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| STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203 | <p style="text-align: center;">▲ COURT USE ONLY ▲</p> |
| <p>[FATHER] and [MOTHER] on behalf of [STUDENT], a minor, Complainants,</p> <p>vs.</p> <p>HARRISON SCHOOL DISTRICT #2, Respondent.</p> | |
| DECISION | |

Complainants filed this due process complaint after Harrison School District # 2 (the District) changed Complainants' son's ([Student]) placement from [Private Behavioral Facility] to [Community School] ([Community School]). This proceeding is subject to the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, § 2220-R-6.02. Hearing was held February 28, March 1, March 9 and March 10, 2017, before Administrative Law Judge Hollyce Farrell (ALJ). On February 28, 2017, the hearing was held at the Office of Administrative Courts at 1525 Sherman Street, Courtroom 5, in Denver, Colorado. The remaining days of hearing were held at the Office of Administrative Courts Regional Office, 2864 S. Circle, Suite 810, Colorado Springs, Colorado. Jack D. Robinson, Esq., Spies, Powers & Robinson, represented the Complainants. Wm. Kelly Dude, Esq., Anderson, Dude & Lebel, P.C., represented the District. At hearing, Complainants' Exhibits 1-4, 6-12, and 14-16 and Respondent's Exhibits B through L were admitted into evidence. Complainant's Exhibits 13 and 16 were offered, but not admitted into evidence. After the hearing concluded, the parties were given additional time to submit briefs on the issue of reimbursement. The final brief was submitted on March 17, 2017. The hearing was digitally recorded.

Case Summary

[Student] is a [age] year-old boy who has been diagnosed with autism spectrum disorder (autism) and speech delays. He moved to Colorado Springs from [Another State] in 2013. Upon moving to Colorado, [Student]'s mother met with the District about enrolling [Student] in school. In December 2013, the District placed [Student] at [Private Behavioral Facility], a private behavioral facility in Colorado Springs.

In 2014, the District proposed moving [Student] from [Private Behavioral Facility] to an unspecified public school after an IEP meeting it held on April 23, 2014. Complainants and the parents of the other three children filed a joint complaint with the Colorado

Department of Education (CDE). After an investigation, the State Complaints Officer (SCO) ruled in favor of the parents, and stated that the District was prohibited from changing the students' placement until it had fulfilled a number of requirements. In January of 2016 and May of 2016 the District convened IEP meetings to determine [Student]'s placement and transition. The IEP team determined that [Student]'s appropriate placement was [Community School]. Complainants object to [Student] being placed at [Community School], and filed a due process complaint.

Based upon the evidence presented at the hearing, the ALJ concludes that the District made an offer of a Free and Appropriate Public Education (FAPE), and that if any procedural violations occurred, those violations did not deprive [Student] of a FAPE. The ALJ further finds that the District did fail to provide [Student] with speech and language therapy (SLP) and occupational therapy (OT), and is ordered to provide compensatory services during any time [Student] was receiving no services after being placed at [Private Behavioral Facility]. The ALJ further finds that while the District owes the amounts paid by the Complainants' insurance company to [Private Behavioral Facility] and to the SLP and OT providers, it is required to reimburse Complainants directly only for the amounts they actually expended.

Findings of Fact

Background

1. [Student] is a [age] year-old boy ([d.o.b.]). He has been diagnosed with autism and speech delay. He has low cognitive function, speech and language delays, and behavioral problems including flapping his arms, rocking back and forth, and needing frequent redirection. [Student]'s behaviors impact his ability to receive an education.

2. Due to his disability, [Student] is eligible for special education services adequate to provide a FAPE.

3. Prior to moving to Colorado Springs, [Student] and his family lived in [Another State]. While he was in school in [Another State], [Student] was on an IEP that included Applied Behavior Analysis (ABA). He also received SLP and OT.

4. [Student] and his family moved to Colorado Springs in the summer of 2013, and his parents enrolled him in the District in August of 2013. Complainants had several meetings with [Special Education Director], who was the District's special education director, and [Special Education Coordinator] who was then the special education coordinator, and is now the District's special education director. In addition to the meetings, [Student]'s mother, [Mother], toured some of the District's schools.

5. Complainants provided [Student]'s [Another State] school records, including his IEP to the District. [Special Education Coordinator] met with [Mother] and they discussed the [Another State] IEP, and the fact that [Student] was receiving ABA in [Another State].

6. The District did not convene a new IEP meeting, but offered [Student] placement in a center based program, and referred him to [Elementary School].

7. [Mother] toured [Elementary School] and told [Special Education Coordinator] that she thought the academics there were too rigorous for [Student]. She toured one other District elementary school, and did not feel that the school was appropriate for [Student]. [Mother] requested placement for [Student] at [Private Behavioral Facility] where she had placed [Student] on the waitlist in the summer of 2013.

8. In 2013, the District did not make an offer for [Student] to attend any particular public school, but did make several referrals for Complainants to consider.

9. The District ultimately offered [Student] placement at [Private Behavioral Facility], which does not offer SLP and OT. The District told [Mother] that a District employee would provide those services. [Student] started attending [Private Behavioral Facility] in November of 2013. When [Student] began attending [Private Behavioral Facility], no one from the District contacted Complainant about SLP or OT for [Student]. [Mother] made several phone calls to the District regarding SLP and OT, but received no response.

10. There was insufficient evidence for the ALJ to conclude that the District offered to provide SLP or OT to [Student] if he was not in placement at a public school. TRICARE, the Complainants' insurance carrier, has been paying for [Student] to receive SLP and OT at [Private Behavioral Facility] since December of 2015 January of 2016.

11. When the private occupational therapist began working with [Student], she noted that he had left hand muscle atrophy and decreased joint integrity due to the use of a maladaptive pencil grasp. She further stated that since she has been working with [Student], and giving him OT interventions, it has made a dramatic difference for him.

12. There is no dispute that [Student]'s speech and language skills have improved at [Private Behavioral Facility] and while working with the private SLP therapist.

13. [Private Behavioral Facility] is a private, non-profit treatment facility in Colorado Springs. It offers one-on-one therapy and uses ABA. The goal of ABA is to teach people to function in society.

14. [Private Behavioral Facility] is not a school certified by the CDE and does not have licensed special education teachers on its staff. Each client is assigned to a lead teacher who is a Board Certified Behavioral Analyst (BCBA), and to several therapists who are trained in ABA. Students do not earn academic credit at [Private Behavioral Facility].

15. [Private Behavioral Facility] focuses on behavioral management because uncontrolled behavior seriously interferes with academic progress. [Student] is on a Behavioral Support Plan (BSP) at [Private Behavioral Facility].

16. [Student] is currently in a classroom with no other students at [Private Behavioral Facility]. His lead teacher is in the classroom and there is a therapist with him all day. He works with a different therapist approximately every 90 minutes.

17. [Student] has limited peer interaction by way of group instruction and facilitated play with autistic other children at [Private Behavioral Facility]; there was no evidence presented that he interacts with typically developing peers while at [Private

Behavioral Facility].

18. [Private Behavioral Facility] uses a curriculum developed by the Center for Autism & Related Disorders, Inc. (C.A.R.D.). It is based upon ABA research and focuses upon eight areas of development: Academic, Cognition, Social, Language, Executive Functions, Adaptive, Plan, and Motor.

19. [Private Behavioral Facility] submits quarterly reports of [Student]'s progress to the District in each area of the eight areas of development.

20. When [Student] first went to [Private Behavioral Facility], his ability to communicate was not very meaningful. While at [Private Behavioral Facility], his communication skills, as well as his behaviors, have improved. [Private Behavioral Facility] continues to work with [Student] on his behaviors and his communication. There is no dispute that [Student] has made progress at [Private Behavioral Facility].

21. In April 2014, the District convened an IEP meeting to discuss [Student]'s services and placement for the following school year. The District did not offer a specific placement for [Student], but told Complainants that although [Student] had made progress at [Private Behavioral Facility], [Private Behavioral Facility] would no longer be an option for him.

22. In August 2014, Complainants and three other complainants filed a state complaint challenging the District's decision to remove their children from [Private Behavioral Facility].

23. In October 2014, a State Complaints Officer (SCO) issued a decision finding that the School District's plan to change [Student]'s placement, and the manner in which it was done, from [Private Behavioral Facility] violated the IDEA. As a remedy, the SCO ordered the School District to resume funding [Student]'s placement at [Private Behavioral Facility] and prohibited any future change of placement until the following three conditions had been met:

a. The District conducted comprehensive evaluations of [Student] in accordance with the requirements of the IDEA;

b. Staff members from any new placement proposed by the District, which staff would have the responsibility for providing special education and related services to [Student], observed [Student] at [Private Behavioral Facility] to understand the nature of his educational and behavioral functioning;

c. The School District convened an IEP meeting, facilitated by a neutral facilitator not employed by the District that complied with all procedural requirements of the IDEA, particularly all of the provisions that the SCO found the School District violated, and developed an IEP that included a description of placement sufficient to allow Respondent to understand what was being proposed.

24. The District did not file a due process complaint to challenge the SCO decision.

The 2016 Evaluation

25. The IDEA requires that children receiving special education be re-evaluated at least once every three years to determine the child's continuing eligibility for special education and the child's educational needs.

26. In April of 2015, [Special Education Coordinator] contacted Complainants by mail, informing them that the District needed to conduct a three year evaluation of [Student], and that the deadline for the evaluation had passed in February of 2015. [Special Education Coordinator] further stated that the evaluation was necessary to update [Student]'s IEP.

27. On May 5, 2015, the District had a formal pre-evaluation meeting with Complainants. Present at the meeting were Complainants and the [Community School] multidisciplinary team, including the middle school special education teacher, the District's coordinator of special programs, and representatives from [Private Behavioral Facility]. During the meeting, it was determined: (1) that evaluation would not begin until August of 2015; (2) that a comprehensive evaluation was needed and (3) that the full 60 day time-line allowance was necessary to ensure that the testing was spread out over 4 to 8 weeks.

28. On August 25, 2015, [School Psychologist], the school psychologist at [Community School], spoke with [Student]'s mother to discuss her concerns and to determine a method for obtaining Complainants' consent for the evaluations. During that phone call it was determined that the testing would take place at [Private Behavioral Facility] in order for [Student] to be as comfortable as possible.

29. On August 25, 2015, the District sent Complainants notice informing them that it would be evaluating [Student] in the following areas: (1) general intelligence; (2) communicative status; (3) academic performance; (4) social and emotional status and (5) motor abilities. At Complainants' request, the notice further informed Complainants of each specific assessment that would be used to evaluate [Student].

30. Complainants ultimately gave their consent for all of the evaluations, and did not request that any additional evaluations be performed. The District did not perform any assessments without Complainants' consent.

31. [Student]'s triennial re-evaluation was conducted in October and November of 2015. The evaluation consisted of a battery of assessments conducted by [School Psychologist], school social worker [Social Worker], speech language pathologist [Speech Language Pathologist], and occupational therapist [Occupational Therapist].

32. The evaluation was comprehensive as required by the SCO's order. Also in compliance with the SCO's order, staff who would be providing services related to special education observed [Student] at [Private Behavioral Facility]. Neither of the special education teachers from [Community School] observed [Student] at [Private Behavioral Facility] during the evaluations.

33. The assessments were performed at [Private Behavioral Facility]. Because [Private Behavioral Facility]'s regular facility had experienced damage from a flood, it was temporarily housed in a church facility, so [Student] was in a setting which was unfamiliar

to him. In the temporary facility, [Student] sat in an open room with many more distractions than [Student] had at [Private Behavioral Facility]'s regular facility. One of the evaluators testified that the atmosphere was "chaotic." Each assessment took in excess of 90 minutes.

34. [Student] was compliant during the testing, and was excited to do the tests even though the evaluators were new to him. The evaluators could tell that [Student] wanted to perform well on tests and he was easily redirected when necessary. However, on some testing days, [Student] appeared to be more distracted by all of the noise and other stimuli in the temporary classroom, but his effort remained satisfactory. [Student] recognized evaluators when they came back for a second day of testing and was eager to proceed with the tests.

35. All of the evaluators are District employees. [Mother] and [Private Behavioral Facility] staff were present for each evaluation. The evaluators talked to [Private Behavioral Facility] staff regarding [Student] each time they went to perform an evaluation. The following assessment tools were used to evaluate [Student] during September and October of 2015:

- Kaufman Assessment Battery for Children, Second Edition (to evaluate general intelligence);
- Kaufman Test of Educational Achievement (to evaluate academic performance), Third Edition;
- Childhood Autism Rating Scales, Second Edition (to evaluate social emotional status);
- Functional Behavior Assessment (to also evaluate social emotional status);
- Clinical Evaluation of Language Fundamentals (to evaluate communication status);
- Developmental Test of Visual Motor Integration (to evaluate motor status);

and

- Functional Occupational Therapy Assessment

36. [School Psychologist] compiled the evaluators' assessments into a Psycho-Educational Report dated December 16, 2015. Ex. F. The findings of each test were thoroughly stated in the Psycho-Educational Report.

37. In addition to the assessments findings, the Psycho-Education Report also included, in detail, the information from the July 6, 2015 through September 30, 2015 quarterly report from [Private Behavioral Facility], which included the following target behaviors for reduction:

- Echolalia
- Inappropriate Vocalizations (IV)

- Scripting
- Gestures
- Visual Self-Stimulatory Behavior (VSSB)
- Physical Feedback (PF)
- Physical Contact (PC)
- Out of Context Laughing (OCL)
- Non-Compliance (NC)

38. In addition to describing the above listed behaviors, the Psycho-Educational Report also contained information about the frequency of each behavior and the progress [Student] had made at [Private Behavioral Facility].

39. The Psycho-Educational Report concluded with the following Implications for Instruction:

- [Student] may benefit from specially designed academic instruction in reading, math, and writing.
- [Student] may benefit from continued modified curriculum and accommodations. [Student] may require instruction and IEP goals based on Extended Evidence Outcomes. He may also need to be working toward modified standards as opposed to regular state standards. [Student] may benefit from access to curriculum at his instructional level as needed.
- [Student] may benefit from continued social skills intervention to address his ability to sustain attention and reciprocal social behavior skill.
- [Student] may benefit from continued speech-language support to address his expressive and receptive language delays.
- Access to computer programs such as spell check, word prediction and text to speech may help assist [Student] in producing written work with a keyboard. Practicing keyboarding would help [Student] become more familiar with key placement and make keyboarding a more suitable alternative to writing.

December 2015 Meeting

40. On December 16, 2015, the District held an eligibility meeting to determine

[Student]'s continued eligibility for special education services. Present at the meeting were:

- [Special Education Coordinator], the Special Education Coordinator
- [Principal], Principal of [Community School]
- [School Psychologist], School Psychologist
- Both Complainants
- [Occupational Therapist], Occupational Therapist at [Community School]
- [Elementary Special Education Teacher], Elementary Special Education Teacher at [Community School]
- [Social Worker], Social Worker at [Community School]
- [Speech Language Pathologist], Speech Language Pathologist at [Community School]
- [Special Education Director], Special Education Director
- [General Education Teacher], General Education Teacher at [Community School]
- [Lead Teacher], Lead Teacher at [Private Behavioral Facility]
- [Program Coordinator], Program Coordinator at [Private Behavioral Facility]

41. On the Determination of Disability report issued by the District, all of the attendees were designated as the Multidisciplinary Team Members.

42. [School Psychologist] facilitated the meeting. Each person who performed an assessment discussed their assessment of [Student] with the team.

43. During the meeting, [Special Education Coordinator] expressed concern that the quarterly report from [Private Behavioral Facility] contained no academic data. The quarterly report did contain some academic data in the areas of: (1) handwriting and penmanship and (2) letter identification. [Mother] stated there was additional academic data, but never supplied it to the District. During the discussion regarding insufficient academic data, the representatives from [Private Behavioral Facility] did not say anything about additional data or if any additional data existed.

44. Complainants did not express any objections regarding the evaluations during the meeting. However, at the end of the meeting, [Mother] said the evaluations were not

representative of [Student], but was unable to express why she thought the evaluations were insufficient. The representatives from [Private Behavioral Facility] did not express any objections or make any corrections to the evaluations or the evaluation results. The [Private Behavioral Facility] representatives did state that [Private Behavioral Facility] provided more academics than were represented in the Psycho-Educational report and [School Psychologist] included that information in the report. No one disregarded [Private Behavioral Facility]'s input.

45. After the meeting had finished, [School Psychologist] was going to make copies of the Determination of Eligibility report (Exhibit G). The representatives from [Private Behavioral Facility] asked if they could have a copy, and [School Psychologist] expressed some hesitation and stated he did not know if the [Private Behavioral Facility] representatives were technically members of the IEP team. Nobody told the [Private Behavioral Facility] representatives that they were not welcome to attend [Student]'s IEP meetings, nor were they told that their input would not be considered. [School Psychologist] simply was not certain if the [Private Behavioral Facility] representatives were members of the IEP team; he did give [Private Behavioral Facility] a copy of the Determination of Eligibility report.

46. The representatives from [Private Behavioral Facility] signed the Determination of Disability as members of his multidisciplinary team. Exhibit G.

47. During the December 2015 eligibility meeting, [Student]'s continued placement at [Private Behavioral Facility] was discussed as an option.

January 8, 2016 IEP Meeting

48. A child's needs, educational services, and placement are determined by an IEP team. Members of the team must include, at a minimum; the child's parent(s), a regular education teacher if the child is or may be placed in a regular education environment, a special education teacher, a supervisory representative of the school district, and, at the discretion of the parent(s), any other person who has knowledge or special expertise regarding the child.

49. Following appropriate notice, an IEP meeting was conducted on January 8, 2016. In compliance with the SCO's October 2014 order, [Facilitator], a neutral facilitator, facilitated the meeting. [Facilitator] is not, and has never been, an employee of the District, nor was she paid by the District for facilitating the meeting. She was not given any information other than she was to assist the parties in drafting an IEP.

50. [School Psychologist] prepared a draft IEP in advance of the meeting and distributed a copy to IEP team members. Prior to the meeting, [School Psychologist] sent a copy of the draft to Complainants, [Private Behavioral Facility], and the District. [School Psychologist] based the draft primarily on his review of the 2016 Psycho-Educational Report because the Quarterly Report from [Private Behavioral Facility] contained almost all

behavioral data. The draft addressed present levels of academic achievement and functional performance; proposed goals: accommodations and modifications; and a proposed service delivery statement.

51. In addition to [Facilitator], the following individuals were present at the meeting:

- Complainants
- [Principal], [Community School] Principal
- [School Psychologist], School Psychologist at [Community School]
- [Occupational Therapist], Occupational Therapist at [Community School]
- [Elementary Special Education Teacher], Elementary Special Education Teacher at [Community School]
- [Social Worker], Social Worker at [Community School]
- [Speech Language Pathologist], Speech Language Pathologist at [Community School]
- [Special Education Director], Special Education Director

52. When [School Psychologist] sent out a notice by email to Complainants regarding the time and date of the meeting, he copied [Private Behavioral Facility] on it. However, no one from [Private Behavioral Facility] attended the meeting. [School Psychologist] copied [Private Behavioral Facility] on all emails he sent to Complainants.

53. Because staff members from [Community School] had conducted the evaluations in the fall of 2015, they were appropriate members of [Student]'s IEP team.

54. [School Psychologist] was very careful about taking notes during the IEP meeting, and to carefully incorporate all of Complainants' concerns, objections and corrections. No one on the team ever disregarded [Mother]'s input. While going through the draft IEP, the other members of the team frequently asked [Mother] if she had questions, and answered every question she did have. [Mother] never stated that a question was not answered to her satisfaction. Complainants were given the opportunity to fully participate in the IEP meeting.

55. When the team discussed the IEP section on Present Levels of Education Performance Summary, each evaluator recapped their findings regarding [Student].

56. It was a concern for [Facilitator] that the quarterly report from [Private

Behavioral Facility] contained almost exclusively behavioral data because it was hard for the team to know what progress he was making on his academics there. At hearing, no data other than the quarterly reports and [Student]'s BSP were provided regarding [Student]'s progress at [Private Behavioral Facility].

57. During the meeting, [Mother] stated that [Student] cannot read, but was working on his letters.

58. The team discussed each section of the draft IEP, including: (1) Student Strengths, Preferences, Interests; (2) Present Levels Of Educational Performance Summary; (3) Consideration of Special Factors; (4) Annual Goals; (5) Extended School Year Determination; (6) State and District Assessments; (7) Service Delivery Statement; (8) Recommended Placement in the Least Restrictive Environment; and (9) Prior Written Notice.

59. During the discussion, [Mother] stated that she did not feel that the Student Needs and Impact of Disability "hit" all of [Student]'s needs with his disability.

60. The team established the following goals for [Student]:

(1) In the area of Reading, by his next IEP [Student] will identify all 26 uppercase letters and the corresponding sound with 80% accuracy in 5/5 consecutive opportunities;

(2) In the area of Reading, by his next IEP, [Student] will be able to read 15 high frequency sight words with 80% accuracy in 5/5 opportunities;

(3) In the area of Mathematics, by his next IEP, [Student] will increase his mathematical computation skills to the Kindergarten level as evidenced by 1:1 correspondence to 20, solving addition problems to 10, and identifying numbers to 50 with 80% accuracy in 4/5 consecutive opportunities;

(4) In the area of Social/Emotional Wellness, by his next IEP, [Student] will maintain attention to the speaker/activity assigned for a minimum of 4 minutes with no more than 2 adult prompts 80% of the time in 4/5 consecutive opportunities;

(5) In the area of Writing, by the next annual review, [Student] will keyboard at a rate of 4 WMP (1 word = 5 keystrokes), when copying from a visual model, given no more than 2 verbal or tactile cues, 3/5 opportunities;

(6) In the area of Language, by the end of the IEP year, [Student] will increase his ability to formulate correct sentences 80% of the time over 3 consecutive sessions;

(7) In the area of Language, by the end of the IEP, [Student] will increase his ability to follow 2-3 step directions of increasing length and complexity that includes the following concepts, spatial, temporal and sequential, with 80% over 3 consecutive sessions; and

(8) In the area of Communication, by the end of the IEP year, [Student] will improve his communication skills by participating in 3 communication exchanges in 4 out of 5 opportunities over 3 consecutive sessions.

61. Each goal set forth objectives for the end of the year, the end of the first quarter, and the end of third quarter. Exhibit I.

62. With respect to the first reading goal, [Mother] stated that she didn't exactly agree with that goal, but she did not have the data from [Private Behavioral Facility], and that without [Private Behavioral Facility] representatives being there, she could not state his exact progress. However, she stated that the information should be in the [Private Behavioral Facility] quarterly report, which the District had at the meeting.

63. Regarding the Mathematics goal, [Mother] may have said that the goal was too difficult; however, the recording of the meeting was not clear when [Mother] gave her opinion regarding the goal.

64. With respect to the other goals, Complainants did not ask questions or express any objections. At hearing, [Mother] testified that none of the goals were appropriate for [Student]. She stated that some of the goals were inappropriate for [Student] because he had already mastered them; however, the assessments used by the District were different than the assessments used by [Private Behavioral Facility].

65. The IEP contained the following Accommodations and Modifications for [Student]:

- Paper with defined writing spaces
- Sensory strategies within the classroom that support self-regulation
- Repeat directions
- Provide visuals when introducing new ideas or vocabulary terms
- Frequent Sensory Breaks
- Visual schedule during structured times of his day (as needed, due to [Student]'s rigidity with his schedule)
- Warn [Student] before changes within his day or routine
- Limit distractions during small group and independent work time
- Consistent redirections during small group and independent work time
- Extended time on all assessments and assignments (2x typically developing peers)
- 1:1 or small group assessment
- Access to computer/laptop for writing assignments
- Closely monitor student

- Utilize motivation surveys and use motivational items and preferences throughout his day.

66. With respect to Extended School Year (ESY) services, the IEP team determined that predictive factors indicated the need for ESY services. However, the team determined that it needed additional information, such as any regression after school breaks, to determine whether those services were necessary and that a decision would be made no later than April 15, 2016. [Mother] stated that [Student] had always had ESY.

67. The team determined that [Student] did not exhibit the need for a Behavioral Intervention Plan (BIP) based on the behaviors he exhibited during the evaluations and the functional behavioral analysis and in speaking to [Student]'s therapist at [Private Behavioral Facility]. At hearing, members of the team testified that if [Student] came to [Community School], and it was determined that a BIP was necessary, they would hold an amended IEP meeting to add a BIP to his IEP. This was true of other services that [Student] may need if it was determined that the offered services did not meet his needs. Complainants did not object to the lack of a BIP in the IEP.

68. The Service Delivery Statement outlined the specialized instruction areas and related services that [Student] would receive. The Service Delivery Statement did not state that ABA would be provided; however, specific methodologies are not commonly included in a Service Delivery Statement, and many of the services listed incorporate ABA methods.

69. A student's IEP is fluid, and can change to reflect a student's needs. For example, if a goal is inaccurate, it can be adjusted, or if levels of service need to be increased, additional services can be provided. Several of the District's witnesses credibly testified that [Student]'s IEP would be changed if it was discovered that it did not accurately or fully meet his needs, and, in fact, such changes were not uncommon.

70. Prior to the meeting, a determination regarding [Student]'s placement had not been made.

71. The team discussed the advantages and disadvantages of both [Private Behavioral Facility] and [Community School], and listed those in the IEP. Ultimately, the majority of the team determined that FAPE could be provided at [Community School]. The District team members felt that the advantages to [Community School] were that [Student] would receive specialized, small-group, social and academic instruction in the special education classroom for the majority of his school day while still accessing the general education environment to practice learned social skills. The team further determined that it would an advantage would be that [Student] would receive more rigorous, tailored academic instruction in the special education classroom. The District members felt it would be advantageous for [Student] to have access to typically developing peers and increased access to peers in special education.

72. The team also discussed the advantages of [Private Behavioral Facility] which were that [Student] struggles with significant change which could impact his learning. [Mother] expressed that [Student] continues to make progress at [Private Behavioral Facility].

73. [Mother] did not agree with the team's decision that [Community School] was the most appropriate placement for [Student] because [Student] was making progress at [Private Behavioral Facility] and she felt no need to disrupt him or interrupt his services. She stated that she had a complete disagreement with the other team members regarding [Student]'s needs, and that [Private Behavioral Facility] knows exactly what [Student]'s needs are.

74. At the conclusion of the January 8, 2016 IEP meeting, the team discussed [Student]'s placement in the least restrictive environment. All of the team members, with the exception of Complainants, opined that [Student]'s goals could best be met at [Community School] in its TAP program. They District members agreed that [Student] was capable of being in a public school setting, and the public school setting was the least restrictive environment for him. The January 2016 IEP considered [Student]'s unique circumstances and was reasonably calculated to provide him with a FAPE.

75. No transition plan was included in the IEP, but the team did discuss transition. At the conclusion of the meeting, [Mother] went on a tour of [Community School] with the elementary school Special Education teacher.

76. The District anticipated that [Student] would begin school at [Community School] in January 2016.

77. However, on January 25, 2016, an attorney for [Mother] wrote to the District and told them that if they changed [Student]'s placement without [Mother]'s approval, he would file a State Complaint or Due Process Complaint on her behalf.

78. After receipt of the letter, the District allowed [Student] to remain at [Private Behavioral Facility] until May of 2016.

May 2016 IEP Meeting

79. On May 13, 2016, the District convened another IEP meeting. This meeting was primarily to discuss transition from [Private Behavioral Facility] to [Community School], and to review the January 2016 IEP.

80. Present at the May 13, 2016 meeting were:

- [Principal], [Community School]'s principal
- [School Psychologist], [Community School]'s School Psychologist
- [Occupational Therapist], [Community School]'s Occupational Therapist
- [Social Worker], [Community School]'s Social Worker
- [Speech Language Pathologist], [Community School]'s Speech Language Pathologist
- [Dean of Students], Dean of Students
- [Special Education Director], Special Education Director
- [Mother]

- Igor Raykin, an attorney representing Complainants
- [Special Education Middle School Teacher], [Community School]'s Special Education Middle School Teacher
- Kelly Dude, an attorney representing the District
- [Special Education Coordinator], Special Education Coordinator

81. [School Psychologist] copied [Private Behavioral Facility] on his email to Complainants regarding the meeting, but no one from [Private Behavioral Facility] attended the May 13, 2016 meeting.

82. At the conclusion of the meeting, the Complainants' attorney stated that the parties were at an impasse and that [Mother] was very emotional and was firm in her position, and that the District was not going to convince her to change [Student]'s placement to [Community School].

[Community School] TAP Program

83. [Community School] is a K-8 school, which contains a separate program for autistic students (the TAP program). There are special education teachers, one for elementary students in grades 3 through 5 and one for the middle school students in grades 6 through 8.

84. All of the teachers in the TAP program have received training on ABA and use it with their students. They are supervised by a BCBA. The goal of the TAP program is for students to become more successful in the general education setting.

85. Students in the TAP program have interaction throughout the day with general education students. For example, they eat lunch with them and have a recess period with them. Some TAP students are with general education students during instruction. Students in the TAP program are taught adaptive behaviors, and then given the opportunity to use those behaviors with the general education students.

86. When the January 8, 2016 IEP was written, [Student] was in 5th grade, and would have been in the elementary school program at [Community School] if he had attended there. That elementary program has one teacher and one paraprofessional for its six or seven students. The abilities and behaviors of the autistic students varied: three had intellectual disabilities in addition to autism; two were going into the general education classroom for reading; and two were going into the general education classroom for English language instruction.

87. The students in the elementary TAP program are taught in small groups. For the reading group, there were six students, the special education teacher and two paraprofessionals. For the math group, there were nine students and four adults. At times, the teacher or the paraprofessionals work with students on a one-on-one basis. The elementary school teacher credibly testified that if [Student] truly needed a one-on-one paraprofessional at all times, one would have been hired for him.

88. Students in the elementary TAP program exhibited a range of behaviors from

non-compliance to melt-downs, to screaming and throwing things. The elementary school special education teacher credibly testified that the TAP program is able to successfully work with all the ranges of behavior.

89. Students in the elementary TAP program have access to sensory aids, such as swings, wiggle seats, and balls to meet their sensory needs.

90. [Student] is now in 6th grade, and would attend the middle school TAP program if he went to [Community School].

91. In the middle school TAP program, there is one teacher and two paraprofessionals for twelve students. At the time [Student] would have entered the TAP program, there was one paraprofessional.

92. The middle school has a separate sensory room next to the regular classroom which has things like a medicine ball, a couch, curtains, weighted blankets and swings to meet students' sensory needs.

93. In addition to helping students manage their behaviors, the TAP program works with students on achieving academic goals such as reading, math, and language.

94. Several students in the TAP program have successfully transitioned from the TAP program to a higher level program at [Community School].

95. Both the elementary school teacher and the middle school teacher credibly testified that they had reviewed [Student]'s evaluation and that he could be successful in [Community School]'s TAP program.

96. Because the District was confident that it had offered [Student] FAPE, it discontinued its payments to [Private Behavioral Facility] on May 20, 2016.

Reimbursement

97. [Student] has continued to attend [Private Behavioral Facility]. Complainants' insurance carrier, TRICARE, paid the cost for [Student] to attend [Private Behavioral Facility] and the cost for [Student] to receive SLP and OT from a private provider who sends qualified staff to [Private Behavioral Facility] to work with [Student]. [Student]'s parents pay a \$35 premium to TRICARE.

98. The letter from TRICARE approving [Student]'s costs at [Private Behavioral Facility] treats the services as treatments, not tuition. Exhibit 12.

99. When the Complainants filed their due process complaint, the District agreed to pay for [Student]'s tuition at [Private Behavioral Facility], and issued a check for an undisputed amount for the time period from May 20, 2016 through February 28, 2017 made payable to TRICARE and Complainants.

100. Complainants argue that the check should be made payable to them alone. They further argue that the District should pay them for the SLP and OT services paid for by TRICARE since January of 2016. [Student] used to receive OT and SLP at home which was paid by TRICARE. Home services are not in any of [Student]'s IEPs.

101. Complainants presented evidence that TRICARE puts a cap on the number

of units that [Student] can receive during a certain time frame. However, there was insufficient evidence presented that [Student] was exhausting or had exhausted his benefits from TRICARE. [Mother] also testified that TRICARE has no interest in receiving reimbursement of the benefits it has paid on [Student]'s behalf.

102. Complainants filed a due process complaint in order to have [Student] remain at [Private Behavioral Facility], to receive compensatory services for OT and SLP, and to receive reimbursement for the cost of keeping [Student]'s placement at [Private Behavioral Facility] after May 20, 2016, and to receive reimbursement for the cost of the OT and SLP services [Student] has received while at [Private Behavioral Facility].

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. In *Endrew F. v. Douglas County Sch. Dist. RE-1*, 2017 U.S. LEXIS 2025, the United States Supreme Court ruled that *de minimis* progress is not a sufficient goal in providing specialized education services to a child, and that the unique circumstances of the child must be considered.

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.

In their due process complaint, Complainants allege that the January 2016 IEP developed for [Student] was procedurally and substantively deficient, which has resulted in a denial of FAPE for [Student].

Allegations of Procedural Violations

Complainants allege that the IEP meeting did not include representatives from [Private Behavioral Facility], which they allege is a violation of the IDEA. In support of that argument, Complainants cite 34 C.F.R. § 300.25. That section of the C.F.R. outlines procedures that must be followed when a public agency is placing a child into a private school or facility. One of the requirements is that a representative from the private school must be present at IEP meeting. In this case, [Student] had already been placed in a private facility, [Private Behavioral Facility], and that was his placement at the time of the meeting. The ultimate outcome of the January and May 2016 IEP meetings was that [Student]'s proper placement was in a public school. Moreover, representatives from [Private Behavioral Facility] did attend the December 2015 eligibility meeting where the results of [Student]'s evaluations were discussed at length. During that meeting, the representatives from [Private Behavioral Facility] did not object to any of the District's evaluation findings. The [Private Behavioral Facility] representatives did state that [Private Behavioral Facility] provided more academics than indicated in the quarterly report and the Psycho-Educational report, and their input was acknowledged and considered. Because [Student] was not placed in a private facility, the ALJ finds that the District did not violate the provisions of 34 C.F.R. §325. For the reasons stated in this paragraph, if there was a violation, it did not amount to a denial of FAPE for [Student].

Complainants further allege that the District violated the IDEA because the District did not conduct a full or adequate reevaluation of [Student]. The ALJ disagrees. The District sent multiple professionals to [Private Behavioral Facility], who conducted comprehensive tests on [Student] to determine his functional, developmental, behavioral and academic levels. Complainants allege that the District denied [Student] a FAPE

because it only used one assessment to evaluate some portions of the evaluation. Complainants rely on 34 C.F.R. § 300.304 in support of that argument. That section provides that a district must utilize a variety of assessment tools and strategies to gather relevant functional, developmental and academic information about a child. The regulation does not mandate that a variety of assessment tools be utilized for each area evaluated. The District also had the behavioral data contained in [Private Behavioral Facility]'s quarterly report. In compliance with 34 C.F.R. § 304, the District used a variety of assessment tools and strategies to gather the relevant required information about [Student].

Complainants allege a violation of the SCO's decision occurred because a [Community School] special education teacher did not participate in the evaluations at [Private Behavioral Facility]. However, [Community School]'s school psychologist, school social worker, school occupational therapist and school speech and language provider did attend. They all performed thorough evaluations of [Student] which were included in the Psycho-Educational report. At the December 2015 eligibility meeting, those individuals discussed, in detail, the findings of their evaluations with the appropriate special education teacher present. The Psycho-Educational report also contained the information from [Private Behavioral Facility]'s quarterly report. As a result of this information, the special education teachers were able to adequately determine his behavioral and educational functioning.

Complainants also allege that the District predetermined [Student]'s placement before the January 2016 and May 2016 IEP meetings. In support of that argument, they address the April 2014 IEP meeting, the State Complaint and the resulting SCO's decision, and argue that the District was determined to change [Student]'s placement. The ALJ does not find that [Student]'s placement was predetermined. In compliance with the SCO's decision, the District: (1) conducted comprehensive evaluations of [Student]; (2) had staff members from [Community School] observe [Student] at [Private Behavioral Facility]; and (3) convened an IEP meeting with a neutral facilitator and developed an IEP. During the IEP meeting, the IEP team members, which included Complainants, discussed the advantages and disadvantages of both [Community School] and [Private Behavioral Facility]. Complainants made a number of suggestions and their suggestions were adopted into the IEP. Complainants disagreed with the goals established by the IEP, and stated that they did not feel that [Community School] was the appropriate placement for [Student]. Complainants' objections to [Student]'s placement at [Community School] were clearly articulated in the IEP. Complainants were given a full opportunity to participate in both of the IEP meetings, and even had an attorney present at the May 2016 IEP meeting. Complainants asked questions in both meetings which seemed to be answered to their satisfaction. After the January IEP meeting, the majority of the team members concluded that the IEP goals, which were supported by comprehensive evaluations, could best be met at [Community School]. That team had the same opinion after the May 2016 IEP meeting. [Student]'s placement was based on the IEP, and was not the result of predetermination.

Failure to comply with the procedural safeguards amounts to a violation of FAPE

only if: (1) the procedural violations impeded the child's right to FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. § 300.513(a)(2); *C.H. by Hayes v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3rd Cir. 2010) (“[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.”) Multiple procedural violations may cumulatively result in the denial of FAPE even if the violations considered individually do not. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 190 (2nd Cir. 2012). The credible evidence in this case demonstrates that the procedural violations, if any, did not impede [Student]'s right to a FAPE, nor did they significantly impede the parents' opportunity to participate in the decision-making process, nor did they cause a deprivation of [Student]'s educational benefit.

Allegations of Substantive Violations

Individualized Education Program

Complainants allege that the May 2016 IEP is not reasonably calculated to provide [Student] FAPE. 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 2016 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, including SLP and OT are to be provided to [Student] during the day, week or month. The January and May 2016 IEPs are

reasonably calculated to enable [Student] to receive educational benefit after his unique circumstances were strongly evaluated and considered. 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. The January and May 2016 IEPs are reasonably calculated to provide [Student] to make far more than *de minimis* progress.

Behavioral Support Plan

Complainants contend that the District's May 2016 IEP denies [Student] a FAPE because it does not include a BIP. 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 BIP, 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 [Student] has been on a BIP his entire time at [Private Behavioral Facility]. However, he has received significant treatment for his behaviors at [Private Behavioral Facility], and no one disputes that he has made progress on his behaviors. The December 2015 evaluations show that [Student] no longer has the need for a BIP. Thus, the IEPs do not include one. The accommodations developed by the team in the IEPs demonstrate that [Student]'s behaviors will not be ignored, and that methods will be utilized to address his behavioral challenges. Moreover, the District's witnesses credibly testified that if [Student]'s behaviors are such that he needs a BIP, one will be put in place for him. The ALJ concludes that the proposed placement in the District's January and May 2016 IEPs appropriately addresses [Student]'s behavioral needs.

Complainants alleged in their complaint that [Student] needs ABA. As stated in the Findings of Fact, although not specifically stated in the Service Delivery Statement of the 2016 IEPs, there is ABA incorporated into many of the services that [Student] would receive at [Community School]. Complainants cannot mandate a particular education method be used as long as the District chooses a sufficient alternative. *Rowley* at 208.

Additionally, at hearing, Complainants raised the issue that the IEP did not meet [Student]'s needs because ESY services were not offered. Because this issue was not raised in the due process complaint, the ALJ makes no findings on this issue. However, the ALJ does not find it unreasonable that the District would wait until it had more data regarding regression before offering those services.

Placement at [Community School] and Least Restrictive Environment

The educational placement decision must be made by “a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” 34 C.F.R. § 300.116(a)(1). Furthermore, the placement must, among other things, be “based on the child’s IEP.” 34 C.F.R. § 300.116(b)(2). If the parents are allowed to meaningfully participate in the decision, as Complainants were in this case, they do not have the right to veto a decision they do not agree with. *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1131 (9th Cir. 2003); *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 449 (2nd Cir. 2015) (“a parent’s right of participation is not a right to ‘veto’ the agency’s proposed IEP.”)

A school district must ensure that a “continuum of alternative placements” is available to meet the needs of children with disabilities, including education in an institution or other setting as necessary. 34 C.F.R. § 300.115. The IDEA, however, does not obligate a school district to pay the cost of educating a disabled child at a private school if the district made FAPE available to the child and the child’s parents elected to place the child at the private facility. 20 U.S.C. § 1412(a)(10)(C)(i); 34 C.F.R. § 300.148(a). Only if the district has not made FAPE available to the child in a timely manner may the district be required to reimburse the parents for the cost of enrollment in a private school. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148(c).

The fact that a child may be happier or may be making better progress at a private facility is not determinative. *O’Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10th Cir. 1998). An IEP is not inadequate “simply because parents show that a child makes better progress in a different program.” *Id.* Courts must defer to the district’s proposal if that plan is reasonably calculated to provide the child with a FAPE in the least restrictive environment, even if a parent believes a different placement would maximize a child’s educational potential. *Ellenberg v. N.M. Military Institute*, 478 F.3d 1262, 1278 (10th Cir. 2007).

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 Behavioral Facility] is far more restrictive than the one proposed by the District in its January and May 2016 IEPs. At [Private Behavioral Facility], [Student] is being educated with only disabled peers. He is not receiving instruction or participating in extracurricular activities with his nondisabled peers, and rarely, with other disabled 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 comprehensive evaluations performed by the District demonstrate that [Student] is capable of learning in a less restrictive environment than the one he is currently in at [Private Behavioral Facility]. The ALJ concludes that the District's proposed placement in the 2016 IEPs is reasonably calculated to enable [Student] to receive educational benefit and complies with the LRE mandate of the IDEA.

SLP and OT Services

An award of compensatory education is an equitable remedy that “should aim to place disabled children in the same position they would have occupied but for the school district’s violation of the IDEA.” *Reid v. Dist. Of Columbia*, 401 F.3d 516, 518 (D.C. Cir. 2005). The District was aware from [Student]’s IEP from [Another State] that [Student] required SLP and OT services. When it placed [Student] at [Private Behavioral Facility], the District told Complainants that that staff from the District would provide those services, but no one ever contacted Complainants about them. [Mother] made many attempts to contact the District about the SLP and OT services, but received no response. In the April 2014 IEP and the 2016 IEPs, the District included SLP and OT as services for [Student]. Based on the evidence at hearing, it does not appear that the District proposed providing those services to [Student], and transporting him to the District to receive them, until the May 2016 IEP meeting. TRICARE began paying private providers to go to [Private Behavioral Facility] to provide SLP and OT services to [Student] as early as December 2015. The District has agreed to reimburse TRICARE for the services it provided. However, based on the evidence at hearing, there is insufficient evidence to conclude that [Student]’s failure to receive SLP and OT from December of 2013 until he began receiving those services at [Private Behavioral Facility] has resulted in an educational deficit. There was no dispute that [Student] has made progress in speech and language. Moreover, the occupational therapist who has been working with [Student] at [Private Behavioral Facility] has noticed a dramatic difference since she has been working with [Student]. While it is very unfortunate that [Student] went without OT and SLP for a long period of time, there is insufficient evidence for the ALJ to determine that [Student] currently has any educational deficit based on the lack of services. The appropriate remedy is for the District to provide reimbursement for the private services provided.

Reimbursement

As stated in the Findings of Fact, TRICARE has been paying for [Student]’s costs at [Private Behavioral Facility] and for [Student]’s SLP and OT services since at least January of 2016. The District has agreed to pay those costs, but argues that the check should be made payable to both Complainants and TRICARE. Complainants disagree, and argue that they should be directly reimbursed. Complainants have failed to establish that they have suffered any financial loss other than the \$35 per month premium paid to TRICARE, and have failed to establish that they have exhausted, or are exhausting, their benefits through TRICARE. The District is not trying to avoid payment of the expenses and derive a benefit from the payment of the costs by TRICARE. The District is willing to pay TRICARE, the entity who actually expended the resources. In support of its position, the District cites *Emery v. Roanoke City Sch. Bd*, 432 F.3d 294 (4th Cir. 2005), which held that the IDEA allows for reimbursement of funds that the child or his parents may have expended to provide the education that was the school district’s responsibility. In this case, Complainants have not expended any money, other than the monthly premiums, and therefore, are not entitled to reimbursement for funds they have not paid. The ALJ finds that while not required to make the check payable to the TRICARE, as well as Complainants, the District may do so. The District must reimburse Complainants directly for the \$35 monthly premiums and any other amounts they, themselves, expended for

[Student]'s costs at [Private Behavioral Facility] and his SLP and OT services.

CONCLUSIONS OF LAW

1. Complainants request an order requiring the District to place [Student] at [Private Behavioral Facility]. They have the burden of proving by a preponderance of the evidence that the District failed to offer [Student] a FAPE, in the least restrictive environment. Complainants have not met their burden. The District 2016 IEPs constitute an offer of a FAPE for [Student].
2. Complainants have failed to meet their burden that [Student] is entitled to compensatory services for OT and SLP therapy.
3. Complainants have met their burden in establishing that the District owes reimbursement for the costs at [Private Behavioral Facility] and for private OT and SLP services. The District has discretion to include TRICARE as a payee on the reimbursement payment. The District must reimburse Complainants directly for any expenditures, such as the monthly premium, they made.

DECISION

The District has made an offer of FAPE to [Student] after considering his unique circumstances, and shall not bear the cost if Complainants choose to continue [Student]'s enrollment at [Private Behavioral Facility] and receive private SLP and OT. The District is not responsible for providing compensatory services to [Student]. The District may include TRICARE as a payee on its reimbursement payment to Complainants.

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 17th day of April

HOLLYCE FARRELL
Administrative Law Judge