BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1213-35

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Against the Local Education Agency (LEA), filed with the State of New Mexico Public Education Department on March 12, 2103. New Mexico Public Education Department Request for Special Education Due Process Hearing and Required Notice Model Form, March 12, 2013 (Due Process Request). The Petitioners' Request for Due Process is denied.

PROCEDURAL BACKGROUND

The Respondent LEA responded to Petitioners' Due Process Request on March 25, 2013. [LEA's] Response to Petitioners' Request for Due Process Hearing, March 25, 2013 (Response).

The parties timely filed their statement of issues for the due process hearing on May 20, 2013. *See* Joint Statement of Issues, May 20, 2013. The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibit List, June 5, 2013; Petitioners' Witness List, June 5, 2013; Respondent's Witness List, June 6, 2013; and Respondent's Exhibit List, June 6, 2013.

The due process hearing commenced on June 11, 2013, and concluded on June 12, 2013. Tr., Vols. 123. Both parties were well-represented by their respective trial counsel - Mia L. Kern and Samantha M. Adams for the Respondent, and Jeffrey A. Goldberg for the Petitioners. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on July 10, 2013. Tr. 550. At the request of the LEA, the date was subsequently extended to July 11, 2013. Letter Extension Order, July

9, 2013. The parties jointly requested an extension for issuance of the hearing officer's decision, which was granted, for filing of his decision to on or before August 1, 2013. Tr. 551.

The Respondent filed its proposed Findings of Fact, Conclusions of Law and Argument on June 11, 2013. [LEA's] Findings of Fact, Conclusions of Law and Closing Argument, June 11, 2013. The Petitioners filed proposed Findings of Fact and Conclusions of Law on June 11, 2013. Petitioners' Proposed Findings of Fact and Conclusions of Law, June 11, 2013. The Petitioners also filed their Closing Arguments and Due Process Hearing Brief on June 11, 2013. Petitioners' Closing Arguments and Due Process Hearing Brief, June 11, 2013.

This decision is due on or before August 1, 2013. Tr. 551.

ISSUES PRESENTED BY THE PARTIES

1. Whether the LEA failed to hold the February 1, 2013 IEP team meeting in accord with the IDEA and its corresponding regulations. *See* Joint Statement of Issues, May 20, 2013.
2. Whether the LEA failed to allow meaningful parent participation at the February 1, 2013 IEP team meeting in accord with the IDEA, specifically, 20 U. S. C. § 1414(e) and § 1414(b)(1), and 34 C. F. R. § 300.501. *Id.*
3. Whether the incident on January 16, 2013, was related to the Student's disability or as discipline for behavior caused by his disability. *Id.*
4. Whether the incident on January 16, 2003, and the events thereafter, denied the Student a free appropriate public education. *Id.*
5. Whether the Student's current placement (2012–2013, 2013–2014) denies the

Student a free appropriate public education. *Id.*

6. Whether the LEA has denied the Student a free appropriate public education by failing to consider or to create a plan for him to be properly disciplined for conduct related to his disability, including, but not limited to, a functional behavioral assessment and a behavior intervention plan during the 2012–2013 school year. *Id.*
7. Whether the LEA failed to provide the Student a free appropriate public education by not providing highly qualified special education teachers in accord with IDEA and its corresponding regulations. *Id.*

The issues noted above were clarified through the proposed Findings of Fact and Conclusions of Law submitted by the parties post-hearing; therefore, those matters contained in the Issues as Presented by the parties which are not preserved through the proposed Findings of Fact and Conclusions of Law submitted by the parties are deemed abandoned.

FACTUAL OVERVIEW

As formally found and concluded elsewhere in this decision, this action is essentially about an incident on January 16, 2013, where the Student's head was bumped on a fence gate while waiting for the bus to take him home from school. His teacher's aide, Mary Blacklock, was with him and the gate came away from the fence as it was being opened and hit the Student. Ms. Blacklock did not consider the bump to require medical attention, or the attention from a nurse, and asked the bus driver to let the Student's parents know when she delivered the Student to his parents that the Student had bumped his head. There was never any mention of a mark on the Student's

back. Later that evening, the Student's parents discovered not only a bump, but also a mark on the Student's back, which looked to his mother to be a fingernail type of mark.

E-mail correspondence and telephone calls ensued to address the underlying cause of the incident. The Student's parents were very upset and sought an investigation into what had happened, because their child, who suffers from Autism, could not verbally communicate about it with them. They wanted to make sure their child was safe at school. Because the Student was a special education student, they requested an IEP meeting to address the incident and their concerns about the Student's safety. They reported the matter to the New Mexico Children, Youth and Families Department as a possible abuse situation. They also reported the incident to the media. They kept the Student home from school.

The parents were of the opinion that Ms. Blacklock hurt their child as a form of discipline, and wanted her fired. An investigation was begun by the Albuquerque Public Schools Police ("APSP"). An IEP meeting was set for February 1, 2013. The LEA sought to follow its standard procedures for conducting the IEP meeting, such as with goals and services, and to go through a step-by-step process. The Petitioners thought that portion of the IEP process was unnecessary and wished to directly discuss the January 16, 2013 incident and the Student's safety at the school. An investigative report of the incident was not available for the February 1, 2013 IEP meeting, although the LEA's administrators believed the APSP were present at the meeting to provide a copy of the report to the parties, which was a mistaken belief. The LEA was open to another type of meeting in a non-IEP setting to discuss the personnel issue regarding Ms. Blacklock, and they would consider safety concerns either in the IEP meeting or in a meeting outside of

the IEP process that addressed only safety. The Petitioners became frustrated with the IEP meeting format process and left the meeting. An IEP resulting from the February 1, 2013 meeting was completed. The Student has not returned to school.

LEGAL OVERVIEW

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

Exhaustion of administrative measures counsels that parents first turn to educator professionals to remedy disputes regarding a child's education. *Cudjoe v. Indep. Sch. Dist. No. 12*, 297 F.3d 1058, 1065-66 (10th Cir. 2002)(student must first assert right to be evaluated for IDEA eligibility before making demand for hearings and procedures to address IDEA claim). During the pendency of the administrative due process proceeding, the child must remain (stay-put) in his then-current educational placement. 34 C.F.R. § 300.518.

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 156 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.* at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive

requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). Academic progress is an important factor in determining if an IEP was reasonably calculated to provide educational benefits. *See CJN v. Minneapolis Pub. Schs.*, 323 F.3d 630, 638 (8th Cir. 2003) (persuasive, citing *Rowley*, 458 U.S. at 202). Meaningful educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. *O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998). Some benefit and meaningful benefit are similar, although not synonymous. *See Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)((distinguishing *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008)(stating that the test is some benefit as compared with meaningful benefit)). *See also Meza v. Bd. of Educ. of the Portales Mun. Schs.*, D.N.M. Nos. 10-0963, 10-0964 (2011)(schools are to provide "some educational benefit").

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

Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003). An IEP is to be in place at the beginning of each school year. See 34 C.F.R. § 300.323(a). The IEP team for a child with a disability includes: the parents of the child,

not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; ii) is knowledgeable about the general education curriculum; and iii) is knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. 34 C.F.R. § 300.321. Related services include transportation and psychological services. *See* 34 C.F.R. § 300.24(a).

The IEP is to be implemented as soon as possible after the IEP meeting. 34 C.F.R. § 300.323(c)(2). An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional needs of the child. 34 C.F.R. § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *See* 34 C.F.R. § 300.324 (a)(2)(iv)&(v).

A child's unique needs in obtaining a free appropriate education, as well as the services to meet those needs, are developed through the IEP. *See* 20 U.S.C. § 1410(20). The setting is to be in the least restrictive environment. *Murray*, 51 F.3d at 926. Mainstreaming to the maximum extent possible should take place if the child cannot be

educated full-time in a regular education classroom with supplementary aids and services. *See L.B. v. Nebo*, 379 F.3d 966, 976-978 (10th Cir. 2004). Parents do not have the right to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208.

Written notice is required regarding issues for the identification, evaluation or placement of a child. See 34 C.F.R. § 300.503; § 6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 § C.F.R. § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dept. of Mental Health and Mental Retardation v. Paul B.*, et al, 88 F.3d 1466 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004). Misinformation provided to parents may prevent them from meaningfully participating

in the IEP process. *Bell v. Bd. of Educ. of Albuquerque Pub. Schs.*, 52 IDELR 161 (D.N.M. 2008).

Among other things, when the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 C.F.R. §300.24(a)(2)(I); §6.31.2.11(F)(1) NMAC. The New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBSs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. §6.31.2.11(F)(1) NMAC. The use of the FBA/BIP is, however, an encouragement – they are not required components of the IEP. *See* 34 C.F.R. §300.320.[1] The IEP team makes the determination of whether a behavioral intervention or support is required, rather than a regulatory requirement. *See In re: Student with a Disability*, 110 LRP 34262 (New Mexico SEA C0809-29)(citing Analysis of Comments and Changes to 2006 IDEA Part B Regulations, 71 Fed. Reg. 46683(2006)). A student may be removed from his regular classroom if necessary to protect his or her safety or the safety of other students. *See* 20 U.S.C. § 1412(a)(5); *Rowley*, 458 U.S. at 181, n.4.

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v.*

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

Acad. Sch. Dist. No. 20, 538 F.3d 1306 (10th Cir. 2008). The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Bell*, 53 IDELR at 161.

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

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence Cnty. Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a

remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005); *Meza*, D.N.M. Nos. 10-0963, 10-0964. There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza, id.* Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010).

Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the in the student's education. *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). An order requiring the training of district personnel or for the district to hire outside consultants may exceed hearing officer authority. *See* Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act, An Update*, J. Nat'l Ass'n Admin. L.J., 31-1, pp. 28-33 (Spring 2011).

FINDINGS OF FACT

1. The Student is entitled to special education services because he is autistic. This is undisputed.

2. At the time of the hearing in this matter, on June 11 and 12, 2013, Student was a four-year old autistic child who had attended Albuquerque Public School's ("LEA") Chaparral Elementary School's autism-specific early childhood school program until January 16, 2013.[2] . Tr. 32. Ex. FF.

3. At the time of the hearing, the Student was not attending school. Tr. 501. Ex. MM at p.5.

4. As a four-year child with autism, the Student is unable to effectively, verbally communicate. Ex. BB.

5. Chaparral Elementary is a school of over 900 students with 250 students being special education students. Chaparral has the largest special education population in the LEA. Tr. 250.2-5.

6. On January 16, 2013, the Student was under the guidance of his special education instructional assistant, Ms. Blacklock, while waiting for the school bus to pick him up and take him home. Tr. 250.

7. Ms. Blacklock was taking the Student and another student to the bus, and she was attempting to open the gate when the Student head was bumped on the gate. Tr.250-252.

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[2] Petitioners' claims are limited to 2012-2013 school year, and the Student's placement for the 2013-2014 school year. *See* Joint Statement of Issues. Petitioners' claims relate to events that occurred on January 16, 2013, in which the Student bumped his head on a fence when walking from the preschool area at Chaparral Elementary School to his bus. Request for Due Process, filed March 12, 2013. Prior to that incident, an annual IEP meeting was held on December 12, 2012. Ex. FF. Parents participated at that meeting, the student's profile was updated and goals created. There is nothing controversial or in dispute about what occurred at the December meeting. Tr. 388. Prior to January 16, 2013, Petitioners were not concerned about the Student's safety at school. Tr. 83. The services provided to the Student under his December 2012 IEP are not at issue.

8. Ms. Blacklock was holding the Student's hand, and when she had to let go of his hand to open the gate, he did not run away from her. Tr. 252; 269.

9. Ms. Blacklock likes the Student and he is one of her favorite students. Tr. 273-274.

10. Ms. Blacklock thought the Student had hit his nose on the fence. Tr. 270.

11. Veronica Sanchez, the Student's bus driver, who saw him immediately after the January 16 incident, testified that Ms. Blacklock told her that the Student bumped his head, but she could not remember what Ms. Blacklock told her about where the Student was hit. Tr. 293- 294. Ms. Sanchez did remember looking at the Student's face and "there was nothing there. There was nothing to indicate that it was bad." Tr. 293.

12. Michelle LaGrange, a bus aide on the Student's bus, stated that Ms. Blacklock told Ms. Sanchez to tell Petitioners that the Student hit the fence. Tr. 301. Ms. LaGrange did not hear Ms. Blacklock state what part of the Student's body hit the fence. Tr. 301. Ms. LaGrange also looked at the Student's face and did not see anything on his face. Tr. 302.

13. Ms. Sanchez and Ms. LaGrange came to learn what part of the Student's body hit the fence when they watched the news clip and it stated that the Student hit his head. Ms. Sanchez and Ms. LaGrange watched the news clip on YouTube together, and when they saw the pictures of the Student's bruised head, Ms. LaGrange told Ms. Sanchez that "he didn't have that [the bruise] on the bus." Tr. 302-304.

14. Bus driver Veronica Sanchez brought the Student home on the afternoon of January 16th and she told the Student's father that Student had run into a fence and that he may develop a bruise. Tr. 292.

15. Petitioners were notified about the January 16th incident the same afternoon it happened. Tr. 36; 147; 257-258;285-286; 300.

16. Petitioners were not notified through the daily communication log because by the time the incident had happened, on the way to the bus, the communication log had been completed and was in the Student's backpack. Tr. 270.

17. Later that evening, the Student's mother noticed a bruise on Student's forehead and a cut the size of a fingernail on his back. Tr. 78.

18. Because of the Student's mother's training and experience as a detention officer, she became concerned that the apparent nail mark might be a potential sign of abuse. Tr. 46-47. She alerted CYFD, tr. 40, and then the parents took photographs of the injuries and emailed them to David Artz, Student's special education teacher. Tr. 40.

19. The injuries did not require medical attention. Tr. 49.

20. Petitioner presented no direct evidence that the fingernail mark had happened while at school.

21. The next morning the Student's father received a call from Mr. Artz, Student's special education teacher, who had initially been unaware of any injury to Student. Tr. 40-41.

22. Florence Goldberg, the school principal, then became aware of the incident, had discussions with the Student's father, it was noted there were video cameras in the area, and Ms. Goldberg said she would conduct an investigation due to the Student's father's accusations of abuse. Tr. 310-314.

23. Principal Goldberg contacted APSP and asked them to investigate. Tr. 310-311.

24. A police investigator subsequently advised Principal Goldberg that although there were video cameras in the area where the Student had bumped his head, they were inoperable. Tr. 311-313.

25. The direct witnesses to the incident were Ms. Blacklock, the Student, and one other autistic child. Tr. 155; 165. Ex. OO at p.9.

26. Principal Goldberg, Ms. Blacklock's supervisor, has never received complaints regarding Ms. Blacklock, tr. 341; she observes that Ms. Blacklock to be very kind and follows the directions of Mr. Artz, tr. 341; and she believes Ms. Blacklock used good judgment. Tr. 384.

27. Mr. Artz believes Ms. Blacklock is truthful and has no concerns about her honesty. Tr. 461-462.

28. Having reviewed the demeanor, memory, ability to observe, and lack of possible bias or prejudice, among other things, including Ms. Blacklock's education and experience -- a Bachelor of Arts in sociology from Austin College and a Master of Divinity degree from Princeton Seminary, tr. 262-263, great weight is given to her testimony regarding the January 16, 2013 incident. She is found to be truthful.

29. There was another incident on January 14, 2013, where the Student and another of Mr. Artz's students were engaging in horseplay; yet the January 14, 2013 incident is not an allegation in this case. They are not related. Tr. 468-469.

30. Mr. Artz forgot to make a note in the Student's daily communication log that the Student was pushed on the playground by another student on January 14, 2013, because he examined the Student following the accident and in his professional

judgment it was not an injury and, if the incident would have warranted a nurse, he would have taken the Student to the nurse. Tr. 468.

31. After the January 16, 2013 incident, Student's parents kept Student at home from school due to subjective concerns they had about Student's safety. Tr. 28; Ex. MM.

32. Student's parents believed these concerns were related to Student's autism in that Student was uniquely vulnerable because he could not tell his Parents what happened to him at school. Tr. 32; 128.

33. There is no evidence other than Student's parents' subjective belief that the January 16, 2013 incident was intentional or the result of the Student being disciplined. Tr.39; 51; 121; 122; 151; 163.

34. The APSP completed an investigation into the allegations against Ms. Blacklock, in which the Student's parents alleged a failure to supervise a student resulting in injury. Ex. OO.

35. Detective Gary Georgia conducted interviews, and otherwise performed an investigation, and concluded that the January 16, 2013 incident where the Student was hit in the head was accidental. Ex. OO. Detective Georgia concluded, as well, that the prior incident which the Student was involved in horseplay was accidental, as well.

36. Weight is given to the Detective Georgia's internal affairs investigative report, specifically due to its completeness and apparent objectivity.

37. It is found that Petitioners did not prove, by a preponderance of the evidence, that Student's January 16, 2013 head bump was anything more than an accidental injury arising from a gate being opened.

38. It is found that Petitioners did not prove, by a preponderance of the evidence, that Student's January 16, 2013 head bump resulted from an intentional act by the LEA's agents or resulted from a form of discipline to the Student by the LEA's agents.

39. It is found that the Petitioners did not prove, by a preponderance of the evidence, that the fingernail mark on the Student's back had happened while at school or while being transported from school or otherwise while in the custody and control of the LEA.

40. It is found that the Petitioners did not prove, by a preponderance of the evidence, that the Student's January 16, 2013 accidental head bump while at school was a safety event related to his special education regarding his identification, evaluation or appropriate placement needs.

41. It is found that the Petitioners did not prove, by a preponderance of the evidence, that because of the January 16, 2013 accidental head bump while at school the Student was or would be unsafe at the LEA's schools.

42. To address Petitioners' concerns about safety of the Student in the classroom, Principal Goldberg immediately offered several times to move the Student to a different classroom. Tr. 224; 459; 465.

43. The Student's father did not want the Student moved because he liked Mr. Artz as a teacher. Tr. 364; 466.

44. The Student has always been welcomed at Chaparral. Tr. 432.

45. The LEA has a policy entitled "Medical Care of Students: General and Emergency." Respondent Ex. D.

46. When determining whether a student needs to go to the nurse, the teacher is afforded discretion. Tr. 374; 378.

47. This medical care policy was not violated on January 16, 2013 as there was no visible injury, and the LEA ensured that Petitioners were verbally notified about the incident just after it happened. Tr. 369.

48. Ms. Blacklock used her professional judgment in deciding to place the Student on the bus on January 16. Tr. 383; 384.

49. At no point after the Student bumped his head on January 16 did Petitioners administer first aid to the Student or secure medical care for him. Tr. 115.

50. The Student's father requested an IEP meeting. Tr. 83; 153.

51. An IEP was scheduled by the LEA for February 1, 2013. Ex. GG; Tr. 83; Tr. 335; Tr. 189.

52. An IEP meeting was then held on February 1, 2013. Ex. GG.

53. Cynthia SooHoo, a Special Education Director for the LEA, was one of the two facilitators of the IEP team meeting. Tr. 385-387.

54. Other people present at the meeting were the Student's mother, father, Principal Goldberg, Lisa Smith (pre-school autism teacher), Denise Garcia (in charge of preschools for the LEA), Tanya Harwood (speech therapist, physically working with the Student's special needs and working with Mr. Artz, the special education teacher in the classroom), Malia Vigil (assistive technology representative for the LEA), and Patricia Rajala (head teacher responsible for all of the IEPs for the school). Tr. 342-345. Ex. GG. The Student's grandparent was also present. Ex. GG. Mr. Artz, the special education teacher, was not present, because he felt intimidated by the Student's father. Tr. 469.

An APSP officer was there, as well, although he was unsure why he was there – Principal Goldberg understood that the police chief was supposed to arrive with the investigative report, but the other officer came instead without the report. Tr. 363.

55. Ms. Harwood is in the Student's classroom twice a week anywhere from a half hour to an hour at a time. Tr. 344.7-12; Tr. 473.4-7.

56. While in the classroom, Ms. Harwood does a variety of activities with the students; she works with the students individually and as a group. Tr. 473.

57. Ms. Harwood has worked with the Student, is knowledgeable about him, and was an appropriate person to have present at his IEP, as she has worked with the Student since August 2012. Ex. HH.

58. Under Ms. SooHoo's operating procedures, safety plans for a student may be written either as a part of an IEP or safety plans may be written outside of the context of the IEP. Tr. 426.

59. As a general operating rule, safety concerns can be a part of the IEP meeting. Tr. 396.

60. According to Principal Goldberg's operating procedures, a child's safety may be a matter to be addressed at an IEP meeting. Tr. 354-355.

61. The resulting IEPs Prior Written Notice of Proposed Actions did not state that safety was an issue proposed by the Student's parents, see Ex. GG, pp. 23-25, yet Principal Goldberg recalled that the Student's parents request for information regarding the January 16 incident, although not specific, regarded an issue in which they felt that the Student was unsafe. Tr. 336.

62. According to Principal Goldberg, a parent has the right to ask what the school is doing to keep the child safe so that the parent is comfortable sending the child to the school. TR. 362

63. While at the IEP meeting, the Student's parents wanted to discuss the Student's safety. Tr. 336.

64. Ms. SooHoo was aware that the Student's parents wanted to discuss the Student's safety concerns, yet they said nothing about a "safety plan" for IEP discussion. Tr. 425.

65. "Safety plans" are not typically written for a defective fence, but are written to ensure a child's safety or safety of others, according to Ms. SooHoo. Tr. 425.

66. The IEP meeting began with a discussion toward goals and objectives required by the IEP process. Tr. 352.

67. According to the operating procedure by Ms. Soohoo, the IEP looks to the student in terms of his present level of performance, the kind of progress he made, supplemental services he might need, and how he has made progress with the goals that were previously designed, and the type of goals made since the last IEP. Tr. 388.

68. Ms. SooHoo sought to incorporate the operating procedures to discuss at the IEP meeting the Student's performance, progress, supplemental services, and goals previously designed and made, as according to IEP operating procedure. Tr. 388.

69. The Student's parents became frustrated with the procedure to discuss the performance, progress, supplemental services, and goals previously designed and made, because an IEP addressing those matters had been completed about one month before. Tr. 322; 388.

70. The Student's parents at that time began to yell and scream, as did the Student's grandfather, saying they did not want to discuss the IEP process, and that they wanted to go immediately to the Student's placement. Tr. 322.

71. The Student's parents and grandparent were advised that the IEP operating process would have to be followed, but they didn't want to accept that process. Tr. 322.

72. Ms. SooHoo explained to the Student's parents and grandparent that delving into the personnel issues involved in the January 16, 2013, incident (Ms. Blacklock's employment) was beyond the nature of the IEP process. TR. 398.

73. Ms. Soohoo did not refuse to discuss safety in the IEP, but rather said that the IEP process was not the appropriate process for personnel matters regarding an investigation involving a peer. Tr. 398.

74. Thus, it would be appropriate for the Student's parents and the grandparent to be involved in personnel issues, although the IEP meeting is not the appropriate forum for that discussion. Tr. 398.

75. Ms. SooHoo did not preclude discussion at the IEP regarding safety concerns by the Student's parents in an appropriate meeting – she did, however, preclude specific personnel matters as a matter for discussion before the IEP team. Tr. 396 – 399.

76. The Student's parents also asked whether placement or location of school was in the best interests of Student. Tr. 128.

77. Ms. SooHoo stated that the placement issues would be addressed after the IEP needs of the child were discussed, at which point the Student's parents' tempers flared, the police officer asked everyone to calm down, and the Student's parents and the grandparent left the IEP meeting. Tr. 332-334.

78. The police officer did not ask the Student's parents or the grandparent to leave. Tr. 334; 403.

79. The LEA's agents did not "shush" the Student's parents or the grandparent. Tr. 215 -216; 338-13.

80. Petitioners participated at the IEP Meeting. Ex. GG, at 23-25 (LEA rejected Petitioners' request for an assistive technology device because no documentation exists that demonstrates the need for an alternative form of communication; LEA accepted Petitioners' request to initiate the process for an Assistive Technology assessment; LEA rejected Petitioners' request that the Student receive services at home for 18 hours per week with a Petitioner supervising because the Student has demonstrated meaningful progress in his current educational setting and requires an environment where he can work on his communication and other skills with his peers; LEA rejected Petitioners' request for a service dog for children with autism to keep the Student safe because there was no documented need and the Student is in a program that provides continual adult supervision through a low adult to student ratio; LEA rejected Petitioners' request to be provided with picture communication system for home use; LEA accepted Petitioner's request for daily communication between home and school; LEA rejected Petitioner's request that classroom staff not communicate with non-teaching staff about the Student because communication is necessary between all personnel who work with the Student). In addition to the matters addressed at the meeting, noted above, the IEP resulting from the meeting considered the least restrictive environment, Ex. GG at 17 (finding Student's least restrictive environment to be met in a specialized school setting outside of the neighborhood school, because of low incidence needs which are best met in a specialized

program at another school, where he can receive direct 1:1 or small group instruction in communication, fine motor skills, sensory integration, and adaptive behaviors). Ex. GG at 17.

81. The IEP team determined that the Student would follow a district-wide school discipline plan (thus, no disciplinary modifications, Functional Behavior Assessments or Behavior Intervention Plan required), Ex. GG at 19, and that positive behavior support strategies were not required. Ex. GG at 26.

82. The IEP of February 1, 2013, was for a "review" of the December 12, 2012 IEP. Ex. GG; Ex. FF.

83. The APSP investigative report of the January 16, 2013 incident is stamped received by Human Resources on February 4, 2013. Exhibit 00.

84. Ms. Goldberg's understanding was that the police investigative report was to be made available by the police officer at the at the February 1 2013, IEP meeting. Tr. 363.

85. Ms. Goldberg thought the Petitioners' already had a copy of the report at the time of the IEP meeting. Tr. 395.

86. The APSP investigative report was not available at the February 1 2013, IEP meeting. Tr. 363-364.

87. The parents were not refused a copy of the investigative report; it is a matter of the report not being requested from the APSP. Tr. 364.

88. Ms. SooHoo had not seen the investigative report until she became the local educational representative for the due process hearing, which was about a week before the hearing. Tr. 391.

89. The Petitioners were not provided a copy of the investigative report for the IEP meeting, although a copy of the report was provided to them at some unknown time prior to the due process hearing. Tr. 75.

90. The Petitioners have not shown a date the investigative report was requested by them from the LEA, although it was requested at some point in time. Tr. 364. The Petitioners have not shown a date they received the report, although it was before the commencement of the due process hearing. There is no evidence that the Petitioners asked the APSP for a copy of the report.

91. During the IEP meeting Petitioners say they sought a copy of the investigative report, but that they were told they needed a court order to obtain a copy of it. Tr. 512. This is in direct contradiction to the testimony presented by Principal Goldberg and the date stamp of the report showing it was received by the LEA on February 4, 2013. For a credibility determination, great weight is given to Principal Goldberg's testimony as corroborated by the February 4, 2013 date stamp that the Petitioners were not told they needed a court order to obtain the investigative report, as further corroborated in that they did receive a copy of the investigative report prior to the due process hearing – the Petitioners' have not presented evidence that they had to obtain a court order in order to eventually have the investigative report provided to them. Thus, it is found that Petitioners were not told at the IEP meeting that they needed a court order to obtain a copy of the investigative report.

92. Petitioners participated in the February 1, 2013 IEP. Tr. 64; 86; 193-194; 197-199.

93. The issues the Petitioners wanted to discuss at the IEP were the January 16, 2013 incident and the investigation that came about from it. Tr. 396.

94. The underlying reason the IEP was requested by the Student's parents was to have Ms. Blacklock fired. Tr. 313.

95. As found elsewhere in this decision, an IEP meeting was set for February 1, 2013. Tr. 314.

96. Petitioners did not advance the topics at the IEP meeting for a "safety plan" which requires the presence of two adults at all times, for a functional security cameras to be placed in the playground and the bus area, for an assurance that the Student not have contact with Ms. Blacklock, or for an assistive technology evaluation for the use of a service dog.

97. Neither of the Student's IEPs requires him to receive homebound services; the words "homebound services" are never used in either of the Student's IEPs. Instead, the Student's December 2012 IEP and February 2013 IEP provide that the Student's needs will be served in a center-based preschool at a school. Ex. FF, at 18; GG, at 18.

98. In an autism-specific preschool program such as Mr. Artz's classroom, the ratio of adults to students is two adults for every one student. Tr. 428.25-429.20.

99. The Student had used a Picture Exchange Communication system ("PECs") at school, whereby the Student communicates by selecting an icon to receive what Student wants in exchange for the icon Tr. 475-476.

100. The evidence presented showed that both the December IEP and the January IEP required the implementation of the PECs system at home, including training of the

parents by the LEA, (Ex. FF and GG), and both the Student's parents and the LEA agreed that PECs system should be implemented at home. Tr. 68-69;188; 445; 446.

101. The LEA is responsible for paying for the PECS system. Tr. 446.

102. The Student's parents never responded to the requested icon materials that they would like for the Student's use at home for the PECs system book to be made, and that is why there was not the picture exchange method for the Student to take home, or training for it. Tr. 478.

103. For the home use PECs system, the LEA would provide a three ring binder book, with the vinyl cover, the velcro icons, and what is needed for the book, but if the Student's parents wanted a sturdier book binder they would have to go online and purchase for themselves the sturdier version from the PECs system inventors. Tr. 478-479.

104. Mr. Artz was the Student's special education teacher in the 2012-13 school year. Prior to January 16, 2013, Petitioners believed Mr. Artz to be a good teacher and to be properly implementing the Student's IEP. Tr. 113-114.

105. The Student's educational team has never observed the Student to cut in line. Tr. 250; 452.

106. The Student is not a behavior problem at school. Tr. 264; 451-452.

107. If Mr. Artz felt that the Student was a behavior problem, he would have initiated the FBA/BIP process. Tr. 452-453.

108. Neither Ms. Blacklock nor Mr. Artz has ever had to discipline the Student. Tr. 274; 345-346; 483-484.

109. Mr. Artz and Ms. Blacklock use different strategies to manage behavior, such as holding a hand out to lead the Student or using weighted blankets to redirect him. Tr. 274; 463; 483-484.

110. To the extent there is conflicting testimony between that of the Student's parents and that of Ms. Blacklock, Ms. Goldberg, Ms. SooHoo, Mr. Artz, Ms. Sanchez and Ms. LaGrange, then greater weight is given to the testimony of Ms. Blacklock, Ms. Goldberg, Ms. SooHoo, Mr. Artz, Ms. Sanchez and Ms. LaGrange as LEA witnesses, as a credibility determination, due to, among other things, the corroboration of their testimony by the Albuquerque Schools' Police objective analysis of in the incident report, as well as viewing the reasonableness of their testimony in light of the other evidence in the case, and the demeanor of the witnesses at trial.

CONCLUSIONS OF LAW AND ANALYSIS

1. Jurisdiction properly lies over the parties and over the subject-matter. 34 C.F.R. §300.507(a); §6.31.2.13(I)(1) and §6.31.2.13(I)(3) NMAC, except for the issue regarding highly qualified teachers and employees, for which there is no subject-matter jurisdiction. 34 C.F.R. § 300.18(f) & § 300.156(e).

2. The statute of limitations period begins two years from the date the initial request for due process was filed; therefore, the material time period to consider in these proceedings is from March 13, 2011, 2010 onward. *See* §6.31.2.13(I)(18)(b) NMAC.

3. The Petitioners failed to meet their burden to establish that the LEA failed to hold the February 1, 2013 IEP team meeting in accord with the IDEA and its corresponding regulations, as relevant to the issues raised in these proceedings. The

team members were all present. They included the parents of the child, a special education provider of the child, a district representative who: a) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; b) is knowledgeable about the general education curriculum; and c) is knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. 34 C.F.R. § 300.321. The parties met and the Petitioners left before an outcome. An IEP was prepared which incorporated discussions between the parties. Although there were not IEP notations addressing the major issues in this case, to wit, the Student's safety and the January 16, 2013 incident, the LEA was open to discuss the issues safety at the IEP meeting or in a meeting outside of the IEP process. They were willing, as well, to discuss the January 16, 2013 incident, yet they would not discuss any personnel matters relating to Ms. Blacklock's employment at the IEP team meeting in front of individuals not involved in the personnel process.

4. Although not cited by either party, in *Lillbask v. Conn. Dept. of Educ.*, 397 F.3d 77, 42 IDELR 230 (2d Cir. 2005), the United States Court of Appeals for the Second Circuit addressed the issue of safety as a procedural violation under the Individuals with Disabilities Act, 20 U.S.C. § 1400, *et seq.* ("IDEA"), which is persuasive in these proceedings. The Petitioners in *Lillbask*, *id.*, requested the LEA to address at the IEP the training and availability of appropriate substitute teachers and aides for the student; the risks for leaving the student within reach of potential dangers, such as electrical cords;

the need to use the student's car seat when transporting the student on the school bus; the need for assistive devices, such as a prone stander, wheelchair and a special seat; to ensure that the student is fed to avoid chocking hazards, and to avoid placing the child on a dirty floor during physical education. *Id.* The Hearing Officer had found no jurisdiction to address safety concerns, as did the District Court. In reversing the District Court, the Court of Appeals concluded that safety concerns were appropriate to address at an IEP if the subject matter of the safety concerns could interfere with the child's right to receive a free appropriate public education. *Id.*

5. Applying the *Lillbask, id.*, rationale to these proceedings, it is concluded that the LEA did not forbid safety concerns to be discussed at the IEP meeting. They were open to discussions taking place in either the IEP meeting or in another meeting format. The discussions did not take place because the Petitioners walked out of the meeting, having become frustrated with the standard and timely process demanded to conduct an IEP meeting under the IDEA. In essence, the testimony by the LEA's representatives, which is found to be credible, is that they were willing to discuss safety issues with the Petitioners at the IEP meeting. Thus, there is no procedural violation. *See Rowley*, 458 U.S. at 207. Petitioners have not shown by a preponderance of the evidence that this amounted to a procedural violation which impeded his right to a free appropriate public education, significantly impeded Petitioners' right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2);NMAC 6.31.2.13(I)(20)(b).

6. The LEA also said it would not discuss personnel matters, that is, the Petitioners' request that LEA fire Ms. Blacklock, at the IEP meeting. Although *Lillbask*,

supra, concluded that it was appropriate for an IEP meeting to address training and availability of appropriate substitute teachers and aides for the student, that does not equate to a discussion of personnel issues regarding a particular teacher being fired to be an issue for discussion at an IEP meeting. The Supreme Court has specifically concluded that an IEP meeting is not the appropriate forum to compel a school district to employ a specific methodology, provide a specific teaching program, or assign a particular teacher. *Rowley*, 458 U.S. at 207-208. The parties have not cited case law addressing whether personnel matters are required to be addressed at an IEP meeting, yet, considering *Rowley's, id.*, requirement that discussions regarding assignment of particular teachers are not to be a part of the IEP meeting, it is concluded that personnel matters relating to those teachers should not be a part of the IEP meeting, either. Thus, it is concluded there is no procedural violation of a free appropriate public education for the Student because personnel matters relating to Ms. Blacklock would not be discussed at the IEP meeting. *See Rowley*, 458 U.S. at 207. *See also Letter to Hall*, 21 IDELR 58 (OSERS 1994). The Student has not shown by a preponderance of the evidence that this amounted to a procedural violation which impeded his right to a free appropriate public education, significantly impeded the parents right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2);NMAC 6.31.2.13 (I)(20)(b).

7. The Petitioners participated at the meeting to some extent, before they left, and an IEP was prepared as a result of that participation. Although Mr. Artz, the special education teacher, was not present at the IEP meeting, Tanya Harwood, the speech therapist, physically working with the Student's special needs, was present as a special

education provider. She had worked with the Student since August 2012, was knowledgeable about him, and was an appropriate person to have present at his IEP in lieu of the actual special education teacher. 34 C.F.R. § 300.321. The Student has not shown by a preponderance of the evidence that this amounted to a procedural violation which impeded his right to a free appropriate public education, significantly impeded the parents right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2);NMAC 6.31.2.13(I)(20)(b).

8. As found, an investigative police report was prepared and was delivered to the Petitioners after the commencement of the due process proceedings. There is no evidence, however, establishing a date as to when the report was requested by the Petitioners from the LEA or a date as to when it was provided to the Petitioners. It was requested at some date either at or before the IEP meeting, was unavailable, and the report was eventually provided to the Petitioners prior to the due process hearing. Thus, given the conclusion in this decision that a safety issue is an appropriate for an IEP, the investigative report would be reasonable information to be provided to the Petitioners. *See generally Taylor v. Vt. Dep't. of Educ.*, 313 F.3d 768 (2nd Cir. 2002)(descriptive of reasonable information, yet not every scrap of paper). Additionally, since it was relevant information, the Student's parents had the right to inspect and review the records without unnecessary delay and before the IEP meeting, among other things, and in no case more than forty-five days after the request had been made. 34 C.F.R. § 300.613. The investigative report was not received by the school (although it is noted that the police agency in this case was the APSP, with APS being the LEA) until February 4, 2013, which was three days after the IEP meeting. Importantly, however, is that the Petitioners

did not provide evidence as to the date the request for the investigative report was made – the allegation that the LEA required them to obtain a court order for the record has been found to be without merit. Thus, there being no evidence of a time sequence, it is found the Petitioners did not meet their burden to show a procedural violation regarding a failure to timely disclose the police report. *See North Clackamus Sch. Dist.*, Or. State Edu. Agency, 12-054-035, 113 LRP 3803 (Jan. 11, 2013) (no violation of free appropriate public education where unable to establish time line). As well, given that the investigative report's finding that the incident was accidental in nature, and presumably that there was no cause for referral for criminal charges, and that the ultimate administrative decision in this case is a conclusion that there was not substantive violation of a free appropriate public education because of the head bump incident and the scratch on the back, then it is concluded that the Student has not shown by a preponderance of the evidence the failure of the report to be presented at or before the IEP meeting amounted to a procedural violation which impeded his right to a free appropriate public education, significantly impeded the parents' right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2);NMAC 6.31.2.13(I)(20)(b).

9. The Petitioners have not shown by a preponderance of the evidence that their concerns were not considered by IEP by autocratically deciding what could be discussed at the IEP meeting, what will be in the IEP, and what may be discussed or included. *See* Due Process Request, pp. 3-4. As found, the Petitioners participated in the IEP process, their concerns were reflected in the IEP, portions of the meeting relating to personnel were not discussed, yet discussion was available to address other safety and January 16,

2013 matters, and they became frustrated with the process and voluntarily left the IEP meeting. The IEP team considered the rights of the Student, the concerns of the Student's parents for enhancing the education of their child, the results of the initial and most recent evaluations of the Student, and the academic, developmental, and functional needs of the Student. 34 C.F.R. § 300.324(a). The IEP meeting addressed the communication needs of the Student under 34 C.F.R. §300.324(a)(1)(iv). It is found and concluded, as further explained in this decision, that the Student's injuries did not result from a form of discipline. The IEP team did not find the Student's behavior impeded his learning or that of others and, therefore, did not find the use of use of positive behavioral interventions and supports and other strategies to address that behavior to be appropriate. 34 C.F.R. § 300.324(a). The IEP team evaluated the least restrictive environment and concluded that the Student could be served in an on-campus special education setting; thus, Petitioners have not shown by a preponderance of the evidence that the IEP team did not consider services for the Student at home. 34 C.F.R. § 300.114. Thus, the Petitioners have not shown by a preponderance of the evidence that these factors amounted to procedural violations which impeded the Student's right to a free appropriate public education, significantly impeded the parents' right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2);NMAC 6.31.2.13(I)(20)(b).

10. To the extent the Petitioners now appear to raise issues outside of what were raised in the IEP process – which were limited to those addressed in the IEP, the Due Process Request, and to the safety and January 16, 2013 incident report, then those issues are dismissed for not being exhausted through the administrative process to first

allow the educator professionals to remedy disputes regarding the Student's education. *Cudjoe*, 297 F.3d at 1065-66. The Respondent's complaints are well-taken that the Petitioners' claims and their requested relief have substantially shifted since this due process action commenced, and this is therefore viewed as an allegation of failure to exhaust. *See* Respondent's Findings of Fact, Conclusions of Law and Closing Argument, June 11, 2013, at p. 3-5. Therefore, the request for a safety plan which requires the presence of two adults at all times, tr. 104, 155, 160-161, functional security cameras placed in the playground and the bus area, tr. 105, 155, 160-161, an assurance that the Student not have contact with Ms. Blacklock, tr. 105-16, and an assistive technology evaluation for the use of a service dog, tr. 106, 123-124, will not be considered because they were not first brought before the IEP team.

11. The Petitioners have not shown by a preponderance of the evidence that the LEA's review and re-writing of the IEP, rather than proceeding by amendment, resulted in a violation of free appropriate public education. The IEP of February 1, 2013, was for a "review" of the December 12, 2012 IEP. Ex. GG; Ex. FF. Amendment of an IEP "may" be made without re-drafting the entire IEP. Thus, the language is permissive – it may be amended, without re-drafting; use of the amendment procedure is not mandatory. In this instance the "review" of the IEP by the team was for re-drafting, which considered various matters the Petitioners sought to be addressed, as described in this decision. Thus, the Petitioners have not shown by a preponderance of the evidence that the LEA's action to review and re-draft rather than amend the IEP, as a procedural process, amounted to a procedural violation which impeded his right to a free appropriate public education, significantly impeded the parents' right to participate in the decision making

process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2); NMAC 6.31.2.13(I)(20)(b).

12. The Petitioners failed to meet their burden to establish that the LEA failed to allow meaningful parent participation at the February 1, 2013 Team Meeting in accord with the IDEA, specifically, 20 U. S. C. § 1414(e) and § 1414(b)(1), and 34 C. F. R. § 300.501. As noted above, and now incorporated herein, the Parents were afforded the opportunity to meaningfully participate in the IEP meeting. They chose to leave before it could be completed. Petitioners presented no evidence of an issue relating to a special education evaluation or lack of notice for that evaluation. *See* 20 U. S. C. § 1414(b)(1). As found and concluded above, the parents were members of the IEP team. That team made a decision regarding placement. 20 U. S. C. § 1414(e). The Petitioners have not met their burden to show that the LEA made a predetermination of placement or services. *See Deal*, 42 IDELR 109, 104 LRP 59544. The Petitioners were provided with an opportunity to meaningfully participate in the IEP process. *Bell*, 52 IDELR 161. Unlike in *Bell, id.*, there was not misinformation from the LEA to the parents about the incident (like the *Bell, id.*, information which found the child to be learning disabled rather than mentally retarded), which the investigative report would rebut, but rather the investigative report eventually corroborated the LEA's position that the environment at the school was safe and that the head bump did not arise from disciplinary action. As such, the lack of the report at the meeting did not significantly imped the parents' right to participate in the decision making process. As described elsewhere in this decision, although the investigative report regarding the head bump and back scratch are relevant records because safety concerns are appropriate in IEP meetings and were subject to disclosure

as part of the educational placement of the child, *see* 34 C.F.R. § 300.501, nonetheless, the Petitioners failed to meet their burden to show when the dates for timely disclosure began; additionally, due to the reports that the head bump resulted from an accidental injury which supports the ultimate conclusion in this case that there was no substantive violation of a free appropriate public education because of a safety issue at the school on January 13, 2013 incident, the Petitioners have not met their burden to show that the failure to produce that report at the IEP meeting amounted to a procedural violation which impeded the Student's right to a free appropriate public education, significantly impeded the parents' right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513(a)(2); NMAC 6.31.2.13(I)(20)(b).

13. The Petitioners failed to meet their burden to establish that the incident of January 16, 2013 was related to the Student's disability or as discipline for behavior caused by his disability. The APSP investigative report, which is found to be the result of an objective investigation, did not find that the January 16, 2013 injury was anything but an accident. *See* Ex. OO. Deference and weight are given to testimony of the LEA's staff, officers and teachers who investigated the incident and, after conducting interviews and objective analysis, found that the Student was injured as the result of an accident. The LEA's staff did not physically discipline the Student by the use of force. Indeed, the IEP prescribed a district-wide behavior plan for which there was no need for additional discipline, such as positive behavioral strategies, for the Student. Therefore, it is concluded that the Student's January 16, 2013 injury was not related to his disability or as discipline for behavior caused by his disability. Thus, the Petitioners have not met

their burden that the LEA has either not complied with the procedures in the IDEA, *see Rowley*, 458 U.S. 156 (1982), or that the Student was denied some and meaningful educational benefits. *See Los Alamos Pub. Sch. v. Dreicer*, D.N.M. No. 08-233 (2009)((distinguishing *Sytsema*, 538 F.3d at 1306 (stating that the test is some benefit as compared with meaningful benefit)).

14. The Petitioners failed to meet their burden to establish that the incident on January 16, 2013, and the events thereafter, denied the Student a free appropriate public education. It is found and concluded that the January 16, 2013, incident was the result of an accident. The Student's head was bumped while a gate was being moved away from a fence, while he was waiting with his teacher's aide, Ms. Blacklock, for the bus to take him home from school. Discretion was given to LEA staff to have a child sent to a nurse. According to the bus driver, the Student had no visible bump at the time of the injury. Ms. Blacklock, in her discretion, did not send the Student to the nurse for what appeared to be a head bump from a stuck fence gate. It is concluded that the accident and events thereafter did not make the school an unsafe place which would preclude the Student from obtaining some and meaningful educational benefits, should he be allowed to attend school. What now precludes the Student from some and meaningful education is the Student's parents' refusal to allow the Student to return back to school. The February 1, 2013 IEP remains appropriate. The LEA has not substantively denied the Student a free appropriate public education. *See Bell*, 53 IDELR 161 (difference between substantive and procedural violations of free appropriate public education). That is, despite the accident on January 16, 2013, the Student's receipt of special education services provided under his IEPs were, and are, reasonably calculated to enable the

Student to receive educational benefits. *Rowley*, 458 U.S. at 207. As for procedural matters, as explained elsewhere in this decision, the Petitioners have failed to meet their burden to show that the procedures the LEA followed subsequent to the January 16, 2013 accident impeded the Student's right to a free appropriate public education, significantly impeded the parents' right to participate in the decision making process, or caused a deprivation of educational benefit. *See* 34 C.F.R. § 300.513 (a)(2);NMAC 6.31.2.13(I)(20)(b).

15. The Petitioners failed to meet their burden to establish that the Student's current placement (2012–2013, 2013–2014) denies him a free appropriate public education, in that the Student is being provided services in the least restrictive environment. As explained elsewhere in this decision, the current February 1, 2013, is appropriate, as is the Student's "placement" under that plan. "Educational placement" refers to the child's type of educational program, such as classes, individualized attention, and additional services the child may need, rather than the 'bricks and mortar' of a specific school. *T.Y. v. New York City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. 2009). The location for services is in the context of the environment appropriate in which the child is receive services. *Id.* An IEP does not have to name a specific school location. *Id.* As discussed elsewhere in this decision, the February 1, 2013 IEP has been found appropriate, with the classes, individual attention, and services provided to the Student. Petitioners's arguments, and the Respondent's responses to those arguments, however, suggest the Petitioners may be alleging the least restrictive environment, under a placement label, for the Student to be provided home-bound services. The Student is required to be educated in the in the least restrictive environment. 20 U.S.C. §

1412(a)(5)(A); 34 C.F.R. § 300.114; §6.31.2.11(C)(1) NMAC. *Murray*, 51 F.3d at 926. As discussed elsewhere in this decision, the IEP team considered the least restrictive environment for the Student and concluded the Student was to be served in a center based pre-school with the resources for the Student with autism. The IEP of February 1, 2013 found that the Student could not be served in a neighborhood school because of low incidence needs which are best met in a specialized program at another school, where he can receive direct 1:1 or small group instruction in communication, fine motor skills, sensory integration, and adaptive behaviors. Ex. GG. As found, this indicates that home-bound services are too restrictive under the continuum of alternative placements. 34 C.F.R. § 300.115; §6.31.2.11(C)(2)(b) NMAC. The Petitioners argument that the Student cannot be safely educated in the school environment and, as a result, requires home-bound services is not well-taken in this "placement" context. As concluded elsewhere in this decision, despite the February 1, 2013 accident, the services under the IEP of February 1, 2013 do not deny the student a free appropriate public education. The Petitioners failed to meet their burden to establish that the Student's current placement (2012–2013, 2013–2014) denies him a free appropriate public education by either not complying with the procedures in the IDEA or because the IEP was not reasonably calculated to enable him to receive educational benefits. *See Rowley*, 458 U.S. 156.

16. Although the Petitioners met their burden to establish that the LEA failed to implement a substantial and material element of the Student's IEP by failing to implement the PECs system for home use by the Student, and to train the parents in its use, at the LEA's expense, they are barred by unclean hands from requested equitable relief of injunctive relief because the Petitioners substantially prevented the LEA from

implementing the provisions under IEP. To establish that the LEA denied a Student a free appropriate public education by a failure to implement provisions of an IEP, Petitioners must "show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP." *Houston Ind. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000) (cited with approval in *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243 (10th Cir. 2008). In this case, the claim of the failure to implement the IEP was because the PECs system was not provided to the Student for his home use, despite its requirement under the IEP. The PECs system is a picture system allowing this Student with autism to communicate. This cannot be considered a de minimis failure. However, the reason the PECs system for home use was not implemented was because the Student's parents refused to provide their input on the choice of icon which Mr. Artz needed in order to produce the book for the home PECs system. The LEA would pay for production of the basic home use PECs system, which Mr. Artz would create, yet if a more sturdy binder was needed then the Student's parents would have to purchase that on their own. The Student's parents never let Mr. Artz know what type of icon they wanted to use. Thus, the PECs system book for home use was not provided. Thus, although the failure to implement was not de minimis, nonetheless the primary fault failure lies on the Student's parents for not providing their input on the necessary icons for the home use, so that the book could be created by Mr. Artz. Guidance is found in the unpublished decision by the Second Circuit Court of Appeals in *French v. N.Y. State Dep't. of Educ.*, 57 IDELR 241 (2d Cir. 2011) where, in a situation in which the parents substantially prevented the LEA from implementing properly-

developed IEP, it was concluded that the parent's unclean hands did not entitle the student to the prospective equitable remedy of compensatory education requested. *Id.* This analysis is borrowed as guidance and it is, therefore, concluded under the facts of this case that the home use PECs system was not delivered to Petitioners not because the LEA was not ready to implement the IEP, but because the Student's parents refused to provide the necessary input to allow Mr. Artz to create the PECs system book. Thus, any equitable remedy in the form what is essentially equitable injunctive relief (request for order to immediately implement PECs system and parental training) is denied due to their unclean hands.

17. The Petitioners failed to meet their burden to establish that the LEA has denied the Student a free appropriate public education by failing to consider or to create a plan for him to be properly disciplined for conduct related to his disability, including, but not limited to, a functional behavioral assessment and a behavior intervention plan during the 2012–2013 school year. The February 1, 2013 found that the Student would follow a school-wide discipline plan, and thus did not require modifications, a functional behavior assessment (FBA), a behavior intervention plan (BIP), or an appropriate behavior goal. Ex. GG at 19. The LEA presented evidence the Student did not show behavioral issues – he did not cut in line, neither Ms. Blacklock nor Mr. Artz has ever had to discipline the Student, Mr. Artz and Ms. Blacklock used different strategies to manage behavior, such as holding a hand out to lead the Student or using weighted blankets to redirect him. It is concluded that the Petitioners have not met their burden to show that the Student's behavior impeded his or her learning or that of others, so that 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. *Rowley*, 458 U.S. at 181, n. 4. While the New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBSs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions," the Petitioners have not met their burden to show that Student exhibited problem behaviors. §6.31.2.11(F)(1) NMAC. Even if problem behaviors are exhibited – which are specifically found not to have been shown by the Petitioners – then the use of the FBA/BIP is only an encouragement – not a required components of the IEP. *See* 34 C.F.R. §300.320; §6.31.2.11(F)(1) NMAC. The Student has not met his burden to show that the LEA has either not complied with the procedures in the IDEA or that the IEP was not reasonably calculated to enable him to receive educational benefits. *Rowley*, 458 U.S. 156 (1982). The LEA did not deny the Student a free appropriate public education.

18. As a matter of law, the issue of whether the LEA failed to provide the Student a free appropriate public education by not providing highly qualified special education teachers in accord with IDEA and its corresponding regulations is a matter which cannot be maintained in a due process hearing. A student cannot maintain a right of action in due process regarding the failure of an LEA employee to be highly qualified. 34 C.F.R. § 300.18(f) & § 300.156(e). Guidance on the subject is found in the Comments to the Rule of Construction for § 300.18(f), where it is clarified that a student may not file a due process complaint or file a judicial action for the failure of a particular LEA employee to be highly qualified. *See* Comments, Rule of Construction, § 300.18(f); Federal Register/Vol. 71, No. 156/ Monday, August 14, 2006, at 46561. This does not mean a

student is without recourse to challenge the issue of a highly qualified teacher or employee, since a student may file a complaint with the SEA regarding the issue. *Id.* The issue regarding whether the LEA failed to provide the Student a free appropriate public education by not providing highly qualified special education teachers in accord with IDEA and its corresponding regulations is a matter which cannot be maintained in a due process hearing, and is, therefore, dismissed for lack of jurisdiction.

19. Because it has been found that there is no denial of a free appropriate public education, then there is no relief ordered regarding those issues. As to the issue regarding implementation of the PECs system, the requested equitable injunctive relief is denied as barred by unclean hands.

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

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' request for due process is denied and their Due Process Request of March 12, 2013, is dismissed with prejudice.

REVIEW

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

MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: August 1, 2013

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by facsimile transmission only to M. Kern, S. Adams, and J. Goldberg, Esqs., to Gloria Regensberg, Esq., via e-mail attachment, and via certified mail only to the Petitioners at their address of record, with a copy through the U.S. Mail to the Secretary of Education, all on this 1st day of August, 2013.