

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	
<b>[Parent 1] and [Parent 2], Individually and on behalf of [Student], a minor,</b> Complainants,  vs.  <b>JEFFERSON COUNTY SCHOOL DISTRICT R-1,</b> Respondent.	▲ COURT USE ONLY ▲  <b>CASE NUMBER</b>  <b>EA 2017-0013</b>
<b>AGENCY DECISION</b>	

On May 22, 2017, the Colorado Department of Education (“CDE”), Exceptional Student Services Unit, received a due process complaint filed by [Parent 1] and [Parent 2] (“Complainants” or “Parents”) on behalf of their minor son, [Student], alleging that Jefferson County School District R-1 (“School District,” or “District”) violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, (“IDEA”), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act (“ECEA”), 1 CCR 301-8., by failing to provide him with a free appropriate public education (“FAPE”).

Specifically, Parents allege that the School District failed to refer [Student] for evaluation for special education services through an Individualized Education Program (“IEP”) team from May of 2014, when the School District conducted a building level threat assessment as a result of threats made by [Student], until March of 2017. Parents allege that from May of 2014 until [Student] was referred to an IEP team, his teachers observed behaviors that indicated a need for special education services, but the District made no referral to evaluate [Student] for either a 504 plan or an IEP during the 2014-2015 or 2015-2016 school years. The parents further allege that at the beginning of the 2016-2017 school year, they inquired about [Student]’s potential eligibility for special education and related services pursuant to an IEP, but were informed by the District that a 504 plan would be suitable to meet [Student]’s needs. Parents allege the District failed to provide them with a copy of their procedural safeguards as parents of a student suspected as having a disability. Parents claim the 504 plan was unsuccessful, thereby necessitating the need to place [Student] at [Treatment Center], a private residential treatment center in [Other State]. They are requesting reimbursement from the District for the total cost of [Student]’s attendance at [Treatment Center], and that the District provide [Student] with additional services to compensate for its failure to provide [Student] FAPE, including payment for [Student]’s continued attendance at [Treatment Center] until such time as he

is capable of returning to a District school.

The due process complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Tanya T. Light for an impartial due process hearing. The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held in Denver, Colorado on September 25, 26, and 27, 2017 at the OAC. Lori C. Hulbert of Hulbert & Associates, and Patrick M. McNelis of Kenney Shelton Liptak Nowak LLP in Buffalo, New York<sup>1</sup> represented Parents, and W. Stuart Stuller and Elliott V. Hood of Caplan & Earnest represented the School District. [Director of Special Education], Director of Special Education for the District, served as the District’s advisory witness. At hearing, the ALJ admitted into evidence exhibits 1 through 62 by stipulation. The proceedings were recorded in Courtroom 2. Denise Freeman of Steven-Koenig provided court reporting services. The record closed on October 23, 2017 with the parties’ submission of written closing arguments. The parties agreed to a decision deadline of November 10, 2017.

### **ISSUES PRESENTED**

Whether the School District failed to provide [Student] with FAPE as required by the IDEA, and therefore should be required to reimburse Parents for tuition and costs of [Student]’s attendance at [Treatment Center] for the 2016-2017 school year and going forward until he returns to a District school.

### **FINDINGS OF FACT**

[Student]

1. [Student] is the [age] year-old adopted son (date of birth [D.O.B.]) of [Parent 1] and [Parent 2], who adopted him when he was approximately two and a half years old.

2. Complainants noticed that at a young age [Student] seemed to cry more easily and need more discipline than other children his age. Transitions are difficult for [Student], and he struggles with executive functioning tasks such as organization of school work. He has been diagnosed with Attention Deficit/Hyperactivity Disorder (“ADHD”) and Reactive Attachment Disorder (“RAD”).

#### **[Elementary School] – Third and Fourth Grades**

3. [Student] attended [Elementary School], a District school, for third and fourth grades. On May 8, 2014, when [Student] was in third grade, he stated that he wanted to kill himself and everyone in his class. [Elementary School]’s principal, [Principal], conducted a threat assessment and determined that [Student] was acting out

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<sup>1</sup> Mr. McNelis was admitted to practice pro hac vice by the ALJ on July 25, 2017.

of frustration, not out of an attempt to do harm. Police were not called. Exhibit 25.

4. [Student] was not referred to an IEP team during his time at [Elementary School].

5. On July 31, 2015, [Parent 1] met with [Principal] with the intention of discussing an IEP team evaluation for [Student]. Instead, they discussed [Principal]'s belief that [Elementary School], as an International Baccalaureate ("IB") school, was not a good fit for [Student], and also that, going forward, she may have to involve the police if his negative behaviors continued. [Principal] recommended [Elementary School 2] for fifth grade.

6. Complainants felt that [Principal] was not supportive of [Student]'s need for an IEP, and that she dissuaded them from pursuing one. She made comments during their meeting that she had seen good and bad IEPs, and that the stigma of being on an IEP can negatively follow a student throughout his education.

7. Complainants were courteous, respectful, and supportive of [Principal], and were very involved in [Student]'s education.

8. Complainants enrolled [Student] at [Elementary School 2], a District school, for fifth grade. Exhibit 23.

#### 2015-2016 School Year – Fifth Grade

9. [Fifth Grade Teacher] was [Student]'s fifth grade teacher at [Elementary School 2] during the 2015-2016 school year. She observed that he had behavioral and emotional issues in the classroom that interfered with his learning, but that he was generally on task and was able to access the general education curriculum. [Fifth Grade Teacher] witnessed [Student] exhibit minor behavioral problems two to three times per week, and major episodes one to two times per month.

10. Complainants were supportive of [Fifth Grade Teacher], and were very involved in [Student]'s education in fifth grade.

11. Comments from [Student]'s 2015-2016 report card included:

- a. "Reading: Rushes through to be finished; sloppy work; sometimes incomplete work; does not work to his potential." Exhibit 21.
- b. "Writing: [[Student]] is capable of writing well, but he simply isn't working to his potential. He does the bare minimum in a haphazard fashion. Even his physical handwriting is unsatisfactory." *Id.* at 000011.
- c. "Math: Quite a few missing assignments; sloppy work." *Id.*

12. The grading system at [Elementary School 2] is as follows: A score of 1 means "lacking adequate progress"; a 2 means "progressing toward standard"; 3 means "meeting standard," and 4 means "exceeding standard."

13. [Elementary School 2] is on a trimester grading system. In [Student]'s first trimester of fifth grade he received two "1's" in social studies. The rest of the first semester and the remainder of the second and third semesters, [Student] received all 2's and 3's on his report card in academic areas, and 4's in music and physical education. Exhibit 21.

14. [Fifth Grade Teacher] wrote at the end of the year that "[Student]] has made some positive progress this year. He has great potential, but lack of desire and effort! If he could overcome those, the sky's the limit!" *Id.* at 000012.

15. [Student] took two standardized tests in the fifth grade, the Colorado Measures of Academic Success ("CMAS") and the Measure of Academic Performance ("MAP") test. Results are coded as green, yellow, and red. On the CMAS, red means "below the standard," yellow means "nearly meets" the standard, and green means "meets or exceeds" the standard. In fifth grade math [Student] received a green; in science and social studies he received a yellow; and in English language acquisition ("ELA") he received a red. Exhibit 30.

16. [Fifth Grade Teacher] had not been concerned with [Student]'s red score in ELA because she knew from her personal experience with [Student] that he was good in that subject. She also knew that if he had not wanted to take the ELA test he would not have tried the day he took it.

17. On the MAP test, red means low or low average; yellow means average; and green means high or high average. In the fall of 2015, [Student] received a green in reading, a green in math, a green in science, and a green in language arts. *Id.* at 000389.

18. In the winter of 2015-2016, [Student] received a red in reading, a green in math; a green in science, and a green in language arts. *Id.*

19. In the spring of 2016, [Student] received a green in reading; a green in math; a green in science; and a green in language arts. *Id.*

20. [Student]'s MAP growth scores from fall of 2015 to spring of 2016 were reading: typical growth; math: high growth; science; typical growth, and language arts: high growth. *Id.* at 000390.

21. [Fifth Grade Teacher] referred students in her classroom to an IEP team if she felt they were not learning at grade level. She did not refer [Student] to an IEP team, and although she observed [Student] being defiant, manipulative, argumentative, and disrespectful, and those behaviors interfered to some degree with his learning, they did not prevent [Student] from accessing and learning the fifth grade content. Additionally, [Student]'s standardized test scores did not prompt a need for an IEP meeting.

22. [Fifth Grade Teacher] explained that [Student] was a bright student, performed average compared to other students in her general education classroom, excelled in technology, and was good in every class but did not like writing.

23. In November of 2015, [Student] became frustrated and angry at school and

left without permission. Exhibit 48.

24. On November 17, 2015, [Student] was being disruptive during class and was sent to the principal's office several times. After returning to class he continued his disruptive behavior and had to be removed from class by the principal, [Principal 2]. [Student] was suspended for 1½ days. Exhibit 14.

25. [Principal 2] credibly testified that [Student] was not in his office more than typical students were.

26. In fifth grade, [Student] was making progress in all content standards in the general education curriculum despite his behavioral problems. See *generally* Exhibits 21 and 30.

#### [Doctor] Assessment

27. In the summer of 2016, Complainants obtained a private educational evaluation conducted by [Doctor], Ph.D. [Doctor] encouraged Parents to pursue an IEP or 504 plan for [Student], stating in her report "[[Student]] should be staffed into special education due to emotional/behavioral difficulties and Attention Deficit Hyperactivity Disorder. He needs an IEP or at least a 504 plan, particularly as he transitions to middle and high school." Exhibit 20, at 000085.

28. [Doctor] also wrote "overall, [[Student]] is not behind his peers in his academics...However, he works slowly and becomes notably inaccurate when he feels rushed. This is due to the ADHD. [[Student]] needs extra time in order to work to his true potential." *Id.* at 000084.

29. [Doctor] gave Complainants four recommendations: 1) that [Student] should be staffed into special education, which to her meant an IEP or a 504 plan; 2) that he be given clear and consistent expectations, limits, routines, and structures; 3) that [Student] be given extra time for tests, particularly standardized tests, and 4) that he would do best with a behavioral plan in school. *Id.* at 000085.

30. [Doctor] wrote it would not be helpful for a child like [Student] to be punished.

#### 2016-2017 School Year – Sixth Grade

31. [Sixth Grade Teacher] was [Student]'s sixth grade teacher at [Elementary School 2]. He believed [Student] was a bright but inconsistent student, who put forth effort only 50% of the time.

32. Complainants were supportive of [Sixth Grade Teacher], and were very involved in [Student]'s education in the sixth grade.

33. [Student]'s first trimester grades in sixth grade included a 1 in reading comprehension and 2's and 3's in the rest of his academic classes. Exhibit 12.

34. Comments on his first trimester report card included:

- a. "[[Student]] has not turned in most of his literature log which has hurt

his comprehension score.” *Id.* At 000009.

- b. “Doesn’t come in prepared with necessary materials. Inattentive in class/preoccupied.” *Id.*
- c. “[Student] has used technology inappropriately in school on more than one occasion.” *Id.*

35. In the fall of 2016, [Student] received a MAP score of green in reading; yellow in math; and yellow in language arts. In the winter of 2016-2017 he received a MAP score of red in reading; green in math; and green in language arts.<sup>2</sup> Exhibit 30.

36. [Student]’s MAP growth scores from fall of 2016 to winter of 2016 were low growth in reading; high growth in math; and high growth in language arts.

#### [Student]’s 504 Plan

37. On September 20, 2016, [Parent 1] wrote to [Principal 2] asking for an IEP evaluation for [Student]. He wrote:

Hi [Principal 2],

As [Parent 2] shared with you, we’d formally like to request the school help us in setting up an IEP for [[Student]]. We have privately conducted an extensive assessment for [[Student]] with a certified clinical psychologist and have determined he is an at-risk student struggling with disabilities. We are interested in finding more resources to support his success as a student through the school. Please let us know what more you need from us to begin this process. You’ll have our full support. Exhibit 50.

38. On September 23, 2016, [Parent 1] had not heard back from [Principal 2], so he emailed him a second time: “Hi [Principal 2]. We haven’t heard back from you on this. Could you share an update?” *Id.*

39. On September 23, 2016, [Principal 2] responded:

[Parent 1], I forwarded your request to my sped team. You can expect to hear from them in the coming days. I have CC’d my team on my reply as well. *Id.*

40. On September 28, 2016, a meeting was held with [Parent 2], [Special Education Teacher], [Elementary School 2] special education teacher, and [Mental Health Provider], [Elementary School 2] Mental Health Provider. Exhibit 17.

41. [Special Education Teacher] and [Mental Health Provider] took notes of the meeting. [Mental Health Provider]’s notes, written the same day, stated in part:

[Special Education Teacher] and [Mental Health Provider] discussed with [Parent 2] the process of initiating an IEP and 504. [Parent 2]

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<sup>2</sup> [Student]’s MAP science scores were not provided for the 2016-2017 school year.

was concerned about [[Student]] having to be tested and interviewed for an IEP. We discussed that an IEP would give [Student] both services and accommodations by members of the special education team and consultation with the classroom teachers whereas a 504 would be focused on accommodations the classroom teachers are doing that help [[Student]] to be successful. [Parent 2] shared that he and [Parent 1] were concerned about labeling [[Student]] and the impact that would have on how he sees himself....when asked what the family really wanted it appeared to be what his teachers are already providing and that they want that to be in place in middle school. It was suggested that a 504 could accomplish that and would not involve [[Student]] in a process that [Parent 2] voiced he did not want...

[Parent 2] said he wanted to go the route of a 504. It was offered that he talk with [Parent 1] and let us know. He said he would prefer to move ahead . . . It was restated that the family could request an IEP referral and that we would honor that request. *Id.*

42. [Special Education Teacher]'s notes were substantially the same and were also written close in time to the meeting. She wrote in part:

The Woodcock-Johnson Tests of Achievement Third Edition (WJ-IV) results were reviewed. The majority of his were at or approaching age and grade level norms . . . [Parent 2] shared that he and [Parent 1] were concerned about 'labeling' him as 'special education' and expressed that they did not want the social stigma of [[Student]] receiving special education services, particularly being pulled out of class by the mental health provider. Additionally, [Parent 2] expressed that he did not want [[Student]] pulled out of class for any testing or data collection that would be required should the parent choose an IEP evaluation...Upon discussion, [Parent 2] indicated that he wanted to pursue a 504 plan with the classroom teacher(s) providing and implementing accommodations that would follow him to middle school...It was offered that he talk with [Parent 1] and let us know what decision they would like to make as parents. [Parent 2] said he would prefer to move ahead with the 504 plan...at the end of the meeting, [Special Education Teacher] restated that they have a right to an IEP referral and we (special education team) would honor that request. [Parent 2], [Special Education Teacher] (sped provider) and [Mental Health Provider] (mental health provider) were in agreement with proceeding with a 504 plan and not move forward with an IEP referral. Exhibit 18.

43. At hearing [Parent 2] testified that a 504 plan was not his idea; that he went into the meeting wanting an IEP but deferred to the professionals; and that, at the time,

the 504 plan sounded like something that would be quicker, more practical, and could be changed.

44. The School District sufficiently explained to [Parent 2] the differences between a 504 plan and an IEP, gave him an opportunity to talk with his partner about the decision, abided by his choice to immediately implement a 504 plan instead of an IEP, and adequately explained that he and [Parent 1] could always request an IEP going forward. District personnel did not coerce Parents into choosing a 504 plan.

45. On October 5, 2016, Complainants, [Student], [Sixth Grade Teacher], [Mental Health Provider], [Special Education Teacher], and [504 Coordinator], [Elementary School 2's] 504 coordinator, met to develop [Student]'s 504 plan, which was finalized on October 25, 2016. The plan included all of [Doctor]'s recommendations. Exhibit 15.

46. The 504 plan included a checklist that would be used as a communication and organization tool, and required that [Student] check in with [Sixth Grade Teacher] in the morning, at mid-day, and after school. [Student] was responsible for showing his parents the checklist and returning it to [Sixth Grade Teacher]. Exhibit 39.

47. [Sixth Grade Teacher] complied with his responsibilities under the 504 plan.

48. During the fall of 2016, [Student]'s behavior began to deteriorate at home and at school. The 504 plan was not working because [Student] frequently lost the checklist or failed to return it to [Sixth Grade Teacher]. He returned it 20% of the time.

49. On September 20, 2016, [Student] punched a student and received a one day suspension. Exhibit 14, at 000045.

50. On October 3, 2016, [Student] punched another student in the eye and was suspended for one day. *Id.* at 000044.

51. On October 17, 2016, "[[Student]] hit [a fellow student] in the jaw and pushed her to pick up something in the trash that she threw away." Exhibit 38.

52. On December 1, 2016, "[[Student]] was very disruptive during classroom testing. He was asked to take his materials to the office to finish his test, at this point he became argumentative and non-compliant. Once he came to the office he was yelling and disrespectful . . . he was sent home for the remainder of the day." Exhibit 14.

53. On December 9, 2016, "[[Student]] walked in the classroom and told a female student to 'go suck (another male student's) di\_k.'" Exhibit 38 at 000311.

54. On December 12, 2016, [Sixth Grade Teacher] wrote: "I asked [[Student]] to move seats. He refused and began arguing with me. To continue to teach I asked him to go to the office, but he is welcome back when he is ready to comply." *Id.* at 000313.

55. By December of 2016, [Student] was having "bad" days at school at least 50% of the time, according to [Sixth Grade Teacher].

56. On December 9, 2016, [Sixth Grade Teacher] sent an email to



Complainants in which he stated in part that “I feel that [[Student]] needs more significant intervention than a general education setting can provide, but I will continue to make the effort to provide him with the in-class interventions I can.” Exhibit 55.

57. [Sixth Grade Teacher] did not mean by this email that he believed the District could not provide [Student] FAPE.

58. At hearing, [Parent 1] testified that as the fall of 2016 wore on, it became apparent that he and [Parent 2]’s household could not withstand [Student]’s deteriorating behavior. He punched holes in the walls at home, he ran away, and his anger and defiance were getting worse.

59. [Student] and the family had been in therapy with [Family Therapist], a family therapist and specialist in RAD, since 2015. [Family Therapist] strongly recommended that Parents place [Student] in a residential treatment center (“RTC”), which she believed would be the most effective way to treat his RAD. [Family Therapist] did not recommend any particular RTC, but one that would be able to physically restrain [Student].

60. Based on [Family Therapist]’s recommendation, recommendations from [Doctor], [Sixth Grade Teacher]’s email, and [Student]’s worsening behaviors at home and at school, Complainants began researching RTCs for [Student]. On January 7, 2017, they placed [Student] at [Treatment Center] (“[Treatment Center]”), a private RTC in [Other State]. Complainants did not discuss [Student]’s placement at [Treatment Center] with the District prior to his placement.

61. [Student] was passing all of his classes at [Elementary School 2] when he was removed from the school by his parents in December of 2016. He was able to access the sixth grade general education content, despite his behavioral problems, at [Elementary School 2], based on his grades, standardized test scores, and credible testimony from [Sixth Grade Teacher]. [Student] was never restrained at [Elementary School 2] or placed in isolation.

62. At hearing, [Special Education Director], Special Education Director for the District, explained that if a student is struggling in class, a disability is not assumed. Prior to referring a student to special education, multiple tiers of systems supports, or “MTSS” is utilized. MTSS uses evidence-based and data-driven information from teachers and others to develop strategies to help the student. MTSS is usually implemented for six to nine weeks to see if the student progresses. The goal is to ensure all the tools in general education have been exhausted prior to referring a child for a special education evaluation. [Special Education Director] explained that a body of evidence is gathered to determine if a child needs special education and related services, which may include report cards, standardized tests, input from teachers, mental health assessments, educational assessments, and classroom observation, among other things.

63. [Special Education Teacher] testified that behavioral issues alone do not trigger an IEP. However, if behavioral issues impede a student’s reasonable access to

the academic content, then behavioral issues will trigger an IEP. [Mental Health Provider] also testified that behavioral issues alone do not warrant an IEP.

64. At the time of [Student]’s placement at [Treatment Center], he had not been using drugs or alcohol, had not been engaging in sexual activity, was not self-harming, had not had police involvement, and had not required emergency mental health services.

[Treatment Center]

65. [Student] has been at [Treatment Center] since January 7, 2017. Tuition is \$7,000.00 per month, which Complainants’ insurance does not cover. Parents appealed the insurance company’s denial of payment, a peer review was conducted, and the result was an affirmation of the denial because, according to the insurance company, there was no clinical evidence to support an RTC level of care for [Student]. Parents were notified of the denial on January 13, 2017.

66. On January 19, 2017, Parents informed the District that they would be seeking tuition reimbursement to cover the tuition and costs of [Treatment Center]. They wrote to [Principal 2] that:

we placed [[Student]] at [Treatment Center] due to his escalating social, emotional, and behavioral needs, which could not be appropriately addressed by the Jefferson County school system. Please also know that we intend to pursue reimbursement for [[Student]’s] placement at [Treatment Center] from Jefferson County. We believe the school system should have evaluated [[Student]] for potential eligibility to receive services under an IEP back in September, instead of deciding that an IEP would not be necessary and a 504 Plan would be sufficient. We would like to note that, when our request for an IEP was instead referred to the 504 team for development of a 504 Plan, we did not receive any information regarding our rights and procedural safeguards in relation to our request for an IEP. We believe that if we did not enroll [[Student]] at [Treatment Center] as soon as possible it would have resulted in significant harm, either physical or emotional. Exhibit 11.

67. [Treatment Center] is a licensed RTC accredited with the [Other State] Department of Education that serves 12-to-17 year olds who struggle with mental health issues and drug addiction. [Treatment Center] currently has 27 students, and [Student] is the youngest student. It also has 83 staff members, including four full time teachers and two substitute teachers. None of the teachers have special education licenses. A Private School Plan, or “PSP,” which is similar to an IEP, is developed by a person who is certified in special education.

68. [Treatment Center] developed a master treatment plan for [Student] upon his admission. The reason for admission as stated in the master treatment plan focused

on his deteriorating relationship with his parents. The only mention of education being a reason for admission was that [Student] stated he was frequently bullied at school. Exhibit 32.

69. [Treatment Center Director], [Treatment Center] director, believes [Student] may have to remain at [Treatment Center] for up to three years. Complainants are committed to keeping [Student] at [Treatment Center] until he succeeds in the program or turns 18 and graduates out of the program.

70. [Student] has not been successful at [Treatment Center] to date, if success is measured by his conduct and grades.<sup>3</sup> When students first arrive at [Treatment Center], they are on the “compliance” level in which they are under constant supervision. Once a student has a full week of success in the compliance group, the student is moved up to the community group, in which he has more privileges. As of the date of hearing, approximately eight months after his admission, [Student] had not had one full week of success, and was still in the compliance group.

71. [Student] was required to take a “life skills” class before he could begin the general education curriculum at [Treatment Center]. He was not successful in the life skills class, and therefore he did not begin to have access to the general education curriculum for the first three months he was at [Treatment Center].

72. If [Treatment Center] students are out of control, they are sent to the special observation (“SO”) room, which is a small, empty, windowless room. Students may only be in the SO room for up to four hours, and do not receive education while in SO. Students may also be restrained if they are out of control.

73. When a student is on SO, the student must be within five feet of a staff member at all times, including while sleeping, must wear a special uniform, and is permitted to only ask one question per hour.

74. [Student] was restrained on January 29, 2017. On that date, [Student] wrapped his arms around his desk in class and refused to remove himself. [Treatment Center] staff wrote that

We were required to remove him from the desk. Once out we placed [[Student]] in a goose neck escort to the S.O. room where we then put [[Student]] prone on the floor in a loosely held bent wrist restraint. [[Student]] was held there in the restraint aprox. 20 minutes before he

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<sup>3</sup> [Treatment Center Director] testified that a student’s behavior will worsen before improvement is seen and that worsening behavior is a sign that the student is on his way to success. While that may be true, for purposes of whether the District is able to provide [Student] FAPE, the ALJ must compare [Treatment Center] and District schools using concrete measures of success such as grades.

was able to comply with basic directions. We remained in the Special Observation room for an additional 30 minutes before taking him out to change for Special Observation. Exhibit 61.

75. [Student] was restrained most recently on August 6 and 21, 2017 and on September 2 and 9, 2017.

76. As of the date of hearing, [Student] had received zero academic credits while at [Treatment Center]. His 2016-2017 [Treatment Center] grades were a D+ in language arts; a zero in math; an F in science; an F in social studies; and an F in PE. His grade point average was 0.61. Exhibit 26.

#### [Student]'s IEP

77. Complainants met with [Principal 2] and [Special Education Director] on February 10, 2017, to discuss an IEP for [Student]. [Special Education Director] explained that the first step was to receive signed consents from Parents. [Special Education Director] believed she told Parents to contact her when they made a decision about moving forward, but Parents thought that the decision had been made to move forward and that [Special Education Director] was going to send them the consents to sign. [Special Education Director] gave Parents the procedural safeguards and her business card at the meeting.

78. On March 3, 2017, after not having heard from Parents, [Special Education Director] called and left a voicemail, and she and [Parent 1] spoke on March 7, 2017.

79. On March 21, 2017, the consent for release of information was signed by Parents. Exhibit 37. On April 8, 2017, the consent for initial evaluation was signed by Parents. Exhibit 8.

80. Once the consents were signed, [Special Education Director] contacted the District's Child Find team. [Academic Evaluator] is part of the District's K-12 Child Find Private and Homeschool team and is responsible for the academic portion of the evaluation. [School Psychologist] is a District licensed school psychologist and is also part of the K-12 Child Find Private and Homeschool team, and is responsible for the mental health portion of the evaluation.

81. [Academic Evaluator] and [School Psychologist] visited [Treatment Center] to evaluate [Student] once the consents were signed by the parents. They were there for five days and met with [Student], his teachers, therapist, and [Treatment Center Director]. They made the following observations:

- a. Neither was able to observe [Student] in a classroom setting because he was in the SO while they were there.

- b. They observed the classes [Student] would have been in if he had not been in S.O. Neither observed any instruction occurring because the teacher was not in the classroom.
- c. They were told that [Student] was out of class 80% of the time.
- d. They did not observe anyone teaching the students how to regulate their behavior.
- e. [Student] was failing all of his classes at the time they visited [Treatment Center].

82. [School Psychologist] testified that [Student]'s ADHD can interfere with his learning, and that ideally a functional behavioral analysis should be conducted to determine why [Student]'s behaviors happen and what reinforces them. Then, a behavioral intervention plan should be developed for the adults, which would provide a more targeted approach to minimizing [Student]'s negative behaviors than giving him consequences.

83. On June 1, 2017, a determination of eligibility for special education services was completed by [Student]'s IEP team. Exhibit 5. His primary disability was determined to be Serious Emotional Disability, and his secondary disability was Other Health Impairment. Exhibit 1.

84. On June 26, 2017, an IEP team meeting was held to develop [Student]'s IEP. The first IEP goal states:

In order to increase time and improve his emotional regulation skills, [[Student]] will identify situations when he experiences stress/anger/frustration, and then identify and implement a coping strategy in order to maintain engagement in academic settings 80% of the time in school as observed by staff over three data collection periods (trimesters). *Id.* at 000132.

85. [Student]'s second IEP goal is:

In order to increase school/academic success, [[Student]] will learn and use self-monitoring strategies to help him remain on task in his classroom settings for 80% of the time with fewer than two adult prompts during any given class period as measured over three data collection periods (trimesters). *Id.*

86. The third and final IEP goal is:

With direct instruction and support from staff, [[Student]] will learn planning and organizational strategies (i.e., goal setting, monitoring

his own progress on the goal, adjusting his plan as needed, etc.) in order to complete and turn in 80% of assigned academic tasks as measured over three data collections periods (trimesters).

87. The IEP provides for 90 direct minutes of mental health services per week, and 1800 minutes of special education instruction, which is 100% special education. *Id.* at 000135. The IEP also states that once [Student] is placed in a District school, a functional behavioral assessment will be completed and a behavioral intervention plan will be developed.

88. [Academic Evaluator] and [School Psychologist] believe that [Student] has the ability to learn the skills identified in his IEP in a District school, and they saw no evidence that he needed to be at an RTC in order to access a general education curriculum.

#### [K-12 School]

89. After the IEP meeting, Parents understood that they would be sent a list of District schools with pros and cons. They did not receive a list of schools after the IEP meeting, and they did not hear back from the District until August 2, 2017, when [Special Education Director] emailed them a copy of [Student]’s IEP that stated that his placement would be at [K-12 School]. They received this information approximately 20 days before the first day of school. See Exhibit 2.

90. [K-12 School Principal] is the principal at [K-12 School], which is a K-12 District school in [City]. [K-12 School Principal] attended [Student]’s IEP meeting and met Complainants.

91. [K-12 School Principal] explained that 100% of the students at [K-12 School] are on IEPs, and are there because they have not been successful at other schools. Currently 90 students attend [K-12 School], and about 10 to 15 of those came from RTCs.

92. [K-12 School] has 16 teachers, seven therapists, and 22 para-educators. Every teacher has the designation as “highly qualified” in their content area, and all are dual licensed as special education teachers. All of [K-12 School]’s therapists are clinical social workers who have worked in clinical settings. The staff is trained in non-violent restraint, verbal de-escalation, and collaborative problem solving. According to [K-12 School Principal], 70-80% of [K-12 School] students have ADHD combined with other diagnoses including RAD. [K-12 School]’s middle school, where [Student] would be placed, has 21 students. Middle school classes have a maximum of seven students, with one teacher and one para-professional. [K-12 School] also has a campus security officer and 3 “floater” para-educators.

93. [K-12 School Principal] explained that while [Student] learns academic content in his [K-12 School] classes, he will also be working on and learning how to master his IEP goals. [K-12 School] has designated places in the classrooms and in the hallways

for students to de-escalate if and when they need to. Paraprofessionals and therapists are available at all times to meet privately with students who are struggling emotionally. [K-12 School Principal] testified that the [K-12 School] staff are good at de-escalating students such that using restraints and calling the police are rare occurrences.

94. [K-12 School Principal] believes [K-12 School] would be a good fit for [Student]. She explained that all of [K-12 School]’s students are dysregulated in some way, like [Student], and it is [K-12 School]’s job to teach them the skills they need to be able to regulate themselves.

95. The IEP team considers [K-12 School] a transitional placement that will be in effect only as long as necessary to help [Student] transition from [Treatment Center] to a District public school. Exhibit 1. Every school year, many [K-12 School] students are successfully able to transition to a regular public school. Last year, 65 of [K-12 School]’s students transferred to neighborhood schools.

96. The IEP team considered options other than [K-12 School]; specifically, the team considered [Treatment Center] at Parents’ request. The team rejected [Treatment Center] as a placement because “[Student] was, and can continue to be educated in a less restrictive setting. As reflected by his academic performance prior to parents’ decision to place him at [Treatment Center], [Student] does not need 24/7 residential care to access the general education curriculum.” *Id.* at 000136.

97. [Parent 1] believes [K-12 School] sounds like a “great” school. He and [Parent 2] do not necessarily object to [Student]’s IEP, but they object to [Student]’s transition between home and school because transitions are triggers that “set [Student] off.” [Parent 1] does not believe [K-12 School] will be able to keep [Student] safe because [Student] has needed restraints at [Treatment Center]. He hopes [K-12 School] can be a good fit for [Student] in the future.

98. [K-12 School] is the District’s offer of FAPE to [Student].

## **DISCUSSION**

### **Burden of Proof**

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

### **The Requirement of FAPE**

#### **Substantive FAPE**

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 FAPE is defined as “special education and related services . . . provided in conformity with an individualized education program.” 20 U.S.C. § 1401(9). 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.” 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. In *Endrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017) the Supreme Court ruled that *de minimis* progress, which had been the standard under a Tenth Circuit decision, is not a sufficient goal in providing specialized education services to a child, and that the circumstances of the child must be considered.

To determine whether the District has complied with the requirement to provide FAPE, the Court established the following two-prong test:

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 benefit?

*Rowley*, 458 U.S. at 206-7. The IEP is the basic mechanism through which a school district’s obligation of providing FAPE is achieved. *Murray by & Through Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10<sup>th</sup> 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).

### Procedural FAPE

In enacting the IDEA, “Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205-06. However, failure to comply with the procedural safeguards amounts to a violation



of FAPE only if: (1) the procedural violations impeded the child's right to FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; or (3) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 CFR § 300.513(a)(2); *C.H. by Hayes v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3<sup>rd</sup> Cir. 2010) (“[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.”) Multiple procedural violations may cumulatively result in the denial of FAPE even if the violations considered individually do not. *R.E. v. N.Y.C. Dep’t of Educ.*, 694 F.3d 167, 190 (2<sup>nd</sup> Cir. 2012).

### Least Restrictive Environment

The IDEA requires that children with disabilities be educated in the “least restrictive environment.” 20 U.S.C. § 1412(a)(5). This means that disabled students must be educated “[t]o the maximum extent appropriate . . . with children who are not disabled” in a “regular educational environment.” 20 U.S.C. § 1412(a)(5)(A); *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Sch.*, 565 F.3d 1232, 1236 (10<sup>th</sup> Cir. 2009). Disabled students may be removed from the regular classroom only “when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” *Id.*; 34 CFR § 300.114(a)(2)(ii).

### Private Placement

A school district must ensure that a “continuum of alternative placements” is available to meet the needs of children with disabilities, including education in an institution or other setting as necessary. 34 CFR § 300.115. In an appropriate case, an alternative placement might include placement in a private residential facility. *Jefferson Cnty Sch. Dist. v. Elizabeth E.*, 702 F.3d 1227 (10<sup>th</sup> Cir. 2012).

The IDEA, however, does not obligate a school district to pay the cost of educating a disabled child at a private school if the district made FAPE available to the child, and the child’s parents nonetheless elected to place the child at the private facility. 20 U.S.C. § 1412(a)(10)(C)(i); 34 CFR § 300.148(a). Only if the district has not made FAPE available to the child in a timely manner may the district be required to reimburse the parents for the cost of enrollment in a private school. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 CFR § 300.148(c). Other requirements pertaining to reimbursement of private school tuition include:

CFR § 300.148(d). Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied -

(1) If - (i) At the most recent IEP Team meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed

by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or

(ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in § 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement -

(1) Must not be reduced or denied for failure to provide the notice if -

(i) The school prevented the parents from providing the notice;

(ii) The parents had not received notice, pursuant to § 300.504, of the notice requirement in paragraph (d)(1) of this section; or

(iii) Compliance with paragraph (d)(1) of this section would likely result in physical harm to the child; and

(2) May, in the discretion of the court or a hearing officer, not be reduced or denied for failure to provide this notice if -

(i) The parents are not literate or cannot write in English; or

(ii) Compliance with paragraph (d)(1) of this section would likely result in serious emotional harm to the child.

Finally, the fact that a child may be making better progress at a private facility is not determinative. *O'Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233*, 144 F.3d 692, 708 (10<sup>th</sup> Cir. 1998). An IEP is not inadequate "simply because parents show that a child makes better progress in a different program." *Id.* Courts must defer to the district's proposal if that plan is reasonably calculated to provide the child with a FAPE in the least restrictive environment, even if a parent believes a different placement would maximize a child's educational potential. *Ellenberg v. N.M. Military Institute*, 478 F.3d 1262, 1278 (10<sup>th</sup> Cir. 2007).

#### Application of the Principles to this Case

Complainants are seeking tuition reimbursement for [Student]'s private placement at [Treatment Center] to date, and going forward until such time as he is able to return to a District school, if he is able to. To prevail on their request, Complainants have the burden of proving, by a preponderance of the evidence, that the District failed to provide [Student] FAPE in a timely manner in the least restrictive environment, and that

[Treatment Center] is an appropriate placement. The parents have not met their burden for the following reasons:

1. [Student]'s IEP is reasonably calculated to provide him FAPE at [K-12 School].

The evidence is convincing that the IEP developed by the team, including the District's offer of placement at [K-12 School], was reasonably calculated to provide [Student] FAPE, taking into account his circumstances. [K-12 School Principal] and [Special Education Director]'s testimony was persuasive that [K-12 School] is specifically designed for students with issues similar to [Student]'s. [K-12 School]'s teachers are all licensed special education teachers as well as being "highly qualified" in their content area. [K-12 School] employs licensed and clinically trained therapists to be available at all times to help students if they are having the kind of "melt-downs" that [Student]'s parents described. Paraprofessionals are also available at all times to talk with students who are struggling or who need to take a break. Significantly for purposes of the IDEA, [K-12 School] rarely uses restraints, and when it does they are non-violent, and it never uses an isolation room. [K-12 School]'s goal is to keep students in the classroom and learning as much as possible, and the credible testimony in the record is that it is successful at doing that.

Moreover, [Student]'s IEP goals are reasonably calculated to provide him FAPE considering his circumstances. The IEP incorporated all of [Doctor]'s specific suggestions, including a functional behavioral analysis and a behavioral intervention plan. [Student]'s IEP goals specifically target the obstacles that were interfering with his education at [Elementary School 2] by teaching him emotional regulation skills, self-monitoring strategies, self-determination, and goal setting. His IEP calls for 90 direct minutes of mental health services per week to help him meet his IEP goals.

Complainants do not disagree that [K-12 School] may be a good placement for [Student] in the future, but they disagree that it is appropriate now due to his need for restraints to keep him safe, and due to the fact that the transition from [K-12 School] to home and back will trigger his melt downs. Concerning restraints, the ALJ is not persuaded that [K-12 School] cannot properly and safely restrain [Student] if the need arises. The staff are trained in the non-violent use of restraints, a school resource officer is present at the school, and police may always be called. Also, prior to [Student]'s placement at [Treatment Center], there was never a need to restrain him, and his behaviors at [Elementary School] and [Elementary School 2] were never so serious that police had to be called.

Concerning transitions, the IDEA does not require that school districts provide the most optimum set of circumstances. *See, e.g. O'Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233*, 144 F.3d at 708 (explaining that a disabled child is "not entitled . . . to placement in a residential school merely because the latter would more nearly enable the

child to reach his or her full potential”). Or, stated differently, Parents are not entitled to reimbursement for [Student]’s placement at [Treatment Center] simply because [Treatment Center] may be the best place to prevent melt downs during transitions because there are no transitions to and from his home. More importantly, and recognizing that transitions are a valid concern, if [Student]’s melt downs during transitions back and forth to [K-12 School] prevent him from receiving FAPE, the District will be required to convene another IEP meeting to revise his IEP such that it is reasonably calculated to provide him FAPE considering his circumstances. That is the appropriate method of addressing Parents’ valid concerns regarding [Student]’s transitions.

2. Although there were delays in providing [Student] an offer of FAPE, the delays were not unreasonable, and the offer of FAPE was timely made.

It is not enough that the District offered FAPE. It must also have offered FAPE timely. Parents were and are frustrated with what they perceived to be the District’s failure to timely staff [Student] into an IEP. Based on [Principal]’s demeanor while testifying, it is plausible that she appeared to Complainants to be dismissive of their request for an IEP. However, the body of evidence that existed at that time – [Student]’s grades, results on standardized tests, and behavioral incidents at school – did not demonstrate that he was unable to access the general education curriculum. Indeed, after Parents asked [Principal] about an IEP for [Student] in the summer of 2015, he successfully received educational benefit in the general education curriculum in the 2015-2016 school year, as evidenced by his grades and results in standardized tests. Therefore, even if a procedural violation occurred as a result of [Student] not being staffed into special education after the meeting with [Principal] (and the ALJ is not making a conclusion that a procedural violation occurred), it did not rise to a substantive violation of FAPE because [Student] was able to receive educational benefit the next school year in the general education setting.

Parents next point to the meeting they had with [Special Education Teacher] and [Mental Health Provider] as evidence that an IEP was not timely developed. They assert that the District chose a 504 plan for [Student] instead of honoring their wishes for an IEP. The weight of the evidence does not support that conclusion. Both [Special Education Teacher] and [Mental Health Provider] took notes of the meeting with [Parent 2], and their notes, taken the same day, as well as their credible testimony, are clear that [Parent 2] was fully apprised of the differences between a 504 plan and an IEP and that he chose to immediately move forward with a 504 plan for very specific reasons. Because he chose that route, the District was not required to provide him and [Parent 1] with a copy of the procedural safeguards at that time. Thus, there was no delay in [Student] receiving an offer of FAPE that came about as a result of this meeting.

Third, Parents assert that [Special Education Director] failed to timely contact them after the February 10, 2017 meeting after they had agreed to move forward with signing consents. [Special Education Director]’s recollection differs from Parents, and the ALJ found Parents and [Special Education Director] all credible concerning their recollection of the events. Nonetheless, [Special Education Director] called Parents on March 3,

2017, and the ALJ does not conclude that the delay between February 10 and March 3, 2017 to be unreasonable.

Finally, Parents were frustrated with the fact that although the IEP meeting was held on June 26, 2016, they did not receive a list of schools as they had been promised, and more significantly, they did not discover that [K-12 School] was the District's offer until August 2, 2017, when [Special Education Director] emailed them a copy of the IEP. Again, the witnesses' memories differ on this point, and all of the witnesses were credible concerning their respective memories. It is understandable that Parents would be frustrated that they only learned that [K-12 School] was the District's offer approximately 20 days before school started. However, [K-12 School]'s principal attended [Student]'s IEP meeting and answered all of their questions about [K-12 School] at that time, so they did have information about [K-12 School] much earlier in the summer than 20 days before the start of school. Also, because [K-12 School Principal] attended the IEP meeting and answered Parents' questions, it could not have come as a complete surprise that [K-12 School] was the offer. Therefore although the delay was frustrating, it does not amount to a procedural violation that denied [Student] FAPE.

3. [Treatment Center] is not an appropriate placement pursuant to the IDEA because it is not the Least Restrictive Environment for [Student].

As explained above, the IDEA requires disabled students to be educated in the least restrictive environment ("LRE"). In the facts of [Student]'s case, two potentially competing goals are at issue. One is the goal of best treating [Student]'s RAD, and the other is providing him FAPE pursuant to the IDEA. According to [Family Therapist] and [Treatment Center Director], a restrictive environment that includes physical restraint and isolation rooms is what is needed to treat [Student]'s RAD., even if it results in significant time out of the classroom, and even if [Student] needs this restrictive environment for six more years until he graduates. This goal is not compatible with the IDEA's LRE requirement if [Student] can access the educational curriculum in a less restrictive environment. The academic data prior to [Student]'s placement at [Treatment Center] indicates that he was able to make educational progress in a less restrictive environment than [Treatment Center]. However, his behaviors certainly were deteriorating in the fall and early winter of 2016 such that [Elementary School 2] may not have been the appropriate placement for him after the winter break. That fact has been taken into account by the District, which is why the offer of [K-12 School] was made. [K-12 School] is less restrictive than [Treatment Center], and according to the credible testimony of [Academic Evaluator], [School Psychologist], and [K-12 School Principal], would enable [Student] to meet his IEP goals and make educational progress. As above, if [Student] attended [K-12 School] and was unable to make educational progress under his IEP because he required a more restrictive environment, the solution would be to convene an IEP meeting in order to ensure that the offer of FAPE was at a location that was appropriate for his circumstances.

4. Parents acted prematurely for tuition reimbursement.

The requirements for seeking tuition reimbursement include that the parents inform the school district of their intent to place the child in a private school prior to doing so, but that requirement is excused under certain circumstances listed above in statute. Parents did not notify the School District that they were taking [Student] out of the District and placing him at [Treatment Center] until after they had done so, when they informed the District they were seeking tuition reimbursement. It is understandable that they were increasingly alarmed by [Student]'s behaviors at home and at school and wanted to act as quickly as possible to obtain what they believed was the best possible help for him. However, in order to be reimbursed for that private school tuition, they need to demonstrate that the District was unable to provide [Student] FAPE. Parents have not so demonstrated because they have not tried the District's offer of FAPE.

### **DECISION**

For all of the reasons discussed above, Complainants have not met their burden of proving that the School District failed to provide [Student] with FAPE as required by the IDEA, or that the District should be required to reimburse Parents for tuition and costs of [Student]'s attendance at [Treatment Center] for the 2016-2017 school year and until he returns to a District school.

Complainant's complaint is dismissed.

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

**DONE AND SIGNED** November 9, 2017

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TANYA T. LIGHT  
Administrative Law Judge