STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
HARRISON SCHOOL DISTRICT #2, Complainant, vs. **[PARENT], on behalf of [STUDENT], a minor,** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **EA 2016-0024**

DECISION

Complainant ("School District") filed this due process complaint after a State Complaints Officer found that the School District's proposed IEP (Individualized Education Program) did not provide for a free appropriate public education (FAPE). This proceeding is subject to the provisions of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.,* as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, § 2220-R-6.02. Hearing was held November 28 through December 1, 2016, before Administrative Law Judge (ALJ) Robert Spencer at the Office of Administrative Courts Regional Office, 2864 S. Circle, Suite 810, Colorado Springs, Colorado. Wm. Kelly Dude, Esq., Anderson, Dude & Lebel, P.C., represented the School District. Michael C. Cook, Esq., and Tyler J. Varriano, Esq., Cook Varriano, P.C., represented Respondent.

Case Summary

[Student] is a [age] year-old boy with severe autism.[1] The School District determined that he was eligible for special education, but despite many efforts could not find an educational placement within the School District that could effectively deal with his disability related behavioral problems. In 2013, the School District agreed to Respondent's request to place [Student] at a private facility in Colorado Springs known as [Private Facility]. Once placed at [Private Facility], [Student]'s behaviors diminished to the point that he was able to make progress academically.

In 2014, the School District proposed moving [Student] from [Private Facility] to a public school operated by the Pike Peak BOCES, known as the [Public School].[2] Respondent objected to this transfer and was able to prevent it by successfully pursuing a

1 At Respondent's request, [Student] was referred to by his proper name throughout the hearing. However, in compliance with 1 CCR 301-8, § 6.02(7.5)(h)(ii)(D), the ALJ will use his initials in this decision.

2 The Pikes Peak Board of Cooperative Educational Services (BOCES) is a cooperative of local school districts in the Colorado Springs area that provides services to its member school districts.

state complaint. In her decision, the State Complaints Officer (SCO) ordered that any future attempt to transfer [Student] must comply with certain procedures. [Student] remained at [Private Facility] until April 2016 when the School again decided to transfer him to the [Public School]. Respondent filed a second state complaint to prevent the transfer, and again received a favorable decision. This time, however, the School District filed a due process complaint seeking a determination that the School District's proposal to transfer [Student] to the [Public School] was an appropriate offer of FAPE. Further, the School District seeks an order that if Respondent chooses to keep [Student] at [Private Facility], it be deemed a unilateral placement not at the School District's expense.[3]

In response to the complaint, Respondent says that not only is the [Public School] incapable of providing [Student] with FAPE, but that the School District's failure to comply with the procedures ordered by the SCO and with regulatory procedural safeguards also amounts to a denial of FAPE. Respondent seeks to maintain [Student] at [Private Facility] at School District expense.

Shortly before the hearing, Respondent filed a motion for summary judgment, contending that the undisputed facts entitled her to judgment as a matter of law. The School District opposed the motion. After considering the parties' briefs, and oral argument on the first morning of the hearing, the ALJ determined that significant issues of material fact could not be resolved without taking the testimony of witnesses. Accordingly, the motion was denied. Summary judgment is proper only when the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Summary judgment is a drastic remedy and should be granted only upon a clear showing that there is no genuine issue as to any material fact. *Brodeur v. Am. Home Assurance Co.*, 169 P.3d 139, 146 (Colo. 2007); C.R.C.P. 56(c).

Based upon the evidence presented at the hearing, the ALJ now concludes that the School District made an offer of FAPE, and that any procedural violations that may have occurred did not deprive [Student] of FAPE or educational benefit, and did not deprive Respondent of her right to meaningfully participate in the decision-making process. Accordingly, judgment is entered in favor of the School District.

Findings of Fact

[Student] and [Private Facility]

1. [Student] is a [age] year-old boy (d.o.b. [Date of Birth]) with severe autism. His disability manifests in extremely low cognitive function, speech and language impairments, sensory processing difficulties, and significant behavioral problems including aggression, self-injury, elopement, and non-compliance.

2. Due to his disability, [Student] is eligible for special education services

3 A due process hearing decision that addresses the same issue as a state complaint supersedes the state complaint decision. *Vultaggio v. Bd. of Educ.,* 343 F.3d 598, 601 (2nd Cir. 2003).

adequate to provide FAPE.

3. Respondent, [Student], and [Student]'s older brother moved to the School District's catchment area in November 2008 and [Student] started school in January 2009. Between that date and June 2013, the School District placed [Student] at a number of different schools, none of which proved successful in managing [Student]'s behavior to the point that he could be academically successful.[4]

4. In June 2013, at Respondent's request, the School District agreed to place [Student] at a private facility in Colorado Springs known as the [Private Facility]. [Private Facility] is a private, non-profit treatment facility providing data-driven, evidence-based, individualized, one-to-one therapy utilizing the principles of applied behavioral analysis.

5. Although [Private Facility] is not a "school" certified by the Colorado Department of Education and does not have licensed special education teachers on its staff, it does provide education to its "clients."[5] Each client is assigned to a "lead teacher" who is a Board Certified Behavioral Analyst (BCBA), and to several "line therapists" who are trained in ABA.

6. [Private Facility] focuses on behavioral management because uncontrolled behavior seriously interferes with academic progress.

7. Prior to admission to [Private Facility], [Student] was non-verbal and exhibited serious behavioral problems, including head-banging to the point that he had to wear a helmet to avoid self-injury. Since enrolling at [Private Facility], most of [Student]'s negative behaviors have significantly improved. Head-banging diminished to the point he no longer requires a helmet. He no longer requires medication to control his behaviors and he has achieved some verbal skills.

8. [Private Facility] maintains a Behavior Support Plan (BSP) for [Student] that tracks the frequency of his behaviors over time. Ex. E. BSP charts show that incidents of head-banging, scripting (out-of-context vocalizations), inappropriate vocalizations (e.g. high-pitched whining or low guttural noises), echolalia (meaningless repetition of words spoken by others), chinning (rubbing chin against objects or body parts of self or others), mouthing, and self-biting have all decreased over time. Ex. E.

9. The frequency of certain behaviors increased over time, including non-compliance with staff demands, body tensing, and physical aggression. Ex. E. According to [Student]'s lead teacher, [Lead Teacher], although the frequency of non-compliance increased, the duration of such incidents decreased. The record does not disclose whether this is also true for body tensing and physical aggression.

10. [Private Facility] uses a curriculum developed by the Center for Autism & Related Disorders, Inc. (C.A.R.D.). It is based upon ABA research and focuses upon eight areas of development: Academic, Cognition, Social, Language, Executive Functions, Adaptive, Plan, and Motor. Ex. F.

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4 The schools included Wildflower preschool; Turman Elementary; Sand Creek Elementary; Giberson Elementary; and [Facility School]. Ex. 2, pp. 1-2.

5 [Private Facility] staff refer to their students as "clients."

11. [Private Facility] submits quarterly reports of [Student]'s progress to the School District in each area of development. Composite charts for seven of the eight areas of development (Language, Social, Play, Cognition, Adaptive, Motor, and Executive Function), show improvement over the time [Student] has been at [Private Facility]. Ex. D, pp. i - iv. The eighth area of development, Academic, is not included in the composite charting, but quarterly reports for the second and third quarters of 2016 suggest [Student] has made progress in basic academics (such as identifying community helpers, the value of money, sight words, and numbers). Ex. D, 2nd qtr. pp. 15-20; 3rd qtr. pp. 13-18.

12. Respondent is extremely pleased with the progress her son has made at [Private Facility], and wants him to continue there.

The SCO Order

13. In April 2014, the School District convened an IEP meeting to discuss [Student]'s services and placement for the following school year. According to Respondent, the School District agreed to continue [Student] at [Private Facility], but later notified her that [Student] would be placed at the [Public School] instead.

14. In August 2014, Respondent and three other complainants filed a state complaint challenging the School District's decision to remove their children from [Private Facility].

15. Pursuant to the procedures described at 34 CFR §§ 300.151 to 153, an aggrieved parent may, as an alternative to a formal due process complaint, elect to file a complaint with the state educational agency (SEA), in this case the Colorado Department of Education (CDE). When a "state complaint" is filed, the SEA appoints a State Complaints Officer (SCO) to investigate the alleged IDEA violations and exercise the SEA's supervisory authority to order corrective action if a violation is found. Unlike a formal due process hearing, this procedure does not allow the parties to call or cross-examine witnesses, or exercise other rights associated with an adversarial due process hearing.

16. In October 2014, the SCO issued a decision finding that the School District's plan to change [Student]'s placement from [Private Facility] to [Public School] violated the IDEA. As a remedy, the SCO ordered the School District to resume funding [Student]'s placement at [Private Facility] and prohibited any future change of placement until the following three conditions had been met:

a. The School District conducted comprehensive evaluations of [Student] in accordance with the requirements of the IDEA;

b. Staff members from any new placement proposed by the School District, which staff would have the responsibility for providing special education and related services to [Student], observed [Student] at [Private Facility] to understand the nature of his educational and behavioral functioning;

c. The School District convened an IEP meeting, facilitated by a neutral facilitator not employed by the School District, that complied with all procedural requirements of the IDEA, particularly all of the provisions that the SCO found the

School District violated, and developed an IEP that included a description of placement sufficient to allow Respondent to understand what was being proposed.

Ex. A.[6]

17. As required by the SCO, the School District filed with the CDE a corrective action plan to address the violations found.

18. SCO decisions are not appealable, but both parties retain the right to request a formal due process hearing if dissatisfied with the decision. Such a hearing is a de novo proceeding.[7]

19. The School District did not file a due process complaint to challenge the SCO decision.

20. [Student] remained at [Private Facility] for the 2014/2015 school year.

21. In April 2015, the School District convened an annual IEP meeting to discuss [Student]'s services and placement for the next school year. At the meeting, the parties agreed that, due the severity of his disability and the extent of his needs, [Student] should continue receiving his special education services in a "separate school." Ex. B.

22. As required by the IDEA, disabled students must be educated in the least restrictive environment (LRE). LRE means that, *to the maximum extent appropriate*, children with disabilities must be educated with children who are nondisabled.

23. A "separate school," as the term is used in the IEP, is an educational facility that specializes in servicing children with the student's disability and does not service nondisabled students. On the continuum, it is the most restrictive educational setting. The parties chose a separate school placement because they agreed that a less restrictive setting was not appropriate for [Student].

24. Although the 2015 IEP did not specifically identify the separate school, the parties agreed that [Student] would remain enrolled at [Private Facility].

The 2016 Evaluation and IEP Meeting

25. The IDEA requires that children receiving special education be re-evaluated at least once every three years to determine the child's continuing eligibility for special education and the child's educational needs.

26. [Student]'s triennial re-evaluation was conducted in January and February 2016. The evaluation consisted of a battery of assessments conducted by school psychologist [School Psychologist], school social worker [School Social Worker], speech language pathologist [Speech Language Pathologist], and occupational therapist [Occupational Therapist].

27. All the evaluators are School District employees. Each evaluator reviewed

6 For purposes of privacy, the SCO decision refers to [Student] as "Stanley."

7 The ALJ adopts, as if fully set forth herein, the Order Regarding Effect to be Given SCO Decisions, dated Nov. 3, 2016.

portions of [Student]'s records, spoke with one or more members of [Private Facility] staff, and observed [Student] at [Private Facility] on one or more dates for periods of 45 minutes to two hours. Several of the assessments included input from Respondent in the form of surveys or questionnaires regarding [Student]'s behavior and cognition.

28. [School Psychologist] compiled the evaluators' assessments into a Pscyho-Educational Report dated March 8, 2016. Ex. 3. Significant findings included:

- Because of [Student]'s severe language deficits, a full standardized cognitive assessment was not performed. However, an assessment of nonverbal intelligence (Kauffman Assessment Battery for Children, Second Edition) resulted in scores below or far below average in every subtest.

- An assessment of academic achievement in reading, math, and written language (Kauffman Test of Educational Achievement, Third Edition) resulted in "lower extreme" scores in every subtest.

- The Behavior Assessment System for Children, Second Edition, assessed [Student]'s behaviors and emotions based upon surveys completed by Respondent, [Student]'s lead teacher at [Private Facility], and by another [Private Facility] staff member. The assessment disclosed clinically significant deficits especially in the areas of atypical behavior, withdrawal, and adaptive skills. However, [Student]'s level of aggression, misconduct, depression, anxiety, and somatization were all rated minimal to no concern.

- The Adaptive Behavior Assessment System, Second Edition, measures the skills that are important to everyday life, such as ability to communicate, social and academic ability, effective function at home and in the community, and engagement in self-care. The assessment was based upon surveys completed by the three individuals noted above. The assessment disclosed extremely low adaptive ability in every skill area assessed.

- An occupational therapy assessment disclosed that, due to his sensory processing disorder, [Student] is over-responsive to sound, but is under-responsive to touch and lacks body awareness and balance. He appears awkward and clumsy, lacks the ability to accurately judge the amount of force to use in routine situations, and has a high tolerance to pain (thus, prone to crashing into things and self-injury).

- An assessment of [Student]'s receptive and pragmatic language skills showed severe impairment.

- An assessment of the degree of [Student]'s autism, using the Childhood Autism Rating Scale, Second Edition, confirmed that [Student] has "severe symptoms."

29. As part of the evaluation, school social worker [School Social Worker] performed a Functional Behavior Assessment that identified five behaviors targeted for reduction: non-compliance with demands, elopement, self-injurious behavior, chinning,

and physical aggression. The behaviors tend to arise when [Student] is asked to complete a non-preferred task. Without strong support, they interfere with his ability to access education. Ex. 14.

30. The Psycho-Educational Report concluded with five recommendations for [Student]'s instructional setting:

- Place [Student] in a classroom and program that are highly structured with a small staff to student ratio.
- To ensure [Student]'s safety, an adult must be present with him at all times, and during times of attempted self-injury at least two adults must be present.
- To help [Student] remain more engaged with instruction, allow frequent breaks with sensory rich activities, seat him close to an adult, shorten his assignments, simplify and repeat directions, present information in different modalities, and reduce visual distractions.
- Continue practice with fine motor skills.
- Use social/emotional interventions that help [Student] understand his social interactions and control his behavior and emotions.

Ex. 3, p. 27.

31. A child's needs, educational services, and placement are determined by an IEP team. Members of the team must include, at a minimum; the child's parent(s), a regular education teacher if the child is or may be placed in a regular education environment, a special education teacher, a supervisory representative of the school district, and at the discretion of the parent(s) any other person who has knowledge or special expertise regarding the child.

32. Following appropriate notice, an IEP meeting was begun on March 29, 2016 and continued on April 5, 2016. The following individuals attended both meetings:

- Respondent
- At Respondent's request, two members of the [Private Facility] staff were present; clinical director [Clinical Director], and lead teacher [Lead Teacher]
- Special education coordinator [Special Education Coordinator 1]
- Special education coordinator [Special Education Coordinator 2]
- School psychologist [School Psychologist]
- [Elementary School] special education teacher [Special Education Teacher]
- [Elementary School] assistant principal [Assistant Principal]
- [Elementary School] school social worker [School Social Worker]

- Speech language pathologist [Speech Language Pathologist]
- Occupational therapist [Occupational Therapist]

33. [Special Education Coordinator 1] and [Special Education Coordinator 2] jointly served as the School District's supervisory representatives. [School Psychologist] assumed the role of meeting facilitator.

34. Staff members from [Elementary School] ([Assistant Principal], [Special Education Teacher], and [School Social Worker]) were present because [Elementary School] is [Student]'s "home school," in that it is the school he would attend but for his out-of-district placement. When, as in this case, the student is placed in a private facility, the home school special education teacher has the responsibility to draft the student's IEP.

35. As was his obligation, [Special Education Teacher] prepared a draft IEP in advance of the meeting and distributed a copy to IEP team members. [Special Education Teacher] based the draft primarily on his review of [Student]'s 2015 IEP and the 2016 Psycho-Educational Report. The IEP, as drafted by [Special Education Teacher], addressed [Student]'s present levels of academic achievement and functional performance; proposed goals, accommodations and modifications; and a proposed service delivery statement. The draft IEP did not propose a physical location where those services would be delivered.

36. As facilitator, [School Psychologist] solicited discussion of each topic covered by the draft IEP. Generally, all team members were in agreement with the statement of [Student]'s present levels of academic achievement and functional performance. The team also agreed upon a revised Behavioral Intervention Plan (BIP) that incorporated additional behaviors suggested by Respondent and the [Private Facility] representatives.

37. When the discussion moved to the IEP's educational goals, Respondent and the [Private Facility] representatives challenged the accuracy of some of the baseline data and disagreed with some of the goals. However, after collaborative discussion, the baseline data was corrected and the team agreed upon revised academic goals.

38. The team then agreed upon the appropriate accommodations and modifications, and the services to be delivered under the IEP, including extended school year (ESY) services. The IEP services included:

- 1,500 minutes per week of special education instruction
- 300 minutes per week of social/emotional intervention
- 90 minutes monthly of direct speech/language therapy and 15 minutes per month of indirect therapy[8]
- 60 minutes quarterly of indirect occupational therapy

8 "Direct" service is face-to-face contact between the therapist and the student. "Indirect" service is consultation by the therapist with the student's teacher or other providers.

- 30 minutes per week of case management services

Ex. 13, p. 29.

39. The levels of service stated in the IEP are minimums. It was understood that additional service may be provided as necessary.

40. Next, the IEP team discussed the appropriate LRE. A four-step continuum was considered, ranging from placement in a general education classroom at least 80 percent of the time (least restrictive) to placement in a separate school (most restrictive). After some discussion, the team unanimously agreed that although a separate school deprived [Student] of in-school exposure to nondisabled students, it was nonetheless the appropriate placement to ensure [Student]'s safety and to accommodate his emotional and academic ability level. The team agreed that a separate school would provide the higher staff to student ratio necessary to meet [Student]'s needs, and would offer a wider variety of appropriate sensory tools and accommodations.

41. Finally, the team discussed the facility that would best meet [Student]'s needs. To begin the discussion, [Special Education Coordinator 1] proposed three possible alternatives: [Facility School], [Private Facility], and the Pikes Peak BOCES [Public School]. No team member proposed any additional alternatives.

42. [School Psychologist] asked the team members to discuss each option, identifying the pro's and con's for each which she recorded on large piece of paper for the team's review. Respondent vehemently objected to [Facility School] because [Student] had been there before and was not successful. The team agreed that [Facility School] was not acceptable and it was quickly rejected.

43. Discussion then moved to the choice between [Private Facility] and [Public School]. Respondent and the [Private Facility] representatives strongly believed [Student] should continue at [Private Facility] because he was successful there. His negative behaviors significantly decreased since his enrollment, and he made academic progress. Furthermore, they believed that transitioning [Student] to another location would be traumatic for him, as it would be for any child with severe autism. They pointed out that [Student] had been unsuccessful at a number of previous locations chosen by the School District, and only at [Private Facility] was he successful. Furthermore, Respondent had visited [Public School] for 30 minutes two years previously and believed that the environment was unstructured and the students were allowed to "do whatever they want." Respondent and the [Private Facility] representatives vehemently questioned why the School District would jeopardize [Student]'s progress by moving him to another school.

44. Despite these arguments, the School District team members believed that transition to the [Public School] would be in [Student]'s best interests. Overall, they felt that because [Student]'s behaviors had improved while at [Private Facility], he could now be transferred to a "more academic" setting where he could receive a higher level of academic instruction while still receiving the behavioral support he requires. Key to this belief was the fact that the [Public School] is staffed with licensed special education teachers, whereas [Private Facility] is not. They also believed [Private Facility] is oriented more

towards treatment than education. The School District team members acknowledged that transition to the [Public School] may be difficult for [Student], but felt it was not right to deny him the opportunity to progress academically because of a fear of transition. They also believed that the longer the decision to transfer was delayed, the more difficult the transition would be.

45. The School District team members were also swayed by the fact that the OT and SLP services required by the IEP could be provided by [Public School] staff therapists. Although [Student] was receiving OT and SLP therapy privately at [Private Facility], [Private Facility] had no OT or SLP therapists on staff to fulfill the obligations of the IEP.

46. In addition, the School District IEP team members felt that the [Public School] would offer [Student] greater opportunity for peer interactions. Those School District members who observed [Student] at [Private Facility] ([Speech Language Pathologist], [School Social Worker], [Occupational Therapist], [School Psychologist], [Special Education Coordinator 1], and [Special Education Coordinator 2]) noted that during their visits to [Private Facility] [Student] appeared to interact primarily with adults, although other children were at times present.

47. Following substantial discussion, [School Psychologist] called for a vote by each team member. As the facilitator, [School Psychologist] did not express her opinion or vote. Although Respondent and the two [Private Facility] representatives voted for [Private Facility], every School District team member (except [School Psychologist] who did not vote) voted for the [Public School].

48. Following the vote, [School Psychologist] observed that the majority of team members agreed that [Student]'s placement should be at [Public School]. [School Psychologist] expressed the opinion that [Student] should remain at [Private Facility] until the end of the school year.

49. After unsuccessfully challenging the decision to transition [Student] to [Public School], Respondent concluded that her opinion did not matter. Therefore she and the [Private Facility] representatives abruptly left the meeting.

50. Immediately following the meeting, [School Psychologist] prepared a Prior Written Notice of Special Education Action summarizing the IEP team's discussions and the actions decided upon. [School Psychologist] characterized the decision to place [Student] at [Public School] as the IEP team's "final" decision. Ex. 8, p. 3.

51. On May 5, 2016, Respondent filed a second state complaint challenging the School District's decision to change her son's placement to the [Public School]. After investigation, the SCO rendered another decision adverse to School District.

52. On August 1, 2016, the School District sought relief from the SCO decision by filing a due process complaint seeking an order finding that the proposed placement at the [Public School] was an offer of FAPE.

The [Public School]

53. The Pikes Peak BOCES [Public School] is a public school located within the

School District's catchment area, but operated by the BOCES and not by the School District. Therefore, placement at the [Public School] is an out-of-district placement.

54. The [Public School] has two classrooms or programs where [Student] could be educated. The first, called COLA (Communication and Language Program), is a highly structured classroom designed for students who have significantly behavior issues and cannot work independently. The second, called LIBERTY (Learning Independence by Educating Responsible Trustworthy Youth), also offers a highly structured classroom. It is for students with a dual diagnosis or a diagnosis on the autism spectrum. Students in LIBERTY have some behavioral issues, but are able to express their wants and needs and are able to work in small groups. It is more academically oriented than COLA.

55. All students in the COLA and LIBERTY programs are special education students with IEPs and BIPs. Both the COLA and LIBERTY programs are staffed with licensed special education teachers, as well as BCBAs.

56. Because students in the COLA and LIBERTY programs are not educated in general education classrooms and have no exposure to nondisabled students in the classroom, [Public School] is considered a "separate" school.

57. COLA and LIBERTY both have elementary, middle, and high school classrooms, each containing small groups of students. The COLA classrooms are staffed with a licensed special education teacher and sufficient paraprofessionals to provide a 1:1 to 1:1.5 adult to student ratio. The LIBERTY classrooms are staffed to provide a 1:2 adult to student ratio.

58. [Behavioral Analyst], a BCBA employed by [Public School], testified that both the COLA and LIBERTY programs could provide the services and meet the needs specified in [Student]'s IEP. She noted that both programs would offer [Student] the opportunity to interact with peers not only in his own program, but also with students in other [Public School] programs during lunch, recess, assemblies, and weekly outings.

59. [Special Education Teacher] had toured the [Public School], had applied in the past for a position at [Public School], and knew teachers who worked at [Public School]. He testified that [Public School] was an excellent program that could well serve [Student]'s academic needs.

60. [Special Education Coordinator 1], who is now the School District's Director of Special Education, is familiar with both the [Public School] and [Private Facility]. She testified that the [Public School] has been very successful in transitioning students from COLA to LIBERTY and ultimately to in-district schools where the student can interact with nondisabled peers. On the other hand, she has never had a student transition out of [Private Facility]. She thought the [Public School] was better suited to meet [Student]'s educational needs.

61. Respondent and the [Private Facility] representatives testified that they were not very familiar with the [Public School], and therefore they did not offer any pro's for [Public School] at the IEP meeting. Their principle objection to the [Public School] was that [Student] was successful at [Private Facility] and there was no reason to incur the risk of

regression by transferring him to another school.

62. There was no testimony, expert or otherwise, that the [Public School] could not provide the services specified in the IEP or meet the IEP's goals.

COLA v. LIBERTY

63 Although [Public School] was selected as the appropriate placement for [Student], no decision was made at the IEP meeting regarding whether [Student] would enter the COLA or LIBERTY program.

64. It was the impression of every School District member of the IEP team that a subsequent meeting would be scheduled to select the appropriate program after Respondent had the opportunity to visit [Public School] and observe both programs.

65 Respondent and the [Private Facility] representatives deny that there was any discussion at the IEP meeting of a subsequent meeting.

66. The School District recorded the IEP meeting. The recording disclosed that at the end of the meeting [School Psychologist] stated, "We can talk about a transition plan at the end of the year", but there was no specific mention of scheduling another meeting to choose between COLA and LIBERTY. Ex. L.

67. The day after the IEP meeting, [Special Education Coordinator 1] sent the following e-mail to the [Public School] Assistant Principal, [Assistant Principal]:

> I have a [grade level] grader who I would like to transition to [Public School]. He is currently at [Private Facility] and our contract with them expires May 20. I want to make sure you have room! He will need to be in either the COLA or Liberty programs and he will also qualify for ESY. I will send you the IEP as soon as it has been finalized.

Ex. 21, p. 1.

68. [Special Education Coordinator 1]'s plan was for [Student] to transition to [Public School] for ESY, then start full time at [Public School] in the fall of 2016. Ex. 21, p. 2.

69. [Special Education Coordinator 1] and [Assistant Principal] discussed scheduling a visit by Respondent to [Public School] "prior to an IEP meeting." [Special Education Coordinator 1], however, expressed doubt that Respondent would accept the offer of an [Public School] tour. Ex. 21, p. 6.

70. [Special Education Coordinator 1] and [Assistant Principal] tentatively planned on holding the transition meeting sometime in the first two weeks of May. However, prior to the meeting, [Assistant Principal] wanted a member of her staff to observe [Student] at [Private Facility]. Ex. 21, p. 10-11.

71. On May 6, 2016, [Public School] BCBA [Behavioral Analyst] visited [Private Facility] to observe [Student] and assess his ability to be successful at the [Public School]. She also reviewed his 2016 IEP and Psycho-Educational Report. Based upon a one-hour observation of [Student] across several activities, and her review of the IEP and evaluation

report, [Behavioral Analyst] concluded that the [Public School] could successfully provide [Student] with the services required by the 2016 IEP.

72. Although [Behavioral Analyst] believed that both the COLA and the LIBERTY programs could meet [Student]'s needs, she recommended that [Student] initially transition into the COLA program where he could receive more behavioral support to ease the transition. Then, he could quickly transfer to the LIBERTY program which more closely matched his academic skills. [Special Education Coordinator 1] agreed with this recommendation. Ex. 21, p. 18-19.

73. At some point, [Special Education Coordinator 1] contacted Respondent with a proposal to schedule a meeting to discuss [Student]'s transition to [Public School]. [Special Education Coordinator 1] wanted to coordinate a date with Respondent before sending a formal meeting notice.

74. On May 16, 2016, Respondent's attorney advised [Special Education Coordinator 1] that because a state complaint was pending, there was "no need to conduct a transition meeting" until the complaint was resolved. Ex. 20. Consequently, the transition meeting did not take place.

75. [Student] remains at [Private Facility] pending the outcome of this proceeding.

Discussion

I. The Controlling Legal Principles

A. Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." That is to say, "the person who seeks court action should justify the request." *Id.* at 56 (quoting C. Mueller & L. Kirkpatrick, Evidence § 3.1, p. 104 (3d ed. 2003)). Although parents are typically the party seeking relief, the rule applies with equal effect to a school district when it is the party seeking court action. *Id.* at 62. Because the School District is the party asking the ALJ to enter an order finding that it made a timely offer of FAPE, and thus avoid the SCO's adverse order, it must bear the burden of proof.

B. The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them 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). Central to the IDEA is the requirement that school districts develop, implement, and revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d).

Two inquiries are involved in deciding whether the School District has met its obligation to offer FAPE. One, the ALJ must decide whether the School District complied with the procedures set forth in the IDEA. Two, the ALJ must decide whether the IEP developed through those procedures was reasonably calculated to enable the child to receive educational benefit. If both requirements are met, the School District has complied

with its obligations. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206-07 (1982).

Substantive FAPE: A school district satisfies the substantive requirement for FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Id.* at 201. Congress sought to make public education available to disabled children, but in seeking to provide such access it did not impose upon a school district any greater substantive obligation that would be necessary to make such access meaningful. *Id.* at 192. Thus, the intent of the IDEA was "to open the door of public education" to disabled children, but not "to guarantee any particular level of education once inside." *Id.* Stated another way, the school is not required to maximize the potential of the disabled child, but must provide "some educational benefit." *Id.* at 200.

Procedural FAPE: In enacting the IDEA, "Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard." *Id.* at 205-06. However, failure to comply with the procedural safeguards amounts to a violation of FAPE only if: (1) the procedural violations impeded the child's right to FAPE; (2) significantly impeded the parents' opportunity to participate in the decision-making process; of (3) caused a deprivation of educational benefit. 20 U.S.C. § 1415(f)(3)(E)(ii); 34 CFR § 300.513(a)(2); *C.H. by Hayes v. Cape Henlopen Sch. Dist.,* 606 F.3d 59, 66 (3rd Cir. 2010) ("[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district's failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.") Multiple procedural violations may cumulatively result in the denial of FAPE even if the violations considered individually do not. *R.E. v. N.Y.C. Dep't of Educ.,* 694 F.3d 167, 190 (2nd. Cir. 2012).

C. Least Restrictive Environment

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

D. Educational Placement

Parents have the right to be involved in any decision regarding the educational placement of their child. 34 CFR §§ 300.116(a)(1), 300.327 and 300.501(b)(1)(i). Although the term "educational placement" is not defined by either the IDEA or the federal

regulations, the CDE has adopted a rule that does address the term:

> [T]he determination of placement must be based on the child's IEP and made by the IEP Team. The terms "placement" or "educational placement" are used interchangeably and mean the provision of special education and related services and *do not mean a specific place, such as a specific classroom or specific school.* Decisions regarding the location in which a child's IEP will be implemented and the assignment of special education staff responsibilities shall be made by the Director of Special Education or designee.

1 CCR 301-8, Rule 4.03(8)(a) (emphasis added).

Despite the italicized language, other portions of the rule make it clear that some changes in location, such as referral to a private school, transfer from a brick and mortar school to an online school and vice versa, or changes which would result in the addition or termination of an instructional service, would amount to a significant change in placement. *Id.,* Rule 4.03(8)(b)(ii). Taken as a whole, then, although the CDE rule does not automatically equate change of placement with change of location, it does take change of location into account when other factors are present that amount to a significant change in the educational setting.

The educational placement decision must be made by "a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options." 34 CFR § 300.116(a)(1). Furthermore, the placement must, among other things, be "based on the child's IEP." 34 CFR § 300.116(b)(2). However, if the parents are allowed to meaningfully participate in the decision, they do not have the right to veto a decision they do not agree with. *Ms. S. v. Vashon Island Sch. Dist.,* 337 F.3d 1115, 1131 (9th Cir. 2003); *Doe v. East Lyme Bd. of Educ.*, 790 F.3d 440, 449 (2nd Cir. 2015) ("a parent's right of participation is not a right to 'veto' the agency's proposed IEP.")

D. Private Placement

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

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

The fact that a child may be happier or may be making better progress at a private

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

II. Application of the Principles to this Case

A. Substantive FAPE

The preponderance of the evidence is convincing that the School District's offer of placement at the [Public School] was reasonably calculated to enable [Student] to receive educational benefit. Through the collaborative IEP process, the parties agreed upon [Student]'s educational goals and the services needed to achieve those goals. The overwhelming weight of the testimony, including that of [Special Education Coordinator 1] and [Special Education Teacher] who were both familiar with the [Public School], and [Behavioral Analyst] who worked at the [Public School], was that the [Public School] is capable of providing the services specified in the IEP.

Although the [Public School], like [Private Facility], is a separate school, there is no basis to reject it as not being the least restrictive environment. The parties agreed that [Student] required the services available in a separate school, and that such a school is the appropriate placement for [Student] even though it is more restrictive than other options that might expose [Student] to nondisabled peers.[9]

Though Respondent and the [Private Facility] representatives dissented from the decision to place [Student] at [Public School], their reason for doing so was primarily based upon the fact that [Student] has done well at [Private Facility] and they saw no reason to make a change. Although Respondent also had the impression that [Public School] lacked the structure that her son requires, her single visit to [Public School] was too brief and too long ago to outweigh the unanimous opinion of the School District's witnesses that the educational setting at [Public School] is highly structured and the [Public School] is an excellent school. The fact that [Private Facility] is also able, and in Respondent's opinion better able, to meet the requirements of the IEP is not determinative. *O'Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233,* 144 F.3d at 708 (a disabled child is "not entitled . . . to placement in a residential school merely because the latter would more nearly enable the child to reach his or her full potential.")

Moreover, the School District has articulated valid reasons for choosing placement at [Public School] over [Private Facility]. Primary among those is that [Public School] has

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9 The School District argues that the [Public School] is in fact less restrictive than [Private Facility] because, among other things, [Student] could interact with peers with disabilities other than autism. Although this may be a good thing, it does not make the [Public School] a less restrictive environment within the meaning of the IDEA. As already noted, LRE is defined by law as the environment where the disabled child may be educated "with children who are *nondisabled*" to the maximum extent possible. 34 CFR § 300.114(a)(2)(i) (emphasis added).

licensed special education teachers, while [Private Facility] does not. Teacher's providing special education in a public school system must be "highly qualified special education teachers," which means, among other things that the teacher is licensed and certified by the state to teach special education. 34 CFR § 300.18(b). While it is true that private placements, such as [Private Facility], do not need to meet this requirement (34 CFR § 300.138(a)(1)), that does not diminish the view that a licensed special education teacher is better qualified to effectively teach a special education student than someone who is not a licensed special education teacher. The fact that [Student] did not do well in previous placements that had licensed special education teachers on staff does not mean that he could not benefit from that exposure now. The passage of over three and the behavioral gains he has made in that time are likely to have a profound effect on his ability to benefit from exposure to a higher academic standard of teaching.

In addition, the School District has a valid reason to believe, based upon past experience, that if [Student] is placed at the [Public School] he has a better chance of ultimately transferring to a district school where he could receive more interaction with nondisabled peers. All parties agreed that the ultimate goal for [Student] is to make such a transition.

In any event, even if the ALJ did agree with Respondent that [Private Facility] is the better placement, the ALJ has no discretion to veto the School District's decision. Courts must defer to a district's proposal if, as here, it is reasonably calculated to provide the child with FAPE in the least restrictive environment. *Ellenberg v. N.M. Military Institute*, *supra*.

B. Procedural FAPE

Respondent contends that even if the [Public School] could provide the services required by the IEP, the School District's process in deciding upon that placement was so flawed that it amounted to a denial of FAPE. Respondent says this is true for several reasons. First, Respondent argues that because no one from the [Public School] was present at the IEP meeting, the School District violated the requirement of 34 CFR § 300.116(a)(1) to have someone knowledgeable about the placement options present at the meeting.

Second, she alleges that the School District determined to place [Student] at the [Public School] before the IEP meeting was convened. In support, she points to the fact that even though she and other team members identified more pro's for [Private Facility] than they did for [Public School], the School District team members nonetheless unanimously voted for [Public School]. She believes her opinion was arbitrarily disregarded. As Respondent points out, predetermination can be a denial of FAPE. *Deal v. Hamilton Cnty Bd. of Educ.,* 392 F.3d 840 (6th Cir. 2004); *Ms. S. v. Vashon Island Sch. Dist.*, 337 F.3d at 1131 ("[a] school district violates IDEA procedures if it independently develops an IEP, without meaningful parental participation, and then simply presents the IEP to the parent for ratification.") These procedural violations, she says, deprived her of a meaningful opportunity to participate in the placement decision, as required by 34 CFR §§ 300.116(a), 300.327 and 300.501(b)(1)(i).

Third, she says the School District erred by not finalizing the IEP with the specific program at the [Public School] that [Student] was to attend. Although the IEP team decided upon placement at the [Public School], they did not decide whether that placement should be in the COLA or LIBERTY program. The ALJ notes as well that although the IEP team decided upon placement at the [Public School], that placement was not stated within the IEP.

Finally, Respondent says that the School District's blatant violation of the SCO order is also a procedural violation amounting to a denial of FAPE. Specifically, she says that the School District failed to comply with the SCO's order to use a neutral facilitator not employed by the School District, and did not require [Public School] personnel to observe [Student] at [Private Facility] prior to changing his placement to the [Public School]. In a prehearing order, the ALJ decided that although violations of the SCO order would not necessarily be a per se violation of FAPE, proven violations would be relevant considerations. As with violation of the regulatory procedures, violations of the SCO's order might be a violation of FAPE if they caused substantive harm to Respondent or her son.

Each of Respondent's contentions will be addressed in turn.

Regulatory procedures: The ALJ finds no violation of regulatory procedures that resulted in a denial of FAPE, educational benefit, or Respondent's right to participate in decision making.

Prior to the IEP meeting, the School District obtained Respondent's consent to a triennial re-evaluation, as required by 34 CFR §§ 300.300(c) and 300.303. There is no serious dispute about the validity of the evaluation's findings and recommendations. The School District then gave Respondent proper notice of the IEP meeting dates as required by 34 CFR § 300.322 and she attended both meetings. Respondent was provided with a copy of the evaluation and a draft of the IEP. She participated fully in the IEP meeting discussions, as required by 34 CFR § 300.501. Except for the dispute about whether a member of the [Public School] should have been present, the IEP team membership complied with 34 CFR § 300.321(a). As required by 34 CFR § 300.321(a)(6), Respondent was allowed to invite other persons, specifically two [Private Facility] representatives who had knowledge and special expertise regarding [Student]. During the meeting, all the topics required by 34 CFR § 300.324 were discussed. Following the meeting, Respondent was provided with prior written notice that summarized the IEP's discussions and the decisions made with regard to [Student]'s services and placement at [Public School], as required by 34 CFR § 300.503.

The ALJ does not agree with Respondent that 34 CFR § 300.116(a)(1) required an [Public School] staff member to be present at the IEP meeting. All that § 300.116(a)(1) requires is that the placement decision be made by "a group of persons, including the parents, and other persons *knowledgeable about . . . the placement options.*" Emphasis added. Although the italicized language requires the presence of someone "knowledgeable about" the placement options, it does not require the presence of a representative of every placement option under consideration. The decision whether a team member has the requisite knowledge or expertise lies with the party inviting that

member. 34 CFR § 300.321(c). Because at least two School District team members, [Special Education Coordinator 1] and [Special Education Teacher], had considerable familiarity with the [Public School], the ALJ concludes the requirement was met.

The ALJ also does not agree that placement at the [Public School] was predetermined. The record shows that Respondent participated fully in the IEP meeting discussions, and that many of her and the [Private Facility] representatives' suggestions were adopted by the team. The record shows that once [Student]'s needs, goals, and services were agreed upon, the team considered three options for physical placement; [Facility School], [Private Facility], and [Public School]. Discussion of the options was robust and lengthy, with Respondent and the [Private Facility] representatives in full participation. Respondent's opinions were duly noted. The fact that the School District IEP team members chose the [Public School] over Respondent's objection does not mean that their choice was predetermined. To the contrary, the School District team members gave due consideration to Respondent's opinions but came to the conclusion that the [Public School] was the better choice because it was a placement where [Student] would have access to licensed special education teachers and on-staff OT and SLP therapists not available at [Private Facility]. Although Respondent makes credible arguments opposing that conclusion, the ALJ is convinced that the School District team members based their decision upon what was presented at the meeting, and did not merely rubber-stamp the [Public School] as a predetermined choice.

Moreover, failure to identify the [Public School] within the IEP as the location where [Student] would receive his services does not amount to a denial of FAPE. It was, arguably, a procedural violation. The parties agree that transitioning [Student] from [Private Facility] to the [Public School] would be a change in educational placement, and although the IEP stated that [Student] would be placed in a separate school it did not specify that the [Public School] was the separate school selected. Among many other things, an IEP must include a statement of "the anticipated frequency, *location*, and duration" of the services required by the IEP. 34 CFR § 300.320(a)(7) (emphasis added). Assuming that the word "location" requires a statement of the specific school at which services will be provided, the IEP's failure to include that specification was a procedural violation.[10]

However, it is clear from the hearing record that Respondent and all other team members understood that the team's final decision was to place [Student] at the [Public School]. This decision was conveyed to Respondent in writing in the prior written notice issued immediately after the meeting. Ex. 8. Based upon that understanding, Respondent promptly filed a state complaint challenging the decision to place her son at the [Public School]. Given that the selection of the [Public School] was final and was unequivocally conveyed to and understood by Respondent, the failure to include it within the IEP was a

10 The federal circuits disagree on this point. *Compare A.K. v. Alexandria Sch. Bd.,* 484 F.3d 672 (4th Cir. 2007) (holding that under the circumstances of that case the specific school should have been identified in the IEP) with *Brad K. v. Bd. of Educ. of City of Chicago,* 787 F.Supp.2d 734, 739-40 (N.D. Ill. 2011) (citing *T.Y. v. N.Y. City Dep't of Educ.,* 584 F.3d 412 (2nd Cir. 2009) and *White v. Ascension Parish Sch. Bd.,* 343 F.3d 373 (5th Cir. 2003) for the proposition that physical location need not be included in the IEP.)

technical violation that did not deprive [Student] of FAPE or impede Respondent's participation in the decision-making.

The case of *A.K. v. Alexandria Sch. Bd.,* 484 F.3d 672 (4th Cir. 2007) illustrates the point. In that case, although several schools were mentioned by the IEP team as potential placements, the IEP only identified a "Level II--Private Day School" as the location. The court held that this was not an offer of FAPE because it did not specify the particular school, and A.K.'s parents expressed doubt that such a school even existed. The court was concerned that "[e]xpanding the scope of a district's offer to include a comment made during the IEP development process would undermine the important policies served by the requirement of a formal written offer, namely 'creating a *clear record* of the educational placement and other services offered to the parents' and '*assisting parents in presenting complaints* with respect to any matter relating to the educational placement of the child.'" *Id.* at 682 (internal citation omitted) (emphasis added). The court, however, emphasized that "*we do not hold today that a school district could never offer a FAPE without identifying a particular location at which the special education services are expected to be provided*." *Id.* (emphasis added). The present case is an example where the failure to specify the school is, if at all, a technical violation that does not amount to a denial of FAPE. Unlike *A.K. v. Alexandria,* the record here is absolutely clear that the [Public School] was the school selected by the IEP team, and because Respondent was well aware of that selection she promptly filed a state complaint challenging that selection.

Respondent's reliance upon *Systema v. Academy Sch. Dist. 20,* 538 F.3d 1306 (10th Cir. 2008) is, similarly, unpersuasive. *Systema* held that the adequacy of an offer of FAPE could not be based upon "vague [and] hypothetical" oral offers that were not included in the draft IEP, but were made in an attempt to resolve an impasse between the parties. Rather, "a formal, written offer creates a clear record that will do much to eliminate troublesome factual disputes." *Id.* at 1316. Because the selection of the [Public School] was clear and unequivocal, was reduced to writing, and was understood by both parties, the rationale of *Systema* is not persuasive authority in this case.

The lack of a final decision whether [Student] would enter the COLA or LIBERTY classroom at the [Public School] is not a procedural violation. Whether [Student]'s education at [Public School] would be in COLA or LIBERTY was a question of educational methodology within the sole discretion of the School District and the [Public School]. Provided that a child receives the special education services specified in the IEP, matters of educational methodology are left to the educators. *Bd. of Educ. v. Rowley*, 458 U.S. at 208 ("once a court determines that the requirements of the [IDEA] have been met, questions of methodology are for resolution by the States"); *O'Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d at 709 (a question regarding the methodology of instruction "is precisely the kind of issue which is properly resolved by local educators and experts"); *M.M. v. Sch. Bd. of Miami-Dade Cnty,* 437 F.3d 1085, 1102 (11th Cir. 2006) (parents "do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child"). *See also A.K. v. Alexandria Sch. Bd.,* 484 F.3d at 680 (there was "little support in the IDEA's underlying principles for [the] assertion that 'educational

placement' should be construed to secure [the] right to attend school at a particular classroom at a particular location.")

Violations of the SCO order: There is no dispute that, contrary to the SCO's order, the School District failed to employ an IEP meeting facilitator who was not employed by the School District. Several factors convince the ALJ that this procedural violation did not amount to a denial of FAPE. First, although the SCO apparently felt such a requirement would help avoid the predetermination that she believed occurred in 2014, neither the state nor federal regulations require that the IEP meeting be facilitated by someone who is not employed by the school district. Second, though the SCO's order was a reasonable remedy, the ALJ has already found there was no predetermination in the 2016 IEP meeting; therefore, the use of a facilitator employed by the School District did not affect the outcome. Third, though employed by the School District, [School Psychologist] acted in a neutral manner, expressed no personal opinion during the placement discussion, and did not vote on the placement options. Only after the IEP team members made a decision in favor of the [Public School] did she take a position on the placement decision by stating that the decision to place [Student] at the [Public School] was final.[11] Thus, although the School District had no reasonable excuse for failing to comply with the SCO's order,[12] that failure did not impede [Student]'s right to FAPE, deprive him of educational benefit, or significantly impede Respondent's opportunity to participate in the decision-making process.

The second provision of the order allegedly violated required the School District to have a staff member from a proposed placement observe [Student] prior to a change in placement. Respondent believes this order required the School District to have the [Public School] evaluate [Student] *before* deciding upon a change of placement. That did not occur. The School District, on the other hand, interprets the order as requiring an observation prior to *transferring* [Student] to the [Public School]. That did occur.

The ALJ finds this part of the order ambiguous as to exactly what it required. Both views have merit. Respondent argues that observation prior to selecting the [Public School] was essential so that the [Public School] and the IEP team could make an informed decision about whether the [Public School] was an appropriate placement. On the other hand, the School District believes that asking the [Public School] to make an observation before the IEP meeting decided upon placement would be viewed as improper predetermination in favor of the [Public School].

The ALJ need not resolve this ambiguity because, even assuming the SCO intended

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11 In prehearing pleadings, relying upon *Letter to Richards*, 55 IDELR 107 (OSEP 2010), Respondent criticized [School Psychologist] for basing the placement decision upon a majority vote of the IEP team. *Letter to Richards*, however, stands for the proposition that when team members disagree, the ultimate decision is up to the district regardless of how the majority voted. Here, both district representatives ([Special Education Coordinator 1] and [Special Education Coordinator 2]) were voted for the [Public School]. Because they voted with the majority, the majority vote controlled the decision.

12 The SCO order was directed to a prior special education director who is no longer with the School District and did not arrange for the IEP meeting. Apparently, no other School District representative reviewed the order or was aware that it required a facilitator not employed by the School District.

a pre-meeting observation, the lack of such an observation did not impede [Student]'s right to FAPE or Respondent's right to participate in the IEP meeting. Two School District IEP team members were familiar with [Public School] and its capabilities, and therefore the team was well-positioned to make an informed decision about the [Public School]'s ability to meet the IEP requirements without a pre-meeting observation by [Public School] staff.

Summary

In summary, the ALJ concludes that the School District made a valid offer of FAPE, and there were no violations of regulatory procedures or of the SCO order, individually or collectively, sufficient to rise to the level of a denial of FAPE or educational benefit, or a denial of Respondent's right to participate in the decision-making process.

Decision

The School District met its burden of proving that it made a substantive offer of FAPE and that any procedural violation did not deprive [Student] of FAPE or educational benefit, or deprive Respondent of the opportunity to participate in the decision making process. Accordingly, judgment is entered in favor of the School District. If Respondent chooses to continue [Student]'s placement at [Private Facility] despite the offer of FAPE at the [Public School], such placement shall not be at the School District's expense.

Done and Signed
December 13, 2016

ROBERT N. SPENCER
Administrative Law Judge