

**BEFORE THE NEW MEXICO  
PUBLIC EDUCATION DEPARTMENT**

**DPH No. 1920-15**

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

THIS MATTER arises on the Petitioners' Due Process Complaint and Request for Hearing Pursuant to the Individuals with Disabilities Education Act, filed with the State of New Mexico Public Education Department on January 22, 2020 (hereinafter Request for Due Process). *See* Due Process Complaint and Request for Hearing Pursuant to the Individuals with Disabilities Education Act, January 22, 2020. The Petitioners' Request for Due Process is granted in part.

**PROCEDURAL BACKGROUND**

The Respondent LEA responded to Petitioners' Request for Due Process on February 5, 2020. *See* Respondent's Answer to Petitioners' Due Process Complaint and Request for Hearing Pursuant to the Individuals with Disabilities Education Act, February 5, 2020 (hereinafter Answer). This was filed in the same afternoon after the Petitioners filed, in the morning, their Notice of Respondent's Failure to Respond to Their Due Process Complaint or Provide Prior Written Notice and Request for Relief. *See* Petitioners' Notice of Respondent's Failure to Respond to Their Due Process Complaint or Provide Prior Written Notice and Request for Relief, February 5, 2020. On February 7, 2020, the Petitioners filed their Notice of Respondent's Failure to Convene Resolution Session and Request to Begin the Due Process Timelines. *See* Petitioners' Notice of Respondent's Failure to Convene Resolution Session and Request to Begin the Due Process Timelines, February 7, 2020.

A Pre-Hearing and Extension Order was entered on February 11, 2020, after a Pre-Hearing Conference on the same day which, among other things, set the date for Pre-Hearing Motions and for the Due Process Hearing. **See** Pre-Hearing and Extension Order, February 11, 2020. It also ordered that the Respondent and the Petitioners act within a timeframe regarding the Petitioners' February 5, 2020 Notice of Respondent's Failure to Respond to Their Due Process Complaint or Provide Prior Written Notice and Request for Relief, because the said Notice was filed before any motions deadlines were set. *Id.* On February 12, 2020, the Petitioners' filed their Supplement to Their Notice of Respondent's Failure to Respond to Due Process Complaint or Provide Prior Written Notice. **See** Petitioners' Supplement to Their Notice of Respondent's Failure to Respond to Due Process Complaint or Provide Prior Written Notice, February 12, 2020.

On February 19, 2020, the Petitioners' filed their Notice of Service of Petitioners' Proposed Statement of Stipulated Facts and Contribution to Joint Statement of Issues. **See** Petitioners' Notice of Service of Petitioners' Proposed Statement of Stipulated Facts and Contribution to Joint Statement of Issues, February 19, 2020. On February 20, 2020, with Respondent not having filed a timely response to Petitioners' February 5, 2020 Notice of Respondent's Failure to Respond to Their Due Process Complaint or Provide Prior Written Notice and Request for Relief, an Order was entered denying relief requested by the Petitioners in Petitioners' February 5, 2020 Notice of Respondent's Failure to Respond to Their Due Process Complaint or Provide Prior Written Notice and Request for Relief. **See** Order Denying Relief for Petitioners' Notice of Respondent's Failure to Respond to Their Due Process Complaint or Provide Prior Written Notice and Request for Relief, February 20, 2020.

The Respondent filed its Motion for Order to Disclose Expert Witnesses on February 24, 2020. **See** Respondent’s Motion for Order to Disclose Expert Witnesses, February 24, 2020. On February 25, 2020, the Petitioners responded to the Respondent’s February 24, 2020 Motion for Order to Disclose Expert Witnesses. Petitioners’ Response in Opposition to Respondent’s “Motion for Order to Disclose Expert Witnesses,” February 25, 2020. An Order Denying Respondent’s Motion for Order to Disclose Expert Witnesses was entered on February 25, 2020. **See** Order Denying Respondent’s Motion for Order to Disclose Expert Witnesses, February 25, 2020.

The parties filed their Joint Statement of Stipulated Facts Pursuant to NMAC §6.31.2.13(I)(14) on February 26, 2020. **See** Joint Statement of Stipulated Facts Pursuant to NMAC §6.31.2.13(I)(14), February 26, 2020. The Petitioners filed their Proposed Statement of Issues on February 28, 2020. **See** Petitioners’ Proposed Statement of Issues, February 28, 2020 (Ps’ Issues). Respondent also filed its Proposed Statement of Issues on February 28, 2020. **See** Respondent’s Proposed Statement of Issues, February 28, 2020 (R’s Issues).

The parties timely filed their respective Witness and Exhibit Lists. **See** Petitioners’ Exhibit Book and Table of Contents, March 6, 2020; Petitioners’ List of Witnesses and Summary of Anticipated Testimony, March 6, 2020; Respondent’s Hearing Exhibit List, March 6, 2020; and Respondent’s Fact Witness List, March 6, 2020. On March 11, 2020, the parties filed their Joint Stipulation Re: Admission of Documents. **See** Parties[’] Joint Stipulation Re: Admission of Documents, March 6, 2020.

The Due Process Hearing was set to begin on March 13, 2020. **See** Pre-Hearing and Extension Order, February 11, 2020. However, on March 12, 2020, at the request of the LEA, an emergency hearing took place where it was represented that a member of the Respondent’s litigation team had been exposed to the Coronavirus. **See** Order Granting Extension and Vacating Hearing, March 12, 2020. The hearing was continued and an extension was granted until May 21, 2020. *Id.* On April 13, 2020, a joint motion was filed to again continue the hearing due to Covid 19 issues. **See** Joint Motion to Continue, April 13, 2020. A hearing was held on that day, with a resulting Order setting the new hearing for June 9, 2020, and granting an extension for a decision to be entered to be on or before July 13, 2020. **See** Extension Order, April 13, 2020.

After a telephone conference on May 18, 2020, an Order was entered, based on the ongoing Covid-19 health crisis, for the hearing to be held for a date certain commencing on June 23, 2020. **See** Order for Firm Setting Date for Due Process Hearing, May 18, 2020. The location for the hearing was subject to extensive protocols for social distancing, wearing of masks, and cleanliness, subject to federal and state orders, and LEA ability, to allow the “in person” hearing to commence, with a virtual hearing to alternatively arise should an “in person” hearing be prohibited. *Id.* On May 22, 2020, an Order was entered *sua sponte* amending the “in person” hearing procedure requirement, and ordering instead that the hearing proceed virtually, on direction of the New Mexico Public Education Department, as a necessary measure to reduce contagion rates for Covid-19. **See** Amendment to Order for Firm Setting Date for Due Process Hearing, May 22, 2020.

A status conference was held on June 12, 2020. **See** Administrative Order, June 14, 2020. Logistics were discussed for holding the virtual hearing via Zoom conferencing, with virtual facilitation and technical support to be performed by the Court Reporter, Paul Baca Court Reporters, in addition to reporting the matter. *Id.* Proposed exhibits were ordered to be disclosed to the Court Reporter for virtual use at the hearing. *Id.* At the status conference the Respondent also requested reconsideration of the prior order denying its prior motion to disclose expert witnesses, which was denied. **See** Order Denying Respondent's Request for Reconsideration of Order Denying Motion to Disclose Expert Witnesses, June 14, 2020.

The Due Process Hearing convened on June 23, 2020, and continued through June 26, 2020, at which time a recess was taken, and then reconvened for the final day on June 30, 2020. Tr. Vols. 1-5. The Respondent's counsel personally appeared with Respondent's representative, Ms. S-S, at the Court Reporter's administrative room, with the Court Reporter, and the Court Reporter's information technology agent when her services were needed. The Hearing Officer appeared via Zoom conferencing, as did Petitioner and her two counsel. Witnesses appeared either virtually, or at the Court Reporter's office. Online cameras and video screens allowed the participants to view, hear, and speak with one another simultaneously.

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 August 13, 2020. Tr. 829. The parties jointly requested an extension of time for issuance of the Hearing Officer's decision, which was granted, for the filing of his decision on or before September 13, 2020. Tr. 831.

The Respondent filed its proposed Findings of Fact and Conclusions of Law on August 13, 2020. Respondent's Proposed Findings of Fact and Conclusions of Law, August 13, 2020 (R's F&C). The Respondent filed its Argument on the same day. Respondent [LEA's] Written Closing Argument. The Petitioners also filed proposed Findings of Fact and Conclusions of Law on August 13, 2020. Petitioners' Proposed Findings of Fact and Conclusions of Law, August 13, 2020 (Ps' F&C). The Petitioners also filed their Closing Argument on August 13, 2020. Petitioners' Written Closing Argument, August 13, 2020 (Ps' Argument).

This decision is due on or before September 13, 2020. Tr. 831.

### **ISSUES PRESENTED BY THE PARTIES**

1. Whether the LEA failed to properly execute its affirmative, ongoing obligation to identify, locate, and evaluate all children with disabilities residing within its jurisdiction who are in need of special education and related services, in violation of 34 C.F.R. § 300.111(a)(1)(i). Ps' Issue # 1.

2. Whether the LEA had an obligation under 34 C.F.R. § 300.111(a)(1)(i) to identify, locate, and evaluate the Student as a child with a disability residing within its jurisdiction and in need of special education and related services and, if so, whether that obligation was satisfied. R's Issue # 2.

3. Whether the LEA had a duty to conduct an appropriate and timely evaluation of the Student and, if so, whether it fulfilled that duty. R's Issue # 3.

4. Whether the LEA failed to conduct an appropriate and timely evaluation of the Student in violation of 34 C.F.R. § 300.304 by:

- (a) failing to review the Student's educational records and history of disability from January 22, 2018 until October 10, 2018;
- (b) failing to act on the Parents' request for a special education evaluation from July 28, 2018 until February 28, 2019, a period in excess of 200 days;
- (c) failing to provide the Parents with prior written notice of the LEA's refusal to evaluate for a period in excess of 200 days;
- (d) failing to provide the Parents with a statement of procedural safeguards regarding the refusal to evaluate at any time during the statutory period;
- (e) failing to evaluate the Student in all areas of suspected disability; and
- (f) improperly using response to intervention strategies to delay or deny a timely evaluation for the Student, in violation of 34 C.F.R. § 300.301(b) and 34 C.F.R. § 300.304-300.311.

Ps' Issue # 2.

5. Whether the Student is a child with a disability as defined in the Individuals with Disabilities Education Act (IDEA) and 34 C.F.R. § 300.8 and, if so, the category of the Student's disability. R's Issue # 1.

6. Whether the LEA had an obligation to offer or to provide the Student with an individualized education program on May 9, 2019, or September 4, 2019, which met the applicable standards, and, if so, whether that obligation was satisfied. R's Issue # 4.

7. Whether the LEA failed to offer or provide the Student with an appropriate individualized education program on either May 9, 2019, or on September 4, 2019, so to enable the Student to make appropriate rather than minimal progress in light of his

unique circumstances under the United States Supreme Court decision of *Endrew F. v. Douglas County Sch. Dist. RE-1*, 137 S. Ct. 988 (2017). Ps' Issue # 3.

8. Whether the LEA failed to offer or to provide the Student with an individualized education program on May 9, 2019, or on September 4, 2019, which met the standards of the state educational agency and is provided in conformity with an IEP that meets the requirements of 34 C.F.R §§ 300.320-300.324 by:

- (a) failing to include an appropriate statement of the Student's present levels of educational performance;
- (b) failing to include an appropriate statement of measurable annual goals;
- (c) failing to appropriately describe how the Student's progress will be measured, and to provide progress reports;
- (d) failing to include an adequate statement of the special education and related services and supplementary aides and services to be provided to the Student;
- (e) failing to include an adequate statement of the Student's least restrictive environment;
- (f) failing to include a sufficient statement identifying the frequency, location, and duration of services and modifications;
- (g) failing to properly consider the Student's need for extended school year services;
- (h) failing to ensure that all required members of the IEP Team participated at the meeting and falsifying educational records to indicate attendance that did not occur; and



(i) failing to provide the Parents with prior written notice regarding the LEA's refusal to accept parental requests relative to the provision of FAPE.

Ps' Issue # 4.

9. Whether the LEA complied with the terms of the Individualized Educational Programs of May 9, 2019, and of September 4, 2019. R's Issue # 5 (identified in its Statement of Issues as a second R's Issue # 4, yet deemed a typographical error, and now renumbered as # 5).

10. Whether the LEA failed to comply with the terms of the Individualized Educational Programs of May 9, 2019, and of September 4, 2019. Ps' Issue # 5.

11. Whether the LEA failed to ensure that the Parents were members of any group that makes decisions about the Student's educational program and placement, and whether the LEA predetermined the level of service to be offered, under the September 4, 2019 IEP, in violation of 34 C.F.R. § 300.327 and 34 C.F.R. § 300.501(c)(1). Ps' Issue # 6.

12. Whether the LEA failed to ensure the availability of a continuum of educational settings, including homebound services, in violation of 34 C.F.R. § 300.115, and whether the LEA failed to provide the Parents with prior written notice of its refusal to offer or provide homebound services, in violation of 34 C.F.R. § 300.503(b). Ps' Issue # 7.

13. Whether the LEA was obligated to provide homebound services to the Student, and, if so whether the services were provided, yet, if the LEA refused services, whether there was an obligation to provide prior written notice of the refusal and, if so,

whether prior written notice was provided. R's Issue # 6 (identified in its Statement of Issues as R's Issue # 5, yet deemed a typographical error, and now renumbered as # 6).

14. Whether compensatory education or equitable remedies are required to make the Student whole and, if so, the type and extent of remedy required, to redress the violations alleged in the Complaint. Ps' Issue # 8 and R's Issue # 7 (identified in its Statement of Issues as R's Issue # 6, yet deemed a typographical error, and now renumbered as # 7).

### **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.” *Andrew 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.” *Andrew F.*, 137 S. Ct. at 1000. The “unique circumstances” of the child for whom the IEP was created determine the adequacy of the offered IEP. *Andrew F.*, 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. *Andrew F.*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Andrew F.*, 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 C.F.R. § 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's) jurisdiction must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R. § 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 C.F.R. § 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 (1<sup>st</sup> Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F.3d. 150, 162 (1<sup>st</sup> 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 C.F.R. § 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 C.F.R. § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child’s right to a free appropriate public education, (2) significantly impeded the parent’s opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents’ opportunity to participate in the decision process, 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 a LEA to comply with procedural requirements. **See** 34 C.F.R. § 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 C.F.R. § 300.323(c)(1).

Written notice is required regarding issues for the identification, evaluation or placement of a child. **See** 34 C.F.R. § 300.503; §6.31.2.13(D) NMAC. 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 C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student’s parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student’s free appropriate public education. **See** *Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727, 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 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, and 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 C.F.R. § 300.321.

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 C.F.R. § 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 C.F.R. § 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).

Under New Mexico specific regulations for students with Autism Spectrum Disorders (ASD) eligible for special education services under 34 C.F.R. § 300.8(c)(1), the IEP Team is to consider and document 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 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 a 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 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003).

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).

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 (10th Cir. 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 exists, as a matter of administrative 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 C.F.R. § 513.
2. All matters were first administratively exhausted by the Petitioners.
3. Because of the Covid 19 pandemic, the Due Process Hearing took place virtually over a Zoom platform. **See** Order for Firm Setting Date for Due Process Hearing, May

18, 2020, and Amendment to Order for Firm Setting Date for Due Process Hearing, May 22, 2020.

4. It was enabled and monitored by the Court Reporter from the Court Reporter's office location.

5. Other procedural hearing factual matters are noted in the Procedural Background, above, and incorporated by reference herein.

6. The virtual Due Process Hearing took some more time than an in person hearing due to use of video-screens and computer technology applications for interactive broadcast of the hearing to the various participants, including having to repeat at times what was said to establish clarity, and to reboot computer operations when an unexpected technical malfunction occurred, yet despite the minor difficulties, the parties were able to be represented by their respective counsel and could communicate with their counsel, and they could present evidence (both written and testimonial) and confront, cross-examine, and compel the attendance of witnesses. The interactive video broadcast on personal webscreens and cameras allowed the parties and the Hearing Officer to see one another generally from mid-section and face presentation. Those appearing at the Court Reporter's office conference room socially distanced with the Court Reporter were on a wider screen view of the conference session. In all settings the participants could hear one another and communicate. Credibility could be assessed.

7. In an attempt to avoid duplicity in these numbered findings and in the Analysis section, the numbered findings are also supplemented by findings in the Analysis section.

8. The relevant statutory period for substantive consideration commenced on about January 22, 2018. **See** §6.31.2.13(M) NMAC.

9. The Student was born on March 6, 2006. **See** Ex. 1 & Joint Statement of Stipulated Facts, February 26, 2020.

10. The relevant academic school years for the Student within the statutory period are the Student's Sixth, Seventh, and Eighth grade years (2017-2018, 2018-2019, and 2019-2020). Ex. 20.

11. The Petitioners are not presenting any claims relating to the Covid 19 school in person closures. Tr. 174.

12. At the time of the Due Process Hearing the Student was attending the LEA, although not in person due Covid 19 closing in person school attendance. Tr. 2403.

13. At the time of the Due Process Hearing the Student was in the Eighth Grade, age 14. Tr. 346-347. **See** Joint Statement of Stipulated Facts, February 26, 2020.

14. At the time of the Due Process Hearing, the Student was taking the prescribed medications of Gabapentin, Hydroxyine, Levothyroxine, Lithium, Minocycline, Clindamycin, and Miralax. Tr. 350.

15. At the time of the Due Process Hearing, the Student was receiving mental health care by providers Pediatric Psychiatrist SC and LPCC CP. Tr. 348.

16. Historically, beginning at about 18 months old, the Student received early intervention services in speech and language, and occupational therapy, with a behavior analyst, through Child Find under a Prior Public LEA, and was classified under developmental delay. Tr. 351.

17. The Student subsequently began education in Private School, with specialized instruction provided by the Public School District in speech and language articulation,

although those services were discontinued by the Public School District at the end of the Third, or the beginning of the Fourth, grade. Tr. 354. Ex. 19. Ex. B3.

18. The Public School District evaluated the Student for Autism, yet the findings came back as inconclusive. Tr. 356.

19. While in Elementary School at the Private School the Student scored in pre-K to Fourth Grade with “As,” and in Fifth Grade with “As” and “Bs.” Tr. 354.

20. The Student exited Private School at the end of the Fifth Grade. Tr. 357.

21. The Student began his program with the current LEA in the Sixth Grade. Tr. 347. Ex. 23

22. The Sixth Grade year is the 2017-2018 school year. Ex. 20.

23. Selection in the LEA Charter School is through a lottery, with random selection from an applicant pool. Tr. 564- 567.

24. The LEA Charter School has about 370 students, from the Sixth through the Twelfth grades. Tr. 802.

25. The LEA is a public charter school. **See** Joint Statement of Stipulated Facts, February 26, 2020.

26. The LEA’s Enrollment Packet completed by the Student’s Mother stated the Student currently had an IEP/504 Plan. Ex. 23.

27. The Student did not have a then current IEP or 504 Plan. Tr. 571- 572.

28. The LEA is ranked as one of the finest academic schools in New Mexico, during the last three years, based on, among other things, advanced placement, scores, college preparedness, honors courses, attendance, and quality of teachers. Tr. 566.



29. Rigor is demanded of the students enrolled in the LEA, with an expectation that there will be a lot of work, and with that work will come educational success. Tr. 565.

30. When students arrive at the LEA in the Sixth Grade they are identified for mathematics as students who are either going to struggle and be placed in remediation, or be on track, or be advanced and placed into higher a grade level. Tr. 760.

31. The Student was determined to be right for the class, right for the school, with an expectation in Math for a grade of C or B, with a grade of an “A” very rarely given in Instructor JD’s classroom. Tr. 761.

32. During the early months of the Sixth Grade, the Student had therapeutic encounters with LPCC CP where the Student expressed worries about a fear of academic demerits at school, yet he did not express excess worry, and he expressed that he had a feeling of success at school. Ex. 28 (000148-000151).

33. Dr. E kept an eye on the Student when he began the Sixth Grade because the Student appeared shy. Tr. 569.

34. The LEA’s Handbook did not contain any information about how to obtain a special education evaluation. Ex. D. Tr. 825.

35. In February 2018, LPCC CP noted the Student’s feelings of emptiness, fatigue, lack of friends, a lack of interest, and carelessness about getting school work done, with a therapeutic assessment of General Anxiety Disorder, Moderate Major Depression, single episode, and ruling out Bipolar Disorder. Ex. 28 (000152).

36. The Student reached age 12 on March 8, 2018.

37. In the Spring of 2018 the Student's Mother reached out to Assistant Principal H and complained about bullying, and in context noted the Student had a general anxiety disorder, with the discussion as to bullying concluding in agreeing to allow the Student to talk with the Assistant Principal to find a way to handle the problem on his own, or else it could get worse. Tr. 365 - 366.

38. In mid-March 2018, LPCC CP continued to assess general anxiety disorder, moderate major depression, single episode, and ruling out bipolar disorder, and noted that the Student had recovered from his prior feelings of emptiness and lack of motivation, that he was no longer anhedonic, and that he was more hopeful and would put more effort into school. Ex. 28 (000154).

39. Toward the end of March 2018, LPCC CP notes that the Student's mood was bright, and that he lost some weight due to another student criticizing his weight. Ex. 28 (000156).

40. Sixth Grade Math Teacher JD observed the Student to be quiet and reserved, improving over the year socially and academically. Tr. 758.

41. On May 24, 2018, the Student met with Dr. SC, M.D., who assessed the Student with ASD (Asperger's Type), moderate ADHD-CT, and ODD, with likely depression, but no signs of BPAD despite family history. Ex. 28 (000158-000161).

42. At the close of the 2017-2018 school year the Student's overall grades reflected "Bs" for both semesters in English, "Cs" for both semesters in History, "As" for both semesters in Intensive Mid School, "Cs" in both semesters in Math 6, "As" in both semesters of P.E. 6, and "Bs" in both semesters for Science 6. Ex. 20 (000117).

43. During the Student's Sixth Grade year he presented to the LEA as doing generally well, with "As" and "Bs," and "Cs" as passing, quiet, trying to fit in, no signs of undue stress, with a reluctance to engage or initiate, a good student, yet was a bit socially stunted as he was growing up. Tr. 569, 762.

44. The education theory for Math in the Sixth Grade was that it would become more difficult as the year progressed, with a "C" considered to be an "A" or "B" in other schools. Tr. 759.

45. Math Teacher JD saw no need to make any exceptions or modifications for the Student in the Sixth Grade. Tr. 762.

46. A Comprehensive Diagnostic Evaluation was conducted on the Student on June 14 and 18, 2018, and into July 17, 2018, by Dr. AH, PsyD., at the referral of Dr. SC, M.D. Ex. 7.

47. Dr. AH concluded that the Student's behaviors showed an overall score for Autism and indicated "a high level of symptoms and characteristics consistent with an Autism Spectrum Disorder." Ex. 7 (000051).

48. The Student required substantial supports in the areas of social communication and restricted, repetitive behaviors, and was diagnosed with Autism Spectrum Disorder (ASD). Ex. 7 (000057, 000058).

49. ASD is a lifelong developmental spectrum disorder which impacts communication and behavior, including difficulties with communication and interaction with other people, restricted interests and repetitive behaviors, and symptoms that impact ability to function in school, work, and other areas of life. Tr. 235 - 236.

50. The diagnosis also included intellectual impairment in the gifted range, average language skills with significant pragmatic impairment, associated general anxiety disorder, and associated major depressive episode in partial remission. Ex. 7 (000058).

51. Dr. AH reported certain recommendations as part of her Comprehensive Diagnostic Evaluation, in relevant part, for an Integrated Service Plan/ABA Therapy Services to be delivered in the home or community, and to be covered by medical insurance. Ex. 7 (000059). She recommended social skills/social communication services which include both individual speech/language therapeutic services from a therapist with experience in social difficulties associated with ASD, as well as with peer group practice in both the educational and community-based agency settings, to build peer relationships with turn-taking and idea sharing, and for direct teaching of, and peer practice in, conversational skills. *Id.* (000060).

52. Dr. AH considered ABA therapy as a priority. Tr. 256 - 257.

53. When the Student met again with his therapist on July 19, 2018, she commented that the Student had been referred to ABA Therapy and Social Skills at Bridges, and that the Student was concerned about the stigma attached with Autism Spectrum Disorder, and that he had gained weight, with a therapeutic assessment of Autistic Spectrum Disorder, Generalized Anxiety, and Moderate Major Depression, with future therapy to be through ABA Therapy and Social Skills Therapy at Bridges. Ex. 28 (000162-000163).

54. The next day, July 20, 2018, the Student met with Dr. SC, M.D., once again for a follow-up, generally following his May 24, 2019 assessment. Ex. 28 (000164-000167).

55. On July 28, 2018, with the Student to be entering the upcoming Seventh Grade year, the Student's Mother contacted the LEA via Email to Dr. E, the LEA's Director of Special Education, Tr. 563, noting that the Student was recently diagnosed with ASD, GAD, and Major Depression in partial remission, and sought a meeting to discuss the impact on the Student's education, and also requested an evaluation for services based on her interpretation of "twice exceptional." Tr. 382 - 383. Ex. 10. Exs. P1, P6, & P10.

56. This as the first notice the Student's Parents had given to the LEA that the Student may have had special needs.

57. Dr. E, PhD., the LEA's Director of Special Education, responded to the Student's Mother on August 1, 2018, suggesting a meeting, Ex. 10, Ex. P2, with an August 6<sup>th</sup> date set, *Id.*, Ex. P5, and Dr. E noting his availability on a Thursday, Friday, and Monday, with a response to help navigate the needs, Ex. P2 & Ex. P9, and the Student's Mother replying asking for a meeting on August 6, 2018, at 10:00 a.m., to which the parties agreed. Ex. 10. Ex. P2.

58. The LEA did not provide the Student's Parents with a parental consent form for an evaluation, prior written notice, or notice of IDEA procedural safeguards. Tr. 383, 663.

59. At this stage there was no refusal to initiate or change identification, evaluation, or educational placement of the Student, although there was a parental request for an evaluation.

60. On or about this time the Student then began the Seventh Grade with the LEA. *See* Ex. D3 (circumstantially, since Exhibit reflects the 2019-2020 year).

61. A meeting was held on August 6, 2018, between the Student's Parents, Vice Principal C, and Dr. E, where access to past educational records and medical records was provided to the LEA. Tr. 384, 707. Ex. 12 (000077).

62. The Student's Parents brought to the meeting a copy of Dr. AH's Diagnostic Evaluation, and a copy of testing records having to do with the Student's special education services from 18 months through the time of the meeting, where the Student's Mother "offered them up to the school and asked them to please go through the files and pick – make copies of whatever they felt was relevant." Tr. 385.

63. The request for an evaluation was renewed at the meeting. Tr. 385 - 386, 664.

64. Dr. E initially had been skeptical about the results of Dr. AH's report, pending further investigation. Tr. 711.

65. At this stage, although the Student's Parents brought to the attention the Student's recent diagnoses of ASD, GAD, and Major Depression in partial remission, as well as their private Comprehensive Diagnostic Evaluation by Dr. AH, the focus by the Student's Parents and the LEA was a request by the Student's Parents for an LEA evaluation for eligibility for services, rather than an immediate change in the identification or educational placement of the Student.

66. The LEA did not provide the Student's Parents with a parental consent form for an evaluation, prior written notice, or notice of IDEA procedural safeguards. Tr. 386, 664 - 665.

67. On September 5, 2018, Dr. E sent an Email to the Student's Mother discussing mindfulness and meditation, with an invitation for the Student to join a lunchtime group for sessions. Ex. P3.

68. A lunchtime meditation group was formed by Dr. E to help students who had anxiety, and the Student attended the session; the Student attended two sessions, and a call phone app for meditation was discussed. Tr. 575 - 576, 694.

69. On October 3, 2018, the Student's Mother followed up with Dr. E regarding her request at a meeting on August 6, 2018, for an evaluation for a dual diagnosis "based on his medical diagnosis of ASD and previous IEP and Special Education testing," and expressed the Student seemed to benefit from meditation. Ex. 11 (000073). Ex. P4, Exs.P7 through P8. She noted concerns with his schoolwork not being graded, that the Student's self-esteem was impacted, that the Student appeared to be stressed, and that he did not want to attend school. *Id.* Tr. 578 - 579. The Student's Mother stated the Student required "further support, until his IEP could be put in place." Ex. 11 (000074).

70. At this stage, the focus of the Student's Parents shifted in not only seeking an LEA evaluation, but also for an Individualized Education Program (IEP).

71. Circumstantially, the LEA had not adopted the Petitioners' Comprehensive Diagnostic Evaluation by Dr. AH as their own, so it remained within the LEA's evaluation scheme.

72. The LEA's IEP theory, according to Dr. E, is that when a parent requests an IEP then the school must first ensure by standardized testing that a student is not being put into special education based on hunches or opinions so to not take a student out of the least restrictive environment. Tr. 588.

73. The next day, on October 4, 2018, Dr. E replied by Email to the Student's Mother and he noted a drop in the Student's grades, he asked for intervention with the Student's counselor (Ms. D), he requested a copy of the medical evaluation, and he began

discussion about a Student Assistance Team (SAT) for support, while noting he could not be a part of the SAT. Ex. 11 (000074). Tr. 581 - 582.

74. Dr. E had received medical evaluation records from the Public School District which had concluded that while in their schools the Student did not qualify for services under the diagnosis of Autism. Tr. 582. Ex. B.

75. Also on October 4, 2018, the Student met with LPCC CP and she noted that the Student had a number of missing school assignments, that he did not want to be at school, at home, or anywhere, and that, for cognition, he stopped trying in school, and for affect, that he was depressed; she noted that the Student had been diagnosed with Bipolar Disorder that day, and that he was excused from school that week while the Student begins his prescription on Lithium. Ex. 28 (000168).

76. On October 9, 2018, The Student's Mother again followed with Dr. E by Email and asked that the Student's teachers be made aware of the Student's special needs ("understand where [the Student] is coming from"), that there was a change in and inclusion of medication, and that the ASD medical evaluation had already been provided to him at the August 6, 2018 meeting, yet she would provide another hard copy if requested. Ex. 11 (000075). She queried about having the Student's IEP updated. *Id.*

77. Dr. E replied to the Student's Parents on October 10, 2018, and noted the Student's special education history including that the Student had DD, ASD, and Speech Impaired services discontinued by the Public School District after the Second Grade, and commented on the Student's current schoolwork, and his relationship with peers, and also acknowledged the Student's Mother's request for an evaluation, which he referred to



the SAT to arrange a meeting to determine a plan of action. Tr. 580 - 581. Ex. 11 (000075-000076).

78. The LEA did not provide the Student's Parents with a parental consent form for an evaluation, prior written notice, or notice of IDEA procedural safeguards based on the October 3, 2018 request. Tr. 665 - 666. The LEA's theory was that notices following a request for an evaluation were not required. Tr. 663, 726 - 727.

79. LPCC CP met with the Student again on October 17, 2018, where, among other things, the Student's Mother noted the Student had some passive suicidal ideation, yet that his affect was now pleasant, quiet, approachable, and cognition was that he was no longer so depressed with a hopeful feeling. Ex. 28 (000170). The Student was having some motivation for school, and his diagnosis now included Bipolar Disorder, Current Episode Depressed of Mild to Moderate Severity, and Autistic Spectrum Disorder. Ex. 28 (000170-000171).

80. On October 26, 2018, History Teacher DF presented his SAT input reflecting that the Student worked about the same as the majority of other students in the class on how the Student works, on his focus and attention span, on his activity level, on his language skills, and his emotional/social maturity. Ex. E14. Subject matter difficulty/frustration was rated as low, and the Student was noted to be very interested in demonstration of interest. *Id.* The Student was observed one on one, visually, auditory, large group, small group, with peers, and in simulations and hands-on work. *Id.* Positive behavior reinforcements were used. Ex. E15. Both abstract and concrete conceptual contents of lessons were observed. *Id.* He noted the Student performed with the group, that the Student voluntarily participates in activities, that the Student is responsive to the

teacher, that the Student is responsive to other students, that the Student starts and stays on task, that the Student finishes what is started, that the Student answers when called on, that the Student shows independence, and that the Student seemed alert. *Id.* No areas were noted to be of issue. *Id.* Frequent checks with the teacher and peers were noted as strengths, and his learning behavior was observed to be on task-focused. *Id.*

81. English Teacher MR presented his SAT input on October 26, 2018, reflecting that the Student's focus and attention span, language skills, demonstration of interest, subject matter/difficulty/frustration, and emotional/social maturity were about average, yet the Student worked more slowly, and his activity interest was less active than the majority of other students in the class. Ex. E18. The Student was observed visually, auditory, small group, and with peers. *Id.* Behavior reinforcements were both positive and negative. Ex. E19. Both abstract and concrete conceptual contents of lessons were observed. *Id.* He noted the Student performed with the group, that the Student is responsive to the teacher, that the Student answers when called on, that the Student showed independence, and that the Student seemed alert, although the Student did not voluntarily participate in activities, was not responsive to other students, did not start and stay on task, and did not finish what was started. *Id.* Areas that may be issues were reported to be developmental in social-some isolation. *Id.* The Student's strengths were reflected to be oral fluency and the ability to conceptualize. *Id.* Observations of the Student's behavior and learning were that the Student had some trouble staying on task and using class time wisely, that the Student was somewhat quiet and self-isolated, and the Student would not volunteer, although he answered when called on. *Id.*

82. On October 26, 2108, House Teacher ARF presented her SAT input reflecting that the Student worked about the same as the majority of other students in the class on his language skills, demonstration of interest, and subject matter difficulty/frustration, yet he works more slowly, his focus and attention span was poorer, activity less active, and his emotional/social maturity less than the other students. Ex. E20. The Student was observed via auditory, large group, and small group. *Id.* Behavior reinforcement boxes were not checked for positive behavior, yet it was explained that when the Student thought a project was finished he would look off into space, and that the Student had not noticed a back side to the assignment when class had been told there was a back page, yet when redirected he would do so. Ex. E21. Both abstract and concrete conceptual contents of lessons were observed. *Id.* Student behavior reflected the Student to perform with the group, voluntary participation in activities, answers when called on, shows independence, and is alert, and is responsive to the teacher when asked a direct question, and when asked a direct question the Student is responsive to other students, when prompted the Student stays on task, and when prompted the Student finishes what is started. *Id.* Areas that may be issues were reported to be emotional, explaining the Student is reserved in class, that he does not ask questions when unsure of the assignment and/or content, that he is surprised when he does not do well, complete his homework, or work that was assigned, that he is distracted and thinks he knows what is expected but is caught off guard when the work is assessed. *Id.* The Student's strengths were observed to be that he wanted to do well and was motivated, with different times of observation. Ex. E22.

83. PE Teacher RS reported his SAT Input on October 26, 2108, reflecting that the Student worked about average in language skills, yet that he worked more slowly, had poorer focus and attention, was less active, disinterested, had high subject matter difficulty/frustration, and his social maturity was less than the majority of other students in the class. Ex. E23. The Student was observed one-on-one, visually, auditory, large group, small group, and with peers. *Id.* The Student's behavior reinforcement was noted as "isolation." Ex. E24. Both abstract and concrete conceptual contents of lessons were observed. *Id.* He noted the Student performed with the group, that the Student was responsive to other students, that he answered when called upon, and that he seemed alert. *Id.* The Student was not observed to voluntarily participate in activities, he was not responsive to teachers, he did not start and stay on task, that he did not finish what was started, and that he did not show independence. *Id.* Areas that may be issues were reported to be developmental in social-some isolation. *Id.* The Student's strengths were reflected to be motor skills because he struggles with physical skills, and emotional because he isolates himself. *Id.* Observations of the Student's strengths were that the Student was quite intelligent. *Id.* His learning and behaviors were summarized as often isolating himself, and tries to get out of work at PE, and tries to hide in the crowd. *Id.*

84. In the Fall of 2108 Dr. E spoke with the Student's teachers, he observed the Student in a science project, he watched the Student at lunchtime and saw relationships with other students and teachers, he saw that the Student had a small group of friends, he tried to assess what was appropriate for the Student on a daily basis, he consulted with different people to gain an understanding on how the Student was doing and performing, and he observed that the Student had changed from one who was not engaging to

someone more animated in discussions and who appeared happy, engaging and socially appropriate. Tr. 583 - 583.

85. From October 26, 2018, though February 4, 2019, the Student's diagnoses remained the same, Ex. 28 (000172-000191), with the December 4, 2018 note indicating the Student's mood was stable and that he was doing well in school, Ex. 28 (000186), and the February 4, 2019 note expressing that the Student was doing well in school. *Id.* (000190).

86. The Student's Mother on February 14, 2019, wrote to Dr. E following up on her requests for special education services, and an IEP, summarizing the history of correspondence, and explained that 192 days had passed since they had their meeting on August 6, 2018, and 202 days since her formal request for an evaluation. Tr. 588. Ex. 12 (000077-000078).

87. On February 15, 2019, Dr. E apologized if he had missed the referral for evaluation from the SAT, he nonetheless was of the opinion that the SAT had met in October, and that the Student was "making some progress here" at the LEA. Ex. 12 (000079).

88. The Student and LPCC CP had a session on February 18, 2019, where in relevant part the note indicted that Student reacted to being told by the science teacher that he was omitted from a group in which he was chosen, so the Student called his Mother, who picked him up from school; the Mother noted at the therapy session that her son had texted him up to 40 times stating he cannot take it anymore and that he can no longer be in school ("... he can't be there.") Ex. 28 (000192). The Student was of the belief he had to ask permission to step outside the classroom and re-enter. *Id.* His

therapeutic goal was to stabilize his mood and complete school work, and that he is completing school work. *Id.* (000193). On February 26, 2109, JB noted the Student likes the LEA, but feels it is too hard, that he has friends and eats lunch with different people, but that he doesn't hang out with the people on the weekends. Ex. E4.

89. On February 26, 2019, Dr. E requested the Student's Parents to sign a waiver to allow testing of the Student for a Multidisciplinary Re-Evaluation Report, "in the area of educational diagnostics." Tr. 607, 609 (report completed titled as Multidisciplinary Re-Evaluation Report). Ex. 5 (final page, noted as 185).

90. Dr. E's purpose for the reevaluation was based on his observations of the Student from the start of the Seventh Grade, the complaints and requests by the Student's Parents, the SAT input, additional information from the Student's family, and medical information from the family. Tr. 609 - 610.

91. The LEA did not provide the Student's Parents with a prior written notice, or notice of IDEA procedural safeguards based on the February 14, 2019 request.

92. On February 27, 2019, the Student's Mother was noticed by the LEA of a Student Assistance Team (SAT) meeting. Ex. 9 (final page, with number 39 at top).

93. On February 28, 2019, Dr. E informed the Student's Mother via Email that he sent a form home with the Student to begin testing, and asked for it to be completed. Ex. 31 (000080).

94. His March 1, 2019 encounter with LPCC CP continued the Student on his medications, Ex. 28 (000195), and into March 8, 2019, where it was noted that against the Student's wishes his Parents met with teachers for an IEP, and that school accommodations were being made for him, such as extra time. *Id.* (000199).

95. Consent was given to begin testing on March 3, 2019. Ex. 5 (000017, and final page with number 185 at top).

96. The Student's Mother on March 3, 2019 also requested, via Email to Dr. E, to meet with the testing coordinator prior to the testing as well as a list of the tests to be used prior to the testing. Ex. 13 (000080).

97. The SAT Meeting commenced on March 5, 2019, as reflected in the SAT Meeting Summary Form, noting interventions tried in the classroom which seemed to help to include extra time for an English essay, with teacher supports to clarify assignments, check for misunderstandings, and note reminders. Ex. 9 (000068-000070). Ex. E1-E3.

98. The Student's teachers were at the meeting, and made each other aware of the Student's needs, and discussed the Student's perception of himself as the "R" word, and that he was unable to do anything right. Tr. 400. No documents regarding the SAT process were shared with the Student's Mother. *Id.*

99. Noise levels in school were noted as concern by LPCC CP on March 20, 2019, and it was expressed that the Student was making friends. Ex. 28 (000201).

100. While unusual to have parental involvement prior to testing, based on parental request, Dr. E set up a phone conversation to speak with the evaluator prior to the test, although he did not allow a parental request for a list of the testing to be administered. Tr. 610– 611.

101. Testing by the LEA was also performed by Dr. W on April 15, 2019, who issued a Multidisciplinary Reevaluation Report (MRR), dated April 17, 2019. Ex. 5.

102. The MRR noted that the Student had received a vision and hearing screenings from a middle school nurse. Ex. 5 (000020).

103. The Student's then current grades for 2018-2019 were noted to be "Cs" in English, History, PE, and Science, with a "D" in Math, and an "A" in Intensive Middle School Chess. *Id.*

104. In relevant part, under the Woodcock-Johnson Tests, the Student scored "Average" in Broad Mathematics, with math fluency being below average, applied math problems being above average, and calculation as average. Ex. 5 (0000223).

105. Dr. W concluded in the MRR that the Comprehensive Diagnostic Evaluation by Dr. AH (Ex. 7) "should be highly considered, and his primary special education eligibility as suggested, should be Autism (ASD)." *Id.* (000026).

106. The MRR recommended, in addition to the recommendations in the Comprehensive Diagnostic Evaluation by Dr. AH, that:

(a) a Speech/Language Evaluation was suggested, to include oral expression, listening comprehension, and pragmatic language;

(b) a School Social Worker Evaluation for social behavior and emotional concerns during the school day was suggested;

(c) a Functional Behavior Assessment (FBA) and Behavior Intervention Plan (BIP) drafted by the LEA with the School Social Worker, the Student, and his parents should be drafted, with frequent updates and review;

(d) School-wide and individual classroom activities to fit the Student's specific interests should be tailored to allow the Student to be more accepted by his peers;

(e) Positive social skills and problem solving could be used;



(f) Rehearsal and practice what the Student will say before it occurs in situations is recommended to be allowed; and

(g) Communication with the Student is to be clear with direct language, eye contact, and being sure the speaker has the Student's attention. Id.

107. Dr. E reviewed the MRR, discussed it with the evaluator, and considered the recommendations, some of which he implemented, and others which he investigated. Tr. 613.

108. On April 29, 2019, LPCC CP noted that the Student "was tested at school and they suggested he might work on areas of socializing and the pragmatics of language," and that because the Student's mood had stabilized he completed his school work. Ex. 28 (000205).

109. An Email chain between Dr. E and the Student's Mother between April 30, 2019 through May 6, 2019, notes an agreement for an EDT meeting to immediately precede an IEP meeting, both to be held on May 9, 2019. Ex. 8 (000066-000067).

110. The LEA's understanding of an Eligibility Team Meeting is to determine if the Student meets the eligibility criteria for special education and, if so, to determine whether special education and related services are necessary to meet the needs. Tr. 614.

111. Notice of the first relevant Individualized Education Program (IEP) meeting was provided on May 6, 2019. Ex. 2 (000005).

112. On May 9, 2019, an Eligibility Determination Team Meeting was held to determine eligibility for special education and related services, which resulted in a determination that the Student was eligible under the eligibility category of Autism. Ex. 8 (000064 - 000065). Exs. H2 through H4.

113. On May 9, 2019, the first relevant IEP meeting was also held. Exs. 2 & 3 (000012-000013). Exs. H1, H5 through H9.

114. Those present at the May 9, 2019 IEP and EDT Meetings were the Student, both of his Parents, a LEA director (representative) Ms. KS-S, a special education teacher (Dr. E), a regular education teacher (Teacher MR), and Dr. W, the educational diagnostician. *Id.* Tr. 622; 426. Dr. E did not want anyone with Autism experience at the meeting. Tr. 711.

115. An IEP resulted from the meeting. Exs 2. Ex. H1, H5 through H9.

116. In this IEP the most recent evaluation was indicated to be that of April 15, 2019, with the Student's primary exceptionality described as Autism for which the IEP Team determined the Student to be eligible, and no secondary exceptionality. *Id.*

117. This IEP did not find the Student to have special oral communication needs. *Id.* (000005).

118. A Behavioral Intervention Plan was not required in the IEP. *Id.* (000006).

119. The Student's strengths were described as "Employment: Engineer," with "Recreation & Leisure: Sleep" and "Post-Secondary Training & Learning: expectation." *Id.*

120. The Student's academic strengths were described as "[d]etermined, can work well with peers in a small group," and concerns and recommendations regarding the Student were "[c]ommunication, self-advocacy, social skills, presentations." *Id.*

121. The post-secondary training and learning described "[t]ransition assessments" in the domain, yet had no strengths, concerns, or recommendations noted. *Id.*

122. The Student's only identified area of need in his present levels of academic achievement was noted to be in communication, and otherwise explained as "self-advocacy, pragmatics of social language." *Id.*

123. Grades 8-12 had proposed educational courses of study to meet the Student's measurable post-secondary goals. *Id.* (000006-000007).

124. Proposed courses include Grade 8 Algebra 1, Grade 9 Honors English, New Mexico History/Government, Biology, Honors Geometry, PE, and Intensive; Grade 10 Honors English, AP World History, Physics, Algebra 2/Pre-Calculus, Critical Language, Intensives; Grade 11 AP English, AP U.S. History, Chemistry/UNM Lab, AP Calculus, Critical Language, and Intensive; and Grade 12 AP English, Dual Enrollment (Economics, Science, Mathematics), 4 dual enrollment electives, including Practical Art (1), Nutrition (health) dual enrollment. *Id.*

125. The accommodations and/or modifications for the Student's educational plan were for instructional materials to be "text for home when available," with the assignments/homework as "additional time as negotiated," testing in the classroom was to be in a quiet space and to allow extended time as needed. *Id.*

126. As for instructional presentation for the Student, it was for projects to be structured in chunks, and to "develop schema, organization, check for understanding, [and] reduce number of problems to prove mastery." *Id.*

127. All of the Student's activities were to be with developing peers, and accommodations were needed for all regular education services. *Id.*

128. As for academic achievement, boxes noting identified areas of need existed for math, reading, and written language, yet they were not checked -- the annual goal was

to be “initiated today.” *Id.* “CCSS.ELA-Literacy. SL. 9-10.1.c” was in a box in the annual measurable goals section, in which the Student was to “[p]ropel conversation by posing and responding to questions that relate the current discussion to broader themes or larger ideas,” and that he would “actively incorporate others onto the discussion; and clarify, verify, or challenge ideas and conclusions.” *Id.* The objective to meet this goal was to “engage in more discussions during classes and socially by posing and responding to questions,” with the criteria to master that goal to “B (sic) in all classes,” for it to be mastered within one year, by the position responsible as special education and general education (“SE/GE”), and “[t]eachers, student.” *Id.*

129. Extended school year was not required. *Id.*

130. Regarding State and District assessments, allowable accommodations were to be made for “special education.” *Id.*

131. Services to be provided to the Student were one hour per week of special education, commencing on May 9, 2019, and concluding on May 9, 2020, to be 100%, all in the general education setting, to be provided by the Special Education/General Education Teacher – the IEP stated the level of service was at 3.26%. *Id.* (000007-000008).

132. The Student’s Parents were to be given quarterly and weekly reporting about progress on annual measurable goals by “RenWeb.” *Id.* (000008).

133. The Prior Written Notice of Proposed Actions in the IEP stated the Team reviewed and discussed student input, parent input, teacher input, classroom performance, and school records. *Id.* It does not describe the input, performance, or school records. *Id.*

134. The documented proposed items and options by the LEA and the Student's Parents in the IEP were two, both proposed by the LEA: (1) regular education with special education services as "Setting:1 80% or more of the day in the regular education classroom," which was documented as accepted; and (2) regular education combined with special education as "Setting 2: 40% to 79% of the day in regular class setting, or Setting 3 (less than 40% in GE). (sic) or Setting 4," which was documented as rejected. *Id.* The documented reason for acceptance of the first option was that the general education environment for the entire day would provide the Student to be educated in the least restrictive environment. *Id.* The documented reason for the rejection of the second reason was because pull-out sessions were not required to meet the Student's needs. *Id.*

135. There was not a list of procedural safeguards and due process rights attached with the Prior Written Notice/IEP. *Id.*

136. There is a statement toward the end of the document which declares that "[f]or assistance in understanding your procedural safeguards/due process rights you may contact" the LEA's Special Education Director, or the Public Education Department, with phone numbers for each noted. *Id.*

137. According to his standard practice, Dr. E has a Procedural Safeguards Notice by the Public Education Department which he offers at every IEP meeting. Tr. 623 - 624. Ex. C.

138. The May 9, 2019 IEP did not document the 11 Considerations for Autism contained in New Mexico Rules. **See** §6.31.2.11(B)(5) NMAC. Exs. 2 & 3 (000012-000013).

139. Although the IEP Form of May 9, 2019 did not include requests by the Student's Parents, the Parents made a number of requests and comments seeking services and assessments, including for a speech and language and social work evaluations, social work services, organization and time management skills (executive functioning skills), support in math, social skills training, that he be able to attend private Applied Behavior Analysis (ABA) training, peer mentoring, a social/emotional goal, weekly progress reports, hard copies of textbooks for home, extra time to alleviate anxiety, that the Student be allowed to make up assignments missed due to excused absences for attending doctors' appointments, and for a place for the Student to go if he had a meltdown to calm himself down, even allowance to go to the bathroom for that reason. Tr. 427 - 428.

140. The Student's Mother requested pull-out sessions from the regular education classroom. Tr. 430.

141. Additionally, the Student's Mother requested a summer program for the Student because his math grade was pretty low, and for social skills, because the Student slides during the summer unless he is in a structured program. Tr. 432 - 433. Dr. E stated the Student needed to rest in the summer. Tr. 433. The LEA did not provide the Student's Parents with a prior written notice denying the request. Ex. 2 (000008).

142. The Prior Written Notice does not address the requests made by the Parents, noting if they were presented, and if so, whether the requests were accepted or rejected. Tr. 429 - 430; 696. Ex. 2 (000008).

143. The sample form was provided to the Student's Mother, with a computer screen image copy of the form projected, with that part completed prior to the meeting. Tr. 426, 430 -431.

144. The LEA does not have small group settings, such as pull-outs, or resource rooms, for students with special needs; the educational setting is all-inclusive Tr. 658, 793, 825.

145. On May 14, 2019, LPCC CP suggested the family look into summer private placement at a private academy for organization, noting the Student had friends who were mostly girls who helped him with the more tedious organizational details, and that the Student's mood was stable and that he could complete school work. Ex. 28 (000207).

146. On May 20, 2019, the Student's Parents received an invoice from the private summer academy for payment of \$745.00. Ex. 24.

147. Matters changed as reported in therapy to suicidal thoughts as reflected in the LPCC CP's note of May 28, 2019, where it was expressed that the Student was much more relaxed since school was out, yet that he had been looking up ways to commit suicide without a gun – he was reported to be extremely overwhelmed and anxious, and that he completed homework. Ex. 28 (0000209-000210).

148. On June 3, 2019, the Student began Tennis Camp and Exploring Algebra 1 Concepts at the private summer academy, to run through July 12, 2019. Ex. 24. Tr. 433.

149. On June 12, 2019, the Student reported to his therapist that he had been severely stressed by finals, yet with school out his stress level was reduced, although he was auditing one class during the summer. Ex. 28 (000211).

150. The June 24, 2019 therapy session notes reflect the Student's mood had stabilized after initial anxiety at starting summer school at the private academy, and that he was able to complete his homework, Ex. 28 (000215), and into July 1, 2019, where the Student enjoys Algebra class, with a stabilized mood, being happy, doing well in school, and able to complete his homework, *Id.* (000127), which extended into his medical review on July 29, 2019 by Dr. SC M.D. Ex. 28 (000219-000222).

151. The Petitioners did not present evidence that the summer program was "necessary" for a provision of FAPE for the Student.

152. The 2019-2020 LEA school year began with an August 2, 2019 Barbeque, and regular classes starting August 7, 2019. Ex. D3.

153. The Student began Eighth Grade. Ex. 20 (000115).

154. After school had begun, therapy notes show the Student's mood to be stable, and that he was able to complete homework, with school going well except for one class as of August 19, 2019, Ex. 28 (000223-000224), and into September 3, 2019. *Id.* (000225-000226).

155. In STEM Class, taught by Mr. JD, the Student started out the year excited about the class, and he was one of the best in the class at programming, yet in other areas like using hand tools, and life lessons like personal finance math did not interest him, and were not important to him. Tr. 768.

156. The Student's Mother requested another IEP due to new information and possibly changes in the Student's medications. Tr. 438 - 439, 626.

157. The parties agreed to hold the IEP on September 9, 2019. Tr. 439.



158. There was no written notice received by the Student's Mother, although the IEP stated notice of some sort was sent to the Student's Parents on August 30, 2019. *Id.* (000001). There is no written notice in the record. It is found there was no notice.

159. On September 4, 2019, the second IEP meeting was held. Ex. 1.

160. Those present at the September 4, 2019 IEP were the Student, both of the Student's Parents, a LEA representative, a special education teacher (Dr. E), and a regular education teacher (JL). Exs. 1 & 3 (000001, 000011).

161. An IEP resulted from the meeting. Ex. 1.

162. In this IEP the most recent evaluation was indicated to be that of April 15, 2019, with the Student's primary exceptionality described as Autism for which the IEP Team determined the Student to be eligible, and no secondary exceptionality. *Id.* (000001).

163. This IEP did not find the Student to have special oral communication needs. *Id.*

164. A Behavioral Intervention Plan was not required – there is nothing to check for a Behavior Implementation Plan, *Id.* (000002), which differs from the May 9, 2019 IEP, where there was a box for a BIP, yet it not checked. **See** Ex. 2 (000006).

165. The Student's strengths were described as “[d]iligent, conscientious, sensitive, intelligent,” his occupational goals were “undecided,” with educational goals for an advanced degree a possibility, and areas of support required/anticipated as [p]ragmatics, self-advocacy skill.” Ex. 1 (000002).

166. The Student's academic strengths were described as “[v]ery responsible and turns in good quality work,” that he “[p]ays attention well, on task,” and has the [a]bility

to remain focused on task at hand, reading and comprehension skills.” *Id.* Additional strengths were described as grades for English of 79.41%, History of 82.59%, Honors Algebra at 69.66%, Science at 68.36%, and STEM at 100%. *Id.* The concerns and recommendations regarding the Student were “[n]one/[n]eeds to be more engaged and ask questions,” “test skills,” and that he has the “[a]bility to remain focused on task at hand, using the maximum amount of time effectively in class, keep up with assignments after absences.” *Id.*

167. The Student’s identified area of needs in his present levels of academic achievement were noted to be in self-advocacy, and “pragmatics of social language,” with the Student/Parent Input expressing that “[i]t is imperative that teachers respond to email queries from [the Student] or parents in a timely manner.” *Id.*

168. Grades 8-12 had proposed educational courses of study to meet the Student’s measurable post-secondary goals. *Id.*

169. The accommodations and/or modifications for the Student’s educational plan were for preferential seating in the Student’s environment, instructional materials to be “text for home when available,” with the assignments/homework as “additional time as negotiated,” testing in the classroom was to be in a quiet space and to allow extended time as needed. *Id.* (000003).

170. As for instructional presentation for the Student, it was for projects to be structured in chunks, and to “develop schema, organization, check for understanding, [and] reduce number of problems to prove mastery.” *Id.*

171. Check-ins and grade checks with a counselor or the Special Education Director were to be weekly. *Id.*

172. All of the Student's activities were to be with developing peers, and accommodations were needed for all regular education services. *Id.*

173. As for academic achievement, boxes noting identified areas of need existed for math, reading, and written language, yet they were not checked -- the annual goal was to be "initiated today." *Id.* "CCSS.ELA-Literacy. SL. 9-10.1.c" was in a box in the annual measurable goals section, in which the Student was to "[p]ropel conversation by posing and responding to questions that relate the current discussion to broader themes or larger ideas," and that he would "actively incorporate others onto the discussion; and clarify, verify, or challenge ideas and conclusions." *Id.* "CCSS.ELA-Literacy. SL. 11-12.4" was in another box in the annual measurable goals section, in which the Student was to "[p]resent information, findings, and supportive evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternate or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and a range of formal and informal tasks." *Id.* The objective to meet these goals was to "engage in more discussions during classes and socially by posing and responding to questions," with the criteria to master that goal to "B (sic) in all classes" and for [p]ragmatic skills, social/emotional growth and self-advocacy are goals for his success and affects all classes and academic growth." *Id.* Mastery was to be within one year, by the position responsible as special education and general education ("SE/GE"), and "[t]eachers/student." *Id.*

174. Extended school year was not required. *Id.*

175. Regarding State and District assessments, allowable accommodations were to be made for "special education." *Id.*

176. Services to be provided to the Student were three hours per week of special education, commencing on May 9, 2019, and concluding on May 9, 2020, to be 100%, all in the general education setting, to be provided by the Special Education/General Education Teacher – the IEP stated the level of service was at 9.8%. *Id.* (000003).

177. The Student’s Parents were to be given quarterly and “three times per week (FACTS)” reporting about progress on annual measurable goals.” *Id.* (000004).

178. The Prior Written Notice of Proposed Actions in the IEP stated the Team reviewed and discussed student input, parent input, teacher input, classroom performance, and school records. *Id.* It does not describe the input, performance, or school records. *Id.*

179. The documented proposed items and options by the LEA and the Student’s Parents in the IEP were two, both proposed by the LEA: (1) regular education with special education services as “Setting:1 80% or more of the day in the regular education classroom,” which was documented as accepted; and (2) regular education combined with special education as “Setting 2: 40% to 79% of the day in regular class setting, or Setting 3 (less than 40% in GE), or Setting 4,” which was documented as rejected. *Id.* The documented reason for acceptance of the first option was that the general education environment for the entire day would provide the Student to be educated in the least restrictive environment. *Id.* The documented reason for the rejection of the second reason was because pull-out sessions were not required to meet the Student’s needs. *Id.*

180. There was not a list of procedural safeguards and due process rights attached with the Prior Written Notice/IEP. *Id.*

181. There is a statement toward the end of the document which declares that “[f]or assistance in understanding your procedural safeguards/due process rights you may contact” the LEA’s Special Education Director, or the Public Education Department, with phone numbers for each noted, and a website for NMPED. *Id.*

182. The Student’s Parents acknowledged they received a copy of the Parent and Child Rights in Special Education. Tr. 632. Ex. C.

183. The September 4, 2019 IEP did not document the 11 Considerations for Autism contained in New Mexico Rules. **See** §6.31.2.11(B)(5) NMAC. Exs. 1 & 3 (000011).

184. Although not included in the September 4, 2019 IEP Prior Written Notice, the Student’s Parents requested further evaluation for speech, social work, (SBA – interpreted as ABA) sensory, functioning skills in organization and time management, a social/emotional goal, support in math, textbooks for home, the peer mentor reviews, a request for all teachers to be provided with the IEP, and a safe spot. Tr. 441.

185. The Prior Written Notice does not address the requests made by the Parents, or noting if they were presented, and if so, whether they were accepted or rejected. Tr. 429 - 430; 696. Ex. 1 (000004).

186. The LEA does not have small group settings, such as pull-outs, or resource rooms, for students with special needs; the educational setting is all-inclusive. Tr. 658, 793, 825.

187. The September 4, 2019 IEP noted Vice Principal C to have been present, with his signature. Ex. 3 (000011). He signed the attendance sheet form as signifying his attendance and participation in the development of the IEP. Ex. 3 (000011).

188. Vice Principal C was not present at the entire meeting. Tr. 823. Ex. 34 (000010).

189. According to the LEA, Vice Principal C was available for budgetary authority, and since there was no need for funds, then Vice Principal was debriefed on the meeting and approved of the IEP's contents, and signed the paperwork. Ex. 3 (000010).

190. Vice Principal C did not request permission from the Student's Parents to leave the meeting, Tr. 823; the Student's Parents did not agree to excuse him. Tr. 443.

191. The Student was to turn 14 years of age on March 8, 2020. Ex. 1 (000001)(date of birth).

192. The September 4, 2019 IEP did not include post-secondary goal transition assessments. Ex. 1.

193. The September 4, 2019 IEP stated the next annual IEP was due on September 4, 2020. Ex. 1 (000001).

194. Accountability for not turning in assignments was stressed to be a therapeutic goal for the Student's education commencing on September 17, 2019, and into October 1, 2019, where LPCC CP noted the Student made progress with schoolwork in that he completed all of his assignments except for one class, and that his mood remained stable and that he was able to complete homework and to talk to his teachers on his own. Ex. 28 (000227-000238).

195. On October 16, 2019 the Student's Mother queried Dr. E about the Student's grades, and missing assignments, noting her position that there was a discrepancy between the Student's progress with teachers she believed were aware of the Student's IEP and others she believed were not aware of the IEP. Ex. 22 (000119). She sought

speech services to address the Student's needs. *Id.* (000120). She expressed her concern that the IEP was not being implemented. *Id.* (000121). She requested another IEP to address the Student's progress and his social/emotional needs, and sought a baseline so to create measurable outcomes appropriately ambitious under current performance levels. *Id.* (000121).

196. The Student still had not received textbooks or weekly detailed progress reports. Tr. 451.

197. Dr. E replied to the Student's Mother on October 22, 2019, and stated, among other things, that "I have informed teachers of the modifications and accommodations, but only the core academic subjects. I will email all of his teachers again and inform them." Ex. 22 (000121). He expressed that if pragmatic language is an issue then he would have a Speech language Therapist assess the Student and would pull the Student out of class, and other pull-out classes may be made available for other special needs yet they would be in a more restrictive environment, away from the Student's peers. Ex. 22 (000122).

198. On October 23, 2019, Dr. E asked the Student's Mother about her availability for an IEP meeting on October 29, 2019, at 10:30 a.m. Ex. 22 (000122). The Student's Mother responded by requesting November 1, 2019, and asked as well for all of the Student's teachers to be at the meeting, and for Ms. D to be there, and for Dr. W to be there, and for sensory processing and speech and language evaluations. Ex. 22 (000123).

199. On October 23, 2019, the Student's Mother signed a consent for evaluation from the LEA through Dr. E for "Speech/language." Ex. 6 (000044).

200. On October 24, 2019, the Student's Mother Emailed Dr. E explaining that October 29, 2019 would not work for her to schedule the IEP, and asked it to be scheduled for November 1, 2019; she asked that "all" the Student's teachers be present at the IEP, as well as Ms. D, the counselor. *Id.* She asked that Dr. W be there, as well. *Id.* The Student's Mother requested speech/language and sensory evaluations. Ex. 25 (70 at top).

201. On October 24, 2019, LPCC CP related her understanding in a therapy session that the Student was gifted, that her opinion was that the IEP was not being followed, for accommodations, although his goal for a stable mood and to complete homework. Ex. 28 (000239).

202. Dr. E sent an Email to the Student's teachers on October 24, 2109, stating he was sending an attachment with the Student's modifications and accommodations and stating the Student was identified as having Autism in his last IEP. Ex. 26. The attachment was not attached to the Email. *Id.*

203. On October 25, 2019, the LEA, via Email, sought to schedule a Parent/Teacher conference as well as the IEP, for November 12, 2019, at 3:45. Tr. 824. Ex. 25 (40 at top). The meetings were confirmed by the Student's Mother on October 25, 2019. Ex. 25 (41 at top).

204. By an Email communication chain between the Student's Mother and Dr. E from October 28, 2019 through November 4, 2019, it was noted that an IEP was not set for November 1, 2019, but was set for November 12, 2019, that the Student's Mother requested a pre-IEP meeting with Dr. E and Mr. C individually at 3:45 p.m. that day,



yet that Dr. E suggested the Student's Mother contact Mr. C personally because he had no luck getting in touch with him. Ex. 22 (000124-000125).

205. The pre-IEP meeting was held on November 8, 2019. Tr. 453.

206. On November 8, 2019, the Student's Mother signed a consent for evaluation from the LEA through Dr. E for "Sensory processing issues, social skills deficits." Ex. 27 (000044).

207. The Student's Parents expressed concerns about the accommodations not being followed, lack of progress reports, failing grades, and that a child with Autism needs consistency, and that the Student's teachers need to know what is going on with the Student. Tr. 454.

208. Dr. E requested the IEP set for November 12, 2019 be postponed until after the speech and language was completed, yet the Student's Mother wanted her other issues addressed as well, to which Dr. E stated that she would have to trust him. Tr. 454 - 455. Dr. E and Vice Principal C hoped the school's psychologist, DT, would participate in the meeting, but she was unable to meet the scheduled time, so it was unilaterally reset for 3:00 p.m. Tr. 811.

209. The LEA representatives were available for an IEP on November 12, 2019 before the 3:45 p.m. scheduled time, yet left prior to the 3:45 p.m. time, under the impression the Student's Parents were to arrive before the end of the school day. Tr. 637 - 638.

210. On November 12, 2109, the Student's Parents arrived for the IEP at 3:45 p.m., yet because of a scheduling error on the LEA's part they were told the meeting

was cancelled and would be rescheduled as soon as possible. Tr. 457 - 459. Ex. 25 (107 at top of page).

211. Vice Principal C thought there was an Email that the meeting was to be rescheduled for 3:00 p.m., yet there is no corroborating evidence of an Email. Tr. 823.

212. Dr. E's statement that he advised the Student's Mother of the schedule change on November 11, 2019 was not credible because that was Veterans' Day, a holiday. Tr. 639, 689, 691. Ex. D3.

213. The IEP meeting did not take place. *Id.*

214. Dr. E received communications from the Student's Mother noting concerns about a noisy environment and timely completion of assessments. Tr. 639.

215. Accommodations were made to allow the Student to complete his assessments without being timed and in a quiet place. Tr. 639.

216. The Speech and Language evaluation began on November 21, 2019. Ex. 6.

217. The Student continued to remain mostly stable as reflected on Dr. SC's note of November 22, 2019. *Id.* (000241-000244).

218. On December 1, 2019, the Student's Mother sought to reschedule the November 12, 2019 IEP that had not taken place. Ex. 25.

219. The meeting was never rescheduled.

220. On December 3, 2019, a proctored exam in Math 8-C reflected that the Student felt did "pretty good," and took most of the time to finish it, although he did not show his work, resulting in 12 missed answers out of 25 problems. Exs. M1 through unnumbered/unlettered M7 (M7 following M6, yet the page M7 is not lettered/numbered, yet for reference is M7).

221. The Student scored less than 50%. Tr. 643.

222. The Student did not show his work, which is a requirement for Mr. W in Math. Tr. 643.

223. The Student did not use the study aid allowed by Math Teacher Mr. W of use of note cards during testing. Tr. 736.

224. The end of chapter Math exam was proctored by Dr. E for Math Teacher W; it was not timed, and was held in Dr. E's office. Tr. 639 - 642.

225. Math Teacher Mr. W instructed the Student in Algebra, and gave the Student more time with instruction than with other students in his class, and full points for homework and classroom assignments if the Student completed at least 50% of the work; he broke the assignments into smaller chunks, did not penalize the Student for not following the numbering of a graph in an assignment, and allowed for the final exam to be taken in a quiet place and with unlimited time. Tr. 732 - 733, 737, 744.

226. Math Teacher Mr. W concluded that the Student's academic struggles were the result of lack of motivation and being unwilling to perform the work required in his class. Tr. 734.

227. Vice Principal C observed the Student during the Eighth Grade Algebra class during times he walked about campus and saw that the Student needed to be more focused, so he was set closer to the school board in a class. Tr. 805 - 806.

228. The Student was placed in a tutoring program where he was tutored by peers, juniors or seniors, with oversight by Math Teacher Mr. W. Tr. 807.

229. On one occasion, the Student was to go before his peers in a peer review hearing (the house card process), yet Vice Principal C determined it was not appropriate for the Student to go before the panel. Tr. 809 - 810.

230. On December 4, 2019, LPCC CP notes that the Student had not wanted to go to school, and that it was reported to her the Student had a panic attack at school, that over Thanksgiving break he was unable to complete homework, that he forgot his pencil and wrote with lead, that he cut and paste the same sentence down the page because he had run out of time to complete an assignment, that he wrote “[i]t’s not worth it. Over[,]” that he is sad and overwhelmed, that he is failing math, and has “Ds” in STEM and English, with a therapeutic goal to be to stabilize his mood and complete his homework, although his mood had been depressed and flat making it very difficult for him to do his usual work and to focus. *Id.* (000245-000246). At the request of LPCC CP, Dr. SC, M.D., increased the Student’s Lithium to 600 b.i.d. *Id.* (000245).

231. Progress reports had not been provided to the Student’s Mother for the September 4, 2019 goals. Tr. 673.

232. On December 4, 2019, LPCC CP penned a medical therapeutic recommendation for homebound school for the remainder of the school semester to meet the Student’s needs to stabilize mood and cognitive status with medication changes because a severe depressive episode affected his cognition, motivation, and ability to complete tasks, where the Student is complexly overwhelmed. Ex. 4 (000016).

233. On December 5, 2019, the Student’s Mother Emailed the LEA through Dr. E that the Student’s behavioral team had recommended homebound services for the

remainder of the semester because the Student had experienced a severe depressive episode, and with medication adjustments, her position was that homebound services would be appropriate to meet the Student's educational needs, and requested an "emergency IEP" for homebound services. Ex. 4 (000014 – 000015).

234. That IEP was not convened. Tr. 713 - 714.

235. For guidance, Dr. E met with Vice Principal C and also researched the option of homebound service requirements other educational entities employ, and concluded that the Student did not fall within the guiding parameters. Tr. 644- 645.

236. An in person discussion took place that day (December 5, 2019) between the Student's Mother and Vice Principal C where Vice Principal C indicated to the Student's Mother that the LEA was unable to provide homebound services, Tr. 816, with two local school districts offered as alternatives to provide homebound services, rather than the LEA charter school. Ex. 4 (000014). The Student's Mother provided Vice Principal C a copy of LPCC CP's December 4, 2019 recommendation for homebound services. *Id.*

237. Admission by Dr. E was that an IEP should have been scheduled to address the emergent situation. Tr. 713 - 714.

238. Teachers were to create packets for the Student to complete educational assignments during the remainder of the term and in through winter break. Tr. 816 - 187.

239. The Student's Mother pulled the Student out from in person class attendance for the remainder of the term.

240. The teacher packets were created on about December 6, 2019. Tr. 817.

241. Vice Principal C allowed final exams to be made up when the Student returned after winter break. Tr. 816.

242. Math Teacher Mr. W provided the Student's Mother with work to be performed remotely while the Student remained at home. Tr. 739.

243. A program named Mathworks was provided the Student, which the Student had difficulty accessing. Tr. 739.

244. On December 6/8, 2019, a Speech-Language Evaluation Report was issued. Ex. 6.

245. The initial Speech-Language Evaluation Report resulted in an inconclusive assessment, because at the time of the evaluations the evaluator could not observe the Student in his school setting. Ex. 6 (000034).

246. Dr. E and the Student's Mother tried to set an EDT meeting for December 11, 2019, surrounding the Speech-Language Pathologist report, yet it was cancelled because the LEA wanted the Student to be present at the meeting, and the Student's Mother objected. Tr. 479. The parties agreed to postpone the meeting. *Id.*

247. The Student failed Math for the Fall semester. Tr. 744.

248. For STEM, the Student did not receive a grade for the first semester because he was removed from class due to medical reasons, Tr. 772, although his assignments reflect he did well in some of the subjects which interested him. Tr. 771. Ex. 21 (000137).

249. The Student returned to school "in person" after the winter break, with school commencing January 10, 2020, and the Student arriving back a few days thereafter. Tr. 817 - 818.

250. After returning from winter break, the Student completed all of his STEM assignments prior to leaving for the Covid 19 pandemic; he was outstanding in his on-line classes, and was one of the top performing students in his on-line school. Tr. 773 - 774.

251. There were no special accommodations during this period made for the Student by Mr. JD for STEM. Tr. 769.

252. Mr. JD noted that since the Sixth Grade the Student had improved in social areas and he was impressed on how well the Student was able to talk communicate in the ongoing year. Tr. 794

253. Math Teacher Mr. W stood next to the Student during assignments and prompted him to do the next step to help the Student avoid drawing pictures and taking to his table mate. Tr. 732.

254. The Student was allowed to make up math work he had missed due to his absences from the classroom. Tr. 734, 739.

255. Instead of getting math projects done in time, the Student would work only one day out the week in Mathspace, with work performed out of school hours. Tr. 742. Ex. N. In Math Teacher W's educational assessment this showed procrastination. Tr. 742. His performance was lackluster. Tr. 744.

256. The Student's Parents can access the Student's grades and performance at school through the FACTS data online information system, previously RenWeb. Tr. 776 - 778.

257. The Student's Parents had the ability to access on-line assignments in grade books, how they should be performed, when due, whether they are completed, the score, the culmination of scores, and attendance. **See** Tr. 785 - 786. Ex. O.

258. Dr. E investigated sensory perception/processing issues regarding the Student, and did not observe conduct which he concluded would result in the need for a functional behavioral assessment. Tr. 650.

259. Prior to stay-put, there was no Functional Behavioral Assessment performed, nor was there a Behavior Intervention Plan.

260. Prior to stay-put, there was no evaluation scheduled by the LEA for the November 8, 2019 consent for evaluation for "Sensory processing issues, social skills deficits."

261. On January 27, 2020, the Petitioners filed their Request for Due Process, at which time "stay-put" commenced.

262. Although post stay-put, the Speech-Language Evaluation Report was redrafted after observation dates of the Student on January 29, 2020 and January 30, 2020, where Evaluator ASV concluded the Student did not have a language disorder in areas of receptive, expressive, or pragmatic/social language skills. Ex. 6 (000043b). Nonetheless, she explained that the Student may have difficulty in social communication situations, and in advocating for himself. *Id.* She suggested consideration of monitoring nonverbal communication techniques, discussion of school friendships to advance to out-of-school friendships, and that his self-esteem, self-confidence, depression and anxiety be carefully monitored since they may impact social exchanges and friendships in and out of school. *Id.* (000043c). The parties stipulated



to the admission of this exhibit. Tr. 18. Although issued after “stay-put,” in context it ties up the Speech-Language Evaluation Report of December 6/8, 2109, which was unable to be completed at the time because the Student was not then in school for observation in the school setting, and is considered in that way.

263. In March 2020 Dr. AH once again evaluated the Student and his educational supports at the LEA for Due Process Hearing testimonial purposes. Ex. 29.

264. At the time the LEA was closed for in school sessions due to Covid-19, the Student had received an “A” in STEM, a “C” in English, a “D” in History, and “Fs” in Science and Honors Algebra. Ex. 21 (000139).

265. Dr. AH was qualified as an expert in the areas of evaluation and treatment of children and adolescents with ASD, differential diagnosis and identification of cooccurring clinical conditions, and in the education of children with ASD. Tr. 230. Among other things, she is a school psychologist. *Id.*

266. From her review, Dr. AH recommended, in relevant part, that the LEA receive training from the University of New Mexico Center for Development and Disability “about serving the special needs of students with Autism” to assist in serving the needs of the Student; that a social work evaluation and services be provided; that speech-language services are recommended; that an FBA and BIP be performed; that there be an occupational therapy evaluation and treatment; and that Applied Behavior Analysis be provided outside of the educational setting with an abbreviated school schedule allowing the therapy during school hours. Tr. 296 - 298. Ex. 29, pp. 7-8.

267. Having reviewed her demeanor, and reasonableness of testimony in light of other evidence, as well as any possible bias or prejudice the witness might have, Dr. AH

is found to be credible; she was truthful in her testimony. Weight is given to many of her opinions, yet not to those opinions reflecting some procedural or other determinations of appropriateness, such as monitoring or facilitated IEPs, or other opinions beyond the eligibility and evaluation recommendations.

268. There is no weight given to Dr. P's opinions, as explained in more detail later. While he is not found to be deceitful in any way, indeed, he was truthful in his testimony, he was nonetheless sufficiently impeached regarding his ultimate opinions.

269. Dr. E at times was impeached, yet the impeachment was on the basis of specific facts, and not on the whole of his testimony. Having reviewed his demeanor, and reasonableness of testimony in light of other evidence, as well as any possible bias or prejudice the witness might have (and he does reflect some self-serving testimony), Dr. E is found to be credible; he was truthful in his testimony.

270. Mr. W is found to be credible. Having reviewed his demeanor, and reasonableness and of testimony in light of other evidence, as well as any possible bias or prejudice the witness might have, Mr. W was truthful in his testimony.

271. Vice Principal C signed off on an IEP stating he was at a meeting when he was not, and this raises a credibility question, although when balanced with his other testimony, after impeachment, it is found that he was truthful in what he recalled, and that he made a mistake. He is otherwise found to be credible.

272. As for the Student's Mother, having reviewed her demeanor, and reasonableness of her testimony in light of other evidence, as well as any possible bias or prejudice the witness might have, and as the Mother she does have some self-serving interests, she is found to be credible; she was truthful in her testimony. While there was

an issue where she stated that the Student had an IEP/504 Plan as he began school, when he did not, it was cleared up as a matter of trying to fit information onto a form to paint a full picture of her child's educational history, rather than being untruthful. She is credible.

273. JD is found to be truthful. Having reviewed his demeanor, and reasonableness of testimony in light of other evidence, as well as any possible bias or prejudice he might have, he is found to be credible.

274. Should there be a conflict in testimony by credible witnesses, then weight is given to the testimony which fits the Finding of Fact in the issue.

275. Should a Finding be more applicable as a Conclusion, or *vice 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 C.F.R. § 300.507(a); §6.31.2.13(I)(1) and §6.31.2.13(I)(3) NMAC.

### **Hearing Held Virtually**

Under the declared national emergency due to Covid-19, public agencies may not be able to provide all services in the same manner as typically provided. **See** Supplemental Fact Sheet, Addressing the Risk of COVID-19 in Preschool, Elementary and Secondary Schools While Serving Children with Disabilities (March 21, 2020)(<https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/Supple%20Fact%20Sheet%203.21.20%20FINAL.pdf>). FAPE is to be provided consistent with the need to protect the health and safety of students with disabilities

and to provide instruction and related services. *Id.* Practices such as distance instruction, teletherapy, tele-intervention, and meetings held on digital platforms are to be considered. *Id.*

The health and safety of children, students, educators and other service providers are the first considerations. **See** Report to Congress of U.S. Secretary of Education Betsy DeVos, Recommendation Waiver Authority (April 27, 2020). States adapt to novel circumstances due to the national pandemic emergency. *Id.* According to Education Secretary DeVos, “[s]ervices typically provided in person may now need to be provided through alternative methods, requiring creative and innovative approaches.” **See** April 27, 2020 Letter to Congress, Secretary Betsy DeVos, p. 11.

States may permit hearings on due process complaints to be conducted through video if concluded that the hearings are consistent with the State’s practices. 34 C.F.R. § 300.511(c)(1)(iii). Such a hearing must ensure the parent’s right to an impartial due process hearing consistent with the requirements in 34 C.F.R. §§ 300.511 through 300.515. **See** United States Department of Education, Office of Special Education and Rehabilitative Services, Office of Special Education Programs, IDEA Part B Dispute Resolution Procedures (June 22, 2020). There is nothing prohibiting virtual due process hearings under the New Mexico Rules. **See** §§6.31.2.13(I)(9) through 6.31.2.13(I)(20) NMAC.

The Hearing Officer has the authority to exercise control over the parties, the proceedings, and according to his own practices. **See** §6.31.2.13(I)(9) NMAC. The Hearing Officer is to exercise control over the parties and the proceedings to further the ends of the circumstances in the case under the practices he deems appropriate, while

striving to maintain a reasonable balance between giving the parties a fair opportunity to “vindicate” their IDEA rights and the financial and human costs otherwise involved in the proceedings. *See Id.*

Therefore, it is concluded that the Due Process Hearing held virtually was in accord with the State and Federal directives for Due Process hearings held during the Covid 19 pandemic, that the hearing afforded all parties the rights contained under 34 C.F.R. §§ 300.511 through 300.515, that credibility could be assessed, and that holding the hearing virtually was not inconsistent with State rules.

### **Child Find and Evaluations**

The burden is on the Petitioner to prove the claim, *see Schaffer v. Weast*, 546 U.S. 49, although the burden is on the LEA to identify an eligible student under the IDEA. *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10<sup>th</sup> Cir. 2002).

The Student’s Mother registered the Student in the Sixth Grade, and noted that he had an IEP/504 Plan, when, in fact, he did not. Other than this incorrect registration note, the Student’s Sixth Grade year was relatively uneventful, from what indicators the LEA had of him in the context of suspicion of a disability. He was enrolled in this challenging lottery accepted LEA charter school, which had rigorous expectations for all students. Although he appeared shy, quiet, reserved, with a reluctance to engage and socially stunted, the Student’s grades were generally reasonable, with As, Bs, and Cs. There is no evidence that the LEA was aware of the therapeutic notes in February 2018 that the Student began to feel empty and lose interest in school; or that, subsequently, in May of that year, that he was diagnosed with ASD. While the Student’s Mother did reach out to the Assistant Principal to

complain about bullying, and that the Student had a general anxiety disorder, the issue between the parties was regarding bullying and an option to try to find a solution to it, rather than in context of a suspected disability based on anxiety. In fact, the therapeutic notes in evidence disclose that during that time period the Student was also feeling hopeful again, and that he would put more effort into school. Although the LEA generally bears the burden of identification for eligibility, *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002), it is concluded that for the Sixth Grade, the 2017-2018 school year, the LEA did not have notice sufficient to rise to a suspicion of disability, such as 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. **See** *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1121 (9th Cir. 2016)(persuasive). It is concluded that the Petitioners did not meet their burden to establish a violation of FAPE based on Child Find for the 2017-2018 Sixth Grade school year. **See** 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i).

Matters changed as the Student prepared to enter the 2018-2019 Seventh Grade school year. Although the Student had been diagnosed with ASD, anxiety, and depression by Dr. S.C. in May of 2018, and a private Comprehensive Diagnostic Evaluation had been conducted by Dr. AH in June and July of 2018, the results were not disclosed to the LEA until July 28, 2018. It is concluded there was no notice sufficient to rise to a suspicion of disability prior to July 28, 2018, and that the Petitioners did not meet their burden to establish a violation of FAPE based on Child Find after the Sixth Grade school year concluded and before July 28, 2018. **See** 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i).

On July 28, 2018, the Student's Mother disclosed the Student's diagnoses of ASD, GAD and Major Depression in partial remission, yet in her communication with Dr. E, the LEA's Special Education Director, she focused on having a meeting on how the diagnoses may impact the Student's education, and sought an evaluation for services based on "twice exceptional." A meeting was set between the parties. After this communication, but before the proposed meeting, the Student's Parents were not given a parental consent form for an evaluation, a prior written notice, or a notice of IDEA procedural safeguards. It is concluded that the lack of a prior written notice after this Email communication to set up a future meeting for discussion did not procedurally violate FAPE. 34 C.F.R § 300.503(a). At this time there was no refusal to initiate or change identification, evaluation, or educational placement of the Student. *Id.*

In this same communication of July 28, 2108, however, the Student's Mother asked for an evaluation, rather than just a future discussion for an evaluation. "I would also like to request an evaluation as he has shown to meet the criterial for twice exceptional." Ex. 10. A procedural safeguards notice must be provided once during the school year, in addition to being provided to the parent on a parent request for evaluation. 34 C.F.R § 300.504(a)(1). A procedural safeguards notice was not provided to the Student's Parents after their request for an evaluation. It is concluded there was a procedural violation of FAPE for failure to provide a timely safeguards notice. 34 C.F.R § 300.513(a)(2)<sup>1</sup>. After the request for an evaluation, the LEA did not

---

<sup>1</sup> The federal regulation, 34 C.F.R § 300.504(a)(1), states a procedural safeguards notice must be provided to the parents once a school year, "except that a copy also must be given to the parents - (1) [u]pon initial referral or parent request for evaluation." *Id.*

seek parental consent for an evaluation as soon as possible. *See Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). 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 Wiesenberg*, 181 F. Supp. 2d at 1311. It was not until February 26, 2019 that the LEA presented the Student's Mother a consent form to allow testing. Ex. 5. As a result, it is concluded there is a procedural violation of FAPE, as well, for this failure to timely request consent from the Student's Parents to be evaluated. 34 C.F.R § 300.513(a)(2).

The next question is whether the Petitioners have proved that there is a rational basis to conclude the two procedural violations resulting from the July 28, 2108 request for an 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 C.F.R § 300.513(a)(2). It is concluded in this complex factual web, at least at this date in the process, that the Petitioners have not met their burden to prove that the failure of the LEA to provide a procedural safeguards notice<sup>2</sup>, or timely evaluation consent, rose to the level of substantive

---

The state rule, however, in relevant part, requires a procedural safeguards notice to be provided once a year, except that the copy must also be given "upon initial referral for evaluation." §6.31.2.13(D)(3) NMAC. The state rule does not require notice to be given on a parent's request for an evaluation, only on referral. *Id.* The more encompassing federal regulation requiring a procedural safeguards notice also on parental request for evaluation will be applied in this decision.

<sup>2</sup> The content of the procedural safeguards notice requires the action proposed or refused by the agency to be described; why the agency proposes or refuses to take the action to be explained; each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action to be described; that the



violations. *Id.* They have not proved the lack of what is contained in the procedural safeguards notice 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 C.F.R § 300.513(a)(2). Similarly, they have not proved that not then having a consent to allow an 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 C.F.R § 300.513(a)(2). The parties were set to meet for future discussions on how to proceed. They met on August 6, 2018, and during that meeting the Student's Parents brought the Student's past educational records, and the private Comprehensive Diagnostic Evaluation by Dr. AH, to the LEA's attention. The goal for the next step in which the parties were working with one another was the Student's Parents request for the LEA to conduct its evaluation after that date, and to move forward after that. They have not proved that not having the language in the procedural safeguards, or the immediate consent form, after the July 28, 2019 Email communication, impacted the future plan for discussions. Thus, given the working relationship between the parties,

---

parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained to be stated; that sources be included for parents to contact to obtain assistance in understanding the provisions of this part; that other options that the IEP Team considered and the reasons why those options were rejected be described; and that other factors that are relevant to the agency's proposal or refusal be described. 34 C.F.R. § 300.503(b). It is to be in understandable language. 34 C.F.R. § 300.503(c) .

what amounted were technical violations, which did not rise to denials of FAPE. **See** *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996)(technical violations alone insufficient). There was no denial of FAPE. 34 C.F.R § 300.513(a)(2).

The joint meeting was held on August 6, 2018, and, as noted, documents were disclosed to the LEA by the Student's Parents. The focus of the meeting was a request by the Student's Parents for the LEA to conduct its own evaluation of the Student. As with the initial Email request for an evaluation, the LEA did not provide the Student's Parents with a procedural safeguards notice, a consent form for an evaluation, or a prior written notice of proposed action. At this time there was no refusal to initiate or change identification, evaluation, or educational placement of the Student. 34 C.F.R § 300.503(a). The meeting for an evaluation was to be considered. It is concluded that the lack of a prior written notice after this meeting did not procedurally violate FAPE, because at this time there was no refusal to initiate or change identification, evaluation, or educational placement of the Student. *Id.*

Once again, however, the failure to provide the procedural safeguards notice after this August 6, 2018, request for an evaluation amounted to a procedural error. 34 C.F.R § 300.504(a)(1). An evaluation was requested by the Student's Parents. And once again, after the request for an evaluation, the LEA did not seek parental consent for an evaluation as soon as possible. **See** *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). 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** *Wiesenberg*, 181 F. Supp. 2d at 1311. Once again, it was not until February 26, 2019 that the LEA presented the Student's Mother a consent form to allow testing. Ex. 5. As

a result, it is concluded there is a procedural violation of FAPE, as well, for this failure to timely request consent from the Student's Parents to be evaluated. 34 C.F.R § 300.513(a)(2).

Similarly, however, despite the procedural violations, as of August 6, 2018, the Petitioners did not meet their burden of proof that the procedural violations resulted in substantive harm; that is, they did not impede the Student's right to a free appropriate public education, significantly impede the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause deprivation of educational benefit. 34 C.F.R § 300.513(a)(2). It is concluded there was no denial of FAPE resulting from the August 6, 2018 meeting. 34 C.F.R § 300.513(a)(2).

Almost two months later, with no action by the LEA, the Student's Mother followed up on October 3, 2018, and expressed concerns with homework not being graded, stress, self-esteem issues, and no desire to go to school. Importantly, at this stage the Student's Mother shifted her focus in not just seeking her continuing request for the LEA to conduct its own evaluation, but in stating that the Student was in need of an IEP. Dr. E responded by stating he would begin the SAT (Student Assistance Team) process. Under New Mexico rules, a parent may request an evaluation at any time during the SAT process, and if the public agency agrees with the parent then they will conduct an evaluation, yet if it disagrees it has to provide prior written notice to the parents that it will not evaluate. §6.31.2.10(C)(1)(d). The use of a response to intervention strategies cannot be used to delay or deny a timely initial evaluation. **See** Memorandum to State Dirs. of Special Educ., 56 IDELR 50 (OSEP 2011). Between

October 3, 2018 and October 17, 2018, the Student's grades were noted to be dropping, the Student in therapy expressed his desire not to go to school any longer and that he had a change in diagnosis that day to include Bipolar Disorder, where he was asked to be excused from school because of a new prescription of Lithium. The Student's Mother asked that the teachers be made aware of the Student's special needs, and she explained that even though she had shared his medical records and diagnostic evaluation before she would do so again. The LEA concluded there was no prior IEP around this time. The Student was beginning to express some passive suicidal ideation. Nonetheless, after the October 3, 2018 communication continuing with the evaluation request, the LEA did not provide the Student's Parents with a procedural safeguards notice. It did not provide them with a consent form for an evaluation. These amount to procedural violations. 34 C.F.R § 300.513(a)(2).

In October of 2018 various teachers responded to SAT information requests about the Student, with indications, among other things, being that the Student worked more slowly than his peers, that he did not voluntarily participate in activities, that he was not responsive to other students, that he was unable to stay on task and did not finish what he started, that there was some social isolation, that when finished with a project he would look off into space, that the Student was reserved in class, that he becomes distracted and thinks he knows what is expected but is caught off guard when assessed, that he was isolated, and tried to hide within crowds.

As explained below, the eventual untimely evaluation eventually arises to a substantive denial of FAPE based on the procedural violations regarding lack of failure to provide consent to evaluate. However, in this limited timeframe capsule arising on

October 3, 2018, the Petitioners did not meet their burden to show the lack of the procedural safeguards (compared with evaluation, discussed below) 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 C.F.R § 300.513(a)(2). It is concluded there was no denial of FAPE resulting from the lack of procedural safeguards, although, as determined below, an eventual conclusion that FAPE was denied is eventually reached regarding the untimely evaluation. 34 C.F.R § 300.513(a)(2).

From August 6, 2018, when the private evaluation from Dr. AH was disclosed to the LEA, through October 17, 2018, there was no action to evaluate or to determine eligibility. Although the parties had initially worked with one another to have an evaluation, the LEA did not perform an evaluation. The LEA was aware of the private evaluation, which noted a diagnosis of Autism Spectrum Disorder. During the process the Student also became diagnosed with Bipolar Disorder. He began to express passive suicidal thoughts. However, the LEA had still not initiated its own evaluation of him, despite repeated and continuing requests. More than two months had elapsed with no action by the LEA. There was a suspicion of disability, as explained earlier. An evaluation was requested by the Student's Parents, despite that they had already had a private evaluation of their own provided to the LEA. And once again, after the request for an evaluation, the LEA did not timely seek a parental consent for an evaluation. ***See Letter to Anonymous***, 50 IDELR 258 (OSEP 2008). 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** *Wiesenberg*, 181 F. Supp. 2d at 1311. At this stage of the proceedings, for lack of a timely evaluation, the Petitioners have met their burden to prove the procedural violation amounted to substantive harm in that the LEA's inaction impeded the Student's right to a free appropriate public education and caused deprivation of educational benefit. 34 C.F.R § 300.513(a)(2). The Student's education was being impacted by the LEA's inaction. It is concluded this amounted to a denial of FAPE. *Id.*

On February 14, 2019, the Student's Mother again asked Dr. E for special education services for her child, an evaluation and for an IEP, that 192 days had passed since their August 6, 2018 meeting, and 202 days since her initial request for an evaluation had elapsed. During this time frame the Student had texted his Mother up to 40 times stating that he could take school anymore, and that he had to ask permission to leave the classroom, and that although he likes the school he feels it is too hard. The LEA did not provide the Student's Parents with a prior written notice or a notice of procedural safeguards. These amounted to procedural violations. 34 C.F.R § 300.513(a)(2).

Then, on February 26, 2019, the LEA provided the Student's Parents a consent form to allow testing. This was about seven months from the July 28, 2018 initial request for an evaluation, and about five months since the August 6, 2018 meeting disclosure and request. Even considering the initial spans while the parties sought to develop a meeting, as explained above, the evaluation is not timely. And once again, after the request for an evaluation, the LEA did timely not seek parental consent for an evaluation. **See** *Letter to Anonymous*, 50 IDELR 258 (OSEP 2008). **See also** *Wiesenberg*, 181 F. Supp. 2d at 1311.

This procedural timeliness violation amounts to a substantive violation in that it impeded the Student's right to a free appropriate public education and caused deprivation of educational benefit. 34 C.F.R § 300.513(a)(2). Persuasive authority is found in the Southern District of New York decision of *Avaras v. Clarkstown Central Sch. Dist., et al*, No. 15 CV 9679 (NSR), 73 IDELR 50 (S.D.N.Y., September 28, 2018). As the Court explained in that case: "By the time the evaluation was performed, and a CSE meeting held, the entirety of Plaintiff's first grade year, except for three (largely administrative) days, had passed (citations deleted). This Court finds that the District violated its Child Find obligation." 73 IDELR 50, at p. 20. Indeed, it is concluded that prior to February 26, 2019, other than beginning a SAT process where the Student's Parents had nonetheless continued to seek the LEA to conduct an evaluation and some initial meeting discussions, the LEA "failed to take any appreciable steps toward complying with its Child Find obligation." *See Krawietz ex rel. Parker v. Galveston Indep. Sch. Dist.*, 900 F. 3d 673, 677 (5<sup>th</sup> Cir. 2018)(four month delay unreasonable). 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. It is found that the procedural violation by the LEA in its Child Find obligation, as noted above, with this Student diagnosed with ASD, anxiety, depression, and bipolar disorder, who stared off into space, could not take school anymore, had passive suicidal thoughts, was in social isolation, prescribed Lithium, who did not think he had permission to even leave his classroom, and was missing assignments, resulted in impeding the Student's right to a free appropriate public education and causing deprivation of educational benefit. 34 C.F.R § 300.513(a)(2).

The Petitioners have met their burden. It is concluded that there was a denial of FAPE. 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.111(a)(i). **See** 34 C.F.R § 300.513(a)(2).

It is also concluded, under persuasive authority by the Ninth Circuit, that due to the untimely evaluation, it amounted to substantive harm, by violating the goals of the IDEA (as in an evaluation for Autism) and rendering the achievement of FAPE impossible. **See Timothy O.**, 822 F.3d at 1124, 1126.

The evaluation consent submitted by the LEA to the Student's Parents was only "in the area of educational diagnostics," despite that the LEA was on notice of the Student's other suspected disability needs, as discussed above. An initial evaluation must consist of procedures that determine (1) if the child is a child with a disability, and (2) the educational needs of the child. 34 C.F.R. § 300.301(c)(2). The evaluation is to be sufficiently comprehensive to identify all of the special education and related service needs, including needs not commonly linked to the child's classification of disability. 34 C.F.R. § 300.304(c)(6). It is concluded that the limited language in the referral form for only educational diagnostics resulted in a procedural violation. 34 C.F.R § 300.513(a)(2). Despite the limited referral, the actual diagnostic report by Dr. W, however, considered other areas of the Student's special education and related needs, including recommended additional assessments, among other things, and agreed with Dr. AH's recommendations. The Petitioners have not met their burden to prove that this impeded the Student's right to a free appropriate public education, or 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 C.F.R § 300.513(a)(2). There was no denial FAPE.



This section addresses Issues 2, 3, and 4. Issue 1 is denied because it alleges a systemic matter; i.e., evaluation of “all” children with disabilities, rather than this Student.

### **The Two IEPs**

The LEA conducted its evaluation on about April 15, 2019, with a report issued on about April 17, 2019. It generally concurred with the Petitioners’ private diagnostic evaluation performed by Dr. AH – that is, that the Student is eligible based on Autism. It also recommended additional evaluations in social work for school day social/behavioral and emotional supports, social skills and communication, a functional behavioral assessment, and speech-language. This was after the LEA’s SAT meeting on March 5, 2018. An Eligibility Determination Team meeting was held immediately before the first IEP meeting on May 9, 2019. The first IEP was effective on May 9, 2019.

Those in attendance at the May 9, 2019 IEP were the Student, both of his Parents, a LEA director (representative) Ms. KS-S, a special education teacher (Dr. E), a regular education teacher (Teacher MR), and Dr. W, the educational diagnostician. It is concluded that they were appropriate members of the Team. **See** 34 C.F.R. § 300.321. It is concluded that the IEPs were appropriately signed by the participants. **See** §6.31.2.11(B)(3).

The second IEP meeting was held on September 4, 2019, with an IEP effective that date. Those in attendance at this IEP meeting were the Student, both of his Parents, a LEA representative, a special education teacher (Dr. E), and a regular education teacher (Teacher JL). It is concluded that they were appropriate members of the Team. **See** 34 C.F.R. § 300.321. It is concluded that the IEPs were appropriately signed by the participants. **See** §6.31.2.11(B)(3).

There was an additional member who signed the IEP, Vice Principal C, who indicated attendance and participation in the meeting, although he had not been there the entire meeting, with the explanation being that he was there for budgetary matters, and since there was no budgetary matter then his presence was not fully required. This portion regarding Vice Principal C is found to be a procedural violation. 34 C.F.R § 300.513(a)(2). New Mexico's rules reflect that participants are to document and sign their attendance – there is no provision for partial attendance. **See** §6.31.2.11(B)(3). Additionally, 34 C.F.R. § 300.321(a)(4) requires a knowledgeable representative of the agency, and 34 C.F.R § 300.321(e) allows absence by parental permission. Despite the procedural violation, the Petitioners have not met their burden to prove that the procedural violation resulted in substantive harm; that is, it did not impede the Student's right to a free appropriate public education, significantly impede the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause deprivation of educational benefit. 34 C.F.R § 300.513(a)(2). It is concluded there was no denial of FAPE because of Vice Principal C's partial attendance.<sup>3</sup>

An 'individualized education program' or 'IEP' is a written statement for each child with a disability that is developed, reviewed, and revised in accord with the enabling statute. 20 U.S.C. § 1414(d)(1)(A)(i). Analysis of whether a free appropriate public education has been, or is being, provided is within the four corners of the IEP itself. **See**

---

<sup>3</sup> This also addresses the Petitioners' position on page 12 of their Argument regarding Assistant Principal C leaving the September 4, 2019 meeting.

*Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). A comprehensive, well-written plan helps avoid subsequent factual contentions. ***See Id.***

An IEP is a comprehensive document, to include the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial or most recent evaluation of the child, the academic, developmental, and functional needs of the child, positive behavioral supports if the child's behavior impedes his or her learning or that of others, communication needs, assistive technology, and related services. ***See*** 34 C.F.R. § 300.324(a). 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 C.F.R. § 300.34(a).

The IEP is to include a statement regarding the student's present levels of academic achievement and functional performance, which includes, in relevant part, how the child's disability affects his or her involvement and progress in the curriculum of the general education (which is the curriculum for non-disabled students). 34 C.F.R. § 300.320 (a)(1)(i). It is to include a measurable annual goals statement, which includes academic and functional goals which are designed to meet the student's needs resulting from his or her disability to allow the student to be involved in and make progress in the curriculum for general education. 34 C.F.R. § 300.320 (a)(2)(i)(A). It is to include a measurable annual goals statement, which includes academic and functional goals which meet the student's other educational needs resulting from the child's disability, with benchmarks or short-term objectives for students taking alternate assessments under alternate achievement standards. 34 C.F.R. § 300.320 (a)(2)(i)(B)(ii). The IEP must describe how the student's progress toward meeting those measurable annual goals will

be measured. 34 C.F.R. § 300.320 (a)(3)(i). It is to include a description on when the periodic progress reports toward meeting the annual goals will be provided. 34 C.F.R. § 300.320 (a)(3)(ii). It is to include the special education and related services and supplementary aids and services, using peer-reviewed research to the extent practicable, to be provided for or in behalf of the student. 34 C.F.R. § 300.320 (a)(4). It is to include a statement of program modifications or supports for school personnel to use to enable the student to advance appropriately toward attaining his or her goals. 34 C.F.R. § 300.320 (a)(4)(i). It is to include a statement of program modifications or supports for school personnel to use to enable the student to be involved in and to make progress in the curriculum for general education in the student's present levels of academic achievement and functional performance, as well as for participation in extracurricular and non-academic activities. 34 C.F.R. § 300.320 (a)(4)(ii). It is to include a statement of program modifications or supports for school personnel to use to enable the student to be educated and to participate with other students with disabilities and with nondisabled students in accord with the IEP. 34 C.F.R. § 300.320 (a)(4)(iii).

The IEP is to include a statement explaining the extent, if at all, where the student will not participate with nondisabled students in regular classes and activities he or she may require to advance appropriately under the terms of the IEP. 34 C.F.R. § 300.320 (a)(5). It must include a statement of individual appropriate accommodations necessary to measure the student's academic achievement and functional performance on state and districtwide assessments. 34 C.F.R. § 300.320 (a)(6)(i). It must state that if the IEP Team determines the student will take alternate assessments rather than state or districtwide assessments of student achievement then to address why the student cannot

participate in the regular assessment and what the particular alternate assessment is appropriate for the student. 34 C.F.R. § 300.320 (a)(6)(ii). The IEP must include a projected date for the beginning of the modifications and services included in the IEP, and include the anticipated frequency, location, and duration of the anticipated services and modifications. 34 C.F.R. § 300.320 (a)(7).

The IEP must also include transition services for students whose IEP is to be in effect when the student turns 16 (in New Mexico, when the student turns 14, §6.31.2.11(G)(3)). 34 C.F.R. § 300.320 (b). These transition services must include appropriate measurable post-secondary goals based on age appropriate assessments which relate to training, education, employment, if appropriate, and independent living skills, and transition services which are to include courses of study needed to assist the student in meeting those goals. 34 C.F.R. § 300.320 (b)(1)&(2). A transfer of rights statement must be included stating the rights will transfer to the student at age of majority, beginning in the IEP not one year prior to reaching the age of majority. 34 C.F.R. § 300.320(c) .

New Mexico has additional requirements for matters contained in the IEP. For a student under ASD eligibility, there have to be the 11 Considerations of Autism considered and documented. §6.31.2.11(B)(4). Written notice of actions which were proposed or which were refused by the public agency have to be provided at the close of the IEP meeting. §6.31.2.11(B)(3). Behavior planning shall be considered by the IEP Team if the behavior impedes the student's learning or the learning of others. §6.31.2.11(F). There is to be a graduation plan integrated into the transition planning and services of the IEP. §6.31.2.11(G). The IEP process is to include appropriate transition services to facilitate

the student's movement from school to post-school activities, to include post-secondary education, vocational education, integrated employment, continuing and adult education, adult services, and independent living and community participation. §6.31.2.11(G)(1). Individual needs are to be considered, with strengths, preferences, and weaknesses, to consider instruction, related services, community experiences, employment and post-school development, adult living, and daily living skills acquisition, where appropriate. §6.31.2.11(G)(2). Beginning with the IEP in effect when the student turns age 14, the IEP must include appropriate measurable post-secondary goals as based on age appropriate transition assessments which relate to training, education, employment and independent living skills (where appropriate). §6.31.2.11(G)(3)(a). It is to include the transition services which are needed to assist the student to reach those goals, which include courses of study. §6.31.2.11(G)(3)(b). The IEP is to include a statement noting the student has been informed of his rights under the IEP and that they will transfer to him or her on reaching majority. §6.31.2.11(G)(3)(c). The measurable post-school goals refer to goals after high school, yet which must be measured while the student is still in high school, based on the needs, wishes, and abilities of each student. §6.31.2.11(G)(4).

No weight is given to Dr. P's expert analysis of the components of the IEP. He was effectively impeached by Respondent. He generally performed a document review and based his opinions on information he gathered from the Petitioners. Tr. 123 - 124. It is also reflected in the following colloquy:

Question (Mr. Esquivel): "Well, isn't – isn't it true that an IEP can meet legal requirements as defined by the law yet not meet all these quality indicators that you're referring to?"

Response (Dr. P): "Are you just – are you just referring to compliance versus quality?"

Question (Mr. Esquivel): "I'm asking you the question."

Response (Dr. P): "I would have to know if you're talking about compliance. Federal OSEP regulations for compliance are pretty minimal versus quality in that an IEP can be compliant but yet have very low quality. Almost in no cases do you find a[n] IEP with low quality or high quality but needs no compliance."

Question (Mr. Esquivel): "So it sounds like the answer to my question is yes, an IEP can meet legal requirements yet not meet certain subjective quality indicators; true or false?"

Objection overruled by Hearing Officer.

Response (Dr. P): "Basic compliance can be met."

Question (Mr. Esquivel): "And not violate the law, correct?"

Response (Dr. P): "Yes."

Tr. 146 - 147.

An IEP is to be reasonable, not ideal. *Andrew F.*, 137 S. Ct. at 999.

The Petitioners' first position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to include an appropriate statement of present levels of academic achievement and functional performance, in violation of 34 C.F.R § 300.320(a)(1). Ps' Argument, p. 11. In both the May 9, 2019 and September 4, 2019 IEPs there were boxes on the forms noting identified areas of need could exist (if checked) for math, reading, and written language, yet none were checked. The identified areas of need in present levels of academic achievement were for communication, and for self-advocacy and pragmatics of social language, in the May 9, 2019 IEP. In the September 4, 2019 IEP it was again for pragmatics for social language and self-advocacy, and that teachers respond to Email quires from the Student and his Parents.

Although not defined as present levels of academic achievement and functional performance, the May 9, 2019 IEP included academic strengths, described as "[d]etermined, can work well with peers in a small group," and concerns and

recommendations regarding the Student were “[c]ommunication, self-advocacy, social skills, presentations.” Other strengths were employment as an engineer, recreation and leisure as sleep, and post-secondary training and learning simply explained as “expectation.”

An IEP must contain present levels of academic achievement and functional performance, which includes, in relevant part, how the child’s disability affects his or her involvement and progress in the curriculum of the general education (which is the curriculum for non-disabled students). 34 C.F.R. § 300.320 (a)(1)(i). It is concluded that the May 9, 2019 IEP’s present levels of academic achievement described as pragmatics of social language communication, and self-advocacy, coupled with being determined and working well in small groups, and sleep as leisure and post-secondary training as “expectation” had little if any explanation of present levels of academic achievement and the Student’s academic involvement in and progress in the general education curriculum. They are vague, casual references, and not clear descriptive measures. An IEP must be appropriately ambitious and reasonably calculated to enable a child to make progress appropriate according to his or her unique circumstances. *Andrew F.*, 137 S.Ct. at 999 - 1001. There must be objective criteria in the IEP to allow measurable progress. **See** *Lessard v. Wilton Lyndeborough Coop Sch. Dist.*, 518 F.3d 18, 23 (1<sup>st</sup> Cir. 2008)(used as persuasive authority). The lack of clear descriptive levels of academic achievement violate these requirements. The Petitioners have met their burden and have established a substantive violation of FAPE. 34 C.F.R. § 300.513 (a)(1)(substantive).

In the September 4, 2019 IEP it was again noted that academic achievement was for pragmatics for social language and self-advocacy, and that teachers respond to Email



quires from the Student and his Parents. Coupled with this were other noted strengths described as the Student being diligent, conscientious, sensitive, intelligent, and that he was very responsible, and turns in good quality work, that he pays attention well, is on task, and that he has the ability to remain focused on tasks at hand, and in reading and comprehension skills. Additional strengths were described as grades, that is, the academics, for English of 79.41%, History of 82.59%, Honors Algebra at 69.66%, Science at 68.36%, and STEM at 100%. The concerns and recommendations regarding the Student were “[n]one/[n]eeds to be more engaged and ask questions,” “test skills,” and that he has the “[a]bility to remain focused on task at hand, using the maximum amount of time effectively in class, keep up with assignments after absences.”

An IEP must contain present levels of academic achievement and functional performance, which includes, in relevant part, and how the child’s disability affects his or her involvement and progress in the curriculum of the general education (which is the curriculum for non-disabled students). 34 C.F.R. § 300.320 (a)(1)(i). Unlike the May 9, 2019 IEP, this September 4, 2019 IEP, when read as a whole and in context, was more detailed, and had greater explanation, including grades, from a procedural requirement on which to measure academic achievement and functional performance. *Id.* As a result, it is concluded that the Petitioners have not met their burden. There is no procedural violation of FAPE in the September 4, 2019 IEP. 34 C.F.R. § 300.513 (a)(2)(procedural).

The Petitioners’ second position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to include an appropriate statement of measurable annual goals, including academic and functional goals, in violation of 34 C.F.R § 300.320(a)(2), and that they do not

appropriately describe how the Student's progress will be measured, in violation of 34 C.F.R § 300.320(a)(2). Ps' Argument, p. 11. The Petitioners do not allege the lack of benchmarks for alternate assessments. *Id.*

The May 9, 2019 IEP described these purported measurable goals as CCSS.ELA Literacy SL. 9-10.1.c in a box in the annual measurable goals section, in which the Student was to “[p]ropel conversation by posing and responding to questions that relate the current discussion to broader themes or larger ideas,” and that he would “actively incorporate others into the discussion; and clarify, verify, or challenge ideas and conclusions.” The objective to meet this goal was to “engage in more discussions during classes and socially by posing and responding to questions,” with the criteria to master that goal to “B (sic) in all classes,” for it to be mastered within one year, by the position responsible as special education and general education (“SE/GE”), and “[t]eachers, student.”

The September 4, 2019 IEP described these purported measurable goals as “CCSS.ELA-Literacy. SL. 9-10.1.c” in the annual measurable goals section, in which the Student was to “[p]ropel conversation by posing and responding to questions that relate the current discussion to broader themes or larger ideas,” and that he would “actively incorporate others into the discussion; and clarify, verify, or challenge ideas and conclusions.” “CCSS.ELA-Literacy. SL. 11-12.4” was in another box in the annual measurable goals section, in which the Student was to “[p]resent information, findings, and supportive evidence, conveying a clear and distinct perspective, such that listeners can follow the line of reasoning, alternate or opposing perspectives are addressed, and the organization, development, substance, and style are appropriate to purpose, audience, and

a range of formal and informal tasks.” The objective to meet these goals was to “engage in more discussions during classes and socially by posing and responding to questions,” with the criteria to master that goal to “B (sic) in all classes” and for “[p]ragmatic skills, social/emotional growth and self-advocacy are goals for his success and affects all classes and academic growth.” *Id.* Mastery was to be within one year, by the position responsible as special education and general education (“SE/GE”), and “[t]eachers/student.” *Id.*

The measurable annual goals statement in an IEP is to include academic and functional goals which are designed to meet the student’s needs resulting from his or her disability to allow the student to be involved in and make progress in the curriculum for general education. 34 C.F.R. § 300.320 (a)(2)(i)(A). It is to include a measurable annual goals statement, which includes academic and functional goals which meet the student’s other educational needs resulting from the child’s disability, with benchmarks or short-term objectives for students taking alternate assessments under alternate achievement standards. 34 C.F.R. § 300.320 (a)(2)(i)(B)(ii). The IEP must describe how the student’s progress toward meeting those measurable annual goals will be measured. 34 C.F.R. § 300.320 (a)(3)(i). It is to include a description on when the periodic progress reports toward meeting the annual goals will be provided. 34 C.F.R. § 300.320 (a)(3)(ii).

Read in context, and as a whole, the goals in the IEPs can be measured, with a one year point as a progress date, and they meet the Student’s educational needs both with the Student’s disability and in the general curriculum. The Petitioners simply argue that the goals were not appropriate, without describing what subject-matter procedurally the goals failed to address – thus, from a procedural standpoint, from what is stated in the IEPs, it is concluded that they have not met their burdens for either the May 9, 2019 IEP or the

September 4, 2019 IEP. There were no procedural measurable annual goal violations of FAPE in the May 9, 2019 and September 4, 2019 IEPs. 34 C.F.R. § 300.513 (a)(2)(procedural).

The Petitioners' third position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to include an adequate statement of special education and related services, and supplementary aids and services, that were to be provided to the Student, in violation of 34 C.F.R § 300.320(a)(4). Ps' Argument, p. 11.

The May 9, 2019 IEP had a service provision of one hour per week of special education, commencing on May 9, 2019, and concluding on May 9, 2020, to be 100%, all in the general education setting, to be provided by the Special Education/General Education Teacher with a stated the level of service at 3.26%. The Student would be regular education with special education services as at 80% or more of the day in the regular education classroom. Proposed courses include Grade 8 Algebra 1, Grade 9 Honors English, New Mexico History/Government, Biology, Honors Geometry, PE, and Intensive; Grade 10 Honors English, AP World History, Physics, Algebra 2/Pre-Calculus, Critical Language, Intensives; Grade 11 AP English, AP U.S. History, Chemistry/UNM Lab, AP Calculus, Critical Language, and Intensive; and Grade 12 AP English, Dual Enrollment (Economics, Science, Mathematics), 4 dual enrollment electives, including Practical Art (1), Nutrition (health) dual enrollment. There is no other statement of special education, and there is no statement for related services or for supplementary aids and services.

The September 4, 2019 IEP had a service provision for three hours per week of special education, commencing on May 9, 2019, and concluding on May 9, 2020, to be 100%, all in the general education setting, to be provided by the Special Education/General Education Teacher – the IEP stated the level of service was at 9.8%. The Student would be regular education with special education services as at 80% or more of the day in the regular education classroom. Proposed courses include Grade 8 Algebra 1, Grade 9 Honors English, New Mexico History/Government, Biology, Honors Geometry, PE, and Intensive; Grade 10 Honors English, AP World History, Physics, Algebra 2/Pre-Calculus, Critical Language, Intensives; Grade 11 AP English, AP U.S. History, Chemistry/UNM Lab, AP Calculus, Critical Language, and Intensive; and Grade 12 AP English, Dual Enrollment (Economics, Science, Mathematics), 4 dual enrollment electives, including Practical Art (1), Nutrition (health) dual enrollment. There is no other statement of special education, and there is no statement for related services or for supplementary aids and services.

In both IEPs, although they state there will be one hour and three hours, respectively, of special education, with 80% or more during the day in the same defined regular education classes, there is no explanation of what those “special education” services were to be. The IEPs must include special education services. 34 C.F.R. § 300.320 (a)(4). An IEP must be appropriately ambitious and reasonably calculated to enable a child to make progress appropriate according to his or her unique circumstances. *Andrew F.*, 137 S.Ct. at 999 - 1001. The lack of what the services consist of does not provide a reasonable calculation to enable the Student to make progress appropriate in his circumstances. *Id.* The Petitioners have met their burden and have established a

violation of FAPE for both IEPs on this subject (special education services). 34 C.F.R. § 300.513 (a)(1)(substantive). For these same reasons, since there are no statements for related services or for supplementary aids and services in either IEP, then the IEPs are not reasonably calculated to enable the Student to make progress appropriate to his circumstances. *Endrew F.*, 137 S.Ct. at 999. The Petitioners have met their burden and have established a violation of FAPE for both IEPs on this subject (related and supplementary aids and services). 34 C.F.R. § 300.513 (a)(1)(substantive).

The Petitioners' fourth position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to include a sufficient statement identifying frequency, location, and the duration of services and modifications, in violation of 34 C.F.R. § 300.320(a)(7). Ps' Argument, p. 11.

The May 9, 2019 IEP stated that all of the Student's activities were to be with developing peers, with accommodations needed for all regular education services, and the accommodations and/or modifications described as having instructional materials to be "text for home when available," with the assignments/homework as "additional time as negotiated," and for testing in the classroom was to be in a quiet space and to allow extended time as needed. The instructional presentation for projects was to be structured in chunks, and to "develop schema, organization, check for understanding, [and] reduce number of problems to prove mastery." No projected date for the beginning of the modifications and services was included in the May 9, 2019 IEP. There was no statement regarding the anticipated frequency, location, and duration of the anticipated services and modifications. As a result, the Petitioners have proved a procedural violation. 34 C.F.R. § 300.320 (a)(7). The language itself on which the frequency, location, and duration of the

services and modifications is based is vague, and indirect, “text for home when available,” and negotiating additional time. Thus, the May 9, 2019 IEP is not reasonably calculated to enable the Student to make progress appropriate to his circumstances. *Andrew F.*, 137 S.Ct. at 999. The Petitioners have met their burden that the procedural violation amounted to a FAPE violation given that inadequate substance of the IEP on which the procedures were to be measured impeded the Student’s right to a free appropriate public education and caused deprivation of educational benefit. 34 C.F.R § 300.513(a)(2).

The September 4, 2019 IEP again states the same vague language as does the May 9, 2019 IEP. For the same reasons that the May 9, 2019 IEP violates FAPE, so too does this portion of the September 4, 2019 violate FAPE. 34 C.F.R § 300.513(a)(2). However, it also adds quiet space, preferential seating, and extended time as need. Ex. 1. These are sufficient and do not violate FAPE.

The Petitioners’ fifth position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to properly consider the need for extended school year, in violation of 34 C.F.R. § 300.106(a)(7). Ps’ Argument, p. 11. Both IEPs had a box for extended school year, and both checked that it was not needed. 34 C.F.R. § 300.106(a)(7). From a procedural perspective, they were addressed. There were no procedural violations. 34 C.F.R § 300.513(a)(2).

The Petitioners’ sixth position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to provide for specialized instruction by certified special education teachers, in violation of 34 C.F.R. § 300.156(c)(1). They advance this in their Argument, with other portions of

their procedural violations arguments, and therefore it will be reviewed procedurally by what they title as statutory definition violations (or regulation). Ps' Argument, p. 11.

While 34 C.F.R. § 300.156(c)(1) states the LEA is to ensure that personnel are adequately prepared and trained, there is nothing that shows an affirmative duty to include this in the IEPs. As a result, the Petitioners have not proved a procedural violation. 34 C.F.R § 300.513(a)(2).

The Petitioners' seventh position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to consider the 11 IEP Considerations for Student's with Autism Spectrum Disorder, in violation of §6.31.2.11(B)(4) NMAC. Petitioners' Closing Argument, p. 11. Neither IEP documented consideration of the 11 IEP Considerations for Student's with Autism Spectrum Disorder. The language in §6.31.2.11(B)(4) NMAC is plain in that "[t]he IEP Team shall document consideration of the strategies." *Id.* The Petitioners have met their burden to prove a procedural violation. 34 C.F.R § 300.513(a)(2). The 11 Autism Considerations are: (1) extended educational programming, such as extended school year services (among things), which consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills; (2) "daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, including, for example, lunch, snack, and recess periods that provide flexibility within routines, adapt to individual skill levels, and assist with schedule changes, such as changes involving substitute teachers and other in-school extracurricular activities"; (3) "in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills, including, for



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

functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching”; (9) “social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role playing”; (10) “professional educator and staff support, including, for example, training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP”; and (11) “teaching strategies based on peer reviewed, research-based practices for students with ASD, including, for example, those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training.” §6.31.2.11(B)(4)(5) NMAC. As explained in this decision in more factual detail regarding a denial of FAPE under the Petitioners’ ninth alleged violation (below), it is found that both evaluators, Dr. W, Ed.S, and Dr. AH, PsyD, Psychologist, expressed recommendations or opinions, to which weight is given, that reflect that they recommended aspects contained in Autism Considerations #4, #8, #9, and #11 to be considered for the Student, and which are found to be appropriate for his IEPs. Note that there is no corresponding number to the number of the Autism Considerations addressed by the evaluators, yet a finding is made that the substance of their recommendations or opinions meet these numbered Autism Considerations. Just as it is concluded in the Petitioners’s ninth position, below, that because the IEPs’ failed to consider these recommendations of Drs. AH and W and thus resulted in a substantive denial of FAPE, so too does failure to include these provisions amount to impeding the Student’s right to a free appropriate public education and causing

a deprivation of educational benefit. 34 C.F.R § 300.513(a)(2). It is concluded there was a denial of FAPE in both IEPs. 34 C.F.R § 300.513(a)(2).

The Petitioners' eighth position on this subject, which is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to provide the Student's Parents with prior written notice regarding the LEA's refusal to accept the Student's Parents' requests relative to the provision of FAPE, in violation of 34 C.F.R. § 300.503. Ps' Argument, p. 11. The Petitioners fail to state what Student's Parents' requests they are referring to which they contend were refused, which would allow the next step of evaluating the alleged lack of prior notice. *Id.* Not being provided guidance to their complaints by the Petitioners, it is concluded they have not met their burden to establish a procedural violation. 34 C.F.R § 300.513(a)(2). Additional conclusions regarding notice will be discussed in later portions of this decision.

The Petitioners' ninth position on this subject, which goes more to substance of the IEPs, rather than procedural compliance, and is what remains ripe and is therefore what will be addressed, as reflected in their Argument, is that both IEPs fail to be based on the most recent evaluation of the Student, in violation of 34 C.F.R. §300.324(a). Ps' Argument, p. 12. Contrary to the Petitioners' argument, the IEPs did reflect an evaluation date of April 15, 2019, which was Dr. W's Multi-Disciplinary Re-Evaluation Report. **See** Ex. 2 (000001) and Ex. 3 (000005). 34 C.F.R. §300.324(a)(iii) states that the IEP Team must consider the most recent evaluation. *Id.* It was considered. They have not proved a procedural violation. 34 C.F.R § 300.513(a)(2). However, the Petitioners later argue that the IEPs violated a substantive standard by failing to write appropriate plans. Petitioners' Conclusions of Law, pp. 43 - 45. It is concluded that the Petitioners have met their

burden to prove substantive violations in this respect. 34 C.F.R § 300.513(a)(1). Both evaluators, Dr. W, Ed.S, and Dr. AH PsyD, Psychologist, opined or recommended, in relevant part, that the Student should receive an Integrated Service Plan/ABA Therapy Services to be delivered in the home or community, covered by medical insurance. Social skills/social communication services were to be considered, with it further developed as a school social worker evaluation for social behavior and emotional concerns during the school day. Speech/language services were to be considered, with it further developed that there be an evaluation. A Functional Behavior Assessment (FBA) was recommended. *Id.* The opinions or recommendations from these evaluators are found to be persuasive.<sup>4</sup>

Both of the IEPs failed to contain the recommended considerations by both evaluators.<sup>5</sup> The LEA has not presented similar expert or other qualified evidence discounting the educational opinions or recommendations of Drs. AH and W. Weight is given to their opinions and recommendations. As a result, it is concluded that the IEPs were not reasonably calculated to enable the Student to make progress appropriate in light of his circumstances.” *Andrew F.* 137 S. Ct. at 999. It was not “appropriately ambitious in light of [the Student’s] circumstances.” *Id.* at 1000. Incorporation of their recommendations would have resulted in reasonable IEPs. *Id.* at 999. The Petitioners have met their burden establishing a substantive violation of FAPE by not incorporating the recommendations by Drs. W and AH in the May 9, 2019 and September 4, 2109 IEPs. 34 C.F.R § 300.513(a)(1).

---

<sup>4</sup> These are the opinions which also reflect Autism Considerations #4, #8, #9, and #11, noted in addressing the Petitioners’ seventh position.

<sup>5</sup> A speech and language assessment began toward the end of 2019, and was completed after the Petitioners filed for due process.

The Petitioners' tenth position on this subject is that transition services were not documented in the September 4, 2019 IEP, in violation of §§ 6.31.2.11(G)(2)(a)-(b) & G(3) NMAC. It is found that the Petitioners have met their burden that this resulted in a procedural violation. The Student was to turn 14 in March 2020, yet the IEP did not have a transition plan. A transition statement was required. §6.31.2.11(G)(3)(a) NMAC (beginning IEP in effect when student turns 14, IEP must include appropriate measurable post-secondary transition goals). Nonetheless, the Petitioners have not met their burden to prove that the lack of the transition statement resulted in substantive harm; that is, it did not impede the Student's right to a free appropriate public education, significantly impede the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause deprivation of educational benefit. 34 C.F.R § 300.513(a)(2).

This section addresses Issues 5 (Autism), 6, 7, 8, and 11.

### **Prior Written Notices**

The Petitioners contend that both IEPs failed to appropriately reflect the Student's Parents' requests, and decision for actions, at the IEP meetings in their prior written notices (PWN) of proposed actions. *See Ps' Argument*, pp. 12 - 19. Their positions are well-taken.

Both PWNs state the same thing – that based on Student input, Parent input, teacher input, classroom performance, and school records, without describing the input, the two proposed items and options, both proposed by the LEA, were either regular education with special education services as “Setting:1 80% or more of the day in the regular education classroom,” which was documented as accepted, or regular education

combined with special education as “Setting 2: 40% to 79% of the day in regular class setting, or Setting 3 (less than 40% in GE). (sic) or Setting 4,” which was documented as rejected. The reasons for acceptance for the first option was that the general education environment for the entire day would provide the Student to be educated in the least restrictive environment, and the reason for the rejection of the second reason was because pull-out sessions were not required to meet the Student’s needs.

At the May 9, 2019 IEP meeting the Student’s Parents, however, had a number of requests brought up at the meetings. Speech and language and social work evaluations, social work services, organization and time management skills (executive functioning skills), supports in math, social skills training, private Applied Behavior Analysis (ABA) training, peer mentoring, a social/emotional goal, weekly progress reports, hard copies of textbooks for home, extra time to alleviate anxiety, making up assignments missed due to excused absences for attending doctors’ appointments, a calm place for the Student to go if he had a meltdown, and even a request to go to the bathroom for that reason. Pull-out sessions from the regular education classroom were requested. A summer program was requested because of possible regression.

At the September 4, 2019 IEP meeting, the Student’s Parents sought the evaluations for speech, social work, (SBA – interpreted as ABA) sensory, functioning skills in organization and time management, a social/emotional goal, support in math, textbooks for home, the peer mentor reviews, a request for all teachers to be provided with the IEP, and a safe spot.

There is nothing in both IEPs which reflect the Student’s Parents’ requests. There is nothing to show that they were rejected, or accepted. There is nothing to show what was

considered and reasons. There are just two PWNs saying the same thing, based on the LEA's proposals.

Under 34 C.F.R. § 300.503(c) , the PWN must be given to the Student's Parents stating the action proposed or refused by the agency to be described; stating why the agency proposes or refuses to take the action to be explained; stating each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed or refused action to be described; stating that the parents of a child with a disability have protection under the procedural safeguards of this part and, if this notice is not an initial referral for evaluation, the means by which a copy of a description of the procedural safeguards can be obtained to be stated; stating that sources be included for parents to contact to obtain assistance in understanding the provisions of this part; stating what other options that the IEP Team considered and the reasons why those options were rejected be described; and stating what other factors that are relevant to the agency's proposal or refusal be described. *Id.* It is to be in understandable language. 34 C.F.R. § 300.503(c) . State rules require the written notice to be provided at the close of the meeting. §6.3.2.11(B)(3) NMAC.

Neither IEP met these procedural requirements in full. Particularly, neither document addressed the various concerns and requests the Student's Parents brought with them to the meetings. There is nothing explaining why the LEA refused the Student's Parents' requests. There is no explanation about evaluation procedures or assessments, although when read in context both IEPs do refer to Dr. W's evaluation as the most recent evaluation, although the IEP differs from a PWN. Relevant other factors that might exist

are not noted. It is concluded that the Petitioners have met their burden to prove that this resulted in a procedural violation. 34 C.F.R § 300.513(a)(2).

A procedural safeguards notice, according to Dr. E's normal practice, was to be on the table, yet a hard copy was not provided on May 9, 2109, yet a copy was acknowledged at the September 4, 2019 IEP. The May 9, 2019 failure to give a hard copy of the procedural safeguards is found to be a procedural violation, although there was no violation with the September 4, 2019 IEP and PWN. 34 C.F.R § 300.513(a)(2).

The Student's Mother is found to be credible with her recollection of asking the IEP Team to consider her requests. Dr. E's initial version that the Student's Mother made no request at the May 9, 2019 IEP meeting is not credible, given that he retracted that statement later by stating it was not the Mother's history not to make requests.

It is concluded that the lack of addressing the input and concerns from the Student's Parents and the lack of explanation on why their requests were refused – or even if they were refused, significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education. The Parents are not passive participants, but are active members of the IEP Team whose thoughts and considerations about their child, the Student, are to be considered and documented, yet were not. **See** *Andrew F.*, 137 S.Ct. 999 - 1001. The Petitioners have met their burden. FAPE was denied by the inadequate PWNs on May 9, 2019 and September 4, 2019. 34 C.F.R § 300.513(a)(2).

As for the lack of the hard copy of the procedural safeguards notice in the May 9, 2019 IEP – it does not rise to a substantive violation. The Petitioners have not met their burden that lack of a hard copy 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 C.F.R § 300.513(a)(2).

This section address Issues 4 and 8.

### **Predetermination**

The Petitioners contend that the LEA predetermined the Student's placement and educational program in the September 4, 2019 IEP because the LEA was of the position the Student should be in the general education environment the entire day, which was based on a full-inclusion program, considering as well that the LEA did not have a resource room, and that it refused to consider the Student's individual needs. *See* Argument, p. 19. The LEA was of the position that it was in the least restrictive environment for the Student to be in an all-inclusive setting. It is concluded that the Petitioners have met their burden and that there was a predetermination in the September 4, 2019 IEP.

A predetermination arises when the LEA unilaterally decides the Student's placement prior to the IEP meeting. *Deal v. Hamilton County Bd. of Educ.*, 42 IDELR 109 (6<sup>th</sup> Cir. 2004). As otherwise explained in this decision, although the Student's Mother expressed her concerns at the IEP Meetings, they were not considered by the IEP Team -- they were not even documented in the IEPs or PWNs. The LEA predetermined that the Student was in the least restrictive environment for an all-inclusive educational setting; the LEA did not have a provision to allow pull-outs to otherwise meet a continuum of placement based on the Student's Mother's requested individual needs. Vice Principal C was in and out of the last meeting because funds were not an issue. If the school had no pull-out programs, then it leads to the conclusion that they could not offer such a program,

and that therefore despite that the Student's Parents requested a pull-out program to be considered, it was predetermined that a pull-out could not exist because they did not have pull-outs. This adds up to sufficient evidence that the Petitioners met their burden to establish a predetermination for the September 4, 2019 IEP. It had already decided the Student's educational plans prior to the meetings. It was not willing to consider the Student's Parents' requests. *See P.F. and S.F. v. Board of Educ. of the Bedford Cent, Sch. Dist.*, 67 IDELR 148 (S.D.N.Y. 2016).

Just as with the lack of addressing the input and concerns from the Student's Parents in the prior written notices, their predeterminations significantly impeded the Student's Parents an opportunity to participate in the decision-making process for a provision of a free appropriate public education. Reviewing the meeting as a whole, the LEA did not consider the Student's Parents as partners in preparation of the educational plan with full discussions, but rather as individuals who were required to be present. The Petitioners have met their burden. FAPE was denied by the predetermination for the September 4, 2019 IEP. 34 C.F.R § 300.513(a)(2).<sup>6</sup>

This section addresses Issue 11.

### **Continuum of Alternative Settings**

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

---

<sup>6</sup> At this stage, the issue is not whether the LEA was correct in its LRE determination; the issue is one of predetermination.

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 LEA is to ensure a continuum of available appropriate placements. 34 C.F.R § 300.115.

In general, the Petitioners' theory is that the LEA did not ensure a continuum of settings. Ps' Argument, pp. 19 - 20. It is concluded that despite the predetermination of LRE, the Petitioners have not met their burden to prove that LRE was not met by the Student being in the full inclusion program should there be the appropriate modifications and accommodations. In other words, the Petitioners have not presented evidence sufficient to meet their burden that an appropriate plan to meet his Student's individual educational needs requires a continuum for more restrictive pull-outs to meet the Student's needs in, for instance, math or science, for the plans to be appropriate. While the Student may be struggling with these subjects, the Petitioners do not tie evidence showing that the nature or severity of the Student's disability is such that the Student's educational needs cannot be achieved satisfactorily in the all-inclusive program with the use of supplementary aids and services. *Nebo* 379 F.3d at 976. As a result, it is concluded the Petitioners have not met their burden to prove a violation of FAPE on the LRE continuum argument. 34 C.F.R § 300.513(a)(1).

Homebound services, however, are considered more specifically, but once again, based on the burden of proof, it is concluded there was no violation of FAPE. Medically,

the Student could not go back to school “in-person” until he stabilized on new medications, which impacted his cognitive ability, motivation, and ability to complete tasks.

Homebound services were recommended. The LEA suggested that the Student’s Parents might be able to receive homebound services from other school districts, yet it also had the Student’s teachers provide assignments to the Student to complete while he was on medical leave, and make-up tests were allowed on his return. Based on the specificity in the medical note showing an impact on cognitive ability, motivation, and an inability to complete tasks, which are found to be abilities to gain educational benefits, and the need to stabilize due to change in medication, it is found the Student could not then be educated in an in-person setting, although this does not mean the LRE could not be met with homework assignments while he was medically unable to attend classes in person for the relatively short period of time. 34 C.F.R. §300.114. The period is December 4, 2019 through the time winter break began, which was December 23, 2020, and until classes began again on January 13, 2020. Ex. D3. Thus, the issue is whether absent specific homebound instruction during this time the Student’s special education was inappropriate because it did not include instruction in the home appropriate to meet his needs to ensure access to the general curriculum. 34 C.F.R. § 300.39(a)(1)(i) & (3). While it is found that the Student was medically required to be at home, it is also found the LRE was still in his IEP setting, yet now with accommodations or modifications allowing homework and tests to be made up on his return to school in person. Therefore, it is concluded that the Petitioners have not met their burden to prove that absent certain homebound services (i.e., math, science, language, etc.) the educational provisions were inappropriate for a provision of FAPE to ensure access to the general curriculum while the Student was at

home, compared with the LEA having the teachers provide the Student with at home assignments during this period, and make up tests afterward. 34 C.F.R § 300.513(a)(1). The Petitioners have not met their burden. The burden of proof rests with the party challenging the IEP. **See** *Schaffer v. Weast*, 546 U.S. 49 (2005). There was no denial of FAPE based on lack of homebound services for a part of December 2019. *Id.*

While there was no violation of FAPE for not providing homebound services, nonetheless there was a procedural violation by not providing the Student's Parents with notice of its refusal of homebound services. On December 5, 2019, the Student's Mother specifically asked for homebound services as appropriate to meet the Student's special education needs. Dr. E admitted he should have set an IEP to discuss the emergent situation. The inaction amounted to a refusal to provide homebound services. Thus, the LEA procedurally violated FAPE by failing to provide a notice regarding its refusal. 34 C.F.R § 300.503(a). Despite the procedural violation, because FAPE was not substantively violated by the lack of homebound services, then the lack of notice did not impede the Student's right to a free appropriate public education, significantly impede the Student's Parents' opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause deprivation of educational benefit. 34 C.F.R. § 300.513 (a)(2). There was no violation of FAPE.

This section address Issues 12 and 13.

### **Implementation**

The Petitioners argue that the IEPs were not implemented because they failed to provide accommodations and modifications, they did not provide textbooks, a quiet space, progress reports, and extended time for testing. Ps' Argument, pp. 13 - 14. In each IEP,

the textbook issue was to provide a text for home when available. It has already been concluded that this vague textbook accommodation violated FAPE. A quiet space was required by each IEP, and evaluating the Petitioners continuing requests for quiet space or a safe spot in both IEPs, it leads to finding that a quiet space was not being provided, coupled with a statement he provided his mother that he was not given quiet space. Tr. 429. As a result, the IEP with this provision was not implemented. However, as to the extra time for work, at the beginning of the SAT process in March 2019 the teachers provided the Student extra time for testing, and after the May 9, 2019 IEP, therapist notes show the Student was able to complete homework and that he was doing well except in one class, going into the September 4, 2109 IEP process, and into accommodations for extra time in November 2019, which is contradictory to the Student's Mother's statement that Dr. E told her none of the students received extra time. In any event, it is concluded that the Petitioners have not met their burden to prove that the IEPs were not properly implemented as to extra time. As for progress reports, the IEPs stated the reports were to be provided three times per week (FACTS) for the September 4, 2019 IEP, as well as quarterly, and weekly (RenWeb) and quarterly in the May 9, 2019 IEP. Dr. E's testimony is given great weight in that he stated in a weaker moment he agreed to give the Student's Mother weekly reports, yet because she appeared to be more aware of updates than he was, he stopped doing the weekly reports. Tr. 673. As a result, the Petitioners have met their burden to prove a failure to implement matter on progress reports.

The IEP is to be implemented as soon as possible after the IEP meeting. **See** 34 C.F.R. § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to

implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp.2d 960, 970 (D. Kan. 2003).

Implementation is a matter of procedure. 34 C.F.R. § 300.323(d)(i)(educator's responsibility to implement IEP). Thus, the burden is on the Petitioners to prove that this 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 C.F.R. § 300.513 (a)(2). Dr. E's testimony on progress reports is a two-edged sword, whereas he admitted he did not provide the reports, he also did so because the Student's Mother was aware of the progress. As a result, for progress reports, although there was a procedural violation, it did not impede the Student's right to a free appropriate public education, or significantly impede the Parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education, or cause deprivation of educational benefit. 34 C.F.R. § 300.513 (a)(2). The Petitioners have not met their burden of a FAPE violation on progress reports. *Id.* Quiet space implementation, while a procedural violation, relates back to a February 18, 2019 therapeutic note, where the Student was concerned about leaving the classroom, during which time he was saying he could not take school anymore, and continuing through the IEPs where the Student's Mother continued to request a quiet safe space, even the bathroom to allow the Student to gather himself. As such, it is concluded that the Petitioners have met their burden that the failure to provide an appropriate quiet or safe space rose to a substantive violation because it impeded the Student's right to a free appropriate public education and caused deprivation of educational benefit. 34 C.F.R. §

300.513 (a)(2). There was a violation of FAPE on the quiet space implementation issue.  
*Id.*

This section address Issues 9 and 10.

To the extent there is an issue regarding reimbursement for summer school, the Petitioners did not meet their burden to prove the summer school program was “necessary to provide FAPE,” and it is, therefore, denied. 34 C.F.R. § 300.106(a)(1).

To the extent there is an issue regarding speech/language services, the Student did not have a language disorder in areas of receptive, expressive, or pragmatic/social language skills; therefore, the Petitioners have not met their burden that it is a service required to assist the Student to benefit from special education. 34 C.F.R. § 300.34(a). It is denied.

## **REMEDIES**

### **Denial of FAPE**

As reflected above in these numerous pages of Analysis, there are 11 substantive violations of FAPE: (1) August 6, 2018 through October 17, 2018 - Failure to Timely Evaluate; (2) February 26, 2019 - Failure to Timely Evaluate; (3) May 9, 2019 IEP - Present Levels of Academic Achievement and Functional Performance; (4) May 9, 2019 and September 4, 2019 IEPs - Special Education Services; (5) May 9, 2019 IEP – Frequency, Location, and Duration of Services; (6) September 4, 2019 IEP - Frequency, Location, and Duration of Services; (7) May 9, 2019 and September 4, 2019 IEPs - 11 Considerations of Autism; (8) May 9, 2019 and September 4, 2019 IEPs - Inappropriate Plans; (9) May 9, 2019 and September 4, 2019 IEPs - PWN; (10) September 4, 2019 IEP - Predetermination; and (11) May 9, 2019 and September 4, 2019 IEPs - Implementation.

There were a number of procedural violations as well, yet only some of them



resulted in substantive violations. Only substantive violations and those procedural violations resulting in substantive violations, above, allow for consideration of a remedy. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008).

### **Compensatory Education**

The Petitioners request for compensatory education is denied. **See** P's Argument, pp. 23 -24. They do not meet a qualitative burden that any lost services (which they have not put into a form for an accounting) 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 LEA 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. While the Student has lost some educational benefit, the Petitioners have not proved what it is, and, more, specifically, what is needed to compensate for the loss to put the Student back in the place he would have been absent to substantive violations, considering the Student's on-going needs. There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. **See** *Meza, Id.* Their request for twice weekly tutoring services does not meet the test. The Petitioners have not met their burden. Any compensatory award would be speculative at this stage, and the invitation to do so is declined.

### **Autism Training**

The request for the LEA's staff to be trained in best practices of children with Autism is denied. **See** P's Argument, p. 24. Borrowing from *Meza, Id.*, in discussing the compensatory component, there has to be evidence which ties in the proposed training to the lost services. *Id.* Initially, the underlying substantive violations were generally not

found to arise because of lack of understanding of Autism, but because the LEA did not comply with procedures, or have a timely evaluations and identification, and create appropriate IEPs by, among other things, not considering the data by a consensus of the evaluators about Autism and needs. There is nothing to tie in a lack of understanding about Autism by staff with the substantive violations.

As well, although Dr. AH recommended training in Autism for LEA staff by the University of New Mexico Center for Development and Disability “about serving the special needs of students with Autism” to assist in serving the needs of the Student, she did not state what that was to consist of – it is very open ended, without detail to whom, what courses, number of hours, and how it specifically ties into violations and each staff member. Weight is not given to her recommendation in this context.

The request for Autism training is denied.

### **New Facilitated IEP/Revisions to Program**

The Petitioners next ask for an Order for a new facilitated IEP so that the LEA receives training on IDEA requirements and state standards, to address communication, social/emotional goals, and release from school for ABA therapy, so to ensure the Student’s needs will be remedied. **See** P’s Argument, p. 24. In other words, they are asking that the matters be remanded for a facilitated IEP to address the possible remedies this Due Process Hearing has been conducted to resolve. This is denied. **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). This Due Process Hearing is the forum to address these matters.

### **Tuition reimbursement**

The Petitioners request reimbursement of \$745.00 for summer school tuition reimbursement. **See** P's Argument, p. 25. This is denied. It has been concluded that there was no violation of FAPE for not including summer school. 34 C.F.R. § 300.106(a)(1).

### **Evaluations**

The Petitioners next request a sensory processing and social skills deficit evaluation, and to conduct additional evaluations recommended by the evaluator in the areas of social work and as recommended by an FBA. **See** P's Argument, pp. 24 - 25. This is granted in part.

The LEA is ordered to conduct the sensory processing and social skills processing evaluation or assessment as authorized in November 2019, to include an evaluation in areas of social work. **See** 34 C.F.R. § 300.305(c) . It is to be within 60 days from the date this Order is entered. **See** 34 C.F.R. § 300.301(c)(although notes initial evaluation time of 60 days, order is now made for assessment further evaluation as part of initial evaluation). The request for an Order to have the LEA conduct in the future additional evaluations (which may or may not be) recommended by the evaluator in the areas of social work and as recommended by an FBA is denied because that issue is not now ripe.

### **Other Remedy Requests**

In addition to their requests for remedies in their Argument, the Petitioners add, through their Proposed Findings of Fact and Conclusions of Law, a request for remedies to include an award for tutoring, communication services, a social/emotional goal, and a facilitated IEP with a facilitator knowledgeable in Autism. **See** Ps' F&C, p. 49, no. 43. They request evaluations in the areas of sensory processing, social work, and social skills.

*Id.* They seek an order for release time for ABA therapy. *Id.* They request a functional behavioral assessment. *Id.* They seek training and consultation for the LEA to “ensure all staff are properly trained in serving children with Autism and the requirements of the IDEA.” *Id.*

As for tutoring and communication services, they have not tied what tutoring or communication services they are seeking to compensate for FAPE violations. As in the other discussion above regarding general compensatory education, there has to be evidence (and an explanation) of the loss consists of and what is needed to compensate for the loss to put the Student back in the place he would have been absent the substantive violations, considering the Student’s on-going needs. There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. **See Meza, Id.** The Petitioners have not met their burden. Additionally, to the extent communication services are requested because of alleged lack of speech/language services, that claim for related services was denied. The requests for tutoring of some sort, and for communication services of some sort, are denied.

The issues for remedies for a facilitated IEP with a facilitator knowledgeable in Autism, and evaluations in the areas of sensory processing, social work, and social skills, have already been addressed. They are denied.

The issues of remedy for a social/emotional goal is not ripe – that is, the award of the sensory processing and social skills processing evaluation or assessment as authorized in November 2019 is the first step to determine if additional evaluations are recommended to include other evaluations in areas of social work. This relief is denied.

As for a Functional Behavior Assessment (FBA) - it is granted. Dr. W's MRR recommended an FBA for FAPE for this Student, as did Dr. AH. It is deemed an assessment. **See** 34 C.F.R. § 300.305(c). It is to be performed and completed within 60 days from the date this Order is entered. **See** 34 C.F.R. § 300.301(c)(the 60 days persuasive as time element).

The Petitioners seek an Order for release from classes for private ABA therapy. Dr. AH recommends ABA Therapy, paid for by private insurance, to be appropriate for this Student's educational needs as a student with Autism. Dr. AH notes that there are wait lists to obtain ABA services. **See** Ex. 7 (000059). Dr. W has concurred with Dr. AH's recommendations in her report. The consensus of evaluators then is that ABA Therapy is appropriate for the Student's educational progress. **See** *A.M. v. New York City Dep't. of Educ.*, 845 F. 3d 523 (2<sup>nd</sup> Cir. 2017)(persuasive). Dr. AH subsequently recommended a flexible educational schedule so to allow the Student to receive his private off-campus therapy. Ex. 29, p. 8. There is no request that the LEA pay for these services — the only request is that the Student be given flexibility in his academic schedule to attend therapy. It is, therefore, ordered that the LEA provide the Student with flexibility during the school days to attend ABA therapy sessions, as prescribed by his ABA therapy provider, for excused absences akin to allowable excused absences for medical or similar care. **See** *Andrew F.*, 137 S. Ct. 999 (required to enable a child to make progress appropriate in light of the circumstances).

Staff training for staff for Autism has already been discussed, and was denied. The Petitioners also add, in their Ps' F&C, a request for training for staff for the requirements of the IDEA. **See** Ps' F&C, p. 49, no. 43. The request for staff training is denied for the

same reasons as is the training request for staff training for Autism. It is vague, and does not tie in substantive violations into what is required to correct them. Among other things, Dr. E already holds a doctorate degree in special education, and has been a Compliance Specialist for the Public Education Department, Special Education Bureau. Tr. 562. Moreover, the LEA is concluded to have 11 substantive violations, and a number of other procedural violations, with this decision explaining the violations, which speaks for itself.

The Petitioners' requests for remedies have been explored as raised, and some granted. Remedies not requested will not be considered *sua sponte*.

### **Next IEP**

Given the barriers between the parties, when the time arises for the next IEP based on future issues, then it is to be facilitated – a Facilitated Individualized Education Program meeting – to seek to improve communication and the relationship among the participants to move forward. The facilitation will be through the New Mexico Public Education Department, which can be reached at (505) 827-1457.

### **ORDER**

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process, filed on January 22, 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 C.F.R. § 300.516, and §6.31.2.13(I)(24) NMAC (2009). Any such action must be filed within 30 days of receipt of the Hearing Officer's decision by the appealing party.

/s/ electronic

---

MORGAN LYMAN  
IMPARTIAL DUE PROCESS  
HEARING OFFICER

Entered: September 11, 2020

## **CERTIFICATE OF SERVICE**

I certify a true copy hereof was sent by Email attachment transmission only to Attorneys Jerri Katzerman and Lily Hofstra (for the Petitioners), and to Attorney Martin Esquivel for the Respondent, on the 11th day of September 2020, with the parties having agreed to service of documents by Email attachment, and with a copy to Attorney Poulin, which also acts as the copy forwarded to the New Mexico Secretary of Education.

/s/ electronic

---

MORGAN LYMAN