

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>[Mother], on behalf of [the Student], Complainant,</p> <p>vs.</p> <p>ST. VRAIN VALLEY SCHOOL DISTRICT RE-1J, Respondent.</p>	
AGENCY DECISION	

On May 29, 2019, Complainant filed a due process complaint with the Colorado Department of Education, Exceptional Student Services Unit, (“CDE”), against St. Vrain Valley School District RE-1J (“District”). On May 30, 2019, CDE referred the complaint to the Office of Administrative Courts (“OAC”). Krishinevsky & Raykin, Attorneys at Law, represented Complainant in this proceeding. Lyons Gaddis Kahn Hall Jeffers Dworak & Grant, PC, represented the District.

When CDE transferred the complaint to the OAC, the complaint was identified as an expedited due process complaint.¹ A prehearing conference was conducted by the undersigned Administrative Law Judge (“ALJ”) on July 22, 2019. Igor Raykin, Esq. appeared for the Complainant. Catherine Tallerico, Esq. and Timothy O’Neill, Esq. appeared for the District. At the prehearing conference, Mr. Raykin confirmed that the complaint is not an expedited complaint. At the prehearing conference, the parties set the hearing for October 21 – 24, 2019 in Denver, Colorado and extended the decision deadline to November 12, 2019.

In her May 29, 2019 complaint, Complainant alleges that District violated the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. § 1400, et. seq., and accompanying regulations at 34 C.F.R. §300, et. seq. and the Colorado Exceptional Children’s Educational Act (“CECA”), § 22-20-101, et. seq., C.R.S., by failing to provide the Student with a free appropriate public education (“FAPE”). More specifically, Complainant alleges that the District failed to: develop an appropriate Individualized education program (“IEP”) or behavior intervention plan (“BIP”); adequately consider the use of positive behavioral interventions under 34 C.F.R. § 300.324(a)(2)(i); provide

¹ Expedited due process hearings must occur within 20 school days of the date the complaint was filed. 34 C.F.R. §300.532(c)(2). Because the complaint was filed after the end of the 2018-2019 school-year and the Student was not eligible for or receiving Extended School Year (“ESY”) services, the 20th school day was September 11, 2019.

appropriate transportation as a related service under 34 C.F.R. § 300.34(a); provide non-academic services and extracurricular activities under 34 C.F.R. §§ 300.107 and 300.117; adhere to required evaluation procedures under 34 C.F.R. §§ 300.304-305; conduct a timely and appropriate manifestation determination review in violation of 34 C.F.R. § 300.530(e); and provide notice of a change in placement in violation of 34 C.F.R. §§ 300.530(h) and 300.503. The District denies all the allegations and has raised the following affirmative defenses: some of the claims are untimely and therefore barred by the statute of limitations; equitable considerations preclude or limit reimbursement, primarily Complainant's refusal to send the Student to school and to participate in meetings with the school; and, that the District cannot be liable when Complainant refuses to allow access to the Student so that it could provide services.

On October 11, 2019, Complainant filed a Motion for Leave to Amend Complaint along with her First Amended Complaint. Complainant sought leave to include the following allegations: On October 1, 2019, Complainant requested an Independent Educational Evaluation ("IEE") at public expense pursuant to 34 C.F.R. § 300.502(b); the District refused to grant the IEE and did not file a due process complaint or provide written notice for its decision. Based on these allegations, Complainant alleges that the District violated 34 C.F.R. § 300.502 and 34 C.F.R. § 300.503. The ALJ convened a prehearing conference on October 17, 2019 to discuss Complainant's motion. At the prehearing conference, the District stated that it opposed the motion because a proposed amendment would be futile as the request for the IEE was untimely and that the District was not required to file a due process complaint because Complainant has already challenged the District's evaluation in the present case. The ALJ granted Complainant's motion to amend the complaint, but granted the District a full opportunity to present evidence and argument at hearing about the timeliness of the October 1, 2019 IEE request and its procedural obligations under the IDEA regarding that request.

Hearing was held before the undersigned ALJ at the OAC on October 21 – 23, 2019 in Courtroom 2. The proceedings were transcribed by a court reporter provided by CDE. At hearing, Christie Bebo, Esq. and Makenzie Bogart, Esq. represented Complainant. Catherine Tallerico, Esq. and Timothy O'Neill, Esq. represented the District. At hearing the ALJ admitted into evidence the following exhibits offered by Complainant: 1-1 through 1-19; 2-1; 3-1, 4-1; 4-2; 4-4; 5-1; 6-1; 7-1; 12-1 through 12-3; 16-1 through 16-19; 17-1; 21-1 through 21-8; 22-1; 23-1; 24-1; 27-1; and 28-1 through 28-15. The ALJ also admitted into evidence the following exhibits that were offered by the District: 1; 2; 4; 5; 6; 8; 10; 12A; 12C; 13; 18; 21; 22; 23; 30; 31; 32; 39; 40; 41; 48; 49; 52; 53; 54; 57; 58; and 59. Complainant testified on her own behalf. Complainant also called [Special Education Coordinator], [Complainant Witness 1], and [Social Worker]. The District called [School Psychology Expert], [District Witness 1], [District Nurse], [Special Education Coordinator], and [Transportation Director].

ISSUES PRESENTED

The ALJ must determine whether Complainant has established by a preponderance of evidence that the District violated both procedural and substantive

requirements of the IDEA and denied the Student FAPE. And, if so, whether the Student is entitled to an award of compensatory education.

FINDINGS OF FACT

1. On December 6, 2016, Complainant contacted the District and informed the District that the Student had been expelled from his private school, [Private School], and was going to be enrolling in the District and attending [Elementary School] after the first of the year.

2. Prior to the Student's enrollment in the District, the District was aware that the Student had been expelled from [Private School] for behavioral problems, including physical aggression towards peers, displays of anger, arguing, flipping school furniture and making stabbing motions towards other students. Exhibit 4.

3. On January 17, 2017, Complainant signed a release of records for the District. Prior to the Student's arrival at [Elementary School] the Student's team talked with a therapist in order to prepare for the Student's start date. On January 19, 2017, [Therapist] of [Health Center] sent [Elementary School] a letter outlining the Student's diagnosis - post traumatic stress disorder ("PTSD") and generalized anxiety. Exhibits 2-1, 4 and 10.

4. Prior to the Student's enrollment in the District, Complainant also informed the District that the Student has severe nut allergies, which included not only peanuts, but all tree nuts and numerous seeds. The Student's nut allergy is so severe that even exposure through skin contact or inhalation of allergens can cause anaphylaxis, which is a potentially life-threatening reaction that impairs breathing and can send the body into shock.

5. The Student is not the only student in the District with severe nut allergies. The District serves many students who have nut allergies. The District staff, including the transportation staff, receive regular training on how to spot potential allergic reactions and training on how to administer medication through an epi pen, if necessary. In addition, the lunch rooms have nut free tables and every student with a nut allergy is permitted to bring in his or her own snacks and choose safe items from the lunch menu.

6. In order to ensure his safety, the Student carries a medical bag that contains an over-the-counter antihistamine (Benadryl) and prescribed epinephrine, which is administered through an epi pen. The severity of the Student's nut allergy is a source of stress and high anxiety for both the Student and Complainant.

7. The District informed Complainant that the Student could start classes at [Elementary School] on January 23, 2017. Complainant asked the school to wait until she could obtain a medical plan from her doctor regarding the Student's allergies.

8. On January 24, 2017, the Student's doctor, [Student's Doctor], contacted the

District nurse, [District Nurse], regarding a health plan for the Student.

9. On January 27, 2017, Complainant signed a written consent form for the Student to be evaluated for special education. The Student was evaluated in the following areas: general intelligence, academic performance, social and emotional status, health, and motor abilities. The Student's team also requested formal evaluation regarding executive functioning skills, sensory processing, and attention skills. Exhibit 1.

10. The following information is also included on the January 27, 2017 Consent for Evaluation form: [The Student] has a severe nut and seed allergy and will be supported in his environment through an individualized health plan. The school team has also initiated the MTSS process and will support his behavioral needs as well." Exhibit 1.

11. On January 27, 2017, the District provided Complainant with a written copy of the special education procedural safeguards, which include, but is not limited to, information about requesting an independent educational evaluation ("IEE") at public expense and filing a state complaint and/or a due process complaint. Exhibits 1 and 57.

12. The Student started classes at [Elementary School] on January 27, 2017. He began his school year at [Elementary School] with the following safety plan:

At the start of the day, [the Student] will have a back pack check in the office or counseling office.

Daily check in with the school counselor to go over his visual schedule for the day, review his goals, and how he can earn points for behavior expectations and to be safe. See [the Student's] check in sheet.

Goal: [the Student] will be safe to self, others and the use of school property (stuff). The Student's schedule will be evaluated biweekly for progress. His goal is to earn 80% or 17 or more check marks for being safe to self, others and use of school property, daily.

[The Student] will have a shortened schedule to provide timely support to ensure he is successful. He will start at 9:55 and end at 11:50. Once he is successful with this schedule, 10 school days in a row, we will begin to lengthen his day over time.

Exhibit 4.

13. Complainant reviewed the safety plan. She was in agreement with the safety plan and signed it before the Student started classes at [Elementary School].

14. After obtaining Complainant's written consent, the District began its evaluation process. Testing started in mid-February 2017 and was completed by March 9, 2017. Student and parent interviews were conducted in early March 2017.

15. The March 2017 evaluation revealed that the Student was weakest in the areas of math and written expression and that reading comprehension was one of his strengths. He was performing below grade-level in math. His executive functioning skills were within the low average to average range and his overall cognitive abilities were calculated to fall within the average range. Exhibit 4.

16. The Student was also tested for use of his fine motor skills. Testing revealed that “[the Student] uses fine motor skills to access school materials such, as scissors, markers, glue independently. [The Student] is independent with self care skills in the school environment.” Exhibit 4.

17. Social/emotional testing revealed the following: “...Anxiety and Somatization [are] areas of behavior clinically significant in comparison to same-age peers. Depression and aggression were elevated indicating somewhat more behaviors in these areas. In the classroom setting, his classroom teacher ratings also indicated slightly more difficulties in adapting to change, being more withdrawn, engaging in odd behaviors, and presenting more difficulties with learning.” Exhibit 4.

18. After the evaluation was completed, the District determined that the Student met the serious emotional disability (“SED”) criteria to receive special educational services and supports. Exhibit 8.

19. In order to quickly get an individualized education program (“IEP”) in place for the Student, the District combined the eligibility meeting and the first IEP meeting. The meeting was originally scheduled on March 13, 2017. Complainant was provided with prior written notice of the meeting. The meeting was rescheduled to March 20, 2017 because the Student was ill and could not attend the March 13, 2017 meeting. Complainant was also provided with prior written notice of the rescheduled meeting.

20. At the March 20, 2017 meeting, the Student was identified as a student with a SED and a formal determination of eligibility was completed. At that same meeting, Complainant, the Student and other members of the IEP team also jointly developed an IEP and an individualized health plan (“IHP”).

21. At the time of the March 20, 2017 IEP meeting, the Student was in the math intervention program and was working to improve math through MTSS and was making “sufficient progress.” All other “[a]cademic assessment[s] indicated that [the Student’s] academic abilities are within the range for his age.” Exhibit 5.

22. The IEP team determined that a behavioral plan did not need to be developed at that time because the Student was not exhibiting his previous behaviors demonstrated at his past school:

Since attending [Elementary School], behaviors noted to have been observed at his previous private school have not been observed. He is participating in class and interacts well with his classmates. Some work

refusal and escape behaviors were noted, and [the Student] has difficulty self-regulating or taking cues from his peers when his behavior is escalating too far. The teacher reports that his level of anxiety is a concern, and that she needs to monitor him and intervene when she sees it rising too far. Due to the gradual transition to a full-day schedule that has [been] put in place, the Student has not yet had much opportunity to participate in more unstructured school-activities specials, recess, etc. His attendance has also been a factor in the speed of transitioning to full day, as he has had 7 absences in 6 weeks.

Exhibit 5.

23. The District nurse was also present at the March 2017 IEP meeting and helped the team develop a health care plan that was incorporated into the Student's IEP and was in accordance with the District's procedures that are followed for all students with nut allergies. In addition to the Student's teachers at [Elementary School], members of the transportation team (including bus drivers) were given a copy of the Student's health care plan to be followed in the event of a medical emergency.

24. At the March 20, 2017 meeting, the team developed the following three IEP goals:

Social/Emotional Wellness – [The Student] will demonstrate the ability to identify his level of anxiety in response to classroom or peer situations through the use of a visual self-rating system (e.g. feelings thermometer of 5-point scale) 90% of the time when asked, as measured by teacher observation.

Self-Determination – The Student will show understanding of expected work in the classroom by completing the daily planner, when given 5 opportunities and completing 3/5 attempts.

Social/Emotional Wellness – [The Student] will be able to identify and demonstrate the use of self-regulation strategies to reduce and manage in response to triggering situations, 80% of the time when needed.

Exhibit 5.

25. The following classroom accommodations were also established:

The Student's anxiety level: When [the Student] begins talking loudly it can be an indicator of rising anxiety.

Establish a safe space for [the Student] to retreat to calm and self-regulate, with calming activity choices (not high interest activities).

Use of check in/Check-out to review expectations.

When possible, [the Student] should be notified of changes in his regular routine.

Check in with [the Student] to check his emotional temperature as needed-morning upon arrival and 2-3 times as needed during the day.

Provide prompts and reminders around self-regulation strategies when anxiety or frustration are escalating.

Use of emotion rating system (such as a 5-point scale) to help [the Student] self-monitor his anxiety in the classroom.

Exhibit 5.

26. The Student was also provided small group instruction, extended time and breaks for all State and District Assessments and was placed in the general education environment 94.9% of the time and 5.1% of the time outside the general educational environment. Exhibit 5.

27. The following IHP was also adopted by the team as part of the Student's IEP at the March 20, 2017 meeting:

[The Student's] epi pen will be kept with him at all times. It will be passed from teacher to teacher as he changes classrooms.

Hand washing is one of the best ways to prevent exposure through contact.

[The Student's] class will wash their hands after lunch recess before coming into the classroom.

[The Student] will have a Nut Free table in the cafeteria that is assigned to him. No one can sit at this table except students with nut allergies or students eating nut/seed free foods.

[The Student] will have wipes provided by mom so he can wipe down his desk, and any computer, iPad, musical instrument before he uses it.

There should be no food given to [the Student], mom will provide snacks for him for the classroom.

[The Student] needs to eat every 2 hours he can eat the snack provided by mom.

[The Student's] water bottle will be filled using the bottle filler in the school.

If [the Student] feels there is an unsafe food issue he can let the teacher know and come down to the office to avoid exposure. Mom can be called to give guidance on next steps.

If [the Student] complains of "tingling" in his mouth or has hives, CONTACT the office immediately to come to [the Student].

[The Student] will be encouraged to advocate for his safety and if he expresses a concern have him come to the office and call mom.

Exhibit 10 (emphasis in original).

28. An Allergy and Anaphylaxis Emergency Care Plan and Medication Orders form that was completed by the Student's doctors was also included as part of the Student's IHP.

29. In March 2017, an additional IHP was established for the Student's transportation services. The transportation IHP included the following:

[The Student] can tell you if he is having an allergic reaction.

[The Student's] epi-pen, asthma inhaler, and Benadryl are to be with him at all times.

Mom will hand these to the bus monitor or driver when he gets on the bus. The monitor will hand it off to the school. When he goes home the school will bring it to the monitor/bus driver.

If [the Student] needs any of these meds he will tell the monitor/driver.

[The Student] is able to self-administer his Benadryl BUT can't self-administer his epi-pen.

Follow the attached Severe Allergy Plan should [the Student] experience a reaction. The plan details what to look for in a moderate reaction, and a severe reaction.

Exhibit 10 (emphasis in original).

30. At the March 20, 2017 meeting, Complainant stated that she was in agreement with the IEP, which includes the IHPs, and acknowledged her agreement by signing the IEP Participant form. She also gave written consent for the Student to begin receiving special education supports and services. At that time, Complainant was, again, given another copy of the special education procedure safeguards informing her of her rights,

including, but not limited to, requesting an IEE, filing a state complaint or a due process complaint. Exhibit 5.

31. At or around the time of the March 20, 2017 IEP meeting, Complainant informed the District that Children's Hospital had medical records for the Student which should also be reviewed. On April 7, 2017, the District requested Complainant to sign a HIPAA release so it could obtain the records from Children's Hospital.

32. Despite making numerous requests for the records, the District was never able to obtain any records from Children's Hospital. Children's Hospital repeatedly stated that it had no records on file for this Student. The District requested several times that Complainant provide all copies of medical records she had from Children's Hospital. Complainant never produced any such records. The District was unable to obtain them even through written requests for the production of documents. The ALJ finds that no such records exist.

33. The Student successfully completed the remainder of his 5th grade year at [Elementary School] without any significant behavioral issues and made progress on his goals. He even participated in the school's basketball program for a short period of time. [School Psychology Expert] an expert in the field of school psychology, credibly testified that the March 2017 testing completed by the District was sufficiently tailored and comprehensive to meet the Student's special educational needs; that the goals in the Student's March 20, 2017 IEP were reasonably calculated to provide the Student with FAPE; and, that the Student was progressing towards those goals.

34. In August 2017, the Student transitioned to middle school and began attending classes at [Middle School]. [Middle School] is also a District school.

35. The Student's March 20, 2017 IEP remained in place. His IHP was updated on August 27, 2017 with Allergy and Anaphylaxis plans in place. The updated plans were also provided to the transportation staff.

36. The Student struggled with the transition to middle school. However, as many of the educators explained, this is a difficult transition for most students. For this Student, one of the biggest problems became riding on the general education bus where there was just one driver and no aides. In early September 2017, Complainant requested additional transportation support for the Student.

37. The District also received a letter from the Student's doctor, [Student's Doctor], dated September 8, 2017 regarding the Student's need for additional allergy monitoring on the bus. "It is the intersection of his allergies with his developmental psych needs related to his PTSD that leave him particularly vulnerable and more likely to be unable to express himself should he develop respiratory distress or anaphylaxis, and this is the reason his mother is requesting an attendant or monitor to accompany him on the bus." Exhibits 12C and 3-1.

38. After receiving Complainant's request for closer monitoring on the bus and the letter from [Student's Doctor], the District reassigned the Student to a special education bus, which has not only a driver, but also an aide, and fewer riders as it is a smaller bus.

39. After starting classes at [Middle School], unlike his time at [Elementary School], the Student began exhibiting aggressive and threatening behaviors towards his peers, which ultimately lead to several days of suspension.

40. On September 21, 2017, the Student threatened two other students that he was going to get his mother's gun and shoot them. This incident resulted in a two-day, out-of-school suspension for the Student. The District completed a threat management screening that same day. The Student was allowed to return to school following the two-day suspension.

41. Within two days after the Student returned to school, on September 25, 2017, the IEP team put in place an amended IEP that increased the Student's special education time. Exhibit 5-1. Prior written notice of the meeting was provided to Complainant. Complainant signed consent for the increase in services on September 21, 2017 and was in agreement with the plan for additional supports. Exhibit 21.

42. On September 25, 2017, the District also adopted a Safety/Management Plan which permitted the Student to leave the classroom and go to the bathroom as needed. This was done to accommodate the Student's need to take breaks. The bathroom was one place where he felt safe to be when he was feeling anxious or overly stressed. Complainant was also in agreement with this and was the one who advocated for her son to be able to go to the bathroom whenever he needed to.

43. On September 27, 2017, the Student removed himself from class 3 times for 30 minutes each, for bathroom "stuff". [Assistant Principal], the Assistant Principal reached out to Complainant inquiring ways to "rein this in." Exhibit 7-1.

44. At hearing, Complainant testified that [Assistant Principal]'s September 27, 2017 email was inconsistent with the September 25, 2017 Safety/Management Plan and insisted that her son was being punished for having to take bathroom breaks. The ALJ disagrees. Around the end of September 2017, the Student's disruptive and refusal behaviors were affecting his academic performance. Everyone was searching for ways to help the Student moderate and self-regulate his disruptive behaviors so he could remain in the classroom. There is no credible evidence that the Student was disciplined for taking bathroom breaks.

45. On October 19, 2017, the Student was suspended again. He became upset with a teacher who had asked him to sit in a seat. The Student became escalated and told the entire class that he was going to kill them all, except two students. This incident resulted in a five-day, out-of-school suspension.

46. The District held a full team threat assessment meeting on October 30, 2017.

The Student was allowed to return to school following the five-day suspension.

47. A few weeks later, on November 7, 2017, the Student fashioned a paperclip into a weapon on two occasions. During the second incident, the Student held the paperclip to another student's neck, kicked another student, ran away and hid from the Assistant Principal and School Resource Officer. He was suspended for another two days.

48. The law requires the District to conduct a manifestation determination review whenever a student has been suspended for 10 or more school days. The purpose of the review is to determine whether the student's disciplinary behavior(s) are a manifestation of and/or related to his disability.

49. Even though the Student had been suspended for a total of 9 days², the District scheduled a manifestation determination review on November 8, 2017, the day after the Student was suspended. Prior written notice of the review was provided to Complainant. The Student was sick on November 8, 2017 and the meeting had to be rescheduled. Exhibit 18.

50. The District was unable to reach Complainant until November 10, 2017. The meeting was reset on November 14, 2017. Complainant was provided prior written notice of the meeting and she participated in the meeting via conference call. Exhibit 18.

51. On November 14, 2017, the District concluded that the Student's behaviors that resulted in his suspensions were a manifestation of his disability and that he was, therefore, eligible for services as a student with an emotional disability. Exhibit 18.

52. Complainant was provided with a copy of the special education procedural safeguards following the November 14, 2017 manifestation determination review.

53. At the time of his last suspension, the Student had not had a functional behavioral assessment ("FBA") nor did he have a behavioral intervention plan ("BIP"). However, in early October 2017 the team began collecting data for a FBA and the development of a BIP.

54. At or around the time of the manifestation determination review, Complainant, again, told the District that Children's Hospital had records for the Student that she wanted reviewed. As discussed above, the District made numerous attempts to obtain any such records, but it was never able to locate any. And, despite repeated requests to Complainant to provide them, she never did. There were no such records for review.

55. On November 16, 2017, two days after the manifestation determination review,

² There is no evidence that the Student was suspended and without classroom instruction for more than 10 school days. There are dates listed in the Student's January 30, 2018 IEP showing times when he was in the office due to behaviors. However, there is no credible or persuasive evidence that he was not receiving instruction while in the office.

the IEP team, with Complainant's participation and input, developed a BIP for the Student. The November 16, 2017 BIP was not formally included in the Student' IEP until January 30, 2018; however, it was put in place and provided to District staff on November 16, 2017.

56. After the development of the BIP and up until the winter break, the Student's behaviors remained largely under control. He was sent to the office several times, but received no other suspensions.

57. Upon returning to school in January 2018, the Student's disruptive and refusal behaviors starting increasing again. On January 8, 2018, the Student was suspended for two days for fighting.

58. Two days after the suspension, on January 10, 2018, the Student's IEP team scheduled a meeting on January 18, 2018 to discuss what other supports and/or services the Student needed. Complainant cancelled the meeting; it was reset on January 23, 2018. Complainant cancelled the meeting again. It was reset on January 30, 2018. Prior written notice of the meetings were provided to Complainant. Both Complainant and the Student attended the January 30, 2018 IEP meeting. Exhibit 21.

59. The purpose of the meeting was to review and update the Student's present levels of academic performance and to develop a plan to provide special education and related services. It was not convened to discipline the Student. The entire team was in agreement that the Student's behaviors were all related to his disability.

60. At the meeting, the Student and Complainant, received and reviewed procedural safeguards and signed the Participants Page. Exhibit 21.

61. The January 30, 2018 IEP shows that the Student was making progress on two of his social/emotional wellness goals, but was still not successfully completing the objectives related to his self-determination goal. The Student's academic records show that his math levels were improving and that his reading levels were at grade level. Exhibit 21.

62. In the first quarter of classes at [Middle School], the Student was failing three classes (Spanish, Language Arts, and Science). He received C's in his other classes. By the second quarter at [Middle School], the Student had no failing grades and received a C in Science and a B in Math. Exhibit 21.

63. After reviewing the Student's academic progress and behaviors at [Middle School], the team determined that the Student needed more specialized supports and services for his behaviors and that his needs could be best served by placing him at a separate school within the District - [School 3]. "Despite increasing levels of support at home school [Middle School], [the Student] is still exhibiting unsafe behaviors and an increased level of need." Exhibit 21.

64. [School 3] is a District school that serves students with behavioral needs. The staff are specifically trained to help the students make progress on their behavioral goals so they can access the learning environment and eventually transfer back to a less restrictive environment with typical peers.

65. The primary problem at [Middle School] was that the Student's behaviors were interfering with his ability to remain in the classroom. When he was in class, he was learning, but he was out of class frequently. He was also absent from school a lot, which was not related to his behaviors or suspensions. The proposal to transfer the Student was not done for disciplinary reasons. It was designed to help him moderate his behaviors so he could return to a less restrictive environment.

66. At [School 3], the Student would receive affective education, electives and academics in a small group setting. In addition, the Student would receive support from a social worker. More specifically the Student was to receive special education instruction 1,710 minutes/week, instruction from a social worker for 225 minutes/week, and 15 minutes/week of individual counseling. Exhibit 21.

67. The January 30, 2018 IEP contains three goals, which are similar to the goals in the Student's March 2017 IEP, all of which are designed to help him improve his social/emotional wellness and self-determination. In addition, the January 30, 2018 IEP incorporated the November 16, 2017 BIP, which includes, among other things, Reinforcement Strategies, designed to positively reinforce desired behavior. These include, earning time with a preferred adult, food reinforcement, and supervised free time with a peer. Exhibit 21.

68. The Student's allergy and asthma health plans would also be transferred to [School 3] and he would continue receiving transportation to and from school on the special education bus, which included an aide.

69. Complainant signed a bus transportation consent form for transport to [School 3], which identifies the Student's nut allergies, that he has an epi pen and an inhaler, and that the aide or attendant is to watch for food on the seats and that the Student is encouraged to wipe the seat or hands. Exhibit 22.

70. At the time of the January 30, 2018 IEP meeting, both Complainant and the Student were in agreement with the change in placement to [School 3]. At hearing, Complainant said she felt that she had no choice except to agree or her son would not be allowed to go to school. The ALJ does not find this statement credible. Complainant provided her consent for the change in placement and no one from the District remembered anything other than that she was in agreement with moving her son to [School 3]. In fact, several members of the team, including [Special Education Coordinator], the District's Special Education Area Coordinator, who was at the meeting, specifically discussed with Complainant the possibility of increasing the Student's supports at [Middle School] and Complainant did not want to do that.

71. On January 31, 2018, the District provided Complainant with prior written notice of the Student's proposed change in placement to [School 3].

72. The Student started classes at [School 3] on February 5, 2018.

73. During the first few weeks at [School 3], the Student received several Incident Reports ("IRs"). [School 3] does not use IRs as a means of discipline or punishment. The IRs are used as data collection tools. Every incident resulting in an IR is documented and shared with other school personnel and the student's parent or guardian. Every student at [School 3] has a record of receiving IRs, not just this Student.

74. While at [School 3], the Student had received several IRs for non-compliance with non-preferred tasks, elopement and aggression towards peers. Many times, the Student was the aggressor. Most of the Student's struggles at [School 3] occurred on the bus. It was clear that his anxiety was increasing while he was on the bus. Exhibits 21-1 - 21-8, 22-1, 23-1, 24-1, 27-1, and 30.

75. [Social Worker] was the Student's classroom social worker at [School 3]. She credibly testified that the Student was a learner and did well in class, but was struggling on the bus. She did not feel, however, that the Student's problems on the bus stopped him from accessing the curriculum or progressing on his educational goals.

76. [Social Worker] was aware that other student's on the bus were not always respectful of the Student's allergies and would sometimes taunt him. She also testified that the students who engaged in these behaviors were disciplined. She did not agree with Complainant's characterization of the acts on the bus as bullying.

77. [Social Worker] worked directly with the transportation staff to help increase the number of positive intervention strategies that were used to reward the Student for desired behaviors on the bus. [Social Worker] also worked with the Student to help him advocate for his needs on the bus, including sitting with the aide.

78. In February 2018 while riding the bus, the Student reported that he had seen the bus aide strike a student. The ALJ makes no finding about the incident, only that this is what the Student reported. The Student was very troubled by this. He even reported it to the police.

79. The incident was investigated by the District. There are cameras on the bus and video recorded the incident. The results of the investigation are unknown and not relevant to this proceeding, but because the Student was so troubled by what he observed, the District reassigned the aide to a different bus. That aide was never again on the Student's bus.

80. Following this event, the Student's bus anxieties increased even more. His negative behaviors increased at home and while on the bus.

81. Complainant contacted the District, requesting permission to watch the video. She was informed that because the incident did not involve her son and because it was related to a personnel matter, she could not view the video.

82. Even prior to the February 2018 incident, the District and the District's Transportation Department were aware of the Student's anxiety about riding the bus. The Transportation Department paired closely with [School 3] to compliment the Student's token reward system and continually used positive reinforcements on the bus. Every IR was shared with [School 3] staff and the entire team was working on solutions to ease both the Student's and Complainant's anxieties about the bus.

83. A IEP meeting was convened on March 22, 2018. Prior written notice was provided to Complainant as well as her procedural safeguards. Complainant and the Student attended the March 22, 2018 IEP meeting. Exhibit 23.

84. At the time of the March 22, 2018 meeting, the Student was making progress on all three goals. He was also making significant progress in math (overall placement level went from level 3 in August 2017 to level 5 in March 2018). He was doing well in science and functioning just below grade level in reading/language arts and math. Exhibit 23.

85. The Student's point sheet data showed that within the past five weeks he had starting moderating his behaviors while in school. He was receiving points for exhibiting desired behaviors. Exhibits 23 and 54.

86. Despite his academic improvement, the team also noted that the Student's inappropriate interactions with peers was increasing. He was "demonstrating a high level of vigilantism and lack of accountability for his own actions." Exhibit 23.

87. At the meeting, Complainant suggested that the Student be able to bring wipes to the calm room to clean it and reduce his anxiety. At the meeting, the Student reported to the team that "he likes [School 3]." The team reported that "[the Student] is doing better identifying his anxiety and with writing." Exhibit 23.

88. The March 22, 2018 IEP contains the following three goals:

Social/Emotional Wellness - When [the Student] is dis-regulated, [the Student] will identify his level of anxiety, and given fewer than three adult prompts, will choose a pre taught self regulating strategy to lower his anxiety level as demonstrated by keeping safe space 100% of the time over 5 consecutive week as measure by point sheets and teacher observation.

Social/Emotional Wellness - When [the Student] is dysregulated, [the Student] will be able to identify the size of the problem and implement a pre taught strategy to match his reaction to the size of the problem 90% of

the time over 5 consecutive weeks measured by point sheets and teacher observation.

Self-Determination - Given work completion strategies, [the Student] will increase his independent work completion to 85% as measured by teacher grades and point sheets over 5 consecutive weeks.

Exhibit 23.

89. At the March 22, 2018 meeting, the team also developed a BIP and established the following classroom and extra-curricular activity accommodations:

Establishing a safe space for the Student to retreat;

Use of Check-in/Check-out to review expectations;

Frequent check ins to help monitor his anxiety level; providing prompts and reminders about self-regulation strategies;

Daily point sheets so he can measure his own progress;

Breaking down assignments into smaller steps; and noise reducing headphones.

His health plan remained the same.

Exhibit 23.

90. The team determined that the Student's placement at [School 3] was still the most appropriate at that time and was the least restrictive environment for the Student to receive FAPE. Exhibit 23.

91. [Social Worker] was in attendance at the Student's March 2018 IEP meeting. She is familiar with his goals and credibly testified that the Student was making progress on all his goals. She was also aware of all the Student's IRs and was not concerned. She explained, as did several other District witnesses, that the IRs are used as data tracking tools to help identify behaviors and target them. The number of IRs the Student received in 3 months were less than most students who were attending [School 3].

92. [Social Worker] saw the Student progress at [School 3]. He was making progress on all his goals. He wasn't leaving class as often to go to the health office and she never saw him somatize. [Social Worker] further explained that it is not unusual for students at [School 3] to be performing below grade level. And, she wasn't concerned about the Student being below grade level in some areas because, overall, he was making progress.

93. [Social Worker] also observed that the Student's anxiety and PTSD were being appropriately addressed through his IEP. The Student was routinely receiving token rewards for good behaviors in class and on the bus. At [School 3], the team developed places within the school, such as the calm room, where the Student could "functionally elope without consequence." The Student was starting to learn how to regulate his behaviors and emotions.

94. In [Social Worker]'s opinion, the Student's placement at [School 3] was the right environment for him to succeed.

95. The Student successfully completed the rest of his 6th grade year at [School 3]. He returned to [School 3] in August 2018 for his 7th grade year. He was still taking the bus, which was still a source of anxiety. His aggressive behaviors towards peers and eventually towards bus staff continued to escalate.

96. On August 14, 2018, Complainant signed a bus transportation form for the Student. On the form it is noted that the Student has PTSD and generalized anxiety. It also includes information about the Student's nut allergies, and epi pen. In the section titled "medical information for the bus" the following instructions are provided "[the Student] must be visible to attendant to ensure he can get epi pen as needed. [The Student] can't sit near students eating allergens and will have extreme anxiety if student[s] are eating allergens." Exhibit 32.

97. [Transportation Director], the Director of Transportation for the District, testified at the hearing and provided credible and persuasive testimony regarding his interactions with the Student and Complainant. [Transportation Director] has been the District's Transportation Director for 3 years. He is familiar with the Student and the Student's medical/health information. [Transportation Director] is also familiar with Complainant and was working directly with her to try and resolve the Student's bus issues.

98. As [Transportation Director] explained, the completed bus transportation forms and all other medical and health information regarding a student is provided to the student's assigned bus driver. As well as a Transportation Student Snapshot. See, Exhibit 48. These documents are kept in a secured area of the bus and are locked up each night to protect the students' privacy.

99. [Transportation Director] was personally aware that copies of the Student's health plans, the bus transportation form completed by Complainant and the Allergy and Anaphylaxis Emergency Care Plan and Medication Orders forms were provided to all the Student's bus drivers and bus aides for every school the Student attended in the District.

100. In addition to receiving students' health information, all District bus drivers and aides receive training about allergies, including nut allergies, and all are trained to respond to allergic reactions. They are also trained on how to use an epi pen. The District nurse, [District Nurse], also provides more specialized training about how to care

for students with severe nut allergies.

101. [Transportation Director] credibly testified that all the Student's bus drivers and aides were aware of the Student's need to wipe down the seats in the bus and to keep food and allergens away from the Student while he was on the bus.

102. To further assist the Student, the District and the Transportation Department eventually banned all food from the Student's bus.

103. [Transportation Director] was in frequent communication with Complainant in early fall 2018 trying to problem solve the transportation issues. The only solution Complainant would accept was the assignment of a 1:1 paraprofessional for the Student on the bus. The District considered the request but the team determined that the Student did not require such a restrictive level of support. Instead, the District began working a transportation plan for the Student.

104. The District and the Transportation Department continued working together trying to find a solution to the bus issue.

105. In September 2018, [Transportation Director] even decided that he would permit Complainant to view the February 2018 video. As [Transportation Director] explained at hearing, it is very atypical to allow the parent of another child to view any such material. However, he perceived that the video had become "a real hang up and we needed to get the Student back on the bus and to school."

106. [Transportation Director] called Complainant and let her know that she could come in and view the video. She never contacted him or came in to view the video.

107. The District also hired a behavioral specialist to help develop an even more comprehensive transportation support plan for the Student.

108. The District made numerous attempts to communicate with Complainant about the bus issues after the start of the 2018 school year. In early fall 2018, Complainant stopped all communications with the District. She pulled the Student out of school on September 10, 2018.

109. On September 26, 2018, the District updated the Student's BIP and drafted a Behavior Response Chart. It also formalized a draft Transportation Plan that included a proposal to move the Student to a smaller nut-free special education bus that had only three other students and two aides, plus a driver. Including the Student there would have been one aide for every two students.

110. The District sent Complainant a copy of the draft Transportation Plan. She never responded to the District or provided any feedback to the District regarding the plan.

111. Despite the fact that the District never heard back from Complainant,

[Transportation Director] directed his driver to go to the Student's home and see if the Student would board the new bus.

112. The driver went to the Student's house for three days. The Student never came out of his house or boarded the bus.

113. The District has a policy that if a student does not ride the bus for three consecutive days, the driver stops the route until the parent restarts it again.

114. In this case, [Transportation Director] asked the driver to continue going to the Student's home for 2 or 3 more weeks. As [Transportation Director] explained, he hoped that through persistence he could get the Student back on the bus and that he wasn't going to give up on either the Student or Complainant.

115. The Student never got on the bus. [Transportation Director] ended the route when one day Complainant appeared on the front yard with her sidearm and asked the driver why he was still coming to the house.

116. The Student has not returned to a District school since September 10, 2018.

117. Between December 2018 and March 2019, the District continued to email Complainant in an attempt to schedule an IEP meeting and have the Student return to school. Complainant did not respond to the District's attempts.

118. On March 12, 2019, the District sent prior written notice to Complainant that an IEP review meeting and manifestation determination regarding truancy was to be held April 22, 2019. Exhibit 39.

119. On April 22, 2019, the team held a manifestation determination review and reviewed the Student's IEP. Complainant did not attend the April 22, 2019 meeting. It was determined that the Student's absences were not a manifestation of his disability. Exhibits 40 and 41.

120. The Student was to be enrolled in 8th grade for school year 2019-2020, but he has not returned to school.

121. A Petition for Truancy was served on Complainant on September 16, 2019 for failure to have the Student attend school.

122. On September 16, 2019, the District sent Complainant prior written notice of an IEP review meeting to be held on September 30, 2019. Exhibit 52.

123. The District held an IEP review meeting on September 30, 2019. Complainant did not attend. Exhibit 53.

124. On October 1, 2019, Complainant's attorneys requested that the District perform

an IEE. The District denied the request.

125. On October 4, 2019, the District held a diversion hearing for truancy. Complainant and the Student attended the meeting; however, they refused to enter into an attendance agreement.

CONCLUSIONS OF LAW AND DISCUSSION

Complainant asserts that the District violated the IDEA, 20 U.S.C. § 1400, et. seq., and accompanying regulations at 34 C.F.R. §300, et. seq., and the Colorado Exceptional Children's Educational Act, C.R.S. § 22-20-101, et. seq. by failing to provide FAPE. More specifically, Complainant alleges that the District's March 2017 evaluation is deficient and that it failed to adhere to required evaluation procedures under 34 C.F.R. § 300.304-305. Complainant further contends that the District failed to develop appropriate IEPs; failed to timely or adequately develop a BIP; adequately consider the use of positive behavioral interventions under 34 C.F.R. § 300.324(a)(2)(i); provide appropriate transportation as a related service under 34 C.F.R. § 300.34(a); provide non-academic services and extracurricular activities under 34 C.F.R. §§ 300.107 and 300.117; conduct a timely and appropriate manifestation determination review in violation of 34 C.F.R. § 300.530(e); and provide notice of a change in placement in violation of 34 C.F.R. §§ 300.530(h) and 300.503. Complainant also alleges that the District failed to comply with the law when it denied her October 1, 2019 IEE request and did not file a due process complaint.

The burden of proof in an IDEA challenge rests with the party challenging a deficiency in the school district's efforts. *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). In this case, Complainant has the burden of proving all the alleged violations as pled in her complaint and that she is entitled to relief as provided for in the IDEA.

Free Appropriate Public Education ("FAPE")

In *Board of Ed. Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 186 (1982), the Supreme Court held that the appropriateness of a public entity's actions under the IDEA is to be determined according to the following two-fold standard: "First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.*, at 206-207. In 2017, in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the Supreme Court provided further guidance to determine whether an IEP is reasonably calculated to enable the Student to make progress in light of his circumstances. The qualification that an IEP is "reasonably calculated" to enable progress reflects:

A recognition that crafting an appropriate program of education requires a prospective judgment by school officials [and] contemplated that this fact-

intensive exercise will be informed not only by the expertise of school officials, but also by input of the child's parents or guardians. Any review of the IEP must appreciate that the question is whether the IEP is reasonable not whether the court regards it as ideal.

Id., at 999.

Included in the child's circumstances is whether a child has any behavioral issues. The IDEA requires that the IEP team, in the case of a child whose behavior impedes the child's learning or that of others, consider and, possibly include in the IEP, the use of positive behavioral interventions, supports, and other strategies to address that behavior. 34 C.F.R. §§ 300.24(a)(2)(i) and (b)(2); and 300.320(a)(4).

District's March 2017 Evaluation and March 20, 2017 IEP

Pursuant to 34 C.F.R. § 300.301(a), the District must conduct a full and individual evaluation before the initial provision of special education and related services can be provided to a child with disabilities. Prior to conducting the evaluation, the parent must provide written consent for testing. Once parental consent is obtained, the District has 60 days to conduct the evaluation. 34 C.F.R. §§ 300.301(b) and (c). As part of that evaluation, the District must review any existing evaluations and data provided by the parent, classroom-based observations, observations by teachers and related service providers, and use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. 34 C.F.R. §§ 300.305(a)(1) and 300.304(b). The child is to be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. § 300.304(c)(4). If a determination is made that a child has a disability and needs special education and related services, an IEP must be developed for the child. 34 C.F.R. § 300.306(c)(2).

Complainant provided written consent for the evaluation and testing on January 27, 2017, which was the first day the Student started classes in the District at [Elementary School]. The District completed its testing by March 9, 2017, well in advance of the 60-day requirement in the IDEA, and found that the Student was eligible for special educational supports and services as a child with a SED. Because the District wanted to get an IEP in place for the Student as soon as possible, it combined the eligibility meeting with the IEP meeting. The meeting was held on March 20, 2017. Complainant was provided prior written notice of the meeting and she attended the meeting. On January 25, 2017, and again on March 20, 2017, Complainant was provided with a written copy of the special education procedural safeguards, including her right to obtain an IEE and/or file a complaint if she disagreed with the evaluation that was obtained by the District. Complainant never challenged the District's March 2017 evaluation or the Student's March 20, 2017 IEP until May 29, 2019 when she filed a due process complaint. The District contends that Complainant's challenge to the District's March 2017 evaluation and the Student's March 20, 2017 IEP are barred by the IDEA's

statute of limitations. Alternatively, the District asserts that the claims should be dismissed because the March 2017 evaluation was a full and comprehensive evaluation that met all the requirements of the IDEA and that the IEP was designed to provide the Student with FAPE.

Under the IDEA, parents must bring a due process complaint “within 2 years of the date the parent ... knew or should have known about the alleged action that forms the basis of the complaint ...” 20 U.S.C. § 1415(f),(3)(C); See also, 34 C.F.R. § 300.511(e). At hearing, Complainant asserted that she never understood she could challenge the evaluation or the IEP until she filed her May 29, 2019 complaint. Despite her testimony, the evidence shows that Complainant, more than twice, acknowledged receiving procedural safeguards that informed her how to challenge the evaluation and/or the IEP. Other than claiming she was unaware of the process, Complainant has presented no credible or persuasive evidence why she waited more than two years to challenge the District’s March 2017 evaluation or the Student’s March 20, 2017 IEP. On these facts alone, the evidence supports dismissal of these claims. However, because the District relied on the sufficiency of the March 2017 evaluation when it denied Complainant’s October 1, 2019 IEE request and defended its March 2017 evaluation at hearing, the ALJ has considered the merits of Complainant’s allegations regarding the March 2017 evaluation and the March 20, 2017 IEP, even though they both occurred more than two years prior to the filing of her complaint.

Between the end of January 2017 and the beginning of March 2017, the Student was evaluated in the following areas: general intelligence, academic performance, social and emotional status, health, and motor abilities. The Student also received formal evaluation regarding his executive functioning skills, sensory processing, and attention skills. In addition, the District obtained information from Complainant, from teachers and related service providers, and reviewed a January 19, 2017 letter from [Therapist] of [Health Center] identifying the Student’s diagnosis as PTSD and generalized anxiety.

Complainant challenges the evaluation, in part, because the District did not review any of the Student’s medical records. This is incorrect. The District relied on the information it was provided by [Therapist]. The District also tried many times to locate records from Children’s Hospital but was never able to do so. The District made numerous attempts to locate them and was repeatedly told by Children’s Hospital that there were no records related to the Student. The District also repeatedly asked Complainant to provide them, and she never did. The ALJ has found that no such records exist. The District relied heavily on the medical and health information that Complainant provided during the evaluation and when it developed the Student’s health and safety plans. Complainant also contends that the District failed to properly test her son to see if he needed occupational therapy services. The evidence does not support this claim. During the evaluation process, the Student was tested for use of his fine motor skills and testing revealed that he used his fine motor skills to access school materials independently.

The ALJ concludes that the District's March 2017 evaluation was tailored to address the Student's identified needs and was comprehensive in its scope as to provide the team with an accurate depiction of the Student's strengths and weaknesses and was appropriate for the team to rely on when it developed the Student's March 20, 2017 IEP. Additionally, the District complied with all of the IDEA's procedural safeguards when it obtained consent for testing, when it conducted the eligibility and IEP meeting and when it began providing the Student with special educational services. The District included Complainant at every step. Complainant actively participated in the evaluation process and in the development of the Student's March 20, 2017. The three goals in the Student's March 20, 2017 IEP were developed by the team to address the Student's needs in the areas of Social/Emotional Wellness and Self-Determination, which are the areas identified in the evaluation as requiring additional supports and services. Those goals have not been challenged in this proceeding and the evidence shows that the Student was making progress on his IEP goals while at [Elementary School] and that those goals were reasonably calculated to enable the Student to receive educational benefit.

Positive Behavioral Interventions and Development of a BIP

Complainant alleges that the District failed to provide the Student with FAPE because it did not timely develop a BIP or provide positive behavioral interventions. The evidence does not support Complainant's allegations. When the Student came to the District, he had just been suspended from his prior private school for aggressive and disruptive behaviors. The District was aware of this. However, the Student was not exhibiting any such behaviors at the time of his enrollment at [Elementary School]. The team, including Complainant, agreed with the goals in the Student's March 20, 2017 IEP, which were developed to help him moderate and self-regulate his behaviors and receive educational benefit. The Student was making progress on those goals while he was attending [Elementary School] and there was no demonstrated need for a BIP at that time.

When the Student transitioned to middle school at [Middle School], he started exhibiting some of the same behaviors that got him expelled from his prior school. He was suspended on two separate occasions for threatening behaviors. The District took prompt action and on September 25, 2017, the team amended the Student's IEP to increase his special education time and developed a safety plan. The District also began collecting data to perform FBA. Even though the Student had not been suspended for 10 days, the District scheduled a manifestation determination review on November 14, 2017. After concluding that the Student's behaviors were a manifestation of his disability, two days later the team created a BIP, which was immediately put into place. The Student's placement was not changed as a result of the manifestation determination review; he remained at [Middle School]. Both the prior safety plan and the November 16, 2017 BIP contain numerous positive behavioral interventions aimed at helping the Student moderate and self-regulate his behaviors. During this time, the District was working closely with Complainant, the Student and all his services providers to increase the level of supports and services.

In January 2018, after returning to [Middle School] following the winter break, the Student was again suspended for fighting. Within days of his return to school, the team scheduled an IEP meeting to discuss how to better support the Student. The team's recommendation was to increase his services by changing his placement to [School 3] where he could receive more intense support for his behavioral problems. Complainant and the Student were both in agreement with the change in placement. Complainant was provided prior written notice of the change in placement as well as notice of her procedural safeguards. The Student's November 16, 2017 BIP was incorporated into the January 30, 2018 IEP. The Student's BIP includes several positive behavioral interventions, all of which were used by the [School 3] staff and the Student's related services providers.

In this instance, the ALJ concludes that the District acted in accordance with the law when it first placed the Student in the general education classroom for the majority of his day, without a BIP, and increased his services as his behaviors worsened, including developing a BIP and ultimately changing his placement to a more restrictive environment. The IDEA requires that a student's recommended program must be provided in the least restrictive environment ("LRE").

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. §§ 300.114(a)(2)(i), 300.116(a)(2).

As the District witnesses explained at hearing, in keeping with the LRE requirement, it could not immediately place the Student on a BIP when he entered [Elementary School]. They first needed to determine whether he needed a BIP, and at that time they determined that he did not. However, after his transition to [Middle School], where his behavioral problems increased, the District acted promptly and reasonably when it first increased his special education time and reassigned him to the special education bus. When it was clear that the Student needed additional supports, the District acted appropriately and timely by recommending a change in placement to [School 3]. Each time the Student's behaviors worsened, the District took prompt and reasonable steps to increase the Student's services and gradually restricted his access to the general education classroom, all in keeping with the spirit and intent of the IDEA's LRE requirement. The ALJ concludes that the District timely and adequately develop a BIP. It also adequately considered the use of and did use positive behavioral interventions, in accordance with 34 C.F.R. § 300.324(a)(2)(i).

September 25, 2017 and January 30, 2018 IEPs

The Student's March 20, 2017 IEP was amended on September 25, 2017. His special educational instructional time was increased; his goals remained the same. A new IEP was developed by the team on January 30, 2018. New goals were developed in the same or similar areas (Social/Emotional Wellness and Self-Determination). The goals in the Student's January 30, 2018 IEP were not challenged in this proceeding. There is some evidence that the Student's grades were declining during the first quarter at [Middle School], which correlates with his multiple suspensions and days out of class; however, after the District implemented the BIP in November 2017, his grades improved. After the Student's transfer to [School 3], his grades and overall academic levels increased further. During the fourth quarter at [School 3], he had a 3.0 GPA and was no longer failing any classes. He was out of the classroom less and did not receive any further suspensions. The evidence shows that the Student's September 25, 2017 and January 30, 2018 IEPs were reasonably calculated to enable the Student to receive educational benefit and that he was progressing towards his goals.

Food Allergies and Health Plans

Complainant asserts that the District failed to provide the Student with FAPE by failing to address his food allergies and develop an individualized health/safety plan. These allegations are contrary to the evidence and unsupported. At all times while the Student was enrolled in the District the District was aware of his food allergies and had IHPs in place. The Student's IHPs were incorporated into his IEPs and provided to district staff and all the transportation staff. The Student's health/safety plans were developed with the information provided by Complainant and in conjunction with the District nurse and the Student's doctor. At all times while in school, during any extracurricular activities and on the bus, the Student had access to his inhaler, epi pen and Benadryl. He was provided daily menu options for school lunch, was permitted to bring his own snacks and sat at a nut free table in the lunchroom. The Student's classmates had to wash their hands after lunch and there were wipes available for the Student to wipe down surfaces, computers, musical instruments, in both the classroom and on the bus. To further ensure the Student's safety and help ease his anxiety, the District and the Transportation Department eventually banned all food on the Student's bus and proposed to put on a nut free bus.

Transportation

In order to provide a student with FAPE, the public agency must ensure that an IEP is developed that addresses all of the needs that arise out of the student's disability that are identified in the evaluation data. In the case of a student whose behavior impedes the student's learning or that of others, the team must consider the use of positive behavioral interventions and supports and other strategies to address that behavior. The Student's severe allergies are an area of great stress for the Student and Complainant. While attending school in the District, the Student's anxieties about riding the bus increased. In *Prince George's County Public Schools*, 65 IDELR 279, the

Maryland ED found that a district failed to provide a student with emotional disturbance the positive behavioral interventions she needed to access her transportation services after the 10-year-old's emotional outbursts increased after she had a physical altercation with another passenger. Unlike the situation in *Prince George's*, here the District took extra efforts to develop comprehensive transportation plans when the Student first started riding the bus and made several adjustments to those plans as the Student's anxieties about riding the bus increased.

The District first assigned the Student to the general education bus. It also developed a health/safety plan that was designed by the District nurse with significant input from Complainant and the Student's doctor. At hearing, Complainant stated that prior to the Student's enrollment in the District, the District had no experience working with students with nut allergies. This is untrue. [District Nurse], the District's nurse, testified that there are many students in the District who have nut allergies and that long before the Student started at [Elementary School], the District had been training bus drivers and aides about how to identify allergic reactions, safely transport students with nut allergies and how to use an epi pen. All the Student's IHPs were provided to the Student's transportation staff. When the Student's bus anxieties increased and the District received the letter from [Student's Doctor] recommending increased supports in the fall of 2017, the District immediately reassigned the Student to the special education bus, which had fewer students and an aide to provide additional support. The Student continued to have problems on the bus, but he was accessing his transportation services and was attending school.

While he was at [School 3], the Student's bus anxieties increased after an incident involving an aide and another student on the bus in February 2018. The District took immediate action by reassigning that aide to another bus the following day. That aide was never on the Student's bus again. During the spring of 2018, the Director of the Transportation Department, [Transportation Director], worked closely with the Student's [School 3] teachers and used the same positive behavioral reward system with the Student on the bus. Over the summer in 2018 the District and [Transportation Director] made numerous attempts to try and resolve the bus issue and reached out to Complainant several times. [Transportation Director] even made an exception to District's policy to allow Complainant to view the video of the February 2018 incident after the personnel matter had been concluded, but she never responded to his offer. By the time school started in August 2018, the only transportation solution Complainant would accept was a 1:1 aide assigned to her son while he was on the bus. The District considered Complainant's request, but the team did not find that the Student required that level of restrictive support. Instead, the District worked with a behavioral specialist and developed a more comprehensive transportation plan, which recommended assigning the Student to a smaller, nut free, special education bus, with a total of four students. Including the Student and two aides, the student to staff ratio would be 2:1. At the start of the 2018 - 2019 school year, the newly developed plan was given to Complainant for review and attempts were made to schedule a meeting to implement it. Complainant never responded to the District regarding the transportation plan.

In addition to the all the District's efforts outlined above, while the Student was riding the bus, the drivers/aides were informed about his need to wipe down the seat, and their need to watch out for food on the bus. As discussed above, the District even decided to ban all food from the Student's bus. There is no evidence that the Student ever required medical attention while he was on the bus. And, more importantly, despite all the problems the Student was having on the bus, [Social Worker], testified that it did not prevent him from accessing his educational goals. The ALJ concludes that the District provided positive behavioral interventions while the Student was on the bus and took extraordinary measures to try and resolve the Student's bus issues, including hiring a behavioral specialist and developing a new, comprehensive bus plan that assigned the Student to a nut free bus with only four students and two aides. Yet, despite these efforts, the District was never able to implement it because Complainant stopped communicating with the District and removed the Student from school on September 10, 2018. Even when [Transportation Director] sent the new bus to the Student's home, after he stopped attending school, the Student refused to get on it and he has not attended school in the District since that time. The District did not deny the Student FAPE or fail to provide the Student with appropriate transportation services under 34 C.F.R. § 300.34(a).

Extracurricular Activities

Complainant alleges that the District failed to provide FAPE because it would not provide accommodations for the Student's food allergies at any extracurricular activities. This claim is not supported by the evidence. There is no evidence that the Student was excluded from any extracurricular activities due to his food allergies. In fact, he even played basketball for a while, but according to Complainant he just stopped going. The Student always had access to his inhaler, Benadryl and epi pen for all school activities and his health/safety plan applied to all extracurricular activities.

October 1, 2019 IEE

On October 1, 2019, Complainant, through her counsel, requested an IEE from District's counsel. The District denied the request. Complainant sought leave to amend her complaint to add a new count charging the District with violations of 34 C.F.R. §§ 300.502 and 300.503 for failing to file a due process complaint or providing prior written notice of its decision. The District opposed the motion. The ALJ granted Complainant leave to amend her complaint, but provided the District with an opportunity to present both evidence and legal argument at hearing regarding the timeliness of Complainant's request and its procedural obligations.

As general matter, under the IDEA, when a parent requests an IEE, the District has two options. It can either grant the parent's request or file a due process complaint to request a hearing to show that its evaluation is appropriate. 34 C.F.R. § 300.502(b)(2). The District did not file a separate due process complaint to show its evaluation is appropriate. The District argues that Complainant's request for an IEE is untimely because it was made thirty (30) months after the District completed its

evaluation in March 2017 and because the District was not required to file a complaint since Complainant has challenged the District's evaluation in this proceeding. In support of its argument, the District cites to *P.R. v. Woodmore Local Sch. Dist.*, 49 IDELR 31 (6th Cir. 2007) (unpub.).

In *Woodmore*, parents made a written request to the district to have the student tested for a learning disability. Shortly thereafter, parents filed a due process complaint, seeking, among other things, an evaluation paid for by the district. Before the due process hearing could begin, the district completed an evaluation and concluded that the student was not eligible for special education services. Parents obtained their own evaluation and amended their complaint, seeking reimbursement for the privately obtained evaluation. At hearing, parents argued that the regulations required reimbursement because the district failed to initiate a due process hearing. The Court rejected parents' argument and found that the district did not have to file a due process complaint and request a hearing if the parent has already filed a due process complaint challenging the district's evaluation. "[The object of the regulation] is to afford Parents an opportunity to challenge and the School District to defend the appropriateness of its Evaluation in an impartial hearing, and that was done here. As long as the object of the regulations is accomplished, there is no reason to exalt form over substance." The District complied with the spirit of the law by participating in the due process hearing. *Woodmore*, 49 IDELR 31.

In this case, Complainant had already filed a due process complaint challenging the District's evaluation prior to requesting an IEE and the due process hearing was scheduled to commence within twenty (20) days of her request. As such, and in accordance with the Court's reasoning in *Woodmore*, the ALJ concludes that the District was not required to file a separate due process complaint when it rejected Complainant's October 1, 2019 request for an IEE. The District did not violate 34 C.F.R. § 300.502(b)(2) for failing to file a due process complaint. Moreover, both Complainant and the District had a full and fair opportunity to present evidence and argument about the appropriateness of the District's evaluation and how it was considered in the development of the Student's IEPs and other related plans. As discussed above, the ALJ finds that the District's March 2017 evaluation is appropriate to serve the Student's needs and finds it supported by the evidence. The ALJ further finds that it was conducted in accordance with the procedural requirements of the IDEA.

In sum, the evidence shows that the Student was making progress towards his goals when he was in school. Several absences were related to the Student's behavioral problems but many others were not. Despite the academic progress the Student was making in school, particularly while he was at [School 3], Complainant removed him from school on September 10, 2018. Since September 10, 2018, the District has had several IEP meetings. Complainant has received notice of them all and has not attended any. She refused to provide any feedback to the District about the proposed transportation plan that was developed in early fall 2018 and even after the District conducted a truancy hearing, she has not returned the Student to school. The District has an IEP developed for the Student that contains appropriate educational and

behavioral goals, a comprehensive safety/health plan, a BIP and a specialized transportation plan. The District stands ready to serve the Student but it has not been able to because of Complainant's unwillingness to return the Student to school. The evidence shows that while the Student was enrolled in the District he was receiving FAPE. If the Student has suffered any educational harm since he was removed from school by Complainant, it is not because the District failed to provide FAPE but because Complainant refused to communicate with the District, refused to attend meetings, and refused to permit the Student to attend school, which has prevented the District from providing services pursuant to the Student's IEP.

"The core of the statute ... is the cooperative process that it established between parents and schools." *Schaffer v. Weast*, 546 U.S. 49, 53 (2005). The "central vehicle for this collaboration" is the process through which the school and the parents work together to create and then to regularly update an [IEP]". *Id.* In *Garcia v. Board of Education of Albuquerque Public Schools*, 520 F.3d 1116 (10th Cir. 2008). The 10th Circuit Court of Appeals held that even though the school district violated some of the IDEA's procedural requirements, no compensatory educational services should be awarded as a matter of equity because, among other things, the student had dropped out of school, demonstrated an unwillingness to return to school, and could essentially receive the very services she seeks simply by re-enrolling in school.

In this case, the ALJ concludes that the District did not violate either the procedural or substantive requirements of the IDEA and that it did provide the Student with FAPE. Therefore, the District is not responsible for providing compensatory educational services. Further, if the Student has suffered any educational loss since September 10, 2018, the District is not responsible for providing compensatory educational services as any such loss is attributable to Complainant's actions and not the fault of the District.

ORDER

The ALJ concludes that the Complainant failed to meet her burden of proof establishing that the District violated the IDEA and failed to provide the Student with FAPE. No relief is warranted and the complaint is dismissed.

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

DONE AND SIGNED this 12th day of November 2019

/s/ MICHELLE A. NORCROSS
Administrative Law Judge