

**DUE PROCESS HEARING  
BEFORE AN IMPARTIAL HEARING OFFICER**

**CASE NO. DP 2010:121**

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**IMPARTIAL HEARING OFFICER'S FINDINGS OF FACT AND DECISION**

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**In the Matter Of:**

**[STUDENT], by and through [student's] parents [Parent] and [Parent],**

**Petitioner,**

**And**

**UTE PASS BOARD OF COOPERATIVE SERVICES and [SCHOOL DISTRICT],**

**Respondents.**

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This due process hearing was held on February 7, 8, 9, 10, and 22, 2011. Petitioner (the Student) was represented by Michael C. Cook, Esq. Respondents Ute Pass Board of Cooperative Services (BOCES) and [School District] (District) were represented by Wm. Kelly Dude, Anderson, Dude & Lebel, P.C. This due process hearing arises pursuant to the Individuals with Disabilities Education Act (IDEA) (20 USC §1415(f)(1)); its implementing regulations (34 CFR §300.507(a)); and the implementing regulations of the Colorado Exceptional Children's Educational Act (1 CCR 301-8, 2220-R-6.02(7)).

The parents of the Student involved in this matter (collectively Parents or individually Mother or Father) requested a due process hearing, and that request was received by the Administrative Unit on November 29, 2010. On January 11, 2011, the Impartial Hearing Officer (IHO) issued an Order Denying Motion for Stay Put. On March 4, 2011, both parties filed post-hearing closing arguments and briefs, at which time this matter was ready for the issuance of findings of fact and a decision. By Order Granting Extension of Decision Deadline, the IHO extended the deadline for issuing this decision through March 25, 2011. 34 CFR §300.515. The IHO issues these findings of fact and decision pursuant to 1 CCR 301-8, 2220-R-6.02(7)(h)(ii).

**I. ISSUES AND RELIEF REQUESTED**

Petitioner in this matter asserts that the Individual Education Plan (IEP) initially offered by Respondents on August 17, 2010, and later modified (Proposed IEP) fails to provide the Student a free appropriate public education (FAPE) for two reasons. First, Petitioner contends that it is inadequate because it fails to include an appropriate

transition plan to transition the Student from the current private placement to the home school. Second, Petitioner asserts that the Proposed IEP is inadequate because the specified number of hours of indirect and direct behavioral services is insufficient and because at least some services should be provided by an individual with a particular certification. At hearing, Petitioner clarified that Petitioner is no longer pursuing any claim of violation of IDEA procedural safeguards.

As relief, Petitioner seeks payment of tuition charges from the current private placement from the time Respondents stopped paying tuition,<sup>1</sup> continued placement at the current placement at Respondents' expense until an appropriate IEP is developed, and a determination that Petitioner is the prevailing party in this matter.

## **II. FINDINGS OF FACT**

### **A. Background**

The Student is an elementary school aged student who has been diagnosed with autism. Children with autism, including the Student, show deficits in the areas of learning, social skills, communication, and behavior. Changes to the Student's daily routine and transitions from one activity to another or one setting to another can cause the Student to act out behaviorally. The Student can find change to be overwhelming, and this can lead to anxiety and the outward expression of negative behaviors toward self and others. The Student engages in self-injurious behaviors and can be physically aggressive with therapists/teachers. The Student has serious acting out behaviors and can change from being happy to being upset, crying and yelling. The Parents show deep concern for the Student and are very actively involved in the Student's education and welfare. They see the Student's biggest issue as behaviors (spitting, scratching, head butting, kicking, biting, and self-injurious behaviors).

The Student began school at a Charter School in a neighboring school district. During the 2008-09 school year, the Student had significant difficulty at this Charter School. The Charter School did not have a severe needs program and did not have any other autistic students. The Charter School hired a paraprofessional who was also a licensed special education teacher to work mornings with the Student, and in the afternoons the Student was in a combined multi-aged classroom with paraprofessional support. The Student's behavioral incidents increased dramatically. The Student lashed out physically, including hitting, kicking, biting, spitting, head butting and scratching. The Student hit another student, and two or three times there were behavioral concerns that led the Charter School to have the Parents pick up the Student from school. The autism specialist brought in to work with the Student from the Charter School's BOCES grew frustrated as she felt the Student was not being well served. The strategies used by the Charter School were not working for the Student, and the program there was not meeting the Student's needs. The Student was at a real low point behaviorally and had

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<sup>1</sup> Petitioner is no longer seeking transportation costs.

full-blown temper tantrums during all waking hours at home. Faced with these circumstances, the Parents and Charter School's district/BOCES agreed to place the Student at the Center, a treatment facility that serves only children with autism.

The Student's placement at the Center began on April 22, 2009. The Center is not a school and does not generally employ licensed teachers. It has no licensed teachers with special education endorsements. Rather, it is a treatment facility that provides structured therapy to the autistic children enrolled there. There are two program coordinators, a Board Certified Behavior Analyst (BCBA) and a Board Certified Assistant Behavior Analyst (BCaBA), on site who provide supervision and consultation in relation to the children enrolled at the Center. They have extensive administrative duties as well. A lead teacher spends a limited amount of time working directly with each child and supervises the line therapist who works one-on-one with the child. The Student's Lead Teacher spends from 3 to 4½ hours/week with the Student and supervises the Student's programming at the Center. She also writes the Student's monthly reports. The Center uses strict Applied Behavioral Analysis (ABA)<sup>2</sup> programming.

Before starting at the Center, the parties involved took a number of steps to ease the Student's transition to the Center. The Mother created social stories, *i.e.*, two books of photos of the bus ride, the Center and Center personnel, to be read to the Student at home and at the Charter School. The Parents took the Student to visit the Center two or three times for a total of about three hours. Center staff talked with the Charter School paraprofessional/special education teacher about the Student and observed her working with the Student. There was no transition plan similar to the one proposed in this proceeding.

It is a characteristic of children with autism and of the Student that they have difficulties with transition. When the Student went from the Charter School to the Center, however, the Student had minimal, if any, difficulty with this transition. Notations in Center records from the first weeks and months at the Center reflect that the Student seemed happy at the Center and had adjusted well.

The Student's October 9, 2009 IEP (for the 2009-2010 school year) provided for full-day services at the Center through April 22, 2010. At a subsequent IEP meeting held on February 24, 2010, the IEP team determined that the Student would remain at the Center through August 31, 2011. The Center staff participated in the IEP meetings and provided services pursuant to the IEPs developed by the Charter School and the IEP team.

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<sup>2</sup> ABA is a methodology and not a particular curriculum. In overly simplistic terms, it seeks to determine the function of behaviors and relies on identifying the Antecedent, Behavior and Consequence. The Center, and also the Elementary School where Respondents propose to place the Student, both use ABA, but they use different curricula. They both use discrete trial training, a teaching strategy where the teacher presents material or a task to a student, with or without prompting, models it and the child responds. If the child responds incorrectly, the teacher corrects and teaches again. If the child responds correctly, the teacher uses a reinforcer.

While at the Center, the Student experienced growth in social, behavioral and educational areas. The Student's functional language increased significantly, behaviors at the Center and at home decreased, and social interactions with peers at the Center and siblings increased.

In approximately May, 2010, the Student's family moved from the school district where the Charter School is located to the District. The District has joined with other school districts to provide special education services through the BOCES. On June 5, 2010, the Student's Mother and Respondents' Special Education Director spoke by phone for the first time. The Mother notified the Special Education Director that the Student now resided in the District, attended the Center, and had attended the Charter School. By this time, Respondents' schools were closed for summer break.

The Special Education Director scheduled a Transfer IEP meeting for June 17, 2010, to discuss the Student. Transfer IEP meetings are held when a student moves into a new school district and are used to decide whether to adopt the IEP from the previous school district or to adopt an interim services agreement. The following persons attended the Transfer IEP meeting for the Student on June 17, 2010: the Special Education Director, the Principal of the Student's home elementary school (Elementary School), the Center's Program Coordinator, the Center's Lead Teacher, and the Parents. The result of the meeting was that the IEP Team/Respondents did not adopt the Student's IEP from the prior school district but did agree to provide special education and related services to the Student at the Center "on an interim basis."

The Transfer IEP provided that the Student would receive Extended School Year (ESY) services at the Center, the current placement, as Respondents collected data regarding the Student's needs, observed the Student at the Center, and talked with Center personnel. The ESY services enumerated covered the time period from July 1, to August 13, 2010. It was agreed that during the week of August 9 –13, the Student would attend a program (Summer Program)<sup>3</sup> offered at the Elementary School for students needing extra help to prepare them for the school year.

Over the summer, Respondents' personnel observed the Student and took other actions to familiarize themselves with the Student and determine whether they could serve the Student's needs and provide a FAPE at the Elementary School. On July 16, the special education teacher who would teach the Student (Special Education Teacher) and three para-educations, including the para-educator who would be assigned to the Student (Para-educator), observed the Student at the Center for about two hours. The Special Education Teacher reviewed the Student's data provided by the Center. The Para-educator observed the Student a second time at the Center. The Principal also observed the Student a total of three times at the Center, including once before August 17, and reviewed the prior IEP and Center reports.

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<sup>3</sup> "Summer Program" is not the actual name of this program.

On August 6, the Special Education Teacher and the Behavior Specialist who would consult regarding the Student observed the Student at the Center. They talked about the Student with the Center staff who worked with the Student. They also discussed with the Center staff the Student's proposed programming at the Summer Program, which was to begin on August 9. It was agreed that during the first two days, the Special Education Teacher and Para-educator would observe the Center Line Therapist and Lead Teacher doing the normal Center program. On Wednesday, the Center staff would begin to fade into the background, and the Special Education Teacher and Para-educator would take over. The goal was to see how the Student would do in the new environment with new personnel and to determine if a transition to the Elementary School was appropriate. Center staff would continue to collect data regarding the Student throughout the week.

The Student attended the Center for ESY during the summer of 2010. During the week of August 9-13, 2010, the Student attended Respondent's Summer Program for three hours in the morning and the Center for the afternoons. Respondents paid for two Center staff and the Para-educator, who does not normally work at that time, to attend the Summer Program. Other than the hour or so the Student spent with other students of the Student's grade level, the Student was in the special education classroom/resource room following the schedule agreed upon above. The Special Education Teacher was with the Student all day Monday and Tuesday and part of each remaining day. The Para-educator and Center Line Therapist were present throughout the week. The Para-educator was the person primarily doing the Elementary School programming with the Student during the second half of the week. The Center Lead Teacher and Program Coordinator were present for two hours on both Tuesday and Friday. The Para-educator and the Center Line Therapist talked extensively about the Student. Both the Special Education Director and the Behavior Specialist observed the Student for about two hours on Friday.

During the Summer Program, the Center continued to collect its normal data on the Student. The Center tracks behavior incidents and indicators of communication skills. It assesses communication by recording the number of mands and tacts. A mand is a student's request for something, and an unprompted or spontaneous mand is more desirable. Manding is an important skill for a child to get [student's] needs met. A tact is when a student labels or comments on [student's] environment and is also a positive indicator. During the Summer Program, the Student did not have any serious behavior incidents. The Student had one incident of self-injurious behavior that staff was able to manage.

The behavioral data collected during the Summer Program week shows increases in some behaviors at both the Elementary School in the morning and the Center in the afternoon. The data collected regarding the Student's mands and tacts during that week shows a decrease at the Elementary School. It is typical of children with autism, including the Student, that they have good and bad days and good and bad weeks. In addition, a spike in behaviors may be due to many different reasons. Data

available from other short time periods for the Student also shows increases and decreases. Data from a one-week period provides a snapshot but is not a good indicator of a trend. It is therefore difficult to draw conclusions and pinpoint causes from data provided for a short time period. The data for the week of August 9 to 13, 2010, is therefore insufficient to support a finding that the Student regressed while at the Summer Program.

In early August, 2010, the Mother contacted the Special Education Director to express a concern about a break in programming for the Student between August 15 (the end of the Summer Program) and August 25, the start of school. During the conversation, the Mother explained that the Student has difficulty with transitions, *i.e.*, that the Student increases maladaptive behaviors after breaks in the school year. She indicated that the Student showed a three-week adjustment cycle after such a break: the Student had a one-week “honeymoon” period of compliance, spiked in maladaptive behaviors for a second week, and then leveled out in the third week. The Mother indicated that the Center staff and its data support the existence for the Student of a three-week adjustment period to transitions. At least by the time of this conversation, the Special Education Director was therefore aware of the Student’s three-week adjustment cycle.

#### B. Proposed IEP: August 17, 2010 and September 1, 2010 IEP meetings

The August 17, 2010 IEP meeting occurred as planned. In addition to the Parents, the Student, and the other children in the family, the following were present: Special Education Director, General Education Teacher, Special Education Teacher, Behavior Specialist, Para-educator, Principal, Principal of the Charter School, Center Program Coordinator, and Center Lead Teacher. This meeting lasted approximately five hours.

The IEP team proceeded to complete the various sections of the IEP. In relation to the behavior plan for the Student, the Behavior Specialist had generated a draft Behavior Intervention Plan before the meeting and accepted changes to that working copy at the meeting. A behavior specialist is the person who coordinates with teachers to develop and implement behavior plans and to analyze student behavior. The team also began addressing the Student’s goals and objectives. After agreeing to some of these, the IEP team decided that the Special Education Teacher and Center Lead Teacher would meet to finish the goals and objectives.

The August 17 IEP provides that the Student will spend less than 40% time in a general education classroom. Respondents’ plan is for the Student to have access to the general classroom on a daily basis from the beginning but to increase the time spent with typically developing peers as the Student feel more comfortable.

When the IEP team neared the end of the IEP, a significant disagreement surfaced in relation to when the Student should begin attending the Elementary School

and how the transfer from the Center to the Elementary School would occur, *i.e.*, the Student's transition. Respondents proposed that the Student begin attendance at the Elementary School on August 26, 2010, the second day of classes. The Special Education Director and others believed that the first day of school would be more hectic and therefore a less desirable day to begin attendance but believed that the Student should essentially start the school year at the Elementary School. The Parents strongly believed that their child would not be ready to attend the Elementary School until a significant transition period had occurred. The IEP team agreed that the Elementary School could meet the Student's needs but decided that the team needed further discussion regarding Least Restrictive Environment (LRE)<sup>4</sup> and transition.

The Mother asked the Center and Respondents to prepare proposed transition plans for the Student to transition from the Center to the Elementary School. The IEP team agreed that the Student would continue placement at the Center through September 2, 2010, in order to give the IEP team an opportunity to meet again on September 1.

In a letter dated August 25, 2010, the Special Education Director stated Respondents' position on transition. She referenced the consultations over the summer between Respondents' staff and Center staff regarding the Student, Respondents' staff observations of the Student, and the Student's attendance at the Summer Program. While reiterating Respondents' position that the Student could appropriately be educated full-time at the Elementary School as of August 26, she offered, as a means of meeting the Parents' concerns about transition, to continue the Student's placement at the Center until September 8, 2011. At that point, she proposed that the Student enroll full-time at the Elementary School.<sup>5</sup> She also offered some additional services, but these services were not written into the Proposed IEP.

The September 1, 2010 IEP meeting reconvened with the same persons as the August 17 IEP meeting, with the exception of the Charter School principal and the Para-educator. Respondents had proposed that the Student start at the Elementary School on September 8, 2010, and had agreed to extend placement at the Center until that date. The IEP under discussion was amended to reflect the proposed starting date of September 8, 2010.

At the meeting, the Center Program Coordinator read and discussed the Center transition proposal. This was not the plan ultimately proposed by the Parents at

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<sup>4</sup> LRE provides that a child must be educated in the LRE. It is undisputed that the Elementary School is the LRE for the Student. The Center, comprised totally of children on the Autism Spectrum, is not the LRE. Rather, the LRE for the Student is the home school, the Elementary School, where the Student will have access to typically developing peers.

<sup>5</sup> Alternatively, the Special Education Director proposed half-day placements at the Center and the Elementary School September 8-10, with full-time placement at the Elementary School beginning on September 13. In either case, she offered to provide consultation from Center staff two hours per week for four weeks and then twice monthly until December. These consultation services were never written into the Proposed IEP.

hearing. At its core, the Center plan calls for the Student to spend half days at the Center (with Elementary School staff being trained there by Center staff) and half days at the Elementary School until the Student achieves certain behavioral targets with Elementary School staff over a two-week period. The Student would then attend the Elementary School full-time with Center staff consultation until the Student reaches these same targets. The proposal also addresses the Student's progress in mands and tacts. In addition, the Center transition plan calls for the Student to be shown photographs of the Elementary School staff, classrooms, playground and reinforcers to familiarize the Student with the new setting. It further provides for the Student to receive at least 30 hours of intensive ABA programming.

The IEP team also reviewed a letter from the Charter School principal describing that school's experience with the Student. The Behavior Specialist had prepared a revised behavior plan and asked if there would be time to review the changes. The Mother indicated that she simply wanted to know whether Respondents were willing to agree to a transition plan, meaning something beyond what Respondents had proposed in the August 25 letter. The Parents believed that any transition should be based on the achievement of benchmarks, not on specified dates. The Father asked whether Respondents would agree to a transition plan involving half days at the Center with Elementary School staff in attendance to learn how to deal with the Student, a key element of the Center's proposal. When the Special Education Director said no, the Parents concluded that there was no reason to continue the meeting. The IEP meeting ended without a resolution regarding the transition issue.

At some point following the meeting on September 1, 2010, the parties entered into mediation. As a result of the mediation, the parties agreed to amend the August 17, 2010 IEP, as it existed at the end of the September 1, 2010 IEP meeting. A November 1, 2010 IEP Amendment to the August 17, 2010 IEP added provisions regarding speech language, physical therapy, and occupational therapy, matters not at issue in this hearing. The term "Proposed IEP" refers to the August 17, 2010 IEP, as amended.

### C. Behavioral Supports in Proposed IEP

The language of the Proposed IEP regarding behavioral supports provides that beginning on "09/08/10," the Special Education Teacher will provide five hours of direct services in Academic/Behavior/Communication. It further provides that beginning on "11/08/10," a Behavior Consultant will provide one hour per week of indirect Behavior services to the Student. It contains no requirement that the Behavior Consultant be a BDBA or a BCaBA, and the person who would provide the indirect services, the Behavior Specialist, holds neither of these certifications. The Proposed IEP provides for the Student to have adult supervision, by either the Para-Educator or the Special Education Teacher, throughout the day. Petitioner does not call into question this provision.

Based on the record as a whole,<sup>6</sup> the IHO finds that the date of November 8, 2010, is a typographical error. The Proposed IEP should have read and is deemed to read that indirect Behavior services will begin on September 8, 2010, *i.e.*, the date of the Student's enrollment at the Elementary School.

Direct services are those involving direct contact with a student. The Special Education Teacher planned to use the five hours/week as one hour/day in two 30-minute segments or three 20-minute segments so that she would have direct contact time with the Student in both the morning and the afternoon. In addition, the Proposed IEP recognizes that the Student would have adult supervision, essentially by the Special Education Teacher or the Para-educator, throughout the day. The Special Education Teacher would provide direction and supervision to the Para-educator, who would be the primary person providing programming to the Student when the Special Education Teacher was not doing so directly. The Special Education Teacher would also train the Para-educator on the Student's behavior plan.

Indirect services do not require student contact but involve consultation. The Behavior Specialist planned to use the one hour/week designated in the Proposed IEP to consult with the Special Education Teacher regarding the Student.

In understanding the roles of the Special Education Teacher and the Behavior Specialist, it is important to understand the special education staff at the Elementary School as a whole. The Special Education Teacher works with students with more significant disabilities such as autism. She is considered the case manager for each of these students and ensures that the services and supports provided in the IEP are delivered. There are several para-educators who work with students with significant disabilities, including the Para-educator; a General Education Classroom Teacher for the Student's grade level; a Speech Language Pathologist; an Occupational Therapist; a Physical Therapist; and the Behavior Specialist. If the Special Education Teacher needs assistance or consultation in meeting the needs of the Student or in responding to the Student's behaviors, she consults with the Behavior Specialist. If this consultation does not provide the needed answers, she and the Behavior Specialist can then consult a BCBA on contract with Respondents, who is available to provide additional training and consultation. In addition, if the Elementary School staff has a question for the Center staff about the Student, the Center staff would be willing to answer it. Respondent's staff has been interested in input from Center staff, and Center staff has willingly provided their input. The General Education Teacher for the Student has experience working with autistic children, is trained in Verbal Behavior Milestones Assessment and Placement Program (VB-MAPPING),<sup>7</sup> and has a particular devotion to

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<sup>6</sup> No IEP team member noted the 11/8/10 date during the IEP meeting. Services routinely begin and end simultaneously. There was no reason for indirect services to begin after direct services to the Student here. Respondents never intended that indirect services would begin at a later date and immediately conceded this error at hearing. The Special Education Director, Behavior Specialist, Principal and the Special Education Teacher all testified that this date was a typographical error and should have reflected services beginning on 9/8/10.

<sup>7</sup> VB-MAPPING is an assessment tool often used with children with autism.

helping special needs children learn. She is committed to making the curricular modifications needed to accommodate special education students

The Elementary School special education staff members have significant education, training and experience to provide the behavioral support needed by the Student. The Elementary School uses ABA methodology based on VB-MAPPING. The Special Education Teacher holds a M.S. in Special Education; is licensed in Elementary Education and as a Special Education Generalist; has eight years of teaching experience, including three as a special education teacher; and has received numerous trainings, including in ABA and Relationship Development Intervention (RDI). She has experience teaching children with autism and has received significant training in this area. She has been trained in nonviolent crisis intervention and takes a refresher course each year. The Behavior Specialist holds a M.S. in Applied Behavioral Studies in Education: Seriously Emotionally Disturbed; is licensed as a Special Education Generalist; and has 32 years of experience in special education. She provides training in nonviolent crisis intervention.

The Para-educator has two years of college and many credit hours in behavior management and working with children such as the Student. She takes a refresher course every year in nonviolent crisis intervention. The Para-educator had significant training from a BCBA in conjunction with services provided to a particular student. In 2009-2010 school year, the Special Education Teacher, Behavior Specialist and Para-education all received four full days of training from a BCBA in ABA, VB-MAPPING, and designing programming and IEPs from VB-MAPPs.

In evaluating the adequacy of the Proposed IEP's weekly provisions for one hour of indirect behavior support and five hours of direct Special Education Teacher services, including behavior, it is useful to compare this level of service/support to the Student's current levels. The Center finds these levels to be appropriate, and the Parents also support the current levels. The Charter School IEP for 2009-2010, the most recent IEP in effect before the Student transferred to Respondents' jurisdiction, contains no requirement of direct or indirect behavioral services from any provider. It provides that the Student will receive 7 hours/day of instruction from teachers at the Center and ¼ hour/week of consultation from the Charter School.

While the Charter School IEP did not require behavioral support by Center personnel, Center personnel clearly provide such support to the Student. The Center Lead Teacher spends 3 to 4½ hours/week with the Student doing various tasks, including behavior support. The Program Coordinator who is a BCaBA occasionally fills in for staff and provides direct services to the Student. The record does not reflect the number of hours spent by the Center BCaBA Program Coordinator in indirect behavioral support to the Student. The Center's other Program Coordinator, a BCBA; a BCBA behavioral consultant who makes a bi-monthly visit to the Center; and a consultant on the Center's curriculum, also a BCBA, are available for behavioral consultations. The

record does not establish the number of hours spent by any of these individuals in indirect behavior services to the Student.

The Center Program Coordinator believes that one hour/week of indirect time would not be a “major benefit” to the Student, because the Student could need this amount of time in one day. No witness opined that the five hours of services from the Special Education Teacher, which include behavior services, were insufficient. In evaluating the Center Program Coordinator’s opinions, the IHO recognizes that she bases her opinions on a goal of providing the best possible services to the Student to maximize progress. It is therefore not possible to determine what level of behavior support the Center Program Coordinator believes the Student needs to make “some progress” on the identified goals in the Proposed IEP.

In proposing the Parents’ transition plan, the Mother asserts that the Student needs two to four hours/week of behavior services from a BCBA or BCaBA in addition to the services of the Special Education Teacher. The Parents’ proposal provides for these services to be provided either directly or indirectly.

The Special Education Director, Behavior Specialist, and Special Education Teacher all testified that the behavioral hours specified in the Proposed IEP are sufficient and would allow the Student to make progress toward the goals and objectives of the Proposed IEP. The Special Education Teacher and Behavior Specialist, whose time is specified in the Proposed IEP, have a plan for how they will use this time to address the Student’s behavior needs. They have significant experience with children with autism, including establishing service plans and allocating services to meet student needs. They recognize that children with autism have difficulty with transitions and intend to focus on identifying predictors (the very first stages of the behavior) and intervening to keep behaviors from escalating. The testimony of these witnesses was persuasive that the behavior supports and services in the Proposed IEP are sufficient to meet the Student’s needs at the time of the Proposed IEP.

Respondents also retained a well-qualified expert to provide opinions regarding the appropriateness of the Student’s placement, service delivery plan, and transition plan. The Expert has a Ph.D. in Professional Psychology, with a dissertation on an autism subject; a master’s degree in special education; Colorado licenses as a Special Education Director and Special Education Teacher; and extensive experience and training in the autism field. The Expert reviewed the Student’s needs and opined that one hour of indirect behavioral support and five hours of direct services for the Student were appropriate. The IHO relies on this expert opinion, as well as the testimony of the witnesses above, to find that the Proposed IEP is sufficient to meet the Student’s behavior needs at the time it was offered. The expert recognized that if the Student’s behaviors exceed anticipated levels, it might be necessary to bring in additional behavioral support for training or a second opinion and that a system to provide additional support was available, if needed.

The IHO finds that the level of behavior supports specified in the Proposed IEP, *i.e.*, the number of hours of direct and indirect services, is sufficient to allow the Student to make some progress on the goals and objectives in the Proposed IEP.

In relation to the issue of the Parents' request that the Student receive behavior services from a BCBA or BCaBA, it is important to understand what these certifications mean. In order to be a BCBA, one must take four graduate level courses (three three-credit and one one-credit course), undergo 1,000 hours of supervision, and pass a Board-certified examination. To be a BCaBA, one must complete five courses in the techniques of ABA, ethics, and working with autistic children; undergo a specified number of hours of supervision; and pass a Board-certified examination. In either case, one must have a bachelor's degree. The Center uses BCBA or BCaBA certification as an indicator of competency in the field of autism. It does not use, for example, Colorado licensure as such an indicator. The Center's reliance on these certifications contrasts with the approach of Respondents, who do not require certification but appear to rely on education, Colorado licensure, and endorsements as competency indicators.

The Center Lead Teacher opined that it would be best practice to have the person overseeing the Student's behavior needs be a BCBA or BCaBA, as these certifications recognize competency. The Parents also request this certification, without explanation, in the transition plan.

BCBA or BCaBA certification is one but not the only measure of competency for addressing the behavior needs of children with autism or of the Student. The BCBA or BCaBA certifications ensure that their holders are familiar with ABA methodology and techniques such as the verbal behavior curriculum; VB-MAPPING; and discrete trial training. The Elementary School staff, and specifically the Special Education Teacher and Behavior Specialist at issue here, are also familiar with this methodology and these techniques. These individuals have sufficient training and experience sufficient to help the Student make progress toward the goals and objectives of the Proposed IEP. There is therefore no basis to find that a BCBA or BCaBA certification is required to allow the Student to make some progress on the goals and objectives in the Proposed IEP.

#### D. Transition Plan in Proposed IEP

The Proposed IEP calls for the Student to attend the Center through September 7, 2010, and then begin attending the Elementary School on September 8, 2010. It therefore contains no transition plan. The Parents' preference is for the Student to stay at the Center. They believe they have no option other than to let the Student go to the Elementary School, however, so they want to ensure that this transition is done in a well-planned manner. The Parents' stated goal is to transition the Student back to the home school when the Student is ready.

At the hearing, the Parents presented for the first time their proposed transition plan, which evolved as the Mother's testimony proceeded. They did not propose the

half-day plan presented by the Center at the September 1 IEP meeting. Rather, they propose that the Student attend the Center full-time until certain benchmarks are met every day for two weeks, *i.e.*, for consecutive school days.<sup>8</sup> Until all of these benchmarks are met, either the Special Education Teacher or Para-educator is required to be at the Center four hours/day learning how to teach the Student and respond to the Student's behaviors. Although the Parents describe these benchmarks as representative of the Student's current level of functioning, they significantly exceed that level of functioning for mands and tacts. The proposed numbers for mands and tacts represent averages of the Student's performance in December, 2010, but the Student has not yet achieved these benchmarks on a daily basis for consecutive days.

Once the Student achieves these benchmarks at the Center, the Parents propose that the Student enroll at the Elementary School. Until the Student achieves the same benchmarks each day for two weeks at the Elementary School, the Center Line Therapist would be full-time at the Elementary School. The Line Therapist would guide and support the Elementary School staff and would step in if that staff did not manage a behavior appropriately. In addition, as stated above, the Parents propose that the IEP provide for two to four hours per week by a BCBA or BCaBA of direct or indirect services to the Student beginning upon the Student's enrollment. These services would extend for the term of the IEP.<sup>9</sup> The Parents do not believe that the Student can make any progress at the Elementary School without this transition plan.

Several Center staff members testified in support of the transition plan written by the Center, a plan that differs in significant details from that proposed by the Parents. Nonetheless, there are several overlapping elements of the Parents' and the Center's proposed transition plans that permit the testimony of the Center staff to be used to support the basic tenets of the Parents' proposal.

The Center Program Coordinator, a BCaBA who has worked with the Student during the entire time the Student has been at the Center, expressed concerns that without the Center's transition plan, the Student could regress behaviorally and also communicate less to get needs met. She also believes that the Student may not progress at the same level. She does not see a regression as a certainty but believes it could potentially occur. She notes that the magnitude of any regression would depend on the speed of the rebound. She believes that the transition model used at the Center when a new therapist is introduced to a child, a process that involves shadowing for one to two weeks before the new therapist is introduced, with the previous therapist continuing to shadow until the new therapist can work independently. She sees the goal of a transition plan as having the Student make maximum progress during the period of transition.

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<sup>8</sup> These daily benchmarks are 122 spontaneous mands, 47 unprompted mands, 142 unprompted tacts, and 12 or fewer of each of the behaviors currently tracked by the Center.

<sup>9</sup> While at hearing, the Mother testified that any transition plan must provide for 30 hours of ABA intensive instruction at the Elementary School. Petitioner later conceded that this was not part of the relief being requested.

The Center Lead Teacher also supports the transition plan offered by the Center at the September 1, 2010 IEP meeting, which she helped write. She believes that the Student should be provided “the best” education, not a lesser one. In her view, it would be a shame to provide something less when something better is available. Providing the best, in her view, involves oversight by a BCBA. Based on her knowledge of autism and of the Student, her “best guess” is that an abrupt change from the Center to the Elementary School would be detrimental to the Student, although she concedes that no one knows how long that detrimental effect would last (two days or years). Neither the Center Program Coordinator nor the Center Lead Teacher could testify that the Student would not be able to make progress under the Proposed IEP. Based on the standards used by both the Center Program Coordinator and the Center Lead Teacher in formulating opinions about the transition plan, essentially attempting to provide the best possible benefit to the Student in this transition, the IHO does not find persuasive their recommendations about a transition plan.

The Center Line Therapist, who has been with the Student for up to four hours a day for 1 ½ years, testified without elaboration that it is appropriate for any transition for the Student to include all elements proposed by the Center in its transition plan. The Charter School Principal testified at hearing that she was concerned about the Student’s being transferred from the Center to the Elementary School and that she favored the Student’s continued placement at the Center. She believes that placing the Student at the Elementary School could lead to violence and a disruption of the progress made at the Center. The Charter School Principal did not have sufficient current experience with the Student to render her opinions persuasive in the IHO’s view.

The Parents believe that without a transition, the Student’s disruptive behaviors will increase and the Student may regress to the type of behaviors exhibited at the Charter School. The record does not show that the Student’s other public school experience, at the Charter School, where the Student did exhibit educational and behavioral regression *without a transition*, is predictive of what would occur should the Student end attendance at the Center one day and start at the Elementary School the next. That experience occurred about 1½ years before the Proposed IEP. It occurred in a different setting with different programming and different personnel. While at the Center, the Student’s behaviors have moderated. The Proposed IEP lists these behaviors as needs and addresses them in the behavior plan.

There is also insufficient evidence to show that the Student’s difficulties at the Charter School demonstrate a generalized difficulty in public school settings that would resurface at the Elementary School. Petitioner has failed to show that the Student’s circumstances, the program offered or the personnel available at the Charter School were sufficiently similar to those that existed at the Elementary School when the Proposed IEP was offered to the Student that it was reasonably foreseeable that a repeat of the regression experienced at the Charter School would occur.

There was significant and persuasive support for an immediate placement of the Student at the Elementary School. Based on the testimony of the Behavior Specialist, Special Education Director, Special Education Teacher, and Expert and given the transition activities that have already occurred, the IHO finds that the Student's needs do not require a transition plan in the Proposed IEP. Each of these professionals has spent time evaluating the Student and reviewing records to develop an informed opinion. While their exposure to the Student does not match that of the Center staff who have worked with the Student over the last 1½ years, they have a sufficient basis to offer opinions in this matter.

Verbal and physical acting out behaviors are part of the Student's disability, but Respondents have the staff available to handle these behaviors. The Elementary School staff base their views in part on their experiences with other children with autism and their transitions to the Elementary School. Some of these transitions involve moves from out-of-district or out-of-state, when few transition activities are available. In other circumstances, the transition may involve the Special Education Teacher reviewing the student's IEP, gathering information from the prior teacher, consulting with the prior teacher and parents, interviewing appropriate persons, and possibly observing the child. These experiences have helped expand the knowledge of the Elementary School staff regarding transitions for children with autism.

The Parents' proposed transition plan would be confusing and unpredictable and therefore not serve the needs of the Student. These negatives arise from having two teams of staff (*i.e.*, from the Center and the Elementary School) involved simultaneously in the Student's education. There may, however, be occasions when the Elementary School staff should confer with the Center staff after the Student enrolls at the Elementary School. The Student has good skills in co-regulation, collaboration, and experience sharing. Co-regulation refers to a conversation when one person speaks and the other listens and *vice versa*. Collaboration refers to working in groups to combine ideas to come up with a mutual idea. These skills will aid the Student in the transition.

In transitioning from one environment to another, the Student has a three- to four-week recovery period. This recovery period is the best predictor available of the Student's response to the proposed change to the Elementary School. At hearing and beforehand, Center personnel and Parents described a three-week cycle. The IEP team on April 24, 2010, before the Student moved within the jurisdiction of Respondents, agreed that the Student needs approximately one month to overcome a transition involving a change of location. The IEP team was discussing the Student's 2010 summer schedule and the effects of moving the Student from the Center to the public school. This IEP team included the Charter School Principal, the Charter School Special Education Teacher, the Parents, the Center Program Coordinator, and the Center Lead Teacher. There was also no evidence of any studies that suggest that autistic children transferring from one school to another have significant long-term behavioral or educational regression. The record thus suggests that within three or four

weeks, any regression experienced by the Student as the result of the transition to the Elementary School would be overcome.

In determining the Student's need for a transition plan, it is also important to note that there was significant work completed before the Proposed IEP to familiarize the Elementary School staff with the Student and the Student with the Elementary School. Various representatives of Respondents, including the Special Education Teacher, Para-Educator, and Behavior Specialist, have spent hours observing the Student in the current setting at the Center. They have consulted with Center staff and been receptive to their input. They have reviewed the Student's prior IEP and spent hours formulating a new one. They have also received the extensive data collected on the Student by the Center. The Student has spent 15 hours in the Elementary School setting where the Student would be taught, including time being taught by the Para-educator who would spend most of the day with the Student. The Elementary School has provided photos to the Center, and the Center and Parents could easily prepare social stories to further ease the transition, something they have to date not chosen to do.

Petitioner has failed to establish by a preponderance of the evidence that the absence of a transition plan in the Proposed IEP will prevent the Student from making some progress on the goals and objectives in the Proposed IEP.

#### E. Tuition Costs at Center

The Student continued to attend The Center after September 7, 2010, the last day Respondents agreed to placement there. The Center charges tuition for the Student of \$4,600/month. Tuition charges that accrued in 2010 after Respondents ceased paying tuition total \$22,460.

As of September, 2010, the Parents stopped paying the Center this tuition. The Center agreed that it would not charge the Parents tuition until the due process hearing is resolved. The Center will not seek payment from the Parents for tuition owing from September through December, 2010. The Parents are seeking tuition reimbursement to be paid directly to the Center from September 2010 through the date of the hearing. Beginning January 1, 2011, the Parents' insurance has paid the tuition charges for the Student.

### **III. DISCUSSION AND CONCLUSIONS**

#### A. Legal Standard and Burden of Proof

The purpose of the IDEA is "to ensure that all children with disabilities have available to them 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). In order to fulfill the mandate of the IDEA, school districts must develop and implement IEPs to meet each eligible student's educational needs. 20 U.S.C. §

1414(d). The written IEP specifies the program of services to which a student is entitled in order to receive a FAPE.

As further elaborated by the United States Supreme Court, the FAPE requirement provides a disabled student with a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982) (*Rowley*). The school district must provide “some educational benefit” to satisfy the IDEA. *Id.* at 199-200.

The IDEA does not require a school district to maximize a student’s educational benefit,<sup>10</sup> but the educational benefit provided to the student must be more than *de minimus*, *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726-27 (10th Cir. 1996); *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1154 (10th Cir. 2008), *cert. denied*. *Rowley* established that if a school district complies with the procedures of the IDEA (not at issue here) and if the IEP developed pursuant to those procedures is reasonably calculated to enable a student to receive educational benefit, the school district has complied with the IDEA. *Rowley* at 206-07; *O’Toole v. Olathe District Schools Unified District No. 233*, 144 F.3d 692, 701 (10th Cir. 1998); *Johnson v. Independent School District No. 4 of Bixby*, 921 F. 2d 1022, 1025-26 (10th Cir. 1990). In addition, the IDEA requires that students be educated in the LRE. To the maximum extent appropriate, disabled children must be educated in regular classrooms with children who are not disabled. 20 U.S.C. § 1412(a)(5)(A).

The burden of proof lies with the party challenging the IEP. The party claiming a deficiency in a school district’s efforts bears the burden of proof. *Thompson R2-J Sch. Dist. v. Luke P.*, *supra*; *Johnson v. Indep. Sch. Dist. No. 4 of Bixby*, 921 F. 2d 2022, 1026 (10th Cir. 1990) (burden of proof is on party attacking the IEP). Petitioner therefore bears the burden of proving that, in relation to the issues of a transition plan and behavioral supports, the Proposed IEP is not reasonably calculated to enable the Student to receive educational benefit.

In determining the appropriateness of the Proposed IEP, the IHO must consider those services identified on the written IEP. Respondents offered additional services not reflected on the Proposed IEP and indicated a willingness to revise the IEP in the future should the Student’s needs exceed those anticipated. While Respondents offers may be well-intentioned, to the extent that those services offered were not written in the Proposed IEP, the IHO may not consider them in determining the appropriateness of that IEP. The IHO must evaluate whether the lack of a transition plan and the behavior services and supports in the written Proposed IEP met the Student’s needs at the time it was proposed. *Sytsema ex. rel. Sytsema v. Academy School Dist. No. 20*, 538 F.3D 1306, 1316 (10th Cir. 2009)(Court refused to consider district’s verbal offers of additional services not contained in the written IEP).

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<sup>10</sup> *Rowley* at 198-200; *Johnson v. Independent School District No. 4 of Bixby*, 921 F. 2d 1022, 1028-29 (10th Cir. 1990); *Urban v. Jefferson County School District R-1*, 870 F. Supp. 1558, 1562 (D. Colo. 1994).

## B. Adequacy of Proposed IEP Regarding Behavioral Supports

Petitioner asserts that the Proposed IEP is inadequate because it fails to include adequate services and supports to address the Student's maladaptive behaviors. Petitioner relies on the IDEA requirement that "[t]he IEP team shall – (i) in the case of a child whose behavior impedes his or her learning or that of others, consider, when appropriate, strategies, including positive behavioral interventions, strategies, and supports to address that behavior." 20 U.S.C. §1414(d)(3)(B)(i). Petitioner challenges three aspects of the Proposed IEP: 1) the provision of only one hour/week of indirect consultation from the Behavior Specialist, 2) the adequacy of direct behavior supports, and 3) and failure to designate that a BCBA or BCaBA provide the behavior supports. To support these objections, Petitioner points to the actual behavioral services provided by the Center, the Student's behavioral needs, and the Parents' and Center's views regarding BCBA involvement.

Adequacy of One Hour/Week Indirect Behavior Services. Petitioner contends that one hour/week of indirect services is insufficient and also seeks to capitalize on Respondents' typographical error in the starting date of the Behavior Consultant's indirect services. Respondents readily conceded that the starting date for indirect services by the Behavior Consultant should be September 8, 2010, the date of the Student's enrollment with Respondents. The IHO deemed the Proposed IEP corrected to rectify this typographical error and reflect the parties' intent, a start date of September 8, 2010. This typographical error is not a substantive ground for finding the Proposed IEP defective.

Petitioner's substantive objection is to the number of hours of indirect behavioral services. Petitioner contends that one hour/week is insufficient given the Student's history of exhibiting aggressive and dangerous behaviors toward self and others that impede learning. There is no dispute that the Student has behavioral needs that must be addressed in the Proposed IEP. Although the Center Program Coordinator opined that one hour/week of behavior consultation would be insufficient and the Parents proposed additional behavior services, the IHO found that Petitioner failed to meet the burden of proof in light of the absence of evidence regarding the amount of indirect services used to address the Student's needs at the time of the Proposed IEP, the testimony that the Behavior Specialist could meet the Student's needs, the underlying assumption pervading the Center Program Coordinator's testimony that the Student should be afforded the maximum benefit, and the training and experience of the Elementary School staff.

Petitioner has failed to establish that one hour/week of indirect behavior services is insufficient. With this level of indirect behavior services, the Proposed IEP is reasonably calculated to enable the Student to receive education benefit and provides a FAPE. Petitioner has failed to establish a violation of the IDEA on this basis.

Adequacy of Direct Behavior Supports/Services. Petitioner asserts that the Proposed IEP is deficient because it provides inadequate direct behavioral support. Because Petitioner is also seeking to have behavioral supports provided to the Student by a BCBA or BCaBA, Petitioner has not directly argued that the five hours/week of services by the Special Education Teacher in the areas of academic/behavior/communication are insufficient. No witness offered this opinion. Rather, Petitioner seems to merge the requests for additional behavior support and for a BCBA or BCaBA. The Special Education teacher does, however, provide direct behavior services under the Proposed IEP.

In trying to discern Petitioner's position, the IHO turns to the Parents' proposed transition plan, which requests two to four hours per week by a BCBA or BCaBA of direct or indirect services, in addition to those of the Special Education Teacher. The IHO therefore interprets Petitioner's asserted deficiency to be that the Proposed IEP lacks these additional two to four hours/week of behavioral services, direct or indirect. It is unclear exactly how many hours of additional *direct* behavioral services Petitioner believes are necessary.

The Special Education Teacher, Special Education Director, Behavior Specialist, and Expert all testified that five hours of direct services would be sufficient to meet the Student's anticipated behavioral needs. The IHO found this testimony to be persuasive.

Petitioner has failed to establish that the direct behavior services in the Proposed IEP are insufficient. With the level of direct behavior services specified, the Proposed IEP is reasonably calculated to enable the Student to receive education benefit and provides a FAPE. Petitioner has failed to establish a violation of the IDEA on this basis.

Requirement of Services from a BCBA or BCaBA. Petitioner asserts that the Proposed IEP is deficient because it does not provide for behavioral supports to the Student from a BCBA or BCaBA. While the Parents' transition plan proposes direct or indirect support from either a BCBA or BCaBA, Petitioner in closing argument asserted that the Student is entitled to increased direct behavior support from a BCBA. This request pertains to the 2010-2011 school year.

The record contains only minimal information about BCBA or BCaBA certification and the training necessary to achieve this certification. Petitioner provided no real rationale for why these certifications are needed in order to meet the Student's needs. It is true that the Center relies on BCBA or BCaBA certifications as an indicator of competence and that the two program coordinators hold these certifications. While Respondents provide training and consultation through a BCBA, they appear to rely more on educational attainment and Colorado licensure/endorsements as their indicators of competence. The issue before the IHO is not the relative merit of these certifications versus other indicia of competence in the field of autism but rather whether these certifications are required in order to provide the Student a FAPE.

The Elementary School personnel, including the Special Education Teacher and Behavior Specialist, have extensive training in behavioral strategies working with autistic students, as noted above. The Special Education Teacher holds a M.S. in Special Education, is licensed in Elementary Education and as a Special Education Generalist, has teaching experience, and has training and experience in working with children on the Autism Spectrum. The Behavior Specialist holds a M.S. in Applied Behavioral Studies; is licensed as a Special Education Generalist; and has extensive special education experience.

Given the training, education and experience of the Special Education Teacher and Behavior Specialist, the record simply does not suggest that a BCBA or BCaBA certification is necessary to meet the Student's needs. The attempt to require this certification is more analogous to an attempt to dictate the methodology that must be used in educating a disabled child, something the IDEA does not permit. As long as a school district provides a FAPE, it may exercise its discretion in choosing a methodology. *Rowley* at 209; *Gill v. Columbia 93 School District*, 217 F.3d 1027 (8th Cir. 2000); and *E.S. v. Independent School District, No. 196*, 135 F.3d 566 (8th Cir. 1998).

Petitioner has failed to establish that behavior services from a BCBA or BCaBA are necessary to allow the Student to make some progress toward goals and objectives in the Proposed IEP. Without the requirement for this certification, the Proposed IEP is reasonably calculated to enable the Student to receive educational benefit and provides a FAPE. Petitioner has failed to establish a violation of the IDEA on this basis.

### C. Adequacy of Proposed IEP Regarding Transition Plan

Petitioner asserts that the Proposed IEP is deficient because it lacks a transition plan. The IDEA does not require a transition plan when a student moves from a private school to a public school. *L.M. v. Department of Education*, 2006 WL 2331031 (D. Haw. 2006) (citing *Bock v. Santa Cruz City Schools*, 1996 WL 539715 (N.D. Cal. 1996)). Some courts have recognized, however, that a student's needs may require transition services in order for the student to receive educational benefit. In those judicial decisions, the need for a transition plan is based on the individual needs of the student. *A.Y. v. Cumberland Valley Sch. Dist.*, 569 F. Supp. 2d 496, 510 (M.D. PA. 2001) ("When a school district knows that a child requires a transition plan to return to that district from a private school placement and that school district does not include a transition plan in the IEP, the IEP is not appropriate."); *Drinker v. Colonial School District*, 78 F.3d 859 (3<sup>rd</sup> Cir. 1996); *Millay v. Surry School Dept.*, 110 LRP 72385 (D. Me. 2010); *Winkelman v. Parma City School Dist. Bd. of Educ.*, 109 LRP 76161 (N.D. Ohio 2009).

Petitioner asserts that the Student's unique needs compel a transition plan beyond those efforts that occurred before the Proposed IEP was written. The IHO disagrees. First, Petitioner contends that the Student's difficulties at the Charter School

demonstrate a generalized difficulty in “integrated educational settings” that would resurface at the Elementary School and cause significant behavioral and educational regression. The record does not support such a finding. Petitioner has failed to show that either the Student’s circumstances or the program or personnel at the Charter School were sufficiently similar to those at the Elementary School when the Proposed IEP was offered that a regression such as experienced at the Charter School would likely recur.

Second, Petitioner relies on the Student’s alleged regression in language and behaviors as the result of the Summer Program. As noted above, the record does not support such a finding. Data from the one-week Summer Program could reflect a number of factors and periodic swings shown by the Student, unrelated to this transition.

Third, Petitioner points to the Student’s difficulties with transitions. The Student has experienced difficulties with transitions between activities and settings. Both the Parents and Center staff, however, report a three-week adjustment cycle, which includes a one-week honeymoon. They relied on this adjustment cycle in thinking about changes from one location to another for the Student’s 2010 summer schedule. It is only logical that this adjustment cycle provides a good basis for predicting the Student’s transition to the Elementary School. This anticipated temporary adjustment period does not depict the type or length of regression that would impede the Student’s receiving educational benefit from the Proposed IEP.

The IHO notes that Center staff members, as well as the Parents, strongly support a transition plan in the Proposed IEP. The Center’s Program Coordinator, Lead Teacher and Line Therapist, who all have experience working with the Student, endorsed the Center’s proposed transition plan. The perspective of the Program Coordinator and Lead Teacher in relation to transition was that everything should be done to ensure that the Student continue to increase skills and obtain the best possible educational and behavioral result. This is a laudable and understandable goal, but the IDEA does not hold Respondents to a standard of developing an IEP that maximizes the educational benefit to the Student. The Center staff did not testify that the Student would fail to make some progress on IEP goals without the transition plan.

In contrast, the Special Education Director, Special Education Teacher, Behavior Specialist, and Expert all endorsed the Proposed IEP and stated they believed that the Student would be able to make progress at the Elementary School toward the goals and objectives outlined without a transition plan. They based their opinions not on the standard of the Student’s receiving maximum educational benefit but on the applicable standard of making progress toward identified and agreed upon goals and objectives. The IHO finds their testimony persuasive.

In considering whether a transition plan is necessary, the IHO has not given weight to the Student’s experience transitioning between the Charter School and the

Center. That transition occurred when the Student had experienced significant regression and was at a behavioral low point. The Student's circumstances at the time of the Proposed IEP were significantly different, and the urgency evident in April, 2009, was not present at the time period under consideration.

While the Proposed IEP does not contain a transition plan, the IHO notes that there were significant transition activities that occurred before the Proposed IEP. The Special Education Teacher, Special Education Director and Principal reviewed the Student's prior IEP and extensive data from the current placement. The Special Education Teacher and Para-educator, as well as the Behavior Specialist, other para-educators, and the Principal, all observed the Student at the Center. There were consultations between Center and Elementary School staff regarding the Student. The Student spent half-days at the Elementary School for a week. Center and Elementary School staff worked together during this time, and further consultations among staff occurred. During this time, the Student worked with the Special Education Teacher and the Para-educator with whom the Student would be working after placement at the Elementary School. The Special Education Teacher and Center Lead Teacher worked together to draft goals and objectives for the Student. The Special Education Teacher provided photographs for social stories to be created for the Student. All of these activities predated Proposed IEP.

Considering the anticipated three- or four-week transition cycle, the lack of any evidence of long-term regression for the Student, the standard relied on by Center staff in recommending a transition plan, the persuasive opinions of Respondents' staff, the lack of evidence that exposure to a public school setting is likely to trigger significant regression, and the transition activities that have already occurred, the IHO concludes that the lack of a transition plan in the Proposed IEP does not render it deficient pursuant to the IDEA. A transition plan is not needed to allow the Student to make some progress toward goals and objectives in the Proposed IEP. Even without a transition plan, the Proposed IEP is reasonably calculated to enable the Student to receive educational benefit and provides a FAPE. Petitioner has failed to establish a violation of the IDEA on this basis.

Because the IHO has found that the Proposed IEP offers the Student a FAPE, she has not made additional findings and does not make additional conclusions regarding the appropriateness of the Student's placement at the Center.

#### **IV. DECISION**

Based on the above Findings and Conclusions, it is the Decision of the Impartial Hearing Officer that Petitioner's due process complaint is dismissed in its entirety. Petitioner's request for relief is denied and dismissed.

## V. APPEAL RIGHTS

A copy of the parties' appeal rights is enclosed with this decision. 1 CCR 301-8, 2220-R-6.02(7)(j) through (m).

DATED: March 25, 2011



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Nancy Connick  
Impartial Hearing Officer  
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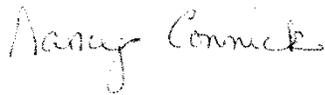
## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the **IMPARTIAL HEARING OFFICER'S FINDINGS OF FACT AND DECISION** was served by electronic mail on March 25, 2011, to the following:

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