the Parents’ opportunity to participate in the decisionmaking process regarding the provision of a FAPE to Student. *O’Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

Parents’ Withdrawal of Student from School.

Perhaps the most difficult issue in this case is determining the impact of Parents’ decision to withdraw Student from school on February 4, 2016. Parents claim that their decision was justified by the chaos surrounding Student’s transition to a part-day in an Emerging Autism class and by Parents’ impression that Student was not welcome in that class. A later exchange of letters and phone calls with District special education staff further upset Parents. Parents were especially upset by the District’s mention of compulsory attendance laws.

Parents do not claim that they provided Student a full school program at home nor do they seek reimbursement for those services. Instead, they seek compensatory education for the entire time Student was out of school.

Compensatory educational services are an equitable remedy like prospective reimbursement of expenses for a private education. The equitable considerations that apply to claims for reimbursement, therefore, apply equally to an award of compensatory education. The IDEA now requires a parent to give a district 10-days notice of the parent’s intent to disenroll their child and to seek reimbursement for a private placement. 20 U.S.C.

§ 1412(a)(10)(C); 34 C.F.R. § 300.148(d)(2). The purpose of this provision is to afford school districts the opportunity to address parental objections to a proposed IEP prior to the removal of a child with a disability from public school. *Jefferson County School Dist. R-1 v. Elizabeth E.*, 702 F.3d 1227, 1241 (10th Cir. 2012). Notice to the District and an opportunity to respond is a relevant consideration, along with other factors, in determining whether compensatory education should be awarded. *Forest Grove School District v. T.A.*, 557 U.S. 230 (2009).

In this case, the District had just reconvened Student's IEP team to consider Parents' request that Student be placed in an Emerging Autism class. The District agreed to place Student in that class for part of the day and to spend 8 weeks collecting data and evaluating which class better met Student's needs. Parents acted unilaterally and impulsively in pulling Student out of school. Although the hearing officer has found that Student was being denied a FAPE the first part of the year, at the time Student was withdrawn from school, the District was responding to Parents' concerns. The District deserved more than two days to put in place services for Student in the Emerging Autism class with a teacher who was skilled in working with students with autism and who had the support of the ART. This program may well have provided Student a FAPE. Moreover, Student appears to have made educational progress during the time period he was out of school, putting in doubt his need for compensatory services for that period of time. In any event, the hearing officer finds that the equities do not support the provision of compensatory educational services to Student for the time Parents chose to keep him out of school.

Intensive Support Program Class v. Emerging Autism Program Class.

Finally, the hearing officer has not agreed with Parents that the provision of FAPE to Student is dependent on his placement in an Emerging Autism class. The District presented evidence that it had resources available that could be used to put in place an

appropriate program for Student in the ISP class. The problem appears to be that Student's IEP did not adequately take into account Student's need for intensive, autism-specific techniques and services or the need to be sure that the therapists and teachers working with Student were schooled in the special needs of non-speaking children with autism. The teachers and speech and language pathologist with whom Student worked did not ask for help from the District and did not accept the help offered by the ART. Under these circumstances, Parents may well be correct that the only way to they could get appropriate resources focused on Student short of a due process complaint was to insist on his placement in an autism-specific class where special needs arising from autism are at least on the radar and where essential techniques for Student, such as keeping data on progress toward goals, are presumably better understood by the staff.

The hearing officer, however, has taken the District at its word that, at least now that Parents' due process complaint has exposed the problem, it can provide the necessary services and supports to Student in an ISP class. The choice of class placement, therefore, will remain the District's. The hearing officer cautions the District to be sure, if it chooses an ISP class for Student, that it puts in place the appropriate services and staffing to meet Student's needs.

Remedy

Having determined that Student was denied a FAPE from August 15, 2015, until February 2, 2016, the remaining question for the hearing officer is remedy.

Appropriate relief under the IDEA is injunctive relief designed to ensure that Student is appropriately educated going forward. The hearing officer can also provide additional services to compensate Student and more quickly remedy the harm done by the deprivation of appropriate services. 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 four and one-half months during which Student made no progress toward his goals and indeed appears to have regressed, the hearing officer has determined that additional services beyond what would otherwise be required by the Act are appropriate as compensatory services.

The hearing officer has included in the remedy a requirement that the District place Student in a different school, regardless of the type of class it chooses for him. Although Parents are not normally free to reject the District's choice of school under the IDEA, the hearing officer has concluded that this is an appropriate remedy for the District's failure to communicate and cooperate adequately with Parents. Parents' distrust of staff who did not tell them that Student was running from his classroom 10 to 30 times a day, denying them the opportunity to intervene earlier, is understandable. Student does not speak and cannot inform Parents about what happens to him at school. For both sides, starting with a clean slate without the misunderstandings and miscommunication of the past clouding the waters makes sense. This requirement should not pose undue hardship for the District, which has many schools where both ISP and Emerging Autism classes are offered.

IT IS HEREBY ORDERED:

1. Student will be moved to another District school that offers both an ISP and Emerging Autism class. In choosing Student's new school, the District shall consider the availability of the services Student needs, the qualifications of the staff who will work with Student, and the convenience of Parents in terms of the location of the school.
2. A new IEP team will be constituted for Student and shall include a speech and language specialist who is a member of the ART as well as the District's

Certified Behavior Analyst. Parents will be permitted to bring Student's private therapists to the IEP meeting if they choose and/or to submit written reports from these therapists. The District shall reimburse Parents for the cost of having these private therapists participate in the IEP process. Parents will be treated as full members of Student's educational team. The team will develop an IEP that takes into account each of the eleven autism considerations included in the State regulations, § 6.31.2.11(B)(5)(k) NMAC. The IEP shall include specific goals for Student based on Parents' and Student's private therapists report of Student's current levels of achievement. These strategies will include ABA and discrete trial training, as appropriate for each goal. The team will also include a requirement that a system of meaningful daily communication with Parent's about Student's education be established.

3. The team will decide on the type of class (ISP or Emerging Autism) which is currently best able to meet Student's needs.
4. The IEP team will be convened as quickly as possible. The District shall ensure that the services and supports needed by Student to make a successful transition are put in place within a week after the team meets so that Student can return to school;
5. A member of the ART shall observe Student in his classroom after two weeks, and shall set up appropriate forms and procedures for data collection so that an FBA can be prepared for Student, with the assistance of the ART consultant. A BIP will then be prepared with the assistance and participation of the ART team member using peer-reviewed, autism specific strategies to extinguish Student's behavior in running from his classroom.

6. Julie McAfee or another speech and language therapist who is a member of the District's ART (if Ms. McAfee is no longer on that team) will assist Student's teacher and SLP in putting in place a functional communication system for Student in his classroom and ensuring that the instruction provided to Student in the use of that system is appropriate to meet his needs arising from his disability.
7. Student will be assigned to a speech and language pathologist who is knowledgeable about autism and about specialized instructional practices shown by research to be effective for students with autism. Student will be provided 720 minutes of SLT a semester this school year, which shall include both individual therapy and time spent by the therapist observing Student's communication program in the classroom and consulting with classroom staff on how to work with Student to achieve his communication goals. The SLT shall also communicate with and work with Parents and Student's private service providers to ensure consistency across settings, and shall offer training to Parents in Student's communication system.
8. Student will be provided additional compensatory speech and language therapy totaling 40 hours provided by a private provider of Parents' choice who meets District standards. This therapy will be in addition to the therapy described in paragraph 7. At Parent's option, these hours may be scheduled during the summer of 2017 or after school during the school year. The District shall reimburse Parents for the cost of this therapy.
9. Student will be provided with ongoing special education instruction toward his IEP goals during the summer of 2017 to enable Student to make up for the progress he lost from August 2015 to February 2016. Instruction will be

provided for 4 hours a day for 8 weeks during the summer, in addition to the extra hours of speech and language therapy described in ¶ 8, above.

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 31th DAY OF AUGUST 2016

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 August 31, 2016, 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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