NEW MEXICO PUBLIC EDUCATION DEPARTMENT
OFFICE OF SPECIAL EDUCATION

PROCEEDINGS BEFORE THE IMPARTIAL DUE PROCESS HEARING OFFICER

Case Number: NMPED DPH 1415-05

FINAL DECISION

Statement of the Case

Parent filed a Request for Due Process Hearing Against the Local Education Agency ("Request") with the New Mexico Public Education Department ("NMPED") on September 25, 2014, alleging that District denied Student, a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Improvement Act of 2004 ("IDEA") 20 U.S.C. §§ 1400 et seq. and implementing federal (34 C.F.R. Part 300, effective August 14, 2006, amended through July 2013) and state (6.31.2 et seq. NMAC, effective June 29, 2007, amended through September 28, 2012) regulations.

District did not challenge the sufficiency of the Request. District attempted to resolve the dispute through Resolution Session and other settlement discussions without success. The District submitted its Response on October 9, 2014. Neither party submitted any prehearing motions.

During the due process hearing, Parent was not allowed to present evidence on two subjects: the first, a claim that was not asserted in the Request and not raised at the prehearing conference concerning District's alleged failure to evaluate and provide services for speech/language impairment; and, the second, the existence of some kind of initiative being launched by the District to promote achievement among students of color. Parent was allowed to make an offer of proof on each matter that included offering exhibits that were marked for the record only. District was allowed to place responsive exhibits in the record as well.

On the third day of the hearing, District's counsel was restricted from further examination of Student due to her failure to abide by the Hearing Officer's rulings ordering her to discontinue questioning the witness on subjects ruled inadmissible. Tr. 862-873. The exercise of control over the

parties and proceedings pursuant to 6.31.2.13(I)(9), in particular subparagraphs (d) and (e), was taken only after counsel had been warned the day before that this would be the sanction applied if she continued to ignore the Hearing Officer's rulings. Tr. 470-476.

The District then questioned the Hearing Officer's impartiality and although the District did not ask the Hearing Officer to recuse herself, the Hearing Officer undertook the independent duty to analyze her impartiality. She concluded that she harbored no bias arising from a personal, extra-judicial source that required recusal and was therefore obligated to fulfill the appointment to serve as the Due Process Hearing Officer in this matter. The parties were informed of this decision by electronic message with authorities attached dated December 11, 2014, which is included in the record.

The procedural history of th's Request is otherwise not remarkable or substantive and need not be related further. Requests by one or both of the parties to extend the deadline for entry of a final decision were granted and this Decision is timely filed if delivered to NMPED and the parties no later than February 27, 2015.

The due process hearing was held over five consecutive days beginning December 8, 2014. Parent was present almost throughout and represented by counsel. Student appeared only to testify. One of the District's Special Education Directors was present on behalf of the District and the District was represented by counsel. All procedural safeguards were observed. Exhibits offered by Parent were identified by numbers. District's exhibits were identified by letters. The Joint exhibits were identified by double letters and all Joint exhibits were admitted at the beginning of the hearing. Page numbers on all exhibits refer to the pagination in the center or lower right-hand corner.

The DPHO, having heard the oral testimony of all witnesses, having reviewed the exhibits admitted as evidence, having considered all argument and citations of authority submitted and the parties' requested findings of fact and conclusions of law and being otherwise advised in the premises, makes the following findings of fact, conclusions of law and order.

Statement of Issues

After extended discussion of the parties' claims and defenses at the prehearing conference, the DPHO identified the following specific issues to be determined at the due process hearing in the Summary of Prehearing Conference of record at November 24, 2014.

1. Whether Student has been, to the maximum extent appropriate, educated with children who are not disabled.
2. Whether District has provided Student with access to the general curriculum.
3. Whether District has offered Student appropriate specialized instruction.
4. Whether District's decision regarding Student's reevaluation complied with C.F.R. §300.303.
5. Whether the annual goals developed for Student's individualized education program ("IEP"), including academic, functional and transitional goals, were measurable and sufficient to enable Student to be involved in and make progress in the general education curriculum and meet each of the Student's other educational and, in particular, transition needs that result from Student's disability consistent with C.F.R. §300.320(a)(2).
6. Whether the strategies and behavioral supports utilized in Student's program, including the development of a BIP and assessment of Student's functional behavior, met the District's obligations under IDEA.
7. Whether District has excluded Student from extracurricular activities and, if so, whether such exclusion was unreasonable and in violation of IDEA.
8. Whether District's process for the provision of assistive technology services was sufficient to confer FAPE and whether the District was required to conduct an assistive technology evaluation.
9. Whether the assistive technology services provided to Student, including auditory books or lack thereof, were sufficient to meet District's obligations under IDEA.

10. Whether District has met its obligations under IDEA to provide Student with transition planning and services.

11. Whether District has employed appropriate accommodations to include Student in state and district testing.

12. Whether District has affirmatively encouraged Student and/or Parent to give up his or her rights to a public education and IDEA protections.

13. Parent concedes that the claim related to "lowered academic expectations" stated in subparagraph 74 (10) of the Request for Due Process Hearing is not cognizable under IDEA and will not be a subject of the due process hearing.

As is apparent from the long list of issues identified at the Prehearing Conference, Parent asserted many claims in her Request which reflect an overall imputation that the District has allegedly failed to appropriately evaluate or address Student's needs related to either of his identified eligibilities resulting in Student being denied appropriate specialized instruction and related services. In relief, Parent seeks various evaluations, prospective relief and compensatory education. The District contends that it has complied with IDEA and that Student's placement and services throughout the statutory period were appropriate to his needs and asks that the Request be dismissed in its entirety. Because the evidence available in the record was so conflicted and devoid of current diagnostically evaluative data, it was not possible to determine the issues identified in numbers 2, 3, 5, 6, 8 or 9. Accordingly, the threshold question addressed herein is whether the District complied with its obligation under IDEA to reevaluate Student.

Summary of Essential Evidence

The testimony of 19 witnesses was received and 59 exhibits were admitted into evidence and five additional exhibits were received in the record in support of the parties' respective offers of proof concerning barred testimony during the five days of hearing. The witnesses heard were Parent; Student; six of Student's special education teachers; District's school psychologist and a contract psychologist

consultant to the program in which Student was placed; District's transition specialist; Student's current high school assistant principal ("AP"); a teacher trained in SPIRE instruction; two of Student's educational assistants ("EA"); two of the District's social workers; the District's instructional manager for reading and math disabilities; and one of the District's behavior consultants. The following is a summary of the evidence relevant to the decision herein that is either undisputed or found to be established by a preponderance of the evidence unless otherwise indicated. References throughout this decision to exhibits admitted into evidence at the hearing are indicated by "Ex. ___," references to pages in the transcript of the hearing by "Tr. ___" and references to the Joint Stipulation of Facts by "Jt. Stip. ___."

Student was 17 years old at the time of the hearing. In his fourth year of high school attendance, Student was enrolled in a program called Positive Accommodations, Curriculum and Emotional Support ("PACES")[1] housed at a District's high school other than Student's neighborhood school for 2013-2014 and 2014-2015 school years. Jt. Stip. 1 and 4. Since at least March 2011, the District has identified and determined Student to be eligible for special education services with the disabilities of emotional disturbance ("ED") and specific learning ("SLD"). Jt. Stip. 2, 3 and 6. The Student's eligibility as ED and SLD is not disputed. Although this is Student's fourth year of high school, he does not have sufficient credits to graduate in Spring 2015. Ex. 21. The statutory period under review is September 25, 2012, to the date of Parent's Request.

In its effort to provide Student with educational services over the course of his high school career, the District enrolled Student at four different high schools which will be identified by initials only: HHS from August 2011 to April 2012; a behavior intervention program at SHS from April 2012 to December 2012[2]; WMHS, Student's neighborhood school at the time, from the beginning of the Spring semester 2012-2013 to February 25, 2013; and finally the PACES program at VHS from February 25, 2013, to the time of the hearing. Ex. II, pp. 4 and 30. PACES is described by District at Exhibit 37 as follows:

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[1] This program was formerly known as the Behavior Intervention Program. Jt. Stip. 5

[2] But from December 13, 2012 to the end of that semester, Student was removed to a "Homebound Program" for safety reasons. Ten hours of instruction was delivered to Student in an isolated location on campus. Ex. HH.

> The PACES provide district special education service to students who require intense behavioral and emotional support. Highly specialized, intensive, comprehensive alternatives for students are utilized in order to facilitate positive behavioral changes in a safe school environment. Each program maintains a low pupil/teacher ratio. PACES has at least one EA in each classroom and appropriate related service providers to meet individual needs. Instructional emphasis is placed on acquisition of skills in the following areas:
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> - social/emotional skills
> - communication
> - applied academics
> - prevocational/vocational skills
> - life skills
> - independence in daily living

It is undisputed that Student has, throughout the educational history reflected in the evidence, exhibited challenging and disruptive behaviors including harassing, threatening, physically and verbally abusive conduct toward both peers and staff and leaving the classroom and disrupting other classrooms or destroying property. He has been the subject of numerous disciplinary referrals and police incident reports. Exs. F, G, H and S. Student admits that he is routinely late to school and often absent from school entirely. Tr. 841 and 844; Ex. N. When in class, he is alternately reported to perform well academically[3] but more often to refuse to perform academic tasks. District steadfastly maintains that Student's behavior is volitional and is the primary, if not the only, barrier to his ability to receive educational benefit from the services offered. Parent contends that Student's behaviors derive from the District's alleged long-standing failure to appropriately address and remediate Student's learning disabilities resulting in frustration with academic and social challenges and its further failure to develop appropriate positive behavioral interventions and supports.

Despite the difficulties in providing services to this Student repeatedly demonstrated by District staff through testimony and the IEPs, there are remarkably only two diagnostic evaluations of record to assist in reviewing the Parent's claims that Student was denied FAPE. The first is a psychological evaluation conducted by a District school psychologist in December 2010. Ex. 2. The second is a neuropsychological evaluation by an independent neuropsychologist in January 2011. Ex. AA. Student

[3] But see Student's testimony alleging that when he did well, it was because the EAs were directing his attention to the correct answers. Tr. 811, 813-815.

was then 13 years old enrolled in eighth grade. He had started the eighth in his neighborhood school, WMS, but apparently quickly after the start of the year, his IEP team determined that Student needed a higher level of support than WMS could provide and he was transferred to VBMS for placement in a small structured classroom for children with emotional, social and behavioral concerns. At the time of the psychological evaluation, Student's instructional day had been reduced to only two hours due to behavioral concerns. Ex. 2, pp. 1-2.

Both evaluations record a significant psychiatric history including diagnoses and treatment for bipolar disorder and oppositional defiant disorder which included in-patient care at a residential treatment center and psychiatric medication when Student was in sixth grade. At the time of these evaluations, Student was not under treatment and off all psychiatric medication. Ex. 2, p. 4. Some difficulties at birth were noted and "significant trauma in his life" was recounted involving homelessness, a verbally abusive father and frequent family moves. Ex. AA, p. 1.

These evaluations were sought to "clarify his special education needs and current eligibilities." Ex. 2, pp. 1 and 9. Student was then classified as eligible for services due to mental retardation ("MR") and speech/language impaired ("SLI") based on a Multidisciplinary Evaluation done by the charter school he was attending in January 2010. Both Parent and Student's then current District IEP team questioned the classification of MR and these evaluations ensued. Exs. 2 and AA.

After completing the assessment procedures described in the report at Exhibit 2, the psychologist concluded that Student's "current emotional and behavioral functioning significantly impacts his ability to succeed in a school environment." Ex. 2, p. 9. With his mental health diagnosis of bipolar disorder, as well as a well-documented history of severe behavioral aggression and disruption in a school environment, the psychologist suggested that Student met the criteria for ED, defined at 34 C.F.R. §300.308(c)(4), specifically citing Subsections (i)(C) and (D) which are quoted in pertinent part below.

> ED means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
>
> (C) Inappropriate types of behavior or feelings under normal circumstances.

(D) A general pervasive mood of unhappiness or depression.

Student was referred to the neuropsychologist to assess cognitive functioning, attention and executive functions. Evaluation was also done in the areas of memory, language and academics. Student underwent a brief clinical interview and extensive testing with the neuropsychologist who found him to be pleasant and cooperative throughout their time together. Student was found to have a full scale IQ of 85 which reflects overall cognitive functioning in the low average range but well above the range for MR. Page 8 of Exhibit AA lists the scores obtained on all the tests administered if the reader requires that information. The neuropsychologist's impressions, in pertinent part, at page 5 of Exhibit AA are:

> Verbal and nonverbal reasoning are about equally well developed. However, further analysis suggests some concrete tendencies and difficulty with language processing. Memory ability is normal in terms of the ability to retain information, although [Student] is weak in learning strategies to facilitate memory. Executive functions are an area of significant weakness, and this includes working memory, cognitive flexibility, planning and organization of information. Attention is poor. Academically, reading is very weak, and only basic mathematics is understood by Student.
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> [Student] presents a complex clinical picture due to the confluence of psychiatric and neurodevelopmental vulnerabilities. In terms of cognitive development, he does not meet criteria for MR . . . He would meet criteria for Reading Disorder, and he would also meet criteria for Mathematics Disorder. He has associated deficits in attention and in executive functions which may be multi-determined, related to genetics, pregnancy and perinatal issues, and possibly to his current psychiatric issues as well.

The recommendations are extensive and can be found on pages 6 and 7 of Exhibit AA. The neuropsychologist starts out with some general comments: "Although indeed [Student] 'hate(s)' school and often refuses to do work, the level of his disability suggests that he would be unable to do mainstream grade level work even if he were highly motivated." Paraphrasing, psychiatric/psychosocial interventions should be considered to be of equal importance as specific academic interventions, as the major challenge may very well be to engage him in the academic process. It is likely to be quite difficult to engage him even if appropriate interventions are used. See Ex. AA, p. 6. The neuropsychologist's specific recommendations will be included in the discussion of the threshold question below.

During Student's February 25, 2013, IEP at WMHS, Parent requested and the District accepted a "psychological re-eval." The stated reason was that "[Student] needs another psychological evaluation."

There is no evidence of record that the IEP directed evaluation occurred and no explanation of what happened to that request. Ex. II, p. 30.

Pursuant to the 34 C.F.R. §300.303 requirement that a reevaluation must occur at least once every three years, Student would be due for a reevaluation December 2013 or January 2014, that being three years from the evaluations conducted in eighth grade. Apparently, in anticipation of that deadline, the District began compiling data for a review of existing evaluation data ("REED"). In September and October of 2013 each of Student's teachers were asked to complete a survey form and all respondents opined that further assessment was not needed. Interestingly, the only exceptionality identified on the form was ED. Student's sponsor teacher did not complete the form until November 2013. She agreed with the consensus but her responses provided significantly more information about Student's performance than the others. Ex. CC. The school psychologist and one of its educational diagnosticians then compiled the data in something called a File Review Report: Reevaluation dated December 19, 2013. Ex. DD.

On December 2, 2013, the educational diagnostician reported via email to the school psychologist that Parent was requesting testing. Student's sponsor teacher also participated in the email chain asking that an IEP be conducted as soon as possible pointing out that all the REED forms from the teachers were already in the file. Ex. U. Parent recalls making a written request for testing to Student's sponsor teacher but could not remember when. Tr. 988-989.

District responded to Parent's request by quickly completing the REED and creating the exhibits described above after the distribution of the email in Exhibit U. Then the school psychologist along with the AP and Student's sponsor teacher met with Parent and Student to explain the old evaluations to the Parent and share with her that all the District staff did not believe that further assessment was needed. Parent did not have an advocate or attorney at the meeting. The meeting was estimated to have lasted an hour. Tr. 104. The District personnel maintain that Parent withdrew her request for testing after this

meeting. Tr. 50-51; 110. Parent maintains that the District personnel said they would conduct the testing. Tr. 991, 993-994.

There is nothing in the record evidencing either the Parent's written request for testing or any written confirmation that she withdrew the request. The unsigned Eligibility Determination Report dated February 19, 2014, contained in Exhibit EE, does not disclose that Parent requested testing saying only, "This evaluator has chosen to go over the assessments, reports and evaluations with [Parent] to further explain them to her so she can better understand them." Only the primary eligibility of ED is identified in this report. Ex. EE, p. 1.

Student's reevaluation IEP was held on that same date and while the language contained in Exhibit EE is repeated in its entirety under the Student Profile, there is no mention of the decision to forego further assessment in the prior written notice ("PWN") and there is no evidence of record that Parent was given written notice of her right to challenge that decision. Both ED and SLD are listed as Student's eligibilities. Ex. JJ, pp. 1, 2 and 23.

Although Student's grades made him ineligible to be a member of either the football or basketball teams, he was allowed to attend practices. Tr. 660-661. He apparently did so for a while but chose not to continue doing so because he wasn't allowed to actually play with the team. Student attended both football and basketball games as a spectator with his friends. Student's testimony generally.

Each one of the IEP's admitted of record includes an attachment reflecting the transition services identified as needed for Student's successful transition. Exs. 9, FF, GG, II and JJ. See also Ex. R. Student completed a Career Interest Inventory and a Transition Interview on October 4, 2013, which were analyzed by the District's transition specialist. Exs. 24 and 25, Tr. 695-696. The transition specialist has conferred with the staff working with Student, conducted a credit review and tried on several occasions to meet with Student to discuss the credit review and other transition matters but Student either refused to meet with her or was not available due to absence. Tr. 692-693 and 710-711. Again, for the reasons

addressed under the threshold question below, it is not possible to evaluate whether the substance of the transition efforts was appropriate to Student's individual needs given the conflicting data.

No evidence was offered on Issue number 11 addressing Parent's claim that District failed to employ appropriate accommodations to include Student in state and district testing and the claim is therefore deemed waived.

Student became invested in a quest to get out of the PACES program and into less structured classrooms with nondisabled peers during the winter of the 2013-2014 school year. He made this request of the IEP team at the February 19, 2014, reevaluation IEP meeting. Ex. JJ. His request was denied and Student responded by running away from home and refusing to attend school for the remainder of that semester. He returned to PACES in the fall of 2014 and has been enrolled there through the time of the hearing.

It is undisputed that Parent and Student met with the AP concerning one or more disciplinary referrals in late September 2014. Parent conceded that during the meeting she was told that removing Student from the program was an IEP team decision. Parent also admitted that the AP was told that Student had a friend who had signed out of the program and was asked how that was done but she claimed Student asked the question and the AP reported that Parent did. The AP stated that it was at this point she asked Parent if she was talking about revocation of special education services and that Parent didn't know what that was. AP claimed that she explained revocation to Parent but recommended against it and told her why she should not do it. Parent was less clear about the content of the conversation but contended that AP brought it up and she felt like AP was trying to talk her into revoking. Ex. H, p. 01479; Tr. 1042-1051.

Discussion and Legal Authority

The Obligation to Provide FAPE

States and local school districts receiving federal funds for education must provide all disabled children residing within their boundaries with FAPE. 20 U.S.C. §§ 1412(a)(1)(A) and 1413(a)(1). FAPE

is defined in 20 U.S.C. § 1401(9) to mean special education and related services that are provided at no charge and in conformity with an IEP. In order to develop appropriate programs the school district must evaluate and reevaluate children with disabilities to determine their eligibility and the appropriate content of their educational programs. 20 U.S.C. § 1414(a)(2), (b) and (c).

The Supreme Court in *Board of Education v. Rowley*, 458 U.S. 176 (1982) 1982.SCT.42760 VersusLaw.com, established a floor for the level of education to be accorded children with disabilities to achieve compliance with the IDEA saying, "We therefore conclude that the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id.* at ¶55 A child has received FAPE if the school district complied with procedural requirements and the IEP was reasonably calculated to enable the child with disabilities to receive educational benefit. *Id.* at ¶65; See also *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008) 2008.C10.0001086 VersusLaw.com.

The vehicle for provision of FAPE is the IEP, the package of special educational and related services designed to meet the unique needs of the child with disabilities. 20 U.S.C. §1414(d) The IEP is developed by a team composed of the student's parents and educational professionals (20 U.S.C. §1414(d)(1)(B)) who must consider several factors: 1) the strengths of the child; 2) the concerns of the parents for enhancing the education of their child; 3) the results of the most recent evaluation of the child; and 4) the academic, developmental and functional needs of the child. 20 U.S.C. §1414(d)(3)(A). The central finding in this decision is that District's election to forego conducting an assessment of Student's cognitive, academic and social/emotional/behavioral functioning on the occasion of the IDEA's triennial reevaluation requirement deprived Student of FAPE.

Relying on the Tenth Circuit case of *Garcia v. Bd of Educ of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008), 2008.C10.0000359, VersusLaw.com, asks that the District be relieved of liability for any alleged failure in the provision of FAPE under IDEA because it is Student's poor behavior that prevents him from receiving educational benefit. While the Tenth Circuit acknowledged the

District's theory of liability, it weighed the pros and cons of such a theory and specifically declined to excuse the District's liability on that basis. 2008.C10.0000359, VersusLaw.com at ¶59. The Court acknowledged obvious problems with

> [D]eeming harmless procedural violations of IDEA for students who fail to exhibit enthusiasm for school. After all, a student's lack of enthusiasm, at least in some cases, may be related to his or her disability. Such students are perhaps most in need of vigilant attention from their schools, . . . 2008.C10.0000359, VersusLaw.com at ¶57.

The Court then noted its obligation to determine by a preponderance of the evidence whether the school district's procedural failures resulted in a denial of educational benefit to the student and whether its action caused the student to suffer an educational loss. On the facts of that case, the Court agreed there was "strong evidence that regardless of what actions the school district did or did not take in Fall 2003, Myisha's poor attitude and bad habits would have prevented her from receiving any education benefit." 2008.C10.0000359, VersusLaw.com at ¶58. Pertinent facts that distinguish the *Garcia* case from the case herein is that at the point the Tenth Circuit was reviewing the behavior, the student had not attended school for any material period of time since the Fall of 2005, a period of over two years. 2008.C10.0000359, VersusLaw.com at ¶29. Furthermore, the student in *Garcia* was eligible for services as SLD and did not receive services for a behavioral based disability as Student herein has for his eligibility of ED. 2008.C10.0000359, VersusLaw.com at ¶16. The Tenth Circuit being unwilling to use the student's behavior to defeat liability in the *Garcia* case, this Hearing Officer is certainly unwilling to do so under the facts extant herein.[4]

Least Restrictive Environment – Issue 1

District must, to the maximum extent appropriate, ensure that children with disabilities are educated with children who are nondisabled. 20 U.S.C. §1412; 34 CFR §300.114. However, where a student's individualized needs are so extensive that they may not be appropriately met in an educational setting with students who are not disabled, a school district may properly provide services in a more

[4] The Tenth Circuit did, however, affirm the district court's discretion to deny the student therein compensatory relief on an equitable basis. 2008.C10.0000359, VersusLaw.com at ¶74.

restrictive setting. *Bd of Educ of Township High Sch. Dist. No. 211 v. Ross*, 44 IDELR 36 (N.D. Ill. 2005), affirmed 486 F.3d 267 (7th Cir. 2007). *Murray v. Montrose Co. Sch. Dist.*, 51 F.3d 921 (10th Cir. 1995) establishes that the District can house highly specialized programs in one location rather than attempting to duplicate those special services in each child's respective neighborhood school. District herein complied with this mandate.

The preponderance of the evidence established that Student has a long history of behaviors that were disruptive to his own learning and that of his classmates. The only contrary evidence is Student's testimony that he would regulate his behavior if allowed to attend regular education classes. He has been placed in less structured settings than the PACES program (briefly at WMHS and an extended period at HHS) during his high school career with conclusively poor results that impelled the IEP team to the more restrictive placement. Given Student's admitted disregard for both staff and peers in the school setting and apparent inability to regulate his behavior, placement in the PACES setting where there are the most resources available to manage his behaviors is the least restrictive environment.

Reevaluation – Issue 4

The District must ensure that Student is reevaluated in accordance with the provisions of 34 C.F.R. §300.303 which provide, in pertinent part, as follows:

> (a) *General.* A public agency must ensure that a reevaluation of each child is conducted in accordance with §§300.304 through 300.311 –
>
> (1) If the public agency determines that the educational or related services needs, including improved academic achievement and functional performance, of the child warrant a reevaluation; or
>
> (2) If the child's parent or teacher requests a reevaluation.
>
> (b) *Limitation.* A reevaluation conducted under paragraph (1) of this section –
>
> (2) Must occur at least once every 3 years, unless the parent and the public agency agree that a reevaluation is unnecessary.

District maintains that it did conduct a reevaluation and this Hearing Officer acknowledges that the REED is a component part of and can be the entire reevaluation. *Letter to Anonymous*, 48 IDELR

136, 107 LRP 45732 (OSEP 2007). The provisions of 34 C.F.R. §300.305 establish the requirements for reevaluations, including the REED and provide, in pertinent part:

> (a) *Review of existing evaluation data.* As part of . . . any reevaluation under this part, the IEP Team and other qualified professionals, as appropriate, must –
>
> (1) Review existing evaluation data on the child, including –
>
> (i) Evaluations and information provided by the parents of the child;
>
> (ii) Current classroom-based, local or State assessments, and classroom-based observations; and
>
> (iii) Observations by teachers and related services providers; and
>
> (2) On the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine –
>
> (i)(B) In case of a reevaluation of a child, whether the child continues to have such a disability, and the educational needs of the child;
>
> (iii)(B) In the case of a reevaluation of a child, whether the child continues to need special education and related services; and
>
> (iv) Whether any additions or modifications to the special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP of the child and to participate, as appropriate, in the general education curriculum.
>
> (d) *Requirements if additional data are not needed.* (1) If the IEP Team and other qualified professionals, as appropriate, determine that no additional data are needed to determine whether the child continues to be a child with a disability, and to determine the child's educational needs, the public agency must notify the child's parents of—
>
> (i) That determination and the reasons for the determination; and
>
> (ii) The right of the parents to request an assessment to determine whether the child continues to be a child with a disability, and to determine the child's educational needs.
>
> (2) The public agency is not required to conduct the assessment described in paragraph (d)(1)(ii) of this section unless requested to do so by the child's parents.

As noted in the summary above, it is undisputed that Parent requested more than once that Student be tested before the District had completed its REED, thereby relieving the District of any obligation to inform the Parent of the determination of the IEP Team and other qualified professionals or her right to request as assessment. The request was made and the District was obligated to conduct the testing requested. Once Parent made her request, it was inappropriate to meet with her for any purpose other than to get consent for the testing needed to meet her request.

Furthermore, the conclusion of the teachers and other qualified professionals that no additional assessment was needed cannot be considered reasonable under the facts in evidence on this question. The

neuropsychologist made the following recommendations concerning Student's reading and mathematics disorders in the most recent evaluation of Student's academic functioning at page 6 of Exhibit AA:

> 1. **Reading, spelling, and written language**. Due to the nature of his learning disability, [Student] will require systematic review in decoding and phonics. Reading materials of interest will not increase his fluency. Rather, he will benefit from evidence-based interventions for fluency, i.e., repetitive oral reading of text which can be decoded with 95% accuracy. The *Wilson Reading Program*, employed by [District], is one example of a reading program which provides direct instruction in phonics, language principles, and fluency for older youngsters using research-based methods, and a program which also has components geared to older youngsters and adults. Written language should be part of his reading program.
>
> 2. **Math**. [Student] will benefit from systematic instruction in place value, division, and fractions, as he does not understand this conceptually. Complex multiplication and division (the relationship between them) should be directly taught to mastery. Only then should he go on to pre-algebra. It is highly unlikely that he would be successful in algebra and higher math without systematically addressing his deficiencies. He will, in addition, benefit from drilling math facts, as he is not automatic in the most basic math facts such as single-digit addition and subtraction.

This was the last comprehensive evaluation conducted in January 2011 when Student was 13 years old in eighth grade.

Contrast this with the testimony of AP, a Wilson certified reading instructor. AP confirmed that the *Wilson Reading Program* had never been offered to Student during his time at VHS[5] because his test scores and the reports of his teachers demonstrated to her that Student can read and has no need for a decoding reading program. Tr. 596-597. AP relied on Brigance test results reflected on pages 2 and 3 of Exhibit JJ, the reevaluation IEP developed for Student on February 19, 2014, for which she admitted she had no information or knowledge concerning the qualifications of the person or persons administering the various tests or the circumstances or conditions under which the tests were administered. Tr. 679. She concluded that because these scores indicated oral reading ranging between 6th and 11th grade equivalency, "He clearly can decode." Tr. 597.

[5] Exhibit BB summarizes a meeting held at HHS on April 3, 2012, to address Student's lack of progress. On page 1, under the topic of considerations suggesting things that could be added to Student's program, it states, "Reading multisensory program? Math support per neuropsych eval?" suggesting the recommendations in Exhibit AA had not been implemented at that point either.

The presence and severity of a reading disorder impacts not only a determination of the specialized instruction required to directly address the disability but also accommodations and modifications that might be necessary to enable the student to access the general curriculum which at the high school level is largely delivered in text that must be read. The educational program that is appropriate for a child whose reading disorder is of the magnitude described by the neuropsychologist (the evaluation that the District says does not need to be updated) is likely very different than the one that would be appropriate for a child who "clearly can decode" and reads at a sixth to eleventh grade level. So, evidently there has either been a significant change in Student's disability needs or the District staff members are misguided in their individual and collective assessments of Student. Under either scenario, a decision to forego reevaluation is not reasonable.

Even taking into account that the school psychologist was notably the driver and primary professional preparing the REED and the fact that her focus was almost exclusively on ED (ED being the only eligibility identified on all of her reports related to the REED) and her emphasis that, in her view, the reported behaviors were essentially the same, the conclusion is still not reasonable. The evidence on this question was also conflicted as each one of Student's providers repetitively and cumulatively testified (despite instructions to counsel to the contrary) using almost identical verbiage that Student can do the work but chooses not to, which explanation was typically followed by a generous sampling of the foul and profane language and aggressive behaviors Student would use to express his resistance. Tr. 209-218; 287-288; 625-626; 917-918; 922-923; 927-929; and 960-962. See also Ex. CC. This contrasts markedly with the findings of both the psychologist and the neuropsychologist that Student's disability impairs his ability to regulate his behavior and that he requires specialized instruction for his identified disability of ED. One would assume that the interventions that would be appropriate to employ when behavior is entirely volitional would differ from the interventions appropriate to intervene with a child whose disabilities impair his ability to regulate behavior.

These conflicts are so endemic and far reaching, it is impossible to evaluate whether the program reflected in Student's IEPs and provided to him in the educational setting was reasonably calculated to confer educational benefit or not. Whether District can be said to have an agreement with Parent to forego additional assessment or not, District's failure to conduct a comprehensive reevaluation to resolve these conflicts in itself deprived Parent and the IEP team as a whole of the reliable information needed to fashion an appropriate IEP and thereby deprived Student of FAPE.

Extracurricular Activities – Issue 7

School districts are obligated to provide extracurricular activities "in the manner necessary to afford children with disabilities an equal opportunity for participation in those . . . activities" 34 C.F.R. §300.107(a). There was no evidence offered of record that Student required supplementary aids or services in order to participate in extracurricular activities, much less evidence that District failed to provide the same.

Relief

Courts and, correspondingly, due process hearing officers are empowered to "grant such relief as [it] determines is appropriate." 20 U.S.C. §1415(i)(2)(C)(iii). "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." (citations omitted) *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116 (10th Cir. 1999) 199.C10.0043586 VersusLaw.com at ¶32.

Having found that Student was deprived of FAPE by virtue of the District's failure to conduct an appropriate and timely reevaluation, Student is therefore entitled to relief. The District must conduct the following evaluations to be completed within 40 days of the date of this decision:

1. A psychological evaluation to assess Student's emotional and behavioral functioning. The evaluation shall not be performed by either of the psychologists who appeared at the due process hearing and the District will arrange, at District expense, for the evaluator to meet with Parent to explain

the results of the evaluation in advance of the IEP meeting and to attend the IEP meeting to explain the results of the evaluation to the IEP Team.

2. An independent neuropsychological evaluation to comprehensively assess Student's cognitive functioning including but not limited to attention, executive functions, academic function, memory and language. Again, District will arrange, at District expense, for the evaluator to meet with Parent to explain the results of the evaluation in advance of the IEP meeting and to attend the IEP meeting to explain the results of the evaluation to the IEP Team.

3. An independent assessment of Student's reading skills by Juli Hancock or other diagnostician with comparable experience in the diagnosis of all reading disorders, including dyslexia. Again, District will arrange, at District expense, for the evaluator to meet with Parent to explain the results of the evaluation in advance of the IEP meeting and to attend the IEP meeting to explain the results of the evaluation to the IEP Team.

The District must convene the IEP team as soon as possible after completing the evaluations. Parent's request that the Hearing Officer retain jurisdiction over this matter is denied. Parent retains all procedural rights and IDEA protections to be exercised in the event the IEP team does not address Student's educational program needs, including the need for compensatory education, if any, to Parent's satisfaction.

Findings of Fact

The parties submitted requested findings of fact and conclusions of law before the hearing and supplemented those requests after the hearing. To the extent that such requested findings and conclusions are inconsistent with or contradict the findings and conclusions below, they are denied. If requested findings and conclusions are not addressed in the findings and conclusions that follow, they were found to be not applicable to the issues determined in these proceedings or contradicted or were not supported by the evidence presented at the hearing. All conclusions of law implicit in the following findings of fact are to be considered the conclusions of law of this Hearing Officer.

1. Student resides with his Parent within District's jurisdictional boundaries and there is no dispute that District is Student's local educational agency.

2. Student, now 17 years old, is a child with the disabilities of ED and SLD and he requires special instruction and related services.

3. It is more probable than not that the PACES program in which Student is currently enrolled is the least restrictive environment for the delivery of educational benefit due to Student's aggressive and unregulated behaviors toward peers and staff.

4. The preponderance of the evidence suggested that the severity of Student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

5. IDEA required that Student be reevaluated no later than January 2014.

6. A preponderance of the evidence suggested that District's decision to confine Student's reevaluation to a REED was not reasonable in light of the conflicting assessments of Student's skills.

7. Parent requested testing/assessment "in order to get a full picture of how to help her son at school." Ex. DD, p. 4.

8. District's failure to appropriately reevaluate Student substantively hampered Parent's right to participate in the process and more probably than not caused Student to be deprived of educational benefit.

9. The preponderance of the evidence suggested that Student received transition planning and services; however, whether the planning and services were appropriate to Student's needs could not be evaluated due to the lack of current, reliable evaluation data.

10. Student was afforded an equal opportunity to participate in extracurricular activities.

11. It is more probable, by a preponderance of the evidence, that District staff did not actively encourage either Parent or Student to revoke Student's special education rights.

12. The remainder of Parent's claims concerning the adequacy of Student's IEPs could not be evaluated due to the lack of current, reliable evaluation data.

Conclusions of Law

1. The DPHO has jurisdiction of the parties and subject matter herein. 20 U.S.C. § 1415(f)(1)(A).
2. All claims, if any, arising prior to September 25, 2012, are time barred pursuant to 34 C.F.R. §300.507(a)(2).
3. The burden of proof, by a preponderance of the evidence, rests with Parent, the party challenging the IEP. *Schaffer v. Weast*, 126 S.Ct. 528 (2005) 2005.SCT.0000166 VersusLaw.com.
4. This proceeding has complied with all procedural safeguards required by IDEA, its implementing regulations, and the New Mexico Special Education Rules.
5. This decision is timely if delivered to NMPED and the parties on February 27, 2015.
6. Student is eligible for special education and related services as ED and SLD. 34 CFR § 300.8 (a) and (c)(4) and (10); Jt. Stip. 5.
7. Parent failed to prove by a preponderance of the evidence that Student was not being educated with children who are nondisabled to the maximum extent appropriate.
8. Parent proved by a preponderance of the evidence that District's refusal to conduct additional assessments of Student's cognitive, academic and social/emotional/behavioral skills on the occasion of his triennial reevaluation deprived Student of FAPE.

ORDER

IT IS HEREBY ORDERED that District will provide Student with relief for its deprivation of FAPE in the form of comprehensive, expedited evaluations consistent with the provisions of this Final Decision.

Any party aggrieved by this decision has the right to bring a civil action in a state or federal district court pursuant to 20 U.S.C. §1415(i) and 34 CFR §300.516. Any civil action must be filed within 30 days of the receipt of the hearing officer's decision by the appealing party. 6.31.2.13.I(25) NMAC.

Barbara Albin
Impartial Due Process Hearing Officer

CERTIFICATION

I, Barbara Albin, certify that a copy of the foregoing decision was transmitted via electronic mail to the following persons this 2nd day of March, 2015:

Gail Stewart, Esq.; 3800 Osuna Road NE, Suite 1; Albuquerque, NM 87109.

Samantha M. Adams, Esq. of the Modrall Law Firm; 500 Fourth Street NW, Suite 1000; Albuquerque, NM 87103-2168

Hanna Skandera, Secretary of Education, New Mexico Public Education Department, 300 Don Gaspar, Santa Fe, NM 87501-2786.

Barbara Albin