BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1920-04

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing with Local Education Agency, Invoking Stay Put Placement and Expedited Hearing on That Issue if Needed, filed with the State of New Mexico Public Education Department on August 9, 2019 (hereinafter Request for Due Process). *See* Request for Due Process Hearing with Local Education Agency, Invoking Stay Put Placement and Expedited Hearing on That Issue if Needed, August 9, 2019. The Petitioners' Request for Due Process against the LEA is granted in part.

PROCEDURAL BACKGROUND

On August 15, 2019, the Respondent LEA and the Petitioners jointly filed a Stipulation agreeing that the need for an expedited hearing was no longer required. *See* Stipulation, August 15, 2019. An Order was entered on August 16, 2019, concluding an expedited hearing was no longer required, and ordering the Request for Due Process to proceed under the traditional (not expedited) due process hearing time frames. *See* Procedural Order on Expedited Request, August 16, 2019.

The Respondent LEA responded to Petitioners' Request for Due Process on August 16, 2019. *See* [LEA's] Response to Request for Due Process Hearing, August 16, 2019 (Answer). A Pre-Hearing and Extension Order was entered on August 22, 2019, after a pre-hearing conference on the same day which, among other things, set the date for the hearing. *See* Pre-Hearing and Extension Order, August 22, 2019.

The parties timely filed their joint Statement of Issues on September 27, 2019. Statement of Issues, September 27, 2109 (Statement of Issues). A joint Statement of Facts was not filed. *See* DPHO record. The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibit List, October 23, 2019; Petitioners' Witness List, October 23, 2019; Respondent's Exhibit List, October 23, 2019; and Respondent's Witness List, October 23, 2019. The parties filed a joint list of exhibits on October 23, 2019. *See* Joint Exhibit List, October 23, 2019. The Respondent revised its exhibit list on October 24, 2019. *See* Respondent's Revised Exhibit List, October 24, 2019. On October 24, 2019 the parties filed a revised joint list of exhibits. *See* Revised Joint Exhibit List, October 24, 2019.

The Due Process Hearing began its first week from October 28, 2019 through November 1, 2019. Tr. Vols. 1-5. A recess was taken until the hearing could be reconvened. Tr. 1,399.

Through a series of email communications, the parties requested an extension for the due process decision until January 6, 2020. *See* Email Correspondence of 11/4/2019 (Adams), 11/4/2019 (Stewart), 11/4/2019 (Lyman), 11/4/2019 (Adams), 11/4/2019 (Stewart). On November 5, 2019, an Order was issued, with a subsequent Amended Order, extending the dates for the due process decision until January 6, 2020, and setting the dates to reconvene the Due Process Hearing. *See* Letter Orders, November 5, 2019 (initial and amended letter orders). On November 13, 2019, the Due Process Hearing was ordered reset to reconvene on December 16, 2019 and continue through December 19, 2019. *See* Letter Order, November 13, 2019.

On December 2, 2019, the Petitioners' filed their second witness list. *See* Petitioners' Second Witness List, December 2, 2019. The Respondent filed a second witness list, as well, on December 9, 2019. *See* Respondent's Witness List for Dec 16-20, 2019.

The Due Process Hearing reconvened on December 16, 2019, and concluded on December 20, 2019. Tr. Vols. 6-10. Both parties were well-represented by their respective trial counsel. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on or before March 2, 2020. Tr. 2,745. The parties jointly requested an extension for issuance of the hearing officer's decision, which was granted, for the filing of his decision on or before April 2, 2020. Tr. 2,745.

Through an email communication, on December 20, 2019, the Respondent proffered that its witness, Ms. JB, was misunderstood at the hearing due to some laughter resulting from a question about data. *See* Email Correspondence, 12/20/2019 (Adams). After a response from Ms. Stewart, *see* email correspondence, 12/20/2019 (Stewart), it was ordered that if initially deemed as an attempted joke by Ms. JB, then based on the Respondent's proffer, it was the Hearing Officer's misunderstanding of the events, and the record was corrected. *See* Email Correspondence, 12/20/2019 (Lyman).

On January 2, 2020, a request was made by the Hearing Officer to the parties seeking their understanding of the admitted trial exhibits, with a list of the exhibits. *See* Lyman Letter, January 2, 2020. On January 6, 2020, the Petitioners agreed with the list by the Hearing Officer. *See* Email Correspondence, 1/6/2020 (Stewart). The Respondent did not respond.

On February 28, 2020, the parties jointly requested an extension of time to file requested Findings of Fact, Conclusions of Law, and Argument, and to extend the Hearing Officer's decision due date. *See* Joint Motion for Extension to Submit FOF/COL on March 11, 2020, and Email correspondence, February 28, 2020. An Order extending the joint deadlines was entered on February 28, 2020, which extended the date to file proposed Findings, Conclusions, and Arguments from the parties to March 11, 2020, and extended the Hearing Officer's deadline for issuing the decision to April 30, 2020. *See* Order on Joint Motion for Extension to Submit FOF/COL on March 11, 2020, and for Extension for Decision, February 28, 2020.

The Respondent filed its proposed Findings of Fact and Conclusions of Law on March 11, 2020. [LEA's] Closing Argument and Proposed Findings of Fact and Conclusions of Law, March 11, 2020 (R's F&C). The Petitioners filed proposed Findings of Fact and Conclusions of Law on March 11, 2020. Petitioners' Requested Findings of Fact and Conclusions of Law, March 11, 2020 (Ps' F&C). The Petitioners also filed their Closing Argument on March 11, 2020. Petitioners' Closing Argument, March 11, 2020.

This decision is due on or before April 30, 2020. *See* Order on Joint Motion for Extension to Submit FOF/COL on March 11, 2020, and for Extension for Decision, February 28, 2020.

ISSUES PRESENTED BY THE PARTIES

1. Whether the LEA denied the Student a fee appropriate public education (FAPE) if Speech-Language Therapy was not a necessary related service.

2. Whether the LEA denied the Student a FAPE if the Student's individualized education plans (IEPs) did not contain "measurable academic and functional goals"

designed to meet the Student's needs as a student with autism, and whether they were designed to enable the Student to make progress in the general curriculum.

3. Whether the LEA denied the Student a FAPE if the Student's IEPs did not include strategies based on peer-reviewed research for students with autism, and, if there were strategies, whether the strategies were implemented.

4. Whether the LEA denied the Student a FAPE if there were no people at the Student's IEP meetings who were knowledgeable about the LEA's resources, or whether there were people at the IEP meetings capable of "interpreting instructional implications of Student's evaluation," and characteristics of autism.

5. Whether the LEA denied the Student a FAPE if it failed to conduct timely functional behavior assessments (FBAs), and to implement behavior intervention plans(BIPs), if needed to address nonconforming behaviors by the Student if connected to autism.

6. Whether the LEA denied the Student a FAPE if aversives and punishment (including threat assessments) were substituted for planned positive behavioral supports and implementation of evidence-based practices for this Student with autism.

7. Whether the LEA denied the Student a FAPE if it failed to provide necessary and supportive services to address all of the Student's needs resulting from disability.

8. Whether the April/May 2019 IEP denied the Student a FAPE if it unilaterally predetermined placement at the LEA's SES program at MZ School due to the LEA's administrative convenience, rather than based the Student's individualized needs, and the Student's right to be educated in his least restrictive environment (LRE).

9. Whether the LEA denied the Student a FAPE if it failed to meet state standards at each IEP meeting to discuss and to document the IEP Teams' decisions on the 11 considerations for students with autism.

10. Whether the LEA denied the Student a FAPE if it failed to implement the Student's IEPs.

11. Whether the LEA denied the Student a FAPE if it failed to conduct an assistive technology evaluation.

12. Whether the LEA denied the Student a FAPE if it failed to write an IEP providing for supports allowing the Student to participate in extracurricular activities.

13. Whether the LEA denied the Student a FAPE if it failed to provide direct occupational therapy to the Student if the Student was averse to being present in the general education classroom and due to sensory differences.

14. Whether the LEA denied the Student a FAPE if it failed to include the parents as full members of the IEP Team when it assembled a threat assessment file on the Student during 2019, and whether it was withheld from the parents.

15. Whether the LEA denied the Student a FAPE if it failed to meet the Student's individual needs by teaching him to read with the SPIRE curriculum.

16. Whether, singly or in combination under Issues 1-15 above, the LEA denied the Student a FAPE.

17. Whether, if a denial of FAPE is first found, an equitable remedy would be appropriate, and, if so, then whether the Student is entitled to an equitable remedy, and, if so, then what that remedy should be.

See Joint Statement of Issues, September 27, 2019.

Note that the issues are addressed in context with the issue numbers as presented in the Joint Statement of Issues. Only the matters preserved by the F&Cs will be addressed – any other matters are otherwise deemed abandoned.

RELEVANT LEGAL OVERVIEW

The burden of proof rests with the party challenging the IEP. ***See*** *Schaffer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990). Once a subject-matter jurisdictional challenge is made, the responding party has the burden to establish jurisdiction. ***See*** *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed. 2d 351 (1992). In this action, the burdens rest, therefore, with the Petitioners.

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. 176, 207 (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.*, 458 U.S. 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). "[A] child is entitled to 'meaningful' access to education based on her individual needs." *Fry v. Napoleon Cmty. Sch.*, 580

U.S. ___, 137 S. Ct. 743, 753-754 (2017). "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017). This requires a "prospective judgment by school officials . . . informed not only by the expertise of school officials, but also by the input of the child's parents or guardians." Id. at 999-1000.

The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. *Endrew*, 137 S. Ct. at 1001. Deference is given to the expertise and exercise of judgment by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Endrew*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Endrew*, 137 S. Ct. at 999.

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. *See* 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111(a)(i) ("child find"). The school district "bears the burden generally in identifying eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a)(1). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. *See* 34 CFR § 300.111(c)(1). The LEA must conduct a full

and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. *See* §6.31.2.10(D)(1)(a)&(b), NMAC. The responsibility for the evaluation lies with the LEA. ***See*** *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See Id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). An LEA's failure to meet its "child find" obligation is a cognizable claim. ***See*** *Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. ***See*** *Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8th Cir. 2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150, 162 (1st Cir. 2004).

A disability is suspected, under persuasive authority from the Ninth Circuit, when the district is put on notice that symptoms of disability are displayed by the child. ***See*** *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

A "child with a disability" is defined as a child evaluated and determined to be eligible for, among other things, serious emotional disturbance (generally referred to as

emotional disturbance) and other health impairment. *See* 34 CFR § 300.8(a). To be qualified, the child must be in need of special education and related services because of the emotional disturbance or other health impairment. *Id.*

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 34 CFR § 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, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. ***See*** *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. ***See*** *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. ***See*** *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. ***See*** *Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order an LEA to comply with procedural requirements. *See* 34 CFR § 300.513(a)(3).

"The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753.

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. ***See*** *Timothy O.*, 822 F.3d at 1124. Similarly, improper implementation of an IEP can run afoul of the procedural requirements demanded by the IDEA. ***See*** *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432 (9th Cir. 2010)(citations omitted). An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. *See* 34 CFR § 300.323(c)(1).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 CFR § 300.503; §6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides 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 CFR § 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, 1998 WL 406787, *3 (10th Cir. Jul. 16, 1998). The IDEA requires notice of a proposed change before the change is made – not 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.*, 88 F.3d 1466, 1481 (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 Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004).

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.*

The term "educational placement" is not defined by the IDEA. *Erickson v. Albuquerque Pub. Sch.*, 199 F.3d 1116, 1121 (10th Cir. 1999). While in some cases the dispositive factor is the IEP in place at the time the stay-put provision is invoked, in other cases it may be fact-driven in that it is "something more than the actual school attended . . . and something less than the child's ultimate educational goals." Id. It may arise when the student is moved from a certain type of program, like the regular class, to another type of program, like home instruction, or when there is a significant change in the student's program while the student remains in the same setting. ***See*** *N.D. ex rel. Parents Acting as Guardians Ad Litem v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1116 (9th Cir. 2010).

A change in location for services differs from a change in educational placement. ***See, e.g.***, *Rachel H. v. Haw. Dep't of Educ.*, 868 F.3d 1085, 1090 (9th Cir. 2017)(location); *N.D. v. Haw. Dep't of Educ.*, 600 F.3d 1104, 1115-16 (9th Cir.

2010)(placement). Failure to include the location of the school in an IEP is not a *per se* violation of the IDEA, although failure to designate a specific location may give rise to an undue burden placed on the parents to decide whether to accept or challenge an IEP, which could result in a procedural and a resulting substantive IDEA violation. ***See*** *C.W. v. Denver County Sch. Dist.*, 75 IDELR 66, 119 LRP 37315, 17-CV-2462-MSK SKC No. 1 (D.C. Colo., Sept. 25, 2019). A change in location of services does not require compliance with the least restrictive means test which a change of educational placement may demand. ***See*** *Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F. 3d 1398, 1403-04 (9th Cir. 1994).

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. *See* 34 CFR § 300.321.

State law enforcement officers are not prohibited from taking action and exercising their responsibilities in regard to federal and state crimes which are

committed by a child with a disability. *See* 34 CFR § 300.535. However, police intervention, coupled with other matters such as time outs and physical restraints, could indicate the IEP was inappropriate if it allowed those activities to take place, or that if not contained in the IEP then that the IEP was being implemented incorrectly. ***See*** *Spring Branch Ind. Sch. Dist.*, v. O.W., 72 IDELR 11 (S.D. Tex. 45:16-CV-2643, March 29, 2018). ***See also*** *C.B. v. Sonora Sch. Dist.*, 54 IDELR 293 (E.D. Cal. CV-F-09-285 OWW/DLB, March 8, 2010)(nine year old disabled student handcuffed for purely punitive reasons unreasonable). ***But see*** *Parrish v. Bentonville Sch. Dist.*, 118 LRP 30734 (8th Cir., July 24, 2018)(physical force and seclusion did not deny FAPE, with strategies used although not perfect, complied with IDEA).

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. *See* 34 CFR § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *Id.* Related services are such "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education . . ." 34 CFR § 300.34(a). ***See also*** *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984)(services to aid student to benefit from special education).

As articulated in *Tatro*, *Id.*, to be a related service, the child must have a disability to require special education services under the IDEA, the service must be necessary to aid the child with the disability to benefit from the special education, and the service must be performed by a non-physician. *Id.* The IDEA's definition of "related service" is

"relatively broad." *Jefferson Co. Sch. Dist. v. Roxanne B.*, 702 F.3d 1227, 1236 (10th Cir. 2012).

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 CFR § 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 – they are not required components of the IEP. *See* 34 CFR § 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.

Under New Mexico specific regulations for students with Autism Spectrum Disorders (ASD) eligible for special education services under 34 CFR § 300.8(c)(1), the IEP Team is to consider and document 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)(5) NMAC. The 11 Autism

[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 CFR § 300.530(a) & (f).

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 child is to be educated in the least restrictive environment (LRE) – the child is to be educated in a regular classroom to the maximum extent appropriate. 20 U.S.C. §

1412(a)(5)(A). Removal from the regular education classroom can occur only when the nature or severity of the child's disability is such that regular classroom education cannot be achieved satisfactorily with the use of supplementary aids and services. *Nebo* 379 F.3d at 976(citing 20 U.S.C. § 1412(a)(5)(A)). Education in the least restrictive environment is a substantive requirement as a statutory mandate. Id. That is, substantive provisions are violated if the LEA either (1) fails to provide FAPE to the child, or (2) if FAPE is provided, then it is not to the maximum extent appropriate in the least restrictive environment. Id. at fn. 13.

The LRE test in the Tenth Circuit is, initially, whether education in the regular classroom, with the use of supplemental aids and services, can be satisfactorily achieved. Id. at 976. Non-exhaustive factors used to make this determination include: (a) the steps the LEA has taken to accommodate the student, including consideration of continuum of placement and support services, in the regular classroom; (b) a comparison of the student's academic benefits he or she will receive in the regular classroom with those to be received in the special education classroom; (c) the overall educational experience of the student in the regular education classroom, which includes non-academic benefits; and (d) the effect of the student's presence in the regular classroom. Id. Then, if found that the student' education in the regular classroom can be satisfactorily achieved with the use of supplemental aids and services, whether the LEA has mainstreamed the student to the maximum extent appropriate. Id.

The IEP is to be implemented as soon as possible after the IEP meeting. 34 CFR § 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).

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).

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. School 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 CFR 148.

Although administrative exhaustion, at least when requiring matters to be brought before a due process hearing prior to court action, remains jurisdictional in the Tenth Circuit, its clarity in analysis in whether exhaustion should continue to be a jurisdictional matter has been questioned. ***See*** *Muskrat v. Deere Creek Pub. Schs.*, 715 F.3d 775, 783 (10thCir. 2013). "Exhaustion," in very general terms, usually applies in context of the IDEA when a matter is sought to be brought before the court on review that was not first raised at due process. ***See*** *Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1275-1279 (10th Cir. 2007). *Ellenberg*, *id.*, states that before relief may be sought in federal court, the party "must first request an IEP for the disabled child, or seek a

change to a current IEP if one exists." *Id.* at 1267. Note that this addresses exhaustion for relief in federal court, yet in context it is concluded to be applicable at the due process hearing level to determine if the party has first requested an IEP, or if it first sought to change the current IEP if one exits, as a matter of exhaustion.

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. *Wheaten 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 student's education. ***See*** *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). 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).

FINDINGS OF FACT

1. There is jurisdiction over the parties and of the subject-matter only for matters raised contesting a free appropriate public education (FAPE) under the IDEA, unless otherwise found or concluded that the matter was not first exhausted. *See* 34 CFR § 513.

2. In an attempt to avoid duplicity in these numbered findings and in the Analysis section, the numbered findings are supplemented by the Analysis section findings, so the numbered findings are generally an overview, with the more specific factual issues relative to the preserved arguments in the P's F&C noted in the Analysis section below.

3. The relevant statutory period for substantive consideration commenced on about August 10, 2017. *See* §6.31.2.13(M) NMAC.

4. The Student was born on May 5, 2011. *See* Ex. B.

5. The relevant grades for the Student within the statutory period are the Student's first and second grades.

6. At the time of the Due Process Hearing the Student was not attending an LEA school. Tr. 2403.

7. The Student was in a private healthcare type of environment for a child with autism. Tr. 2403.

8. The Petitioners are not seeking reimbursement for the Student's attending the private facility.

9. The private facility does not provide educational services to the Student. Tr. 2402, 2403.

10. There is no challenge to the lack of educational services being provided while at the private healthcare facility.

11. The Student moved to that facility in about July or August 2019. Tr. 2171, 2312.

12. The Student's Mother began to teach the Student in both the Hungarian and English languages, as a bilingual learner, yet she concluded that the Student was unable to learn Hungarian, and emphasized English, when the Student was very young. Tr. 2071.

13. The Student received a diagnosis of Autism Spectrum Disorder and Mixed Receptive/Expressive Language Delay from the University of New Mexico Center for Development and Disability, with an evaluation date of February 27, 2014, when the Student was two years, nine months, and 22 days old. Ex. A.

14. The Student's Mother has training teaching children with special education disability needs, having obtained a bachelor's degree in special education in Hungary, with motor disability specification, and having taught in special education in the United Kingdom and other six other countries for 10 years. Tr. 2072, 2073, 2081.

15. The Student's Mother recently completed a Master's Degree in Educational Psychology from the University of New Mexico. Tr. 2072.

16. The Student's Mother assisted the Student's Father with another child, who also had special education needs. Tr. 2073-2074.

17. Within the relevant statutory time period, an IEP of March 6, 2017 was in place for services on and after August 10, 2017. Ex. B.

18. The March 6, 2017 IEP concluded the Student was eligible for services based on the exceptionality of autism. Ex. B.

19. Although the Student was in Kindergarten when the IEP was completed, it extended into his first grade year. See Exs. B and G.

20. On February 2, 2018, another IEP was created, which continued to find the Student eligible for services based on autism. Ex. G.

21. At this time the Student was in the first grade. Ex. G.

22. The February 2, 2018 IEP refers back to the March 6, 2017. See Ex. G, p. 2.

23. During the March 6, 2017 IEP the Student attended MT Elementary School. Ex. B.

24. The Student's education at MT Elementary, although not the Student's "home" school, was in a social communication support school classroom setting (SCS). Ex. B. Tr. 235.

25. A SCS classroom focuses on social communication needs in an educational setting for students with communication barriers. *See* Tr. 32.

26. Petitioners do not object to the Student's attendance at MT Elementary for social communication support services.

27. While at MT Elementary, during the March 6, 2017 IEP period, the IEP Team accepted, among other things, that the Student required specialized instruction in fine motor, self-regulation, and motor skills, most appropriately addressed in the social communication support program at MT Elementary which provides autism-specific

strategies and supports to the Student to provide him access to grade-level academics, and provided him with 1065 minutes per week of special education services in MT Elementary's SCS program. Ex. B, p. 12.

28. The 11 Autism Considerations were a part of the March 6, 2017 IEP, which did not find that communication interventions were required. Ex. B, p. 145.

29. Prior speech and language services were discontinued because the Student made significant gains in areas of expressive, receptive, and social language, which negated a need for those services in order to access a regular education curriculum. Ex. B, p. 12.

30. Social work services were increased, however, to 1080 minutes per semester because of the Student would have outbursts longer than five minutes, because his escalations averaged 2-4 times per day in the classroom, and because of transitions and schedule changes. Ex. B., p. 12.

31. The March 6, 2017 IEP stated that the Student's behaviors impeded his learning or that of others, stated the Student was in need of a Functional Behavioral Assessment (FBA), and placed the duty for conducting a Functional Behavioral Assessment on the special education classroom teacher. Ex. B, p. 4.

32. However, the March 6, 2017 IEP also stated that Functional Behavior Assessment had already been conducted. Ex. B, p. 4.

33. Under this March 6, 2017 IEP there is a statement that positive behavioral interventions, strategies, and accommodations were not required to meet the Student's discipline needs in the IEP. Ex. B., p. 4.

34. The Autism Considerations attached to the March 6, 2017 IEP, however, stated that positive behavioral support strategies were required, with development of an FBA followed by a BIP, "if necessary." Ex. B, p. 14.

35. The record does not reflect that a Functional Behavioral Assessment resulted from the March 6, 2017 IEP or that a prior FBA had been conducted.

36. Under the March 6, 2017 IEP occupational therapy services were reduced from 180 minutes per month to 120 minutes per month because he made therapy progress. Ex. B, p. 12.

37. Teacher SM was not listed as a member of the March 6, 2017 IEP. Ex. B, p. 11.

38. The Student remained at MT Elementary School for the February 2, 2018 IEP. Ex. G.

39. The Student's Parents noted their concerns at the IEP meeting reflected by the February 2, 2018 IEP, that their child's behaviors are impeding his ability to be successful in the general education setting, and that they would like strategies for the Student to reach his full potential. Ex. G, p. 2.

40. The Student's Parents also expressed that general education not be reduced, and the need for positive reinforcement, such as getting more attention when calm than attention he receives from inappropriate behaviors. Ex. G, p. 4.

41. The Student's social skills were noted that he was becoming verbally aggressive, which could follow with physical aggression towards classmates, and escalation and then physical aggression toward staff, with the Social Work provider

reporting that Student's outbursts would last longer than five minutes, with escalations two to three times a day. Ex. G, p. 3, 14.

42. The five minute outbursts and the two to three times a day escalations in the February 2, 2018 IEP are similar to those reflected in the March 6, 2017 IEP.

43. The Occupational Therapist noted the Student is aware and understands tools and strategies he can use during his time of escalation, yet that the Student chooses not comply, in that the outbursts do not appear from sensory dysregulation. Ex. G, p.3.

44. As in the March 6, 2017 IEP, the February 2, 2018 IEP stated that the Student's behaviors impeded his learning or that of others, again stated the Student was in need of a Functional Behavioral Assessment (FBA), again placed the duty for conducting a Functional Behavioral Assessment on the special education classroom teacher, yet now stated that the Functional Behavior Assessment was warranted, rather than stating that one had been previously performed, as the March 6, 2017 IEP represented. Ex. G, p. 4.

45. As in the March 6, 2017 IEP, the February 2, 2018 IEP has a statement that positive behavioral interventions, strategies, and accommodations were not required to meet the Student's discipline needs in the IEP. Ex. G, p. 4.

46. As in the March 6, 2017 IEP, the February 2, 2018 IEP attached the 11 Autism Considerations, with one of the consideration stating, however, that positive behavioral support strategies were required, with development of an FBA followed by a BIP, "if necessary." Ex. G, p. 15.

47. The record does not reflect that a Functional Behavioral Assessment resulted from the February 2, 2018 IEP, or that a prior FBA had been conducted.

48. The IEP, on the proposal of the LEA, did begin consolation with the District Comprehensive Support Services Resources Team (DCSSRT team). Ex. G, p. 14.

49. In the February 2, 2018 IEP the Student's Parents requested that the Student receive all of his math, science, and social studies instruction in the general education classroom, yet that was rejected by the IEP Team because of the Student's behaviors in general education, with reduction in the general education setting being reduced by 150 minutes per week from the previous IEP. Ex. G., p. 13.

50. Thus, the Student was to receive special education services in the SCS Level 2 classroom with 465 minutes per week in ELA, 150 minutes per week in math, 600 minutes per week in social skills, and then in the general education setting with adult assistance 150 minutes per week in math, 30 minutes per week in social studies, 30 minutes per week in science, and 225 minutes per week in electives as in music, art, PE, and computer lab. Ex. G, p. 13.

51. Social work services were to be at 1080 minutes per semester, and occupational therapy consolation services at 120 minutes per semester. Ex. G, p. 14.

52. An evaluation report from Centria Healthcare was also presented by the Student's Parents, yet it was not considered at that time by the IEP Team, but that it would be submitted to some unknown person or place for consideration if a need arose for deficits in receptive language. Ex. G, p. 14.

53. That evaluation employed the test instruments of Clinical Interview/Mental Status Examination, Vineland Adaptative Behavior Scales-Third Edition (VABS-3), Autism Diagnostic Interview-Revised (ADI-R), and Autism Diagnostic Observation Schedule-Second Edition (ADOS-2). Ex. F, p. 2.

54. The evaluation noted that the Student's expressive language was much better than his receptive language. Ex. F, p. 4.

55. The diagnostic conclusions resulted in a continued diagnosis of Autism Spectrum Disorder, with a recommendation for an individualized service plan including Applied Behavior Analysis (ABA) Therapy, of 35-40 hours per week, to allow the Student to cope with frustration without resorting to aggressive and disruptive behavior, to express wants and needs, to allow him to develop and implement strategies to cope with frustration, to use and read nonverbal cues, to express his wants and needs of others, to understand and demonstrate concepts of reciprocal play, and to independently care for his own hygiene. Ex. F, p. 8.

56. The Centria evaluation also recommended that the Student "should be included with typical peers as much as possible to provide peer models." Ex. F, p. 9.

57. The Centria evaluator did not testify at the Due Process Hearing.

58. The Centria evaluator is noted in the evaluation as being a licensed New Mexico Psychologist. Ex. F, pp. 7, 9.

59. The Student remained at MT Elementary School through an IEP Progress Report dated February 19, 2018. Ex. H.

60. In the February 19, 2018 IEP Progress Report it was noted that the Student's aggression had been decreasing since in the past two weeks, although he still often times was unable to participate in math due to his behavioral challenges. Ex. H, p. 2.

61. On May 11, 2018, an Amendment to the IEP was created. Ex. I.

62. In it, the Student's Parents continued to express concern about the Student's behaviors yet also sought greater time in the general education setting. Ex. I, p. 2.

63. The May 11, 2018 Amendment noted the Student's maladaptive behaviors had improved significantly since the IEP of February 2018, that his escalations were not physically aggressive, and that he had been able to attend his general education math class more successfully. Ex. I, p. 2.

64. As in the March 6, 2017 IEP, and the February 2, 2018 IEP, the May 11, 2018 Amendment has a statement that positive behavioral interventions, strategies, and accommodations were not required to meet the Student's discipline needs in the IEP. Ex. I, p. 5.

65. The 11 Autism considerations were not included as a part of this May 11, 2018 Amendment, Ex. I, although an "Autism Considerations Checklist" was noted to be an accommodation or modification for the Student "as needed." Ex. I, p. 9. It is noted however that this was an amendment to the existing IEP, rather than a new IEP. Id.

66. As in the February 2, 2018 IEP, the May 11, 2018 Amendment stated that the Student's behaviors impeded his learning or that of others, again stated the Student was in need of a Functional Behavioral Assessment (FBA), again placed the duty for conducting a Functional Behavioral Assessment on the special education classroom teacher, and again stated that the Functional Behavior Assessment was warranted. Ex. I, p. 5.

67. The record does not reflect that a Functional Behavioral Assessment resulted from the May 11, 2018 Amendment or that a prior FBA had been conducted.

68. The May 11, 2018 Amendment proposed and accepted that the Student's behaviors as they impacted his general education setting were decreasing from four escalations per day in February to one escalation per day, that the Student was able to

participate in the general education classroom 69 minutes per week on average, and that he was able to stay in the general education math class for about 15-20 minutes each day, based on Open Skies BMS data. Ex. I, p. 14.

69. As a result, the Student's Social Communication Support Level 2 classroom services were amended to 450 minutes per week in ELA, 210 minutes per week in math, 60 minutes per week in science, 60 minutes per week in social studies, 600 minutes per week in social skills, and 250 minutes per week in the general education setting for math, art/music, library, and PE, with adult assistance. Ex. I, p. 14.

70. The Student's Parents requested that the Student's private (not an LEA agent) BMS (behavior management specialist) from Open Skies accompany the Student in his educational activities, which was accepted by the May 11, 2018 Amendment, to continue consistency to support the Student's social/emotional needs. Ex. I, p. 14.

71. The 11 Considerations for Autism were not attached to this IEP Amendment. Ex. I.

72. By May 20, 2018, the Student's behavior had improved greatly since February, with aggression decreasing, and rarely exhibiting aggressive behaviors, although he was eloping. Ex. J, p. 2.

73. On August 16, 2018, a crisis intervention was required with the Student which resulted in a one minute restraint because of physical aggression by hitting, kicking, grabbing, biting, head butting, and grabbing, with verbal aggression, and where the Student hit his own head one time, and staff had bite marks and a swollen knee. Ex. M. The Parents were notified of the incident by phone. Id.

74. Another crisis intervention was required on August 20, 2018, resulting in a one minute restraint, where again the Student hit, kicked, and grabbed, and also scratched, head butted, pulled hair, with verbal aggression, resulting in a scratch to the Student's upper right arm and a scratch on a staff member's cheek. Ex. N, p. 3. Attempts were made to contact the Parents on that day. Id.

75. On August 21, 2018, another IEP Amendment arose, amending the February 2, 2018 IEP and the May 11, 2018 IEP Amendment. Ex. O.

76. The August 21, 2018 Amendment was based on the Student's maladaptive behaviors between August 1, 2018 and August 21, 2018, which included elopement, property destruction, verbal aggression, including biting, although it was reported these behaviors did not occur in the home environment. Ex. O, p. 3.

77. Other reported examples of maladaptive behavior were biting, hitting, kicking, scratching, grabbing, grabbing clothes, pulling hair of staff, and throwing backpacks, tearing objects off the wall, pulling things off counters, pulling off a cabinet door, throwing desks and chairs, tearing books, and school work, and throwing books. Ex. O, p. 4.

78. The Student's Parents sought the Student to use the tools and strategies he learns in school to apply in environments outside of the school setting. Ex. O, p. 3.

79. The Student could not work with a partner in math, and he became agitated and ran away, and not participating or staying the full length of time in math. Ex. O, p. 6.

80. With this August 21, 2018 Amendment, it was again noted the Student's behaviors impeded his learning or that of others, and again stated the Student was in

need of a Functional Behavioral Assessment (FBA), again placed the duty for conducting a Functional Behavioral Assessment on the special education classroom teacher, and again stated that the Functional Behavior Assessment was warranted. Ex. O, pp. 6-7.

81. However, unlike the prior IEPs and Amendments, this time the box was left unchecked as to whether positive behavioral interventions, strategies, and accommodations were included in the IEP. Ex. O, p. 6.

82. The record does not reflect that a Functional Behavioral Assessment resulted from the August 21, 2018 Amendment, or that a prior FBA had been conducted.

83. With this August 21, 2018 Amendment, the LEA sought the Student's Parents to gather data to update the Student's FBA and to write a Behavior Implementation Plan (BIP) after the FBA. Ex. O, p. 18.

84. Additionally, the August 21, 2018 Amendment reduced the Student's math instruction in the general education setting from 90 minutes to 60 minutes per week outside of the general education environment (general education math will be in a special education setting), disallowed the Student's Parents from being present to help the Student transition and to increase participation, disallowed the further use of the outside BMS during the school day, and placed a duty on the LEA to provide the LEA BMS services instead. Ex. O, pp. 18-19.

85. The 11 Considerations for Autism were not attached to this IEP Amendment. Ex. O.

86. A crisis demanded intervention on October 23, 2018, where the Student was restrained about .25 minutes, with some verbal aggression, hitting, punching, grabbing, biting, and hair pulling, with the Student's Parents contacted. Ex. P.

87. An IEP Progress Report was completed on October 25, 2018, where the Student was learning strategies for self-regulation and using them 70% of the time, rather than having a meltdown. Ex. Q.

88. The next IEP took place on December 17, 2018. Ex. R.

89. In this IEP the Student continued to be eligible for services due to autism. Ex. R, p. 1.

90. The Student's Parents' goals were for the Student to be independent in the long run, and present his emotions in a more socially acceptable way. Ex. R, p. 3.

91. The December 17, 2018 IEP noted the Student made "incredible progress" toward his social skills goal, where the goal was to use words instead of his body to find a solution, and that he rarely uses his body to harm others. Ex. R, pp. 4, 7.

92. This incredible progress reflected well on the Student's communication needs – he asks permission to go to another room rather than running out of class, and that he rarely refuses to perform a task requested of him. Ex. R, p. 8.

93. The Student attended general education in math, yet did not attend consistently. Ex. R, p. 5.

94. According to the December 17, 2018 IEP, it was accepted that the Student would continue in the Social Communication Support Level 2 classroom for academics and social skills, to provide 285 minutes per week in regular education for math, science, social studies and electives, with adult assistance for those 285 minutes, 1080 minutes per semester of social work services, and updated the 11 Autism considerations. Ex. R, p. 16.

95. The 11 Autism Considerations sheet was attached, and said "no" to whether positive behavior support strategies were to be implemented. Ex. R, p. 17.

96. As with the August 21, 2018 Amendment, in the December 17, 2018 IEP the box was left unchecked as to whether positive behavioral interventions, strategies, and accommodations were included in the IEP. Ex. R, p. 5.

97. This December 17, 2018 IEP again noted the Student's behaviors impeded his learning or that of others, but stated that an FBA did not need to be conducted, and that an FBA had already been conducted. Ex. R, p. 5.

98. The Prior Written Notice of the IEP of December 17, 2019, proposed, and was accepted, that a Behavior Intervention Plan be developed, because "staff working with [Student] have conducted a Functional Behavior Assessment." Ex. R, p. 16.

99. The 11 Considerations for Autism were attached to this IEP. Ex. R.

100. The record does not reflect that a prior FBA had been conducted.

101. During the 2017-2018 school year and into the 2018-2019 school year Teacher SM communicated with CC, a member the LEA's DCSSRT program (the District Comprehensive Support Services Resources Team) regarding the Student's behaviors, and positive practices to assist. Tr. 49, 74, 102-103, 104-106, 139-140, 144, 188, 255-256, 287, 322-323, 325-326, 347-348, 804-806, 809-811, 813-822, 829-831, 842, 860-861, 862.

102. Part of the process Teacher SM used was the COMI, a self-help reflective teaching tool, which was a Tier 1 intervention (a non special education tool). Id, and Tr. 2806-2807.

103. The COMI process was a tool which helped decrease the Student's escalations by the use of positive behavioral interventions, to the extent that the LEA determined no further restrictions were required. Tr. 124-25, 875, 523-527, 529, 609, 871-872, 936-938, 2563-2564.

104. Two developments occurred on January 24, 2019: A Functional Behavioral Assessment, and a Crisis Plan. Exs. T and S, respectively.

105. The facilitator for both was Teacher SM, the SCS II Special Education Teacher. Ex. S, p. 1, and Ex. T, p. 1.

106. This is the first Functional Behavioral Assessment reflected in the record. Id.

107. This Functional Behavioral Assessment assessed behavior information consistent with the physical aggression maladaptive behaviors expressed in the August 21, 2018 Amendment, however the physical aggression behavior frequency is 1 incident per day out of 10 days. Ex. T.

108. As a result of the Functional Behavioral Assessment, a Behavior Intervention Plan (BIP) was completed on February 11, 2019. Ex. U.

109. In it, prevention strategies were incorporated, including self-regulation verbal reminders, with the target behavior concluded to be a performance deficit, rather than a skills deficit. Ex. U, pp. 1, 3.

110. On February 22, 2019, an annual goal IEP progress report was developed which noted, among other things, that the Student was staying regulated in general education with adult support, and was attending general education in math about 2 to 3 times a week. Ex. V, p. 5.

111. Another IEP Amendment arose on March 4, 2019. Ex. W.

112. As with other IEPs and IEP Amendments, it included some information contained in the prior documents, yet also explained that since the Fall Break (11/12/18) and the Winter Break (12/20/18) the Student exhibited physical aggression 13 times in two days out of 26 days, and within the span of time between the Winter Break (1/7/19) and March 1, 2019, the Student exhibited physical aggression 95 times in 10 days out of 35 days. Ex. W.

113. Two Threat Assessments resulted since the Winter Break: (1) on 1/25/19 the Student said to a peer that the child did not deserve to live, and that the Student was going to bring a gun to school the next day; and (2) on 2/6/19 the Student told staff that if the staff member did not stop what he was doing then the staff member would be dead, with the Student stating he was not kidding, and by stating five times the staff member's life would be over. When questioned by Teacher SM, the Student explained that the statements meant that the individuals were going to die. Ex. W, p. 4.

114. The March 4, 2019 Amended IEP noted that the threats often precede physical aggression such as when he states he will punch a staff member in the face then he will follow through with trying to punch a staff member in the face. Ex. W, p. 4.

115. Self-regulation strategies were used, like taking a break, deep breathing, or taking a walk, Ex. W, p.4, although, like the prior IEP documents, for discipline needs, the area is blank as to whether positive behavioral interventions, strategies, and interventions were included in the IEP. Ex. W, p. 6.

116. The Student's Parents expressed their concern that the Student's behaviors are becoming so "scary" that action needs to be taken because as he gets older he may

gain access to a gun, and could be a threat to the Mother; concern was expressed that he beat up an 18 year old after school staff member. Ex. W, p. 6.

117. It was determined that a Functional Behavior Assessment need not be performed, because one had been performed already.[2] Ex. W, pp. 7-8.

118. At the March 4, 2019 IEP Amendment session the Student's Parents proposed a Certified Behavior Analyst, which was rejected pending results of new data based on the six weeks of the ongoing BIP. Ex. W., p. 17.

119. The Student's Parents expressed concern that the Student did not understand why something was right or wrong, or why something was not his fault; thus, a new Speech and Language assessment was deemed necessary. Ex. W, p.17.

120. The 11 Considerations for Autism were not attached to this IEP Amendment. Ex. W.

121. Also on March 4, 2019, a review of the existing evaluation data (a REED) was conducted for an early reevaluation. Ex. X.

122. March 4, 2019 produced as well another Functional Behavioral Assessment, describing the physical aggression similar to that noted in the prior IEPs and FBA. Ex. Y.

123. This resulted in another Behavior Intervention Plan, also dated March 4, 2019. Ex. Z.

124. This BIP had suggested strategies such as offering a brain break, using roller coaster breathing, and verbal reminders, yet, unlike the BIP of February 11, 2019, it was

[2] Note at this stage an FBA had in fact been performed earlier, on January 24, 2019.

concluded that the target behavior was now a skills deficit, rather than a performance deficit. Ex. Z, pp. 1, 3.

125. On March 7, 2019, the Student was suspended from school for telling a peer he would be dead the rest of his life, and then punched the peer. Ex. AA, p. 4.

126. The final IEP relevant in these proceedings took place on April 22, 2019. Ex. AA .

127. In it, the results indicate that the Student understands grade-level literary and informational texts, that he applies effective comprehension skills and strategies, that he demonstrates steady progress in phonics, that he has a growing command of grade-level words and word learning skills, that the expectation was continued growth in reading with exposure to increasingly complex texts. Ex. AA, p. 3.

128. This final IEP also notes the physical aggression similar to that contained in the March 4, 2019, yet adds that since March 4, 2019 and between April 18, 2019, the Student exhibited physical aggression 190 times in 6 out of 23 days. Ex. AA, p. 4.

129. While it was noted the Student did use some self-regulation strategies, they were used when staff came to observe him after his suspension form the program. Ex. AA, p. 4.

130. It notes the March 7, 2019 suspension, and an April 18, 2019 incident where the Student threatened five times to break peers' legs because they ran faster he did. Ex. AA, p. 4.

131. It also finds that the Student demonstrates receptive language skills by referencing instructions and conversations in order to follow directions and rules. Ex. AA, p. 5.

132. In April, the IEP notes that the Student's Mother disagreed with the suspension in March, and that she did not tell the Student that he was suspended because to her the Student's suspension is not a negative consequence. Ex. AA, p.8.

133. Although this final IEP is dated April 22, 2019, it contains information dated May 2, 2019. See Ex. AA, pp. 5, 8, 13, and 19.

134. The April 22, 2019 IEP was tabled to gather additional information, thus proceeding into the May 2, 2019 portion of the IEP. Ex. AA.

135. One of the May 2, 2019 statements was that taken from the Student's Mother, where she references that because the Student's verbal skills are so developed, according to his counselor, the Student can portray he is able to understand matters which he cannot understand, and that what the Student says cannot be taken at face value. Ex. AA, pp. 8, 19.

136. The April 22, 2019 Written Notice of Proposed Actions as a part of the April 22, 2019 IEP, also notes both April 22, 2019 matters and May 2, 2019 matters. Ex. AA, pp. 20-21.

137. The Student's Parents request for an updated BIP was rejected, although a new FBA was accepted. Ex. AA, p. 19.

138. The Student's Parents' request for daily BCBA services was rejected because the Student's social emotional skills and emotional regulation could be addressed through a teacher and social worker, although BCBA support services to staff was accepted for collaboration and training of teachers and staff for the Student's social emotional needs. Ex. AA, p. 20.

139. A request by the Student's Parents to not have the Student participate in competitive sports was rejected. Ex. AA, p. 20.

140. The LEA proposed, and it was accepted, over the Student's Parents' objections, that the Student be provided special education services in a Social Emotional classroom, whereas the Student's Parents sought continuation of services in the Social Communication Support Level 2 classroom. Ex. AA, p. 20.

141. The focus for the new services in the Social Emotional Support classroom was to provide the Student with social skills, emotional strategies, self advocacy, and self-efficacy so that the Student would be able to access general education curriculum. Ex. AA, p. 20.

142. The 11 Considerations for Autism were not attached to this final IEP Amendment. Ex. AA.

143. The LEA contends that the Student's Mother was not credible because, among things, she considered the LEA's staff to be incompetent. Credibility relates more to truthfulness rather than her opinions about staff. It is found that although the Student's Mother's testimony was self-serving to some extent, the fact that she called the staff incompetent does not impact credibility. Having heard her testimony and evaluated her demeanor, it is found she is a mother of a child for whom she wants the best, and she is willing to seek due process to assist her with protecting what she believes is best for her child, and that includes having an opinion about the LEA's staff or their educational techniques. This does not impact her credibility.

144. Similarly, credibility is not impacted by the evidence presented by the LEA that the Student's Mother and the Student's Father had marriage difficulties. The

Student's Mother was a victim of domestic violence, and the Student's Father was incarcerated because of it. Abuse of alcohol was present. There was a subsequent divorce. This does not impact the credibility of the Student's Mother or the Student's Father. Having reviewed their demeanor and listened to their testimony at the due process hearing, it is found they are generally credible as to truthfulness. The issue of the social environment in the Student's home life was allowed for the limited purpose of forming, or corroborating, a basis for understanding the increase in the proposed social-emotional component of the Student's education, in comparison with the social-communication aspect of his educational program.

145. All witnesses are generally found to be credible for truthfulness. There is no single witness who stands out as being untruthful in these proceedings.

146. Weight is given to JB as the LEA's BCBA expert, as the only expert to testify in the case relating to behavioral aspects of the Student's educational needs. She was available throughout the hearing, and listened to the testimony of the witnesses. A subsequent determination was made regarding her credibility after the case closed due to, after two weeks of testimony, an issue about how data could be perceived, which may have come across as a bit of humor. A determination was made that this was not the case and it had no bearing on her credibility, and she continues to be found credible.

147. Teacher SM held up well under three days of testimony. She is a dedicated educator. She is found to be credible.

148. CC is a truthful person. She was forthright with her responses. She is found to be credible.

149. JL was a clear witness, sincere. She is credible.

150. DT, although unaware of some matters, is nonetheless found to be truthful and credible. She is an administrator (a principal), in an oversight role.

151. SB is a credible EA and testified to what her knowledge was of the Student. She was truthful. She corrected herself to make sure her testimony was correct. She is credible.

152. DG is an EA, and although a bit nervous, she was credible with what she could recall.

153. RH is an EA who answered questions directly. She is credible.

154. RC, a physical education teacher, did not remember attending a meeting, but her statement that she did not remember it adds to her credibility. She is credible.

155. MK, a family liaison, also has personal experience with a child with autism. She was truthful. She is credible.

156. LS was truthful, and she explained what did and did not take place as a social worker. She gave thought to her answers before responding to what she could recall. She admits to making a mistake. She is credible.

157. LD testified over the telephone. It was difficult to gauge her credibility since it was over the telephone. She was not necessarily direct in her responses. However, it did not reflect adversely on truthfulness. She is credible.

158. LF was forthcoming and truthful with his testimony. Weight is given to it. He is credible.

159. PC was hesitant in his answers, and was fairly new with the LEA, yet his truthfulness is not impacted by these matters. He is credible.

160. BD, the MZ teacher, also worked in the private sector before her role in the social emotional support program at MZ school – she was well versed in the programs, and weight is given to her testimony. She is credible.

161. CCO performed a speech language record review, yet had never met the Student, so weight is accorded to her testimony appropriately. She is found to be truthful, and therefore, credible.

162. MI was a speech language evaluator, and she had met with the Student. More weight is given to her testimony than that of CCO, because of actually meeting the Student. She was truthful, and held up well during her testimony. She is credible.

163. Should a Finding be more applicable as a Conclusion, or *vise versa*, then it is to be interpreted under the proper classification.

ANALYSIS AND LEGAL CONCLUSIONS

Jurisdiction

Unless otherwise found, jurisdiction properly lies over the parties and over the subject-matter. 34 CFR § 300.507(a); §6.31.2.13(I)(1) and §6.31.2.13(I)(3) NMAC.

Speech Language

This portion of the Decision addresses Issue 1, and part of Issues 10 and 16.

Speech and language therapy is claimed by the Student as a related service, not as an eligibility issue. Nonetheless, eligibity factors lead to an understanding of the claimed speech and language service request, as a related service. That is, borrowing from eligibility, the speech and language impairment must be a communication disorder which adversely affects the child's educational performance. *See* 34 CFR § 300.8(c)(11). Then, if so, the question becomes whether speech and language therapy is a related

service, that is, a service necessary to aid the child with the disability to benefit from the special education, and to be performed by a non-physician. ***See*** *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984). The related service definition comes under a relatively broad standard. *Jefferson Co. Sch. Dist. v. Roxanne B.*, 702 F.3d 1227, 1236 (10th Cir. 2012).

Some IEP documents address speech and language therapy. *See* Exs. B, G, W. Given the consideration of the service by the IEPs, whether or not they ultimately found speech and language services appropriate, it is concluded that speech and language therapy, as a service, comes within the relatively broad standard for a defined related service.

With it meeting the definition of a related service, the next step is to determine if speech and language therapy is necessary to aid the Student to benefit from his special education, in those IEPs which did not include speech and language therapy.

At the end of the Student's kindergarten year, the speech and language services were discontinued. Ex. B, Tr. 679, 2122-2123. Although the IEP noted that the Student had oral and written communication needs, Ex. B, p. 4, it nonetheless rejected continued speech and therapy services because the Student made significant gains in expressive, receptive, and social language, where he met all of his goals, thus finding the services to no longer to be necessary for the Student to access his regular education curriculum. Ex. B, p. 12. This was accepted by the Team members – that is, there is nothing in the IEP showing the Student's Parents objected at the time to discontinue speech and language services. Ex. B., p. 12. The Student's Mother was present at the meeting. Ex. B., p. 11. The relevant IEP at the time is Exhibit B, dated March 6, 2017. Ex. B. The limitation

period begins on August 10, 2017, so the March 6, 2017 IEP is outside of that window. However, this March 6, 2017 IEP continues with its services (or lack thereof) in effect on August 10, 2017, through the next IEP, which was February 2, 2018. Ex. G. Thus, it is concluded that because the Petitioners did not express their request for continued speech and language therapy to the IEP Team during the March 6, 2017 IEP, which continued in place on August 10, 2017, and thereafter until the February 2, 2018 IEP meeting, then they did not administratively exhaust a claim for speech and language services between August 10, 2017, and February 8, 2018. ***See*** *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1262. Petitioners have not produced evidence that they sought to change the current IEP during that time. Id. Thus, any claim for speech and language services during this period is denied.

Analysis continues with the February 8, 2018 IEP. Ex. G. The Petitioners did express, and therefore did exhaust, their desire for speech and language services during this IEP. Tr. 2122-2123. The evidence they present is by the Student's Mother, in her belief that the Student deceives the LEA's staff by his ability to talk. Tr. 2124. Other evidence is that the February 8, 2018 suggests a weakness in social communication and sensory processing. Ex. G, p. 3. The IEP of February 8, 2018, also speaks of referring the Centria Healthcare evaluation of July 13, 2017, to some unstated person or entity. Ex. G, p. 14. The Centria evaluation diagnostically concluded the Student continued to meet the criteria for Autism Spectrum Disorder (ASD), by demonstrating substantial functional impairment in social communication and social interaction, with deficits in, among other things, normal back and forth conversation, and poorly integrated verbal and nonverbal communication. Ex. F., p. 6. The evaluator noted that the Student was

responsive to her questions, but that his answers were odd. Ex. F., p. 2. She found, as well, that the Student's score exceeded the cutoff criteria, in that he had communication deficits compared with his peers. The evaluator provided a suggestion that the LEA reconsider the Student's need for speech therapy because of receptive language deficits. Ex. F. p. 9. There is nothing in the evaluation which reviewed educational records, and the evaluator was not a speech and language pathologist. Ex. F. Tr. 2523-2524. Rather, the evaluator was a licensed psychologist, a BCBA (Board Certified Behavior Analyst). Ex. F, p. 7. The evaluator did not testify at the due process hearing. There is no opinion from the evaluator that continued speech language therapy for the Student required, or was necessary for, the Student to benefit from his special education services in his IEP. Ex. F.

A Speech and Language Evaluation was conducted by the LEA's Speech and Language Pathologist on March 19, 2018, and on April 9, 2018. Ex. 30. It was conducted by MI, MS CCC-MLP. Ex. 30. MI testified at the due process hearing. Tr. 2531. She reviewed the Centria Report, which led her to perform her additional testing. Tr. p. 2533. Ms. MI met with the Student twice, Tr. at 2534, obtained consent to perform the tests from the Student's Parents, Tr. 2533, and conducted the Comprehensive Assessment of Spoken Language (CASL) test on the Student, with information obtained from the Student's teacher with a social skills improvement system rating. Tr. 2534. Given her testing procures, she concluded that the results of her testing were consistent with the IEP Team's prior decision to discontinue speech and language services because the classroom the Student was in was a social communication classroom, where the classroom structure had already integrated the Student's

communication deficits. Tr. 2537-2538. Ms. MI does not normally ask parents for ratings, because her goal is to assess how the Student is functioning educationally. Tr. 2545. The evaluation concluded that the Student's general language ability fell within the average range, as did his receptive language, but that he had social skills deficits. Ex. 30, pp. 2-4.

It is concluded there was a procedural violation by the February 8, 2018 IEP because the assessment by Centria was not considered by the Team at the meeting, but was to be "referred" elsewhere to some unknown person or entity. *See* 34 CFR § 300.324(a). However, this procedural violation does not result in a denial of FAPE. *See* 34 CFR § 300.513(a). The Petitioners have not proved that there is a rational basis to conclude it impeded the Student's right to a free appropriate public education, significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. *Id.* at (a)(2). It amounted to a technical deviation, particularly since the evidence showed the Centria evaluation was reviewed by Ms. MI soon after the IEP meeting. Technical deviations alone are insufficient to establish a denial of free appropriate public education. ***See*** *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d at 726. Therefore, it is concluded that the procedural defect did not result in a substantive denial of FAPE. Id.

The issue of a related service will be reviewed substantively. The Petitioners have not met their burden to prove that speech and language therapy was a necessary, required, service to aid the Student to benefit in his special education. ***See*** *Tatro*, 468 U.S. at 891. The question for review is to determine if the IEP is reasonable, not whether

it is regarded as ideal. *Endrew*, 137 S. Ct. at 999. The clinical evaluator did not testify, and her report failed to reach a conclusion that speech and language services were necessary or required for educational benefit, but only suggested, as a BCBA and not as a SLP, that the LEA reconsider the loss of those services. In other words, perhaps an ideal Plan might include speech language services, but the Petitioners did not prove that Plan without the services was nonetheless unreasonable. Deference is given to the expertise and exercise of judgment by the school authorities, particularly with the testimony and evaluation by Ms. MI, the SLP. *Endrew*, 137 S.Ct. at 1001.

The LEA did not provide the Petitioners with a copy of the SLP Speech and Language Evaluation, Ex. 30, until the Due Process Hearing, although Ms. MI called the Student's Mother and shared the results with her. Tr. 2327, 2492. The Student's Parents had consented to the evaluation. Tr. 2533. From April 9, 2018 (the last date in the SLP evaluation date, noted for reference, since it is undated, *see* Ex. 30) and onward through these relevant proceedings, there were five IEP-type documents (IEPs or IEP Amendments), to wit: May 11, 2018 IEP Amendment (Ex. I), August 21, 2018 IEP Amendment (Ex. O), December 17, 2018 IEP (Ex. R), March 4, 2019 IEP Amendment (Ex. W), and April 22/May 2, 2019 IEP Amendment (AA). By the time of the March 4, 2019 IEP, the LEA proposed a speech and language assessment. Ex. W. At none of the five IEP-type meetings was the SLP's Speech and Language Evaluation considered, or disclosed. Id. Among other things, an appropriate plan must consider the results of the initial or most recent evaluation of the child. *See* 34 CFR § 300.324(a)(iii). The five IEP-type Plans did not consider this SLP Speech and Language Evaluation. The Student's Parents had not been provided a copy of the report. Tr. 428.

It is concluded that there were five procedural violations due to the lack of consideration of the SLP Speech and Language Evaluation. 34 CFR § 300.513(a)(2). The next question is whether the Petitioners have proved that there is a rational basis to conclude the five violations impeded the Student's right to a free appropriate public education, significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. *Id*. The Student's Mother brought up at every IEP meeting since the SLP Evaluation that speech and language services had been taken away from her son. Tr. 2326 - 2327. She had consented to the SLP Evaluation. Ex. 30. She was aware of the report, after it was completed. Tr. 2327-2328. She was told the Student did not need speech and language services. Tr. 2324. However, the evidence from the Petitioners does not go to the next level of proof, that is, whether the procedural violations amounted to a substantive violations. The evidence does not show the impact it had them, or what they would have done differently. It would be left to conjecture to conclude that the failure to produce or consider the SLP Evaluation impeded the Student's right to a free appropriate public education, significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. 34 CFR § 300.513(a)(2)(i-iii). As a result, it is concluded the procedural errors did not rise to a violation of FAPE. This does not excuse the procedural violation. It concludes only that it was not a substantive denial. The LEA is ordered correct this error and to now consider all evaluation reports at IEP meetings

and to accordingly provide all future evaluation reports to the Petitioners. 34 CFR § 300.513(a)(3).

As for implementation of the March 4, 2019 IEP Amendment, it is concluded the LEA did not implement the March 4, 2019 IEP (Ex. W) portion of a speech language assessment as soon as possible after the meeting. *See* 34 CFR § 300.323(c)(2). There is nothing in the IEP requiring first that a REED must be performed. Ex. W. Nonetheless, a REED (Review of Existing Evaluation Data) was performed, with an evaluation recommended on April 9. 2019 Ex. X. No one from the LEA contacted the Student's Mother about conducting a speech and language evaluation. Tr. 2126. MT Elementary was on a year around schedule, commencing July 2019. Tr. 2170. The Student left the LEA's educational setting on May 2, 2019, Tr. 2312, and then in August 2019 he entered his private healthcare setting. Tr. 2171. A speech and language assessment had not been performed prior to his leaving. Tr. 284.

Improper implementation of an IEP is viewed as a procedural defect under the IDEA. *See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 432 (persuasive). Thus, the burden is on the Petitioners to prove the procedural defect (1) impeded the Student'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. 34 CFR § 300.513 (a)(2).

While not bound by Ninth Circuit precedent, case law regarding lack of an initial evaluation is informative to this issue regarding lack of an assessment for SLP in the procedural context. **See** *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105,

1119 (9th Cir. 2016). In *Timothy O*, id., it was concluded the Petitioners need not definitely show that absent the error educational placement would have been different, but rather that the failure to obtain mandated medical information about an autistic child violates the goals of the IDEA (as in an evaluation for autism) and renders the achievement of FAPE impossible. Id. at 1124, 1126. A similar concept arises in this case with the failure to conduct the SLP mandated by the IEP Team. The mandate under the IEP of March 4, 2019, specifically stated that the IEP Team "agrees that an updated SLP assessment is necessary to determine [the Student's] receptive language needs." Ex. W, p. 17. The basis for it was at the LEA's request, due to the Student's Parents' concerns that the Student does not understand right or wrong behavior, that the Student's understanding is limited as to why consequences exist, and that the Student lacks an understanding that it is his behavior that needs to be changed, rather than someone else's behavior. Id. This is what the IEP states is demanded. ***See*** *Sytsema*, 538 F.3d at 1316.

Also in this context is a recent District of Colorado decision where a four-month delay in finding residential placement demanded by the IEP resulted by its terms in a substantive violation based on the procedural violation. ***See*** *C.W. through B.W. and C.B. v. Denver County Dist.*, 119 LRP 37315, No. 17-CV-2462-MSK SKC No. 1 (D. Colo., September 25, 2019). The failure to have the service provided itself became a substantive failure. Id.

Considering these two cases with the case at hand, it is also concluded that the procedural violation of not implementing the IEP's SLP assessment language resulted in a substantive failure, for which the Petitoners have met their burden. 34 CFR § 300.513

(a)(2). Not having the assessment is like "putting the cart before the horse," because absent the assessment which the Team mandated a void existed in the eventual data needed for behavior issues presented by this Student. The Student was in the SCS classroom when this mandate for an SLP assessment was made – that is, it was due to a communication need the Team found to be appropriate even if the Student was in the SES classroom, which was a communication support classroom. Not knowing the evaluation results because an assessment evaluation was not performed rises to rendering the achievement of FAPE impossible. This results in a violation of FAPE because it impeded the Student's right to a free appropriate public education. 34 CFR § 300.513 (a)(2)(i).

Autism -- 11 Considerations, FBAs, Goals, Characteristics

This portion of the Decision addresses Issues 2, 3, 4, 5, 9, 10, and 16.

The Petitioners allege a continued denial of FAPE, relevant to Autism, because the Student's IEPs did not contain appropriate measurable goals designed to enable him to make progress in the educational system, because the IEPs did not include strategies based on peer reviewed research, and if there were strategies, whether they were implemented, because the IEP meetings did not have individuals capable of interpreting an evaluation or knowledgeable about the LEA's resources, and because the IEPs did not meet the 11 considerations for Autism. *See* Issues 2, 3, 4, 9 and 16.

"Autism" is defined as a developmental disability which affects verbal and nonverbal communication and social interaction, and adversely affects educational performance. 34 CFR § 300.8(c)(1)(i). Characteristics include engagement in repetitive activities and stereotyped movements, a resistance to environmental or daily routine

changes, and unusual responses to sensory experiences. *Id*. The disability is generally evident before age three, *id.*, yet the same characteristics may be manifest after age three. *Id*. at § 300.8(c)(1)(iii). Autism is inapplicable if the child's educational performance is adversely affected because, primarily, the child has an emotional disturbance. *Id*. at § 300.8(c)(1)(ii). An "emotional disturbance" is defined as a condition where over a long period of time and to a marked degree the child's educational performance is affected by an inability to learn not explained by intellectual, sensory, or health factors, or an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, or inappropriate types of behaviors or feelings under normal circumstances, or a general mood of unhappiness or depression, or a tendency to develop physical symptoms or fears associated with personal or school problems. *Id*. at § 300.8(c)(1)(4)(i).

In this case, the Student has been deemed eligible for services because of autism. Exs. B, G, I, O, R, W, and AA. These are for IEPs or IEP Amendments within the statute of limitations period, that is, an IEP of March 6, 2017 was in place for services on and after August 10, 2017, and thereafter.

In New Mexico, for students coming within the autism spectrum disorder (ASD) eligible for special education services under 34 CFR § 300.8(c)(1), eleven strategies "shall" considered by the IEP team in developing the IEP for the student. §6.31.2.11(B)(5) NMAC. Consideration of the strategies must be documented by the IEP Team. Id. The strategies must be based on peer-reviewed, research based educational programing practices to the extent practicable. Id.

The 11 considerations of Autism for school-aged children required to be made a part of an IEP 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 relevant documents labeled IEPs are as follows: the IEP of March 6, 2017 (Ex. B), the IEP of February 2, 2018 (Ex. G), and the IEP of December 17, 2018 (Ex. R). Each of these IEPs have attached to them a sheet labeled Autism Considerations, with boxes to check for the 11 considerations of Autism, a noted above. *See* id. The Autism Considerations boxes comport with, and are in the same pattern (although unnumbered) as the 11 considerations for Autism under §6.31.2.11(B)(4)(5) NMAC, noted above. *See* Exs. B, G and R. Each of these three IEPs check the following boxes the same way (referenced by number according to the 11 numbered consideration for Autism): (1) no to extended educational programming, (2) yes to daily schedules, (5) no to futures planning, (6) no to parent or family training and support, (7) yes to suitable staff-to-student ratio, (8) no to communication interventions, (9) yes to social skills supports, (10) yes to professional educator and staff support, and (11) yes to teaching strategies based on peer reviewed, research-based practices. Id. The March 6, 2017 IEP checks yes to (3) in-home and community-based training, whereas the February 2, 2018 and December 17, 2018 IEPs check no. *Compare* Ex. B *with* Exs. G and R. The March 6, 2017 IEP and the February 2, 2018 IEPs check yes for (4) positive behavior support strategies, whereas the December 17, 2018 IEP checks no. *Compare* Exs. B and G *with* Ex. R.

There are also four IEP Amendments, to wit: IEP Amendment of May 11, 2018 (Ex. I), IEP Amendment of August 21, 2018 (Ex. O), IEP Amendment of March 4, 2019 (Ex. W), and IEP Amendment of April 22/May 5, 2019 (Ex. AA). None of the IEP Amendments contain the 11 Autism Consideration checklists. *See* Exs. I, O, W, and AA.

The Petitioners' position is that an IEP is an IEP, regardless of whether it is labeled as an amended IEP, which must document consideration of the 11 New Mexico Autism Considerations. The Respondent's position is that it is entitled to amend an IEP, and that the amendment only amends the portions that were not changed, thus retaining the original IEP 11 Autism Considerations contained in the underlying IEP. Thus, to follow the Respondent's argument: the March 6, 2017 IEP (Ex. B), is not amended; the February 2, 2018 IEP (Ex. G) is amended by the IEP Amendments of May 11, 2018 (Ex. I) and August 21, 2018 (Ex. O); and the December 17, 2018 IEP (Ex. R) is amended by the IEP Amendments of March 4, 2019 (Ex. W) and of April 22/May 5, 2019 (Ex. AA). BCBA JB testified that the 11 Autism Considerations remain a part of the of the IEPs. Tr. 2699.

The plain meaning of 20 U.S.C. § 1414 (d)(3)(D) and (F) support the Respondent's argument. Id. 20 U.S.C. § 1414 (d)(3)(D) states the parents and the LEA may agree not to convene an IEP meeting to make changes, and "instead" may then develop a written document to amend or modify the current IEP. Id. This takes place after the annual IEP to make changes to the IEP. Id. It may be done, therefore, without a meeting, by a written document amending or modifying the current IEP. Id. The statute does not preclude an amendment with a meeting – this section does not address it. Id. Reading this portion in concert with 20 U.S.C. § 1414 (d)(3)(F) allows changes to

be made by the entire IEP Team (with Subsection F titled "Amendment"), or by otherwise amending it under subsection D, which allows the written modification, as noted above. 20 U.S.C. § 1414 (d)(3)(F). The IEP Teams met in amendment settings to makes changes, which resulted in the Amended IEPs of May 11, 2018 (Ex. I), August 21, 2018 (Ex. O), March 4, 2019 (Ex. W), and April 22/May 5, 2019 (Ex. AA). These Amended IEPs modified, rather than creating new IEPs, the then current IEPs of February 2, 2018 (Ex. G), and December 17, 2018 (Ex. R). Since the then current IEPs of February 2, 2018 (Ex. G) and December 17, 2018 (Ex. R) had the 11 Autism Considerations, then it is concluded there was no error in the Amended IEPs of May 11, 2018 (Ex. I), August 21, 2018 (Ex. O), March 4, 2019 (Ex. W), and April 22/May 5, 2019 (Ex. AA) by not attaching to them the 11 Autism Considerations checklist. [3]

As noted, the then current IEPs, as amended, each contained the 11 Autism Considerations, and they were checked, and changed over time. The checklists comported with the 11 Autism Considerations under New Mexico law. It is concluded there was not a procedural violation of FAPE by not having the 11 Autism Considerations attached in the IEP Amendments. 34 CFR § 300.513(a)(2).

Continuing with the 11 Autism Considerations, the Petitioners apparently also contend that even if the 11 Autism Considerations were a part of the IEPs, and Amendments, the IEPs resulting from the IEP meetings were not appropriate because of failure to consider a number of provisions they contend should have been considered in the forms, that is, in the procedures set through the state forms required by state autism

[3] Additionally, the Petitioners continued voicing objections in the IEPs about the Student's lack of services for autism, thus meeting to exhaustion requirements. ***See*** *Ellenberg v. N.M. Military Inst.*, 478 F.3d at 1262.

considerations, particularly with regard to positive behaviors interventions and behavioral issues. *See* Ps' F&C, pp. 21 - 23, Issue 9. As such, examination will take place under a procedural violation inquiry. Joined with this issue regarding behavioral strategies is Issue 5. [4] Thus, the burden is on the Petitioners to prove that first there was a procedural defect, and then, if so, whether the procedural defect (1) impeded the Student'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. 34 CFR § 300.513 (a)(2). The matters presented by the Ps' F&C are the only matters preserved now for consideration.

The Student's Mother raised many concerns during the IEP meetings with her objections to the lack of consideration for her child's needs with autism. It is concluded that they have preserved and exhausted any error with the IEP Teams on the autism matters.

The March 6, 2017 IEP and the February 2, 2018 IEPs check yes for (4) positive behavior support strategies, whereas the December 17, 2018 IEP checks no. *Compare* Exs. B and G *with* Ex. R. At issue is the December 17, 2018 positive intervention goal which had no positive support strategies. Note that the 11 Autism Considerations are considerations, that is, to be considered. As the form states: "Not all students with autism will require all strategies to be implemented. " Ex. R, p. 17. The question then is whether checking the box regarding positive behavior was an error, and, if so, its impact.

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[4] Failure to follow procedures for an IEP and a behavior plan are considered procedural violations. ***See*** *Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003).

Ms. JB, the LEA's BCBA, trains staff on completing the 11 Autism Checklists. Tr. 2687. Part of the training she provides has allowed her to understand that checking yes to positive behavior supports may confuse people because that does not mean that an FBA/BIP is required, although people often become confused thinking that checking yes does demand an FBA/BIP. Tr. 2687 - 2688. That the positive behavior support box was not checked was surprising to the BCBA JB. Tr. 2686. Given this interpretation, it is concluded that there was a procedural error in checking the box showing there was no need for positive behavioral support strategies. 34 CFR § 300.513 (a)(2). However, this did not result in (1) impeding the Student's right to a free appropriate public education, (2) significantly impeding 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. 34 CFR § 300.513 (a)(2). The record is filled with examples that positive behavior strategies that were employed in the classroom settings. *See* Ex R, p. 7 (positive ways to express needs, wants, and feelings, appropriate expression of emotions, use self-regulations strategies, such as a break, a walk, deep breathing, calm state). Tr. 519 522, 796, 1680, 1682, 1699 - 1700. Thus, it was a technical error, deemed harmless, yet it was an error.

More disconcerting, however, is the lack of an FBA for almost two years, despite the requirement for an FBA in various IEPs. *See* Issue 5. Review of the IEP case history shows that the March 6, 2017 IEP, the February 2, 2018 IEP, and the May 11, 2018 Amended IEP, and August 21, 2018 Amended IEP, all require that an FBA be prepared. Exs. B, G, I, and O. The IEPs of March 6, 2017, and February 2, 2018, and the May 11, 2018 Amended IEP each state that positive behavior techniques were not

required. Exs. B, G, and I. The August 21, 2018 IEP left unchecked whether positive behavior techniques were necessary. Ex. O. The December 17, 2018 IEP stated a FBA had already been conducted. Ex. R. However, an FBA was not conducted until January 24, 2019. Ex. T.

The Student had verbal and physical escalations during these time periods. March 6, 2017 IEP: outbursts longer than five minutes, escalations 2-3 times a day (Ex. B); February 2, 2018 IEP: physical aggression toward staff and classmates, longer than five minutes, two to three times a day (Ex G.); August 6, 2018 Crisis Intervention, hitting, kicking, grabbing, biting (Ex. M); August 20, 2018 Crisis Intervention, scratching, hitting, kicking, biting (N); elopement, property destruction, verbal and physical aggression, throwing desks, chairs, pulling off cabinet doors (Ex. O); and October 23, 2018, verbal aggression, hitting, kicking, biting, punching, pulling hair (Ex. P). These were all during the periods when an FBA and later a BIP were supposed to have been drafted, and in place. These FBA documents, as required by the IEP Team, with the involvement of the Student's Parents, were not prepared in a timely manner. As a District of Colorado court recently found, with the court being within the Tenth Circuit, where there was a four-month lapse in finding a residential facility required by the IEP, it was as if no IEP had existed in the first place, with the ambiguity thus arising to a substantive violation in the context of a procedural challenge. ***See*** *C.W. through B.W. and C.B. v. Denver County Dist.*, 119 LRP 37315, No. 17-CV-2462-MSK SKC No. 1 (D. Colo., September 25, 2019).

It does not go unnoticed that the staff, such as Teacher SM, and Ms. CC, a member of the DCSSRT team, met throughout two school years, on ways to approach

the Student's behaviors, that a COMI (a teacher self-reflecting tool) had begun, and that progress at times was being made with the Student's behaviors. Tr. 124-125, 529-546, 804-806, 862, 871, 2563-2564, 2806-2807. As well, it does not go unnoticed that escalations may have subsided to some extent. Tr. 402, 487, 497, 546, 656, 689. Additionally, positive behavior techniques were being used. *See* Exs. FF, EEE. The Student is a very bright youngster. Tr. 156. This does not, however, excuse the almost two year gap between first requiring an FBA, as demanded by the first IEP Team which included the Student's Parents, and finally having one created.[5] Similarly, the various statements in the IEPs or Amendments stating that an FBA had been created when it had not been was adds greater impact; it was misleading. The IEP is the cornerstone of the framework – it states what the FAPE consists of. *Sytsema*, 538 F.3d at 1312. When the FBA was finally drafted on January 24, 2019, it was created by Social Worker LS, Head Special Education Teacher JL, the Student's Mother, and Teacher SM. Ex. T. This shortly led to a Behavior Implementation Plan, which was drafted by Teacher SM, Head Special Education Teacher JL, Regular Education PE Teacher RC, and Social Worker LS. Ex. U. Soon thereafter, another FBA was drafted, and then another BIP. Exs. Y and Z. This shows the importance of informed decisions regarding the behavioral management of the Student other than by only Teacher SM and the LEA staff, but in connection with input from the Student's Parents.

[5] In reaching this conclusion various data collection materials were reviewed, such as the Calm Down Reflection sheets, capture service notes, and REED, yet they do not excuse the almost two year span before an FBA was finally created, as required by the first and continuing IEPs.

It is concluded, therefore, that the Petitioners met their burden to prove the Student did not receive educational services during his periods of behavioral escalation that he might have otherwise received had there been the timely FBA, thus impeding his right to a free appropriate public education and depriving him of educational benefit. 34 CFR § 300.513 (a)(2)(i, iii).[6] The span between the first IEP requirement for an FBA of March 6, 2017, Ex. B, through January 24, 2019, when the FBA occurred, Ex. T, was almost two years. The Student's Parents continued to press for an FBA during this span, with the IEPs continuing to require one, or interpreting that one had been prepared, yet the LEA was taking action regarding the Student's behaviors outside of the FBA or IEP processes to conclude an FBA was not warranted. Thus, the Petitioners have proved, as well, the lack of an FBA during this almost two-year span significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education. 34 CFR § 300.513 (a)(2)(ii). It cannot be said that this was harmless error[7]. This results in a violation of FAPE.

The Petitioners also contend the IEPs did not contain measurable goals to meet the Student's needs as a student with autism. Specifically, as advanced in their

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[6] While Teacher SM is a fine, dedicated teacher with good intentions is well-taken, Tr. 445, 1227-1229, she did not initiate a timely FBA, which was her duty. Although she may have concluded that the Student's aggression was under control due to positive interventions at some point after an IEP determined an FBA was appropriate, giving her pause to have an FBA conducted, the decision to withhold an FBA for almost two years was not hers to make, either alone, or in concert and coordination with staff, such as with CC. It was a decision to be made by an IEP Team, which would include the Student's Parents.

[7] When the FBA was finally drafted on January 24, 2019, it then allowed a BIP to be created on February 11, 2019. Ex. U. In it, the target behavior was found to be a performance deficit. Id. About three weeks later another FBA was created, Ex. Y, which resulted in a new BIP, this time finding the target behavior to be a skills deficit. Ex. Z.

requested F&C's (which limits analysis to what the proposed F&C's preserve), they contend that there were inappropriate measurable goals for reading under the March 6, 2017 IEP (Ex. B); the lack of a goal to manage aversion to general education in all IEPs, the FBA, and the BIP connected inappropriate goals for a reduction in general education; the lack of a goal for winning and losing; and the lack of a specific goal for verbal aggression. *See* Petitioners' F&C, pp. 6-7.

The Petitioners contend these are various inappropriate goals contained or not contained in the various IEPs. As a result, these allegations will be addressed substantively. Given these contentions, this an alleged substantive violation, reviewed to determine if the Petitioners have met their burden by a preponderance of the evidence to establish that the LEA did not "offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances," *Endrew F.* , 137 S. Ct. at 999, "appropriately ambitious in light of [the child's] circumstances," *id.* at 137 S. Ct. at 1000, considering thee "unique circumstances" of this Student. *Id. at* 137 S. Ct. at 1001. All the while deference will be given to the expertise and judgment of the educators, with parents to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Id. at* 137 S.Ct. at 1001, while recognizing the ultimate is question is whether or not the IEP is reasonable, not whether it is regarded as ideal. *Id.* at 137 S. Ct. at 999. ***See*** *Albuquerque Public Schools v. Maez and Mondragon, on behalf of M.M.*, p. 22, No. 16-cv-1082 WJ/WPL (D.N.M. August 1, 2017)(goals viewed as substantive, unique circumstances, appropriately ambitious under *Endrew F*, supra, with burden).

As for reading, the Petitioners did not present a reading specialist, or expert, to support that the goals did not meet the Student's unique circumstances. They base their allegations on a bare reading of the goals, and LEA educators. They contend that because the Student was able to read at first grade level in kindergarten then the goal of having him read at the first grade level in the first grade was inappropriate, because he could read grade level text accurately and write legibly. P's F&C, p. 6.

His first grade testing showed that the Student was reading at a 1st grade level in kindergarten. Ex. B, p. 2. Tr. 66. The goal for him was to use grade level text with 80% accuracy. Ex. B, p. 6. Tr. 64. This was the stated goal, as something to reach toward. This goal, noted in the March 6, 2017 IEP, which was effective within the statutory period commencing August 10, 2017, carried on with the Student until his next IEP on February 2, 2018. Ex. G. Despite that the Student could read first grade level in kindergarten, the goal was extended into the first grade program to comprehend, write, discuss, and recall grade level information in the first grade, at that present level, using the general education curriculum, modified with using the Student's preferred use of technology to read, with research-based reading tools, with practice in comprehension to model answers. Tr. 63-69. It is concluded, therefore, that the Petitioners did not meet their burden by a preponderance of the evidence that the goal for reading in the March 6, 2017 IEP was not appropriately ambitious, considering the Student's unique needs, as reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. ***See*** *Endrew F,* ***supra****, and Maez and Mondragon*, ***supra***. A FAPE was not denied. 34 CFR § 300.513 (a)(1).

As for the lack of a goal to manage aversion to general education in all IEPs, the FBA, and the BIP – initially as already concluded, the failure to conduct the FBAs for behavior in a timely manner resulted in a violation of FAPE. As also noted above, an FBA is not required unless for a manifestation determination. ***See*** *Clasen v. Unified Sch. Dist. Sedgwick County Area Edu. Services Interlocal Cooperative*, 119 LRP 33123, No. 17-1280-EMF (D. Kansas, August 27, 2019)(court within 10th Circuit, FBA would be procedural issue if viewed as under manifestation circumstances). Thus, the Petitioners' theory that an FBA is required to address the Student's alleged aversion to general education does not rise to the level of a substantive violation. Similarly, the Petitioners present no evidence, other than asking for a *prima facie* reading of the face of the IEPs, that this Student's unique characteristics of a student with autism and behavioral escalations requires a specific goal to manage a proposed aversion to the general education environment. While at times he may prefer to remain in the special education setting, Tr. 572, the goals under the IDEA are to be measurable annual goals, including academic and functional goals to enable the Student to be involved in and make progress in the general education setting. 34 CFR § 300.320(a)(2)(i). They are to be in objectively, measurable terms. *See O'Toole,* 144 F.3d 692. There is not sufficient evidence, however, that a specific goal had to be set so the Student would like to go to his general education classes. As reflected in the December 17, 2018 IEP, for instance, the Student's participation in math in the general educational environment is based on his escalations. *See* Ex. R. He receives adult assistance for transitions. Id. As such, the IEPs have addressed the issue as it becomes appropriate. Self-regulation had been addressed in the IEPs. *See* Ex. B. Dysregulation goals were included under health goals

on how to make choices. Ex. B. Tr. 627-630. Similarly, health goals incorporated self-regulation in the February 2, 2018 IEP. Ex. G. Social and emotional needs in health goals continued to be addressed in the December 17, 2018 IEP. Ex. R. The Student eloped and escalated during these time periods. He had an aversion to going to class, yet, as described, the health goals addressed his aversions. Therefore, Petitioners have not met their burden to prove by a preponderance of evidence that placing a specific goal for this Student to meet a possible aversion to general education is required by an IEP to be reasonably calculated to enable him to make progress appropriate in light of his circumstances. *Endrew* F., 137 S. Ct. at 999. As a result, it is concluded there is not denial of FAPE because aversion to general education was not part of the IEP goals. 34 CFR § 300.513 (a).

As for a goal for winning and losing – again since it questions a goal, it is reviewed substantively. The Student did not like to lose, and when this happened he could escalate. The April 22, 2019 IEP Amendment reflects a goal for winning and losing, as part of physical education. Ex. AA, p. 12. The March 4, 2019 Amendment reflects discussion of winning and losing in the goals for career readiness in the December 17, 2018 IEP. *See* Ex. W, p. 9. The December 17, 2018 IEP notes those winning and losing strategies in career readiness goals. Ex. R, p. 8. The August 21, 2018 IEP did not contain or address a goal including for winning and losing, Ex. O, yet the Student was working on sportsmanship techniques at the time with the social worker. Ex. BB, p. 4. The May 11, 2018 IEP Amendment does not reflect that the February 2, 2018 IEP had or addressed a winning or losing goal. Ex. I. The February 2, 2018 IEP does not reflect or address a winning or losing goal. Ex. G. The March 6, 2017 IEP does

not reflect or address a winning or losing goal. Ex. B. The matter of the Student's difficulty with competitive games as an issue (winning and losing) with the schools did not arise until the Student was in the second grade. Tr. 2131. The IEP for the second grade was the August 21, 2018 IEP. Ex. O. As noted, although that IEP did not have an express goal, the Student was working on sportsmanship at that time with the social worker. Ex. BB. Therefore, it is concluded that the Petitioners did not prove a substantive violation of FAPE for the April 22, 2019, March 4, 2019, and December 17, 2018, IEPs or amendments because these were addressed in goals. 34 CFR § 300.513 (a). The Petitioners have not met their burden to prove by a preponderance of evidence that a win/lose goal in the for this Student in the May 11, 2018, February 2, 2018, and March 6, 2017 IEPs or amendments was a term reasonably calculated to enable him to make progress appropriate in light of his circumstances because the matter had not yet ripened. ***See*** *Endrew* F., 137 S. Ct. at 999. As for the August 21, 2018 IEP, although ripe (second grade), it did not include a goal, yet because the social worker was working with the Student on strategies then the error is concluded to be harmless. There was not a denial of FAPE. 34 CFR § 300.513 (a).

As for a specific goal for verbal aggression, each of the IEPs or Amendments address the Student's verbal aggression as goals in either Career Readiness or Health Education. *See* Exs. B, G, I, R, W, and AA. As a result, the Petitioners have not proved that anything else was demanded for the IEPs to be reasonably calculated to enable the Student to make progress appropriate in light of his circumstances. *See Endrew* F., 137 S. Ct. at 999. There was not a denial of FAPE. 34 CFR § 300.513 (a).

Peer-Reviewed Research

This relates to Issue 3.

Special education services in an IEP are to be based on peer reviewed research to the extent practicable. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). Methodology for education is left to the LEA. ***See*** *Rowley*, 458 U.S. at 208. There is no requirement for a BCBA. ***See*** *Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR 271.

Petitioners contend that the educational strategies used by the LEA, particularly in dysregulation, competitive practice, misperception of situations, social stories, transitions, ABA therapy and Behavior Analysis, BCBA services, BIPs and data, apology letters, one on one time, and discontinued use of a blanket were inappropriate, are not peer-reviewed and thus their use results in a denial of FAPE. P's F&C, pp. 7-11.[8]

The Petitioners have not met their burden to either show that the strategies were not peer-reviewed, or that they had to be peer-reviewed to the extent practicable. They contend that the use of a strategy called Zones of Regulation did not meet that requirement. Zones of Regulation is a methodology. ***See*** *Rowley*, 458 U.S. at 208. Tr. 238, 1460-1461 (Student in red zone, green zone, a teaching method to emotionally self-regulate). There is no evidence that these are not research based. Tr. 103 (Teacher SM's practices used research-based strategies and methods). Petitioners' theory that scripting, prompting, planned ignoring are more appropriate does not rise to the level of proof. Petitioners did not present an expert, or otherwise present evidence, to show scripting, prompting, and planned ignoring had to be included in a strategy, or in an

[8] Petitioners refer in their heading to implementation, yet reviewing the body of their continued theories they are not proposing a test under implementation, which would be procedural.

IEP, to make to make the IEPs inappropriate without them. There was no denial of FAPE. 34 CFR § 300.513 (a).

As for use of competition, there is no evidence that the LEA's methods utilizing competition were not research based to the extent practicable. Tr. 103 (Teacher SM's practices used research-based strategies and methods). That Petitioners may have preferred another practice does not make the Plan inappropriate. It need only be reasonable. *Endrew*, 137 S. Ct. at 999. There was no denial of FAPE. 34 CFR § 300.513 (a).

The LEA used portions of Applied Behavior Analysis in the Student's educational services. Tr. 2573. Reinforcers and preference assessments were incorporated. Tr. 2574. Rewards and punishments were used. Tr. 2573. This is a part of research-based behavior analysis. There was no denial of FAPE. 34 CFR § 300.513 (a).

There is no evidence that social stories and rehearsals had to be included in a strategy or in an IEP to make to make the IEPs inappropriate without them. There was no denial of FAPE. 34 CFR § 300.513 (a).

Non-preferred tasks were addressed in the various IEPs and amendments, as noted otherwise herein as in transitions, elopement, and what he liked to do. They were non-preferred activities. There is no evidence that the LEA's methods for those tasks were inappropriate or that they were not based on peer-review. There was no denial of FAPE. 34 CFR § 300.513 (a).

Whereas a private BCBA assisted with the Student in the first grade, Tr. 143-144, 571-572, 574-576, this approach was discontinued because there was correlation between having a BMS on campus and improved behaviors. Ex. O, p. 18. There is no

evidence that this was inappropriate or that this was not based on peer-review. There was no denial of FAPE. 34 CFR § 300.513 (a).

As for letters of apology, although the LEA's BCBA, Ms. JB, would probably not have used them, she was not of the opinion that they were inappropriate. Tr. 2740. There is no evidence that this was inappropriate or that this was not based on peer-review. As stated by Teacher SM, "I'm not aware of any research that supports or denies" that writing apology letters serves an educational benefit for this Student with autism. There was no denial of FAPE. 34 CFR § 300.513 (a).

As to that staff may have provided one on one attention to the Student at times may have reinforced bad behaviors, the Petitioners have not met their burden to prove that one on one attention resulted in bad behaviors, or that the use of one on one attention was inappropriate or that this was not based on peer-review. There was no denial of FAPE. 34 CFR § 300.513 (a).

The Student's use of a blanket for self-regulation – the facts were that the Student was to raise his hand to get a blanket. Tr. 2789-2790. The LEA's BCBA, Ms. JB, opined that use of hand rasing to obtain an object was an important skill for school aged children to acquire to participate in general education. Tr. 2790. The Petitioners have not met their burden to prove that having the Student raise his hand for a blanket was inappropriate or that this was not based on peer-review. There was no denial of FAPE. 34 CFR § 300.513 (a).

The IEP Team

This relates to Issue 4.

Petitioners further contend, for those matters preserved through their F&Cs, that the DSSCRT team members should have been at all of the IEP and amended meetings, that the LEA's BCBA should have been at the May 2, 2019 IEP meeting, along with other knowledgeable staff at all meetings, and that a speech and language pathologist should have been at the February 2, 2018 IEP (Petitioners cite to the transcript at 120-122, which relates to Ex. G, the February 2,2018 IEP). *See* Ps' F&Cs, pp. 11-12.

An IEP team is to include the parents, not less than one general education teacher if the child is or may be participating in general education, a least one special education teacher or provider (if appropriate), and 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. *See* 34 CFR § 300.321(a)(1-4). An additional member is an individual who can interpret the instructional implications of evaluation results, who may also otherwise be a member of the Team. Id. at (a)(5). "At the discretion of the parent or the agency" other members may include individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate. Id. at (a)(6). Finally, as appropriate, the Student. Id. at (a)(7). This tracks the enabling legislation. *See* 20 U.S.C. § 1414(d)(B).

The Petitioners contend there were not staff knowledgeable about autism or LEA resources at all five of the IEP or Amendment meetings. The only evidence they cite to is the Student's Mother's testimony. *See* Petitioners' Proposed F&Cs, p. 12. Review of this testimony, however, does not support the reference. When questioned about the people

at the various IEP and amended meetings, who would be responsive when it came to questions about autism, the Student's Mother's testified that she did not "actually remember anybody being responsive to really anything I asked." Tr. 2152. Petitioners' position is unpersuasive. The head teacher is aware of the resources, and she was available at the meetings. Tr. 1150-1151. The Petitioners have not met their burden to prove that there was a violation by not having someone knowledgeable about district resources. There was no violation of FAPE. 34 CFR § 300.513 (a).

As for the DSSCRT team all being required members of the IEP and amended meetings, the Petitioners have not met their burden that they were demanded to be there. The enabling statute and the resulting federal regulations speak of mandatory and discretionary members. *See* 20 U.S.C. § 1414(d)(B) *and* 34 CFR § 300.321. Although discussions between DSSCRT team members and Teacher SM arose, Tr. 103, 829, the Petitioners do not point to any evidence that shows they had to be mandatory members. *See* Petitioners' Proposed F&Cs, pp. 11-12. Perhaps as a discretionary measure, but Petitioners have not met their burden to prove that either party asked for their attendance. The Petitioners have not met their burden to prove that there was a violation by not having DSSCRT team members at all IEP and amended IEP meetings. There was no violation of FAPE. 34 CFR § 300.513 (a).

Similarly, although there was a BCBA, Ms. JB, who eventually became aware of the Student on about May 2, 2019, Ex. 24, Tr. 878-879, that fact that she eventually became engaged with the Student's behavior does not lead to a rational basis to conclude that she , or any other BCBA, was required to attend all the IEP Meetings and IEP Amendment Meetings. The Petitioners have not met their burden to prove that there

was a violation by not having BCBA JB., or another BCBA, at the meetings. Once again, it was not mandatory. The important factor is consideration positive behavior interventions[9], not necessarily a BCBA. The Petitioners have not met their burden that a FAPE requires a Board Certified Behavior Analyst. This is consistent with recent case persuasive authority, and is followed. *See D.S. v. Parsippany Troy Hills Bd. of Ed.*, 73 IDELR 143 (D.N.J. 2018); *Pottsgrove Sch. Dist. v. D.H.,* 118 LRP 37748 (E.D. Pa. 2018). There was no violation of FAPE. 34 CFR § 300.513 (a).

As for a speech language pathologist, speech and language pathology services are related services. 34 CFR § 300.34(c)(15). By the very nature of the definition of a speech and language service provider, it becomes discretionary attendance. *See* 34 CFR § 300.321(a)(6)(at discretion of parent or agency, related service personnel). The Petitioners have not met their burden to prove that either party asked for her attendance . The Petitioners have not met their burden to prove that there was a violation by not having a speech and language pathologist at the meetings. There was no violation of FAPE. 34 CFR § 300.513 (a).

Implementation of BIPs

This topic relates to Issue 5.

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[9] While evidence supports that positive behavior interventions were considered, the IEPs or Amendments of March 6, 2017 (Ex. B, p. 4), February 2, 2018 (Ex. G, p.4), May 11, 2018 (Ex. I, p. 5), all state none were included in the IEP. The August 21, 2018 Amendment, the December 17, 2018 IEP, and the March 4, 2019 Amendment left the box unchecked as to whether positive behavior supports were part of the IEPs. Exs. O, p. 6, R., p. 5, and Ex. W, p. 6, Finally, in the April 22/May 2, 2019 IEP, the box is checked that positive interventions are included in the IEP. Ex. AA, p. 9. At best these IEP documents differ from the testimony from the educators stating that positive behavior supports were included. Their testimony, under oath, is given weight, so that it is found there were positive behavior supports considered at the IEPs. See 34 CFR § 300.324(2)(i).

It has already been concluded that FAPE was violated by the LEA's failure to timely conduct an FBA. The Petitioners also contend that the BIPs were not implemented. See P's Proposed F&Cs, p. 12. These allegations are what is preserved by their F&C's, under Issue 5. As an implementation claim, it will be reviewed as a procedural violation. ***See*** *J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 432 (persuasive).

The BIP of February 11, 2019 (Ex. U), was not implemented. As Teacher SM stated: "some of the strategies were updated – or were implemented, but no, not in full, because we pretty much immediately amended this." Tr. 272.

Another BIP was created on March 4, 2019. Ex. Z. Teacher SM considered this BIP substantively implemented. Tr. 272. It was implemented after March 4, 2019, and through the end of the school year. Id. Teacher SM was not consistent with complete fidelity of checklist monitoring, although it was required by the BIP. Tr. 274. In the April 22/May 5, 2019 IEP, it is noted by Teacher SM that upon consultation with the BCBA the BIP was having a positive effect on the Student. Ex. AA, p. 19.

It is concluded that there was a procedural violation by failure to implement the February 11, 2019 IEP. Thus, the burden is on the Petitioners to prove the procedural defect (1) impeded the Student'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. 34 CFR § 300.513 (a)(2). They have not met this burden.

About three weeks after the February 11, 2019 BIP, the March 4, 2019 BIP was created. This subsequent BIP reflected on the Student's target behavior as a skills

deficit. Ex. Z, p. 3. The BIP of three weeks earlier considered the target behavior to be a performance deficit. Ex. U, p. 3. The difference between a skills deficit and a performance deficit is that with a performance deficit intervention focuses on problem solving and increasing motivation, whereas with a skills deficit intervention is to focus on skill acquisition, fluency, maintenance and generalization of adaptive skills, and the functionally equivalent replacement behavior. Id. and Ex. Z, p. 3. Note that in the December 17, 2018 IEP the Student's weaknesses were concluded to be deficits in adaptive skills, and social-emotional development, with sensory processing. Ex. R, p. 5. These are consistent with the target behavior being a skills deficit. In other words, once the BIPs were finally created then through changes the focus shifted to the targeted behavior as a skills deficit, like that expressed in the December 17, 2018 IEP, and procedures were created to manage those behaviors, which were having a positive impact on the Student's behaviors. Ex. AA. The about three week period between the two BIPs was, therefore, harmless.

Therefore, it is concluded, as for implementation of the February 11, 2109 BIP, that the Petitioners did not prove the procedural defect (1) impeded the Student'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. 34 CFR § 300.513 (a)(2). There was no violation of FAPE. 34 CFR § 300.513. Nonetheless, there was a procedural error, although it did not rise to a FAPE violation.

As for implementation of the March 4, 2019 BIP, the Petitioners' preserved alleged violation is that there was no fidelity monitoring, with insufficient data kept for a

brain break, as required by the BIP, and that contingency mapping documents could not be located. P's F&Cs, p. 14. It is concluded that this did amount to a procedural error in failure to implement the BIP. Teacher SM admitted that she was not consistent with compete fidelity of checklist monitoring. Tr. 274, 353. She admitted that she did not know where the data was kept for tallies on brain breaks. Tr. 273. However, there were tallies kept by staff, Tr. 707, and data was summarized at the next IEP Amendment meeting on April 22, 2019. Tr. 275. The duty, however, was on the classroom staff to tally brain breaks. Ex. Z, p. 4. Teacher SM did not have a checklist. Tr. 353. While a contingency map was made, Teacher SM was unsure what happened to it. Tr. 353 - 354.

The BIP language is clear for fidelity of BIP implementation monitoring -- once per week there was to be "[c]omplete fidelity monitoring checklist based on content of BIP." Ex. Z, p. 6. Teaching strategies for replacement behavior were for a "brain break," to be tallied by staff during the day. Ex. Z, p. 4. Visual reminders were to be used to check for the Student's understanding of expected behaviors with consequences (contingency maps). Ex. Z, p. 2.

The BIP was not followed, that is, it was not implemented for complete fidelity checklist monitoring. As a result, the Petitioners have met their burden that this was a procedural defect. 34 CFR § 300.513 (a)(2).

While there was an absence of records for a contingency map or the actual "brain break" tallies, it is concluded that the testimony of Teacher SM is credible that there was continency mapping and that there were tallies made of the "brain breaks" by staff. As a result, it is concluded that the Petitioners have not met their burden that there were

procedural defect due to not following the BIP for contingency mapping and tallies of brain breaks. 34 CFR § 300.513 (a)(2).

As for the fidelity checklist portion of this argument where a procedural violation is found, it is also concluded that the Petitioners have not met their burden that the procedural defect (1) impeded the Student'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. 34 CFR § 300.513 (a)(2). That is, the Petitioners have not proved the defect in record keeping impacted them relative to the Student's educational needs. There was no violation of FAPE. 34 CFR § 300.513. This was an error, but it did not rise to the level of a denial of FAPE.

The Petitoners also contend that there was a violation of FAPE because an FBA was not included for the Student's resistance to go to math class, art, and physical education classes. P's Proposed F&Cs, pp. 14-15. Note that these are not implementation allegations, where FBAs and BIPs were created as part of IEPs or amendments, but substantive allegations that FBAs should have been performed. Id. This is an unpersuasive argument. Although New Mexico 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, they are only an encouragement, not a requirement. The only FBA/BIP requirement is for a disciplinary change of placement, like suspension for over ten days. *See* 34 CFR § 300.530(a) & (f).

Resistance to go to math class, art, and physical education classes does not meet the mandatory test. There was no violation of FAPE. 34 CFR § 300.513.

Aversives, Restraint

This relates to Issue 6.

New Mexico rules and laws are explored in this procedural context. Restraint or seclusion is permitted only if: (1) a student's behavior presents an imminent danger of serious physical harm to the student or others, and (2) less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm. NMSA 1978, § 22-5-4.12.

Restraint may be mechanical or physical. Id. *See* §6.11.2.7(T) NMAC. Physical restraint does not include a physical escort, but it does otherwise include use of physical force without using a device or material that restricts the free movement of all or a portion of the student's body . Id. *See* §6.11.2.7(P) NMAC. Mechanical restraint is when a device or material attached to, or adjacent to, the student's body restricts freedom of movement or normal access to any portion of the student's body which the student cannot easily remove, yet does not include mechanical supports or supportive devices. Id. *See* §6.11.2.7(N) NMAC.

Seclusion is the student's involuntary confinement alone in a room where ingress or egress are prevented, yet does not prevent the use of a voluntary behavior technique, such as a timeout location, if part of an education plan for the student, or safety plan for the student, or behavioral plan or individualized education program which involves separation of the student from a larger group for calming purposes. *See* §6.11.2.7(V) NMAC.

The restraint or seclusion, if used, requires school employees to maintain continuous visual observation of, and to monitor, the student while the restraint or seclusion technique is used, and is to cease when there is no longer an imminent danger of serious physical harm to the student or to others. NMSA 1978, § 22-5-4.12 (B)(1)&(2). The restraint must not impede the student's ability to breathe or speak, shall not be out of proportion to the age and physical condition of the student, and shall only be used by school employees trained in safe an effective use of restraint and seclusion techniques, unless an emergency due to insufficient time to summon trained staff dictates otherwise. Id. at (B)(3)(4)&(5).

The restraint or seclusion, if used, requires, among other things, written or oral notice to the student's parent on the day of the incident, unless circumstances dictate otherwise, in which notice must then be provided within twenty-four hours after the incident and then, within a reasonable time after the incident, written documentation must be provided to the parents about the persons, locations, or activities which may have triggered the behavior (if it is known), with specific information about the behavior and its precursors, the type of restraint or seclusion used, and if restraint or seclusion has arisen two or more times within a thirty-calendar-day period, then there must be a review of the incidents and an analysis of how future incidents may be avoided, including whether a functional behavioral assessment is required, plus an IEP team meeting, BIP team meeting, or student assistance team meeting within two weeks after the second use of the restraint or seclusion in the within the thirty-calendar-day period, with recommendation to avoid future incidents for restraint or seclusion. Id. at D (1)-(3).

The Petitoners contend, for those portions of the issues in Issue 6 preserved through their F&Cs, that although EA staff were trained in restraint and seclusion, they did not receive training in autism, thus resulting in a violation of FAPE. See Ps' F&Cs, p. 15. This is unpersuasive. School employees were trained in safe an effective use of restraint and seclusion techniques, unless an emergency due to insufficient time to summon trained staff dictates otherwise. NMSA 1978, § 22-5-4.12 (B)(3)(4)&(5). The record supports this training. Tr. 62-63, 1252-1255, 1890-1891. EA SB received on-the-job training in autism from Teacher SM. Tr. 1252-1253. EA DG received on-the-job training in autism from Teacher SM. Tr. 1350. In response to a question about her training for autism, EA RH explained her training every day from teachers as to behaviors and different situations they come across. Tr. 1409. Through the Petitoners F&Cs, they admit the EAs had been trained in nonviolent crisis intervention. The LEA's Non-Violent Crisis Intervention training focuses on verbal de-escalation techniques and not physical restraint. Tr. 1309-1310, 1651-1652. Although Special Education Assistant Principal JL could not specifically remember if she had training that there had to be an imminent danger of serious harm before restraint, as part of NVCI, the Petitioners present not other evidence that her NVCI training did not require it. Tr. 1120. It is concluded the Petitoners did not meet their burden that there was a denial of FAPE. 34 CFR § 300.513.

Petitioners contend that the Student's Parents received no notices of restraint for the first grade. See P's Proposed F&Cs, p. 15. They cite to the Student's Mother's testimony to support this, at Tr. 2147. Review of her testimony is unpersuasive. When questioned about how many times the Student was physically restrained in the first

grade, the Student's Mother's response was that "I did not get any reports, that I remember." Tr. 2147. This does not support that there were restraints used in the first grade, only that the Student's Mother did not receive reports of any restraints. Thus, the Petitoners have not met their burden that FAPE was denied. 34 CFR § 300.513.

Petitoners contend the Student was twice restrained in August 2018, on October 23, 2018, and was secluded once at the end of the 2019 school year. *See* Ps' F&Cs, p. 16. They cite to Exhibits M, N, and P for restraints. Id. These remain as the matters presented and preserved by the Petitioners for review by their F&Cs.

Ex. M refers to an occurrence on August 16, 2018, which includes two incidents on that date. Ex. M. Exhibit N refers to an occurrence on August 20, 2018. Ex. N. Ex. P refers to an occurrence on October 23, 2018. Ex. P. The alleged seclusion was a day where there were fire trucks and helicopters and police cars at the end of the 2019 school year. Tr. 1357.

The August 16, 2018 restraint of 10:00 a.m. lasted for one minute. Ex. M. Tr. 209. It was due to the Student's hitting, kicking, grabbing, biting, head butting, throwing objects at people, hitting is own head, and ripping student folders from backpacks. Ex. M. The 11:45 incident lasted one minute, as well. It was due to the Student's hitting, kicking, grabbing, biting, head butting, and throwing objects at people. Ex. M. [10] The Parents were contacted by telephone on both dates. Ex. M. Crisis intervention behaviors were described in detail. Ex. M. On August 20, 2018 another restraint took place, which lasted one minute. Ex. N. The Student's behaviors at the

[10] That the school assistant principal did not review a crisis form has no bearing on the issue, since she testified there was not duty to do so. Tr. 1073.

time were hitting, kicking, grabbing, scratching, pulling hair, throwing backpacks, and tearing off hook protectors. Ex. N. Notice of the incident was given on the date of each restraint. *See* Exs. M and N. These meet the notice and documentation requirements to Parents. NMSA 1978, § 22-5-4.12 (D)(1)-(3). Both the second incident of August 16, 2018 (11:45 a.m.), and the incident on August 20, 2018, stated an IEP was set to commence on August 21, 2018. *See* Exs. M, p. 6, and Ex. N, p. 3. These meet the two week requirement for an IEP to commence after a second restraint within a thirty day period. NMSA 1978, § 22-5-4.12 (D)(3)(b). An IEP Amendment meeting took place on August 21, 2018. Ex. O. It addressed the maladaptive behaviors and noted the restraints. Ex. O., p. 3. It is concluded that Petitoners have not met their burden that there was a procedural violation of FAPE in these incidents. 34 CFR § 300.513.

The next restraint was on October 23, 2018. Ex. P. The Student's behaviors were hitting, punching, grabbing, biting, and pulling hair. Ex. P. It lasted about .25 of a minute, and the parents were informed of it by both oral and written notice that day. Ex. P., p. 1. Crisis intervention behaviors were described in detail. Ex. P. This meets the notice and documentation requirements to Parents. NMSA 1978, § 22-5-4.12 D. (1)-(3). A two week IEP was not demanded, since there were not two incidents within a thirty day period. NMSA 1978, § 22-5-4.12 D. 3(b). It is concluded that Petitoners have not met their burden that there was a procedural violation of FAPE in this incident. 34 CFR § 300.513.

At the end of the 2019 school year the Student hit EA DG's foot over 100 times and grabbed her ankle, so he was taken to a break area. Tr. 1357. This does not rise to a procedural violation. It was a voluntary behavioral technique, with going to a break area

a specific prevention strategy in the February 11, 2109 BIP. See Ex. U, p. 2. This comports with NMSA 1978, § 22-5-4.12 (I)(5). It is concluded that Petitoners have not met their burden that there was a procedural violation of FAPE in this incident. 34 CFR § 300.513.

Despite coming within the procedural framework of the New Mexico law on restraint, the Petitoners contend that the Student did not like to go to school because of the restraint and that, therefore, there was a violation of FAPE because it was not a positive reinforcement technique. *See* P's F&Cs, p. 15. New Mexico law allows limited restraint and seclusion. NMSA 1978, § 22-5-4.12. The LEA followed the law. While it is true that the IEP of May 11, 2018 (Ex. I) did not include a statement of positive reinforcement techniques (as cited by Petitoners), the Petitoners have not met their burden that following the New Mexico law on restraint was not an evidence-based practice, or that his dislike of restraint, when preformed in accord with New Mexico law, resulted in a punishment. As a result, it is concluded that there was not a procedural violation of FAPE. 34 CFR § 300.513.

Necessary Special Education and Supportive Services

Regarding Issue 7, the Petitioners continued theory through their F&Cs is that a FAPE was denied the Student because the Student's performance in English regressed between his kindergarten and first grade years, because social work showed no lasting progress in the second grade, because the Parents at times were contacted to assist with the Student while working, and that giving attention during a meltdown was not effective. Ps' Proposed F&Cs, pp. 17-18.

Contrary to the Petitioners' position regarding English, the testimony from Teacher SM was that the Student did make progress between his kindergarten and first year of school, consistent with Exs. J and 13. Tr. 149-150. It is concluded that Petitoners have not met their burden that there was not some appropriate progress under the circumstances relative to the severity of the Student's disabilities. ***See*** *Endrew F.*, 137 S. Ct. at 998-999.

As to social work in the second grade due to behavioral issues, the Petitoners continue to preserve and contend that after the March 4, 2019 BIP the Student continued to exhibit signs of maladaptive behavior for six weeks. This is unpersuasive. While it was reported that the Student did have maladaptive behaviors by the Social Worker, his he was acquiring skills by taking breaks, which helped, and brainstorming and self-regulation, which also proved helpful. *See* Ex. AA, p. 5. Based on data, and longer and longer stretches between time periods of physical aggression, the BIP had a positive impact. Tr. 289-291. Post-BIP data was summarized in the April 22/May 2, 2019 IEP, and the recommendation was made by the LEA for the next step that the Student be educated in a social emotional support classroom rather than his existing social communication support classroom. Ex. AA, p. 20. It is concluded that Petitoners have not met their burden that there was not some appropriate progress under the circumstances relative to the severity of the Student's disabilities. ***See*** *Endrew F.*, 137 S. Ct. at 998-999.

Parents were contacted at times to assist with the Student's behavioral challenges while at school. Tr. 2142-2143. Note, however, as discussed earlier, that there are times when the teacher is under a duty to contact the parent when restraint exists. Teacher SM

did call the Student's Mother when she was at her school and told her she felt threatened by the Student's actions. Tr. 2142-2144. Texting and other communications took place between the LEA staff and the Student's Father while he was working, as well as at other hours. Tr. 2416-2418. While the duty is on the LEA to provide a free appropriate public education (rather than on the Parents), 20 U.S.C. § 1400, *et seq*., there is no evidence that the LEA attempted to delegate their duty to the Student's Parents to perform the Student's educational services, but only that they kept them abreast of the Student's behaviors. It is concluded that Petitoners have not met their burden that this substantively or procedurally violated FAPE. 34 CFR § 300.513.

As to discussions with the Student during a meltdown, while the private healthcare center may not provide him an audience, Tr. 2442, the LEA staff spoke to him in an effort to calm him down to allow release of the restraint, or to get back into a zone of behavior. Tr. 1085. The practice of allowing LEA staff to speak to the Student to calm him down is akin to a strategy, or program (Zones of Regulation, Tr. 2497, the red zone, green zone simple strategy, Tr. 1561), and it is concluded that this type of service is left to the LEA discretion. ***See*** *Rowley*, 458 U.S. at 208. The Petitoners have not met their burden that this substantively or procedurally violated FAPE. 34 CFR § 300.513.

Finally, Petitoners contend a Board Certified Behavior Analyst was required to meet the Student's educational needs regarding his behavioral issues. It is concluded that there was no need. Although the March 8, 2018 IEP with the Behavior Plan has been found to deny FAPE, the Petitioners have not met their burden that a FAPE requires a Board Certified Behavior Analyst to form a behavior plan. As noted above,

what is required are positive behavior interventions – not a board-certified analyst. Again, this is consistent with recent persuasive case law, and will be followed. *See D.S. v. Parsippany Troy Hills Bd. of Ed.*, 73 IDELR 143 (D.N.J. 2018); *Pottsgrove Sch. Dist. v. D.H.,* 118 LRP 37748 (E.D. Pa. 2018). There was no denial of FAPE.

Predetermination, Social Emotional Support Classroom, Least Restrictive Environment

Issue 8 address an alleged predetermination by the LEA in changing the Student's classroom services for one school location, the MT school to another school, the MZ school.

In the April 22/May 2, 2019 IEP the Team met and concluded, among other things, that the Student should have his future educational needs, starting with the new school year, at MZ school. Ex. AA. The Petitoners objected to this proposal. Id. This would mean relocating the Student from MT school where he been receiving his services, to the new setting. While at MT school, the Student was placed in a social communication support (SCS2) classroom. At the MZ school the setting was to be in a social emotional support classroom. Ex. AA, p. 20.

The Student's Parents had heard through acquaintances that the MZ school setting was where behavioral disorder children were placed. The Student's Mother read a newspaper account that the MZ school was for behaviorally challenged students where about 1/3 of all LEA restraints take place, and she was concerned since the Student at times would mirror the behaviors of others around him. Tr. 2163, 2169-2170. The Student's Parents visited MZ school, and did not like the seclusion room, which was an in-school suspension room. Tr. 2169. In August 2019, the Student was accepted in the

private healthcare setting for services for his autism. Tr. 2171. He has remained there during these proceedings. He has not entered the MZ educational setting.

A social emotional classroom is one where the needs of a student are for social emotional supports, where the classroom meets the needs to work on social skills and where this Student would be given the opportunity to communicate with his peers about their own thinking, so to talk about what is going on in their minds. Tr. 2582-2585. Staff are trained in the AIM method, with the social emotional programing as an ABA-based AIM curriculum. Tr. 2587. Given the Student's frustration level, and relying on the opinion of Expert JB, the Student requires the ability to work on his feelings to allow him to communicate, rather than giving him opportunities to only communicate. Tr. 2588. The acronyms are SES1 and SES 2. See Tr. 2599. The SES 1 and SES 2 classrooms are at MZ school. They use an AIM based curriculum developed by a BCBA, Tr. 2575.

SES 1 has two adults, with eight students, and a connection with the general education population, such as sharing the same hallway. Tr. 2021-2022. Many activities are performed with the general education students. Tr. 2022. There is a check-in for every student, individually, or in a group setting, every 30 minutes. Tr. 2024. One-on-one communication takes place, using the AIM based language to connect with core processes. Tr. 2026-2027. The SES 2 classroom has about three adults to six students. Tr. 2021-2022. The focus is on emotional support, to teach students to self-regulate and build strategies and coping mechanisms and tools to exhibit appropriate emotional responses in situations. Tr. 230.

The social communication classroom, or SCS, was at MT school, where the Student had been attending classes, mostly with Teacher SM, prior to moving to his private healthcare facility. *See* Exs. B, G, I, O, R, W, and AA. In the SCS classroom the Student was working on communication skills relative to his autism. Tr. 235.

After the Winter Break in the 2018-2019 schedule the Student's escalations and misbehaviors precipitously increased. Strife was taking place in the home setting, and the Student would at times come to school escalated. While there is no causal factor required between the Student's misbehaviors and the educational duties demanded from the LEA, evidence was admitted regarding the home environment which corroborated the emotional context the Student was in and its relationship to educational needs in the SCS, SES 1 and SES 2 classrooms. An FBA had not yet been implemented, as required. The required FBA was finally created on January 24, 2019, Ex. T, and the second on was created on March 4, 2019. Ex. Y.

The aggressive behaviors were numerous, verbal, and physical, including statements that the Student would make someone die, and obtain a firearm, which the LEA security forces took seriously, despite the Student's age. The Student's psychotherapy notes indicate the Student's issues with the Student's anger and dysregulation. Ex. JJJ, pp. 23, 26, 94, 130-135, 182-183, 204-206, and 213-215. The Student would hurt others, and parents of other students in the SCS classroom were concerned about their children's safety. Tr. 1187. The second FBA, which resulted in a BIP, reached a conclusion that the target behavior was a skills deficit, rather the prior BIP noting it as a performance deficit. Ex. Z. The second BIP of March 4, 2019 took place about six weeks before the final IEP of April 22/May 2, 2019. Ex. AA. At this final

IEP the LEA proposed, over the objection of the Student's Parents, to leave the MT school SCS setting, and to have his have his future classes at the MZ school setting, under the SES classroom. Ex. AA. A teacher for the SES program at MZ school, BD, attended the IEP of April 22/May2, 2019 IEP. Tr. 1994.

Ms. BD went to the IEP to explain to the Student's Parents what the program consisted of – she did not go there with any preconceived understanding that the LEA had already decided to send the Student to MZ school. Tr. 1995. She was there to explain the option. Tr. 1995. It was a potential support. Tr. 1997. The IEP of April 22/May 2, 2019 did not name MZ as the new school.

JB, a BCBA, one of three with the LEA, an expert in behavior analysis, credibly testified that it would be appropriate for the Student to be in the SES 1 or SES 2 classroom, after having heard testimony in the multi-day due process hearing, and after what she had read. Tr. 2599-2600. According to BCBA expert JB, the Student's transition from the private healthcare setting (where is receiving no education) back to school would have her lean towards the SES 2 classroom, to allow less demand for academics in that setting, while maintaining access to general education, yet giving the teachers greater flexibility because the Student had not been in the classroom setting for some time. Tr. 2552, 2599-2600. The Petitioners did not present an expert with opposing views.

The question posed is whether the change to the social emotional classroom from the social communication classroom is a change in placement, or only a change in location for services. While the term "educational placement" is not defined by the IDEA, in some cases the dispositive factor is the IEP in place at the time the stay-put

provision is invoked, and in other cases it may be fact-driven in that it is "something more than the actual school attended . . . and something less than the child's ultimate educational goals." *Erickson at* 1121. The Fifth Circuit has, as recently as March 6, 2020, concluded that a change in placement did not occur in facts similar to the case at hand. In *A.A. for K.K. v. Northside Ind. Sch. Dist.*, 120 LRP 9212 (5th Cir. , March 6, 2020), the LEA unilaterally changed the school the student attended into an applied learning environment without notice to the parent, for a blended schedule of applied learning and general education with behavioral supports. Id. The Fifth Circuit held that it did not amount to a procedural violation. Id.

A predetermination allegation will be considered as a placement procedural violation. *See A.A. , id.* If there is a procedural violation, then the next step is to determine if the procedural inadequacies: (1) impeded the Student'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. 34 CFR § 300.513 (a)(2).

A student is to be educated in his least restrictive environment. 34 CFR § 300.114(a)(2)(i). The student is not to be removed to a special education setting unless the nature of the severity requires that the education in the regular classroom cannot be achieved satisfactorily. 34 CFR § 300.114(a)(2)(ii). There must be a continuum of alternate placements available to meet the student's needs. 34 CFR § 300.115. Placement in the least restrictive environment is to made by a group of people knowledgeable about the student, including the parents. 34 CFR § 300.116(a). It is to be based on the student's IEP. 34 CFR § 300.116(b)(2).

The *A.A.* case, id., is persuasive and timely in the determination in this case. The Student exhibited signs of maladaptive behaviors which increased, including threats of use of a firearm which the LEA security took seriously. The LEA staff and educators worked with the Student and his Parents a number of times to resolve the educational behaviors the Student presented with. When the March 4, 2019 BIP finally was completed, the data was reviewed, and the April 22/May 2, 2019 IEP concluded the educational plan for the Student would be in the new location at MZ school, rather than MT school. The emphasis, based on the expert testimony by the LEA's BCBA, which is found to be credible, was to manage the Student's emotions to allow him to gain educational opportunity and advancement, rather than the stay-put MT school setting, in which the emphasis was on communication. *Endrew*, 137 S.Ct. at 1001 (deference is given to the expertise and exercise of educators). General education services would continue to be provided. In the new setting the Student would be able to communicate with his peers. While the Student's Parents' concerns, specifically that of possible mirroring misbehaviors of other children, does not go unnoticed, this is a preconceived notion at this stage since the Student has not attended the MZ school, and should it become ripe then a future IEP presumably would address it. Considering these factors, it is concluded the change in location for services was not a significant program change, *see N.D. ex rel. Parents Acting as Guardians Ad Litem v. Haw. Dep't of Educ.*, 600 F.3d at 1116, and therefore, there was not a procedural violation of FAPE. 34 CFR § 300.513.

Therefore, a least restrictive means test is not necessarily required. *See Sacramento City Unified Sch. Dist. v. Rachel H.*, 14 F. 3d at 1403-04. Nonetheless, it is concluded the Petitioners have not met their burden to show that the new classroom

environment is not the least restrictive environment. 34 CFR § 300.114(a)(2)(i). If anything, given access to the general education population and the ability to communicate and associate with peers also with emotional regulatory issues, and lack of a one on one BCBA, as the Petitoners assert could be a requested service to remain in the SCS classroom, all support that the new SES classroom is less restrictive than the old SCS classroom, and the decision to do so was made by the IEP Team, with the Student's Parents present on April 22/May 2, 2019 IEP. *Endrew*, 137 S.Ct. at 1001 (deference given to discretion and expertise of educators, with parents having the ability to voice opinions). The decision was made at the meeting, although it was not the decision the Student's Parents wanted. It is concluded the Petitoners have not met their burden to prove that there was a procedural violation amounting to a predetermination. *See* 34 CFR § 300.116(a) and 300.513.

Given this conclusion, the issue of whether it was an appropriate change of placement under *L.B. ex. rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004) will not be explored.

Failure to Implement IEPs

This portion addresses those remaining matters regarding alleged implementation in Issue 10, preserved by the Petitoners in their F&Cs, which have not already been addressed in the other issues and analysis herein.

The remaining issues regard whether a "gifted" evaluation ever took place, implementation of the March 4, 2019 BIP, and implementation of the April 22/May 2, IEP requiring BCBA support to train educators and the BCBA.

As for the gifted referral, the evidence presented by the Petitoners is that: (1) there was a referral for the gifted program (*see* Ex. B, p. 13); (2) Teacher SM did discuss with the Student's prior teacher, who was responsible for the testing, whether the Student had been tested, and she said that everything had been done to meet the proposal for gifted, although Teacher SM did not know of anyone who had done the testing. Tr. 80, 82. As noted otherwise in this Memorandum Decision, a failure to implement an IEP allegation is viewed as a procedural claim. The first question is whether there was a procedural error. 34 CFR § 300.513(a)(2). It is concluded the Petitioners have not met their burden to prove a procedural error. Id. Although Teacher SM did not know of anyone who had done the testing, she did speak with the Student's teacher at the time responsible for the testing, and was told it had been performed. There being no other evidence presented by the Petitoners to the contrary, it cannot be concluded that they met their burden to prove the IEP had not been implemented. Therefore, there was no denial of FAPE. 34 CFR § 300.513(a).

As for the April 22/May 2, 2019 IEP requiring BCBA collaboration and training of teachers, the April 22/May 2, 2019 IEP Prior Written Notice states, in relevant part, that in response to the Student's Parents' request for a BCBA to support all staff who work with the Student, that the LEA will "provide BCBA support in the form of collaboration and training of teachers and staff as needed to meet [the Student's] social emotional needs." Ex. AA, p. 20. It goes to state that the Student's Parents could request BCBA support for staff as well. Id. There was only one meeting between staff and the BCBA, JB, which was between April 22 and May 2, 2019. Tr. 373, 376. She went to Teacher SM's class and looked at the current Behavior Implementation Plan, and they talked

about the Student, the need to change strategies, and data on how the Student was doing since he began the BIP. Tr. 374. The BCBA gave Teacher SM advice, such as the need for an additional FBA, and the Student's behaviors and aggression. Tr. 374-375. This was the only meeting the teachers had with the BCBA. Tr. 376, 414. It lasted an hour. Tr. 752. Petitoners only cite to testimony relating to the BCBA training for the teacher, and not to other staff, so this is only what is considered. See Ps' Proposed F&Cs, p. 24.

While the term "as needed" appears discretionary, the Petitoners raise the claim as a failure to implement, and it will be considered under a failure to implement standard. Thus, the burden is on the Petitioners to first prove a procedural implementation defect. 34 CFR § 300.513 (a)(2).

At first glance, an hour would appear insufficient, yet there is no testimony one way or the other as to what was "as needed," and the burden is on the Petitioners to prove a violation of FAPE. To understand this "as needed" phrase, the testimony of Teacher SM must be read in context, rather than piecemeal. In addition to her testimony that she only spent one hour in training with the BCBA, she also explained that she continued to receive supports from a behavior specialist, CC, because the BCBA works alongside with the behavior specialist to make sure the support was applicable and appropriate. Tr. 375-376. From this explanation in context, it is found that the one hour session was what was determined to be "as needed." As such, there was no procedural violation with the one hour session with the BCBA.

Assistive Technology

That part of the Petitioners' issue regarding assistive technology preserved through its F&Cs is fairly limited. See Ps' Proposed F&Cs, pp. 24-25. Their claim is the Student did better with assistive technology (a keyboard). Id. This will address Issue 11.

They cite to the record at Tr. 600, 604-605, 608-609. Id. Reading the cited transcript, it refers to Ex. R., the IEP of December 17, 2018. Ex. R. Ex. R states the Student does not have assistive technology needs. Ex. R, p. 5. Yet the same IEP states in narrative that he would use assistive technology. *See* Ex. R, p. 4. Teacher SM's testimony shows, however, the Student grew into using assistive technology over time. Tr. 599-600, 604 - 605, 740 (language), 611 (math). An assistive technology device is a piece of equipment which increases, maintains, or improves the functional capabilities of a child with a disability. 34 CFR § 300.5. This should be included in the IEP. 34 CFR § 300.324. Failure to include it, if it is a failure, will be considered under a procedural violation, and, if so, whether it impeded the Student's right to a free appropriate public education, significantly impeded the Parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The IEP box was not appropriately checked for assistive technology, yet the narrative text spoke about it, and the practice was to use it. Thus, not checking the box stating the Student needs assistive technology is yet another procedural flaw, but it does not rise to the Petitioners meeting their burden to prove that it impeded the Student's right to a free appropriate public education, significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or

caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). There was no denial of FAPE.

Extracurricular Activities

This topic relates to Issue 12. The extracurricular activity the Petitoners advance is that the LEA had to provide an educational assistant to support the city run preschool program because at times the Student would come from the preschool program into the LEA school program in an escalated state. *See* Ps' F&Cs, p. 25-26. Non-academic and extracurricular services are to be provided to afford children with disabilities an equal opportunity to participate in those activities, such as counseling services, athletics, transportation, health services, recreational activities, clubs or special interest groups, among other things. 34 CFR § 300.107. They have to be appropriate and necessary by the student's IEP Team. Id.

The Petitioners first have not exhausted this through the IEP Teams. None of the IEP Team meetings reflect that the Petitoners asked for the LEA to provide these type of preschool services. See Exs. B, G, I, O, R, W, and AA. Contrary to not asking, they specifically proposed in the August 8, 2018 IEP, which was accepted by the Team, that they, as the Parents, would provide before school care staffing. Ex. O, p. 18. Although the Student's Mother also made a request for outside BMS support, it was for support during the school day, not for the before school program. Tr. 231, Ex. O. It is concluded the Petitoners did not first exhaust this request with an IEP Team for a before school assistant should it even be deemed an appropriate and necessary service, for which no finding need be now made, due to the exhaustion requirement. *Ellenberg* at 1267. It is

a jurisdictional issue. *See Muskrat*, 715 F.3d at 783. This portion of the Student's Due Process Request is denied.

Occupational Therapy Services

This topic relates to Issue 13.

The Student's Mother considers her child's difficulty with the general education math class was due to sensory sensitivities, in that he was hyposensitive to some things, and hypersensitive to other things. Tr. 2127. As a result, she believes the deficits can be addressed by occupational therapy. Id. Although the Student's Mother's understanding of her son is not discounted, for she is the Student's Mother and knows him well, she is not an occupational therapist, nor is she an expert within the realm of knowledge regarding how sensory issues would demand occupational therapy for the Student's educational program to be appropriate under his unique circumstances in general education math. The educators concluded that the Student's refusal to participate in general education was due to his emotional dysregulation. Tr. 119, 145-148, 213, 228, 230, 366, 458-462, 485-488, 2584. Exs. G, I, O, R, W, and AA. Deference is given to the expertise and exercise of judgment of the educators. *Endrew*, 137 S.Ct. at 1001.

In the February 2, 2018 IEP the IEP Team, in which the Mother participated, concluded that occupational therapy should become 120 minutes per semester of occupational therapy consultation services, rather than direct services. The four corners of the instrument do not reflect that the Student's Parents objected to the consultation proposal. Ex. G, p. 14. In the IEP, it was noted that when the Student escalates he is aware of what he is doing and understands the tools he can use in escalation, yet he does not implement them. Id. In the May 11, 2018 IEP Amendment

there is no discussion about occupational therapy services. Ex. I. On August 21, 2018, the IEP proposed reducing the Student's general education math studies to 90 minutes per week because the Student refused to go to the class. Ex. O, p. 19. The four corners of the instrument do not show the Student's Parents sought direct occupational therapy. Id. The IEP of December 17, 2018 does not address occupational therapy. Ex. R. What is noted is that the Student's escalations in math class prevent him from working in the general education setting, thus leading to a suggestion that the instruction in general education time be at least 30 minutes per day. Ex. R, p. 8. At this stage, the Student's general education services, including with math, were set at 285 minutes per week, allowing him to participate in the general education setting, while developing social and sensory skills. Ex. R, p. 15. Once again, there is no objection by the Student's Parents, nor is there any request for direct occupational therapy services. Id. In the March 4, 2019 IEP it was noted the Student met his goals for math, yet escalations prevented him from attending general education settings, with the suggestion that he go to class at least 30 minutes per day. Ex. V, p. 5. Occupational services were not addressed. Id, p. 17. The Student's Parents did not request direct occupational therapy services. Id. The April 22/May 2, 2019 IEP is the IEP which changes the location of the Student's services to the SES setting, because of the Student's need to focus on social skills, emotional strategies, self-advocacy, and self-efficacy to participate in general education. Ex. AA, p. 20. The Student's Parents did not seek direct occupational services. Id. They did request the Student be retained in the SCS classroom, but, again, there was no request for direct occupational therapy services. That is, the Student's Parents did not give the IEP Team " 'at least the first crack at formulating a plan to overcome the consequences

of educational shortfalls.' " *Ellenberg*, 478 F.3d at 1275 (citing *Cudjoe ex rel. Cudjoe*, 297 F.3d at 1065). It is a jurisdictional issue. *See Muskrat*, 715 F.3d at 783. It is concluded the Petitoners did not first exhaust this request with an IEP Team for direct occupational therapy services. This portion of the Student's Due Process Request is denied. Note, as well, that had the matter been exhausted, the Petitoners nonetheless failed to meet their burden to prove the IEPs lacking direct occupational therapy services otherwise "required" those services to assist the Student to benefit from special education. 34 CFR § 300.34(a). It was not required, therefore, as an appropriate related service. Id. There was no denial of FAPE.

Threat Assessment Parent Participation

This portion addresses Issue 14.

Two informal threat assessments, and one formal threat assessment, arose with regard to the Student. Ex. GG. Tr. 1220-1222, 1829-1834. A threat assessment determines if a threat is plausible, and, if so, a formal investigation is performed, yet if it is informal, then it is documented. Tr. 1824-1825. Both students with disabilities and students without disabilities are capable of carrying out threats. Tr. 1871. The individual responsible for carrying out the protocol for the LEA is LF. Tr. 1819.

The formal threat assessment was carried out due an incident on March 7, 2019, where the threats were made to teachers, and a threat to kill another student. Ex. HH, pp. 2, 12. Members of the Threat Assessment Team (TAT) were DT, School Psychologist Dr. M, LS, and Teacher SM. Ex. HH. The Student's Parents were not included. Id. Tr. 1190. The threat was considered to be medium level, Ex. HH, p. 11, Tr. 1866, and it was noted that for a special education student consideration was to be given to conducting a

manifestation determination, FBA, or BIP, in relevant part. Ex. HH, p. 11. A BIP was checked. Id. The form also noted an ongoing FBA and BIP. Ex. HH, p.13. The meeting took place on March 28, 2019. Ex. HH, p. 1. Note that an FBA and BIP had been completed on March 4, 2019.

The first informal threat assessment was on January 25, 2019, where the Student threatened to bring a gun to school. Exs. G, and 28. The Student was suspended for one day due to that incident. Ex. 28. The second occurred on February 6, 2019. Ex. 28, p. 3. The Student said that someone else would be dead if their action of some sort did not stop. Id. Tr. 1186-1187. Three out of eight parents called the LEA voicing concerns about their children's safety due to the Student using words like "killing," and "dead." Tr. 1187.

Threat assessments are performed for both regular education students, and special education students, although the school psychologist is only for the special education students as part of the team, and for regular education students a contractor facilitates the program. Tr. 1864-1865. TAT members have to sign a confidentiality agreement precluding them from disclosing information about the process, so to protect confidentiality of employees who participated in the threat assessment. Tr. 1839. Parents are only given a copy of the Threat Assessment Plan Summary. Tr. 1838. Ex. HH, p. 12. The Student's Parents were not provided the formal threat assessment. Tr. 2419-2421. The procedure the LEA uses for the threat assessments is in recommendation with some sort of Secret Service recommendations. Tr. 1840. The LEA did not consider the assessment records to be educational records. Tr. 1845. As for this Student, his age of seven, and that he had a disability, were factors considered by

the TAT, although the noted disability mislabeled the Student as learning disabled. Tr. 1848-1851. LF takes every threat seriously; for example, a first grader brought a loaded handgun to school a year earlier. Tr. 1855. The purpose is to prevent any tragedies. Tr. 1871.

The issue asserted by the Petitioners is that because the Student's Parents were members of the IEP Team, then they should have been a part of the TAT, and also provided full copies of the Threat Assessment paperwork. Ps' Proposed F&Cs, p. 27.

While an LEA is not prohibited from referring a child with a disability to a law enforcement agency and judicial authorities with respect to federal and state criminal law, 34 CFR § 300.535, the group here was not a law enforcement team. While disclosure of records to the police or judicial authorities are to be consistent with the Family Educational Rights and Privacy Act, *see* 34 CFR § 300.535(b)(2), the relevant TAT record is not subject to disclosure by the LEA to the police or courts. While the LEA may apply the same rules to students with disabilities as to those without disabilities, unless removal is for more than 10 consecutive days, at which time a manifestation determination arises, *see* 34 CFR § 300.530(c) , the TAT group for this special education Student specifically included a school psychologist, and this Student's special education status was considered for an FBA/BIP and whether there should be a manifestation determination, if required. A different TAT group was used for special education students than for general education students, with the general education students having services by an independent contractor. While on the one hand it would be inconsistent to conclude that an internal threat investigation of a special education student, like that by the TAT group, might require disclosure of confidential source

records, when other referrals to police and disciplinary action under 10 days might not, the composition of TAT group itself, and what it considers, presents a challenge to this conclusion.

Parents are required to be given the opportunity to examine records and participate in meetings with respect to the identification, evaluation, and educational placement of their child, and for the provision of a FAPE to their child. 34 CFR § 300.501 (a)&(b). These are procedurally a part of the process for FAPE. Id. As for meeting participation, a "meeting" does not include informal or unscheduled conversations regarding personnel or issues on methodology, lesson plans, or coordination of a service provision, or preparatory activities to address a proposal or response to a parental request to be considered at a later meeting. 34 CFR § 300.501 (b)(3). As for records, they are to be in accord with procedures under 34 CFR §§ 300.31–300.621. Id. In relevant part, 34 CFR § 300.613 allows parents the ability to inspect and review educational records, and the agency must comply without unreasonable delay and before any IEP meeting, but in no case longer than 45 days. Id. There is nothing in the regulations allowing an exception for a threat assessment meeting, or threat assessment records.

These are procedural requirements and will be viewed in a procedural context.

As for meeting participation, it is concluded that because the TAT group meeting included a psychologist to address the Student's special education needs, and because there was a discussion and TAT document consideration of an FBA/BIP, then the Petitoners have met their burden to prove the meeting was a meeting regarding an evaluation and for the provision of a FAPE to the Student. 34 CFR § 300.501 (a). There

was a procedural error in not including the Student's Parents in the meeting, as it was factually composed in this case.

Regarding the meeting and whether a FAPE was violated because of the procedural violation by not having the Student's Parents at the meeting, it is concluded that by the Student's Parents not given the opportunity to attend the formal threat assessment meeting, which resulted in discussion of the Student's special education behavior management, then it significantly impeded their opportunity to participate in the decision-making process for a provision of a free appropriate public education. 34 CFR § 300.513 (a)(2). Throughout these proceedings, the Student's Parents consistently emphasized the Student's behavioral challenges as a key component to his need for special education services. They were not given the opportunity to act in a meeting regarding an evaluation and a provision of FAPE to their child. It is concluded, therefore, that the Petitioners have met their burden to prove a violation of FAPE. 34 CFR § 300.501.

As for records disclosure, the Petitoners have met their burden to prove that they requested the LEA to let them inspect the Student's educational records. Tr. 2419. Student's Father, found to be truthful, testified he never received a copy of Ex. HH, the threat assessment package. Tr. 2421. Although p. 12 of Ex. HH states the Student's Father will "scan and email document to his attorney and will come in and sign after approval," id., there is nothing to show that he came in and signed after some sort of unexplained approval, and it was inconsistent with LF's testimony, which is found to be credible, that only the single page threat assessment summary is given to parents. Assistant Principal PM has limited memory, and includes only his perception of

standard practices he employs that by noting it on a form means he provides a form to a parent, Tr. 1896, and Principal DT remembers that Assistant Principal PM, and not her, who was to provide the Threat Assessment Summary to the Student's Parents. Tr. 1195. In any event, it is found that even if the Threat Assessment Summary was the only page given to the Student's Parents, the other pages, including risk factors, precipitating events, threat levels, stabilizing factors, and special education service considerations such as the FBA/BIP (Ex. HH, pp. 8-11), were not given to the Student's Parents. These records (Ex. HH) relate to the evaluation and for the provision of a FAPE to the Student. 34 CFR § 300.501 (b). It is concluded that by the Student's Parents not being given the opportunity to inspect the records then it significantly impeded their opportunity to participate in the decision-making process for a provision of a free appropriate public education. 34 CFR § 300.513 (a)(2). As with the failure to allow attendance at the meeting, the Student's behavior was a key component for his special education services, and the TAT records reflect special education considerations in the behavior management of the Student for special education services. It is concluded, therefore, that the Petitioners have met their burden to prove a violation of FAPE. 34 CFR § 300.501.

SPIRE

This portion relates to Issue 15. The Petitoners voice their contention that the LEA failed to meet the Student's individual needs because it used the SPIRE reading program with the Student. Ps' F&Cs, pp. 28-29. SPIRE is an evidence-based reading program. ***See*** *Ms. M. v. Falmouth Sch. Dep't.*, 847 F. 3d 19 (1st Cir. 2017). Methodology is left to the discretion of the LEA. ***See*** *Rowley*, 458 U.S. at 208.

Despite this general standard, the Petitoners frame the matter that they are not seeking another methodology, but are rather asserting the Student's appropriately ambitious unique educational needs are not being met by the reading program, which is essentially a substantive claim. *Endrew F.* at 999 - 1001. The burden remains on the Petitoners to prove this. *See Schaffer*, 546 U.S. 49.

SPIRE is primarily phonetic, although it addresses fluency, comprehension, and writing. Tr. 154. Of the ten components of SPIRE, one part is comprehension, another part is a written component, and the other parts address decoding and fluency. Tr. 155. Although the Student was successful in reading books he chose, and although he was incredibly good at decoding, he still showed gaps in decoding. Tr. 156. The education reading plan used SPIRE, but also used other research-based evidence practices, like the Ready curriculum, and the i-Ready piece, with computer-based elements, and workbooks, papers, and lessons. Tr. 158. The Student would use the SPIRE approach to tap out, in a multi-sensory approach, phonetics. Tr. 156. After the SPIRE lessons, the Student would begin to read certain phonemes, and generalize them. Tr. 602.

The Student would use grade level text and apply reading skills to recall information. Tr. 64, 67, 69. As the Student progressed with the phonetics and phonetic awareness, the reading program was revised to comport with the Student's high language skills and communication needs. Tr. 447, 600-601.

While the Student was able to read chapter books, Tr. 249, and some testing showed he was at a level of phonetic awareness, Ex. R, Tr. 249, the Petitoners present no independent evidence, such as by a reading expert, that he was not making appropriate progress with the reading methods employed by the LEA, relative to his autism and

behavioral needs. ***See*** *Endrew F.*, 137 S. Ct. at 998-999. A very recent case in the District of New Mexico addressed reading methodology and Orton-Gillingham, yet the conclusion was that the methodology did not teach appropriate reading skills to that student because they were not calculated to enable that student to succeed appropriately under his circumstances. ***See*** *Preciado v. Bd. of Educ. of Clovis Mun. Schools*, 76 IDELR 67, 120 LRP 9731, 19-cv-0184 SMV/KRS (D.N.M. March 11, 2020). This is dissimilar to the present case. In this case, it is concluded that the Petitioners have not proved that this Student has not made progress appropriate under his circumstances, which included his autism and behaviors, with a combination of reading techniques provided by the LEA. There was no denial of FAPE. 34 CFR § 300.501.

Alleged Admission by Party Opponent

The Petitioners ask, because the Respondent's Answer reflected that the Petitoners' "proposed services seen generally reasonable," that this effectively leads to an admission of a party opponent that the equitable remedy proposed by the Petitoners in their Request for Due Process is reasonable. *See* Petitioners' Closing Argument, p. 11. This invitation is declined. Hearing officers are given the authority to grant relief as deemed appropriate. 20 U.S.C. § 1415(e)(2). While the Answer may have stated that the services generally seem reasonable, it also states it was without information to accept or reject a number of the actions, and that it intended to explore the matters in greater depth. *See* Answer, p. 1. There was no admission. Indeed, the remedy for what is appropriate lies with the hearing officer, not an editorial statement of possible reasonableness by the LEA.

Remedies

Denial of FAPE

As reflected above in these numerous pages of Analysis**,** there are three FAPE violations: (1) Lack of Implementing a Speech-Language Assessment or Evaluation, (2) Untimely Implementation of FBA/BIPs, and (3) Failure to Include Parents in the TAT meeting and to failure to provide them TAT records.

SLP Evaluation

The Student will be independently evaluated (assessed) by an expert in the area of Speech and Language. This will take place without unnecessary delay, to mean, to meet the goals of this decision, to be within 30 days from the date the Petitioners receive notice from the LEA of the independent evaluator process, as explained below. *See* 34 CFR § 300.502 (a)(3)(b)(2). To meet the goals of this decision, the Petitioners will respond to the LEA regarding the independent evaluator process within 10 days of receipt of the evaluator notice. This evaluation is ordered by the Hearing Officer under the independent evaluation provisions, *Id.* at § 300.502(d), rather than under the initial evaluation procedures, *Id.* at § 300.301, because as a remedy for a violation of FAPE if the LEA is ordered to conduct the evaluation as an initial evaluation then it could give the LEA undue influence on the evaluation process. ***See*** *M.S. v. Utah Sch. for the Deaf and Blind*, 822 F.3d 1128, 1135 (10th Cir. 2016)(delegation back to IEP team for remedy inappropriate due to concern of undue influence). The LEA is to act in accord with the independent evaluation process in that it will, without unnecessary delay, provide the Petitioners information about where an independent educational evaluation will be obtained, *see* 34 CFR § 300.502 (a)(2), and conducted by a qualified examiner not

employed by the LEA. *Id.* at (a)(3)(i). ***See*** *M.S. v. Utah Sch. for the Deaf and Blind,* 822 F.3d at 1130 (practice to send list of qualified evaluators). Unnecessary delay means, to meet the goals of this decision, within 30 days of the Student's re-enrollment or entry into the LEA school environment. The LEA is to act in accord with the criteria in 34 CFR §§ 300.304, 305, and 502. *See id.* at § 300.502(e). It is to be at public expense. *Id.* To meet the goals of this decision, on completion of the independent educational evaluation, it will be provided to the parties. Note that at this time the schools in New Mexico are physically closed through the end of the school year due to the Covid 19 illness in the world. Should the Student make himself available for services with the LEA during this time frame, then the evaluation procedure is postponed until schools physically reopen, at which time the 30 day window begins.

FBA/BIP/IEP Staff Education

The Student's proposed educational services with the LEA at MZ school, as concluded, resulted in a change of physical location with a prospective proposal for services in the SES1 or SES2 classrooms. Given the Student's unique special education needs as a Student eligible for services with autism, however, staff education in the new setting is ordered in relation to the denial of FAPE due to the untimely implementation of an FBA/BIP, and the components of the various IEPs with the 11 Autism considerations as they relate to the behavioral issues under the untimely FBA/BIP for this Student and his unique needs due to autism.

BCBA JB, whom has been found credible, testified that people she trains are often confused about positive behavior support strategies not included in an IEP, and its relationship to an FBA/BIP. Tr. 2687-2688. To fashion a remedy prospectively, ***see***

Endrew F. at 999-1000 ("prospective judgment by school officials") under the Student's unique circumstances, so to avoid confusion about positive behavior strategies and an FBA/BIP, as well as to timely implement an FBA/BIP, and IEPs, certain staff and teachers, noted below, educating the Student at MZ school will be trained in Autism Spectrum Disorder, and the 11 Considerations of Autism. *See* §6.31.2.11(B)(5)(j)(training of professional educator and staff support training to assure the correct implementation of techniques and strategies described in the IEP). Although the LEA employs a train the trainer model, Tr. 2558, in this instance, given this Student's unique behavioral and autism needs, all staff and educators, either in the SES1 or SES2 classroom, who will be working with the Student are required to have specific training in ASD and the 11 Considerations of Autism. This also includes general education educators and staff, if any, who will be participating in the Student's future IEP meetings. It includes, as well, Teacher SM, and although she will no longer be the Student's special education classroom teacher, she is a part of the educational environment which has formed the Student's education plan, for any transition of the Student now into MZ school.

The training will be in person, by a New Mexico trainer based on skill, education, training, and experience, to give instruction to educational staff and teachers regarding autism, or it may be by video. If by video, by way of example only, the UNM Center for Development and Disability Training for Educators has a website at cdd.health.unm.edu/autismportal/2019/05/15/training-for-educators. Located on that website are two programs: one on the FBA (1:56), and another on the BIP (1:01), both by Maryann Trott, MA, BCBA. This website does not include ASD training. By way of

example, similar training in ASD may be found in Moodle, for which an account is needed, also by Ms. Trott, MA, BCBA, called Introduction to ASD. Thus, within two weeks of the Student entering the new setting at MZ school, the noted educators and staff will go thorough the training, amounting to three courses, similar in length to what are noted above. This is in addition to the ongoing twice a month training provided by BCBA JB in the MZ school environment. Tr. 2581.

All relevant educators and staff noted to be involved in the required training will log the date and time of their training, and sign a document attesting that they attended the training in person or on line. The documentation will be provided to the IEP Team at the next IEP Team meeting, and notation will be made in the next IEP of the training.

It does not go unnoticed that some authority exists that a hearing officer may lack authority to award prospective training. *See* Zirkel, Perry A., the Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update, Journal of the National Association of Administrative Law Judiciary, Spring 2011, 31-1, p. 28 (with authority cited therein). However, this remedy today is fashioned under New Mexico's 11 Considerations of Autism, and the FBA/BIP process specific to New Mexico law relating to the Student's autism and behavioral challenges.

Given the barriers between the parties, the next IEP will be facilitated – a FIEP – to seek to improve the relationship among the participants to move forward in the future. The facilitation will be through the New Mexico Public Education Department, which can be reached at (505) 827-1457.

TAT Meetings and Records

Once again, to fashion a remedy prospectively, ***see*** *Endrew F.* at 999-1000, due to the Student's unique circumstances and the composition of the TAT Team and required discussion about the special needs of the Student, the Student's Parents will be invited to participate in all future TAT meetings, as a special education meeting, should the TAT Team continue to be composed as in the past and continue to consider the Student's special education needs. The parties did not address possible redaction of names or other materials, and it will not now be addressed.

Compensatory Education

The Petitioners request for compensatory education is denied. They do not meet a qualitative burden that any lost services (if any can be put in hours) resulting from the denials of FAPE are 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.

Other Requested Remedies

The Petitioners request a number of other remedies they construe as equitable relief. *See* Request for Due Process, pp. 27-30. Unless otherwise disposed of herein, they are denied.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process against the LEA, filed on August 9, 2020, with requested relief, is granted in part and denied in part.

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 CFR § 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.

/s/ electronic

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MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: April 1, 2020

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by email attachment transmission only to G. Stewart, S. Adams, A. De Young, and D. Poulin, Esqs., on the 1st day of April 2020, with the parties agreeing to service by email attachment, with the copy to Attorney Poulin also acting as the copy forwarded to the New Mexico Secretary of Education.

/s/ electronic

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MORGAN LYMAN