

NEW MEXICO PUBLIC EDUCATION DEPARTMENT

PROCEEDING BEFORE THE DUE PROCESS HEARING OFFICER

In the Matter of

[REDACTED], Parent
on behalf of [REDACTED] Student

Petitioner

v.

[REDACTED],
a state chartered charter school

Respondent

DPH #2021 12

DECISION

Muriel McClelland
Due Process Hearing Officer

May 17, 2021

Attorneys for Parent

Jerri Katzerman, Esq.

Lily Hofstra, Esq.

Pegasus Legal Services for Children
505 Marquette Ave NW, Suite 1350
Albuquerque, NM 87102

Attorney for [REDACTED] School Charter School

Martin Esquivel, Esq.

Esquivel and Howington, LLC
111 Lomas Blvd., NW, Suite 203
Albuquerque, NM 87102

STATEMENT OF PROCEDURE

Petitioner filed a Due Process Complaint and Request for Hearing on February 2, 2021. [DPHO Exhibit 1] The Due Process Hearing Officer was assigned by letter dated February 2, 2021 [DPHO Exhibit 2] On February 5th the parties requested mediation. [DPHO Exhibit 3] A Pre Hearing Conference was held on February 11, 2021 at which time the Due Process Hearing was scheduled for April 12 16, 2021 and not sooner because of attorney scheduling conflicts, and over objection of Petitioner's counsel. [DPHO Exhibit 4] The mediation held on February 17, 2021 resulted in an Impasse. [DPHO Exhibit 5] A Second Pre Hearing Order was issued by the Hearing Officer sua sponte, changing the hearing dates to April 15 22, 2021 due to Hearing Officer conflict. [DPHO Exhibit 6] Statements of Issues were timely filed on or about February 25, 2021. [DPHO Exhibits 7,8] The parties exchanged exhibits and witness lists as directed on April 5, 2021. [DPHO Exhibits 9,10] The Due Process Hearing commenced on April 15 and concluded on April 21, 2021. Closing Arguments, Requested Findings and Conclusions were submitted on April 5, 2021 [DPHO Exhibits 11, 12, 13, 14] This Decision was entered on May 17, 2021. [DPHO Exhibit 15]

ISSUES PRESENTED

Petitioner's Statement of Issues:

- 1) Whether Respondent **School** failed to appropriately execute its affirmative, ongoing obligation to identify, locate, and evaluate all children with disabilities in need of special education and related services...as that duty related to Student from August 2019 until September 2020?
- 2) Whether **School** failed to conduct a timely and comprehensive special education evaluation of Student from November 2019 to the present?
- 3) Whether **School** improperly used "Response to Intervention" (RTI) strategies to delay or deny a timely evaluation for Student?
- 4) Whether **School** failed to offer or provide Student with an Individualized Education Plan (IEP) on November 18, 2020 or at any other time that is reasonably calculated to enable him to make meaningful educational progress in light of his unique circumstances, that meets the standards of the state educational agency (NMPED), and is provided in conformity with an IEP that meets the requirements of IDEA?
- 5) Whether Respondent **School** failed to conduct an adequate functional behavior assessment (FBA) and an appropriate behavior intervention plan (BIP) for Student during the statutory period?
- 6) Whether **School** failed to provide Parent with sufficient legal notices including prior written notice (PWN) and meeting notices at any time between November, 2019 to the present, and

failed to provide Parent with notice of procedural safeguards when requesting an initial evaluation?

7) Whether **School** failed to ensure the availability of a continuum of educational settings and predetermined Student's placement at the November 18, 2020 IEP meeting based upon what was available within the school system rather than upon Student's individual needs?

8) The type and extent of compensatory education and equitable remedies required to make Student whole and to redress the violations alleged in the Complaint.

Respondent's Statement of Issues:

1) Was the Student a child with a disability as defined in the Individuals with Disabilities Act (IDEA) and 34 CFR §300.8(c)and, if so, which disability?

2) Did Respondent **School** have an obligation under 34 CFR §300.111(a)(1)(I) to identify, locate, and evaluate Student as a child with a disability residing within the jurisdiction and in need of special education and related services? If so, was that obligation satisfied?

3) Did **School** have a duty to conduct an appropriate and timely evaluation of Student? If so, did **School** fulfill that duty?

4) Are compensatory education or equitable remedies required to make the Student whole? If so, what type and to what extent?

FINDINGS OF FACT

1. All proposed findings, conclusions, and supporting arguments of the parties have been considered. To the extent these contentions are consistent with the findings and

conclusions herein, they have been accepted. To the extent that they are inconsistent, deemed irrelevant, or not necessary to a proper determination of the issues presented, they have been rejected.¹

2. All applicable time limits have been met, waived by the parties, or extended for good cause shown.

3. The LEA is a state chartered charter school and, as such, is an independent LEA.

TR I, 32; TR IV, 892 893

4. As of August 19, 2019, Student has been attending middle school. He is thirteen years old and in the 7th grade. He is currently eligible for special education services as Gifted and Other Health Impaired (OHI). He previously attended S.Y. Jackson, a public elementary school, where he was on a transition IEP for Gifted Only. This IEP dated May 12, 2019 was carried over to the charter school. He is ranked at Very Superior Intelligence;. Exh 3; TR I, 240 242

5. Parent provided Student's 5th grade transition IEP and FBA (Functional Behavior Assessment) in the enrollment package she submitted to the LEA on August 27, 2019. This IEP noted several behavior issues, describing Student as disrespectful, argumentative and noncompliant with directions but stated these behaviors did not impede his learning or that

¹Petitioner's Exhibits are numerical, Respondent's Exhibits are by letter, Page numbers in exhibits are the last 2 or 3 digits of the Bates number. DPHO Exhibits are identified as such. All exhibits except Respondent's A and H were admitted.

of others. The IEP states an FBA (Functional Behavior Assessment) may be warranted for Student. Exhs 3, F; TR III, 709

6. Upon enrollment, parents and students are required to sign a Student/Family Contract addressing expectations for behavior. Exh C; TR, IV, 861 862

7. Director S S is directly responsible for ensuring the LEA's compliance with state and federal law, including the provisions of IDEA. She is unfamiliar with IDEA requirements during school closure or IDEA time lines having delegated these duties to the Dr.E, Director of Student Services in charge of special education (hereinafter known as the special education director). TR IV, 893

Student's Behaviors in the 2019-2020 and 2020-2021 school years

8. Symptoms of ADHD and OCD were observed while Student was in elementary school, such as frequent hand washing, tapping his pencil, "always moving," chewing on shirt collars, interrupting, not following directions or listening, difficulties with peer interactions. TR I, 247 248

9. Early in his first semester and continuing throughout his attendance in the LEA, Student exhibited exceedingly disrespectful and noncompliant behavior in various classrooms, summarized as often using foul language, disrespecting teachers, laughing when a teacher fell, calling them names (e.g., dick) and throwing them the finger, refusing to work. He is defiant, rude, disruptive, impulsive, abusive and insulting to teachers, screams at and berates teachers and classmates alike. He is inattentive, uncooperative, argumentative, impulsive, sleeping and

eating in the classroom. He fails to do assignments, often engages other students. He leaves the classroom or virtual screen without permission. Student constantly disrupted the classroom, lashed out at other students and interfered with the education of other students. Exhs I, L, J, N, P; TR I, 34 36, 40, 43, 71 72, 93, 95, 100 101, 168, 254; TR III, 559, 565 569, 582 587, 593, 622, 650 653, 661 667, 670, 720 721, 724 726; TR IV, 886 887

10. Early on most of Student's behaviors occurred in his science class. Student and CP, the science teacher, were in a confrontational and argumentative relationship. On November 6, 2019 CP tripped falling on his back and spilling coffee on Student's board. Student's response was to laugh and adamantly insist the teacher pay for a new board. Exhs L, N; TR III, 674, 726 727

11. An independent teacher evaluator observed Student in this class and stated he was the worst behaved student she had ever observed in over 40 years of teaching. Exh H; TR IV, 865 866, 870 872

12. On February 19, 2020 Student's history teacher, SM, reported an incident involving eating in the classroom, when Student refused to surrender the food but instead took two bites out of it. She believed Student manipulates situations with attention seeking behaviors; even though impulsive he can control his behavior. Exhs M, P; TR III, 588, 593 595, 720 721

13. When schools went virtual in March, 2020, Student refused to have his face seen on screen. The Physical Ed teacher SS reported he played guitar, swash buckled with a sword, and frequently left the screen for 15 minutes at a time. TR III, 622

14. In October 2020 TM, the math teacher, reported inappropriate behaviors (foul language, refusal to turn on camera, insults, berating and rudeness) and threatened to quit if it did not cease. A parent had reported Student hosted an independent chat room involving other students with running commentary laced with F bombs about the teaching shortcomings of TM. Exh G; TR III, 559 564; IV, 881, 883, 888

Discipline

15. The vice principal, BC, oversees critical discipline issues and suspensions. Discipline at the school is a demerit system which is instructor driven, i.e., teachers manage their own classrooms with respect to discipline. TR I, 21

16. At the classroom level an instructor can either ignore behaviors (extinction), utilize time out procedures, practice redirection. If ineffective the incident is reported to the vice principal who will call a PTC (Parent/Teacher Conference) with all teachers present. If behavior is not curbed, a behavior contract is initiated by the school which both parents and student sign. The next step is the creation of a SAT (Student Assistance Team) and commencing the process of teacher data collection for an FBA (Functional Behavior Assessment). Exhs K, N; TR III, 702 707, 712, 716

17. The vice principal discussed Student's unacceptable behavior with Parent for various incidents on several occasions. He called a Parent/Teacher Conference (PTC) on November 8, 2019 to discuss the short term suspension Student received on November 6, 2019. BC was unfamiliar with the IEP or the FBA from Student's elementary school, and with

his medical diagnoses. TR I, 38 39, 46 47

18. At that meeting Parent informed the school for the first time that Student had medical diagnoses of OCD and ADHD. A few days later she forwarded two letters from his treating physicians documenting these conditions for which he has been in treatment since 2017. Exhs 11, 12, 16, pp. 94 95; TR IV, 877

19. The school produced a Student/ Family Contract which both parties signed November 8 , 2019. Student committed to following school rules and behavior expectations subject to permanent removal from the school. Exhs C, 10; TR I, 267

20. Another PTC with all teachers present was held on Feb. 21, 2020 to discuss the eating in classroom incident and second short term suspension at which time the LEA issued a “Notification of Behavioral Intervention” in which it stated that Student “refused to perform academic obligations, failed to obey authority, and engaged in disruptive behaviors during school hours.” Parent first received a copy of this document through discovery in this matter. Exhs 9, 10, pp. 81 82; TR III, 605

21. The vice principal equated the school’s behavior contracts with a Behavior Intervention Plan (BIP). He acknowledged that other school districts have programs for “situations where students with this type of behavior can be actually accommodated and be helped. But we don’t have...” TR I, 118, 126

22. The charter school does not provide alternative placements for discipline problems. TR I, 126

23. The LEA has 57 students on disability IEPs out of a student population in middle and high school of 370-400 students approximately, with about 175 on Gifted Only IEPs. TR I, 134

24. The vice principal testified "...I don't understand this young man and why he acts out and what- why he does things the way he does." "I'm at wits end." "We've done everything we can." TR I, 113, 125

IEPS, FBAS AND BIPS

25. Student's most recent IEP is the one that was developed while he was still in elementary school dated May 13, 2019. Exh 3; TR I, 250-251

26. This IEP noted that Student exhibits "behaviors that impede his ... learning or that of others," and that a "Functional Behavior Assessment is warranted." His behaviors at this venue "were challenging... [he] often has difficulty accepting teacher direction and can be defiant. His actions can be disruptive to other students." Exh 3, p.5

27. The public school IEP Team suggested that the function of Student's behavior was to seek attention from peers and to escape a learning activity: the FBA from this school noted "A BIP IS WARRANTED AND RECOMMENDS THE MIDDLE SCHOOL CONSIDERS A BIP AFTER [Student] BEGINS SCHOOL IN AUGUST 2019." Exh 6, p.51 (emphasis not mine)

28. Parent provided the LEA with the May 13, 2019 IEP and FBA in the enrollment package submitted to the LEA in on August 19, 2019. Exhs B, 18; TR I, 260-261

29. Dr.E the special education director, is familiar with IDEA behavior regulations having

supervised behavior intervention teams at Albuquerque Public Schools for a number of years.

He is licensed as a special education teacher. Exhs 3, B, p.4; TR III, 688

30. Dr.E informed Parent by email on November 6, 2019 that he had completed an FBA. The date on the FBA is November 6, 2019 ,however, this document was not shared with Parent until the due process hearing. In this FBA Student’s problem was identified as “verbal interactions with adults....” It noted that prior interventions (verbal praise and acknowledgment of compliance) were largely ineffective but offered no alternatives. No other staff were consulted about developing this FBA. Exh 7; TR I, 174 176, 271

31. Dr.E first learned of Student’s medical diagnoses at the PTC held on November 8, 2019 although there was mention of OCD and ADHD in the transition IEP. The relevant PWN (Prior Written Notice) stated “[Student] has diagnoses of both OCD and ADHD.” Exh 3, p.5

32. Upon further review of his transition IEP, Dr.E became aware that an FBA had been started at his former school but not completed. He acknowledged that Parent in November, 2019 requested an IEP meeting to add the ADHD eligibility. He informed Parent the Student Assistance Team (SAT) process must be pursued initially to study the issues and try different interventions through the Three Tier process and, ultimately, special education testing. Exhs A, 3; TR 1, 135, 139, 143; TR III, 708 712

33. According to the special education director, “typically schools do not use applied behavior analysis [sic] (ABA) because they are time consuming, involving too much personnel;” he utilizes some components and techniques of ABA. TR III, 714

34. Following the PTC addressing the incident in the science class Parent requested an IEP meeting on November 9, 2019. Exh 16, p.94; TR I, 62 63

35. Although an SAT (Student Assistance Team) was created, Student was not referred to a SAT in the fall of 2019 or at any time thereafter. His next annual IEP meeting would be scheduled in May, 2020. Student was not the subject of a FBA leading to a BIP (Behavior Intervention Plan) as recommended in his May, 2019 IEP. In December, 2019 Dr.E continued to work with teachers to address behavior issues and with Parent to determine which direction to go; he suggested a 504 Plan. TR III, 713, 715 716, 718 720, 722

36. Dr.E testified he started a draft FBA/BIP on November 20, 2019; it mirrored the FBA/BIP from Student's previous school. Adjustments were made in later drafts on December 8 and December 17, 2020, without any significant changes. The first time a draft BIP was sent to Parent was November 20, 2020. Exhs 6, 7, 8, pp.56, 60; TR I, 148, 170 174, 223 225

37. The special ed director informed Parent in November, 2019 that the school could create modifications and accommodations without an IEP meeting as this was done for all students. Dr.E continued extensive email communications with Parent throughout the fall semester regarding various supports to assist Student, including behavioral contracts and interventions. TR I, 172; TR III, 719

38. All classes at the school were held virtually as of March 1, 2020 pursuant to the governor's order. Virtual learning and school operations presented a challenge. TR III, 730 731

39. Parent followed up her first request with second request for an IEP meeting on

December 20, 2019. In February, 2020 she asked for an IEP meeting for the third time. In February she agreed to a 504 Plan as a stopgap measure to address the impact of Student's medical/psychiatric diagnoses on his behavior. Dr. E apologized to Parent for not responding to her multiple replies to his email of December 5, 2019. Exh 16, pp.97, 100; TR I, 180

40. Because an in person IEP meeting was not feasible, Dr.E attempted to complete the required annual IEP for Gifted Only online, sending Parent his draft (including an incomplete PWN) on April 28, 2020 and requesting her input. Exh 2; TR I, 151, 183 184

41. His draft "IEP by mail" identified accommodations and/or modifications as follows: "follow behavior contract," "preferential seating" {placement on the virtual screen}, "model, monitor and manage appropriate behavior in the classroom." Parent was instructed to fill in blanks and return the document to be finalized and date stamped. This IEP was never finalized. Exhs 2, p.10, 16,pp.97 98; TR I, 190

42. In the draft IEPs teachers noted incomplete assignments, lack of focus, failure to follow class procedures, and impulsivity. The proposed IEP did not contain any behavior services to assist Student. Exhs 1, 2; TR II, 451

43. Parent did not sign the May, 2020 or the November 20, 2020 proposed IEPs because she did not think the accommodations and modifications made during the COVID virtual learning period met Student's needs. No IEP meetings were held virtually or otherwise prior to the IEP meeting on November 20, 2020 which was held with Parent and Student appearing telephonically. Exh 2; TR II, 453 455, TR III, 732, 739 740, 758, 766; TR IV, 786

44. While Dr.E proposed a Section 504 Plan and Parent requested that one be developed, there was no followup to this proposal. The SAT team meeting never took place.

Exh 16, pp.16, 97; TR I, 70, 178, 180

45. Only on May 5, 2020 did Dr.E acknowledge that Parent wished to pursue educational diagnostic testing in her efforts to add an IDEA eligibility. He again noted that the SAT process had to commence first, stating he had turned it over to BC. The vice principal denied having a role in this process stating "...that is the role of [Dr.E]." Exh 16, pp.100 101 TR I, 78

Educational Evaluation

46. The school contracted with an evaluator charged with conducting an educational evaluation in the areas of attention, behavior and educational achievement on August 19, 2020. Parental consent was obtained September 22, 2020. Exhs 4, 16,p.100; TR 1, 193 196; TR III, 742 743, 748

47. Testing and evaluation was performed by EASi, an independent testing resource, on October 7, 2020 with due consideration given to COVID restrictions. Exh 4

48. The evaluator concluded that Student has a neurological processing deficit that impacts the following academic area: basic reading, reading fluency, reading comprehension, math calculation, math problem solving, and written expression. Student has difficulty with focus, engagement and completing academic tasks. Additionally Student's disability adversely affects his educational performance in the social/emotional domain. She recommended

adding the ADHD eligibility. Exh 4, pp.37 38

49. A combined EDT/MDT (Eligibility Determination Team; Multidisciplinary Team) and IEP meeting was held on November 18, 2020 at which time the team added the additional eligibility of OHI (Other Health Impaired), acknowledging Student's ADHD impairment. The IEP was not completed on that date, however. There was no LEA representative present. While teacher concerns were presented and discussed, (e.g., assignment completion and homework, lack of focus, impulsivity, struggles with interpersonal relationships and self regulation), goals were not documented. Still missing were specific accommodations/modifications, monitoring and the BIP. Exhs 1, p. 5, 5; TR I, 80, 200 201, 215 216; TR II, 475 483, 760 761

50. The incomplete IEP of November 20, 2020 did not specify a present level of achievement baseline and contained no information regarding functional performance, instructional accommodations and modifications. Listed goals were common core standards and not individualized to Student's needs. "Weekly special education services" lists administrative duties such as "data collection, monitoring, providing intermittent supports in behavior goals, consults with teachers," and not specifically designed instruction. Exh 1; TR II, 482 483

51. Dr.E prepared a one page BIP dated November 20, 2020 which is largely incomplete. The BIP relies on the 5th grade FBA of May 22, 2019 and does not account for virtual learning. Exhs 6, 8, p.56, 16, pp.114 115; TR I, 226 227

52. A revised draft dated December 17, 2020 is limited to one specific behavior not

showing his face on camera during virtual learning. It continues to copy the elementary school FBA and the November 6, 2019 FBA. Exh 8, pp.60 61

53. Dr.E attempted to draft several different versions of a BIP dated November 20, December 17 and 20, 2020. None of the draft BIPs represented a final document; none met with Parent's approval. Exh 8; TR III, 764 766, 775

54. Parent made several requests in November and December, 2020 to complete the IEP. A meeting was scheduled for December 9, 2020 which never took place. The administration at the school suggested completion of the IEP by email, which Parent rejected. Exh 16, p.119; TR II, 488, 490 492; TR III, 774 775

55. Parent's request for a FIEP (Facilitated IEP) was rejected by the school administration allegedly because of the cost of the facilitator. Exh 16, p.125; TR I, 126, 220 221; TR II, 491 492

56. Although Parent suggested to school staff that she could not have her sons enrolled in two different schools, she testified that was not her first priority. TR II, 525; TR III, 682

57. Dr.E offered to reconvene the IEP meeting on February 10, 2021. Parent rejected this proposal instead filing a request for due process. TR II, 492

58. S .S, the LEA's director, testified that Student is "out of control" and teachers have threatened to quit; "we've gone above and beyond.....And frankly, we're battered." TR IV, 887 889

59. At present the LEA is on a hybrid model. Parent chose to continue virtual learning in

the spring semester of the 7th grade as opposed to in person learning. TR II, 533; TR IV, 799
800

60. Student's grades in his first semester, 6th grade, were As and Bs. In the first semester of 7th grade his grades had dropped to Cs and Ds because he failed to complete assignments and perform on quizzes. At the time of the due process hearing his grades were an F in English, Math and Science, D in History. PE was zero. Exhs B, 9, pp,76 78, 13, 14, 15; TR II, 494; TR IV, 791 797

BCBA Expert Testimony

61. MS presented as a very knowledgeable and credible witness who qualified as an expert in applied behavior analysis in the educational setting. She is a nationally certified BCBA (Board Certified Behavior Analyst) and is experienced in developing and performing FBAs and BIPs, as well as in training LEA staff both in conducting and interpreting the results of FBAs. Exh 19; TR II, 292 301, 311 312

62. The bases for her opinion and recommendations are Student's educational records (with the exception of Respondent Exh G which witness reviewed during the hearing), including draft FBAs and BIPs, and an interview with Parent only, in light of COVID restrictions. Exhs 7, 8, 19; TR II, 331 332, 342 343, 435 436

63. In her opinion the proposed FBA dated November 6, 2019 and subsequent revisions are not adequate to meet the needs of Student or comply with state standards. They lack team participation, omit sources, a summary of those sources, and the results of the source

information, they omit antecedents, they omit identifiable function for behavior, there is an inadequate definition of the behavior problem, they provide no behavior supports, and no parental interviews are noted. Exh 7, p. 54; TR II, 348 357, 363

64. It is her opinion that Student requires a BIP that provides more than the Tier I interventions presently in place. There is a narrative of disciplines to be applied in this BIP but there is no problem behavior identified and no target goal listed, no specified positive supports are outlined, replacement behaviors are not functionally related to the behavior problem, and the proposed BIP omits a concrete plan for accountability, review and consequence. It is not clear what teachers have attempted by way of accommodations/modifications. Its reliance upon a May, 2019 IEP is misplaced. Exh 8; TR II, 364 369

65. LEA records show Student is able to respond to positive rewards (as evidenced by his selection as master of ceremonies for the talent show), however, according to MS, teachers' implementation of positive behavior and Tier I supports may not be effective for this student. Exh 10; TR II, 369, 371 375, 393, 408; TR III, 586 587, 593

66. From her review of Student's educational records, it is this expert's opinion that Student's well documented extreme behaviors in school impact both his education and that of other students in the classroom. TR II, 347 348

67. This expert recommended that Student receive an FBA performed by a qualified, independent BCBA, with training in the application of New Mexico standards, who can develop a FBA/BIP that will meet Student's unique needs. TR II, 360, 362

DISCUSSION

CHARTER SCHOOLS AND IDEA

Charter schools are not treated any differently than public schools for purposes of compliance with IDEA. Students with disabilities enrolled in charter schools are entitled to receive all rights inherent in IDEA. 34 CFR §300.209(a); Letter to Anonymous, 53 IDELR 127 (OSEP 2009); Dear Colleague Letter on Students with Disabilities in Charter Schs., 68 IDELR 108 (OSERS/OSEP 2016); see also U.S. Department of Education, Office of Special Education and Rehabilitative Services, Frequently Asked Questions about the Rights of Students with Disabilities in Public Charter Schools under the Individuals with Disabilities Education Act (December 28, 2016)

CHILD FIND

Child Find provisions apply to charter schools. 34 CFR §300.111(a)(1); 20 U.S.C. §1412(a)(3)(A); Walter D. Palmer Leadership Learning Partners Charter School, 115 LRP 50023 (SEA PA 9/18/15); Memorandum to State Directors of Special Education, 65 IDELR 181 (OSEP 15 08)

Student's suspected IDEA eligibility was readily observable in all his classes due to his extreme acting out behaviors. He was, however, doing well academically during his first semester (As and Bs) leading the special education director to conclude he was a behavior problem only and did not have a disability which affected his educational experience. The LEA took the position that so long as Student's behavior did not affect his grades, he was not

eligible for special education services. There are positions to the contrary. Memorandum to State Directors of Public Education, 65 IDELR 181 (OSEP 2015)[“High cognition is not a bar to eligibility”]; Williamson County Bd. of Education v. C.K., 52 IDELR 40 (M.D. Tenn. 2009)[despite a 143 IQ and passing grades, the student’s ADHD adversely affects his educational performance qualifying the student for special education.]

If there is a suspicion of disability the LEA is obligated to conduct a full and individual evaluation in a reasonable period of time to determine if a child has a disability. Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist., 181 F. Supp 2d 1307 (2002); Regional Sch. Dist. No. 89 v. Mr. and Mrs. M, 53 IDELR 8 (D.C. Conn. 2009) The inquiry is not whether a student actually qualifies for special education services but whether a student should be referred for an evaluation. Dept. of Education v. Cari Rae S., 158 F. Supp. 2d 1190, 1195 (D. Haw. 2001) A disability is suspected when an LEA is put on notice that the symptoms of disability are displayed by the child. Timothy O. v. Paso Robles Unified Sch. Dist., 822 F. 3d 1105 (9th Cir. 2016). The school’s “determinations alone should not be determinative. The informed suspicions of parents, who may have consulted outside experts, should trigger the statutory protections.” Pasatiempo by Pasatiempo v. Arizawa, 103 F. 3d 796, 802 (9th Cir. 1996)

IEP REQUEST FOR AND LEA RESPONSES TO

On November 9, 2019 Parent made her first request for an IEP meeting to consider an IDEA eligibility of ADHD and OCD. Parent put the school on notice at that time (as did his previous IEP developed while he was in fifth grade) that Student had diagnoses of

ADHD, OCD and suffered anxiety. Pasatiempo, op cit.

The director of special education erroneously asserted that NMPED Tiers 1 3 and a SAT (Student Assistance Team) **must** be employed before an eligibility can be added to a student's IEP. This is not the case. Independent Sch. Dist No 283 v. E.M.D.T., 74 IDELR 19 (D. Minn.2019); Memorandum to State Directors of Special Education, 56 IDELR 50 (OSEP 2011); The Student Assistance Team (SAT) and the Three Tier Model of Student Intervention, A Guidance and Resource Manual for New Mexico's Response to Intervention (Rti) Framework, New Mexico Public Education Department, Revised Fall, 2009. Tier I modifications and accommodations were attempted and failed.

By February, 2020, when Student was in his second sixth grade semester, his grades were dropping and unacceptable behaviors were increasing. A 504 Plan was never effected, a SAT meeting never occurred, neither was the requested IEP meeting scheduled. Although Parent communicated with the special education director by email on a frequent basis, the LEA was largely unresponsive despite repeated requests for an IEP meeting.

TWICE EXCEPTIONAL EVALUATION

Giftedness, while considered exceptional under state law, is not a disabling condition that meets the two part test for eligibility under IDEA. Letter to Anonymous, 55 IDELR 172 (OSEP 2010); Gifted Education in New Mexico, Technical Assistance Manual 2019, Chapter 4: Social and Emotional Issues of Students who are Gifted, pp. 40, 42 43 IDEA eligibility is conditioned upon a defined disability and recognition that the student's disability

adversely affects the student's educational performance. J.D. v. Pawlet Sch. Dist., 33 IDELR 34 (2nd Cir. 2000); Mr. and Mrs. I. v. Maine Sch. Admin. Dist., No. 55, 47 IDELR 121 (1st Cir. 2007); Marshall Joint Sch. Dist. No. 2 v. C.D. 54 IDELR 307 (7th Cir. 2010); C.M. v. Department of Educ., State of Hawaii, 58 IDELR 151 (9th Cir. 2012) A student's academic standing is irrelevant if a student meets IDEA eligibility requirements. Williamson, op cit.; Memorandum to State Directors of Special Education, 65 IDELR 181 (OSEP 2015)

The LEA agreed to do an evaluation towards the end of the school year. Parent consented on September 22, 2020 when she was first provided consent forms. Parent filed the due process request when it became apparent that there would only be a continuation of IEP/FBA drafts all failing to address adequately address Student's behaviors.

PWN (Prior Written Notice) and Procedural Safeguards are required when a school "proposes to initiate or change the identification, evaluation, or educational placement of a child," or refuses to do so. Although there was not an outright refusal, an evaluation was not contemplated by the LEA at the time Parent requested an IEP meeting or in the succeeding months. 34 CFR §§300.503 and 300.504

Student's evaluation affirming his ADHD disability, which affected his and others educational experience, the MDT and the IEP team met on November 18, 2020. At that time the IEP team added the eligibility of Other Health Impaired (OHI) eligibility, triggering IDEA provisions consistent with the evaluator's recommendations.

FUNCTIONAL BEHAVIOR ASSESSMENT (FBA) AND BEHAVIOR INTERVENTION PLAN (BIP)

Student was admitted to the LEA based upon the sibling exception to the usual lottery selection system. He exhibited acting out behaviors on his first day of school continuing to the present. Even though his transition IEP emphasized the need for a FBA, the school's response to his out of control behavior, peppered with foul language directed towards teachers, was to short term suspend, hold a Parent Teacher Conference (PTC) with all teachers and student present, to be followed by a behavior contract signed by parent and student if necessary. The vice principal analogized the school's behavior contracts to a BIP (Behavior Intervention Plan). They are not interchangeable terms. 34 CFR §300.324(a)(2)(I); In re: Student with a Disability, 119 LRP 21260 (SEA WA 7/28/18) [If a district develops only an individual discipline plan for a student who requires a BIP to receive FAPE, the district has violated FAPE.]

Student's first short term suspension occurred November 6, 2019. A second suspension followed in February, 2020. In the 2019 2020 school year Student's behaviors continued to be disciplined much the same way as any other student's behaviors who were on Gifted Only IEPs.

The special education director testified he first drafted an FBA on November 6, 2019, however, this document merely reflected Student's elementary school's FBA and was never provided to Parent. The LEA's proposed IEPs, FBAs and BIPs suffered from notable deficiencies in addressing behaviors. An adequate FBA addressing Student's unique needs and disability was never developed in the 2019 2020 school year. BCBA Report, Exh 19

FBA and BIPs are not required components of the IEP. 34 CFR § 300.320; 6.31.2.11 (F)(2) NMSA Neither are they required under IDEA unless it is to fulfill the disciplinary requirements of 34 CFR §§ 300.300(a) and 300.530. Under IDEA the IEP team is obligated to consider behavior, however; §300.324(a)(2)(I) provides:

[I]n the case of a child whose behavior impedes the child's learning or that of others, [the IEP team must] consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

Letter to Christiansen, 48 IDELR 161 (OSEP 2007); 34 CFR § 300.300(a)(1); See also federal guidance at 52 IDELR 231, Question E 4, June, 2009

FBA and BIPs are recognized in New Mexico under state law. 6.31.2.11(F)(1) – Behavioral management and discipline provides:

Behavioral planning in the IEP.
Pursuant to 34 CFR Sec. 324(a)(2)(I), the IEP team for a child with a disability whose behavior impedes his or her learning or that of others shall consider, if appropriate, strategies to address that behavior, including the development of behavioral goals and objectives and the use of positive behavioral interventions, strategies and supports to be used in support of those goals and objectives. Public agencies are strongly encouraged to conduct functional behavior assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal rules.

The definition of an FBA in the New Mexico Public Education Department behavior manual is:

An FBA is an approach that incorporates a variety of techniques and strategies to diagnose the causes and to identify likely interventions intended to address problem behaviors.
Addressing Student Behavior: A Guide for All Educators: Conducting a Functional Behavior Assessment, Developing a Behavioral Intervention Plan, Revised 2010, p.1

A FBA is usually contingent upon classroom observation which after March 1, 2020 was no longer possible due to COVID restrictions. There was, however, sufficient experience with and documentation of Student's classroom behavior prior to COVID virtual learning and instances of insubordinate behaviors while on screen. The IEP resulting from the IEP meeting on November 18, 2020 could not be completed pending the creation of a FBA and BIP as recommended by the independent evaluator.

The LEA gives no credence to the expertise of the BCBA, however, analyses by behavior specialists are precisely what is needed in this case in order to have the LEA achieve compliance with IDEA regulations. Development of the FBA in this case requires expertise that is beyond that of the special education director, as does the development of an appropriate BIP. Ignoring the recommendations of both the educational diagnostician evaluator and the BCBA testifying in this case and simply declaring that the LEA provided FAPE to Student does not make it so.

DENIAL OF FAPE

The two fold inquiry for a free appropriate public education is: 1) whether the LEA has complied with procedures governing special education in IDEA, 2) whether the individualized

educational program developed through these procedures is reasonably calculated to enable the child to experience educational benefit. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 To meet its substantive obligation pursuant to IDEA the school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. The educational program is informed not only by the expertise of school staff, but also by parents' input. It must be appropriately ambitious. *Endrew F. v. Douglas Cnty. Sch. Dist. RE 1*, 137 S.C. 988, 999 1000 (2017) These standards and IDEA provisions were not followed in this case resulting in a denial of FAPE.

REMEDIES

Attorneys for Petitioner have requested compensatory education. They have not, however, met the qualitative burden required to prove lost services resulting from the denial of FAPE. *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005) While this Student may have lost educational benefit as a result of virtual learning this was not proven and compensation for any loss was not defined. The evidence required to tie an award of compensatory education to past violations is absent.

Petitioner has also requested IDEA training for LEA staff. This request is also denied. While there is a lack of knowledge of IDEA provisions in the administration, the special education director responsible for Implementing IDEA provisions and state interventions appears to be well versed in these principles with a few notable exceptions. The problem is that the LEA did not follow procedures, identification and other IEP requirements, not that they didn't know

better.

Petitioner's requests for a Facilitated IEP is well taken as is the request for a knowledgeable BCBA to devise Student's FBA and BIP, and are granted. The need for other remedies has not been sufficiently spelled out and they are denied.

CONCLUSIONS OF LAW

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

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

3. A parent or a public agency may initiate a hearing to address matters regarding the education of a particular child, i.e., "any matter relating to the identification evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." *20 U.S.C., §1415(b)(3),(6)(2000); 34 CFR §§300.503(a);300.507(a)(1)(2004); 6.31.2.13(l)(3) NMAC*

4. All due process procedural safeguards required by IDEA and implementing

regulations and the New Mexico Special Education Regulations have been complied with.

Administrative remedies have been exhausted.

5. The applicable time limit under the Statute of Limitations for IDEA actions is two years prior to the date of filing the request for due process, in this case, prior to February 2, 2021. Any findings or exhibits admitted with respect to information prior to that date is for historical purposes only.

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

7. Parent's complaint has met sufficiency requirements. 34 CFR §300.508(6)(d)

8. Failure to act on a request to evaluate is the equivalent of a refusal that requires prior written notice (PWN). Technically, Parent's initial request was for an IEP meeting not an evaluation; taking no action is not an acceptable excuse for the LEA's failure to timely evaluate based upon a suspected disability. *Compton Unified Sch. District v. Addison*, 598 F.3d 1181, 1184 (9th Cir. 2010); *Forest Grove Sch. Dist. V. T.A.*, Letter to Anonymous, 50 IDELR 258 (OSEP 2008); 557 U.S. 230, 245 (2009); 20 U.S.C. §1415(b)(3); 34 CFR § 300.503(a)

9. The LEA has abrogated Child Find and notice requirements of IDEA.
34 CFR § 300.111; 34 CFR § 300.503(a)

10. There were sufficient procedural defects in the LEA's response to Parent's request for an IEP meeting ,e.g., unreasonable delay in scheduling the IEP meeting and evaluation, inadequate proposed IEPs and FBAs, and failure to give proper notice, among other

failings, to constitute a substantive violation resulting in a denial of FAPE. O'Toole v. Olathe Dist. Unified Sch.. Dist. No 233, 144 F. 3d 692 (10th Cir. 1996); Garcia v. Bd. of Educ. Of Albuquerque Pub. Schs., 520 F. 3d 1116 (10th Cir. 2008); Sytsema by Sytsema v. Academy Sch. Dist No. 20., 538 F.3d, 1306 (10th Cir. 2008)

11. The LEAs' proposed FBAs do not meet NMPED state standards in that they did not involve team participation, they omitted a description of antecedent and sources, a summary of the results of the sources of information, and an identifiable function for the behavior problem, they did not provide positive supports. Parental interviews are not noted. Addressing Student Behaviors, op cit.

12. The proposed IEPs do not conform to the IEP provisions of IDEA. The IEP must contain present levels of academic performance and functional performance, including how a child's disability affects progress in the classroom, measurable academic goals and how progress will be measured, and a statement of special education and related services. Parental concerns are not documented 34 CFR §§300.320 300.324

13. Student's behaviors affect his learning and that of other students.

14. It has not been determined whether Student lost educational benefit as a result of the LEA's inaction.

15. Tier One supports have not been uniformly applied and have been ineffective in mitigating Student's classroom behaviors.

16. Administrative programs such as Tier 1 3 supports and SATs are not valid

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.

CERTIFICATE OF SERVICE

I hereby certify that I emailed and mailed by US mail a copy of the foregoing Decision on May 17, 2021 to the following persons:

Lily Hofstra, Esq.
Jerri Katzerman, Esq.
Pegasus Legal Services for Children
505 Marquette Ave., NW Suite 1350
Albuquerque, NM 87102

Martin Esquivel, Esq.
Esquivel and Howington, LLC
111 Lomas Blvd., NW, Suite 203
Albuquerque, NM 87102

Deborah Poulin, Esq.
Chief Counsel
Special Education Department
New Mexico Public Education Department
300 Don Gaspar
Santa Fe, New Mexico 87501

Dr. Ryan Stewart, Secretary of Education
New Mexico Public Education Department
300 Don Gaspar
Santa Fe, New Mexico 87501-2786

/s/ _____
Muriel McClelland

