BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1718-14

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing Against Local Education Agency (Due Process Request), filed with the State of New Mexico Public Education Department on February 14, 2018.[1] The Petitioners' Due Process Request is granted in part.

RELEVANT PROCEDURAL BACKGROUND

The Respondent LEA responded to the Petitioners' Due Process Request on August 8, 2017. *See* [LEA's] Response Including Prior Written Notice to Due Process Hearing Complaint, February 26, 2018 (Response). The Prehearing and Extension Order was entered on February 22, 2018 (Prehearing Order). On April 5, 2018, the parties filed a Joint Statement of Issues (JSF). On April 16, 2018, the Petitioners filed a Motion for Continuance (Motion to Continue), which was granted on April 18, 2018. *See* Order Granting Continuance, Extension Order, and Revised Scheduling Order, April 18, 2018. On July 10, 2108, an email by *pro se* Petitioner was treated as a Motion to Amend the Joint Statement of Issues. *See* Petitioners' Email Request, July 6, 2018 (Motion to Amend.) The Joint Statement of Issues was ordered amended on July 10, 2018 (Order Amending Joint Statement of Issues.) On August 10, 2018, a *Sua Sponte* Order Prohibiting Cameras,

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[1] The relevant limitations period thus commences two years prior to February 14, 2108, to wit: on or after February 13, 2016, with not including the date of occurrence. §6.31.2.13(I)(18)(b) and §6.31.2.13(M)(1) NMAC.

Cellular Telephones with Cameras, Transmitters, Receivers, and Other Recording Equipment at the Due Process Hearing was entered. *(Sua Sponte* Control Order.) The parties filed their respective Witness and Exhibit Lists. *See* Petitioners' Evidence Disclosure List, August 16, 2018 (Ps' Ex. List); Petitioners' Amended Evidence Disclosure List, August 17, 2018 (Ps' Amended Ex. List)[2]; Respondent's Disclosure of Witnesses, August 15, 2018 (R's Witness List, substituted for August 15, 2018 initial Disclosure); Respondent's Exhibits, August 15, 2018 (R's Ex. List); and Respondent's Amended List of Exhibits, August 16, 2018 (R's Amended Ex. List).[3]

The Due Process Hearing commenced on August 20, 2018, and concluded on August 25, 2018. The Petitioners proceeded *pro se* through the Student's Mother[4]. Tr. 6. The Respondent was represented by counsel. Tr. 6. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on October 25, 2018. Tr. 1624. A joint extension to issue the Hearing Officer's decision was requested by the parties, which was granted for good cause shown, for the filing of his decision on or before December 3, 2018. Tr. 1624-1626.

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[2] Although the Petitioners did not file a formal Witness List, they had filed of record a number of requests to compel attendance of witnesses, which will not now be independently listed, placing all on notice of the witnesses intended to be called. No objection was made regarding this issue by the Respondent. *See* Administrative Docket.

[3] There were a number of other prehearing matters filed of record, mostly dealing with production matters and compelling witness attendance, for which the administrative record will speak for itself. *See* Administrative Docket.

[4] The Petitioners were represented by two different counsel in different aspects of these proceedings, yet each subsequently withdrew prior to commencing the evidentiary due process hearing on the merits. *See* Orders Granting Withdrawal for Attorneys S (April 6, 2018), and Attorney C (July 9, 2018).

The Respondent filed its proposed Findings of Fact, and Conclusions of Law, on October 25, 2018. *See* Respondent's Proposed Findings of Fact and Conclusions of Law, October 25, 2018 (R's F&C). Its Closing Argument was filed on October 25, 2017. *See* Closing Argument, October 23, 2017 (R's Argument). The Petitioners filed their Findings of Fact (*Pro Se*) and Conclusions of Law (*Pro Bono* Counsel) on October 25, 2018. *See* Petitioner's Proposed Findings of Fact (*Pro Se*) and Conclusions of Law (*Pro Bono* Counsel), October 25, 2017 (Ps' FFCL). At that time an Entry of Limited Appearance was filed by a *Pro Bono* counsel seeking to act in a limited capacity generally in the drafting of pleadings. *See* Entry of Limited Appearance, October 25, 2018. The Petitioners also filed an unsigned Petitioners' Closing Argument on October 25, 2018. *See* Petitioners' Closing Argument, October 25, 2018. (Ps' Argument). Through *Pro Bono* counsel, the Petitioners also filed a Supplemental Legal Argument on October 25, 2108. Petitioners' Supplemental Legal Argument, October 25, 2108 (Supplemental Argument.)

A *sua sponte* issue was raised by the Due Process Hearing Officer seeking additional information and authority for the limited nature of the appearance of the *Pro Bono* counsel who is not seeking to become a full counsel of record. *See* Due Process Hearing Officer Email to Parties, October 26, 2018. On October 30, 2018, Pro Bono counsel filed an Amended Entry of Limited Appearance by *Pro Bono* Counsel, noting, among other things, authority for the limited entry he proposed. *See* Amended Entry of Limited Appearance by *Pro Bono* Counsel, October 25, 2018. The Respondent did not voice a position on the issue. *See* DPHO's Administrative Record. The *Pro Bono* counsel also represented that although the Petitioners forwarded to him their substitute closing argument, he neglected to forward the substitute argument for consideration, and

forwarded only the initial closing argument, which was the unsigned incorrect closing argument. *See Pro Bono* Limited Counsel Email, October 30, 2018. The Petitioners, acting *pro se* – that is, independently of the *Pro Bono* counsel – then filed Petitioners' *Pro Se* Response to Hearing Officer's Concern, on October 30, 2018 (*Pro Se* Response to Concern), and Petitioners' *Pro Se* Substitute Closing Argument, also on October 30, 2018 (Pro Se Substitute Closing Argument.) *Pro Bono* counsel then filed a Brief in Support of Petitioners' Substitute Closing Argument on October 30, 2018. Brief in Support of Petitioners' Substitute Closing Argument, October 30, 2018 (Petitioners' Substitute Brief). [5]

On October 31, 2018, an Order Accepting Limited Appearance and Notice of Submissions for Review was entered. *See* Order Accepting Limited Appearance and Notice of Submissions for Review, October 30, 2018. For record clarity, and not restating the basis for the said Order, it was ordered that the ripe Petitioners' closing documents which are now considered are: (1) Amended Limited Entry, (2) *Pro Se* Substitute Closing Argument, and (3) Petitioners' Substitute Brief. *See* id. This is in addition to the Ps' FFCL. On November 2, 2018, the Respondent then filed a Motion to Amend its Closing Argument. Respondent's Motion to Amend Closing Argument, November 2, 2018 (R's Amended Closing Argument.) An Order was entered allowing the amendment, and accepting the proposed Respondent's Amended Closing Argument to become the Amended Closing Argument, without requiring another hard copy submission of the actual Amended Closing Argument. *See* Letter Order, November 5,

[5] At this stage both parties had exceeded to a limited extent the pages authorized for argument, due to attachments, or combined argument with closing.

2018, Amended Closing Argument. Thus, for record clarity, the ripe Respondent's closing documents which are now considered are: (1) R's F&C, and (2) R's Amended Closing Argument.

Page limit extensions were subsequently allowed for arguments by both parties. *See* Order Accepting Limited Appearance and Notice of Submissions for Review, October 30, 2018.

On November 6, 2018, the Petitioners filed a Motion to Request Limited Conditional Agreement. *See* Motion to Request Limited Conditional Agreement, November 6, 2018. The Respondent opposed the said Motion on November 7, 2018. *See* Respondent's Objection to Petitioners' Motion to Request Limited Conditional Agreement, November 7, 2018. On November 8, 2018, an Order Denying Motion to Request Limited Conditional Agreement was entered. *See* Order Denying Motion to Request Limited Conditional Agreement, November 8, 2018.

This decision is due on or before December 3, 2018. Tr. 1440.

ISSUES

(1) Whether the LEA failed to provide the Student with a FAPE by failing to evaluate the Student in all areas of suspected disability, and specific learning disability including characteristics of dyslexia, thereby failing to provide appropriate special education to meet the Student's unique needs. Joint Amended Issue 1 (a).

(2) Whether the LEA failed to provide the Student with a FAPE by failing to comply with state law standards including the length of the school day and curriculum requirements for elementary age students, the New Mexico dyslexia regulation, and,

since June 2017, New Mexico's law restricting use of restraint and seclusion in public schools. Joint Amended Issue 1 (b).

(3) Whether the LEA failed to provide the Student with a FAPE by involving law enforcement in IEP team decisions. Joint Amended Issue 1 (c).

(4) Whether the LEA failed to provide the Student with a FAPE by IEP goals which do not implement research-based instruction and which fail to meet IDEA/*Endrew* standards requiring IEPs focused on the individual child's needs and calculated to provide the child with educational benefit, including opportunity to make progress on challenging objectives. Joint Amended Issue 1 (d).

(5) Whether the LEA failed to provide the Student with a FAPE by failing to provide an assistive technology evaluation, services, and equipment to aid the Student's skill development in written expression. Joint Amended Issue 1 (e).

(6) Whether the LEA failed to provide the Student with a FAPE by failing to provide a Board Certified Behavior Analyst (BCBA) to analyze the Student's nonconforming behaviors, and create and implement strategies based in research to successfully remediate behaviors. Joint Amended Issue 1 (f).

(7) Whether the LEA failed to provide the Student with a FAPE by reducing the Student's speech language therapy to thirty minutes per week in the November 2017 IEP. Joint Amended Issue 1 (g).

(8) Whether the LEA failed to provide the Student with a FAPE by writing IEPs that fail to include the parent s a full member of the IEP team. Joint Amended Issue 1 (h).

(9) Whether the LEA failed to provide the Student with a FAPE by writing IEPs which inappropriately rely on restraint and seclusion, parent, law enforcement, and potentially "ambulance" responses without conducting a current FBA or maintaining usable data about the context/causes of the Student's nonconforming behaviors and effectiveness of preliminary interventions. Joint Amended Issue 1 (i).

(10) Whether the LEA failed to provide the Student with a FAPE by not providing education which was "free" and instead relying on the parent to an extraordinary degree to seek and supply "answers" and "solutions" including requiring her physical present/interventions in order to respond to the Student's nonconforming behaviors during the school day and her ability to remove the Student from school and keep him at home. Joint Amended Issue 1 (j).

(11) Whether the LEA failed to provide the Student with a FAPE by failing to create any instructional or therapeutic program to teach the Student necessary sensory coping skills or help him desensitize to loud, noisy events or environments at school (fire alarms, cafeteria, etc.), and instead has placed him in a more and more restrictive environment with decreased educational opportunity and limited access to neurotypical peers. Joint Amended Issue 1 (k).

(12) Whether the LEA failed to provide the Student with a FAPE by failing to provide ESY (Extended School Year). Joint Issue 1 (l).

(13) Whether the LEA failed to provide the Student with a FAPE by failing to provide mediation when requested by the parent in December 2017/January 2018. Joint Amended Issue 1 (m).

(14) Whether the Student is entitled to an equitable remedy, and what that remedy should be. Joint Amended Issue 2.

(15) Whether the LEA failed to provide the Student with a FAPE by procedural errors which (a) impeded the Student's right to a FAPE, (b) significantly impeded the parent's opportunity to participate in the IEP process, or (c) caused a deprivation of educational benefits. Joint Amended Issue 3.

(16) Whether the Hearing Officer lacks jurisdiction over the Petitioners' claims due to the Petitioners' failure to exhaust administrative remedies and/or because the claims are not ripe for review. Joint Amended Issue 4.

(17) Whether the Hearing Officer lacks jurisdiction over the Petitioners' claims related to involvement of law enforcement (school resource officers) at IEP meetings and otherwise. Joint Amended Issue 5.

(18) Whether the Hearing Officer lacks jurisdiction over the Petitioners' claims of retaliation. Joint Amended Issue 6.

(19) Whether the Hearing Officer lacks jurisdiction over the Petitioners' claims related to the LEA's decision to limit parent communication to specific people and to restrict the Petitioner Mother from coming onto campus during the time she is not bringing the Student to school. Joint Amended Issue 7.

(20) Whether the Hearing Officer lacks jurisdiction over the Petitioners' claims related to an alleged report to CYFD, the LEA's decision not to engage in mediation, the alleged threatened referral to the Juvenile Probation and Parole Office, and the LEA's decision to disenroll the Student after he had been absent (by the Petitioners' choice) for over two months. Joint Amended Issue 8.

(21) Whether the Petitioners' claims are barred due to waiver, estoppel or laches. Joint Amended Issue 9.

RELEVANT LEGAL OVERVIEW

The burden of proof rests with the party challenging the IEP. *See Schaffer v. Weast*, 546 U.S. 49 (2005); *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022 (10th Cir. 1990). Once a subject-matter jurisdictional challenge is made, the responding party has the burden to establish jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561, 112 S.Ct. 2130, 2136, 119 L.Ed. 2d 351 (1992). In this action, the burdens rest, therefore, with the Petitioners. A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed. 690 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is reasonably calculated to enable the child to receive educational benefits. *Id.*, 458 U.S. at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose 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 Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743, 753-754 (2017).

"To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas 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." *Endrew*, 137 S. Ct. at 1000. The "unique circumstances" of the child for whom the IEP was created determine the adequacy of the offered IEP. *Endrew*, 137 S. Ct. at 1001. Deference is given to the expertise and exercise of judgment by the school authorities, with parents and school representatives to be given the opportunity to fully air their opinions regarding how an IEP should progress. *Endrew*, 137 S.Ct. at 1001. The issue for review is to determine if the IEP is reasonable, not whether it is regarded as ideal. *Endrew*, 137 S. Ct. at 999.

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. *See* 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111(a)(i) ("child find"). The school district "bears the burden generally in identifying eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a)(I). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. *See* 34 CFR §300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. *See* §6.31.2.10(D)(1)(a)&(b), NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp.

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

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

A "child with a disability" is defined as a child evaluated and determined to be eligible for, among other things, serious emotional disturbance (generally referred to as emotional disturbance) and other health impairment. *See* 34 CFR § 300.8(a). To be qualified, the child must be in need of special education and related services because of the emotional disturbance or other health impairment. *Id.*

An "emotional disturbance" is a condition, over a long period of time and to a marked degree that adversely affects the child's educational performance, which is, either singularly or in a combination, composed of the following characteristics:

1. an inability to learn not explained by health, intellectual or sensory factors;

2. an inability to maintain or to build satisfactory interpersonal relationships with peers or teachers;

3. behaviors or feelings which are inappropriate under normal circumstances;

4. generally, a persuasive mood of unhappiness or depression; and

5. a tendency for development of physical symptoms or fears which are associated with personal or school problems.

34 CFR § 300.8(c)(4)(I).

A specific learning disability is defined is "a disorder in one or more of the basic psychological processes involved in understanding or in using language, written or spoken," which manifests itself in "the imperfect ability to listen, think, speak, read, write, spell . . . including conditions such as . . . dyslexia." 34 CFR § 300.8 (c)(10).

New Mexico Regulation §6.31.2.7(B)(6) NMAC, under definitions, reads:

> (6) "Dyslexia" means a condition of neurological origin that is characterized by difficulty with accurate or fluent word recognition and by poor spelling and decoding abilities, which characteristics typically result from a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction and may result in problems in reading comprehension and reduced reading experience that may impede the growth of vocabulary and background knowledge.

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 34 CFR § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *See O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *See Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order a LEA to comply with procedural requirements. *See* 34 CFR § 300.513(a)(3). "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753.

Failure of the LEA to meet its child find duty to locate, identify, and evaluate a student with a disability amounts to a procedural violation. *See Timothy O.*, 822 F. 3d

at 1124. Similarly, improper implementation of an IEP can run afoul of the procedural requirements demanded by the IDEA. *See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d 431, 432 (9th Cir. 2010)(citations omitted). Thus, for procedural violations to constitute a denial of FAPE, they must be found to seriously impair the parents' opportunity to participate in the IEP formation process, or result in an educational opportunity loss to the child, or cause a deprivation of educational benefits to the child. *Id.* Otherwise, the error is harmless. *Id.* An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. *See* 34 CFR § 300.323(c)(1).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 CFR § 300.503; §6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 § CFR § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. *See Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727, 1998 WL 406787, *3 (10th Cir. Jul. 16, 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (6th Cir. 1996) (failure to provide notice of

"stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton County Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004).

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

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

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

An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional needs of the child. *See* 34 CFR § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *Id.* Related services are such "developmental, corrective, and other supportive services as are required to assist a child with a disability to benefit from special education . . ." 34 CFR § 300.34(a). *See also Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984)(services to aid student to benefit from special education).

As articulated in *Tatro, id.*, to be a related service, the child must have a disability to require special education services under the IDEA, the service must be necessary to

aid the child with the disability to benefit from the special education, and the service must be performed by a non-physician. *Id.* The IDEA's definition of "related service" is "relatively broad." *Jefferson Co. Sch. Dist. v. Roxanne B.*, 702 F. 3d 1227, 1236 (10th Cir. 2012).

Under federal law, marijuana is a Schedule 1 controlled substance. 21 U.S.C § 812 (c). A Schedule 1 controlled substance currently is defined as having no accepted medical use in treatment in the United States. 21 U.S.C § 812 (b)(1)(B). Its possession and use are illegal, subject to criminal penalties. 21 U.S.C § 844. Dispensing or distributing the substance is illegal, subject to criminal penalties. 21 U.S.C § 812 (b)(1)(B). Criminal conspiracy for drug crimes may subject the conspirator to criminal penalties. 21 U.S.C § 846. Aiding and abetting the principal may result in criminal penalties. 21 U.S.C § 2.

Under New Mexico law medicinal use of marijuana (cannabis) is decriminalized under limited situations, except for, among other things, on school grounds or property, or in a school bus. NMSA 1978, § 26-2B-5.

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). Implied in this concept is that the child need not master the regular education environment for mainstreaming, but rather that with appropriate supplemental aids and services the child

can make progress toward the IEP's goals in a regular education setting. *See L.K. v. Hamilton Co. Dept. of Edu.*, 118 LRP 34015 (6th Cir. 2018).

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.

The IEP is to be implemented as soon as possible after the IEP meeting. *See* 34 CFR § 300.323(c)(2).

Educational benefit is to be provided to the child, although that means neither maximizing the potential of the child nor minimizing the benefit provided. See *O'Toole* 144 F.3d at 702. *But see Endrew*, 137 S. Ct. 999 (appropriate in light of the child's circumstances). Some educational benefit is required. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). *But see Endrew*, 137 S. Ct. at 999 (appropriate in light of the child's circumstances). IDEA's statutory goal is "to provide each child with meaningful access to education by offering individualized instruction and related services appropriate" to meet the student's "unique needs." *Fry*, 137 S. Ct. at 755.

In relevant part, 34 CFR § 300.324(a) reads:

> (2) Consideration of special factors. The IEP Team must -
>
> > (i) In the case of a child whose behavior impedes the child's learning or that of others, consider the use of positive behavioral interventions and supports, and other strategies, to address that behavior.

A Functional Behavior Plan (FBA) is not federally mandated unless a manifestation determination is necessary. *See* 34 CFR § 300.530(f). According to New Mexico regulations, however, with behavioral planning in the IEP the LEAs are strongly

encouraged to conduct FBAs and integrate behavior intervention plans (BIPs) into IEPs for those students exhibiting problem behaviors well before the behaviors result in disciplinary action for which FBAs and BIPs are required under federal regulations. §6.31.2.11(F)(1) NMAC.

In New Mexico, a school may permit the use of the aversives of restraint or seclusion techniques on any student only if both of the following apply:

> (1) the student's behavior presents an imminent danger of serious physical harm to the student or others; and
> (2) less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm.

NMSA 1978, § 22-5-4.12 (2017).

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*, 538 F.3d at 1316. The focus of the IEP is to be on the text of the document developed, so to avoid possible factual disputes later. *See Id.*

Matters regarding the content of an IEP must first be exhausted administratively and brought before the IEP Team for consideration before a challenge may be jurisdictionally entertained in the due process chain. *See Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1275 n. 11 (10th Cir. 2007). "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." *Endrew*, 580 U.S. ___, Slip Op. at 16 (citations omitted). Exhaustion has been assumed to be jurisdictional. *See Muskrat v. Deer Creek Pub. Schs.*, 715 F.3d 775 (10th Cir. 2013). Similarly, matters mut be ripe for legal review. See *Morgan v. McCotter*, 365 F. 3d 882 (10th Cir. 2004)).

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 34 CFR § 300.511, 300.513. "The only relief that an IDEA officer can give . . . is relief for the denial of a FAPE." *Fry*, 137 S. Ct. at 753. Equitable factors are considered in fashioning a remedy, with broad discretion allowed. *See Florence County 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 v. Dist. of Columbia*, 401 F. 3d 516, 524 (D.C. Cir. 2005). There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza v. Bd. of Educ. of the Portales Mun. Schs.*, Nos. 10-0963, 10-0964 (D.N.M. 2011). A student's behavior, attitude, bad habits, and attendance may be considered when addressing an equitable remedy. *Garcia Albuquerque Pub. Schs.*, 520 F. 3d 1116 (10th Cir. 2008).

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

FINDINGS OF FACT

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

2. The Student is now 11 years old. *See* R's Ex. 79 (DOB 9/30/2007). At the time of the due process hearing he was ten years old, and during the relevant limitations period in this proceeding he was between eight and ten years of age[6]. Id.

3. The relevant school calender years within the two-year period are: (a) 2015/2016 School Calendar (July 2015 thorough June 2016), (b) 2016/2017 School Calendar (August 2016 through May 2017), and (c) 2017/2018 School Calendar (July 2017 through June 2018). In the testimony the school years were referenced, thus, they relate to these school calendar years. Ex. 109.

4. The Student's eligibility for special education services is for emotional disturbance due to undifferentiated childhood schizophrenia, coupled with post-traumatic stress disorder (PTSD). R's Ex. 79.

5. Undifferentiated childhood schizophrenia affects only one out of 30,000 children. Tr. 1470.

6. The Student has hallucinations, hears voices telling him to do things, and feels things crawling on his body. Tr. 1176 - 1184. Ps' Ex. 4.

7. He has delusions, impulsivity, agitation, aggression and disorganized behavior. Tr. 1456, 1471.

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[6] As noted, the relevant limitations period thus commences on or after February 13, 2016, with not including the date of occurrence and ends February 14, 2018. §6.31.2.13(I)(18)(b) and §6.31.2.13(M)(1) NMAC.

8. When the Student goes into a "crisis" mode he becomes violent, and must deescalate. Tr. 296 - 300; 1105; 1143.

9. The Student has a history of hospitalizations. Tr. 1093.

10. The Student's prescription drug regimen at different periods has included Seroquel, Gabapentin, Tenex, Clonidine, Risperdal, Haldol, Triafron, Xaniz, Faxil, and Depakote. Tr. 1111.

11. Risperdal and Gabapentin produced a toxic response in the Student. Tr. 1111-1112.

12. The Student was taken off the drugs by Dr. M, and the Mother began her consult in 2015 with Pediatric Neurologist Dr. F. Tr. 1006-1110. Tr. 1106.

13. Dr. F was able to associate with the Mother her under the New Mexico medical cannabis program. Tr. 1112.

14. Given the Student's medical history, during sometime in the 2016 school year, the Student began taking cannabis CBD oil, under the guidance of Dr. F, a pediatric neurologist. Tr. 1093.

15. Cannabidiol (CBD) oil is a non-intoxicant substance from the cannabis plant. Tr. 1405-1406.

16. CBD oil was then subsequently combined with cannabis THC for evening use, under the direction of Dr. F. Tr. 1094.

17. Tetrahydrocannabinol (THC) of the cannabis plant has impairing side effects. Tr. 1405.

18. Dr. F then placed the Student on Lithium at 450 milligrams, in addition to the medical cannabis combination. Tr. 1095.

19. The Student began to medically stabilize with the combined CBD oil, the THC, and the Lithium, unless the Student was in a "crisis" mode, at which time 20 milligrams of THC were administered, which was eventually increased to 40 milligrams of THC. Tr. 1096 - 1098.

20. "Crisis" modes developed while the Student was at school. Tr. 296 - 300; 319; 895 - 897.

21. The Student's Mother was then called and she administered the medical cannabis combination to the Student on campus, and off campus. Tr. 311, 1094; 1127.

22. After the Student began the medical cannabis in the Spring of 2016, he was able to focus, and do some of his work. Tr. 334-336.

23. While the Student was administered the medical cannabis during the 2016 to 2018 school years he was "able to actually access some education . . . sit down and try to do math or reading . . . [w]e did see more access to the education . . . [w]e were finally able to actually attempt it." Tr. 360.

24. The Student's Mother was called into the school about three times a week to assist with the Student's behavioral crises toward the end of October and into early November 2017. Tr. 1176.

25. The LEA discontinued the Mother's ability to administer medical cannabis at school in about November 2017. Tr. 1043-1044. R's Exs. 79, 80.

26. Use, possession, disbursement, and aiding and abetting and conspiracy related to cannabis is illegal under federal law, and violates state law when on school grounds.

27. The relevant education plans did not provide for administration of cannabis on school grounds. R's Exs. 38, 68, 79, 80 and 97.

28. On September 26, 2017, at the beginning of the 2017 school year, Principal ML, discussed that assault charges "could happen" against the Student. Tr. 776.

29. The Student had a crisis, the Mother was called, and a Code 4 was activated (where staff were alerted by walkie talkie that there was a situation with the Student). Tr. 1133.

30. The Student was placed in a sensory room where he could tear up papers, at which time Principal ML told the Mother she was going to change how the crisis situations were handled. Tr. 1135.

31. The sensory room is a room with football pads, a tent, soft pillows, and where sharp objects and edges are reduced, with slant boards added to reduce climbing on counter tops. Tr. 384.

32. Although the Mother asked for a meeting to discuss this proposal, the Student was in the middle of an escalated crisis, Principal ML had papers in her hands, tr. 1136, and Principal ML expressed concern about staff safety. Tr. 584.

33. The Student was five feet away from Mother and Principal ML, he became highly upset, used foul language, lunged toward Principal ML, and said that if he was going to be made a criminal then he would make it worth his time. Tr. 1138-1140.

34. Principal ML then changed the "crisis mode" so that if the Student was in a behavioral crisis staff were to step out of the room and observe the Student through the doorway. Tr. 1140-1141.

35. CS, the School Nurse, did not follow Principal ML's directive, and said she was uncomfortable as a nurse leaving the Student in an escalated crisis by himself, without supervision and support. Tr. 1141-1142.

36. Principal ML told Nurse CS that felony charges could be pursued against the Student if someone was harmed by him. Tr. 3120.

37. Special Education Director KP "pulled up" documentation she could find to support whether or not the Student can be charged with a crime, tr. 777, and she produced NMSA 1978, § 30-3-9, which describes the criminal elements for assault and battery on school personnel. Ps' Ex. 6 at 125-125. She concluded that this could be a possibility for the Student's actions. Tr. 782.

38. During the 2017-2018 school year the Student did not make a lot of educational progress due to his episodes. Tr. 80.

39. The Student left school on about November 15, 2017. Tr. 1189. He has remained out of school since that time.

40. School Resource Law Enforcement Officer MF was invited by the LEA to the January 12,2018 IEP meeting, so he could become familiar with the Student's IEP. Tr. 813-819. There is no evidence, however, that he held knowledge about the Student, with emphasis on the Student's unique circumstances.

41. The subsequent meeting and educational documents considered as part of the education plan allowed use of police and calling an ambulance to deal with the Student's behavior issues. R's Exs. 79, 80.

42. While the Student's IEPs and related documents do show that he was making some educational progress, for instance, as in his reading and writing, as more fully

described in the Analysis section below, his crisis behaviors required him to be out of the classroom, so although he was making some process academically on standardized tests and as reflected in his IEPs, his behaviors and plans or lack of appropriate plans and crisis modes are what are found to impact his educational benefit. In other words, the very unique Student child is often out of class in a crisis mode where the deescalating method is to either use medical cannabis on one hand (which is illegal and therefore unreasonable for an IEP) or threaten him with arrest on the other hand. It is, therefore, found that the relevant educational plans with supporting documents as to behavioral matters do not afford the Student a FAPE, despite some academic progress shown in the education plans.

43. The Student's Mother is found to be credible, and weight is given to her testimony. Although she was impeached to some extent, it did not impact her truthfulness in this hearing, particularly having observed her demeanor first-hand. She may have been less than stellar in her people skills in her dealings with the LEA, publishing emojies on Facebook, tearing up paperwork, and engaging in behaviors which gave rise to an independent D.D. Waiver Social Worker's, VG's, suggestion that she could be a threat. Yet I conclude that her testimony is believable, particularly in regard to the Student's complicated unique behavioral educational circumstances and medical history.

44. Nurse CS is found to be very credible. Although there is evidence that she is also an acquaintance of the Mother and of the Student off campus, the LEA is located in a very small town and people do associate with one another. CS took her duties as a nurse seriously, refusing to violate her duties to her profession despite being directed to do so by

the school principal. She was familiar with the Student and his educational needs. Weight is given to her testimony. She is found to be truthful, given her testimony and demeanor.

45. Similarly, LEA Social Worker DT is found to be credible and weight is given to her testimony. With hands on experience with the Student, she was familiar with the Student's educational needs and progress or lack of progress. She is found to be truthful.

46. Superintendent JS is found to be truthful and credible. As an administrator, his interests are to follow the law. Although he is aware of the Student, he did not engage with the Student as did, for instance, Nurse CS or Social Worker DT.

47. Chief SR of the local police department is found to be truthful, for the limited purpose of her background testimony.

48. VG is an independent D.D. Wavier Social Worker and is found to be credible, and truthful, although to a limited extent relating to meetings and the Mother's behavior.

49. Dr. DM is found to be well versed and credible as an expert, and his background testimony about medical cannabis, undifferentiated childhood schizophrenia, and post traumatic stress disorder was very helpful for this fact finder. He reviewed medical records from other providers, although he did not interview the Student. His testimony, while very helpful, nonetheless relates more to the Student's best interests and medical reasonableness areas in being administered medical cannabis, which are outside of the jurisdiction of this hearing.

50. Although truthful, limited weight is given to Nurse DEO's testimony about strains of medical cannabis. Although informative, it related little to FAPE.

51. MF, DC, ML, JM, ZWH, LS, JD, MT, DS, AT, and CGA are found to be truthful, although any testimony, if any at all, which may contradict the testimony of those whom

specific findings are made is given less weight than that given those for whom specific credibility determinations are made.

52. Special Education Director KP's testimony is given weight, and she is found to be truthful, particularly in exploring the contradictory testimony between the Mother's version and Principal ML's version of events surrounding the issue of discussion of possible criminal sanctions for the Student.

53. Officer MF had limited memory of events. His testimony is given limited weight.

54. Principal ML's credibility causes some concern regarding the incident in the hallway meeting where a unilateral decision was made for new crisis mode behavior, and as to the use of possible criminal sanctions. Limited weight is given to her testimony.

55. 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.

56. Factual determinations indicated in the Analysis and Conclusion section, below, if not stated above, are also by reference deemed as Findings, as are Conclusions if better described as Findings, and vice-versa.

ANALYSIS AND LEGAL CONCLUSIONS

Medical Cannabis and FAPE

The primary challenge, indeed, the only challenge the Petitioners briefed through *Pro Bono* counsel, is the issue of whether the Student was denied FAPE because the LEA did not provide a related service of either administering, or allowing the Mother to administer, medical cannabis on school grounds, and because it would not allow staff to assist in escorting the Student off of school grounds to receive medical cannabis. *See* Petitioners'

Substitute Brief, Petitioners' *Pro Se* Substitute Closing Argument, Ps' FFCL, R's Amended Closing Argument, and R's F&C. At issue is whether the relevant IEPs were "reasonable," *see Endrew*, 137 S. Ct. at 999 (reasonable, not ideal), considering the "unique circumstances" of the Student, *see Endrew*, 137 S. Ct. at 1001, as to whether or not medical cannabis is a related service necessary or required for the Student to benefit from special education under the *Tatro* test, given that the medical cannabis is unlawful under federal criminal law, and while on school grounds under state criminal law, and would impose an unlawful duty on both the creation and implementation of the IEPs should they contain a related service for medical cannabis. Given these factors, it is found and concluded that the relevant IEPs are appropriate absent medical cannabis as a related service because medical cannabis is unlawful under federal law and unlawful under state law while at school. Therefore, there is no violation of FAPE. This addresses Joint Issues (1)(d), (i), (j) and (k).

At the outset it is found, under the Student's unique circumstances based on the record in this particular case, that but for the unlawfulness of the medical cannabis, the medical cannabis substance in the amount provided to the Student by the Mother during the school day would be a realted service. *Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. at 891 (services to aid student to benefit from special education). Whether on school grounds personally by the Mother, or which non-physician staff would be requested to administer it on school grounds, or in which staff would be requested to take the Student off school grounds to allow the Mother to administer the substance, based on the consult and recommendation of the Student's medical cannabis physician under New Mexico law, Dr. TF, and with guidance from Greenleaf Dispensary, it would come under the "relatively broad," *see Jefferson Co. Sch. Dist. v. Roxanne B.*, 702 F. 3d at 1236, umbrella of a related

service as a supportive service required to assist the Student with his education due to his behaviors resulting from undifferentiated childhood schizophrenia and post-traumatic stress disorder. *See* 34 CFR § 300.34(a). The LEA's Superintendent admitted as much. Tr. 960 (if recommended by a doctor then necessary.)

Having reviewed the Mother's demeanor and listened to her testimony during the six-day due process hearing, and having considered her testimony, and some impeachment of her testimony, I find her to be credible as to being truthful, particularly in regard to the Student's medical history of hospitalizations and history of prescribed medications. Of note, at the time of the relevant portions of the due process hearing, this Student was ages eight, nine, and ten – he was, and is, a child. Historically, however, the Student had been prescribed and had been taking at different times Seroquel, Gabapentin, Tenex, Clonidine, Risperdal, Haldol, Triafron, Xaniz, Faxil, and Depakote. Tr. 1111. A mixture of the Risperdal and Gabapentin produced a toxic response in the Student. Tr. 1111-1112. Dr. M then took the Student off those medications and the Mother began her consult in 2015 with Pediatric Neurologist Dr. TF. Tr. 1006-1110. Tr. 1106. Dr. F. was able to associate with her under the New Mexico medical cannabis program. Tr. 1112. At that stage medical cannabis became an option for treatment. Id. There is no contest that the Mother and Dr. F have engaged, or are engaging, in lawful New Mexico activity through the New Mexico medical cannabis program – the legalities of New Mexico's medical cannabis scheme and Mother's acquisition of the medical cannabis for the Student are not at issue.

Similarly, it is not at issue as to whether the medical cannabis was reasonable and necessary medical care, as the LEA argues. See R's Amended Closing Argument, p. 12. The issue is whether a FAPE was denied because a related service of the administration of

medical cannabis, or assistance for the administration of the medical cannabis, was required or necessary for the Student's educational benefit. The LEA effectively is under an obligation to provide services to a student whether or not the student is medicated. 34 CFR § 300.174 (prescription medication not a precondition to attending school or obtaining services). In this context, the opinion of LEA's cannabis expert, Dr. DM, while very informative and competent on the subject of marijuana, that medical cannabis with THC is not "a good drug for somebody like [Student]," tr. 1415, goes to the issue of whether medical cannabis is reasonable and necessary medical care, which is beyond the subject-matter jurisdiction in this hearing. The jurisdictional question is whether the Student was denied a FAPE due to not providing related administration of, or assistance for the administration of, the medical cannabis required or necessary for the Student's educational benefit, not whether the medical cannabis was necessary medical care. *See* 34 CFR §§ 34, 174 and 513.

In this context, the Student was in the LEA during the relevant school years of 2015/2016, 2016/2017 and 2017/2018. *See* Ex. 109. During sometime in the 2016 school year, Mother, with the consult and recommendation of Dr. F, began cannabis CBD oil alone, tr. 1093 (which is a non-intoxicant, tr. 1405-1406), then combined it with cannabis THC (which has impairing side effects, tr. 1405) in the evenings. Tr. 1094. In addition, the Student was put on Lithium, with the dosage raised to 450 milligrams. Tr. 1095. The combined effect of the CBD oil, the THC, and the Lithium began to stabilize the Student medically, unless he had a "crisis," where 20 milligrams of THC were then to be administered, which was eventually increased to 40 milligrams of THC. Tr. 1096 - 1098. The "crisis" periods would also arise in the school setting, where the issue of administration,

or assistance with the administration, of medical cannabis relates to the need or requirement for educational services.

School Nurse CS was active in oversight and providing the Student's educational, medical, and mental health services. Tr. 291-354. During the 2016/2017 school year Nurse CS recalled a particular "crisis" the Student had where he ran away from the classroom, and became upset and was throwing things, becoming violent, and agitated. Tr. 298. Nurse CS interacted with the Student frequently during the 2016/2017 school year. Tr. 301. When a crisis such as this type arose, there would be an internal deescalation, and if the Student would not be able to get to a better place then Mother was called and she administered medical cannabis to the Student. Tr. 297-301. According to Nurse CS, after the Student began the medical cannabis in the Spring of 2016, he was able to focus, and do some of his work. Tr. 334-336. According to School Social Worker DT, during the 2016 to 2018 school years while the Student was taking cannabis, the Student was "able to actually access some education, where [the Student] would sit down and try to do math or reading, ... [w]e did see more access to the education ... [w]e were finally able to actually attempt it." Tr. 360. Given these events, it is found that this benefitted the Student's functional and behavioral performance. Although there may be other standardized test results, weight is given to the Nurse's and Social Worker's testimony from educating and assisting the Student in his activities at school. The ability to administer medical cannabis at school was then discontinued by the LEA on about November 2017. Tr. 1043-1044. R's Exs. 79. 80.

With these facts, it is found that administration, or assistance with the administration[7], of the combined cannabis CBD oil and cannabis THC during a crisis mode of the Student's escalation at school would be, but for the unlawfulness of marijuana, a related service as a supportive service required to assist the Student with his education due to his behaviors associated with undifferentiated childhood schizophrenia and post-traumatic stress disorder. *See* 34 CFR § 300.34(a). Note that this decision does not, and will not, make any determination on whether administration of medical cannabis is reasonable and necessary medical care for this Student, or whether it is in the Student's best interests -- there is no jurisdiction to address these issues. 34 CFR § 300.513 (a)(2)(FAPE jurisdiction). The issue is FAPE and a related service. In this regard, possession and use of marijuana are illegal under federal law. 21 U.S.C § 844. It is a Schedule 1 controlled substance, *see* 21 U.S.C § 812 (c), which means that it has no accepted medical use in treatment in the United States. 21 U.S.C § 812 (b)(1)(B). Dispensing or distributing the substance is illegal, subject to criminal penalties. 21 U.S.C § 841 (a)(1). Criminal conspiracy for drug crimes may subject the conspirator to criminal penalties. 21 U.S.C § 846. Aiding and abetting the principal may result in criminal penalties. 21 U.S.C § 2. Thus, although medical cannabis would rise to the level of a related service under the facts of this record should it be lawful, the substance remains unlawful under federal law.

An IEP is the educational plan for the Student which places a duty on the LEA through the IEP team to find the child, *see Timothy O.*, 822 F. 3d at 1124, create an IEP, 20

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[7] In this regard, assistance in the administration of the medical cannabis also means having staff assist in the removal of the Student off of school grounds to an area where the Mother is parked in her vehicle so she can administer the dose of medical cannabis to the Student.

U.S.C. § 1410(20), *see generally Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (the four corners of the IEP to evaluate duties), and then implement it. 34 CFR § 300.323(c)(2). Placing a duty on the IEP Team members to violate federal criminal drug law in order to meet federal FAPE law, as the Petitioners assert, places the IEP members in a Catch 22 position. *See* Heller, Joseph, CATCH 22, (Simon and Schuster 1961)(the paradox of contradictory rules). That is, when read to the conclusion the Petitioners' seek, the IEP Team must either: (1) write and implement an IEP requiring administration or help with administration of medicinal cannabis to assist the Student's possession and use of marijuana, either on campus, or help take him off campus, or to agree or conspire with Mother to allow the Student to use or possess marijuana, in violation of federal criminal drug law, or (2) not write and implement an IEP in which a related service of medicinal cannabis is required to provide the Student with a FAPE, in violation of the federal IDEA. A reasonable solution, however, of the possible conflict is found in the interpretation of the IDEA itself – that is, the IEP Plan is only to be reasonable, not ideal. *Endrew*, 137 S. Ct. at 999.

Since the terms of an IEP Plan must be reasonable, it is concluded that it is unreasonable to place a duty on the IEP Team to violate federal criminal law to meet the requirement of a FAPE in an IEP for a related service. Thus, the IEP of October 11, 2016, R's Ex. 38, the IEP of November 7, 2016, P's Ex. 8, the IEP of November 2, 2017 R's Ex. 68, the Addendum to the IEP of November 2, 2017, with its prior written notice, P's Ex. 8, with a BIP of November 30, 2017 and Prior Written Notice of November 30, 2017, R's Ex. 79, Prior Written Notice of December dated December 13, 2107, R's Ex. 80, and IEP Addendum of January 12, 2018, R's Ex. 97, in context of medical cannabis, do not create an unreasonable

plan or plans by not allowing the LEA staff to assist with the administration of the Student's medical cannabis as a related service. There is no violation of FAPE.

That the Justice Department is not now prosecuting medicinal cannabis use or possession actions when allowed by State law is irrelevant. It is noticed that policy can instantly change so that what might not be prosecuted today may be prosecuted tomorrow. *See Sledge v. Albuquerque Public Schools*, DPH No. 1819-01 (SEA N.M. Oct. 7, 2018). The law remains the same. Marijuana use and possession, distribution, dispensing, and conspiracy, and aiding and abetting, are illegal under federal law. *See* 21 U.S.C §§ 2, 812, 844, and 846.

State law in New Mexico does allow, to some extent, the medicinal use and possession of medical cannabis. See NMSA § 26-2B-1, *et seq*. It cannot, however, be on school property. NMSA 1978, § 26-2B-5. As noted earlier, there has not been any contest as to Mother's ability to provide medical cannabis outside of the school setting, presumably in accord with New Mexico's medical cannabis law. However, if within the school limits, it remains prohibited, and New Mexico has similar criminal violations for possession, distribution, aiding and abetting, and conspiracy. *See, e.g.,* NMSA §§ 30-1-13, 30-28-2, and 30-31-20. Thus, just as with the federal law, placing a duty on the IEP Team to violate state drug law would amount to an unreasonable IEP Plan, and it is concluded that a FAPE is not violated because it fails to include medical cannabis. The primary holding remains, however, in that it violates federal law, whether or not permissible to some extent under state law.

The parties address issues relating to statutory construction, funding for schools, and other matters regarding why or why not medical cannabis should or should not be made a

part of the Student's IEP Plan. *See Pro Se* Substitute Closing Argument, Petitioners' Substitute Brief, Ps' FFCL; R's F&C, and R's Amended Closing Argument. Having concluded the matter is resolved under interpretation of the IDEA itself in that an IEP Plan must be reasonable, and that it is unreasonable to impose illegal duties of violating federal and state drug laws on the IEP Team to comply with FAPE, the other legal issues need not be addressed.

As represented by the LEA, although there may now be a type of CBD oil available for use within federal law approved by the DEA, the substance used by the Student under the guidance of his health care provider was a combination of CBD/THC. As a result, it is concluded that because CBD oil alone was not an issue, it need not now be explored.

Dyslexia, Speech Language Reduction, Assistive Technology, and Related Issues

This addresses Joint Issues (1)(a), (b), (e), (g), (3) and (4). Child find places a duty on the LEA to find the Student – the duty is not placed on the Student to ask for help. The school district "bears the burden generally in identifying eligible students for the IDEA." *See Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d at 1066 (10th Cir. 2002). There must be a suspicion of disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058. However, for administrative jurisdiction to proceed, educational matters which relate to the child's IEP must first be exhausted administratively and brought before the IEP Team. *See Ellenberg v. New Mexico Military Institute*, 478 F.3d at 1275 n. 11. Reading the two duties together, then child find requires a suspicion of the disability before the LEA is to act, whether before or after the IEP process has begun, so thus there is no need to first bring the

issue before the IEP Team because the duty remains on the LEA in the first place. Thus, there is administrative jurisdiction to address this issue of dyslexia suspicion, if any.

The Petitioners have failed to meet their burden to show that there was a suspicion of dyslexia. *Schaffer v. Weast*, 546 U.S. 49. That is, there is no evidence by experts, or otherwise, which showed that the Student exhibited dyslexia signs of "difficulty with accurate or fluent word recognition" or "poor spelling and decoding abilities," resulting from "a deficit in the phonological component of language that is often unexpected in relation to other cognitive abilities and the provision of effective classroom instruction." See §6.31.2.7(B)(6) NMAC. Dyslexia is classified as a specific learning disability based on understanding and using language, manifesting itself in "the imperfect ability to listen, think, speak, read, write, spell . . ." 34 CFR § 300.8 (c)(10). There is insufficient, if any, evidence presented by the Petitioners that there was a suspicion of dyslexia.

The Student was suspected of, and was found eligible for, special education services for emotional disturbance. Ex. 68. His medical diagnosis was undifferentiated childhood schizophrenia, R's Ex. 115, and post-traumatic stress disorder. R's Ex. 14.

Given the cornerstone foundation arising from the IEP, *see Sytsema*, 538 F.3d at 1316, and insufficient evidence otherwise to meet the Petitioners' burden, it is found that there was no procedural violation of FAPE. The child find procedure was not violated. 34 CFR § 300.111(a)(I). There was no suspicion of dyslexia to require an evaluation for a specific learning disability. There is, therefore, no need for further analysis as what impact, if any, there would be had there been a procedural inadequacy. 34 CFR § 300.513(2).

Speech and language services are deemed "related services." See 34 CFR § 300.34 (c)(15). Related services are such "developmental, corrective, and other supportive services

as are required to assist a child with a disability to benefit from special education . . ." 34 CFR § 300.34(a). *See also Tatro*, 468 U.S. 891 (services required to aid student to benefit from special education).

Once again, reviewing the IEP as cornerstone foundation, s*ee Sytsema*, 538 F.3d at 1316, given his reading, writing, and communication skills as noted above, and his "growth toward his goals and pragmatic communication skills," the reduction to 120 hours a month (30 hours a week), deferring to the IEP, does not violate a FAPE. Ex. 68 at 17, 28. According to the IEP the Mother concurred with the reduction. Id. at 17. Nonetheless, given the IEP factors and the Student's advancement in the speech and language sector it is concluded the Petitioners did not meet their burden to prove a FAPE violation by decreasing the number of hours of speech and language therapy to 120 hours a month.

The next issue is that FAPE was denied because the LEA failed to provide an assistive technology evaluation, and services and equipment to aid the Student's skill development in written expression. Joint Issue (1)(e). The assistive technology issue presumably is being sought as a related service. *See* 34 CFR § 300.105 (a) (2). Apparently the technology the Petitioners sought was speech to text. Tr. 343. As a related service then the technology must be required for the Student to benefit from special education. 34 CFR § 300.34(a). Given the Student's communication, reading, and writing skills as noted above, with the cornerstone reviewed from the IEP, s*ee Sytsema*, 538 F.3d at 1316, the Petitioners have not met their burden to show that it was required for the Student to benefit from special education. 34 CFR § 300.34(a). There was no denial of FAPE.

Extended School Year

This addresses Joint Issues (1)(l) and (4). Joint Issue (1)(l) alleges that a FAPE was denied because of the failure to provide extended school (ESY) year services. Id. ESY services are appropriate when a student would experience substantial regression without summertime instruction. *See C.H. v. Goshen Central Sch. Dist.*, 61 IDELR 19 (S.D.N.Y. 2013)(persuasive, not binding). This is read in connection with the appropriateness under the *Endrew F, supra*, standard.

Review of the Ps' FFCL for clarity on how the Petitioners met their burden is unavailing. *See* Ps' FFCL. Evaluation of the IEP, as the cornerstone, thus arises. *See Sytsema*, 538 F.3d at 1316. The November 2, 2017 IEP explains that ESY services were considered, yet that they were not needed, R's Ex. 68 at 29, because the Student did not "exhibit substantial regression that cannot be recouped within a reasonable period of time in one or more of the critical areas addressed in the annual measurable goals." Id. at 5. The concept of services was therefore brought before the IEP Team and there is administrative jurisdiction, although there is no notation that the Mother objected to the lack of ESY services at the time. Id. at 29. In any event, the Petitioners have not shown by a preponderance of the evidence that ESY services are necessary to provide the Student with a FAPE. 34 CFR § 300.106. As a result, it is concluded there was no denial of a FAPE.

Parent as Member of IEP Team

This addresses Joint Issues (1)(h), (3) and (4). This issue questions whether the IEPs failed to include the Mother as a "full member" of the IEP Team. Although *Ellenberg v. New Mexico Military Institute*, 478 F.3d at 1275 n. 11, requires administrative IEP Team exhaustion, nonetheless, although the argument is not entirely clear, since the Mother's

theory is that she is not a "full member" of the IEP Team then this imposes a barrier to first bring the idea that she is not a full member of the IEP Team to the IEP Team in the first place. Thus, the issue will be examined.

The IEP team for a child with a disability includes, among others, the child's parent. *See* 34 CFR § 300.321. If the claim is that the parent is not a "full member" of the IEP Team then it is a claim that it violates this procedure – a procedural violation. A FAPE denial may only arise due to a procedural violation when 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. *See* 34 CFR § 300.513(a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. Review of the *Pro Se* Substitute Closing Argument, Petitioner's Substitute Brief, and Ps' FFCL gives little guidance on how her allegations tie up to the facts presented.

Resort once again is made to the relevant IEPs themselves. *See Sytsema*, 538 F.3d at 1316. In this regard, Ps' Ex. 8, and R's Exs. 38, 68, 79, 80 and 97 are examined as IEPs or notices. The documents contain the Mother's signature as a participant. The Petitioners have not met their burden to prove, first, that there was any procedural violation, and then, second, if so, that the Mother's opportunity to participate in the decision process was seriously hampered, or that it compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707.

What does arise, however, is what is contained in R's Ex. 76, which was the Eligibility Team Determination Meeting of November 16, 2017, for an eligibility determination for emotional disturbance based on undifferentiated schizophrenia. *See* R's Ex. 76. The Mother's signature is not on the document. Id. Prior to that date, during the 2017-2018 school year, the Mother had been given a volunteer packet to complete to allow her to come unsupervised onto the school grounds, which included a requirement for a background check. Tr. 574. The form requires a background check on any person who is unsupervised on the campus for prolonged activity. Tr. 575. The Mother had been on the campus in an unsupervised role, outside of the Student's classroom and related settings. Tr. 626-634. The Mother ripped the volunteer packet into shreds. Tr. 1295. The Mother was invited to attend the November 16, 2017 meeting, for the purpose of the special education meeting, despite the volunteer form not being completed. Tr. 1507-1508. It is found that completing the volunteer packet was not a precondition to attending the November 16, 2017 meeting.

While the Mother's concern, subjectively, that she was being hampered in her efforts to remain unsupervised in the school setting is considered, she was not prevented from attending the November 16, 2017 meeting because she did not complete a volunteer form. It is noted that the interactions between the Mother and the LEA had begun to disintegrate during this time frame. The Mother was, however, invited, and she was free to attend the meeting on the campus, although it had become adversarial between the parties by then. It is concluded that the Petitioners have not met their burden to prove, first, that there was any procedural violation, and then, second, if so, that the Mother's opportunity to participate in the decision process was seriously hampered, or that it compromised the student's right to

an appropriate education, or caused a deprivation of educational benefits. *See O'Toole*, 144 F.3d at 707. There was no violation of a FAPE.

Board Certified Behavior Analyst (BCBA), Behavior Plans, Police Involvement, Parent Involvement, Restraint

This addresses Joint Issues (1)(c), (f), (i), (j), (3), (4), and (5).

The only time a Functional Behavior Plan (FBA) is federally required is when there is a manifestation determination action. *See* 34 CFR § 300.530(f). *See Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR 271, 118 LRP 37748 (E.D. Pa., 17-2658, Sept. 10, 2018). New Mexico encourages the FBA process outside of the manifestation determination actions for students exhibiting problem behaviors well before the behaviors result in disciplinary action. §6.31.2.11(F)(1) NMAC. An encouragement is not a mandate. Otherwise, when a child's behavior impedes the child's learning or that of others, positive behavioral interventions and supports, and other strategies, are to be considered to address that behavior. 34 CFR § 300.324(a)(2).

The Student, during these proceedings, was between eight and ten years of age. He is now 11. He was ten years old when the final Behavior Intervention Plan (BIP) of November 30, 2108, was completed. R's Ex. 79. On December 13, 2017, a Prior Written Notice of Proposed Actions was completed which, among other things, reflected that the Student had a current IEP of November 2, 2017, and that the BIP of November 30, 2017 was developed and accepted by the parent and the team. R's Ex. 80. Mother signed each of the three documents as a participant. Id. On January 12, 2108, another meeting was held in which the Mother was present, but also in attendance was the School Resource Officer,

Officer F. R's 97. Officer F is a police officer in the local community. Tr. 422. As noted, the Student at this time was ten years of age.

The Student has been determined to be eligible, by the LEA, for services based on undifferentiated childhood schizophrenia and post-traumatic stress disorder (PTSD). Undifferentiated childhood schizophrenia is very rare – one in 30,000 children is affected. Tr. 1470. The Student, unlike a child without special needs, due to his schizophrenia, has delusions, hallucinations, impulsivity, agitation, aggression and disorganized behavior. Tr. 1456, 1471. The PTSD makes him afraid, for example, of a man in his neighborhood. Tr. 1472. Thus, this then ten year old child Student saw things, heard things, and felt things that a child without his same special needs would not see, hear, and feel. These are this Student's "unique circumstances" for which the IEP is to be created. *Endrew*, 137 S. Ct. at 1001.

Whereas the FBA is not mandated, nonetheless the IEP Team must consider the Student's functional needs, and his behaviors, among other things in creating the IEP. § 34 CFR § 300.324(a)(iv)& (2). With foundation, the BIP of November 30, 2018, which became part of the IEP, will be explored, with the Prior Written Notice of Proposed Actions for the January 12, 2108 meeting. Ex. 97.

The Mother objected to the proposal due to the crisis portion of the BIP Plan. R's Ex. 80 at 2. On January 12, 2108, she asked that the use of the police be changed. R's Ex. 97 at 2. It is concluded, therefore that she has exhausted this issue and that it may proceed. *Ellenberg v. New Mexico Military Institute*, 478 F.3d at 1275 n. 11.

Facts leading up, and including, the various meetings, including November 30, 2017 and January 12, 2108, are particularly relevant. The Student and the Mother had a good rapport with a prior police officer, Officer S, yet Officer S was no longer available to meet

with the Student. Officer F was invited by the LEA to the January 12,2018 meeting so he could become familiar with the Student's IEP. Tr. 813-819. An optional related team member may include, at the discretion of the agency or the parent, an individual who has knowledge regarding the child. 34 CFR § 300.321(a)(6). As a matter of law, an agency is not prohibited from reporting a crime committed by a child with a disability. 34 CFR § 300.535. Thus, although there is no prohibition to the police officer's presence, the question is whether he had knowledge about the Student. There is no evidence that he held knowledge about the Student, with emphasis on the Student's unique circumstances.

During the relevant time frame, at the beginning of the 2017 school year, the school principal, Principal ML, discussed that assault charges "could happen" against the Student. Tr. 776. On September 26, 2017 there was an incident when the Student had a crisis, and the Mother was called. A Code 4 was established, where staff were alerted by walkie talkie with the Code 4 meaning there was a situation with the Student. Tr. 1133. Mother arrived at the sensory room where the Student was to tear up papers, at which time Principal ML told the Mother she was going to change how the crises were handled. Tr. 1135. The Mother asked for a meeting to discuss this, but Principal ML had papers in her hands, while the Student was in the middle of an escalated crisis. Tr. 1136. Principal ML expressed concern about staff safety. Tr. 584. Principal ML told staff that if they were afraid of being hurt by the Student, rather than restraining him, they could step out of the room, yet remain within the line of sight, and step back in after later. Tr. 586. According to Mother, Principal ML stated that based on her recent review of restraint and seclusion law, coupled with staff safety, that she would impose new techniques and will have staff leave the room while the Student was escalated, and that staff would be able to press charges against the Student if

he touched them in a hurtful manner. Tr. 1138. According to Principal ML, she said that if some staff members were not aware of the Student's condition or did not have rapport with the family, that they, that is, the staff, could avoid assault charges. Tr. 586. The Student was five feet away from Mother and Principal ML at that time, and he became highly upset, with foul language, and lunged toward Principal ML and said that if he was going to be made a criminal then he would make it worth his time. Tr. 1138-1140. At that stage the crisis mode changed to where if the Student was in a behavioral crisis then the staff were to step out of the room and observe the Student through the doorway. Tr. 1140-1141. The Nurse, CS, refused to follow Principal ML's directive, stating that as a nurse she was uncomfortable with leaving the Student in an escalated crisis by himself. Tr. 1141-1142. At this time the Student was nine years old, going on ten. Tr. 1144.[8]

A meeting was held with Special Education Director KP during that time period and she "pulled up" documentation she could find to support whether or not the Student may be charged with a crime, tr. 777, and she produced NMSA 1978, § 30-3-9, which describes the criminal elements for assault and battery on school personnel. Ps' Ex. 6 at 125-125. Ms. KP found that this could be a possibility for the Student. Tr. 782. This testimony conflicts with Principal ML's memory that she spoke of assault charges as being pressed against the staff, rather than the Student, when she met with Mother in the hallway. *See* Tr. 586. The conflict in testimony between Mother and Principal ML is resolved in favor of Mother. Having Special Education Director KP subsequently "pull up" law regarding assault charges that could possibly be brought against the Student corroborates the Mother's version of

[8] The IEP in place at the time was the November 7, 2016 IEP (P's Ex. 8) which spoke of an attached BIP, see P's Ex. 8 at 00024, yet there is not a BIP attached to the Exhibit.

events that Principal ML said that staff could press charges against the Student if he touched them in a hurtful way. Weight is given to Special Education Director KP's testimony to find that assault charges were discussed throughout that assault charges were a possibility for the Student.

During the 2017-2018 school year the Student did not make a lot of educational progress, because he was, as described by EA DC, "having episodes every day." Tr. 80. It is found that the various "crises" and "episodes" impact functional performance as well, given the background explained in this opinion. By the end of October and into November 2017 the Mother was being called into the school about three times a week to assist with the Student's behavioral crises. Tr. 1176. A "crisis" is when the Student hits, kicks, becomes escalated, upset, has frequent hallucinations, and becomes aggravated. Tr. 1329-1334. The BIP of November 30, 2017, refers to the Student's behaviors of physical aggression and threats of physical aggression toward himself and others, as well as noncompliance with teacher directions, and inappropriate running. R's Ex. 79 at 2. The BIP set out four consequences for the behavior, first being expected behavior, second being distraction, third being a choice to the sensory room and the fourth, if the Student attempts to hit, scratch, kick, spit or bite personnel then he is to be moved to a safe place, CPI deescalation will be implemented, the crisis team will be notified, and the Student will be told he can go into his tent, hit tackle pads, and tear papers, but that he cannot touch anyone while he is angry. R's Ex. 79 at 3. The "Crisis Plan," because of an emergency or behavior crisis, is to call a Code 4, have available the CPI Team to respond where CPI strategies will be implemented, the Mother will be notified, law enforcement will be called for support if necessary, and as a last

resort, if the Mother is not available and the Student is harming himself or others, then an ambulance will be called. R's Ex. 79 at 4.

Given this factual backdrop, it is concluded that the November 2, 2107 IEP, with the BIP of November 30, 2107, the December 13, 2107 PWN, and the January 12, 2018 PWN are inappropriate to meet the Student's unique circumstances. *Endrew*, 137 S. Ct. at 1001. While deference is given the LEA's expertise, when read not in a vacuum but as a whole, the threat of law enforcement arrest of the Student, police involvement in the IEP meeting by an officer without knowledge of the Student, Plans that rely on calling the Mother, placing the Student in secluded line of sight without staff interaction to tear up papers and hit a punching bag, having police called, and having an ambulance called are not "appropriately ambitious in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000. The Plans are not working – the Student was having daily episodes where he did not make a lot of educational progress, tr. 80, and impacted his functional and behavioral performance.[9]

During the relevant time periods, the Student was eight to ten years of age. He is one out of 30,000 children recognized with undifferentiated childhood schizophrenia, and it is coupled with post-traumatic stress disorder (PTSD). He sees things those without his unique circumstances do not see, he hears things that those without his unique circumstance do not hear, and he feels things that those without his unique circumstances do not feel. It is

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[9] The LEA's argument does not go unnoticed that educational progress might be impacted by the side effects of medical cannabis, taken while both in school and off campus. The issue, however, is FAPE – not fault. Essentially the LEA takes the child where it finds him under the child's unique circumstances. *See Endrew*, 137 S. Ct. at 1001. In this case, the Student takes medical cannabis and the Mother administers it, as a parent, under the terms of New Mexico's medical cannabis laws. This is medical cannabis, not a recreational drug, and is not deemed a bad act by the Student as in *Garcia*, 520 F. 3d at 1127-1131, on which the focus is remedy.

concluded that the IEP with related documents is inadequate and therefore results in a violation of FAPE. Id. *See, e.g., Pottsgrove Sch. Dist. v. D.H*, 72 IDELR 271 (behavior plan inadequate, "last resort tools," occurrences of over 11 times in seven months); *Spring Branch Independent Sch. Dist. v. O.W.*, 72 IDELR 11, 118 LRP 134118 (S.D. Tex., 4:16-CV-2643, March 29, 2018)(police intervention under the circumstances, restraint, time outs, not positive behavioral supports); *C.B. v. Sonora Sch. Dist.*, 54 IDELR 293, 110 LRP 38429 (E.D. Cal., CV-F-285 OWW/DLB)(504 Plan, not IDEA, 11 year old and nine-year-old students and police involvement, detentions of children raise particular concerns, yet persuasive).

Although the Student left school on about November 15, 2017, tr. 1189, which was before the BIP of November 30, 2107, the December 13, 2107 PWN, and the January 12, 2018 PWN, the elements in those subsequent documents decreased even more the inadequate positive behavioral interventions, if any, that were in place prior to him leaving school. They imposed even more restrictive techniques. The point remains that the Plans were not working with similar elements of police involvement and seclusion which took place before the Student left school, thus evincing, when viewed in light of the actions that took place prior to his discontinuing school, that the less positive post-November 15, 2107 documents as to behavior continue to present an inadequate Plan in connection with the November 2, 2017 IEP.

What need be done is not explored, for it would be speculative and advisory. Suffice to say that a FAPE has been denied because of inappropriate Plans. 34 CFR § 300.513 (a).

There is no requirement for a BCBA, nor is an FBA demanded. *See Pottsgrove Sch. Dist. v. D.H.*, 72 IDELR 271. The Petitioners have not met their burden that not having a BCBA or FBA results in a violation of a FAPE. *Schaffer v. Weast*, 546 U.S. 49.

Remaining Issues

As to the Petitioners' claim that FAPE was denied because the LEA failed to create an instructional or therapeutic program to teach sensory coping skills and placed him in more restrictive environment, *see* Joint Issue (1)(k) and (4), while mention was made of over stimulation in community settings, the concerns were not first brought before the IEP Team for a FAPE resolution. R' s Ex. 68. The issue was not exhausted, and will not proceed. *See Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262, 1275 n. 11.

As to Joint Issue (6), there is no jurisdiction to entertain retaliation. 34 CFR § 300.513 (a).

As to Joint Issue (7), there is no jurisdiction to entertain the LEA's decision to limit communication and restrict Petitioner (Mother) from campus access for purposes not related to special education. 34 CFR § 300.513 (a).

As to Joint Issue (8), there is no jurisdiction to entertain the LEA's threatened referral to the Juvenile, Probation and Parole Office, or to disenroll the Student after a two-month absence, unless it relates to a denial of FAPE. 34 CFR § 300.513 (a). Petitioners have not their burden to show that this resulted in a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49.

As to Joint Issue (1)(b) alleging that state law and length of school day, curriculum requirements, and New Mexico's restraint and seclusion law, as standards violated a FAPE, it is concluded that the Petitioners have not their burden to show that any of these resulted in a denial of FAPE. *Schaffer v. Weast*, 546 U.S. 49.

As to Joint Issue (8), mediation jurisdiction, while it is concluded that if raised as a denial of FAPE there may be jurisdiction, nevertheless as a matter of law, mediation is what it is meant to be – mediation, a voluntary measure to resolve a dispute, and not mandatory.

There is no violation of a FAPE by one side not wanting to mediate. *See* 34 CFR § 300.510 (b)(3)(joint agreement to use mediation).

As to Joint Issue (9), equitable defenses such as waiver, estoppel or laches, it is concluded that these defenses did not preclude any of the claims asserted.

Remedy

Having found a denial of FAPE due to inadequate Plans relating to, *inter alia*, behavior, restraint, and police involvement, a remedy is to be considered. There is no evidence, however, of an accounting or explanation to tie a compensatory education award to past violations. *See Meza v. Bd. of Educ. of the Portales Mun. Schs.*, Nos. 10-0963, 10-0964 (D.N.M. 2011). There being insufficient evidence, there is no award for compensatory education.

As noted earlier in this opinion, this case relates to a child with very unique behavioral and educational needs. The Student is now 11 years old, and has not attended school for over a year. The parties have been at diametric odds with each other – one side seeking medical marijuana to be administered, or assistance in its administration, by the LEA while at school (which is now concluded to be unreasonable for an IEP because it is illegal), with the other side professing the use of police intervention and criminal charges against the child Student due to his escalated behaviors. Although positive behavioral interventions might lie someplace in between the two positions, there has been insufficient, if any, evidence, however, presented by the Petitioners as to what would be appropriate to remedy the matter. Resort will not be made to speculation or conjecture.

As a result, no equitable remedy is awarded.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process Hearing Against the Local Educational Agency is granted in part and denied in part. No equitable remedy is awarded.

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 20 U.S.C § 1415(i), 34 CFR § 300.516, and §6.31.2.13(I)(24) NMAC (2009). Any such action must be filed within 30 days of receipt of the hearing officer's decision by the appealing party.

It is so administratively ordered.

MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: December 3, 2018

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent via email attachment only to Petitioners via Mother and *Pro Bono* counsel C. Noland, Esq., to the LEA via E. Howard-Hand and L. Gerkey, Esqs., and to the New Mexico Public Education Department via Michelle Bowdon, Esq., on this 3rd day of December 2018, and with hard copy via U.S. Mail with delivery notification receipt to the *pro se* Petitioners via Mother at their address of record, to be forwarded on the 4th day of December 2018.