

**BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1314-14**

**HEARING OFFICER'S
MEMORANDUM DECISION AND ORDER**

THIS MATTER arises on the Petitioners' Second Request for Due Process Hearing with the Local Education Agency (LEA)(Due Process Request), filed with the State of New Mexico Public Education Department on November 26, 2103. The Petitioners' Due Process Request is denied in substantial part.

PROCEDURAL BACKGROUND

The Respondent LEA responded to Petitioners' Due Process Request on December 6, 2013. *See* LEA's Response to Petitioners' Request for Due Process Hearing, December 6, 2013 (Response).

The parties timely filed their statement of issues for the due process hearing on January 10, 2014. *See* Joint Statement of Issues, January 10, 2014. The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibit List, January 15, 2014; Petitioners' Witness List, January 15, 2014; Respondent's Witness List, January 17, 2014; and Respondent's Exhibit List, January 17, 2014.

The due process hearing commenced on January 24, 2014, and, pursuant to intervening hearing extensions and staggered hearing periods over several different dates, concluded on February 14, 2014. The transcript of record consists of 2,250 pages. Both parties were well-represented by their respective trial counsel: Mia L. Kern and Samantha M. Adams for the Respondent; and Gail Stewart for the Petitioners. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on March 31, 2014. Tr. 2,248. The parties jointly

requested an extension for issuance of the hearing officer's decision, which was granted, for the filing of his decision to on or before April 30, 2014. Tr. 2,248.

The Respondent filed its proposed Findings of Fact and Conclusions of Law on March 31, 2013. *See* LEA's Findings of Fact and Conclusions of Law, March 31 11, 2014. Its Closing Argument was filed on March 31, 2014. *See* LEA's Closing Argument, March 31, 2014. The Petitioners filed proposed Findings of Fact and Conclusions of Law on March 31, 2014. *See* Petitioners' Requested Findings of Fact and Conclusions of Law, March 31, 2014. The Petitioners also filed their Closing Argument on March 31, 2014. *See* Petitioners' Closing Arguments, March 31, 2014.

This decision is due on or before April 30, 2014. Tr. 2,248.

ISSUES PRESENTED BY THE PARTIES

1. Whether the Local Education Authority (LEA) has failed to consistently identify the Student with Autism during the 2013-2014 school year.
2. Whether the LEA provided the Student with education in the least restrictive environment by placing him in a classroom with nonverbal students, with not typically developing peers, and with staff who were unprepared to meet his needs as a Student with Autism.
3. Whether the LEA's alleged failure to provide appropriate research based instruction, supplemental aids and services, and trained staff during the 2013-2014 school year deprives the Student of a free appropriate public education (FAPE).
4. Whether Applied Behavior Analysis (ABA) practices are necessary for the Student's education and whether the LEA failed to deliver ABA during the 2013-2014 school year, if necessary; whether the alleged failure to provide ABA was based on assessment of the Student's individualized needs or the LEA's administrative convenience and predetermination that it would

not provide the Student with meaningful and sufficient ABA during the school day because it lacks staff to provide ABA.

5. Whether the LEA failed to meet the Student's alleged needs as a result of disability.

6. Whether the LEA's alleged use of physical force and isolation to manage the Student deprived him of a FAPE.

7. Whether the Student was denied a FAPE because of the LEA's alleged failure and refusal to provide the Student's classroom/school staff with necessary supports including, but not limited to, ongoing consultation and assistance from the Center on how to meet the Student's alleged needs as a student with Autism.

8. Whether the LEA's alleged failure to conduct a current functional behavioral analysis (FBA) and write an evidence-based behavioral implementation plan (BIP) for the Student during the 2013-2014 school year denied him a FAPE.

9. Whether the LEA denied the Student access to the general curriculum and punished him for his disability by allegedly excluding him from recess and other activities with non-disabled peers, and/or by allegedly segregating him alone with staff in the corner of the room or in the sensory room and who were not able to provide him with evidence based instruction.

10. Whether the LEA failed to provide education which was free, appropriate and met state standards, by repeatedly calling Parent for assistance during the school day, including, but not limited to, allegedly directing the family to remove the Student from school before the end of his school day.

11. Whether the LEA has denied the Student a FAPE by allegedly failing to consider or incorporate assistive technology such as an I-Pad into his school day.

12. Whether the LEA has denied the Student a FAPE during the 2013-2014 school year by the alleged actions/inactions described in Issues 1-11.

13. Whether the LEA must provide placement at the Center prospectively, to include education for the remainder of the school year, summer of 2014, and the 2014-2015 school year, in order to achieve a FAPE for the Student and/or as compensatory education for the alleged failure of education during the 2013-2014 school year.

14. Whether the equitable remedy, to include placement at the Center, should be awarded to provide the Student with a FAPE during the 2013-2014 school year.

RELEVANT LEGAL OVERVIEW

The burden of proof rests with the party challenging the IEP. *Schaffer v. Weast*, 44 IDELR 150 (U.S. 2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990). In this action, the burden rests, therefore, with the Petitioners (the Student).

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational

benefits. See *CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 638 (8th Cir. 2003)(persuasive, citing *Rowley*, 458 U.S. at 202). Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). Some benefit and meaningful benefit are similar, although not synonymous. See *Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008)(stating that the test is some benefit as compared with meaningful benefit)). See also *Meza v. Bd. of Educ. of the Portales Mun. Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide "some educational benefit").

Pursuant to 20 U.S.C. § 1415(b)(3), "a school district must give prior written notice whenever it proposes to change, or it refuses to change, any aspect of a child's education." *Murray*, 51 F.3d at 925. As a result, a "parent wishing to challenge a school district decision is entitled to an impartial due process hearing conducted by a state, local or intermediate educational agency." *Id.*

An IEP is to be in place at the beginning of each school year. See 34 C.F.R. § 300.323(a). The IEP team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; ii) is knowledgeable about the general education curriculum; and. iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services

personnel as appropriate, and, whenever appropriate, the child. 34 C.F.R. § 300.321. Related services include transportation and psychological services. *See* 34 C.F.R. § 300.24(a).

An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324(a). Communication needs and the use of assistive technology must be considered, as well.

A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray*, 51 F.3d at 926. Mainstreaming to the maximum extent possible should take place if the child cannot be educated full-time in a regular education classroom with supplementary aids and services. *See L.B. v. Nebo*, 379 F.3d 966, 976-978 (10th Cir. 2004). Parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208.

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 C.F.R. § 300.503; § 6.31.2.13(D) NMAC. In order to afford parents an opportunity to participate in the IEP meetings, the district must provide them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made rather than notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ.*

of the Fruitport Cmty. Schs., 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). See also *Tenn. Dep't of Mental Health and Mental Retardation v. Paul B., et al*, 88 F.3d 1466 (6th Cir. 1996)(failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. See *Deal v. Hamilton Cnty. Bd. of Educ.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004). Misinformation provided to parents may prevent them from meaningfully participating in the IEP process. *Bell v. Bd. of Educ. of Albuquerque Pub. Schs.*, 52 IDELR 161 (D.N.M. 2008).

Among other things, when the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 C.F.R. § 300.24(a)(2)(i); § 6.31.2.11(F)(1) NMAC. The New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBAs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. §6.31.2.11(F)(1) NMAC. The use of the FBA/BIP is, however, an encouragement and they are not required components of the IEP. See 34 C.F.R. §300.320.¹ A student may be removed from his regular classroom if necessary to protect his or her safety or the safety of other students. See 20 U.S.C. § 1412(a)(5); *Rowley*, 458 U.S. at 181, n.4.

New Mexico law provides specific regulations for students with autism spectrum disorders (ASD) eligible for special education services under 34 C.F.R. § 300.8(c)(1). The IEP Team is to

¹ Compare the permissive use of "encouragement" for an FBA/BIP to be integrated into IEPs in situations noted in §6.31.2.11(F)(1) NMAC, with the mandatory requirement of an FBA/BIP where a disciplinary change of placement, like suspension for over ten days, takes place – then, if found to be a manifestation, the IEP team "must" conduct an FBA/BIP. See 34 C.F.R. §300.530 (a) & (f).

consider and document and strategies based on peer-reviewed, research-based educational programming practices "to the extent practicable and, when needed to provide FAPE, addressed in the IEP." 6.31.2.11(B)(4)(5) NMAC. The eleven Autism considerations are: (1) extended educational programming, such as extended school year services (among things), which consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills; (2) "daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, including, for example, lunch, snack, and recess periods that provide flexibility within routines, adapt to individual skill levels, and assist with schedule changes, such as changes involving substitute teachers and other in-school extracurricular activities;" (3) "in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills, including, for example, strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;" (4) "positive behavior support strategies based on relevant information, including, for example, antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions, and a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings;" (5) "futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;" (6) "parent or family training and support, provided by qualified personnel with experience in ASD, that, for example provides a family with skills necessary for a child to succeed in the home or community setting, includes information regarding resources such as parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of

specific teaching and management techniques related to the child's curriculum, and facilitates parental carryover of in-home training, including, for example, strategies for behavior management and developing structured home environments or communication training so that parents are active participants in promoting the continuity of interventions across all settings;" (7) "suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social or behavioral progress based on the child's developmental and learning level and that encourages work towards individual independence as determined by, for example adaptive behavior evaluation results, behavioral accommodation needs across settings, and transitions within the school day;" (8) "communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;" (9) "social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role-playing;" (10) "professional educator and staff support, including, for example, training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP;" and (11) "teaching strategies based on peer reviewed, research-based practices for students with ASD, including, for example, those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training." § 6.31.2.11(B)(4)(5) NMAC.

The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). "[A] party challenging the implementation of an IEP must show more than a *de minimus* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other

authorities failed to implement substantial or significant provisions of the IEP.” *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000).

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Bell*, 53 IDELR at 161.

A hearing officer’s determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. 34 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child’s right to a free appropriate public education, (2) significantly impeded the parent’s opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents’ opportunity to participate in the decision process, comprised the student’s right to an appropriate education, or caused a deprivation of educational benefits. *O’Toole*, 144 F.3d at 707. In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720 (10th Cir. 1996). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008).

As for residential placement reimbursement, for parents to recover costs of the student’s placement then they must show that first, the LEA denied the student a FAPE, then, if so, whether the facility was a state -accredited elementary or high school, then, if so, whether the facility

provided specially designed instruction to meet the student's unique needs, and, then, if so, whether any non-academic services received by the student met the definition of related services under the IDEA. See *Jefferson Cnty. Sch. Dist. R-1, v. Elizabeth E., et al*, 702 F.3d 1227 (10th Cir. 2012). It is noted that the United States Department of Education explains that parental placement does not require that it meet state standards to be an appropriate placement. See 34 C.F.R. § 148.

Hearing officers have authority to grant relief as deemed appropriate based on their findings. See 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. See *Florence Cnty. Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. See *Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. See *Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005); *Meza*, D.N.M. Nos. 10-0963, 10-0964. There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. See *Meza, id.* Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaton v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the in the student's education. *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010).

FINDINGS OF FACT

1. The Student was born in July 2009. Ex. A.

2. Thus, he was four years old at the time of his enrollment at the Local Education Agency's (LEA) Autism- specific preschool program at DCES on August 15, 2013. Tr. 1468-1472.

3. Prior to the commencement of this due process proceeding, the parties agreed in settlement, on July 29, 2013, that the Student was entitled to special education services as Autism eligible. Ex. 2. Although the parties agreed to the introduction of their agreement, it is relevant and is considered for background information only. There is no jurisdiction for this due process hearing to determine if terms of the agreement have been met, breached, or for any enforcement action. *See* Opinion and Order on District's Partial Motion to Dismiss, DPH 1314-14, dated January 13, 2014.

4. Prior to this, the Student was found to be eligible under the heading of Developmentally Delayed. *See* Ex. G.

5. On August 9, 2013, the LEA, through the Eligibility Determination Team (EDT), formally determined the Student to be eligible for services under the criteria for Autism Spectrum Disorder, with eligibility criteria met for classification under primary Autism. *See* Ex. 4.

6. Prior to the eligibility determination, the Student had received a private neurodevelopmental evaluation conducted by Dr. BL, dated July 26, 2013. *See* Ex. 1.

7. According to Dr. BL's evaluation, "[a]n autism disorder is considered a persistent impairment in reciprocal social communication and social interactions, and restricted, repetitive patterns of behavior, interests, or activities." *See* Ex. 1 at 5.

8. Dr. BL is the Executive and Clinical Director of the Center. Tr. 675.

9. The Center is physically located in the same community as is the LEA.

10. The Center serves children with Autism from between ages 18 months to 13 years of age. Tr. 675.

11. The Center is a small clinic, with 30 to 35 employees, which is a private Applied Behavioral Analysis (ABA) provider. The Center is not chartered as a school, Dr. DL does not hold himself to be a school administrator, and Dr. BL does not want the Center to be a school. Tr. 864-868.

12. The Center bills private insurers or Medicaid for its services and is paid according to contracted rates as health care services. Tr. 875-863.

13. Prior to enrolling at DCES's autism-specific classroom, the Student had received some private services from the Center. Ex. UU; Tr. 1009-1010, 2118.

14. On August 9, 2013, and Individualized Education Program (IEP) was completed. Ex. A.

15. Among other things, the August 9, 2013 IEP team reviewed the Student's previous IEP, Dr. BL's neurodevelopmental evaluation dated July 26, 2013, a July 31, 2013 Sensorimotor History Questionnaire, and a Peabody Developmental Motor Scale -2 (dated July 31, 2013), resulting in the August 9, 2013 IEP. Ex. A.

16. The IEP meeting participants for the August 9, 2013 IEP included Dr. BL, Behavior Analysts JG (who works with Dr. BL at the Center), the Student's mother, a principal/designee, a special education teacher, a regular education teacher, an evaluation representative, an Autism resource member, a head teacher from the P school, and others (AT, SM, AC and TA). Ex. A.

17. Ms. CR, an autism resource teacher for the LEA, participated in the 8/9/13 IEP to provide information and answer questions from Petitioners about APS autism programs. Tr. 2067-2068.

18. The Student's mother provided information to the IEP team about the Student's needs and the Center's staff - Dr. BL and JG were also participants in the IEP in order to provide guidance and input. Tr. 2069-2077.

19. Neither Dr. BL nor JG offered much input to the August 9, 2013 IEP team (nodding, without providing other input when asked, as to strategies regarding positive behavioral support and core deficits of Autism). Tr. 2076.

20. The Student's mother raised a concern about one portion of a particular communication goal but, after discussing it with the Student's previous Speech and Language Pathologist, the issue was abandoned. Tr. 2071-2072.

21. At the time of August 9, 2013 IEP meeting, the Student had not yet enrolled at DCES. Tr. 1468-1472.

22. The August 9, 2013 IEP stated that the Student was Autism eligible, that a small class setting was appropriate, that the Student's least restrictive environment needs could be met in a specialized preschool program "offered at another school," that extended school year services (ESY) were required, and that a Functional Behavior Assessment (FBA) and/or a Behavior Intervention Plan (BIP) were needed for discipline. Ex. A.

23. In the Student Profile section of the IEP it was noted that, among things, effective strategies included deep pressure/touch prior to group tasks. Ex. A, p. 4.

24. The August 9, 2013 IEP stated that a "BIP is attached." *Id.* at 16. The record does not reflect a BIP attached to the August 9, 2013 IEP. *See* Ex. A.

25. There was a prior FBA, dated November 26, 2012. Ex. F.

26. There was a prior BIP, dated April 2, 2013 (the "4/2/13 BIP"). Ex. G.

27. The August 9, 2013 IEP considered strategies for the Student as Autism eligible, and required extended educational programming, daily schedules reflecting minimal unstructured time and active engagement in learning activities, in-home and community based training or viable alternatives to assist the Student with acquisition of social behavioral skills, positive behavior support strategies (to develop an FBA followed by a BIP if necessary), parent/family training and support (community resources and working with the Center), staff-to-student ratio, communications interventions, social skills supports, professional educator/staff supports, and teaching strategies based on peer-reviewed and/or research based practices. Ex. A.

28. The August 9, 2013 IEP does not state that the parents gave permission to have the Student physically managed, or in accord with the physical restraint policies set by the New Mexico Public Education Department in its Memorandum, Use of Physical Restraint as Behavioral Intervention for Students with Disabilities, for State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, March 14, 2006.

29. The peer review notation, marked "yes," teaching strategies will used based on peer-reviewed and/or research based practices, by then documenting that the Staff will utilize strategies that include positive behavioral support and address the core deficits of autism. Ex. A, p. 20.

30. The August 9, 2013 IEP considered, but did not require, futures planning (as in post-secondary environment). *Id.*

31. The August 9, 2013 IEP states that the Student is a child with externalizing behaviors at clinically significant or at a highly elevated range, where he is unusually active, has difficulty in social situations, and is aggressive at school (though not at home). *Id.*

32. There is nothing in the record stating the IEP Team found that the Student's behavior was a manifestation of his disability for discipline, for which a Functional Behavioral Assessment (FBA) or Behavior Intervention Plan (BIP) would be required under federal law. *See* 34 C.F.R. § 300.530(f)(i)&(2).

33. The August 9, 2013 IEP gives notice of proposed actions to include positive behavioral supports in a program which incorporates the strategies that address core deficits of Autism. Ex. A.

34. Under the IEP of August 9, 2013 the Student's Parent (his mother was noted to be present), according to an IEP form box, requests Applied Behavior Analysis (ABA), yet this proposal was rejected by the LEA, by stating in the IEP form box, that its Autism pre-school programs use a variety of evidence-based practices, strategies, and interventions which address the core deficits of Autism. *Id.* at 20.

35. Examination outside of the IEP form boxes finds that the Student's Mother requested at the IEP meeting that the Center, as an outside agency, provide private off-site ABA services to be paid by the LEA, not for ABA methods to be used in the public education classroom. Tr. 2079-2084.

36. Examination outside of the IEP form boxes finds the request for the private off-site ABA services was rejected by the LEA because the LEA already provides ABA strategies and supports in its classrooms. Tr. 2081-2082.

37. The Center employs the ABA approach and recommended at the IEP meeting that ABA would help the Student focus on developing play, language, cognitive, motor, adaptive, toileting, and pre-academic skills, under a developmental-oriented, play-based form of ABA called Intensive Behavioral Intervention (EIBI), as well as a picture exchange communication system, and an Autism-specific classroom to help the Student learn pre-academic skills, social skills,

communication skills, and play skills, along with skills to help the family reduce challenging behaviors. Ex. 1., pp. 5-7 (Dr. BL's report considered at IEP meeting).

38. ABA generally is a behavior analytic method to change socially important behaviors, such as in language and communication, social skills, and adaptive skills like eating and toileting, in meaningful ways. The concept is to find the antecedent which precedes the behavior (the A, as in antecedent), have a consequence immediately after the behavior (C, as in consequence), which then affects a change in the behavior (B, as in behavior)(ABC). Ex. 42. The ABA method includes discrete trials. *Id.*

39. The Center had developed a behavior profile for the Student in June 2013, but neither Dr. BL nor the Student's mother shared the behavior profile information at the IEP meeting for the August 9, 2013 IEP. Tr. 2078-2079.

40. After holding the IEP in August 2013 it was concluded that the Student would be placed in an Autism-specific program, with a specific request by the Student's parent (the Student's mother was in attendance) that the Student attend the DCES Autism-specific program, rather than the program at P school (DF, the head of P school was part of the IEP Team) because DCES was closer to the Center, although P school was closer to the Student's home school. Tr. 2118.

41. The Student was then enrolled in Ms. T's Autism-specific preschool classroom at DCES. Tr. 1468-1472.

42. Reviewing Ms. T's testimonial demeanor and presence at the due process hearing, it is found that Ms. T is an energetic, enthusiastic educator dedicated to the needs of the preschool children in her classroom. She answered the questions presented to her in a complete manner under the pressure of examination by adverse counsel. Ms. T testified truthfully. Colleagues consider her a gifted teacher. Ex. 11. She holds degrees in special education, cognitive impairments, elementary

education and child development from Michigan, North Carolina and New Mexico. Tr. 300-301. Ms. T is found to be credible and great weight is given to her testimony, particularly since she is involved in the day-to-day teaching of the Student in her Autism-specific preschool classroom.

43. The Student began Ms. T's Autism-specific preschool classroom on August 15, 2013 for about 13 weeks, with about 9 full day absences, until he stopped attending school on November 8, 2013. Tr. 1468-1472.

44. A few days after school began Ms. T reviewed the Student's prior FBA (Ex. F, dated November 26, 2012) and BIP (Ex. G, dated April 2, 2013)). Tr. 1464.

45. Ms. T had been operating off the information contained in the FBA (Ex. F) and BIP (Ex. G)("4/2/13 BIP") in working with the Student in her classroom. Tr. 1466.

46. The FBA, BIP and IEP did not require the assistive technology device of an I-Pad. Exs. A, F and G.

47. Ms. T concluded that the behaviors the Student was exhibiting in her classroom were the behaviors noted in the FBA. Tr. 1466.

48. The November 26, 2012 FBA referred to the Student's exceptionality as Developmental Delay, yet stated that the events that precede then problem behavior result from seeking immediate attention and sensory input, with the problem behavior being the Student being wild and excited, throwing things, jumping off things, aggressiveness at school, but not at home, and then, if at home, the Student will receive a time-out, but at school a positive behavior support system is implemented. Ex. F.

49. The April 2, 2013 BIP looked at the Student's behavior such as, among other things, hitting, spitting, throwing objects, kicking, climbing on furniture, escalated behavior, running away from adults, pushing things off tables, as attention seeking behaviors, for which rewards/motivators

are provided such as snacks, fine motor tasks, play with desired items, "high five" with animated faces, saying the Student's name, a selective sticker earring to show it is meaningful, with recess not to be removed. Ex. G.

50. The Student's mother uses edibles as reinforces. Tr. 1782.

51. Ms. T's strategies toward teaching in her Autism-specific preschool classroom were child specific, based on the specific child and his needs, so to allow what works best in the situation, like visual schedules, PEC's, and communication books, so to allow choices. Tr. 302.

52. There were normally four adults in Ms. T's Autism-specific preschool classroom at DCES; Ms. T (the teacher), Educator Assistant (EA) Ms. B, EA Mr. PE, and EA Ms. DC. Tr. 21, 141, 202-203, 263.

53. There were eight students in Ms. T's Autism-specific preschool class. Tr. 29.

54. The APS Autism-specific preschool class met for 18.5 hours per week, in the mornings. Tr. 1381.

55. One of the strategies used by Ms. T and her classroom staff to help the Student communicate effectively was a custom-made picture book (a PECS book) to encourage language and expand communication skills and understanding. Tr. 311-312.

56. According to Ms. T, a "verbal" student means someone who can functionally communicate so they can express their wants and needs with their voice. Tr. 1488.

57. The Student was not always able to meet that definition of "verbal;" Ms. T was working on that part of functional communication with him. Tr. 1488.

58. Other students in the class could talk, but the Student was more "verbal" in carrying on conversations and requests. Tr. 33.

59. One student in the class did not speak at all. Tr. 34.

60. Four students in the class could initiate conversation on their own. Tr. 35.

61. One other student had in the classroom had at the time equal functional communication to the Student's. Tr. 1488-89.

62. Although the Student was more "verbal" than the other students in Ms. T's classroom in Fall, 2013, his IEP goals were appropriately addressed in that setting. Tr. 1499-1506.

63. At various times the Student would "escalate" in Ms. T's classroom by running around, being aggressive toward other students, he would throw things off shelves, throw chairs, jump under desks and tables and jump over tables; the escalation would sometimes last for 45 minutes, and the Student would hit, spit, and scratch when he did not want to participate in tasks. TR. 64, 75, 150, 155.

64. Occasionally the Student would refuse to come in from the playground and additional staff would be called to assist with bringing him in the classroom, where blocking would be used to guide the Student back to class Tr. 184-185.

65. LEA staff also occasionally used blocking techniques with blue gymnastics mats to protect themselves and others from the Student's behaviors (at one point the Student was kicking or pinching adults, going after them and biting them), and to restrict the Student's body movement. Tr. 44-51, 47, 63, 109-112, 114, 162-163, 165, 170, 214, 316, 1145, 1616.

66. The use of mats in this fashion was not recommended by Ms. B, the ARTS consultant. Tr. 1967.

67. It is found the use of mats was as a safety mechanism to re-establish self-control or for safety for others in the environment, yet not as a form of physical force to protect the staff from imminent, serious physical harm.

68. The use of mats and use of other blocking was not indicated in the August 9, 2013 IEP.

Ex. A.

69. The record does not reflect that the parents gave written permission for the for the use of mats and for blocking; the Prior Written Notice of Proposed Actions states the parents do not consent to physical management, yet this request was rejected by the LEA, and in its place it was stated that the LEA will follow board policy with regard to physical management. Ex. A, p. 20.

70. It is found that the use of these mats and the playground blocking resulted in a physical restraint, known as a manual restraint.

71. Although some staff at DCES who worked with the Student had been trained in the use of physical restraint (crisis prevention, a/k/a CPI) for student de-escalation, *see* Tr. 1236, it is found that this circumstantial evidence does not amount to a finding that positive behavior supports were not used or that the Student had been physically restrained because some staff had been trained in CPI.

72. Before, during and after his attendance at DCES, the Student had received private therapeutic services at the Center, commencing May 17, 2013. Tr. 1010.

73. While at the Center, the Student would exhibit behaviors such as disrobing, placing hands in urine, speaking gibberish, and urinating and defecating on the floors. Ex. UU, Ex. SS.

74. Dr. BL found the Student to be difficult. Tr. 779-780.

75. Blocking was also used by the Center's staff. Tr. 613-616.

76. The Student's mother also blocks him when he is "running and darting" from her. Tr. 1718.

77. Ms. T and her staff were provided with training and direction or education for educating students with Autism. Tr. 23-25, 145-146, 186, 204, 228-230, 282-283, 1875, 1895-1896.

78. JG from the Center visited Ms. T's classroom and made suggestions for implementing strategies/techniques that could support the Student. Ex. 2; Tr. 456.

79. Ms. MB was trained in ABA and other research-based methods for use with autistic children. Tr. 24-28.

80. Ms. MB used ABA-methods of discrete trials and ABLLS with the Student. Tr. 53-60.

81. Mr. PE trained in and performed discrete trials with the Student. Tr. 206-208.

82. Ms. T used discrete trials with the Student. Tr. 320-321

83. In providing the Student Autism-specific educational services, Ms. T's classroom would use positive behavior intervention strategies. Tr. 1265, 1279-1282, 1870-1879.

84. Ms. T's classroom would employ a "calm body" technique in trying to teach the Student self-regulation. Tr. 1207.

85. On one occasion Ms. T employed a "therapy hug" in which pressure and touch were used to calm the Student. Tr. p. 1233-1234. The therapy hug was documented and such documentation was provided to Petitioner. Tr. p. 1233-1234.

86. The Student was not physically managed or restrained by the therapy hug.

87. Ms. T engaged in deep pressure touch input, where a calming touch is placed on shoulders, arms, wrists, elbows, knees and ankles to help the child calm down. Tr. 2235-2237.

88. The Student was not physically managed or restrained by deep pressure touch.

89. Ms. T's classroom used a technique called "time-in" to help the Student self-regulate with the calm body approach. Tr. 1273.

90. Ms. T's classroom employed the "good waiting" technique to teach waiting skills so if the Student was presented with something then, after a given period of time, it was given to him, with the reinforcement of "good waiting."

91. Ms. T's classroom used ABC charts showing behaviors and incidents, using visual schedules to show that less adverse behavior resulted in greater positive praise. Tr. 1265.

92. Ms. T asked for, and received, assistance with the LEA's Behavior Consultant Team, beginning after September 25, 2013. Tr. 1269.

93. Ms. T asked for, and received, help from the LEA's Autism Resource Team (ART). Ex. 18. Tr. 1275, 1870. The ART Team helped Ms. T collect ABC data for the Student on September 16, 17, 18 and 19, 2013. Tr. 1884.

94. Ms. T's classroom used techniques which were highly reinforcing through the use of praise, rewards and positive reinforcement, such as, when asked what the Student was working for, he would say he was working for something he wanted, like an action figure doll. Tr. 1280.

95. Ms. T would let the Student sit next to her to reinforce positive behaviors, because the Student liked to sit next to her. Tr. 1280.

96. Ms. T's classroom would employ some aspects of ABA strategies, such as positive reinforcement, structure, work environment, specific classroom areas for circle, areas of literacy, areas for snack, and visual schedules. Ex. 16; Ex. 22; Tr. 302-303, 1871-1872.

97. Ms. T reviewed the antecedent to the Student's behavior (ABA terminology) to determine why the behavior was happening; she used the Autism Resource Team with behavior specialists to look over the data, including the prior FBA, and concluded that the Student's behaviors were attention-seeking, avoidance, and seeking out sensory interaction. Tr. 1253.

98. Ms. T's uses of reinforcement was based on a 30 second reinforcement schedule so the Student would receive needed reinforcement. Tr. 1874-1875.

99. Ms. T used ABC data to assist with determining the function of the Student's challenging behavior (such as attention seeking behavior). Tr. 1886.

100. It is found that the Petitioners have not shown by a preponderance of the evidence that the strategies employed by Ms. T were not peer reviewed or research based, particularly when read in connection with the Autism considerations in the August 9, 2013 IEP stating that the teaching strategies will used based on peer-reviewed and/or research based practices, by then documenting that the Staff will utilize strategies that include positive behavioral support and address the core deficits of autism. *See* Ex. A, p. 20.

101. The data showed that attention seeking was the main function of the Student's misbehavior. Tr. 1886.

102. According to Dr. BL, the Student's behaviors are for attention seeking. Tr. 1590.

103. Ms. T's classroom contained a workspace for the Student in the side room, similar to the personal workspace used for the Student in the therapy rooms at the Center. Tr. 314-315, 2212-2213.

104. The work space was used for a quiet, controlled setting, because the classroom is loud and has distractions. Tr. 314-315.

105. The initial work personal space or side room had to be moved because another student who was being dangerous needed a personal space. Tr. 2212.

106. Ms. T showed the Student's mother the work space before it was used. Tr. 314-315.

107. The Student sometimes requested to use his personal workspace in the side room. Tr. 178.

108. The Student's mother was not happy about the personal work space being moved. Tr. 2212.

109. Ms. T's classroom used a sensory room to provide breaks and reinforcement to the Student in which he could earn time, incrementally, for appropriate behavior. Tr. 64, 186-187.

110. The sensory room had big foam blocks, a trampoline, and a balance beam. Tr. 64-65.

111. One time the Student was taken to the sensory room for recess because the day before he ran away and was unsafe at recess – he was not punished by the sensory room, he placed there as a form of safe recess; it was a safety issue. Tr. 1200-1201.

112. The Student would ask to go to the sensory room, where he could run around in the room; it had a trampoline where a child could jump up and down. Tr. 63.

113. The Student was accompanied by at least two adults in the sensory room. Ex. 17 at 2; Tr. 195-196, 1200.

114. The Student accidentally pressed the "help" intercom button in the sensory room one time, and it has happened with other students as well. Tr. 2213-2214.

115. The Student was not isolated in a closet during a fire drill. Tr. 1605-1606, 2127-2128, 2141-1243.

116. The Student was not placed in a closet.

117. If a student's parents arrive and need to be ushered to the classroom then there may be a short lapse of time where there might be only one adult, like when Ms. T would have been the "second" adult with leaving only temporarily to summon the Student's parents into the school. Tr. 2227.

118. Ms. T and her staff sometimes used their radios to ask other school staff for an "extra set of hands" in the classroom or on the playground to reduce the pupil-teacher ratio for the Student and address his escalating behavior; the extra hands helped Ms. T and staff keep everyone safe and help de-escalate the Student. Tr. 1147-1148, 1325.

119. In addressing the Student's transitioning from his school day in leaving the classroom for home, classroom staff would reinforce appropriate, positive behavior in following directions

when "getting ready to go home" by waving the Student's mother or his grandmother into the classroom if the Student was compliant, had followed instructions and was ready to go home a few minutes early. Tr. 1290, 1292-1293.

120. The Student's father went to DCES four times to pick up the Student during the Fall Semester, never observed the Student in the classroom, and has limited personal factual knowledge of the Student's behavior or the progress in Ms. T's classroom. Tr. 1562-1563.

121. Ms. T would call the Student's mother to keep her informed if the Student was having a difficult day. Tr. 1219-1220, 1230-1231. Ms. T did not call the Student's mother in order to summon her to help school staff manage the Student. Id. The Student's mother asked Ms. T to call her. Tr. 1784-1785.

122. Ms. T's classroom inside classroom door was unlocked, although the other door going to the outside of the building was locked for safety reasons. Tr. 2210-2211. The bottom half of the of one of the doors to Ms. T's classroom was covered with paper, but there are three windows to the door, so the remaining two windows remain unblocked so that the Student's parents could look through the windows into the classroom at any time they wished. Tr. 2211-2212.

123. Training for all the educational assistants in Ms. T's classroom was scheduled for November 2013, but had to be rescheduled due to a snow delay. Tr. 282-283.

124. Ms. O, a Behavior Management Specialist with the LEA district level Behavior Consultation Services, conducted an observation of Ms. T's classroom on October 1 and 16, 2013, and completed a report regarding recommendations on November 22, 2013. Ex. 18 at 12. Ms. T implemented some of the recommendations from Ms. O that she felt were useful, although, as the classroom teacher and as a professional she had a professional difference with issues with the report like use of edibles at lunch, holding hands, time-outs (which Ms. T does not use). Tr. 1495-1499.

125. Dr. BL is of the opinion, generally from a private therapeutic setting rather than a public educational setting, that Ms. T's Autism-specific preschool program was not optimal, compared with that of a private therapeutic setting, such as the Center offered. *See generally* Tr. 675-1061, 1987-2067.

126. Similarly, JG is of the opinion, generally from a private therapeutic setting rather than a public educational setting, that Ms. T's Autism-specific preschool program was not optimal, compared with that of a private therapeutic setting, such as the Center offered. *See generally* Tr. 347-651.

127. On November 4, 2013, after the Student's return from recess, he told EA Ms. C that his ear hurt and that he needed ice. Tr. 189-190. The ear looked to EA Ms. C to be a little red, like a rug burn. Tr. 191. The Student did not appear to be in distress. Tr. 190.

128. Prior to seeing EA Ms. C, the Student had been taken to see the School Nurse by EA Mr. PE. Tr. 190.

129. The Student told EA Mr. PE that he had a pain behind his ear after he had been in the sensory room. Tr. 219.

130. The School Nurse and EA Mr. PE had a discussion, and EA Mr. PE stated that he was not aware how the mark happened, or where, or when, but that he would like the Student to be treated for it. Tr. 219-220.

131. The sensory room, where the Student had been playing earlier in the day, had vinyl blocks, a small bouncer trampoline, mats, a workout ball, and a desk and an erase board. Tr. 217.

132. The School Nurse, whose testimony was the only direct medical evidence presented, saw a tiny little red bump behind the Student's ear, at the bottom, in an area called the mastoid process, which is where the bone sticks out behind the ear, with a raised area being bone. Tr.

1848-1851. See Ex. YY (photo of Student's ear). The Student was content when he saw the School Nurse in that he was happy; he was not crying. Tr. 1848.

133. The School Nurse considered the bump to be extremely minor. Tr. 1856.

134. She brought out a flashlight and saw something she could not even call a tiny scratch, but rather a little red area. Tr. 1850.

135. The School Nurse was also working with a child with a broken arm at the time, so when she later went to give medication to another child in the Student's classroom she asked the Student's teacher about the incident and discussed with her zippers on vinyl blocks which could have caused the bump behind the Student's ear, so she could write her report and let the parents know that the Student had the minor ear abrasion. Tr. 1856-1858.

136. The Student's father testified that the Student showed him that EA Mr. PE pushed his head down, and that the Student may have used words to describe the event, but that he does not recall the exact words. Tr. 1554-1557.

137. The Student's mother testified that the Student was seated on the floor when she was talking to him about his ear and, when asked what had happened, the Student told her "Mr. [PE] in the sensory room," and then pushed his head. Tr. 1723. The Student's mother subsequently interpreted this to mean that EA Mr. PE slammed the Student's head to the floor. TR. 1721-1722.

138. Neither the Student's mother nor his father were present at DCES at the time of the event where the Student's ear injury occurred.

139. The Student's mother took a picture of the Student's ear on her cell phone that evening. Tr. 1692. She states she did so because it "was really bad." *Id.*

140. The photograph of the left ear area is located in Ex. YY. Tr. 1832.

141. Several days later the Student's mother took the Student to his primary care pediatrician, and showed him the ear and the photo to the pediatrician who said there was still a little swelling in the left ear. Tr. 1691. The pediatrician said that the area near the ear should heal on its own. Tr. 1721.

142. The Student's mother reported to the New Mexico Children, Youth and Families Department, as well as to the LEA's police, that the Student had been abused by EA Mr. PE. Tr. 1723-1725.

143. There is no evidence in the record that the New Mexico Children, Youth and Families Department or that the LEA's police found there was cause for any administrative or criminal action based on the allegations of abuse.

144. About a week after the Student's ear injury the Student's mother took the Student to the Emergency Room because the Student was shaking and crying and the Student's mother was concerned that if something had happened to his head then she should have him examined. Tr. 1681-1696.

145. It is noted that both Dr. BL and the IEP Team had determined that the Student's behaviors in the education and therapeutic settings are for attention seeking purposes.

150. EA Mr. PE is found credible -- his demeanor was viewed, his answers were clear to the questions presented; his credibility was not impeached. He is found to be truthful.

151. The School Nurse is found to be credible -- her demeanor was viewed, she recalled the day in question and the Student's ear injury, and testified as a school nurse professional regarding what she observed based on her examination of the Student very soon after the Student's ear injury. The School Nurse's observation is given great weight given her observation of events and closeness in time, place and circumstances. She was the only direct medical type of evidence presented.

152. EA Ms. C is found to be credible - her demeanor was viewed and there was no significant impeachment of her credibility to call her memory of what had happened on November 4, 2013 into question.

153. It has been considered as circumstantial evidence to the claim of an unsafe environment as whether APS staff in the APS Autism Preschool classroom referred the students with Autism by their behaviors such as "head bangers," "biters," "scratchers," "runners." Tr. 46, 106. However, little weight is given to the use of the terms because they were not intended as negative terms, but rather descriptors which might alert staff as to whether a child is elevated, as a safety issue. *See* Tr. 107-108.

154. It is found that the Student has not shown by a preponderance of the evidence that EA Mr. PE had improper physical contact with the Student to create a minor abrasion behind the Student's left ear; therefore, the Student has not shown a deprivation of a free, appropriate public education due to an unsafe environment in Ms. T's Autism-specific classroom while EA Mr. PE was his educational assistant.

155. Similarly, it found that the Student has not shown by a preponderance of the evidence that the Student was in an unsafe environment for which he was denied a free, appropriate public education in Ms. T's Autism-specific classroom by having received a minor abrasion behind his left ear while in the sensory room, where there were blocks with zippers, exercise balls, and a small trampoline.

156. The Student's family has kept the Student home from the LEA's DCES since November 8, 2013. Tr. 1470, 1554.

157. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student made progress toward his goals. Ex. 10.

158. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student's behavior improved, he independently asked for the side room for down time, and progressed in his setting. Tr. 177-179.

159. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student progressed in managing and preventing his behavior escalations, and progressed toward academics because Ms. T's staff could address escalation before it happened. Tr. 230-231.

160. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, there was a strong observation of progress in ability to interact with class and participate in classroom activities. Tr. 1084-1087.

161. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student progressed in his ability to wait, participate in group activities, and in functional communication. Tr. 1279-1290.

162. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student progressed in his ability to follow schedules and to be redirected quickly. Tr. 1294-1296.

163. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student progressed in his ability to follow directions and routines, communicate, make requests, make transitions, and in interacting with peers, such as in hand shaking. Tr. 1298-1302.

164. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student made progress in his ability to make requests for wants and needs. Tr. 1323-1324.

165. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student made progress toward his IEP goals. Tr. 1499-1506.

166. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student progressed by his improvement from 50% to 70% in demonstrating appropriate social behavior notwithstanding ongoing need for intensive supervision. Tr. 1512-1515, 1534.

167. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, placement was deemed appropriate to address the Student's behaviors, self-regulation, and social interactions. Tr. 1482-1483.

168. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, observation of Ms. T's classroom showed the Student was progressing with Ms. T's implemented strategies as to following schedules and being independent. Tr. 1870.

169. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, observation of Ms. T's classroom showed the Student was progressing with Ms. T's implemented occupational therapy strategies. Tr. 2136-2137.

170. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, progress was shown by fewer team calls to intervene with behavior. Tr. 261-262, 280-281.

171. From the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, progress was shown by the Student making progress in the day to day settings in connections with the other students. Tr. 11315.

172. Ms. T subsequently drafted a new BIP in November 2013 (Ex. 9) and in doing so made handwritten notes on the 4/2/13 BIP (Ex. G) with her mentor. Tr. 1465.

173. The 4/2/13 BIP with the handwritten notes on it states the exceptionality to be developmentally delayed. Ex. G.

174. The new BIP dated November 15, 2013 also states developmentally delayed for the Student's exceptionality. Ex. 9.

175. Ms. T did not conduct a new FBA because the Student's functions were the same as in the "4/2/13 BIP." Tr. 1466-1467.

176. Although the functions were the same, the eligibility exceptionality heading noted on the November 15, 2013 BIP was incorrect. Tr. 1467.

177. Ms. T edited the 4/2/13 BIP into the new BIP, but she was not the person who typed it during the meeting. Tr. 1467.

178. The computer web-based system for creating BIPs works with another computer information system program where the information from one system uploads periodically into the other system, but because the system did not upload until November 19, 2013 describing the new BIP as Autism then the BIP put into the system on November 15, 2013 retained the Student's exceptionality as developmentally delayed. Tr. 1394-1395.

179. Every document from November 19, 2013 onward reflects the exceptionality as Autism. Tr. 1395-1396.

180. Ms. T fully understood that the new BIP of November 15, 2013 was for Autism, not for developmental delay. Tr. 1467.

181. The LEA operated under the Student's exceptionality of Autism commencing on July 29, 2013, and continuing onward through the new BIP process and the due process hearing.

182. The use of the term "developmentally delayed" as an exceptionality was a heading error, not an error of substance for the services the Student received for Autism.

183. The November 15, 2013 BIP ("11/15/13 BIP") notes the Student engaged in behaviors unsafe to himself and to others. Ex. 9.

184. Just as in the 4/2/13 BIP process, there is nothing in the record stating the IEP Team found that the Student's behavior for this new BIP was a manifestation of his disability, for which a Functional Behavioral Assessment (FBA) or Behavior Intervention Plan (BIP) would be required under federal law. *See* 34 C.F.R. § 300.530(f)(i)&(2).

185. Similar to the 4/2/13 BIP, the 11/15/13 BIP looked at the Student's behavior such as, among other things, hitting, spitting, throwing objects, kicking, climbing on furniture, escalated behavior, running away from adults, pushing things off tables, as attention seeking behaviors. Ex. 9.

186. The 11/15/13 BIP looked at, among other things, use of calm body strategies with waiting skills and use of the discrete trials, the use of picture exchange systems for clear functional communication, the use of timers and clear expectations, use of a sensory diet for self-regulation, expansion of communication skills to express needs and requests, and sitting time. Ex. 9, p. 2.

187. Intervention strategies include environment and circumstances, curriculum and instruction, and tried positive behaviors and strategies. Ex. 9.

188. Reward and motivators are to be used, such as 30 second reinforcement intervals, access to sensory space, praise and high fives, stickers, thumbs up, use of an I-PAD and movies, uses of crafts to develop fine motor skills, use of sports and movement activities, use of toys, and to provide him crunchy foods. Ex. 9.

189. On November 19, 2013 a new IEP was prepared (11/19/13 IEP). Ex. 10.

190. Consequences in the 11/19/13 IEP include use of a "time-in," use of calming sensory input, and timed interval reinforcements. Ex. G.

191. The 11/19/13 IEP stated that a BIP was attached. Ex. 10, p. 14.

192. Exhibit 10 (the 11/19/13 IEP) does not have a BIP attached to it. However, as noted, a new BIP had been completed on November 15, 2013. Ex. 9.

193. Neither the 11/19/13 IEP nor the 11/15/13 BIP state that the parents gave permission to have the Student physically managed, or in accord with the physical restraint policies set by the New Mexico Public Education Department in its Memorandum, Use of Physical Restraint as Behavioral Intervention for Students with Disabilities, for State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, March 14, 2006. Exs. 9, 10. An FBA had not been drafted.

194. Specifically, in the 11/19/13 IEP's Prior Written Notice of Proposed Actions it states that the parents do not consent to any physical management, which the LEA rejected by stating that it will follow board policy with regard to physical management. Ex. 10, p. 18.

195. In the 11/19/13 IEP the Team found that the Student no longer was in need of extended school year services, and that he requires a FBA and BIP. Ex. 10, p. 14.

196. The Student has not returned to the DCES school setting since the 11/19/13 IEP was completed.

197. Little weight is given to the testimony of Ms. RG, the Student's grandmother. Her conclusions were based upon assumptions and guessing; she was evasive, argumentative and contradictory. Tr. 965-957. She had a preference for the program at the Center. Tr. 958-972. She demonstrated a lack of understanding of appropriate techniques and strategies used with preschoolers with Autism in, for example, giving a lay opinion about "planned ignoring," tr. 938, rather than understanding the educational setting in the classroom.

198. Dr. BL is found to be truthful, despite the Facebook posting he made from information he gained while serving as an expert in the hearing where the rule of exclusion was otherwise

invoked commending the job Ms. JG did during her testimony at trial; it was an oversight and did not reflect adversely on his truthfulness. He is found, as well, to be credible in the therapeutic and clinical settings for children with Autism, and in regard to the Student. However, little weight is given to his testimony regarding the Student in a public education setting. The Center, which he directs, is a private, therapeutic institution, not an educational setting. Notably, the Center is not educationally chartered, Dr. BL is neither a teacher nor an educator, and his opinions are formed, therefore, primarily from a private therapeutic and clinical setting. Thus, although found credible for his testimony in the private clinical setting and the Student's psychological needs in those settings, some of which also transfer to his opinions about the educational needs of the Student, little weight is given to his testimony regarding the public education component of this Student with Autism. Generally, his testimony is viewed in the education setting as describing the optimal, or best, plan for the Student from a private therapeutic, clinical perspective, rather than what is appropriate in the public education realm.

199. Similarly, JG is found to be credible in her sphere of the private therapeutic, clinical setting of the Center, although little weight is given to her testimony regarding the public educational setting component of the Student with Autism.

200. Unless otherwise stated, all other testifying witness, including the Student's mother and father, are found to be truthful and credible, giving such weight to their testimony as appropriate in consideration of the other testimony and evidence admitted in this action.

LEGAL CONCLUSIONS AND ANALYSIS

1. Jurisdiction properly lies over the parties and over the subject-matter. 34 C.F.R. §300.507(a); §6.31.2.13(I)(1) and § 6.31.2.13(I)(3) NMAC, except for those matters relating to settlement agreement terms, breach, or for any enforcement action. *See H.C. v. Colton-Pierrepont*

Central Sch. Dist., 52 IDELR 278, 109 LRP 44855 (2d Cir. 2009)(unpublished); *J.K. v. Council Rock Sch. Dist.*, 833 F. Supp. 2d 436 (E.D. Pa. 2001).

2. Petitioners failed to prove by a preponderance of the evidence that Student was denied a FAPE because the LEA did not correctly identify him as a student with Autism.² 34 C.F.R. § 306. The relevant time period with this due process proceeding is for the events which occurred after a settlement agreement on July 29, 2013. On August 9, 2013, an IEP met and found the Student eligible for services under the criteria for Autism Spectrum Disorder, with a primary eligibility classification under primary Autism. Ex. A. The IEP stated it had a BIP attached, but one was not attached. Id. The Student continued in Ms. T's Autism-specific classroom for about three months, but then his parents discontinued his attendance. Soon thereafter, on November 19, 2013, a new IEP team met and completed a new IEP. Ex. 10. Several days prior to the new IEP meeting, on November 15, 2013, a BIP had been prepared. Ex. 9. That BIP stated that the Student's eligibility determination was for developmentally delayed, rather than as eligible under the heading for Autism. Ex. 9. The substance of the BIP was consistent with the new IEP's consideration of primary Autism eligible. Exs. 9, 10. The new IEP stated the BIP was attached, but it was not. Ms. T labored under the plan that the new BIP was for the exceptionality of Autism. Ms. SH described the internal mechanisms for the LEA's computer network and explained that "developmentally delayed" had been mistakenly placed in the exceptionality category, instead of the exceptionality of Autism. In other words, it was a typographical error. The IEP was sufficiently individualized to meet the Student's unique needs and to provide him with educational benefits. A FAPE was not denied the Student by this error. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458

² This addresses Issue 1 as refined by the Petitioners' Requested Conclusion of Law No. 1. See Petitioners' Requested Findings of Fact and Conclusions of Law, March 31, 2014, p. 19-20, ¶¶ 1.

U.S. 156 (1982). *See R.C. v. Keller Indep. Sch. Dist.*, 958 F. Supp. 2d 718 (D.C. N.D. Tex. 2013)(program met student's needs despite improper classification).

3. The Student failed to prove by a preponderance of the evidence that he was denied a FAPE because the LEA did not place him in the least restrictive environment.³ *Murray v. Montrose Cnty. Sch. Dist. RE-IJ*, 51 F.3d 921, 925 (10th Cir. 1995)(least restrictive environment analysis). *See L.B. v. Nebo*, 379 F.3d 966, 976-978 (10th Cir. 2004)(main streaming and least restrictive environment). There were eight students in the Student's class, which met in the mornings for 18.5 hours per week. There were normally four adults in the classroom – Ms. T, and three EAs. The Student was not always able to meet the definition of verbal, which she defined as an individual who could functionally communicate so to express wants and needs with their voice, although the Student was more “verbal” in carrying on conversations and requests than the others. Four students in the classroom could initiate conversations on their own. One other Student in the class had equal functional communication to the Student. One student did not speak at all. The Student's goals were addressed in the setting he was in the IEP. For the about three months he was in Ms. T's Autism-specific classroom he made progress. The Student was not denied a FAPE in this classroom Autism-specific setting. 34 C.F.R. § 300.114.

4. The Student failed to prove by a preponderance of the evidence that he was denied a FAPE because he was denied research-based instruction by trained LEA staff.⁴ 20 U.S.C. §1401 (29). Among other things, the August 9, 2013 IEP considered strategies for the Student as Autism

³ This addresses Issue 2 as refined by the Petitioners' requested Conclusion of Law No. 2. *See* Petitioners' Findings of Fact and Conclusions of Law, p. 20, ¶¶ 2.

⁴ This addresses Issue 3 as refined by the Petitioners' requested Conclusion of Law No. 3. *See* Petitioners' Findings of Fact and Conclusions of Law, pp. 20-21, ¶¶ 3-6.

eligible, and required teaching strategies based on peer-reviewed and/or research-based practices, extended educational programming, daily schedules reflecting minimal unstructured time and active engagement in learning activities, in-home and community-based training or viable alternatives to assist the Student with acquisition of social behavioral skills, positive behavior support strategies (to develop an FBA followed by a BIP if necessary), parent/family training and support (community resources and working with the Center), staff-to-student ratio, communications interventions, social skills supports, and professional educator/staff supports. This considered the unique needs of this Student with Autism. Dr. BL participated in the IEP meeting and his recommendations were considered, as was his neurodevelopmental evaluation. An Autism resource teacher for the LEA participated in the meeting. Effective strategies, such as deep pressure/touch, were considered. A small group setting was a part of the plan. Notice of proposed actions included strategies to include positive behavior supports in a program which incorporates the deficits of Autism. Although the IEP rejected private off-site ABA services to be paid by the LEA, it did provide that the Autism-specific preschool program would use a variety of evidence-based practices, strategies, and interventions to address the core deficits of Autism. Testimony was presented that instruction was research based by trained staff. The IEP was appropriate as it was reasonably calculated to enable the child to receive some and meaningful educational benefits. *See Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Sytsema*, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)).

5. The Student failed to prove by a preponderance of the evidence that he was denied a FAPE because the IEP did not consider the Eleven Specific Autism strategies, including peer-reviewed research-based educational programming to the extent practicable and teaching

strategies such as discrete trial training and visual supports, applied behavior analysis, structured learning and social skills training. 6.31.2.11(B)(4)(5) NMAC. Although schools should strive to create a specially designed educational program on peer-reviewed research to the extent possible, the IEP team retains the ability to create the appropriate program in light of available research. *See Ridley Sch. Dist. v. M.R.*, 630 F.3d 260 (2012). The Student has not proved by a preponderance of the evidence that the research programming was not peer-reviewed evidence-based to the extent practicable – thus, he has not shown by a preponderance of the evidence that the IEP was not reasonably calculated to enable him to receive some and meaningful educational benefit. *Id.* *See Dreicer, D.N.M.* No. 08-233 (2009)(distinguishing *Sytsema*, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)).

6. Under New Mexico specific regulations for students with Autism Spectrum Disorders (ASD) eligible for special education services under 34 C.F.R. § 300.8(c)(1), the IEP Team is to consider and document and strategies based on peer-reviewed, research-based educational programming practices “to the extent practicable and, when needed to provide FAPE, addressed in the IEP.” § 6.31.2.11(B)(4)(5) NMAC. The New Mexico Eleven Autism Considerations are: (1) extended educational programming, such as extended school year services (among things), which consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills; (2) “daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, including, for example, lunch, snack, and recess periods that provide flexibility within routines, adapt to individual skill levels, and assist with schedule changes, such as changes involving substitute teachers and other in-school extracurricular activities;” (3) “in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills,

including, for example, strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;" (4) "positive behavior support strategies based on relevant information, including, for example, antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions, and a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings;" (5) "futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;" (6) "parent or family training and support, provided by qualified personnel with experience in ASD, that, for example provides a family with skills necessary for a child to succeed in the home or community setting, includes information regarding resources such as parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching and management techniques related to the child's curriculum, and facilitates parental carryover of in-home training, including, for example, strategies for behavior management and developing structured home environments or communication training so that parents are active participants in promoting the continuity of interventions across all settings;" (7) "suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social or behavioral progress based on the child's developmental and learning level and that encourages work towards individual independence as determined by, for example adaptive behavior evaluation results, behavioral accommodation needs across settings, and transitions within the school day;" (8) "communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;" (9)

"social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role playing;" (10) "professional educator and staff support, including, for example, training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP;" and (11) "teaching strategies based on peer reviewed, research-based practices for students with ASD, including, for example, those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training." § 6.31.2.11(B)(4)(5) NMAC.

7. Thus, as to consideration of strategy one, extended educational programming was considered in the IEP and extended educational services are part of the plan. As to consideration of strategy two, daily schedules reflecting minimal unstructured time and active engagement in learning activities and schedules were considered in the IEP. As to consideration of strategy three, in-home and community-based training or viable alternatives to assist the Student with acquisition of social behavioral skills were considered in the IEP. As to consideration of strategy four, positive behavior support strategies (to develop an FBA followed by a BIP if necessary) were required, although the FBA/BIP was not attached, as required by the IEP. As to consideration of strategy five, futures planning was noted as a consideration, though not required as in a post-secondary environment. It is noted the Student is a four-year-old in preschool. As to consideration of strategy six, parent/family training and support were considered as part of the IEP with community resources and in working with the Center. As to consideration of strategy seven, a staff-to-student ratio was considered as part of the IEP (and in practice it is noted that Ms. T's classroom had eight children, with one teacher and three educational assistants). As to consideration of strategy eight, communications interventions were considered as part of the IEP. As to consideration of strategy

nine, social skills supports were considered as part of the IEP. As to consideration of strategy ten, professional educator/staff supports were considered as part of the IEP. As to consideration of strategy eleven, teaching strategies based on peer-reviewed and/or research-based practices were considered a part of the IEP. The IEP gives notice of proposed action to include positive behavioral supports in a program which incorporates the strategies that address the core deficits of Autism, and that it would use a variety of evidence-based practices, strategies and interventions which address the core deficits of Autism. Testimonial evidence explained that the LEA used ABA strategies and supports in its classrooms. Thus, the Student has not shown by a preponderance of the evidence that the eleven New Mexico Autism specific strategies were not considered and based on peer-reviewed, research-based programming, as stated in the IEP. § 6.31.2.11(B)(4)(5) NMAC. Therefore, he has not shown by a preponderance of the evidence that the IEP was not reasonably calculated to enable him to receive some and meaningful educational benefit. *Id. See Dreicer*, D.N.M. No. 08-233 (2009)(distinguishing *Sytsema*, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)).

8. The Student has not shown by a preponderance of the evidence that the LEA rejected the use of Applied Behavior Analysis (ABA) based on a predetermination or administrative convenience; thus there was no denial of a FAPE. *Cf. Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004)(predetermination may deny meaningful participation).⁵ As has been found, ABA was not rejected by the LEA – what was rejected was the private placement of the Student at the Center for the Center’s use of its style of ABA programs. ABA methods had been employed by the LEA. The IEP stated it considered special education and related and supplemental

⁵ This addresses Issue 4 as refined by the Petitioners’ requested Conclusion of Law No. 4. *See* Petitioners’ Findings of Facts and Conclusions of Law, p. 21, ¶¶ 7-8.

aids and services – the Student has not shown by a preponderance of the evidence that it did not consider those aids and services or they were not based on peer-reviewed research to the extent practicable. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The Student cites no authority that LEA staff present at the IEP meeting must “know” the Student which would infer predetermination or administrative convenience. *See* Petitioners’ Findings of Fact and Conclusions of Law, p. 21, ¶¶ 8. Contrary to this assertion by the Student, since the Student’s mother was present at the IEP meeting, as was Dr. BL and the Center’s Behavior Analyst, JG, then there was meaningful participation in the IEP process – the Student has not shown by a preponderance of the evidence otherwise.

9. The Student has not shown by a preponderance of the evidence that the LEA failed to meet all of the Student’s needs as a result of his disability.⁶

10. The issue of the appropriateness of medication is neither considered as a fact nor in the analysis this due process decision. § 6.31.2.9(J) NMAC.

11. The August 9, 2013 IEP did not provide for the use of an I-Pad as assistive technology for the four-year preschool Student. The November 15, 2013 BIP did provide for use on an I-Pad as assistive technology to be used as a motivator. The Student has not shown by a preponderance of the evidence that for the time period between August 9, 2013 and November 15, 2013 BIP that an I-Pad was necessary to aid the Student to benefit from special education. *See Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883 (1984).

12. The Student argues that a totality in a myriad of ways the LEA failed to adequately plan and program the Student’s complex behavioral needs as a result of Autism. *See* Petitioners’ Findings of Fact and Conclusions of Law, p. 21, ¶¶ 11. He then goes on to say that “examples”

⁶ This addresses Issues 5 and 11 as refined by the Petitioners’ requested Conclusion of Law No. 5. *See* Petitioners’ Findings of Facts and Conclusions of Law, pp. 21-22, ¶ 9-11.

include a failure to create behavior plan to assist in his transition back from playground/recess, and the LEA's classroom setting in which he is with "no verbal peers." *Id.* He states that the LEA thus overlooked the Student's actual needs and failed to undertake specialized planning and delivery of services for the Student. *Id.* The Student provides no guidance as to other myriad of ways in the totality of ways he contends the LEA failed to address his needs; therefore, only those two cited examples will be evaluated in context of his argument.

13. As a factual matter, as noted in the findings of fact, the claim that the Student was in a classroom setting without "verbal peers" is misplaced. Of the eight students in Ms. T's Autism-specific preschool classroom, four could initiate conversations on their own, one other student had equal functional communication with the Student, and one could not speak at all – the Student did not always meet Ms. T's definition of verbal, which means someone who can functionally communicate so to express wants and needs. Thus, the Student has not shown by a preponderance of the evidence that his placement in Ms. T's classroom with these other students resulted in the loss of an educational benefit to him – his potential may not be maximized in the classroom, but the Student has not shown that he was denied some or meaningful educational benefit as a Student in Ms. T's classroom with those classmates. *See O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998)(benefit does not mean maximizing potential); *Dreicer, D.N.M. No. 08-233* (2009)(distinguishing *Sytsema*, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)).

14. The Student has not shown by a preponderance of the evidence that the LEA was procedurally and substantively required to create a BIP for playground/classroom transition. *See Rowley*, 458 U.S. 156.

15. When the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 C.F.R. §300.24(a)(2)(i); § 6.31.2.11(F)(1) NMAC. As the findings indicate, positive behavioral interventions, supports, and other strategies were not only considered, but were employed, by the IEP and in Ms. T's classroom.

16. Although the New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBSs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions," § 6.31.2.11(F)(1) NMAC, this is, however, only an encouragement - it is not a required component of the IEP. *See* 34 C.F.R. § 300.320. Integration of BIP into an IEP is mandatory only in situations noted in § 6.31.2.11(F)(1) NMAC, where a disciplinary change of placement, like suspension for more than ten days, takes place - then, if found to be a manifestation, the IEP team "must" conduct an FBA/BIP. *See* 34 C.F.R. § 300.530 (a) & (f). When read in connection with this mandatory/encouragement provision, therefore, item four of New Mexico's Eleven Autism Considerations (a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment using current data related to target behaviors and addressing behavioral programming across home, school, and community-based settings) is only required in FBA/BIP manifestation determination actions. *See* 34 C.F.R. § 300.530 (a) & (f).

17. It is concluded, therefore, that a FBA/BIP for the playground classroom transition was not a required component of the IEP. The IEP itself addressed the behaviors. As the findings of fact indicate, the IEP itself discussed positive behavioral techniques and the Student's behavior issues. As the findings indicate, the Student progressed in the educational and behavioral settings while he

was in Ms. T's Autism-specific preschool classroom for about three months. He has not, therefore, shown by a preponderance of the evidence that the LEA was procedurally required to have a FBA/BIP in place for the playground/classroom transition. *See Rowley*, 458 U.S. 156.

18. The Student has proved by a preponderance of the evidence that the LEA's use of containment gym mats in class and post-playground period use of blocking to guide the Student into back class is a procedural violation, yet did not prove by a preponderance of the evidence that the violations impeded the Student's right to a FAPE, significantly impeded the parent's right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2). § 6.31.2.13(I)(20)(b) NMAC.⁷ By occasionally holding the blue gymnastic mats to guide the Student and to protect the staff from his escalations and the occasional use of blocking the Student to guide him back into the classroom setting from the playground, the LEA engaged in physical manual restraint. Prior to doing so, it did not follow express policy set by the New Mexico Public Education Department. The LEA did not have the express written agreement of the parent or legal guardian, the IEP team did not approve the restraint to be used, the IEP did not state who is authorized to apply it, it did not state the specific setting or conditions in which the restraint is to be applied, it did not state how other staff will monitor it, and it did not state what reporting requirements are required when the restraint is used, a mental health professional did not review all information about the Student and observe the Student prior to making recommendations at the IEP meeting about the use of physical restraint, and the IEP team did not first find that other less restrictive behavioral management techniques have been tried and documented as unsuccessful. *See Memorandum, Use of Physical Restraint as Behavioral Intervention for Students*

⁷ This addresses Issues 6 and 9 as refined by Petitioners' requested Conclusion of Law No. 6 and 9. *See* Petitioners' Findings of Fact and Conclusions of Law, p. 22, ¶¶12-13.

with Disabilities, for State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, March 14, 2006.

19. According to the New Mexico Public Education Department's policy memorandum, of which notice is taken, manual physical restraint exists when one or more people use their bodies to restrict a student's movement which allows the student to reestablish self-control and/or maintain safety others in the environment. See Memorandum, Use of Physical Restraint as Behavioral Intervention for Students with Disabilities, for State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, March 14, 2006. Where there is severe, persistent and frequent problematic behavior that impedes the student's learning or that of others the IEP team must develop a BIP emphasizing positive behavior strategies and interventions based on an FBA. *Id.* Physical restraint may be required for emergency situations where aggressive, violent, or dangerous behavior requires immediate intervention to protect the student and others from serious injury, to safeguard property, and to be used only in emergency situations. *Id.* The physical restraints may be either mechanical or manual. *Id.* Mechanical restraints involve use of blankets, tape, blindfolds, or tie-downs to restrict a student's movement or activity, and are not condoned by the New Mexico Public Education Department. *Id.* However, manual restraints, described as when one or more people use their bodies to restrict the student's body movement to act as a restraint to allow the student to regain self-control and/or to maintain safety of others in the environment, are permissible under set conditions. *Id.* Touching or holding a student without the use of force, or escorting a Student is not considered to be physical restraint. "Time out," as well, is not considered a physical restraint. *Id.* For permissible use of manual restraints, "the use of physical restraint must be approved by the student's IEP team, documented in the student's BIP, have the express written agreement of the parent or legal guardian, and be addressed in the

public agency's Prior Written Notice of Actions Proposed (PWN) provided to parents following an IEP meeting." *Id.* The IEP team must approve the type of restraint to be used, must state who is authorized to apply it, must state the specific setting or conditions in which the restraint is to be applied, must state how other staff will monitor it, and state what reporting requirements are required when the restraint is used. *Id.* A mental health professional, such as a social worker, counselor, or psychologist, must be a member of the IEP team; he or she must review all information about the student and observe the student prior to making recommendations at the IEP meeting about the use of physical restraint in the BIP. Positive interventions must first be tried, designed for de-escalation, to be listed in the BIP, so that physical restraint is the last resort to protect the student and others from harm. *Id.* As a prerequisite, the IEP team must find that other less restrictive behavioral management techniques have been tried and documented as unsuccessful. *Id.*

20. As noted in an earlier section, the mandatory requirement for a FBA/BIP is only when a manifestation determination is made. *See* 34 C.F.R. § 300.530 (a) & (f). Otherwise, by state regulation, the use of a FBA/BIP is only encouraged. Thus, similar to the provisions for a FBA/BIP in the New Mexico Eleven Autism Considerations, it is interpreted that the requirement for a FBA/BIP under the New Mexico Public Education's March 14, 2006 policy guidance is only required in FBA/BIP manifestation discipline determination actions. *See* 34 C.F.R. § 300.530 (a) & (f). As a result, a procedural violation is not found for the lack of a FBA/BIP in connection with the August 9, 2013 IEP since this case does not involve a manifestation determination.

21. Nonetheless, a restraint procedural violation did exist based on the New Mexico Public Education's March 14, 2006 policy guidance for other reasons. The restraints should not have been employed absent the procedural conditions first being met, as required by the New Mexico Public

Education's March 14, 2006 policy guidance. This, however, does not by itself result in a violation of a FAPE. The second step is to determine whether these procedural violations impeded the Student's right to a FAPE, significantly impeded the parent's right to participate in the decision making process, or caused a deprivation of educational benefit. See 34 C.F.R. 300.513(a)(2). § 6.31.2.13(I)(20(b) NMAC. It is concluded that, as the findings of fact note, the Student has not shown by a preponderance of the evidence that procedural violations impeded his right to a FAPE, that the parents' participation rights were significantly impeded, or that they caused a deprivation of educational benefit. *Id.*

22. Specifically, as the findings of fact show, from the beginning of his Autism-specific program in Ms. T's classroom and prior to his removal from DCES, the Student made educational, social and behavioral progress. The Student has not shown by a preponderance of the evidence that the IEP did not provide him with some and meaningful educational benefit. *Id. See Dreicer, D.N.M. No. 08-233 (2009)(distinguishing Sytsema, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit).*

23. The Student has not shown by a preponderance of the evidence that the IEP did not provide him with some and meaningful educational benefit because he was isolated from other students and deprived of the general curriculum and educational time when he is escalated. *See Dreicer, D.N.M. No. 08-233 (2009)(distinguishing Sytsema, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)).* As the findings of fact note, the use of the playground/classroom blocking and the use of the blue gymnastic mats were occasional, and he made progress despite those uses – the Student has not proved he was isolated or deprived of the general curriculum and educational time when he was escalated. As the findings of fact also indicate, the Student was not confined in a closet; he at times had the use of a sensory room and a

companion room, but he was not isolated. The Student was provided with meaningful educational benefits in the classroom in the least restrictive environment.

24. The Student has not shown by a preponderance of the evidence that he was not provided with some and meaningful educational benefit under the IEP because EA Mr. PE had improper contact with the Student to create a minor abrasion behind the Student's ear. *See Dreicer, D.N.M. No. 08-233 (2009)*(distinguishing *Sytsema*, 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)). As expressed in the findings of fact, EA Mr. PE did not have physical contact with the Student. Similarly, the minor abrasion behind the Students' ear did not cause a deprivation of educational benefit to the Student – his parents voluntarily removed him from the classroom, which resulted in the Student's inability to continue in his Autism-specific educational setting.

25. The Student has not shown by a preponderance of the evidence that there was insufficient training and supports to staff so to deny the Student a FAPE.⁸ It has been found that in the classroom setting Ms. T and her staff members were provided with training and direction for educating students with Autism. The Student's position that the Autism Resource Team lacked board certified analysts and that it thus was unable to provide timely and meaningful assistance is without merit – as the findings note, the Student progressed in the academic and other school environments. The IEP was sufficiently individualized to meet the Student's unique needs and to provide him with educational benefits, and some and meaningful educational benefits were provided. *Rowley*, 458 U.S. 156. *See also Dreicer, D.N.M. No. 08-233 (2009)*(distinguishing *Sytsema* 538 F.3d 1306 (stating that the test is some benefit as compared with meaningful benefit)).

⁸ This addresses Issue 7 as refined by the Petitioners' requested Conclusion of Law No. 7. *See* Petitioners' Findings of Fact and Conclusions of Law, p. 22, ¶¶ 14.

26. The Student has not shown by a preponderance of the evidence that he was denied a FAPE because of a failure to conduct a FBA.⁹ As explained in a prior section of this Memorandum Opinion, the use a BIP/FBA is not mandatory unless there is a manifestation determination issue. See 34 C.F.R. §300.530 (a) & (f). Otherwise, it is an encouragement. § 6.31.2.11(F)(1) NMAC. There is no manifestation issue with this Student. Thus, a FBA as a prerequisite requirement to BIP is not a mandatory requirement. Nonetheless, the August 9, 2013 IEP specifically stated that a BIP was attached, yet a BIP was not attached. The LEA's argument that a BIP did not have to be in writing is found without merit in this circumstance – the IEP specifically stated a BIP was to be attached. Nonetheless, contrary to the Student's argument that staff could not consider the New Mexico Eleven Autism Considerations absent a FBA/BIP, all eleven considerations were addressed in the IEP. At issue, therefore, is whether the failure to have a BIP required by the IEP resulted in a denial of FAPE because the IEP was not implemented. It is concluded there was not a denial of FAPE because of that error. The test is whether the Student has shown by a preponderance of the evidence that the failure to create the BIP resulted in failure to implement substantial or significant portions of the IEP. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000)(as persuasive authority). As the findings of fact show, the Student showed some and meaningful educational benefits during his about three month period in Ms. T's classroom, and, as explained in other portions of the Memorandum Opinion regarding the physical restraint issue, the Student has not shown by a preponderance of the evidence that the failure to have the BIP as required by the IEP resulted in failure to implement substantial or significant portions of the IEP. 34 C.F.R. § 300.513.

⁹ This addresses Issue 8 as refined by the Petitioners' requested Conclusion of Law No. 8. See Petitioners' Findings of Fact and Conclusions of Law, p. 22, ¶¶ 15.

27. The Student has not shown by a preponderance of the evidence that he was denied a FAPE because the parents at times were called. 34 C.F.R. § 300.513.¹⁰ As the findings of fact show, Ms. T would call the Student's mother at times to keep her informed if the Student was having a difficult day, as requested by the Student's mother – parents were not summoned to help the staff manage the Student.

28. Joint Issue 12 combines issues 1-11, in alleging that the actions/inactions by the LEA denied the Student a FAPE. See Joint Statement of Issues, January 10, 2104. The Student has not separately proposed a Conclusion of Law under this number. See Petitioners' Findings of Fact and Conclusions of Law. Similarly, this Memorandum Opinion will not address this as a separate issue, in that it is considered in analysis and conclusions for Issues 1-11, above. However, evidence was developed at the due process hearing regarding the new IEP's lack of extended school year services (ESY), and findings on this matter stated the IEP team did not find ESY to be appropriate. In this regard, the Student has not shown by a preponderance of the evidence that ESY services are necessary to provide him with a FAPE. 34 C.F.R. § 300.106. The Student has not shown by a preponderance of the evidence that he would experience substantial regression without summertime instruction. See *C.H. v. Goshen Central Sch. Dist.*, 61 IDELR 19 (S.D.N.Y. 2013).

29. The Student is not entitled to the remedy of educational placement at the Center continuing through the summer of 2014 and during the entirety of the 2014-2015 school year.¹¹ As concluded, the Student has not shown by a preponderance of the evidence that he was denied a

¹⁰ This addresses Issue 10 as refined by the Petitioners' requested Conclusion of Law No. 10. See Petitioners' Findings of Fact and Conclusions of Law, p. 22, ¶¶ 16.

¹¹ This addresses Issues 13 and 14 as refined by the Petitioners' Requested Conclusions of Law No. 13 and 14. See Petitioners' Findings of Fact and Conclusions of Law p. 23, ¶¶ 17-18.

FAPE. Similarly, because the Student has not shown by a preponderance of the evidence that he was denied a FAPE, he is not entitled to compensatory education services.

30. Nonetheless, despite that there was no substantive violation of FAPE, there was a procedural violation with regard to the use of manual physical restraint. Therefore, it is administratively ordered that the LEA will not prospectively use physical manual restraint unless expressly authorized by the parents and only then otherwise in accord with the New Mexico Public Education Department's Memorandum, Use of Physical Restraint as Behavioral Intervention for Students with Disabilities, for State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, March 14, 2006. *See D.B. v. Mabank Indep. Sch. Dist.*, 114 LRP 16087 (D.C. N.D. Tex. 2014)(although no substantive denial of FAPE, hearing officer may order procedural violations to be cured).

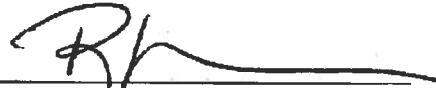
31. Any claims or defenses otherwise raised which are not specifically addressed herein, and due to this order, are denied.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Second Request for Due Process Hearing with the Local Educational Agency is denied in substantial part, and their claims in their Second Request for Due Process Hearing with the Local Educational Agency of November 26, 2013, are, therefore, dismissed with prejudice, with the exception of the procedural violation as to physical restraint with the requirement that the LEA prospectively follow the New Mexico Public Education's policy on physical restraint under the New Mexico Public Education Department's Memorandum, Use of Physical Restraint as Behavioral Intervention for Students with Disabilities, for State Director of Special Education to New Mexico Superintendents, Special Education Directors, Charter Schools and RECs, March 14, 2006.

REVIEW

Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 20 U.S.C § 1415(i), 34 C.F.R. § 300.516, and § 6.31.2.13(I)(24) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.



MORGAN LYMAN
IMPARTIAL DUE PROCESS HEARING OFFICER

Entered: April 30, 2014

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by facsimile transmission only to M. Kern, S. Adams, G. Stewart (and to Ms. Ford, through Ms. Stewart), and Gloria Regensberg, via facsimile, and via certified mail only to the Petitioners at their address of record, with a copy through the U.S. Mail to the New Mexico Secretary of Education, all on this 30th day of April, 2014.

