

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, Denver, Colorado 80203	
[Father] and [Mother], Complainants, vs. EL PASO COUNTY SCHOOL DISTRICT #11, Respondent.	▲ COURT USE ONLY ▲
	CASE NUMBER: EA 2015-0033
AGENCY DECISION	

On April 4, 2016, the undersigned Administrative Law Judge (“ALJ”) convened the evidentiary hearing in this matter in the offices of the Court in Colorado Springs. [Father] and [Mother], Complainants and parents of the Student, were present and appeared through their designated advocate, [Advocate]. Ms. Deborah S. Menkins and Mr. Brent Rychener appeared as counsel for Respondent El Paso County School District No. 11 (“Respondent” or the “District”). During the hearing, the ALJ admitted Hearing Exhibits No. 1 through No. 30, No. 33, No. 36, No. 37, No. 54, No. 61, and No. 62 from Respondent’s set and Hearing Exhibits A through E, H through L, and N through X from Complainant’s set. The proceedings were stenographically recorded. Following conclusion of the hearing, the parties each submitted a written closing brief.

ISSUES PRESENTED

As confirmed in a Procedural Order issued on January 29, 2016, the issues for determination in this case are as follows: Whether Respondent committed procedural violations in developing an Individualized Education Program (“IEP”) during August and December, 2015, IEP team meetings by precluding meaningful input from the Student’s parents and/or by predetermining the Student’s educational program and placement, including the areas of adaptive physical education and extended school year services, prior to the IEP process; whether Respondent failed to appropriately measure the Student’s progress in the areas of behaviors and cognition in implementing the August, 2015 IEP; whether the Student has received a free appropriate public education (“FAPE”) as evidenced by her substantive progress on goals and objectives present in the August, 2015 IEP; and whether the Respondent is unable to provide the Student with FAPE going forward such that Respondent is responsible for reimbursement of tuition and other direct expenses of private school. The latter issue included

consideration of the Student's need for a curriculum based on Advanced Behavioral Analysis ("ABA") and whether such curriculum can be provided by Respondent.

FINDINGS OF FACT:

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

1. The Student is a [age] girl who resides within the District in the Colorado Springs area. She has multiple medical diagnoses including epilepsy with significant seizure activity as well as autism spectrum disorder. She has undergone numerous brain surgeries and endured significant post-surgical complications. There is no dispute in this case that the Student is a child with a disability in need of special education supports and services.

2. The Student has significant language delays that are described in greater detail below. She also has impaired impulse control that can cause her to try to elope without notice from settings and situations, compounded by little or no awareness for her own safety. By way of example, [Mother] established that the Student's bed is surrounded by a soft enclosure and everything in her bedroom is locked away to keep her from getting up and getting into danger. In the mornings, after she takes medications, she has trouble with fine motor activity, including feeding herself breakfast. Her fine motor control is better in later parts of the day. She requires assistance with dressing and total assistance with bathing. [Father] and [Mother] monitor her through the night to assess any seizure activity.

3. The Student experiences seizures of different types. Some seizures have pronounced physical manifestations that are obvious to the untrained eye. She also has what were termed "absence seizures" that may only be detectable by noticing that her eyes have become fixed or appear to roll back. She has occasionally experienced thousands of the latter type of seizures during a single day. [Father] testified that the Student has also been seizure free for a period as long as nine months.

4. As is common for many people with autism, the Student engages in repetitive, self-stimulating actions such as creating and then re-creating piles of objects. Occasionally, this behavior can result from her desire to avoid completing an assigned task and, thus, can interfere with educational or developmental goals. She also tends to apply pressure with her chin to her chest or to objects as a different form of stimulation. Complainants termed this latter activity "chinning" and expressed concern that it can have safety implications for the Student. However, the behavior was not identified in the Student's health plan as requiring adult supervision and/or intervention. Hearing Exhibit W.

5. The Student has [siblings]. Recently she learned how to say her [sibling's] name. She was described by virtually every witness as a joyful child who enjoys play and interacting with other children and adults.

6. The Student and her family moved to Colorado from [Former State] in January, 2014. In [Former State], the Student was enrolled in a preschool program where she received special education services under an IEP first implemented in 2012. The programming in [Former State] featured a 1:1 instructional aide qualified in ABA, a methodology suited to children with autism that is discussed in more detail below.

7. Upon the family's arrival in Colorado, the Student was enrolled in preschool in the District for the remainder of the 2013-14 academic year. She re-enrolled in preschool for the 2014-15 year. During the 2014-15 year, the Student underwent another major surgery that caused her to be absent for the entire second quarter. Two of the Student's preschool teachers from the District testified that she was a pleasure to have in class and seemed to love participating in school.¹ She occasionally required hand-over-hand assistance to stay on task. The Student also demonstrated interest in and benefitted from interaction with other children in the preschool classes and on the playground. Neither teacher described any inappropriate, disruptive, or unsafe behaviors that interfered with her ability to benefit from preschool despite the fact that she did not have a 1:1 instructional aide during that time. Also neither teacher witnessed any type of seizure while the Student was at school, although neither was specifically aware of all indicators of an absence seizure.

8. In July, 2015, the parties reached a written settlement resolving issues raised by Complainants with regard to the Student's preschool enrollments. That settlement included a release by Complainants of all claims, actions, or demands that were or could have been raised prior to July 31, 2015, in relation to the District's obligations to the Student under the Individuals with Disabilities Education Act ("IDEA"), the IDEA reauthorization, and/or the Colorado Exceptional Children's Education Act ("ECEA"). Hearing Exhibit No. 1. As such, the scope of the issues in this hearing is limited to events after July, 2015.²

9. In accordance with the settlement agreement, the Student was placed in the District's Teacher Training Lab (the "Lab"), based at [Elementary School 3], for each afternoon of the first quarter of the 2015-16 academic year. The Lab is a training facility where District staff learn ABA principles from a qualified instructor at the same time as the curriculum is being delivered to the Student. While at the Lab, the Student was attended by an adult to provide supervision and support. The support consisted of an educational assistant-in-training, a special education teacher, or a related services provider such as an occupational, physical, or speech-language therapist. Although not expressly stated in the settlement agreement, this arrangement was understood to represent 1:1 support for the Student in her educational setting. Complainants typically observed the Student at the lab one time per week.

¹ [Preschool Teacher 1] had the Student for the spring of 2014 at [Elementary School 1], and [Preschool Teacher 2] had her for the 2014-2015 year at [Elementary School 2] (after Complainants moved to within the boundaries of [Elementary School 2]).

² Evidence regarding the Student's medical and educational history prior to July, 2015, was admitted to provide context for presently-existing claims.

10. During the mornings of the first and second quarter of the 2015-16 year, the Student attended the [Autism Center] (“[Autism Center]”) in [City], Colorado under a Medicaid program waiver. At [Autism Center] the Student was evaluated in multiple areas including cognition, executive functioning, language, play and social interaction. She primarily worked on language acquisition and behaviors using ABA methodology. [Clinical Director]³ and [Behavior Analyst 1]⁴ established that the Student responds well to a highly structured learning environment. If not redirected by an adult, the Student will tend to avoid following through on tasks, including engaging in self-stimulating activities or attempting to physically move away from where she is working. However, the record clearly established that the Student is receptive to appropriate redirection. She made substantial progress in the area of language at [Autism Center], but [Clinical Director] and [Behavior Analyst 1] both opined that the Student requires 1:1 adult supervision to retain focus on learning tasks. There was no evidence to establish that the Student has interaction with non-disabled peers when at [Autism Center].

11. The parties convened an IEP team meeting for the Student on August 17, 2015. Complainants attended with their advocate, [Advocate]. [Behavior Analyst 1] also attended at the request of Complainants. Numerous District personnel attended, including [Facilitator] as lead facilitator, [Preschool Teacher 2], [Kindergarten Teacher] who was contemplated to be the Student’s kindergarten teacher, [Speech Pathologist 1] as speech language pathologist and primary instructor at the District’s Lab,⁵ [Psychologist 1] as school psychologist, [Educational Diagnostician] as educational diagnostician, [Coordinator of Assistive Technology] as coordinator of assistive technology, [Physical Therapist 1] as physical therapist, [Occupational Therapist] as occupational therapist, [Behavioral Consultant] as behavioral consultant,⁶ and [Principal] as school principal. The IEP team meeting lasted approximately four hours.

12. The IEP team discussed the Student’s present levels of educational performance and recorded input from the parents in that section of the IEP document as well as in two other areas. Hearing Exhibit No. 5 at Bates No. pages 47, 48, 61, and 62. This input established her interests and strengths at home, some of her preferred foods and activities, difficulties in keeping her focused, health issues related to tiredness, overheating, vision, and hearing in addition to concerns about seizures, and the parents’ interest in effective collaboration between home and school. With regard to negative behaviors, the parents explained that these are more common if she is challenged or required to do something she is not interested in doing.

³ The Clinical Director at [Autism Center] and an ABA Board Certified Behavioral Analyst (“BCBA”). She provided opinion testimony as an expert in the treatment of children with autism using ABA methodology.

⁴ A Board Certified Assistant Behavior Analyst at [Autism Center]. She provided opinion testimony as an expert in ABA methodology as it relates to the education of people with autism spectrum disorder.

⁵ [Speech Pathologist 1] is also a BCBA. She provided opinion testimony as an expert in speech language pathology and use of ABA methodology in a school setting.

⁶ [Behavioral Consultant] is a BCBA employed by the District. He supports students and teachers in the areas of behavior. He provided opinion testimony as an expert in special education instruction using ABA interventions and support.

13. Other members of the team reviewed documentation for possible behavior issues identified in the Student's records. These behaviors included loud vocalizations or pushing items away as a sign of non-compliance, self injurious behavior such as pinching herself and "chinning", elopement in the form of attempting to move away from the task area, and visual self stimulation. In an observation of the Student prior to the IEP team meeting over 94 ten-second intervals, the Student demonstrated only four instances of vocalizations or pushing away and 1 instance of chinning. None of the other listed behaviors were noted. [Speech Pathologist 1] also conducted a two-hour observation of the Student prior to the IEP team meeting during which she observed the Student using excellent eye contact to initiate interactions with multiple adults, imitating signs and using gestures and simple vocalizations to get desired objects. She also avoided eye contact and pushed items away when she was disinterested.

14. [Physical Therapist 1] noted that the Student had gross motor skills that allow her adequate access to the school environment. She could climb stairs with an alternating gait and descend with "mark time" steps, placing both feet on each tread. She was able to ambulate on flat surfaces and slopes, and able to climb. She was not evaluated for physical education because that was not a component of the half-day placement at the Lab. [Physical Therapist 1] testified that additional assessment would be required before determining how the Student could access recess time and physical education.

15. [Occupational Therapist] established that she had worked with the Student during preschool and had conducted an occupational therapy observation prior to the August IEP team meeting. The Student demonstrated independent and spontaneous use of both hands to access materials in the classroom employing various different grips. She was independent with finger feeding and inconsistent in her use of utensils and an open cup. She required assistance with toileting. [Occupational Therapist] described the Student's skill with scissors as "emerging" and her writing as "pre-writing." The Student required hand over hand assistance to make a mark and was working on how to stop and start, aim her use of a crayon, and scribble. [Occupational Therapist] testified that she had observed some task avoidance and self-stimulation, but no tantrums or attempts to run away in class. With regard to the Student's "piling" activity, [Occupational Therapist] observed this during free time, but not when the Student was engaged in a directed activity. [Occupational Therapist] established that the Student does require substantial amounts of verbal prompting, especially when she is participating in a non-preferred activity. The ALJ found this testimony to be very credible and probative regarding the Student's behaviors in the school setting.

16. [Educational Diagnostician] reported to the IEP team an attempt to complete a standardized assessment of the Student's cognitive ability on August 10, 2015. [Educational Diagnostician] has a masters' degree in special education and has administered assessments to approximately 20 to 30 children with autism spectrum disorder and other medical complications over a period of ten years. [Educational Diagnostician] had not previously worked with the Student. She asked the Student questions related to her name, age, birthday, the alphabet, and counting to determine if the Student had the ability to participate in the Woodcock Johnson IV assessment.

Although [Educational Diagnostician] noted that the Student exhibited no negative behaviors and did not try to leave the testing room, she testified that the Student did not have the verbal skills or attention necessary to complete the Woodcock Johnson IV. The IEP team was also made aware of an attempt by the District psychologist, [Psychologist 1], to assess the Student's cognitive ability on August 10, 2015, using the Reynolds Intellectual Assessment Scale. [Psychologist 1] noted that the Student did not have the skills to complete a formal cognitive assessment. Hearing Exhibit No. 5 at Bates No. page 63. [Educational Diagnostician] did not identify any alternative assessment tool for determining the Student's cognitive abilities.

17. [Coordinator of Assistive Technology] testified regarding the District's determinations and actions regarding the Student's needs for assistive technology for communication. He observed the Student at the Lab on August 10, 2015, and spoke to her parents at the same time. He noted that she had adequate fine motor skills for use of a touch-activated device that would display pictures and produce a corresponding sound for the image using a recorded voice. At the time of the IEP team meeting, he knew the Student was using an assistive device for communication at home, but he did not know that she had an Apple iPad tablet with Bridge software. [Coordinator of Assistive Technology] recommended a GoTalk 4 device because it represented "entry level" technology for the Student. The GoTalk resembles a computer tablet. It displays four images on screen, with seven different available screens for a total of 28 images. A voice can be recorded for each image so that the user hears an actual person as opposed to a computer-generated voice when the image is selected. [Coordinator of Assistive Technology] testified that he was not specifically aware of the Student's cognitive abilities at the time of the IEP meeting. He typically suggests a trial with a simple device to ensure a student's success with it before moving to a more complex device. Once he saw Appellant using her iPad, he agreed that she was effective in using it. [Speech Pathologist 1] concurred with the initial selection of the GoTalk during the IEP and the plan to move to more complex devices as appropriate. She also felt that raised ridges that separated images on the GoTalk screen made it easier for the Student to use successfully. [Speech Pathologist 1] testified that this approach was explained to the Complainants.

18. In addition to the points noted above, [Preschool Teacher 2] testified that the Student made progress on her goals and objectives during the portions of the 2014-15 year that she attended school. She stated that she was aware of no data to establish that the Student's skills regress at a level that would warrant inclusion of extended school year services in the August, 2015 IEP.

19. [Facilitator] credibly testified that the IEP team heard and considered the contributions of the parents and their advocate. She established that the District members of the team listened to Complainants' requests and repeatedly asked them how they felt about various aspects of the IEP as it emerged. The IEP team reviewed a report prepared in May, 2015, by the [Therapy Center] ("[Therapy Center]") following a neuropsychological evaluation of the Student. Hearing Exhibit E. [Psychologist 2] testified at hearing and conducted the evaluation at the [Therapy Center]. His recommendations regarding appropriate "accommodations" in the Student's educational

setting as of May, 2015, were as follows: a special education setting for children with autism in a small quiet classroom; speech therapy; access to sensory stimuli to help with self-regulation; use of assistive technology and hands-on learning methods; and ABA therapy with positive reinforcement.

20. The IEP team created an IEP document that resulted in Student's placement in the District for the first quarter of the 2015-16 school year. Hearing Exhibit No. 5. She was identified as a child with a disability described as Other Health Impairment.⁷ The IEP specified that the team would convene again on October 19, 2015, to resolve the Student's placement for subsequent portions of the school year. *Id.* at Bates No. page 45. The IEP confirmed the Student's need for specialized instruction and identified communication as her primary area of need. Four goals were written for the Student in the areas of occupational therapy (1): increasing independent use of tools), and communication (3): independent use of pictures to express wants and needs, independent use of functional signs and/or gestures to express wants and needs, and increasing ability to correctly respond to verbal and visual cues. Each goal had corresponding measurable objectives associated with it. The IEP would be implemented every afternoon at the Lab.

21. [Speech Pathologist 1] established that the Lab implements ABA methodology in the form of positive behavior reinforcement. The program at the Lab was created with the support of [Behavior Analyst 2]⁸ [Behavior Analyst 2] trained [Speech Pathologist 1] and other staff in ABA therapy to qualify them as BCBAs. From her recent observation of the Lab, [Behavior Analyst 2] opined that it remains faithful to the principles of ABA. Specifically, staff attempt and evaluate the effectiveness of positive interventions, usually in the form of providing a stimulus, gauging the student's response, and then providing an appropriate consequence. If the response was compliant, then the consequence is reinforcement. If the response was non-compliant, then the consequence is redirection or demonstration of the desired outcome. The process is repeated for tasks until the student can begin to generalize the particular skill without cueing from the therapist. This latter aspect was described as "fading" as in gradually reducing the therapist's intervention until it is no longer needed. [Speech Pathologist 1] also described the concept of "errorless teaching" as that phrase is used in ABA therapy. Errorless teaching emphasizes positive reinforcement by guiding the Student to the correct response. As an example, if the Student was asked to point to a picture of a cat, but started to point to a dog, then the therapist would guide the Student's hand toward the cat so that there would not be an incorrect response. In this way, the Student avoids making a mistake that can result in confusion for her, and the therapist avoids saying "no" in response to the Student's initial indication.

22. During the first quarter of the 2015-16 academic year, the Student's IEP was implemented at the Lab every afternoon. During this time, [Speech Pathologist 1] worked directly with the Student and worked on training a teacher or an educational

⁷ This designation was modified from "Multiple Disabilities" in the prior IEP. [Facilitator] testified to initiating this change based on her understanding of the prerequisites of a "Multiple Disabilities" designation.

⁸ [Behavior Analyst 2] is a BCBA who provided opinion testimony as an expert in assessing and serving the educational and behavioral needs of children with autism using ABA therapy.

assistant in ABA methodology and how to implement it with the Student back in the Student's neighborhood school. [Speech Pathologist 1] established that the focus of the training is communication as a connection to behaviors. She modeled the therapy for the education assistant-in-training, explained the basis of what she was doing, and then asked the assistant to model the learned therapy with the Student. [Speech Pathologist 1] described the Student as a great child who is social and curious. [Speech Pathologist 1] testified that approximately two-thirds of the children that attend the lab are on the autism spectrum. Over twelve years, based on her estimate of nearly 100 teachers and 200 assistants that have come through the Lab, [Speech Pathologist 1] has worked with approximately 200 autistic children. She credibly described the Student's behaviors as very minimal and far less problematic than most other autistic children. Once the Student was used to the program, she could be expected to work on assigned tasks. Moreover, the Student was not allowed to leave or quit an assigned task once she had started it. She also showed interest in peers that she encountered at school.

23. Due to health reasons, the special educator that worked with the Student at the Lab during the first quarter of the 2015-16 school year had to resign her position with the District in early October. This meant that she was not available to transition with the Student back to her neighborhood school after October 19. [Principal] informed Complainants of this development and convened a meeting to discuss how to respond. Initially, the District offered to return the Student to the Lab for the second semester after a period during which the Lab would be closed for eight days (meaning the Student would be at [Elementary School 2] for that interval). Subsequently, the parties reached a secondary settlement agreement that resolved this issue and resulted in the Student being returned to the Lab through December 18, 2015, with a new special educator-in-training. Hearing Exhibit No. 9.

24. [Speech Pathologist 1] testified extensively about the Student's experience at the Lab and the extent to which she made progress on her IEP goals and objectives. Summary reports of progress at the conclusion of the first and second quarter demonstrated overall progress on her occupational goal and her communication goals. Hearing Exhibit No. 28 at Bates No. pages 331-333.⁹ In addition, [Speech Pathologist 1] recorded data for the Student's behaviors and ability to attend during class activities. The Student attempted to elope from the classroom one day, but never reached the point where she was at an exterior door. On two other occasions, the Student physically left the room, but only because she believed it was time to access her backpack. [Behavioral Consultant] credibly testified that the Student was not at risk of harm during any of these episodes and was effectively redirected back to the appropriate area. In other respects, the Student's ability to participate in circle time and directed activities increased during the fall of 2015 while her need for redirection by an adult decreased. Hearing Exhibit No. 29 at Bates No. pages 381-386. When she began at the Lab, she could attend for three to five minutes. This increased to 21 minutes. [Speech Pathologist 1] also established the Student's progress with language through the use of her assistive devices. Id at Bates No. page 387. While at the Lab,

⁹ Goal No. 2 was met at the end of the first quarter, so there is no summary of progress for the second quarter.

the Student increased her use of words from approximately five in August, to fifteen or twenty—albeit inconsistently—by December.

25. [Speech Pathologist 1] also testified regarding the Assessment of Basic Language and Learning Skills that was administered during the 2014-15 and 2015-16 school years. Data was collected in seventeen areas related to the Student's cooperation, receptive language, spontaneous vocalization, social interaction, and gross and fine motor skills. This data showed that the Student increased skills two or threefold in the categories just noted.

26. [Father] and [Mother] both testified that the Student made progress while at the Lab, although less progress than they would have preferred to see. [Mother] also emphasized that the Student's work at [Autism Center] and additional speech and language therapy she received at home may have contributed to this progress. However, no witness was able to say that the Student's progress was the result of one aspect of her multiple therapies, but not another. She received assistance from a number of sources and it appears that they produced positive results overall. No witness testified that the Student failed to make any progress academically or behaviorally at the Lab. Moreover, there was no convincing evidence that the Student's behaviors at the Lab interfered with her ability to access her educational program.

27. Complainants disagreed with the designation of Other Health Impairment as the primary disability listed in the August, 2015 IEP. The parents requested an Independent Education Evaluation ("IEE") and this was approved by the District. The IEE was undertaken by [Psychologist 3], who was qualified to testify as an expert in the areas of clinical psychology and cognitive assessments. [Psychologist 3] reviewed the Student's medical history and available information from prior assessments, obtained background facts from an interview with the parents, and observed the Student in various settings. She testified to the Student's complex medical situation including her seizure activity, brain surgeries, post-surgical infections, autism and pervasive developmental disorder diagnoses. [Psychologist 3] observed the Student at the Lab on October 5, 2015. She noted that the Student moved around the room to various activities including circle time, snack time, and free time. She did observe the Student attempt to avoid certain non-preferred tasks, but also saw that the Student was easily redirected on-task and required to complete an activity before moving on to something else. [Psychologist 3] did not see any problematic behaviors in the form of elopement, chinning, self-harm, or aggression. She also observed the Student at [Autism Center]. [Psychologist 3] opined that the tasks assigned to the Student at [Autism Center] were less academic and less functional than what she observed at the Lab.

28. [Psychologist 3] opined that the District's attempted assessment of the Student using the Woodcock Johnson instrument was appropriate. [Psychologist 3] administered the Vineland II Adaptive Behavior Assessment which is based on parent and teacher questionnaires¹⁰ that rate the subject's behaviors in the areas of communication, daily living skills, socialization, and motor skills. Hearing Exhibit 12 at

¹⁰ [Speech Pathologist 1] and [Behavior Analyst 1],

Bates No. page 121. [Psychologist 3] found that the ratings from home, the Lab, and [Autism Center] all established a composite score more than two standard deviations below the mean. This result is consistent with the criteria for Intellectual Disability, Part B, found in the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition. The Student's fine motor skills were perceived as an area of significant difficulty for her. Her receptive, expressive, and written communication skills fell in the low range, as did her personal, interpersonal and social skills. Adaptive skills were developing uniformly, but remained another area of significant difficulty for the Student.

29. [Psychologist 3] attempted to administer the Wechsler Nonverbal Scale of Ability to the Student. This assessment measures ability for those with language difficulties and is appropriate for children of the Student's age. The Student was unable to understand the nonverbal tasks that comprise the assessment, and just moved items away from her. [Psychologist 3] concluded that she was unable to complete the demands of a standardized cognitive assessment. [Psychologist 3] also concluded that the Student met the criteria of an Unspecified Intellectual Disability and formulated a number of suggestions based upon her evaluation of the Student. The suggestions included modifying the identification of the Student's primary disability in her IEP and attempting to re-assess her cognitive ability when she is older. Hearing Exhibit No. 12 at Bates No. page 124. She specifically noted that children with intellectual disabilities benefit from access to regular education peers in that they tend to progress at a higher level than those in a more restrictive environment. [Psychologist 3] opined that the Student's behaviors would not be expected to impair the benefits to her of maximum exposure to non-disabled peers. [Psychologist 3] also made a suggestion to consider development of social and living skill goals as a general need of children with intellectual disabilities. Her observations of the Student were always in a 1:1 setting with an adult, so [Psychologist 3] made no specific recommendation of a social or life skill goal.

30. On December 3, 2015, Complainants filed and served a Notice of Intent to Unilaterally Place Student in a Private Placement. This action triggered a further IEP team meeting that was convened on December 14, 2015. As a result of the December IEP meeting, the parents amended the Complaint in this proceeding to allege that the District's proposed IEP did not represent an offer of FAPE going forward.

31. The December, 2015 IEP was attended by [Father] and [Mother], their advocate [Advocate], [Clinical Director] and [Behavior Analyst 1] from [Autism Center], and [Psychologist 2] (by telephone). The representatives from the District were substantially similar to the August, 2015 IEP including [Facilitator], [Speech Pathologist 1], [Psychologist 1], [Coordinator of Assistive Technology], [Occupational Therapist], [Behavioral Consultant], and [Principal]. [Special Education Teacher] attended in the role of special education teacher from [Elementary School 2], and [Physical Therapist 1] was replaced by [Physical Therapist 2] as physical therapist. [Father] and [Facilitator] estimated that the IEP meeting lasted approximately 4.5 hours and considered the reports of [Psychologist 2], [Psychologist 3], and the Student's private physical and occupational therapists. [Father] described the meeting as the best and most

productive meeting between the parties to date even though Complainants did not agree with the District's offer.

32. The designation of the Student's primary area of disability was changed back to Multiple Disabilities from Other Health Impairment. The evidence established that the demonstrated unique needs of a child—rather than the designation of a certain named disability—form the basis for determining what services and supports are necessary to provide the child with a FAPE.

33. The IEP team updated the summary of the Student's Present Levels of Educational performance. Hearing Exhibit No. 6 at Bates No. page 67. The incidents of elopement described above in Finding of Fact No. 24 were included in the summary. Non-compliance during transfers from one activity to another were discussed as these had the greatest potential to impact her ability to acquire skills and develop in the public school setting. Such behaviors occurred during an average of 4.5 transitions per day during the first quarter at the Lab, and during 2.9 transitions during the second quarter. *Id.* In addition, the Student's behaviors related to task avoidance were discussed in detail. These included spontaneous vocalizations of "yay," the visual self-stimulation of rotating an object and gazing it at for 1-3 seconds, dropping objects, or leaning over out of her chair. Chinning was observed daily, but most frequently during free time. There is no mention of self-harming, aggression, or tantrums. In instances where the Student did engage in avoidance behaviors, she was able to be redirected without difficulty.

34. During the IEP team meeting, [Father] acknowledged that the Student had made some progress in the Lab. He also asserted that the Student needed 1:1 supervision by an adult trained in ABA therapy in all settings. Complainants felt that the Student was not ready to be placed in a classroom with regular education peers, even with 1:1 support, as they believed that her unwanted avoidance behaviors may be inadvertently reinforced. At hearing, [Father] testified that he would like the Student to be with non-disabled peers at some point in the future. [Psychologist 2] told the other IEP team members that a typical classroom might be overwhelming for the Student. At hearing, [Psychologist 2] testified that he had observed the Student at [Autism Center], but not in a school setting or with neuro-typical peers.¹¹

35. [Mother] established that the Student had begun using an Apple iPad tablet with Bridge software to assist with communication development during the spring of 2015. This technology was implemented in conjunction with speech language therapy provided to the Student at home by [Speech Pathologist 2].¹² Later, in the fall of 2015, the Student transitioned to a NovaChat assistive device loaned by [Speech Pathologist 2]'s firm. [Speech Pathologist 2] stated that the transition was not the result of any formal speech/language assessment, but rather on a trial basis. She opined that the use of assistive technology does not delay language development, and believed that the Student had made great progress in the area of language from September, 2015, to

¹¹ Based on his review of the Student's records, [Psychologist 2] also testified that the Student had made "a little progress" in the Lab. He expressed no opinion about the amount of progress.

¹² [Speech Pathologist 2] is a Speech Language Pathologist who provided opinion testimony as an expert in speech pathology and assistive technology.

the time of the hearing. [Speech Pathologist 2] advocated that a NovaChat device be used across all settings to minimize the confusion of using different devices.

36. The December IEP updated the assistive technology that the District would make available to the Student by specifying an iPad tablet with TouchChat HD software. [Coordinator of Assistive Technology] established that this device would function just the same as the NovaChat device that the Student was using at home.

37. The December IEP included the following service delivery statement: “[Student] will be provided constant adult supervision for safety, personal care, communication, eating, and redirection across all school settings. [Student] will receive direct Special Education services to work on pre-academic skills. *Services will include strategies and techniques consistent with those demonstrated at the [Lab] including, but not limited to consistent reinforcement, first/then strategies, visual prompts, and errorless teaching strategies.* Direct and Indirect school-based occupational therapy services for fine motor skills related manipulation of classroom tools and materials. Indirect [physical therapy] consultation. Consistent access to assistive technology. Direct and indirect speech language services in a small group or one on one setting.” Hearing Exhibit No. 6 at Bates No. page 76 (italics added).

38. [Speech Pathologist 1] established that the italicized portion of the service delivery statement amounted to a description of ABA methodology. She testified that the named strategies were those that she determined to be most effective with the Student during their time at the Lab. [Facilitator] clarified that the phrase “constant adult supervision ... across all school settings” described a 1:1 relationship between an adult and the Student at all times. The statement did not refer to a certain named adult because the IEP called for direct services to be provided by a special education teacher/team, a speech language pathologist, and an occupational therapist. *Id.*

39. The IEP specified five goals, with associated measurable objectives, in the areas of access/fine motor skills (tracing), communication (expressive language, independently following directions, and labeling items activities using pictures, signs, or gestures), and academics (independently matching items or pictures). [Speech Pathologist 1] established that Complainants had direct input on Goal #1 by suggesting that the Student trace her name, on Goal #2 by including the use of “carrier phrases”, and on Goal #3 by adding that following directions must take into account preferred and non-preferred tasks. *Id.* at Bates No. pages 71-75.

40. [Speech Pathologist 1] endorsed the adequacy of the IEP noting that it addresses the Student’s significant needs in areas of expressive and receptive language, as well as academics. She re-emphasized that she had not observed the Student being disruptive to others and did not anticipate that the Student’s behaviors would prevent significant benefit in the school setting. The IEP specified the Student’s placement at [Elementary School 2] with less than 40 percent of the Student’s day in the general education classroom. With regard to interaction with general education peers, [Speech Pathologist 1] and [Facilitator] established that the Student would be exposed to the general education classroom gradually and to the extent that it benefitted her. If

she became upset or overwhelmed in the regular education classroom, she could move into a quieter setting. Because the Student had not previously been placed with neuro-typical peers, [Speech Pathologist 1] and [Facilitator] described the process as a trial designed to determine what amount of integration suited the Student best. This concept was frequently termed a “continuum” of more or less restrictive settings tailored to the Student’s individualized needs but in no event amounting to greater than 40 percent in the general education setting.¹³

41. The IEP team noted that the Student primarily engaged in parallel play, but would share with adult prompting. She used eye contact to promote her needs and appeared to understand the intent of others in her daily routine. Social interaction is commonly a challenge for autistic people and Complainants advocated at hearing that the IEP should have included a goal in this area. [Speech Pathologist 1] confirmed that this was discussed at the December IEP team meeting. Based on her observation of the Student during the fall of 2015, [Speech Pathologist 1] testified that a socialization goal may have value for the Student only after she acquires more language skills to facilitate interactions with peers.

42. Complainants also requested that the District conduct a Functional Behavioral Assessment of the Student as a precursor to developing a Behavioral Intervention Plan. The District declined the request on the basis of input from [Preschool Teacher 2], [Speech Pathologist 1], [Psychologist 3], and [Behavioral Consultant] to the effect that the Student is not an aggressive child, nor one whose behaviors interfere with her own learning or that of others. These witnesses all testified that while the Student regularly demonstrated non-compliance, she was fairly easily redirected and able to complete assigned tasks. Additionally, it was not shown that her chinning behavior, demonstrated at school, is injurious and the Student was not observed engaging in any other self-harming activity.

43. With regard to extended school year (“ESY”) services, the Complainants supported by their advocate and [Behavior Analyst 1] advocated for these to be included in the December, 2015 IEP. ESY services are typically provided during the summer or other breaks in the school schedule to recoup regression in skills that is beyond what can be recovered normally upon return to school. There was evidence of regression during the 2014-2015 school year when the Student missed an entire quarter. However, this was also a time when she was experiencing significant medical problems. There was no evidence about whether the Student continued to receive the types of therapies and services during that absence that she receives currently at [Autism Center] and through Medicaid services delivered at home. It is not clear from the record whether the same amount of regression could be expected during a regular school break given the present circumstances of the Student’s health and continuing access to Medicaid services. Moreover, there was no detailed evidence of the amount of time necessary for the Student to recover the skills expected to be lost during a scheduled break. [Facilitator] testified that the parents also informed the District during

¹³ [Facilitator] testified that the direct special education and related services specified in the IEP amounted to 69 percent of the hours in a school week, leaving 31 percent in the regular education setting.

the December IEP team meeting that the Student would continue at [Autism Center] during the summer of 2016. That factor was considered by the District in declining to write ESY services into the December, 2015 offer.

44. As to adaptive physical education, [Physical Therapist 1] established that the Student has the gross motor skills to access the school environment. She did not evaluate the Student's ability to participate in regular physical education because that was not a feature of the half-day program at the Lab. [Facilitator] established that adaptive physical education consists of a separate program tailored to children who cannot participate in regular physical education with the benefit of reasonable accommodations. She also testified that the Complainants never raised the issue of adaptive physical education at the December, 2015 IEP team meeting. However, the District has the obligation to assess the Student in all areas of suspected disability and to make an offer of appropriate services regardless of whether the topic was raised by the parents. [Facilitator] established that the District was not in a position to evaluate the Student for the necessity of adaptive physical education because the Student had not attended a District school where participation in physical education was part of her day. [Facilitator] testified that if the Student attended school in the District under the December, 2015 IEP, then she would be evaluated in a number of physical education trials for determination of whether an offer of adaptive physical education was warranted.

45. Although not framed by the issues confirmed for hearing, Complainants elicited testimony regarding the Student's seizure activity and how the August and December, 2015 IEP documents treated this health concern. As noted above, the Student has a long history of seizures that manifest in various forms. The August and December IEP documents both include input (identical) from the District nurse regarding the Student's medical history, and references a seizure action plan. Hearing Exhibits No. 5, No. 6, and W. The seizure action plan details the types of seizures that the Student experiences: absence seizures, generalized tonic/clonic seizures, and complex partial seizures. The generalized or grand mal seizures feature fairly recognizable physical signs including loss of consciousness, stiffening of the body, and involuntary spasms. Absence seizures are more difficult to detect, as confirmed by [Father], because they may last only a few seconds and may be identifiable only as a momentary fixed gaze or eye roll. The seizure plan also details the appropriate responses to be taken in the event of each seizure type. A section entitled "Emergency Treatment" prompts personnel to monitor the Student and to take certain actions to prevent injury. For seizures lasting longer than two minutes, staff are instructed to contact 9-1-1. Lastly, all seizures are to be documented on log sheet (attached) and any seizure activity reported to the nurse and the parents. Hearing Exhibit W.

46. [Speech Pathologist 1] testified that she observed the Student at the Lab with [Father] present. [Father] identified that the Student was having an absence seizure and pointed it out to [Speech Pathologist 1]. He acknowledged to her that the signs can be very subtle and she conceded that he was better at detecting absence seizures than she was. [Speech Pathologist 1] established that [Behavioral Consultant] did observe the Student experiencing a seizure while she was at the Lab and informed

the parents of the incident by email. This evidence was not confirmed with [Behavioral Consultant] during his testimony. [Speech Pathologist 1] did not use the log sheet or count absence seizures.

47. From review of the Emergency Treatment protocol, and with the testimony of [Father] that absence seizures are difficult to detect and may occur thousands of times in a single day, the ALJ finds and concludes that the failure to log every absence seizure did not amount to a failure to implement the seizure plan. There was no testimony that any health-related intervention was necessary in response to an absence seizure, and to document every single occurrence would significantly detract from staff's ability to implement the educational aspects of the Student's IEP. [Speech Pathologist 1] or [Behavioral Consultant] should have used the log sheet to document the one seizure that he did observe, but because he timely advised the Student's parents of the episode, the ALJ finds that any procedural violation did not rise to the level of depriving the Student of the benefit of the IEP or a FAPE.

DISCUSSION

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

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008). 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 her IEP. *Id.* In this case, since Complainants are challenging the District's development of the August and December, 2015 IEPs, they have the burden of establishing that any failure to comply with the procedural requirements in developing such plans actually resulted in a denial

of FAPE,¹⁴ and that the proposed placements and services were not reasonably calculated to confer educational benefit on the Student.

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

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).

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

¹⁴ *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116, 1123 (10th Cir. 1999); *O’Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692, 707 (10th Cir. 1998).

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).

With regard to eligibility for ESY services, the Tenth Circuit has adopted a standard that requires the proponent of the services to establish that benefits accrued to the child during the regular school year will be significantly jeopardized if she is not provided an educational program during summer months. *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990). Analysis of ESY eligibility should take into account evidence of past regression, but also predictive factors that include the severity of the child's impairment, the recovery time from regression, the ability of the parents to provide an educational structure at home, and the availability of alternative resources. *Id* at 1030.

Lastly, The IDEA allows parents who believe their children are not receiving a FAPE in state schools the option of removing their children from public school and enrolling them in private school. The parents may then seek reimbursement of the costs of the private placement by the district. 20 U.S.C. § 1412(a)(10)(C)(ii). Parents who unilaterally place their child in a private school do so at their own financial risk and are only entitled to reimbursement of the costs of such placement by the District upon proof of two elements: (1) that the public placement violated the IDEA; and (2) that the private school placement was proper under the Act. *Andrew F. v. Douglas County School District RE-1*, 798 F.3d 1329, 1334 (10th Cir. 2015) [citing *Florence County Sch. Dist. v. Carter*, 510 U.S. 1, 15 (1993)].

Issue No. 1: Whether the Student's parents were precluded from providing meaningful input during the August and December, 2015 IEP team meetings.

Based on the record at hearing, the ALJ finds and concludes that Complainants were included as members of the Student's IEP team and afforded the opportunity to provide meaningful input. This conclusion is based on the evidence of the IEP team meetings lasting more than four hours each, and including not only the parents, but also their advocate, representatives from [Autism Center], and (in December) [Psychologist 2]. The report prepared by [Psychologist 2] was considered at both meetings and the report of [Psychologist 3]—prepared at the request of Complainants—was considered in December. The IEP documents reflect contributions from the Student's parents in the present levels of performance, in the parent input, in the narrative description, and in the drafting of the goals and objectives. The fact that the parents did not agree with the District's offer following the December IEP team meeting does not alter this conclusion given that [Father] testified that the meeting was productive and he thought he had been heard.

The record did not establish that the District "pre-determined" the content of the Student's IEPs without consideration for the parents' views. With regard to the August IEP, the Student's placement at the Lab was foreshadowed by the July, 2015, settlement agreement that Complainants executed. Complainants desired the implementation of an ABA methodology, and that was provided based on the testimony of [Behavior Analyst 2] and [Speech Pathologist 1]. Moreover, even though it was

unusual, the Student was enrolled in the Lab during the afternoon to accommodate her time at [Autism Center] in the morning. On the subject of assistive technology, the District demonstrated that it took a “trial and success” approach, starting with less complex communication devices and then adjusting according to the Student’s ability. [Speech Pathologist 2] acknowledged the appropriateness of that approach. [Speech Pathologist 1] established that the GoTalk 4 device was effective in assisting the Student’s language development. However, as Complainants demonstrated her ability with the Apple iPad, the District proceeded to acquire one for use at school. Additionally, the District obtained a software package compatible with the iPad to mirror the functionality of a NovaChat device that Student had transitioned to in her home speech therapy.

Turning to the Student’s behaviors and the parents’ request for a functional behavioral analysis, the evidence conclusively showed that negative behaviors were not interfering with her ability to learn at school or to interact with other children. The testimony of [Behavior Analyst 2], [Psychologist 3], [Preschool Teacher 1], [Preschool Teacher 2], [Occupational Therapist], [Speech Pathologist 1], and [Behavioral Consultant] was not contradicted by any witness or other evidence that formal behavioral analysis and intervention were necessary. Despite the Student’s manifested desire to avoid non-preferred tasks, she was consistently able to be redirected to finish the task without becoming aggressive or defiant. She was never observed to engage behaviors that were potentially harmful to herself or others.

Nor did the handling of ESY and/or adaptive physical education establish that the District pre-determined the Student’s IEP without parental input. Neither of these potential services were appropriate to consider in August, 2015, because the Lab placement did not feature physical education and it was contemplated to end well before the summer. The same is true with regard to development of a socialization goal as the Lab was a 1:1 setting where the Student had very limited interaction with other children. At the time of the December IEP team meeting, these services and the development of a goal in social skills were potentially ripe for consideration.

With regard to ESY, both sides presented essentially conclusory testimony about the Student’s propensity to regress. [Preschool Teacher 1] and [Preschool Teacher 2] testified that the Student did not need ESY while [Behavior Analyst 1] testified that she did. None of these witnesses established detailed facts to support their conclusions. Some of the other predictive factors were established, however. Through the parents’ diligent pursuit of available services, it is very evident that the Student benefits from a structured environment that supports the acquisition and maintenance of skills away from school. She received home therapy for behaviors and speech, and attended [Autism Center] as a Medicaid service during non-school hours where numerous skills were addressed. Significantly, the parents informed the District that the Student would continue at [Autism Center] as an “alternative resource” during the summer of 2016. The ALJ also made note of the fact that the Student’s extended absence during the 2014-15 year occurred in conjunction with a major medical episode for her. Thus the extent of her regression during that time may have been impacted by different predictive

factors as set forth in Finding of Fact No. 43. Complainants did not establish that ESY was warranted.

Based on the Student's gross motor skills and ability to access the school environment, there was no indication as of December, 2015 that she might not be able to participate in physical education without reasonable accommodations. [Facilitator] noted that the Student would have been able to attempt physical education with her general education peers during the spring of 2016 had the proffered IEP been implemented. During such trials, the District could have evaluated whether she was successful or whether, due to her disability, she needed a specially adapted physical education program for her. The fact that the parents did not raise this issue during the IEP meeting does not alter the District's duty to provide either accommodations or specially designed instruction to facilitate the Student's participation in physical education. It does, however, militate against a contention that the parents' concerns in this area were disregarded.

Based on the foregoing considerations, the ALJ finds and concludes that the Student's parents were afforded an adequate and meaningful opportunity to participate in the IEP process during the August and December, 2015 meetings. As to the first issue, Complainants did not establish a procedural violation on the part of the District.

Issue No. 2: Whether the District failed to measure the Student's progress in the areas of behaviors and cognition during the fall of 2015.

During the relevant period, the Student was at the Lab with [Speech Pathologist 1] as her primary special education teacher. [Speech Pathologist 1] testified to the Student's behaviors generally in very positive terms as noted in the Findings of Fact. In terms of measuring instances of negative behaviors, there was no specific IEP goal or measurable objective that specified data collection in that area. However, [Speech Pathologist 1] did record data to track various aspects of the Student's behaviors in the following areas: physical redirections during transitions, running or walking away during transitions, duration of tantrums, and time attending. Hearing Exhibit No. 29 at Bates No. pages 381-386. In addition, [Speech Pathologist 1] identified skills the Student acquired in the area of cooperation as part of the Assessment of Basic Language and Learning Skills. This data suggested improvement in the area of behaviors. The record also established three individual episodes where the Student attempted to leave the classroom when it was not time to do so. Neither [Speech Pathologist 1] nor [Behavioral Consultant] testified that these instances presented a safety risk, and neither observed any other instances of significantly negative behaviors, including aggression and/or self-injury. [Father] and [Mother], who routinely observed the Student at the Lab on a weekly basis, did not establish any pattern of behaviors that conflicted with the evidence of [Speech Pathologist 1]. The ALJ finds and concludes that the District's efforts to measure the Student's behaviors during the fall of 2015 were sufficient to enable the Student to receive a FAPE.

The Student's cognitive development during the implementation of the August, 2015 IEP was difficult to measure. On August 10, 2015, [Psychologist 1] determined

that the Student did not possess the prerequisite skills to complete a standardized cognitive assessment. [Educational Diagnostician] also established the Student's inability to participate in the Woodcock Johnson assessment prior to the August 17, 2015 IEP team meeting. Similarly, [Psychologist 3] found that the Student was unable to understand the tasks necessary to measure her cognitive ability with the Wechsler assessment in late September or early October, 2015, despite that instrument being nonverbal. Complainants presented no testimony to suggest that there was a valid methodology for assessing the Student's cognitive ability that was overlooked by [Psychologist 1], [Educational Diagnostician], and [Psychologist 3]. In fact, [Psychologist 2] had no criticism of the District's failure to complete a cognitive assessment of the Student based on his own observations of her ability to attend to the constituent tasks of such assessments. Based on these facts, the ALJ finds and determines that the District's inability to measure the Student's cognitive ability did not constitute a procedural violation or a failure to provide her with a FAPE.

Issue No. 3: Whether the Student's failure to make substantive progress on the goals and objectives in the August, 2015 IEP amounted to a denial of FAPE.

The Subject IEP had four goals with corresponding objectives. In a progress report dated October 18, 2015, [Speech Pathologist 1] documented that the Student had met Goal #2 in the area of communication. Hearing Exhibit No. 28 at Bates No. pages 331-332. With regard to Goal #1 in the area of fine motor access, the Student was to "increase the number of classroom tools she uses independently from 0 to 3 per day for 5 consecutive days." When the IEP was first implemented, it was documented that the Student only used the tools for stimulation, rather than their correct purpose. As of October 18, 2015, [Speech Pathologist 1] noted progress in the Student's ability to write, use scissors and use a glue stick. As of December 10, 2015, the Student had made further substantive progress on her fine motor goal. *Id* at Bates No. page 331.

With regard to Goal #3 in the area of communication, the Student was to express wants and needs through independent use of "at least 5 different functional signs/functional gestures." As of August, 2015, the Student did not use gestures to get preferred items. As of October 18, 2015, the Student was using a "high five" gesture in response to others, and making a sign to indicate "my turn/mine." She had also begun to use a sign to indicate her desire to go outside. As of December 10, 2015, the Student was noted to be using four gestures independently and working on pointing to desired items. *Id* at Bates No. pages 332-333.

With regard to Goal #4 in the area of communication, the Student was to increase the number of times she responds correctly to the verbal and visual cue "come here" at least 3 times a day for 5 consecutive days. This was a new skill as of August, 2015. As of October 18, 2015, [Speech Pathologist 1] documented that the Student would respond to a visual cue for "come here" in order to join a preferred activity. She was inconsistent in her response if the activity was unknown. As of December 10, 2015, the Student was responding willingly to an oral instruction to come to a desired

activity five times out of five trials. If the Student did not know the activity she was being summoned for, she would scan to determine if it was preferred or not. If preferred, she would respond. *Id* at Bates No. page 333.

When questioned in this area, [Speech Pathologist 1], [Father], and [Mother] all agreed that the Student made progress in the Lab. The [Father] and [Mother] were unsatisfied with the amount of progress and believed that some progress should be attributed to the home therapy and the program at [Autism Center]. However, there was no evidence that established how much of this progress was attributable to any source.

Based on the foregoing facts, the ALJ finds and concludes that the Student was making substantive progress on the goals set forth in the August, 2015 IEP. One goal was met, and the progress on Goal #1 and Goal #3 was meaningful. Although the progress on Goal #4 was contingent on her own feeling about the activity she was being summoned to, there was still identifiable progress on this new skill. These acquired skills in areas of need that had been identified for the Student clearly represent educational benefit to her. Thus, her demonstrated progress is consistent with a FAPE.

Issue No. 4: Whether the District failed to make an offer of FAPE in December, 2015, such that the Student's parents are entitled to reimbursement of costs at [Autism Center].

Incorporating some of the discussion from the previous issues, the December, 2015 IEP was developed with the effective input of the Student's parents. In addition, the IEP team considered information from [Psychologist 2] and [Psychologist 3]. [Speech Pathologist 1] established that the parents contributed to the drafting of the updated goals and objectives in a positive discussion that lasted over four hours.

The essential change from the previous IEP was the Student's transition from the restrictive environment of the Lab to a "continuum" placement at her neighborhood school. The IEP specified that the Student would participate in a regular education classroom for approximately 31 percent of the time, with the rest of her time being in quieter continuum settings. If dictated by the needs of the Student, the times that resulted in this ratio could be adjusted for her benefit. "Across all settings" the IEP assured constant adult supervision of the Student in a direct 1:1 relationship with an adult consistent with what had been implemented at the [Lab]. In addition, the IEP specified the use of ABA methodology that had been found effective with the Student through the use of terms such as consistent reinforcement, first/then strategies, visual prompts, and errorless teaching strategies. [Speech Pathologist 1] had worked on these strategies with the Student and trained the person primarily responsible for implementing the special education supports and services in ABA principles. Although Complainants wanted the IEP to incorporate specific mentions of "ABA" therapy in a "1:1" relationship, the IEP as written did commit the District to those principles using other terms.

The goals and objectives in the IEP continued to focus on the Student's primary deficits in communication and fine motor skills necessary to access the school

environment. Complainants presented no evidence that the IEP goals were not appropriate to meet the unique needs of the Student. With regard to goals not included in the IEP, the ALJ agrees that a goal for socialization should be considered after the Student has had the chance to develop more communication skills and participate in learning and free time activities with her neuro-typical peers. Complainants did not establish the need for a socialization goal as part of the December, 2015 IEP and did not present any evidence of what an appropriate socialization goal would be for the Student. As for the issues of ESY and/or adaptive physical education, the ALJ incorporates the above discussion here and finds that the IEP was not deficient by the omission of those services.

In terms of assistive technology, the District had acquired a tablet and the appropriate software to duplicate the communication device recommended and used by the Student's private speech therapist. There was no evidence that any other accommodations specified in the IEP were inadequate or inappropriate.

There was significant testimony around the extent to which exposure to non-disabled peers would benefit the Student. The District personnel consistently established that the Student is interested in her peers and can be expected to attempt to engage with them in a positive way. [Psychologist 3] emphasized that the Student, as a child with an intellectual disability, will benefit from access to her regular education peers, and based on research, should progress to a higher level than if she did not have access. There was no substantial evidence from which to conclude that the Student might represent any sort of danger herself or other children, or that her behaviors would deprive either of the benefit of exposure. Moreover, as noted above, the Student would have the opportunity to work on skills apart from regular education children during the majority of school time, and the District pledged to be flexible in this regard to maximize the benefit of the proposed placement. Mindful of the IDEA's mandate that "to the maximum extent appropriate," disabled children should be educated in public school classrooms alongside children who are not disabled, the ALJ finds and concludes that the December, 2015 IEP represented a reasonable attempt to integrate the Student into the regular education setting with the benefit of flexibility, constant adult supervision, appropriate accommodations, and the proven ABA methodology. By comparison, the ALJ finds the proposed alternative placement at [Autism Center] where she would have zero interaction with non-disabled peers, to be overly restrictive and contrary to the weight of the evidence regarding the likely educational benefits from the Student's exposure to such peers.

DECISION

The ALJ concludes that the Complainants failed to meet their burden of establishing that the Student was denied a free appropriate education as required under the Individuals with Disabilities Education Act in the development of the Student's August 17, 2015 IEP, in the implementation of that IEP, and in the development of the December 14, 2015 IEP. The December, 2015 IEP was reasonably calculated to confer some educational benefit on the Student given the unique needs associated with her

disabilities. The alternative private placement proposed by the Student's parents did not conform to the requirement of special education being provided in the least restrictive environment appropriate to the Student's needs. Complainants are not entitled to any relief requested.

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

May 16, 2016

KEITH J. KIRCHUBEL
Administrative Law Judge