BEFORE THE PUBLIC EDUCATION DEPARTMENT
DPH NO. 1819-23

DUE PROCESS HEARING OFFICER'S MEMORANDUM DECISION AND ORDER

THIS MATTER arises on the Petitioners' Request for Due Process Against Albuquerque Public Schools, Petitioners' Local Education Agency ("District"). Petitioners are the parents ("Parents") of J.N. Petitioners filed their Request for Due Process with the State of New Mexico Public Education Department on April 11, 2019. Petitioners' Due Process Request is granted in part.

I. Procedural Background

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

Pursuant to various stipulations by the parties, the Due Process Hearing commenced on June 25, 2019, and concluded on August 23, 2019, with various days off in between. The hearing took a total of nine days. Both parties were well-represented by their respective trial counsel. Both parties timely filed Proposed Findings of Fact and Conclusions of Law, and Closing Arguments.

Pursuant to a stipulated extension of time, this final decision is due on or before November 4, 2019.

II. Relevant Legal Overview

Petitioners assert that the District failed in its "child find" duty, and denied Student his entitlement to an evaluation for the purpose of special education eligibility, without Prior Written Notice. Petitioners also challenge the District's process in drafting Student's Individualized Education Plan ("IEP"), the IEP ultimately developed by the IEP team, and the implementation of the IEP. As the party asserting these challenges to the District's actions, Petitioners have the burden of proof in this case. *See Schafer v. Weast,* 546 U.S. 49 (2005)*; Johnson v. Indep. Sch. Dist. No. 4,* 921 F.2d 1022 (10th Cir. 1990). The District has the burden of proof with respect to its affirmative defenses.

While the parties have presented me a multitude of issues to address, the essential questions before me are twofold: (1) whether the District has violated the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C.A. § 1400 *et seq.* , and if so, whether the violation has resulted in the denial of a Free and Appropriate Public Education ("FAPE")(substantive violation) or (2) whether any procedural violation may be redressed by an

appropriate procedural remedy (procedural violation). "The IDEA contains both extensive procedural requirements designed to ensure that an IEP is properly developed for each child and that parents or guardians have significant involvement in the educational decisions involving their children, as well as substantive requirements designed to ensure that each child received the 'free appropriate public education' mandated by the Act." *Murray v. Montrose County Sch. Dist. RE-1J,* 51 F.3d 921, 925 (10th Cir. 1995). "[A] child is entitled to 'meaningful' access to education based on [his] individual needs." *Fry v. Napoleon Cnty. Sch.,* 580 U.S. _____, 137 S. Ct. 743, 753-754 (2017).

"To meet its substantive obligation under the IDEA, a school, must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1,* 580 U.S. _____,137 S. Ct. 988, 999 (2017). The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000.

> We will not attempt to elaborate on what "appropriate" progress will look like from case to case. It is in the nature of the Act and the standard we adopt to resist such an effort: The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created. This absence of a bright-line rule, however, should not be mistaken for "an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review." *Dept. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley,* 458 U.S. 176, 206 (1982).
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> At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities. The Act vests these officials with responsibility for decisions of critical importance to the life of a disabled child. The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. *See* 20 U.S.C. §§ 1414, 1415; *id.*, at 208–209, 102 S.Ct. 3034. By the time any dispute reaches court, school authorities will have had a complete opportunity to bring their expertise and judgment to bear on areas of disagreement. A reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that shows the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances.

Endrew F., 137 S. Ct. at 1001–02.

A hearing officer's determination must generally be based on substantive grounds as to whether a child received a free appropriate public education. *See* 34 C.F.R. § 300.531(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)(emphasis added).

Notably, in this regard, parents have their own enforceable rights pursuant to the IDEA, separate and apart from the child's entitlement to FAPE: "[T]he Court disagrees that the sole purpose driving IDEA's involvement of parents is to facilitate vindication of a child's rights." *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 517, 127 S. Ct. 1994, 1996, 167 L. Ed. 2d 904 (2007). In this regard, a hearing officer may also order a LEA to comply in the first instance with procedural requirements, even if there has been no denial of FAPE. *See* 34 C.F.R. § 300.513(a)(4).

III. Hearing Officer's Combined Statement of Issues[1]

1. Whether the District violated the IDEA and denied FAPE by failing to timely identify J.N. as a student eligible for special education in an area of suspected disability, specifically autism?

    a. Whether the LEA failed to timely identify J.N. as a student with a disability under the IDEA? (R(1)).

    b. Whether APS failed in its Child Find duty to evaluate and identify Student for special education eligibility? (P(1)).

    c. Whether a failure to timely identify J.N., if any, (1) impeded J.N.'s right to a free and appropriate public education; (2) significantly impeded the Petitioners' opportunity to participate in the decision-making process for a provision of a free appropriate public education; or (3) caused deprivation of educational benefit? (R(2)). [2]

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

[2] Throughout its Statement of Issues, the District repeats this list of items that may accompany a procedural violation of the IDEA. I am aware that for Student to be entitled to substantive relief, Parents must do more than show a violation of the IDEA – they must show

2. Whether the District violated the IDEA and denied FAPE by denying a request for an evaluation by Parents and/or by failing to consider the private evaluation submitted by Parents, without Prior Written Notice?

   a. Whether APS refused Parents' request for evaluation without providing any [Prior Written Notice]? (P(5))

   b. Whether APS refused Petitioners' request for an evaluation of J.N. and whether any refusal of APS to evaluation J.N. deprived J.N. of FAPE? (R(7) and (8)).

   c. Whether APS refused, without [Prior Written Notice], to consider private evaluation(s) furnished by Parents? (P(6)).

   d. Whether APS failed to consider the private evaluation obtained by Petitioners, and whether a delay in considering the private evaluations, if any, deprived J.N. of FAPE? (R(9) and (10)).

   e. Whether APS's failure to evaluate and its delay in consideration of private evaluation(s) presented by Parents [denied Student a free and appropriate public education]? (P(7)).[3]

3. Whether the District violated the IDEA and denied FAPE by transferring J.N. to a segregated classroom prior to a special education eligibility determination?

   a. Whether APS's decision to move Student into a segregated special education classroom for students with disabilities, before it had evaluated J.N. or determined his eligibility and written an IEP, violated his right to appropriate education in the [least restrictive environment] based on his individual needs? (P(2)).

   b. Whether APS's movement of J.N. into a segregated special education classroom prior to his identification as a student eligible for special education under the IDEA [denied J.N. a free and appropriate public education]? (R(3)).

   c. Whether Petitioners' claims related to J.N. attending a special education classroom prior to his identification as a child eligible for services under the IDEA are barred by the doctrines of waiver, estoppel, and laches? (R(22)).

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some substantive harm to FAPE, as reflected in the District's list. *See Systema*, 538 F.3d at 1313. I therefore will not repeat the list each time.

[3] *See* footnote 2, *supra.*

4. Whether the alleged overuse of restraint and seclusion by the District violated the IDEA?

   a. Whether APS substituted aversive responses (restraint, punishment, discipline, school exclusion) for necessary evaluation and creation of an appropriate IEP based on its own administrative convenience, not the Student's individual needs? (P(3)).

   b. Whether APS's repeated reliance on physical restraint as the staff response to J.N.'s nonconforming behaviors denies him a free and appropriate public education? (P(15)).

   c. Whether a special education hearing officer has jurisdiction over the notice and record requirements of State law related to restraint? (R(11)).

   d. Whether a special education hearing officer has jurisdiction over Petitioners' allegations of physical restraint and alleged harm to J.N.? (R(17)).

   e. To the extent a special education hearing officer has jurisdiction over Petitioners' allegations of restraint, whether any restraint of J.N. deprived him of a [free and appropriate public education]? (R(18)).

5. Whether the District mislabeled student as eligible for special education on the basis of emotional disturbance?

   a. Whether APS has mislabeled J.N. as a student with "emotional disturbance" when he does not meet eligibility criteria? (P(13)).

   b. Whether J.N. is a student with an emotional disturbance? (R(12)).

6. Whether J.N. was denied FAPE (before[4] or) after he was identified as a student eligible for special education?

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[4] The parties distinguish between J.N.'s receipt of FAPE before and after he was identified as a student eligible for special education, which is appropriate. They also distinguish between the denial of FAPE resulting from the overuse of restraint in place of alternative strategies, and the denial of FAPE resulting from other alleged violations of the IDEA. However, I will rule herein that J.N. *should have been* receiving special education services prior to the date of his IEP, pursuant to the District's child find obligations. Accordingly, there is a substantial amount of overlap between the analysis of J.N.'s receipt of FAPE prior to and after he was identified. There is also a substantial amount of overlap related to the denial of FAPE arising from the failure to identify J.N. as eligible for special education services, and the denial of FAPE resulting from the overuse of restraint. Therefore, I will address the denial of FAPE resulting from *all* violations of the IDEA under Section 6, *infra.*, in a hopefully holistic approach.

a. Whether J.N.'s IEPs were reasonably calculated to provide him a FAPE with respect to his goals, social skills, functional communication, positive behavioral interventions, and the 11 considerations for students with autism spectrum disorder, including the use of the methodology of [Applied Behavioral Analysis]? (R(5)).

b. Whether J.N.'s IEPs were implemented with respect to his goals, any needed social skills, functional communication, positive behavioral interventions, and the 11 considerations for students with autism spectrum disorder? (R(6)).

c. Whether APS has failed to deliver education to Student which meets state standards (as to IEP team action on the 11 considerations for students with [Autism Spectrum Disorder] and as to any use of physical restraint and seclusion)? (P(10)).

d. Whether APS has failed to write IEP goals which are sufficiently ambitious for Student and are supported by delivery of research based instruction? (P(12))

e. Whether APS denied J.N. access to the general curriculum by withholding ABA-(Applied Behavioral Analysis) based instruction to support Student's acquisition of "learning to learn skills" needed for classroom participation and by failing to address Student's social communication deficits? (P(8)).

f. Whether APS has failed to provide J.N. with necessary specialized instruction, related services, and supportive services to address Student's needs in social communication resulting from autism? (P(4)).

g. Whether APS has failed to provide J.N. with appropriate education from school staff who are sufficiently knowledgeable about evidence based practices for students with autism to be able to implement such practices with fidelity and consistency? (P(11)).

h. Whether APS failed to timely conduct an FBA and BIP following the November 2018 IEP and instead prematurely moved Student into a more restrictive setting away from his neighborhood school? (P(9)).

i. Whether the positive behavioral supports provided to J.N. between November 29, 2018 and the date of the filing of the Complaint were reasonably calculated to provide J.N. with a FAPE? (R(4)).

j. Whether the positive behavioral supports provided to J.N. between November 29, 2018 and the date of the filing of the Complaint were reasonably calculated to provide J.N. with a FAPE? (R(4)).

k. Whether APS actions or inactions, as set forth above,[5] denied J.N. a FAPE? P(16))

7. Whether the District violated the IDEA by requiring Parents to come to or remain at school, or by constructively excluding J.N. from school?

a. Whether APS required Petitioners to be present at school, to remove J.N. from school, or to not send J.N. to school? (R(14)).

b. Whether a special education hearing officer has jurisdiction to award Petitioners damages, i.e., compensation for time Petitioners spent in J.N.'s classroom? (R)(19))

c. Whether APS has failed to provide J.N. appropriate education which was "free," instead requiring Parents to be at school to meet J.N.'s needs or not send him/remove him from school for administrative convenience of staff? (P(14)).

d. Whether any removal of school for J.N. constituted a change of placement under the IDEA? (R(15)).

e. Whether Petitioners' claims for a denial of a FAPE after January 30, 2019, are barred by the doctrines of waiver, estoppel and laches, because Petitioners refused to allow J.N. to attend school after that date? (R(23)).

8. Whether the District violated the IDEA as a result of racial bias against J.N.?

a. Whether a special education hearing officer has jurisdiction over Petitioner's claims of racial stereotyping and bias? (R(13)).

9. Whether a special education hearing officer lacks jurisdiction over Petitioners' claims for attorneys' fees and costs? (R(24)).

10. Remedy

a. Whether J.N. and his parents are entitled to equitable remedy and what that remedy should be? (P(17)).

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[5] This is a reference to all of Petitioners' issues.

b. Whether the Hearing Officer lacks jurisdiction over [multiple][6] claims due to Petitioners' failure to exhaust their administrative remedies under the IDEA? (R(16)).

c. Whether Petitioners' claims, as follows, are ripe?

i. Petitioners' claims for evaluations for social communication skills and an [Assessment of Basic Language & Learning Skills] ("ABLLS") evaluation by UNM [Center for Development and Disability] ("CDD") (R(20));

ii. Petitioners' claims arising after the date the Request for Due Process Complaint was filed (R(21)).

IV. Hearing Officer's Findings of Fact[7]

OVERVIEW OF STUDENT AND HIS TIMELINE

1. J.N. is seven years old and is a second grade student. His date of birth is December 8, 2011. He has Autism Spectrum Disorder (ASD or Autism). He also has a medical diagnosis of anxiety, secondary to autism. Petitioners' Proposed Finding of Fact Number 1; Respondent's Proposed Finding of Fact Number 5.

2. J.N. is very bright and personable. *See,* Tr. 2 at 92-93; Tr. 2 at 41 ("Very articulate. Very high verbal skills. Great enthusiasm with science and also computers."); Tr. 2 at 70 (no

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[6] The District lists fourteen items that Petitioners allegedly failed to exhaust.

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

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

My decision not to include a particular proposed finding does not indicate rejection of the finding, except as otherwise indicated in this Memorandum Decision and Order. For example, some proposed findings were duplicative or were worded awkwardly.

concerns during kindergarten with his academic skills); Tr. 2 at 102-103 (Kindergarten teacher did not recommend evaluation for "gifted" because J.N. not in her room long enough); Tr. 2 at 106 ("amazing student"); 118 (top 2 or 3 students in K class); Tr. 4 at 42 ("very intelligent,. . . very articulate. . . funny. . . a good kid"); Tr. 4 at 54 ("a really personable kid"); Tr. 4 at 81 ("a lot of personality,. . . very charismatic") ; Tr. 4 at 128 ("really bright child") ; Tr. 4 at 159 ("very bright"); Tr. 4 at 310 ("charming and bright, well-spoken" and enjoyed conversing with adults); Tr. 5 at 57 ("just really inquisitive"); Tr. 6 at 132 ("He is an old soul").

3. The impact of autism is not negated by a child's intelligence. Tr. vol. I at 93.

4. Children with autism can be highly successful in 1/1 engagement with an adult. Tr. 4 at 133. Without necessary training, staff who worked with J.N. at school did not know what the impact of autism is or how it affected J.N.; some staff at Bandelier were never told J.N. had been diagnosed with autism. *See, e.g.,* Tr. 4 at 42-43.

5. J.N. struggles with transitions, changes in expectations, changes in schedule, and changes in school personnel. Tr. 2 at 43-44; Tr. 3 at 81 (struggled with transitions in first grade); Tr. 5 at 58-60 (transitions) ; Tr. 6 at 140-41 (elopement from school when time to transition home). He has definite deficits in his sensory processing. Tr. 1 at 142-143; Tr. 5 at 62. J.N. has trouble with task initiation and doing work he is not interested in. Tr. 3 at 77-78.

6. J.N. needs lots of structure during the school day. Tr. 2 at 103-104; Tr. 3 at 88-89 (needed structure for lining up); Tr. 5 at 61 (struggles with chaotic situations).

7. Things that help J.N. during the school day include a quiet space or safe space. Tr. 2 at 124; *testimony of Samantha Hannah*,[8] Tr. 5; Tr. 6 at 139-140 (when his mother came to pick him up during kindergarten, he would be in his cubby which made him feel more secure). He was learning to use deep breathing as a self regulation tool. Tr. 2 at 124-125.

8. J.N. was successful in some settings when offered high interest, hands on activity. *See, e.g.,* Tr. 1 at 28-31, 48, 107 (art class at Collet Park); Tr. 1 at 48-49 (working 1/1 with Sam Hannah); 88 (students with Autism Spectrum Disorder more organized when engaged in high interest activity).

9. Bandelier Elementary is J.N.'s neighborhood school; J.N. attended Bandelier for kindergarten (2017-18) and first grade (2018-19). J.N. received no special education services at Bandelier.

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[8] Samantha Hannah was J.N.'s first grade teacher at Collet Park.

10. J.N.'s first IEP, dated November 29, 2018, J.N. placed him in the Social Communication 2 District program at Collet Park Elementary School. He began attending Collet Park on December 3, 2018. Tr. 4 at 306. The principal of Collet Park was not consulted about J.N.'s transfer. Tr. 4 at 307-308.

11. At Collet Park, Samantha Hannah taught the Social Communication 2 classroom where J.N. was assigned. Tr. 5 at 252-253.

12. J.N.'s current IEP from March 2019 still places him in the Social Communication 2 District program at Collet Park Elementary School.

13. J.N.'s mother testified that Parents kept J.N. at home after January 29, 2019, because of their concerns that he was not safe at Collet Park and the use of restraint was harming him and causing regression.

14. APS disenrolled J.N. from the District on April 1, 2019, due to unexcused absences. (Tr. 1 at 99-100). J.N.'s mother is currently providing "home school."

15. J.N.'s mother testified that since stopping attendance at APS, J.N. has become significantly less anxious. Tr. 4 at 171.

16. At the Due Process Hearing, APS took the position that Student should be moved again, this time to the Social Emotional District program at Montezuma Elementary, the most restrictive elementary placement in APS. Tr. 4 at 222-224. This placement was previously specifically rejected by the current IEP from March 2019. Exh. BB at 24.

17. Parents oppose moving J.N. to the Social Emotional District program at Montezuma.

IDENTIFICATION OF J.N. AS ELIGIBLE FOR SPECIAL EDUCATION

Bandelier Elementary School

18. During Student's enrollment at Bandelier Elementary School (fall, 2017 to beginning of fall, 2018), the District should have been and was on increasing notice that J.N. was demonstrating symptoms of disability, including notable to severe behavioral problems.[9]

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[9] Throughout the Due Process hearing, I noted a distinction between testimony concerning J.N.'s "behavior" as a voluntary act and J.N.'s "behavior" as associated with his diagnosis of autism. I use the term interchangeably for both manifestations – whether voluntary or involuntary, associated with J.N.'s autism or not, unless the distinction is critical for understanding a particular finding. Here, for example, *some* of J.N.'s struggle with restraints on his behavior could have been typical for a kindergarten child. Some of his struggles were clearly a manifestation of his disability. In either event, the manifestation was noteworthy. As I

With reference to this ultimate factual finding, I adopt Petitioners' Proposed Findings Numbers 24, 27, 29-33, 40, as well as Respondent's Proposed Finding Number 19.

19. Petitioners have requested a finding that "[a]t a Health and Wellness team meeting in January 2018, it was reported that two students had called J.N. 'autism boy.' Tr. 2 at 73; Exh. 8 at 2; Tr. 6 at 192 (J.N. asked his mom if he had autism since he was being called "autism boy" at school)." Citing the same exhibit, Exhibit 8:2, Respondent has proposed a finding that "[a]t the 1/12/18 Health Team meeting, Petitioners reported that J.N.'s aggression was caused by asthma medication, and that he had anxiety due to having been involved in a motor vehicle accident in which his father accidentally hit and killed a person." In the context of the testimony surrounding both this meeting and the larger picture of events, I find that Parents were providing all information they could think of to school personnel, but were focusing on the potential diagnosis of autism.

20. Respondent has submitted in it Proposed Finding Number 27 and I adopt that "[t]he Health Team met again on 3/15/18 with additional teachers . . . to discuss transitions becoming more difficult for J.N. in January, as well as the fact that J.N. had become more physically aggressive . . . and was engaging in work refusal."

21. Bandelier school personnel believed that participation on "the Health and Wellness Team," and "Student Assistance Team" had to precede a referral for special education evaluation, in a type of tiered review. Tr. 2 at 39-40, 171-172, 182-183, 193-196, 197 ("I understood . . . that the SAT paperwork had to be completed before the evaluation could be done"). The Health and Wellness Team did not discuss with Parents whether J.N. might be eligible for special education. Tr. 2 at 87.

22. School staff never told Parents that APS could evaluate J.N. for autism. Tr. 2 at 74-75, 85, 184-185. APS suggested Parents obtain an outside evaluation or consultation to diagnose J.N. Tr. 4 at 158-160; Exh. 50 at 1; Exh. 8 at 3; Tr. 2 at 80 (teacher unsure about why information is recorded by Health and Wellness team about Parent getting a referral for neuropsychological evaluation); Exh. 50 at 1; Tr. 4 at 158-159; *and see,* Tr. 6 at 150-151("I was encouraged by the Health and Wellness Team to seek medical help. . . I was asked to talk to his . . . psychiatrist and find out what she could do to support us.") .

23. In April of 2018, Mother took J.N. for an evaluation by Dr. Cynthia King, a child psychiatrist. Mother reported to Dr. King that she was there for a "psychiatric consultation to discuss additional options *at the request of [J.N.'s] school.*" Tr. 4 at 158 (emphasis added). J.N. was having "difficulty with dysregulation which was worsened or increased in the school setting." *Id.* Dr. King saw "red flags" for autism: regulation

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ultimately find, pursuant to the evidence and testimony, J.N.'s behavior was one factor, among several, that supported a suspicion that J.N. had autism that was affecting his educational progress, or that J.N. might otherwise be eligible for special education, based on his *symptoms*.

difficulty with seemingly high verbal skills; extreme difficulty with transitions; and repetitive and self injurious behaviors. Tr. 4 at 159-162.

24. Respondent has submitted in its Proposed Findings Numbers 10 and 11, in part, that J.N.'s behavior was not as problematic during fall of 2017, and he showed an increase in behavior problems during his second semester, which would be Spring 2018. I agree as stated herein.

25. School staff believed Student's behavior of refusing to come inside and fleeing campus presented safety concerns, and relied on these events to call "the safety team." Tr. 2 at 47-48; 54-56. "Safety team" was the name for the"Physical Crisis Team" at Bandelier. Tr. 3 at 26-27.

26. In its Proposed Finding Number 32, Respondent has submitted a list of interventions that sometimes led to "better behavior" by J.N. I adopt this finding with my modification, with the caveat that these interventions were adopted haphazardly, and that in terms of fidelity and consistency, these interventions were applied *ad hoc* at best, and were often not applied at all.

27. On or before May 10, 2018, the Health & Wellness team staff learned that the neuropsychologist's recommendation was that J.N. be evaluated for autism. Tr. 2 at 84; Exh. 8 at 5; Tr. 2 at 184; *see also* Respondent's Proposed Finding Number 36.

28. Failure to detect autism can lead to children falling behind in school and in their developmental trajectory. Tr. 4 at 197.[10]

29. Student has many learning strengths and it is his social communication deficits, sensory dysregulation and nonconforming behaviors which are a barrier to his participation in general education classes, not his cognition or academic readiness. *See, generally,* Exh. 1 (APS Multidisciplinary Evaluation Team report).

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[10] According to Petitioners, Student regressed academically from grade level to below grade level between kindergarten and first grade, but then made progress again in first grade. Tr. 3 at 253-255. According to Respondent, "According to J.N.'s I-Station scores, he was reading at the level of the average kindergarten student who took the assessment in February (Ex. 14:22). This does not demonstrate regression during first grade because there are no I-Station scores from August, 2018, when he returned to school after the summer. The formal evaluation completed in November, 2018, reflected that he was reading on grade level (Ex. 1:12)."

FAILURE TO CONSIDER PRIVATE EVALUATION AND FAILURE TO PROVIDE PRIOR WRITTEN NOTICE

30. During the summer of 2018, Parents obtained a private evaluation by Centria, diagnosing Student with autism ("Centria evaluation"). Via email, Parents provided the Centria evaluation report to Bandelier school officials. Tr. 2 at 99; Tr. 6 at 153 ("I immediately emailed it to the principal"); Exh. E. *See also* Respondent's Proposed Finding Number 40.

31. The school principal received an email from Mother in the summer of 2018 that J.N. had been evaluated and determined to have autism. Tr. 2 at 190-194; Exh. E. Rather than holding a meeting to consider the autism evaluation as a trigger to evaluate J.N. for special education eligibility, the school started the Student Assistance Team ("SAT") process. Tr. 2 at 193-195, 248.

32. APS required that Student go through the entire SAT process and a "whole" SAT packet is finished before an evaluation and determination of special education eligibility. Tr. 3 at 267-268, 272.

33. Ricky Adams, the APS diagnostician assigned to J.N., received the Centria evaluation in August 2018. Tr. 4 at 242. He thought that APS needed to have SAT meetings before the evaluation could be considered to determine eligibility for special education. Tr. 4 at 246-247, 249. According to Mr. Adams, APS starts the SAT process when it receives a request from a parent for evaluation. Tr. 4 at 249.

34. A team of APS personnel then reviewed the Centria evaluation to determine whether it contained all of the components for an IDEA evaluation required by the New Mexico Technical Evaluation and Assessment Manual. Respondent's Proposed Finding Number 41.

35. Mr. Adams does not know why APS did not provide Prior Written Notice to Parents, explaining that consideration of the private evaluation for purposes of special education eligibility would be delayed until after the SAT process. Tr. 4 at 251, 256-257. It was the school's responsibility to "get the SAT together" even though Mr. Adams had the private autism evaluation and knew that Student was refusing to go to class and people were concerned about him running away. Tr. 4 at 253-254.

36. APS ultimately relied on the Centria evaluation including its Autism Diagnosis Observation Schedule ("ADOS") and did no testing for autism. Tr. 4 at 259-262.

37. J.N.'s first grade teacher did not know whether she could ask for a special education evaluation; she thought SAT was the step she could seek. Tr. 3 at 65-67. When she filled

out forms for the SAT process, she neglected to include that J.N. had been diagnosed with autism already. Tr. 3 at 113.

38. The SAT chair did not know that Parents had provided APS with an evaluation documenting a diagnosis of autism until sometime into the SAT process. Tr. 3 at 262. At the first SAT meeting, evaluation for autism was discussed. Tr. 3 at 266. The SAT packet indicates Student was "placed in queue." Exh. 14 at 19.

39. When the SAT team decided to recommend special education evaluation, there was no discussion about using the private evaluation to determine eligibility more quickly. Tr. 3 at 119-120; 122-123.

FAILURE TO EVALUATE AND FAILURE TO PROVIDE PRIOR WRITTEN NOTICE

40. On August 30, 2018, approximately eight months after J.N. was showing clear signs of autism that was affecting his educational program, and at least one year after J.N. first demonstrated signs of disability, the SAT team advised Petitioners that they could request an evaluation for special education. Respondent's Proposed Findings Numbers 50-52.

41. Parents provided a written request for evaluation for autism on September 10, 2018. Exh. 48; Tr. 2 at 278-279. When the principal received Parents' written request, she gave it to the SAT chairs and may have shared it with "a couple of people." *Id.* The principal did not give Parents a consent form for evaluation. Tr. 2 at 279-280. The evaluation could not occur because "other forms [in the SAT process] had to be taken care of. . . ." Tr. 3 at 283. A parent request acts to put student "in the queue." Tr. 3 at 284. A SAT process must occur before evaluation according to APS training. Tr. 3 at 285-287.

42. During the early fall of first grade (fall 2018), APS recorded 75 instances of Student "attacks peers and adults," and 329 incidents of "Doesn't comply with rules." Exh. II at 2; Tr. 2 at 254. In addition, Student refused to come into his first grade classroom in the mornings. Tr. 3 at 67, 79. The teacher knew that Student was disturbed by all the noise in the classroom. Tr. 3 at 80.

43. The school principal received a letter from Dr. Cynthia King on or about September 24, 2018, to explain that J.N.'s anxiety at and about school had greatly increased in first grade. Tr. 2 at 285-286; Exh. H. J.N.'s first grade teacher was aware that by the end of the first week of school, J.N. did not want to enter the 1st grade classroom because he felt "overwhelmed." Tr. 3 at 67-68. The first grade teacher sought help from the school administration which was "sometimes" received. *Id.* She was hit on the head by a bingo piece thrown by J.N. which made her cry. Tr. 3 at 124-125.

44. On September 24, 2018, Student was moved into the SES 1 or "social emotional support" special education classroom before he was evaluated for special education by the

District, and before he had an IEP. Tr. 2 at 197-200; Tr. 3 at 73; Tr. 3 at 152-153; *see also* Respondent's Proposed Finding Number 59.

45. Even though he had not yet been determined to be eligible for special education, APS had J.N. attend Ms. Woods' special education classroom toward the end of September 2018, because he was struggling in the first grade general education classroom, the teacher was also struggling to meet his needs with 21 students, and because J.N. "was in the queue" for special education evaluation. Tr. 2 at 198-200; Tr. 3 at 72, 75; Tr. 3 at 157-158. J.N. did better in the special education classroom because it had fewer students and more adults. Tr. 2 at 250; Tr. 3 a 36-37 (principal knew J.N. needed special education eligibility and an IEP for special education classroom placement); Tr. 3 at 72, 75; Tr. 3 at 163-164.

46. During the time J.N. was in her special education (SES 1) classroom, the special education teacher had no IEP for him and was not provided the Centria autism evaluation until he had been in her class for a week. Tr. 3 at 159-160.

47. A follow-up SAT meeting occurred on September 26, 2018; Mr. Adams, the APS diagnostician, explained the process for a special education evaluation and eligibility determination. Respondent's Proposed Finding Number 69. J.N. was referred for a special education multi-disciplinary team evaluation on September 26, 2018. Respondent's Proposed Finding Number 74.

48. Pending his special education evaluation, J.N. remained in Ms. Woods' classroom. Respondent proposes that I find that J.N.'s behavior improved in Ms. Woods' classroom. *See* Respondent's Proposed Finding Number 68. This generally accords with my recollection. However, Respondent goes too far in proposing that I find that J.N. was "doing well." Respondent's Proposed Finding Number 79.

49. After nine days of testimony, what I learned and therefore find is that J.N.'s behavior – in Ms. Woods' classroom and elsewhere – follows a pattern that is in accord with his diagnosis of autism spectrum disorder. J.N. is a bright child; he does, in fact – sometimes and sometimes often – do well through the course of a day or longer. He does somewhat better when he is in a classroom similar to the environment in Ms. Woods' classroom, and with the strategies in place Ms. Woods attempted. However, he also responds in a certain and often predictable ways to certain stimulation. When, contrary to the evidence-based practices necessary to address J.N.'s disorder, adults respond in a way that stimulates J.N. further, his behavior escalates. His behavior escalates even more when the same adult response is repeated. Indeed, the adult behavior also sometimes escalates, in response to J.N.'s escalating distress. This pattern is apparent throughout the record, but also in what Respondent describes as J.N's "doing well" in Ms. Woods' classroom. Respondent's Proposed Findings Numbers 79 to 85.

50. The multi-disciplinary evaluation team ("MET") Report was completed by APS, and the MET convened on November 29, 2018. Exhibit 1; *see also* Respondent's Proposed Finding Number 86. J.N. was determined to be eligible for special education under the IDEA in the categories of Autism Spectrum Disorder and Emotional Disturbance. Respondent's Proposed Finding Number 98.

NECESSARY SPECIALIZED INSTRUCTION FOR A STUDENT WITH AUTISM SPECTRUM DISORDER

Bandelier Elementary School

51. Student was never identified as a student with eligibility for special education services at Bandelier Elementary School. While at Bandelier he never had an IEP, specialized instruction to meet his unique needs, related services, a functional behavior assessment or behavior intervention plan created by an IEP team. The 11 considerations for students with autism mandated by state law were never considered or acknowledged by school staff who worked with Student.

52. J.N. told Bandelier staff that he wanted to be somewhere that autism was understood. Tr. 4 at 36-37.

53. The educational assistants at Bandelier did not receive training in autism, but they did receive training on restraint. Tr. 2 at 265; Tr. 4 at 67; Tr. 2 at 264-265; Tr. 4 at 61-62. Staff at Bandelier take the Non-Violent Crisis Intervention ("NVCI") training before the school year begins during professional development days. Tr. 2 at 295-296. No professional development was devoted to training about autism. Tr. 2 at 296.

54. The first grade teacher at Bandelier had no experience teaching children with autism and had received no training on autism from the 1980s through the present time (2019). Tr. 3 at 62-63, 81. She recorded multiple safety team calls for J.N. beginning the first week of school in August 2018. Exh. 12, Tr. 3 at 76-77 ("I . . . made my safety calls because I just needed someone else to help me. I needed another set of hands.").

55. J.N.'s first grade teacher tried various positive behavioral interventions to help J.N. Respondent's Proposed Findings Numbers 44 to 46.

56. No formal data collection on J.N. occurred at either Bandelier or Collet Park. Tr. 1 at 137; Tr. 3 at 115 (no tracking of Student's interactions with peers).

57. No individualized visual schedule was created for J.N. in his first grade general education classroom. Tr. 3 at 89-90. Visual schedules can assist children with autism manage transitions. Tr. 4 at 166-167 ("even the brightest children with autism. . . do better with a

visual schedule or a written schedule rather than someone telling them what's coming next").

58. APS placed Student in a classroom with 21 students for first grade (fall 2018) although it had a year's worth of knowledge about his challenges and had received the Centria evaluation diagnosing autism during the summer of 2018. Tr. 3 at 60-61.

59. The 1st grade teacher used a "clip" system with J.N.'s clip "going down" to show when he had not met expectations; "most of the time," [J.N.] "wasn't happy about it." Tr. 3 at 84-85.

60. "Sensory overload" was one reason given by APS for placing Student in a segregated special education setting at Bandelier, rather than in general education, even before he was evaluated for special education. Tr. 1 at 104; *see also* Tr. 5 at 85-86 (Parents are aware that Student is bothered by sensory overload at school).

61. Student was never evaluated for eligibility for special education services or for occupational therapy. There, J.N. never or rarely received any of the approaches later recommended by the occupational therapist at Collet Park Elementary, including the use of a "weighted blanket," a "quiet space," "therapy balls" for sitting and noise cancelling headphones for noisy environments. Tr. 1 at 21-24; 49-50, 52, 54; 78-79; 81-84; 105-106; 131-132; 147-148.

62. To meet J.N.'s sensory processing deficits, APS relied on "Zones of Regulation," which is a general education approach to teach students certain "tools" they can use to feel calm, seemingly used school-wide at Bandelier. Exh. R at 7; Tr. 1 at 12-15. According to multiple descriptions provided at the Due Process Hearing, Zones of Regulation asks students to identify by color where they are on a spectrum of emotions.

63. Petitioners proved by a preponderance of the evidence that throughout J.N.'s enrollment at Bandelier Elementary School, the District failed to develop an effective or adequate research based assessment or plan to address J.N.'s multiple behavioral challenges that were affecting his educational progress, and also failed to implement an effective plan to address these challenges. In support of this finding, I adopt Petitioners' Proposed Findings Numbers 82, 83, 84, 85, 90, 91, 101, and 113. This deficit in planning and implementation led to a regression in J.N.'s ability to self-regulate and to both escalating behavior by J.N. and to the "default" overuse of restraint.

Development of J.N.'s First IEP at Bandelier[11]

Eleven Considerations

64. At § 6.31.2.11(B)(5) NMAC,[12] the New Mexico Administrative Code provides as follows, with regard to the development of an IEP for students with Autism Spectrum Disorder,

> (5) For students with autism spectrum disorders (ASD) eligible for special education services under 34 CFR Sec. 300.8 NMAC NMAC(c)(1), the strategies described in Subparagraphs (a)-(k) of this paragraph *shall be considered* by the IEP team in developing the IEP for the student. *The IEP team shall document consideration of the strategies. The strategies must be based on peer-reviewed, research-based educational programming practices to the extent practicable and, when needed to provide FAPE, addressed in the IEP:*
>
> **(a)** extended educational programming, including, for example, extended day or extended school year services that consider the duration of programs or settings based on assessment of behavior, social skills, communication, academics, and self-help skills;
>
> **(b)** 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;
>
> **(c)** in-home and community-based training or viable alternatives to such training that assist the student with acquisition of social or behavioral skills, including, for example, strategies that facilitate maintenance and generalization of such skills from home to school, school to home, home to community, and school to community;
>
> **(d)** positive behavior support strategies based on relevant information, including, for example:

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[11] J.N.'s initial IEP (11/29/18) resulted in J.N.'s transfer to Collet Park Elementary School; therefore all findings related to implementation of the IEP are addressed in the section on Collet Park, *infra.*

[12] The "eleven considerations" are mandated by state law. I have inserted them into my findings solely to provide an informational platform for my findings regarding whether the District adequately considered the eleven considerations in developing J.N.'s IEP.

(i) antecedent manipulation, replacement behaviors, reinforcement strategies, and data-based decisions; and

(ii) a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings;

(e) futures planning for integrated living, work, community, and educational environments that considers skills necessary to function in current and post-secondary environments;

(f) parent or family training and support, provided by qualified personnel with experience in ASD, that, for example:

(I) provides a family with skills necessary for a child to succeed in the home or community setting;

(ii) includes information regarding resources such as parent support groups, workshops, videos, conferences, and materials designed to increase parent knowledge of specific teaching and management techniques related to the child's curriculum; and

(iii) facilitates parental carryover of in-home training, including, for example, strategies for behavior management and developing structured home environments or communication training so that parents are active participants in promoting the continuity of interventions across all settings;

(g) suitable staff-to-student ratio appropriate to identified activities and as needed to achieve social or behavioral progress based on the child's developmental and learning level and that encourages work towards individual independence as determined by, for example:

(I) adaptive behavior evaluation results;

(ii) behavioral accommodation needs across settings; and

(iii) transitions within the school day;

(h) communication interventions, including communication modes and functions that enhance effective communication across settings such as augmentative, incidental, and naturalistic teaching;

(i) social skills supports and strategies based on social skills assessment or curriculum and provided across settings, including, for example, trained peer facilitators, video modeling, social stories, and role playing;

(j) professional educator and staff support, including, for example, training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP; and

(k) teaching strategies based on peer reviewed, research-based practices for students with ASD, including, for example, those associated with discrete-trial training, visual supports, applied behavior analysis, structured learning, augmentative communication, and social skills training.

§6.31.2.11(B)(5) NMAC.

65. Although APS accepted the Centria diagnosis of autism at the Multi-disciplinary Evaluation Team ("MET"), the MET did not discuss the 11 considerations. Ricky Adams, the APS diagnostician, assumed those would be discussed at the IEP. Tr. 4 at 270.

66. Mr. Adams did not attend Student's November 2018 IEP to provide instructional implications but he assumes that some things mentioned in the evaluation were incorporated into the IEP. Tr. 4 at 268-269. There was no one at the meeting who could interpret the instructional implications of the autism evaluation.

67. Respondent proposes a finding that the IEP team reviewed the 11 considerations for children with Autism Spectrum Disorder, citing Exhibit R:13-14; and Day 5 of the Transcript at 79:19 to 81:10. *See* Proposed Finding Number 100. However, even with very directive and leading questions, the cited testimony supports only that the witness recalls some sort of discussion of some of the 11 considerations, not that the 11 considerations were addressed with the specificity required by state law. Moreover, the witness had no recollection of reviewing the need for a Functional Behavioral Assessment and a Behavior Intervention Plan, a higher staff-to-student ratio, J.N.'s need for social skills support, parent and family training, or staff training. If anything, this testimony supports the opposite finding, that the IEP team gave no serious consideration to and likely never even mentioned the specific items constituting the 11 considerations.

68. It is not clear that the 11 considerations were ever discussed at the subsequent March 2019 IEP meeting. The single page form included (Exh. BB at 22) does not document research based practices/strategies needed and the form will not allow input of information. Tr. 1 at 116-118; Tr. 5 at 337-338.

69. Certainly, despite J.N.'s obvious need, there was no plan to assess J.N., set goals, measure his progress, or implement a plan with fidelity and consistency based on evidence-based research related to the items listed in the 11 considerations.

70. The APS Executive Director for special education compliance does not see a need for school staff to be trained on the state-mandated 11 considerations for students with autism. Tr. 7 at 318-319.

Identification of Eligibility Based on Emotional Disturbance

71. It is unclear who asked for evaluation for "Emotional Disturbance," as part of the November 2018 MET / IEP. Tr. 2 at 279.

72. "Emotional Disturbance" ("ED") is solely an educational label. Tr. 4 at 104. Although eligibility criteria for ED are specifically set out in federal regulation, the APS school psychologist, Dr. Niloufer Mody, repeatedly testified that she thought J.N. had Emotional Disturbance because he "is a child who is anxious at school." Tr. 4 at 150; Tr. 4 at 232-233; *see also* Tr. 4 at 265 (diagnostician testified about Dr. Mody's reliance on "anxiety" as the basis for ED).

73. The New Mexico TEAM manual (Exh. 60 at 28) suggests that the team that evaluates a student for special education eligibility (known as the "MET") should document what is relied on for one or more of the characteristics of Emotional Disturbance. Tr. 4 at 202-206. That was not done by APS and it not called for by the District's forms. *Id.* The same manual asks whether it was determined that no other eligibility best describes a student's disability. Tr. 4 at 205-208.

74. Parents disagreed with the "Emotional Disturbance" label. Tr. 6 at 174-176. Their disagreement was explained to Dr. Mody. See Tr. 6 at 176 ("I let her know then that I didn't agree with [ED], that I had done sort of my own research to kind of try to understand it. . . [autism] seemed to fit better. . . .And I was concerned that with the label of emotional disturbance, that J.N., in particular, because he was already on their radar and having so many holds and restraints and calls, that then labeling him with an emotional disturbance would, in fact, *increase this overreaction from staff, and I was afraid of that."*).

75. Dr. Mody met with Parents for 30-45 minutes before the MET. She did not remember their telling her that they disagreed with the Emotional Disturbance label. Tr. 4 at 217-218. Parents were given inaccurate justification for the Emotional Disturbance label by Dr. Mody, who said autism might be "overlooked" and the Emotional Disturbance label could be used temporarily to get quicker services. Tr. 5 at 73-74, 82-84.

76. At the MET meeting to discuss eligibility, there was no conversation about the definition of autism. Tr. 2 at 271. Dr. Mody explained her findings on why Student had "Emotional Disturbance." *Id.* Dr. Mody does not know whether the eligibility criteria or the form was discussed with the team at the MET. Tr. 4 at 151-152. She filled out the Emotional Disturbance eligibility form for J.N. on November 2 although the MET meeting was not until November 29. Tr. 2 at 27–73; Tr. 4 at 145; Exh. M & *compare*, Exh. 1 and Exh. R.

77. Dr. Mody did not provide any instructional implications of the "Emotional Disturbance" label, and did not participate in the subsequent IEP meeting for J.N. Tr. 4 at 106, 154-155; Tr. 4 at 228.

78. The first grade general education teacher left the meeting not knowing what J.N.'s eligibility for special education was; she does not recall either autism or Emotional Disturbance being discussed. Tr. 3 at 130-131. The first grade SES 1 teacher is unclear about why she agreed with Emotional Disturbance or what showed J.N. met eligibility criteria. Tr. 3 at 210-213.

79. The MET never discussed or themselves decided whether Student met the eligibility criteria for "Emotional Disturbance." Tr. 2 at 273-274, 276-277.

80. The APS diagnostician did not believe there needed to be agreement by Parents or the team about Emotional Disturbance eligibility; it just needed to be discussed. Tr. 4 at 265.

81. While IDEA provides that any member of the team could have submitted a separate statement to express their disagreement, the paperwork which was done, inferring agreement on "Emotional Disturbance," fails to explain this right and Parents were never provided with such information. *See* 34 C.F.R. §300.311(b) (requires each member of the team "certify in writing" that the eligibility determination reflects their conclusion). APS did not share the eligibility determination paperwork with Parents at the meeting or explain to them that everyone was to "certify in writing" agreement or submit a separate statement of disagreement.

82. In her evaluation, Dr. Mody did not address the impact of J.N.'s autism. Tr. 4 at 117 ("I did not address that issue at all."). She has "cursory knowledge" on what a child with autism may need. Tr. 4 at 230.

83. Dr. King, J.N.'s child psychiatrist, determined that Student's anxiety flows from his autism and has been worsened by events at school including restraint. Tr. 4 at 115-116; Exh. TT at 26; Tr. 4 at 155 *et seq.* Statements from J.N. describing his loss of control as a "bad guy in his brain," are a reflection of his developmental age, not a sign of some kind of psychosis. Tr. 4 at 183-185. She concludes Student's primary diagnosis is autism

and secondary diagnosis is anxiety. Tr. 4 at 187-188. Children with autism tend to have more anxiety than the population as a whole. Tr. 4 at 188.

Collet Park Elementary School

84. J.N.'s first IEP, dated November 29, 2018, placed him in the Social Communication 2 District program at Collet Park. He began attending Collet Park on the following Monday, December 3, 2018. Tr. 4 at 306. The principal of Collet Park was not consulted about J.N.'s transfer. Tr. 4 at 307-308.

85. J.N.'s teacher was Samantha Hannah. There were a variety of educational assistants. Tr. 4 at 298-299. There were 6 to 9 students in the classroom during the 2018-19 school year.

86. When an occupational therapy evaluation was conducted on November 9, 2018, prior to J.N.'s transition to Colett Park, the evaluation confirmed Student has sensory processing concerns at the level of "definite dysfunction." Tr. 1 at 10, 17-18; 121-122; Exh. N. Children on the Autism Spectrum "absolutely" have a high level of need in sensory processing. (Tr. 1 at 67).

87. I adopt Respondent's Proposed Finding Number 104, which provides, "Collet Park [Elementary School] uses the Zones of Regulation school-wide. The Zones of Regulation is a program to teach self-regulation and uses colors to help children identify their emotion state, as well as what led to that state and how to get back to a good state."

88. Teaching Student "Zones of Regulation" did not meet Student's needs and was ineffective as the sole or primary approach for helping Student with sensory processing issues during the school day/week. Tr. 1 at 72-74 (J.N. already knew "Zones of Regulation" when he got to Collet Park); Tr. 4 at 213-216 (school psychologist explains her understanding of how Zones of Regulation helps children identify "*internal triggers*" and so helps with self regulation).

89. During the time he was receiving assistance from an occupational therapist, J.N. was responsive. Respondent's Proposed Finding Number 119.

90. In his two school years, Student received a total of approximately four hours of occupational therapy. (Tr. 1 at 79-80; 96) ; Exh. MM. The IEP provided for only 120 minutes per month. Tr. 1 at 101-102. In J.N.'s IEP for November 2018, APS did not write an occupational therapy goal for J.N. which addressed his sensory needs. Tr. 1 at 104-105; Tr. 5 at 272.

91. The occupational therapist at Collet Park also recommended use of a "weighted blanket" and a "quiet space" for Student to use for self regulation, as well as "therapy balls" for

sitting and noise cancelling headphones for noisy environments. Tr. 1 at 21-24; 49-50, 52, 54; 78-79; 81-84; 105-106; 131-132; 147-148 With the exception of the therapy ball for sitting, there is little evidence or data that the equipment "available" was actually used regularly or at all by Student. Tr. 1 at 105-107.

92. A visual schedule helped J.N. to know what was expected and to be able to transition between activities and environments. Tr. 1 at 32-35; 54. When the occupational therapist did *not* have a visual schedule supporting a transition, Student had difficulty with transition. (Tr. 1 at 90-92). The only staff who used a visual schedule with J.N. were the occupational therapist at Collet Park, *id.*, and within Ms. Hannah's classroom. Tr. 1 at 47. Student had identified schedule changes as hard for him during the occupational therapy evaluation. *Tr.* 1 at 118-120; Exh. 1 at 15.

93. If his nonconforming behavior were ignored by school personnel and sufficient time were provided for him to respond, verbal cuing also could help J.N. engage in activities and follow directions as well as help him deal with transition. Tr. 1 at 38-44; 51.

94. Social communication is a core deficit of Autism Spectrum Disorder. Tr. 5 at 167.

95. J.N. did not receive any direct service in speech language therapy based on IEP goals. Tr. 5 at 153-154. The speech language pathologist at Collet Park has received some training on assessment and a framework for social skills work. Tr. 5 at 160-163. APS has not adopted any curriculum or program for its speech language pathologists, to use with students with Autism Spectrum Disorder, to address social communication skills deficits. Tr. 5 at 163-164.

96. Although referral for social emotional evaluation for social work services was done on November 29, 2018, a social work evaluation was never done. Tr. 3 at 224-225; Exh. T.

97. I adopt in part Respondent's Proposed Findings Numbers 110 to 111, and 113-18, as follows. These Proposed Findings support that J.N. was assigned to Samantha Hannah's SCS2 classroom at Collet Park. Ms. Hannah was qualified to teach J.N. as a student with autism. Ms. Hannah *attempted to* train her educational assistants in appropriate instructional strategies. J.N. did better in Ms. Hannah's classroom, except when Ms. Hannah was absent. Ms. Hannah implemented J.N.'s IEP and provided direct instruction in social skills and self-regulation. J.N. received some occupational therapy. J.N. also received some direct instruction in social skills. Ms. Hannah completed the Assessment of Basic Language and Learning Skills Tracking System ("ABLLS") assessment for social interaction to determine the appropriate skills to teach J.N. During the short time he was in Ms. Hannah's classroom, J.N. made some progress.

98. Ms. Hannah does not provide any formal training to her educational assistants and does not know if APS employs educational assistants who are Registered Behavior

Technicians (RBT). Tr. 5 at 256. With regard to students with autism, Ms. Hannah teaches "some things to know and some things to be aware of." *Id.*

99. Among other things, a behavior intervention plan can be done to address a student's difficulty with transitions. Tr. 1 at 129-130.

100. J.N. was moved to Collet Park without having a functional behavior assessment or behavior intervention plan based on special education procedures and his evaluations; no functional behavior assessment or behavior intervention plan was in place when Student attended Collet Park and continued to be physically restrained by staff. Tr. 4 at 338-340; see also Tr. 1 at 110; Tr. 5 at 292-293 (staff did not have a functional behavior assessment or a behavior intervention plan for J.N.).

101. Although some semblance of Review 360 behavioral "data" was constructed at Bandelier, none of it was available to Collet Park staff when Student was placed there. Tr. 5 at 265.

102. The functional behavior assessment process was initiated after the January 22 restraints. Tr. 5 at 27-29; Exh. 29.

103. There is a Behavior Intervention Plan (BIP) dated March 27, 2019 (a few days before APS disenrolled Student), a date when a meeting of some staff occurred without Parents. Tr. 1 at 115-116; Exh. BB at 15-21. This document adopts calling "school crisis team" as the proper response if three other suggestions do not stop the behavior. Exh. BB at 19. This document also references potential reliance on "physical crisis intervention techniques" and, if J.N. left the campus, calling police. Exh. BB at 21.

104. The school principal at Collet is unaware whether the teacher had ever requested or received help from a District Board Certified Behavior Analyst. Tr. 5 at 21. She does not believe anyone at Collet is a Registered Behavior Tech. *Id.*

TRAINING OF STAFF IN HOW TO ASSIST STUDENT WITH AUTISM / USE OF RESTRAINT

105. APS asserted during the Due Process Hearing that it must reserve the power – and apparently unrestrained discretion – to restrain its students, including J.N. Parents requested that the Due Process Hearing Officer order that APS cannot use restraint on J.N. I find that both parties' positions are too extreme to fit J.N.'s circumstances, in terms of research based assessments, planning, and implementation as to how to address the educational program and progress of a child with autism, who manifests behavioral challenges related to his diagnosis.

106. Attorneys for both Petitioners and the District spent considerable time during the Due Process Hearing proving that APS personnel receive "a whole lot of training" in the use

of restraint on students. Indeed, the parties likely could have stipulated to this fact. Regardless, they proved the fact through testimony by multiple witnesses.

107. Counsel for Petitioners also proved that the same staff who received "a whole lot of training" in restraint often received no or minimal training regarding autism, its manifestations, and possible research based strategies to address any manifestations that interfered with either the child's educational progress or the "good order" of the classroom setting. *See, e.g.,* Tr. 2 at 265; Tr. 4 at 67; Tr. 2 at 264-265; Tr. 4 at 61-62; Tr. 2 at 295-296; Tr. 2 at 296; Tr. 4 at 303-304.

108. I find that APS provided insufficient training to teachers or staff at J.N.'s schools to allow them to know, understand, or implement effectively any research based program to address J.N.'s autism, either in terms of obstacles to his educational progress, in terms of precursors to his behavioral issues that resulted in the use of restraint and other obstacles to learning, or in terms of the reaction to his resulting "meltdowns" by teachers, educational assistants, and other school personnel.

109. In support of my more general findings regarding lack of education and training in autism, and the potential value to J.N. of education and training in autism, I adopt Petitioners' more specific Proposed Findings Numbers 60, 106, 108, 109, 111, 112, 117, 119 *see especially* 60 (Ignoring nonconforming behaviors was a successful strategy which worked with J.N. Tr. 1 at 109-110; 129-130); 110 ("Verbal instructions can overwhelm a child with autism who does better with visual instruction. Tr. 4 at 171. J.N. may not hear much of anything said to him when he is upset or dysregulated; that would be a good time to allow him to be alone in quiet place. Tr. 4 at 195.); 116 (At Collet Park the two people with the most knowledge and training (Sam Hannah and Stephanie Blythe) were the most successful in 1/1 interactions with J.N. and did not, themselves, use or rely on physical restraint. Tr. 5 at 255.).

110. In this autism training vacuum, school personnel often relied on their own professional or personal opinions as teachers or parents, or on NVCI training, to respond to J.N.'s non-conforming behavior, escalating behavior, and "meltdowns." For example, school personnel variously testified that they would ask J.N. about his non-conforming behavior, challenge rather than ignore his non-conforming behavior, physically touch him as a gesture of comfort, and scold him for non-conforming behavior.

111. In contrast, Dr. Cynthia King, who testified as an expert in child psychiatry, stated these responses may be and often are contra-indicated for a child with autism. *See* Tr. 4 at pages 156-57 (expert in child psychiatry); 166-171; 189; 193; and 195; see also Exhibit 50 (admitted as Dr. King's notes for J.N.). Dr. King has known and treated J.N. since April 2018. J.N. was having "difficulty with dysregulation which was worsened or increased in the school setting." Dr. King saw several "red flags" for autism, including that J.N. was having difficulty with dysregulation despite his otherwise good verbal

skills.[13] *Id.* pages 160-61. J.N. also had difficulty with transitions and repetitive behavior. *Id.* page 161. Dr. King recommended occupational therapy. *Id.* page 162. Dr. King also recommended evidence-based practices at school, such as visual schedules, and clear notice of "what's coming next." *Id.* page 166.

112. Dr. King agreed that children with autism "have a different sensory experience." *Id.* page 169. For example, J.N. had difficulty with loud noise. *Id.* page 169. Children with autism do better with a written or visual schedule, rather than being told about their schedule. *Id.* page 167. Indeed, verbally *telling* a child about a transition could be counterproductive. *Id.* page 167. Children with autism can be overwhelmed by verbal instructions. *Id.* page 171.

113. "I don't think [J.N.], when he is kind of upset or dysregulated, *I don't think he hears much of anything*. . . . And for a child with autism, I think when things are so overwhelming, *it can be better to be in a quiet place . . . alone*." *Id.* page 195 (emphasis added). It "might be better [for adults] *just to back away*." *Id.* (emphasis added).

114. Ignoring nonconforming behaviors was a successful strategy which worked with J.N. Tr. 1 at 109-110; 129-130.

115. Dr. King also testified regarding J.N.'s reaction to being restrained at school. He felt "remorse and shame." *Id.* page 168. Dr. King testified that restraint can be harmful to neurocognitive development, "especially for a child with autism, touch is one of the things that is – can be very aversive." *Id.* page 168. There is a cumulative effect to restraint; in J.N.'s case, the use of restraints "significantly worsened his anxiety." *Id.* page 170. J.N. needs "*[p]ositive behavioral supports, evidence-based supports for children on the spectrum, yes. Seclusion and restraint, no.*" *Id.* page 189 (emphasis added). The only time restraint should be used is after appropriate proactive measures have been performed and the child is still [a] danger to himself." *Id.* page 193.

116. In the context of Dr. King's clear explanation of the needs of a student with autism, I was particularly struck by the testimony of Jaime Sais, who participated in a restraint of J.N. in the fall of 2018. Mr. Sais was one of a very small number of personnel involved in a restraint of J.N. who had any experience with autism – Mr. Sais is the stepfather of two children with autism. Yet he was not made aware prior to or during the restraint that J.N. has autism.

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[13] It is not unusual "to have several diagnoses leading up to a final diagnosis of autism." Tr. 4, pages 196-97. Without an accurate diagnosis of autism, children can fall behind. *Id.* page 197.

117. During his testimony, Mr. Sais was asked, "Would you have interacted with [J.N.] in a different way knowing that he has autism?" Tr. 8 at page 72. Mr. Sais testified that he would have looked at J.N.'s behavior intervention plan in advance,[14] and he "would have *waited* and *talked to him across the room*, to see if he had autism, if he was riled up . . ." Tr. 5 at page 72. Counsel for Respondent then reminded Mr. Sais that at the moment Mr. Sais approached J.N., he was not, in fact, "riled up," but nonetheless J.N. punched him. *Id.* Mr. Sais agreed – J.N. "was just sitting there." Tr. 5 at page 73. This was precisely the distinction Mr. Sais would have made – he had indeed approached J.N., whom he thought was "starting to de-escalate." But J.N. then punched him. However, *had he known J.N. had autism*, Mr. Sais "would have talked to him across the room . . . ." Tr. 8 at page 73. In other words, knowledge would have been power; Mr. Sais, with experience in de-escalating children with autism, would have followed Dr. King's advice that "it might be better just to back away."

118. Respondent requests that I find that the restraints were undertaken only after J.N. demonstrated "an imminent risk of serious bodily injury to himself or staff." Proposed Finding Number 126. I reject this proposed finding as not supported in many instances by the evidence and testimony, and as not providing the entire picture of the context of any of these incidents, including, importantly, the failure of school personnel to de-escalate the behavior prior to even the potential need for restraint. Also, while major incidents were recorded, minor incidents not necessarily so.

119. There were several recorded incidents of physical restraint and seclusion of J.N. at Bandelier during kindergarten and first grade. There were at least two major incidents of restraint involving J.N. at Collet during the few weeks J.N. was enrolled there. The principal at Collet Park does not know how many restraints were done at Collet Park during the 2018-19 school year but thinks there were approximately ten and that two involved J.N. Tr. 4 at 305. The principal did not know that Parents had previously asked for J.N. to never be restrained. Tr. 4 at 327.

120. Based on the testimony and the documents presented, I find that there were an unknown number of incidents of restraint that were not reported, or were not documented, or for which notice was not provided to Parents, in contravention of state law.[15] The school

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[14] At this point, J.N. did not have a behavior intervention plan that recognized and took into account his autism.

[15] In addition, at the time Parents participated in both IEP meetings, they had not been provided written records documenting all use of restraints. This lack of information hampered Parents' ability to participate and advocate for an appropriate IEP. *Cf.,* 34 C.F.R. 300.501(a) (parental right to inspect all education records concerning placement and provision of FAPE).

personnel performing the restraint were sometimes known to J.N. and sometimes not. APS and the school administration were often ignorant of and in violation of the monitoring of the use of restraint mandated by state law. They provided little oversight of the use of restraint and seclusion by teachers and staff, with the exception of ensuring annual training. Training was provided by NVCI. Substitute staff are not trained in NVCI or physical restraints. Moreover, training was not always followed. I do find that APS personnel generally tried to comply with NVCI training. This evidence, however, was not sufficient to undercut the testimony and evidence presented regarding the overuse of restraint in the first instance, as the "default" plan, in lieu of research based assessments, planning, staff training, and measured goals, to avoid the overuse of restraint for a child with autism. *See, e.g.,* Petitioners' Proposed Findings Numbers 21, 46, 47, 51-52, 54, 55-56, 155, 157, 161,163-169, 170, 171, 187, 190, and 192.

121. Parents understood that Collet Park was an autism specific program and people would have good training and tools and so Parents assured J.N. that he would be safe at Collet Park and not be restrained. Tr. 5 at 74-76; Tr. 6 at 190-194. Before the first restraint at Collet Park, Parent had discussed with the teacher that J.N. "is extremely sensitive to touch and being held down and that that was something we had experienced at Bandelier that was very traumatizing. . . ." Tr. 6 at 194.

122. J.N. has expressed a "large fear of people putting their hands on him and using any sort of physical management." Exh. BB (3/18/2019 IEP) at 5. Student has expressed that the restraints interfere with his ability to feel safe: "They try to hold me down when I try to get away to a safe space." Exh. 3 at 2; Tr. 5 at 279-282. J.N. was frightened of being held down. Tr. 1 at 57; Exh. 3 at 2; Tr. 5 at 76-77; 281. J.N. had nightmares about his interactions with school staff and their injuries. Tr. 1 at 57-59; Tr. 5 at 76-77.

123. Student's child psychiatrist testified that the result of APS's use of restraint was for J.N. to "become increasingly anxious about returning to the classroom"; the restraints made him "horribly mortified." Tr. 4 at 167-168. APS's use of restraint "significantly increased [J.N.'s] anxiety. Tr. 4 at 170. Physical restraints are "very harmful . . . for neurocognitive development." Tr. 4 at 168. In addition, for children with autism, "touch. . . can be very aversive." *Id.* Impact of repeated restraints can be cumulative and very "destructive to a child's sene of efficacy" and development of internal or self control. Tr. 4 at 170.

124. J.N.'s ability to self-regulate and conform to the expectations of teachers and staff was foundational to his learning. Regression, or the failure to progress, in Student's ability to function was directly caused by inappropriate special education and planning and pre-planning, as well as repeated default by staff to use the restraint tool that they had been provided by APS training, in large part because they had no education or training in more appropriate and effective evidence-based tools.

125. Student regressed in his ability to ability to demonstrate appropriate student behaviors during his attendance in APS. He did not want to enter school or his classroom(s); he eloped from classroom/school in his attempts to escape environments which were too demanding or hostile and was unable to appreciate the relative lack of safety attached to fleeing from the supervised school environment or refusing to follow commands attached to personal safety; his pattern of resistant behaviors became increasingly physical and dangerous for him (and others).

126. There were many incidents of restraint reported at the Due Process hearing, including as described by the parties in their respective proposed findings, as follows.

127. **Fall of 2018**

a. The school principal at Bandelier restrained J.N. on one occasion at the beginning of first grade year, which would be the fall of 2018. He struggled to get away from her restraint. Tr. 3 at 4-7; 41-42. There was never any imminent danger of serious physical harm. Tr. 3 at 46. The Principal knew at the time that J.N. had autism. Tr. 3 at 47. Her restraint (in the health office) escalated J.N. "because he was angry that [the principal] had him in the hold" and a safety team call followed. Tr. 3 at 9-10. The principal never made any written report about the restraint because she "felt like [she] was forced to put him into a restraint, and that was not [her] choice." Tr. 3 at 42.

128. **September 18, 2018**

a. The September 18, 2018 incident started because J.N. wanted to use a computer rather than follow instructions. He started writing on the back of the computer and then on a bookcase and the Safety Team was called. Tr. 3 at 93-101. His teacher is "not sure" if J.N. writing on the bookcase with a pencil created an imminent danger of serious physical harm. Tr. 3 at 95. When J.N. kicked the bookcase and threw books, he was restrained by another teacher. Tr. 3 at 97. How he was restrained and whether he was on the floor or standing up is unclear. *Id.* The restraint form which was filled out (Exh. 13 at 3-4) is inaccurate. Tr. 3 at 99-101.

b. J.N. was restrained "off and on" for 30 minutes, "a long period of time" for a student who was six years old. Exh. 13 at 3-4; Tr. 2 at 210-211; Tr. 3 at 101. When Mother walked in to the "Refocus Room," she saw J.N. restrained on the floor by several adults; he was crying and dripping wet with sweat. Tr. 2 at 212-213 ; Tr. 6 at 142, 159-160 ("He was hysterical. His face was purple. He was soaking wet. I thought he had urinated. It was scary. I didn't know what had happened to him."). I find Mother's account of what she saw when she entered the room to be credible.

c. Mother asked for a conference with the staff and told them that J.N. should never be restrained. Exh. 13 at 5; Tr. 2 at 212; Tr. 6 at 162.

d. Parent was not provided with any written notice or description of the restraint. Exh. 13 at 3-4; Tr. 3 at 307-308.

129. **September 24, 2018**

a. The incident began with Student's refusal to enter his classroom. Tr. 3 at 106; Tr. 3 at 310. When the teacher called the safety team, a substitute educational assistant responded. Tr. 3 at 106-107. Then the substitute educational assistant and another educational assistant took J.N. to the sensory room which he wanted to leave once his mother had left. Tr. 3 at 311-312. The educational assistants blocked his exit and held the door, to prevent J.N. from leaving the sensory room. Tr. 3 at 312-314. He was then in the seclusion room for 45 minutes. Tr. 4 at 21. A substitute educational assistant who had never been trained in NVCI/restraint, and was not on the safety team, was one of the staff involved — "She should not have, but she did." Tr. 2 at 219; Tr. 3 at 315. After the substitute educational assistant was hit with a radio, the APS educational assistant placed J.N. in a Child Control Position for 10 minutes. Tr. 3 at 220-221 314. J.N. struggled during the restraint by kicking, scratching and attempting to bite. Tr. 4 at 52. Staff also used a "seated hold" with J.N. which is not a restraint taught in the NVCI training. Tr. 2 at 222-225; Tr. 3 a 317.

130. **September 2018**

a. After the two restraints in September 2018, no meeting was held to make changes to the behavior plan(s), as was required by state law. Tr. 2 at 225-226; Tr. 3 at 32.

131. **October 5, October 17, November 9, 2018**

a. On October 5 and 17, and November 9, 2018, Review 360, the District's computer program for the documentation of behavior, recorded "physical crisis team calls" for J.N. *See* Exh. 13 at 12-18; Tr. 2 at 226-228, *et seq.* ; Tr. 3 at 190; *see also* Exh. YY.

132. **Unknown date in fall 2018**

a. Multiple adults were involved in preventing J.N. from running off, after his father brought him to school. Tr. 4 at 28-32. An educational assistant placed J.N. in a hold in a school hallway at some point which lasted 5-10 minutes, during which

time there were 3 other adults present. Tr. 4 at 32-36. This restraint was never written up. Tr. 4 at 38-40.

133. **October 17, 2018**

a. This incident began because Student took another student's ball and the teacher then took it away. Tr. 3 at 167; Tr. 4 at 83. Student was restrained in the SES 1 classroom by the educational assistant and then placed in a physical escort and taken to the sensory room , where he continued to be restrained. Tr. 3 at 167-170; Tr. 3 at 190; Exh. 13 at 13-14 . The incident lasted 2 hours. Tr. 3 at 190-193; Tr. 3 at 235-236. In order to leave the sensory room, J.N. "needed to calm down and to be able to talk without being physically aggressive." Tr. 3 at 219.

134. **November 9, 2018**

a. J.N. crawled into a tube on the playground structure. Exh 13 at 12; Tr. 3 at 200-201. J.N. was allowed inside the tube, but another student was on top of an adjacent monkey bar, which was not allowed. Tr. 4 at 73-77. The educational assistant, who knew nothing about J.N.'s sensory needs,[16] approached J.N. and told him, "in a more intense manner" to stop shaking the tube. She curled her fingers around inside the tube, and J.N. kicked her fingers, injuring her hand. Tr. 4 at 75-76; 79-80. "Physical management," lasting one minute, was recorded. . Exh 13 at 12; Tr. 3 at 200-201.

135. **December 12, 2018**

a. J.N. was restrained during an event in the classroom involving multiple adult staff, including the school principal, who previously had no interaction with the child. Tr. 4 at 312 *et seq.* During this incident J.N. stood on furniture, threw objects including books, and the principal and J.N. ended up falling down on bean bags that were on the floor. Tr. 4 at 314-315. The principal first restrained him by grabbing his wrist, also grabbing him by his belt loops, and then additional staff (all on the floor) held his legs and arms so he could not get up off the floor. Tr. 4 at 315, 320-322; Exh. 26 at 1-3; Tr. 5 at 42-46, Tr. 5 at 216-218 (hold was on the floor); Tr. 5 at 233-236. At the time of this restraint, Student had been at the school about 7 days and did not know most of the staff who were involved. Tr. 4 at 317; Tr. 5 at 212. Staff knew only that J.N. had autism and had eloped. Tr. 7, page 12.

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[16] Like many children with autism, J.N. likes to retreat to small safe places. *See* Finding of Fact No. 7.

b. The incident began when an educational assistant, Natasha Hernandez, and other assistants, required Student to complete some work. Tr. 4 at 318; Tr. 5 at 278-279; Tr. 7, page 18, *et seq*.

c. J.N. was verbally instructed to finish work on an art project and, according to Hernandez, J.N. "refused." Tr. 9, page 18. "At first he was sitting and kind of mulling over it . . . ." Tr. 9, page 32. After a substantial amount of verbal – not visual – prompting, J.N. became more and more upset.

d. At that point, the staff "[w]ent through the Zones. . . . *I told him* he was in the red zone because he was displaying behaviors that were escalated. At that time, . . . he was kicking the tables, lifting them, being disruptive to the other students and also destructive in the classroom." Tr. 9, page 18 (emphasis added). Various staff members were giving J.N. "constant reminders." *Id.* Once again, the reminders were verbal: "You know, 'Finish your work. You'll earn your earned time. You can still get your iPad. You just have to do work first, and then you can go out to recess." Hernandez was asked, "So is it accurate, then, that you or someone else *was constantly talking to him*?" *Id.* (emphasis added). Hernandez responded, "Absolutely." According to Hernandez, this was "done in rotation," with the other assistants. Tr. 9, page 33. Also according to Hernandez, "I never knew that he had a behavioral intervention plan,[17] so I just functioned as if he was like the other students in the classroom." Tr. 9, page 25.

e. A teacher came in and declared that it was a "hazardous condition." Tr. 9, page 19. Hernandez then started restraining J.N., but he started "flailing." Tr. 9, page 19. Hernandez backed away, at which point J.N. ran to the bookcase, threw books at Hernandez, jumped on top of the bookcase, and threw books at the light. Tr. 9, page 20. The principal then came in and physically approached J.N., who jumped towards the principal. They both fell. Hernandez then re-entered the fray and tripped on bean bags on the floor. Hernandez couldn't get up and was holding onto one of J.N.'s legs while the principal held one of his arms down. Tr. 9, pages 20-21.

f. Because J.N. had difficulty engaging with more than one person, Hernandez considered J.N. to be "oppositional defiant." Tr. 9, page 26. During the Due Process hearing, Hernandez struck the Due Process Hearing Officer, in both her language and her tone, as being upset with J.N. due to his inability to connect with

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[17] When J.N. was moved to Collet Park, he did not have a functional behavior assessment or behavior intervention plan based on special education procedures and his evaluations; no FBA or BIP was in place when Student attended Collet Park and continued to be physically restrained by staff. Tr. 4 at 338-340.

her. Tr. 9, pages 26-27. I do not note this fact to single Hernandez out, but as an example of possibly a human but certainly an ill-informed reaction to J.N., indicating a fundamental misunderstanding of J.N.'s lack of social communication skills, due to his autism. Hernandez, like many of the APS witnesses who testified, could not understand and therefore grew exasperated with J.N.'s perceived "refusal to listen."

g. The incident lasted 45 minutes and was chaotic. Tr. 4 at 319-320; Tr. 5 at 226-231.

h. During the incident J.N. was restrained on the floor by three staff; a fourth staff person (the Social Communication Skills teacher) refused to participate. Tr. 5 at 120-123.

i. The form documenting this restraint fails to identify the floor restraints and is inaccurate about what happened and incomplete about the series of events. Exh. 26; Tr. 5 at 126-127.

136. **January 22, 2019**

a. J.N. was restrained again. Exh. 26 at 4-6. As Petitioners have described, paperwork about the restraint is very unreliable. Petitioners' Proposed Finding of Fact No. 198-99.

b. As Petitioners have described, most of the staff involved did not know J.N. or his needs. One staff person did not even know J.N. could talk. They had been trained in restraint, but not in autism. During the incident, staff were repeatedly talking to/at J.N., which is completely contrary to what will assist J.N. to de-escalate. Petitioners' Proposed Finding of Fact No. 200. The situation was chaotic. There was no one in charge, although there were multiple adults with no training in or even knowledge of autism present, some of them watching the event, some of them making multiple attempts to corner or control J.N. Petitioners' Proposed Finding of Fact No. 201.

c. I was particularly struck by the description of this event by PC,[18] a special education teacher from the neighboring class. While Respondent has described PC as a friendly, non-threatening presence, and I am convinced this was her intent, PC.'s testimony and her tone during the Due Process hearing do not support this view.

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[18] I recognize that PC experienced this incident as traumatic; I have therefore not used her full name.

d. PC described J.N. as threatening a fellow APS employee – Ms. Little – with a pencil. Tr. 9, page 68. He appeared "aggressive." *Id.* Both Ms. Little and PC asked J.N. to put the pencil down, and both were telling him "safe hands." Tr. 9, pages 68-69. "We kept on repeating the words 'safe hands,' and to stop." Tr. 9, page 69. PC began talking as soon as she entered the room, and she "and Ms. Little were continually talking to him, telling him to stop, safe hands, over and over again . . . ." Tr. 9, page 88.

e. When J.N. did not stop, PC "smacked the pencil out o f his hand because he was looking towards Ms. Little." Tr. 9, page 69. J.N. did not directly threaten Ms. Little, but PC "didn't know what he was going to do," because she "didn't know him, but he looked so angry." Tr. 9, pages 75-76.

f. There was another educational assistant in the room during some of this time, Ms. Kathy. Tr. 9, pages 70-71.

g. While PC was demonstrating this event to me during the Due Process hearing, she raised her hands a few times to show me the "safe hands" signal. Each time, she closed her fingers, rather than keeping them out in a friendly way, and her tone was very tense and clipped, to the point of sounding frightened. At other times her tone was angry and defensive. Tr. 9, page 90.

h. I found both the testimony and the demonstration disconcerting. There was little in PC's demonstration that supported that she would have provided any comfort or accessible guidance to a panicked child with autism.

i. PC described J.N. as being almost as tall than she is, even though he was approximately one foot shorter. Tr. 9, pages 76-77. According to PC, J.N. "probably came up to [her] nose" when she was standing. Tr. 9, pages 76-77. PC is 5'3"; PC is in second grade and was less than four feet tall one month before this event, according to his medical records.

j. PC's description of her so-called "child control" restraint of J.N. strongly suggested that she was either leaning down over J.N. from the back, or actually lifting him up, in order to allow him ultimately to bite her hard on her arm. J.N. locked his teeth on PC's arm, while at the same time dropping down between her arms and onto the floor. Accordingly to PC, he then punched PC "right in the face." Tr. 9, page 70. While there are photographs of employee injuries, including PC's bite mark, there is no photograph of an injury to PC's face.

k. At that point, J.N. started throwing objects and demanding that everyone leave. Tr. 9, page 70. Everyone left except for PC. *Id.*, pages 70-71. According to PC, "He wanted to be alone in the classroom. He just wanted himself . . . in the classroom by himself." Tr. 9, page 71. Undoubtedly, PC could not leave the classroom, but she also did not back away inside the classroom. PC kept talking to J.N., and demonstrating her "safe hands" technique – "I kept showing him my hands." Tr. 9, page 71. PC "just kept reiterating" a phrase she had learned – apparently on the fly – from the other persons in the room; she no longer

remembers the phrase. Tr. 9, page 71; page 89. J.N. just kept screaming and throwing things. When J.N. attempted to come down from the desk where he was standing, PC approached him again and he kicked her. Tr. 9, page 72.

l. After a new person – Ms. Rogers – entered the room, J.N. attempted to crawl under a table. Tr. 9, page 72. Ms. Rogers would not permit him to crawl under a table, because she did not believe J.N. would be safe there; the perception was that he might turn the table over. *Id.* Ms. Rogers attempted to de-escalate J.N. by talking to him some more. Tr. 9, page 73. J.N. kicked Ms. Rogers while trying to get under the table and, according to PC, knocked Ms. Rogers out, although no one else, including Ms. Rogers, remembers Ms. Rogers' being knocked out. J.N. then climbed under his own desk, until Ms. Dhaouadi came in, whereupon he came out from under his desk and jumped over to a different table. Tr. 9, page 74. Another person[19] entered. PC was bleeding and having a panic attack, so she left. Tr. 9, pages 74-75. PC had also experienced an unrelated panic attack, prior to this event. Tr. 9, page 94.

m. PC had training two years or so before this event, having to do with reading skills training that could be used with children with autism, among other students with other disabilities. Tr. 9, pages 86-87.

n. J.N. physically injured PC and Ms. Dhaouadi on January 22, 2019. The bite on PC's arm broke PC's skin, caused a great deal of pain, required medical treatment, and left a scar. She suffered post-traumatic stress disorder as a result and has a service animal.

o. PC's reaction to the circumstances she was asked to manage was a human one, and I sympathize with her distress. This incident and PC's reaction, however, also demonstrate a lack of preparation and training in terms of J.N.'s behavior as related to his diagnosis of autism. The fault for PC's lack of preparation and training lies with APS.

p. J.N. was "very, very, very upset about hurting somebody [on January 22] . . . [and] couldn't sleep for . . . days. He . . . felt so bad. . . . And he really internalized that. And he said, "Mom, am I like a killer kid or something? Am I a bad kid?" Tr. 6 at 199.

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[19] There was some confusion regarding the names of all persons present and when they were present. Respondent's Proposed Finding Number 126(k) refers also to Mr. Rey and Ms. Blythe, who also attempted to assist. Mr. Rey was unable to restrain J.N. Ms. Blythe was able to convince J.N. to permit PC to leave. A thorough and detailed review of each witness' testimony might enable the DPHO to sort out the "Russian novel" aspect of this incident, but this is not necessary for an understanding of the chaos of the scene.

137. **Following incident on January 22**

a. Following the incident on January 22, the school called police. Tr. 6 at 203-204. Although no functional behavior assessment or behavior intervention plan had been done, Collet Park conducted a "Threat Assessment" regarding J.N. Numerous APS employees, some with little to no knowledge about J.N., checked numerous boxes about J.N.; J.N.'s teacher, Ms. Hannah, denied checking many of the boxes and testified that the form was filled out after she left by the others. *See* Petitioners' Proposed Finding of Fact Numbers 88-89.

b. The information in the form is very negative, pejorative and damning. The form concluded that J.N. was a "severe-level threat." The principal believes that the form was then "uploaded to Synergy" where various unknown staff would have had access, although she then revised that testimony to state it only went into a folder. *See* Petitioners' Proposed Finding of Fact Number 88.

c. Following the incident on January 22, Parents decided J.N. could not be safe at school and he quit attending. Tr. 6 at 204-207. Parents acted because of what they saw in J.N., namely difficulty sleeping, nightmares, negative feelings about himself. Tr. 6 at 206-207.

d. The District wrote a "crisis plan" in March 2019 to address elopement caused by Student's "significant deficits with self-regulation skills, and sensory overload," but did not involve the occupational therapist in the creation of the crisis plan. Tr. 1 at 113-115. J.N. complained that he was held down by staff when he tried to get away to a "safe place." Exh. 3 at 2; Tr. 1 at 123-124. The classroom teacher never talked to the occupational therapist regarding J.N.'s fear of being held down. *Id.*

FAILURE TO PROVIDE EDUCATION WHICH IS "FREE"

138. Petitioners proved by a preponderance of the evidence that Bandelier often depended on Parents to assist with J.N. at school and often requested that Parents, specifically Mother, take J.N. home.

139. Among other evidence presented, this evidence is persuasive that the District's failure to evaluate J.N. for special education denied J.N. a free and appropriate public education, by substituting parental intervention for evidence-based practices designed to permit J.N. to attend and remain at school. Petitioners failed to provide any precise accounting of the number of times this type of exclusion occurred, other than often.

140. In addition, APS delayed the second IEP from February 4, 2019 until March 18, 2019 even though J.N. was not attending school due to Parents' concerns about programming and use of restraint. Tr. 5 at 32.

V. Hearing Officer's Conclusions of Law[20]

Issue Number 1: Whether the District violated the IDEA and denied FAPE by failing to timely identify J.N. as a student eligible for special education in an area of suspected disability, specifically autism?

2. Issue Number 2: Whether the District violated the IDEA and denied FAPE by denying a request for an evaluation by Parents or by failing to consider the private evaluation submitted by Parents, without Prior Written Notice?[21]

1. 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, who are suspected to having a disability, must be identified, located and evaluated. *See* 20 U.S.C. § 1412(a)(3)(A); 34 C.F.R, § 300.111(a)(i)("child find"). This "child find" obligation is imposed on the LEA for a child suspected of a disability and in need of special education, even though the child may advance from grade to grade. *See* 34 C.F.R. § 300.111(c)(1). 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. Conn. 2009). 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 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 Weisenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.* 181 F. Supp. 2d 1307, 1311 (D. Utah 2002).

2. A state or LEA "shall be deemed to have knowledge that a child is a child with a disability if [among other things] . . . the behavior or performance of the child demonstrates the need for such services." 20 U.S.C. § 1415(k)(8)(B)(ii).

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[20] The IDEA requires the application of complex legal principles to an oftentimes factually intensive record. Accordingly, "Conclusions of Law" must necessarily reference and synthesize factual findings. To the extent I refer to a factual basis for my Conclusions of Law, it is synthesized from findings set forth in the findings section of this Memorandum Decision and Order, *supra.*

[21] While these are distinct legal issues, Number 2 is ultimately subsumed in Number 1, as I will explain, *infra.*

3. Our circuit has not specifically defined "suspicion of disability." Under persuasive authority from the Ninth Circuit, a disability is suspected 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 child's symptoms, expressed opinions by informed professionals, or less formal indicators, like the behavior in and out of the classroom. *Id.* at 1121. While "[t]he child-find obligation is in no way absolute," "[k]nowledge of a disability may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." *See* 20 U.S.C. § 1415(k)(8)(B)(i-iv)." *Wiesenberg v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 181 F. Supp. 2d 1307, 1311 (D. Utah 2002).

4. "[T]he threshold for suspicion [of disability] is low." *See e.g., JK v. Missoula County Public Schools,* 2016 WL 4082633 * 9 (D. Mont. 2016).

5. In this case, the suspected disability was autism. Pursuant to 34 C.F.R. § 300.8(c) (1)(i), "[a]utism means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences."

6. Here, as I've set forth extensively in my findings of act, J.N. first began demonstrating symptoms creating a suspicion of disability, if not autism *per se*, in kindergarten. By January 2018, J.N's behavior was deteriorating at school, not improving, despite limited efforts by the District to address his difficulties. In the summer of 2018, Parents were so concerned that they obtained a private evaluation, which in fact diagnosed J.N. as having autism. *See* 20 U.S.C. §1414(c)(1)(A)(i)(evaluations provided by parents shall be considered by the LEA as part of an initial evaluation for special education eligibility). Notably, J.N.'s school was so convinced that J.N. needed assistance that by September 2018, it was allowing him to attend a special education classroom, even though the District had just barely referred him for an evaluation for special education.

7. Despite numerous "red flags," the District did not even inform Parents that they could request an evaluation for eligibility for special education until August 30, 2018, *at least* seven to eight months after J.N. should have been suspected to have a disability that was affecting his education. Indeed, the District likely should have suspected J.N. had a disability triggering its "child find" obligation earlier, in the fall semester of 2017.

8. Parents provided a written request for evaluation for autism on September 10, 2018, nearly as soon as they were informed by the District that a written request would trigger

an evaluation. Prior to this time, the District insisted that J.N. and Parents were required to pursue the Student Assistance Team ("SAT") process as a prerequisite to evaluation for special education.

9. While the Due Process Hearing Officer is required to defer to the expertise of school authorities in their judgment regarding the educational needs of students, I am also directed at the same time to "fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions . . . ." *Endrew F.,* 137 S. Ct. at 1001. In this case, I heard none, other than the insistence that despite the District's clear suspicions regarding J.N.'s disability, it was *required* to refer the matter first to the Health and Wellness Team and/or the Student Assistance Team. In other words, the District's belief, as expressed by several witnesses, was that these alternative ways of addressing J.N.'s suspected disability were required to precede an evaluation of J.N. for special education eligibility, pursuant to the IDEA.

10. Respondent appears to concede as much in Paragraph 3 in its Closing Argument, when it contends that New Mexico's three-tier model of intervention mandates that APS proceed in a specific order of events, *prior* to seeking parental consent for an evaluation. Thus the District's argument appears to be that it was not permitted to seek consent for an evaluation until it had exhausted efforts by way of the Health and Wellness Team and the Student Assistance Team:

> In New Mexico, districts are required to follow a three-tier model of student intervention as a proactive system for early intervention for students who demonstrate a need for educational support. 6.29.1.9(D) NMAC. The three-tier model refers to "a multi-tiered organizational framework"(referred to as "Response to Intervention" or "RtI") "that uses a set of increasingly intensive academic or behavioral supports, matched to student need, as a system for making educational programming and eligibility decisions. It is a continuum of school-wide support that contributes to overall comprehensive school improvement efforts." 6.29.1.7(BX) NMAC.

Respondent's, Albuquerque Public Schools, Closing Argument, ¶ 3. Thus, the District's logic goes, the District only had "reason to suspect that J.N. was a student with a disability" once he had "increased behavioral difficulties" in his first semester of first grade, "even with tier 2 interventions." *Id.* at ¶ 27.

11. Whether the District adopted this system of prerequisite procedures either *de facto* or *de jure*, the District is incorrect as a matter of law that it may set aside its IDEA "child find" obligations while pursuing other remedies provided by the "three tier model."

12. First, to the extent the State's "three tier model" contradicts the IDEA, the IDEA child find obligations preempt and therefore override the three tier model. *See El Paso*

Independent School District v. Richard R., 567 F.Supp.2d 918, 941, 947-48 (W.D.Tx. 2008)("In those instances where the [SAT] committee impedes the exercise of rights guaranteed by federal law, those practices violate the IDEA.").[22] Where a school interposes any "intervention strategy" that effectively blocks a parent's access to the protections of the IDEA, a parent's acquiescence to the referral does not operate as a waiver of the parent's or the student's IDEA rights. *Id.* at 947-48; *see also Regional School Unit 51 v. Doe,* 920 F.Supp.2d 168, 177-79 (D Maine 2013)(because of complexity of IDEA, parent was under mistaken impression that SAT / 504 referral must precede IDEA evaluation; school should have corrected misimpression rather than encouraging it); *cf. N.G. v. District of Columbia*, 556 F.Supp.2d 11, 29 (D. D.C. 2008)(school district could not displace IDEA process with referral to Section 504 supports).

13. Indeed, the Office of Special Education Programs of the United States Department of Education has made clear that "[s]tates and [local educational agencies] have an obligation to ensure that evaluations of children suspected of having a disability are not delayed or denied because of implementation of a [Response to Intervention] strategy." OSEP 11-07, page 1. "It would be inconsistent with the evaluation provisions at 34 CFR Sections 300.301 through 3000.111 for an LEA to reject a referral and delay provision of an initial evaluation on the basis that a child has not participated in an RTI framework." *Id.* The OSEP has directed the states and LEA's to "examine the procedures and practices in your State to ensure that . . . the use of RTI is not delaying or denying timely initial evaluations to children suspected of having a disability." *Id.*

14. Second, the State's three tier model is not nearly so directive as the District suggests in its Closing Argument. Specifically, while I agree with the District that N.M. Admin. Code 6.29.1.9(E) provides that "[t]he school and district shall follow a three-tier model of student intervention as a proactive system for early intervention for students who demonstrate a need for educational support for learning or behavior," to include the SAT as Tier 2, this is not the entire story.

15. Specifically, as part of the SAT in Tier 2, "*When it is determined that a student has an obvious disability or a serious and urgent problem, the SAT shall address the student's needs promptly on an individualized basis, which may include a referral for a full, initial evaluation to determine possible eligibility for special education and related services consistent with the requirements of Subsections D-F of 6.31.2.10 NMAC and federal*

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[22] Notably, the United States District Court for the Western District of Texas distinguished this type of circumstance, where the school's interventions impede a parent's access to IDEA procedures, from the Tenth Circuit's decision in *Ellenberg v. New Mexico Military Institute*, 478 F.3d 1262 (10th Cir. 2007), where the parents attempted to circumvent the IDEA entirely. *El Paso Independent School District v. Richard R.*, 567 F.Supp.2d at 941.

regulations at 34 CFR Sec. 300.300. N.M. Admin. Code 6.29.1.9(E)(3)(emphasis added).

16. Here, J.N.'s behavior was getting worse, not better, by January 2018. He was manifesting several clinical "red flags" for autism. J.N.'s problems with self-regulation were clearly affecting his educational progress. At this point, the District could not simply refer J.N. to Tier 2 services, in place of a full, initial evaluation to determine J.N.'s possible eligibility for special education and related services. Thus I conclude that the District's time limits to begin evaluating J.N. for special education eligibility began running in January 2018.

17. "The comments to the final Part B regulations note, "[I]t would not generally be acceptable for an LEA to wait several months to …seek parental consent for an initial evaluation…." 71 Fed. Reg. 46,540 (2006)." Respondent's Closing Argument, ¶ 27; *see also W.B. v. Matula*, 67 F.3d 484, 501 (3d Cir.1995)((holding that a jury could reasonably find a violation of Child Find where a school failed to conduct an evaluation within **six months** after the personal observations of teachers and the receipt of information from parents provided notice of the student's likely disability), *abrogated on other grounds by A.W. v. Jersey City Pub. Schs.*, 486 F.3d 791 (3d Cir.2007); *New Paltz Cent. Sch. Dist. v. St. Pierre ex rel. M.S.*, 307 F. Supp. 2d 394, 401 (N.D.N.Y. 2004) (finding delay of approximately **ten months** from time parent informed the school district of child's educational problems until time of evaluation was violation of Child Find); *O.F. ex rel. N.S. v. Chester Upland Sch. Dist.*, 246 F. Supp. 2d 409, 417-18 (E.D. Pa. 2002) (finding delay of nearly **one year** from time of observation that child was experiencing emotional problems until evaluation constituted Child Find violation); *El Paso Indep. Sch. Dist. v. Richard R.*, 567 F. Supp. 2d 918, 952 (W.D. Tex. 2008) (finding **thirteen month period** between request for evaluation and school district's offer to evaluate unreasonable).

18. Here, at the very least, the District's child find obligation was triggered in approximately January 2018, when J.N.'s behavior, by all accounts, was deteriorating and he was either not abating or was exhibiting more avoidance behavior with regard to school. J.N. was not referred for an evaluation for purposes of special education eligibility until August 20, 2018. Parents provided a written request for evaluation for autism on September 10, 2018. The referral for evaluation was delayed by the need to fill out more SAT forms. The District obtained parental consent for an evaluation on or about October 3, 2018. While the District obtained consent timely if its time began running on September 10, 2018, this was not timely in terms of the bigger picture of the time that elapsed between J.N.'s deteriorating behavior in January 2018 and the District's finally taking action after its child find obligations were triggered. In the context of J.N.'s extreme behavior, this was not a reasonable amount of time to wait even to begin an evaluation for eligibility for special education services.

19. Despite nine days of testimony and numerous exhibits, I am not clear whether Parents made a less formal but nonetheless effective request for an evaluation by the school prior to September 10, 2018, either by way of their delivery to the District of the private Centria evaluation or otherwise. Petitioners do not develop this point in detail in their post-hearing submissions. Because I otherwise conclude that the District violated the IDEA by failing to refer J.N. for an evaluation for special education services beginning in January 2018, I am not required to address this point.

20. I do conclude that the District's insistence on referring Parents and J.N. to the Health and Wellness Team and the Student Assistance Team, as an unspoken *condition precedent* to evaluation for special education eligibility, was, in these circumstances, a violation of the IDEA. Insofar as the District requested that Parents obtain a private evaluation to assist the Health and Wellness Team, and then ignored the private evaluation, this compounded the violation of the IDEA. The District cannot *displace* its federal IDEA child find obligations with a different model.

Issue Number 3: Whether the District violated the IDEA and denied FAPE by transferring J.N. to a segregated classroom prior to a special education eligibility determination?

21. Parents have failed in their burden of proof to articulate how the informal placement of J.N. in a segregated classroom violated the IDEA in a manner that can be redressed by the Due Process Hearing Officer. The sense I received from the testimony concerning J.N.'s placement in a "segregated classroom" was that J.N. was using self-help in seeking out this environment, because his special needs were outdistancing the District's efforts to assist him. Allowing him to remain in this classroom was thus a "temporary fix," which tends to support Parents' claim that the District failed in its child find obligations with regard to J.N. On the other hand, Parents have failed to identify any substantive harm to J.N. that is distinct from the harm caused by the District's delay in evaluating J.N.'s eligibility for special education, which is addressed by the remedy provided for the District's violation of its child find obligation.

22. I therefore deny this claim.

Issue Number 4: Whether the alleged overuse of restraint and seclusion by the District violated the IDEA?

23. The District's response to Petitioners' challenge to the use of restraint and seclusion by APS is that a Due Process Hearing Officer lacks jurisdiction over such claims. Specifically, "[a] parent or public agency may initiate a hearing to address matters regarding the education of a particular child, i.e., 'any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.'" *Chavez ex rel. M.C. v. N.M. Pub. Educ. Dep't*, 621 F.3d

1275, 1282 (10th Cir. 2010), *quoting* 20 U.S.C. § 1415(b)(3), (6) (2000). I agree with the District that the use of restraint does not *per se* violate the IDEA and that a pure challenge to the use of restraint in school would appear to be beyond the jurisdiction of the DPHO. *See, e.g., Couture v. Bd. of Educ. of Albuquerque Public* Schools, 2009 WL 10708112 *7 (D.N.M. 2009); *cf Sellers v. Sch. Bd. of City of Manassas, VA.*, 141 F.3d 524 (4th Cir. 1998)("The purpose of these procedural mechanisms is to preserve the right to a free appropriate public education, not to provide a forum for tort-like claims of educational malpractice.").

24. I also agree with the District that the DPHO lacks jurisdiction to enforce New Mexico's statutory limitations on the use of restraint in school. New Mexico law specifically authorizes restraint only when:

a. the student's behavior presents an imminent danger of serious physical harm to the student or others; and
b. less restrictive interventions appear insufficient to mitigate the imminent danger of serious physical harm.

NMSA 1978, § 22-5-4-12(A). This is not a statute that is exclusively applicable to special education student; it is generally applicable to all students. The question before me is therefore whether the overuse of restraint by the District violated the IDEA, implementing federal or state regulations, or applicable precedent.

25. Petitioners acknowledge that the IDEA does not mention physical restraint, one way or another. Indeed, the IDEA does not provide much in the way of specific guidance as to what should or should not be part of a child's IEP. Instead, the IDEA specifies only that the IEP, the road map for a child's special education, must contain:

> a statement of the special education and *related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child*, and *a statement of* the program modifications or *supports for school personnel* that will be provided for the child –
>
> (aa) to advance appropriately toward attaining the annual goals;
>
> (bb) to be involved in and make progress in the general educational curriculum. . . and
>
> (cc) to be educated and participate with other children with disabilities and non-disabled children . . .

20 U.S.C. §1414(d)(1)(A)(i)(IV)(emphasis added).

26. Applicable New Mexico law, namely the "eleven considerations" drill down quite a bit more, in requiring that the IEP team consider effective research based strategies to address familiar issues for children with autism, including problems with transitions and changes. *See* §6.31.2.11(B)(5) NMAC. Notably, consideration Number **(d)** requires the team to consider

> positive behavior support strategies based on relevant information, including, for example, . . . data-based decisions; and a behavioral intervention plan focusing on positive behavior supports and developed from a functional behavioral assessment that uses current data related to target behaviors and addresses behavioral programming across home, school, and community-based settings.

The team was also required to consider communication interventions, social skills supports and strategies, and teaching strategies based on peer reviewed, research-based practices for students with ASD. *Id.* at (h), (i), and (k). Importantly, the eleven considerations specifically mention "training provided to personnel who work with the student to assure the correct implementation of techniques and strategies described in the IEP." *Id.* at (j).

27. Here, the District acknowledged that J.N.'s behavioral issues were central to his disability and presented obstacles to advancement in his educational program. Thus Student's IEPs (Exh. R, Exh. BB) both summarize evaluation information for J.N. as determining:

> [J.N.] displays clinically significant levels of *anxiety*. . . significant problems with *sensory overstimulation* and a *need for a calm learning environment with high levels of structure and routine*. When not provided with this type of environment, [J.N.] engages in behaviors that can be described as fight or flight. Multiple sources of data also indicate that J.N. displays *difficulties* in socialization including the areas of *social skills and social communication.*

Exh. R at 3; Exh. BB at 3 (emphasis added).

28. Both IEPs also reference J.N.'s overwhelming distress about being restrained at school. The initial November 2018 IEP included: "Restraints bother him greatly. He has nightmares about being held." Exh. R at 5 ("Parent input" section).

29. The second IEP in March 2019 recorded: "He does have a large fear of people putting their hands on him and using any sort of physical management however he is also aware that when he becomes out of control or extremely unsafe that it can be used." Exh. BB at 5 (information from special education classroom teacher).

30. Thus APS, on paper, recognized *both* that Student needed specific special education services focused on skill deficits and challenges resulting from autism *and* that physical restraints (and chaotic, *ad hoc* environments without structure) would inevitably increase his anxiety and inability to meet school demands or trigger more escalated behaviors. Yet, APS failed to shape or deliver special education which encompassed what was known about J.N., the child whose *unique* needs as a child with autism were *the central, if not the sole point of special education placement.*

31. After nine days of testimony and dozens of exhibits, there is absolutely no question in my mind, as DPHO, that J.N.'s precipitating behavior and his escalating behavior are directly related to the failure by the District to have planned or implemented with fidelity and consistency any evidence-based practices to address his autism, and that the overuse of restraint in lieu of evidence-based practices has resulted in the regression of J.N.'s behavior and his fear of school. In this regard, then, the District's insistence that the Due Process Hearing Officer has no jurisdiction to address the District's overuse of restraint, to the exclusion of the implementation of evidence-based practices, finds no support in the letter or spirit of the IDEA.

32. In this context, the District's position that J.N. caused serious physical injury to APS employees before and during *some* incidents of restraint is not the point in terms of why the overuse of restraint by APS violated the IDEA and denied FAPE. In this regard, the APS witnesses to the major incidents of restraint were akin to teachers who have failed to apply evidence-based practices to the task of teaching a student to read, who testify after the fact that nothing can now be done if a child cannot understand the instructions on a test.

33. Once again, I return to *Endrew F.*, 137 S. Ct. at 1001–02, and the Supreme Court's admonition that I am to defer to school authorities only if those authorities have applied "expertise and the exercise of judgment." *Endrew F.*, 137 S. Ct. at 1001–02. Thus "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions . . . ." *Id.* Here, I heard many hours of testimony about the major incidents of restraint involving J.N. Some of the witnesses were emotionally distraught, panicked, judgmental, confused, aghast, defensive and exasperated – sometimes at J.N. and sometimes at each other. Some were more rational than others, some had more common sense than others, some had a better grasp of how to restrain a child than others. But I did not hear a cogent and responsive *expert* explanation addressing the possible precursors to J.N.'s behavior, the possible evidence-based practices that could provide alternatives to the clearly unsuccessful Zones of Regulation, the possible alternatives to restraint prior to J.N.'s escalation to a point where he was a danger to others, and on and on, much less an evidence-based plan that was *or would be* implemented with consistency and fidelity. Notably, in relation to his eligibility for special education on the basis of autism, J.N. was not given a functional behavioral assessment until extremely late in the day, and did not have a behavior intervention plan

in place until after his final meltdown at Collet Park, at which point J.N.'s parents were so concerned about the lack of attention, planning, and training that they reasonably concluded J.N. was not safe at his school.

34. Notably, in this regard, the District concedes that "[u]nder the IDEA, when the child's behavior impedes his learning or that of others, then positive behavioral interventions, supports, and other strategies must be considered by the IEP team to address that behavior. 34 C.F.R. § 300.24(a)(2)(i); § 6.31.2.11(F)(1) NMAC. The New Mexico Public Education Department strongly encourages that [functional behavioral assessments] be conducted and that [behavior intervention plans] be adopted for students who exhibit problem behaviors . . . ." Respondent's, Albuquerque Public Schools, Closing Argument, ¶ 18.

35. The District adds that none of these items are "*required* components of the IEP," and that "there are no *legal standards* for a BIP, either under the three-tier model or under the IDEA." *Id.* (citations omitted). True enough, but this could easily be said about almost any evidence-based practice to assist any child who is eligible for special education services. The District misses the forest for the trees, which is that the IEP must address "special education and *related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child*, and *a statement of* the program modifications or *supports for school personnel* that will be provided for the child" to advance him towards his participation and progress in the general education, and to be educated and participate with other children. 20 U.S.C. §1414(d)(1)(A)(i)(IV).

36. Here, APS appears to posit a false choice, between what it pre-determines as its less restrictive Three Tier Model and an inevitably more restrictive special education model. Thus, the logic goes, APS was acting within its prerogative as the educator to refer Parents and J.N. to the Health and Wellness Team and the SAT team as a condition precedent to evaluating J.N. for special education on the basis of autism, pursuant to the District's child find obligations. This approach ignores the framework of the IDEA, which mandates a prompt evaluation and special education planning that *accounts for* a child's disability. Just as APS cannot "wait and see" whether a visually impaired child can walk without a cane or a child with a learning disability can learn without reading supports, APS could not "wait and see" whether J.N. could manage his general education classroom with *ad hoc* behavioral interventions, rather than an IEP that was "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" and that was "appropriately ambitious in light of [the child's] circumstances." *Endrew F.* , 580 U.S. _____,137 S. Ct. 988, 999, 100 (2017). Here, the child's circumstances included his autism, which raised very diagnosis-specific issues with regard to both the precursors to his non-conforming behavior and the reaction by school employees to his non-conforming behavior, throughout the entire arc of his

experience, not limited to the emergencies that were in large part created by the District's inattention to Student's eligibility diagnosis of autism.

Issue Number 5: Whether the District mislabeled student as eligible for special education on the basis of emotional disturbance?

37. Parents allege that in evaluating J.N. as eligible for special education on the basis of Emotional Disturbance, Dr. Mody failed to take sufficient account of J.N.'s diagnosis of autism and otherwise failed to conduct a sufficient assessment of J.N. or his behavior.

38. After listening to all the testimony and reviewing all the documentary evidence, and especially after listening to Dr. Mody's testimony, I found Parents' argument persuasive. This is not, however, the applicable standard of review.

39. Rather, Dr. Mody's evaluation is entitled to the same deference that the Supreme Court has directed that I give to the opinions of all school professionals involved in the design and implementation of a program of special education. Thus while I am to consider J.N.'s "unique circumstances" in making a decision regarding the label of Emotional Disturbance, "[t]his absence of a bright-line rule, however, should not be mistaken for 'an invitation to . . . substitute [my] own notions of sound educational policy for those of the school authorities which [I] review." *Rowley*, 458 U.S., at 206, 102 S.Ct. 3034. In light of this standard, I cannot say that Dr. Mody failed to apply her expertise or to exercise professional judgment in reaching her conclusion. *Id.* at 208-209.

40. Accordingly, I conclude that the labeling of J.N. as having Emotional Disturbance, as contained in the November 2018 IEP, cannot be set aside for substantive error. However, the question remains whether there has been a procedural error requiring a procedural remedy.

41. Here, Parents' complaints about the procedure preceding the adoption of the ED label are twofold. First, they contend that the team that considered this label did not consider Parents' opinion; indeed, Parents contend that even they, as parents, were not clear about their right to object. Parents did raise their objection with Dr. Mody prior to the MET, which was that labeling J.N. would increase the staff's overreaction to J.N., in terms of the overuse of restraint. Second, Parents contend that there was no opportunity during the MET for anyone to talk about or object to the ED label; instead, according to Parents, the ED label was predetermined. No one was present who could explain the label, and no one did explain the label.

42. As a factual matter, Parents have convinced me by a preponderance of the evidence that the procedure leading up to and in place during the MET was procedurally flawed, to the point that Parents and the team were not allow to participate in the process and decisionmaking that form the bedrock of the IDEA. Specifically, the way J.N. was

assigned the label of "Emotional Disturbance" violated Parents' IDEA procedural rights to be involved in a determination made by a team of people, acting based on accepted evaluation tools. *See* 34 C.F.R. 300.327; 300.501 (mandating that parents be permitted to participate in decisionmaking). "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 . . . ." *Murray v. Montrose County Sch. Dist. RE-1J,* 51 F.3d 921, 925 (10th Cir. 1995). The same rules apply to the eligibility determination during the MET process as apply to the development of the plan during the IEP process.

43. In violation of IDEA, team members did not certify in writing their agreement with the label of Emotional Disturbance. 34 C.F.R. §300.311(b) ("Each team member must certify in writing whether the report reflects the member's conclusion."). The absence of a signed written statement might not, in other circumstances, be sufficient to support a procedural violation of the IDEA requiring a remedy. Here, however, Parents' testimony regarding their exclusion from the process was both credible and noteworthy, and participants at the MET that "adopted" the ED label appeared largely ignorant of both the evaluation process leading up to the evaluation and the significance of the ED label for J.N. There was not a serious attempt to ensure participants' understanding of the criteria for the eligibility of ED, how the label was linked to any evaluation, or how the label of ED related to or was undermined by the label of autism. This approach was contrary to the letter and the spirit of the IDEA. "The nature of the IEP process, from the initial consultation through state administrative proceedings, ensures that parents and school representatives will fully air their respective opinions on the degree of progress a child's IEP should pursue. *See* 20 U.S.C. §§ 1414, 1415; *Rowley*, 458 U.S., at 208–209." *Endrew F.*, 137 S. Ct. at 1001–02.

44. Even still, these procedural defects still do not support a remedy, unless there is a "rational basis" to believe at least one of three things is true: (1) the procedural errors seriously hampered the parent's opportunity to participate in the decision process, (2) compromised the student's right to an appropriate education, *or* (3) caused a deprivation of educational benefits. *See O'Toole,* 144 F.3d at 707. Technical deviations alone are insufficient to establish a violation of the IDEA. *See Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 726 (10th Cir. 1996). Procedural violations must adversely impact the student's education or significantly impede on the parent's opportunity to participate in the process. *See Systema v. Acad, Sch. Dist. No. 20,* 538 F.3d 1306 (10th Cir.2008). Procedural defects must amount to substantive harm in order to support an award of compensatory services. *See Garcia v. Bd. of Educ. of Albuquerque Pub Sch.,* 520 F.3d 1116, 1125-26 (10th Cir. 2008). However, a hearing officer may also order a LEA to comply with procedural requirements. *See* 34 C.F.R. § 300.513(a)(4).

45. In this instance, J.N. received the label of Emotional Disturbance in November 2018 and was disenrolled from APS by January 2019 – an insufficient amount of time to determine

whether the process compromised J.N.'s right to an appropriate education or caused a deprivation of educational benefits. Nor did Parents present any evidence to show substantive harm.

46. At the same time, Parents' concern that the label could be stigmatizing and could detract from a focus on J.N.'s autism is legitimate. In this regard, I reviewed with interest Judge Browning's decision in *Bell v. Board of Education of Albuquerque Public Schools*, in which a student challenged a mislabel of "mental retardation," rather than the apparently correct label of "specific learning disability."

> APS is correct in arguing that an incorrect identification will not lead to a denial of a FAPE if the student's IEP nonetheless provides for educational programming appropriately tailored to the student's unique needs. See Response at 3–5. The IDEA is not designed to ensure that students are appropriately labeled but that they are appropriately educated. Nonetheless, the Court finds it unconvincing, as a general matter, that a school district would design the same IEP for a learning disabled student as it would for a mentally retarded student. This general finding, however, does not mean that Bell was necessarily denied a FAPE. In addition to the likely effects of a mislabeling such as Bell endured, however, Bell has specifically demonstrated that his IEP was changed when his eligibility was changed. Labels are not determinative. They are, however, often important. APS' actions in changing Bell's IEP indicate that Bell's situation was one in which the incorrect label turned out to be important.

Bell v. Bd. of Educ. of Albuquerque Pub. Sch., No. CIV.06-1137 JB/ACT, 2008 WL 5991062, at *27 (D.N.M. Nov. 28, 2008)

47. Here, there was little to no evidence presented regarding whether the alleged mislabeling denied J.N. FAPE. Indeed, the record before me does not prove – one way or another – whether the ED label was or is, in fact, a "mislabel." What is clear is that neither Parents nor the IEP / MET team were allowed to participate in the process of reaching this decision. In this regard, I am permitted by 34 C.F.R. § 300.513(a) (3) to order the LEA to comply with the procedural requirements that were missing from the November 2018 MET and the November 2018 IEP.

48. My order is therefore that the District must conduct a new MET and a new IEP to review with Parents J.N.'s special education eligibility on the basis of Emotional Disturbance, in compliance with the procedural requirements of the IDEA. Dr. Mody must attend the review. The District must pay for a facilitator, and must pay Petitioners' attorneys' fees should they wish to have counsel attend with them.

49. Parents argue that I am prohibited from referring the issue of alleged mislabeling to the MET / IEP team. *See M.S. v. Utah Sch. for the Deaf & Blind*, 822 F.3d 1128, 1136 (10th Cir. 2016) ("Allowing the educational agency that failed or refused to provide the . . . student with a FAPE to determine the remedy for that violation is simply at odds with the review scheme set out in §1415(i)(2)(C)."). Here, however, I am not referring the remedy to the LEA; the remedy is, in fact, for now, a new process, wherever the process may lead.

Issue Number 6: Whether J.N. was denied FAPE (before and) after he was identified as a student eligible for special education?

50. "To meet its substantive obligation under the IDEA, a school, must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Endrew F. v. Douglas County Sch. Dist. RE-1,* 580 U.S. _____,137 S. Ct. 988, 999 (2017). The educational program offered by the IEP must be "appropriately ambitious in light of [the child's] circumstances." *Endrew*, 137 S. Ct. at 1000.

51. The IDEA requires that the LEA provides *specialized instruction* to meet a student's needs arising from disability. By definition, J.N.'s identified disability of autism meant his communication and social interactions were *significantly affected* and adversely affected his educational performance. 34 C.F.R. §300.8(c)(1)(i).

52. In addition, the LEA must provide and should have provided "related services." The term "related services" is defined in the IDEA to mean "transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, ...) as may be required to assist a child with a disability to benefit from special education,...." 20 U.S.C. § 1401(22).

53. Here, I have found and concluded that the District failed in its child find obligation to identify J.N. as eligible for special education on the basis of autism, beginning at the latest in January 2018. Accordingly, both the specialized instruction mandate and the related services mandate should have applied to J.N. by approximately January 2018, earlier than the date of his first IEP.

54. Here, the educational program in place for J.N. was not appropriately ambitious, both in terms of the ultimate drafting of the IEP's to address J.N.'s identified disability of autism, but most notably, in terms of any intent or subsequent effort to implement a program with fidelity and consistency.

55. APS's failure to provide specialized instruction or related services for J.N.'s communication and social interaction was a denial of FAPE.

56. APS failed to provide Student with the related service of occupational therapy to meet his unique needs in the area of sensory processing/regulation and failed, during the 2018 and early 2019 school years, to provide him an adequate amount of occupational therapy service, which denied him a FAPE.

57. APS failed to provide Student with the related service of speech language therapy to meet his unique needs in the area of social communication, particularly with peers, which denied him a FAPE.

58. At Bandelier, APS failed to ever conduct an FBA or BIP informed by knowledge of Student's unique needs arising from disability, which denied Student FAPE.

59. At Collet Park, APS failed to ever conduct an FBA or implement a BIP during the two months of Student's attendance there, which denied Student FAPE.

60. At both schools, APS failed to provide supplementary aids and services to staff sufficient to allow them to meet J.N.'s needs, which denied Student FAPE.

61. APS's failure to train staff working with J.N. in even rudimentary knowledge of autism or strategies which could support children with autism to be successful at school denied J.N. a FAPE because he did not received specialized instruction to meet his unique needs.

62. APS's reliance on staff resorting to repeated restraints of J.N. denied him FAPE because it flowed from its choice to fail to provide training and support to school staff on recognition of autism, the needs of students with autism and effective strategies to support and teach students with autism.

63. APS's use of physical restraint against J.N. during both school year was chaotic and unmonitored — the opposite of the planned specialized education required by IDEA and the IEP planning and implementation process, and the use of physical restraint denied J.N. a FAPE.

64. During the 2017-18 and 2018-19 school years, APS was in violation of the state law requirement to have J.N.'s IEP teams make the "11 considerations" for students with autism part of its educational planning. §6.31.2.11(B)(5) NMAC. The failure denied Student FAPE since the 11 considerations review was a specific tool New Mexico has chosen to ensure that research supported practices are used for children with autism and included in the IEP and educational program and monitoring of goals. The teams' lack of discussion and planning around the 11 considerations bypassed application of state law requirement to the IEP and planning process.

65. With regard to J.N., the District's program of special education and lack thereof did not enable J.N. to make progress appropriate in light of J.N.'s circumstances, as mandated by

Endrew F.. J.N. is a bright child who is able to progress in the classroom setting during those times that his disability of autism does not overtake him. Because the District failed to address J.N.'s autism specific issues in school, he regressed to the point of feeling unsafe at school. Indeed, he has now been forced out of school due to Parents' reasonable concerns about J.N.'s physical and emotional health – if anything, support that is reasonably calculated to allow a child with a disability to remain in school is the very heart of the IDEA mandate. The District's response has been to recommend and insist upon more and more restriction on J.N., which has led to further deterioration, without any consistent effort to plan an "appropriately ambitious" special education program for J.N.

Issue Number 7: Whether the District violated the IDEA by requiring Parents to come to or remain at school, or by constructively excluding J.N. from school?

66. Both as a matter of fact and as a matter of law, Petitioners have failed to develop the issue of the District's alleged violation of the IDEA due to Parents' attendance at school to assist J.N. I did not learn from evidence or testimony how often Parents were "expected" to be at school. Nor did I learn whether this expectation led them to "volunteer" to help at school or the District "required" them to be at school, a notably subtle distinction in the context of a chaotic kindergarten and first grade classroom. I understood from testimony that Parents were often asked to remain at school to assist with J.N.'s behavioral issues, and were often called to the school to take J.N. home. Parents produced no documentation to demonstrate how often this occurred, and did not provide testimony in terms of the actual time involved.

67. Parents have presented no legal argument to support that intermittent requests for assistance violate the IDEA. There may be such legal authority somewhere, but Petitioners have not presented me with legal authority, and I decline to develop the issue on their behalf.

68. Parents have not provided any guidance as to what remedy would be or should be available to correct this asserted violation of the IDEA. Nor have Parents provided any guidance as to how any remedy specifically would be measured. I decline to develop a remedy in the absence of any guidance from Petitioners.

69. I therefore deny this claim.

70. The other issue is whether the District constructively excluded J.N. from school. My understanding of Petitioners' theory is that the District overused restraint as the default response to J.N.'s behavior, related to his autism. This overuse of restraint culminated in a serious incident on January 22, 2019, resulting in physical injury to some APS personnel and severe emotional trauma to J.N. According to Parents, the school did

nothing to reassure them that the overuse of restraint would not continue, leading them to be fearful of returning J.N. to school, without sufficient safeguards in place to ensure that J.N. would not continue to be restrained unnecessarily.

71. I conclude that Parents acted reasonably in removing J.N. from school. The District was not providing FAPE and its failure to design a research based plan to address J.N.'s autism placed him in emotional and physical danger and led him to regress, due to the failure to teach him strategies to be able to either temper or accommodate his own behavior, which in turn ultimately resulted in the school's default to the overuse of restraint, which led J.N. to regress even more, in a disastrous cycle.

72. Parents could have, in these circumstances, placed J.N. in a private placement and sought reimbursement. However, they did not do so; instead, they have home schooled J.N. Parents specifically reject the remedy of compensatory education in terms of additional hours of education, and either home schooling did not "cost" anything, or Parents have not presented evidence with regard to cost. In either event, I can conceive of no remedy for J.N.'s removal from school. Because there was no evidence presented that the home school was state-accredited or provided special education, this "placement," by definition, is not a reimbursable placement. *Jefferson Cty. Sch. Dist. R-1 v. Elizabeth E. ex rel. Roxanne B.*, 702 F.3d 1227, 1236–37 (10th Cir. 2012). Respondent is correct that a Due Process Hearing Office may not award money damages, except as reimbursement for a parent's expenditures to provide FAPE or to obtain other benefits that should have been made available by the District.

73. I am not aware of any legal authority permitting a Due Process Hearing Office to declare that an act *per se* is illegal, in the absence of an applicable IDEA remedy. Nor have Petitioners presented any such authority.

74. I therefore deny Petitioners' claim.

Issue Number 8: Whether the District violated the IDEA as a result of racial bias against J.N.?

75. A Due Process Hearing Officer has jurisdiction over claims that a Local Educational Agency has violated the IDEA, including state or federal standards implementing the IDEA, and has thereby denied a student a free and appropriate public education. *See* 20 U.S.C.A. § 1400 *et seq*. Even assuming an underlying violation of the IDEA, there is nothing in the IDEA that gives a Due Process Hearing Officer the authority to consider the motives or racial bias of school personnel in any failed attempt to implement the IDEA.

76. I therefore dismiss Petitioners' claim, without prejudice to any other legal remedies Petitioners may have.

Issue Number 9: Whether a special education hearing officer lacks jurisdiction over Petitioners' claims for attorneys' fees and costs? (R(24)).

77. I do not have jurisdiction to award or set the amount of attorneys' fees and costs. *See* 20 U.S.C.A. § 1400 *et seq*.

78. I therefore dismiss Petitioners' claim, without prejudice to any other legal remedies Petitioners may have.

Issue Number 10: Remedy

79. The Hearing Officer has equitable authority to fashion all appropriate relief to address Respondent's violation of the IDEA. *Burlington School Comm. v. Mass. Dep't. of Ed.*, 471 U.S. 359, 369, 374 (1985); *Florence County School District Four v. Carter by and through Carter,* 510 U.S. 7, 15-16 (1993). The emphasis in each case is on the unique circumstances of the student as well as the particular IDEA violations committed by the School. "[T]he essence of equity jurisdiction is to do equity and to mold each decree to the necessities of the particular case. Flexibility rather than rigidity has distinguished it. . . . Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA." *Reid v. District of Columbia,* 401 F.3d 516, 523-24 (D.C. Cir. 2005).

80. Compensatory education is, as the term suggests, educational service that is intended to compensate a disabled student who has been denied the individualized education guaranteed by the IDEA. *Id* at 518. The goal in awarding compensatory education should be "to place disabled children in the same position they would have occupied *but for* the school district's violations of IDEA." *Id.* (emphasis added).

81. "In every case, …, the inquiry must be fact-specific and, to accomplish IDEA's purposes, the ultimate award must be reasonably calculated *to provide the education benefits that likely would have accrued from special education services the school district should have supplied in the first place*." *Id.* at 524 (emphasis added). The court noted in *Reid* that "whereas ordinary IEPs need only provide "some benefit," compensatory education awards *must do more* – they must compensate." *Id.* at 525 (emphasis added). The court explained that "this flexible approach will produce different results in different cases depending on the child's needs. Some students may require only short, intensive compensatory programs targeted at specific problems or deficiencies."

82. In the case before me, Parents reject the remedy of compensatory education, in terms of additional hours of service, reasoning apparently that more bad medicine will not cure the

ailment. Petitioners' Proposed Finding of Fact Number 214. I agree, but "compensatory education" in the form of more hours of education is but one type of equitable relief. It does not limit my authority to craft equitable relief to address the IDEA violations that exist with regard to J.N.'s educational program and that will continue to exist without an appropriate administrative order. "There is no obligation to provide a day-for-day compensation for time missed." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 97 (9th Cir.1994).

83. Instead, I am directed by the IDEA, specifically 20 U.S.C. § 1415(i)(2)(B)(iii), to grant such relief as I determine to be appropriate. "Appropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the [Individuals with Disabilities Education Act]." *Parents of Student W. v. Puyallup Sch. Dist.*, 31 F.3d 1489, 97 (9th Cir.1994).

84. Thus, for example, in *Park, ex rel. Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033–34 (9th Cir. 2006), the United States Court of Appeals for the Ninth Circuit agreed with the Hearing Officer that additional services could be directed at the student *or at educators*. Thus the Ninth Circuit affirmed the District Court's order, in turn affirming the Hearing Officer's order that teachers at the student's school must be better trained, in terms of additional hours of training, to meet the student's particular needs.

85. I agree with Petitioners' citation to *M.S. v. Utah Sch.*, 822 F.3d 1128 (10th Cir. 2016), as guidance to determine how I should approach equitable relief. In *M.S.*, the Tenth Circuit rejected the Hearing Officer's delegation of authority to the IEP team to determine the student's future placement. In addressing the inherent problem in such delegation, the Court noted the problem of the "endless loop" created by allowing a school to continue on course with only the equivalent of an advisory opinion by the Hearing Officer, a result which would inevitably occur without an intervening equitable force to break the cycle.

86. In this context, the Tenth Circuit quoted the following construction by the Fourth Circuit of the nature and purpose of "compensatory education":

> compensatory education involves discretionary, prospective, injunctive relief crafted by a court *to remedy* what might be termed an educational deficit *created by* an educational agency's failure over a given period of time to provide a FAPE to a student.

822 F.3d at 1135-1136 (emphasis added), *quoting from G. ex rel. RG v. Fort Bragg Dependent Schools,* 343 F.3d 295, 309 (4th Cir. 2003).

87. Here, I am similarly asked to order a remedy for a deficit created by the District. Moreover, throughout the Due Process Hearing, the District made its position clear that it sees no reason to change the approach to J.N.'s program that created the deficit in the first place. Thus the Tenth Circuit's warning in *M.S.* clearly applies equally here: "Allowing

the educational agency that failed or refused to provide the covered student with a FAPE to determine the remedy for that violation is simply at odds with the review scheme set out at § 1415(i)(2)(c)." *M.S. ex rel. J.S.*, 822 F.3d at 1135.

88. Here, the District has failed to design and implement a strategy to provide FAPE to J.N. Indeed, it has failed even to begin to train staff involved with J.N. in his most basic symptoms and needs related to his autism. Accordingly, the only effective equitable remedy available is to require APS to hire experts to provide the independent evaluations and independent training necessary to accomplish what APS should have but has not accomplished in the lengthy time it has had to do so.

89. This analysis also addresses the District's argument that the DPHO cannot grant *any* relief that Petitioners have not previously requested via a new IEP. In this regard, the District's view of the requirement of exhaustion at the school district level paints far too broad of a brush regarding the significance of *Ellenberg v. New Mexico Military Institute,* 478 F.3d 1262, 1275 (10th Cir. 2007). In *Ellenberg*, the parents attempted to circumvent the entire IEP / IDEA process. This is simply not the case here. *See El Paso Independent School District v. Richard R.*, 567 F.Supp.2d at 941 (distinguishing Ellenberg where parents attempted to use the school's process but were impeded in their efforts).

90. In contrast to the unique circumstances of "IEP avoidance" prohibited by *Ellenberg*, the District's construction, would condemn parents to the "trap" of "an endless cycle of costly and time-consuming litigation" warned against in *M.S. M.S. ex rel. J.S.* , 822 F.3d at 1136. The same logic applies to the District's arguments concerning ripeness. There is nothing in the IDEA that mandates that parents must request identical relief from an immovable IEP team, prior to requesting equitable relief from the Due Process Hearing Officer.

VI. Reward of Relief

1. In their Request for Due Process Hearing, Etc., filed April 11, 2019, Petitioners request several items of equitable relief on pages 20 and 21. Of these items,

   a. I deny Number 1 as not feasible and beyond what is necessary to address the violation of the IDEA and the denial of FAPE.

   b. I grant Number 2, with the following modifications:

      i. The expert shall be identified through the UNM CDD Autism program, or shall be another expert acceptable to Petitioners;[23]

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[23] By definition an IEE is by a "qualified examiner who is not employed by the [LEA]." 34 C.F.R. 300.502(a)(3)(i).

ii. The expert shall perform an Independent Educational Evaluation, to include but not be limited to an Assessment of Basic Language and Learning Skills, as the expert deems necessary in his or her professional judgment;

iii. The evaluation shall provide specific, concrete instructional implications for how to deliver FAPE to J.N. in the context of his presentation and educational history.

iv. The evaluation shall address training needed for all school staff who might be in contact with J.N. to be able to implement evidence based practices with fidelity.

c. I grant Number 3, with the following modifications:

i. "Any [educational assistant] who works with Student" is overly broad;

ii. A fulltime EA shall be assigned to work one on one with Student, subject to the approval of Parents;

iii. The fulltime EA assigned to J.N. shall receive the training described in Request Number 3 prior to working with Student, unless Parents expressly agree that training may occur during or after J.N.'s transition;

iv. Prior to J.N.'s transition back to school, the fulltime EA assigned to J.N. shall meet with Parents and with J.N., at Parents' discretion, so that J.N. is familiar with and comfortable with the assigned EA;

v. Any fulltime EA assigned to J.N.'s classroom, with the exception of substitutes, and any member of the NVCI team at J.N.'s school must receive at least 8 hours of both online training in autism and training on J.N.s specific needs. The online training chosen by APS is subject to the approval of Parents;

vi. Substitutes may be assigned to work with J.N., as necessary due to absences or other assigned duties; in this event and as much as possible given potential life events, the normally assigned 1:1 EA must set aside time to let J.N. and his Parents know that there will be a substitute;

vii. The substitute must review J.N.'s behavior intervention plan and APS must document such review;

viii. The District shall undertake a concrete plan to train any staff who are at J.N.'s school on autism and research supported strategies for students with Autism as well as on J.N..'s specific needs. This training may be provided by APS teaching or administrative staff, so long as they have either training or experience in assisting children with autism who are high functioning or they are approved by Parents.

d. I grant Number 4.

e. I grant Number 5.

f. I grant Number 6, with modifications as necessary to account for the passage of time that has occurred, resulting in the stated deadline for an evaluation having now passed.

g. I grant Number 7, with the modification that "does not rely on physical restraint" shall not be construed to mean "never relies on restraint." The issue with regard to J.N., as I understood and concluded from the evidence presented, is that reliance on restraint has displaced reliance on evidence-based practices; this aspect of my reward should be construed accordingly.

h. I grant Number 8, with the modification that Ms. Laurel or another expert acceptable to Petitioners shall initiate and support, not initiate and direct an individualized program for J.N., as otherwise described in Number 8.

i. I grant Number 9.

j. I deny Number 10. Instead, in accordance with my findings of fact and conclusions of law, my order is that the District must conduct a new MET and a new IEP to review with Parents J.N.'s special education eligibility on the basis of Emotional Disturbance, in compliance with the procedural requirements of the IDEA. Dr. Mody must attend the review. The District must pay for a facilitator, and must pay Petitioners' attorneys' fees should they wish to have counsel attend with them.

k. I deny Number 11 as being a request that is currently unsupported by the evidence and has not been administratively exhausted through APS, without prejudice to any future Request for Due Process Hearing by either side, in accordance with the IDEA and applicable federal and state regulations and case precedent.

l. I grant reimbursement for the cost of the autism evaluation, but deny the remainder of Number 12.

m. I dismiss Number 13 as being outside the jurisdiction of a Due Process Hearing Officer, without prejudice to any other remedy available to Petitioners in any tribunal having jurisdiction over their request.

2. To further address the overuse of restraint, due to the longstanding failure, beginning at the latest in January 2018, to address the 11 considerations, including evidence-based strategies regarding J.N.'s behavioral symptoms related to autism, I also order the following:

a. The District must contract with an expert acceptable to Petitioners to conduct a preliminary functional behavioral analysis, based on record review, interviews with Parents and Student, and school staff, to address J.N.'s most prominent behaviors which would include refusal (to transition, to engage in non-preferred tasks) as well as elopement, and then create a working document for staff training, program implementation and behavior intervention plans, to be monitored and revised as necessary over the course of two school years, beginning on a date acceptable to Petitioners.

b. All adults assigned to J.N.'s classroom, including substitute teachers and educational assistants, and all members of the NVCI team at J.N.'s school must read J.N.'s current behavior intervention plan. APS must document that all persons listed herein have read J.N.'s current behavior intervention plan.

c. All incidents of restraint and seclusion must be documented by a person with personal knowledge of the event, Parents must be verbally notified of the incident on the day of the incident, and all written documentation must be provided to Parents within 48 hours of the incident. This order is intended a minimum floor and does not displace any requirements of State law.

ORDER

Therefore, for the foregoing reasons and under the foregoing terms, Petitioners' Request for Due Process Hearing Against the Local Educational Agency is GRANTED in part and DENIED in part. Other than as noted herein, there is jurisdiction over the parties and the subject matter. *See* 34 C.F.R. § 513. Any claims or defenses otherwise raised which are not specifically addressed herein will be, and hereby are, DENIED.

REVIEW

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

It is so administratively ordered.

Nancy L. Simmons, Esq.
Due Process Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that a copy of the forgoing Memorandum Decision and Order was electronically transmitted via email to the Parties, and a courtesy copy was electronically transmitted via email to New Mexico Public Education Department to Caroline Bass, Esq., this 4th day of November, 2019.

Nancy L. Simmons, Esq.
Due Process Hearing Officer