

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

In the Matter of

On Behalf of , Parent,
 , Student,

Petitioner

v.

RALPH J. BUNCHE ACADEMY, and
THE INTERNATIONAL SCHOOL AT MESA DEL SOL,

Respondents

DPH 1314-35

DECISION
AUGUST 9, 2014

Muriel McClelland
Due Process Hearing Officer

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DECISION

This matter coming before the due process hearing officer (DPHO) at a hearing held on June 23, 24, 27 and July 7, 2014. Petitioner (hereinafter "Parent") represented by Gail S. Stewart and Tara Ford, Attorneys at Law; Respondents Ralph J. Bunche Academy and The International School at Mesa del Sol (hereinafter RJBA and TIS) represented by Shana Baker and Patricia Matthews, Attorneys at Law, and the hearing officer, having heard the testimony of witnesses, having reviewed the exhibits, and being otherwise advised in the premises, enters the following findings of fact, conclusions of law and Order.

STATEMENT OF PROCEDURE

Parent filed a request for due process on April 18, 2014 [*DPHO Exhibit 1*] Parent included four Respondents in the complaint: NMPED (SEA), District (LEA); RJBA (charter school) and TIS (charter school). The due process hearing concerned only the two charter schools which Student attended during the statutory period (April 18, 2012 to April 18, 2014). Parent alleged the charter schools, both state-charters and not LEA charters, were not providing FAPE by failing to properly identify Student's disability and by not developing and/or implementing Student's IEPs.

Responses from the charter schools were entered May 2, 2014 [*DPHO Exhibits 6, 7*] District's Response was filed May 9, 2014. [*DPHO Exhibit 8*]. NMPED filed a special Entry of Appearance and a Motion to Dismiss on jurisdictional grounds. [*DPHO Exhibits 9, 10*] Petitioner's Response to the Motion to Dismiss was entered May 5, 2014. The SEA's reply was entered May 9, 2014 [*DPHO Exhibits 10, 11*] The Pre-Hearing Order was entered May 2, 2014 [*DPHO Exhibit 13*] The NMPED was dismissed from this action based upon the ruling in Chavez ex rel M.C. v.

New Mexico Public Educ. Dept., 621 F. 3d 1275 (10th Cir. 2010). [DPHO Exhibits 14, 15] The LEA, as authorizer for the public district schools, entered into a settlement agreement with Petitioner and was dismissed from this action on July 1, 2014. [DPHO Exhibit 18]

A First Amended Joint Statement of Issues was timely submitted on June 18, 2014. [DPHO Exhibit 20] Exhibit and Witness Lists were exchanged on June 16, 2014. [DPHO Exhibits 21, 22, 23, 24, 25, 26] Requested Findings of Fact, Conclusions of Law and Closing Arguments were timely submitted on June 22, 2014. [DPHO Exhibits 27, 28, 29, 30, 31] The Decision was entered August 9, 2014. [Decision and Order, DPHO Exhibit 32]

STATEMENT OF ISSUES

1. Whether both state charters, RJBA and TIS, acting as their own LEAs, failed to accurately identify Student's eligibility for receipt of special education, by failing to conduct all necessary evaluation/testing to identify him in all areas of suspected disability? Whether both LEAs failed to provide necessary medical evaluation for confirmation of Tourette Syndrome (TS) and whether such failure(s) denied Student a FAPE?

2. Whether RJBA failed to provide education which was free and under public supervision and direction, instead requiring Parent to obtain and provide a Behavior Management Specialist (BMS) to accompany Student at school and intervene during the school day?

3. Whether RJBA failed to write and implement a complete IEP for Student during the period April / May 2012?

4. Whether RJBA failed to provide specialized instruction to meet Student's unique needs as a student with specific learning disability, including the failure to provide specialized instruction based on evidence-based research for reading/writing/spelling?

5. Whether both charter schools acting as their own LEAs repeatedly blamed and punished Student for behaviors, motor and vocal tics, which were not volitional and were caused by disability?

6. Whether both LEAs failed to provide for timely reevaluation as necessary to identify Tourette Syndrome?

7. Whether both LEAs unnecessarily segregated Student, based on lack of understanding of his vocal and motor tics, for certain academic and nonacademic periods of the school day, thereby denying him education in his LRE?

8. Whether RJBA excluded Student from receipt of public education and FAPE for the 2012-13 school year based on disability by refusing his enrollment as a student unless Parent supplied a BMS?

9. Whether TIS failed to conduct a timely IEP during the 2013-14 school year and failed to implement IEPs to deliver education based on current knowledge about Student's educational need, present levels of performance and goals ?

10. Whether both LEAs failed to provide necessary accommodations, related services or supplementary aids and services to allow Student full participation in school day activities and learning in spite of his involuntary tics and related needs resulting from disability?

11. Whether TIS failed to provide any special education to Student in the fall of 2013 despite his identification as a student eligible for receipt of special education and as a student needing delivery of special education and despite the existence of his IEP and other records documenting disability and need for special education?

12. Whether TIS failed to implement any IEP for Student during the time he was a

student there?

*** *The International School takes exception to this issue as redundant of #11.***

13. Whether TIS punished Student including excluding him from receipt of public education for manifestations of his disability?

14. Whether TIS completely failed to have any special education structure, including staff, available to meet Student's unique needs as a student with disability?

*** *The International School does not agree to inclusion of this issue.***

15. Whether NMPED is liable for the denial of FAPE by RJBA?

16. Whether NMPED is liable for the denial of FAPE by TIS?

17. Whether Petitioner and Student are entitled to equitable relief and, if so, from which public entities?

FINDINGS OF FACT

General Findings

1. Student is a 10-year-old special education student who, as the result of a settlement agreement with the district LEA entered on or about June 12, 2014, will be attending a district school in a self-contained classroom in August, 2014. *TR I, 158, 192-193*

2. The statutory time limit for this case runs two years from April 18, 2012 while Student still attended RJBA, a state-chartered charter school, until April 18, 2014, when the request for due process was filed.

3. State-chartered schools are charter schools authorized by the Public Education Commission (PEC) as their own LEAs, as opposed to LEA charter schools. The PEC is the "authorizer" of these charter schools and not the district LEA. The PEC is an elected body which

oversees charter schools in the state of New Mexico with assistance from the Charter School Division (CSD), a department within the New Mexico Public Education Department (NMPED). The PEC acts as an advisor to the NMPED. The PEC does not receive training on special education requirements but relies on the CSD for information. *TR III, 448-450, 457, 491, 502*

4. During the period in question, Parent has consistently reported to schools and evaluators. that Student was diagnosed with Tourette Syndrome (TS) when he was in first grade.¹
TR I, 31, 167

5. Parent has also consistently reported, in addition to TS, diagnoses for ADHD, Speech/Language disability, dyslexia, and OCD. *Exh. 5*

6. The physician's assistant at New Mexico Clinical Neurology Center does not have the expertise to diagnosis TS definitively. TS was to be confirmed by a neurologist. *Exh 3; TR I, 169*

7. TS is a neurological disorder which is diagnosed from observation of behaviors. Comorbid conditions of TS are ADHD, OCD, and learning disabilities, among other conditions. Rage or "storming" is a symptom present in some children diagnosed with TS, in addition to obvious and not so obvious vocal and motor tics. Tics may be mild or severe. TS may be simple or complex.
Exh 4; TR I, 146, II, 271, 405, 407-408, 426, 431-432

¹ Dr. Betsy L. Williams, performed a neurobehavioral evaluation on June 6, 2011 at the request of Parent. Her report mentions a possible movement or cognitive disorder but not specifically TS. She did diagnose S/L impairment and deferred a diagnosis on a cognitive disorder. Student was to be tested in eighteen months after being weaned from most medications and was to see a mental health professional as soon as possible. This report noted that Student's movements were not volitional and could not be controlled. The record does not reflect that the retesting or the psychiatric referral ever happened either before or after the statutory period.
Exhs 2, 3 were admitted and are referred to for historical purposes.

8. Sandra Hollis was qualified (over objection) only as an expert in supports for children in the educational setting and not for purposes of diagnosis. She is not a qualified medical examiner. She has never seen Student. According to this witness, TS has nothing to do with ED; outrage can be a component of TS. *Exh 14; TR II, 398, 403-405, 426-428*

9. Student had a largely successful experience most of third grade (2012-2013) when he was placed in a self-contained classroom in a district school, liked the teacher, and received multi-sensory reading instruction. *TR I, 178*

Ralph J. Bunche Academy

10. RJBA had approximately 100 students in grades K through 8, twelve of whom were special education students. The school was closed as of June 30, 2014. *TR I, 26*

11. Student attended 2nd grade at RJBA from September 27, 2011 through the end of the 2011-2012 school year. Only the period from April 18, 2012 to the end of the 2011-2012 school year and enrollment in the fall of 2013 are relevant here, approximately a five-week period. *Exh C*

12. The relevant evaluation for purposes of developing Student's RJBA IEP was performed in January, 2012 by EASi, a private firm offering assessment and therapy services to schools. A licensed school psychologist contracting with EASi found that Student met IDEA criteria as Emotionally Disturbed (ED): "Specifically, he meets federal criteria in the areas of 'inappropriate behaviors and feelings under normal circumstances' and 'an inability to build or maintain satisfactory interpersonal relationships with peers and teachers,' noting that 'these behaviors have persisted over a long period of time and they clearly interfere with his ability to function in a general education program'." This evaluator references Dr. Williams' report but did

not believe that Student's movements could not be controlled. This evaluator made recommendations for controlling Student's behaviors but left specific special education determinations to the MDT.

Exh G

13. Student's relevant IEP is dated December 2011/January 2012. Based upon the EASi evaluation dated January 31, 2012, the RJBA IEP team changed Student's eligibility determination from SLD to ED, with secondary disabilities of Other Health Impairment (OHI), Speech/Language Impairment, and dyslexia. The school psychologist who evaluated Student was provided information about TS by Parent, however, there was no discussion at the IEP meeting of TS as related to Student's outbursts. *Exhs A, E, G, H, pp. 1, 7; TR I, 68, 89-90*

14. RJBA operated on the assumption that TS, as reported by Parent, had not yet been confirmed. According to the principal "We did not disavow it and we did include it." She was aware of the June, 2011 neurological evaluation and the need for a full neurological reevaluation. *Exh H; TR I, 31-32, 43, 146*

15. Although Student's IEP specified a FBA and BIP neither evaluation was developed by RJBA. His RJBA IEP provided for pullouts for OT, S/L and "therapeutic counseling" services for 45 minutes per week each (a total of 2.25 hours per week, 10% or less of the school day). The remainder of the school day was spent in the regular 4th grade classroom. Annual goals included goals for self-calming, but did not include reading goals. *Exhs G, H, pp. 7, 24; TR I, 78, 94-96, 103*

16. Although RJBA had a special education teacher on staff who worked with students with learning disabilities, she did not work with Student. Student received small group instruction in reading from the regular education teacher in the regular education classroom. *TR I, 37-38*

17. Student's outbursts and tantrums, often violent and involving throwing things, were of considerable concern to staff, but these behaviors were not correlated by staff with a TS characteristic known as "raging" or "storming." The IEP team noted that Student "is unable to control his anger and can become destructive of furniture when he is upset. He does not have the ability to self-calm. He needs assistance in controlling his outbursts." *Exh H, pp. 4, 20; TR I, 86-87, 110, 139, 144-145*

18. Staff at RJBA could not manage Student's behaviors and asked Parent to provide a Behavior Management Specialist (BMS). The BMS, paid for with Medicaid funds, shadowed Student four hours during his school day and an additional four hours at his home. During spring break the BMS spent eight hours a day in the family home stating she had to get her hours in. The principal denied that the BMS was a condition precedent to keeping Student at RJBA. *Exh H; TR I, 82-83, 143, 145, 175, 201*

19. Parent cancelled the services of the BMS during spring break when she found the BMS to be intrusive in her home life. During the relevant months of April and May 2012 a BMS was not in attendance at RJBA. *TR I, 141*

20. When Parent attempted to reenroll Student for the 2012-2013 school year, the principal inquired whether she had a BMS in place. Whether the BMS was required or recommended by RJBA is disputed. Parent's perception was that the presence of a BMS was a condition of attendance. The principal stated "We really can't take him without one." Parent choose not to register Student. *Exh 9; TR I, 120, 143, 174-175*

21. The principal acknowledged that Student's kicking behaviors could be a motor tic, however, she never observed verbal tics or motor tics such as eye-movements or shoulder

shrugging. She did not associate his outbursts as involuntary symptoms of TS. *TR I, 135-136*

22. Some of the RJBA records could not be located (e.g., OT logs, therapy and S/L information). The principal testified Student received the related services provided in his IEP during the period in question. *Exh 1; TR I, 101-102, 114, 117*

23. Student evidenced academic progress in reading and math. Performance levels were not reported. *Exhs I, M; TR I, 104*

24. The principal was not aware that a LEA could refer a Student for medical examination if for educational diagnostic purposes. *TR I, 45*

25. RJBA's Student Handbook specifies that the school would not provide all needed special education services and would decide which services were appropriate to provide. *Exh 9; TR I, 120*

26. RJBA ceased to exist after June 30, 2014, its charter not having been renewed by the PEC. *I, 127-128*

The International School at Mesa del Sol

27. Eighty-nine special education students out of a total school population of 310 (29%) attended TIS in the fall of 2013. *TR II, 222*

28. Parent selected TIS because it was the only school with openings as of September 26, 2013; Student had attended several public schools earlier that fall without success. She was informed at that time that TIS taught in the least restrictive environment, full- inclusion model only, and did not have a self-contained classroom. Students in a given classroom usually numbered about twenty. Parent toured the classrooms. According to TIS staff, she did not mention a small classroom setting, TS, or discuss Student's previous placements in the district schools. *TR I, 180; TR II, 251*

29. It is disputed whether the BIP was the only document Parent provided to staff. Parent stated she also provided a copy of the IEP. Staff immediately requested additional transfer documents from the district LEA, which were received October 1, 2013 with the exception of an evaluation noted as missing from Student's records. No effort was made by staff to obtain Student's complete record. *Exhs G, AA, CC, FF, GG, HH, II, NN; TR II, 306, 315-317, 327, 332, 344*

30. Student attended TIS from September 30, 2013 through October 29, 2013 (approximately 15 school days counting absences; he was enrolled from September 26, 2012 to November 4, 2012). During that time he was suspended from the classroom for 6 days. Parent withdrew him from the school to home-school him because of the suspensions. *Exhs OO, PP, QQ, RR, SS, TT; TR I, 181-182, II, 317, 331, 367*

31. Although the school did not have a designated special education teacher on staff in the fall of 2013, it did have two regular education classroom teachers who had special education licenses. These teachers resigned October 11, 2012, effective November 1, 2012. *TR II, 365*

32. The Assistant Head of School (also the Special Education Director), who was licensed and experienced in special education, filled in teaching subjects such as math, science and sometimes reading for grades K-8 in the absence of a special education teacher. *TR II, 225*

33. Student's IEP at the time he was enrolled at TIS was dated November 18, 2012. It noted ED eligibility only. The Addendum to this IEP specified 21.5 hours in a self-contained classroom, 3 hours of S/L per month, 2 hours of OT per month, and 14 hours of social work services per semester. The relevant BIP was dated April 24, 2013. TIS did not schedule an IEP meeting; one was not due until November 18, 2013. *Exhs AA, BB, CC; TR II, 230, 242*

34. The Assistant Head of School had frequent contact with Student throughout the

school day. Student had a pass allowing him to come to his office any time he felt stressed. The Assistant Head of School/Special Education Director testified he provided 20.2 hours of direct services to Student during the time he attended TIS. He never recognized any signs of TS although he did observe kicking and running behaviors, as well as violent outbursts which involved yelling and throwing furniture. *Exhs SS, XX; TR I, 184, TR II, 266, 271, 274, 276*

35. According to the Assistant Head of School, Student exhibited IDEA characteristics of ED and not TS. He did not know whether Student received social work or S/L services while in attendance at TIS. Student did not receive specialized multisensory, evidence-based reading instruction. *TR II, 299-301, 381-382*

36. The Assistant Head of School did not believe TIS had to immediately comply with Student's previous IEP: "It's like we should first try to comply with it, but in trying to comply with the IEP, other avenues tend to be better. Better, other things need to be tried to see if we can meet his needs." He believed that since IDEA did not list "a definite timeline" for implementation of a transferred IEP, TIS had time to comply. *TR II, 245-246*

37. The Head of School tells parents "I don't have a program for that. This is what we do. And if you are willing to bring your child here until we have a program, then that's what we will do." According to the Head of School, TIS will respect a parent's request with respect to placement. He did not consider whether Student had TS. *TR II, 374, 391-393*

38. At the time Student was enrolled, TIS did not have the special education staff available to implement the IEP as written. *TR II, 217-223, 364, 371, 374, 391*

39. The OT (also the school's special education coordinator half-time) believed Student exhibited the IDEA characteristics for ED eligibility. She did not observe motor or vocal

tics, but was aware of “humming and, like, subvocalization.” She had never worked with a child with TS. She did not know whether Student received S/L services. The OT provided Student services 1.45 hours per month. *TR II, 321-323, 330*

40. TIS did not provide Parent with PWN indicating the school wasn’t going to implement the presenting IEP, nor did TIS provide the services and placement prescribed by the IEP. Parent never formally consented to withdraw Student from special education. When Parent toured the regular classroom and inquired about smaller classrooms, she was informed by the Assistant Head of School that TIS did not have special education, *per se*. *Exh AA; TR I, 181, 186, 192, II, 230-231, 242-245, 249-251, 253-254, 364*

DISCUSSION

Identification of Eligibility

It is clear from testimony in this case that neither RJBA or TIS acknowledged that Student’s behaviors were consistent with a TS diagnosis. *Pohorecki v. Anthony Wayne Local Sch. Dist., 637 F. Supp. 2d 547 (Dist. Ct. N.D. Ohio 2009)* [“The IDEA does not require children be classified by their disability. The IDEA requires that a child who needs special education and related services be regarded as a child with a disability and receive an appropriate education.”] The closest documented diagnosis Student had to a TS diagnosis was for a *possible* movement disorder or cognitive impairment which the neurologist directed be reviewed again by a neurologist within eighteen months of June 6, 2011 in order to affirm the diagnosis. The record does not indicate that this reevaluation was ever performed. All reports of TS came to the numerous schools Student attended through Parent. TS was never confirmed and should have been by the original or other

neurologist. 20 U.S.C. § 1414(b)(3)(B); *D.B. v. Bedford County Sch. Bd.*, 708 F. Supp. 564 (Dist. Ct., W.D. Virginia 2010), 55 IDELR 42 (2010); see also related decision reported at 54 IDELR 190 (2010) [IEP Team failed to assess the student or even discuss SLD despite the fact that the evidence suggested student may have had such an impairment. Team conflated two classifications.]

The central issue is not whether Student was improperly disciplined by removing him from the classroom when he had outbursts but whether his behaviors were voluntary or involuntary as result of his disability and what supports could be put in place to assist him. Behaviors observed by staff did not conform to their limited preconceived notions of TS but in their assessment did conform to the IDEA definition of ED characteristics.

Staff had little or no experience with TS as a disability. Student presented a complex case with overlays of comorbid conditions. Relying solely on the assessment of a school psychologist, the charter schools did not seek further medical examination necessary to arrive at a definitive diagnosis for educational purposes, resulting in a *possible* misidentification as ED.

Denial of FAPE in this case does not hinge only on misidentification and whether Student's eligibility is ED or OHI (which includes TS), but whether the charter schools followed IDEA procedures and mandates in providing special education services to Student.

Behavior Management Specialist

RJBA implicitly, if not explicitly, expected Parent to provide a BMS in order for Student to remain on campus. RJBA did not provide the BMS – it was up to Parent to arrange for one and for the funds to pay her. This action is contrary to IDEA and contradicts the provision of a free, appropriate public education even if funds do not come out of a parent's pocket. The IEP

team is responsible for providing sufficient support services to permit the child to receive educational benefit. *Reid., op.cit; 34 CFR § 300.324(a)(2)(i)*

RJBA IEP and Specialized Instruction

Student received special education services in the regular education classroom, which was too loud and noisy for him. There was no continuum of services offered. Student could only attend in a full-inclusion setting with related service pullouts. Student was not taught by a special education teacher and never received the specialized reading instruction to which he was entitled. While the IEP team noted the need for a FBA and a BIP, this was not done.

TIS IEP and Specialized Education

TIS blatantly ignored IDEA requirements for this special education Student and, no doubt, others based on the testimony of administrators in this case. Parent accepted TIS terms and enrolled Student with full knowledge that he would not receive services pursuant to his public school IEP. IDEA provides for a withdrawal of parental consent, which was not followed. There is no provision in IDEA for a parental waiver of services. Although the school had no intention of providing services pursuant to the transfer IEP, TIS did not immediately schedule an IEP meeting to revise Student's IEP. Student did not receive FAPE in any way, shape or form during his very limited time at TIS. *Van Duyn v. Baker School District 5J, 502 F. 3d 811, 822 (9th Cir. 2007)* [A “material failure to implement an IEP violates the IDEA. A material failure occurs when there is more than a minor discrepancy between the services a school provides to a disabled child and the services provided by the IEP.”]

Remedies

Remedies are severely limited under the facts presented. One school is now closed. The other school falls back on the 20 days of student enrollment (fifteen days of attendance) as a defense. Meanwhile Student received no S/L services (at less than 3 hours per month), no social work services (approximately 2.75 hours), or specialized reading instruction. During this very limited period of time Student *may* have actually received some OT services and *maybe* special education provided by a licensed special education teacher *qua* Assistant Head of School. We have no way of knowing since no records were located. This charter school's real fault lies in ignoring IDEA requirements which apply equally to charter schools despite their mission, as well as public schools that provide education for disabled children. The International Baccalaureate program does not trump IDEA.

The award of compensatory education is equitable and not hour for hour. The first thing that should happen is that this child be examined/evaluated by a neurologist to have his medical diagnosis and educational eligibility put to rest. Since TS has not been definitively established as Student's disability (and that needs to be determined one way or the other if Student is to receive educational benefit in whatever setting), a remedy involving TS education or supports is not appropriate and will not be ordered until after TS is definitively confirmed. The problem of identification of disability has existed since first grade and the failure to resolve is a burden to be shared by all involved in Student's education.

It is also obvious that TIS especially receive training in IDEA requirements. Because Student is now attending another school and not TIS, he is not personally likely to benefit from such training and accordingly such training is not awarded. *Reid, op.cit* [The inquiry must be fact-

specific and the ultimate award must be reasonably calculated to provide the educational benefits that student would have likely received if IDEA had been complied with]. *See also Gill v. Dist. of Columbia*, 55 IDELR 191 (D.D.C. 2010)

Finally, although there is no jurisdiction here to order this or it would have been, it is apparent that the PEC should receive much needed instruction on special education requirements, and the state-chartered charter school applications (including mission statements and handbooks) should be carefully scrutinized by the PEC and CSD (along with monitoring) to determine if IDEA requirements are actually being complied with, and not just given lip service. It is also troubling that special education students attending state-charted schools acting as their own LEAs as structured have no recourse for remedy if the school fails or is otherwise found wanting under the present authorization scheme.

Other Issues

All other relevant issues in this case are covered by the Findings and Conclusions herein.

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.

2. The jurisdiction of a due process hearing officer is limited to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. There is no jurisdiction over the Public Education Commission or the New Mexico Public Education Department. 34 CFR § 300.503(a)(1), (2)

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

4. Parent bears the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).02

5. The statute of limitations for due process hearings under the IDEA is two years prior to the date the due process complaint was filed. The complaint in this matter was filed on April 18, 2014. 20 U.S.C. § 1415(f)(3)(C)(2004); 34 CFR § 300.507(a)(2)

6. At all relevant times, Student was eligible for special education and related services under the IDEA as a student with a disability. 34 CFR § 300.8

7. IDEA does not give a substantive right to a particular disability classification so long as a student has a disability listed under 34 CFR § 300.8 and is receiving services which address his or her unique needs regardless of the disability classification. 20 U.S.C. § 1414(d); 34 CFR §§ 300.320-300.324

7. IDEA procedures were not followed in the development of the IEPs of the RJBA December/January 2012 IEP in that a special education teacher was not present, resulting in a denial of FAPE. 20 U.S.C. § 1414(d)(B)(iii), (iv),(v); 34 CFR § 300.321(a)

8. RJBA did not provide Student with reading goals or evidence--based reading instruction delivered by a special education teacher, resulting in a denial of FAPE. 20 U.S.C. § 1401(9)(B); § 1414(d)(1)(A)(i)(II),(IV); NMSA §22 -12-32(E)

9. RJBA did not provide the FBA and the BIP pursuant to the IEP developed by RJBA resulting in a denial of FAPE. 34 CFR § 300.324(a)(2)(i); *Harris v. District of Columbia*, 561 F. Supp. 2d 63 (D.D.C. 2008)

10. RJBA, implicitly required Parent to supply a BMS, which is the LEA's responsibility. *20 U.S.C. § 1401(9)(A); 34 CFR §300.154(d)(1)*

11. Substantive failures by RJBA in the development and implementation of his RJBA IEP resulted in a denial of FAPE during the statutory period Student attended RJBA.

12. Parent's tacit agreement to waive special education services at TIS does not excuse the fact that Student was denied FAPE due to the absence of an individualized program delivered by a special education teacher, constituting a material failure in implementation.

Van Duyn, op cit.

13. TIS did not comply with the procedures for a parent's revocation of consent to withdraw a student from special education, which must be in writing. *34 CFR §§ 300.300(b)(4), 300.9*

14. TIS did not provide parent with a PWN. *34 CFR § 300.503*

15. TIS did not implement Student's IEP, neither did the school convene a new IEP team meeting to revise Student's IEP. *34 CFR § 300.323(C); Wilson v. District of Columbia, 56 IDELR 125 (D.D.C. 2011)*

16. TIS did not provide Student with any related services, with the exception of OT, as specified in his transfer IEP. *20 U.S.C. § 1401(26)*

17. TIS did not provide Student with his IEP mandated evidence-based reading instruction delivered a small self-contained classroom, resulting in a denial of FAPE. *20 U.S.C. § 1414(d)(2)(C)(II); NMSA §22-12-32(E)*

18. TIS neither implemented Student's IEP nor did the school develop, adopt or implement another IEP that met the requirements of 34 CFR §§ 300.320 through 300.324. *20 U.S.C.*

§ 1414(d)(2)

19. TIS blatantly disregarded Student's IEP and IDEA mandates and requirements, resulting in a denial of FAPE.

20. Neither charter school acting as its own LEA sought further medical evaluation of Student's condition for educational diagnostic purposes, while apparently disregarding the Parent's reports and an earlier neurological evaluation. *20 U.S.C. § 1401(9) 34 CFR §300.34(c)(5); Scott v. District of Columbia, 45 IDELR 160 (2006)*

21. Alternative strategies are not a substitution for IDEA mandates. *Scott, ibid.*

22. Neither charter school provided Student with a continuum of services as required by IDEA, choosing instead a full inclusion model that was inappropriate for this child's needs. *20 U.S.C. § 1414(d); 34 CFR §§ 300.115-300.116*

23. Charter schools must follow the same IDEA provisions as other LEAs. *34 CFR § 300.2(b)(1)(ii)*

24. Student did not receive educational benefit from either of the two charter schools. *Houston Indep. Sch. Dist. v. Bobby R., 31 IDELR 185 (5th Cir. 2000)*

25. Student is entitled to compensatory education based upon these charter LEAs' failure to appropriately develop and implement Student's IEPs in the periods Student attended RJBA and TIS.

26. Hearing officers do not have unbridled discretion in fashioning equitable relief. Relief must be tied to the record. *Reid v. District of Columbia, 401 F.3d 516, 524 (D.C. Cir. 2005); 365 U.S. App. D.C. 234 (2003); Meza v Bd.of Educ. of Portales Municipal Schools, 56 IDELR 167 (2011).*

27. Appropriate relief does not have to be hour-for-hour relief but is relief designed to ensure that a student is receiving appropriate education within the meaning of IDEA, designed to meet a student's unique needs. *Reid, op.cit.*

28. Parent carried her burden by a preponderance of the evidence that Student was not provided FAPE by the state-chartered charter schools Student attended even for the short time falling within the statutory period. *20 U.S.C. § 1412(a)(1)(2004); 34 CFR § 300.530(d)*

ORDER

WHEREFORE IT IS HEREBY ORDERED THAT

1. If Parent consents and if not part of a previous settlement agreement involving this Student, Student shall be examined and evaluated for a cognitive impairment, specifically a movement disorder and/ or Tourette Syndrome. This evaluation will be paid for by RJBA and TIS, in equal shares, and will be made available to the school Student is now attending.

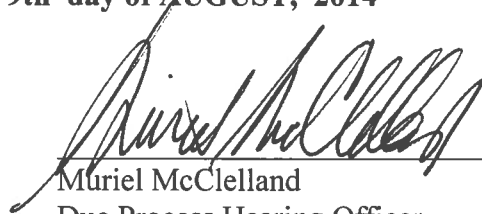
2. As compensatory education, TIS shall provide and pay for 5 hours of Speech/Language therapy and 2 hours of social work services (the latter only if Parent concurs), to be delivered at Student's present school.

3. In the event that TS is confirmed following the neurological/neurobehavioral reevaluation as specified in ¶ 1, above, TIS shall also provide Student and Parent \$2,000.00 total to be used for, at Parent's discretion, attendance at the Tourette Syndrome Association conference in 2016, *and/or* to purchase materials concerning TS, *and/or* to employ the services of Sandra Hollis to assist Parent and the school Student is presently attending with school issues, including, but not limited to, attendance at Student's future IEP meetings.

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 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.

THIS DECISION IS ENTERED THIS THE 9th day of AUGUST, 2014



Muriel McClelland
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I mailed by US mail a copy of the foregoing Decision on August 9, 2014 to the following persons:

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Muriel McClelland