

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>[Parents], Complainants,</p> <p>vs.</p> <p>EAST CENTRAL BOCES, Respondent.</p>	
DECISION	

The evidentiary hearing in this matter was convened via teleconference before the undersigned Administrative Law Judge (“ALJ”) on May 8-9, 2023. Complainants [Parents] (“Complainants”) appeared *pro se*, on behalf of their child, the Student. Respondent East Central BOCES (the “BOCES”) appeared through its counsel, Mr. Jack Peters. The following documentary exhibits were offered and admitted into evidence: Hearing Exhibits No. 0, No. 16, and No. 17¹ from Complainants’ set, and A, C through G, J through M, and P from the BOCES’ set. The hearing was electronically recorded.

ISSUES PRESENTED

As confirmed at the outset of the hearing, the issues to be determined at hearing were as follows: Whether, during the time period between April 15, 2022, and January 9, 2023 the BOCES provided a free appropriate public education² to the Student by offering and implementing an Individualized Education Program (“IEP”) that addressed the Student’s unique needs in the areas of eating and toileting, and that provided safe round-trip transportation from the Student’s home to school. Complainants also asserted that the BOCES was forcing the Student “to do things he can’t do” which the ALJ interpreted as a general assertion that the implementation of the IEP(s) was inconsistent with the provisions of the document(s) or the unique educational needs of the Student.

The time period applicable to the above issues is bracketed by a written settlement

¹ As to Hearing Exhibit No. 17, only pages 1 and 2 were admitted.

² As that phrase is used in the federal Individuals with Disabilities Education Act (“IDEA”) and its Colorado counterpart, the Exceptional Childrens’ Education Act (“ECEA”).

agreement between Complainants and the BOCES, that resolved all issues with the Student's special education that had been identified or may have been identified prior to April 15, 2022. January 9, 2023, is the date on which Complainants filed their Due Process Complaint in this matter. When asked by the ALJ whether they wished to amend the complaint to incorporate a broader time period or additional issues, Complainants declined.

FINDINGS OF FACT

Based on the evidence presented at hearing, the ALJ finds the following:

1. Complainants [Parents]I (“[Parent]” and “[Parent]”, respectively) are the parents of [Student](the “Student”), a nine year-old boy. The family resides within the geographical boundaries the [District] (“District”) and the BOCES. There is no dispute in this matter that the Student was and is eligible for special education services and supports, or that the BOCES is the administrative unit responsible for providing an appropriate program of such services and supports.
2. The Student experiences a number of disabilities that affect his ability to access and benefit from education. He is eligible for special education with a primary designation of multiple disability, with secondary designations for intellectual disability, autism spectrum disorder (“ASD”), and speech/language impairment. He is able to communicate, but not to the extent of his non-disabled peers. The Student experiences social and behavioral issues as a result of his ASD, and has engaged in self-injurious behaviors when he becomes frustrated or when confronted with non-preferred activities. Among these behaviors, the Student will bang his head against objects around him such as a desk or a wall. He also spits at people around him, including at the driver who transported him to school.
3. Currently, the Student is being educated pursuant to an IEP implemented in November, 2022. From April 15, 2022, up to the point where the November, 2022 IEP was adopted, the Student was educated pursuant to IEP amendments implemented on March 17, and May 6, 2022. Hearing Exhibits K and L, respectively.
4. At all times between April 15, 2022, and January 9, 2023, the Student's IEPs called for him to be educated at [Private School] (“[Private School]”) in [City], Colorado. [Private School] is a private school that provides specialized instruction and behavioral supports to approximately 42 children. The Student has attended [Private School] since June, 2021.
5. [Private School] is approximately 22 miles from Complainants' home. The BOCES has offered transportation services to take the Student from his home to [Private School] on all days when school is in session. The trip takes approximately 75 minutes each way, but can vary depending on traffic conditions.
6. The District transported the Student to [Private School] in a Ford Transit minivan that

features front bucket seats for the driver and passenger, and two rows of bench seating behind the driver.

7. On August 5, 2022, while the Student was being transported to [Private School], he was seated in the middle row of the van, secured by a standard lap belt and shoulder strap. In this position, the Student was able to shift his upper body from side to side. Approximately five minutes before the van reached [Private School], the Student hit his head on a hard object in his seating area, possibly a cup holder or a side window. As a result, he suffered three cuts to his forehead and was bleeding when the van arrived at [Private School].

8. The Student was unable to communicate what had occurred to cause the injury.

9. [Student Driver] is an employee of the District. Since April, 2022, [Student Driver] has been the Student's driver. At the time of the incident, she decided that the best course of action was to continue to the school rather than stop to assess the Student's injuries. She stated that although she had a first aid kit in the van, she did not feel there was a safe place to stop the van where the injury occurred. Additionally, [Student Driver] felt that she would have more support if she continued to [Private School] which was five or six blocks away at the time.³

10. The Student's special education teacher at [Private School], [Special Education Teacher], photographed the Student's forehead, texted the photo to [Parent], and immediately called [Parent] to report the incident. Hearing Exhibit E. The Student had blood on his forehead and arm, which [Special Education Teacher] cleaned with water. The Student was not injured on his arm. [Parent] established that the Student did not require stitches to treat the cuts. She did not ask anyone at [Private School] to have the Student seen by a doctor. [Special Education Teacher] put adhesive bandages over the cuts and the Student participated fully in his school program for the rest of the day. [Parent] did not go to the school and did not see the Student until the District returned him home in the afternoon. The incident was detailed in a report. Hearing Exhibit F.⁴

11. As a precaution, Complainants took the Student to his doctor for assessment after the incident. An MRI scan revealed no abnormalities and the Student was released with just bandages while the cuts healed.

12. Following the incident on August 5, 2022, the BOCES proposed modifications to the Student's IEP to enhance his safety during transportation. Hearing Exhibits No. 17 and C. These changes included a harness that prevented the Student from shifting his upper body

3 [Student Driver's] mother was riding in the front passenger seat at the time of the incident. August 5, 2022, was the only day when the driver's mother accompanied her. [Student Driver] had cleared the presence of her mother with the District, and had informed Complainants about the arrangement before August 5, 2022.

4 [Special Education Teacher] noted that the time on the incident report should be 8:24 a.m., not 9:24.

as he did when the injury occurred, as well as a soft protective helmet that he was allowed to wear on the van. The BOCES also proposed that the Student should be seated in the middle position of the bench so that he was as far as possible from hard surfaces in the area.

13. [Parent] testified that the Student's doctor advised that the Student should only be sent back to school once they had "figured everything out." [Parent] clarified that this statement referred to Complainants observing the Student's behaviors at home to see if they were consistent with what the school reported.

14. [Parent] established that Complainants did not agree with the changes proposed by the BOCES in Hearing Exhibit No. 17. Following the incident on August 5, 2022, the Complainants did not send the Student to school until October. During this time, the BOCES had the van show up to the home every day to offer transportation.

15. Multiple witnesses established that the Student was reluctant to use the helmet. [Student Driver] and [Special Education Teacher] noted that they could not physically force the Student to wear the helmet against his wishes. When the Student's IEP was revised in November, 2022, the IEP team discussed use of the helmet and other trends related to behaviors. Hearing Exhibit J. The updated IEP document included accommodations and a goal with corresponding objectives regarding encouraging use of the helmet and obtaining the Student's voluntary compliance. Hearing Exhibit No. 0 at pages 15 and 16.

16. Initially, the Complainants provided the Student with a helmet. District and [Private School] personnel thought the helmet was too small for the Student and furnished a larger version after November 15, 2022.

17. On August 26, 2022, the District equipped the minivan with a camera that records a view of the Student in his seat. That system was upgraded to two cameras in September, 2022. Video from the camera is available for Complainants to view at the District offices.

18. With regard to toileting, the Student is independent in completing the activity, but requires prompts to go to the bathroom. [Parent] agreed that school staff can only offer to take the Student to the bathroom, but cannot force him to go or to use the toilet if he does go.

19. [Parent] testified that the Student required toilet training. He testified that Complainants did not raise the issue at the November, 2022 IEP team meeting, but then changed his testimony to say that they had. [Parent] asserted that Complainants had been asking about toileting since the Student started at school. No provision was included in the IEP documents from March, May, and/or November, 2022. Hearing Exhibits K, L and No. 0.

20. [Special Education Teacher] established that she has served as the Student's special education teacher at [Private School]. She oversees a classroom of nine children

between the ages of six and twelve who exhibit lower levels of cognition. In that role, [Special Education Teacher] instructs paraprofessionals on collecting data for the children, she participates in IEP Team meetings for her students, and she engages in communication with parents. Overall, there are seven adults in [Special Education Teacher's] classroom during the school day.

21. [Special Education Teacher] established that four of the children in her classroom have toileting issues, including the Student. She testified that taking him to the bathroom is occasionally effective, but that he does not always 'go.' On rare occasions, he has experiences urinary incontinence later, but is cooperative in getting changed into clean clothes afterwards. He has never had an issue with bowel incontinence. [Special Education Teacher] stated that her staff was assisting the Student with toileting before it was formally added as an accommodation in November, 2022. Staff will assist children at [Private School] with 'pull-up' diapers if these are provided by the family; Complainants have never provided pull-ups or suggested that the Student wear them during school.

22. [Special Education Teacher] established that she and the other staff implement the Student's IEP and BIP on a daily basis. She characterized the Student as being a lot of fun to have in class when he is in a good mood.

23. Addressing the Student's BIP, [Special Education Teacher] testified that it is effective in reducing the problematic behaviors he can engage in. Clear communication with the Student about upcoming activities, transitions, and rewards/consequences for his choices help him stay emotionally regulated. [Special Education Teacher] established that the Student's behaviors are maintained by attention. Accordingly, when the Student's behaviors escalate, the staff do not make eye contact with him or otherwise acknowledge the behaviors in a way that would cause him to believe that he was gaining attention. The staff redirect elopement from activities, maintain an area clear of objects he might throw, and place soft foam mats on nearby surfaces to protect him from hurting his head. Less restrictive interventions are always attempted first.

24. With regard to eating, the Student is independent in completing the activity. [Parent] prepares snacks and a lunch that the Student takes with him to school. [Special Education Teacher] established that the Student is able to eat what he brings and consistently does so throughout the day; the classroom staff help him open food containers as he needs. He does not always eat everything that is sent with him. [Parent] acknowledged that the school staff cannot force him to eat.

25. [Parent] described an incident on April 19, 2022, when the Student hurt his feet after removing his shoes. Hearing Exhibit No. 16. The [Private School] report for the incident indicated that the Student took his shoes off without permission and was hurt when another child opened a door and scraped the Student's toes. There was no information that the entire class was engaged in a "shoes-off" activity as suggested by [Parent].

26. [Education Director] testified in his capacity as Education Director at [Private

School], where he has worked for twenty years. He established that [Private School] does not feature any general education setting. All students are placed by school districts and have IEPs in place. [Education Director] participates as part of IEP teams for children at [Private School] to ensure that services and supports deemed appropriate can be implemented by the school.

27. [Education Director] established that, in most cases, a draft IEP is circulated a few days prior to a team meeting. Then at the IEP team meeting, the members discuss present levels of performance, needs, accommodations, goals and objectives for the child.

28. Children at [Private School] with behavioral needs receive support from Board Certified Behavioral Analysts (“BCBA”). BCBAs are professionals trained in Applied Behavior Analysis who observe and gather data related to a child’s behaviors to inform development of a Functional Behavioral Assessment (“FBA”). The findings of the FBA then form the basis for a Behavior Intervention Plan (“BIP”) that is implemented by the school staff with coaching provided by the BCBA. Paraprofessional staff at [Private School] monitor and record data on behaviors throughout the day for the BCBA and educators to use in adjusting the BIP to maximize effectiveness for the children.

29. [Education Director] testified that the Student exhibits many of the characteristics commonly associated with ASD, including problems with attending, emotional rigidity, elopement, bathroom incontinence, and self-injurious behaviors.

30. BCBAs at [Private School] developed a BIP for the Student dated October 17, 2022. Hearing Exhibit G. Previous BIPs had been developed and implemented for the Student in February, and June, 2022. [Education Director] established that the BIP is a component of the Student’s special education program. [Education Director] testified that he felt the various BIPs provided appropriate behavioral support for the Student at the times they were implemented.

31. [Education Director] was present for the November 15, 2022 IEP Team meeting and discussed what took place. He stated that the team reviewed the data and patterns related to the Student’s recent behaviors. Given the Student’s disabilities and challenges, [Education Director] established that it is not realistic to expect that the behaviors would be near zero. If interventions are working, then a trend of reduced behaviors should be apparent. Looking at page 6 of Hearing Exhibit No. 0, [Education Director] opined that the data showed progress in reducing problematic behaviors. [Parent] testified that she did not agree that the Student’s self-injurious behaviors were improving.

32. [Education Director] established that [Private School] did not have any role in providing transportation to the Student, although [Private School] staff gave input on best practices for managing the Student’s behaviors during transportation, and assisted [Student Driver] with getting the Student out of and into the van at the school site. [Special Education Teacher] established that the Student exits the van fairly willingly, but is more resistant to getting in and being fitted with the harness.

33. [Education Director] was not personally responsible for the [Private School] response to the Student's injury on August 5, 2022. He was made aware of the incident at the end of the day and believed that [Private School] staff had handled the issue consistent with the school's policies. He did not feel as though there was any need to contact emergency medical services to deal with the cuts on the Student's forehead.

34. At the IEP Team meeting on November 15, 2022, the team discussed and added a new behavior goal focused on improving the Student's tolerance and use of the soft helmet. No other additional goals were proposed by any of the team members.

35. [Special Education Teacher] established that the foam helmet covers the Student's head, including his forehead and ears. She noted that he is not fond of wearing it.

36. [Education Director] and [Special Education Teacher] established that once the Student's behaviors had escalated and he had begun banging his head, it was not possible to then get him to wear the helmet. In implementing the new goal, the helmet was offered and encouraged during times when the Student was calm, and his tolerance of it measured. [Special Education Teacher] established that the longest the Student has worn the helmet is 17 minutes. He has mastered the first objective associated with the goal and is now working on the second.

37. [Education Director] recalled the Complainants requesting support for bathroom use and meal times during the November, 2022 IEP Team meeting. The remaining team members did not determine that the Student required specific goals in these areas, and noted that the Student already benefitted from one-on-one support during all times of the day to assist with using the bathroom and eating. The IEP document included accommodations that emphasized assistance with snack and meal times, toileting, and helmet use. Hearing Exhibit No. 0 at page 16.

38. The IEP featured Extended School Year services during school breaks as [Education Director] testified that the Student could be expected to lose skills during times he is away from school for more than just a short time.

39. [Education Director] reviewed records of the Student's attendance at [Private School]. Hearing Exhibit P. After the incident on the van in August, 2022, the Student missed nearly all of September and parts of October. [Education Director] testified that this time away from school and supports could have been significant in reversing progress that had been seen with managing the Student's behaviors. [Special Education Teacher] noted that the Student lost progress in reading and occupational therapy skills during his absence. She did not believe the absence caused a significant regression in behaviors.

40. [Education Director] felt the IEP developed in November, 2022, was appropriate for the Student's unique needs and was capable of being effectively implemented by the staff at [Private School]. [Special Education Teacher] also opined that the Student's IEPs

included appropriate services and supports for him; she was fully able to implement the March, May, and November, 2022 IEPs. [Special Education Teacher] established that the Student made progress on his goals and in his behaviors after November, 2022.

41. [Transportation Director] testified in her capacity as Transportation Director for the District. She is responsible for hiring, training, and scheduling drivers, as well as purchasing and maintaining vehicles to transport regular and special education students to school, including out of district placements such as [Private School].

42. In addition to some of the information noted above with regard to transportation and the incident of August 5, 2022, [Transportation Director] established that the minivan used for the Student's transportation has been inspected by a licensed mechanic as required by the Colorado Department of Education and maintained by a local shop. Hearing Exhibit M. At no time has the vehicle experienced any type of mechanical issue that adversely affected the Student's access to education. The vehicle is equipped with a first aid kit.

43. [Transportation Director] confirmed that [Student Driver] has been the only driver who has actually transported the Student from April, 2022, through January, 2023.⁵ [Student Driver] successfully completed training informed by the CDE, the BOCES, the District nurse and special education director. Hearing Exhibit D. [Student Driver] also passed a mandatory background check and randomly-conducted tests for drug and/or alcohol use.

44. [Transportation Director] stated that [Student Driver] is a good driver who is safe, patient, and has met all requirements of the position. [Transportation Director] has had no concerns about [Student Driver]. [Transportation Director] agreed with [Student Driver's] decision to continue driving to [Private School] after the Student was injured on August 5, 2022, because they were so close to the school.

45. [Student Driver] established that she has been responsible for transporting the Student to and from school at [Private School]. She listed the following aspects of maintaining the Student's safety: strapping him securely in his harness, choosing a safe route, assessing road conditions and speed limits and driving accordingly, ensuring the vehicle is clean and mechanically sound, including windows, mirrors, engine oil level, and tire pressure.

46. [Student Driver] completed six hours of BOCES-provided training related to the needs of special education students and one hour specific to the needs of children with ASD. She also completed two days of training in safe operation of small vehicles and small

5 [Transportation Director], and her daughter, [Student Driver Sub], filled in for [Student Driver] on two days when the Student was being kept at home during September and October, 2022. [Transportation Director] established that both replacements possessed the qualifications to be drivers, but neither actually transported the Student.

buses.

[Student Driver] stated that she enjoys her time with the Student, who is in a good mood about 75 percent of the time. When he is having a problem, she just leaves him alone. She described his behaviors in the van, including trying to kick her seat, spitting at her, throwing objects he has access to, and head banging.

47. [Student Driver] was asked about [Parent]'s testimony that the Student is sometimes overheated and sweaty when he arrives home. [Student Driver] established that the minivan has air conditioning that is vented to the front and the rear. However, the Student is sensitive to the noise of the air conditioner and has thrown tantrums over it. If he complains, [Student Driver] directs the air out of the front vents only. She stated that the Student sometimes sleeps against the window and can get sweaty if the sun is shining and/or he is wearing his helmet.

48. As related to [Parent's] testimony that [Student Driver] had hit an animal with the minivan, [Student Driver] confirmed that two antelope jumped from the side of the road while she was alone in the car. Although she hit them, she had the vehicle inspected and no repairs were required. She emphasized that the Student was not in the van with her.

49. [BOCES Special Education Director] testified in her capacity as Special Education Director for the BOCES. She has held that position for four years. [BOCES Special Education Director] oversees training of staff and special education and related services provided by twenty member school districts to approximately 1,120 children with IEPs. She has been employed by the BOCES for 32 years, including as Special Education Coordinator and Assistant Special Education Director.

50. [BOCES Special Education Director] is assisted by an out-of-district coordinator who gathers information about private facilities, assesses the suitability of such facilities, communicates with parents, and participates in IEP Team meetings where out-of-district placements are considered. At the time of hearing, the BOCES had 22 children in such placements, including the Student.

51. [BOCES Special Education Director] established that each school, including [Private School], is responsible for implementing the IEP of students enrolled there. [BOCES Special Education Director] is familiar with the Student's case and with [Private School], where the BOCES has placed other children. [BOCES Special Education Director] had no concerns with [Private School] and rated it as a "great program." She opined that the Student had made significant growth and progress since attending [Private School].

52. [BOCES Special Education Director] established that a general education environment is not suitable for the Student given his unique educational needs and behaviors. She testified that [Private School] is an appropriate setting for the Student, that the IEP in place includes appropriate services and supports for him, and that the implementation of the IEPs has allowed him to benefit from his education.

53. On August 26, 2022, [BOCES Special Education Director] was concerned because the Student was not attending school. She contacted the Complainants and suggested amending the Student's IEP to address the Complainants' concerns and the safety of the transportation plan. The Complainants did not agree to an amendment, leading [BOCES Special Education Director] to document the BOCES' proposals in a prior written notice. Hearing Exhibit C.

54. [BOCES Special Education Director] attended the Student's IEP Team meeting in November, 2022. She believed that the Student's goals and objectives were informed by his present levels of performance, and that the listed accommodations and service delivery provisions would lead to educational progress. She had no concern that the IEP developed at that time omitted any necessary goal or accommodation. Complainants agreed that the IEP was appropriate for the Student at the conclusion of the meeting.

55. With regard to toileting and eating, [BOCES Special Education Director] noted that these issues were addressed in the accommodations section of the IEP, and assistance was already being provided by [Special Education Teacher] and the [Private School] staff. The Student appeared to be somewhat independent in the two areas, and [BOCES Special Education Director] thought that should be respected.

56. The IEP Team discussed helmet use and agreed that the Student could not be forced to wear it. Hearing Exhibit J. [BOCES Special Education Director] noted that while the Complainants physically put the helmet on the Student when he is at home, doing so at school could lead to an escalation of behaviors that might require restraint as an intervention. [BOCES Special Education Director] endorsed the approach of [Special Education Teacher] to always attempt less restrictive intervention(s) initially and to avoid actions that provoke escalation of behaviors.

57. [BOCES Special Education Director] did not see indication of an inappropriate implementation of the Student's IEP merely because the data suggested that his behaviors had not entirely disappeared. The Student's behaviors are a result of his disabilities, and as long as they decrease in occurrence and severity, then the data suggest improvement.

58. Lastly, as related to Complainants' assertion that the Student was being "pushed" to do things he was not capable of, [BOCES Special Education Director] and [Special Education Teacher] both thought that [Private School's] approach was appropriate. [BOCES Special Education Director] testified that the Student should be helped to be more independent and to cope in society by being challenged in a safe and supportive environment. His teachers and paraprofessionals were and are capable of assessing his ability to handle new challenges and to determine what extent is beneficial. [Special Education Teacher] also testified that children need to be challenged academically and in their peer associations to attain growth.

CONCLUSIONS OF LAW

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (“FAPE”) that provides special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Section 1401(3) defines a “child with a disability” as meaning “a child— (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services.” A school district satisfies the requirement for a FAPE when, through the IEP, it 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). To meet its obligations under the IDEA, the school district “must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.” *Andrew F. v. Douglas County School District RE-1*, 580 U.S. ___; 137 S.Ct. 988 (2017). States are empowered to implement statutory and regulatory programs to further the goals of the federal law. *Id.* at § 1407. Colorado has adopted the ECEA as well as rules for its administration here. Article 20 of Title 22, C.R.S., and 1 *Code of Colorado Regulations* (“CCR”) 301-8, respectively. The IDEA is also implemented through regulations found at 34 *Code of Federal Regulations* § 300, *et seq.*

Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” *See also Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008) (stating that “[t]he burden of proof . . . rests with the party claiming a deficiency in the school district’s efforts”). Complainants therefore bear the burden of proving by a preponderance of the evidence that the BOCES violated its obligations under the IDEA.

DISCUSSION

The evidence at hearing established that the Student was enrolled within the District, which is itself a member of the BOCES, between April 15, 2022, and January 9, 2023. By virtue of the Complainants’ residence, the BOCES had legal duty to comply with the IDEA and ECEA regarding the Student’s identification as a child with a disability, to develop an IEP that would permit him to receive appropriate benefit from his education in light of his unique needs, and to implement the IEP safely and effectively.

As noted above, Complainants entered into an agreement with the BOCES resolving all legal issues arising out of the Student’s special education prior to April 15, 2022. Following that agreement, the Student was educated pursuant to IEP amendments adopted in March and May, 2022. At hearing, the Complainants identified no provisions of either of

those documents that were inappropriate or omitted in terms of the services and supports necessary for the Student. [Parent] expressed general concern about the Student's need for assistance with eating, but there was no evidence about what specific needs, if any, were not being met in the area of eating. [Special Education Teacher] described the Student's ability to eat independently throughout the day, but also acknowledged that she and [Private School] staff helped the Student with food containers when necessary. At the November, 2022, IEP Team meeting, this matter was discussed and the support of [Private School] staff was written into the document as an accommodation. There was no substantial evidence that these measures were inadequate to permit the Student to eat and remain healthy throughout the school year and more specifically the time period between April, 2022, and January, 2023.

In the area of toileting, Complainants again failed to present any evidence of specific problems arising from the contents or the implementation of IEPs between April, 2022, and January, 2023. The Student experienced occasional urinary incontinence despite being reminded to go to the bathroom throughout the day. Both [Parent] and Special Education Teacher established that the school staff could not force the Student to actually "use" the bathroom at any time, they could only facilitate his ability to do it. On those occasions when the Student had an accident, [Special Education Teacher] established that the school staff promptly assisted the Student with a change of clothes. She also noted that the [Private School] staff were willing to assist children with the use of pull-up diapers supplied by parents. However, Complainants never indicated a desire to have the Student wear pull-ups, and they never took steps to provide them for his use. This issue was discussed at the November, 2022, IEP Team meeting, but no member of the team advocated for an educational goal centered on toileting. Complainants accepted the terms of the IEP that included express provisions for continuing to assist the Student with toileting as an accommodation.

For both eating and toileting, the ALJ finds and concludes that there was no substantial evidence of need in these areas that was unmet by the IEPs developed and implemented for the Student between April 15, 2022, and January 9, 2023. Complainants failed to show that the BOCES denied the Student a FAPE in the development and implementation of IEP provisions pertaining to eating and toileting.

Turning to transportation of the Student and Complainants' concerns with safety, the ALJ finds that these were also unproven. Much of the evidence focused on the Student's behaviors and the measures written into his IEPs to address behaviors. The injury the Student sustained on August 5, 2022, was caused by his head-banging behavior and not any unsafe operation of the District vehicle by [Student Driver]. Additionally, [Student Driver] had received training related to transportation of special education students, and children with ASD in particular. She was aware of the Student's triggers and took steps to minimize environmental factors, such as the rear air conditioning vent, that could cause escalation of the Student's behavior(s). The Student had not caused injury to himself in the vehicle prior to August 5, 2022, such that the District or the BOCES should have been aware that he needed a more secure harness. Nor had the Complainants ever raised such

an issue.

After the injury occurred, [Student Driver] continued driving for a period of a few minutes to cover the final six blocks of the ride to school. She established that there was no safe place to pull over in the immediate vicinity of where the injury occurred, and she deemed it preferable to have the assistance of school staff to help with first aid. There is no evidence that these choices exacerbated the injury to the Student or unreasonably put him at risk of harm. The cuts to the Student's head required cleaning and bandages, but were not so severe that any additional steps needed to be taken. [Parent] conceded as much. The school staff sent [Parent] photos of the injury and called her immediately. She did not request any additional medical assessment or treatment and did not go to the school to check on the Student. The Student completed his day without incident, and follow-up visits with his doctor revealed no serious complications. Thus, the ALJ finds and concludes that the actions of [Student Driver] and [Private School] staff prior to, and on the date of the incident did not represent any failure to provide the Student with safe transportation to his special education placement.

As it related to subsequent actions by the BOCES and District, [Transportation Director] and [BOCES Special Education Director] established that a number of measures were proposed and ultimately implemented to enhance the Student's safety, despite Complainants' initial objection. The Student's transportation plan was amended to include the opportunity to wear a soft helmet, to include the installation and use of a five-point harness to limit his ability to head-bang, to include a video camera in the vehicle, and to identify the place in the vehicle that was most likely to minimize the chance for further harm. The record established that the Student had not suffered another injury during transportation at any time relevant to the due process complaint. For these reasons, the ALJ finds and concludes that Complainants failed to establish that the policies, procedures, and actions of the BOCES and/or the District applicable to transportation of the Student to and from [Private School] represented an unsafe or unreasonable implementation of the IEPs. No relief is warranted on this issue.

Finally, with regard to the generalized concern of Complainants that the Student was being forced to "do things he can't do," there was no substantial evidence to support this claim. Neither [Parent] gave any specific account of any instance where such overreach resulted in educational harm to the Student. First, there was no evidence of any provision in the Student's IEPs that Complainants identified as inappropriate because it was too demanding. Second, there was no evidence of any action on the part of the [Private School] staff where the Student was required to undertake some task, whether identified in the IEP or not, that so exceeded his abilities as to cause him harm. The only real testimony on this issue came from [Special Education Teacher] and [BOCES Special Education Director], both of whom endorsed the notion of pushing students to achieve to the extent of their ability so as to realize the maximum benefit from their education. Special Education Teacher noted that she had challenged the Student academically and in his interactions with peers without any negative outcome. She established that and the other [Private School] staff were sensitive to his unique needs and were committed to implementing the

IEP and BIP in ways that minimized interventions and respected his rights. In the former regard, [Special Education Teacher] established how staff were trained to communicate with him in ways that reduced triggers and to react to behaviors in ways that tended to result in de-escalation. As to the latter, the record specifically established that the Student was not forced to wear his helmet and was not forced to use the bathroom against his will. These factors, and the evidence as a whole, support the determination that the [Private School] school took appropriate steps in implementing the Student's IEP to maximize his educational benefit.

DECISION

The ALJ concludes that the Complainants did not meet their burden of establishing that the BOCES is responsible for a deprivation of FAPE to the Student in the development and implementation of IEPs between April 15, 2022, and January 9, 2023. The IEPs were developed and implemented to address the unique educational needs arising from the Student's disabilities, and afford him the benefits of special education. Accordingly, Complainants are not entitled to any relief on the issues raised by their Due Process Complaint herein.

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

DONE AND SIGNED this 12th day of June, 2023.



KEITH J. KIRCHUBEL
Administrative Law Judge