

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	▲ COURT USE ONLY ▲
<p>[STUDENT], by and through his parents, [PARENT] and [PARENT], Appellants,</p> <p>vs.</p> <p>THOMPSON R2-J SCHOOL DISTRICT, Appellee.</p>	
DECISION UPON STATE LEVEL REVIEW	

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon Appellant's appeal of a decision by an Impartial Hearing Officer (IHO). This state level review is governed by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* and its implementing regulations at 34 CFR § 300.510; and the state Exceptional Children's Educational Act (ECEA), §§ 22-20-101 *et seq.* and its implementing regulations at 1 CCR 301-8, §§ 2220-R-6.02(9) to (12).

This appeal was filed March 19, 2008, but at the parties' request, the decision deadline specified by 1 CCR 301-8, § 2220-R-6.02(7)(j)(iv) was suspended to permit resolution of Appellee's motion to dismiss. Following resolution of that motion, the parties agreed upon a schedule to brief and argue the merits of the case. Neither party wished to offer new evidence. Briefing was completed and oral argument was held July 11, 2008; the matter is now ripe for decision. Upon agreement of the parties, the decision upon state level review will be due July 25, 2008.

W. Stuart Stuller, Esq. and Alyssa C. Burghardt, Esq. of the law offices of Caplan and Earnest LLC, represent the District. Jack D. Robinson, Esq. of Spies, Powers & Robinson, P.C., represents the Appellants. For purposes of confidentiality, the ALJ will refer to Appellant ([STUDENT]) by his initials throughout this decision.

Background

[STUDENT] is an [AGE] boy diagnosed with Asperger's Syndrome (a form of autism), attention deficit hyperactivity disorder (ADHD), traumatic brain injury, a sensory integration disorder, and bipolar disorder. The District identified [STUDENT] as a child with a disability under the IDEA and has been providing [STUDENT] with special education and related services pursuant to an individualized education program (IEP).

In December 2005, following a deterioration in [STUDENT]'s behavior, the parties agreed to place [STUDENT] at [PRIVATE SCHOOL], a private school located in

Denver that specializes in day treatment and education of autistic children. [STUDENT] has performed successfully at [PRIVATE SCHOOL]. In May 2007, the District proposed an IEP to transition [STUDENT] back into the public schools so that [STUDENT] could begin to interact with normally developing peers in the educational setting, a goal contemplated by the IDEA.¹ Although Parents share this ultimate goal, they object to the District's plan to accomplish it. In particular, the Parents object to what they view as the District's plan to introduce [STUDENT] into the public school in an isolated setting they contend was previously tried and failed. Parents rejected the proposed IEP and requested a due process hearing.

Although Parents and the District generally agree upon the goals and objectives for [STUDENT]'s education, they disagree as to whether the May 2007 IEP was reasonably calculated to accomplish those goals and objectives. After a four day hearing, the IHO upheld the IEP, concluding that it was a reasonable plan to provide [STUDENT] with a free and appropriate public education (FAPE). Having carefully considered the record below, the IHO's report, and the arguments of the parties, the ALJ affirms the IHO's decision.

Findings of Fact

The record supports the IHO's findings of fact and the ALJ generally adopts them as his own. The following findings of fact are drawn from the IHO's decision, with modifications as footnoted:

1. [STUDENT] is an [AGE] boy with a date of birth of [DOB]. He is currently attending [PRIVATE SCHOOL], a private school in Denver, Colorado specializing in the education of children with autism. The District proposes to transition him to a placement at [ELEMENTARY SCHOOL], [STUDENT]'s neighborhood school in the District.²

[STUDENT]'s Disabilities and Needs

2. [STUDENT] is disabled. His primary diagnosis is Asperger's Syndrome, a category of autism. Asperger's Syndrome is a severe and sustained impairment of social interaction and functioning but, in contrast to other types of autism, there are no clinically significant delays in language, cognitive, or developmentally age-appropriate skills.³

3. [STUDENT] falls within the medium to high functioning range on the autism spectrum. He has good cognitive skills and is at the low end of the average range of intellectual functioning.

4. In addition to Asperger's Syndrome, [STUDENT] has attention deficit hyperactivity disorder and a traumatic brain injury. He also has an emerging diagnosis

¹ Throughout the record, "normally developing peers" are also referred to as "typically developing peers." For consistency, the ALJ will refer to these peers as normally developing.

² As originally proposed, this transition was to take place in August 2007, at the beginning of [STUDENT]'s sixth grade year.

³ This definition is drawn from *Taber's Cyclopedic Medical Dictionary* 174 (19th ed. 2001).

of bipolar disorder, a mood disorder. In the past he was also diagnosed with a sensory integration disorder, which impairs his ability to take in and process information.

5. Although [STUDENT] has adequate language skills, he has deficits in socialization. As a result of his disabilities he has problems reading and understanding emotions and has difficulty recognizing his own emotions and how they affect other people. [STUDENT] finds it hard to initiate, maintain or complete social interactions, has difficulty in interpreting social nuances such as body language and facial expressions, and difficulty understanding complex language such as figures of speech.

6. [STUDENT] also has executive function issues, which result in difficulty in planning, prioritizing and organizing information. He is therefore easily distracted by anything in his external environment. Additionally, [STUDENT] has a very short attention span (he has difficulty focusing, sustaining attention and staying on task) and he is impulsive (such as blurting out comments or interrupting others).

7. As a result of his disabilities, [STUDENT] has difficulty coping with transition or change, which can be very stressful for him. He has difficulty managing emotions. On occasion he will engage in out-of-control behavior. His out-of-control behavior manifests itself in defiance, verbally provocative behavior, anger outbursts and being oppositional. Because of his mood disorder he may easily become enraged, and it is not predictable when that might occur.

8. [STUDENT] has serious behavioral problems at home, including physical aggression and violence. He functions much better at school due to the structure provided in his school environment. To deal with these behavior issues at school, [STUDENT] needs a good relationship with school staff and someone he can go to help him identify and manage emotions. [STUDENT] seeks out and often prefers adult companionship as adults help him interpret his environment and decide how to act.

9. [STUDENT]'s medical providers have attempted a number of trials of medications to deal with his symptoms. These attempts were substantially unsuccessful. The medications either resulted in unacceptable side effects or were simply ineffective in addressing [STUDENT]'s symptoms.

10. [STUDENT] has specific educational needs resulting from his disabilities. His academic instruction must be delivered either one-on-one with a teacher or in very small groups. His educational environment must be highly structured and present minimal distractions (such as visual and sound distractions). He needs a quiet environment with minimal background or competing noises, so that he can focus and not become over stimulated. His teaching strategies must include visual and verbal support, repetition, redirecting and frequent reinforcement of good behaviors. He needs direct social skills instruction and social skills practice throughout the day, both in educational settings and in non-educational settings such as lunch and recess.⁴

11. [STUDENT] needs frequent breaks due to his need to move around the

⁴ It is important that [STUDENT]'s social skills training occur in the context of interactions with his peers, rather than simply isolated instruction by his teacher.

room. His educational materials must be very structured to help him organize and plan. He requires a consistent environment and monitoring and cueing by teachers or other adults throughout the day so that he can better organize information and control his behaviors. [STUDENT] needs a consistent and predictable routine, within which he is given the ability to make choices so that he has a sense of control over his life.

12. The evidence presented by the parties' experts was in conflict regarding the type of peer interaction is most important for [STUDENT]'s educational program. While Parents' experts place a premium upon [STUDENT] remaining within a small, consistent group of children who share a relatively similar developmental level, the District's experts believe that exposure to more normally developing peers is critical.⁵

13. Parents' experts believe that autistic children form better and more realistic relationships and friendships with other special needs students. Many successful programs for autistic children operate under this philosophy. Parents' evidence was that consistent interaction with a small group of children at a relatively similar level of developmental disability was a critical element of [STUDENT]'s educational needs. The Parents' experts discount the importance of exposure to normally developing peers because, in their opinion, the autistic child lags in social interaction ability and therefore will not understand social interactions with such children and will find the interaction stressful. While interaction between children with such disparate abilities can be positive if there is adult supervision, the interaction can have a negative effect in the absence of adequate supervision.

14. On the other hand, the District presented expert evidence that children with autism, even those with additional mental health diagnoses, benefit from contact with normally developing peers. In this view, normally developing peers model appropriate language, social skills and behavior for autistic children and autistic children have a better chance to learn these skills if they have access to normally developing peers. By contrast, practicing social skills with other developmentally disabled children may not be as effective because those children have similar social skills deficits, and [STUDENT] might actually learn inappropriate behaviors from such peers. According to these opinions, [STUDENT] would benefit from a more challenging environment in which he has the opportunity to interact with normally developing peers. Doing so with appropriate supports, such as adult supervision, would give [STUDENT] a better opportunity to function in society at large, which is an important goal for [STUDENT].

15. The District's evidence was that [STUDENT]'s most important need is to begin integration with normally developing peers in an educational setting, even if as a transitional move he first is placed in a one-on-one environment with his teacher, and then is introduced to developmentally similar children and finally normally developing

⁵ The ALJ has modified the IHO's findings 12, 13 and 14 to more clearly contrast the difference in the parties' positions.

peers as tolerated.⁶

16. The divergent views of the parties regarding interaction with peers represent a difference in educational methodology. The evidence did not establish that the District's chosen method was inappropriate or was not designed to provide educational benefit.

17. [STUDENT] does, in fact, successfully interact with normally developing peers in social settings involving small groups, such as Boy Scouts, religious training, day camps,⁷ and at a neighbor's home. These interactions involve close adult supervision.⁷

[STUDENT]'s *Public School History*

18. The District identified [STUDENT] as a child with special needs and placed him in a special education program in pre-school. He then attended kindergarten for half days, at first with the support of an aide and later with support from a resource room teacher.

19. [STUDENT] was placed in a regular classroom at [ELEMENTARY SCHOOL] for the first and second grades, but he had difficulty coping and his behavior deteriorated at home. His behavior at school worsened in the second grade, including aggressive behavior on the playground.

20. An IEP team meeting was conducted at the end of [STUDENT]'s second grade year, in the spring of 2005. As a result of that meeting, the team decided that during the 2005-06 school year [STUDENT] would be educated part-time in the general classroom and part-time in the resource room, and that he would be provided with a full-time aide. However, at the start of that school year no aide was available.

21. Because no aide was available in the fall of 2005, [STUDENT] began his third grade year receiving almost all of his instruction in the resource room. His behavior deteriorated substantially. In September 2005, the principal of [ELEMENTARY SCHOOL] notified Parents that [STUDENT] was out-of-control. He was disruptive, interrupted the learning of other children, was defiant and objected to his schooling, and threatened another student with a pencil.

22. Parents home schooled [STUDENT] for a period of time beginning in late September 2005. In October, the District placed [STUDENT] in a one-on-one teaching situation. Despite this individualized instruction, [STUDENT] continued to be off task and to respond to almost every sight, sound and movement in his environment. He would yell or talk at inappropriate times, engage in defiant behavior and get out of his seat frequently to gain attention and avoid academic tasks.

23. An IEP team meeting was conducted October 18, 2005. The IEP that

⁶ Parents do not oppose some interaction with normally developing peers in a supervised setting, but object to what they see as the lack of a plan in the IEP to guarantee [STUDENT] receives his day-to-day education in a small group of developmentally similar peers, as exists at [PRIVATE SCHOOL].

⁷ Revised based upon the testimony of [PARENT], Tr. v. 1, p. 188, l. 12 to p. 189, l. 4.

resulted from this meeting provided for [STUDENT] to attend school on a modified schedule, for half days only. Pursuant to this IEP, [STUDENT] received individual instruction in a room with no other students. He was seated away from doors and windows and the windows were covered to limit distractions.

24. On October 31, 2005, Parents placed [STUDENT] in a day treatment psychiatric program at [HOSPITAL] in Denver. One goal of placing [STUDENT] in this program was to identify medications to deal with his mood disorder. The medications, however, resulted in serious side effects such as mania, bizarre behavior, an inability to sleep and occasional incoherence. Additional medications resulted in additional problems, to the extent that [STUDENT] had to be admitted to the hospital overnight on one occasion at the end of November. By this time he was having hallucinations and delusions and was unable to function.

25. By the end of November, [STUDENT] could not function at the hospital, let alone at school. Doctors at [HOSPITAL] suggested [PRIVATE SCHOOL] and the District agreed to place [STUDENT] at that school at the District's expense. [STUDENT] began attending [PRIVATE SCHOOL] on December 12, 2005.

26. Neither Parents nor the District intended [STUDENT]'s placement at [PRIVATE SCHOOL] to be his permanent educational placement. Rather, the intent was that [STUDENT] would return to his neighborhood school when he was stable and an appropriate educational program was in place within the District.

[PRIVATE SCHOOL]

27. [PRIVATE SCHOOL] is a small school designed to meet the needs of individual students. The school specializes in autism, but also serves children with other developmental disabilities. The school currently serves 12 students, aged six to fourteen.⁸ None of these students are normally developing children.

28. The goal of [PRIVATE SCHOOL] is to return a student to a regular educational setting when the child is ready. Typically, children remain at [PRIVATE SCHOOL] for a period of one to three years.⁹

29. Although the parties intended [PRIVATE SCHOOL] to be a temporary placement, they agreed to continue [STUDENT] at [PRIVATE SCHOOL] until they could further assess and evaluate his circumstances and consider a plan for his transition back to the District.¹⁰

30. [PRIVATE SCHOOL] is located in Denver and [STUDENT] lives in [CITY], Colorado, thus requiring a one-hour commute each way to and from school. [STUDENT] is driven by himself in a regular vehicle, not a school bus. He does very well with his commute and has no transportation issues.

⁸ The school is licensed to accept persons up to 21 years of age.

⁹ As of the date of the IEP, [STUDENT] had been at [PRIVATE SCHOOL] almost 18 months.

¹⁰ The ALJ has not adopted the IHO's discussion of the parties' dispute as to the reason [STUDENT] was placed at [PRIVATE SCHOOL]. The relevant fact is that the placement was intended to be temporary.

31. At [PRIVATE SCHOOL], [STUDENT] is in a class with three other boys who are at about his same level developmentally and socially. The small class size minimizes sounds and distractions. The class members differ somewhat academically and these differences are individually addressed in academic instruction. There is one lead teacher in the class along with one or two co-teachers and much of the instruction is one-to-one with a teacher (although other people are in the room during the one-to-one instruction, so that [STUDENT] learns to deal with some distractions).

32. During the day, [STUDENT] works either one-on-one with a teacher on guided independent projects, or in small groups of two to four students.¹¹ Lunch and recess are taken with all of the students at the school. Lunch and recess are part of the curriculum; during these periods [STUDENT] practices social skills and the staff collects data and teaches.

33. [STUDENT] works with several teachers and staff during the day so that he can develop the ability to generalize skills he has learned from one adult to other individuals.

34. [STUDENT] has done very well at [PRIVATE SCHOOL]. He enjoys the school and has made friends there; he has made reasonable progress towards his goals and objectives; and he has shown a consistent ability to meet the academic and behavioral demands of that school.

The 2006-2007 School Year

35. The District anticipated that [STUDENT] would return to [ELEMENTARY SCHOOL] by the fall of 2006 and hired a behavioral specialist to work with [STUDENT] over that summer so that he would be ready to return to his regular school in the fall. In late July 2006, Parents and the District discussed convening a transition team to plan [STUDENT]'s return to the District when he was ready. Parents even suggested the possibility of using [PRIVATE SCHOOL] as a model for [STUDENT]'s future placement. However, Parents did not think that [STUDENT] was ready to return to the District at that time and they reported these concerns to the behavioral consultant. In early August, Parents reported to the behavioral specialist that [STUDENT]'s behavior at home was deteriorating to the point that they feared he might have to be hospitalized.

36. Despite his deteriorating behavior at home in the summer of 2006, [STUDENT] continued to do well in the structured environment of [PRIVATE SCHOOL].

37. On August 14, 2006, as a result of a contractual dispute between the District and [PRIVATE SCHOOL], the District gave [PRIVATE SCHOOL] 30 days written notice that the District was terminating its contract for [STUDENT]'s placement. This letter was the first notice to [PRIVATE SCHOOL] that the District contemplated termination of this placement. At this time no IEP was in place or IEP team meeting scheduled to deal with [STUDENT]'s transition from [PRIVATE SCHOOL], though the notice did state that an IEP meeting was necessary for this purpose.

¹¹ Even when receiving instruction one-on-one, his other classmates are present in the room.

38. The District's unexpected attempt to cancel its contract with [PRIVATE SCHOOL], with no transition plan in place, caused the Parents to question whether the District had [STUDENT]'s best interests in mind and generated a certain level of distrust in the District. Nevertheless, the Parents were willing to work with the District toward developing a transition plan.

39. Viewing the evidence as a whole, the District's attempt to cancel its contract with [PRIVATE SCHOOL] does not support an inference that the District would not act in good faith to plan and implement an IEP in [STUDENT]'s best interests.

40. The IEP team met on September 20, 2006 to gather and review data regarding [STUDENT]'s present levels and assess where [STUDENT] was at that time. [PRIVATE SCHOOL DIRECTOR], the director of [PRIVATE SCHOOL], and [LEAD TEACHER], [STUDENT]'s lead teacher from that school, were present at this meeting, along with Parents and representatives of the District. The participants at the meeting concluded that they did not have sufficient information about whether [STUDENT] was ready to transition out of [PRIVATE SCHOOL]. They decided that it was necessary for [STUDENT] to come to [ELEMENTARY SCHOOL] to update his formalized testing in order to complete his triennial review, to determine [STUDENT]'s current academic levels, and to assess whether [STUDENT] was ready to transition and, if so, into what setting.

41. The District administered a set of academic tests to [STUDENT] at [ELEMENTARY SCHOOL] on September 29, 2006. [STUDENT] took the tests in the school's resource room and exhibited no behavior issues during the testing or during a break in the playground. Although school was in session, [STUDENT] did not interact with any other students at [ELEMENTARY SCHOOL] that day.

42. The IEP team next met on November 20, 2006 and reviewed [STUDENT]'s data. The team identified a number of possible settings within the District but determined that it needed more information regarding [STUDENT]'s potential transition. The IEP team therefore decided that [STUDENT] would remain at [PRIVATE SCHOOL] for the rest of the school year. The District would then propose a plan for [STUDENT]'s transition back to the District for the 2007-2008 school year.

The May 15, 2007 IEP and Transition Plan

43. The IEP team's next meeting took place on May 15, 2007. Prior to this date representatives of the District had observed [STUDENT] at [PRIVATE SCHOOL] on two occasions, in the summer of 2006 and in April 2007. They had also participated in progress meetings at [PRIVATE SCHOOL] and took part in the development of [STUDENT]'s IEP at [PRIVATE SCHOOL] in February 2006. By May 2007, the District determined that [STUDENT] was ready to return to [ELEMENTARY SCHOOL]. The District based this conclusion on its observations of [STUDENT] at [PRIVATE SCHOOL] and at [ELEMENTARY SCHOOL] during his testing, his progress meetings at [PRIVATE SCHOOL], the assessment data, and the conferences with Parents.

44. At the May 15 meeting the IEP team, including Parents, [PRIVATE

SCHOOL DIRECTOR] and [LEAD TEACHER], reviewed a proposed IEP that included a transition plan for [STUDENT] to return to [ELEMENTARY SCHOOL] in the fall of 2007. Parents had not been involved in the development of the proposed plan. The proposed IEP, including the transition plan, contained the following elements, among others:

A. [STUDENT]'s initial schedule at [ELEMENTARY SCHOOL] would be the same as his schedule at [PRIVATE SCHOOL], in order to provide consistency during the transition. A consistent schedule that lets [STUDENT] know what is coming next will assist him in making this transition. His daily schedule could be modified over time based on [STUDENT]'s individual needs and how well he is doing at [ELEMENTARY SCHOOL].

B. The goals and objectives in the IEP are the same as at [PRIVATE SCHOOL].

C. [STUDENT] would receive services and support from a variety of individuals, including the resource teacher, the school psychologist, a counselor, a paraprofessional and a behavioral specialist.¹² The IEP also provided for [STUDENT] to receive the services of an occupational therapist and a speech language pathologist.

D. [STUDENT]'s initial educational setting would be in a separate classroom, with one-on-one instruction. The transition plan contemplates integration of peers for small group instruction, but the timing and rate of integration will be based on [STUDENT]'s needs and progress.¹³ [STUDENT]'s educational environment would be highly structured and would present minimal distractions. The IEP contemplates visual and verbal directions and feedback, repetition, and frequent reinforcement.

E. The District planned initially to introduce a developmentally similar peer into [STUDENT]'s program, with the goal of eventually teaming [STUDENT] consistently with one to three other students in his academic instruction and for lunch and recess. The District would adjust this setting in terms of the number and developmental levels of his peers according to [STUDENT]'s progress. The District would prepare [STUDENT] for peer interactions with techniques such as pre-teaching, modeling, role-playing and practice.

F. Social skills instruction would be delivered either one-on-one or in a small group, depending on [STUDENT]'s ability to tolerate peer interaction. Lunch, recess and academic instruction would all be looked at as opportunities for social skills coaching and for [STUDENT] to practice social skills (this practice may not be available with peers immediately, but the IEP is designed to introduce social skills practice with peers at the earliest opportunity).

G. [STUDENT] would begin the 2007-2008 school year attending

¹² The resource teacher and the behavioral specialist testified at the hearing. Both are well trained in their respective fields and have experience with disabled children, including those with autistic disorders.

¹³ This decision will be made in consultation with the Parents.

[ELEMENTARY SCHOOL] one day each week, with his other school days spent at [PRIVATE SCHOOL]. The transition plan anticipates that [STUDENT]'s attendance at [ELEMENTARY SCHOOL] would increase by one day a week each month, with full-time attendance at [ELEMENTARY SCHOOL] to occur after five months. However, the actual rate of transition will be based on [STUDENT]'s needs and readiness. The District would collaborate with [PRIVATE SCHOOL] during this transition.

H. Because of concern about how [STUDENT] might react to attending a larger school (there are over 300 students at [ELEMENTARY SCHOOL]) the timing of his arrival and leaving school would be set to avoid contact with large groups of students. [STUDENT] would be escorted to and from the classroom by a paraprofessional.

I. [STUDENT] would initially eat lunch by himself in the room where he receives instruction, with a teacher, counselor or paraprofessional. As he is able to handle increased social time without becoming over stimulated he would eventually be joined by one or more peers, in the lunchroom or other setting.

J. To avoid over stimulation by exposure to large numbers of other children, [STUDENT] would at first have recess apart from the general school population, with a teacher, paraprofessional or counselor. He would eventually be joined by peers as he is able to tolerate increased social time. [STUDENT] might at first be joined by one other student in limited amounts of time with increases in the number of peers as [STUDENT] progresses.

K. Initially, the behavioral specialist would be present with [STUDENT] for almost all of his instruction and activities during the school day. The behavioral specialist would support other [ELEMENTARY SCHOOL] staff to ensure consistency in behavioral expectations and interventions during the transition period. In addition, the District offered the services of this specialist to the Parents to help them deal with [STUDENT]'s behaviors at home. The provision of this service to ensure consistency in behavioral expectations and interventions is similar to the structure provided to [STUDENT] at [PRIVATE SCHOOL].

45. The intent of the District's transition plan was that [STUDENT] would progress in his transition as quickly as he was able. For example, he might transition from individual academic or social skills instruction to small group instruction or to lunch and recess with peers as soon as his second week at [ELEMENTARY SCHOOL], if his behavior indicated that he was ready to accept peers into his environment at [ELEMENTARY SCHOOL].¹⁴ Ultimately, the District has the following goals for [STUDENT]: He will be in a small class for academic instruction similar to his current placement at [PRIVATE SCHOOL], with one-on-one instruction as needed to address specific needs; he eventually might spend part of the day in the general classroom;

¹⁴ [ASSISTANT DIRECTOR], the Assistant Director for Special Education, testified that the integration of peers could even begin "immediately." Tr. v. III, p. 621, ll. 4-6.

normally developing peers would be introduced into his program at lunch and recess; and [STUDENT] would engage in specials such as art and music along with normally developing peers.¹⁵

46. Because of the possibility that [STUDENT]'s transition would require adjustment, a follow-up IEP team meeting was scheduled for September 20, 2007, one month after [STUDENT]'s planned return to [ELEMENTARY SCHOOL], to make any necessary adjustments. The District also could also modify the transition plan prior to September 20th, in response to [STUDENT]'s needs and readiness, in consultation with the Parents.¹⁶

47. The transition plan contemplated that the peers initially introduced into [STUDENT]'s program would be students with needs similar to his, in order to be consistent with his experience at [PRIVATE SCHOOL]. However, the District intended under this plan that [STUDENT] would have access to normally developing peers where possible.

48. In developing this transition plan the District also considered that [STUDENT] would be attending middle school the following year. In the District's view, it was better for [STUDENT] to transition in stages (from [PRIVATE SCHOOL] to [ELEMENTARY SCHOOL] to middle school), rather than to move directly from [PRIVATE SCHOOL] to a middle school. [STUDENT] was already familiar with the building and some of the staff at [ELEMENTARY SCHOOL]. Also, a staged transition would give [STUDENT] the opportunity to develop relationships with peers with whom he could move on to middle school, rather than to go directly from [PRIVATE SCHOOL] to an unfamiliar middle school where he knew no one. Parents believe, however, that it would be better for [STUDENT] to have one change of school rather than two.¹⁷

49. The District considered continuing [STUDENT] at [PRIVATE SCHOOL] but concluded that this placement was not appropriate, primarily for two reasons: the long commute to and from school, and the inability for [STUDENT] to interact with normally developing peers at [PRIVATE SCHOOL].

50. Parents did not agree with the proposed transition plan presented at the May 15, 2007 meeting. In their view, the IEP was not a comprehensive plan designed to meet all of [STUDENT]'s needs, and was in essence an experiment with his education.

51. Parents believed that if [STUDENT] was ready to interact with peers the District would have him do so initially, not start him in an isolated setting. Additionally, while the transition plan anticipated [STUDENT]'s eventual interaction with peers, the

¹⁵ The plan to integrate [STUDENT] with his normally developing peers is found in the IEP at Exhibit B, p. 22.

¹⁶ Because the May 15th IEP was not implemented, the September 20th meeting was not held.

¹⁷ Although Parents wished to minimize the number of changes in [STUDENT]'s transition, their principle objection to the District's proposal was not the timing of the transition, but rather the District's failure to have a "comprehensive" plan in place that contained the essential elements of [PRIVATE SCHOOL] program and did not isolate [STUDENT] from his peers.

introduction of peers was not guaranteed by the plan while such interaction was a known aspect of his program at [PRIVATE SCHOOL].

52. Parents also were concerned that the size of the school and of the student body at [ELEMENTARY SCHOOL] would over stimulate [STUDENT] and that his bad behavior at home would escalate accordingly. Because of these concerns the District included in the transition plan the provision that [STUDENT] would arrive at and leave school when no other children were present. However, Parents objected to removing this opportunity for socialization from [STUDENT]'s schedule.

53. Parents were also concerned about [STUDENT]'s isolation in a self-contained classroom and at lunch and recess.¹⁸ They wanted [STUDENT] to interact with his peers. While they did not want [STUDENT] to be isolated at recess they did want to avoid large crowds and excessive noise.

54. Parents also objected to the May 15th transition plan because, in their view, one-on-one education in an isolated setting was previously tried in the fall of 2005, and was not successful.

55. Parents believe the District could develop an appropriate program for [STUDENT], but that this IEP did not do so. Parents want [STUDENT] to be placed in a proven program where it has been established that children like [STUDENT] can be successful. The program envisioned by Parents would involve the following: teaching and learning would occur every moment and in all settings; [STUDENT] would be in a small setting with minimal distractions and a small, consistent set of peers; good staff coordination; and good communication between home and school. Parents have not identified any other placement in the District that they believe would meet these requirements.

56. [PRIVATE SCHOOL DIRECTOR] and [LEAD TEACHER] also objected to the May 15th plan. They believed that [STUDENT] needs a consistent set of three or four peers in a small school environment and that he was not ready to return to [ELEMENTARY SCHOOL]. In their opinion, if [STUDENT] was ready to make a transition he should be placed with peers from the first day at [ELEMENTARY SCHOOL]. [PRIVATE SCHOOL DIRECTOR] and [LEAD TEACHER] also believed that [PRIVATE SCHOOL] was a less restrictive environment because the proposed IEP initially isolated [STUDENT] from peers, while he interacted with peers continually at [PRIVATE SCHOOL]. Introducing peers at variable times would not, in their view, meet [STUDENT]'s need for a consistent set of peers.

57. [PRIVATE SCHOOL DIRECTOR] acknowledged at the due process hearing that the proposed IEP incorporated many aspects of [PRIVATE SCHOOL] program, but testified that this IEP did not constitute a comprehensive and cohesive plan (that is, that all people working with [STUDENT] are appropriately trained, know [STUDENT]'s program, know what [STUDENT] is doing at all times and know how to

¹⁸ In their view, this aspect of the District's plan constitutes a more restrictive setting than what he enjoyed at [PRIVATE SCHOOL].

deal with [STUDENT] appropriately). He does not believe the District has the ability to successfully implement this plan. In particular, [PRIVATE SCHOOL DIRECTOR] and [LEAD TEACHER] believe that the lack of a consistent group of peers and daily social skills group and practice are important elements missing from the proposed IEP. [PRIVATE SCHOOL DIRECTOR] also believes that the plan lacks sufficient provisions for role-playing with peers and interaction with multiple staff working together during the day.

58. Between May 15, 2007 and August 1, 2007 neither Parents nor [PRIVATE SCHOOL] provided specific suggestions for modifications or alternatives to the proposed IEP and transition plan discussed at the May 15 IEP team meeting. Parents were willing to work with the District to develop what they considered to be an appropriate plan placing [STUDENT] in the District, but they objected to the May 15, 2007 proposal for the reasons described above.

59. The preponderance of the credible evidence did not establish that the proposed IEP and transition plan would be any more stressful for [STUDENT] than alternatives within the District that might be more acceptable to Parents. Similarly, the preponderance of the credible evidence did not establish that the proposed transition to [ELEMENTARY SCHOOL] would be any more stressful than an abrupt change from one setting to the other.

60. On August 1, 2007 the District sent Parents a letter informing them that the May 15th IEP proposal would be implemented at [ELEMENTARY SCHOOL] beginning August 2007. In this letter the District described the nature of the transition plan and the reasons for its implementation, including the following information:

A. [STUDENT] would be in a self-contained setting, initially one day per week at [ELEMENTARY SCHOOL].

B. [PRIVATE SCHOOL] setting was no longer appropriate because: the interventions at [PRIVATE SCHOOL] are not unique and can be replicated in a public school; [STUDENT] can not interact with normally developing peers at [PRIVATE SCHOOL]; the District has a traumatic brain injury team and [PRIVATE SCHOOL] has no similar resource; and attendance at [PRIVATE SCHOOL] requires a two hour commute each day.

C. Data from various sources, including [PRIVATE SCHOOL] staff input, observations of [STUDENT] at [PRIVATE SCHOOL], progress reports and triennial assessment data indicated that while [STUDENT] continued to demonstrate inappropriate behaviors at home his behavior was acceptable in the school setting and he was making slow academic progress.

D. Access to normally developing peers at [ELEMENTARY SCHOOL] makes placement at that school a less restrictive environment than [PRIVATE SCHOOL].

E. The District would implement Parents' suggestion to mirror [STUDENT]'s program at [PRIVATE SCHOOL].

F. Transitioning [STUDENT] in the 2007-2008 school year would allow him to move on to middle school with his peer group from [ELEMENTARY SCHOOL] rather than requiring a jump directly to an unfamiliar middle school, which could create additional stress and anxiety.

61. Parents filed a request for a due process hearing after receiving the District's August 1, 2007 letter. [STUDENT] has remained at [PRIVATE SCHOOL] pending the resolution of this case, pursuant to the stay-put provisions of the IDEA.

62. The parties presented differing expert opinions regarding whether [STUDENT]'s program at [PRIVATE SCHOOL] was more appropriate than the proposed IEP of May 15, 2007. The preponderance of the credible expert testimony does not, however, prove that the District's plan is inappropriate or would result in regression of the progress [STUDENT] made at [PRIVATE SCHOOL].¹⁹

Special Education Services In the District

63. The District serves 1,850 special education students, including approximately 60 students with autism, 40 students with traumatic brain injuries and many students with multiple disabilities. Like [STUDENT], many of the autistic children have mental health issues and other comorbidities.

64. The autistic students in the District require levels of service ranging from minimal special education support to significant support. Compared to the universe of autistic children served by the District, [STUDENT] is moderately impaired.²⁰ [STUDENT]'s educational needs are not uncommon compared to the needs of other special education students served by the District.

65. The District maintains a multi-disciplinary autism team that consults with special education teachers throughout the District. The District also has a multi-disciplinary behavior support team and a traumatic brain injury team, both of which provide support and consultation throughout the District. Schools also have social workers to support the special education teams. In addition, the District has contracted with a behavioral consultant to work with [STUDENT] and with [STUDENT]'s parents, if they wish.

66. The District has the staff and programs to provide [STUDENT] with the same instruction, curriculum and interventions provided to him at [PRIVATE SCHOOL].

¹⁹ Although the ALJ agrees with this finding, the ALJ does not adopt the IHO's finding that there was "no evidence" [STUDENT] would regress under the May 15th IEP. [CLINICAL PSYCHOLOGIST], Ph.D., [STUDENT]'s clinical psychologist, testified that exposure to a variable set of peers at [ELEMENTARY SCHOOL], rather than a stable group of peers such as [STUDENT] enjoyed at [PRIVATE SCHOOL], would lead to higher anxiety for [STUDENT] and likely result in his acting out. Tr. v. II, p. 466, l. 22 to p. 468, l. 4.

²⁰ Though this was the testimony of the District's witnesses, other evidence suggested that [STUDENT]'s has "very significant neurocognitive difficulties." Ex. BB, p. 4. The ALJ does not adopt one characterization over the other, and instead finds that [STUDENT]'s disabilities fall in the range of moderate to very significant.

67. The ALJ finds, from the record as a whole, that the District has trained staff and appropriate facilities and programs such that the District is able to provide [STUDENT] with an appropriate education at [ELEMENTARY SCHOOL].

Additional Findings

The ALJ makes the following additional findings of fact:

68. A long term educational goal for [STUDENT] is to operate meaningfully in the natural social environment integrated with normally developing peers. Therefore, getting [STUDENT] into an environment where he has the opportunity to interact with normally developing peers is an educational priority.²¹

69. [PRIVATE SCHOOL] had no normally developing peers in its student body, and thus [STUDENT]'s exposure to such peers in the educational setting is limited to occasional contact when students go on field trips, or when regular school students visit [PRIVATE SCHOOL]. Given the size of the [ELEMENTARY SCHOOL] student body and the greater variety of activities in a school of this size, opportunities for supervised interactions with normally developing peers are much greater at [ELEMENTARY SCHOOL] than at [PRIVATE SCHOOL].

70. [STUDENT] performed well at [PRIVATE SCHOOL], and most experts agreed that as of the date of the proposed IEP [STUDENT] was ready to transition to a different educational setting.²²

71. One of the two IEP goals is to "improve behavior." The objectives that must be met to meet this goal include that [STUDENT] will reduce interruptions of others, will adopt appropriate methods of resolving conflicts with peers, will develop through real life situations and understanding the differences between friends, acquaintances and strangers, and will initiate play activities and interactions with peers. Exhibit B, pp. 27-28. This goal and these objectives can only be met by substantial supervised interaction between [STUDENT] and his peers, including normally developing peers.

Discussion and Conclusions of Law

Scope of Review and Burden of Proof

The ALJ is to issue an "independent" decision. 20 U.S.C. Section 1415(g). In the context of a district court review of a state level decision, such independence has been construed to require that "due weight" be given to the administrative findings below. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). In reviewing the decision of the IHO, the ALJ is in a position analogous to a district court reviewing a state level

²¹ Testimony of [PRIVATE SCHOOL DIRECTOR], Tr. v. I, p. 276, ll. 3-25; and [ASSISTANT DIRECTOR], Tr. v. III, p. 592, l. 20 to p. 593, l. 14.

²² For example, see Testimony of [PRIVATE SCHOOL DIRECTOR], Tr. v. I, p. 257, l. 23 to p. 258, l. 3; testimony of [ASSISTANT DIRECTOR], Tr. v. III, p. 616, ll. 13-17; but see testimony of [CLINICAL PSYCHOLOGIST], Ph.D. Tr. v. II, p. 490, ll. 8-12.

decision. Therefore, it is appropriate for the ALJ to apply a “modified de novo standard” in reviewing a hearing officer's decision and decide, based on a preponderance of the evidence in the administrative record, whether the requirements of the IDEA are met. *L.B. and J.B. on behalf of K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). In so doing, the ALJ must give due weight to the hearing officer's findings of fact, which are considered prima facie correct. *Id.* As the party seeking relief, [STUDENT]’s parents bear the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005).

The Requirement of a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). A school district satisfies the requirement for a FAPE when 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. *Rowley*, 458 U.S. at 201. The school district is not required to maximize the potential of the handicapped child, but must provide “some educational benefit.” *Id.* at 199-200. That benefit must be more than *de minimus*. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726-27 (10th Cir. 1996).²³

The ALJ agrees with the IHO that the District’s May 15, 2007 IEP provides [STUDENT] a FAPE. To explain why, the ALJ will address four key aspects of the District’s plan: 1) the decision to transition [STUDENT] back to a public school; 2) the timing and schedule of the transition; 3) the educational plan; and 4) the initial setting of isolation. Each aspect will be discussed in turn.

The Decision to Transition [STUDENT] Back to a Public School

Although the parties’ experts somewhat disagreed, the evidence established the existence of a credible educational philosophy that a student with autism, such as [STUDENT], requires exposure to normally developing peers in order to benefit from the role modeling such peers provide. Interactions limited to other developmentally disabled children may not be as effective because the children may share the same social skill deficits. From a common sense perspective, it is reasonable to think that an autistic child must have some meaningful exposure to normally developing peers if the child is ever to have a chance to be a productive citizen in society. It is unreasonable to believe that an autistic child could be educated in a protected environment exposed only to peers of similar developmental level, and then be thrown into the real world environment to “sink or swim” once his education was complete. Rather, the child’s education must prepare him for that more challenging environment. Transition to an environment with increased opportunity for exposure to and integration with normally developing peers was therefore an educational priority for [STUDENT].

²³ The IDEA also requires a school district to follow prescribed procedures in arriving at an IEP. Parents did not raise procedural challenges in their request for due process hearing, and therefore such issues are not addressed here. See Order Granting Appellee’s Motion to Dismiss, dated April 24, 2008.

For that reason, the District's plan to transition [STUDENT] back into [ELEMENTARY SCHOOL] where he could have more consistent interaction with normally developing peers was eminently reasonable. [PRIVATE SCHOOL], though a stable environment, was not well equipped to provide that exposure. [PRIVATE SCHOOL] had no normally developing peers in its student body, and thus exposure to such peers was limited to occasional contact when the students went on field trips, or other regular school students visited [PRIVATE SCHOOL].

Furthermore, the transition back to the public school system was consistent with the Parents' basic understanding and agreement that [PRIVATE SCHOOL] was not a permanent placement, but only a temporary educational environment until [STUDENT] was able to return to the public school system.

Finally, to comply with the IDEA, disabled students must be educated, to the maximum extent appropriate, with children who are not disabled. 20 U.S.C. §1412(a)(5)(A); *Nebo Sch. Dist., supra*; *Murray v. Montrose County Sch. Dist. Re-1j*, 51 F.3d 921, 926 (10th Cir. 1995)(among the most important substantive requirements of the IDEA is the obligation to educate disabled children in the "least restrictive environment" in which they can receive an appropriate education). The District's plan to transition [STUDENT] back to [ELEMENTARY SCHOOL] is consistent with that goal because it will maximize [STUDENT]'s opportunity to be educated alongside non-disabled peers.

The ALJ therefore concludes that the District's plan to transition [STUDENT] back to the public school system was appropriate to provide him a FAPE.

Transition Timing and Schedule

The ALJ also concludes that the timing and schedule of the District's plan was reasonable. When the IEP was proposed, [STUDENT] was due to enter sixth grade. The beginning of sixth grade represented a good transition point because [STUDENT] could have returned to [ELEMENTARY SCHOOL], a building and environment with which he was familiar, and had the chance to develop friendships at [ELEMENTARY SCHOOL] before moving into unfamiliar middle school environment the following year. Although that opportunity has now past, the ALJ must judge the reasonableness of the plan under the circumstances existing when the plan was proposed. *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 662, 702 (10th Cir. 1998)("the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date"); *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 992 (1st Cir. 1990)("An IEP is a snapshot, not a retrospective"), *cert. denied*, 499 U.S. 912 (1991).

By all accounts, [STUDENT] had performed well at [PRIVATE SCHOOL]. By the time the IEP was proposed, he had been at [PRIVATE SCHOOL] for approximately 18 months and even [PRIVATE SCHOOL DIRECTOR] agreed that [STUDENT] was ready to transition to a different setting. Although the parties disagree whether the IEP provided the appropriate setting, the preponderance of the credible evidence supports

the conclusion that a transition to a public school setting in August 2007 was a reasonable plan.

Furthermore, the District's plan to ease the stress of [STUDENT]'s transition by starting him at [ELEMENTARY SCHOOL] one day per month and then, assuming [STUDENT] handled that transition well, progressing one additional day each month was objectively reasonable. Because [STUDENT] has difficulty coping with transition or change in his environment, it was reasonable for the District to assume a cautious approach and make the transition to [ELEMENTARY SCHOOL] as gradual as possible. The one-day-at-a-time transition provided the additional option of slowing or accelerating the transition depending on [STUDENT]'s response. Although Parent's experts were critical of the length of the transition period, the evidence was not sufficient to prove that a more rapid transition would produce any better results.

The ALJ therefore concludes that the timing and schedule of the proposed transition was objectively reasonable.

The Educational Plan

The elements of the IEP, as the District intended to implement them, are described in Findings of Fact 44 through 47. These elements are reasonably designed to address each of [STUDENT]'s identified educational needs, as described in Findings of Fact 10 through 16. Specifically, the IEP provides for one-on-one instruction by well-trained staff initially individually, then in very small groups. The separate classroom setting away from the main student body will provide [STUDENT] a quiet environment with minimal distractions. The IEP initially adopts the same course schedule employed at [PRIVATE SCHOOL] as well as the same educational goals and objectives, which means [STUDENT]'s education will be highly structured. The IEP contemplates visual and verbal directions and feedback, repetition and frequent reinforcement. Social skills training will occur throughout the day and in all settings. Because of [STUDENT]'s individual to very small class size, he will be subject to continual monitoring and cueing by his teacher and other professional personnel. Finally, it is planned that [STUDENT] will transition from an individual setting to one where he will receive his academic and social skills training in the context of a very small group of developmentally similar peers, and also have increasing opportunity for supervised interaction with normally developing peers.²⁴

The ALJ does not agree with Parents' objection that the plan is not comprehensive. To the contrary, the IEP provides a coherent and coordinated plan to transition [STUDENT] back to the public school system in a way designed to meet his educational needs and at the same time minimize the stress of the transition.

²⁴ Parents object that the IEP does not guarantee [STUDENT] will be consistently placed with the same peers, as opposed to a variety of different peers at different times. Although [STUDENT] enjoys a small, stable group of peers at [PRIVATE SCHOOL], the evidence was not sufficient to prove that he is incapable of tolerating a variety of peers, provided they interact in small groups and are adult-supervised. The fact that he has performed well in a variety of such groups, such as Boy Scouts, religious training, day camps, visits to neighbors, etc. suggests otherwise.

Although the Parents' and their experts disagree with the District's plan in several respects, mere disagreement with the District's plan is not sufficient grounds to overturn the IEP. Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ specific methodology in providing for the education of their child. *Sytsema v. Academy Sch. Dist. No. 20*, 46 IDELR 71, p. 7 (D. Colo. 2006)(citing *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290 (7th Cir. 1988), and *Gill v. Columbia 93 Sch. Dist.* 217 F.3d 1027 (8th Cir. 2000).

Furthermore, the ALJ may not substitute his own opinion for that of the school administrators simply because he might prefer a different outcome. As the court in *Gill* aptly noted, "autism experts have a variety of opinions about which type of program is best. Federal courts must defer to the judgment of education experts who craft and review a child's IEP so long as the child receives some educational benefit and is educated alongside his non-disabled classmates to the maximum extent possible." *Gill*, 217 F.3d at 1038. Although an ALJ is not required to accept supinely whatever school officials testify to, the ALJ errs when he substitutes his own opinions for that of the school administrators. *School Dist. of Wisconsin Dells v. Z.S.*, 295 F.3d 671, 676 (7th Cir. 2002). To survive review, an IEP need only be "reasonably calculated to enable the child to receive educational benefits." *Rowley*, 458 U.S. at 206-07.

Because the District's plan is reasonably calculated to meet [STUDENT]'s educational needs, and to educate him alongside his non-disabled peers to the maximum extent possible, the ALJ will not second-guess the methodology for implementing that plan.

[STUDENT]'s *Initial Isolation*

Although the District acknowledges that [STUDENT] has done well at [PRIVATE SCHOOL] in the context of a small group of developmentally similar peers, and seeks to emulate a similar setting at [ELEMENTARY SCHOOL], the District's plan initially calls for [STUDENT] to be placed in a separate classroom by himself where he will receive one-on-one instruction primarily from his teacher. Integration with peers will be based on [STUDENT]'s progress. Furthermore, initially, [STUDENT] will have lunch and recess without the company of peers. Introduction of peers into [STUDENT]'s academic, lunch and recess settings will depend upon the IEP team's judgment as to whether he can handle such social interactions without disruption. Based upon his performance at [PRIVATE SCHOOL], the District anticipates that [STUDENT] will progress rapidly in the introduction of peers to the point that he will again enjoy the company of a small, consistent, group of peers in most settings.

The Parents object to this plan for several reasons. First, they contend that if in fact [STUDENT] is capable of interacting successfully with similarly developing peers, as he has at [PRIVATE SCHOOL], there is no reason to begin his education at [ELEMENTARY SCHOOL] in isolation. The Parents view this as punitive and a more restrictive environment than he had at [PRIVATE SCHOOL].

Second, Parents contend that [STUDENT] is a very social individual who

requires peer contact as part of his educational plan. They believe the development of his social skills, which is a goal of the IEP, can effectively occur only if he is educated within a consistent small group of peers where social skills training can continuously occur.

Third, Parents' expert, Dr. [CLINICAL PSYCHOLOGIST], believes that because introduction of new peers is stressful to [STUDENT], he may learn to avoid interaction with new peers by acting out, and therefore may never progress to the point where the District feels comfortable introducing peers. If this occurs, the IEP may be self-defeating.

Fourth, Parents contend that educating [STUDENT] in an isolated one-on-one setting in a separate classroom with just his teacher was previously tried in the fall of 2005, but was unsuccessful.

Finally, Parents object to the "speculative" nature of the process by which peers will be introduced. They complain that the IEP contains no written plan as to exactly when or under what circumstances introduction of peers will occur.

The ALJ shares some of Parents' concerns. Given the success that [STUDENT] has had at [PRIVATE SCHOOL] in interacting with developmentally similar peers, and given that [STUDENT] needs peer interaction and requires social skills training integrated into that interaction, the ALJ questions whether starting [STUDENT] in an isolated setting at [ELEMENTARY SCHOOL] is the best course. If, as Dr. [CLINICAL PSYCHOLOGIST] predicts, [STUDENT] learns that he can avoid introduction of new peers by acting out, initial isolation may well be counterproductive and self-defeating.

It also appears that the District's inclusion of this initial period of isolation within the IEP may have been in response to a mistaken belief that Parents requested it. According to the IEP, as well as the testimony of District representatives, Parents expressed concern that [STUDENT] would be overstimulated if exposed to large groups of students upon transition to [ELEMENTARY SCHOOL]. [ELEMENTARY SCHOOL] has a student body in excess of 300 students, and the opportunity for exposure to large numbers of students and consequent risk of overstimulation of [STUDENT] is very real. Initially limiting [STUDENT]'s contact to his teacher was an attempt to meet this concern by providing for a gradual transition. During oral argument, the District affirmed that its primary rationale for proposing the initial isolation was to satisfy Parents' concern.

The Parents' legitimate concern about [STUDENT]'s exposure to large groups of students, however, is not the equivalent of a request for isolation. Parents and their experts have consistently, at least during their testimony at the hearing, argued that [STUDENT] needed the company of similarly developing peers and objected to the planned isolation. Therefore, to the extent that the District structured the IEP upon a belief that the parents wanted [STUDENT] to initially be isolated from all other students, it may have misinterpreted the Parents' request.

Despite these misgivings, the ALJ finds this provision reasonable when the IEP is considered as a whole, for the following reasons:

First, an initial period of isolation may very well be helpful. [STUDENT]'s existing peer group at [PRIVATE SCHOOL] will not transition with him to [ELEMENTARY SCHOOL], therefore it is unavoidable that the peers to whom he'll be exposed at [ELEMENTARY SCHOOL] will be strangers, even if developmentally similar. This introduction to strangers will cause [STUDENT] some amount of stress, especially if his introduction to his new teacher and his new environment all occur at the same time. It is reasonable to think that [STUDENT]'s stress will be minimized by spending a short period getting acquainted with his teacher and his surroundings before new peers are introduced to his environment.

Second, the plan clearly contemplates that supervised peer interactions must occur for the IEP to be successful. One of the two IEP goals is to "improve behavior." The objectives necessary to meet this goal include that [STUDENT] will reduce interruptions of others, will adopt appropriate methods of resolving conflicts with peers, will develop through real life situations and understanding the differences between friends, acquaintances and strangers, and will initiate play activities and interactions with peers. Satisfaction of this goal and these objectives requires substantial supervised peer interaction. The existence of this goal and these objectives and the structure of the transition plan provide a high degree of confidence that the District will, and must, work diligently to introduce peers into [STUDENT]'s educational environment at the earliest reasonable opportunity.

Third, the District's representatives testified that the intent of the plan was to promote the early integration of peers, and that such could happen very quickly. There is no reason to think that the District will not act in good faith to see that this happens.

Fourth, though the Parents condemn the transition plan as "speculative" because it does not precisely define when and how peers will be introduced, some flexibility in the peer introduction scheme is essential. There is no way to predict with certainty how [STUDENT] will react to his new educational environment. To maximize [STUDENT]'s chances of success, the District should have a reasonable degree of flexibility to alter the rate and scenario at which peers will be introduced. An inflexible schedule would likely reduce [STUDENT]'s chances of successful integration. The ALJ agrees with the IHO that the flexibility of the District's plan does not render it inappropriate.

Fifth, the ALJ does not agree with Parents that the plan to reintroduce [STUDENT] to [ELEMENTARY SCHOOL] through a one-on-one setting in a separate classroom is doomed to failure because it was tried in November 2005 and found unsuccessful. In the fall of 2005, [STUDENT]'s in-school behavior was spiraling out of control before he was placed into the one-on-one setting in a separate classroom. The evidence is not clear whether his failure to do well in that setting was the result of that environment, or the fact that he was already out-of-control. The ALJ cannot conclude that, two years later when [STUDENT]'s in-school behavior is much improved, a period of one-on-one instruction in a separate classroom cannot succeed. To the contrary, it is reasonable to think that a setting designed to minimize distractions at a time when [STUDENT]'s environment is in transition would be helpful.

Finally, the plan provides for input from the parents and the opportunity for early modification if necessary. As the District representatives testified, the decision regarding when to introduce peers would be made in consultation with the Parents. If they thought introduction of peers was moving too slowly, their opinion would be considered. Furthermore, the IEP's inclusion of a follow-up IEP meeting one month into the plan would provide a formal opportunity for the parties to review [STUDENT]'s progress and revise the plan as necessary.

On balance, the ALJ concludes that though [STUDENT]'s prompt integration with a small peer group is a shared goal of the parties, it was not unreasonable for the District to initially place [STUDENT] into a separate classroom by himself so that he could become acquainted with his new teacher, routine and surroundings before introducing a new set of peers. Whether this plan accomplishes its goal or not remains to be seen. The issue, however, is not whether the IEP was prescient enough to achieve perfect academic results, but whether it was "reasonably calculated" to provide an "appropriate" education. *D.F. v. Ramapo Central School Dist.*, 430 F.3d 595 (2nd Cir. 2005). The ALJ concludes that it was.

Summary

The District's IEP provides access to specialized instruction and related services that are individually designed to provide educational benefit to [STUDENT] in the least restrictive environment, and therefore meets the requirements of the IDEA.

Decision

The ALJ upholds the IHO's decision, and denies the Parents' appeal.

The ALJ also adopts the IHO's directive that the parties convene an IEP team meeting within 30 days of the date of this decision to consider any appropriate modifications to the IEP or transition plan necessitated by the passage of time since the IEP was originally proposed.

This decision is the final decision on state level review. Any party has the right to challenge this decision in an appropriate court of law, either federal or state.

Done and Signed

July 25, 2008

ROBERT N. SPENCER
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this ____ day of July 2008.

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