

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
HARRISON SCHOOL DISTRICT NO. 2, Complainant, vs. [Mother] and [Father], Respondents.	
AGENCY DECISION	

On October 2, 2017, the undersigned Administrative Law Judge (“ALJ”) convened the evidentiary hearing in this matter in the offices of the Court in Colorado Springs. Mr. Kelly Dude and Mr. John Stanek appeared as counsel for Complainant Harrison School District No. 2 (“Complainant” or the “District). [Mother] and [Father], Respondents and parents of the Student, were present and appeared through their designated advocate, [Advocate].¹ During the hearing, the ALJ admitted Hearing Exhibits A through J, and L through NN from Complainant’s set, and No. 4 (pages 590 through 590C only), No. 9 (pages 613 to 614 only), No. 10 (pages 615 through 783 only), No. 11 (pages 803 through 806 only), No. 13 (pages 834 through 888 only), No. 14 (pages 931 through 949 only), No. 16 (pages 991 to 992, and 997 only), No. 17 (pages 1007 through 1009, 1032 to 1033, and 1038 through 1041 only), and No. 18 (pages 1086 through 1088, 1148 through 1153, 1211 to 1212, 1240, 1242 through 1248, 1256, and 1268 through 1271 only) from Respondents’ set.² The proceedings were digitally and stenographically recorded. The official set of Hearing Exhibits used by the witnesses throughout the hearing, were retained by the court reporter. Following conclusion of the hearing, the parties each submitted a written closing brief.

ISSUES PRESENTED

As confirmed in a Procedural Order issued on July 17, 2017, the issues for determination in this case were as follows: Whether an Individualized Education Program (“IEP”) dated December 13, 2016, including a behavioral intervention plan

¹ The ALJ does not refer to the Student by name in this Agency Decision in order to protect his privacy.

² Some two-sided copies in Respondents’ exhibit set were not numbered on the reverse side. In such cases, the ALJ specified that the reverse-side page would be referenced by using the number from the obverse side with the letter “a” appended to it, as in page no. 13 and page no. 13a for the reverse.

incorporated with the IEP, offered a free appropriate public education (“FAPE”) to the Student, Respondents’ son. Additionally, based on the Respondents’ cross-complaint, the scope of issues also included whether Complainant committed procedural violations, including denial of parent participation in IEP meetings between January and December, 2016, predetermination of the content of the December, 2016 IEP, incomplete constitution of the IEP team, and failure to consider all relevant and appropriate information in development of the December, 2016 behavioral intervention plan. To the extent that any such procedural violations occurred, the ALJ considered whether the violations resulted in substantive harm to the Student. Finally, the ALJ considered whether a failure by the District to implement a transportation plan resulted in the Student missing instructional time and, if so, what remedy (if any) is appropriate.³

FINDINGS OF FACT:

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

1. The Student is [age] year-old boy who resides within the District in the Colorado Springs area. He was diagnosed with autism spectrum disorder (“ASD”) before age four and with attention deficit hyperactivity disorder (“ADHD”) in 2012. He experiences delays in language, mathematics, and executive functioning. [Mother] established that he has other health problems including difficulty sleeping and issues with foot and ankle stability for which he wears orthotic braces. [Mother] also described the Student as a sensory seeker, a characteristic that makes him very inquisitive but can also lead him to cross over what some people would consider the normal bounds of social space and interaction. There is no dispute in this case that the Student is a child with a disability in need of special education supports and services.

2. The Student requires assistance with socialization. [Mother] and others established that he is very impulsive and tends to interrupt conversations. He also jumps from topic to topic, which [Mother] described as random, and repetitive. [Mother] established that these communication patterns, coupled with his tendency to intrude into others’ space, are frequently viewed as strange by his peers and significantly inhibit his ability to initiate and maintain friendships.

3. The Student is also extremely fidgety. [Mother] established that he will bump his head against objects, jump up and down, lean against other people, and spin. He enjoys things that light up and particularly enjoys taking objects apart to see how they work. Although he was described by multiple witnesses as having a delightful and engaging nature, these behaviors distract him from completing required tasks. Sometimes the behaviors are intentional with the aim of provoking a reaction from others or avoiding non-preferred activities. The Student has engaged in some aggressive behaviors directed toward adults although the evidence did not establish that this is a common occurrence. He has also engaged in inappropriate behaviors that

³ Respondents’ cross-complaint was filed on June 8, 2017, so any relief for missed instructional time is limited to the period June 8, 2015, through the filing date.

have put himself and others at risk of harm affecting the protocols put in place for transportation to and from school, as discussed in more detail below.

4. Since kindergarten, the Student has attended the [Private Facility] (“[Private Facility]”) in [City]. [Private Facility] is a center-based program serving children with ASD and other co-morbid disabilities, through an approach rooted in Applied Behavioral Analysis (“ABA”). ABA seeks to identify behaviors associated with ASD, determine the antecedents of such behaviors, and then employ positive supports to encourage positive behaviors and redirect/replace problematic behaviors. At [Private Facility], the Student works with an adult therapist in a 1:1 relationship throughout his entire day. [Private Facility] has at times employed therapists who also have teaching credentials, but [Clinical Director]⁴ testified that none of the current therapists are teachers. She was not sure whether any therapists employed at [Private Facility] during 2016 were credentialed teachers. [Clinical Director] estimated that [Private Facility] serves between 23-27 children most days, none of whom are considered typically developing.

5. [Mother] testified that she and her husband desire the Student to be educated with non-disabled peers but insist that he requires appropriate supports to succeed in that setting.

TRANSPORTATION ISSUE

6. The District agreed with and paid for the Student’s attendance at [Private Facility] as part of his educational placement pursuant to IEPs developed and implemented prior to 2016. The District has transported the Student to and from [Private Facility] as a related service included in his IEPs. [Transportation Director] testified in his capacity as Transportation Director for the District. [Transportation Director] established that the route from the Student’s home to [Private Facility] is the longest route for any pupil in the District. The route also requires the bus to use Interstate Highway 25 during morning commute times when it is extremely congested. The combination of these factors present unique challenges for the bus driver. In unrefuted testimony, [Transportation Director] established that the Student has always been extremely interested in items found near the driver’s area on the bus, including the lights and controls on the dash. The Student has grabbed items in the driver’s area, refused to follow directions, and crawled over and under the seats while the bus was in motion. On one occasion, the Student attempted to open the rear emergency exit door while the bus was in motion on the Interstate and other children were present. A video of this incident was shown to [Mother].

7. The behaviors described in the previous finding led the District to implement use of a restraint vest to keep the Student in his seat on the bus. The vest was secured in the back to prevent the Student from getting out of it and from getting out of his seat. There is no evidence that Respondents opposed the use of the safety

⁴ The Clinical Director at [Private Facility] and an ABA Board Certified Behavioral Analyst (“BCBA”).

vest when it was proposed by the District. [BCBA]⁵ from [Private Facility] also observed the Student on the bus over the course of two days in July, 2014. There is no evidence that her observation employed any specific procedure that was discussed and/or approved in advance by Respondents. [BCBA] testified that her observation was valid in the sense that it provided an accurate picture of the Student's behaviors and needs during his time on the bus. She prepared a list of recommendations based on her observations that were shared with the Student's IEP team. The District also incorporated the use of a "social story" which is a narrative that was reviewed with the Student before each ride to reinforce the ways in which he needed to act in order to be safe during transportation. [Transportation Director] established that the Student's behaviors on the bus improved over time.

8. On May 19, 2015, [Mother] signed a transportation request/referral form that was not filled in with details about the program the Student was attending ([Private Facility]) or his then-current health concerns such as allergies, treating physician, and preferred hospital. Hearing Exhibit No. 17 at pages 1038-1039. [Mother] did write in "see Bus Recommendations, Bus Story" where prompted for "suggestions for behavior management on the bus." Later, a District representative filled in the missing details using information copied from the previous year's form. Id at pages 1032-33, and 1040-41. [Mother] established that the Student's treating physician and preferred hospital had changed since the previous year, rendering what the District added to the blank form inaccurate. However, there was no evidence of any substantive harm resulting from the inclusion of inaccurate information.

9. On December 7, 2015, the Student's safety vest malfunctioned in the morning and the District's transportation personnel were unable to make it usable. For that reason, the Student was not transported to [Private Facility] by the District and [Mother] had to drive him. [Transportation Director] responded to an email from [Mother] that he was aware of the situation and apologized for inconvenience to her. He also assured [Mother] that transportation personnel would be trained to correct any future issues with the vest. Aside from this one incident, [Mother] testified that she reviewed sign-in sheets at [Private Facility] for the period between October and December, 2015. During that time, she calculated that the Student arrived late to [Private Facility] with an aggregated loss of instructional time totaling approximately eight hours. Respondents did not produce any records in support of this testimony and [Mother] was not specific about which days contributed to the lost time. Nor is there any evidence about the cause of any delay in transport, whether due to some action of the District or traffic or weather conditions.

10. [Mother] established that the Student did not like the fact that he had to be restrained on the bus, an attitude that [BCBA] observed in 2015. He also viewed the bus story as "babyish" and unnecessary. Over time, [Mother] came to see the vest as very restrictive and socially inhibiting. During a meeting of the Student's IEP team on

⁵ A Board Certified Behavior Analyst at [Private Facility]. She has worked extensively with the Student at [Private Facility] and provided opinion testimony as an expert in ABA methodology and the extent to which ABA is appropriate for use with the Student.

April 11, 2016, [Mother] requested that the District evaluate the Student to determine if his behaviors were sufficiently improved that use of the vest could be discontinued and, if so, what protocols would be appropriate to maintain the Student's safety on the bus. Hearing Exhibits D and E. However, she also expressed that maintaining the Student in the vest was unwarranted given his behavioral progress. [Special Education Director] established that [Mother]'s advocate also actively participated in the meeting, posing many questions on her behalf. Hearing Exhibit E. [Transportation Director] did not agree that the Student had made sufficient progress with his behaviors to permit abandonment of the vest, but arranged with [Mother] to have her view and consider different types of restraints. [Transportation Director] also established that while the District identified no specific evaluation procedure, after [Mother] renewed her request at a follow-up meeting, the District did conduct observations of the Student riding on the bus without the restraint in late August and early September, 2016.

11. In September, 2016, based on the observations, the District concluded that the Student was safe to ride the bus without further use of the restraint vest. This matter was discussed at an IEP team meeting on September 9, 2016. [Mother] conceded that she had the opportunity to give input on the transportation issue, but felt "blindsided" by the recommendation that the vest be discontinued because she had wanted to know the protocol for any observation ahead of time. She requested that the District document the results of the observation and it did so. Hearing Exhibit No. 16 at page 997. In response to a question from the ALJ, [Mother] stated that she agreed with the decision to stop using the vest. [Transportation Director] established that the Student has ridden the bus without the vest since that time without any behavioral incidents.

DEVELOPMENT OF THE 2016 IEP

12. The Student required a triennial review in 2016 to inform his IEP team on the educational impacts of his disabilities, his strengths and weaknesses, and present levels of academic and functional performance. On February 19, 2016, the District sought and [Mother] provided parental consent for special education reevaluation of the Student. Hearing Exhibit A. The District proposed assessments in the areas of cognition, academic skill development, social/emotional/behavioral development, adaptive skill development (geared to ASD), speech/language development, motor skills, and sensory processing. *Id.* At a pre-evaluation meeting conducted on the same date, [Mother] attended with her advocate, [Advocate]. Hearing Exhibit B. [Special Education Director], Special Education Director,⁶ and [School Psychologist], school psychologist attended on behalf of the District along with specialists in the areas of occupational therapy, speech/language, mental health, and administration. [Mother] presented an agenda for the meeting and the meeting notes reflected answers provided in response to her questions. *Id.* [Mother] expressed her desire to be present for all of the assessments, to which the District agreed and provided her with a schedule. The meeting lasted approximately two hours.

⁶ [Special Education Director] has been the Special Education Director for one year. Prior to that she served as a special education coordinator for three years, and as a special education teacher for 13 years.

13. [Special Education Director] and [School Psychologist] established that [Mother] did observe each of the reevaluation assessments. [School Psychologist] also answered a number of questions that [Mother] put to him via email. Hearing Exhibit C.

14. On April 6, 2016, the District provided notice of an IEP team meeting on April 19, 2016, to discuss the results of the reevaluation in the context of the Student's continued eligibility for special education supports and services. Hearing Exhibit F. The District provided the IEP team, including [Mother], with copies of its psychoeducational evaluation report (Hearing Exhibit G) and functional behavioral assessment (Hearing Exhibit H).⁷ [Special Education Director] established that [Mother] attended the meeting with her advocate, [Advocate], in addition to [School Psychologist] and the Student's full IEP team. District members of the team at this meeting and each IEP team meeting in 2016 consistently included [Special Education Director] as District designee, the school psychologist, special education teacher, regular education teacher, social worker, occupational therapist, speech/language pathologist, and school administrator. [Mother] was an active participant, posing questions and providing input over the course of approximately two and a half hours. At the conclusion of the meeting, the Student's continuing eligibility was confirmed with a primary identified disability of ASD. Hearing Exhibits I and J. ADHD was not listed as an identified disability and [Mother] acknowledged that she did not ever disclose the Student's 2012 ADHD diagnosis to the District during development of the 2016 IEP. She explained that it did not occur to her to disclose the ADHD diagnosis to the IEP team. She knew that the team was aware of the Student's impulsivity and hyperactive behavior and did not feel it necessary to talk about all of his medical diagnoses.

15. No member of [Private Facility] attended the April 19, 2016 IEP team meeting. Neither [Mother] nor the District extended an invitation to anyone from [Private Facility] prior to the meeting. [Special Education Director] testified that [Mother] had the ability to include [Private Facility] at her discretion. In fact, [Private Facility] staff did participate in the Student's IEP team meetings during 2012, 2013, and 2015. [Mother] specifically requested that [Private Facility] personnel attend the next IEP team meeting. Hearing Exhibit No. 18 at page 1151. Although [Mother] invited members of the [Private Facility] staff to the next meeting, they were not available to attend on the scheduled date of May 19, 2016. [Mother] requested that the meeting date be changed, but the District convened the Student's IEP team meeting on May 19, 2016, when the [Private Facility] personnel were unavailable. [Mother] informed the District that she felt that going ahead with the meeting on a date when [Private Facility] could not attend represented a serious infringement on her right to participate. *Id.*

16. After the April 19, 2016 IEP team meeting, [School Psychologist] met with [Mother] individually to address her questions about the reevaluation. The two discussed the specific assessment protocols that were administered and how the Student performed on the various subtests. [School Psychologist] estimated that the

⁷ The functional behavioral assessment incorporated [Mother]'s response of more than ten pages to a parent questionnaire.

meeting lasted more than two hours, during which he felt that he answered all of her questions.

17. The Student's IEP team convened another meeting on May 19, 2016. [Mother] presented a written agenda for the meeting. Hearing Exhibit O. [Special Education Director] established that the team addressed the agenda items primarily related to the Student's reevaluation and what progress he would need to show to be able to succeed in a general education classroom one hundred percent of the time. [Mother] felt that her questions were answered "resistantly" and that much of the two and a half hours were occupied with District team members expressing how [Mother]'s questions should be addressed to them. [Mother] also testified that had [Private Facility] staff been at the meeting, the team would have been able to make faster progress on understanding the Student's levels of performance there. The ALJ notes that the first nine items on the parents' agenda relate to District evaluations and observations rather than matters about which [Private Facility] could provide input. The agenda item No. 11 entitled "Review and update [Student's] IEP is conditioned by a footnote that specified that "Parent wishes to review and update [the] IEP after all questions have been answered about the evaluation report." Id. As discussed below, [Mother] continued to have many detailed questions about the evaluation report after the May 19, 2016 IEP team meeting.

18. A further IEP team meeting was contemplated for June, 2016. Hearing Exhibit P. However, the facilitator that assisted in the May IEP team meeting was unavailable. Subsequently, [Mother] requested that a different facilitator be used—one who had no affiliation with the District. That request was honored, but the next IEP team meeting did not occur until September due to problems scheduling with the new facilitator.

19. [School Psychologist] did not attend any further IEP team meetings related to the Student. He coordinated with [School Psychologist 2] who was assuming responsibility as school psychologist on the IEP team. [School Psychologist] met with [School Psychologist 2] numerous times to explain the results of the Student's evaluation and answer her questions. [School Psychologist] gave his notes to [School Psychologist 2], including those related to his meeting with [Mother] after the April 19 IEP team meeting. [School Psychologist 2] observed the Student at [Private Facility] in June, 2016, and shared the results of the observation with [Mother]. [School Psychologist 2] also reviewed the quarterly status reports from [Private Facility], the functional behavioral assessment

20. On August 29, 2016, the District gave notice of a further IEP team meeting on September 9, 2016. The meeting was facilitated by [IEP Facilitator], Director of Advocacy for the ARC of Pueblo. [IEP Facilitator] established that her role was to create an agenda for the meeting, maintain the participants' focus on the agenda, and ensure that all voices were heard. [Mother] contacted [IEP Facilitator] in advance of the meeting and sent a fourteen page document identifying the family's issues with the Student's IEP. [IEP Facilitator] created the meeting agenda based on this input, District

input, and IEP requirements.⁸ [IEP Facilitator] found [Mother] to be very well prepared and involved as an IEP team member. [Mother] and [Father] were assisted by two advocates. [Special Education Director] and [School Psychologist 2] participated on behalf of the District as did a number of other service providers and staff from [Private Facility]. The meeting lasted approximately three hours. Following the discussion regarding transportation noted above, the team had further discussion regarding the results of the reevaluation as well as the Student's present levels at [Private Facility]. [Mother] read from her input into the functional behavioral assessment and her parent report regarding the Student's strengths. [IEP Facilitator] created a list of action items which she characterized as "homework" for the participants to complete prior to the next meeting. Hearing Exhibit R.

21. [Mother], [School Psychologist 2], [Speech Language Pathologist],⁹ and [Occupational Therapist]¹⁰ participated in a separate meeting on September 19, 2016, to further discuss the protocol details of the Student's evaluation. Hearing Exhibit S. This was an action item identified during the IEP team meeting of September 9 at the request of [Mother]. [School Psychologist 2] established that [Mother]'s questions were substantially answered in the course of less than three hours.

22. On November 8, 2016, [Mother] emailed [School Psychologist 2] as a follow-up to the September 19 protocol meeting. [Mother] thanked [School Psychologist 2] for access to the protocols and assessments shown during the meeting. [Mother] posed other questions that were unable to be answered during the protocol meeting due to members needing to access information not available in that moment. [School Psychologist 2] and [Speech Language Pathologist] provided detailed responses to these additional questions in separate replies sent to [Mother] the next day. Hearing Exhibit V.

23. Pursuant to notice issued on November 7, 2016, the Student's IEP team met again on November 11, 2016. [IEP Facilitator] facilitated the meeting that included [Mother], [Advocate], another advocate assisting [Mother], representatives from [Private Facility], and numerous District members. [Mother] prepared an updated agenda setting forth the family's concerns and the Student's needs. [Mother] indicated that many of her technical questions had been answered about the reevaluation but that she felt she still did not have a "full" [emphasis original] understanding of the interpretations of all of the results. Hearing Exhibit W. [Transportation Director] reported that the Student was doing well on the bus without restraint, but [Mother] continued to express concern about the need for a behavior plan to be in place for transportation. The team began discussion related to goals that should be written into the Student's IEP. The discussion began with draft goals that were prepared by District Staff some months

⁸ [IEP Facilitator] has participated in dozens of IEP team meetings both as a facilitator and as an advocate for parents and school districts.

⁹ [Speech Language Pathologist] is a Master's candidate in the area of speech pathology. She holds a Bachelor's degree in audiology and speech/language sciences and is licensed to act as a speech language pathologist under the supervision of another professional. She has been employed in the District since 2012.

¹⁰ [Occupational Therapist] holds a Bachelor's Degree in occupational therapy and has worked in the profession for 31 years. She has been employed in the District for 13 years.

before. However, the team soon realized that the draft goals were outdated due to progress that the Student had made in the meantime. [Private Facility] staff provided input on the Student's present levels of performance and the team amended the language of certain goals to reflect what was seen in [Private Facility]'s quarterly status reviews. Other goals were identified for revision based on further information including writing samples from [Private Facility] and collaborative discussion between District and [Private Facility] team members. [Mother] established that she was frustrated by the fact that she had no direct input on the draft goals that were presented and that she had to advocate strongly for them to be revised so as to be appropriate for the Student.

24. Ina, the IEP team discussed the Student's needs for direct and indirect services in the areas of occupational and speech/language therapies. The District proposed to provide 120 minutes per month of direct services in both areas, supplemented by indirect, or consultative, services. The Student would also benefit from a full-time, 1:1 paraprofessional aide to support his academic, behavioral, and social/emotional needs. This represented a change, advocated by [Mother], from an earlier proposal to merely ensure "adult supervision" of the Student. The IEP team discussed the range of accommodations and modifications necessary to ensure the Student's ability to benefit from his educational program, and tabled the discussion of least restrictive environment ("LRE") for a future meeting.

25. [Mother] stated her request for an Independent Educational Evaluation ("IEE") based on her conclusion that the reevaluation conducted by the District was inadequate. [Special Education Director] provided [Mother] with a District form to facilitate the request, but emphasized that the process of pursuing an IEE was not contingent on completion of a specific form. Multiple witnesses established that the November 11, 2016 IEP team meeting was contentious and emotional than other meetings. [IEP Facilitator] established that [Mother] cried and [Advocate] raised her voice to a yell. The meeting lasted approximately three hours.

26. [Mother] recorded the November 11, 2016 IEP team meeting and continued to record after the meeting adjourned. Hearing Exhibit NN. The recording captured a discussion between [Mother] and [Advocate] in which [Mother] stated that she felt like the other members of the IEP team were trying to pull [Mother] into the conversations regarding the IEP issues. [Mother] told [Advocate] that she was not comfortable sharing the parent report she had created regarding the Student (Hearing Exhibit 10) and that she ([Mother]) intended to talk less at future meetings.

27. On December 5, 2016, [School Psychologist 2], [Speech Language Pathologist], and [Occupational Therapist] observed the Student at [Private Facility]. [Occupational Therapist] obtained work samples from the [Private Facility] staff. [School Psychologist 2] shared the results of her observation with [Mother] on December 13, 2016, (Hearing Exhibit No. 16 at pages 990-991) and used the observation to inform her input at the next IEP team meeting. The observations by [Speech Language Pathologist] and [Occupational Therapist] were used to update the Student's motor and language goals. On December 12, 2016, one day prior to the next scheduled IEP team meeting, [Mother] sent lists of questions to multiple team members related to their

respective knowledge of the Student and his special educational programming. Hearing Exhibit AA. [Special Education Director] responded to [Mother] and instructed the other District team members to do so as well.

28. A final IEP team meeting was convened on December 13, 2016, and lasted more than four hours. This meeting was also facilitated by [IEP Facilitator]. [Mother] attended with both of her advocates. Members of [Private Facility] attended as did all of the designated District personnel already listed above. Hearing Exhibit GG. The meeting opened with [Mother]'s announcements and members of the team responding to her emailed questions over the course of approximately 70 minutes. The team next addressed issues raised by [Mother] regarding record requests and the extent to which the change in transportation required prior written notice. [Mother] had more questions about evaluation protocols and expressed concern that the definitions of behaviors in the functional behavioral assessment were too vague.¹¹ The IEP team updated the Student's goals and then moved onto discussion of continuing his placement at [Private Facility] or transitioning him to a District school ([Elementary School]) with a continuum of services and supports tailored to students with ASD. [Mother], her advocates, the [Private Facility] staff, and the District members all raised advantages and disadvantages they saw with the two options. In essence, [Mother], her advocates and [Private Facility] expressed their preference for the Student to remain at [Private Facility], while the District personnel preferred the option of placement at [Elementary School].

29. [Mother] emphasized that the process could have moved faster if [Private Facility] had been included earlier. This would have permitted the Student's draft goals to be more reflective of his progress and therefore more appropriate when the team began discussing them. However, by the end of the December 13, 2016 IEP team meeting, the input from [Private Facility] staff and [Mother] was duly considered and the Student's goals updated in response to information presented by all team members.

30. [IEP Facilitator] confirmed that part of her goal as facilitator was to elicit input from the IEP team members. She characterized [Mother]'s parental input as very high in terms of her preparation, thorough questioning of the reevaluation, and interactions with District members both in outside meetings and written correspondence. [IEP Facilitator] did note that [Mother] tended to shut down emotionally to a degree when she disagreed with a decision. In such cases [Mother] would state, in effect, "that's fine, okay" and the team would move to another issue. [IEP Facilitator] did not form the impression that the District had predetermined the outcome of issues raised in the course of the meetings.

31. Prior to the conclusion of the meeting, the District proposed to place the Student at [Elementary School] within the Autism Program ("TAP"). TAP is a center-based program where children with ASD receive academic, behavioral, and social/emotional support consistent with their IEPs. The District proposed to provide the Student with a full-time 1:1 paraprofessional and extensive accommodations and

¹¹ [Mother]'s concern is discussed in the context of the substance of the IEP in the following section.

modifications addressed to his unique educational needs. The District indicated that the Student would be supported during the initial transition from [Private Facility] with a blending of his day at [Private Facility] and [Elementary School]. Additionally, depending on the Student's success within TAP and his readiness in terms of behaviors and socialization, he would be permitted to access a Communications and Social Development program at [Elementary School] geared toward students on the higher functioning end of the autism spectrum, as well as access to recess, lunch, and elective classes with non-disabled peers.

32. The District's offer was codified in an IEP document (Hearing Exhibit DD), a behavior intervention plan (Hearing Exhibit EE), and a prior written notice (Hearing Exhibit FF) each dated December 13, 2016. [Mother] wrote "I reject the IEP" next to her signature. Hearing Exhibit DD at page 3 of 64. She later reiterated her disapproval in an email message to [Special Education Director] on January 10, 2017. Hearing Exhibit LL. [Special Education Director] responded that the District had scheduled what it considered to be a "transition" meeting with staff at [Elementary School] to discuss aspects of the placement there and what needed to be in place for the Student's IEP to be implemented. On January 13, 2017, [Special Education Director] sent another message to [Mother] as a reminder of the meeting scheduled for January 17. [Mother] responded on January 17, 2017, that she would not be able to attend due to [Father] being unavailable. [Mother] also communicated that she felt that she had not received proper notice of an IEP meeting. [Special Education Director] clarified that the District was not convening the January 17 meeting as an IEP team meeting. Hearing Exhibit KK. [Special Education Director] then informed [Mother] that the Student's "placement was determined" at the December 13, 2016 IEP team meeting. [Special Education Director] referred [Mother] to the "procedural safeguards" provided during the IEP team meeting if the latter disagreed with the placement change. [Mother] did not attend the rescheduled transition meeting, but District staff proceeded with it in her absence.

SUBSTANCE OF THE DECEMBER, 2016 IEP

33. The IEP process chronicled above took into account various sources of information in producing the offer of placement on December 13, 2016. These sources include detailed input from the Student's parents and their advocates, quarterly review reports from [Private Facility], observations of the Student at [Private Facility], the battery of assessments that made up the reevaluation, and input from [Private Facility] staff.

34. The District Evaluation took place between the middle of March and the middle of April, 2016. In that time, the District administered multiple standardized assessments in the areas of oral, written, and pragmatic language, behaviors, sensory processing, visual-motor integration, cognitive functioning, academic achievement, and impacts of ASD.¹² [School Psychologist] also conducted three observations of the Student at [Private Facility] during this period. [Social Worker], social worker for the

¹² [School Psychologist] stated that it would have been helpful to know of the Student's ADHD diagnosis in conducting the reevaluation.

District, also conducted a survey of the Student's adaptive behavior with [Mother] and [Private Facility] Staff, and supported development of a functional behavior assessment under the supervision of [School Psychologist] and in collaboration with other team members. Most of the assessments were conducted at [Private Facility] with [Mother] able to be present. The results of these measures were described in Hearing Exhibits G and H.

35. In his reevaluation summary, [School Psychologist] noted the Student's strengths as being lively, active, and inquisitive, with special interest in electronics and science projects. [Mother] identified the Student's strong vocabulary and "huge improvement with regard to social development." Hearing Exhibit G at page 42. He also demonstrated relative strength in areas of verbal reasoning, pragmatic language (ability to express feelings and explain how things work), and visual-motor integration.¹³ [School Psychologist] also included a number of cautionary statements regarding interpretation of the evaluation results. These cautions derived from the Student's behaviors and levels of engagement during the assessments, in addition to the prevalence of ratings that fell within the extreme ranges of the assessment results.

36. [School Psychologist] concluded that the Student's diagnosis of ASD likely had a substantial impact on his access to the educational environment. The Student displayed more severe symptoms of ASD in the school environment, especially in the areas of verbal and non-verbal social communication and social interaction. *Id* at page 43. His demonstrated deficits in the areas of expressive language, receptive language, and articulation impacted his ability to communicate with adults and peers. Multiple witnesses described ASD as a "communication-based" disorder. [School Psychologist] established that where the ability to communicate is limited, that can lead to difficulties across the educational environment. The Student's proprioceptive and vestibular seeking behaviors, together with his difficulties with body awareness and communication adversely impacted his abilities in social situations. The Student also demonstrated substantial difficulties across areas of reading, mathematics, and writing. Additionally, consistent with how ASD impacts many people, the Student seeks consistency in his environment and experiences marked distress over changes in his routine.

37. The Student rated "low or extremely low" in the conceptual, social, and practical domains of adaptive behaviors. With regard to maladaptive behaviors, both the teacher and parent assessments rated the Student within the range of "at risk" for internalizing problems. Both the teacher and parent assessments rated the Student's hyperactivity and adaptability within the clinically significant range. [School Psychologist] concluded from these results that the Student is likely to experience significant difficulties adapting to changes within his environment. [School Psychologist] determined that the Student may require substantial intervention to be successful in the educational environment. He identified needs in the areas of adaptive skill development, academic skill development, speech-language development, fine/visual motor development and social/emotional/behavioral development. *Id* at page 44.

¹³ In this latter instance, the Student's standardized score placed him above only 0.9% of his peers.

[School Psychologist] went on to make specific recommendations for interventions related to reading, math, writing, sensory processing, social development and emotional regulation, and behaviors.

38. With regard to reading, writing and mathematics, [School Psychologist] suggested a very structured teaching approach that included repeated practice of skills and reinforcement of academic and behavioral progress through immediate positive and corrective feedback. In the area of sensory processing, [School Psychologist] advocated for a sensory diet that could provide the Student with the sensory inputs he is seeking in appropriate ways and also recognize his needs for movement breaks. The Student would also benefit from direct and indirect occupational therapy services to support his visual-motor integration skills as well as independent self-regulation skills. With regard to social development and emotional regulation, [School Psychologist] identified needs for prompting to support self-regulation and on-task behavior, consistent and structured routines, warning and preparation prior to changes in routine, assistance with processing through behaviors including providing very descriptive replacement behaviors, and exposure to and assistance with social interactions with peers and adults.

39. The functional behavioral assessment completed by the District was documented in Hearing Exhibit H. [Social Worker], [Occupational Therapist 2],¹⁴ and [School Psychologist] conducted observations of the Student at [Private Facility] and recorded the results of the observations in terms of noted behaviors over the course of four and a half hours on multiple days. Non-compliance and off-task behaviors were noted most frequently among the categories of problem behaviors. Examples of non-compliance were listed as follows: raising voice to express displeasure, falling to the floor, refusal to complete an assigned task, taking items from others, attempting to negotiate breaks and incentives, and rushing through tasks with minimal effort. Examples of off-task behaviors were listed as being distracted by adults or environmental stimuli in the room (i.e. the timer or pictures on the wall), and perseverating on specific items or ideas. *Id* at page 2. [BCBA] and another staff member at [Private Facility] also provided answers to a questionnaire that was incorporated as part of the assessment. The [Private Facility] staff revealed that the Student had exhibited aggressive behaviors toward adults, although this was only observed in one instance by the District team. As noted above, the functional behavioral assessment also incorporated [Mother]'s extensive response to the parent questionnaire. She identified his weaknesses as difficulty in understanding "gray areas" where strict interpretations may not apply,¹⁵ inflexibility with changes, and emotional dysregulation.

40. The functional behavioral assessment targeted the non-compliance, off-task behaviors, and physical aggression as being the most likely to interfere with the Student's functioning in the educational setting. The ALJ finds and concludes that the

¹⁴ Occupational therapist.

¹⁵ [Mother] provided the following example: if a child should not talk to strangers, why is it okay to say "hi" to a person you encounter on the street?

targeted behaviors are statistically consistent with the observations of the Student at [Private Facility] in the first two instances, and with the results of the [Private Facility] questionnaire in the case of aggression. The functional behavioral assessment proceeded to identify the antecedents and most typical consequences of the Student's behaviors as well as skill deficits that may contribute to the behaviors, and the functions or aims of the behaviors. *Id* at page 15. The results of the functional behavioral assessment were noted in Hearing Exhibit G as warranting implementation of a behavior intervention plan, as well as numerous other supports including use of social stories to prepare for upcoming events and/or changes in routine or environment, continuous modeling of appropriate interactions with peers and staff, consistent implementation of expectations, incentives, and consequences, high levels of positive reinforcement for appropriate behaviors, opportunities for peer interaction, use of "first-then" or "if-then" language, use of visual schedule, redirections for off-task or non-compliant behaviors, and providing hands-on activities and manipulatives when possible. [School Psychologist] established that the goal of these measures was to provide the Student with skills to replace maladaptive behaviors with behaviors conducive to learning.

41. Respondents presented the testimony of [Doctor of Psychology]¹⁶ who was admitted as an expert in the area of Behavioral Analysis. Between June and September, 2017, [Doctor of Psychology] observed the Student on one occasion at home, on two occasions at [Private Facility], and on one occasion during a bus ride. [Doctor of Psychology] found the Student's behaviors to be consistent across his observations and opined that it was "highly probable" that the Student displayed the same behaviors in 2016. The essence of [Doctor of Psychology]'s testimony, however, was that the functional behavioral assessment conducted by the District was inadequate. This opinion was founded on [Doctor of Psychology]'s belief that only an ABA trained BCBA can prepare an appropriate functional behavioral analysis. [Doctor of Psychology] did not cite to any authority, published or otherwise, in support of that belief. He described the appropriate process for completing a functional behavioral assessment as follows: gather relevant data, identify target behaviors, identify the functions (causes) of the behaviors, identify replacement behaviors with the goal of reducing the target behaviors, gather data to assess the efficacy of the interventions, and work on generalizing skills to other settings. He acknowledged that tallying behaviors from observation is one way to identify target behaviors. In his observations of the Student, [Doctor of Psychology] identified non-compliance and inappropriate vocalizations as two target behaviors. [Doctor of Psychology] did not identify any specific flaw in the District's functional behavioral assessment as he was uncomfortable commenting on another person's analysis. He established that an adequate functional behavioral analysis is a prerequisite for a behavior intervention plan that is effective in reducing and/or replacing targeted behaviors. [School Psychologist] established that school psychologists are thoroughly trained in how to conduct a proper functional behavioral assessment. He disagreed with [Doctor of Psychology] that only an ABA trained BCBA is qualified to complete such an analysis.

¹⁶ [Doctor of Psychology] holds a Ph.D in Psychology as well as doctoral level certification in Applied Behavioral Analysis.

42. [Speech Language Pathologist] testified regarding the evaluation of the Student related to speech-language skills. She participated in the assessments of him¹⁷ at [Private Facility] and observed him in that setting on other occasions. [Speech Language Pathologist] noted deficits in the areas of listening comprehension (receptive language), oral expression, articulation (impacting the extent to which the Student can be understood), and pragmatic language. Some of these findings were based on information provided by [Mother], as in the case of the Pragmatic Language Skills Inventory. [Speech Language Pathologist] responded to questions posed by [Mother] regarding the assessments during the May, 2016 IEP team meeting, during the September 19, 2016 meeting, and in email responses included within Hearing Exhibit V. [Speech Language Pathologist] participated in the observation of the Student at [Private Facility] prior to the December, 2016 IEP team meeting and reviewed data provided by [Private Facility] staff. She used all of the information gathered during the assessments, observations, document reviews, and IEP team meetings with [Mother] and [Private Facility] staff to revise Goals No. 6 through No. 9, included in the Student's December, 2016 IEP. [Speech Language Pathologist] established that these goals, which focus on receptive language (reading to learn), oral expression and listening (figurative language), articulation, and pragmatic language (not interrupting others), respectively, addressed the Student's unique needs in speech-language. In addition, Goals No. 8 and No. 9 were calculated to foster improvement in social interaction by helping the Student to be understood better and by improving on his impulsive habit of interrupting conversations. In addition, [Speech Language Pathologist] supported the inclusion of a number of accommodations and modifications that she believed to be appropriate to the Student's needs in speech-language. Specifically, she identified preferential seating, short and repeated instructions, and frequent checks for understanding (related to receptive language), and modeling appropriate language (related to expressive language). [Speech Language Pathologist] agreed wholeheartedly with the proposal to implement the December, 2016 IEP at [Elementary School]. She has worked in the TAP and Communication and Social Development Program at [Elementary School] for more than six years and has seen children with symptoms of ASD more severe than the Student succeed in terms of the services provided and the access to regular education peers. She referenced the Service Delivery statement in the IEP and the Prior Written Notice as detailing the social and emotional supports that the Student would receive beyond what was described in the Accommodations and Modifications section and the description of direct and indirect services in the IEP.

43. [Occupational Therapist] testified regarding the evaluation of the Student in the areas of occupational therapy and the extent to which his needs in that area were addressed by the December, 2016 IEP. She observed the Student at [Private Facility] in May, 2016, and interpreted the assessment results of the prior occupational therapist. [Occupational Therapist] attended the September 9, 2016 IEP team meeting and the follow-up meeting with [Mother] on September 19. At the latter meeting, [Occupational Therapist] explained the results of the Beery Buktenica Developmental Test of Visual Motor Integration and answered [Mother]'s questions. Following the November, 2016

¹⁷ In cooperation with [Fully-licensed Speech-language Pathologist], a fully-licensed speech-language pathologist who supervised [Speech Language Pathologist].

IEP team meeting and based on input from [Mother] and the [Private Facility] staff, [Occupational Therapist] understood that the Student's goals needed to be updated. She participated in a further observation of the Student at [Private Facility] and obtained samples of his work. She identified needs in a number of areas including his ability to form letters with consistent sequence, problems with spacial judgment and consistency of size, reversal of letters, and body awareness (pencil pressure). [Occupational Therapist] suggested updates to Goals No. 1 and No. 2 related to writing upper and lowercase letters with measurable objectives based on the results of her recent observation. She also advocated for accommodations and modifications that would assist the Student with his writing and sensory needs, including: specialized writing paper, various sensory strategies to support self-regulation and attention/focus,¹⁸ and frequent breaks to allow proprioceptive and/or vestibular input. [Occupational Therapist] clarified that her contribution was unrelated to physical therapy, which in the educational setting is focused on a student's ability to access the educational environment. [Occupational Therapist] was unaware of any deficits that prevented the Student from accessing the environment. She supported the December, 2016 IEP as appropriate and supportive of the Student's unique needs.

44. [School Psychologist 2] participated in the IEP team meetings between September and December, 2016, in addition to attending the protocols meeting on September 19, 2016. She testified that she was responsible for interpreting the evaluation results for the team, contributing regarding the Student's needs for direct and indirect services, and developing the behavior intervention plan. She observed the Student on multiple occasions at [Private Facility]. She found him to be very talkative and always engaged with an adult in a 1:1 relationship. As noted above, she also reviewed the quarterly reports prepared by [Private Facility]. [School Psychologist 2] established that the Student's Goals No. 10 through No. 12 were updated to reflect the results of the functional behavior assessment and reinforce the antecedent strategies of the behavior intervention plan. For example, Goal No. 11 was written to reduce incidents of aggression, and Goal No. 12 was written to reduce non-compliance. As for the behavior intervention plan, it listed setting event strategies designed to remove potential triggers for the Student's behaviors, such as ensuring a structured setting that also encourages positive contacts with adults and peers, and providing a visual schedule that prepared him for upcoming events. The behavior intervention plan also listed antecedent strategies describing how interactions with the Student should occur to reduce the occurrence of targeted behaviors throughout the day. Teaching strategies were included as means to increase the likelihood that appropriate replacement behaviors would occur through instruction. To take off-task behavior as an example, the behavior intervention plan incorporated the setting strategy of a timer system to provide structure and anticipated reward/consequence for the Student remaining focused on a task. Antecedent strategies included providing prompts and consistent implementation of expectations, incentives, and consequences to minimize off-task behavior. Behavior teaching strategies included modeling appropriate behavior,

¹⁸ Listed as proprioceptive input such as heavy work, vestibular input such as taking a walk, and alternative seating such as a stool or wiggle cushion.

providing high rates of positive reinforcement for desired behaviors, and using positive language to correct undesired behaviors.

45. [Mother] testified that she felt the functional behavioral assessment was insufficiently detailed regarding the Student's targeted behaviors being targeted. In the context of aggressive behavior, she testified that a description that relies on how the behavior is perceived by another person could lead to inconsistent interpretation. For example, for the Student to slam a door on another person may or may not be perceived as aggressive, depending on who the other person is. She maintained that the behavior intervention plan did not provide a specific "road-map" for staff to pick up and be able to understand and manage the Student's behaviors in a consistent manner.

46. [School Psychologist 2] described other aspects of the IEP that were calculated to assist with the Student's behavioral issues. She established that the following accommodations and modifications supported the Student's ability to successfully attain Goals No. 10 through No. 12: 1:1 adult supervision at all times, visual token board to remind and reinforce expected behaviors, use of a timer and scheduled breaks for reinforcement, use of social stories to communicate what is required of the Student, use of sensory strategies to support self-regulation, frequent breaks, and extra time to complete tasks.

47. Respondents presented the testimony of [Clinical Psychologist].¹⁹ [Clinical Psychologist] is a licensed clinical psychologist who began working with the Student in August, 2016. [Clinical Psychologist] has no formal training related to instructional strategies in public schools or the IEP process. He reviewed prior assessments of the Student, including a neuropsychological evaluation of the Student performed by another person in early 2016. [Clinical Psychologist] opined that the assessment results he reviewed, including the areas of intellectual functioning, verbal and non-verbal communication, and working memory, were consistent and did not indicate the need for further assessment. [Clinical Psychologist] had seen the Student on seven occasions for one hour each prior to testifying. He described minimal change in the Student's behaviors over the course of nine months, noting that exhibits severe inattention, hyperactivity, and impulsivity requiring frequent redirection. [Clinical Psychologist] established that he could determine the Student's social/emotional deficits and impulsivity within fifteen minutes of observing him.

48. [Clinical Psychologist] described ASD as a social/emotional impairment characterized by profound deficits in social reciprocity, verbal and non-verbal communication, and socially appropriate interactions. ADHD is characterized by hyperactivity and difficulty maintaining focus, planning, and organization. [Clinical Psychologist] opined that the Student requires extensive environmental supports of the type provided by ABA therapy. He needs substantial social skills training and individualized support at all times. [Clinical Psychologist] has not prepared any written report of his findings to [Mother] and has not communicated with the Student's IEP team.

¹⁹ [Clinical Psychologist] was admitted as an expert in the area of children's neuro behavior.

49. [BCBA] provided opinion testimony consistent the expert designation described in footnote no. 5, above. She has worked with the Student at [Private Facility] since 2012 and has observed that he has made steady and significant progress in the areas of behaviors and social skills.²⁰ She noted however, that the Student has a history of property destruction and physical aggression toward staff that has required that he be physically restrained at [Private Facility].²¹ [Private Facility] has implemented a behavior support plan and [BCBA] established that the Student's behaviors are tracked consistently. She confirmed that [Private Facility] staff gave input at the Student's September, November, and December, 2016 IEP team meetings. Although she could not say that every suggestion from [Private Facility] resulted in a modification of the IEP, she agreed that the Student's goals were adjusted based on [Private Facility] input. [BCBA] testified that she had not reviewed the behavior intervention plan prepared by the District, but she shared [Mother]'s concerns that behaviors be precisely defined so that the plan is implemented consistently by the various people involved in the Student's education. However, when the ALJ asked [BCBA] to express the behavior of "distraction" with an objective alternative, she did not do so. She concurred that the Student requires 1:1 adult supervision to promote interaction with peers, especially in the area of communication.

50. [Lead Teacher] testified in her capacity as the Student's lead teacher at [Private Facility] during 2016. [Lead Teacher] reiterated much of what [BCBA] and others had established regarding the Student. He is challenged by changes in environment and in social interactions. She described negative behaviors demonstrated by the Student during 2016 as property destruction, non-compliance, and physical aggression. No more specific or objective descriptions of these behaviors was given. [Lead Teacher] supported the Student's need for extensive adult support to work through academic problems, and to redirect common behavioral problems like interrupting others, making inappropriate (critical or teasing) comments to others, or seeking to avoid non-preferred tasks. [Lead Teacher] confirmed that she was able to provide input during IEP team meetings that led to changes in the Student's goals. She noted that [Mother] was able to ask questions during the meetings, but did not always get answers.

51. [BCBA], [Lead Teacher], and [Clinical Director] all established that a goal of [Private Facility] is to prepare children to exit the program and return to a setting where they can be educated with typically-developing peers. [Clinical Director] described an ABA-approved intervention strategy employed at [Private Facility] called "Safety Care." The strategy essentially identifies functions or triggers of behavior, attempts intervention by identifying preferred behaviors, gauges the reaction of the child, and directs management of the child to prevent any harm to the child or to others. [Clinical Director] is unaware of any time when this protocol had to be employed with the Student during 2016.

²⁰ [Private Facility] focuses on eight areas of development: social/emotional, cognitive, executive functioning, motor, language, play, adaptive skills, and academics.

²¹ She was not aware of any incident of physical aggression on the school bus during 2016.

52. [School Psychologist 2] described the process of discussing placement options at the December 13, 2016 IEP team meeting. [IEP Facilitator] created a list of pros and cons for the one-hundred percent special ed setting characterized by [Private Facility], and the [Elementary School] TAP setting with less than forty percent inclusion in regular education. Each of the participants around the table, including [Mother], her advocates, [Private Facility] staff, and District staff, spoke their minds regarding the appropriateness of the two options for the Student. [Private Facility] was noted to be a stable environment where the Student had made progress on a number of areas over the years. It was, however, an environment where the Student had zero access to non-disabled peers, where no licensed special educators provided instruction to him, and where he did not have access to academic curriculum approved by the State of Colorado. [Elementary School] represented a major change for the Student, but one where he could access the Communication and Social Development Program and interaction with non-disabled peers during lunch, recess, and specials (electives) as appropriate. [Elementary School] is also substantially closer to the Student's home than is [Private Facility]. Both settings offered full time, 1:1 adult support.

53. The service delivery statement of the Student's IEP reflected that he was to "receive 120 minutes per month of speech-language services outside of the general education setting to address articulation, expressive language, and receptive language skills. [The Student] will also receive 15 minutes a month of speech-language services to consult with staff, observe, attending, and complete paperwork. Services will be provided by a speech-language pathologist or speech-language pathology assistant under the supervision of the speech language pathologist." The Student was also to "receive 120 minutes of direct pull-out occupational therapy services and 45 minutes of indirect occupational therapy services per quarter. The role of the occupational therapist is to support [the Student's] access to educational activities through direct services and collaboration with educational staff as needed. Services will be provided by an occupational therapist or a certified occupational therapy assistant under the supervision of the occupational therapist." Lastly, the Student was to "receive 580 minutes per week of academic achievement support, 580 minutes per week of social emotional support, and 580 minutes per week of behavior support provided by a special education teacher or a paraprofessional under the supervision of a special education teacher." Hearing Exhibit DD at page 62 of 66.

54. The prior written notice document dated December 13, 2016, and provided to [Mother] further described the District's formal offer of placement as follows: "the District made a firm offer of FAPE which specified that [the Student] would participate in The Autism Program with access to the Communication and Social Development Program at [Elementary School]. He will receive support from an adult throughout his day (this will consist of a 1:1 paraprofessional, special education teacher support, speech/language support, behavior support provided by the school psychologist or school social worker at the individual and classroom level as needed)." Hearing Exhibit FF. The District described the reason for the proposed change, in part, as follows: "Placement within the TAP program classroom with access to CSD was proposed to meet [the Student's] needs. TAP placement will allow [the Student] to be educated alongside of his same age peers and to access the general education

curriculum as he is able. Access to the CSD program will allow him to participate in social skill development specific to the needs of child with Autism Spectrum Disorders. Although TAP also offers social skill development, [the Student's] language skills and level of functioning likely best match the lessons offered within the CSD classroom." *Id.*

55. The District presented the testimony of [Administrator 1] and [Administrator 2]. Both are administrators at [Elementary School]. Both established that [Elementary School] has a culture of inclusion and support for special education students. [Administrator 1] described a variety of academic curricula available for use with the Student in the context of his unique needs and the content of his IEP. [Mother] visited the school twice during the Spring of 2017 and was permitted to view the full spectrum of instruction, including TAP. No witness established that any one specific curriculum was necessary to address any of the Student's unique educational needs.

56. [School Psychologist 2] uploaded information provided by [Mother] into the IEP document created by the District. This information included a parent report that was superseded by more current information supplied by [Mother]. Hearing Exhibit DD at pages 33 through 39. [School Psychologist 2] testified that the team agreed that this information could be removed, but that she either failed or was unable to do so. As a consequence, more relevant information from [Mother] could not be inserted into the document due to system limitations of the District's software. The District did upload [Mother]'s input as separate documents and linked these to the Student's IEP in its case management system. In that way, documents not capable of being inserted into the "four corners" of Hearing Exhibit DD were nonetheless included as part of the IEP and visible to any member of the District with access. Hearing Exhibit MM.

DISCUSSION

The IDEA was enacted to ensure that all children with disabilities have access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") is defined as "special education and related services . . . provided in conformity with an individualized education program." 20 U.S.C. § 1401(9). The individualized education program ("IEP") is the basic mechanism through which the school district's obligation of providing a FAPE is achieved. *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). The local school district is required to develop, implement and annually revise an IEP that is calculated to meet the student's specific needs and educate that student in the "least restrictive environment", meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public school classrooms alongside children who are not disabled. 20 U.S.C. §§ 1414(d) and 1412(a)(5)(A).

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). To meet its substantive

obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. *Endrew F., et al., v. Douglas County School District RE-1*, No. 15-827, slip op. at 11 (U.S. Supreme Ct. March 22, 2017). In this case, the District has the burden of demonstrating that the December 13, 2016 IEP represented an offer of FAPE. Since Respondents are challenging the development of the December 13, 2016 IEP, they have the burden of establishing that any failure to comply with the procedural requirements of such steps actually resulted in a denial of FAPE.²² Respondents also have the burden of establishing that any failure on the part of the District to implement a transportation plan actually resulted in educational harm in the form of lost instructional time to the Student.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase "free appropriate public education". In that decision the Court held that the statutory definition of FAPE requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children; the school district's obligation extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit. *Id.* at 200. More recently, the Court clarified that "any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal" (emphasis in original). *Endrew F., supra*, slip op. at 11. The educational program must be appropriately ambitious in light of a student's circumstances and provide the student with the chance to meet challenging objectives. *Id.* at page 14.

A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 C.F.R. 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 CFR 300.513 (a)(2)(i) – (iii).

Issue No. 1: Whether the District's failure to implement the Student's transportation plan resulted in a loss of instructional time.

The only evidence in the record on this issue is the testimony of [Mother]. She described a review that she conducted of sign-in sheets at [Private Facility] during late 2015 in which she observed a number of occasions where the District bus did not deliver the Student to [Private Facility] on time. [Mother] did not provide any detail about what

²² *Erickson v. Abuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999); *O'Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998).

specific days the Student was late, the extent to which (in minutes or hours) he was late on those days, or how she calculated her estimate that all of the late arrivals resulted in the Student missing approximately eight hours of instruction. Because the instances were not detailed, there was no opportunity to verify the amount of time that was supposedly lost, or what caused of the identified late arrivals. [Transportation Director] established that the Student's transportation plan required that he be transported to [Private Facility] on U.S. Interstate 25 in morning commute traffic. Moreover, during the time of year when the late arrivals were said to have occurred, commute times may have been impacted by weather. [Mother]'s summary testimony and estimate of an aggregate amount of time lost is not sufficiently precise that the ALJ can determine that the late arrivals were due to a failure on the part of the District to implement the Student's transportation plan. On this issue, Respondents did not demonstrate by a preponderance of relevant evidence that they are entitled to relief for loss of instructional time.

Additionally, although the Respondents did establish by a preponderance of the evidence that the transportation form [Mother] signed in May, 2015, was subsequently modified by District personnel, there is no connection between that modification and the issue of lost instructional time. The modification was problematic in that some of the information added by the District was inaccurate on important details related to the Student's medical care. However, there is no evidence in the record that the modification resulted in any actual harm to the Student. As noted above, procedural violations do not give rise to relief unless they result in a substantive impairment of the Student's right to FAPE. This modification was not shown to have any adverse substantive impact.

Issue No. 2: Whether the Student's parents were precluded from providing meaningful input during the development of the 2016 IEP.

The record at hearing established that the IEP development process during 2016 was procedurally sound. This conclusion derives from consideration of a number of individual factors as well as a general impression that the ALJ formed regarding the process.

The relevant individual factors include the amount of time spent by the IEP team reviewing information related to the Student's unique educational needs, the proper composition of the complete IEP team, the process of reevaluation including [Mother]'s ability to observe assessments, development of a functional behavioral assessment, the use of a facilitator to ensure an orderly and inclusive process, the active participation of [Mother], [Father], and their advocates, the eventual inclusion and participation of [Private Facility] staff as IEP team members, the time and effort expended outside of formal IEP team meetings to review evaluation results with [Mother], the fact that input from [Private Facility], [Mother] and her advocates resulted in changes to the IEP, the incorporation of written information provided by [Mother] as part of the IEP, and consideration of observations of the Student conducted by IEP team members in development of his special education program. [Mother] specifically felt that proceeding with the May, 2016 IEP team meeting when members of [Private Facility] could not

attend infringed on her ability to meaningfully participate. However, her agenda for that meeting made clear that details of the IEP were not up for discussion until after all questions had been answered about the evaluation report. The chronology of the IEP development in the Findings of Fact demonstrates that the evaluation was still being questioned well into November, when [Private Facility] was present and participating. For that reason, the ALJ finds and concludes that the failure to include [Private Facility] in May did not materially impact [Mother]'s participation. The ALJ acknowledges that other aspects of the process were frustrating for Respondents at times, particularly when it came to [Mother]'s sense that working through the Student's present levels of performance so as to produce appropriate goals and objectives took entirely too much time. However, the process ultimately resulted in the proposal of twelve goals, supplemented by measurable objectives, that did reflect the contributions of all team members including [Mother], the [Private Facility] staff, and District staff that had evaluated and/or observed the Student. Nor does the fact that parents disagreed with the District's offer following the December IEP team meeting alter the conclusion related to the quality of the process. Unanimity is not required for development of a valid IEP.

Development of the Student's 2016 IEP followed an orderly and sensible sequence. The Student was due for reevaluation and his IEP team convened to discuss and determine the areas to be assessed. The District secured [Mother]'s approval for the reevaluation plan and acceded to her request to be present during the assessments. Assessments were completed by qualified personnel and the results were documented and presented for consideration by the IEP team. [School Psychologist] sat down with [Mother] to answer her questions and more fully explain the results of the reevaluation. [School Psychologist] collaborated with [School Psychologist 2] to hand off responsibility for interpreting the reevaluation results and contributing to the IEP team in the role of school psychologist. [School Psychologist 2] conducted observations of the Student at [Private Facility] and met with [Mother] as means of further taking on that role. When the IEP team was reconvened in the fall of 2016, members of [Private Facility] with knowledge of the Student's unique needs were included. Members of the evaluation team continued to meet with [Mother] and respond to her written inquiries regarding interpretation of the assessments. IEP meetings followed agendas that permitted [Mother] to provide parent updates, ask questions, and establish action items that team members would work on prior to the subsequent meeting. [Mother] credibly testified that she felt that not every one of her questions was answered in this process. However, the ALJ finds and concludes that she was able to participate as a full-fledged member of the IEP team and that the District demonstrated good faith efforts my multiple team members to respond to her questions to the best of their respective abilities. [IEP Facilitator] and others established that the team actively sought to elicit participation from [Mother]. These efforts were not always successful due, in part, to her desire to preserve the impression that the process was not reflecting her input. Hearing Exhibit NN. [School Psychologist 2], [Speech Language Pathologist], and [Occupational Therapist] conducted additional observations and reported their findings to [Mother] and the IEP team. These findings also informed the final offer of placement, including goals and objectives, accommodations and modifications, and consideration of the least restrictive environment appropriate for the Student.

The record did not establish that the District “pre-determined” the content of the Student’s IEPs without consideration for the parents’ views. Although the District proffered draft goals and objectives that were ultimately shown to require substantial revision, the District engaged [Mother], her advocates, the [Private Facility] staff, and District members who conducted further observations of the Student to produce revised goals and objectives. The adjustment of support for the Student from “adult supervision” to a full-time 1:1 paraprofessional further supports the conclusion that the District was open to input that reflected the best interest(s) of the Student despite what was initially proposed. This evidence established that all members of the IEP team had meaningful input, notwithstanding the fact that earlier inclusion of [Private Facility] may have expedited the process.

[Mother] clearly established that she is a very caring, involved, and detail-oriented parent. Although she communicated that she and [Father] prefer for the Student to transition from [Private Facility] to an environment where he can engage regular education peers, she was not convinced that the IEP process had resolved all of her concerns to the point where she could support the change of placement offered on December 13, 2016. The general impression formed by the ALJ is that [Mother] continued to ask questions and probe details regarding assessments, present levels, and curricula because she wanted the IEP team to conclude, as she already had, that the change of placement was not adequately supported. From this impression, the ALJ finds and concludes that no amount of facilitation, inclusion, and explanation on the part of IEP team members would have produced a different impression of the process in the mind of [Mother] so long as the result was a proposal to change the Student’s placement.

Finally, while not technically an aspect of developing the IEP that was offered in December, 2016, the ALJ will address the issue of the Student’s transportation and the use of a safety vest. The evidence established that the use of a vest was initially appropriate to protect the Student and others from the risk of harm posed by his behaviors on the bus. Later, the Student came to resent having to use the vest and [Mother] asked the District to evaluate whether it was still necessary. After initial resistance and some discussion, the District eventually conducted observations of the Student and concluded that improvements in his behavior warranted discontinuing use of the safety vest. While this was the result [Mother] sought and believed was appropriate, she felt that she did not have adequate input on the process of the observation and that consideration had to be given to a contingency plan to account for the safety consequences of the vest’s use being discontinued. [Transportation Director] established that the Student has been fine without the vest in the intervening time since September, 2016. Without discounting the concern of [Mother] for the Student’s safety, the ALJ notes that Respondents presented the testimony of [BCBA] who, after two observations of the Student on the bus, formulated an entire transportation plan for the Student in approximately July, 2014. There was no evidence that [Mother] discussed the protocols for the [Private Facility] observation in advance or objected that limited observation over two days in 2014 was inadequate to impose conditions on the Student’s transportation that she still considered mandatory in 2015. These facts illustrate that the District’s action of observing the Student and putting forth a

recommendation did not deprive [Mother] of meaningful input regarding this aspect of the Student's special education programming. Nor was the vest discontinued by the District unilaterally as [Mother] agreed with the change, albeit with reservations. In any event, as no evidence was presented of any harm—educational or otherwise—experienced by the Student as a result of discontinuing use of the safety vest, the actions of the District in this regard do not give rise to any right to relief.

In conclusion, the Respondents did not establish a procedural violation of the IDEA that resulted in the denial of the parents' rights to be included as IEP team members or that resulted in a substantive deprivation of FAPE to the Student.

Issue No. 3: Whether the IEP of December 13, 2016, including the behavior intervention plan, constituted an offer of FAPE.

In order to be reasonably calculated to enable the Student to make progress toward ambitious objectives appropriate to his circumstances, the IEP needed include an accurate assessment of his unique educational needs, describe appropriate goals in the areas of those needs, and set forth services and supports (including accommodations and modifications) necessary to support the Student's attainment of such goals. The ALJ finds and concludes that the December 13, 2016 IEP was adequate in these respects and offered the Student a FAPE.

Understanding the Student's unique needs derived from the District's reevaluation, the extensive information [Mother] communicated to the IEP team, and the inclusion of input from [Private Facility] staff and District team members who had observed him and/or sampled his work. As described above, the reevaluation was discussed and agreed upon in terms of its scope and the instruments to be administered. The assessments were completed and interpreted by persons qualified to do so. IEP team members including [Mother] engaged in repeated and detailed discussions regarding the results of the assessments resulting in the team being further informed regarding the Student's needs. No witness testified that the reevaluation was incomplete or that any particular assessment was improperly administered or omitted. In fact, [Clinical Psychologist] opined on behalf of Respondents that no further assessment of the Student was necessary. As to whether the Student required assessment in the area of ADHD, [Mother] did not communicate any such diagnosis to other members of the team. The Student's impulsivity, distractibility, and hyperactivity were recognized by the team and addressed in the educational program offered in December, 2016. While [School Psychologist] acknowledged that it would have been helpful to have been informed of the ADHD diagnosis prior to designing the reevaluation criteria, no witness opined that the reevaluation was invalid in the absence of such consideration. [School Psychologist] did include cautionary statements about the results of the assessments based on the Student's attitude and behaviors, but the ALJ notes that these same factors would likely be present in any evaluation of the Student. The reevaluation results produced the picture of the Student's strengths and weaknesses set forth in Findings of Fact No. 35 through No. 38, above. Based on the record as a whole, the ALJ finds the reevaluation to have provided an adequate base of knowledge for the IEP team to plan for the Student's educational needs. Members of

the IEP team also observed the Student on a number of occasions and obtained samples of his work. Significantly, [Clinical Psychologist] established that it is possible to get a picture of the Student's social/emotional deficits and impulsivity within fifteen minutes. The observations of the Student conducted by the District were far more involved than that. In addition, [Mother] continued to provide very detailed accounts of the Student's needs in the areas of academic functioning, social/emotional needs, and behaviors. The combination of these inputs resulted in accurate understanding of the Student's levels of performance at that time.

The District also developed a functional behavioral assessment based on many of the same sources of information. The assessment identified three target behaviors that were either most statistically prominent during observations or, in the case of physical aggression, advocated by the [Private Facility] staff. There was no substantial evidence in the record to suggest that any other behaviors impacted the Student's ability to access his educational program more than the three listed in the functional behavioral assessment. Without citing any authority in support, [Doctor of Psychology] did criticize the assessment on the basis that it was not created by an ABA trained BCBA, but [School Psychologist] established his qualification as a school psychologist to develop the assessment. In addition, [Mother] and [BCBA] testified that the targeted behaviors needed to be identified in more objective terms to promote consistent application of the interventions. The ALJ agrees that the Student's behaviors at school should be understood and addressed by school personnel in a consistent manner. However, [BCBA] did not provide any more objective criteria in response to inquiry from the ALJ, and [Mother] identified one way that physical aggression could be subject to differential interpretation. On balance, the ALJ finds and concludes that the functional behavioral assessment could be improved, but was not shown to be fundamentally inadequate as presented.

No witness established that the goals and objectives present in the December 13, 2016 offer were inappropriate to the Student's unique needs in the areas of language (including reading, writing, and oral communication), mathematics, behaviors, and social/emotional wellness. As noted above, the draft goals initially proffered by the District required substantial revision, but that process elicited input from [Private Facility] staff and District team members who conducted further observations of the Student with the result that the final product was improved. [Mother] noted that the Student had more goals than twelve in previous IEPs but neither she nor any other witness identified a particular goal that was appropriate for the Student that was missing from the December, 2016 offer. The ALJ finds and concludes that the record as a whole supports the adequacy of the goals and measurable objectives set forth in the IEP

Multiple witnesses, including [School Psychologist 2], [Speech Language Pathologist], and [Occupational Therapist], spoke to the appropriateness of the accommodations and modifications listed in the IEP to support the Student's needs in the areas of safety, attending, coping with changes in schedule and/or environment, behaviors, receptive language, expressive language, social/emotional deficits, and sensory input. There is no evidence in the record establishing that the measures described in Findings of Fact No. 42, No. 43, and No. 46 were inappropriate, or that the

full list in Hearing Exhibit DD was inadequate to promote the Student's ability to access his educational plan.

The behavior intervention plan included as a component of the Student's IEP derived from the functional behavioral assessment. It identified the same targeted behaviors and prescribed a methodology for reducing the occurrence of such behaviors or increasing the occurrence of preferred replacement behaviors as set forth in Finding of Fact No. 44. The ALJ finds and concludes that the methodology employs an approach consistent with the positive behavior supports characteristic of ABA, and is similar to the principles of "Safety Care" used with the Student at [Private Facility]. In the same way that the functional behavioral assessment might be improved, the behavior intervention plan could likewise be more prescriptive. However, while there was general agreement about the behavioral profile of the Student being consistent, the record established that the his behaviors are not static. An example of this is the progress made on the bus that allowed him to be safely transported without a safety restraint. For this reason, the ALJ finds and concludes that it was appropriate to craft the behavior intervention plan to address categories of behaviors that may be present and observed over time, rather than to identify very specific behaviors that may be transitory. In summary, the behavior intervention plan was reasonably calculated to identify and respond to behaviors with the potential to negatively impact the Student's health, safety, and access to education.

Lastly, the IEP team analyzed the comparative benefits of [Private Facility] and the [Elementary School] TAP room with access to the Communication and Social Development program as appropriate. A major consideration in this stage is the expressed preference in the IDEA for education in the least restrictive environment. The evidence is undisputed that [Private Facility] offers no opportunity to interact with typically developing peers throughout the day. Testimony from numerous witnesses established that the Student is an intelligent and engaging child who desires interactions. There was no substantial evidence that exposure to non-disabled peers would be inappropriate for him so long as appropriate social/emotional supports were in place. The District established that it was aware and sensitive to the Student's needs in this area and was willing and able to support them with paraprofessional staffing, instruction in expressive, receptive and pragmatic language, availability of the Communication and Social Development program, and what was established to be the positive, inclusive environment of [Elementary School]. Mindful of the Student's aversion to change, the District proposed to ease the transition by allowing a period of gradual integration where, at first, he would still have contact with the people at [Private Facility]. In addition, a number of accommodations and modifications were tailored to this need. Special education children are to be educated alongside regular education children "to the maximum extent possible." No one will ever know what is possible for the Student if he is sequestered at [Private Facility] year after year. The ALJ finds and concludes that the District IEP, while potentially challenging for the Student, nonetheless provided adequate supports that were reasonably calculated to enable him to realize the benefits of being educated with typically developing children. This factor preponderates in the overall conclusion that the IEP of December 13, 2016, represented an offer of FAPE.

DECISION

The ALJ concludes that the District met its burden of establishing that the December 13, 2016 IEP represented an offer of FAPE to the Student as required under the Individuals with Disabilities Education Act. Respondents failed to meet their burden of establishing that the Student was denied FAPE as a result of procedural violations alleged in the development of the IEP. Finally, the Respondents failed to demonstrate that the Student lost instructional time as a result of the District's failure to implement his transportation plan.

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.

DATED AND SIGNED

October 25, 2017

KEITH J. KIRCHUBEL
Administrative Law Judge