

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p>[Father] and [Mother] on behalf of [Student], a minor, Complainants,</p> <p>vs.</p> <p>DOUGLAS COUNTY SCHOOL DISTRICT RE 1 Respondent.</p>	
AGENCY DECISION	

On February 21, 2012 the Colorado Department of Education, Exceptional Student Services Unit, received a due process complaint filed by [Parents] (“the parents”) on behalf of their minor child, [Student], alleging that the Douglas County School District RE 1 (“District”) had denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act (“ECEA”), 1 CCR 301-8. The complaint was forwarded to the Office of Administrative Courts and assigned to Administrative Law Judge (“ALJ”) Michelle A. Norcross for an impartial due process hearing. Hearing was held in Denver, Colorado on June 6 – 8, 2012.¹ The parents were represented by Jack D. Robinson, Esq. The District was represented by Robert Ross, Esq. At hearing, the ALJ admitted into evidence Complainants’ exhibits 1 – 25, and District’s exhibits F – J. The proceedings were recorded in courtroom 2.

ISSUES PRESENTED

Whether the District failed to provide [Student] with a free appropriate public education (“FAPE”) as required by the Individuals with Disabilities Education Act (“IDEA”); and, whether the District is responsible for tuition reimbursement and travel expenses related to [Student]’s unilateral private school placement.

¹ The hearing was originally scheduled for April 23 – 25, 2012. At the request of the parties, on April 18, 2012, the hearing was continued to June 6 -8, 2012 and the decision deadline was extended beyond the 45-day time limit provided in state and federal regulations to June 22, 2012. Per the request of counsel, the decision deadline was further extended to July 16, 2012 to allow for the filing of post-hearing briefs.

FINDINGS OF FACT:

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

1. [Student] is a [age]-year old [gender] who was born on [date]. [Student] was diagnosed with autism at the age of two. In 2003, [Student] was also diagnosed with Attention Deficit/ Hyperactivity Disorder.
2. [Student]'s disabilities impact [Student's] cognitive functioning, language and reading skills, as well as [Student's] social and adaptive development. [Student] is unable to engage in age-appropriate socialization and is not always able to express [Student's] needs or wants. [Student] plays well independently but generally does not approach or engage in play with other children. [Student] becomes frustrated and anxious when [Student] is challenged or is around a feared stimulus, which includes dogs, flies, spilled liquids, airports and airplanes, and public restrooms.
3. When [Student] becomes anxious or agitated, [Student] has difficulty calming down on [Student's] own. For the past several years, [Student] has engaged in the following disruptive and self-harming behaviors when agitated or anxious: climbing over classroom furniture, walls, and other students, hitting objects, yelling, screaming, kicking, head banging, running away and has twice taken off all [Student's] clothing and urinated and defecated in the classroom.
4. [Student] started preschool in the Douglas County School District RE-1, where [Student] was qualified to receive special education services and had an individualized education program ("IEP").
5. [Student] was enrolled in the District's preschool program for three years. In 2005, at the age of [age], [Student] advanced to the half-day kindergarten program at [School #1].
6. Preschool went well for [Student]. When [Student] entered preschool [Student] spoke only a few single words but was speaking in phrases and sentences by the time [Student] entered kindergarten. Kindergarten was also successful. [Student's] social interactions were improving and [Student] enjoyed attending school. [Student] was placed in the general education kindergarten classroom and continued to receive special education and related supports and services, including speech therapy, occupational therapy and social skills supports outside of school.
7. After completing kindergarten, [Student] remained at [School #1], where [Student] attended full-day first and second grades in 2006 and 2007, respectively. During these years, [Student] was also placed in the general education classroom. [Student] continued to receive pull out special education and related supports and services. At this time, [Student] was receiving 20 hours per week of speech therapy, occupational therapy, group and individual therapy and social skills interventions.

[Student] was also assigned a full-time paraprofessional to help keep [Student] on task and to help deescalate [Student's] disruptive behaviors.

8. Neither party produced [Student's] 2005 or 2006 IEP. The first available IEP is [Student's] 2007 IEP. [Student's] 2007 IEP includes several academic and functional goals, short-term objectives, as well as a behavioral intervention plan ("BIP"). The IEP also contains several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. In this year, [Student] was to be inside the general education classroom between 40% and 79% of the day. [Student] spent the rest of the day in the special education classroom.

9. Through first and second grade, [Student] was progressing academically. [Student] was meeting several of the goals and objectives in [Student's] IEPs and developing limited social skills. Sometime during [Student's] second grade year, [Student's] behavioral problems began increasing. [Student] started having more frequent tantrums in class, which included yelling, crying and dropping to the floor, running out of line during class transitions; and, on occasion urinating in [Student's] pants. [Mother] had several conversations with [Student's] special education teacher at the time trying to find a solution to [Student's] disruptive behaviors.

10. The parents had had some success redirecting [Student's] behaviors at home using a timer. The timer worked in the classroom for a short while but ultimately created bigger problems as it became an obsession for [Student]. When [Student] was denied access to the timer in [Student's] classroom, [Student] would leave class in search of another timer and when [Student] found one [Student] would disrupt that classroom, crawling over other students, desks, and chairs to get to the timer.

11. The problem behaviors noted by both [Student's] teacher and [Student's] parents are documented in [Student's] BIP. Recognizing that [Student] responded more favorably to rewards for positive behavior than consequences for negative behavior, the plan outlined ways to redirect and reward [Student]. The BIP incorporates rewards for good behavior (e.g. computer time), picture cards to redirect [Student] back on task, and transporting [Student] to another classroom where [Student] could engage in self-calming behaviors like swinging or listening to music with the lights turned off. It also included use of District-approved restrain procedures if [Student] was in danger of hurting [him/her]self or others.

12. [Student] remained at [School #1] until [Student's] third grade year when [Student] was transferred to [School #2]. [School #2] is [Student's] neighborhood school, but at the time [Student] was enrolled in the District, [School #2] did not have a significant support needs ("SSN") classroom. When the SSN classroom was completed at [School #2], [Student] and [Student's] classmates were transferred to [School #2].

13. The transition to [School #2] from [School #1] was difficult for [Student]. [Student's] behavioral problems continued. Throughout the year, [Student's] social skills had declined and [Student] was engaging in all types of avoidance behaviors,

such as dropping to the floor, yelling, crying and urinating in [Student's] pants. [Student] did not want to go school.

14. [Special education teacher] was [Student]'s special education teacher at [School #2]. She worked with [Student] at [School #1], but was not [Student's] classroom teacher until third grade. Similar to [Student's] other years in the District, for third grade, [Student] was placed in the general education classroom with support from a paraprofessional. [Student] continued to receive special education and related services in the self-contained SSN classroom.

15. [Special education teacher] and the parents used a back-and-forth notebook to communicate how [Student] was doing at home and in school. The entries confirm the increase in [Student's] disruptive behaviors. Academically, [Student] was making progress towards some of [Student's] goals and objectives during [Student's] third grade year, but [Student's] behaviors were beginning to interfere with [Student's] educational opportunities.

16. Prior to each IEP meeting and on a quarterly basis throughout the years [Student] was at [School #2], [special education teacher] provided the parents with progress updates regarding [Student]'s performance. The District's IEPs have a section under each objective for documenting [Student]'s progress towards [Student's] annual goals. Some of the objectives contain little or no progress reporting; however, most contain at least conclusory statements about whether [Student] was on track to meet the expectations of the plan and whether the objective had been completed or would be continued.

17. The goals in [Student]'s 2008 IEP are similar, if not identical, to the goals in [Student's] 2007 IEP; however, most of the objectives and criteria in the 2008 IEP were modified to account for [Student]'s progress toward those goals.

18. In the spring of 2009, the IEP team scheduled a meeting in April 2009 to develop [Student]'s 2009 IEP.

19. Prior to the April 2009 IEP meeting, [Mother] provided her desires to the team regarding [Student]'s goals for the next school year, which included: [Student] spending more time in the general education classroom, increasing [Student]'s reading and writing skills, increasing [Student's] social interactions with peers, and decreasing [Student's] dependence on a paraprofessional.

20. [Mother] also requested that 4 of the 5 reading goals in [Student]'s 2008 IEP be maintained and carried over to [Student's] 4th grade IEP. She also requested that several of the math, writing and social skills goals be maintained but with more specific objectives.

21. [Student]'s 2008 and 2009 IEPs contain several academic and functional goals, short-term objectives, as well as several narrative sections describing [Student's]

present levels of educational and functional performance and the educational services to be provided. Again, [Student] was to be inside the general education classroom between 40% and 79% of the day and receiving pull out special education and related services the remainder of the day.

22. [Student]'s 4th grade year at [School #2] started off very rocky. [Student] did not want to attend school and [Student's] tantrums started increasing in both severity and frequency. There were times when [Student] had to be removed from the classroom because [Student] was crawling under desks, slapping the computer screen, or being disrespectful to [Student's] peers by messing with their work or desk. Other noted areas of concern were [Student's] tendencies to wander out of the room without supervision and run out of line before school when the class was lining up for the bell to ring. And, on at least two occasions in school year 2009, [Student] became so upset and agitated that [Student] ran from school and when [Student] returned [Student] took off all [Student's] clothing and urinated and defecated on the classroom floor.

23. [Mother] had many conversations that year with [special education teacher] and [Student]'s social worker to find a solution to [Student]'s increasing behavioral problems. Everyone was working together to solve the problem but [Student's] problem behaviors continued. By spring of 2010, [special education teacher] suggested that the IEP team bring in an autism specialist.

24. Despite the increase in [Student]'s problem behaviors, during school year 2009 [Student] was still making some progress towards [Student's] academic and functional goals.

25. The start of the 2010 school year was much the same as the 2009 school year. The parents continued to express their concern to [Student]'s teachers and the IEP team regarding [Student]'s behaviors, elopements and lack of social progress. There is no persuasive evidence that prior to that point the parents complained to the administration about any concern they had regarding [Student]'s academic progress or lack thereof.

26. With input from the parents, on April 13, 2010 the IEP team drafted a new IEP for [Student]. Similar to [Student's] prior IEPs, the annual goals in [Student]'s 2010 IEP are nearly identical to those in [Student's] 2009 IEP. The difference between the two programs appears in modifications that were made to the objectives and the measuring criteria.

27. [Student]'s April 2010 IEP contains several academic and functional goals, short-term objectives, as well as several narrative sections describing [Student's] present levels of educational and functional performance and the educational services to be provided. This year, [Student] was to be inside the general education less than 40% of the day and receiving pull out special education and related services the remainder of the day.

28. When the IEP team met in April 2010, [social worker], a licensed social worker, noted that [Student]'s classroom behaviors were, at times, inhibiting [Student] from accessing academic learning as well as social learning. And that when [Student] exhibits these behaviors [Student] typically does not stop until [Student] wears [him/her]self out.

29. Everyone was in agreement that a new BIP was needed and that an autism specialist should be part of the team. A behavior plan meeting was scheduled for May 10, 2010 and a draft BIP was prepared by the District. The parents did not attend the May 10 meeting.

30. On May 1, 2010 the parents notified [Director], Director of Special Education for the District, in writing of their intent to withdraw [Student] from [School #2] and place [Student] at the private [Private School] (now [Private School's new name]). In the letter the parents expressed their concerns regarding the lack of academic and social progress [Student] was making at [School #2]. They informed [Director] that they were obtaining academic and functional performance evaluations and would be seeking tuition reimbursement from the District.

31. On May 19, 2010 [Director] responded requesting that the team convene another IEP meeting as soon as possible to discuss the family's concerns. [Director] also requested copies of [Student]'s academic and functional performance tests for the IEP team to consider the information and determine if additional evaluative data would be necessary and/or appropriate.

32. When [Director] wrote the May 19, 2010 letter to the parents he was unaware that [Student] had already been withdrawn from [School #2] on May 7, 2010. In light of the new information, [Director] told the parents that if they decided to reenroll [Student] in the District, the District would convene an IEP meeting as expeditiously as possible and stand ready to serve [Student].

33. Despite the fact that [Student] was now attending [Private School], the District went ahead with the May 10 meeting and developed a new BIP for [Student], which remains in draft form but was shared with the staff at [Private School].

34. [Student] began classes at [Private School] on May 10, 2010. [Student] was placed in the [] classroom.

35. [Private School] specializes in working with autistic students to help them acquire skills for independence in the school and community settings as well as improve social interactions and social learning.

36. At [Private School], [Student] has a 1:1 student to teacher ratio and is one of eight special needs students in [Student's] class. Aside from occasional field trips, [Student] does not engage with non-disabled children during [Student's] school days at [Private School].

37. Each day the [Private School] classroom staff collects data on each student's IEP objectives to assess progress. The raw data is compiled and graphed, charting each student's progress. [Student]'s progress reports from [Private School] are quite extensive and contain documented, detailed, daily information about [Student's] progress.

38. When [Student] came to [Private School], the only IEP [Student] had was the one that was developed by the District on April 13, 2010. [Private School] chose not to develop a new IEP for [Student] until they had had a chance to observe and evaluate [Student]. The [Private School] staff spent the first six to eight weeks following [Student]'s enrollment observing [Student]. Between May 12, 2010 and August 1, 2010 the staff at [Private School] observed and collected data on [Student].

39. [Student]'s disruptive behaviors that were observed and documented by [Private School] are the ones previously identified by the District and are addressed in the District's May 2010 draft BIP, which include dropping, eloping, climbing, loud vocalization, crying, property destruction, verbal and physical aggression, self-injurious behavior, and perseverative language.

40. In July 2010, the [Private School] staff tested [Student] on the goals and objectives in the District's April 13, 2010 IEP, using the same measurement criteria developed by the District's IEP team. The [Private School] team concluded that [Student] had mastered many of the objectives in the April 13, 2010 IEP, including 4 language arts objectives, one physical objective and one inter- intra-personal objective.

41. With the participation of the [Private School] IEP team and the parents, the District convened another IEP meeting on November 16, 2010. Many of the same goals in the April 13, 2010 IEP were incorporated into the District's November 16, 2010 IEP but again the objectives and criteria had been modified to reflect [Student]'s academic progress. The parents rejected the District's November 16, 2010 IEP and elected to keep [Student] enrolled at [Private School]. [Student] remains at [Private School] and [Student's] parents are seeking tuition reimbursement from the District.

42. The District is responsible for providing [Student] with a FAPE. If it fails to do so, it may be responsible for paying the cost of private placement elsewhere.

43. In this case, the ALJ finds that the credible and persuasive evidence establishes that [Student] made progress towards [Student's] academic and functional goals in [Student's] IEPs during the time [Student] was enrolled in the District and that the District was providing a FAPE. This does not mean that [Student] achieved every objective in [Student's] IEPs or that [Student] made progress on every goal, but the evidence shows that [Student] received some educational benefit while enrolled in the District.

44. The District provided ongoing progress reporting to the parents consistent with the quarterly reporting it provided to other parents of students who received report

cards. The District also provided the parents with an opportunity to fully participate in the drafting of [Student]'s IEPs.

45. The credible and persuasive evidence further establishes that the District's April 13, 2010 IEP goals are clear and measurable. They are supported by short-term objectives, all of which contain measuring criteria and baseline functioning. This fact is supported by the testimony of the [Private School] witnesses who testing [Student]'s performance on the April 13, 2010 goals.

46. Shortly after [Student] was enrolled at [Private School] the staff concluded and it is found as fact that [Student] had made progress towards and even mastered several of the objectives in the District's April 13, 2010 IEP. [Private School] was able to draw these conclusions by relying on the goals, objectives and criteria in the District's IEP.

47. There is no question that [Student] has made progress at [Private School] particularly in reducing [Student's] anxieties and conquering some of [Student's] fears. The [Private School] team has developed specific programs targeted to address [Student]'s anxieties around using public restrooms, reacting to spills, riding in airplanes and encountering dogs. Of particular note, recently, [Student] was able to access the airport and board a plane with [Student's] family for a family vacation. [Student] has also been able to use public restrooms with much less anxiety. But the fact that [Student] was making greater behavioral progress at [Private School] does not mean that [Student] was not receiving a FAPE at [School #2].

48. [Student]'s compulsions and avoidance behaviors can and have interfered with [Student's] learning. [Student's] behavioral problems began to escalate in 2008 and became so severe in 2010 that the District sought help from an autism specialist. A new BIP was drafted, but never implemented because [Student] was no longer enrolled in the District at the time it was created. If [Student] returns to the District, it is clear that [Student] needs a well-developed BIP to ensure that [Student's] behaviors do not impeded [Student's] educational opportunities.

49. Although the District was unable to find a long-lasting solution to [Student]'s increasing behavioral problems prior to May 7, 2010, the ALJ finds that the District worked collaboratively with the parents and other service providers to address [Student]'s behaviors as they arose.

DISCUSSION

The IDEA was enacted to ensure that all children with disabilities have access to "a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education ("FAPE") is defined as "special education and related services . . . provided in conformity with an individualized education program." 20 U.S.C. § 1401(9). The individualized education program ("IEP") is the basic mechanism through which the school district's obligation of providing a FAPE is achieved. *Murray*

by & Through *Murray v. Montrose County Sch. Dist. RE-1J*, 51 F.3d 921, 925 (10th Cir. 1995). The local school district is required to develop, implement and annually revise an IEP that is calculated to meet the student's specific needs and educate that student in the "least restrictive environment", meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public school classrooms alongside children who are not disabled." 20 U.S.C. §§ 1414(d) and 1412(a)(5)(A).

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke*, 540 F.3d 1143, 1148 (10th Cir. 2008). It is determined that a school district has provided a disabled student with a FAPE when demonstrable evidence from the student's educational records establishes that the student made some measureable progress on the goals and objectives in [Student's] IEP. *Id.* In this case, since the parents are seeking private school tuition reimbursement, they have the burden of establishing that the District's educational plan was not reasonably calculated to provide [Student] to some educational benefit.

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase "free appropriate public education". In that decision the Court held that the statutory definition of FAPE requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children; the school district's obligation extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit *id.* at 200.

Individualized Education Program

In order to comply with the requirements of the IDEA, a school district shall insure that each handicapped child's educational placement: Is determined at least annually; is based on his or her IEP; and is as close as possible to the child's home. See 20 U.S.C. § 1412(5)(B). The IEP consists of a written document containing:

- (A) a statement of the present levels of educational performance of such child;
- (B) a statement of annual goals, including short-term instructional objectives;
- (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;

- (D) the projected date for initiation and anticipated duration of such services; and
- (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

The parents argue that the District's April 13, 2010 IEP was deficient and not reasonably calculated to provide [Student] an appropriate education. They state that they rejected the April 13, 2010 IEP because [Student] had made little to no progress on [Student's] goals and objectives over the past few years and that the April 13, 2010 IEP provided no substantive change from the previous years' IEPs. The parents assert that the increasing gaps in [Student]'s education were becoming more pronounced and even evidencing regression. The parents also argue that the goals in the Districts IEPs over the years were too vague to be measured, that they were not, in fact, measured and that the IEPs lacked adequate data on [Student]'s progress. For the following reasons, the ALJ is not persuaded by the parents' arguments.

It is true that most, if not all, of the annual goals in [Student]'s IEPs between 2007 and 2010 are the same or similar. Each IEP contains several language arts, math, communication and basic language skills, physical and self-advocacy/self-determination goals. The goals are generally defined, but they are not so broadly written as to be vague. By way of example, one of the continued language arts goals is, "the student will improve writing skills as measured by the following objectives:"; and, one of the continued math goals is, "the student will communicate an understanding of number sense as measured by the following objectives:" The District's IEP team recommended continuing [Student]'s annual goals from year-to-year because they remained an appropriate component of [Student's] educational plan. And, while the goals remained the same, the objectives and the measuring criteria changed from year-to-year taking into account [Student]'s progress. As [Student] progressed, the objectives were modified or replaced with new objectives and/or the measuring criteria were modified to reflect a higher level of expectation. Sometimes [Student] did not make progress towards [Student's] goals and in those instances the team recommended continuing the objective to the following year.

The IDEA does not guarantee outcomes and an IEP does not have to provide the best conceivable education. The IDEA is designed to provide a floor not a ceiling. An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-7. The goals and objectives in [Student]'s April 13, 2010 IEPs are both clear and objectively measurable and [Student] was making progress towards those goals. The most persuasive evidence of this came from the [Private School] witnesses. Shortly after [Student]'s enrollment at [Private School], in July 2010, [Private School] used the District's goals, objectives and criteria in

the April 13, 2010 IEP to evaluate [Student]'s academic and functional performance. The [Private School] staff concluded that [Student] had made progress towards and/or mastered several of the goals/objectives in [Student's] IEP. [Private School] also adopted several of the District's goals and objectives, some with modifications, into its own IEP later that fall. Both the District's and [Private School]'s educational records show that [Student] was making some measureable progress on the goals and objectives in [Student's] April 13, 2010 IEP.

The parents are also critical of the lack of progress reporting contained in the IEPs. In this regard, the ALJ finds some merit in their argument. The 2006 IDEA Part B regulations require that every IEP include a description of how the child's progress toward meeting the annual goals will be measured; and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided. 34 C.F.R. 300.320 (a)(3).

The IEPs produced in this case contain some information in the progress reporting section about [Student]'s progress, but many of the entries are lacking in detail or contain only conclusory statements about whether [Student] was on target to meet the goal. Even [Director], the District's Director of Special Education, stated that he would have liked to have seen a little more substantive information in the progress reporting sections. That being said, however, it is the IEP team, not IDEA regulations that determine the frequency and content of the reports. 34 C.F.R. 300.320 (a)(3)(i).

In addition to the progress reporting information in the IEPs, [special education teacher] testified that she sent home periodic reports regarding [Student]'s progress throughout the year. [Mother] stated that she did not remember receiving any such reports; however, she did state that she was provided with copies of [Student]'s draft IEPs prior to each year's IEP meeting. There is no reason to believe [special education teacher] did not do as she stated nor is there any reason to believe that the parents did not receive any such reports. The fact remains, however, that the parents were provided all of [Student]'s draft IEPs prior to each meeting, were in constant communication with [special education teacher] either through face-to-face meetings or the back and forth notebook, and were able to meaningfully participate with the District in directing [Student]'s education.

Failure to comply with the progress reporting practices of the IDEA can amount to a substantive denial of FAPE or a procedural violation that may or may not deny FAPE. In *Beaverton School Dist.*, 30 IDELR 740 (SEA OR 1999), it was determined that a district's failure to provide a parent with a student's periodic reports was a procedural violation that did not constitute a denial of FAPE because the student continued to receive appropriate services and it did not deprive the parent of meaningful participation in directing her child's education. In the instant case, the ALJ concludes the same. While the District's progress reporting could have been more robust and informative, the absence of more detailed reports does not amount to a substantive denial of a FAPE.

Behavioral Intervention Plan

The parents contend that the District failed to comply with the IDEA by not performing a functional behavioral assessment (“FBA”) in order to develop a behavior plan to address [Student] increasing problem behaviors. A behavioral intervention plan (“BIP”) is a set of interventions, supports and strategies designed to assist a student whose behavior impedes [Student’s] own learning or the learning of others. 34 C.F.R. 300.324 (a)(2)(i). The IDEA requires districts to consider the need for a BIP when a student exhibits problem behavior, but it does not mandate the BIP’s format or contents. Districts have broad discretion in developing BIPs, which are to be done on a case-by-case basis, taking into account the particular student’s behavioral needs. 34 C.F.R. 300.530 (a).

There is no dispute that, at times, [Student]’s behavioral problems interfered with [Student’s] learning process. [Student] has exhibited disruptive classroom behaviors since, at least, 2007. [Student]’s 2007 IEP contains a BIP, which remained part of this IEP in the following years. [Student]’s problem behaviors began increasing in frequency and duration when [Student] transferred from [School #1] to [School #2] but [Student] did not start engaging in more severe self-harming behaviors until 2009. At that time, both the District and the parents had multiple discussions about what to do, including bringing in an autism specialist. By the spring of 2010 and based on observations of the school’s social worker, [social worker], the IEP team took steps to modify [Student]’s BIP. A behavior plan meeting was scheduled for May 10, 2010 and a new draft BIP was prepared by the District. The parents did not attend the May 10 meeting, however, as they had already made the decision to remove [Student] from [School #2] and enroll [Student] at [Private School].

The record does not establish whether the District performed a FBA either prior to implementing [Student]’s 2007 BIP or thereafter. However, a failure to do so would not necessarily violate the IDEA. Neither a FBA nor a BIP are required components of an IEP. 34 C.F.R. 300.320. And the only time the a district is required to perform a FBA is when the district, the parent(s) and member of the IEP team determine that a student’s conduct – the conduct giving rise to a change in placement (i.e. removal for 10 or more consecutive school days or a series of removals that constitute a pattern) - was a manifestation of the student’s disability. 34 C.F.R. 300.530(f). [Student]’s change in placement was a unilateral one made by [Student’s] parents based on an allegation that the District failed to provide a FAPE. The change in placement at issue in this proceeding does not trigger the mandatory FBA requirements of 34 C.F.R. 300.530(f). Therefore, any failure on the part of the District to perform a FBA does not violate the IDEA.

Least Restrictive Environment

In addition to providing personalized instruction for a handicapped child, a state must comply with the IDEA’s requirement that this personalized instruction be provided in the least restrictive environment (“LRE”). In order to do so, a state must adopt:

[P]rocedures to assure that, 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 that 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 is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B) (Supp. 1991).

Under Colorado law, each public agency must ensure that—

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 nondisabled; and

Special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

1 CCR § 301-8, 2220-R-5.02; 34 C.F.R. 300.114 (a)(2)(i) and (ii).

In *L.B. v. Nebo Sch. Dist.*, 379 F.3rd 966, 978 (10th Cir. 2004), the parents of a child diagnosed with autism, unilaterally removed their child from the Nebo School District and placed her at their own expense in a private preschool. Although the student's parents generally agreed with the goals in Nebo's proposed IEP, they disagreed with Nebo's proposal to place their child at Park View. Park View is a special education preschool populated primarily by disabled students, but includes thirty to fifty percent typically developing children who interact throughout the school day with the disabled children. Following the due process hearing, the hearing officer found that Nebo did not violate the LRE requirement and that Appellants had failed to present evidence that the student was progressing on her IEP at the private preschool. *Nebo* at 973. Appellants challenged that finding on appeal. The Tenth Circuit Court concluded that Park View was not the student's least restrictive environment. *Id.* at 975.

In its decision in *Nebo*, the court held:

In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum

extent appropriate. 20 U.S.C. § 1412(a)(5)(A). . . Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. (citing *Murray v. Montrose County Sch. Dist.*, 51 F3d 921, 926 (10th Cir. 1995)). Thus, the LRE requirement is a specific statutory mandate. It is not, as the district court in this case mistakenly believed, a question about educational methodology.

Nebo at 976.

In the instant case, the evidence shows that the District developed, implemented and annually revised an IEP that was calculated to meet [Student]'s specific needs and educate [Student] in the least restrictive environment. The ALJ concludes that [Student]'s placement at the District complies with the LRE mandate of the IDEA.

CONCLUSIONS OF LAW

1. A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 C.F.R. 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 CFR 300.513 (a)(2)(i) – (iii).
2. District developed, implemented and annually revised an IEP that was calculated to meet [Student]'s specific needs and educate [Student] in the least restrictive environment.
3. The District's April 13, 2010 IEP contained goals and objectives that were reasonably calculated for [Student] to receive educational benefit.
4. [Student] made some academic progress towards the goals in [Student's] April 13, 2010 IEP while [Student] was enrolled in the District.
5. The District offered [Student] a FAPE as required by the IDEA.

DECISION

A local education agency (LEA) is not required to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a FAPE available to the child and the parents elected to place the child in a private school or facility. 34 CFR 300.148 (a). The ALJ concludes that the Complainants have not met their burden of establishing a claim for

tuition reimbursement or related travel expenses associated with the costs of [Student]'s unilateral private school placement.

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

DATED AND SIGNED

July _____, 2012

MICHELLE A. NORCROSS
Administrative Law Judge