

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>[Parent], on behalf of [Student], a minor, Complainants,</p> <p>vs.</p> <p>MESA COUNTY VALLEY SCHOOL DISTRICT 51 Respondent.</p>	
AGENCY DECISION	

On November 20, 2012 the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint filed by [Parent] (“the parent”) on behalf of her minor child, [Student], alleging that the Mesa County Valley School District 51 (“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 Grand Junction, Colorado on January 23-25, 2013.¹ The parent was represented by William J. Higgins, Esq., and Jennifer Purrington, Esq. The District was represented by Kathleen Sullivan, Esq., and Tammy Eret, Esq. At hearing, the ALJ admitted into evidence Complainants’ exhibits A-F, H, L-N, P-U, Y-Z, and BB, and also District’s exhibits 8, 10-14, 16-34, 36, and 45-48. The proceedings were digitally recorded. Following conclusion of the hearing, both parties submitted a written closing brief.

ISSUES PRESENTED

Whether the District failed to provide [Student] with a free appropriate public education (“FAPE”) as required by the Individuals with Disabilities Education Act (“IDEA”) pursuant to an individualized education program (“IEP”) dated April 24, 2012; and whether a subsequent IEP dated October 30, 2012, conforms to the procedural requirements of the IDEA and constitutes an offer of FAPE going forward.

¹ Per the request of counsel, the decision deadline was further extended to February 15, 2013, to allow for the filing of post-hearing briefs.

FINDINGS OF FACT:

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

1. [Student] is a [age]-year old boy who resides within the District. [Student] has received numerous diagnoses over the years including sensory integration disorder, brain injury, post-traumatic stress disorder, attention deficit hyperactivity disorder, oppositional defiance disorder, chronic constipation, and a spinal cyst. There is no dispute in this case that [Student] is a child with a disability as defined by the IDEA.
2. [Student]'s disabilities impair his cognitive functioning and cause learning difficulties. Assessments of [Student]'s cognitive functioning in 2004 and 2005 revealed results in the "extremely low" range.² Due to significant processing impairments, [Student] has problems with self-control and regulating his emotions. [Student] thrives on adult contact and attention, but can become agitated or uncomfortable in transitional situations, such as when his environment changes or he is confronted by a person he does not know. [Student] can be very uncomfortable in group activities to the point where he chooses not to participate.
3. When [Student] becomes anxious or agitated, his problem behavior can escalate beyond his ability to control. For the past several years, [Student] has engaged in the following disruptive and potentially risky behaviors when agitated or anxious: cursing and using abusive language toward others, hitting and kicking objects including glass windows, and attempting to strike others.
4. [Student] takes prescription medications in the morning and throughout the day to slow him down and help him focus. [Parent] stated that he "climbs the walls" if he doesn't take the medicine. [Student] also takes fiber supplements and over-the-counter treatments for his chronic constipation.
5. Since the spring of 2010, [Student] has received weekly in-home services from Behavior Services of the Rockies ("BSR"). BSR conducted a functional behavioral assessment of [Student] in May, 2011, and a behavior plan that still forms the basis for behavioral modeling and consulting services that BSR provides to [Student] and [Parent]. The behavior assessment found a correlation between inappropriate behaviors and [Student] being presented with a request or demand. Problems were particularly evident during transitions.
6. The BSR behavior plan identified giving [Student] a task or demand, denying [Student] one of his requests, and interrupting a preferred activity as antecedents to his aggressive and destructive behaviors. Precursor behaviors suggesting escalation on the part of [Student] include refusal, talking louder and using provocative language and gestures, and banging/slamming items. The plan outlined prevention strategies to promote appropriate behaviors and introduced the idea of signature cards (discussed below) as a method of rewarding [Student] for compliance. In the event of aggressive

² Using the Wechsler Intelligence Scale for Children, 4th Edition.

or destructive behaviors occurring, the plan specified permitting [Student] to “take space” to calm down and ultimately demonstrate his own ability to relax.

7. [Parent] established that [Student] is very impulsive and often does not have awareness that his behaviors are out of line until after they have manifested and someone reacts negatively. At times, [Student] will apologize and correct the behavior. If [Student] escalates, in the experience of [Parent] then she tries to stay calm, give [Student] time to process, give [Student] instruction regarding de-escalating, and play soothing music.

8. [Parent] established that while she attempts to implement the strategies in the behavior plan at home, she has occasionally been forced to restrain [Student], to separate herself from [Student] if possible, or resort to calling for support from law enforcement, family members, and crisis service providers when [Student] does not de-escalate in response to those strategies.

9. [Student] is currently enrolled as a ninth grader at [High School] in [City]. Previously, [Student] attended [Middle School], also within the District.

10. [Student] had a positive academic experience in eighth grade. He earned a Student of the Month award in March, 2012, and a place on the Honor Roll in May, 2012. [Student] had an IEP in place for eighth grade that featured the assistance of a one-on-one instructional aide at all times during school. [Student] was educated primarily in a single classroom throughout the day, although he would transition to another setting for math once per day,³ and attended adaptive physical education twice per week. [Student] was typically with ten to twelve other students in the special education classroom.

11. [Student] had a good working relationship with his eighth grade teacher, [Teacher] and his aide, [Middle School Aide]. [Student] made progress regulating his behaviors during the year. At a triennial evaluation in the spring of 2012, [Teacher] opined that [Student] might not require a full-time one-on-one aide in familiar settings. As of February, 2012, [Student] had not had any office referrals and had not been sent home during the year. [Student]’s reading and math scores indicated a grade equivalency in the range of 3.2 to 3.6 (STAR Benchmark).

12. An IEP team meeting was convened on April 3, 2012, for the purpose of determining [Student]’s placement for ninth grade. [Parent] and representatives of the District identified that the more frequent transitions and larger environment and population of [High School] had the potential to impact [Student]’s behaviors. [Student] continued to demonstrate progress in his Middle School setting, transitioning regularly to math class and regulating his behavior. [Student]’s STAR equivalency scores were down slightly in reading and up in math compared to the previous assessment.

³ [Student] could skip this transition if he was agitated.

13. The IEP team noted that [Student] benefits from having a quiet place available where he can take breaks when needed. [Student] also needs a structured, quiet environment and routines. He requires prompting to stay on task and reminders, such as to take turns, to improve his social interactions.

14. On April 24, 2012, the IEP team, including [Parent], her advocate, and [Special Education Teacher],⁴ reconvened to complete [Student]'s IEP for ninth grade (the "April IEP"). The team decided that [Student] would receive specialized services for literacy, math, social skills, and life skills in special education classrooms. [Student] would have the services of a one-to-one aide 100 per cent of the time for the first nine weeks of the fall, 2012, term at which point that element would be reviewed. Depending on [Student]'s ability to regulate his behavior in the form of limiting verbal and physical outbursts and following classroom expectations, he was expected to see limited integration into general education elective class settings. [Student]'s seventh grade behavior intervention plan ("BIP") was to be implemented if [Student] demonstrated physical or verbal aggression, significant anxiety, or escape behavior in any setting.

15. The BIP for [Student] referenced in the April IEP noted that [Student] enjoyed interaction with familiar adults and peers. He was also identified as having good problem solving skills when he is calm. The BIP identified [Student]'s problem behaviors as attempting to intimidate by posturing, throwing things, or name calling when really angry. [Student]'s behavior problems can result from frustration, feelings of defensiveness, or a desire to gain control over a situation where he believes his needs are not being met.

16. The BIP recognized that [Student] responds more favorably to rewards for positive behavior than consequences for negative behavior. Accordingly, the plan outlined ways to redirect [Student] by permitting time to calm down and reward self-control with appropriate peer/adult approval and recognition. The BIP asserted a goal that [Student] would be able to express anger and release frustrations in an appropriate way. The BIP listed strategies for decreasing the likelihood of problem behavior occurring and increasing the likelihood that appropriate replacement behavior will occur through instruction. These strategies included modeling and practicing appropriate responses to stressors, reviewing calming techniques, and providing [Student] with opportunities to make choices to de-escalate behaviors.

17. District staff arranged a series of supervised field trips to [High School] in order to help prepare [Student] for transition to the larger, more complex setting. Between February and May, 2012, [Student] visited [High School] on four occasions.

18. During the summer of 2012, [Student]'s family moved to another house within the District. [Parent] established that [Student] had difficulty with this transition.

⁴ [Special Education Teacher] would be [Student]'s special education teacher for ninth grade. Her unmarried last name at the time of the April IEP meeting was "[]."

19. Since late 2011, [Assistant Behavior Analyst]⁵ has assisted with teaching and modeling behaviors for [Student] in his home. She also established a system of “signature cards” that were used at home. The signature cards documented the extent to which [Student] complied with behavioral expectations in the areas of controlling verbal and physical aggression, refusal, and property destruction. If [Student] earned signatures from responsible adults at home then he would be rewarded with preferred activities.

20. On August 14, 2012, [Parent] attended a meeting at [High School] to finalize [Student]’s schedule for the upcoming year. [Assistant Behavior Analyst] also attended the meeting. She recommended that the signature card system be employed at school too, with teachers evaluating [Student]’s compliance during each period throughout the day. The District representatives agreed to implement the signature card system to promote consistency between the home and school environments.

21. [Student]’s ninth grade year commenced on August 20, 2012. As specified in the April IEP, [Student] was primarily educated in special education classrooms with [Special Education Teacher] and [2nd Special Education Teacher], another special education teacher, and as many as 23 other students. [High School Aide] was assigned as [Student]’s full time aide. [Student] primarily transitioned between two rooms in adjoining buildings, but he also participated in adaptive physical education in a third location. The District prescribed that [Student] should transition between classes a few minutes early to avoid the stress of having him encounter the entire population of approximately 1,500 general education students.

22. [Assistant Behavior Analyst] observed [Student] once in his high school setting once following the meeting of August 14, 2012. The observation occurred during September and lasted approximately 1.5 hours while [Student] was with [High School Aide] in [2nd Special Education Teacher]’s classroom. She noted that [Student] was generally following instructions, participating, and asking questions in the relatively small classroom setting of four to five students. [Assistant Behavior Analyst] also observed [Student] transitioning to [Special Education Teacher]’s classroom, where he encountered the general student population.

23. [Special Education Teacher] was designated the District’s case manager for [Student], meaning that she had responsibility for development and implementation of his IEP, including the BIP. At the beginning of the 2012-2013 school year, [Special Education Teacher] held a bachelor’s degree in elementary education and an elementary level teaching credential. She is a master’s candidate in special education. She was hired by the District prior to the 2011-2012, and has been employed as a special education teacher with a special education generalist endorsement.

24. The transition to [High School] from [Middle School] was difficult for [Student]. Multiple witnesses established [Student] had more problems in situations where he was

⁵ [Assistant Behavior Analyst] is an Assistant Behavior Analyst employed by Behavior Services of the Rockies.

surrounded by people unfamiliar to him, such as the hallway and lunch room. [Student] was involved in a number of behavior incidents that represented a contrast to the success he experienced in eighth grade.

25. On September 7, 2012, at approximately 11:00 a.m., [Student] entered the lunch room at [High School] very upset. He sat down near where [Special Education Teacher] was assisting another student. [Special Education Teacher] approached [Student] and learned from him that he had broken a pair of sunglasses that he had purchased with his own money. [Student] became agitated and verbally abusive toward [Special Education Teacher]. He attempted to strike her with a fragment of the sunglasses. He also pretended to punch [Special Education Teacher] and made stabbing motions at his own hand with the fragment. As many other students were in the area, [Special Education Teacher] took action to restrain [Student].

26. Other District staff cleared the other students out of the lunch room for the safety of those students and also to eliminate a potential source of agitation for [Student]. In the meantime, [Student] attempted to bite [Special Education Teacher] and butt her with his head. [Student] grabbed one of [Special Education Teacher]'s fingers and bent it backwards, resulting in injury. She continued to restrain [Student] believing that he could pose a risk to himself and others if he was unrestrained. [Student] was restrained for a total of 15 to 20 minutes.

27. [High School Aide] specifically noted that [Student] was relatively calm about having broken the sunglasses as the two of them were walking together and discussing whether they might be repaired. [Student]'s behaviors escalated noticeably when he reached the lunch room. [Parent] was called and arrived at the school to pick up [Student]. [Parent] noted that [Student] was non-verbal with his head down with District staff all around him. [Special Education Teacher] was attempting to talk to [Student] and asking him if he wanted to stay at school. [Parent] told [Student] it was time to go and took him home at approximately 12:30 p.m.

28. On September 14, 2012, during adaptive P.E., [Student] was involved in another incident at [High School]. The class was in the course of walking two laps, when [Student] stated that he would not complete the second lap and decided to lay down under a tree. A class aide encouraged him to move to a separate location and he complied. At that point, the class teacher, [P.E. Teacher], informed [Student] that he would not be able to participate in a planned volleyball game that period because he had not completed the goal of walking two laps.

29. After watching the other students for a time, [Student] started to become more agitated and broke a limb off of the tree. A District staff person asked [Student] to stop. He responded with profanity and broke another limb off an adjacent tree. [High School Aide] asked [Student] to stop and he again responded with profanity directed at her. While [High School Aide] asked another staff member for assistance, [Student] started walking rapidly away from the school. [High School Aide] followed [Student] at a

distance to permit him the opportunity to cool down. She also called to [Special Education Teacher] over a walkie-talkie for assistance.

30. When [Special Education Teacher] arrived, [Student] was in the process of climbing a fence that separates the area where P.E. activity was being conducted from a major road. [Special Education Teacher] believed that if [Student] was able to get over the fence, school personnel would be unable to stop him from getting to the road and beyond. She decided to contact law enforcement for support. [Special Education Teacher] approached [Student] and he began to walk along the fence toward a soccer field. [Student] was cursing and began kicking a soccer goal in frustration. Despite the space given to [Student] by [Special Education Teacher], he was not calming down.

31. During the approximately twenty minutes that [Student] was allowed space to cool down, he was shouting repeated profanity and making aggressive physical demonstrations in the direction of the staff. [Student] was offered the chance to go inside and discuss the situation, but continued to escalate. [Parent] was called to pick up her son. When [Parent] arrived, [Student] cursed at her and struck her on the arm before getting into her van, where he proceeded to kick and strike the interior. Although [Special Education Teacher] determined that [high School Aide] followed [Student]'s BIP, [Parent] felt that the school should be able to control situations such as this without having to call her.

32. On October 2, 2012, the District convened a meeting with the purpose of updating [Student]'s BIP. [Parent] attended with her advocate, as did [Assistant Behavior Analyst]. The District was represented by [Principal], principal at [High School], [Special Education Coordinator], the District Special Education Coordinator, and [Special Education Teacher], among others. [Special Education Teacher] orally presented a functional behavior assessment ("FBA") of [Student] based on observations she had made of him between September 17, and September 28, 2012.

33. The October 2, 2012 meeting was terminated by [Principal] when [Parent] became very upset and began yelling at [Special Education Teacher].

34. The October FBA was put into writing on October 5, 2012. In it, [Special Education Teacher] noted that the frequency, duration, latency and intensity of [Student]'s behaviors are variable. This was also confirmed by exemplar signature cards. One specific occasion of overt physical aggression was described. On that occasion, [Student] threatened to "murder" a teacher with a fork following a transition to that teacher's classroom. Other behaviors, including non-compliance, verbal aggression and property destruction were not described with any particularity but quantified with a range of incidents observed daily. The description of the target behaviors and the settings in which the behaviors occur are substantially similar to the findings of the FBA conducted by BSR.

35. A subsequent meeting was convened by the District on October 9, 2012. There, a new BIP was prepared. The new BIP was significantly more detailed with regard to

antecedent strategies and behavior teaching strategies than the one included with the April IEP.

36. The BIP also referenced the District's crisis plan which is to be followed when "there is imminent danger to self or others." Another section of the BIP provided that, "in instances that [[Student]] shows verbal or physical aggression that is harmful to a student, an adult or himself," [Student] will be redirected with verbal prompts and a chance to "cool down." Although [Special Education Teacher] testified that she is more likely to implement the crisis plan when others are in close proximity, both provisions reference effects on others. It is also unclear how demonstrated physical aggression that is actually harmful is to be distinguished from imminent danger in this context.

37. On October 11, 2012, [Student] was involved in another serious behavior incident at school. [Student] brought to school an air pump with an attached needle such as is commonly used for inflating balls. [Student] removed the air pump and was handling it in an outdoor common area of the school. [Special Education Teacher], who was with [Student], determined that the pump was potentially dangerous in [Student]'s hands. She informed him that he could not have the air pump out and offered [Student] the choice of putting it away or giving it to her. [Student] refused.

38. [Special Education Teacher] contacted [Principal] for assistance as many other students were in the immediate area, less than twenty feet away. [Special Education Teacher] asked [Student] to take a walk with her to another side of the adjacent building where [Student] could cool down. [Student] continued to escalate his behavior and began swinging the pump and talking in a threatening way. [Special Education Teacher] gave [Student] approximately three to five feet of "space" but felt that she could not safely give him any more space given his level of agitation.

39. [Special Education Teacher] and [Principal] managed to escort [Student] to a vestibule near an entrance to a school building. On the way, [Student] attempted to strike [Special Education Teacher] with the pump, but narrowly missed. [Student] continued to escalate and began striking the windows of the building with the air pump. [Special Education Teacher] and [Principal] established that [Student] was unable to de-escalate his behaviors after 20 minutes.

40. Ultimately, additional school staff were called and [Student] was essentially confined to the vestibule as the other students in the school began a transition. [Parent] was called to pick up [Student]. [Parent], who is employed as a home health worker, was with a client at the time of the call and found it extremely difficult to stop what she was doing to drive to the school. When she arrived, [Student] was still in the midst of school staff and looking very scared. [Parent] explained that [Student] had been allowed to bring the pump to middle school. [Parent] took [Student] home.

41. [Parent] testified that she subsequently sent an email to the District asking that [Student]'s behavior plan be discussed further. The District sent out a notice of a meeting to be convened on October 30, 2012. The notice identified [Parent] as an

integral part of the IEP team and signaled that discussing [Student]'s educational needs was the purpose of the meeting. In particular, the issue of the need for adult supervision was identified as an issue as the nine week initial term of the school year had concluded.

42. [Parent] attended the meeting on October 30, 2012, with her advocate, [Assistant Behavior Analyst] and Mr. [] of BSR, and Ms. [] of Colorado West Mental Health. [Special Education Coordinator], [Principal], [Special Education Teacher], school psychologist [School Psychologist], and others attended the meeting on behalf of the District. Over 6.5 hours, [Student]'s complete educational program was discussed.

43. The IEP team agreed that while [Student] was making some academic progress at Central, his behaviors were not improving and were a cause for real concern. District members of the team emphasized the size and transition-heavy nature of the Central High School environment as triggers for [Student]'s behavior problems. [Parent] believed that better-trained staff and more consistent implementation of the IEP/BIP would resolve the behavior issues.

44. District members of the IEP team advocated for placement at [Facility], a facility jointly operated by the District and Colorado Health which houses a Therapeutic Day Program ("TDP").⁶ Ms. [], who was intimately familiar with the TDP described it to [Parent] in the course of the meeting. [Parent] and the others that accompanied her urged that [Student] be retained at [High School] or perhaps moved to [School], another school in the District with ninth graders.

45. The TDP is very small in comparison to [High School]. Students in the TDP are not required to transition between buildings and do not encounter hundreds of general education students during the day. The TDP classroom is similar to that in which [Student] was educated at [Middle School] in terms of the number of other students and the overall ratio of adults to children. A single special education teacher is assisted by an aide as well as a speech/language therapist and full-time behavioral therapist. Aside from the classroom, there are also two separate areas where students can have "space" when necessary.

46. Witnesses who had observed the TDP established that it is highly structured and relatively insular compared to the environment at [High School]. Expert witnesses who had observed [Student] at [High School] and also the TDP testified that the TDP offers a safe, secure setting that will eliminate many of the factors that led to problem behaviors in [Student] during his time at [High School]. These witnesses opined that the TDP is an appropriate placement for [Student] where he can focus on improving behavioral

⁶ [Facility] also houses a non-therapeutic program for students who have been removed from school for disciplinary reasons. The TDP is in a separate building and features virtually no interaction with this other program.

skills with a goal of perhaps moving back to the larger and more challenging environment of [High School].⁷

47. [Expert Witness #1] and [Expert Witness #2] testified that the system of levels used at the TDP are consistent with the principles of advanced behavior analysis and could be effectively and appropriately integrated into [Student]'s educational program. This system promotes growth in the area of behaviors for students in the TDP by identifying positive skills that are to be demonstrated and setting out rewards for attainment of such skills. For example, students are encouraged to avoid having any major safety concerns for three straight weeks at Level Two. Attainment of all goals at Level Two, results in benefits of Level Three which include participation in all and facilitation of some recreational activities.

48. The observations of [Student] and of the TDP by the expert witnesses, and the detailed information gathered regarding the TDP by other witnesses occurred after the IEP meeting on October 30, 2012. While the ALJ finds and concludes that the District always intended the placement offered on October 31, 2012, to be at the TDP, it appears that the presentation regarding the elements of the TDP that render it appropriate for [Student] was much more detailed and complete at hearing than during the discussion at the IEP meeting. However, the District extended an offer to [Parent], her advocate, and the others assisting [Parent] at the October IEP meeting to visit and observe the TDP at [Facility]. This offer was not accepted.

49. On October 31, 2012, [Special Education Coordinator] issued a letter to [Parent] constituting prior written notice of the District's offer of placement and services at the TDP. This notice attached and referenced the IEP developed at the October 30, 2012 meeting.

50. With the filing of the due process complaint in this matter, [Student] has continued to receive special education and related services in his placement at [High School].

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

⁷ [Expert Witness #3] testified as an expert in the areas of assessing and programming for the needs of individuals with challenging behaviors, supervision of programming for the needs of individuals with challenging behaviors, and inclusive education; [Expert Witness #2] testified as an expert in the areas of applied behavior analysis, and educational programming for children with challenging behaviors; [Expert Witness #1] testified as an expert in the areas of assessment and diagnosis of students with dual diagnoses, including the medical implications of such diagnoses, and developing appropriate educational programming.

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 parent is challenging the District’s implementation of the April, 2012 IEP, she has the burden of establishing that the District’s implementation of the plan did not provide [Student] with some educational benefit. With regard to the October, 2012 IEP, [Parent] has the burden of establishing that any failure to comply with the procedural requirements in developing that plan actually resulted in a denial of FAPE,⁸ 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 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:

⁸ *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).

- (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).

Implementation of the April IEP

[Parent] argues that the District's failure to adequately implement the April IEP at [High School] denied [Student] an appropriate education. [Student] continued to experience many behavioral episodes and [Parent] believes that the reason for these problems is that the District did not follow the strategies in the BIP designed to identify precursor behaviors and causes and then help to [Student] to de-escalate behaviors. [Parent] attributes this failure, at least to a degree, to a lack of training and experience on the part of District staff responsible for [Student] and implementation of his IEP. There was little discussion of [Student]'s academic progress at hearing, and the only information in the record suggests that [Student] was, in fact, making progress toward educational goals not directly related to behaviors.

Complainant does not take issue with the content of the April IEP. It was developed when [Student] was enjoying a period of relative success at [Middle School]. In April, 2012, the IEP team concluded that [Student] could succeed at [High School] with the assistance of a full time one-to-one aide, inclusion of specific goals and objectives related to acquiring behavioral skills, and reliance on a BIP to reduce the impact of behavioral problems on [Student]'s education. The IEP team contemplated that [Student]'s educational program would be re-evaluated at the end of the first nine-week term to see what changes, if any, were appropriate.

As it turned out, [High School] was a very challenging environment for [Student]. The numerous transitions and repeated exposure to the general student population each day were stressors that contributed to frequent behavioral problems. Every witness who testified to having observed [Student] in the [High School] setting stated that he appeared very uncomfortable and insecure in situations where he was confronted by unfamiliar or unexpected situations. These observers stated that

[Student]'s apprehension and anxiety in such settings led them to conclude that he could not even be said to be participating in the activities.

On the three notable occasions described above, [Student] was unable to de-escalate his behaviors in response to a personal setback (September 7, 2012) or a directive to do something he did not want to do (September 14, and October 11, 2012). Giving [Student] choices regarding what to do, and affording him time to cool down as prescribed by the BIP were not effective. On each of these occasions, [Student] was at risk of hurting himself, possibly hurting others, or leaving a designated school area. These consequences precipitated further steps, such as use of restraint or not always granting [Student] time and space to cool down, on the part of school personnel. While these steps were not spelled out in the BIP, they were nonetheless necessary for the protection and benefit of [Student] and others.⁹

Such measures were not only necessary at school. Despite having the benefit of many years of teaching and counseling regarding applied behavioral analysis and intervention in the home environment, [Parent] conceded that she had been forced to take steps including contacting law enforcement and/or restraining [Student] when he was unable to de-escalate behaviors. Thus, the evidentiary record does not support a conclusion that [Student]'s problems resulted from an inability or unwillingness on the part of District personnel to implement the IEP, including the BIP. Nor was the problem a lack of experience or proper credentialing on the part of [Special Education Teacher] or other staff. Rather, it is the conclusion of the ALJ that [Student] did not possess the skills necessary to succeed in the complex and frequently challenging environment at [High School].

[Parent] argues that [High School] was and can be an appropriate setting for [Student]'s education going forward. Given the success that [Student] realized toward the end of his eighth grade year, the IEP team cannot be faulted for granting [Student] the opportunity of being educated in the comparatively unrestricted setting of a large, general education campus. However, the behavioral problems documented for [Student] came to supersede any academic progress he was able to make in the beginning of ninth grade. Taking the full record of this proceeding into account, the ALJ concludes that Complainant failed to establish that the District did not implement the April IEP with fidelity and in good faith. The severity of [Student]'s behaviors related as they were to the nature of the placement at the [High School] campus, necessitated that [Student]'s educational program be reviewed and revised.

Development of the October IEP

⁹ The overlap of provisions noted in Finding of Fact No. 36 does not alter this conclusion. It is evident that [Special Education Teacher] and [Principal] afforded [Student] as much time and space to de-escalate as was practicable on October 11, 2012. The proximity of other students, and [Student]'s physically aggressive, threatening and potentially destructive behavior necessitated immediate action to prevent harm despite the measured and non-confrontational strategies outlined in the BIP.

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).

Following the major incident on October 11, 2012, [Parent] e-mailed the District and requested that a meeting be convened to address [Student]'s behaviors. On October 22, 2012, the District invited [Parent] to attend a meeting to discuss the educational needs of [Student] as an integral part of his IEP team. The purpose of the meeting was further described as to discuss and determine whether adult supervision would continue. This statement was in reference to the provision in the April IEP specifying that [Student]'s need for a full time one-to-one aide would be re-evaluated after nine weeks. The notice also advised [Parent] that she was welcome to invite such other people that would be helpful to her. The ALJ finds and concludes that this notice, which also allowed [Parent] to request rescheduling of the meeting if the appointed time was not convenient, adequately and appropriately apprised [Parent] of her ability to attend and contribute to [Student]'s educational programming.

[Parent] attended the meeting on October 30, 2012, with numerous people there to advise and support her. Representatives from the offices of her advocate, BSR and Colorado West Mental Health accompanied [Parent] and participated in the 6.5 hour discussion that followed. Input from [Parent], Mr. [], and [Assistant Behavior Analyst] was received and incorporated into the IEP and BIP documents.¹⁰ The District recommended changing [Parent]'s placement to the TDP, and much discussion ensued regarding the propriety of that proposal. [Parent] felt that the TDP was inadequately described. She and her supporters eventually disagreed with the proposal of placement at the TDP and advocated that [Student] continue to be educated at [High School] or [School].

As noted above, there is no doubt that the TDP was discussed in greater detail in the course of the three-day evidentiary hearing than at the IEP meeting. There is also no dispute, however, that the TDP program was described to [Parent] by Ms. [] whom [Parent] invited to the meeting and who had first-hand experience of the TDP. Nor is it disputed that the District offered to have [Parent] and anyone else of her choosing observe the TDP after it was proposed as a placement option for [Student]. Neither [Parent] nor any of her advocates or behavioral consultants accepted that offer.

Thus, although there was no consensus on the location where the IEP would be implemented, the ALJ finds and concludes that [Parent] did not establish that she was denied a meaningful opportunity to contribute as a member of the IEP team. With the information exchanged at the IEP team meeting and disclosed in the prior written notice

¹⁰ Mr. [], in particular, provided substantial input on the Behavior Teaching Strategies portion of the BIP.

on October 31, 2012, the District gave an adequate description of the educational program proposed for [Student], including the physical placement and the supports and services that would attend it.

Moreover, Complainant did not demonstrate that even if the development of the October IEP did not conform to the procedural requirements of the IDEA, that such violation(s) resulted in the substantive loss of educational opportunity. Other than the dispute regarding the proposed placement at the TDP, the record does not disclose any other procedural or technical shortcomings of the IEP that might deprive [Student] of FAPE. Taking into consideration that he remains in his stay-put placement and also the conclusions set forth in the following section, the ALJ concludes that [Parent] failed to establish that the development of the October IEP resulted in a denial of FAPE.

The October IEP offers [Student] a FAPE

The record in this proceeding establishes that [Student] did not possess the behavioral skills necessary to have a successful experience at [High School]. The question, then, becomes whether he can acquire those skills while still at [High School], or whether a different setting is appropriate.

The IDEA requires that personalized instruction be provided in the least restrictive environment (“LRE”). In order to do so, a state must adopt:

[P]rocedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B) (Supp. 1991).

Under Colorado law, each public agency must ensure that—

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education

in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

1 CCR § 301-8, 2220-R-5.02; 34 C.F.R. 300.114 (a)(2)(i) and (ii).

The requirement, and desirability, of educating in child in the LRE is a consideration with regard to the proposed placement of [Student] at the TDP. [High School] is far less restrictive in that it features substantially more contact with the general education population. This was also a primary reason why [Parent] preferred to have [Student] educated at [High School]. She did not want him to be unnecessarily segregated from his non-disabled peers. While this is understandable, the ALJ finds that the TDP, and not [High School], is the appropriate placement for [Student] at present.

This conclusion is founded on the factors common between the TDP the [Student]'s placement at [Middle School] where Complainant repeatedly emphasized that he really progressed. These include a small class size, a similar ratio of adults to students promoting rapid and consistent feedback critical to [Student], a structured schedule, full-time support of a behavioral therapist, quiet spaces where [Student] can take time when needed, and virtually none of the transitions that lead to escalating behaviors. Also, [Expert Witness #1] and [Expert Witness #2] established that the TDP curriculum is infused with applied behavioral supports and strategies that are very likely to benefit [Student] in the acquisition of skills. With such acquisition, rewards such as increased choices and opportunities for integration in the form of outings encourage further development.

Complainant questioned why the District could not simply import the elements of the TDP to [High School]. While this suggestion tacitly endorses the strengths of the TDP, it ignores the reality that housing a wholly separate educational pod based on the TDP curriculum at [High School] would not result in meaningful integration for [Student]. This notion also has no basis in relevant special education law. An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-7. Even with LRE as an overlay, Complainant has identified no authority for requiring a District to replicate an effective program, in which its separateness is a component of its effectiveness, in a large, general education facility.

[Parent] also expressed concern that if [Student] was placed at the TDP, he would be there permanently for the remainder of his high school years. This concern is addressed in two ways. First, an IEP must be revisited periodically in accordance with a student's unique educational needs. Thus, the TDP has not been and indeed cannot be identified as [Student]'s placement for years into the future. Second, [Expert Witness #2], who will be responsible for supervising [Student]'s behavioral progress at TDP very credibly testified that the goal is to provide [Student] with a behavioral skill set that will allow him to successfully transition back to a placement that is less restrictive.

Taking the record as a whole, the ALJ concludes that, at present, [Student] can not develop and improve his behavioral skills while trying to cope with the relatively complex and challenging environment at [High School]. He requires a simpler, more structured setting where outside stressors do not interfere with his acquisition of skills to the same extent as at the [High School] campus. The District's offer of placement at TDP to implement the October IEP was reasonably calculated to confer educational benefit in the LRE in that it appropriately responded to the unique needs of [Student], particularly as demonstrated during the beginning of ninth grade. Complainant failed to establish otherwise.

CONCLUSIONS OF LAW

1. The District adequately implemented [Student]'s April, 2012 IEP to enable him to receive a FAPE.
2. The procedures employed by the District in the development of [Student]'s October, 2012 IEP did not result in a denial of a FAPE.
3. The District offered [Student] a FAPE as required by the IDEA in the form of the October, 2012 IEP as transmitted by the prior written notice on October 31, 2012.

DECISION

The ALJ concludes that the Complainant has not met her burden of establishing that [Student] was denied a free appropriate education as required under the Individuals with Disabilities Education Act in the implementation of [Student]'s April, 2012 IEP, the development of the October, 2012 IEP, and the educational placement offered by the October, 2012 IEP.

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

February _____, 2013

KEITH J. KIRCHUBEL
Administrative Law Judge