

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

ALBUQUERQUE PUBLIC SCHOOLS,

Petitioner,

vs.

Case No. DPH 0910-37

PARENTS on behalf of CHILD,

Respondents.

FINAL DECISION OF THE DUE PROCESS HEARING OFFICER

**Jane B. Yohalem, Due Process Hearing Officer
August 16, 2010**

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STATEMENT OF THE CASE

This due process proceeding was brought by the District pursuant to 20 U.S.C. §§ 1415(b)(1) and 1415(d)(2)(A) and 34 C.F.R. 300.502 in response to the Parents'¹ request for an independent educational evaluation (IEE) at public expense. Parents requested an IEE because the Parents disagree with the District's occupational therapy reevaluation. That reevaluation concluded that Student needs only limited occupational therapy services to assist him in the area of motor planning and sequencing, primarily to support his writing skills. Ex. A.

The law provides that, when an IEE is requested by a Parent, the District must provide an independent evaluation at public expense unless the District promptly requests a due process hearing and establishes at that hearing that its evaluation is appropriate. *See* 34 C.F.R. § 300.502(b) (2006).

The District has argued in this proceeding that the IDEA "provides five factors for determining whether a public evaluation is appropriate," and that, if the District's evaluation has complied with these statutory criteria, the Parent should be denied an IEE at public expense. *District Findings and Conclusions*, ¶ 8. The five factors on which the District relies are found in 20 U.S.C. § 1414(b)(3)(A) (2004). They include: (1) whether the evaluation materials are free of racial and cultural bias; (2) whether the evaluation is performed in the manner most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) whether the evaluation materials are valid and reliable; (4) whether the assessments and other evaluation materials are administered by qualified personnel; and (5) whether the assessments are administered in accordance with the producer's instructions. 20 U.S.C. § 1414(b)(3)(A)(i)-(v) (2004).

¹ in this decision Student's grandparents are referred to as "Parents" because they are playing that role as defined by the IDEA. 34 C.F.R. § 300.304(a)(4).

In addition to contending that not all of these five factors were satisfied in the District's occupational therapy evaluation, the Parents have argued for a broader interpretation of the term "appropriate" in the context of an evaluation, pointing to such factors as the narrow focus of the evaluation, the failure of the evaluation to consider all of the available data on Student's progress, and the failure of the evaluation to address the instructional implications of all areas of need.

The due process hearing was held in a single day. Rather than detailing the exhibit numbers admitted and objections made here, the hearing officer has included an annotated list of exhibits in the record in this case.

Having heard the testimony of the witnesses, and having reviewed the exhibits and the proposed findings, conclusions and argument made by the parties, the Hearing Officer enters the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1. Student is nine years old and was in the third grade during the 2009-2010 school year. Ex. B, p. 1. Student is eligible for special education and related services as a Student with a primary disability of emotional disturbance and a secondary disability of mental retardation. *Id.*

2. Student's placement has been in a highly restrictive behavior intervention program for children with severe emotional disturbance during the past four years. TR. 57-58. During the 2009-2010 school year, Student has experienced frequent and intense escalations where Student exhibits physically aggressive behavior toward himself and staff, including yelling, grunting, throwing objects, knocking over and throwing furniture, hitting, kicking, head butting, scratching, biting, and running away from the area of supervision or running off campus. These incidents occur as frequently as three times a day, often every day of the week. Ex. B, p. 3; TR. 58.

3. When Student is unable to deescalate, as frequently occurs, District staff sometimes resort to physical restraint to keep Student safe. The use of physical restraint has increased

significantly this year. TR. 58. The evidence established that Student's behaviors have gotten so extreme and so frequent that Student is unable to participate in educational activities for more than one hour a day. TR. 96-97.

4. A due process complaint filed by Parents earlier in the school year was resolved through a mediation agreement which, among other provisions, resulted in an agreement for the District to pay for a neuropsychological evaluation of Student. TR. 62, 216. At the mediation, Parent also requested additional 1:1 occupational therapy for Student and the District agreed to provide this apparently on a temporary basis. TR. 100.

5. Parent's request for additional occupational therapy was aimed primarily at using occupational therapy techniques to help Student with self-regulation. Parent hoped that this would help Student avoid the increasing frequent behavioral escalations which were interfering with his ability to participate in any sort of educational activity. TR. 171-73.

6. The District OT who had been working with Student over a four-year period and who conducted the evaluation at issue in this proceeding testified that she felt that an increased level of OT services should not continue to be provided to Student after the mediation without a reevaluation to determine whether these additional OT services were needed by Student. TR. 17, 58, 28-29.

7. The District's OT conducted the reevaluation of Student at issue in this proceeding in March of 2010 and prepared the report in early April, 2010. Ex. A, p.2. The OT administered the Developmental Test of Visual Perception, Second Edition (DTVP-2); the Sensory Processing Measure Main Classroom and Home Questionnaire Test, and the Word Sentence Copy test. Ex. A. The testimony established that these assessments are free of racial and cultural bias, properly performed, valid and reliable for the purposes used, and administered by a qualified OT. TR. 13-16, 29, 34, 38-39.

8. The DTVP-2 assesses visual perception skills and visual motor skills. TR. 30. The results of this assessment showed that Student had relative strength in copying words and figures and eye-hand coordination, and a weakness in visual closure (seeing the whole picture). TR. 30, 39-40.

9. The Word Sentence Copy test was administered to determine Student's writing speed. It showed that Student copied words very slowly. TR. 48-49. The OT goal in Student's December, 2009, was improving Student's handwriting and forming sentences by sequencing words. Ex. 7, p. 1.

10. The Sensory Processing Measure evaluated Student in the areas of social participation, vision, hearing, touch body awareness, balance and motion and motor planning and ideas based on observations of Student by Parent at home and by teachers at school. TR. 40. This assessment tool identified definite dysfunction in the areas of social participation and motor planning and ideas. TR. 40, Ex. A, p.5. Student's identified social participation difficulties include difficulty in handling frustration, working as part of a team, resolving peer conflicts, and playing cooperatively. Ex. A, pp. 17, 22, 23. Student's identified difficulties in the area of planning and ideas include variation in the quality of work, inability to solve problems, failure to complete tasks with multiple steps, inconsistent performance on daily tasks, and difficulty coming up with ideas for games and activities. Ex. A, p. 5.

11. In addition to these assessments published assessment tools and tests, the OT asked Student's educational assistant to offer Student sensory material or movement breaks hourly and to collect data on the frequency with which Student would self-select to use a sensory item or a movement break. Ex. A, p. 8; TR. 45-46. Ex. C are the visual representations to which Student could point to make a choice. The chart prepared by the assistant and the OT showed that there had been very limited opportunities to offer breaks because Student was often too agitated. TR. 98-99, 101. When breaks were offered, Student generally did not affirmatively choose to use the sensory

equipment. Ex. A, p. 8. Based on this data and the OT's observation that Student responded best to verbal interventions once he was agitated, the OT concluded that Student did not have any sensory or sensory-motor needs and that movement breaks would be ineffective to avoid Student's frequent escalations. TR. 51-52.

12. Other than the opinion of the District OT stating that this self-devised assessment was dispositive on the question of the potential effectiveness of sensory and movement breaks for Student, there was no other evidence supporting the OT's testimony that this data trumped the results of the normed and properly administered Sensory Processing Measure; the OT's own testimony about Student's positive response to somatosensory and movement exercises in the classroom, and the recommendations of Student's neuropsychological evaluation. Ex. 2, p. 23; TR. 87, 211.

13. The District's OT testified at the due process hearing that she agreed with the conclusion of Student's independent neuropsychological exam that Student is "highly dysregulated" and impulsive. Ex. 2, pp. 8, 17, 20, 23; TR. 71-72 (OT testifies dysregulation for Student manifested as lack of attention and loss of physical control). The District OT testified that these areas of concern and behaviors resulting from them can be addressed by occupational therapy and that occupational therapists work with children with emotional disturbance or Attention Deficit Disorder to learn self-regulation and impulsivity control. TR. 72, 98, 105.

14. The District OT also testified that Student has been receiving occupational therapy services in this area over the past four years in a group program provided to the entire class. TR. 74; Ex. 1, p. 2. The therapeutic modalities used by the District OT with Student and the class combine somatosensory techniques, movement and physical relaxation with teaching the children to recognize their level of arousal and regulate it. TR. 24-27, 87, 98, 105.

15. The District OT testified that Student has benefitted from the somatosensory activities provided in class over the past four years and that he continues to benefit from those activities. TR.

87. She testified that the impact of these activities on Student's behavior is limited, however, because Student has not yet been able to integrate the self-regulation techniques into his day. TR. 74.

16. The District's OT's evaluation does not review Student's progress in the area of self regulation. It does it review his need to generalize and be able to use what he has learned, nor does it make any recommendations concerning these services to the IEP team. Ex. A.

17. Student's need for services in the area of social skills and social behavior also is not discussed in the evaluation report. Social skills and social behavior is another area which often can be addressed by occupational therapy services. Student's test results show severe dysfunction in this area. Ex. A; TR. 78, 79, 100-101 (social behavioral not mentioned, no instructional implications in OT discussed), 110.

18. The many reasons given by the District OT in her testimony for failing to comprehensively address Student's progress and needs in the areas of self-regulation and social skills were not persuasive or credible. Many of the reasons given conflicted with the IDEA provisions governing the conduct of evaluations, conflicted with other IDEA provisions on the scope of services to children with disabilities, or were inconsistent with the witness's answers to other questions. *See* TR. 98-99, 106, 148, 150 (no recommendations on addressing behaviors because school-based occupational therapy should focus on functional performance in academic activities, even for a Student who has social and behavioral IEP goals); 93-94 (there are therapeutic modalities to avoid out-of-control behavior, but these were not included because the witness cannot speak to a situation where a child is at risk of hospitalization); 78-82 (occupational therapy strategies for addressing Student' behavior and social skills would be duplicative where teachers and social worker are already working on Student's goal in this area, even though witness concedes OT is a different discipline with different approaches to addressing problems and that collaboration on these goals

might well be helpful for Student); 65 (neuropsychologist's recommendations for somatosensory activities are "clinically based" and, therefore, not appropriate to provide in a school); 75, 86-88, 98, 105 (neuropsychologist's recommendations for somatosensory activities are already being provided to Student in the classroom, the teachers can help Student generalize, and therefore, there was no need to address modifications or additions to these services this occupational therapy evaluation); 100-101 (despite evaluation results showing social behavior to be an area of severe dysfunction for Student, OT failed to make recommendations concerning occupational therapy for social behavior because this was not one of Parents' expressed concerns). The hearing officer concluded that the witness's focus on defending her evaluation when shortcomings were pointed out undermined her credibility.

CONCLUSIONS OF LAW

1. The due process hearing officer has jurisdiction over this matter pursuant to the IDEA, 20 U.S.C. §§ 1400, *et seq.*, (2004); 34 CFR §§ 300.511-300.514 (2006), and the New Mexico Special Education Regulations, 6.31.2.13(I) NMAC (2007).

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

3. Extensions of time for entry of the decision in this matter have been granted until August 16, 2010, at the request of the parties. This decision is timely filed.

4. The District is the complaining party and therefore bears the burden of proof by a preponderance of the evidence. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005).

5. Student is qualified for special education and related services under the IDEA as a student with a disability in the eligibility areas of emotional disturbance and mental retardation. 34 C.F.R. §§ 300.8(c)(4) and (6) (2006).

6. A parent has the right to request an independent educational evaluation at public expense if the parent disagrees with the evaluation obtained by the district. 34 C.F.R. § 300.502(b)(1).

7. A district, upon receiving such a request for an IEE, must, without undue delay, either file a due process complaint requesting a hearing to show that its evaluation is appropriate, or ensure that an educational evaluation meeting agency criteria is provided at public expense. 34 C.F.R. § 300.502(b)(2).

8. If the hearing officer decides the district's evaluation is not appropriate, the district must provide an independent educational evaluation meeting agency criteria at public expense. 34 C.F.R. § 300.502(e).

9. Whether an evaluation is "appropriate" under the IDEA depends on whether it complies with all of the Act's substantive and procedural requirements for conducting an evaluation, not just the five "[a]dditional requirements" listed in 20 U.S.C. § 1414(b)(3)(A) (2004).²

10. The IDEA requires that, in conducting an evaluation, a district must "use a variety of assessment tools and strategies to gather relevant functional, developmental and academic information" which may assist in determining "the content of the child's individualized education program." 20 U.S.C. §§ 1414(b)(2) and (b)(3)(C); 34 C.F.R. § 300.304(b)(1). In the case of a reevaluation, the reevaluation must assess the present levels of academic achievement and the related developmental needs of the child, and must assess whether any additions or modifications to the special education and related services of the child are need to enable the child to meet his IEP goals

² These five additional requirements are: (1) whether the evaluation materials are free of racial and cultural bias; (2) whether the evaluation is performed in the manner most likely to yield accurate information on what the child knows and can do academically, developmentally, and functionally; (3) whether the evaluation materials are valid and reliable; (4) whether the assessments and other evaluation materials are administered by qualified personnel; and (5) whether the assessments are administered in accordance with the producer's instructions.

and to participate in the general education curriculum. 34 C.F.R. § 300.305(a)(2)(i)(B) and 300.305(a)(2)(iv); 20 U.S.C. §§ 1414(c)(1)(B).

11. The District failed to carry its burden of establishing by a preponderance of the evidence that Student's occupational therapy evaluation looked at Student's progress in all relevant areas, and fully assessed whether, in light of Student's regression during the past year, modifications or additions to Student's OT services were needed. In addition, the District failed to carry its burden of demonstrating that the decision that movement breaks and other somatosensory OT techniques would not be helpful was made based on valid assessments and on data collected in the manner most likely to yield accurate information on Student's needs. For these reasons, the hearing officer concludes that the District failed to carry its burden of establishing that its occupational therapy evaluation was appropriate. 34 C.F.R. § 300.502(b)(2).

It is hereby **ORDERED**:

1. that the District will provide to the Parent the information about its criteria for an independent evaluation and information about where an independent occupational therapy evaluation may be obtained;
2. that the District will ensure that such evaluation is provided at public expense without cost to the parent; and,
3. that the District will reconvene Student's IEP team when the evaluation is completed to consider the recommendations of that evaluation and to make any modifications to Student's IEP which the team determines are appropriate based on that evaluation.

RIGHT TO APPEAL

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 USC § 1415(I)(2004), 34 C.F.R. 300.516, and 6.31.2.13(I)(25)

NMAC (2007). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

THIS DECISION ENTERED THIS 16th DAY OF AUGUST, 2010.

Jane B. Yohalem
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this *Final Decision of the Due Process Hearing Officer* was sent by certified mail, return receipt requested, to the Secretary of Education, State of New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, New Mexico 87501-2786 and by e-mail in PDF format as well as by first class U.S. Mail to the following counsel of record in this proceeding, on August 16, 2010.

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