BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH No. 1819-05

HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Hearing Against the Local Education Agency (LEA) and State Educational Agency (SEA), filed with the State of New Mexico Public Education Department on September 28, 2108 (hereinafter Request for Due Process). *See* Request for Due Process Hearing Against Local Education Agency and State Education Agency, September 28, 2018. On November 6, 2018, an order was entered dismissing Petitioners' claims brought against the SEA. *See* Order Dismissing Claims Brought Against the New Mexico Public Education Department, November 6, 2018. This Memorandum Decision and Order only addresses, therefore, the claims brought by the Petitioners against the LEA. The Petitioners' Request for Due Process against the LEA is granted in part.

PROCEDURAL BACKGROUND

The Respondent LEA responded to Petitioners' Request for Due Process on October 8, 2018. *See* [LEA's] Answer to Request for Due Process, October 8, 2018 (Answer). A Pre-Hearing and Extension Order was entered on October 11, 2018, after a pre-hearing conference on the same day which, among other things, set the date for the hearing. *See* Pre-Hearing and Extension Order, October 11, 2018. At the request of the parties, the hearing date was revised to begin on November 27, 2018, and last for four days. Letter Order, November 13, 2018.

The parties timely filed their joint Statement of Issues on November 15, 2018. Statement of Issues, November 15, 2108 (Statement of Issues). A joint Statement of

Facts was not filed. *See* DPHO record. The parties timely filed their respective Witness and Exhibit Lists. *See* Petitioners' Exhibit List, November 19, 2018; Petitioners' Witness List, November 19, 2018; [LEA's] Exhibit Binder Index, November 19, 2108; and [LEA's] Witness List, November 19, 2108.

The due process hearing commenced on November 27, 2018, and concluded on November 30, 2018. Both parties were well-represented by their respective trial counsel. Proposed Findings of Fact and Conclusions of Law, with written argument, were ordered due on or before January 25, 2019. Tr. 1,151. On January 18, 2019, at the request of the Petitioners, with the concurrence of the LEA, an extension was granted to allow the proposed Findings of Fact and Conclusions of Law, with written argument, to be filed on or before January 30, 2019. *See* Letter Order, January 18, 2019. The parties jointly requested an extension for issuance of the hearing officer's decision, which was granted, for the filing of his decision on or before February 25, 2019. Tr. 1,152. The time for the filings is no later than before midnight on the due dates. Tr. 1,153.

The Respondent filed its proposed Findings of Fact and Conclusions of Law and Argument on January 30, 2019. [LEA's] Findings of Fact and Conclusions of Law, January 30, 2019 (R's F&C). Its Closing Argument was filed on January 30, 2019. [LEA's] Closing Argument, January 30, 2109. The Petitioners filed proposed Findings of Fact and Conclusions of Law on January 30, 2019. Petitioners' Requested Findings of Fact and Conclusions of Law, January 30, 2019 (P's F&C). The Petitioners also filed their Closing Argument on January 30, 2019. Petitioners' Closing Arguments, January 30, 2019.

This decision is due on or before February 25, 2019. Tr. 1,152.

ISSUES PRESENTED BY THE PARTIES

1. Whether the LEA denied the Student a FAPE by failing to evaluate [redacted] for Autism.

2. Whether there are any indications that the Student should be evaluated for Autism.

3. Whether the LEA denied the Student a FAPE by shortening [redacted] school day and thus denying [redacted] access to the general curriculum and education in her LRE.

4. Whether the decision to have the Student attend the outside ADT program was a parental choice, and not a decision by the IEP Team.

5. Whether the LEA denied the Student a FAPE by writing inaccurate and incomplete IEPs, including lack of necessary PWN.

6. Whether the IEPs developed and implemented by the LEA provide a FAPE to the Student.

7. Whether the LEA denied the Student a FAPE by failing to provide appropriate related services in the areas of occupational therapy and/or speech therapy.

8. Whether the LEA denied the Student a FAPE by failing to incorporate instruction and strategies which are evidence based, including failure to have her IEP Teams consider the 11 considerations for students with Autism required by state regulation.

9. Whether the IEP Team is required to consider the 11 items outlined for consideration of Autism when the Student is not identified as qualifying for special education under that exceptionality.

[redacted]

10. Whether the LEA denied the Student a FAPE by use of aversives (restraint and seclusion) in school settings and at the [redacted].

11. Whether the LEA used aversive actions in the school setting, and if the LEA has any responsibility for the action of personnel of the Humphrey House when they are not LEA employees.

12. Whether the LEA denied the Student a FAPE by punishing [redacted] for manifestations of disability, and the LEA's failure to implement an appropriate IEP to meet [redacted] needs.

13. Whether the LEA is prohibited from applying discipline to students regardless of the existence of a disability so long as it is within the 10 cumulative days per school year as provided in state and federal regulations.

14. Whether the LEA denied the Student a FAPE by not providing education which was "free," and requiring that parents intervene during the school day, including to pick up the Student early.

15. Whether the LEA's decision to contact the parent when the Student was exhibiting dangerous behaviors is prohibited by any regulation or statutory requirement.

16. Whether the LEA denied the Student a FAPE by refusing to provide [redacted] with a full day of public education, and instead by referring [redacted] to the Adolescent Treatment Program staffed by persons who are not licensed by NMPED to provide education or special education.

17. Whether a parental decision to place a student in a partial day treatment program places any obligation on the LEA to require that program to employ staff with specific PED licensure.

[redacted]

[redacted]

18. Whether the LEA denied the Student a FAPE by failing to write appropriate IEP goals for [redacted].

19. Whether the goals written for the Student are appropriate and provide for a FAPE.

20. Whether the LEA denied the Student a FAPE by requiring [redacted] parents to obtain medication for the Student in order to receive/continue as a student in the LEA.

21. Whether the LEA has ever required a parent to obtain medication for any child to access educational programs within the District.

22. Whether the LEA denied the Student a FAPE by failing to provide [redacted] and staff, with necessary aids and supports.

23. Whether the LEA and its staff and support provided are designed to meet the needs of the Student.

24. Whether the LEA denied the Student a FAPE by failing to include [redacted] parent as a full participant in the IEP process.

25. Whether the Student's parent ever requested assistance in fully understanding the IEP process or ever advised the District that [redacted] did not understand the decisions [redacted] was making.

26. Whether the LEA denied the Student a FAPE by not providing Extended School Year (ESY) services.

27. Whether the Student qualified for ESY services for the summer of 2019.

28. Whether the LEA denied the Student a FAPE by not conducting a FBA and creating inappropriate BIPs for the Student.

[redacted]

29. Whether the BIP and FBA are appropriate for the Student, and the role of the TABS program in behavior management.

30. Whether, as the result of denial of FAPE, the Student is entitled to an equitable remedy, and what that remedy should be.

31. Whether the program designed and implemented by the LEA is appropriate and provides a FAPE to the Student in light of the parents' decision to place the Student in a half-day treatment program.

Note that the issues will addressed in context with the issue numbers as presented in these Issues Presented by the Parties, although the Petitioners have subsequently labeled and argued their issues differently than those contained in the above Issues Presented by the Parties. *See* P's F&C.

RELEVANT LEGAL OVERVIEW

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

A twofold inquiry is demanded to determine if a child has been provided with a free appropriate public education. *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 207 (1982). The initial inquiry is whether the State has complied with the procedures set forth in the Act. The second inquiry is whether the individualized educational program developed through the procedures of the Act is

reasonably calculated to enable the child to receive educational benefits. *Id.*, 458 U.S. at 207. "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child receives the 'free appropriate public education' mandated by the Act." *Murray v. Montrose Cnty. Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). "[A] child is entitled to 'meaningful' access to education based on individual needs." *Fry v. Napoleon Cmty. Sch.*, 580 U.S. ___, 137 S. Ct. 743, 753-754 (2017). "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas Cnty. Sch. Dist. RE-1*, 580 U.S. ___, 137 S. Ct. 988, 999 (2017).

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

All children with disabilities who are in need of special education and related services are to be identified, located, and evaluated. *See* 20 U.S.C. § 1412(a)(3); 34 CFR § 300.111(a)(i) ("child find"). The school district "bears the burden generally in identifying

eligible students for the IDEA." *Cudjoe v. Ind. Sch. Dist. No. 12*, 297 F.3d 1058, 1066 (10th Cir. 2002). All children residing in the local educational agency's (LEA) jurisdiction must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 CFR § 300.111(a)(1). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. *See* 34 CFR § 300.111(c)(1). The LEA must conduct a full and individual evaluation, at no cost to the parent, to determine if the child is a child with a disability. *See* §6.31.2.10(D)(1)(a)&(b), NMAC. The responsibility for the evaluation lies with the LEA. *See Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1310 (D. Utah 2002). The identification and evaluation must be made within a reasonable time once school officials are placed on notice of behavior likely to indicate a disability. *See Id.* at 1311. That is, there must be a suspicion of disability, rather than actual knowledge of the underlying qualifying disability. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). An LEA's failure to meet its "child find" obligation is a cognizable claim. *See Compton Unified Sch. Dist. v. Addison, et al.*, 598 F.3d 1181, 1183-84 (9th Cir. 2010). Eligibility for special education benefits may be considered, as well. *See Hansen v. Republic R-III Sch. Dist.*, 632 F.3d 1024, 1026 (8th Cir. 2011). A "difficult and sensitive" analysis can be required with these issues. *Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1,4 (1st Cir. 2007)(quoting *Greenland Sch. Dist. v. Amy*, 358 F3d. 150, 162 (1st Cir. 2004).

A disability is suspected, under persuasive authority from the Ninth Circuit, when the district is put on notice that symptoms of disability are displayed by the child. *See*

Timothy O. v. Paso Robles Unified Sch. Dist., 822 F.3d 1105, 1120 (9th Cir. 2016). Notice may come in the form of expressed parental concerns about a child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behaviors in and out of the classroom. *Id.* at 1121.

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

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 34 CFR § 300.513(a). If a procedural violation occurs, then it results in a denial of a free appropriate public education only if the procedural inadequacies: (1) impeded a child's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. *Id.* at (a)(2). Procedural defects are insufficient to set aside an IEP unless a rational basis exists to believe the procedural errors seriously hampered the parents' opportunity to participate in the decision process, compromised the student's right to an appropriate education, or caused a deprivation of educational benefits. *See O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998). In other words, technical deviations alone are insufficient to establish a denial of free appropriate public education. *See Urban v. Jefferson Cnty. Sch. Dist. R-1*, 89 F.3d 720, 726 (10th Cir.

1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008). Procedural defects must amount to substantive harm for compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub. Sch.*, 520 F.3d 1116, 1125-26 (10th Cir. 2008). A hearing officer may order 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). An IEP meeting must be conducted within 30 days from a determination that the student needs special education and related services. *See* 34 CFR § 300.323(c)(1).

Written notice is required regarding issues for the identification, evaluation or placement of a child. *See* 34 CFR § 300.503; §6.31.2.13(D) NMAC. Parents are afforded an opportunity to participate in the IEP meetings by ensuring the district provides them with a notice of the meeting, which is to include, among other things, the purpose, time, and location of the meeting, as well as who will be present. *See* 34 CFR § 300.345(a). In the context of requiring meaningful involvement and input from a student's parents in the IEP, the parents must be provided with prior written notice of any change in the provisions of a student's free appropriate public education. *See Logue v. Unified Sch.*

Dist. No. 512, 153 F.3d 727, 1998 WL 406787, *3 (10th Cir. Jul. 16, 1998). The IDEA requires notice of a proposed change before the change is made – not notice of the proposed change prior to commencement of the IEP meeting where the change will be discussed. *See Masar v. Bd. of Educ. of the Fruitport Cmty. Schs.*, 39 IDELR 239, 103 LRP 37950 (W.D. Mich. 2003). *See also Tenn. Dep't. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1481 (6th Cir. 1996) (failure to provide notice of "stay-put" not prejudicial for summary judgment proceedings). Nonetheless, a predetermination by the district of the student's placement and services does not allow the student's parents to meaningfully participate in the process and results in substantive harm to the student. *See Deal v. Hamilton Cnty. Bd. of Ed.*, 42 IDELR 109, 104 LRP 59544 (6th Cir. 2004).

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

The IEP team for a child with a disability includes: the parents of the child, not less than one general education teacher of the child (if the child is or may be participating in the general education environment), not less than one special education teacher of the child, or, where appropriate, not less than one special education provider of the child, a district representative who: (i) is qualified to provide, or supervise the provision of, specially designed instruction to meet the unique needs of children with disabilities; (ii) is knowledgeable about the general education curriculum; and (iii) is

knowledgeable about the availability of district resources, an individual who can interpret the instructional implications of evaluation results, at the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, included related services personnel as appropriate, and, whenever appropriate, the child. *See* 34 CFR § 300.321.

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

An appropriate plan considers the (1) strengths of the child; (2) the concerns of the parents for enhancing the education of their child; (3) the results of the initial or most recent evaluation of the child; and (4) the academic, developmental, and functional needs of the child. *See* 34 CFR § 300.324(a). Communication needs and the use of assistive technology must be considered, as well. *Id.* Related services are such "developmental, corrective, and other supportive services as are required to assist a

child with a disability to benefit from special education . . ." 34 CFR § 300.34(a). *See also Irving Indep. Sch. Dist. v. Tatro*, 468 U.S. 883, 891 (1984)(services to aid student to benefit from special education).

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

Among other things, when the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 CFR § 300.24(a)(2)(I); §6.31.2.11(F)(1) NMAC. The New Mexico Public Education Department strongly encourages that functional behavioral assessments (FBAs) be conducted and that behavioral intervention plans (BIPs) be integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. §6.31.2.11(F)(1) NMAC. The use of the FBA/BIP is, however, an encouragement – they are not required components of the IEP. *See* 34 CFR § 300.320.[1] A student may be removed from his regular classroom

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

if necessary to protect his or her safety or the safety of other students. *See* 20 U.S.C. § 1412(a)(5); *Rowley*, 458 U.S. at 181, n.4.

Under New Mexico specific regulations for students with Autism Spectrum Disorders (ASD) eligible for special education services under 34 CFR § 300.8(c)(1), the IEP Team is to consider and document and strategies based on peer-reviewed, research-based educational programming practices "to the extent practicable and, when needed to provide FAPE, addressed in the IEP." §6.31.2.11(B)(5) NMAC. The eleven Autism considerations are: (1) extended educational programming, such as extended school year services (among things), which consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills; (2) "daily schedules reflecting minimal unstructured time and reflecting active engagement in learning activities, including, for example, lunch, snack, and recess periods that provide flexibility within routines, adapt to individual skill levels, and assist with schedule changes, such as changes involving substitute teachers and other in-school extracurricular activities;" (3) "in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills, including, for example, strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;" (4) "positive behavior support strategies based on relevant information, including, for example, antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions, and a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral

programming across home, school, and community-based settings;" (5) "futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;" (6) "parent or family training and support, provided by qualified personnel with experience in ASD, that, for example provides a family with skills necessary for a child to succeed in the home or community setting, includes information regarding resources such as parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching and management techniques related to the child's curriculum, and facilitates parental carryover of in-home training, including, for example, strategies for behavior management and developing structured home environments or communication training so that parents are active participants in promoting the continuity of interventions across all settings;" (7) "suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social or behavioral progress based on the child's developmental and learning level and that encourages work towards individual independence as determined by, for example adaptive behavior evaluation results, behavioral accommodation needs across settings, and transitions within the school day;" (8) "communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;" (9) "social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role playing;" (10) "professional educator and staff support, including, for example, training provided to personnel who work with the student to assure the correct

implementation of techniques and strategies described in the IEP"; and (11) "teaching strategies based on peer reviewed, research-based practices for students with ASD, including, for example, those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training." §6.31.2.11(B)(4)(5) NMAC.

The IEP is to be implemented as soon as possible after the IEP meeting. 34 CFR § 300.323(c)(2). Various steps must be followed not only to design an IEP, but to implement it as well. *See Johnson v. Olathe Dist. Unified Sch. Dist. No. 233*, 316 F. Supp. 960 (D. Kan. 2003).

The cornerstone for analysis of whether a free appropriate public education has been or is being provided is within the four corners of the IEP itself. *See Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306 (10th Cir. 2008).

As for residential placement reimbursement, for parents to recover costs of the student's placement then they must show that first, the LEA denied the student a FAPE, then, if so, whether the facility was a state-accredited elementary or high school, then, if so, whether the facility provided specially designed instruction to meet the student's unique needs, and, then, if so, whether any non-academic services received by the student met the definition of related services under the IDEA. *See Jefferson Cnty. School Dist. R-1, v. Elizabeth E., et al*, 702 F.3d 1227 (10th Cir. 2012). It is noted that the United States Department of Education explains that parental placement does not require that it meet state standards to be an appropriate placement. *See* 34 CFR 148.

Hearing officers have authority to grant relief as deemed appropriate based on their findings. *See* 20 U.S.C. § 1415(e)(2). Equitable factors are considered in fashioning

a remedy, with broad discretion allowed. *See Florence Cnty. Sch. Dist. v. Carter ex rel. Carter*, 510 U.S. 7, 16 (1993). The form of compensatory education as a remedy is intended to cure the deprivation of the student's rights while reviewing the length of the inappropriate placement. *See Murphy v. Timberlane*, 973 F.2d 13 (1st Cir. 1992). As to the compensatory education component of the remedy, under persuasive authority for a qualitative approach, compensatory education awards should be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005); *Meza*, D.N.M. Nos. 10-0963, 10-0964. There must be evidence to allow an accounting or explanation to tie a compensatory education award to past violations. *See Meza, id.* Indeed, even with a free appropriate public education denial, subsequent placement may remedy the prior violation. *Wheaten v. Dist. of Columbia*, 55 IDELR 12 (D.D.C. 2010). Wide discretion to fashion equitable relief includes the ability to decline to award any equitable relief at all, due, for instance, to insufficient evidence to adequately catalogue services and expenses, and particularly if the proposed relief would have no effect on the student's education. See *Chavez v. N.M. Pub. Educ. Dep't.*, 621 F.3d 1275, 1284 (10th Cir. 2010). Procedural defects must amount to substantive harm for compensatory services. *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116 (10th Cir. 2008).

FINDINGS OF FACT

1. The Student entered the LEA's district in the 2015-2016 school year, after moving from CMS District, where [redacted] was identified as having Speech and Language Impairment. Ex. 3. Tr. 1076-1077,

2. While in the present LEA, the Student attended M school, Ex. 8, BTW school, Exs. 9 and 10, and WRE school, Ex. 11, although for statistical recording keeping [redacted] is shown to also attend SH and TE schools because WRE school is a transitional program and [redacted] home schools are noted to be SH and TE. Tr. 244-248, 865. Ex. 30.

3. Three IEPs were developed or subject to implementation during the relevant time limitations period: the September 1, 2016 IEP, Ex. 9, the March 10, 2017 IEP, Ex. 10, and the March 8, 2018 IEP. Ex. 11.

4. The Student is now [redacted] years of age, although in relevant part [redacted] was ages [redacted] and [redacted] Exs. 9, 10, and 11.

5. The school years in issue are the 2016-2017 school year, the 2017-2018 school year, and the 2018-2019 school year. Exs. 9, 10, and 11.

6. A full occupational therapy evaluation was recommended in the September 1, 2016 IEP, Ex. 9, p. 21.

7. A formal occupational therapy assessment report was issued March 2, 2017, Ex. 41.

8. The Student exhibited signs to the LEA of problem behaviors in communication, social, emotional, cognitive, sensory, repetitive activities, resistance to environmental and daily changes, and unusual responses to sensory experience. Exs. 1, 6, 9, 10, 11, 14, 39. Tr. 53, 129, 174-175, 176, 186-187, 189, 190, 195, 199, 218-219, 221, 232, 251-252, 354, 451, 452, 752-753, 798-800, 943-945, 1138, 1089, 1091, 663, 649, 577-594.

9. There was a suspicion of Autism. *Id.*

10. The Student was not assessed or evaluated for Autism by the LEA. Tr. 657.

11. The Petitioners did not request an Autism assessment. Tr. 1131.

12. The Petitioners did not bring the request for an Autism assessment before an IEP Team. *Id.*

13. The Student is determined to eligible for services by the LEA under Other Health Impairment due to attention-deficit/hyperactivity disorder, or ADHD. Exs. 10, 11.

14. The Student is medicated for ADHD. Tr. 46-47, 1089.

15. The medication came on the recommendation of the LEA's school psychologist, although it was a parental choice after consult with a physician. Ex. 6. Tr. 649, 1139-1140.

16. After October 7, 2016, at some time in the fall of that year, the Student's Mother was told that the Student had to medicated to attend BTW school. Tr. 1143.

17. On October 14, 2016, the Student began taking Aderall. Tr. 1089.

18. The Student attended school at BTW. Ex. 9.

19. The Student subsequently moved to WRE school in about March 2017. Tr. 1086-1087.

20. WRE school is the host educational institution for the TABS program. Tr. 160.

21. TABS is an acronym for Teaching Appropriate Behavior Skills. Tr. 135.

22. The TABS program is for LEA elementary students with challenging behavioral issues, in small group settings, to provide supports for social/emotional needs, academics, and behaviors. Tr. 73, 162.

23. The Student exhibited a number of challenging behaviors, such as aggressiveness, scratching, isolation, elopement, screaming, and crying. Exs. 10, 11, 13. Tr. 194-195, 234.

24. The TABS program would sometimes have several students, although it would also have only this Student as the only student, with one educator and two paraprofessionals, with the program to remain active for administrative purposes whether it be for one student or for several students. Tr. 831-833.

25. The Student's March 10, 2017 IEP placed the Student in an alternate program, in the regular classroom 40 percent to 70 percent of the school day, Ex. 10 at p. 15, in need of moderate services up to 50 percent of the school week, *Id.* at p. 16, yet fails to state why [redacted]s out of a general education more than 80percentwith aides and services not adequate, advantageous placement, why the general education setting is reduced, and what is being done to reintegrate the Student back into the general education setting. *Id.*

26. The Plan had an objective that the Student would demonstrate effective coping skills and age appropriate social and academic behaviors in seven out of 10 opportunities. Ex. 10.

27. Extended school year services were not included as part of the Plan. Ex. 10.

28. The Student's Mother did not request ESY services. Tr. 60.

29. Speech language therapy was part of the Plan. Ex. 10.

30. The Student missed a number of speech therapy sessions due to absenteeism. *See* Ex. 20.

31. Occupational therapy was part of the Plan. Ex. 10.

32. The Student missed a number of occupational therapy sessions due to absenteeism. *See* Ex. 20.

33. The eleven New Mexico Autism considerations were not contained in the Plan. Ex. 10.

34. The March 10, 2017 IEP requires a Behavior Intervention Plan, and states that the Behavior Intervention Plan is attached to the IEP, Ex. 10, p. 3, yet there was no behavior intervention plan attached to it. *Id.*

35. A Behavior Management Plan was created on April 11, 2017, which described the Student's behaviors as hissing, kicking, biting, scratching and clawing, as well as using weapons to attempt to harm others, with intervention strategies, such as calming touches, praise, check for understanding and instruction, sensory breaks, time out of classrooms, a time out break system for use not as punishment but as positive opportunity to regain composure, frequent reminders, removal from the situation when escalation begins, and parent contact when behavior becomes aggressive or violent, auditory and visual stimuli, movement, social training, reinforcement with sensory stimuli, sticker chart, and consequences, such as loss of privilege and computer time and contact of parent, Ex. 13. Calming touches, praise, check for understanding and instruction, sensory breaks, time out of classrooms, a time out break system for use not as punishment bust as positive opportunity to regain composure, frequent reminders, removal from the situation when escalation begins, and parent contact when behavior becomes aggressive or violent were to be used as strategies. Ex. 13.

36. The Student's March 8, 2018 IEP indicated the Student to be in need of services for the majority of the school day/week in supported integration or direct

services to achieve goals and objectives, but did not explain that if the Student was not in the general education setting for 80 percent of the time, why aides and services are not adequate, how placement is a special education setting will be more advantageous, why the general education setting is reduced, and what is being done to reintegrate the student back into the general education setting. Ex. 11.

37. A Behavior Intervention Plan is attached to the March 8, 2018 IEP, which explains behaviors as being as performance deficit, temper outbursts, frequent, ongoing and intense, with mood swings, with the Student becoming upset, sad, frustrated, angry and irritable, emotionally disturbed based on domestic disturbance, no change in curriculum required because the behaviors are due to domestic disturbance, and for strategies and positive supports the "bastion of support should come from the family," yet providing a positive environment in school through verbal praise, unnamed tangible rewards, and an opportunity to earn preferred activities, with a continuum of consequences for behavior. Ex. 13. A crisis plan calls for educators to be defensive, law enforcement on call, if it is physical, or if only defiant or not doing school work then in-school suspension, other responsibilities like cleaning a table, and out-of-school suspension based on disruptive or destructive behavior. *Id.*

38. The Plan had an objective that the Student would demonstrate effective coping skills and age appropriate social and academic behaviors in three out of five opportunities. Ex. 11.

39. The Student did not make progress in the 2017-2018 school year in demonstrating effective coping skills and age-appropriate social and academic behaviors. Tr. 465-466.

40. The Plan listed Language Arts goals as being able to recognize and state verbally 26 uppercase letters of the alphabet in three out of four trials, when presented with flash cards. Ex. 11, p. 13.

41. The Student cannot recognize which is the lower and which is the upper case. Tr. 185.

42. Extended school year services were not included as part of the Plan. Ex. 11.

43. The Student's Mother did not request ESY services. Tr. 60.

44. Speech language therapy was part of the Plan. Ex. 11.

45. The therapist sought to gain the Student's trust, and make eye contact, in order to engage in services. Tr. 553. The speech language therapist maintained data, and she wrote the goals in the Plan (Ex. 11, p. 16) for specific areas in which the Student needed improvement. Tr. 576.

46. The Student missed a number of speech therapy sessions due to absenteeism. *See* Ex. 20.

47. Occupational therapy was part of the Plan. Ex. 11.

48. The Student missed a number of occupational therapy sessions due to absenteeism. *See* Ex. 20.

49. The eleven New Mexico Autism considerations were not contained in the Plan. Ex. 11.

50. The LEA's standard as an educational service provider is for students in this grade level to receive 1680 minutes per week of educational services, excluding recess and lunch breaks.

51. The IEPs provided that the Student would receive educational services for 1680 minutes a week. Exs. 10, 11.

52. The typical school day began at 7:50 a.m., and concluded at 2:40 p.m., except for Wednesday, when the release bell rings at 1:40 p.m. Tr. 830.

53. The Student began the ADT program in late September or early October of 2017. Tr. 431, 1101.

54. ADT is an acronym for Adolescent Day Treatment Program, associated with the Humphrey House, and the Guidance Center of Lea County, New Mexico. Tr. 491-492, 1038.

55. The ADT program is an off-school site community behavioral program for elementary school children aged five to 14, which is not licensed by the Public Education Department, and provides no educational services. Tr. 1041.

56. The Student's Mother agreed with the Student's participation in the ADT program. Tr. 1098.

57. The ADT program operates between the hours of 12:30 p.m. and 5:30 p.m. Tr. 1065.

58. The Student began the ADT program in late September or early October of 2017. Tr. 431, 1101.

59. Initially, the Student would go from school to home, and then to ADT. Tr. 1101.

60. On December 22, 2017, arrangements were made for the Student to be picked up directly at school by ADT transportation, Ex. 18, pp. 2-3; Tr. 439, 1103, and on

January 9, 2018, the Student began going directly from school to ADT. Ex. 18, p. 3. Tr. 440.

61. While at the ADT program the Student did not attend LEA's school for a full school day. Tr. 1065, 1101-1103.

62. The LEA did not count Student as absent or truant while attending the ADT program. Tr. 843.

63. The LEA statically classified the Student as a student in its educational program for full day. Tr. 730-731.

64. ADT billed Medicaid for services while the Student was in its program. Tr. 1052, 1060.

65. While at ADT program the Student did not receive any educational benefit. Tr. 1065.

66. The Student attended ADT during school hours for about 1.5 years. Tr. 531-532.

67. On March 12-13, 2018 (with prior visits on August 13, 2017, and October 24-26, 2017) private evaluations to assist with student and classroom concerns we performed by Collaborative Autism Resource and Education, or CARE. Ex. 46.

68. The Student's Mother did not receive notice of, or consent to, the evaluation. Tr. 1118-1119.

69. The Student's behaviors at times presented an imminent danger of harm to others, such as hissing, kicking, biting, scratching and clawing, as well as using weapons to attempts to harm others. Ex. 13. Those types of behaviors continued through August 20, 2018. Tr. 354, 371, 377.

70. In addressing the dangerous behaviors, less restrictive methods were used to first mitigate the danger, or action by physical escorts. Tr. 294, 295, 353-355, 453-455.

71. The Student presented with challenging behaviors and the Student's Mother would be called by the LEA to intervene. Tr. 37, 489, 52-53, 296, 297, 358, 875-876, 1081-1084, 1109.

72. On August 20, 2018, the school nurse reported the Student to the police alleging that the Student had scratched her and spit at her, and although she did not want the Student, who was seven years old, to go to jail, she used this report to the police as a behavior management technique by wanting the Student to realize [redacted] behavior was not acceptable. Tr. 354, 371, 377.

73. Many of the Student's actions, according to the psychological report by Dr. T.S. Ph.D., cannot be deemed deliberate or willful since the Student was not able to maintain focus, or to maintain her position in the classroom, or to read social cues from others, or follow even the simplest instructions. Ex. 6, p. 3.

74. In November 2018 the Student discontinued the ADT program and began to attend the LEA's school on a full time basis. Tr. 1131-1132. While in the ADT program the Student was not counted as absent by the LEA. Tr. 873.

75. These Findings of Fact are supplemented by the more detailed findings to the extent applicable made in the Analysis section, below.

76. All witnesses are generally found to be credible for truthfulness. The Mother is found to be credible, and weight is given to her testimony, particularly with regard to being told that she had to have her child medicated for school – her demeanor was viewed at the time, which assisted in the credibility determination. Dr. T.S., Ph.D., while

being found to be truthful, did maintain preferences for his opinions about medicating the Student and for a conclusion that there is a likelihood for ADHD. His clinical observation of the Student for only twenty-five minutes, in addition to 80 percent of his thousands of evaluations concluding ADHD, impacts the weight given to his testimony regarding lack of Autism suspicions, and as inconsistent with his report. The Speech Language pathologist, while nervous, was credible, and knowledgeable, yet equated a finding of Autism with a suspicion of Autism, as did other educators. Special Education Teacher P.G., while having some difficulty in understanding a few questions presented to her by the Petitioners' counsel, did well under questioning, and although she often answered simply, this did not impact her credibility; her credibility was not impacted by because she was not educated in the United States. Teacher A.P. exhibited some frustration at being called to testify, but this frustration did not impact her testimony for truthfulness. Director of Special Education D.J. came across as truthful, and although she was a fairly new in her job position, this did not impact the credibility of her testimony. A.C., the Clinical Director of Humphrey House, was truthful.

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

ANALYSIS AND LEGAL CONCLUSIONS

Jurisdiction

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

Systemic Issues

At the outset, Issues 13 and 21 raise systemic matters, for which there is no administrative jurisdiction. *See* 34 CFR § 300.513 (hearing officer determination of FAPE for the child, not all students). Issue 13 questions whether the LEA is prohibited from applying discipline to students as a whole (not this particular Student) regardless of disability, within a time period and under state and federal regulations. *See* Issue 13. Issue 21 questions whether the LEA has ever required a parent (not the Student's Parents) for any child (not the Student) to access educational programs. *See* Issue 21. As a result, concluding there is no jurisdiction to address these matters, Issues 13 and 21 are dismissed.

Autism Assessment

When the Student was a baby, at about 6 months of age, the Student showed signs of attention seeking behaviors, clinginess, to her Mother. Tr. 1138. While in preschool at the CM Schools, at 3 years of age, the Student was found to have delayed language and articulation skills, where [redacted] gestured more than communicated, and had difficulty following direction without cues, and, during the CM School's evaluation, drooling was noted. Ex. 1. When the Student was in kindergarten, [redacted] wanted to be treated like an infant, Ex. 14, and would do flapping and jump up and down, imitating, in Mother's view, her brother. Tr. 1091. The brother is a younger child on the Autism spectrum. Tr. 1089.

In the September 1, 2016 IEP with the LEA it was noted that the Student engaged in classroom disruption, that [redacted] attempted to kick and hit staffers, and there was a lack of participation. Ex. 9. Concerning social behaviors arose, such as when the Student

would hide under the desk, and run away from staff and teachers. *Id.* The Student would shake, have a high heart rate when anxious, and [redacted] was noted to display sensory processing difficulties. *Id.* [redacted] was 5 years old. *Id.*

On October 7, 2016 Dr. T.S., Ph.D., the LEA's school psychologist, issued his Psychodiagnostic Screening report, which was prepared the request of the Student's IEP Team. Ex. 6. To prepare his report, Dr. T.S. observed the Student in the classroom for twenty-five minutes, and compiled the scores in the Connors' Early Childhood Form, which was a form completed by the Student's mother and one of [redacted] teacher's, Ms. A. *Id.* Dr. T.S. concluded that the compilation of the scores from the Connors' Early Childhood resulted in high rates for several potential diagnoses, with the first being Autism. *Id. See* Tr. 656. Based on his experience, however, Dr. T.S. opined that the Student had symptoms consistent with Attention Deficit Disorder. Ex. 6. Dr. T.S.'s experience includes twenty-two years of doing evaluations, having probably evaluated several thousand students, with probably up to 80 percent of his evaluations resulting in a finding of Attention Deficit Disorder. Tr. 663. Dr. T.S. "highly recommended" that the Student's Parents consult with a physician regarding advisability for medication for Attention Deficit Disorder, with a conclusion that if the Student is to be medicated, then the Student should be rescreened to determine the effectiveness of the medication. Ex. 6. Dr. T.S. was of the opinion that "medication would more than likely be helpful." Tr. 649.

The Student's Mother went to the Student's physician soon thereafter with Dr. T.S.'s recommendation for Adderall, and on October 14, 2016, the Student started taking Aderall. Tr. 1089.

On March 10, 2107, in the annual IEP after Dr. T.S.'s report, it was determined the Student was eligible for services under the Other Health Impairment exceptionality, with significant health information stating the Student "[h]as ADD." Ex. 10. The Student at this time was five years old. *Id.* The IEP also indicates, among other things, that the Student's behaviors can become very aggressive when the Student is asked to complete a simple ask, that [redacted] has difficulty answering questions and staying on topic and describing objects, that [redacted] has significant delays in sensory processing skills, that [redacted] has frequent outbursts when [redacted] screams and cries, and has difficulty maintaining [redacted]. *Id.* The Student's exceptionality was determined to meet the criterial of ADHD. *Id.* The IEP is silent as to whether the Student was taking medication, *Id.*, although [redacted] prior IEP noted [redacted] was taking Abuderall for asthma, Ex. 9, and [redacted] subsequent IEP noted [redacted] was taking Vyvance 30 mg, once daily, due to ADHD. Ex. 11.

At the Student's next annual review, the March 8, 2018 IEP, when the Student was six years old, Dr. T.S. was present with the Team members. Ex. 11. Slow progress was found to exist due to poor behaviors and sensory difficulties, where [redacted] refused sensory integration and activities for fine motor control. *Id.* [redacted] would shut down, and would engage in repetitive behaviors such as writing and erasing a letter or a word over and over again. *Id.* [redacted] would become aggressive toward the staff, and would melt down. *Id.* [redacted] "continued to take medication, Vyvance, for ADHD." *Id.*

Despite the concerns and other observations contained in the three IEPs as explained above, *see Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d at 1316 (although not based on IEP observations, IEP services offered in the IEP itself controls), teachers and staff testified at the Due Process Hearing that the Student only reflected some Autistic

symptoms, but not other Autistic symptoms. According to Speech Pathologist T.K., Autism is a communication problem, and although she observed the Student to have had social communication deficits, and refused to engage in therapy and activities not interesting to [redacted], and had an unwillingness to listen to adult direction, [redacted] did not see the need for an Autism assessment because the Student picked up social cues and did not engage in Autistic-like behaviors consistently. Tr. 577-594. Resource Special Education Teacher A.P. did not observe the Student flapping or twitching, and noted the Student was able to have good social skills, and saw the Student make eye contact, and thus did not consider the Student to be Autistic because, in part, due to [redacted] personal experience with a family member, a child with Autism flaps and twitches. Tr. 53, 129. Special Education Teacher P.G. noted the Student was aggressive, would hit people, had special interests in particular toys, a difficulty in speech pronunciation, lack of interaction with other students, a desire to be alone and to play by herself, an inability to connect to a topic, running away, writing words over and over again, a refusal to eat in the cafeteria because [redacted] had difficulty in following routines of other students, spitting, refusal to speak, and had melt-downs due to a change in schedule, but did not consider that the Student should be evaluated for Autism because [redacted] did not show symptoms such as fixating on a particular object, or putting toys on a line, or liking all round objects, as she experienced as a teacher in the Philippines. Tr. 174-175, 176, 186-187, 189, 190, 195, 199, 218-219, 221, 232, 251-252. Paraprofessional N.C. explained the Student would spit, make baby noises, and animal noises, and would hiss in order to communicate things [redacted] wanted, although it did not happen every day. Tr. 289, 291-292, 308. On March 16, 2018, there was a fear that the Student would elope, or wander off

the school grounds, and on March 20, 2018, the Student crawled on her hands and knees into the office of D.C., the LEA's social worker, which was not typical for a first grade student. Tr. 451-452. The Student, on August 20, 2018, lunged at the school nurse and scratched the side of her face. Tr. 354. Difficulties in relationships with other students, attention seeking behaviors, inability to follow direction, difficulty with transitions, and poor interactions with peers and adults were behaviors Social Worker J.P. observed about the Student. Tr. 798-800. The Student sometimes, however, is cooperative, and interacts with peers, and can be engaged in an educational program, which could be inconsistent with Autism, according to the LEA's Special Education Coordinator, D.S. Tr. 943-945. Dr. T.S., Ph.D., the LEA's school psychologist, was of the opinion that if the Student was placed in a Autism program setting it could be harmful to a child if the child is not Autistic. Tr. 752-753.

The initial issue at hand, however, is not about the Student's eventual requested placement in an educational setting for services under the Autism spectrum, but rather whether there was a suspicion of Autism in this Student to order an evaluation. *See* 20 U.S.C. § 1414(b)(3)(B). 34 CFR § 300.111(c)(1) (child find, suspicion). A "suspicion" requires a"difficult and sensitive" analysis. *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). 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). A suspicion of disability, rather than actual knowledge of the underlying qualifying disability, is the key. *See Regional Sch. Dist. No. 9 v. Mr. and Mrs. M.*, 53 IDELR 8, 109 LRP 51058 (D.C. Conn. 2009). A suspicion arises when the LEA "has notice that the

child has displayed symptoms of that disability." *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, 1119 (9th Cir. 2016).

"Autism" is defined as a developmental disability which affects verbal and nonverbal communication and social interaction and adversely affects educational performance. 34 CFR § 300.8(c)(1)(i). Characteristics include engagement in repetitive activities and stereotyped movements, a resistance to environmental or daily routine changes, and unusual responses to sensory experiences. *Id.* The disability is generally evident before age three, *Id.*, yet the same characteristics may be manifest after age three. *Id.* at § 300.8(c)(1)(iii). Autism is inapplicable if the child's educational performance is adversely affected because, primarily, the child has an emotional disturbance. *Id.* at § 300.8(c)(1)(ii). An "emotional disturbance" is defined as a condition where over a long period of time and to a marked degree the child's educational performance is affected by an inability to learn not explained by intellectual, sensory, or health factors, or an inability to build or maintain satisfactory interpersonal relationships with peers and teachers, or inappropriate types of behaviors or feelings under normal circumstances, or a general mood of unhappiness or depression, or a tendency to develop physical symptoms or fears associated with personal or school problems. *Id.* at § 300.8(c)(1)(4)(i).

In New Mexico, educational characteristics of Autism for school-aged children include, but are not limited to:

Communication

- Deficits in communication and language development, including difficulty:
- Initiating, maintaining, and terminating appropriate conversations with others;

- Recognizing and appropriately responding to the feelings and behaviors of others;
- Using and understanding verbal and/or symbolic communication; and/or
- Communicating wants, needs, and feelings appropriately and effectively.

Social/Emotional

- Deficits with social interactions, including difficulty:
- Understanding and participating appropriately in social interactions;
- Initiating and maintaining social and learning activities alone or with others;
- Learning incidentally from the environment, such as through social activities; and/or
- Participating in school and community activities with his/her peers and/or family due to communication, social, and sensory differences.
- Presence of challenging behaviors associated with communication and sensory processing difficulties.

Cognition

- Deficits in flexibility with thoughts and taking the perspectives of others, including difficulty:
- Altering a routine, such as changed school schedule (e.g., field trips or assemblies), sitting at a different table in the cafeteria, coping with a substitute teacher;
  and/or
- Interpreting or understanding thoughts, feelings, and intents of others, such as not recognizing that other people have thoughts and feelings that are different than their own.
- Deficits with generalization of skills across situations, people, tasks, and/or environments.

Sensory

- Sensory processing differences, including:
- Sensitivity to clothing, like wearing shoes and socks, shirts with tags, or wearing long-sleeved shirts;
- Sensitivity to sounds, such as flushing toilets, school bells, fire alarms, birds chirping, noise level in the cafeteria, etc.;
- Sensitivity to textures and tastes, including being a very "picky" eater and refusing to eat specific types of foods (e.g., soft foods, salty foods, or green foods);
- Sensitivity to touching materials, such as paper, glue, paint, chalk, clay, etc.;
- A need for increased sensory input, such as seeking out hugs, "crashing" into people and furniture, and/or wearing heavy clothing during inappropriate times of year;

and/or
- A decreased awareness of sensory input, such as not noticing when they are dirty, not reacting when hurt, and/or not responding to a parent's or teacher's voice.
- Activity levels related to sensory processing differences, including:
- Demonstrating decreased activity levels, such as falling asleep if they don't have enough stimulation or preferring sedentary activities; and/or
- Demonstrating increased activity levels related to either avoiding or seeking out specific types of sensory input. This level of activity may be confused with attention deficits.

See Ex. 39.

Given this backdrop of factual elements, above, and legal application, it is concluded that a suspicion of Autism arose for an assessment or evaluation to be performed by the LEA. There has never been an evaluation of the Student for Autism performed by the LEA. Tr. 657. Weight is given to the IEPs in which the Student was noted to scream, cry, had sensory processing skill deficiencies, repetitive behaviors, and [redacted] would hide, run away, was aggressive, and would shake, among things. Due Process Hearing testimony and IEPs showed the Student would hiss and make animal sounds, would elope, could not maintain relationships with peers or staff, would remain isolated, could not stay on topic, was unable to follow routines, would have melt downs, could not follow routines, and would crawl and hide, among other things. Communication, social/emotional, cognitive, and sensory deficiencies presented themselves. A suspicion that the Student may have characteristics associated with Autism therefore arose, and the LEA was on sufficient notice of the Student's suspected Autism for a timely formal assessment. *See D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180, 118 LRP 51059 (S.D. CA 3:17-cv-2400-BEN-MDD, Dec. 17, 2018)(persuasive, although not binding).

As concluded in *D.O. v. Escondido Union Sch. Dist., Id.*, the failure to conduct the assessment is a procedural violation. *Id.* Thus, the next step is to determine if it if the Student was denied a FAPE because of the violation. *Id. See* 34 CFR § 300.513(a). That is, whether 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. 34 CFR § 300.513(a)(2). *See O'Toole*, 144 F.3d at 707.

Like in *D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180, the failure to assess (in *D.O., Id.*, there was an eventual assessment, unlike in this present action) was due in part to skepticism on the part of staff. *Id.* In this present action, Dr. T.S. highly recommended the Student be medicated for ADHD before any other evaluations be performed, despite his initial opinion that based on the compilation of the scores from the Connors' Early Childhood the Student had high rates for several potential diagnoses, with the first being Autism. Other staff acted similarly, for instance, when Resource Special Education Teacher A.P. did not observe the Student flap or twitch then [redacted] did not conclude the Student was Autistic, although the Mother had seen those signs when the Student was a baby. Among other things, according to staff and educators, since the Student may have picked up some social cues, or because repetitive behaviors might not always have been consistent, then there may be some skepticism. In other words, the staff and educators may have been skeptical and substituted their judgments on what they consider to be a subjective determination of eligibility, rather than noting suspicions so to ensure that an assessment be performed. *See, e.g.*, 20 U.S.C. §

1414(a)(1)(E)(a screening by teachers or specialists to determine instruction is not an evaluation for services).

D.O. v. Escondido Union Sch. Dist., 73 IDELR 180, concluded that an educational benefit was denied the child by the procedural violation of failure to timely assess for Autism, and thus a denial FAPE because, following the analysis in *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d at 1124, 1126, the Petitioners need not definitely show that absent the error educational placement would have been different, but rather that the failure to obtain mandated medical information about Autistic child violates the goals of the IDEA and renders the achievement of FAPE impossible. *D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180. Concluding the goals of the IEP were "likely inappropriate" without sufficient evaluative information about the capabilities of a potentially Autistic child, the court found a deprivation educational benefit due the procedural violation and concluded there was a denial of FAPE. *Id.*

Although not bound by the United States District Court in California in *D.O. v. Escondido Union Sch. Dist.*, 73 IDELR 180, or the Ninth Circuit Court of Appeals in *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105, their analysis is found to be persuasive in the context of this action. Commencing with the IEP of September 1, 2016, Ex. 9, when the Student's social behaviors began to be documented as suspicious indicators of Autism, resulting in implementation within the statutory period, and onward through the filing of the Petitioners' Request for Due Process, without the sufficient evaluative information which an assessment can provide the Student's right to a free appropriate public education is impeded, and [redacted] is deprived educational benefit. 34 CFR § 300.513(a)(2). This is a potentially Autistic Student, and there is no evaluative

information that an assessment for Autism could have provided, thus resulting in [redacted] IEP goals (and the three IEP Plans) likely inappropriate knowing not what [redacted] needs actually consisted of so to allow a draft of appropriate Plans. Given the IEP Teams' inability to create appropriate Plans absent an assessment it is concluded that this amounted to substantive harm. *See O'Toole v. Olathe Dist. Unified Sch. Dist. No. 233*, 144 F.3d at 707 (procedural harm into substantive violation). Procedural errors resulted in an effective denials of FAPE. *See Garcia*, 520 F.3d at 1126 (procedure/substance).

Analysis of this matter still does not end, however. In one of the LEA's proposed Conclusions of Law it states that "[t]he parent did not raise any of the concerns or issues asserted in the due process complaint with the school district including the IEP team prior to the filing of the complaint." R's F & C No. 12, p. 3. Other than this, there is no allegation that there may be a lack of jurisdiction to first require an issue be brought before the IEP Team before it can be addressed at the Due Process Hearing, or subsequently by the courts. *See* Answer and Statement of Issues. Although administrative exhaustion, at least when requiring matters to be brought before a due process hearing prior to court action, remains jurisdictional in the Tenth Circuit, its clarity in analysis in whether exhaustion should continue to be a jurisdictional matter has been questioned. *See Muskrat v. Deere Creek Pub. Schs.*, 715 F.3d 775, 783 (10thCir. 2013). This present action is thus impacted by the jurisdictional possibility, if jurisdictional, as to what impact a proposed conclusion of law will have on attacking failure to bring a matter before an IEP Team before it can be brought under the

procedures for a Due Process Hearing.[2] Following *Muskrat, Id.*, exhaustion remains jurisdictional and thus should be addressed if there appears to be what may be deemed a jurisdictional matter.

"Exhaustion," in very general terms, usually applies in context of the IDEA when a matter is sought to be brought before the court on review that was not first raised at due process. *See Ellenberg v. N.M. Military Inst.*, 478 F.3d 1262, 1275-1279 (10th Cir. 2007). The possible issue presented by the LEA's proposed conclusion of law as to first bring a matter before an IEP Team before due process adjudication , *see* R's F&C No. 12, p. 3, presents a possible jurisdictional matter prior to court exhaustion, that is, is a type of "pre-exhaustion" of matters to be brought before the IEP Team before a due process determination can be made of the issue. *Ellenberg, Id.*, states that before relief may be sought in federal court, the party "must first request an IEP for the disabled child, or seek a change to a current IEP if one exists." *Id.* at 1267. Note that the issue addresses relief in federal court, not due process hearing agency relief. Nonetheless, the issue now presents itself.

There was never a formal request made by the Parents that the LEA test the Student for Autism. Tr. 1131. There has never been an evaluation of the Student for Autism performed by the LEA. Tr. 657. Parents did not request, in any of the three relevant IEP meetings, an assessment or evaluation for Autism. *See* Exs. 9, 10, and 11.

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[2] Note that in the Respondent's Answer, they assert an affirmative defense stating that there is no jurisdiction for the hearing officer to award relief requested by the Petitioner because it is not available under the IDEA. *See* Respondent's Answer, Second Affirmative Defense. Whether this relates only to a remedy, or jurisdiction as a whole, is not explained.

Nonetheless, the issue presented itself by the Autism-like suspicions the Student presented with and which were recorded in each of the three IEP meetings, in different ways, as discussed in substance above. *Id.* The IEP Teams therefore had notice of the indications of Autism and the need for an Autism assessment, although the Petitioners did not make a formal request that an evaluation or assessment be made. *Id.* In other words, given the information about the Autism-like suspicions reflected in the three IEPs, "those with experience in educating the nation's disabled children [were provided] 'at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.'" *Ellenberg*, 478 F.3d at 1275 (citing *Cudjoe ex rel. Cudjoe*, 297 F.3d at 1065). Assuming, although not deciding, that "IEP pre-exhaustion" is also jurisdictionally required before the matter may be decided in a due process hearing, it is found that the three IEPs allowed the IEP Teams to formulate plans to overcome the educational shortfalls complained of at the due process hearing, and it is therefore concluded that the matter has been exhausted.

As a result, the matter having been internally exhausted, it is concluded that the Petitioners have their burden of proof by a preponderance of evidence that there was a procedural violation of the IDEA by the LEA's failure to assess or evaluate the Student based on a suspicion of Autism, and that it resulted in a substantive denial of FAPE because it impeded the Student's right to a free appropriate public education, and deprived her of educational benefit. 34 CFR § 300.513(a)(2).

This addresses in context Issues 1, 2, 5, 6, 18, 19, 22, 23, 28 and 29.

Autism Eligibility, Strategies and Services

Although, as found above, that there was a suspicion of Autism for an assessment, there is insufficient evidence provided by the Petitioners that the Student, on this record, is eligible for services for developmental disability under Autism. *See Schaffer v. Weast*, 546 U.S. 49 (2005)(burden on party challenging IEP). Following the analysis regarding internal IEP exhaustion, noted above, Autism like suspicions were before the IEP Teams, so it is not barred from consideration at the due process hearing. However, a suspicion for an assessment does not equate with a preponderance of evidence for a finding of Autism and eligibility.

The Petitioners did not provide an independent assessment, expert, or similar evidence, to support a finding that the Student is a student with an Autism spectrum disorder, or that the IEPs were deficient because the Student was not found eligible for services due to Autism. *See* Due Process Hearing record, inclusive. The Student has not been diagnosed with Autism. Tr. 1070. In fact, the Mother would step out of the Due Process Hearing at times in order to participate her own ongoing private evaluation of the Student. *See* tr. 412-421, 611. The results of the private evaluation (if any) were not made part of this record. *See* Due Process Hearing record, inclusive. Under the regulatory scheme, evaluations and assessments can lead to possible reevaluations, which eventually lead to eligibility determinations. *See* 34 CFR §§ 300.301, 303, 304, 305, and 306. As explained in part earlier, with the factual basis for a suspicion adopted herein, the Petitioners offer no proof through an evaluation, assessment, expert witness, or similar evidence, which would take that step from suspicion of the Student's unique circumstances to a finding that [redacted] is a student with an Autism spectrum disorder, or

that she is eligible for services based on the unique circumstances of being a student with an Autism spectrum disorder. As a result, it is concluded that FAPE has not been denied on either the lack of defining the Student as a student with an Autism spectrum disorder, or on the eligibility question. *Endrew*, 137 S. Ct. at 1001 (IEP and unique circumstances for FAPE).

The leads to the next connected issue, in that since the Student has not yet been found eligible for services for developmental disability under Autism, whether a FAPE was denied because the IEP Teams and educators did not consider New Mexico's regulatory strategies contained in subparagraphs (a)-(k) of §6.31.2.11(B)(5) NMAC in creating the Student's IEPs. These §6.31.2.11(B)(5)(a)-(k) NMAC strategies, also described in the Statement of Issues as the eleven items for consideration of Students with Autism, are outlined in the Relevant Legal Overview of this Memorandum Decision and Order, and will not be restated here. Suffice to conclude that the answer lies in the plain reading of introductory language of the Rule – the procedure – itself: "For students with autism spectrum disorders (ASD) eligible for special education services under 34 CFR § 300.8(c)(1), the strategies described in Subparagraphs (a)-(k) of this paragraph shall be considered by the IEP team in developing the IEP for the student." §6.31.2.11(B)(5) NMAC. Preconditions to consideration of the eleven items for an IEP Team are that the Student is a student with ASD and that she is eligible. Having only found and concluded a suspicion for assessment of ASD, and that there has been no determination that she is a student with ASD or eligible for services under ASD, then those preconditions are not met. As a result, there is no procedural violation because the

State Rule is not violated. Therefore, there is no need to address the second prong for a procedural violation. There was not a denial of FAPE.

This addresses in context Issues 5, 6, 8, 9, 18, 19, 22, 23, 28, and 29.

Adolescent Day Treatment Program (ADT)

The Adolescent Day Treatment Program, or ADT, is a day treatment program, associated with the Humphrey House, and the Guidance Center of [redacted] County, New Mexico. Tr. 491-492, 1038. For reference, the programs will be called ADT. The ADT program is not licensed by the New Mexico Public Education Department. Tr. 1041. It does not provide educational services – it performs behavior management, tr. 1065, a behavior management program, but it is not a medical appointment. Tr. 1067. Medicaid is billed for the services of ADT, if the patient qualifies for Medicaid services, tr. 1060, and Medicaid was billed for the services provided to the Student. Tr. 1052. The ADT program is an off-school site afternoon program for elementary-age students. Tr. 1039. It serves children from the ages of five to fourteen. Tr. 1041. Participation in the ADT program is between the hours of 12:30 p.m. and 5:30 p.m. Tr. 1065. The Student was a participant in the ADT program. Tr. 1043.

During the 2016-2017 school year the Student was in kindergarten. During the 2017-2018 school year the Student was in first grade. During the 2018-2019 school year the Student was in second grade. *See* Exs. 9, 10, and 11.

The typical educational school week in the LEA, excluding recess and lunch breaks, was for 1680 minutes. Exs. 9, 10, and 11 (the three IEPs). The Student began the ADT program in late September or early October of 2017. Tr. 431, 1101. The referral date is August 25, 2107. Ex. 36. [redacted] was in the first grade. Tr. 1097. At first, the Student

would go home from school, at about noon each day, tr. 1101, but on December 22, 2017, arrangements were made for the Student to be picked up directly at school by ADT transportation. Ex. 18, pp. 2-3. Tr. 439, 1103. On January 9, 2018, the Student was going directly from school to ADT. Ex. 18, p. 3. Tr. 440. From the fall of 2017 though the fall of 2018 the Student attended the ADT program. Tr. 1107. In November 2018 the Student discontinued the ADT program and began to attend the LEA's school on a full time basis. Tr. 1131-1132. While in the ADT program the Student was not counted as absent by the LEA. Tr. 873.

She was dismissed at noon, early dismissal, to attend the ADT program. Tr. 421-425. Services required are 1680 minutes a week. Ex. 11. The first mention of the ADT program was in Student's IEP of March 8, 2018, where it is indicated the Mother mentioned the Student continued to participate in the ADT program. Ex. 11, p. 8. The 1680 minutes a week noted for the Student's typical week, including the special education setting, the issue of the number of hours was before the IEP teams, including ADT, giving them " 'at least the first crack at formulating a plan to overcome the consequences of educational shortfalls.' " *Ellenberg*, 478 F.3d at 1275 (citing *Cudjoe ex rel. Cudjoe*, 297 F.3d at 1065). The ADT program was not included as part of the service plans, however, in the March 8, 2018 IEP. The setting stated the 1680 minutes were in the special education setting in "Public/Private Separate Schools, RTC, Homebound/Hospital." Ex. 11, p. 20. Nonetheless, the setting was not for these purposes. The LEA claimed services based on the IEP for funding under the special education program for time the standard time the Student was supposed to be in the educational setting at the school, although the Student was not in school or in an LEA

educational setting for at least 1.5 hours daily. Tr. 730-731. This relates to this particular Student and not to any possible systemic practice by the LEA, which is outside the jurisdiction of this case. *See* 34 CFR § 300.513. As noted, the ADT program billed Medicaid for the times the Student was with them, which are for some of the same periods the LEA claimed services for special education, although the Student was not in an educational program provided by the LEA at those times. Ex. 35; Tr. 983-990. The Student attended the ADT program during school hours for about 1.5 years. Tr. 531-532.

The parties dispute whether the Parents sought the ADT "referral," or whether the school initiated the ADT referral. The Student went to ADT from the school environment for a part of the day in which [redacted] would have otherwise been in the LEA's educational setting. The ADT setting was for behavioral, rather than educational, purposes. The concept of who made the referral, however, as explained below, becomes a non-issue. The concept raised is that the Student's placement in the ADT program for behavioral support was not based on the IEP – it was effectively a predetermination with nothing contained or considered in the IEP process.

Once again, although not bound by Ninth Circuit precedent, persuasive support is found a recent Ninth Circuit opinion. *See M.S. v. Los Angeles Unified Sch. Dist.*, Ninth Cir. No. 16-56472, D.C. No. 2:15-cv-05819-CAS-MRW (January 24, 2019). In its Order affirming the District Court, the Court concluded that even though the State's Children and Family Services had residentially placed the child in mental health treatment under state law, based on a State Juvenile Court Order, FAPE was still denied because there was an independent obligation to ensure a continuum of alternate placements to meet the student's educational needs and for educational purposes. *Id.*, Slip Op., p. 4.

Adopting the District Court's Memorandum and Decision, it was concluded that a predetermination was made regarding the residential treatment, albeit subject to a State Juvenile Court Order, because the matter was not discussed as a part of the IEP. *Id.*, p. 23 of Appendix A. The same concept presents itself in this present case.

The Student was put into the ADT program, be it by a parental request or a request by the LEA. For 1.5 years the Student attended the ADT program during school hours. Tr. 531-532. The ADT program was an offsite behavioral treatment center, not an educational program. The IEP Teams did not address or discuss the necessity of including the ADT program as a part of the Student's IEPs. It is concluded, therefore, that this resulted in a predetermination without addressing the propriety for placement for educational purposes. This holding is not inconsistent with Tenth Circuit precedent in that off-site placement and related services require the institution to have educational accreditation and that it provide some type of special education, neither of which were provided to this Student by the ADT program. *See Jefferson Cnty. Sch. Dist. R-1 v. Elizabeth E.*, 702 F.3d 1227, 1235-1236 (10th Cir. 2012).

A predetermination is a procedural violation. *See M.S. v. Los Angeles Unified Sch. Dist.*, p. 22 of Appendix A. The next step is to determine 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. 34 CFR § 300.513 (a)(2). For 1.5 years the Student was placed in the ADT program for behavioral modification, where [redacted] obtained no education, although [redacted] was supposed to receive 1680 minutes a week of educational services

under her IEPs. The relevant IEP Teams failed to consider the possibility of the impact to educational benefits to the Student by having [redacted] removed from the educational setting, thus impeding her right to a free appropriate public education and depriving [redacted] of educational benefit. *See* Exs. 10, 11. Just as in *M.S. v. Los Angeles Unified Sch. Dist.*, p. 23 of Appendix A, it cannot be said that the error is harmless. *Id.* That is, the relevant IEPs were not "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew*, 137 S. Ct. at 999. It is concluded, therefore, that FAPE was denied to the Student by the relevant IEP Teams not fulfilling an independent obligation to ensure a continuum of alternate placements to meet the Student's educational needs for educational purposes.

This addresses in context Issues 3, 4, 5, 6, 11, 16, 17, 18, 19, 22, 23, and 31.

Medication

An LEA is prohibited from requiring a parent to have her child obtain prescription medications as a condition of attending school, or to receiving educational benefits. *See* 34 CFR § 300.174.

At some unknown date in the fall of 2016, the Principal of BTW school told the Student's Mother that the Student could not attend school unless she was placed on medication. Tr. 1143-1144. This would have been in the Student's kindergarten year. Ex. 9. The kindergarten IEP is dated September 1, 2016. *Id.* According to the Mother's testimony, the Student was at BTW school "when my child was having to be put on medication, I do remember the principal did mention to me that [the Student] will not be able to come to school unless she is on medication." Tr. 1143. The Psychodiagnostic Screening by Dr. S, Ph.D. was on October 7, 2016, in which medication was

recommended. Ex. 6. It is found, therefore, that the statement to the Mother from the BTW Principal took place after October 7, 2016. Review of the next IEP, that being the IEP dated March 10, 2107, states that the Student has ADD, but does not list any medication. Ex. 10, p. 3. The first mention of medication in an IEP is the IEP of March 8, 2018, where the Student's significant health information noted ADHD, and medication was noted to be Vyvance 30 mg, once daily. Ex. 11, p. 5. The Student, however, began to take the ADD medication of Adderall on October 14, 2016. Tr. 1089.

On October 7, 2016, Dr. T.S., Ph.D., "highly recommended that [the Student] and [redacted] family consult with their physician to inquire as to the advisability of medication for symptoms of Attention Deficit Disorder." Ex. 6, p. 3. He recommended that the medication would more than likely be helpful, and recommended a physician consult. Tr. 649-650, 665. Of the thousands of students Dr. T.S. has evaluated for the LEA that he has concluded that about 80 percent have Attention Deficit Disorder, tr., 663, and that he prefers to make medication recommendations rather than heavy-duty behavioral accommodations if the child is struggling to the point satisfactory progress in the classroom is not being made. Tr. 663. The Mother then took the Student to the Student's physician and the Student began Adderall on October 14, 2016. Tr. 1089. The point remains that Dr. T.S. only recommended the medication, and that the Mother consulted the Student's physician, and after that the Student was put on the medication.

There is no evidence presented by the Petitioners that the Student discontinued going to school because the BTW Principal said [redacted]had to take medication. The Student took medication after a physician's consult. The Student continued to attend school at BTW until about March 2017, when [redacted]was moved to the TABS program at WRE

school. Tr. 1086-1087. The Student's behaviors, such as temper tantrums, were present on December 12, 2106, to such an extent that Dr. T.S. recommended medication twice daily, or extended release. Tr. 673-674. Ex. 14. Although behavioral issues continued to exist, id, and *see* Ex. 10, the burden remains on the Petitioners to present evidence that the BTW Principal's statement to the Mother that the Student would not be allowed into school absent medication either (1) impeded the Student's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2).

It is concluded, therefore, that BTW Principal's statement to the Mother that the Student could not attend BTW school unmedicated was a violation of procedure in which the LEA is prohibited from requiring a parent to have her child obtain prescription medications as a condition of attending school, s*ee* 34 CFR § 300.174, yet that the Petitioners have not met their burden to prove that the procedural violation resulted in a denial of FAPE. 34 CFR § 300.513 (a)(2).

This addresses in context Issues 5, 6, 12, and 20.

TABS Program, Behavior, and IEPs

In March 2017, the Student began going to the TABS program at WRE school. Tr. 1086-1087. The IEP of March 10, 2107, states that the Student meets the exceptionality of Other Health Impairment due to ADHD, and that based on [redacted] social and emotional needs [redacted] is in need of additional supports by a behavior program found in an alternate program. Ex. 10, p. 17. Although the IEP states the school the Student attends is BTW, *Id.* at p. 1, as the testimony states, and to which weight is given, the alternate program is

the TABS program at WRE school. Tr. 1085-1087. The Student was still in kindergarten. Tr. 1084-1085. The IEP does not mention the acronym "TABS." Ex. 10. "TABS" stands for Teaching Appropriate Behavior Skills. Tr. 135. The IEP does not state that the Student was to attend school at half day and to be taken home at noon. Tr. 157-158; Ex. 10. There was no prior written notice noting the school day would be reduced. *Id.* The IEP does not mention Teaching Appropriate Behavior Skills.

The TABS program is an on-school site program for students with challenging behavioral issues in small group settings to give extra supports to address social/emotional needs, academics, and behaviors, where they are to function in class though activity modification. Tr. 73, 162. The Student was relocated to WRE school with the TABS program to change the Student's behaviors in and out of the classroom. Tr. 109-110. On March 14, 2107, special transportation services were provided to the Student to pick [redacted] up from [redacted] home in the morning, take [redacted] to school, and then to return [redacted] home from school by picking [redacted] up at noon from the school grounds. Ex. 21.

The length of the Student's setting in the TABS program changed with the years. While [redacted] began to be dismissed at noon in kindergarten, [redacted] was later dismissed at 12:40 p.m. Tr. 167-169. Initially, the Student was to be home, but that was changed to have [redacted] taken directly to the ADT Program from the TABS school setting. The Student eventually began to attend the LEA school full time once again in early November 2018. Recall, however, that the IEPs called for, excluding recess and lunch breaks, 1680 minutes a week of educational services. Exs. 9, 10, and 11 (the three IEPs).

In the 2017-2018 school year there were three students in the TABS program, with one of them being this Student. Tr. 832. In the 2018-2019 school year there was

only one student in the program – the Student. Tr. 832. One teacher, and two educational assistants/paraprofessionals taught the TABS Student, or students. Tr. 832-833. The educators do not know the number of students who may be placed in the program at a given time, although there could be as many as ten children. Tr. 833. As a result, there are always the three educators participating in the program. *Id.*

It has already been concluded that because of the IEP Teams' inability to create appropriate Plans absent an assessment that a FAPE was denied the Student. The Plans are inappropriate. However, it is concluded that even these inappropriate Plans were not implemented as written because of the hourly reductions due to early dismissals. Implementation is a procedural violation. *See J.W. ex rel. J.E.W. v. Fresno Unified Sch. Dist.*, 626 F.3d at 432. The questions now arise, because of the shortened school day, despite the Plans requiring otherwise, as to whether the Plans (1) impeded the Student's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). Borrowing the analysis recited earlier regarding loss of education while at the ADT program, a similar approach is now used – that is, for 1.5 years the Student was placed outside of an educational setting, where [redacted] obtained no education, although [redacted] was supposed to receive 1680 minutes a week of educational services under [redacted] IEPs. By the IEP Teams' failure to consider the possibility of the impact to educational benefits to the Student by having [redacted] removed from the educational setting, they impeded [redacted] right to a free appropriate public education and deprived [redacted] of educational benefit. *See* Exs. 10, 11. As in *See M.S. v. Los Angeles Unified Sch. Dist.*, p. 23 of

Appendix A, and as in the ADT analysis in this Order, it cannot be said that the error is harmless. *Id.* It is concluded, therefore, that FAPE was denied.

As to the setting in the TABS classroom and the least restrictive environment – once again, FAPE has been found to be denied by the Plans not having an assessment, thus what flows from the Plans would be inappropriate as well. How can it be known what the appropriate least restrictive environment is for the Student if the Student is not properly assessed in the first place? Similarly, when looking at a behavior plan, how can the Plans be appropriate if an assessment does not show what the needs of the Student are? In the exercise of caution, however, the issues will be explored.

The IEPs did not place the Student in the TABS program. Exs. 10, 11. For least restrictive environment, the IEP of March 10, 2017, considers the Student to be in the regular classroom 40 percent to 70 percent of the school day, Ex. 10 at p. 15, and finds [redacted] in need of moderate services up to 50 percent of the school week, *Id.* at p. 16, and states if the Student is not included in a general education more than 80 percent of the time then the Team must explain why aides and services are not adequate, how placement in a special education setting will be more advantageous, and why the general education setting is reduced and what is being done to reintegrate the student back into the general education setting. *Id.* These latter factors were not explained. *Id.* However, it was noted that because of the Student's social and emotional needs the Student would be in an alternate program. *Id.* at 17. The program was not explained or otherwise defined. *Id.* In the March 8, 2018 IEP the Team found the Student in need of services for the majority of the school day/week in supported integration or direct services to achieve goals and objectives, but once again did not explain if the Student was not in the

general education setting for 80 percent of the time, why aides and services are not adequate, how placement in a special education setting will be more advantageous, and why the general education setting is reduced, and what is being done to reintegrate the student back into the general education setting. Ex. 11, p. 21. As explained above, however, during the 2017-2018 school year there were three students in the TABS program, with one of them being this Student, tr. 832, while in the 2018-2019 school year there was only one student in the program – the Student. Tr. 832. One teacher, and two educational assistants/paraprofessionals taught the TABS Student, or students. Tr. 832-833. That is, the IEPs on their face were inappropriate, as shown by their subsequent implementations in the more restrictive environments.

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

It is concluded that because the IEPs themselves were not in accord with the practice of a much more restrictive environment by the LEA then, as to least restrictive environment, they were inappropriate and denied the Student a FAPE. They were not reasonably calculated to enable a child to make progress appropriate in light of [redacted] circumstances, which is a substantive violation. *Endrew* 137 S. Ct. 988 at 999. The LEA's

own practices with the TABS program outside of the IEP least restrictive environment terms evince the inadequacy of the IEPs. The least restrictive environment portions of the IEPs, in and of themselves, did not reflect the unique circumstances of this Student in the least restrictive environment for [redacted]. *Id.* at 1001. They were incomplete forms that did not reflect the true nature of the Student's educational needs. It is therefore concluded that the Petitioners have met their burden that the March 10, 2017 IEP and the March 3, 2018 IEPs, as written, denied the Student a FAPE. *See* §6.31.2.11© NMAC (IEP teams shall ensure continuum of placements, address services, peer-reviewed research to extent practicable, statement of modifications and supports to be provided to school personnel, explanation why student will not participate with regular education students, written notice of change, among other things, in IEP). Thus, procedural violations occurred with the March 10, 2017 and March 8, 2018 IEPs which resulted in substantiative violations by both impeding the Student's right to a free appropriate public education, and by causing a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). As a result, FAPE was denied.

Concluding a denial of FAPE with the IEPs and the least restrictive environment, there is nothing to measure whether the actual practices were or were not in accord with the least restrictive environment. As stated earlier, given the lack of assessment for Autism, it is "putting the cart before the horse" to try to determine what the least restrictive environment should be for this Student. Petitioners have not met their burden on this aspect as to what it should have been.

As to behavior – the Student presents the Team with challenging behaviors, to put it lightly. [redacted] elopes. [redacted] is aggressive. [redacted] hurts others. [redacted] prefers isolation. The

March 10, 2017 IEP states that the Student requires a Behavior Intervention Plan, and states that the Behavior Intervention Plan is attached to the IEP. Ex. 10, p. 3. There is no Behavior Intervention Plan attached to the March 10, 2017 IEP. *Id.* There was, however, a Behavior Management Plan created on April 11, 2017. Ex. 13. The March 3, 2018 IEP states the Student is in need of a Behavior Intervention Plan, Ex. 11, p. 5, and one is attached to this document. Once again, these Behavior Plans expressed in the IEPs are without the benefit of an assessment for Autism and for that reason are inappropriate.

Nonetheless, failure to follow procedures for an IEP and a behavior plan are considered procedural violations. *See Neosho R-V Sch. Dist. v. Clark*, 315 F.3d 1022 (8th Cir. 2003). In New Mexico, a functional behavioral assessment is strongly encouraged to be conducted, with behavioral intervention plans integrated into the IEPs for students who exhibit problem behaviors "well before the behaviors result in proposed disciplinary actions" which are demanded under federal regulations. §6.31.2.11(F)(1) NMAC. As noted earlier in this administrative order, a strong encouragement is not a mandate. Thus, for consideration, the first issue is whether both the March 10, 2107, and the March 3, 2018 IEPs required a functional behavioral assessment. The answer lies in the plain meaning of the State regulation – it is strongly encouraged, but not required. *Id.* The only time they are required are in manifestation determinations. *See* 34 CFR § 300.530(a) & (f).

As to the March 3, 2017 IEP – the next issue, given that the IEP was said to attach a behavior plan, when it did not, although a plan did arise in April of that year, whether that procedural defect (1) impeded the Student's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the

decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The Petitioners have not met their burden that it did so. Once again, this however, is based on the IEP absent the Autism assessment, which in and of itself is found to violate FAPE.

There was a Behavior Management Plan, that of April 11, 2017. Ex. 13. It describes the Student's behaviors as hissing, kicking, biting, scratching and clawing, as well as using weapons to attempt to harm others. *Id.* Intervention strategies were created, such as calming touches, praise, check for understanding and instruction, sensory breaks, time out of classrooms, a time out break system for use not as punishment but as positive opportunity to regain composure, frequent reminders, removal from the situation when escalation begins, and parent contact when behavior becomes aggressive or violent. *Id.* The reinforcement plan speaks of auditory and visual stimuli, movement, social training, reinforcement with sensory stimuli, sticker chart, and consequences, such as loss of privilege and computer time and contact of parent. *Id.* This Plan was created before the Student was moved to the ADT program. This in and of itself questions whether the Plan was allowing the Student to make progress, since the Student was moved to the ADT off-site program.

The March 8, 2018 IEP did have a Behavior Intervention Plan attached. Ex. 11, p. 25. It described the Student's problem behaviors as being a performance deficit, (that is, the Student knows how to perform the desired behavior but does not do so consistently), due to temper outbursts, frequent, ongoing and intense, with mood swings, and where the Student becomes upset, sad, frustrated, angry and irritable. *Id.* It describes the Student as being emotionally disturbed based on domestic disturbance, with no change

in curriculum required because the behaviors are due to domestic disturbance, and that as for proposed strategies and positive supports the LEA only proposed emotional support, stating the "bastion of support should come from the family." *Id.* It simply provides that some sort of positive reenforcement will be given to the Student by giving her a positive environment in school, which will be through verbal praise, unnamed tangible rewards, and an opportunity to earn preferred activities, with a continuum of consequences for behavior. *Id.* A crisis plan includes having the educator be defensive, with law enforcement on call, if it is physical, or if only defiant or not doing school work then in-school suspension, other responsibilities like cleaning a table, and out-of-school suspension based on disruptive or destructive behavior. *Id.* There is no indication about the TABS program of the ADT program. *Id.* Note that the prior activities of concerns of hissing, kicking, biting, scratching and clawing, as well as using weapons to attempt to harm others noted in the April 11, 2017 Behavior Management Plan were not discussed in the March 8, 2018 Behavior Intervention Plan. Those activities were continuing, however.

The concern here is whether the two Plans meet the unique educational needs of this Student, or, rather, whether the Petitioners have met their burden to prove the Plans do not meet the unique circumstances of this Student, while giving deference to the expertise and exercise of judgment by the school authorities. *Endrew*, 137 S.Ct. at 1001. It is concluded that the Petitioners have met their burden as to the March 8, 2018 Behavior Intervention Plan, but not as to the April 11, 2017 Behavior Management Plan.[3]

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[3] Note, however, that the two Behavior Plans, and IEPs, are nonetheless found to deny FAPE because lack of assessment, as discussed earlier.

Weight is given to Dr. T.S., Ph.D.'s Psychodiagnostic Screening of October 7, 2016. This report was prior to the behavior plans of April 11, 2017 and March 8, 2018. In it he finds that the Student "demonstrates an inability to maintain focus, to maintain [redacted] position in the classroom, to read social cues from others and to follow even the simplest instructions." Ex. 6, p. 3. He goes on to explain that "[i]t is imperative at the present time that those who are working with her understand that many of these actions are not deliberate [or] willful." *Id.* Despite the LEA's School Psychologist, Dr. T. S., voicing these recommendations to the IEP Team, the March 8, 2018 Behavior Intervention Plan only proposed that the LEA provide "emotional support," with the family to take primary responsibility, and that law enforcement was to be on call, as well as in school and out of school suspensions. Ex. 11, p. 25. It is difficult to conclude that these strategies are positive supports to address the unique circumstances of this Student whose actions are not deliberate or willful. In practice, as a behavior management tool, the LEA's nurse reported the Student to the police when she says the Student scratched her and spit at her, on August 20, 2018, because "I didn't want [redacted] go to jail; but I did want [redacted] to realize that this was not acceptable behavior." Tr. 354, 371, 377. At this time the Student was seven years old.

While police may be called, *see* 34 CFR § 300.535, when viewed with other factors such as time outs and physical restraints, then an IEP may be inappropriate, or if not contained in the IEP, the actions themselves may give rise to an IEP 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).

When a student's behavior impedes the student's learning or that of others then positive behavioral interventions, supports, and other strategies are to be used to address that behavior in the IEP. 34 CFR § 300.324 (a)(2)(i); §6.31.2.11(F)(1) NMAC. In this regard, the April 11, 2017 Behavior Management Plan, Ex. 13, contains the positive behavioral interventions and does not deny FAPE. Although the Plan was supposed to be attached to the IEP, this is found to be a procedural violation which did not impede the Student's right to a free appropriate public education, significantly impede the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or cause deprivation of educational benefit. 34 CFR § 300.513 (a)(2). The March 8, 2018 IEP with the Behavior Intervention Plan, Ex. 11, p. 25, however, does deny FAPE. This Plan does not note the unique characteristics of the Student's behaviors, like the April 11, 2017 Behavior Management Plan did (hissing, scratching, etc.), and provided no positive behavior techniques to address the lack of willfulness or deliberation on the Student's part to such an extent that suspensions were to take place, and the police were to be on call, so that the police were called due to a scratching incident (which the Behavior Intervention Plan no longer defined as a problem behavior) to teach the Student that [redacted] behavior was not acceptable. While not substituting independent judgement for what should have been in the Plan, and giving deference to the expertise and exercise of judgment by the school authorities, *Endrew*, 137 S.Ct. at 1001, it is concluded the March 8, 2018 IEP with the Behavior Intervention

Plan does not consider the unique circumstances of this Student, and was not reasonably calculated to enable this Student to make progress appropriate in light of [redacted] circumstances, which is a substantive violation. *Id.* 137 S. Ct. 988 at 999. Thus, a procedural violation occurred with the March 8, 2018 IEP which resulted in a substantiative violation by both impeding the Student's right to a free appropriate public education, and by causing a deprivation of educational benefit. 34 CFR § 300.513 (a)(2). While it is noted that the Student may be interacting better with her peers, with some academic progress, and aggressive behaviors have been reduced in frequency, tr. 256, 262-268, 307, 324, 489, 496, this does not change the conclusion that the Plan impeded the Student's right to a free appropriate public education and caused a deprivation of educational benefit to [redacted] – the issue is the lack of positive behavior practices considering the Student's lack of willfulness or deliberation as unique circumstances of the Student. As a result, FAPE was denied.

This addresses in context Issues 3, 5, 6, 12, 15, 18, 19, 23, 28, 29, and 31.

Board Certified Behavior Analyst, Aversives, and Parents

The next related issue is whether a Board Certified Behavior Analyst was required to meet the Student's educational needs regarding [redacted] behavioral issues. It is concluded that there was no need. Although the March 8, 2018 IEP with the Behavior Plan has been found to deny FAPE, the Petitioners have not met their burden that a FAPE requires a Board Certified Behavior Analyst to form a behavior plan. As noted above, what is required are positive behavior interventions – not a board certified analyst. This is consistent with recent case law, and will be followed. *See D.S. v. Parsippany Troy*

Hills Bd. of Ed., 73 IDELR 143 (D.N.J. 2018); *Pottsgrove Sch. Dist. v. D.H.*, 118 LRP 37748 (E.D. Pa. 2018).

Continuing with behavior related matters, an issue of aversive interventions, such as restraint and seclusion, is raised. Particularly, the Petitioners contend inappropriate interventions because staff used their bodies to move the Student to the Nurse's office, blocked the door to prevent an exit, stood on either side of [redacted], stood by the door to block an exit, and had the Student leave the classroom when [redacted] would not sit in time out. Tr. 113, 294-295, 317-318, 454-455; Ex. 26. New Mexico rules and laws are explored in this procedural context. Restraint is permitted if behavior presents an imminent danger of serious physical harm to the student or others, and less restrictive interventions are insufficient to mitigate the danger. NMSA 1978, § 22-5-4.12. However, physical restraint does not include a physical escort. §6.11.2.7(P) NMAC. It is found that the Student's behaviors at times presented an imminent danger of harm to others, yet that the LEA used less restrictive methods to first mitigate the danger, and otherwise only used physical escorts. Tr. 294, 295 (stood in front of door, did not hold Student back, guided Student so [redacted] would not go through doors), 353-355 (running toward open door, closed door to prevent leaving, firmly stating conduct not acceptable), tr. 453-455 (staff would go with the Student to the hallway, moving in the direction where they wanted Student to go, prompts and direction, gentle guidance touching). It is concluded there was not a procedural error. There is no need therefore to go to the next step of whether it resulted in substantive harm. 34 CFR § 300.513(a.)

Another behavior challenge in the behavior components is that the LEA is alleged to rely on the Parents to intervene when the LEA was unable to manage the Student's

behavior challenges, thus denying the Student a FAPE. This may be viewed as substantive challenge to the IEP, that is, whether the IEP is reasonably calculated to enable the child to receive educational benefits. *Rowley*, 458 U.S. at 207. The Petitioners' argument, however, is that the Parents at different times and dates were called to attend to the Student when [redacted] escalated in [redacted] behaviors, thus denying an education which was "free." P's F&C, Issue 8, pp. 11-12. In this regard, if the action taken is outside of the IEP, then it could be viewed as an implementation challenge. *See Spring Branch Ind. Sch. Dist.*, v. O.W., 72 IDELR 11 (S.D. Tex. 45:16-CV-2643, March 29, 2018)(in context, implementation for police intervention if not in IEP). In any event, the challenge is made and will be viewed as an implementation challenge in context of the argument.

When the Student presented with challenging behaviors the Student's Mother would be called to intervene. Tr. 37, 489, 52-53, 296, 297, 358, 875-876, 1081-1084, 1109. The Mother was "getting called all the time," and the Student was not able in stay in a full school day because of the calls. Tr. 1091.

Implementation is a matter of procedure. 34 CFR § 300.323(d)(i)(educator's responsibility to implement IEP). Thus, the burden is on the Petitioners to prove that this procedural defect (1) impeded the Student's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). While references are made that the Mother was often called by educators, and that the Student missed some school because of it, there is no nexus to how much school was missed, and that these

particular missed days or hours are what impacted the Student's education, or whether there was an impact. It does not go unnoticed that the Mother frequently requested that she be contacted in these situations. Tr. 486-487. It does also not go unnoticed that the Student was often absent from related services, such as speech, occupational and physical therapy. Ex. 20. While the duty is on the LEA to provide a free appropriate public education (rather than the parents), 20 U.S.C. § 1400, et seq., there is no connection proved between the Mother being called to intervene and a deprivation of educational benefit (if any), impediment to a free appropriate education (if any), or significant impediment to parental participation (if any). Thus, it is concluded there has been no denial of a FAPE on this issue.

Petitioners argue that an organization called Collaborative Autism Resource and Education, or CARE, observed the Student without informed consent, and that the Parents were never notified about the CARE's observation. P' F&C, Issue 13, p. 18. *See* Ex. 46. They cite to the transcript at Tr. 1118-1119 for a factual basis. That witness, the Mother, did not remember being told of an observation of the Student by CARE, or of being provided reports. Tr. 1118-1119. CARE is a contract program that assists with plans for students with Autism, but also assists with discipline and behavior issues for Students without Autism. Tr. 894. The CARE reports were not given to the Mother. Tr. 893-894. The LEA must provide notice to the parents which describes the evaluation procedures the LEA is proposing to conduct. 34 CFR § 300.304(a). It is found that this CARE process was part of an evaluative procedure, be it for Autism or behavioral issues, and that the Parents were not provided notice. This is deemed a procedural violation. *Id.* Despite the procedural violation, the Petitioners have not met their burden that it

impeded the Student's right to a free appropriate public education, significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). Although the Mother was not given an opportunity to participate in the CARE program due to lack of notice or consent, the record does not support that the Petitioners have established that this "significantly" impeded her opportunity to participate in the provisions of a FAPE for her Student. As a result, it is concluded that there was a procedural violation, yet that it did not result in a substantive violation of FAPE. There was no denial of a FAPE.

This addresses in context Issues 5, 10, 11, 14, 15, 24, and 25.

Extended School Year

Petitioners argue that a FAPE was denied due to lack of Extended School Year provided (ESY) in the IEPs. See P' F&C Issue 14, p. 18. Their reference to any factual basis in the record is minimal. *Id.* The Student's kindergarten teacher did not recommend ESY in the summer because due to the Student's difficulty with transportation, and the difficulty she had in getting the Student to regular school, that it could be traumatic to put her through it in the summer. Tr. 59. Additionally, the Mother was not interested in ESY. Tr. 60. The IEPs of September 1, 2016, March 10, 2017, and March 8, 2018 each review whether ESY services should be provided and each determine it should not be provided. Exs. 9, 10 and 11. The question in the IEPs presented is whether the Student "exhibits severe or substantial regression that cannot be recouped within a reasonable period of time in one or more of the areas addressed in the annual measurable goals." *Id.* The answer in each IEP is "no." *Id.*

ESY services are required if they are necessary for the provision of FAPE. *McQueen v. Colorado Springs Sch. Dist. No. 11*, 488 F.3d 868, 870 (10th Cir. 2007). The standard for ESY requires "both documentation concerning past regression and predictions of future regression . . . [which] requires investigation into many aspects of the child's educational, home, and community life." *Johnson*, 921 F.2d at 1030. The burden is thus on the Petitioners to show not only past regression, but predications for future regression as well. The kindergarten teacher's view that she did not want to have ESY services for the Student because it might be traumatic to the Student due to getting [redacted] to the school in the summer neither addresses past regression, nor predictions for future regression. Petitioners do not tie the Student's educational, home, and community life to regression, as the burden requires. It is concluded there was no denial of FAPE due to not providing ESY services.

This addresses in context Issues 5, 6, 18, 19, 26, and 27.

Related Services

Related services addressing occupational therapy and speech language therapy are not found to deny FAPE. While the occupational therapy may have been viewed as required, or needed, with a full occupational therapy evaluation recommended in the September 1, 2016 IEP, Ex. 9, p. 21, although a formal report was not issued until March 2, 2017, Ex. 41, the Petitioners offer no other evidence, such as, for instance, an expert, to show how that lack of having the service provided late resulted in a substantive loss or denial of FAPE. Deeming occupation therapy as a related service, which is procedural, 34 CFR § 300.34, with the evaluation also deemed to be procedural requirement, 34 CFR §§ 300.301,303, that it be performed within 60 days of receiving parental consent,

34 CFR § 300.301(c)(1)(i)(initial evaluation time frame), the burden remains on the Petitioners to prove the late evaluation resulted in a substantive denial FAPE. That is, finding that a procedural violation has occurred by not timely having the evaluation performed, the Petitioners must show that it (1) impeded the Student's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). What is noted is that the Student missed a number of occupational therapy sessions due to absenteeism. *See* Ex. 20 (provider services snapshot). This impacts, as well, the second portion of the Petitioners' occupational therapy argument, which contends that the Student was not provided appropriate occupational therapy to address his sensory issues. The burden is on the Petitioners to prove not only that the Plans were inappropriate, and that implementation was incorrect, but that there was a denial of FAPE because of it. Having no independent evidence from Petitioners (as in an expert, for instance) that occupational therapy was inappropriate, deference will be given to the expertise and exercise of judgment by the school authorities. *Endrew*, 137 S.Ct. at 1001. There is no evidence that the sensory difference of registration or sensory diet impacted FAPE. There is nothing to tie the alleged error to a denial of FAPE, as, for instance, an expert might provide. Thus, as to the occupational therapy claims, it is concluded that the LEA violated the procedures by not conducting a timely evaluation, yet that the Petitioners did not prove it resulted in a denial of FAPE, and that the Petitioners did not prove that the related service of occupational therapy for [redacted] sensory issues as provided

was inappropriate either as a matter of procedure or substance. That is, there was no denial of FAPE.

The Petitioners urge a similar concept for a violation of FAPE for speech therapy as they did in occupational therapy. *See* P's F&C, Issue 4, p. 8. The Petitioners present no evidence that because the Student would get under the table when the speech therapist arrived makes the speech therapy provided inappropriate. The speech-language therapist sought to gain the Student's trust, and make eye contact, in order to engage in services. Tr. 553. The speech-language therapist maintained data, and noted that she wrote the goals in the IEP of March 1, 2018 (Ex. 11, p. 16) for specific areas in which the Student needed improvement. Tr. 576. The Petitioners contend that the Student required specialized speech-language skills to improve social communication skills, P's F&C, p. 9, yet do not meet their burden of proof as to what those specialized skills are. Once again, deeming the related service first to be a procedural issue, 34 CFR § 300.34, the Petitioners have not proved that the speech language services were not in accord with 34 CFR § 300.34(c)(15). Should the contention be couched in terms of the IEP being substantively inappropriate, the Petitioners have not met their burden that the Student's unique circumstances were not considered, or that it was not appropriately ambitious in light of those circumstances. *Endrew*, 137 S. Ct. at 1000. Deferring to the expertise and exercise of judgment by the school authorities, it is concluded that a FAPE was not denied by the speech-language services. *Endrew*, 137 S.Ct. at 1001.

This addresses in context Issues 5, 6, 7, 22, and 23.

Goals

The Student contends that the LEA failed to implement appropriate IEP goals for the Student. *See* Issue 10, P's F&C, p. 15. The Petitioners contend the goals did not have challenging objectives, that progress was not measured, that they were not supported by evidence-based instruction, and did not consider the 11 Autism considerations. *Id.* As for the 11 Autism considerations, it has been concluded that although the Student may be suspected of having Autistic characteristics sufficient for an assessment, it was not concluded that [redacted] was on Autism spectrum. Thus, the eleven Autism considerations need not be addressed in the IEP. There was no violation of FAPE by not doing so.

An IEP is to address, among other things, measurable annual goals, including academic and functional goals to meet the child's needs resulting form [redacted] disability to enable the child the make progress in the general education curriculum and to meet other educational needs resulting from the disability, with a description of how the annual goals will be measured, and progress in meeting the goals. 34 CFR § 300.320(a). The Petitioners' contention, therefore, is treated once again as procedural. Also, given the contention that the IEP goals were not implemented, this will be reviewed as a procedural issue as well. 34 CFR § 300.323(d)(i)(educator's responsibility to implement IEP). Thus, the burden is on the Petitioners to first prove the procedures were not met, and, if so, if the procedural defect (1) impeded the Student's right to a free appropriate public education, (2) significantly impeded the parent's opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit. 34 CFR § 300.513 (a)(2). Review of the IEPs of September 1, 2016, March 10, 2017, and March 8, 2018 (Exs. 9, 10, and 11) all provide

for goals on their face in a number of different areas. *Id.* There is nothing to indicate that progress was not being measured from the face to the documents. *See e.g.*, Ex. 9, p. 10, "measured by therapy date, observations." Petitioners do not offer evidence that the objectives were not "challenging," or what challenging should consist of. While the Student may have continued to show some difficulties in [redacted] sensory needs, Ex. 11, p. 7, Petitioners do not show first what goal was not being implemented because of that allegation and, second, if a goal was not implemented, how that difficulty in sensory needs substantively impeded the Student's right to a free appropriate education, deprived an educational benefit, or significantly impacted the Parents' opportunity to participate. A FAPE was not denied.

The Student did not make progress in the 2017-2018 school year in demonstrating effective coping skills and age-appropriate social and academic behaviors. Tr. 465-466. Procedurally, measurable annual goals, including academic and functional goals, must be presented. The concept, however, is that it is a goal, something toward which to aspire. That does might not necessarily determine success. Thus, the goal was stated. As for implementation, it was a goal. While this lack of progress did not meet the March 8, 2018 Plan's objective that the Student would demonstrate effective coping skills and age appropriate social and academic behaviors in seven out of 10 or three out of five opportunities, *see* Exs. 10, 11, they were goals. Without more with to establish the Petitioners' burden, it is not concluded that this automatically deprived [redacted] educational benefit or impeded [redacted] right to a free appropriate public education. 34 CFR § 300.513 (a)(2). There was no denial of FAPE.

The March 1, 2018 Plan listed Language Arts goals as being able to recognize and state verbally 26 uppercase letters of the alphabet in three out of four trials, when presented with flash cards. Ex. 11, p. 13. Thus, the goal has been stated. Once more, it is a goal. Although the Student cannot recognize which is the lower and which is the upper case, tr. 185, this does not lead to the conclusion, absent something more from the Petitioners, that it deprived the Student of educational benefit or impeded her right to a free appropriate public education. 34 CFR § 300.513 (a)(2). This did not result in a denial of FAPE.

This addresses in context Issues 5, 6, 7, 8, 9, 18, 19, 22, and 23.

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

Remedy

Autism Evaluation

The Student will be independently evaluated by an expert in the area of Autism. This will take place without unnecessary delay, to mean, to meet the goals of this decision, to be within 30 days from the date the Petitioners receive notice from the LEA of the independent evaluator process, as explained below. *See* 34 CFR § 300.502 (a)(3)(b)(2). To meet the goals of this decision, the Petitioners will respond to the LEA regarding the independent evaluator process within 10 days of receipt of the evaluator notice. This evaluation is ordered by the Hearing Officer under the independent evaluation provisions, *Id.* at § 300.502(d), rather than under the initial evaluation procedures, *Id.* at § 300.301, because as a remedy for a violation of FAPE if the LEA is ordered to conduct the evaluation as an initial evaluation then it could give the LEA

undue influence on the evaluation process. *See M.S. v. Utah Sch. for the Deaf and Blind*, 822 F.3d 1128, 1135 (10th Cir. 2016)(delegation back to IEP team for remedy inappropriate due to concern of undue influence). The LEA is to act in accord with the independent evaluation process in that it will, without unnecessary delay, provide the Petitioners information about where an independent educational evaluation will be obtained, *see* 34 CFR § 300.502 (a)(2), and conducted by a qualified examiner not employed by the LEA. *Id.* at (a)(3)(i). *See M.S. v. Utah Sch. for the Deaf and Blind*, 822 F.3d at 1130 (practice to send list of qualified evaluators). Unnecessary dely means, to meet the goals of this decision, within 30 days of entry of this administrative order. The LEA is to act in accord with the criteria in 34 CFR §§ 300.304, 305, and 502. *See id.* at § 300.502(e). It is to be at public expense. *Id.* To meet the goals of this decision, on completion of the independent educational evaluation, it will be provided to the parties. This restarts the eligibility and IEP Team processes once again.

Compensatory Education

The Petitioners request for compensatory education is denied. They seek "the hours of education which were not provided (which at a minimum would be 125 hours . . .)." P's F & C, 5 (D), p. 20. In essence, they seek some sort of quantitative hour for hour award, without meeting their qualitative burden that the services be reasonably calculated to provide the student with the education benefits which the student should have received had the district provided the services in the first place. *See Reid ex rel. Reid v. Dist. of Columbia*, 401 F.3d 516 (D.C. Cir. 2005); *Meza*, D.N.M. Nos. 10-0963, 10-0964. It does not go unnoticed that the Student lost educational benefit, yet the Petitioners do not meet their burden to tie in the services they assert they lost into

future compensatory services required to place the Student back to where she should be have been had the LEA provided the services in the first place. The Student is now a seven year old child in the second grade. The Petitioners have not met their burden. The request is denied.

Other Requested Remedies

The Petitioners request a number of other remedies they construe as equitable relief. They include an order for an independent speech language evaluation, that a board certified behavior analyst contract with the LEA, that the lead occupational therapist reassess the sensory needs of the Student and train others, that evaluator(s) meet with evaluation teams and subsequent IEP Teams with the board certified analyst they seek to have appointed, that future IEP meetings be facilitated, that training be given to staff, and that extended school year services be ordered. P's F & C, 5 (B),(C),(E), (F),(G),(H),(I), and (J), pp. 20-21.

Although occupational therapy has been deemed a procedural violation, it did not rise to a substantive violation of FAPE; thus, there is no need to provide relief. As for speech therapy, a FAPE was not denied. A Board Certified Behavior Analyst is not required, as explained in the FAPE issues. Lack of Extended School Year services were not concluded to violate a FAPE. While New Mexico allows for a facilitated IEP procedure, *see* §6.31.2.7(C)(1) NMAC, it is concluded there is no Hearing Officer authority to order how future IEP meetings should proceed because what is ripe for adjudication in this case are the past FAPE issues, upon which a remedy could lie, not any speculative future action, which is what is requested for future facilitated IEP Team meetings. Similarly, as for future staff training, there is no Hearing Officer authority to

order this requested relief. *See* Zirkel, Perry A., the Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update, Journal of the National Association of Administrative Law Judiciary, Spring 2011, 31-1, p. 28 (with authority cited therein). Future LEA actions, if any, are speculative, and will not be entertained in this proceeding.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, the Petitioners' Request for Due Process against the LEA, filed on September 28, 2018, with requested relief, is granted in part and denied in part.

REVIEW

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

MORGAN LYMAN
IMPARTIAL DUE PROCESS
HEARING OFFICER

Entered: February 25, 2019

CERTIFICATE OF SERVICE

I certify a true copy hereof was sent by email attachment transmission only to G. Stewart, J. Archuleta-Staehlin, A. Salazar, and M. Bowdon, Esqs., on the 25th day of February, 2019, and subsequently posted via certified U.S. Mail only to the Petitioners at their address of record, with a copy through the U.S. Mail to the New Mexico Secretary of Education.

MORGAN LYMAN