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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, Fourth Floor, Denver, Colorado 80203 | ▲ COURT USE ONLY ▲ |
| [Parent], in the interest of [Student], Petitioner, vs. BOULDER VALLEY SCHOOL DISTRICT RE-2, Respondent. | |
| AGENCY DECISION | |

On September 5, 2013 the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint filed by [Parent] (“Petitioner”), the mother of minor child [Student], alleging that the Boulder Valley School District RE-2 (“District” or “Respondent”) denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act (“IDEA”), 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. Petitioner requests tuition reimbursement from the District for [Student]’s private placement at [Private School] (“[Private School]”).

The complaint was received by the Office of Administrative Courts (“OAC”) on September 9, 2013 and assigned to Administrative Law Judge (“ALJ”) Michelle A. Norcross for a due process hearing. Hearing was held at the OAC in Courtroom 1 in Denver, Colorado on December 16 - 19, 2013. At the conclusion of the evidentiary hearing, the parties requested an opportunity to submit written closing statements. The ALJ granted the parties’ request. The parties selected January 16, 2014 as the due date for submission of their closing briefs. In addition to amending the procedural schedule to allow for written closings, the parties also agreed to extend the decision deadline from January 8, 2014 to February 3, 2014. The hearing was recorded and transcribed by Verbatim Reporting & Transcription, LLC. At hearing, Petitioner was represented by John Tweedy, Esq. The District was represented by Kathleen Sullivan, Esq. The following exhibits were admitted into evidence: Petitioner’s Exhibits P-1, P-12, P-14, P-15, P-26, P-28 – P-57, P-59 – P-63, P-65 – P-70, P-75- P-77, P-94, P-96, P-98, P-102 – P-104, and P-106, and District’s Exhibits 1 – 13, 16 – 29, 31, 32, 34 – 37, 38 (pp. 821, 824, 679, 680, and 683 only), 39, 40, and 42.

On January 24, 2014 the ALJ received Respondent’s Motion to Supplement Closing Brief and Respondent’s Closing Brief Supplement. In its motion, Respondent requested an opportunity to address two points raised in Petitioner’s closing brief. On January 31, 2014 the ALJ received Petitioner’s Response to Motion to Supplement

Closing Argument. Petitioner argues that Respondent's motion should be stricken on the basis that the Court did not invite or authorize the parties to comment on each others' closing briefs and that there is no merit to Respondent's argument that supplementation is required by the form or the content of Petitioner's closing argument. The ALJ agrees. The only post-hearing submissions agreed to and permitted by the ALJ were the parties' closing arguments, which were due on January 16, 2014. The record in this case closed on January 17, 2014. Respondent's motion to supplement its closing argument is denied.

PARTIES' POSITIONS and ISSUES PRESENTED

Petitioner requests that the District reimburse her for tuition and school-related costs associated with [Student]'s private placement at [Private School] and pay for [Student]'s placement at [Private School] until he turns twenty-one. Petitioner asserts that the District has failed to provide [Student] with a free appropriate public education ("FAPE") as required by the IDEA. Petitioner further claims that the District's 2011, 2012, and 2013 individualized education programs ("IEPs") were not reasonably calculated to provide [Student] with any educational benefit; that the District's progress reports and data inaccurately and falsely document that [Student] made meaningful progress towards his goals; that the District materially understated [Student]'s behavioral problems and safety risks; and, that [Student]'s placement at [Private School] is appropriate.

The District denies that it failed to provide [Student] with a FAPE and asserts that it complied with all procedural and substantive requirements of the IDEA. The District further argues that all [Student]'s IEPs were reasonably calculated to enable him to receive educational benefit; that he made meaningful progress towards his IEP goals; that the District's recorded data and progress reports are accurate and verifiable; that the District offered [Student] educational services, to the maximum extent appropriate, in the least restrictive environment; and that Petitioner failed to satisfy the IDEA's notice requirement regarding private placement.

The ALJ must determine if the District complied with the IDEA's procedural requirements and afforded [Student]'s parents meaningful participation in the IEP process; if the District offered [Student] a FAPE in the least restrictive environment; if Petitioner complied with the IDEA's notice requirement; and, if [Student]'s placement at [Private School] is appropriate.

FINDINGS OF FACT:

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

1. [Student] is a [age]-year old boy who was born on [date of birth]. In 2007, at the age of two, [Student] was evaluated by the staff of the JFK Center and diagnosed as having an autism spectrum disorder. Autism affects individuals differently but most

individuals with this disorder, including [Student], have difficulty understanding and using verbal language and engaging with peers in social settings. Similarly, transitioning between both new and familiar environments can be difficult for children with autism, just as they are for [Student]. He functions best in highly structured, consistent and predictable settings.

2. Following his assessment at the JFK Center, it was recommended that [Student] start speech-language and occupational therapy, with comprehensive goals in the following areas: Social development, functional, interactive and pretend play with peers, motor development, and daily living skills.

3. [Student] started speech-language and occupational therapy. Initially, he received these therapies through private providers and through a state Medicaid autism waiver program. When [Student] started public school, he was placed on an IEP. Through his IEP, [Student] received special education services, speech-language and occupation therapies and as well as extended school year ("ESY") services. ESY services are provided to students to help them maintain previously learned skills and reduce regression during extended breaks.

4. [Student] started preschool at [Elementary School #1] in the fall of 2009. He was placed in the early childhood special education classroom. [Student]'s preschool class size was relatively small. He performed well in school and progressed towards his educational goals. By all accounts, [Student] enjoyed attending preschool.

5. Each student on an IEP is required to have a meeting at least once every year. The purpose of the annual meeting is for the student's IEP team, which includes teachers, service providers and parents, to review the student's progress over the past year and develop goals and objectives for the following year. Every three years, the District is required to hold a triennial IEP meeting to reevaluate and reassess the student's special education eligibility.

6. [Student] had an annual IEP meeting every year he was in District placement. His parents received timely and adequate notice of every meeting and either one or both participated in every District IEP meeting. One or both of [Student]'s parents also attended regularly scheduled parent-teacher conferences and his triennial reviews.

7. As part of the IEP process, the District provided [Student]'s parents with quarterly progress reports, report cards, daily functional assessment observations, and weekly school schedules, all of which contain information about how [Student] was functioning, behaving, and progressing towards his goals. [Student]'s mother and his teachers also used a back-and-forth notebook to communicate how [Student] was doing at home and at school on a nearly daily basis.

8. Throughout the years [Student] was in District placement, the school provided his parents with nearly 400 pages of information about his progress. Much of District's data shows that [Student] was progressing towards his goals.

9. [Student]'s mother acknowledged that the District reported [Student] was progressing; however, she believes that the District manipulated the data and kept lowering [Student]'s goals to show progress, when there was none. The ALJ finds these claims unsupported.

10. At hearing, each of [Student]'s teachers and service providers credibly explained how they measured, analyzed and reported [Student]'s progress. Their results were recorded contemporaneously with their observations and are consistent with the information contained in quarterly progress notes, anecdotal classroom notes and feedback provided by [Student]'s mother as well as private providers.

11. There is also no credible evidence that the District continued to lower [Student]'s goals to show growth. Several of [Student]'s goals were carried over from year-to-year; however, the objectives used to measure progress towards those goals were continuously modified. As [Student] progressed, the complexity of the objectives increased, primarily through decreasing the number of prompts provided during the task and/or increasing the number of successful completions required to meet the goal.

12. [Student]'s first triennial review occurred in May 2010. At that time, the IEP team found him eligible for services and developed goals and objectives for the upcoming year in the areas of social, communication, and motor skills, as well as academics.

13. [Student] started kindergarten at [Elementary School #2] (“[Elementary School #2]”) in the fall of 2010. He was placed in the school's center-based Autism Intensive Learning Center (“ILC”). He also received instruction in the general education classroom. Throughout his placement at [Elementary School #2], [Student] received special education instruction from [ILC teacher], the ILC teacher.

14. [ILC teacher] and the ILC staff have received training in applied behavior analysis (“ABA.”) ABA is the application of the principles of learning and motivation from Behavior Analysis (the scientific study of behavior), and the procedures and technology derived from those principles. Breaking skills down into small steps and providing positive reinforcement when each step is accomplished are just two examples of ABA instruction. ABA has been shown to be an effective method for teaching and reinforcing skills to individuals with autism. The District's ILC program is based on the principles of ABA. One does not have to be certified in ABA in order to teach its principles.

15. [Student] has a difficult time adjusting to changes in routines and schedules. He had a difficult time transitioning from [Elementary School #1] to [Elementary School #2], which is a bigger school. Prior to the start of kindergarten, [ILC teacher] met with [Student] and his teachers at [Elementary School #1] and developed a transition plan

designed to provide consistency and structure for [Student] during and after his move to [Elementary School #2].

16. Despite the plan, it took a while for [Student] to settle in at [Elementary School #2]. He would often engage in refusal behaviors to avoid non-preferred tasks or adults. His refusal behaviors include tantruming, crying, screaming, dropping to the floor and/or running away.

17. At the start of the 2010 school year, [ILC teacher] requested assistance from [Student]'s preschool teacher to deal with these behaviors. Within a few weeks, [Student]'s negative behaviors decreased and he began participating in classroom activities with his peers.

18. Some of methods used by the District to help [Student] communicate his wants and needs and improve his behaviors included picture icons, picture sentence strips in a Picture Exchange Communication System ("PECS") books and, most recently, an iPad.

19. [ILC teacher] and [Student]'s providers also found that using a picture schedule to visually guide [Student] through his days lessened his negative behaviors. The picture schedules and assistive communication technologies used by the District worked well. They helped ease the uncertainty of transitions and changes from one activity to the next.

20. [Student]'s first annual IEP meeting at [Elementary School #2] occurred on May 10, 2011. The IEP team reviewed his progress over the past year and developed goals and objectives for the next school year.

21. During the 2010-2011 school year, [Student] made progress towards many of his goals. He was increasing the length of time he was able to stay on task, complete his work activities, follow one-step directions, communicate his needs and wants through picture choices, imitate gestures in physical education ("PE") and music, match body parts, and identify certain colors, letters, and new picture objects. [Student] was still having difficulty initiating social interactions with his peers, but he was able to sit side-by-side with his classmates for longer periods of time during group circle time.

22. At the May 2011 IEP meeting the team developed goals and objectives for the next year in the following areas: Transitions, toileting, social interaction, social communication, language arts, fine and gross motor skills, and behavior. Some of the goals were carried over from [Student]'s 2010 IEP; some were new goals.

23. [Student] again attended summer school for five weeks during the summer of 2011. When he returned to school in the fall of 2011, his teachers were [ILC teacher] and [Teacher], the general education first grade teacher. Similar to the previous fall, [Student] had difficulty transitioning back to school. His behaviors had regressed. He did not want to go to school and had a hard time participating in classroom activities

once he got to school. He would cry, drop to the floor and/or run, trying to avoid non-preferred activities and adults. This behavior was occurring both at home and at school.

24. During the 2011-2012 school year, [Student] had good days and bad days. [ILC teacher] and [Teacher], worked closely together throughout the year, developing more effective ways of keeping [Student] engaged in his school work and participate in classroom activities. Overall, [Student] showed some improvement in his refusal behaviors, but his eloping behaviors continued to be a problem.

25. In the second semester of the 2011-2012 school year, the District determined that because [Student]'s behavior problems were increasing and, at times, interfering with his ability to participate in school activities, a behavior support plan ("BSP") needed to be developed.

26. [Student]'s annual IEP meeting was held on May 8, 2012. At the meeting, the team reviewed [Student]'s progress over the school year and developed goals and objectives for the next year in the following areas: Self-advocacy, fine motor and perceptual motor access skills, daily living skills, and receptive and expressive communication skills. The team also developed a BSP.

27. By the end of [Student]'s first grade year, he had made meaningful progress towards several of his IEP goals. He was successfully transitioning within the school 60% of the time with fewer, minimal prompts. He was successfully transitioning to his seat upon entering the classroom nearly 50% of the time and consistently participating more in circle time, at times, up to 20 minutes in both the general education classroom and in the ILC.

28. [Student] also made progress towards several of his language goals. By mid-semester, he was independently writing his name two times out of every five tries, tracing pictures, receptively identifying stars, hearts, circles and triangles with 80% accuracy, following one-step verbal directions when prompted and demonstrating progress towards following two-step directions. Occasionally, he was using two words to comment on or request items, using one and two words to request his wants and needs, and intermittently, in structured settings with verbal prompting, using a three-word phrase. He was also receptively identifying pictures, copying simple drawings in two out of five tries, and matching numbers up to 20.

29. By March 2012, [Student] was able to participate in music and P.E. for 20 minutes on a regular basis and was performing simple back and forth routines with his peers, taking turns when prompted by an adult, compared to the fall of 2011, when [Student] was largely resisting interacting with his peers in the classroom.

30. During the summer between first and second grade, [Student] attended another five-week ESY program. When [Student] returned to school in the fall of 2012, just as he had done in the prior two years, he regressed. His refusal behaviors were worse

than they had been at the end of the 2011-2012 school year and he was running more frequently. The big difference was that in the fall of 2012 he started eloping or trying to elope from the building more often.

31. Twice, at the beginning of the 2012 school year, [Student] left the ILC classroom, walked through the outdoor classroom and entered the house of a neighbor whose backyard shares a property line with the school. And, at least one other time, one of his para-educators lost sight of him. She worried he had left the building and had gotten lost. He hadn't; he was hiding in another teacher's classroom. Nevertheless, everyone, including his teachers and school administrators were very concerned about the increasing elopements. Everyone on the team knew something more needed to be done to address the situation.

32. [ILC teacher] started by requesting help from the District's autism team. The autism team met with [ILC teacher] several times and devised a series of discrete trial training procedures to help address [Student]'s elopements.

33. Discrete trial training is one of several ABA methods used with autistic children to effectively teach new skills and reinforce old ones. It is a method of teaching that uses simplified and structured steps. Instead of teaching an entire skill at one time, discrete trial training breaks the overall skill down into small steps and deploys discrete trials to teach each step of the skill, one at a time.

34. The discrete trials used by the autism team included stop signs. The team placed stop signs around the areas in the school where [Student] commonly ran to or from. Then, the team worked one-on-one with [Student], teaching him to stop at the signs. Each time [Student] stopped at a stop sign and did not run, he was rewarded. The trials were effective at reducing his elopements for a while, but within a few weeks his eloping behaviors resumed.

35. By October 2012, [Student] was still running or trying to run and his refusal behaviors were at an all time high. There were days when his behaviors caused him to miss class, Specials (art, PE, and music), and even recess. His screaming, tantruming, and aggression had all escalated. [Student]'s parents and teachers agreed it was time to meet and figure out how to help reduce these behaviors.

36. The IEP team held a special IEP meeting on October 23, 2012 to discuss [Student]'s behaviors and revise his IEP and/or BSP.

37. At the October 23 meeting some of the members felt that [Student] was acting out and running more frequently because he was not being challenged or motivated enough by his current work activities. Hoping that a change in work activities would help, the IEP team modified some of [Student]'s school assignments to make them more challenging. The team also agreed that all the para-educators who work with [Student] should receive additional training on his BSP and that [Student] should have

access to his visual break menu throughout the entire day to request a break whenever it was perceived he was becoming frustrated. The team agreed to meet again in 4 - 6 weeks to review the data and [Student]'s progress.

38. A couple of sections on the October 23, 2012 BSP are not filled in, including the alternate behavior section, which is where the replacement behavior and the plan for teaching the behavior are generally documented. Optimally, all sections of plan should have been completed; however, the notes attached to the plan, which are also part of the plan, contain this information.

39. The October 23, 2012 BSP was implemented immediately and was very successful in reducing [Student]'s refusal behaviors as well as his elopements. He no longer ran from the building and was re-engaged in his school work. Following the October 23 meeting, several of his teachers and providers described [Student] as "a new kid."

40. When the October 23, 2012 meeting was over, [Student]'s mother expressed her concerns about [Student]'s safety. She also expressed concern about his lack of progress at school and said she was looking into [Private School] as an alternative placement for [Student]. This was the first time the team had heard [Student]'s mother express concern about her son's progress. In fact, several times in the back-and-forth notebook, [Student]'s mother told [ILC teacher] how pleased she was to learn how well [Student] was doing in school.

41. The staff directed [Student]'s mother to speak with [Special Education Director], the Special Education Director, about her concerns and [Student]'s placement at [Private School]. [Student]'s mother did not contact [Special Education Director] about sending [Student] to [Private School] until sometime in mid-January 2013.

42. On December 4, 2012 members of the District and [Student]'s mother met to discuss how well [Student] was doing. The December 4 meeting was not an IEP meeting; it was described as a family partnership or "check-in" meeting.

43. At the December 4, 2012 meeting, [Student]'s mother reported she was happy [Student] was making progress, but said she was still looking at [Private School]. Unbeknown to the District, the day before the meeting, on December 3, 2012, [Student]'s mother had completed enrollment paperwork for [Student] to attend [Private School]. And the day after the December 4, 2012 meeting, on December 5, 2012, in the back-and-forth notebook, [Student]'s mother wrote to [ILC teacher], "I am so happy to hear all about [Student]'s progress at school. You guys are doing an awesome job."¹

¹ Exhibit 19, p. 00201.

44. [Student]'s parents withdrew him from the District on December 21, 2012. The administration was not notified about [Student]'s enrollment at [Private School] until after school started in January 2013.

45. [Student] started school at [Private School] in early January 2013. At [Private School], [Student] attends classes with other disabled children. He does not receive academic or extracurricular instruction with nondisabled peers.

46. At [Elementary School #2], [Student] was educated with and interacted daily with nondisabled peers. [Student] benefited from these interactions as did his peers. It is widely accepted that autistic children benefit by being educated with nondisabled peers. [Student] developed friendships with some of his general education classmates and learned to model some of their behaviors. In his current placement at [Private School], [Student] does not have the opportunity to learn from and benefit from interacting with nondisabled peers.

47. Although [Student] had been unilaterally removed from the District by his parents and was attending [Private School], the District was still required to conduct a triennial review and consider [Student]'s private placement. The triennial IEP meeting occurred on April 3, 2013. [Student]'s mother attended the meeting.

48. At the April 3, 2013 meeting, the team reviewed and discussed [Student]'s progress during his first semester at [Elementary School #2] in 2012; it also reviewed [Private School] records and the testing data provided by [Student]'s mother.

49. The District's data shows that while [Student] was in District placement, and prior to attending [Private School], he was making meaningful progress towards several of his IEP goals, including those in the areas of: Literacy, math, motor skills, time management, transitions, social skills and communication.

50. While at [Elementary School #2], [Student] progressed in his ability to correctly write certain letters of the alphabet, forming them from top to bottom, while applying adequate pressure with his pencil. He was also demonstrating some understanding of letters and letter sounds and able to express the letters of his name as well as the letters K, X, J, Y, Z and P. He was able to match numbers up to 20, could receptively identify numbers 0 - 12 out of a field of two with 70% accuracy, and expressively identify numbers 1, 2, 5, 8 and 12. Many of these skills [Student] had not been able to successfully perform at the time of his last IEP meeting in May 2012.

51. In the fall of 2012, [Student] could only participate in seated work with no more than one prompt one time during an entire school week. By December 2012, he was participating in at least two seated work tasks, with only one prompt, a total of sixteen times during sixteen school days. In this area, [Student] not only met, but exceeded his goal.

52. At the start of the 2012 school year, [Student] continued to struggle with transitions. He was having the greatest difficulty transitioning to and from the bathroom and to and from Specials. By December 2012, however, [Student] was successfully transitioning independently to new activities, between school environments in eight out of ten opportunities, and nearly 100% of the time between preferred and non-preferred activities. By December 2012, [Student] had met both objectives in his transitions goal.

53. By December 2012, [Student] was also making some progress towards his social skills goals. In May 2012, [Student] was mainly engaged in parallel play with his peers. Towards the end of 2012, however, he was more actively engaged in playing with his peers. He still had difficulty taking turns, but in structured social group activities, he showed an ability to take turns with his peers, when prompted by an adult.

54. In the area of communication, [Student] was also showing some growth. He was communicating his needs and wants more effectively through verbalizations, PECS and his iPad. By December 2012, when [Student] was showing signs of frustration and presented with his iPad or his PECS break menu, he made an appropriate choice to take a break a total of twenty-two times, which is more than a 50% increase from his performance in October 2012.

55. At the April 2013 IEP meeting, the District also developed a BSP and created goals and objectives for the 2013-2014 school year in the following areas: Physical hygiene, communication - making appropriate requests, access skills, social interaction, fine motor skills for writing, receptive language, literacy, reading comprehension, number identification, toileting, and personal care.

56. The District's April 2013 IEP provides [Student] with daily special education instruction with a certified special education teacher in small group settings, one-to-one instruction in math, 90 hours a month of occupational therapy, 240 hours a month of speech language therapy, and 30 hours of month of consultation services from the school psychologist. It also provides for [Student] to be educated with his peers in a general education classroom, up to 40% of the time, during literacy, computers and library, as well as Specials, lunch and recess.

57. At the April 3, 2013 meeting, [Student]'s mother rejected the District's IEP and requested that the District pay for his placement at [Private School]. She believes that the April 3, 2013 IEP does not provide any meaningful academic benefit to [Student] and that it is not substantially different from his two previous IEPs, which she believes were also deficient. According to [Student]'s mother, since 2010 [Student] has not made any academic progress and has even shown signs of regression. It is her belief that without the one-to-one instruction [Student] is receiving at [Private School], he is at risk for institutionalization and/or incarceration. The ALJ does not find these assertions supported by the evidence.

58. There is no credible or persuasive evidence that [Student] requires one-to-one instruction across all settings in order to learn. He has demonstrated that he has the ability to learn in small group settings and with his nondisabled peers in the general education classroom with the supports and services that have been provided by the District. Further, there is no credible evidence that without private placement he is at risk for institutionalization or incarceration. The District's October 23, 2012 BSP effectively reduced his negative behaviors, which kept him safe.

59. Both parties offered expert opinion testimony. Dr. Freeman, the District's expert, testified that the District's IEPs were reasonably calculated to provide [Student] with meaningful educational benefit; that [Student] made slow but steady progress towards his goals; and, that District's April 3, 2013 IEP provides [Student] a FAPE in the least restrictive environment. Dr. Huckabee, who testified on behalf of [Student]'s mother, opined that [Student] not only failed to make academic progress while in District placement but that he regressed; that [Student] cannot make academic progress without one-to-one instruction across all settings; and, that without the supports and services he is currently receiving at [Private School], his behaviors will continue to decline, putting him at risk for institutionalization and/or incarceration.

60. The ALJ has considered the opinions of both parties' experts and finds those expressed by Dr. Freeman supported by the credible evidence and consistent with the testimony of [Student]'s District teachers and services providers who have worked directly with him for several years and have personally observed his progress. The ALJ has afforded less weight to Dr. Huckabee's opinions for the following primary reasons:

- a. Many of Dr. Huckabee's opinions regarding [Student]'s lack of progress and regression are based on the premise that for several years the District has been manipulating the data and lowering [Student]'s goals in order to show progress when there was none. For reasons already discussed, the ALJ finds these assertions unsupported, and therefore, not persuasive.
- b. Dr. Huckabee also based some of her regression opinions on the scores [Student] received on the assessments she and her colleagues administered. Yet, there is some question as to whether these scores validly represent [Student]'s skills or show regression. First, the tests were performed five months after [Student] was removed from [Elementary School #2]; if there has been regression, it could have been occurring at [Private School]. Second, [Student] refused to complete or perform all of the tests, which could affect the validity his scores. And, finally, at least one score Dr. Huckabee relied on to show regression is a composite score. Composite scores do not always accurately reflect skill levels of children who function high in certain areas and low in others, such as [Student].

- c. Lastly, some of Dr. Huckabee's opinions were contradicted by the testimony of [Student]'s mother and [Private School] records. [Student]'s mother testified that [Student] made progress in school up until May 2010; yet, Dr. Huckabee found no evidence of academic progress at any time while [Student] was in District placement, dating back to 2008. Dr. Huckabee also testified that since [Student] started attending [Private School] his behaviors have significantly improved and his elopements have significantly decreased. Yet, school records show that [Student]'s refusal behaviors and elopements have continued at [Private School] with nearly the same intensity and frequency as they were occurring at [Elementary School #2].

61. The ALJ finds that the District's 2011, 2012 and 2013 IEPs are all reasonably calculated to enable [Student] to receive educational benefit; that the goals and objectives in the IEPs are appropriate in that they are targeted to address [Student]'s areas of need, are objective and measurable; and, that [Student] made some meaningful progress towards many of the goals and objectives in his 2011 and 2012 IEPs. Moreover, the District's April 3, 2013 IEP is reasonably calculated to enable [Student] to receive educational benefit in the least restrictive environment.

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 FAPE is defined as "special education and related services . . . provided in conformity with an individualized education program." 20 U.S.C. § 1401(9). 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 *Rowley*, 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.

To determine whether the District has complied with the requirement to provide FAPE, the United States Supreme Court established the following two-prong test:

First, has the State complied with the procedures set forth in the Act? And second, is the Individualized Education Program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefit?

Rowley, 458 U.S. at 206-7.

The 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).

A parent or public agency may file a due process complaint relating to, among other things, the provision of FAPE. The due process complaint must allege a violation that occurred not more than two years before the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 34 C.F.R. § 300.507 (a)(1) and (2). 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, in the least restrictive environment. The controlling decision in the Tenth Circuit regarding the provisioning of FAPE is *Thompson R2-J Sch. Dist. V. Luke*, 540 F.3d 1143, 1148 (10th Cir. 2008). In *Thompson*, the Court found that that a school district had provided a disabled student with a FAPE when demonstrable evidence from the student's educational records established that the student made some measureable progress on the goals and objectives in his IEP. *Id* at 1148.

In her complaint, Petitioner contends that the IEPs developed by the District beginning in 2010 failed to meet [Student]'s needs and that during the 2010-2011 school year he made *de minimis* progress while his behavioral regression was stark.² And, rather than recognizing [Student]'s lack of progress, the District repeated the inadequate levels of support in school years 2011-2012 and 2012-2013. Petitioner argues that the evidence at trial shows lack of meaningful progress from 2010 to 2012 and contends that the Court should begin its analysis of the adequacy of [Student]'s academic progress with the recognition that his potential for progress is considerably greater than the progress he made at [Elementary School #2]. The ALJ disagrees with Petitioner's argument that determining [Student]'s potential is the appropriate standard for determining FAPE. The standard for determining whether the District provided [Student] with a FAPE is whether he made some measureable progress on the goals

² The IDEA has a two-year statute of limitations. Based on the date of her complaint, which was filed on September 5, 2013, at hearing, Petitioner withdrew her claims regarding the 2010-2011 school year.

and objectives in his IEP as demonstrated in his educational records, not whether he achieved his potential. See, *Thompson* at 1148. (Congress simply did not guarantee children "a potential-maximizing education," *Thompson*, 540 F.3d at FN 11.) To comply with the requirements of the IDEA, the District is not required to provide services sufficient to maximize each child's potential. *O'Toole v. Olathe Dist. School*, 144 F.3d 692, 697-98 (10th Cir. 1998).

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. 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).

The District's IEPs contain detailed descriptions of [Student]'s present levels of educational performance, statements of annual goals and objectives with evaluation procedures and schedules for determining progress towards those goals and objectives, and a description of how supports and services are to be provided to [Student] during the day, week or month. Since [Student] started school at [Elementary School #2], the District has provided notice to his parents of all IEP and other parent meetings, has considered and included input from [Student]'s parents and outside providers about his progress and needs, has routinely provided his parents with information about [Student]'s progress, and has performed all required and necessary evaluations. Over the past several years, the District has shared approximately 400 pages of information with [Student]'s parents about his progress and behavioral problems. And, for at least two of those years, [ILC teacher] and [Student]'s mother had frequent communications about [Student]'s home and school behaviors in a daily back-and-forth notebook. The ALJ concludes that the District has complied with all the IDEA's procedural

requirements in preparing [Student]'s IEPs and reporting on his progress.

The ALJ also concludes that [Student] made some measureable progress towards his IEP goals while in District placement. There is no credible evidence that the District manipulated the data or lowered [Student]'s goals each year to demonstrate growth or progress when there was none. The District's IEP data is supported by and consistent with the information that was recorded contemporaneously by [Student]'s teachers, service providers, and para-educators in quarterly progress reports, anecdotal classroom notes and the back-and-forth notebook. [Student] did not always make progress and when he did not, the District staff documented it. If the staff had been manipulating the data to show progress even when it was not occurring, there would be no reason for them to have reported the times when [Student] made no progress, made inadequate progress or even regressed, yet they did. Some of [Student]'s goals were modified or discontinued; yet, towards several, he showed slow, but steady gains. Even Dr. Huckabee, who testified that [Student] had made no academic progress since 2008, conceded that [Student]'s verbal skills had improved at [Elementary School #2].

Petitioner contends that rather than educate [Student], the District simply carried over, from year-to-year, the same ineffective and deficient IEP goals, unconcerned about [Student]'s progress. The ALJ disagrees. Several of [Student]'s IEP goals were carried over from one year to the next. However, the goals were not deficient. The mere fact that many of the goals appear on each year's IEP does not mean that [Student] failed to progress. As the result of his disability, [Student] continued to need support in his certain areas, including transitions, communication, language, and social skills. The continuation of goals in these areas is appropriate. Further, although several of [Student]'s overall goals were carried over, each year the District's IEP team reevaluated the data and modified each goals' objectives to account for [Student]'s progress and needs.

With regard to the District's April 3, 2013 IEP, the ALJ concludes that it, too, is reasonably calculated to enable [Student] to receive educational benefit. The goals and objectives in the 2013 IEP are more robust than the prior year's program and the goals and objectives are specifically targeted to the areas in which [Student] needs the most support. The District's 2013 IEP provides [Student] with daily special education instruction in small group settings, one-to-one instruction in math, instruction with supports in the general education classroom and in extracurricular activities, as well as several hours of occupational and speech language therapy, and psychological consultation services. The IDEA does not guarantee outcomes and an IEP does not have to provide the best conceivable education. 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.

Behavior Support Plan

Petitioner contends that the District's April 3, 2013 IEP denies [Student] a FAPE because the proposed placement fails to ensure [Student]'s safety and does not effectively address his behavioral needs. A BSP or a behavioral intervention plan ("BIP") is a set of interventions, supports and strategies designed to assist a student whose behavior impedes his own learning or the learning of others. The IDEA requires districts to consider the need for a BSP when a student exhibits problem behavior(s), but it does not mandate the plan's format or contents. Districts have broad discretion in developing a BSP, which are to be done on a case-by-case basis, taking into account the particular student's behavioral needs, positive behavioral interventions and supports, and other strategies to address that behavior. 34 C.F.R. 300.324 (a)(2)(i).

No one disputes that for several years [Student] has engaged in negative behaviors that, at times, have interfered with his learning process and placed him in danger. Beginning in May 2011 the District developed, as part of [Student]'s IEP, a BSP. The plan was initially effective at reducing his problem behaviors and was revised in the fall of 2012 when more supports and services were needed to address his increasing refusal and elopement behaviors. After the October 23, 2012 BSP was implemented, [Student]'s behaviors improved and he remained safe in District placement. If the District had failed to address [Student]'s behaviors, it could have amounted to a denial of FAPE; however, the District took a proactive approach and addressed the situation.

Since [Student]'s behaviors began interfering with his ability to participate in school activities dating back to the 2011-2012 school year, the District's staff has actively worked together to find new and better methods of controlling and mitigating [Student]'s behavioral problems. The IEP team developed several behavior plans, enlisted the help of the District's autism team, worked directly with [Student]'s parents and outside providers to gather information, conducted discrete trial training procedures, and provided ongoing training to [Student]'s para-educators. The ALJ concludes that the proposed placement in the District's April 3, 2013 IEP appropriately addresses his behavioral needs and is designed to keep him safe.

Least Restrictive Environment

In addition to providing personalized instruction for a disabled student, each state must comply with the IDEA's requirement that the student's personalized instruction be provided in the least restrictive environment ("LRE"). Districts are required to educate students with disabilities with their nondisabled peers to the maximum extent appropriate. 34 C.F.R. § 300.114(a)(2)(i).

The controlling case in the Tenth Circuit regarding LRE is *L.B. v. Nebo Sch. Dist.*, 379 F.3rd 966, 978 (10th Cir. 2004). In *Nebo*, the parents of a child diagnosed with autism, unilaterally removed their child from the Nebo School District and placed her at

their own expense in a private preschool. Although the student's parents generally agreed with the goals in Nebo's proposed IEP, they disagreed with Nebo's proposal to place their child at Park View. Park View is a special education preschool populated primarily by disabled students. Following the due process hearing, the hearing officer found that Nebo did not violate the LRE requirement and that Appellants had failed to present evidence that the student was progressing on her IEP at the private preschool. *Nebo* at 973. Appellants challenged that finding on appeal. The Tenth Circuit Court concluded that Park View was not the student's least restrictive environment. *Id.* at 975.

In its decision in *Nebo*, the Court held:

In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). . . Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. (citing *Murray v. Montrose County Sch. Dist.*, 51 F3d 921, 926 (10th Cir. 1995)). Thus, the LRE requirement is a specific statutory mandate. It is not, as the district court in this case mistakenly believed, a question about educational methodology.

Nebo at 976.

The educational environment at [Private School] is more restrictive than the one proposed by the District in its April 3, 2013 IEP. At [Private School], [Student] is being educated with only disabled peers. He is not receiving instruction or participating in extracurricular activities with his nondisabled peers. 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 evidence shows that [Student] is capable of learning in a less restrictive

environment than the one is currently in at [Private School]. Petitioner's assertion that without the services and supports [Student] is receiving in private placement at [Private School], he is at risk for institutionalization and/or incarceration is not supported. [Student] showed progress and growth at [Elementary School #2] without one-to-one instruction across all settings. He is capable of being educated with other nondisabled children and was benefiting from his interactions with his nondisabled peers by learning how to model their behavior. The ALJ concludes that District's proposed placement in the April 2013 is reasonably calculated to enable [Student] to receive educational benefit and complies with LRE mandate of the IDEA.

IDEA's Notice Requirement

A request for tuition reimbursement may be reduced or denied if at the most recent IEP meeting, prior to the removal, or at least 10 business days prior to removing the child from school, the parents failed to inform the IEP team that they were rejecting the proposed placement, what their concerns were, and their intent to enroll the student in a private school at public expense. 34 C.F.R. § 300.148(d)(1).

The last IEP meeting that was held while [Student] was still in District placement occurred on October 23, 2012. Petitioner did not reject the District's IEP at that meeting. After the meeting was over, Petitioner reiterated her concerns about [Student]'s safety and his lack of academic progress. She informed the staff that she was looking into [Private School]. The District staff directed Petitioner to discuss her placement concerns with [Special Education Director]. Petitioner enrolled [Student] at [Private School] on December 3, 2012; however, she did not notify the District about [Student]'s enrollment at [Private School] until after school started in January 2013. By that time, [Student] had been enrolled at [Private School] for several weeks. Petitioner contends that she informed the District at the December 4, 2012 meeting that she was rejecting the District's IEP and enrolling [Student] at [Private School]. The evidence does not support Petitioner's testimony. The December 4 meeting was not an IEP meeting. Additionally, the only information Petitioner provided at that meeting was that she was pleased [Student] was making progress but that she was still looking into [Private School]. She did not reject the District's IEP or disclosed that she had already enrolled [Student] at [Private School] at the December 4, 2012 meeting. Petitioner's general statements about exploring the possibility of enrolling [Student] at [Private School] after the October 23, 2012 IEP meeting and at the December 4, 2012 partnership meeting do not satisfy the IDEA's notice requirement.

CONCLUSIONS OF LAW

1. Petitioner is seeking tuition reimbursement for a private placement, therefore, she has the burden of proving by a preponderance of the evidence that the District failed to provide [Student] with a FAPE, in the least restrictive environment. Petitioner has not met her burden.

2. Between 2011 and 2013, the District developed, implemented and annually revised IEPs that were calculated to meet [Student]'s specific needs and educate him in the least restrictive environment.
3. The District's 2011, 2012, and 2013 IEPs contain goals and objectives that are reasonably calculated for [Student] to receive educational benefit.
4. [Student] made some academic progress towards many of the goals and objectives in his IEPs during his placement within the District.
5. At all times relevant to this decision, the District provided [Student] with a FAPE, as required by the IDEA.
6. Petitioner failed to comply with the IDEA's notice requirement for private placement tuition reimbursement.

DECISION

A District is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a FAPE available to the child and the parent(s) elected to place the child in a private school or facility. 34 CFR 300.148 (a). The ALJ concludes that Petitioner has not met her burden of establishing a claim for tuition reimbursement or ongoing tuition costs associated with [Student]'s placement at [Private School] as the District provided [Student] with a FAPE at all times relevant to this decision and Petitioner failed to comply with the IDEA's notice requirement.

This decision is considered a final decision and subject to appeal pursuant to 34 C.F.R. §§ 300.514(b) and 300.516.

DONE and SIGNED this 3rd day of February, 2014

MICHELLE A. NORCROSS
Administrative Law Judge