

**BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH NO. 1920**

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

THIS MATTER arises on the Petitioners' Request for Due Process Against Albuquerque Public Schools, Petitioners' Local Education Agency ("District" or "██████"). Petitioners filed their Request for Due Process with the State of New Mexico Public Education Department on February 25, 2020.

As to Issue Number 9, Petitioners' Request is DISMISSED insofar as Petitioners are seeking a remedy based exclusively on what occurred during the Threat Assessment Process, rather than seeking a remedy based on the more general question whether CH received appropriate positive behavioral supports.

As to all remaining issues, including the issue regarding positive behavioral supports that is embedded in Issue Number 9, Petitioners' Due Process Request is DENIED.

I. Procedural Background

Pursuant to a Pre-Hearing Order, the parties timely filed their Joint Statement of Issues for the Due Process Hearing. The parties also timely filed their respective Witness and Exhibit Lists.

Pursuant to various stipulations by the parties, the Due Process Hearing commenced on July 6, 2020, and concluded on July 17, 2020, for a total of seven and one half days of testimony. Both parties were well-represented by their respective trial counsel. Both parties timely filed Proposed Findings of Fact and Conclusions of Law, and Closing Arguments.

Pursuant to a stipulated extension of time, this final decision is due on or before November 4, 2020.

II. Relevant Legal Overview

As the party challenging the Individualized Education Plan ("IEP") and the implementation thereof, Petitioners ("Parents" and "Student" or "CH"¹) have the burden of proof in this case. *See Schafer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990). The District has the burden of proof with respect to its affirmative defenses.

While the parties have presented me a multitude of issues to address, the essential

¹ CH is eighteen years old and appeared as a petitioner in this case.

question before me is whether Student has been provided a free and appropriate public education (“FAPE”), or has been denied FAPE as a result of a violation of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C.A. § 1400 *et seq.* Petitioners contend that for many reasons, Student has been denied his rights pursuant to the IDEA. The District responds to the contrary, that Student has not been denied his rights pursuant to the IDEA, and that, in any event, Student was not denied FAPE.

To resolve this matter, the Due Process Hearing Officer must engage in a twofold inquiry. *Dept. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S. Ct. 3034, 73 L.Ed. 690 (1982). The first question is whether the District has complied with the procedures set forth in the Act. The second question is whether the IEP(s) developed through the procedures of the Act are reasonably calculated to enable the student to receive educational benefits, and whether the District did, in fact, implement the IEP(s). *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 received the ‘free appropriate public education’ mandated by the Act.” *Murray v. Montrose County 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 Cnty. 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 County Sch. Dist. RE-1*, 580 U.S. _____, 137 S. Ct. 988, 999 (2017). 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.

We will not attempt to elaborate on what “appropriate” progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for “an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review.” *Rowley*, 458 U.S., at 206, 102 S.Ct. 3034.

At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child’s IEP should pursue. *See* §§ 1414, 1415; *id.*, at 208–209, 102 S.Ct. 3034. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and

responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

Id. at 1001–02. The issue for review is whether the IEP is reasonable, not whether it is regarded as ideal. *Id.* at 999.

Technical deviations alone are insufficient to establish a violation of the IDEA. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Moreover, any procedural defects must amount to substantive harm in order to support an award of compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). 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. 20 U.S.C. § 1415(f)(E)(ii); *see O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998); *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). The Supreme Court has pointedly noted “the primacy of a FAPE in the statutory scheme.” *Fry*, 137 S. Ct. at 753. “The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE.” *Id.*

III. Statement of Issues²

AUTISM and DUAL DIAGNOSIS OF AUTISM AND GIFTED

Issue No. 1: Whether IEPs provide for specialized instruction in Student’s areas of need connected to autism?

Issue No. 2: Whether IEPs provide for special education, related services and supplemental aids and services, based on peer-reviewed research about autism?

Issue No. 3: Whether the 2019 IEPs inappropriately downgrade expectations for Student?

Issue No. 5: Whether Student has received necessary accommodations and supports?

Issue No. 8: Whether [REDACTED] has included staff capable of interpreting instructional implications of Student’s evaluation(s) at IEP meetings, including staff knowledgeable about

² I am cognizant of the potential problems that re-organization of the issues may create for the parties. *See, e.g., M.C. by & through M.N. v. Antelope Valley Union High Sch. Dist.*, 858 F.3d 1189, 1196 (9th Cir.), *cert. denied sub nom. Antelope Valley Union High Sch. Dist. v. M.C. ex rel. M.N.*, 138 S. Ct. 556, 199 L. Ed. 2d 437 (2017). However, I find the issues as stated are unnecessarily duplicative and lacking in internal organization. I have therefore combined and re-organized the issues, without omitting or re-phrasing any issue.

autism?

Issue No. 9: Whether [REDACTED] has punished Student for manifestations of his disability and its own failure to provide appropriate and necessary special education and services?

Issue No. 10: Whether [REDACTED] has failed to provide Student with education consistent with state standards, failing to appropriately address and implement the 11 considerations for students with autism?

Issue No. 12: Whether [REDACTED] failed to provide supplemental aids and services necessary for staff, including training on autism and evidence based practices for instruction and support for students with autism?

Issue No. 13: Whether Student regressed based on failure of appropriate special education and services?

Issue No. 14: Whether [REDACTED] unilaterally predetermined that Student would not need special education and services linked to autism based on Student's "gifted" eligibility?

RELATED SERVICES (SPEECH LANGUAGE THERAPY)

Issue No. 7: Whether [REDACTED] conducted necessary speech and language evaluation for social communication and pragmatic language and provided necessary related services?

Issue No. 11: Whether [REDACTED] has failed to implement its IEPs, including the failure to provide a speech language evaluation required by April 2019 and October 2019 IEPs?

RELATED SERVICES (ASSISTIVE TECHNOLOGY)

Issue No. 6: Whether Student has received necessary Assistive Technology equipment and services?

TRANSITION SERVICES

Issue No. 4: Whether IEPs contain measurable transition goals, reflect transition planning and services connected to Student's unique needs and whether transition services to meet Student's needs have been provided by the LEA?

FREE AND APPROPRIATE PUBLIC EDUCATION

Issue No. 15: Whether [REDACTED] has denied Student a FAPE based on any of issues 1-14?

REMEDY

Issue No. 16: Whether Student is entitled to equitable remedy and what remedy would be

equitable?

Issue No. 17: Whether student's graduation on a standard pathway precludes appropriateness of equitable relief even if there was a denial of FAPE?

Issue No. 18: (District's Exception): Respondent [REDACTED] has approved this Statement of Issues with the following caveat: [REDACTED] takes exception to the presupposition that an equitable remedy is needed rather than determination first whether there has been a deprivation of FAPE, and second, even if there is a deprivation of FAPE, whether an equitable remedy is appropriate.

IV. Hearing Officer's Findings of Fact³

OVERVIEW OF STUDENT AND HIS TIMELINE

1. CH ("Student" or "CH") was originally identified for special education in 1st grade as a student with Gifted eligibility. His intelligence testing score was 141, which was at the 99th percentile. **Exh. 2 at 7; 1 TR at 30-32.** CH is "very smart. . . brilliant. . . [with a] vocabulary . . . probably larger than a lot of people's." **1 TR at 81.** He is "very, very bright" and "an incredibly capable student." **2 TR at 386; 4 TR at 1046.** "He's brilliant; he's exceptionally smart." **6 TR at 1396.** He was reading the classics in 1st grade. *Id.*; **7 TR at 1497.** His favorite classes in high school were ROTC and history. **5 TR at 1129, 1199-1212.** History is a passionate interest for him. **5 TR at 1251-1253.**
2. CH was found eligible for special education under the IDEA based on autism in 2016 "due to challenges with social interaction, verbal and nonverbal communication, resistance to environmental change, resistance to change in daily routine, and unusual responses to sensory activities." **Exh. I at 5.** Pursuant to 34 C.F.R. § 300.8(c)(1)(i), "[a]utism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, . . . that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in

³ Should there be a difference in testimony between competing testimony and the factual findings, then it is found that credibility and weight are given to the testimony supporting the factual findings.

In drafting my Memorandum Decision and Order, I have adopted those proposed findings that accord with my recollection of the evidence and testimony. I have also reviewed the transcript and exhibits when necessary to refresh my memory or to find items that were not cited by either party. However, I have not always cite checked either party's citation to portions of the record to support particular proposed findings, if the proposed finding otherwise corresponds with my recollection of the testimony.

My decision not to include a particular proposed finding does not indicate rejection of the finding, except as otherwise indicated in this Memorandum Decision and Order.

repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.”

3. CH’s autism (“ASD”) was diagnosed at the end of 8th grade. **Exh. C.** Student was diagnosed with Type I Diabetes in fall 2017 and “Other Health Impaired” (“OHI”) was added as an eligibility. **3 TR at 677-679.** He struggled to accept the diabetes diagnosis, in part because he understood he would be excluded from military education/service. **6 TR at 1337, 1339-1340.** CH is also treated for clinical depression. **6 TR at 1341-1342, 1348-1350, 1361-1362.**
4. Since 2018, CH has qualified for special education under three eligibilities: Gifted, ASD, and OHI. **Exh. I.** These eligibilities are not disputed. **1 TR at 45.**
5. CH attended [REDACTED] for his entire education, attending four years of high school at [REDACTED] and graduated with a standard high school diploma in May 2020. At time of filing, he was 18 years old. **5 TR at 1153-1154.**
6. [REDACTED]
7. This Request for Due process was filed on February 25, 2020. As a consequence of the pandemic (COVID 19), New Mexico school campuses were closed by public health order effective in mid-March 2020 and [REDACTED] schools remained closed through the end of the 2019-20 school year, the summer of 2020 and the fall of 2020 up through the date of the parties’ submissions (9/17/20). During the 2019-20 school year, campuses were closed for about 7.5 weeks although some of that time there was some “remote” education. **6 TR at 1420-1421; 6 TR at 1435.**
8. CH turned 18 on October 31, 2019 and graduated from [REDACTED] with a standard diploma and an above-average grade point average of 2.5. **1153:20-1154:1; Ex. S** (transcript shows standard pathway and GPA); **Ex. P-2** (PWN showing standard pathway).
9. CH was accepted by the University [REDACTED] and [REDACTED] Community College [REDACTED]. He chose [REDACTED]. **1146:18-23.**
10. CH’s parents are licensed special education teachers. **5 TR at 1253-1254, 1265; 6 TR at 1394.** They knew nothing about autism when CH was first diagnosed. **5 TR at 1254-1255; 6 TR at 1395.** *But see,* **6 TR at 1395-1396** (discussion with social worker helpful). [REDACTED] staff assumed CH’s parents had knowledge about autism. **4 TR at 920-922.**

AUTISM and DUAL DIAGNOSIS OF AUTISM AND GIFTED

Specialized Instruction in Student's Areas of Need Connected to Autism, including Use of the Autism Considerations, Issues 1-3; 5; 8-10; 12; 13; 14

11. The IDEA requires the IEP Team to hold an IEP meeting once annually (the "Annual IEP"). 20 U.S.C. §1414(d)(4)(A); NMAC §6.31.2.11(J)(1)(b)(iii)(e).
12. "State officials develop each IEP through a collaborative process that is a central characteristic of the IDEA framework. 20 U.S.C. § 1414(d)(1)(B)."⁴ *Sytsema*, 538 F.3d at 1312. An IEP is first of all a written statement, containing specific items addressing a student's special education program. See *Urban*, 89 F.3d at 722 (providing list of items, citing 20 U.S.C. §§ 1414(a)(5), 1401(a)(20)). "However, an IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document." *O'Toole v. Olathe District Schools Unitified School District No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). In particular, the written IEP is "not required to provide the level of detail found in monthly instructional plans." *Id.* at 705.
13. "An IEP's failure to clear all of the Act's procedural hurdles does not necessarily entitle a student to relief for past failures by the school district." *Sytsema*, 538 F.3d at 1313. Instead, "the courts inquire whether the violation resulted in the denial of a FAPE." *Id.* Thus "[i]t is important to distinguish between the *statement* of . . . services in the IEP and the *provision* of . . . services." *Urban*, 89 F.3d at 726 (emphasis in original).
14. At § 6.31.2.11(B)(5) NMAC,⁵ the New Mexico Administrative Code provides as follows, with regard to the development of an IEP for students with Autism Spectrum Disorder,

(5) For students with autism spectrum disorders (ASD) eligible for special education services under 34 CFR Sec. 300.8 NMAC NMAC(c)(1), the strategies described in Subparagraphs (a)-(k) of this paragraph shall be considered by the IEP team in developing the IEP for the student. The IEP team shall document consideration of the strategies. The strategies must be based on peer-reviewed, research-based educational programming practices to the extent practicable and, when needed to provide FAPE, addressed in the IEP:

⁴ Required procedures and content of an IEP are provided by federal law; they are not findings of fact. I have inserted them here to provide the context for my findings regarding whether the District provided adequate procedures for the development of the IEP, and whether the IEP provided FAPE, in other words, to set forth what questions I am answering.

⁵ The "eleven considerations" are provided by state law; they are not findings of fact. I have inserted them here to provide context for my findings regarding whether the District adequately considered the eleven considerations in developing CH's IEP.

- (a)** extended educational programming, . . . ;
- (b)** daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, . . . ;
- (c)** 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;
- (d)** positive behavior support strategies based on relevant information, including, for example:
 - (i)** antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and
 - (ii)** 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;
- (e)** futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;
- (f)** parent or family training and support, provided by qualified personnel with experience in ASD, that, for example:
 - (i)** provides a family with skills necessary for a child to succeed in the home or community setting;
 - (ii)** 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
 - (iii)** 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;
- (g)** 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:

- (I) adaptive behavior evaluation results;
 - (ii) behavioral accommodation needs across settings; and
 - (iii) transitions within the school day;
- (h) communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;
- (i) 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;
- (j) 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
- (k) 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)(5) NMAC.

15. The Autism Considerations work sheet provides guidelines to IEP Teams. 1024:17-21; 1037:15-1038:1 (S. Brodeur, NMPED representative, explained all 11 Autism Considerations must be discussed and considered but the IEP Team, including the family, would determine which considerations to include in IEP document); 1038:12-23 (IEP Team must document its discussion of the considerations on considerations sheet or within the IEP or PWN⁶).
16. The [REDACTED] witnesses were competent in their areas of work. 28:11-17, 49:5-8, 49:16-50:2, 50:12-25 ([REDACTED]); 67:10-13, 77:1-20, 125:12-19([REDACTED]); 278:4-5, 278:25-279:4, 279:15-21, 293:1-18 [REDACTED]; 335:12-20, 342:7-23 (Lopez);518:10-20, 519:3-4 ([REDACTED]); 528:17-529:1, 583:19-584:12 ([REDACTED]); 673:11-15, 683:7-11([REDACTED]); 733:11-12 ([REDACTED]); 742:15-18, 742:25-743:10, 743:14-16 [REDACTED]; 767:20-23, 784:16-19 ([REDACTED]); 808:8-13, 835:19-836:3 ([REDACTED]); 934:2-5, 9-17, 935:2-

⁶ "PWN" stands for "prior written notice." PWN is required any time a school district proposes or refuses to take action with respect to the provision of a child's FAPE. 34 C.F.R. § 300.503.

11 [REDACTED]; 984:20-23, 985:1-4, 985:24-986:21, 993:10-24, 996:17-997:10, 1004:3-16 ([REDACTED]); 1043:15-18, 1050:10-22 [REDACTED]; 1083:7-1085:1; 1087:11-23; 1111:5-17 [REDACTED]; 1529:23-1530:7, 1553:12-1554:3 [REDACTED]; 1582:19-25, 1583:7-13 [REDACTED] 1672:10-25, 1673:9-19, 1674:9-21, 1675:2-10 [REDACTED]; 1764:22-1765:3, 1765:7-13, 1820:4-19 [REDACTED] 1840:9-17, 1848:12-1849:17, 1852:13-14 [REDACTED]

17. In particular, [REDACTED] (“[REDACTED]”), CH’s assigned social worker, has a Ph.D. in behavioral health. She has been a clinical social worker with the schools for eighteen years. Many of the students she has worked with have been diagnosed with autism. Tr. 1, page 77, lines 4 through 10.
18. [REDACTED] testified as an expert for the District. [REDACTED] was accepted as an expert in: (1) behavior analysis as a BCBA, 1854:7-13 (per stipulation); (2) evidence-based practices for students with autism; and (3) positive behavior supports in school-based settings. 1871:22-1872:4; 1878:24-1879:2. [REDACTED] has education, training, and experience in working with and teaching persons with autism, evidence-based practices for people with autism, the use of positive behavior supports, and effective teaching and learning strategies for students with autism. 1859:3-1862:1.
19. [REDACTED] is employed by [REDACTED] and spends considerable time appearing as an expert witness for [REDACTED] in Due Process hearings. Tr. 1873, lines 9 through 19. Part of her job duties is to testify as [REDACTED]’s expert. Tr. 1873, lines 20 to 22. She has never testified for any other party in a Due Process case, other than [REDACTED]. She has never worked with CH or evaluated him; she based her testimony on a review of records and listening to the testimony at the Due Process hearing.
20. Throughout her testimony, [REDACTED] frequently agreed with leading questions from counsel for the District that other witnesses had testified to a specific fact. She was then asked whether what the witnesses had described was an “evidence-based practice,” and she uniformly responded that it was. On several occasions, she expressed that she had “no concerns” about particular areas of learning for CH. The only time she expressed concern about CH’s educational program was when she testified, in response to a leading question, that she did have concerns that when strategies that were working stopped working, CH might be responding to a “co-morbid issue[]” such as depression. Tr. 1981, lines 1 to 25. [REDACTED]’s testimony closely and uniformly reflected the District’s legal theory of the case.
21. Respondent’s attorney asked [REDACTED] whether she agreed with counsel for Petitioners that she has “been resistant generally to providing information about your services and supports generally?” Tr. 1933, lines 9-12. [REDACTED] responded that she “advocate[s] for students and parents and teachers and staff members as [she] should,” and that she “abide[s] by [her] ethical code.” Tr. 1933, lines 13-19. [REDACTED] added that the question was “offensive.” Tr. 1933, lines 18-19. At this point, [REDACTED] became emotional and teared up.

22. [REDACTED] answered numerous leading questions by counsel for [REDACTED] quickly and in agreement with the assessment of [REDACTED] counsel. That I observed, there was often little indication of careful, purposeful thought or analysis of the question by [REDACTED]. [REDACTED] appeared to be acting more as a fellow advocate for the [REDACTED] case, rather than as an expert with an independent analysis to offer. [REDACTED] undoubtedly presented some valid opinions in this case; her tendency towards advocacy rather than expert opinion simply made discerning the difference both burdensome and problematic in terms of the ultimate evidentiary value of her testimony. I therefore found that her testimony overall was neither persuasive nor helpful to the trier of fact.
23. The tone and tenor of [REDACTED]'s testimony overall suggested to me as the trier of fact that she believes her role is generally to support [REDACTED] as a party in Due Process hearings, rather than to provide an objective assessment of a particular special education program at [REDACTED]. On the other hand, "bias" is an emotionally charged word that may suggest intentionality. I do not ascribe the word "bias" to [REDACTED]'s testimony.
24. In addition to her opinions as to whether CH's educational program raised any concerns, [REDACTED] also provided definitions of terms and other testimony that was necessarily based on her own independent expert knowledge. In those instances, I have relied on [REDACTED]'s expert testimony.
25. For the most part, in considering the record of this case, I have relied on the testimony of [REDACTED] personnel, most especially on CH's teachers and his social worker, [REDACTED]. I found generally that CH's teachers and his social worker objectively and cogently described their observations and their assessments of CH and his educational program. Overall, Petitioners failed to present, by a preponderance of the evidence, a fair basis for me to reject the explanations of [REDACTED] educators and staff for their various views concerning the development and implementation of CH's IEPs.
26. As I describe in detail in the following findings of fact, CH's IEPs provided for specialized instruction that included strategies that addressed CH's autism diagnosis. Ex. 43, p. 2, #4. *See also generally* Table Documenting Autism Considerations.⁷

Language Arts

27. CH's Language Arts Goals were appropriate and challenging, and he made progress in light of his circumstances. Table of Goals/Progress; 1769:25-1770:25, 1771:24-1772:17;

⁷ The District has provided a table comparing the autism considerations, the IEP documentation, and how a particular strategy was applied to CH. The District has provided similar charts for other issues. The tables duplicate the District's proposed findings in a chart format; they do not add to them. My reference to the District's tables should not be taken as an endorsement of all proposed findings contained in a particular table; they are a helpful demonstrative aid but do not replace the Hearing Officer's Findings of Fact as to particular facts.

1801:4-24; 1810:3-1811:18; 1822:1-24; 1592:19-1893:6; 1589:19-1591:13; 1067:7-1068:19; 354:4-14; 1586:23-1588:2; 1682:13-1684:21.

Mathematics

28. CH was moved into a special education setting for math in part because of “behavior” needs and CH’s preference for small group instruction with 1/1 time from the teacher. **2 TR at 305; Exh. J-1 at 12-13.** During junior year, CH was in a small group special education math class working independently (with teacher guidance) on Khan Academy (online curriculum), which the teacher, Mr. Montano, monitored, while other students in the class received instruction from the teacher on basic math skills. **5 TR at 1148-1149, 1218-1219; 6 TR at 1384-1387; 7 TR at 1492-1494.** CH was not subsequently offered pre-trigonometry or pre-calculus, because [REDACTED] would not provide that curricula in a small special education class. **6 TR at 1346-1348; 1384.** He was placed in a Financial Literacy class. **6 TR at 1383-1384.**
29. CH’s math goals were appropriate and challenging, and he made progress in light of his circumstances. Table of Goals and Progress; 486:25-427:10; 1148:24-1149:13; 1218:5-1219:12. In particular, Father was “a big supporter” of Montano; Montano went “above and beyond” and “[did] an excellent job.” 1491:9-1494:21.
30. Mother testified CH’s junior math class and his teacher were “beneficial. 1346:1-1347:9; Ex. F-1, at 2 (at 10/17 IEP, Mother wants CH to bring up math grade); Ex. H-1, at 3 (at 02/18 IEP, Mother reiterates bringing up math grade); Ex. H-2 (02/18 IEP Team agrees CH needs small-group math setting); Ex. P-1, at 12-13 (math teacher reports CH success in part due to small group where teacher has more time to interact with him.).

Health Education

31. [REDACTED] (“[REDACTED]”) was assigned as CH’s social worker at [REDACTED]. She appropriately supported CH regarding the impacts of his autism, including intensity of emotions, tendency to perseverate, expressing emotions with others, and self-awareness. 82:1-24; 83:1-7 (supported self-regulation); 90:4-91:25 (supported perspective-taking when CH perseverated on a topic). I found [REDACTED] to be credible and knowledgeable concerning CH’s educational program, particularly with regard to health education, executive function, social interaction and social communication and progress in his academic program.
32. CH’s health education goals were appropriate and challenging and he made progress in light of his circumstances. See Table of Goals and Progress; 73:24-74:3 ([REDACTED] worked towards health education goals); 98:2-100:6 (goal objectives to manage stress, verbalize needs, and work with social worker were ongoing in high school based on CH’s needs); 120:8-121:7 ([REDACTED] and CH’s sponsor teacher collected data and reported the data to the social worker and that no incidents occurred during the interim period); 207:9-211:15 (health education goal was challenging for CH, the goal’s objectives changed from year

to year, and he made progress, as identified in Exs. D1, p. 11; F1, p. 10, J1, p. 12, giving examples of progress); 75:6-77:10 (████████ supported progress of developing communication skills and career readiness goal to effectively and appropriately communicate); 80:3-81:1 (████████ discussed 10/21/16 IEP (Ex. D1) health education goal objective supported CH to verbalize wants/needs without making threats); 787:15-790:4 (Ukeiley supported motivation, empathy and perspective taking, areas that were difficult for CH); 720:19-722:8 (Taylor saw CH made progress toward health education goal regarding understanding what his body was telling him and blood sugar levels); 722:16-723:10 (CH was “really good” about planning and communicating regarding snacks for blood sugar).

Executive Function and Career Readiness

33. “[E]xecutive function is how the brain organizes itself to start a task from beginning to end. It has to do with being able to regulate yourself and to complete tasks.” **7 TR at 1720-1721**. “Executive functioning is the ability to organize and plan for and execute tasks and follow through.” **8 TR at 1921**.
34. Petitioners established by a preponderance of the evidence that CH experienced major issues with executive function, including timeliness, self-organization, and time management. **4 TR at 1046-1047**. Student’s deficits in executive function skills were recognized as one reason he required small, special education classes, according to his final IEP. **P-1 at 18**.
35. CH identifies that his unwillingness to complete school work is linked to his lack of interest in the subject or if he does not see the purpose. **5 TR at 1142; 5 TR at 1268-1270; 7 TR at 1479-1480**. He also recognizes that he has great difficulty asking for help. **5 TR at 1228-1230**. Petitioners established by a preponderance of the evidence that CH struggled with executive function during the statutory period. **2 TR at 498; 6 TR at 1419-1420; 8 TR at 1777, 1778; 1786; 1795**.
36. Petitioners established by a preponderance of the evidence that District staff did not always understand well the meaning of “executive function,” and sometimes attributed CH’s lack of executive function to either his giftedness, lack of motivation, or perfectionism. **2 TR 360-364; 374-377; 382-385; 501-501; 4 TR 1046; Exh. M-1 at 9**.
37. The school did not put any formal structures or instruction in place to address executive function. **6 TR at 1420; see, e.g., 8 TR at 1815-1817** (10th grade Great Books teacher believes class process taught organizational skills, but she did not offer explicit lessons on organization or time management). The Guided Study class gave CH an opportunity to practice EF skills by guiding students to meet deadlines, with the goal that this would result in transferable skills. **8 TR at 1830-1831**.
38. “Study skills” was not a priority of CH’s participation in social work services. **1 TR at**

110. To the extent the social worker, ██████ addressed EF skills deficits, service consisted of discussions about prioritizing; there was no curriculum for learning executive function skills. **1 TR at 106-109.**

39. Petitioners contend that CH's "executive function ["EF"] deficits were never addressed by an IEP goal except to the extent that the 'career readiness' goal changed at the end of Student's junior year from making appropriate responses in class to 'submit 9 out of 10 assignments for each class.' See Exh. M-1 at 11; Exh. P-1 at 14. No one was addressing [CH's] EF skill deficits; there was no provision of specialized instruction." Petitioners' Closing Argument at page 13.
40. Petitioners are correct that the IEP goal for executive function is not separately set out in any IEP, and that the focus of the single executive function goal that is provided is on CH's submissions of the majority of his assignments. Petitioners have not proven, by expert testimony, admission or omission in the testimony of any of CH's educators, or any other evidence, that this is an inadequate goal, or that the IEP should provide any other goals as to executive function. My finding is that there was universal or nearly universal agreement by ██████ educators and other personnel, by Parents, and by CH himself, that completing assignments was the primary symptom of CH's difficulties with executive function and that his failure to complete assignments on time interfered with his educational progress. Petitioners have not suggested alternative executive function goals that should have been stated in the IEPs.
41. The goal of completing assignments does not appear in CH's IEPs until the end of his junior year. See Exh. M-1 at 11; Exh. P-1 at 14. Petitioners have not proven by a preponderance of the evidence that this omission in CH's IEP until junior year deprived CH of FAPE in the area of executive function.
42. The evidence is to the contrary. CH's IEP addressed instruction on executive function as part of CH's career readiness goals. In this regard, CH's career readiness goals were appropriate and challenging, and he made progress in light of his circumstances. Table of Goals and Progress; 797:7-798:18; 1129:4-9; 1206:2-1210:3; 381:17-382:3; 389:8-390:7; 352:3-8; 472:20-475:25; 498:16-19; 101:12-19; 102:4-9; Ex. K, social work logs (17-18 SY) (multiple discussions about future planning when CH couldn't enlist in military with diabetes diagnosis); Ex. O, pp. 5 (discussed pros/cons of graduating with a diploma when CH raised dropping out and getting a GED); pp. 9 (discussed college goal and strategies to meet it).
43. Petitioners make the sweeping statement that "no one" was addressing CH's deficits in executive function and that he was receiving no "specialized instruction" in executive function. The District, on the other hand, appears to take the position that CH's problems with executive function were all a result of CH's lack of motivation, caused by a combination of a character defect, his giftedness and perfectionism, and the numerous personal difficulties he was facing. Neither of these "all or nothing" positions is helpful to the trier of fact in resolving the issue whether CH was denied FAPE in the area of

executive function.

44. After listening to the testimony of CH, Parents, and [REDACTED] educators and personnel, my finding is that several factors contributed to CH's problems with executive function; these problems included CH's difficulties in organizing, planning for, and executing tasks and follow through. CH lacked motivation, especially with regard to some tasks. He was also facing several emotional challenges including difficulties at home, death in the family, and a diagnosis of diabetes that blocked his important goal of joining the military. He also lacked particular skills due to his diagnosis of autism, leading him to over-focus on some tasks to the detriment of others. I therefore reject the District's proposed findings insofar as they suggest that CH's lack of motivation was the exclusive or even primary cause of CH's difficulties in executing tasks, or that CH's lack of motivation excuses any failure by the District to provide specialized instruction in the area of executive function.
45. I find, however, that whatever its omissions, the District did, in fact, provide adequate specialized instruction for CH in the area of executive function. In this regard, Petitioners' focus is on the lack of a formal structure or curriculum devoted specifically to executive function. For example, Petitioners complain that CH did not receive "explicit lessons," and that service consisted of assisting CH with "prioritizing." Petitioners have not proven, through expert testimony or otherwise, that CH needed a formal structure or curriculum to receive FAPE in this area of his education.
46. To the extent that Petitioners suggest that teaching executive function skills was not a priority for [REDACTED] educators and personnel, I find entirely the opposite. Several [REDACTED] employees, most especially his sponsor teachers, his ROTC teacher, his Great Books and Guided Studies teacher, and his social worker, testified that they worked with CH extensively on planning and executing tasks.
47. [REDACTED] supported CH's executive function skills throughout the statutory period, including his organization, time management and accountability skills. 448:25-449:10; 106:15-107:12; 108:3-15; 108:18-109:11.
48. The ROTC class was particularly helpful to CH in developing executive function skills. 796:19-797:1, 767:24-768:21, 770:17-771:14; 775:5-776:7.
49. In addition, CH's gifted teacher, Ms. [REDACTED] worked to support CH's time management and organizational skills development in her Great Books and Guided Study elective courses during his sophomore year (SY 2017-18), including by requiring him to maintain an organized binder, giving frequent check-ins and reminders, using a weekly schedule/log and class syllabus with deadlines, and working with CH to create an action plan with frequent deadlines throughout the semesters. 1773:4-1776:1; 1777:1-1781:5; 1802:2-20; and see 1776:14-25. She further supported his progress towards completing tasks and self-monitoring skills. 1790:8-1791:7.

50. CH had the opportunity to take an Advancement Via Individual Determination course (“AVID”) to learn organization and study skills to prepare for college during all four years of high school. AVID is a college preparatory course to develop study skills. 1172:10-1174:13 (CH); 905:3-24 (██████████). CH understood the purpose AVID program was to help with organization, how to write general essays and academic papers, fill out resumes and college applications, and how to connect with people. 1132:1-20.
51. CH chose not to re-enroll in the AVID class because, even though he admitted it helped him with organization and “surpassed many of [his] expectations,” the “return” was “not equal to the effort being put in” and not worth the stress and effort involved in the class. CH similarly elected not to take gifted classes in later years because he felt he was not getting what he wanted out of them. 1131:20-1134:12; 1176:12-1180:12.
52. CH’s teachers consistently worked on organization / time management skills with him in almost all of his classes. *See, e.g.*, 481:7-482:11; 796:19-797:1; 1053:4-11; 1779:19-24. The team supported CH to meet deadlines and improve his time management skills; this was done with the goal of transferring those skills CH so he could use them independently. 1830:17-1831:14; 1832:6-20.
53. CH was very involved in ROTC. By senior year, CH had learned good leadership skills, could identify and address areas in need of improvement by his platoon, and was able to plan how to accomplish (and help others accomplish) short-term and long-term goals. 1198:23-1206:16. CH understood he was responsible for his own success in learning. 1206:17-1210:3.
54. CH explained that, throughout high school, he developed and used a purposeful process to determine what assignments he would complete and submit for the grading period, i.e., based on “a combination of what could be done fastest and easiest versus what was worth the most, because they didn’t – they obviously didn’t always line up as faster and easiest was worth the most.”1231:15-1232:12.
55. CH demonstrated clear understanding of the standard school grading periods for each semester (three 6-week grading periods each semester) and each course’s topical divisions such as a table of contents. 1213:10-1215:11.

Accommodations

56. As I describe in the following findings of fact, the accommodations contained in CH’s IEPs throughout the statutory period were appropriate for CH.
57. Petitioners do not appear to challenge whether the District provided necessary accommodation and support of his Other Health Impaired (“OHI”) identification related to his diabetes. Neither have they specifically abandoned the issue. Therefore, I do not make specific findings regarding the accommodations provided by the District with regard to CH’s diabetes, other than to state that I generally agree with the District’s

Proposed Finding No. 48 that the District assisted CH to learn to understand and manage his diabetes.

58. [REDACTED] staff consistently provided necessary accommodations by providing CH opportunities to take breaks to refocus. 477:18-178:18; 153:22-155:6; 223:2-224:1; 231:3-232:14; 87:25-88:3.
59. [REDACTED] staff consistently provided necessary accommodations by allowing CH to take a break or access safe people as necessary when he was escalated, including the nurse's office, the social worker's office, and Father's office. 84:11-16; 87:17-24; 195:1-8; 684:9-19; 687:21-689:1; 716:8-22; 717:2-16; 874:3-13; 1134:20-1135:5; 1403:2-18; 1404:3-13; 1454:2-10; 1487:20-1488:7; 1613:1-1614:8; 1654:4-1655:16.
60. [REDACTED] staff consistently provided necessary accommodations by providing CH extra time on assignments as necessary. *See* 480:15-24; 477:2-7; 1595:2-1596:12, 1597:10-1598:14.
61. [REDACTED] staff consistently provided necessary accommodations by providing CH written and oral directions if needed. 479:5-480:11 (Lopez); 1807:20-25; 1808:17-1809:4 (Brown); 1595:2-1596:12, 1597:10-1598:14 (Hill).

Aids and Services, including Training on Autism

62. [REDACTED] contends that staff at [REDACTED] had access to general training about autism from the Direct Comprehensive Support Services Resource Team ("DCSSRT"). **8 TR at 1966.** However, there is not evidence that anyone who worked with CH at [REDACTED] had any contact with the DCSSRT team staff except in May 2019 for assistance with an the incomplete FBA.
63. Although staff were assigned to provide training in autism and evidence-based practices, training did not consistently occur for staff, CH, or Parents. *See Exh. H-3 at 2; Exh. J-3 at 2; 2 TR at 297-299; 340, 343-347; 8 TR at 1953-1954.* On the other hand, [REDACTED] trained on autism during the 2017/18 school year. 125:6-126:10. [REDACTED] discussed autism supports with CH's teachers in 2019, and [REDACTED] also trained the team on CH's needs. 125:6-126:10 ([REDACTED]); 298:1-299:16 ([REDACTED]). In addition, [REDACTED] recommended that that Parents contact "Parents Reaching Out" for additional resources. 310:8-12.
64. CH's IEP teams apparently did not review the 11 Considerations for students with autism until a parental request at the February 2018 IEP. **1 TR at 48-49; 121-122** (social worker had never seen form before); **Exh. H-2 at 2; Exh. H-3; 2 TR at 293** (case manager teacher thought the 11 considerations were new). The April 2019 annual IEP does not contain the 11 considerations at all. **Exh. M-1, M-2; 2 TR at 409.**
65. Petitioners have at most supported by a preponderance of evidence that his educators and other staff failed to *explicitly* review the 11 Considerations by name and failed in some ways to provide training in autism, as provided in his IEPs. These are procedural errors.

Petitioners have failed to support by a preponderance of evidence that these asserted procedural errors denied him FAPE.

Giftedness

66. Petitioners failed to prove [REDACTED] acted as if CH's giftedness "cancelled out" any concerns or issues resulting from autism. [REDACTED] appropriately supported CH's diverse needs related to his giftedness and other eligibilities, including autism and diabetes. 1769:3-18 (Brown made modifications and supported CH's learning challenges, giftedness, disabilities, and unique needs); 1765:14-1766:23 (Brown used New Mexico Technical Assistance Manual in her work teaching gifted students and explained gifted students may shine in one particular area but also may have challenges in other areas).
67. CH chose to revoke gifted services for the 2018/19 school year, which [REDACTED] explained is not uncommon for gifted students for a variety of reasons, and which [REDACTED] explained does not necessarily mean CH would not have enrichment. 1834:13-1835:22 ([REDACTED]); 48:4-19; 64:5-65:9 ([REDACTED]).
68. Father testified none of CH's teachers "downgraded expectations for CH." 1525:19-1528:9.

Regression

69. Petitioners' complaints about CH's regression are essentially a reiteration of many of their complaints about the design and implementation of CH's IEPs, such as lack of transition planning, lack of specialized instruction in social communication and executive function, CH's mathematics curriculum, and failure to address CH's identification as "twice exceptional" because he was eligible for special education both because he is gifted and for his disability. *See* Petitioners' Proposed Findings of Fact Nos. 63-73. As such, they are addressed in other sections of this Memorandum Decision and Order.
70. Petitioners also blame CH's substitute teachers for having failed to follow CH's IEPs. Their evidence is that the substitutes were not sufficiently trained, that CH's junior year of science was "busy work with multiple substitute teachers," **6 TR at 1459; 7 TR at 1526-1527**, and that CH dropped his Spanish class because "he felt he did not have a real teacher and learned that one year of foreign language was needed for college entry." **5 TR at 1132-1133**.
71. Petitioners failed to identify in any precise way how CH's teacher or substitute did not follow the IEP; they assume CH's IEP was not being followed when CH had a substitute. 1458:15-1462:7; *see also* 1241:7-1243:18; Ex. S (CH was challenged by computer graphics but was able to bring his grade up from a C in first semester to a B in his second semester); *and* 1233:15-1235:15; Ex. S (AP U.S. History was very difficult for CH because the teacher was very demanding of his class but CH turned in assignments in accord with his usual assessment of what assignments he would need to submit in order

to pass, and he did pass).

72. In terms of a claim *per se* that CH “regressed,” Petitioners’ complaints more concern CH’s failure to progress as expected. Thus Petitioners complain that CH’s ambition in eighth grade was to pursue an engineering degree, so that he could become a game designer. **3 TR at 649-650; 654.** His goal was to attend a four-year university, a goal CH apparently abandoned by the time of his final IEP. **Exh. P-1 at 5; 2 TR at 365-366.** CH’s intellect was assessed at the “very superior” range in 1st grade, but by the time he was a senior, his sponsor teacher was “very happy” that he had passed his classes. **2 TR at 445, 476-477** (staff happy when he got a D or D - and passed). Even Petitioners express this complaint as a failure to support CH’s “trajectory.” Petitioners’ Proposed Finding of Fact No. 64.
73. Petitioners blame CH’s failure to progress as expected on the low expectations in CH’s IEP goals, noting that his career readiness goal was to become “employable,” as well as the lack of planning for CH’s post-secondary goal of attending a four-year university. **Exh. J-1 at 12; 2 TR at 355-357; Exh. J-1 at 3; 2 TR at 349-352, 360.** At the same time, Petitioners noted that CH’s high school IEPs reflect his goal to attend a four year university. **Exh. H-1 at 3; Exh. J-1 at 5; Exh. M-1 at 3.**
74. While there appears to be some truth to Petitioners’ view that CH’s teachers did not always expect him to excel, this was not a frequent occurrence; CH’s teachers mostly recognized his clear potential and strived to support him. Moreover, Petitioners have not made any factual or legal connection between the allegedly low expectations of CH’s teachers and his teachers’ failure to fully support his underlying potential, and a claim for a procedural violation of the IDEA or a resulting denial of FAPE.
75. Because CH made progress towards his goals and earned his grades, Petitioners failed to prove by a preponderance of evidence that CH in fact regressed.

Threat Assessments / Punishment for Manifestation of Disability

76. CH has never had a discipline referral at [REDACTED] 1510:23-24. He has been the subject of the [REDACTED] Threat Assessment (“TA”) process.
77. Petitioners have broadly suggested that the District used the TA process as a substitute for behavioral intervention and support. They allege that “[e]mbedded and disguised within [REDACTED]’s Threat Assessment process is preservation of punitive measures without reference to IDEA’s requirements for special education informed by positive behavioral supports, along with state standards for students with [Autism Spectrum Disorder]. 20 U.S.C. §1414§(d)(3)(B)(i); §6.31.2.11(B)(5)(d)NMAC.” See Petitioners’ Closing Argument at page 15.
78. In support of this allegation, Petitioners have submitted six proposed findings of fact:

- a. As a result of autism, CH struggled with self-regulation, sometimes making statements that were inappropriate and could be perceived as threatening. **1 TR at 82-83, 90-92.** His verbal outbursts in class were believed to scare other people. **1 TR at 234-235.**
- b. During high school, there were at least 7 threat assessments on CH. **Exh. 59.**
- c. There was an informal threat assessment on CH at the beginning of high school (August 2016), when he drew a picture of guns in response to an assignment to draw something about himself. **4 TR at 831-833; Exh. 62.** CH had just participated in 4H shooting competition: he took the assignment literally not seeing the “nuance” of how drawing gun pictures in a school setting might be misinterpreted. **5 TR at 1265; 5 TR at 1312-1315.**
- d. All other threat assessments followed inappropriate statements by Student. **1 TR 1 at 181-183; 196-197; 199-204; 3 TR at 696-699; Exh. L; Exh. 59; Exh. 27; 6 TR at 1391-1392.**
- e. Threat Assessments should be informed by judgment and common sense and ignore events that do not present plausible threats. **3 TR at 757-758.** Formal TA paperwork is required to designate when the student has a disability; this portion was not completed by █████ in two formal TA team meetings on CH. **4 TR at 893-895; Exh. 27 at 1; Exh. L at 1.** During one TA, staff deliberation focused on a picture been posted at some time in the past by his mother on Facebook of CH when he was a young child sleeping with a toy gun. **6 TR at 1378-1382.**
- f. Father’s view is that the threat assessments were not informed by common sense or by professional knowledge about autism. **7 TR at 1522.** (Jeff Horton: “I think common sense was lost at the very beginning. . . .” [threat assessment process after CH’s statement following a school assembly].).

79. In addition, Petitioners submitted several factual points in their Closing Argument. Beyond describing additional objections to how the District conducted the Threat Assessments *per se*, Petitioners contend that “[e]mbedded and disguised within █████’s ‘threat assessment process,’ is unrecorded exclusion from school. After two of the Threat Assessments, once in sophomore year and once in junior year, [CH] was prevented from attending school for some number of days (until parents obtained a private evaluation that he was not a ‘danger’) although no formal suspension paperwork was created by █████ **7 TR at 1510-1517; Exh 27 at 15; 7 TR at 1518-1521.**” Petitioners’ Closing Argument at 15. Petitioners contend that CH “was restrained by security following a verbal outburst in the principal’s office on January 23, 2019, resulting in criminal charges.” **1 TR at 239-241 ; Exh. O at 9-10; 4 TR at 821-823; 7 TR at 1477-1478.**

80. Petitioners suggest generally that many of these actions were an exaggerated response that

failed to take CH's autism eligibility into account.

81. Even if I accept all of Petitioners' proposed findings as supported by the evidence, Petitioners have nonetheless failed to prove by a preponderance of the evidence that the threat assessment process was used by the District to exclude CH from school as a punishment for the manifestation of his disability, or that the temporary exclusion of CH resulting from Petitioners' inability on two occasions to obtain a private evaluation that CH was not a danger, prior to allowing CH's return, was a change of placement. *See 7 TR at 1510-1517; Exh 27 at 15; 7 TR at 1518-1521*. Nor have Petitioners provided any factual basis or legal argument to support a view that the threat assessment process itself, as implemented by the District, otherwise violated the IDEA.
82. Rather, Petitioners' proposed findings, at most, tend to show that the District's threat assessment process was flawed, as applied to CH. Accordingly, I will neither accept nor reject Petitioners' proposed findings of fact, concluding instead that as a Due Process Hearing Officer, I have no jurisdiction to address Petitioners' complaints about the [REDACTED] Threat Assessment process as allegedly applied to CH. I will address Petitioners' legal theory regarding whether the threat assessment as described violates the IDEA in my Conclusions of Law, *infra*. I will address whether the District provided adequate positive behavioral supports to CH – which *is* an IDEA claim, in the next section.

Positive Behavioral Supports⁸

83. CH was found eligible for special education in 2016 based on autism “due to challenges with social interaction, verbal and nonverbal communication, resistance to environmental change, resistance to change in daily routine, and unusual responses to sensory activities.” **Exh. I at 5**. Pursuant to 34 C.F.R. § 300.8(c) (1)(i), “[a]utism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.”
84. After listening to the testimony at the Due Process Hearing and reviewing the exhibits, I find that Petitioners have proven by a preponderance of the evidence that CH's autism continues to significantly affect his social communication and social interaction (“social communication”), and affects his behavior. CH's autism clearly directly affects his social

⁸ [REDACTED] sometimes had two responses to CH's inappropriate verbal statements, interpreted as threats. CH was referred to the Threat Assessment process, and also received counseling. There is therefore an overlap between some of CH's verbal statements, the TA process, and whether CH received positive behavioral supports. I have tried to connect these threads where the context is helpful.

communication skills. I was unable to discern whether his autism affects CH's behavior because of his social communication deficits, or whether his autism has a more direct effect on his behavior. Unquestionably, however, his disability is involved in both, and the two deficits overlap, in cause, effect, and consequence.

85. Thus, for example, Petitioners point out and I find that the only Functional Behavioral Assessment ("FBA") that [REDACTED] started for CH was for target behavior of inappropriate *communications*: "verbal outbursts/refusal: expressing thoughts and opinions at inappropriate time and place. . . noncompliance. . .questioning comments. . .interrupting and derailing a classroom conversation. . . ." **Exh. 38 at 1, 5; 1 TR at 151-152.** In May 2019, consultation from the DCSSRT team was requested based on staff's concerns that "CH exhibits *verbalizations* which can include threats. . . [and] also demonstrates *verbalizations* of thoughts and opinions at inappropriate times and place. . . ." **Exh. 58 at 2.** (emphasis added); **4 TR at 837-838.**
86. CH's impaired social interaction skills were linked to autism. **3 TR at 681-686; Exh. 17 at 6.** As a result of autism, CH tended to perseverate – such as getting stuck on a topic – and also struggled with self-regulation, sometimes making statements that were inappropriate and could be perceived as threatening. **1 TR at 82-83, 90-92.**
87. One way to evaluate the cause and potential solution for behavioral issues is a Functional Behavioral Assessment. Petitioners contend that when [REDACTED] first suggested an FBA in 2018, the process was not explained to Parents, who therefore did not consent. **6 TR at 1354-1358; Exh. N.**
88. The District responds that Mother refused to consent to an FBA for CH in 2018. Ex. 41, at 36. The District contends further that although Mother now states that she refused because she did not understand the FBA process, back in 2018, Mother said she refused in consultation with CH's medical team. *See* Exh. 41, page 36; *see also* 1354:16-1363:11 (Mother trying to remember details of consultation with CH's medical team and what led to denial of consent). Regardless of her internal confusion about the FBA process, at the time, Mother wrote to CH's special education sponsor teacher, "After consulting with [CH's] medical team we are not going to a FBA/RIP. A new letter is being provided to the school nurse." Exh. 41, page 36. I find that Mother refused consent to the FBA for CH in 2018, and that her confusion over the process was not the responsibility of [REDACTED]
89. After the Threat Assessment for the January 2018 incident, involving a threat to "shoot [] up" the school, Mother met with Administration to develop a safety plan for CH. Ex. 27, at 7-8; 181:12-183:6 (describing incident).
90. [REDACTED] spent several sessions with CH to help him process the January 2018 incident, when CH made a comment about "stabbing" someone. She found it useful and appropriate to have such discussions with him to help him see connections between his actions and the world around him. 218:12-221:18; 198:7-25.

91. [REDACTED] appropriately supported CH's unique needs, including those arising from autism, to develop strategies and skills for self-regulation, managing emotions, and expressing frustration in a safe place. She observed CH to use all such strategies and make progress. 224:18-230:6; 83:7-86:6; 221:15-222:5; 142:14-143:6; 147:13-22; 233:4-235:5; Ex. Q, at 3; 154:11-157:3; 221:11-224:1; 250:4-251:22.
92. In a rare instance of agreement, both Petitioners and Respondent agree that [REDACTED]'s use of modeling and role-play was an evidence-based strategy. Thus Respondent has submitted the following opinion by [REDACTED] as a Proposed Finding of Fact: [REDACTED]'s "support and handling of the conflict between CH and Principal [REDACTED] was appropriate, as [REDACTED] used modeling and role-play to practice appropriate communication which is an evidence-based practices for students with autism. 1891:6-23; 1951:9-16, 22-25 [REDACTED])." Respondent's Proposed Finding of Fact No. 194. Petitioners cite the testimony of [REDACTED] [REDACTED]'s SLP liaison,⁹ but agree that "SL therapy for a high school student with social communication deficits could be delivered using strategies such as role playing, video feedback; specific evidence based strategies would need to match the particular student's needs." **7 TR at 1715-1716.**" Petitioners' Proposed Finding of Fact No. 35.
93. [REDACTED] spent at least four sessions processing CH's outburst with Principal [REDACTED] ("[REDACTED]") in January 2019. Thereafter, CH did not have any other similarly significant public outbursts. Ex. O, p. 9-11; 238:2-20; 240:24-242:9. However, CH did threaten during a session with [REDACTED] in February 2020 that if he wouldn't "go to jail," he "would kill [REDACTED]." 203:2-204:2. This resulted in an informal threat assessment. *Id.*
94. CH testified that [REDACTED] helped him calm down and learn how to avoid getting frustrated and mad. She listened to him and helped him identify if and what problem may actually exist and how to fix problems that did arise. 1134:13-1135:5. It was appropriate for CH to work on his frustration with [REDACTED] to help him learn how to "slow down and think" before expressing his message. 1184:21-1189:11. CH testified he really enjoyed all of his teachers, his social worker, the nurses, and he felt that especially his senior year, he got along with the [REDACTED] police officers. 1130:17-22.
95. In the April 2019 IEP, the team agreed to conduct an FBA. Exh. M-2 at page 1. The FBA agreed on at the April 2019 IEP was never completed or presented to an IEP team. **Exh. 38; 1 TR at 158, 164-165; 8 TR at 1940-1942** (according to [REDACTED] "the data was insufficient and [they] had planned to conduct more observations and collect for data the following year").

⁹ Notably, while [REDACTED] was not offered as an expert, she has been a speech-language pathologist for [REDACTED] since 2003. Tr. 7, page 1672, lines 10 to 25. In 2014, she became the speech pathology liaison for the District, which is a support position helping other speech-language pathologists in the District. *Id.*

96. ██████'s unfinished FBA from May 2019 (**Exh. N**) gives no consideration to the impact of autism or social communication deficits on the target behavior (“verbal outbursts. . . expressing thoughts and opinions at inappropriate time and place. . .”). ██████ discounted any need to consider autism for CH’s FBA, testifying that “[t]he why of the behavior doesn’t matter if you have autism. . . . *The fact that he has autism doesn’t affect the FBA.*” **8 TR at 1962-1963**. At the same time, ██████ also testified as to the importance of assessing the “why” of behavior. Specifically, ██████ would look at the impact of possible previous trauma – “[W]hen we look at a student, *we have to consider the why. Why is something happening.*” **8 TR at 1932**. In addition, ██████ stated that the possible effect of CH’s blood sugar should be taken into account as affecting how CH manages disagreement. *Compare* 1962:4-1963:24 & Tr. 1982:22-1983:5 (autism could not affect the purpose of the FBA to “identify the why of the behavior”) *with* 1983:6-1984:9 (parents reported in FBA paperwork that CH’s blood sugar can affect how he manages disagreement, which Expert opined would obviously affect the target behavior and something that would be taken into account). ██████’s opinion is not a sufficient basis to reject or discount Petitioners’ claim that the unfinished FBA failed in taking into account CH’s autism diagnosis.
97. The District submits that although an FBA was proposed in April 2019 to address CH’s verbal outbursts, there was “no need” for an FBA/BIP in May 2019, because data on the function of the behavior showed CH had not engaged in any significant behaviors which had initially prompted the same. Exhibit 38, p. 8 (CH did not engage in targeted behavior during observations so team planned to monitor during first few months of following school year and look at strategies to support classrooms); 157:25-158:6 (data didn’t show significant behaviors during monitoring period).
98. The testimony I have heard in this case and the exhibits I have reviewed reveals an instance of unilateral decision-making by ██████ staff, in that a request for an evaluation by the IEP team results instead in a decision by the evaluator that an additional evaluation is unnecessary. *Compare* Exh. M-2, page 1 (IEP team directs preparation of FBA). The failure to provide a timely and complete FBA, as requested by the IEP team in April 2019, appears to be a procedural violation of the IDEA.
99. Nonetheless, I find that the District did, in fact, provide appropriate and necessary special education and services to CH in his area of need, including positive behavioral supports, through his social work sessions with ██████. ██████’s sessions included evidence-based practices, whether ██████ herself was able to label them as such or not. Moreover, any omission by ██████ in providing instruction and services did not deny FAPE. CH was able to progress in his skills in controlling the behavioral outbursts and inappropriate speech connected to his autism. The District’s procedural error in failing to provide a timely and complete FBA in May 2019 did not deny FAPE to CH.

RELATED SERVICES

100. In addition to specialized instruction, the District was required to provide “related

services.” The term “related services” is defined in the IDEA to mean “transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, ...) as may be required to assist a child with a disability to benefit from special education,....” 20 U.S.C. § 1401(22). The appropriate related services and supplementary aids and services, if any, for a student are determined as part of the IEP Team process. 34 C.F.R. § 300.320(a)(4). Here, Petitioners challenge whether the District provided required speech language therapy and assistive technology.

RELATED SERVICES (SPEECH LANGUAGE THERAPY)

Issue No. 7: Whether █████ conducted necessary speech and language evaluation for social communication and pragmatic language and provided necessary related services?

Issue No. 11: Whether █████ has failed to implement its IEPs, including the failure to provide a speech language evaluation required by April 2019 and October 2019 IEPs?

101. The only speech language (SL) evaluation done by █████ for Student was done as a required part of the 2016 autism evaluation before he entered high school. **Exh. C, Exh. I.** The 2016 SL evaluation noted that CH’s behaviors of concern included peer interactions, turn-taking, participating in conversation and withdrawing from others. **Exh. C at 18; 7 TR at 1555-1556; 8 TR at 1925-1927.** These behaviors of concern can be addressed through speech language therapy. **7 TR at 1556.** The IEP team which met at the end of 8th grade anticipated that CH would be in a high school program “to teach social skills and social communication. . . [for] resolving conflicts, tolerance of others [and] study skills for organization . . . due to lack of executive function.” **Exh. D-1 at 10.**
102. CH’s pragmatics were fully evaluated in the 2016 Evaluation, which showed he had adequate language skills to access curriculum. Ex. C, MET Report, at 6, 17-18 (ADOS evaluation for autism conducted); 9-10 & 18 (CH had adequate language skills to access curriculum).
103. Social communication is “a very important part of . . . a diagnosis of autism.” **7 TR at 1676.** “[S]ocial communication encompasses pragmatics.” *Id.* SL services are *anticipated for students with autism* since social communication is a core characteristic. **Exh. 43 at 3.**
104. Some IEP teams recognized that the “special factor” of oral and written communication needs applied to CH. **Exh. D-1 at 10; Exh. H-1 at 11.** Other IEPs documented “significant difficulties interacting with peers and teachers.” **Exh. J-1 at 9.** Some IEPs substitute “accommodations” for specialized instruction/related services addressing social communication deficits. The May 2018 IEP lists “encourage CH to verbalize his wants and needs without making verbal threats” as an accommodation. **Exh. J-1 at 15.**

105. The Individualized Health Plan created by [REDACTED] nurse office that documents CH's need for "effective methods of communication" was assigned to the social worker, [REDACTED], in collaboration with nursing. **3 TR at 687-688; Exh. 17 at 6.**
106. CH made verbal statements in class considered to be "outbursts." **1 TR at 99-100; Exh. 38 at 1, 5.** Every IEP's social work ("health education") goal had an objective on learning to "verbalize . . . wants and needs without making verbal threats." *See, e.g., Exh. D-1 at 11; Exh. F-1 at 11; Exh. H-1 at 12; Exh. J-1 at 12; Exh. M-1 at 11; Exh. P-1 at 14.*
107. Data was not collected or reported on CH's progress on his social work/health education goals. **1 TR at 120-121, 123-124; Exh. H-2 at 2; Exh. P-1 at 9; 1 TR at 160-162.** Progress toward goals reporting records do not appear to have been created and maintained. **2 TR at 353-356, 380-381, 438, 506-512.**
108. CH understood that speech therapy for pragmatics could help him learn skills for casual conversations and also what was "appropriate and acceptable to say, and especially when and where to say it. . . ." **5 TR at 1138.** CH does not ask questions of others often, which impedes the back and forth of conversations at school. **7 TR at 1667-1668.** CH thinks he needs someone to work with him and teach him techniques or tricks for "how to slow down and think" about what he is saying. **5 TR at 1189.**
109. Notably, these were also the issues CH worked on with [REDACTED] and made progress. 1134:13-1135:5; 1182:19-1183:1184:12:205:3-25 (progress managing emotions and participating in discussions regarding The Hate U Give, a book with controversial topics being discussed in class), 209:2-210:16 ([REDACTED] suggested a different forum to discuss The Hate U Give to not trigger CH); 240:24-241:8 ([REDACTED] spent 4 plus sessions with CH regarding a verbal outburst with Principal [REDACTED] that escalated); 244:14-22 ([REDACTED] facilitated conversation for CH and teachers regarding conflicts); 496:3-18 (CH recognized he became triggered if he disagreed with topic).
110. During the 2017-18, 2018-19, 2020-21 school years, Parents asked for a SL evaluation at IEPs because of concerns for CH's pragmatic language. **Exh. H-2 at 2; Exh. H-3 at 2; Exh. J-3 at 2; Exh. M-2 at 1; 5 TR at 1302-1305, 1307-1308; 6 TR at 1363-1364; 6 TR at 1368; 7 TR at 1507.**
111. In April 2019, the IEP Team agreed to the Petitioners' repeated request for a speech language evaluation. 512:15-513:3. At first nothing happened. **Exh. M-2 at 1; 2 TR at 406-407.** The school-based speech and language pathologist ("SLP"), [REDACTED] was not informed about the need for an evaluation until the end of October 2019. **7 TR at 1534-1536.** [REDACTED] was uncertain how to conduct the evaluation. **Exh. U, 7 TR at 1548, 1550-51, 7 TR at 1678, 1681, 1685** ([REDACTED] reached out to District liaison to find out how to evaluate and obtain tools). [REDACTED] does not recall ever having assessed a student who had ASD and was gifted. **7 TR at 1530, 1548.** [REDACTED] "didn't feel like

- additional testing was warranted.” 7 TR at 1530, 1548 (“has the skills”); 1553 (“outbursts in the class. . . [not] due to a skill he didn’t have. . . just his high emotions”).
112. Petitioners contend that ██████ did not conduct the SL evaluation accepted by the April 2019 and October 2019 IEPs. **Exh. M-2 at 1; Exh. P-2 at 1; Exh. U** (emails detailing failure to do speech evaluation); **1 TR at 166; 2 TR at 446-447, 456-460, 462, 520-521; 5 TR at 1275-1276.** Petitioners’ Proposed Finding of Fact No. 139. Petitioners list the following facts in support of their Proposed Finding:
- a. CH’s father completed an “Autism Social Skills Profile” form in November 2019. **Exh. U at 9-13; 6 TR at 1397-1399** (no more information from SLP after from complete); **1400-1401; 7 TR at 1495; 7 TR at 1539-1540** (what Martinez did).
 - b. ██████ had 2 teachers fill out classroom performance assessment forms which were scored by a computer. **7 TR at 1561-1569; Exh U at 14 et seq.**
 - c. At some unidentified time, ██████ reached a unilateral decision that “SLP services were [not] warranted.” **7 TR at 1540.** She wrote no report, told no one about her decision, and does not know when she reached it. **7 TR at 1540-1541.** The SLP was waiting for a meeting that was never scheduled before writing up her “findings” and does not know why a meeting was never held. **7 TR at 1541-1542.** Her “notes” about her “data” were not provided to anyone. **7 TR at 1543.** ██████ never met CH. **7 TR at 1545.**
113. ██████ testified that she completed assessments of CH which ultimately supported the IEP Team’s original determination that CH had appropriate communication skills. She reviewed the prior speech and language evaluation completed in 2016, reviewed teacher feedback, completed a classroom-based assessment, and obtained information from Parents. Thereafter, she determined that her recommendation to the IEP Team would be that SLP services were not warranted because speech/language deficiencies were not impacting CH’s education. 1540:14-20; 1572:19-1573:21; 1544:7-1545:8.
114. ██████’s SLP liaison, testified that formal standardized testing of CH in connection with the re-evaluation in Fall 2019 was neither required nor recommended to serve CH because while such testing “can give some information, it’s not going to be as complete, and it’s not going to show as much about how the students doing in their current academic setting.” ██████’s use of non-standardized tools to assess CH’s communication skills was appropriate as it would help to create a better picture of the student and his actual communication needs in the school setting. 1701:13-1702:15 (K. ██████ explaining why formal testing was unnecessary for CH during his SLP re-evaluation).
115. I find that ██████ did a speech language re-evaluation in the fall of 2019, which she did not reduce to writing, and which Petitioners were therefore unable to review. I also find

that [REDACTED] credibly testified that formal standardized testing of CH was “neither required nor recommended.” I also find that Petitioners have failed to show by a preponderance of the evidence that [REDACTED]’ use of non-standardized tools was in contravention of the April 2019 and October 2019 IEPs. In particular, the April 2019 IEP provided only that the IEP team agreed that CH’s needs in pragmatic language / social communication were “being addressed by Social Work,” but that “parents would like to investigate if [CH’s] pragmatics are affecting his ability to effectively identify social communication.” Exh. M-2 at page 1. While the IEP team called its request a Speech Language Evaluation, the more detailed description of an “investigation” allowed some deference to [REDACTED] in how to conduct the re-evaluation. In light of [REDACTED]’s uncontested testimony as to what type of testing was necessary, Petitioners have failed to prove by a preponderance of the evidence that the failure to reduce the re-evaluation to writing in order to present it to the IEP team, including Parents, was more than a procedural violation of the IDEA.

116. There was a substantial amount of testimony that Parents’ concern about pragmatic language was already supported by the District in the classroom or social work setting. See Respondent’s Proposed Findings of Fact Nos. 25 and 109. This testimony included that [REDACTED] supported CH’s progress towards the goal of effective and appropriate communication, development of pragmatic language and communication skills, and learning the adult skill of seeing the connections between his actions and the world around him. *Id.* [REDACTED] observed that CH made progress in expressing his feelings and with decreased outbursts in class. *Id.* The ROTC program at [REDACTED] also supported CH using appropriate communication. *Id.* See also Petitioners’ Proposed Findings of Fact Nos. 115 (tenth grade teacher helped CH understand boundaries in the classroom through re-direction and reminders) and 116 (twelfth grade teacher sat with CH during class to guide him with visual cues and hand signals, to let him know that he needed to de-escalate his speech in class, that he should stay on appropriate topics aligned with topic in class, and that his comment might make some people feel uncomfortable).
117. I find that the above-described efforts by teachers and [REDACTED] are supported by the evidence and therefore adopt them as the Due Process Hearing Officer’s findings of fact as well. The exception to my adoption of the proposed findings is Respondent’s statements in Proposed Finding of Fact No. 109 that CH’s language deficit resulted exclusively or primarily from his emotional dysregulation and was therefore exclusively a “Tier 2 intervention issue.” My memory of the testimony and my review of the exhibits do not support the suggestion that emotional dysregulation was the exclusive or even primary cause of CH’s difficulties with social communication. Instead, by a preponderance of the evidence, I find that in many instances there was a little of each preceding the other. CH’s struggles with social communication were neither exclusively nor even primarily limited to instances of his losing his temper.
118. My findings are that CH has difficulties with social communication and interaction that are tied to his diagnosis of autism, and that his teachers and his social worker applied effective strategies, based on their education, training, and experience, that assisted him to make progress in this area.

119. Mother admitted that [REDACTED] [REDACTED] and staff working with CH worked with him on social interaction and social communication. 1284:13-1285:12; *and see* 1320:17-1321:15 (Mother admitted that in particular, CH's ROTC instructors and [REDACTED] were "invested in his growth" and "worked to teach [CH]...skills that would serve him in college.").
120. [REDACTED] [REDACTED]'s SLP liaison, credibly testified that based on her experience and knowledge as an SLP, the strategies used by CH's teacher and social worker to address CH's social communication skills were more appropriate than pulling CH out of class to receive SLP services. 1683:7-1684:21. Moreover, because CH was already receiving substantial support with communication through his social work services, adding unnecessary SLP services to CH's IEP would have been more restrictive. 1574:4-1575:7 (SLP explaining that teachers and the social worker were fully capable of addressing the SLP skills identified in Exhibit C, the 2016 MET, at page 18, and that allowing teachers and the social worker to develop those skills is a lesser restrictive way to address the same than adding additional services); 1581:11-15 (SLP explaining that it was ideal for C.H. to develop his peer interaction skills in a classroom where teachers are supporting appropriate peer interactions as they occur with young adults).
121. In senior year, CH still had problems with verbal outbursts, the way he expressed himself or needing to leave the classroom, approximately 20% of the time. **1 TR at 160-163; see also 7 TR at 1587-1588; 7 TR at 1591; 7 TR at 1617.** However, Petitioners failed to present any evidence of the percentage of time CH had similar difficulties prior to the interventions by [REDACTED] staff and educators; I therefore find that this testimony has little evidentiary value, especially in comparison to the substantial testimony presented that CH made substantial progress in the time, place, and manner of his social communication.
122. Petitioners met their burden to prove that [REDACTED]' failure to reduce her re-evaluation to writing in fall 2019 was a procedural violation of the IDEA. Nonetheless, Petitioners failed to meet their burden of proving that any procedural deficiencies by [REDACTED] resulted in a denial of FAPE.
123. CH has difficulties with social communication and interaction that are tied to his diagnosis of autism; his teachers and his social worker applied effective strategies, based on their education, training, and experience, that assisted him to make progress in this area, in light of his circumstances. There is no speech language therapy related service that was required to assist CH to benefit from special education.

RELATED SERVICES (ASSISTIVE TECHNOLOGY)

Issue No. 6: Whether Student has received necessary Assistive Technology equipment and services?

124. "The term "assistive technology device" means any item, piece of equipment, or product

system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve functional capabilities of a child with a disability.” 20 U.S.C. § 1401(1)(A). By definition, an assistive technology device is any kind of item “ used to increase, maintain, or improve functional capabilities of a child with a disability.” 20 U.S.C. §1401(1)(A). The determination of a student’s need for AT rests with the IEP team. 20 U.S.C. §1414(d)(3)(A)(iv)(B)(v).

125. (a) Each public agency must ensure that assistive technology devices or assistive technology services, or both, as those terms are defined in §§ 300.5 and 300.6, respectively, are made available to a child with a disability if required as a part of the child's

(1) Special education under § 300.39;

(2) Related services under § 300.34; or (3) Supplementary aids and services under §§ 300.42 and 300.114(a)(2)(ii).

(b) On a case-by-case basis, the use of school-purchased assistive technology devices in a child's home or in other settings is required if the child's IEP Team determines that the child needs access to those devices in order to receive FAPE.

34 C.F.R. § 300.105(a) and (b).

126. CH’s handwriting difficulties and difficulties producing written work product have persisted since elementary school. **Exh. 3 at 1; Exh. I at 3; 2 TR at 298-299; 7 TR at 1592; 7 TR at 1624; 7 TR at 1625.** The quality of CH’s written work improves when he uses a keyboard because then he does not have to struggle with the physical part of writing. **5 TR at 1279; see also 4 TR at 1052.** CH has always struggled to read his own writing. **5 TR at 1277.** At home, he uses a keyboard to write 90% of the time and is “more productive” then. **6 TR at 1427.**
127. Mother asked for an AT evaluation for CH because she was nervous about CH “switching classes and everything.” 1277:1-18. Parents requested Assistive Technology services and equipment at IEP meetings. **Exh. H-2 at 1; 1 TR at 35-37; Exh. J-2 at 2.** The IEP Team rejected Father’s request for an AT evaluation in February 2018, Ex. H-2, so it could first try the Tier 2 intervention of allowing CH to use his laptop. 1523:15-1525:8. Three months later, in May 2018, Father requested AT specifically for note-taking and productivity. Ex. J-2, at 2. At the Due Process hearing, Father agreed CH was more productive when using the Tier 2 intervention of keyboarding. 1427:1-12.
128. Instead of agreeing to provide a formal AT evaluation, [REDACTED] provided writing implement grips and wide lined paper, **Exh. H-2 at 1; 1 TR at 46,** and CH was allowed to use his personal laptop in class. *Id.* At times, CH avoided school work and played computer games on his personal laptop which led to at least one disciplinary write up. **8 TR at 1800-1801.** Parents did not want him using his own computer because of temptation to

play video games and because of the expense of replacing his personal computer if anything happened. **5 TR at 1278; 6 TR at 1386-1388.**

129. [REDACTED] also moved forward with a type of pre-screening step, known formally as the “collaborative technology team meeting” (hereinafter “pre-screening step”). **5 TR at 1088-1089, 1091-95** (explaining “collaborative technology team meeting” process). The AT department is known as the Access and Communication Technology Team (“ACT” team). **5 TR at 1093.** The ACT team does not appear to have any particularized knowledge about autism, including as referenced by the 11 considerations. **5 TR at 1111.**
130. The pre-screening step includes suggestions to be implemented during a trial period. **5 TR at 1088-1089, 1091-95.** The process does not include parents and the student. **5 TR at 1088, 1090-92.** It is only after the pre-screening step that a student may eventually obtain an AT evaluation. **5 TR at 1098-1100.**
131. Petitioners complain that the [REDACTED] pre-screening step prevents IEP teams from making decisions for a student to be evaluated for or receive AT.
132. The District responds that [REDACTED] did “assess” CH’s need for a computer to produce written work. According to the District, [REDACTED] did so through the “other evaluations” – presumably “other” than an AT evaluation. *See* Respondent’s Proposed Finding of Fact No. 144. In addition, the educational team worked daily “with CH to support production of written work using preferred topics and technology.” 113:17-25; 327:5-330:14; 130:24-131:9; 1052:3-25; 46:1-12; 1627:8-23. The District does not appear to be asking that I find that all of this effort equated to a formal AT evaluation, nor could the District sustain such a request through the evidence presented.
133. I find that the evidence presented by Petitioners and Respondent concerning the pre-screening step is largely beside the point. I find that there is nothing *per se* about the described pre-screening step that violates the IDEA. Petitioners complain that they were left out of the pre-screening process, that the process is confusing, and that the ACT team does not possess any particular knowledge about autism. I find all of these facts are more than likely true. However, Petitioners have not pointed me to any legal authority prohibiting the District from relying on advice from an ACT team of the sort described, prior to deciding whether to proceed with a formal evaluation, nor am I aware of any legal authority to this effect.
134. Notably, I find that the pre-screening process had none of the earmarks of an IEP meeting, was not intended to be an IEP meeting, and was not, in fact, an IEP meeting. Instead, the decision was made at the two IEP meetings cited by Petitioners that the District *declined* to provide a formal AT evaluation. The fact that the District may have¹⁰

¹⁰ The parties have not directed me to anything in the record that provides the timing of the pre-screening step conducted by [REDACTED], nor have I been able to discern from a quick review

made this decision in part based on the observations of the ACT team is not a violation of the IDEA, so long as the decision was not predetermined.¹¹ Regardless whether the May 2018 team considered the pre-screening step results, I find that the decision was not “predetermined.” Indeed, the testimony at the Due Process hearing was that the attendees at the May 2018 IEP spent four hours on the subject of assistive technology. **2 TR at 326-328, 333.**

135. Because the District denied the request for an AT evaluation either before the pre-screening step or without “predetermination” after the pre-screening step, any defect in the pre-screening step is irrelevant to the factual questions at hand. The more appropriate factual questions are whether the District was required to provide a formal AT evaluation and whether the denial of a formal AT evaluation *by the IEP team* denied CH FAPE. I find that Petitioners have failed to prove by a preponderance of the evidence that there was any reason to suspect that CH required an AT evaluation, and have failed to prove by a preponderance of the evidence that the denial of assistive technology denied CH FAPE.
136. In their written submissions, Petitioners have not pointed to any evidence in the record to demonstrate that CH demonstrated a need for an AT evaluation. Instead, they return to a procedural point, contending that the █████ system is designed to “ration” AT devices and is therefore antithetical to the IDEA. Petitioners contend that the IEP team could not require CH to use his own personal computer at school only pursuant to an AT evaluation, an option that █████ unilaterally “vetoed.” *See*, Petitioners’ Closing Argument at pp. 24-25, citing Exh. H-2 at 1; Exh. J-2 at 2. There are two points to this argument – a factual contention that the IEP team voted in favor of an AT evaluation but the team’s decision was vetoed by an administrator, and an argument no decision could be made about AT in the absence of an evaluation.
137. In fact, the IEP teams at both IEPs cited by Petitioners rejected the need for an AT evaluation. *see* Exh. H-2 at 1 and Exh. J-2 at 2. While Petitioners contend that an █████ administrator denied CH an AT evaluation over the objection of everyone who attended the IEP in May 2018, their only support for this version of what occurred is Mother’s testimony. “After long discussion where the team agreed to AT evaluation, the administrator acted for █████ by denying evaluation. **6 TR at 1428- 1430; Exh. J2 at 2.** Proposed Finding of Fact No. 101.” Mother’s unsupported testimony to this effect,

when the pre-screening step occurred. My personal recollection from the hearing is that this step occurred after the May 2018 IEP. If so, then the pre-screening step clearly did not predetermine the IEP team’s denial of an AT evaluation – the denial had already occurred.

¹¹ Predetermination occurs when an educational agency has made a determination prior to the IEP meeting, including when it presents one educational placement option at the meeting and is unwilling to consider other alternatives. *G.W. v. Boulder Valley Sch. Dist.*, 2019 WL 4464130, at *8 (D. Colo. Sept. 18, 2019)(citations and internal citations omitted).

- concerning a very acrimonious four-hour IEP meeting, is not sufficient, in the face of a contrary Prior Written Notice, to prove by a preponderance of the evidence that the rest of the IEP team wished to or did order an AT evaluation. See Exh. J2 at 2. “Taken together, the statutory definition of an IEP and the Court’s command that the courts must focus the inquiry on the draft IEP as written.” *Sytsema*, 538 F.3d at 1315.
138. Of course, Petitioners are also entitled to challenge whether the IEP team was incorrect to reject Parents’ request for an AT evaluation. But by relying too heavily on procedural violations, Petitioners lose the thread of why CH needed an AT evaluation.
 139. Petitioners contend that an AT evaluation could assess the ability to produce writing with a keyboard versus the use of a paper and pencil. **5 TR at 1103**. This point, however, never seems to have been in dispute; I heard no testimony during the Due Process hearing that the District did not accept as fact that CH did better with his writing when he had access to a keyboard
 140. CH presented no evidence that he wanted some assistive technology tool he did not receive. He testified he was given the opportunity to use an [REDACTED] Chromebook and was adept at using spell check, Google Calendar, and electronic alarms if and when he wanted them. 1219:10-1220:9; 1221:18-1224:4. CH is able to use Google products for his computer, including spell check. CH is able to revise his writing and knows how to edit. 1240:11-1241:6 (CH testifying); 1478:25-1479:10 (Father); 1122:17-1123:5 (AT staff person testifying that Google is good for teaching organization).
 141. Even when CH was provided a Chromebook by [REDACTED] he would choose his laptop instead. 1220:2-13. Even though Mother was concerned about the safety of the laptop and CH’s gaming during the school day, she agreed CH preferred his laptop and his written productivity improved once he started using it. 1278:5-1279:13.
 142. Using AT tools, including low-tech tools, to which a student already has access is important for life after school so the student can generalize and not have to purchase additional equipment or software. 1105:10-1108:4 (Mick).
 143. CH was able to use his computer for written work, consulted with the teacher on his written notes, and learned notetaking skills. 1237:17-1238:12; 1239:24-1241:6; 1791:8-1793:4.
 144. Petitioners failed to prove by a preponderance of the evidence that [REDACTED] failed to consider whether CH required AT devices or services to receive FAPE or that [REDACTED] did not, in fact, incorporate the use of technology in the provision of FAPE to CH. Petitioners failed to prove it was more likely than not that C.H. required more assistive technology than was provided to him by the District. 1944:25-1945:4. Petitioners failed to prove by a preponderance of the evidence that the IEP team needed a formal AT evaluation to make an appropriate decision concerning CH’s AT needs.

TRANSITION SERVICES

Issue No. 4: Whether IEPs contain measurable transition goals, reflect transition planning and services connected to Student's unique needs and whether transition services to meet Student's needs have been provided by the LEA?

145. The IDEA requires every IEP, beginning no later than the one that will be in effect when the child is 16 years old, to include "appropriate measurable post-secondary goals based on age appropriate transition assessments related to training, education, employment, and, where appropriate, independent living skills," and to describe the "transition services (including courses of study) needed to assist the child in reaching those goals." 20 U.S.C. § 1414(d)(1)(A)(i)(VIII)(aa)-(bb).
146. In CH's case, the "career readiness" goals found in each IEP at issue did not provide for specialized instruction from designated staff. *See, e.g., Exh. J-1 at 12; 2 TR at 303-305.* The IEP descriptions of transition services consisted of generalized inventories, checklists, and questionnaires which were unconnected to the IEP team planning process or delivery of special education. **2 TR at 434-436, 3TR at 563-568, 633-637, 640-642.**
147. [REDACTED] currently does not have a system of transition services in which transition services and goals are aligned. **4 TR at 950; Exh. 30 at 7.**
148. CH's IEPs do not contain measurable postsecondary goals, although that heading appears on IEP forms. *See Exh. H-1 at 4; Exh. J-1 at 4; Exh. M-1 at 4; Exh. P-1 at 6.* The District's rehabilitation counselor¹² thought "measurable post secondary goals" refers to goals that can only be measured after the student leaves high school. **3 TR at 558-559.** ("They are not to be measured while in high school."), **562-563; 8 TR at 1944** ([REDACTED] employee expert testified CH accomplished his goal because he is "enrolled" in CNM). *And compare, §6.31.2.11(G)(4) NMAC; 4 TR at 965-966* (IEP transition goals should be measurable while students are in high school).
149. CH had no direct services time with the rehabilitation counselor during his junior year. **3 TR at 603.** The rehabilitation counselor attended one IEP meeting, the last IEP on October 28, 2019. **Exh. P-1 at 2; 2 TR at 429-430; 3 TR at 528-530.** Before then, she consulted for IEPs. **3 TR at 534-535; 3 TR at 552-554.**
150. In the last two years, CH's explicit transition services were that (1) the rehabilitation counselor gathered information from teachers, (2) CH met with [REDACTED] (3) AVID classes were available, (4) he received a final folder, and (5) he was offered presentations by DVR and Job Corps, plus college and career mini-fairs. **3 TR 598-599; 601-602, 621, 623-633; Exh. 35 & Exh. T** (copy of folder). Job Corps is a program for high school

¹² "Rehabilitation counselor" is current terminology for position formerly known as "transition specialist." **2 TR at 614-615.**

dropouts to age 24. **3 TR at 599.**

151. The rehabilitation counselor's knowledge about ASD and perceptions about the potential needs of students with ASD attending college was limited. **3 TR at 578, 583-585** ("He might need outside support for his emotions, but that is not something that is done by the school."); **3 TR at 605-606** (no need for rehabilitation counselor to know about staff's concerns about CH's communication in classroom); **3 TR at 612-614** (not consulted on 11 Considerations). The rehabilitation counselor believed that if outbursts occurred in a college, CH would be told he cannot have an outburst and should seek other services. **3 TR at 606.** Provision of general education classes (AVID, ROTC) to meet CH's transition needs was considered appropriate "because he is high functioning." **3 TR at 596.** CH's rehabilitation counselor assumed he did not meet UNM admission requirements, CH was in fact admitted to UNM. **3 TR at 664-665; 5 TR at 1146, 1174.**
152. A disconnect exists between █████ transition services and knowledge about characteristics and needs of students with autism including the State's requirement of 11 Considerations for students with autism. **4 TR at 993-1000, 1002-1007; Exh.43 at 2** ("futures planning" Consideration requires asking, at "each grade level," "what skills must be built to reach" post-secondary goals?); **Exh. 44.**
153. One goal of transition services "is to make sure that all of the pieces are working together so that [students] can fill their toolbox for life, and they are able to independently go forward after high school." **3 TR at 667.**
154. █████ students find out about how their needs in college will be accommodated when they are in college and contact the college disability resource center; █████ does not know exactly how the process works for students, and the rehabilitation counselor has "faith" it works. **TR at 604.**
155. A Summary of Performance ("SOP") is required for students who exit special education through graduation.¹³ **4 TR at 1008-1013; 3 TR at 643-647.** At Student's final IEP (October 2019), his rehabilitation counselor provided him with a folder or "book" about services available in New Mexico, which █████ believed stood for the SOP. **3 TR at 596-597; 643-647. Exhs. 35 & T.**
156. As a remedy for the asserted denial of an SOP, Petitioners request that the District be ordered to pay for the "creation of an SOP . . . or plan by an autism professional knowledgeable about [the] needs of college students with ASD, . . . who can perform any

¹³ "For a child whose eligibility under this sub-chapter terminates [with standard graduation] a local educational agency shall provide the child with a summary of the child's academic achievement and functional performance, which shall include recommendations on how to assist the child in meeting the child's post-secondary goals." 20 U.S.C.A. § 1414.

necessary assessments, interview [CH] and also his Parents, and devise a written report identifying areas of transition needs and providing recommendations for [CH] . . . , so that services are guided and coordinated to meet transition needs and respectful of [CH's]self-identified concerns and commitment to growth in social communication and EF skills.” Petitioners’ Closing Argument at page 27. Presumably, this request corresponds with what Petitioners believe they should have received as transition services, to be summarized and set forth in the missing SOP. However, they have failed to provide any evidence or any legal authority that this description matches what is in fact required. The “book” that Petitioners referenced, which appears at Exhibits 35 and T, contains information that is generally applicable to all students with post-secondary goals, some information that is specifically applicable to students with disabilities, and some information that is specific to CH.

157. Petitioners submit that “██████ did not provide CH with any specialized information about services available for adults with autism. **5 TR at 1153.**” Petitioners’ Proposed Finding of Fact No. 87. However, Pages 17 to 18 of Exhibit 35 provide a lengthy list of websites for college age adults with disabilities. Exhibit T at pages 20 to 21 explains the CNM Disability Resource Center. I therefore reject this proposed finding of fact and find instead that the District did provide CH with specialized information about services available for students with disabilities. To the extent that Petitioners are contending that the District was required to cull information specific to services available for adults with autism, and set it forth for CH in the SOP, rather than referring CH to websites and the CNM Disability Resource Center for more specific information, I find that this was not required in order to provide CH FAPE, and I do not believe that the District’s failure to provide this information did not, in fact deny CH FAPE.
158. Petitioners also complain that CH’s IEPs indicate that DVR services needed to be considered, and that DVR would be invited to CH’s IEPs. Although Parents signed consent forms, DVR was not invited and typically only sends staff to the 12th grade IEP. **2 TR at 306-307, 369-370; 3TR at 608-610.** Petitioners failed to provide any evidence as to how DVR would have assisted CH with his post-secondary goal of attending a fulltime university or CNM. Based on the testimony I heard concerning what services DVR offers, DVR would not have provided any relevant information or service to CH.
159. Petitioners allege that CH did not receive the following assistance with his post-secondary goals:
 - a. It was not until senior year that CH was given assessment about the kinds of skills he would need for his identified career and asked to identify his weaknesses. **3 TR 671-672; 5 TR at 1143-1144** (called into office in senior year, asked about post-graduation plans, given paperwork to fill out and a black folder). Petitioners’ Proposed Finding of Fact No. 88.
 - b. CH registered at CNM in July 2020 and will pursue education there in fall 2020 through remote/distance learning which is all that is offered due to COVID. **5 TR**

at 1147-1148. He is concerned about ability to communicate with professors and understand the goals of assignments. **5 TR at 1149-1150.** CH dropped his junior year CNM “dual credit” class in part because he had trouble seeking clarification and asking for help. **5 TR at 1150.**

- c. CH would not be comfortable with classes where the course expectation is lots of group work; he struggled with group work in high school. **5 TR at 1151-1152.**
- d. CH anticipates relying on his parents as he begins college — for help with communication with college professors and administrators and for homework. **5 TR at 1154-55.** He needs someone to coach him through interactions with professors. **5 TR at 1230-1231.** During his senior year in high school, Parent checked his grades on Synergy 3-5 times weekly. **6 TR at 1416.** Parent believes he will need an ongoing mentor to teach/coach him through events and expectations in the college setting. **6 TR at 1412-1415.**
- e. In remote learning during spring 2020, CH struggled to detect nuances in email communications and in recognizing and navigating course expectations. **5 TR at 1280-1281.**
- f. CH needs a mentor, familiar with the college experience, to guide him and assistance to “weed out the noise” and understand and focus on course requirements. **5 TR at 1156; 5 TR at 1281.** He needs someone to teach him how to navigate social situations through a curriculum which teaches and practices skills. **5 TR at 1282-1283.** Focus and repetition of instruction in ROTC is the kind of curriculum that could work. **5 TR at 1284-1285.**

160. All of these services, which Petitioners contend were missing from the District’s transition services, are in fact a reiteration of Petitioners’ concerns that CH did not acquire the executive function skills and the social communication skills that he will need to function as an adult. Petitioners have failed to prove by a preponderance of the evidence that the District failed to provide an IEP that was reasonably calculated to enable him to make progress on his ability to communicate or interact with professors, ask for assistance, understand the expectations and goals of courses and assignments, detect nuances in communications, navigate social situations, and focus. While CH did not receive the unified post-secondary planning he believes is mandated by Section 1414(d)(1)(A)(i)(VIII)(aa)-(bb), he received the equivalent services and therefore was not denied FAPE as a result of this procedural error.

FREE AND APPROPRIATE PUBLIC EDUCATION

Issue No. 15: Whether [REDACTED] has denied Student a FAPE based on any of issues 1-14?

161. I find that [REDACTED] has not denied Student a FAPE based on any of issues 1-14.

REMEDY

Issue No. 16: Whether Student is entitled to equitable remedy and what remedy would be equitable?

Issue No. 17: Whether Student's graduation on a standard pathway precludes appropriateness of equitable relief even if there was a denial of FAPE?

Issue No. 18: (District's Exception): Respondent [REDACTED] has approved this Statement of Issues with the following caveat: [REDACTED] takes exception to the presupposition that an equitable remedy is needed rather than determination first whether there has been a deprivation of FAPE, and second, even if there is a deprivation of FAPE, whether an equitable remedy is appropriate.

162. I find that Student is not entitled to an equitable remedy, because Petitioners have not shown a substantive violation of the IDEA or a procedural violation that denied CH FAPE.
163. I address the effect of Student's graduation as a matter of law, in my Conclusions of Law, *infra*.

V. Hearing Officer's Conclusions of Law¹⁴

INTERSECTION OF REQUIRED EVIDENTIARY SHOWING AND AVAILABLE RELIEF

1. "To meet its substantive obligation under the IDEA, a school, must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F.*, 580 U.S. _____, 137 S. Ct. at 999. The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." *Endrew F.*, 137 S. Ct. at 1000.
2. The IDEA requires that the LEA must provide specialized instruction to meet a student's needs arising from disability. By definition, CH's identified disability of autism meant his communication and social interactions were significantly affected and adversely affected his educational performance. 34 C.F.R. §300.8(c)(1)(i).
3. Procedural defects in designing or implementing the IEP still do not support a remedy, unless there is a "rational basis" to believe at least one of three things is true: (1) the procedural errors seriously hampered the parent's opportunity to participate in the decision process, (2) compromised the student's right to an appropriate education, or (3) caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. Technical

¹⁴ To the extent I refer to a factual basis for my Conclusions of Law, it is derived from the Findings of Fact.

deviations alone are insufficient to establish a violation of the IDEA. *See Urban*, 89 F.3d at 726. Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Systema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir.2008). Procedural defects must amount to substantive harm in order to support an award of compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008).

4. In this case, there is no available remedy for CH unless Petitioners are able to show substantive harm. While a hearing officer may ordinarily order a LEA to comply with procedural requirements, *see* 34 C.F.R. § 300.513(a)(4), the only remedy available to a student who has graduated is an award of compensatory services.
5. Graduation with a standard diploma ends entitlement to continued receipt of FAPE under the IDEA. 34 C.F.R. §300.102(a)(3)(i); §6.31.2.11(G)(5) NMAC. However, equitable remedy for denial of FAPE seeking compensatory education and services is not barred or forfeited when a request for IDEA due process hearing is filed before high school graduation. *Bell*, 2008 WL 5991062 (D.N.M. 2008).
6. In *Bell*, the District Court was presented with ██████'s defense that graduation on a standard diploma had made Student's IDEA claims "moot" or not appropriate for remedy. The court analyzed ██████'s various arguments, rejecting them, and providing the following explanation:

[T]he rule that graduation moots an IDEA case "applies, of course, only where a student does not contest his graduation, and where he is seeking only prospective – rather than compensatory – relief." *T.S. v. Independent School Dist. No. 54*, 265 F.3d 1090, 1092 (10th Cir. 2001). . . . *Bell*, however, is not seeking prospective relief; he is seeking compensatory relief. Compensatory education can still be ordered subsequent to graduation. *Bell*'s claims are therefore not moot and the Court may hear them.

Bell, 2008 WL 5991062 * 34.

7. Having concluded that there is jurisdiction to hear Petitioners' claims for compensatory education, the question is whether Petitioners have shown that the District violated the procedural or substantive requirements of the IDEA and whether the violation, if any, denied CH FAPE.

An IEP's failure to clear all of the Act's procedural hurdles does not necessarily entitle a student to relief for past failures by the school district. *Garcia*, 520 F.3d at 1125–26; *see also Urban*, 89 F.3d at 726 (holding that a procedural failure did not entitle a student to relief because that deficiency did not result in the denial of a FAPE). Instead, this court must

determine whether the procedural error resulted in substantive harm to the child or his parents; deprived an eligible student of an individualized education program; or resulted in the loss of an educational opportunity. *see also Garcia*, 520 F.3d at 1126 & n. 4 (“[O]ur precedent hold[s] that procedural failures under IDEA amount to substantive failures only where the procedural inadequacy results in an effective denial of a FAPE.”); *O’Toole*, 144 F.3d at 701 (“[T]echnical deviations from the requirements ... do not render an IEP entirely invalid; to hold otherwise would exalt form over substance.” (quotation marks omitted) (*quoting Urban*, 89 F.3d at 726)). In sum, then, the courts inquire whether the violation resulted in the denial of a FAPE.

Sytsema, 538 F.3d at 1313 (some citations and some internal punctuation omitted). Thus where “only compensatory relief is sought, the pivotal question is [whether the school district provided a FAPE], because an award of compensatory education vindicates the student’s substantive right to receive a FAPE and compensates for a past deprivation of educational opportunity rather than a deprivation of purely procedural rights.” *Garcia*, 520 F.3d at 1125.

8. In many instances, Petitioners appear not to be fully cognizant of the need for them to prove the denial of FAPE to support their request for compensatory education. Thus, for example, they have requested independent evaluations for assistive technology, speech language pathology, transition services, and possibly behavioral analysis, as a remedy for the denial of various services. Even if the District failed CH in some way in any of these areas, I have no basis to conclude, on the current record, that these services would be helpful to CH, much less that the denial of these services resulted in the denial of FAPE.
9. This is Petitioners’ burden of proof. Rather than present evidence that, for example, the failure to evaluate CH for AT denied CH FAPE, Petitioners request that the DPHO order the District to pay for an AT evaluation and then Pay “for any devices or computer software *as recommended*.” Petitioners’ Closing Argument at 26-27 (emphasis added). This is a tacit admission by Petitioners that they do not know – nor, then, have they proven – what AT services, devices, or computer software CH needed in [REDACTED] that he did not receive. “[L]iability under IDEA is determined not by imagining the possibilities of what might have been, but rather by determining whether the preponderance of the evidence indicates that the school district’s procedural failures resulted in a denial of educational benefit to the student.” *Garcia*, 520 F.3d at 1127. Petitioners must prove that CH was denied FAPE as part of their case before the DPHO, rather than wait to receive the results of their request for relief to show what should have happened.
10. With this analytical floor in mind, I will turn to what Petitioners assert are the specific deficiencies in CH’s educational program. Petitioners state in their Closing Argument that “[a]s outlined in Petitioners’ Requested Findings of Fact and Conclusions of Law, facts which establish denial of FAPE can be grouped into three general categories.” These categories are (1) autism; (2) related services (Assistive Technology, Speech

Language Therapy); and (3) transition services. I will address these categories in the order I've listed them.

AUTISM

Dual Diagnosis of Giftedness and Autism

11. I have found that Petitioners have failed to prove by a preponderance of evidence that CH's IEPs did not provide for specialized instruction that considered strategies that addressed CH's autism diagnosis, including in the areas of language arts, mathematics, and health education. In CH's case, health education included the areas of executive function, social communication, and career readiness. Petitioners have also failed to prove by a preponderance of evidence that CH's IEPs failed to provide appropriate accommodations, aids and services, and training.
12. Petitioners' theory of the case appears to assume that the Supreme Court's direction in *Andrew F.* that an IEP must be "appropriately ambitious in light of [the child's] circumstances," *Andrew F.*, 137 S.Ct. at 1000, means that the District was required to provide a special education program that ensured that CH reached his full potential as a gifted student, despite his diagnosis of autism. I agree that the direction of the Supreme Court in *Andrew F.* required the District to take CH's giftedness into account in designing his program – CH's "circumstances" included his giftedness, and therefore an "appropriately ambitious" IEP would not leave this factor entirely out of the District's special education planning.
13. At the same time, Petitioners cannot rely on CH's potential as a gifted student – the true statements that CH is "brilliant; he's exceptionally smart" – to bootstrap a factual finding or a legal conclusion that the District's IEPs were not "appropriately ambitious" solely because CH did not make educational progress commensurate with the expected trajectory of a student with his intellectual abilities. *Andrew F.*, 137 S.Ct. at 1000.
14. The Supreme Court in *Andrew F.* used the term "appropriately ambitious" in the context of rejecting the Tenth Circuit's *de minimis* standard of educational progress, as applied to students who cannot be educated in a general education classroom:

Rowley had no need to provide concrete guidance with respect to a child who is not fully integrated in the regular classroom and not able to achieve on grade level. That case concerned a young girl who was progressing smoothly through the regular curriculum. If that is not a reasonable prospect for a child, his IEP need not aim for grade-level advancement. But his educational program must be *appropriately ambitious* in light of his circumstances, *just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom*. The goals may differ, but every child should have the chance to meet challenging objectives.

Of course this describes a general standard, not a formula. But whatever else can be said about it, this standard is markedly more demanding than the “merely more than *de minimis*” test applied by the Tenth Circuit. It cannot be the case that the Act typically aims for grade-level advancement for children with disabilities who can be educated in the regular classroom, but is satisfied with barely more than *de minimis* progress for those who cannot.

Andrew F., 137 S. Ct. at 1000–01 (emphasis added for non-Latin words).

15. Thus notably, the Court in *Andrew F.* was using the term “appropriately ambitious” in the context of a child whose intellectual disabilities had inappropriately “cancelled out” any expectation of progress beyond “merely more than *de minimis*.” *Id.* Here, Petitioners rely on the flip side of this point – CH’s eligibility of giftedness should *raise* the expectations of his special education program related to autism, not “cancel out” any concerns related to autism, based on the school’s presumption that CH will “manage.”
16. I agree with Petitioners that the District could not legally rely on CH’s giftedness to “cancel out” any concerns related to autism. Surely this approach would contradict the Supreme Court’s instruction that the IEP team must consider the “unique circumstances of the child for whom it was created.” *Andrew F.*, 137 S.Ct. at 1001. However, in this regard, I have found that Petitioners have failed to prove by a preponderance of the evidence that the District believed or acted upon the belief that CH’s giftedness “cancelled out” concerns related to autism.
17. Petitioners then go one step further, however, appearing to argue that CH’s progress in his special education program must be measured against his academic potential. Compared to the volume of cases addressing the progress of special education students with what would be termed academic “deficits,” there is very little case precedent addressing special education students with a dual diagnosis that includes giftedness.
18. As described in my Findings of Fact, CH’s IEPs were reasonably calculated to enable CH to make progress, and CH in fact made significant and measurable progress in all his educational goals, including with social communication and executive function, the two skills that were most frequently singled out by Petitioners. He received FAPE in all areas as a result of his IEPs and the implementation of his IEPs. Petitioners have not pointed me to any additional requirement that CH receive FAPE in *accordance with or commensurate with* his potential as a gifted student.
19. Indeed, a rule that provided that CH must succeed at a level *measured by* his giftedness flies in the face of Petitioners’ argument that autism is a disability that cannot be “cancelled out” by giftedness. Thus Petitioners more than convinced me that CH’s struggles with social communication and executive function are separate and apart from his high intellectual functioning. For example, a gifted student with autism may have an

impressive vocabulary, far beyond his peers, yet be unable to navigate everyday communication tasks. A school district cannot ignore a student's social communication deficits simply because the same student is able to communicate easily in other settings. But the reverse must also be true – nothing in the direction in *Andrew F.* that a special education program must be “appropriately ambitious” mandates that a school district must ensure that a gifted student with autism performs at the level he might have achieved in the absence of his autism diagnosis. This is a worthy goal, but as a requirement of the IDEA, it would contradict the Supreme Court's statement in *Rowley* that a student is not guaranteed any particular outcome. *Rowley*, 458 U.S. at 192.

20. If Petitioners are relying on a different measure of “appropriate progress,” they have not shared the appropriate measure during their presentation of evidence. In the absence of any basis to assess the adequacy of CH's IEPs and the provision of FAPE, I must fall back on the Supreme Court's instruction in *Rowley* that I cannot substitute my “own notions of sound educational policy for those of the school authorities which [I] review.” *Rowley*, 458 U.S., at 206, 102 S.Ct. 3034. In this context, the [REDACTED] staff and educators were only required to “offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.” *Id.* They did so in the course of seven and one half days of testimony and voluminous exhibits.
21. I have also found that Petitioners have proven that CH's IEPs did not document the IEP team's consideration of the 11 Considerations for students with autism, and that the IEP team did not always explicitly review the 11 Considerations. [REDACTED] staff and educators did not consistently provide training in autism to [REDACTED] staff and educators, CH, or Parents. These deficits arguably rise to the level of a procedural violation of the IDEA, assuming that Parents and CH were thereby denied an opportunity to participate in the decision-making process.¹⁵ If CH were still in school, a remedy in the form of an order requiring the District to consider and document its consideration of the 11 Considerations in future IEPs might be in order.
22. Here, however, because he has already graduated, the only remedy remaining to CH is compensatory education. To receive compensatory education, CH must show he was denied FAPE. See *M.S. v. Utah Sch.*, 822 F.3d 1128 1135-1136 (10th Cir. 2016); *Garcia v. Bd. of Educ. of Albuquerque Pub Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). Plaintiffs have failed to show by a preponderance of the evidence that the District did not provide FAPE in all areas of identified need, related to CH's autism.

¹⁵ In this regard, I note Judge Browning's admonition in *Bell*, 2008 WL 5991062 * 24 (D.N.M. 2008) that “Tenth Circuit case law directs a court to focus on the text of the IEPs that are developed, to avoid “troublesome factual disputes many years later.” *Systema v. Academy School Dist. No. 20*, 538 F.3d at 1316 (internal quotation marks omitted).”

Threat Assessments and Positive Behavioral Supports

23. There are clear constraints on the jurisdiction of a Due Process Hearing Officer. “A parent or public agency may initiate a hearing to address matters regarding the education of a particular child, i.e., ‘any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.’” *Chavez ex rel. M.C. v. N.M. Pub. Educ. Dep’t*, 621 F.3d 1275, 1282 (10th Cir. 2010), quoting 20 U.S.C. § 1415(b)(3), (6) (2000).
24. Petitioners have broadly suggested that the threat assessment process as applied to CH violated the IDEA, entitling CH to an IDEA remedy. Petitioners have not pointed to any legal authority that would support that what occurred vis-a-vis the [REDACTED] threat assessment process and CH implicates the IDEA. At most, Petitioners have decried the District’s allegedly inappropriate use of the threat assessment process to address behavior that Petitioners do not believe was threatening and which was a manifestation of CH’s deficits in social communication. Neither of these points turns the issue of the District’s inappropriate use of this process into an IDEA claim. *See, e.g., Couture v. Bd. of Educ. of Albuquerque Public Schools*, 2009 WL 10708112 *7 (D.N.M. 2009); *cf. Sellers v. Sch. Bd. of City of Manassas, VA.*, 141 F.3d 524 (4th Cir. 1998)(“The purpose of these procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice.”).
25. The IDEA specifies only that the IEP, the road map for a child’s special education, must contain:
- a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child
- (aa) to advance appropriately toward attaining the annual goals;
- (bb) to be involved in and make progress in the general educational curriculum. . . and
- (cc) to be educated and participate with other children with disabilities and non-disabled children . . .
- 20 U.S.C. §1414(d)(1)(A)(i)(IV)(emphasis added).
26. Under the IDEA, when the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 C.F.R. § 300.24(a)(2)(i); § 6.31.2.11(F)(1) NMAC.

27. In the case of children with autism, applicable New Mexico law, namely the “eleven considerations” drills down even more, in requiring that the IEP team consider effective research based strategies to address familiar issues for children with autism, including problems with transitions and changes. *See* §6.31.2.11(B)(5) NMAC. Notably, consideration Number (d) requires the team to consider

positive behavior support strategies based on relevant information, including, for example, . . . 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.

The team was also required to consider communication interventions, social skills supports and strategies, and teaching strategies based on peer reviewed, research-based practices for students with ASD. *Id.* at (h), (i), and (k).

28. Thus whether the District provided adequate positive behavioral supports is an IDEA issue, which the DPHO does have jurisdiction to address.
29. In this regard, I reject as a matter of law the District’s analytical framework to answer the question whether the District was required to conduct an FBA. Specifically, the District suggests that it was required to implement strategies in CH’s classroom, prior to developing an individualized intervention. The District relies for support on “the response-to-intervention process required by the IDEA and the New Mexico Public Ed Dept. 71 Fed. Reg. 46,540, at 46,646-48 (2006); 6.31.2.10(C)(1)(c)(i-iv) NMAC; Tr. 2620:21-2624:25 (Expert); *see also* NMPED Response to Intervention Framework, available at <https://webnew.ped.state.nm.us/wp-content/uploads/2018/03/RtI-Manual-most-updated-2.15.pdf> (last visited 3/11/20).” Respondent’s Proposed Finding of Fact No. 168. The portion of the Federal Register cited by Respondent addresses the unrelated question of children who are suspected of having a learning disability, who have not yet been identified. There is nothing in the NMPED manual that suggests that the District was not allowed to perform a functional behavioral assessment as part of plan to develop adequate positive behavioral supports. Indeed, quite the opposite is true.
30. The District goes on to state that while “[t]he use of the FBA/BIP process for CH, while encouraged by the NMPED was *not* required, Section 6.31.2.11(F)(1) NMAC.” Respondent’s Proposed Finding of Fact No. 169. This is closer to accurate; the actual section cited by the District provides as follows, under the rubric of “behavioral planning in the IEP”:

Pursuant to 34 CFR Sec. 324(a)(2)(i), the IEP team for a child with a disability whose behavior impedes his or her learning or that of others *shall consider, if appropriate*, strategies to address that behavior, including the development of behavioral goals and objectives and the use

of positive behavioral interventions, strategies, and supports to be used in pursuit of those goals and objectives. Public agencies are *strongly encouraged* to conduct functional behavioral assessments (FBAs) and integrate behavioral intervention plans (BIPs) into the IEPs for students who exhibit problem behaviors *well before the behaviors result in proposed disciplinary actions for which FBAs and BIPs are required under the federal rules.*

Section 6.31.2.11(F)(1) NMAC (emphasis added).

31. Most importantly, the District's position that it was not *required* to conduct an FBA in the spring of 2019 ignores that in the April 2019 IEP, the District proposed and the team accepted that the District would perform an FBA. Exh. M-2, page 1. "[A]n IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document." *O'Toole By & Through O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). The District cannot defend its unilateral decision not to conduct the FBA by looking backwards to argue that it was not required to propose an FBA in the first place – in a contest between what the IEP team required in the IEP and what the evaluator thought was necessary, the IEP prevails.
32. In this instance, the evaluator terminated her assessment when the data were still insufficient; she planned to do more work on the assessment the following years – what my mother would call "a lick and a promise." This appears to be a procedural violation of the IDEA.
33. While I reject the District's legal position that it was not required to conduct an FBA in spring 2019, the failure of the District to do so does not entitle CH to compensatory education unless Petitioners were able to show that the denial of the FBA caused substantive harm. They have failed to do so. Instead, Petitioners have asked the DPHO to speculate as to what an FBA would have added to CH's program. Moreover, Petitioners have failed to prove by a preponderance of the evidence that the program already in place was not already providing FAPE as to CH's behavioral challenges.

RELATED SERVICES

34. In addition to specialized instruction, the LEA must provide "related services." The term "related services" is defined in the IDEA to mean "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, ...) as may be required to assist a child with a disability to benefit from special education,...." 20 U.S.C. § 1401(22).
35. The burden is on Petitioners to prove an actual, substantive deprivation of FAPE resulted from the District's failure to provide appropriate related services or supplementary aids/services. *Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996)

(technical deviations alone insufficient to establish denial of FAPE); *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008) (procedural violations insufficient unless *adversely impact* student's education or *significantly impede* parent's opportunity to participate in the process); *Garcia*, 520 F.3d at 1125-25 (procedural defects must amount to substantive harm for compensatory services).

Speech Language Therapy

36. CH's IEPs in April 2019 and October 2019 called for a speech language evaluation. Petitioners have challenged whether the evaluation that was subsequently performed was adequate. Indeed, Petitioners assert that [REDACTED]'s efforts were so minimal that there was no SLP evaluation.
37. At most, I conclude that [REDACTED] deficient evaluation was a procedural violation of the IDEA. This is especially true in light of [REDACTED]'s testimony that [REDACTED]'s underlying investigative work was sufficient, in light of CH's circumstances. A delay in producing a written report on her work to present at a new IEP meeting did not make the current IEP or CH's special education program inadequate. *See, e.g., Scott ex rel. C.S. v. New York City Dep't of Educ.*, 6 F. Supp. 3d 424, 437 (S.D.N.Y. 2014)(failure to timely re-evaluate student in the area of speech-language amounted to a procedural violation which did not render the IEP legally inadequate, where IEP team otherwise had sufficient information to make a decision).
38. In addition, I have found as a matter of fact that CH has difficulties with social communication and interaction that are tied to his diagnosis of autism, and that his teachers and his social worker applied effective strategies, based on their education, training, and experience, that assisted him to make progress in this area, in light of his circumstances. There is no speech language therapy related service that was required to assist CH to benefit from special education. Any delay to convene the IEP Team to discuss the SLP re-evaluation results did not result in substantive harm to CH. *D.R. ex rel. Robinson v. Gov't of D.C.*, 637 F. Supp. 2d 11, 18-19 (D.D.C. 2009) ("A delay does not affect substantive rights if the student's education would not have been different had there been no delay.").

District's Request for Additional Medical History for CH

39. The DPHO denied District's request for documentary evidence of CH's mental health records during the due process hearing. 1347:10-1354:13 (evidence excluded). These records would relate to CH's history of depression.
40. In its current submission to the DPHO, the District raises not only the issue of CH's depression, but challenges the DPHO's ruling as to the District's request for CH's mental health records.

41. The DPHO recognizes that this matter may be appealed to the United States District Court, which will conduct a *de novo*, or close to a *de novo* review, including potentially a new evidentiary hearing to add evidence to the record. In response to the District's proposed findings, I will therefore explain my ruling further here.
42. During the Due Process hearing, Petitioners agreed that CH received support from an outside therapist for depression. 1338:19-1342:8. Mother agreed that she does not hold █████ 100 % responsible for CH's struggle to get through the day his junior year and explained that CH was frustrated about his small group math class but also suffering from depression that, despite medication, would sometimes "flare up." 1344:1-1348:24.
43. The District's request was to be allowed access to CH's mental health records. Petitioners, however, had already admitted that CH has been diagnosed with depression, and that his diagnosis contributed to some of his problems at █████ CH's mental health records were therefore excludable because they would be unduly repetitious, in terms of what the District was seeking to prove. 6.31.2.13 (I)(9)(d) and (e) NMAC.
44. In addition, a Due Process Hearing Officer has the authority and discretion to issue orders and make rulings "and issue such other orders and make such other rulings, not inconsistent with express provisions of these rules or the IDEA, as the hearing officer deems appropriate to control the course, scope and length of the proceedings while ensuring that the parties have a fair opportunity to present and support all allowable claims and defenses that have been asserted." 6.31.2.13 (I)(9)(e) NMAC.
45. In this context, allowing counsel for the District to review CH's mental health records and presumably pose questions about them struck me as an overbroad and unnecessary request that could invade the privacy of and cause emotional damage to CH, without substantial justification by the District. I therefore denied the District's request.

Assistive Technology

46. I have found as a matter of fact that with regard to CH's need for assistive technology, CH's teachers and other school personnel have determined, based on their education, training, and experience, that CH did not need additional assistive technology to assist him in his special education program. Petitioners have failed to prove by a preponderance of the evidence that there is additional assistive technology that the District should have provided, or that the process provided to make the decision to deny additional assistive technology violated the IDEA in some procedural or substantive way. This is sufficient to comply with the IDEA. In addition, even if there were a procedural or substantive violation, Petitioners have failed to prove by a preponderance of the evidence that the violation resulted in the denial of FAPE.

Transition Services

47. I have found as a factual matter that Petitioners have failed to prove by a preponderance of the evidence that the District failed to provide an educational program that was reasonably calculated to enable him to make progress on his ability to communicate or interact with professors, ask for assistance, understand the expectations and goals of courses and assignments, detect nuances in communications, navigate social situations, and focus. These are the skills Petitioners list as what CH will need in college. CH therefore received FAPE.
48. Petitioners' additional claim is that CH never received assistance from [REDACTED], through the rehabilitation counselor or otherwise, to connect his educational program at [REDACTED] with what he would need in college or any other post-secondary endeavor. My recollection of the Due Process hearing is that in working with CH on his executive function and social communication skills, CH's educators and his social worker assisted CH to connect these dots. To the extent that Petitioners are asserting that CH's transition services should have included a mentor or a coach to assist him to accomplish his specific goal of attending a four year university or a community college, I agree with Judge Browning in *Bell* that this service or a similar service is "above and beyond what is needed to provide a FAPE." *Bell*, 2008 WL 5991062 * 36. Nor have Petitioners alerted me to legal authority requiring the assignment of any type of "coach" to CH prior to his graduation, to assist him to achieve his college goals.

ORDER

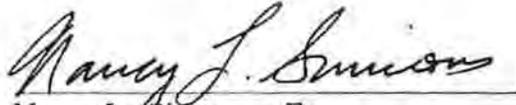
Therefore, for the foregoing reasons and under the foregoing terms, the DPHO orders as follows:

- (1) As to Issue Number 9, "Whether [REDACTED] has punished Student for manifestations of his disability and its own failure to provide appropriate and necessary special education and services?" Petitioners' Request is **DISMISSED** insofar as Petitioners are seeking a remedy based exclusively on what occurred during the Threat Assessment Process, rather than the more general question whether CH received appropriate positive behavioral supports.
- (2) As to all remaining issues, including the issue regarding positive behavioral supports that is embedded in Issue Number 9, Petitioners' Due Process Request is **DENIED**.
- (3) Other than as noted herein, there is jurisdiction over the parties and the subject matter. *See* 34 C.F.R. § 513. Any claims or defenses otherwise raised which are not specifically addressed herein will be, and hereby are, **DENIED**.

REVIEW

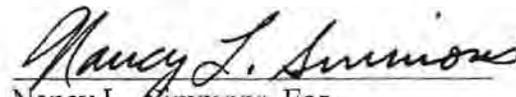
Any party aggrieved by this decision has the right to bring a civil action in a court of competent jurisdiction pursuant to 29 U.S.C. § 1415, 34 C.F.R. § 300.516, and § 6.31.2.13(I)(24) NMAC 2018-19. Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

It is so administratively ordered.


Nancy L. Simmons, Esq.
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Memorandum Decision and Order was electronically transmitted via email to the Parties, and a courtesy copy was electronically transmitted via email to New Mexico Public Education Department to Debra Poulin, Esq., this 4th day of November, 2020.


Nancy L. Simmons, Esq.
Due Process Hearing Officer