

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>[MOTHER] and [FATHER], Complainants,</p> <p>vs.</p> <p>ARAPAHOE COUNTY SCHOOL DISTRICT 5, Respondent.</p>	
AMENDED AGENCY DECISION	

On November 16, 2012 the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint filed by [Mother] and [Father]. (“the Complainants”) on behalf of her minor child, [Student], alleging that the Arapahoe County School District 5 (“District”) had denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act (“ECEA”), 1 CCR 301-8. The complaint was forwarded to the Office of Administrative Courts and assigned to Administrative Law Judge (“ALJ”) Keith J. Kirchubel for an impartial due process hearing. Hearing was held in Denver, Colorado on February 26-28, 2013.¹ The Complainants were represented by Louise Bouzari, Esq., and Kate Gerland, Esq. The District was represented by Kathleen Sullivan, Esq. At hearing, the ALJ admitted into evidence Complainants’ exhibits no. 1, 4, 13,² 16-22,³ and 26, and also District’s exhibits no. 1-12,⁴ 14, 17, and 19. The proceedings were digitally recorded. Following conclusion of the hearing, both parties submitted a written closing brief.

ISSUES PRESENTED

Whether an individualized education program (“IEP”) dated May 30, 2012, conforms to the procedural requirements of the Individuals with Disabilities Education

¹ Per the request of counsel, the decision deadline was further extended to April 19, 2013, to allow for preparation of a written transcript and the filing of post-hearing briefs.

² Only pages 4 through 15 of this exhibit were admitted.

³ Complainants’ Exhibit No. 21 was admitted as administrative hearsay.

⁴ The District’s Exhibit No. 10 was admitted as administrative hearsay.

Act (“IDEA”) and constitutes an offer of a free appropriate public education (“FAPE”) for [Student]. If the District did not offer [Student] a FAPE, whether Complainants are entitled to reimbursement for [Student]’s private school placement during the 2012-2013 academic year.

FINDINGS OF FACT:

Based on the evidence in the record, the ALJ finds the following:

1. [Student] is a [age]-year old girl who resides within the District. There is no dispute in this case that [Student] is a child with a disability as defined by the IDEA.
2. [Student] has been identified as eligible for special education and related services with a specific learning disability that impairs her processing of speech and language and, in turn, adversely impacts her proficiency in reading, writing, and math. [Student] can read and can hear spoken language, but she is unable to remember and apply this information in a manner consistent with typical development. She also has difficulty with organizing tasks and materials consistent with a diagnosis of ADHD. [Student]’s awareness of her own disability and how it is perceived by others, especially school peers, has resulted in a significant level of social anxiety.
3. [Student] testified at the hearing and presented as an articulate, if relatively shy, teenager. She spoke quietly but confidently about a range of topics including her own academic challenges, her experiences at school, including relationships with peers, and her preferences related to potential placements in the District. [Student] would like to attend college after high school.
4. [Student] often requires additional help to understand new concepts introduced in class. Her disability makes it very hard to understand an oral lecture and then take notes or put the lesson into practice. She may need to have the topic or method explained in a different way and she benefits from having a teacher work with her while in the process of solving a problem.
5. Currently, [Student] attends [School] as a ninth grader. She is also an athlete and just completed what she described as a successful season on the basketball team. She has made friends in the approximately two years she has attended [School] and has positive interactions with her teachers there. [Student] attends school with many other students with learning issues at [School] and feels like there is mutual support within her class groups.
6. As a result of an IEP team meeting on May 30, 2012, the District offered [Student] ninth grade placement at [High School] (“[High School]”) starting in the fall of 2012. The content of that IEP is discussed in detail below. [Student]’s parents opted to reject the offered placement resulting in [Student]’s continued attendance at [School].

7. Previously, [Student] attended sixth and seventh grades at [Former Middle School] (“[Former Middle School]”) within the District pursuant to an IEP developed in October, 2009. [Student] struggled in her placement at [Former Middle School]. She was unable to follow the lessons that were being introduced and was regularly unable to complete homework independently. She felt that the teachers were frustrated by her requests for help and were unable to provide the amount of individualized assistance that she felt she needed. [Student]’s perceptions of her teachers’ attitudes made her reluctant to ask for help which, in turn, further degraded her ability to get assistance and keep up in class.

8. As a result, [Student] began to experience relatively severe anxiety related to school at [Former Middle School]. She felt stupid because she was not learning the material. She would avoid situations where her disability might be evident to her peers such as reading aloud or going up to the front of the class to work on a problem. She became so anxious that her body would shake and she experienced headaches. [Student] began to obsess and worry about her learning problems and the perception that others had of her. She became depressed and started to miss school.

9. [Student] felt socially isolated at [Former Middle School]. She had few friends and felt that many peers were mocking her for her problems with class work. This lack of acceptance led to increased feelings of anxiety for [Student].

10. [Student] also had difficulty with organization of class materials and class transitions at [Former Middle School]. She misplaced assignments or failed to turn them in when required. [Student] felt lost at [Former Middle School] and her performance suffered.

11. The District tried an interim placement for [Student] at another District facility, but this did not solve the problems she was experiencing. Ultimately, the District and [Student]’s parents reached an agreement whereby [Student] would attend [School] at District expense for the remainder of seventh grade and throughout eighth grade.

12. When [Student] arrived at [School] during mid-year of seventh grade, she was very shy and withdrawn. [Teacher], teacher who had [Student] in a number of classes, recalled that she was very difficult to engage in class and would typically eat lunch alone in her homeroom. [Student] very rarely volunteered information in class and if called upon would answer quietly, frequently just saying, “I don’t know.” [Student] appeared anxious and fearful to [Teacher].

13. [Student] has benefitted from 1:1 interaction with instructors at [School] and is more comfortable in small groups of three to four students than in large class settings. [Teacher] established that [Student] requires a substantial amount of repetition to grasp concepts introduced in class lectures. She also struggled with multi-step problems such as long division, multi-digit multiplication, and multi-step fractions. [Teacher] will model a concept, guide students as they practice, check for understanding, and then assign independent practice.

14. [Teacher] testified that [Student] has made modest academic progress in the course of the past year. He confirmed that [Student] appears less anxious than when she arrived at [School] and that she has formed a number of relatively close friendships with classmates. She is more willing to seek help and advocate for herself in situations where, for example, she has forgotten to complete an assignment.

15. Class sizes at [School] range from eight to ten students with one teacher and one aide. [School] features multiple classes in each grade. Students are grouped in classes according to their abilities. [Student] testified that her ninth grade teachers are able to circulate among the students and provide more direct help than she experienced in larger classes at middle school.

16. [School] is accredited nationally and by the State of Colorado. The majority of students at [School] would not qualify for special education services in a public school setting. Approximately 300 children attend [School], 210 of which are in high school classes.

17. [Student] has developed a rapport with the teachers at [School]. She feels that they understand her needs and don't exhibit frustration with her when she asks for clarification or individualized help. These factors reduce her level of anxiety in the classroom setting.

18. [School] operates with the same class schedule every day. [Student] testified that this regular routine simplifies the organization required at school and consequently reduces her anxiety about school.

19. Students' progress at [School] is monitored based on curriculum tests, homework completion, teacher interactions with students, and parent/teacher conferences. [School] also administers the Iowa Tests of Basic Skills (ITBS). [Student]'s ITBS results from seventh and eighth grade show improvements in the areas of reading and writing, but regression in mathematics scores. [Student]'s composite grade equivalency, as measured by the ITBS administrations in seventh and eighth grades, increased from 5.3 to 6.3.

20. In April, 2012, the District started the process of re-evaluating [Student] and developing an IEP for her ninth grade year. On April 20, 2012, the District requested that Complainants authorize a battery of evaluations of [Student]. Consent was given on April 23, 2012.

21. The District administered a Clinical Evaluation of Language Fundamentals – Fourth Edition (“CELF-4”) on May 9, 2012. This assessment revealed severe deficits in the areas of Receptive Language and Language Memory where [Student]'s scores fell in the seventh percentile. Receptive Language deficits impair [Student]'s ability to process orally presented materials and directions. Subtest scores were in the second percentile for Semantic Relationships (identifying proper noun/verb combinations) and

Sentence Assembly (creating complex sentences that make sense). The evaluator noted that [Student]'s significant difficulty with the latter skill could impair her ability to formulate responses, describe events, and/or formulate questions using appropriate grammar. On the subtest for Understanding Spoken Paragraphs, [Student] scored in the ninth percentile.

22. The District conducted a psychological evaluation of [Student] on May 11, 2012, comprised of a review of a Wechsler Intelligence Scale for Children – Fourth Edition (“WISC-IV”) administered to [Student] in 2010, administration of the Behavioral Assessment System for Children – Second Edition (“BASC-2”), Student/Parent interview, Parent report of social history, and review of available records. The evaluator noted that [Student] was friendly, cooperative, and acted in appropriate manner.

23. Review of the 2010 WISC-IV revealed a full scale I.Q. of 85 corresponding to low average range of intellectual functioning in the sixteenth percentile. [Student] exhibited very strong nonverbal reasoning skills, but extremely poor visual-spatial skills. [Student] scored in the low average range for working memory, the ability to hold information for short periods of time. [Student] scored in the fifth percentile for processing speed index indicating a significant weakness. Her difficulty with responding to stimuli suggested that [Student] will move more slowly than her peers when writing is required of her. The evaluator confirmed that the cognitive assessment of [Student] was consistent with a prior assessment by the District in the fourth grade where weaknesses in processing speed and visual-spatial skills were identified.

24. The BASC-2 assessment yielded scores “within normal limits” in all areas based on [Student]'s self report. The input from [Student]'s mother yielded scores within normal limits in most areas, but an “at risk” score in the area of withdrawal. The input from [Teacher], one of [Student]'s teachers at [School], yielded scores within normal limits in most areas, but an “at risk” score in the areas of anxiety and learning problems. Input from one of [Student]'s middle school teachers rated [Student] as “clinically significant” on the depression and somatization scales and “at risk” for anxiety. The evaluator⁵ concluded that [Student] can do well in a learning environment that allows for accommodations of her needs. Extra time for processing and extended time for tests and assignments were indicated. [Student] requires a structured classroom with good routines and predictability as well as the services of a case manager to help with academic and social/emotional demands at school.

25. As part of the Evaluation Report for the May, 2012, IEP team meeting, the District also incorporated the results of an Educational Assessment of [Student] conducted in 2010. This earlier assessment featured a Woodcock-Johnson Test of Cognitive Abilities – Third Edition (“WJIII”) conducted in 2010. The WJIII revealed that [Student] struggles with decoding, spelling, and written language organization as well as automaticity of basic math facts and comprehension of math concepts. In 2010, the

⁵ [Psychology Intern] was a psychology intern for the District at the time of the assessment. She worked under the supervision of [Clinical Psychologist], a licensed clinical psychologist employed by the District.

District Examiner reported that [Student] had very low academic skills for her age. [Student]'s lack of confidence around spelling limited how much she was willing to write and led her to compose sentences with simple structure to ease spelling demands.

26. The District solicited input from [Teacher] in developing the IEP. [Teacher] provided narrative input via email on May 30, 2012. The information from [Teacher] is substantially consistent with the findings related to [Student]'s experience at [School] set forth above. [Teacher]'s input was incorporated into the Evaluation Report prepared by the District and used by the IEP team.

27. The District convened an IEP team meeting for [Student] on May 30, 2012. The District was represented by [Executive Director],⁶ [Director],⁷ [Department Coordinator],⁸ [Speech Language Pathologist],⁹ [Math Teacher], [Clinical Psychologist],¹⁰ and [School Nurse].¹¹ [Student] attended with her Mother and Ms. Gerland. The IEP identifies college attendance as [Student]'s only post-secondary objective.

28. At the beginning of the meeting, [Executive Director] was informed that [Student]'s parents desired that [Student] continue in her placement at [School]. [Executive Director] responded that the IEP team meeting would follow an established agenda and that placement would not be determined right off the bat.

29. [Student] discussed her feelings about school including the aspects of [School] that appealed to her. No one from the District who was a member of the May, 30, 2012 IEP team had observed [Student] at [School] prior to the meeting. No one from [School] attended the meeting to discuss [Student]'s progress there. [Student]'s mother did not provide substantial input during the IEP team meeting. She felt that the District had determined to place [Student] at [High School] and that [Executive Director] was not open to discussing alternative placements. [Student]'s mother did not discuss how [Student] was doing at [School] and did not request any additional assessments of [Student] to inform the IEP process.

30. Both [Student] and her mother testified that [Executive Director] cut off [Student]'s discussion of [School], and that he was adamant that the team was writing an IEP for placement at [High School]. [Executive Director] and every other witness denied that this exchange took place and that [Student] and her mother were not disrespected or silenced during the meeting.

31. [Math Teacher], a general education math teacher for the District, participated in the May 30, 2012 IEP team meeting in order to provide input on the aspect of

⁶ [Executive Director] is the Executive Director of Student Achievement Services for the District. He served as the District special education designee at the IEP team meeting.

⁷ [Director] is the Secondary Director for Special Education within the District.

⁸ [Department Coordinator] is the student achievement services department coordinator at [High School].

⁹ [Speech Language Pathologist] is a speech language pathologist and literacy specialist employed by the District.

¹⁰ [Clinical Psychologist] is a clinical psychologist employed by the District, principally at [High School].

¹¹ [School Nurse] is a school nurse employed by the District.

[Student]’s IEP related to mathematics. [Math Teacher] had not met [Student] prior to the IEP team meeting. She had reviewed the District’s Evaluation Report and she participated in team discussions.

32. [Math Teacher] recommended placement of [Student] in a co-taught pre-algebra math classroom at [High School]. “Co-taught” means that the class is led by one general education teacher and one special education teacher and features a mix of general and special education students. Currently, [Math Teacher] teaches in a co-taught pre-algebra class with 26 students total. Students are placed in classes according to their ability, so even though there is a mix of general and special education children in one room, their abilities are compatible and the subject matter is selected accordingly.

33. [Math Teacher] testified that the accommodations built into [Student]’s IEP were appropriate to allow [Student] to progress in the pre-algebra curriculum. These include use of a calculator or table so that [Student] is not bogged down in routine calculations that prevent her from attending to larger concepts, allowing for test corrections and allowing extra time to compensate for [Student]’s processing deficits and eliminate potential sources of anxiety, breaking down directions and checking frequently for understanding, and providing notes, outlines and instructions so that [Student] is not totally dependent on her note-taking ability.¹²

34. [Math Teacher] also recommended that [Student] be placed in a math lab. This was reflected in [Student]’s proposed class schedule. At hearing, [Math Teacher] provided testimony regarding the purpose of the math lab and what takes place in that setting. She stated that students work on self-advocacy skills and receive special education support intended to allow them to advance toward their IEP goals. She also described coordination between herself and the math lab teacher regarding concepts being covered in the core class. [Student]’s proposed class schedule merely has the notation “+ lab” added to her English and Math courses. The IEP states: “[Student] will receive special education services in an academic support lab class every other day to address organizational skills as well as support for core courses.”

35. [Math Teacher], and [Department Coordinator] addressed concerns expressed by Complainants that [Student] would be subjected to mocking and/or bullying at [High School]. The District has conducted significant training around the subject of bullying and demonstrated that it is proactive in promoting a positive learning environment at [High School]. [Math Teacher] stated that some joking takes place among students, but that disrespectful, inappropriate criticism is not tolerated by teachers.

36. [High School] features a block schedule where students attend different classes on different days. [Math Teacher] estimated that 2,600 students attend the “academic wing” of [High School].

¹² These accommodations, with the exception of allowing use of a calculator and arithmetic tables, are not specific to [Student]’s math class but apply to all academic settings.

37. [Department Coordinator] testified extensively regarding the role of the case manager in providing consultative support for [Student] and other students. She had not met [Student] prior to the IEP team meeting. At hearing, [Department Coordinator] testified that she had worked with hundreds of students with specific learning disability and an estimated 25 with a diagnosis of generalized anxiety disorder in her eleven years as a professional educator. She personally reviewed and approved the battery of assessments that went into the District's Evaluation Report in preparation for the IEP team meeting. From reviewing the District's file and talking to [Student]'s mother, she knew that a social/emotional assessment was a concern and therefore necessary. She also endorsed assessment of cognitive ability and speech language.

38. Based on her review of the District's Evaluation Report and her participation in the IEP team meeting, [Department Coordinator] concluded that [Student] has identified needs in the areas of math, reading, and writing.

39. [Department Coordinator] and [Speech Language Pathologist] described the working relationships between case manager and student, and between case manager and teacher. Each case manager has responsibility for approximately 15 students. Either the case manager or the student can initiate a consultative meeting. The case manager helps with organization, monitoring for homework completion, and self-advocacy. The case worker collaborates with a student's teacher to make sure that all IEP services and accommodations are clear. In addition, the case manager regularly checks on academic progress and attendance. The case manager will seek to communicate with a student's parents and, if approved, outside providers such as therapists seen by the student.

40. The IEP describes case manager services available to [Student] as follows: "[[Student]] will also receive consultative support from her case manager to help with the transition to high school and the new educational setting." The record does not reflect that the broader and more detailed aspects of the services provided by a case manager were covered during the IEP team meeting.

41. [Department Coordinator] also testified extensively regarding the services available to [Student] in the language lab.¹³ These include a writing intervention program that measures grammar, punctuation and sentence fluency. The results of this program, she testified, are evaluated eight times per year for students like [Student]. She also reiterated the point made by [Math Teacher] that the support labs address social/emotional concerns, organization and self-advocacy.

42. [Speech Language Pathologist] testified regarding the process of administering [Student] the CELF-4 assessment. She verified the results that are discussed above. She clarified that [Student] has good memory skills for parroting back information, but breaks down when it comes to processing and interpreting information, especially in longer samples. [Speech Language Pathologist] also confirmed that the CELF-4 does

¹³ She clarified that the language lab is also referred to as the writing intervention class.

not assess writing ability and does not measure processing speed. She did not review any other assessment results in preparation for the IEP team meeting.

43. [Speech Language Pathologist] explained that CBM Maze is a program for monitoring reading comprehension. On a monthly basis, students are presented passages at various grade levels and then prompted to supply a word to fill in a blank from a set of choices in order to fit the context of the passage.

44. The IEP team identified two areas of need and wrote two corresponding goals for [Student]: one in reading comprehension and one in math. The reading goal states, "Given a reading intervention class, [[Student]] will improve reading comprehension from current level to one years growth as measured by CBM Maze." The stated objective is for [Student] to improve from 6 words read correctly to 8 words.

45. [Student]'s math goal states, "Given direct instruction and a math intervention class, [[Student]] will improve conceptual understanding and strategic thinking in carrying out mathematical algorithms and procedures to solve math problems accurately from current level to one years growth measured by algebra basic math skills."

46. Expert testimony established that [Student] has a generalized anxiety disorder. [Student]'s anxiety is not triggered by specific situations or settings. Rather, she experiences anxiety as a result of pervasive thoughts about her own shortcomings and how they are perceived by others. This anxiety manifests as a fear of negative evaluation or embarrassment that can be so severe that [Student] experiences physical effects such as shaking, nausea, and/or headache.

47. [Student] participated in cognitive/behavioral therapy regarding her anxiety with [Psychologist]¹⁴ between February, 2011, and September, 2011. [Student] saw [Psychologist] again one time in April, 2012. [Student] worked on her own cognitive monitoring (recognizing and correcting bad thoughts) and also on improving her physical control (breathing) to minimize the onset and effects of anxiety. She also worked on improving her confidence to confront the causes of her anxiety by practicing such things as making eye contact, raising her hand to ask questions, and giving presentations in front of others. There is no indication in the record that [Student]'s IEP team was made aware of the details of [Psychologist]'s opinions regarding [Student] or of this therapy at the time of the team meeting on May 30, 2012.

48. [Doctor of Psychology], Psy.D., performed a psychological evaluation of [Student] on behalf of the District in May, 2010. This evaluation included the administration of the BASC-2 and the Multidimensional Anxiety Scale for Children ("MASC"). The MASC is a nationally-normed questionnaire specifically addressing three aspects of anxiety: physical anxiety symptoms, harm avoidance, and social anxiety. [Doctor of Psychology] stated that the MASC is much more in-depth on the subject of anxiety than is the BASC-

¹⁴ [Psychologist] has a master's degree in clinical psychology and was designated an expert in anxiety disorders.

2. Based on the MASC results, [Doctor of Psychology] identified significant concerns in the area of social anxiety including fears of humiliation and rejection in connection with performance fears. [Student]'s scores placed her in the 95th percentile for social anxiety, especially as regards social perception.

49. [Doctor of Psychology] established that issues with processing speed are not amenable to change. In other words, a person's cognitive ability to process information cannot typically be improved. An appropriate response to delays in this area is to provide an accommodation to allow the student more time to complete tasks. He has seen IEP goals addressed to self-advocacy where a rubric is set forth to measure a student's willingness to ask for help or additional time to complete tasks.

50. [Clinical Psychologist] testified that he has provided psychological services since 1997 in Colorado. He has worked with 300-400 students with specific learning disability, and with 40-70 who have a clinical diagnosis of anxiety. He was admitted as an expert in the evaluation, identification, and programming of individuals with disabilities, including children in a school setting.

51. [Clinical Psychologist] established that [Psychology Intern] was qualified to administer the assessments conducted in May, 2012, under his supervision. He selected which assessments were to be administered, reviewed the results with [Psychology Intern], and wrote the report contained within the District's Evaluation Report. [Clinical Psychologist] reviewed [Student]'s prior history as part of his report and his participation on the IEP team. Other than meeting [Student] for approximately five minutes on May 11, 2012, [Clinical Psychologist] did not speak to her or observe her prior to the IEP team meeting. He also did not interview any of her past teachers or [Doctor of Psychology].

52. [Clinical Psychologist] determined that anxiety for [Student] was not a major concern. In support of this conclusion, he noted that [Student]'s mother not indicated that [Student] is shy, she did not also check boxes indicating that [Student] is withdrawn, fearful, or self-conscious on a social history form. [Clinical Psychologist] endorsed the selection of the BASC-2 because it had been administered to [Student] before and would therefore permit direct comparison of results.

53. From review of the BASC-2 test results of May, 2012, [Clinical Psychologist] determined that [Student] was making progress on social/emotional issues. Subsequent to the IEP team meeting but prior to testifying, he reviewed records of [Psychologist] and confirmed a pattern of improvement over the course of [Student]'s therapy and prescription of Prozac for anxiety.

54. At the IEP team meeting, [Clinical Psychologist] agreed that the two goals addressed the main areas [Student] would need to improve in to be prepared for college. He did not evaluate the need for a goal or identified services in the area of writing. He determined that the slate of accommodations and the services of a case manager would adequately support [Student]'s social and emotional needs. [Clinical

Psychologist] had not observed [Student] in her classes at [School] and could offer no opinion as to whether her comfort level there was a factor in her improved level of anxiety.

55. Following the IEP team meeting on May 30, 2012, the District provided prior written notice to the Complainants setting forth the offer of placement at [High School], incorporating the two goals and objectives, and the specified accommodations and service delivery provisions specified in the IEP. Complainants rejected the offer of placement and services and re-enrolled [Student] in [School] for the 2012-2013 school year. Tuition for [Student] at [School] during this year was demonstrated to be \$24,525, less \$10,000 in assistance from the school for an effective total of \$14,525.

DISCUSSION

The IDEA was enacted to ensure that all children with disabilities have access to “a free appropriate public education that emphasizes special education and related services designed to meet their unique needs.” 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education (“FAPE”) is defined as “special education and related services . . . provided in conformity with an individualized education program.” 20 U.S.C. § 1401(9). The individualized education program (“IEP”) is the basic mechanism through which the school district’s obligation of providing a FAPE is achieved. *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). The local school district is required to develop, implement and annually revise an IEP that is calculated to meet the student’s specific needs and educate that student in the “least restrictive environment”, meaning that, “[t]o the maximum extent appropriate,” disabled children should be educated in public school classrooms alongside children who are not disabled.” 20 U.S.C. §§ 1414(d) and 1412(a)(5)(A).

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke*, 540 F.3d 1143, 1148 (10th Cir. 2008). It is determined that a school district has provided a disabled student with a FAPE when demonstrable evidence from the student’s educational records establishes that the student made some measureable progress on the goals and objectives in his IEP. *Id.* In this case, since the parents are challenging the District’s development of the May 30, 2012 IEP, they have the burden of establishing that any failure to comply with the procedural requirements in developing that plan actually resulted in a denial of FAPE,¹⁵ and that the proposed placement and services were not reasonably calculated to confer educational benefit on [Student].

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase “free appropriate public education”. In that decision the Court held that the statutory definition of FAPE

¹⁵ *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999); *O’Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998).

requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children; the school district's obligation extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit *id.* at 200.

Individualized Education Program

In order to comply with the requirements of the IDEA, a school district shall insure that each handicapped child's educational placement: Is determined at least annually; is based on his or her IEP; and is as close as possible to the child's home. See 20 U.S.C. § 1412(5)(B). The IEP consists of a written document containing:

- (A) a statement of the present levels of educational performance of such child;
- (B) a statement of annual goals, including short-term instructional objectives;
- (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;
- (D) the projected date for initiation and anticipated duration of such services; and
- (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

Development of the May 2012 IEP

A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 C.F.R. 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 CFR 300.513 (a)(2)(i) – (iii).

The development of the May, 2012 IEP for [Student] consisted of the process of gathering information necessary for the IEP team to consider and the conduct of the actual IEP team meeting on May 30, 2012.

A significant amount of testimony focused on the conduct of the meeting and whether [Executive Director], as representative of the District, had silenced [Student] and instructed the team that only [High School] would be considered as an ultimate placement. Not surprisingly, the testimony was divided down party lines with [Student] and her mother stating that [Executive Director] had effectively cut off any consideration of other placements, and the District personnel clearly recalling no such incident. None of the witnesses lacked credibility on this issue and because each was affiliated with a party, each may be said to suffer from the same taint. Because Complainants have the burden of proof on the issues of whether [Executive Director] denied effective participation on behalf of the student and whether a placement at [High School] was “predetermined,” the ALJ finds and concludes that these were not established by a preponderance of the evidence.

In other respects, the record reflects that Complainants had adequate notice of the IEP team meeting and were free and able to bring any persons they felt would assist them. As it happened, when [Executive Director] did not entertain the request to simply renew [Student]’s placement at [School] at the outset of the meeting. From this point forward, it appears that Complainants were resolved to participate in the meeting only passively, providing no input on the identification of goals, objectives, accommodations and services. The ALJ finds and concludes that the totality of the record evidences that Complainants had a full and adequate opportunity to participate in the May 30, 2012, IEP team meeting.

The District established that it assembled a team representing a broad cross-section of personnel to address the unique needs of [Student], including a psychologist, speech-language therapist, special education teacher, case manager, general education teacher, and District designee. Complainants argue that in determining the placement of a child with a disability, the District must ensure that the decision is made by a “group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” 34 C.F.R. §300.116(a). Here, the team included the parents and educational professionals from many relevant disciplines. However, the extent to which these persons were knowledgeable about [Student] is debatable. None of the District IEP team members had observed [Student] in her prior educational settings, either at [School] or [Former Middle School]. None of them had spent any time with her, other than [Clinical Psychologist]’s five minutes prior to the assessments administered on May 11, 2012. Nor does the record reflect that the team members assembled examples of her recent school work. The brief narrative provided by [Teacher] is the only evidence that the team had of her recent performance in eighth grade. This lack of direct familiarity with her places even greater emphasis on their review of her educational history and the data developed in assessments of her over the years.

The District must ensure that “the child is assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. §304(c)(4). The ALJ finds and concludes that the District’s assessment of [Student] was inadequate in the area of social emotional needs. [Clinical Psychologist] testified that he selected the BASC-2 because it had been administered previously and would allow for a direct comparison of scores. [Doctor of Psychology] had also administered the MASC in 2010 and identified a significant level of social anxiety related to performance. This result is entirely consistent with the testimony of [Student], her mother, [Psychologist], and [Teacher]. [Clinical Psychologist] decided that because of how [Student]’s mother had completed a social history questionnaire, he was unconcerned with [Student]’s history or needs in the area of anxiety. His opinion that psychotherapy she had received had been effective was not developed until well after the IEP team meeting when he was provided with [Psychologist]’s files. To readminister the MASC would have given [Clinical Psychologist] and the team the “apples to apples” comparison he stated was essential. Given that [Student]’s anxiety was inextricably linked to her disability and tended to exacerbate the effects of her disability when anxiety increased, to proceed without an updated and complete picture of this aspect of [Student] deprived the IEP team of essential information to decide on her educational programming. This is especially true with her transition from a small, relatively structured environment at [School], to the large, complex, populous campus of [High School].

Based on the above findings, the ALJ concludes that the District failed to properly assess [Student] in all areas of demonstrated need and that such failure materially affected the development of the May 30, 2012 IEP.

The May, 2012 IEP fails to offer [Student] a FAPE

The record in this proceeding establishes that [Student] has demonstrated needs in the academic areas of reading, writing, and math arising out of her specific learning disability. She also has a history of relatively severe and generalized anxiety related to school and her concerns about how her performance is perceived by others.

Reading and math are addressed in the IEP with relatively perfunctory goals. These essentially prescribe that [Student] will make a year’s progress within a year, with measurements that are less than precise. As established by [Speech Language Pathologist], the goals reflect an estimate of [Student]’s ability in reading comprehension as opposed to a firm statement of her present level of performance. The math goal does not define [Student]’s present level of performance other than stating “# correct: 6.” What kind of problem is referenced and what proportion six represents out of all problems presented is not specified. Nor does either goal specify the frequency of evaluation to monitor progress. These goals fail to communicate that a unique educational program has been designed to suit the needs of [Student] in a way that promotes her post-secondary goal.

The ALJ also concludes that the IEP lacks a goal in the area of written expression. [Student]'s difficulties with spelling and sentence composition were well documented and represent an obstacle to her post-secondary goal of attending college. While [Department Coordinator] acknowledged this as an area of need, it is only addressed in the form of a lab class. The testimony at hearing was far more detailed about the features and methods of the writing lab than the IEP or the prior written notice. These documents provide no goal or method of measuring progress in an area of demonstrated academic need. Nor is it clear that the writing lab (or the math lab) were discussed in detail at the IEP meeting such that the Complainants actually knew the scope of the proposal for [Student]. For these reasons the IEP fails to address [Student]'s unique educational needs in the area of written expression.

Much was made by the District regarding the numerous accommodations set forth as part of the IEP. The ALJ finds that these are generally supportive of [Student]'s needs related to processing speed and auditory processing.

As for service delivery, District witnesses provided much information about the role of case manager that are not present in the IEP, including the prior written notice. The supports that may be provided by a case manager are critical to addressing [Student]'s challenges with organization, self-advocacy, and anxiety regarding relationships with teachers and peers directly related to her disability. However, the IEP only provides a generalized assurance that a case manager will assist [Student] "with the transition to high school and the new educational setting." The descriptions of services in the academic support labs similarly fail to set forth the detailed services that will allow [Student] to make meaningful progress in her education. The District did establish that the co-taught model for core curriculum subjects may be effective in allowing [Student] to be educated with non-disabled peers. [Math Teacher] demonstrated extreme confidence and competence with her subject matter and the ability to respond to the needs of [Student] in a co-taught setting. As a group, the District personnel presented a laudable enthusiasm and willingness to serve [Student] However, because the IEP fails to meet the unique needs of the student, the ALJ does not reach the issue of how likely the District would be to implement the program.

Taking the record as a whole, the ALJ concludes that the Complainants established that the May, 2012 IEP did not represent an offer of FAPE to [Student]. It set forth inadequate goals and objectives in the areas of reading and math, and no measurable goals or services related to a demonstrated need in written expression. While many of the accommodations were responsive to [Student]'s needs, the descriptions of service delivery related to intervention labs and case manager services were too general to provide a clear statement of the necessary supports that [Student] and Complainants could expect to address the well-established difficulties with organization, self-advocacy, and anxiety. Lacking these essentials, the ALJ is unable to conclude that the May 30, 2012 IEP was reasonably calculated to confer educational benefit in the LRE in that it appropriately responded to the unique needs of [Student].

Appropriateness of [School]

Complainants and the District agreed to place [Student] at [School] in the middle of her seventh grade year. The school is accredited and through [Student], her mother, [Teacher] and Mr. Daniel Loan, Complainants established that [Student] is thriving emotionally in the comparatively secure setting of the school. Academically, [Student] has demonstrated progress in language skills, although her math performance is mixed at best. Importantly, she has become more willing to participate in class and advocate for herself. She has made friends and successfully participated in school athletics.

Taken together, these factors establish that [Student] is reasonably calculated to receive academic benefit at [School]. As Complainants have proven that the District failed to offer an appropriate program in the form of the May 30, 2012 IEP, they are entitled to reimbursement of the cost of tuition and transportation as a related service pursuant to 20 U.S.C. § 1401(26)(A). See *Knable v. Bexley City Sch. Dist.*, 238 F.3d755, 771 (6th Cir., 2000) (citing *Florence County Sch. Dist. v. Carter*, 510 U.S. 1 (1993)).

CONCLUSIONS OF LAW

1. The District's failure to adequately assess [Student] in all areas of suspected disability materially and adversely affected the development of the May 30, 2012, IEP.
2. The District failed to offer [Student] a FAPE as required by the IDEA in the form of the May 30, 2012 IEP.
3. Complainants' private school placement of [Student] at [School] is reasonably calculated to confer educational benefit in the absence of an offer of FAPE.

DECISION

The ALJ concludes that the Complainants have met their burden of establishing that [Student] was denied a free appropriate education as required under the Individuals with Disabilities Education Act in the development of [Student]'s May 30, 2012 IEP, and the educational placement offered by the May 30, 2012 IEP. Complainants are entitled to reimbursement of the cost of tuition and any related services associated with the placement of [Student] at [School] during the 2012-2013 school year.

This Decision is the final decision except that any party has the right to bring a civil action in an appropriate court of law, either federal or state, pursuant to 34 C.F.R. 300.516.

DATED AND SIGNED
April 19, 2013

KEITH J. KIRCHUBEL
Administrative Law Judge