

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of
LINDSAY SLEDGE and DAVID GUBA, as parents of
P.S.G., Student

Petitioners

v.

ALBUQUERQUE PUBLIC SCHOOLS and
NEW MEXICO PUBLIC EDUCATION DEPARTMENT

Respondents

DPH #1819-01

DECISION

October 7, 2018

Muriel McClelland
Due Process Hearing Officer

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STATEMENT OF PROCEDURE

The Request for Due Process in this case was filed on July 3, 2018. *[DPHO Exh 1]* The DPHO was appointed on July 5, 2018. *[DPHO Exh 2]* The attorney for the SEA, NMPED, entered a Special Entry of Appearance challenging jurisdiction of the DPHO over NMPED on July 5, 2018. *[DPHO Exh 3]* A Pre-Hearing telephone conference was held on July 12, 2018 and a Pre-Hearing Order entered July 16, 2018. *[DPHO Exh 4]* On July 9, 2018 NMPED filed a Motion and Memorandum to Dismiss for Lack of Jurisdiction. *[DPHO Exh 5]* District's Response to the complaint was entered July 16, 2018. *[DPHO Exh 6]* Petitioners' Response in Opposition to the Motion to Dismiss was entered July 17, 2018, *[DPHO Exh 7]* NMPED's Reply to Petitioners' Response in Opposition was entered July 19, 2018. *[DPHO Exh 8]* The DPHO entered her Decision and Order Denying NMPED Motion to Dismiss on July 27, 2018. *[DPHO Exh 9]*

District timely filed a Notice of Insufficiency for the Due Process Complaint on July 18, 2018. *[DPHO Exh 10]* The DPHO entered her Sufficiency Determination on July 22, 2018, finding the complaint allegations sufficient and denying another pre-hearing conference. *[DPHO Exh 11]*

District filed a Motion for Reconsideration of Order Denying Prehearing Conference to Identify the Issues and Relief on July 23, 2018. *[DPHO Exh 12]* NMPED filed a Motion for Reconsideration of Order Denying NMPED's Motion to Dismiss for Lack of Jurisdiction and Request for Prehearing Conference on July 30, 2018. *[DPHO 13]* A Motions Hearing was held on August 2, 2018 to again hear arguments for the two reconsideration motions. The DPHO entered an Order on August 4, 2018 denying both Respondents' oral and written motions to dismiss.

[DPHO Exh 14]

On August 10, 2018 District filed its Partial Motion to Dismiss Due Process Hearing Complaint. *[DPHO Exh 15]* Petitioners' Response was entered August 18, 2018. *[DPHO Exh 16]* The Order Denying District's Partial Motion to Dismiss Due Process Complaint was entered August 20, 2018. *[DPHO Exh 17]*

District filed a Motion for Issuance of Order to Produce Documents on August 15, 2018. *[DPHO Exhs 18A, 18B]* Petitioners' Response was filed August 18, 2018. *[DPHO Exh 19]* This Motion was denied August 20, 2018. *[DPHO Exh 20]*

The parties' Statements of Issues presented and Petitioners' Statement of Relief Requested were timely filed on August 13 and 14, 2018. *[DPHO Exhs 21, 22, 23, 24]* Exhibit and Witness Lists were timely filed on August 20, 2018 and Exhibits exchanged on that date. *[DPHO Exhs 25, 26, 27, 28, 29]*

NMPED filed in the Second Judicial District Court (a state court) a Petition for Emergency Writ of Prohibition or in the Alternative Petition for Writ of Superintending Control on August 17, 2018. *[DPHO Exh 30]* On August 21, 2018 NMPED filed a Motion to Stay Enforcement of Administrative Order Pending Review of the emergency petitions, along with a Request for Hearing. *[DPHO Exhs 31A, 31B]* On August 27, 2018, District filed a Motion to Intervene. *[DPHO Exh 32]* On August 27, 2018 the DPHO filed an Entry of Appearance and Response in Opposition in the pending state case *[DPHO Exhs 33, 34]* The state district court judge without hearing on August 27, 2018 granted District's Motion to Intervene and dismissed all pending Petitions and Motions filed in Cause #D-202-CV-2018-06102. His Order Denying NMPED's Motion for Stay Pending Review of Petitioner's Writ of Prohibition or in the Alternative

Writ of Superintending Control was entered August 27, 2018. [DPHO Exh 35]

The Due Process Hearing took place on August 27, 28 and September 6, 2018.

Requested Findings of Fact, Conclusions of Law, and Arguments were duly filed on October 2, 2018. [DPHO Exhs 36, 37, 38, 39, 40, 41, 42] This Decision was entered on October 7, 2018.

[DPHO

Exh 43]

STATEMENTS OF ISSUES

Petitioner submits the following issues to be decided by the DPHO:

LEA (District) issues

1. Whether the LEA failed to provide Student with an education that was “free” since Parent was required to stay at the school campus each day Student attended in order to allow [REDACTED] to have access to medical cannabis for treatment of [REDACTED] seizures;

2. Whether the LEA failed to provide necessary related services for Student to attend school, based on her need for medical cannabis during the school day, without [REDACTED] Parent and sufficient to meet Student’s known learning needs and [REDACTED] possible needs as a child with autism;

3. Whether the LEA failed to evaluate Student in all areas of suspected disability by failing to evaluate [REDACTED] for autism;

4. Whether the LEA, in both written IEPs, failed to provide Parents with complete and accurate PWN, which impaired Parents’ ability to enforce the right to FAPE, by failing to explain to Parents that FAPE is “free,” without cost to Parents, and should not have required Parent attendance as the only means to access public education/special education, by failing to give PWN

about why the LEA refused to meet Student's need for medical cannabis, by failing to give PWN that the LEA is required to evaluate in all areas of suspected disability, and by failing to give PWN that the LEA refused to evaluate Student for autism;

5. Whether the LEA failed to provide Student with FAPE by making Parents responsible for ensuring and figuring out how Student could have access to public education for a full school day in [REDACTED] LRE when Student needed availability and administration of medical cannabis during the school day;

6. Whether the LEA failed to provide Student with FAPE by its incomplete and inaccurate IEPs which simply provide no information at all about what staff/the LEA will do to meet Student's needs flowing from Dravet Syndrome during the school day on the public school campus, and failure to record anywhere that the LEA was depending on Parent to meet Student's needs, thereby creating IEPs which describe special education which failed to meet Student's unique needs.

SEA (NMPED issues:

1. Whether the SEA failed to ensure FAPE was available in New Mexico for Student who needs medical cannabis during the school day in order to access public education and special education on a school campus;

2. Whether the SEA denied Student FAPE by taking no action to ensure provision of public education to students who are qualified to receive medical cannabis under the Lynn and Erin Compassionate Care Act and are qualified to receive special education pursuant to IDEA;

3. Whether the SEA denied Student FAPE by creating a system of special education in New Mexico which does not in any way address how children, like Student, who need medical

cannabis administered during the school day, will access public education on a public school campus in the child's LRE and receive FAPE;

4. Whether SEA denied Student FAPE by failing to coordinate with the New Mexico Department of Health to create necessary regulations and rules allowing IDEA eligible students in New Mexico who are qualified to receive medical cannabis, to receive medical cannabis during the school day on a school campus without reliance on parents to be providers of medical cannabis during school hours;

5. Whether the SEA denied Student FAPE by failing to ensure that related service providers and/or paraprofessional or other classroom staff are trained in administration of Student's medical cannabis and have waiver from criminal liability or penalty for administering necessary medical cannabis on school grounds during school hours to qualified students such as Student;

LEA and SEA

1. Whether Parents and Student are entitled to equitable remedy for denial of FAPE.

2. What equitable remedy is necessary based on the evidence of denial of FAPE.

Respondent District submits the following issues for determination by the DPHO:

1. Whether the LEA failed to provide Student with an education which was "free" by failing to administer cannabis on school property;

2. Whether the LEA failed to provide necessary related services, supplementary aids and services, and supportive services for the administration of cannabis sufficient for Student to attend school without her Parent and sufficient to meet her known learning needs and [REDACTED] possible needs as a child with autism;

3. Whether the LEA failed to evaluate Student in all areas of suspected disability by

failing to evaluate her for autism;

4. Whether the LEA, in both IEPs written, failed to provide Parents with complete and accurate PWN, which impairs Parents' ability to enforce the right to FAPE by failing to explain to Parents that FAPE is "free" and without cost to Parents; by failing to give PWN about why the LEA refused to meet Student's need for medical cannabis; by failing to give PWN that the LEA is required to evaluate in all areas of suspected disability; by failing to give PWN that the LEA refused to evaluate Student for autism;

5. Whether the LEA failed to provide Student with FAPE by not administering cannabis to [REDACTED] on school grounds so that [REDACTED] could have access to public education for a full school day in her LRE;

6. Whether the LEA failed to provide Student with FAPE by providing insufficient information about what staff/the LEA will do to meet Student's needs for cannabis flowing from Dravet Syndrome during the school day on the public school campus, and by failing to record anywhere that District would not administer cannabis to Student;

7. Whether there were any procedural errors by providing an incomplete Prior Written Notice regarding a half-day kindergarten program, the refusal to allow Student to have cannabis on school grounds or to administer it to [REDACTED] and the District's obligation to evaluate Student for Autism Spectrum Disorder;

8. Whether any procedural errors impeded Student's right to FAPE, significantly impeded the Parent's opportunity to participate in the IEP process, or caused a deprivation of educational benefits;

9. Whether the Hearing Officer lacks jurisdiction over Petitioners' claims of alleged

discrimination;

10. Whether the Hearing Officer lacks jurisdiction over claims arising after the date the Complaint was filed;

11. Whether the Hearing Officer lacks jurisdiction over Petitioners' claims related to cannabis;

12. Whether Petitioners' claims related to cannabis state a cause of action under IDEA;

13. Whether the Hearing Officer lacks jurisdiction over Petitioners' claims related to autism spectrum disorder (ASD) and an evaluation for same because Petitioners failed to exhaust their administrative remedies;

14. Whether Petitioners are entitled to an IEE when the District has not conducted an evaluation for ASD;

15. Whether the Hearing Officer lacks jurisdiction over Petitioners' claims related to Board policy;

16. Whether Petitioners' claims are barred by waiver, estoppel, and laches.

SEA (NMPED) submits the following issues to be decided by the DPHO:

1. Whether the Hearing Officer has personal jurisdiction over the PED;

2. Whether the Hearing Officer has subject matter jurisdiction over the PED;

3. Whether the Student's needs during the school day for medical cannabis can be remedied by ordering in the PED to require district school personnel to engage in criminal activity by possessing and administering medical cannabis in violation of criminal and civil federal and state laws and regulations;

4. Whether the Student's needs for medical cannabis during the school day can be remedied by ordering medically trained school personnel and/or school district staff to engage in criminal activity by possessing and administering medical cannabis in violation of criminal and civil federal and state laws and regulations;

5. Whether the Student's need for medical cannabis during the school day can be remedied by ordering the PED to require medically trained school personnel to engage in criminal activity in violation of their licensure requirements;

6. Whether the Hearing Officer has legal authority to order PED to seek from the Attorney General and local law enforcement/district attorney, as needed, an agreement that the state/county/city will informally extend waiver of civil or criminal penalty against any school employee designated to dose Student with medical cannabis as needed during the school day when such an agreement would be illegal and contrary to federal and state criminal laws;

7. Whether the Hearing Officer has legal authority to order the PED to affirmatively engage with the Attorney General and *all* local and state government law enforcement agencies in the State of New Mexico to request they enter into illegal (referred to above as "informal") agreements with the PED.

FINDINGS OF FACT

1. Student is a [REDACTED] who will be a [REDACTED] in the LEA in the 2018-2019 school year. *TR II, 322*

2. Student has Dravet Syndrome, a severe form of epilepsy which causes frequent seizures and requires medications in order [REDACTED] to attend school. *TR I, 175-177, 179, 182; Exh 3.*

7. 11, 20

3. Student is eligible for special education services as Other Health Impaired (OHI).

TR I, 59-61; Exhs 12, 14

2016-2017 School Year, ESY

4. Student started school in mid-March, 2017. [REDACTED] attended ESY (Extended School Year) classes in the summer of 2017. *TR I, 73, 92*

5. Student attended a developmental preschool at the neighborhood elementary school for approximately 2.5 hours per day. [REDACTED] experienced many absences and a shortened day for her own health issues and to accommodate Parent's (in this case Mother's) schedule. *TR I, 87, 139-140; TR II, 494*

6. At the times Student attended a LEA developmental preschool, Parent was in attendance at the school, first sitting behind [REDACTED] in the classroom and then available during school times on campus either in her car or in the teachers' lounge. *TR I, 76, 92, 94, 180-181*

7. The March, 2017 IEP "Seizure Management Plan" noted that "physician-ordered emergency medications will be required before Student enters a DPP [Developmental Preschool]." Under the heading "Health History/Assessment," it was noted that Student "is on Keppra and CBD daily to help control the seizures." *TR I, 216-218*

8. The need for cannabis was discussed at the IEP meeting. *TR I, 44-45; Exh 18*

9. At the March, 2017 IEP meeting Parent requested homebound school services. Homebound services for preschoolers are usually 1 hour per week, whereas preschoolers on site receive 2.5 hours daily. This request was rejected by the IEP team because it lacked documentation of Student's need. *TR I, 55-56; TR II, 479-481; Exhs 17, 18*

10. Parent stated she had a one hour window in which Student's medication had to be administered. *TR I, 57, 65, 68*

11. The family lived very close to the pre-school setting. *TR I, 54*

12. Student had at least 13 absences and missed several speech therapy sessions.
Exhs 22, 23, 28

2017-2018 School Year

13. Student continued to have a lot of absences (at least 21), usually missing preschool classes on Mondays and Fridays. *TR I, 123-124, 139-140; TR II, 494; Exh R*

14. Student's health plan did not mention [REDACTED] need for medical cannabis or the fact that Parent would be on campus to administer it. *TR I, 128-130; Exh 28*

15. Student's neurologist, Dr. Bansal, completed a Consideration for Homebound Placement form which indicated that Student was expected to be in the home due to seizures. *TR I, 170* In a letter to District dated March 2, 2017, she stated:

At home 'rescue medications' are used to stop those prolonged seizures. Generally, the use of rescue medications does not prohibit school attendance, if the school has a nurse or other provider who is comfortable administering these medications should the need arise. [Student's] mother states that prescribed rescue medications (rectal diazepam, intranasal midazolam) cause patient is (sic) be irritable for 24 hours after use. She reports that using CBD oil shortens the duration of the seizure without these side effects. While the number or length of school days can be adjusted for [Student], we cannot predict when or where [REDACTED] seizures may occur. There are no medical barriers to the patient being in school. Homebound education, however, will provide an environment which [Student's] mother is able to provide what she feels is an effective rescue medication. *TR III, 758; Exh 17*

16. The school's action plan for seizures in 2017-2018 school year stated that Parent would take charge in the event of a seizure. *TR I, 129-134; TR III, 641; Exhs 18, 20*

17. Even though Keppra was listed as one of Student's daily medications along with CBD, Student was not receiving the prescribed rescue medications during both school years or in ESY in the summer of 2017, per parental choice. *TR I, 34; Exhs 14, p. 3, Exh 18*

18. Despite numerous absences Student's overall educational and related service progress in the 2017-2018 school year was good. *TR I, 81, 84, 149, 232, 254-256, 274*

2018-2019 School Year

19. The IEP team meeting March/April, 2018 considered and again rejected Parent's request for a homebound placement for the 2018-2019 school year ostensibly because need was not documented. Instead the team endorsed a full school day as the LRE for Student. *TR I, 285-287, 290; TR III, 757-760; Exhs 17, 28*

20. Student was originally scheduled to attend kindergarten 6.5 hours per day in a K-3 classroom with a total of sixteen students in the 2018-2019 school year. Student would have a 1:1 aide assigned to [REDACTED] District's policy, however, is that parent of a kindergartner in the LEA, in general or special education, can choose a full-day or half-day schedule, irrespective of the team's decision. District rejected homebound placement as too restrictive and not appropriate for Student because it did not provide socialization opportunities necessary for Student's development. *TR I, 120, 145; TR II, 372-375, 381-382, 385-388, 499, 505; TR III, 636-637, 683, 732,*

21. At the IEP meeting Parent appeared intent on homeschooling Student as the only alternative. *TR III, 628-629*

22. District never offered homebound services as a result of the two IEP meetings in March, 2017 and April, 2018. C.S-H., District's Executive Director in the Special Education Department testified that homebound services can be made available to Student, including related

services. She also testified that, although unusual, a hybrid program could be made available to Student using homebound services and some limited attendance in the school setting so that Student could socialize with peers. Both these possibilities would require another IEP meeting and a revised IEP. *TR III, 757-760, 773; Exhs 17, 28*

23. At the time of the Due Process Hearing Student had not been attending school but continued to be enrolled. *TR I, 200*

Autism Screening

24. J.D., a special education department resource teacher, observed Student in the classroom and surmised that [REDACTED] may be eligible for a social communications class as opposed to the cross-categorical kindergarten class [REDACTED] was assigned. The social communication class was previously known as the autism-specific classroom but was not exclusive to that disability identification. *TR I, 98-100, 103-104, 113, 141, 274; TR II, 495-496*

25. Parent had an independent autism screening with Dr. Neesen in July 5, 2018 as a result of J.D.'s observations. He did not solicit questionnaires from Student's teachers, relying on Parent observation. To date, the cost to Parents is \$168.93 after insurance. *TR II, 512; Exh 35*

26. Dr. Neesen's screening report diagnosed Student with autism. District's expert, Dr. Hayes, disagreed with the methods used and Dr. Neesen's conclusion, stating she would not accept the diagnosis of ASD for this child. Dr. Hayes was qualified as a expert in the area of evaluation and identification of children with ASD. She presented as very knowledgeable about the ASD diagnosis and ADOS testing and was a very credible witness. *TR III, 788-811, 824, 830; Exh 35*

27. Numerous teachers and related service providers experienced with ASD diagnoses

in young children [REDACTED] testified they did not observe any behaviors that would suggest ASD. *TR II, 575-576, 589, 599, 606; TR III, 642-643, 657-659, 685*

28. At the due process hearing C.S-H. also testified that District's response to any report provided by Parent would be to schedule an Eligibility Determination Team meeting. It is District policy to evaluate a student if a parent suspects a child may be autistic. Parent declined to consent to and attend an evaluation awaiting the decision in this case. *TR III, 725-726, 730*

Medical Marijuana (Cannabis)

29. The school nurse believed there were several IHPs (Individualized Healthcare Plans) for Student, all designating Parent as the person to deal with emergency care. The IHP is part of a student's IEP. *TR I, 183; Exh 29*

30. Student experienced two seizures the entire time [REDACTED] attended school. *TR I, 208, Exh BBB*

31. Medical cannabis has been available in dispensaries in New Mexico since 2007 with a duly authorized medical card, which Student possesses. Parent is the designated caretaker. The Lynn and Erin Compassionate Care Act and the New Mexico Department of Health regulations clearly specify that cannabis may not be used on school grounds subject to criminal prosecution or civil penalty. *TR II, 336-342, 418, 466; Exhs 36, 43; NMSA § 26-2B-4, §26-2B-5(A)(3)(a),(b)*

32. Parent reported she dosed Student three times a day with CBD oil as a seizure maintenance dose. This medication lessens the seizure count but does not stop Student's seizures. Parent also uses a cannabis oil that has a higher dosage (1:1 ratio) of THC as a rescue medication which is what actually stops the seizures. The after effects of this treatment are that Student takes a half hour nap and then is ready to engage in any of [REDACTED] activities. *TR II, 469-470, 556-557*

33. Several different medications for which medical doctors can provide prescriptions have been recommended by Student's doctors over the years, e.g., Onfi, Tosamax, Keppra, Versed, in addition to the ones Dr. Bansal recommended. *TR II, 554-559; TR III, 734; Exhs 2, 7, 17, 20, p. 3*

34. All of the above rescue medications could be delivered by a school nurse if prescribed by a medical doctor and supplied by Parent. *TR I, 204; TR III, 736-737*

35. Parent has not provided any of these medications to the school nurse because, according to Parent they have "horrible side effects." No documentation was provided to the school that stated Student requires CBD oil or the CBD/THC combination as a rescue medication. Medical providers are prohibited to prescribe cannabis as a medication so long as it is a Schedule 1 drug prohibited by state and federal law. *TR II, 559; TR III, 736*

36. Parent stated she preferred the medical marijuana oil containing CBD/THC she used as rescue medication. Parent was informed by District that cannabis medication was not permitted on campus. *TR I, 164-165, 172-173, 204, 206; TR II, 556-557*

37. Parent made a formal request by email dated November 2, 2017 to District to explain the denial of her request for the cannabis rescue medication on campus which resulted in the inability of Student to attend school. *TR II, 411, 492-493; Exhs 30, p. 4, 31, CCC*

38. K.M. of District's SFFB (Student Family Community Support) responded to this letter on November 27, 2017 reciting the LEA's board policy and state and federal law that provided for disciplinary actions and measures for the presence of drugs on campus. *TR II, 418; TR III, 686-689; Exhs 30, 31*

39. This witness testified that if a student has a doctor's prescription for a medication, the school process is as follows:

So we have to follow the guidelines from the Department of Health, who [sic] oversees school nurses in our schools. And if there's a prescription and it's a legal prescription, than that has to go to the school nurse. And the school nurse then would look at the prescription and what the doctor is prescribing, what the dosage is how much and when it would need to be administered. And depending on the specific drugs or – sort of two exceptions in state law now – the drug would have to be administered either by the school nurse; or if it is allowable under the Nurse Practice Act as a drug that can be delegated to someone in the school, then the nurse can determine if that delegation can happen. But then it would be by the nurse or whoever is delegated per the doctor's orders. And typically we ask the parents – the nurses ask the parents for the ability to contact the prescribing doctor in case – if there's a side effect or something like that, that happens on the administration for the drug, that they can contact directly the provider in order to get other orders on what to do. *TR II, 437-438*

40. Pursuant to the Nurse Practice Act a prescription from a medical doctor is required for over-the-counter medications as well. An exception is Naloxzene, the antidote for drug overdose, which can be dispensed by a school nurse in an emergency situation without a doctor's prescription. *TR II, 438-440; Exh 41*

41. Parent discussed Epidiolex with Dr. Bansal in April, 2018. She indicated to Parent she would prescribe it once it became legal to do so. Parent expressed hesitation about changing medications since the ones she was using worked. Epidiolex does not contain THC. *TR II, 533; Exh 17*

42. In April, 2018 Parent informed District of the anticipated approval by the FDA of the pharmaceutical marijuana known as Epidiolex, a CBD oil specifically designed to treat patients with seizures resulting from Dravet Syndrome. At the time of the hearing Epidiolex had been approved by the FDA (June 25, 2018). The DEA subsequently approved the recommended decriminalization of this medication on September 27, 2018 by categorizing it as a Schedule V

pharmaceutical medication.¹ Parent has testified she probably will not use this medication because what is presently in use is working and because the cost would be prohibitive (\$32,000. per year) if not covered by Medicaid or other insurance. *TR I, 193-194, 197-199; TR II, 422-423, 552-553; Exh BBB*

43. K.M. testified that “it depends on what the approval looks like and if it becomes a legalized prescription drug. Then whatever New Mexico determines, we would follow those rules around any other prescription drug in New Mexico.” *TR II, 426*

44. If Student was receiving a pharmaceutical medication, it would not be necessary for Parent to be on campus. If CBD oil was legal for school nurses to administer, Parent would not need to be involved while the child attended school. *TR I, 206*

45. There were several inconsistencies in the testimony of Ms. Oliphant, District’s Special Ed Support Principal. She did not present as a credible witness. *TR II, 395-397, 511*

46. At the time of the hearing, Parent would not commit to any educational plan for Student, awaiting the outcome of the hearing. The request for relief in Parents’ Closing Argument was substantially different than the relief requested earlier in Parents’ Statement of Requested Relief. *TR II, 540-541, 543; DPHO Exh 22*

47. Mother is actively pursuing a change in legislation in the New Mexico state legislature to allow cannabis on school campuses. *TR II, 528*

48. NMPED did not attend Student’s IEP meetings or any other meeting in the LEA. *TR I, 151-152, 214; TR II, 385* NMPED was not involved in any of the discussions with respect to cannabis or Student’s schedule for preschool education. *TR I, 69, 214*

¹ Business Insider, September 27, 2018

DISCUSSION

Jurisdiction

The jurisdictional issue has been decided by this DPHO in numerous previous decisions denying motions. IDEA states unequivocally that a due process hearing officer's jurisdiction relates "to the identification, evaluation or educational placement of a child with a disability, **or the provision of FAPE to the child.**" [Emphasis added] 34 CFR §300.507 (a)

The SEA consistently takes the position that IDEA does not permit jurisdiction over the SEA unless the SEA provides direct services to a student. This line of reasoning is based entirely on language in the 10th Circuit case, *Chavez ex rel. M.C. v. New Mexico Public Educ. Dept.*, 621 F. 3d 1275 (10th Cir. 2010).

Parents in *Chavez* alleged that NMPED failed to offer appropriate placement for this student and other children with autism. The *Chavez* court stated "And, the parents' theory of liability was not beyond the pale--states may be held responsible for failing to provide services to disabled children." In support of this proposition, the court cited *St. Tammany Parish Sch. Bd. v. La.*, 142 F. 3d 776, 785 (5th Cir. 1998); *Gadsby v. Grasmick*, 109 F. 3d 940, 953-956 (4th Cir. 1997 [which held that the SEA is ultimately responsible for the provision of FAPE to its students]; *Kruelle v. New Castle County Sch. Dist.*, 642 F. 2d, 687, 696-697 (3d Cir. 1981)[upholding the district court's determination that the state is generally responsible for ensuring that the child's needs are evaluated and a plan implemented, but not requiring the state to engage in the student's specific educational program]

The *Chavez* case is read narrowly by the NMPED, ignoring other language in that decision that specifically states that parent may allege a different claim that involves both the LEA

and the SEA. The *Chavez* case relates to facts specific to that case, and that case alone, and should not be interpreted to relieve the SEA of all responsibility under IDEA. While the NMPED argues that they will then be made a party to every due process request in New Mexico and that is not the intent of IDEA, neither is the opposite position valid – that the NMPED can never be a party to DPH proceedings under the right circumstances, including this one. As a result of the NMPED’s very narrow interpretation of the ruling in this decision, the SEA will never provide direct services, thereby making itself immune from ever becoming a named party to an IDEA claim.

There are numerous references to the SEA responsibility in IDEA, including monitoring and supervisory functions when a LEA has failed to provide educational services that would benefit a child. *20 U.S.C. 1415(a); 34 CFR §300.511* In this case, it is SEA policy that is being challenged (not the provision of direct services).

Medical Marijuana (Cannabis)

Despite considerable posturing over jurisdiction in numerous written and oral motions that both Respondents filed in this case, including a NMPED Motion for Prohibition and Superintending Control filed in state court, by far the major issue in this case is the permissibility of cannabis on a school’s campus.

Parent requested homebound services in both school years. The two IEPs in March, 2017 and March/April, 2018, considered a homebound placement for Student at Parent’s request and denied it. *DPHO Exhs 18, 28* Simply put, District bases its denial of homebound services on the fact that such a placement results in the most, not the least restrictive environment, and further that homebound placement does not meet Student’s unique needs for peer socialization, resulting in an impasse. Once homebound services were denied and District’s position was that cannabis could

not be delivered to Student on school grounds, little choice was left to Parent but to attend preschool with her 3-year -old child so she could administer [REDACTED] preferred treatment and have Student receive the education [REDACTED] entitled to under IDEA. It was not a requirement of District, *per se*, maybe more of the only alternative given the options. Nowhere in the 2016-2017 PWN (Prior Written Notice), or in the 2018-2018 PWN, or in the IHPs (Individualized Health Care Plans) does it mention Parent's presence on campus,

The latest IEP has Student attending kindergarten in the 2018-2019 school year for 6.5 hours a day. Parent was later informed that every parent in the LEA has the option of a full day or half day kindergarten program for their child. That policy is not reflected in Student's IEP, however. *DPHO Exh 28* It is no longer feasible for Parent to be present on the school campus.

The restriction on cannabis on school grounds results from the federal and state laws which strictly prohibit this practice, making it illegal. Cannabis is classified as a Schedule I drug under the Food and Drug Administration and, as such, is an illegal drug pursuant to 21 U.S.C.

§812(c). The definition of an illegal drug in IDEA is:

Illegal drug means a controlled substance, but does not include a controlled substance that is legally possessed or used under the supervision of a licensed health-care professional or that is legally possessed or used under any authority under that Act or under any other provision of federal law. *34 CFR §300.530(l)(2)*

An exception was carved out recently by the FDA and DEA (as of September 27, 2018) for the cannabis derivative made from hemp and legally marketed under the name Epidiolex. The reclassification for this medication is now Schedule V.--.

- (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in Schedule IV.
- (B) The drug or other substance has a currently accepted medical use

in treatment in the United States.

(C) Abuse of the drug or other substance may lead to limited physical dependence relative to the drugs or other substances in schedule IV.

21 U.S.C. §812(b)(5)

District and NMPED in support of their stated policy rely on state and federal law prohibiting cannabis on school campuses. The statute authorizing the use of medical marijuana in New Mexico, also known as the Lynn and Erin Compassionate Care Act (CUA), provides without exception:

Participation in a medical use of cannabis program by a qualified patient or primary caregiver does not relieve the qualified patient or primary caregiver from: ... (3) criminal prosecution or civil penalty for possession or use of cannabis: (a) in a school bus; (b) on school grounds or property....

NMSA 26-2B-5(A) (2013)

District and the SEA also rely on the Controlled Substance Act's restrictions enumerating specific controlled substances, and the Nurse Practice Act outlining the NM Department of Health regulations, as well as the CUA. *Controlled Substances Act, 21 U.S.C. §812(c); Nurse Practice Act, NMSA 61-3-*

23.2 Parent's sole reliance is on another federal law, namely the IDEA requirements that disabled children must be provided FAPE.

The recent DPH decision in California, may be distinguished on several fronts. *In the Matter of Parent on Behalf of Student v. Rincon Valley Union Elementary School District, OAH Case No. 2018050651* In that case Student attended a private preschool with her nurse in attendance the entire time, paid for by the LEA. When it came time for kindergarten requiring the presence of Student in a LEA facility and not a private facility, the issue of cannabis on campus became real. In a well-reasoned decision the administrative law judge reviewed federal and California state restrictions. He considered the imminence of a change in federal prohibitions to be speculative and

the present law having a very low chance of enforcement. In that student's case, student's use of cannabis for medical purposes was taken as a "recommendation" (although that term was not actually used by student's physician)."The doctor could not write a prescription because of federal law. Cannabis was also used as a rescue medication for student's seizures at Kaiser Hospital. This 9th circuit administrative law judge found that the practices student had in the past – riding the school bus and attending school with her nurse, with the private nurse carrying and administering cannabis in the private school setting as needed –complied with FAPE requirements, and ordered the kindergarten school placement under the same conditions. Cannabis was allowed on a school campus in that particular case.

Critical to that case was approval and endorsement of medical marijuana by licensed medical practitioners sufficient to meet the requirements of California's Compassionate Care Act. In the present case, Parent as primary caregiver determines the variety of cannabis she purchases from a dispensary, the daily dosage she administers to the child and the combination rescue medication (CBD/THC on a 1:1 ratio) without benefit of a medical prescription.

Differences among state cannabis laws abound. While the use of cannabis for medical purposes is becoming more and more widespread – 46 states including New Mexico already have laws permitting same – this DPHO is not as sanguine about enforcement potential. Federal law and state laws are not in harmony. Even federal law criminalizing marijuana is not in sync with another federal statute, namely IDEA, which is the issue here.

Because state laws on marijuana use vary widely comparisons are not particularly useful. In New Mexico, state law specifically prohibits the presence of cannabis on school grounds and prohibits in no uncertain terms medical doctors from prescribing this drug. Section 844 prohibits

possession of a controlled substance “unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice.” 21 U.S.C. §844(a) New Mexico has taken this language as unambiguously requiring a doctor’s prescription. The revised Colorado statute also requires that there be a medical doctor’s prescription before cannabis is allowed on school grounds in that state. *Colorado Revised Statute §22-1-119.3, effective June 4, 2018*

Evaluation for Autism

■

With respect to Parent’s other IDEA claim, namely that Student was not evaluated in all areas of suspected disability, the weight of the testimony by Student’s teachers and related services providers compared to a one-time observation of Student’s behaviors in the classroom indicated that autism was not a suspected area of disability that warranted further evaluation and identification. The IEP team deemed Student to be more advanced than placement in a communication classroom would warrant and recommended the cross-categorical classroom. Dravet Syndrome and autism may be comorbid all the same.

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). The main purposes of IDEA are: (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)*

2. 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(I)(3)(2004

3. Specifically, IDEA grants DPHO jurisdiction for both subject matter and personal jurisdiction over the District (LEA)and NMPED (SEA), and its agents.

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 from date of filing the request for due process, Any findings or exhibits admitted with respect to information prior to that date is for historical purposes only.

6. The DPHO does not have jurisdiction over § 504 or § 1983 claims.

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

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)*

9. Parents claims are not barred by waiver, estoppel or laches.

10. Eligibility of Student to receive special education and related services under IDEA as OHI (Other Health Impaired) is not at issue. *34 CFR § 300.8(a); 34 CFR § 300.8 (b)(9) and (10)*

11. The school setting represents the LRE but not insofar as that setting requires Parent's presence on campus.

12. The LRE under these circumstances is the homebound setting with socialization opportunities.

13. The presence of Parent on campus to be available in the event of a seizure was a *de facto* requirement of Student's IEP.

14. Prior Written Notices did not mention the need for Parent to be on campus in the event of a seizure and were incomplete in that respect.

15. There is no evidence supporting Parent's request for payment for the time she spent at school. *Chavez, op cit.*

16. The New Mexico Department of Health is the responsible authority for nursing policy, including policy for school nurses. *NMSA 61-3-23,2*

17. The Colorado statute permits cannabis on school campuses for treatment of seizures only if it is prescribed by a physician. *Colorado Revised Statute §22-1-119.3 effective June 4, 2018.*

18. New Mexico is one of 46 states which has partially decriminalized cannabis. *NMSA 26-2B-5(A) (2013)*

19. Medical marijuana, while permitted in New Mexico, is still classified as a Schedule I drug under federal law. *21 U.S.C. §812(c); NMSA 26-2B-5(A) (2013)*

20. While IDEA expressly states that the LEA must evaluate in all areas of suspected disability, there was no consensus that autism was a suspected disability. *20 U.S.C §1414(b)(3)©*

21. Parents' complaint has met sufficiency requirements. *34 CFR §300.508(6)(d)*

22. Parents have met their burden of proof.
23. Parents have exhausted administrative remedies.
24. Parents have stated a claim for which relief may be granted.
25. Procedural errors were not serious enough to result in a denial of FAPE.
26. Under New Mexico state law and federal law, cannabis may not be present on a school campus, with the exception of Epidiolex.
27. Given the child's need for medications that the school cannot legally administer, the LRE for Student is homebound.
28. The failure to provide Student with the IDEA required continuum of services denied Student FAPE. *34 CFR §300.115*

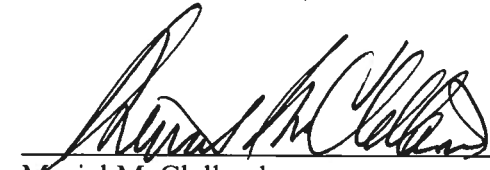
ORDER

1. District shall conduct, within 20 days of this Order, an IEP meeting revising the March/April, 2018 IEP to provide Parent with the option of a hybrid, homebound kindergarten placement, with related services provided either at school or in the home. Some additional time but not less than three hours per week, at times determined by the IEP team will be offered at the school so that Student may interact with peers. Mother may attend school during these times, at her option, but she is not required to.
2. In the alternative, Student may attend a half-day kindergarten school day.
3. In the event Parent chooses to have the school nurse administer Epidiolex during the time Student attends school, NMPED shall work with the DOH to have that medication, as prescribed by a physician and supplied by Parent, available within 30 days of Parent's election to

utilize this medication.

4. District's offer of an Eligibility Determination shall be provided to Parent.

THIS DECISION IS ENTERED THIS THE 7TH DAY OF OCTOBER, 2018



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 U.S.C. § 1415(I)(2004), 34 CFR § 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.

CERTIFICATE OF SERVICE

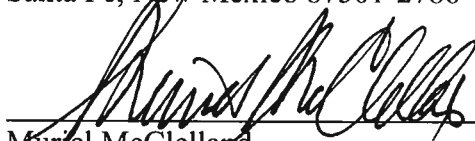
I hereby certify that I mailed
by US mail a copy of the foregoing Decision
on October 7, 2018 to the following persons:

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Muriel McClelland