

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

In the matter of

[REDACTED]
as Parents and on Behalf of L.T.B., Student
Petitioners

v.

LOS LUNAS SCHOOLS,

Respondent

DPH 2223-16

DECISION

Muriel McClelland
DUE PROCESS HEARING OFFICER

JUNE 18, 2023

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**DPH 2223-16
DECISION**

STATEMENT OF PROCEDURE

The complaint was filed on March 3, 2023 *[DPHO Exhibit 1]*. The appointment of the DPHO was made on March 6, 2023 *[DPHO Exhibit 2]*. The Prehearing Order was entered on March 3, 2023 *[DPHO Exhibit 3]*. Mediation took place on March 27, 2023, but was unsuccessful in resolving issues. The LEA's Answer to the Complaint was filed on March 15, 2023 *[DPHO Exhibit 4]*. Respective Statements of Issues were filed on April 10, 2023 *[DPHO Exhibits 5, 6]*. Exhibits and Witness Lists were exchanged on or about April 18, 2023 *[DPHO Exhibits 7, 8, 9, 10]*. The Due Process Hearing took place by ZOOM on April 24 to April 27, 2023. A Revised Scheduling Order was entered on April 27, 2023, moving the due date for a Decision to June 19, 2023. *[DPHO Exhibit 11]* Respective Findings, Conclusions and Memoranda of Law were filed on June 7, 2023. *[DPHO Exhibits 12, 13, 14, 15, 16]*. The Decision was entered on June 18, 2023 *[DPHO Exhibit 17]*.

ISSUES PRESENTED

Petitioners identified the following issues for due process determination:

1. Whether the LEA failed to implement its Child Find duty and failed to evaluate Student in all areas of suspected disability;
2. Whether the LEA failed to identify Student as eligible for special education, create IEPs with appropriate goals, and provide special education services and supports;
3. Whether the LEA has punished Student for conduct which is a manifestation of his

- disabilities and the LEA's own failure to identify his eligibilities for special education and provide appropriate special education services;
4. Whether the LEA failed to provide Student with access to the general curriculum by excluding him from instruction, the classroom, and the school;
 5. Whether the LEA failed to provide Student with education in his least restrictive environment (LRE);
 6. Whether the LEA failed to provide Student with education which is "free" instead relying on Parents supplying evaluation and physically remaining with or removing Student from school for the administrative convenience of the LEA, not to meet the unique needs of Student;
 7. Whether the LEA failed to consider and provide Student with necessary related services including occupational therapy, speech language therapy and assistive technology;
 8. Whether the LEA failed to provide education as required by state law, specifically failing to provide student with public education informed by the 11 considerations for autism and subjecting Student to unnecessary, harmful and prohibited physical restraints without required written reports and related follow up;
 9. Whether the LEA deliberately and repeatedly used the SAT process as gatekeeping to deny Student special education, substituting reliance on a lengthy multiple year SAT process for appropriate identification of eligibility and provision of special education;
 10. Whether the LEA has acted at all times for its administrative convenience and in contradiction to meeting Student's unique needs flowing from disability through the IEP process and provision of appropriate special education and services;
 11. Whether the LEA's actions and inactions have denied Student a FAPE;

12. Whether Student is entitled to remedy;
13. What remedy is appropriate to address the denial of FAPE.

Respondent has enumerated the following issues for hearing:

1. Do the previous District administered evaluation and outside evaluations which found the student did not qualify for receipt of special education services support District's EDT determination of does not qualify?
2. Does a student who does not qualify for receipt of special education services because there is no qualifying disability become subject to the same disciplinary action applicable to all general education students?
3. Does a student who is identified as a general education student who is suspended more than 10 school days a year qualify for receipt of compensatory services?
4. Does a Student who has previously been tested and found not to have a disability qualify as a student who requires a Section 504 plan?
5. Does a school district who has evaluated a student for suspected disabilities and found the student ineligible meet its Child Find obligations under IDEA?
6. How many times must a school district evaluate a student to meet its Child Find obligations under IDEA?
7. Does a student who is not eligible to receive special education services require consideration of LRE as contemplated by the IDEA if the student is educated with nondisabled peers for his entire school day?
8. Does a student who does not qualify for receipt of special education services including speech remain eligible to receive ancillary services?

9. Is it appropriate for a student who does not have a diagnosed disability to be placed on a Section 504 plan or IEP?
10. Is there any prohibition to a school district placing and keeping a child in a SAT (Student Assistance Team) plan when they do not qualify for receipt of special education services but do display the need for additional support through Tiered intervention?
11. Does a student who has been tested and found ineligible for either an IEP or a 504 plan and files a complaint become entitled to a remedy of any kind?

FINDINGS OF FACT

Background

1. The 2-year statutory period is March 3, 2023, the date the Complaint was filed with the SEA, back to March 3, 2021. Findings referencing events prior to that date are for background and historical purposes only. *TR I, 118, 134*

2. Student is a 12-year old, regular education 6th grade student who will transition to a LEA middle school in the 2223-2224 school year.

3. His behaviors were formally observed May, 2017 at the end of his Kindergarten year when he exhibited temper tantrums and random outbursts of anger. He was first evaluated by the LEA on August 23, 2017 when he was six years old. *Exhs 1, 2*

4. A Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) was commenced October 10, 2017 because District staff identified extreme behavior problems demonstrated by yelling, screaming, kicking and punching students and staff. These behaviors were considered a performance deficit, not tied to a disability. *Exh 13, p. 1; Exh 14; TR I, 76-81, 89, 106-107*

5. District performed two evaluations of Student while he was in elementary school, one preceding the Centria Healthcare independent evaluation and one following (October 3, 2017, May 21, 2019). *Exhs 3, 6*

6. Student was found not to qualify for special education by District evaluators under the category of Emotional Disturbance in October 18, 2017 when he was in first grade. *Exh 3*

7. Student received a diagnosis of autism spectrum disorder (ASD) from an independent evaluation by Centria Healthcare December 6, 2018. *Exh 5*

8. Following the Centria evaluation, the District conducted a second evaluation dated May 21, 2019 which reviewed the independent evaluation. Acknowledging Centria's medical diagnosis of autism based upon ADOS testing, when evaluated by District's diagnostician Student was deemed ineligible for IDEA Autism eligibility based upon TEAM criteria. *Exh 4, Exh 6, pp. 26, 31-34, Exh 8, p. 4; TR III, 616-617, 624-625, 673-678, 707, 728*

9. The school diagnosticians who evaluated Student in 2019 were under the impression that "[t]he eligibility of Autism [sic] requires that there be restricted and repetitive patterns of behavior and deficits in social reciprocal communication." These diagnosticians did not observe restrictive, repetitive behaviors. Student was denied special education eligibility based upon his educational performance. *Exh 5, p. 5, Exh 6; TR III, 677*

10. According to District's diagnostician, when Student's test results were compared to DSM-5 criteria, it was determined he failed to meet the criteria for an educational determination of autism, emotional disturbance (ET), and Speech/Language Disorder (SLD). In short, he did not fit any of the criteria that would make him eligible for special education. *Exh 6, pp. 26-32; Exh 8, p. 7*

11. Quoted in the evaluation report dated May 21, 2019 Parent (mother) states “his academics are a strength, however, his ability to socialize and regulate his emotions, his safety (as well as his peers and staff) are a huge concern.” The same evaluation noted that District staff did not observe “restricted, repetitive patterns of behavior, interest or activities,” or “stereotyped or repetitive motor movements, use of objects, or speech.” *Exh 6, p. 6*

12. Student has been closely and consistently followed by Student Assistance Teams (SATs) throughout his elementary school years since first being referred for special education December 5, 2016, SATs repeatedly noting “no academic concerns at this time.” SATs did refer Student for behavior concerns. *Exh 9, p. 1; Exh 11, p. 1, Exh 12, Exh 16, Exh 19; TR I, 65*

13. The school held a Manifestation Determination hearing March 2, 2018 while Student was on a BIP which noted “escalated behavior not resulting from a diagnosed exceptionality.” A second manifestation review was conducted November 2, 2018. *Exhs 15, 18*

14. Prior to the 2021-2022 school year Student had been placed on a reduced, half-day schedule in an effort to modify behaviors. Parents were called on a frequent basis to calm him down or to take him home. *Exh 16; TR I, 119-123. 133*

Statutory Period/ March 3, 2021-March 3, 2023

15. SAT referrals during the 2-year statutory period centered on behavior referrals only which resulted in shortened school days. *Exh 20*

16. Student returned to school at the beginning of the 2022-2023 school year on a full day schedule. He remained under SAT supervision. At the beginning of his 6th grade school year he was doing well and progressing. He continued to reject writing assignments. At that time the SAT noted “it was determined that no actions or interventions are needed.” *Exh 24, p. 1;*

TR I, 146, TR II, 323-324, 375-376

17. He continued to have behavior issues. To de-escalate outbursts he was permitted to show an orange card which indicated he needed a break. Break times vary but were usually 15-20 minutes and were over when Student indicated he was ready to return to the classroom. Other de-escalation efforts included allowing him to draw on his iPad, putting his head on the desk, avoid writing and other assignments. *Exh 27; TR I, 102-103, TR II, 336-338. 391-394*

18. According to V.M., the school counselor who would usually see Student when he needed breaks, Student would “throw things, yell, scream, get the chair and rock it back and forth and make noise with it, with the table as well.” He hit and kicked staff and students, and growled. His teacher had to evacuate the room. *TR I, 44-46*

19. R.J., Student’s 6th grade teacher did not think his behaviors were involuntary. She expressed safety concerns. She did not consider Student’s growling, tapping behaviors as motor tics. The general consensus among LEA staff with knowledge of Student was that his behaviors were voluntary and that he behaves in a way to get what he wants at that particular moment. *TR II, 316-317, 339-340, 405-410*

20. As the year progressed, Student continued to growl, scowl and tap; breaks were no longer working. Within a period of a week (January 13 and 20th), Student had to be restrained twice, the first time for 20 minutes, the second for 40 minutes. His teacher noted the incident as “got a little violent.” *TR II, 316, 453-454, 495-496*

21. On January 27, 2023 Student was placed on a 45-day suspension following a Manifestation Determination Review (MDR). The summary of the SAT plan noted that Student’s behavior “was a manifestation of [Student’s] suspected disability regarding behaviors.” At that

time, the SAT agreed to refer Student for testing re: "Behavior Problem." *Exh 27; TR I, 174*

22. Following the MDR it was decided Student attend after-school tutoring for 1.5 hours, 4 days a week on a 45-day suspension, only returning to the classroom full-time on April 17th..
Exh 24; TR II, 501-502, 531

23. Student on several occasions expressed suicidal ideation. *TR I, 161, TR II, 450, 496, 558-559*

24. To a person, no one on the LEA staff had any experience with Tourette Syndrome (TS) or tic disorders. The school counselor was unaware of any time staff referred a child for a tic disorder or TS¹. *TR I, 48-49, 58, TR III, 639-642*

25. Student's educational performance continues to be average, above average and at grade level although there have not been reports about the effect of his suspension on educational performance.

26. Student continues to have problems with peers involving social communication.

27. Participants at the January 23, 2023 SAT meeting agreed upon a re-evaluation for Student, allowing 45 days to complete the evaluation. Parent recalls consenting in writing to an evaluation at this meeting. The LEA formally requested parental consent on April 12, 2023, after the request for due process was filed with the SEA. *Exh 28; TR II, 409, 503-504*

29. Although followed since Kindergarten by SAT, Student continues to be deemed DNQ

¹The transcript is replete with mention of Student's vocalizations and movements consistent with vocal and motor tics. *Cf. Exh I, p.4, Exhs 25, 26, Exh 28, p.6; TR I, 31, 44-46, 69, 78-79, 99, 114-115, 127, 130, 133-134, 137, 158, 190-191, 202-203, 212, 216-217, 256, 287-288; TR II, 327-328, 333-336, 353, 389, 391-393, 488; TR III, 653-654*

– “does not qualify” for special education services under IDEA.

30. Dr. Lauren Parks of Northern New Mexico Neuropsychology presented as an expert in pediatric neuropsychology. Her testimony was extremely knowledgeable and credible with respect to Tourette Syndrome and her ability to perform a comprehensive evaluation of Student.

Exh 31, TR III, 776-789

DISCUSSION

Medical v. Educational Autism Qualification

If a student has one of the conditions enumerated in 34 CFR 300.8 such as Autism, it must also be determined whether that disability adversely affects the student's academic performance. *Marshall Joint Sch. Dist. No.2 v. C.D.*, 54 IDELR 307 (7th Cir. 2010) A problem that LEA diagnosticians had in this case was that Student progressed educationally and received educational benefit from his attendance in a regular education classroom despite his behaviors. District diagnosticians made the distinction between a medical diagnosis of autism and an educational diagnosis in an effort to conform to New Mexico TEAM² (Technical Evaluation Assistance Manual) guidance on autism eligibility. District concluded that Student was not IDEA eligible.

Student has consistently demonstrated common signs of autism, such as difficulty with transitions, need for adult attention 1/1, difficulty with change, refusal to engage in activities, shutting down, participation in group activities with peers, social skills, narrow specific interests, “obsessions,” using pragmatic language to get his needs met, avoidance of large crowds or loud

²The New Mexico T.E.A.M., New Mexico Public Education Department, January, 2017 (rev. December, 2017), pp. 57-77.

noises and environments, sensitivity to certain sounds, immature behaviors, eating habits, writing avoidance, sensitivity to clothing textures. His educational performance, however, shows academic progress.

“Educational performance” is not defined in IDEA or the Part B regulations. Many states have codified this distinction making academic performance a barrier to receipt of special education services. *Chicago Pub. Schs. Dist No.299*, 119 LRP 9560 (SEA IL 02/15/19); *Spec Sch. Dist of St. Louis County*, 73 IDELR 271 (SEA MO 2019); *Q.W. v. Board of Educ. of Fayette Country, Ky.* 66 IDELR 212 (6th Cir. 2015 unpublished), cert denied, 116 LRP 38090. Several states have endorsed a broader definition of educational performance to include nonacademic achievement such as social skills, classroom behaviors, interactions with peers and other needs in affective areas. *Mr. I. And Mrs. II v. Maine Sch. Admin. Dist. No 55*, 47 IDELR 121 (1st Cir. 2007); *Independent Sch. Dist. No. 283 v. E.M.D.H.*, 129 LRP 17110 (8th cir. 06/03/20); *OSEP Letter to Anonymous*, 55 IDELR 172

Child Find/ Suspected Disability

There is sufficient evidence that Student displayed many of the vocalizations and movements consistent with vocal and motor tics common to Tourette Syndrome (TS) or a tic disorder diagnosis (for example, makes noises or distracting sounds, screaming or yelling out, tapping, pushing or throwing objects, furniture, paper, books, disrupting the class, repetition of words, phrases, spitting, kicking, fidgeting, banging or pouncing with hands, swinging, punching, hitting with arms and hands, growling at adults and peers, clapping, outbursts, meltdowns, temper tantrums during class, breaking things, ripping up paper, blurt outs, interrupting teachers, scowling facial expressions, cycling through the rage before it can be

controlled³. *Exh 30*

Student, however, was not referred for evaluation for this disability or for a more complex diagnosis involving more than one IDEA identified disabilities.--in short, a comprehensive neurological work-up. Staff with knowledge of Student testified they did not suspect that further evaluation was necessary, deeming his behaviors voluntary and expressed in an effort to avoid direction and to get his own way. Antecedent causation for behaviors was never analyzed. In this respect, District has failed in its Child Find duties, denying Student FAPE.

34 CFR §300.111

District never engaged a licensed BCBA (Board Certified Behavior Analyst) to formally observe Student, produce a FBA (Functional Behavior Analysis), and recommend a Behavior Intervention Plan (BIP) that would address his behaviors. District's response to Student's disruptive behaviors was to evacuate the classroom, allow Student breaks whenever he chose, long term suspensions and shortened school days, parental assistance in calming Student, and more recently restraints. Student is getting older, bigger and stronger and poses more of a discipline problem than in the past. The question of **Why** he behaves as he does has never been answered. Attending tutoring after school hours for one and a half hours three days a week has had to affect his educational performance, especially since several subjects were not covered, however, the record is silent on this point.

In a case that is directly on point, an honor student with a number of social and

³*Navigating Tourette Syndrome: An Educator's Guide to Planning and Support* Tourette Association of America

behavioral issues that included spinning in circles, avoiding human contact, having tantrums, pulling out his hair blurting out answers and arguing in class, among other disruptions, was deemed ineligible for special education services based upon his academic performance. The administrative order for evaluation was upheld on appeal, the court explaining that 20 USC 1414(a)(1)(B) “requires that districts evaluate all students who are identified as possibility [sic] having a disability and that the evaluation must be ‘full and individual.’ The [appellate] court also explained that evaluating the student is not the same as providing special education.” *Lawrence County Sch. Dist. of Lawrence County, Ark v. McDaniel ex rel CDM*, 72 IDELR 8 (8th Cir. 2018); *East Lawrence County School District, Arkansas State Educational Agency 8-16-44*, 116 LRP 47955, (September 21, 2016), *Affirmed*.

CONCLUSIONS OF LAW

1. The DPHO has jurisdiction over this matter pursuant to the Individuals with Disabilities Education Act (IDEA 2004). *20 U.S.C. §§ 1400, et seq., 34 CFR §§ 300.511--300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2004).*

2. The main purpose of IDEA is: (1) to ensure that all children with disabilities have available to them FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment and independent living; and (2) to ensure that the rights of children with disabilities and their parents are protected. *20 U.S.C. §1400(d)(1)*

3. A parent or a public agency may initiate a hearing to address matters regarding the education of a particular child, i.e., “any matter relating to the identification evaluation, or

educational placement of the child, or the provision of a free appropriate public education to such child. *20 U.S.C. §1415(b)(3),(6)(2000); 34 CFR §§300.503(a);300.507(a)(1)(2004); NMAC 6.31.2.13(l)(3)(2004*

4. All procedural safeguards required by IDEA and implementing regulations, and the New Mexico Special Education Regulations have been complied with.

5. The applicable time limit under the Statute of Limitations for IDEA actions is two years beginning prior to the date of filing the request for due process, in this case, prior to March 3, 2023. Findings and exhibits admitted with respect to information prior to that date are for historical purposes only.

6. Extensions of time limits have been granted at the request of one or both of the parties. *34 CFR §300.510(c)*

7. Parent's request for due process has met sufficiency requirements. *34 CFR §300.508(6)(d)*

8. Parent bears the burden of proof that Student was denied FAPE. *Schaefer v. Weast, 126 S. Ct. 528 (2005), 44 IDELR 150; Johnson v. Independent School Dist. No. 4 of Bixby, 921 F. 2d 1022 (10th Cir. 1990)* Parent has met her burden of proof.

9. Determination of eligibility is in the province of the Eligibility Determination Team (EDT) of the LEA, not the Due Process Hearing Officer.

10. It has not yet been determined whether Student lost educational benefit as a result of the IAES (Interim Alternative Educational Setting) placement.

11. Student's behaviors have adversely affected his classmates' as well as his own academic performance.

12. Administrative supports such as Tier-1 Student Assistance Teams (SATs) are not valid justifications for failure to adequately evaluate and to follow the Child Find mandates of IDEA.

34 CFR §300.111

13. District has denied Student FAPE by its failure to obtain updated evaluations.

14. District has denied Student FAPE as a result of its abrogation of its Child Find duties.

34 CFR §300.111

ORDER

WHEREFORE IT IS HEREBY ORDERED:

1. To assist in Student's transition to middle school, representatives from Student's elementary school with a knowledge of Student's classroom behaviors shall meet prior to the beginning of the 2223-2224 school year with his middle school teachers to provide them with information relating to Student's issues and his anticipated behaviors.

2. Effective immediately, District shall employ the services of a Board Certified Behavior Analyst (BCBA) to conduct a Functional Behavior Assessment (FBA) to address Student's needs and to develop a Behavior Intervention Plan (BIP) which can be followed in middle school.

3. Effective immediately, District shall have Student evaluated by Dr. Lauren Parks for a comprehensive neurological evaluation in all areas of IDEA disability, including but not limited to, Autism, Emotional Disturbance, Speech/Language Disorder, Tourette Syndrome/Tic Disorder and any other disabilities in the Other Health Impaired category, such evaluation to be completed prior to the start of the 2223-2224 school year, if possible.. In addition, Dr. Parks will be charged with assessing the need for related services such as assistive technology, vocational therapy, speech/language therapy and any other ancillary or related service which would aid

in meeting Student's unique educational needs.

4. Upon completion of this comprehensive evaluation the LEA's middle school shall schedule an EDT meeting to review Student's most recent evaluation and determine Student's eligibility for special education and related services, if any there may be. Dr. Parks will attend this meeting and recommend strategies to this team and to any subsequent IEP team on how to deal with Student's behaviors.

THIS DECISION IS ENTERED ON THE 18TH DAY OF JUNE, 2023

Muriel McClelland
Due Process Hearing Officer

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(l)(2004), 34 CFR § 300.516 and 6.31.2.13(l)(25) NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

CERTIFICATE OF SERVICE

I hereby certify that I emailed and mailed by US mail a copy of the foregoing Decision on June 18, 2023 to the following persons:

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