

**BEFORE THE OFFICE OF ADMINISTRATIVE COURTS  
STATE OF COLORADO**

**CASE NO. ED 20060016**

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**DECISION UPON STATE LEVEL REVIEW**

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**ST. VRAIN VALLEY SCHOOL DISTRICT RE-1J,**

**Appellant,**

**v.**

**[STUDENT], by and through his parents, [PARENTS],**

**Appellee.**

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This matter is the state level review before Matthew E. Norwood, an Administrative Law Judge (“ALJ”) of the Office of Administrative Courts (“OAC”) as described in 20 U.S.C. Section 1415(g). The subject of the review is a decision of Richard G. Fisher, an Impartial Hearing Officer (“IHO”), pursuant to the Individuals With Disabilities Education Act (“IDEA”), 20 U.S.C. Sections 1400 *et seq.*; the regulations at 34 C.F.R. Section 300 and the regulations to the Colorado Exceptional Children’s Educational Act (“ECEA”).<sup>1</sup>

In this appeal Catherine A. Tallerico, Esq. and Adele Reester, Esq. represent the Appellant (“School District”); Eloise Henderson Bouzari, Esq. represents the Appellee (“[STUDENT]”).

**Scope of Review**

The ALJ on state level review is to issue an “independent” decision. 20 U.S.C. Section 1415(g). In the context of court reviews of state level decisions, such independence has been construed to require that “due weight” be given to the administrative findings below. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). It is appropriate to apply this same standard by analogy at the state administrative review level. Thus it is sensible for the ALJ to give deference to the IHO’s findings of fact and to accord the IHO’s decision “due weight,” while reaching an independent decision based on a preponderance of the evidence.

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<sup>1</sup> The ECEA is at 1 CCR 301-8. All citations to the ECEA will be made by Rule number only.

## Summary

Summarized very briefly, the School District appeals the decision of the IHO to require it to pay for [STUDENT]'s education at the Western Institute for Neurodevelopmental Studies and Interventions ("WINSI") for all or a portion of the 2006-07 school year. [STUDENT]'s representatives appeal the IHO's decision that the School District provided him a free appropriate public education ("FAPE") at Frederick Elementary School ("Frederick" or "the School") for the 2005-06 school year.

## Findings of Fact

Based on the record below, the ALJ enters the following findings of fact:

[STUDENT]

1. [STUDENT] was born [DOB]. He is the older of his parents' two children. [STUDENT]'s father was in the U.S. Navy and [STUDENT] attended school in Japan and Hawaii prior to coming to Colorado for the 2005-06 school year for the fourth grade. [STUDENT]'s father was away for part of 2005 and rejoined the family in August of that year. At the beginning of 2006, [STUDENT]'s mother underwent a surgical procedure. [STUDENT] was nervous that she was in the hospital.

2. [STUDENT]'s mother resumed working outside of the home in 2006. She is a lay advocate in special education matters. She is employed by [STUDENT]'s attorney, Ms. Bouzari.

3. Prior to coming to Colorado, [STUDENT] was diagnosed with Asperger syndrome, dyslexia and bi-polar disorder. He also has asthma and allergies. He takes multiple medications. He received special education services for many years and has had a variety of placements, including a self-contained classroom for students with autism and a day treatment program for students with significant behavioral challenges.

4. [STUDENT] attended school in Hawaii before moving to Colorado in January 2005. At his school in Hawaii, [STUDENT] was aggressive and hit another student. At least once he ran away from campus. [STUDENT] was asked to leave this school and the school refunded his tuition. After moving to Colorado he was initially home schooled. In the spring of 2005 [STUDENT] attended Brideun, a private school, part time. He started fourth grade at Frederick in August 2005.

5. Prior to starting school at Frederick, a School District psychologist and a special education teacher had [STUDENT] undergo a number of tests. According to the Woodcock Johnson III test evaluated by School District special education teacher Margaret Wilson, [STUDENT] was functioning at approximately a 1.9 grade equivalent.

6. In addition to this and other tests, the School District prepared an assessment of [STUDENT] prior to his beginning school in August 2005. Based on this assessment the ALJ finds that [STUDENT]'s history was that he would cry very easily, would complain of not having any friends and was easily upset and seemed lonely. He would say that he hated himself and that he wished he were dead. The assessment

also found, as does the ALJ, high indicators of anxiety, aggression, frustration, depression and attention problems, with serious learning problems at school, and that his adaptive skills ranged from low average to well below average. Also, [STUDENT] had significant difficulty adjusting to changes in routine, recovering from a set back and being soothed when angry. [STUDENT] responded well to a “safe place:” a quiet dark room without distractions.

#### *Enrollment at Frederick*

7. In a letter dated May 9, 2005, [STUDENT]’s mother wrote to School District personnel and told them of [STUDENT]’s enrollment in the School District. She advised them of [STUDENT]’s special needs and supplied 15 attachments of medical, psychological and academic information concerning her son. Included in the material was a seven-page document prepared by her regarding his behavior and providing strategies to work with him.

8. In a letter dated May 25, 2005, [STUDENT]’s mother wrote to the School District and provided a list of 16 items [STUDENT]’s education should provide. [STUDENT]’s mother developed this list using information from [STUDENT]’s previous teacher, his psychologist, his occupational therapist and his previous treatment team.

#### *The August 12, 2005 IEP*

9. On May 25, 2005, [STUDENT]’s mother met with a group of School District employees that were part of the Individualized Education Program (“IEP”) team. Over the 2005-06 school year at Frederick, different persons participated in IEP team meetings. Some usual attendees were Kathy McCall, [STUDENT]’s Special Education Teacher; Joyce Spong, his classroom teacher; and Kathy Horning, the Principal at Frederick. The May 25 meeting was a getting-to-know-you meeting, not a formal meeting.

10. In a letter to the School District dated July 25, 2005 [STUDENT]’s mother wrote that [STUDENT] had complex needs and that a traditional educational environment “has resulted in severe emotional and psychological damage to [STUDENT].”

11. On August 12, 2005, [STUDENT]’s mother met with the IEP team to draft an IEP for [STUDENT]. She expressed concern about the school’s plan to place [STUDENT] in a regular classroom with more than 20 children, as [STUDENT]’s previous educational experience had been a small day treatment program with five children and an aide to provide one-on-one instruction. [STUDENT]’s kindergarten class had had eight to ten students. Other than his kindergarten experience, his classes had never had more than four to five students.

12. At the August 12 meeting, Frederick was the only placement option offered. The IEP team was also not willing to incorporate all of the goals and objectives from [STUDENT]’s draft IEP in Hawaii. [STUDENT]’s mother signed a statement on the IEP form that she consented to having [STUDENT] receive special education and related services.

13. Based on his history and tests, the School District determined that [STUDENT] was eligible for special education services. The School District developed an IEP for him for the 2005-06 school year. The IEP is reflected in a multiple page document setting out 21 goals and objectives for [STUDENT] that is dated August 12, 2005.

14. The School District did not regard the IEP as finished until a behavior support plan ("BSP") was developed. A portion of the August 12, 2005 IEP is that BSP. (Pages 41-43 of the School District's exhibit C.) The BSP set out strategies to help [STUDENT] stay focused on schoolwork as well as what to do if he were to get upset. The BSP allowed [STUDENT] to take "sensory breaks" every 30 minutes.

15. [STUDENT]'s mother and School District personnel met September 9, 2005 and had additional discussions regarding the IEP.

16. On approximately October 11, 2005, [STUDENT]'s mother sent back a draft of the August 12, 2005 IEP form with some corrections she wanted made. In mid October Ms. McCall met with [STUDENT]'s mother to discuss the IEP document. [STUDENT]'s mother agreed to the finalized version of the IEP. The document was then submitted to "Student Services" October 24, 2005.

17. The ALJ finds that the School District's August 12, 2005 IEP for [STUDENT] conformed to the requirements of the IDEA and was reasonably calculated to provide him educational benefit. [STUDENT]'s mother was included in the creation of the IEP. The School District reviewed the extensive documentation provided by [STUDENT]'s mother and employed a psychologist and special education teacher to evaluate [STUDENT] through the use of standardized tests. His IEP took into account his learning disabilities. The BSP set out extensive and comprehensive strategies to keep [STUDENT] focused and to prevent him from becoming upset. The BSP provided for a "safe place" for [STUDENT] to go when he did lose his temper.

#### *Measurements of [STUDENT]'s Progress*

18. The August 12, 2005 IEP form was updated with comments setting forth [STUDENT]'s progress in November 2005, March of 2006 and May of 2006. In addition to the comments, [STUDENT]'s teachers used a code to show whether [STUDENT] had mastered, made progress or made no progress for each of the 21 goals and objectives.

19. By May 2006 [STUDENT] had mastered three of the goals and objectives, demonstrated progress in 14 of the goals and objectives, and had no progress or was not graded in four of the goals and objectives.

20. Based on the testimony of Erin Mallon, a school speech and language therapist, the ALJ finds that [STUDENT]'s speech improved over the 2005-06 school year. In particular, his stuttering decreased and his ability to converse with adults improved. He also improved in his ability to take turns with other students.

21. In addition to Ms. McCall and Mrs. Spong, Ms. Sheryl Haas and Ms. Becky Ellis worked with [STUDENT]. Ms. Haas was a special education paraprofessional; she worked with [STUDENT] in Mrs. Spong's classroom and Ms.

McCall's special education room. Ms. Ellis was a special education paraeducator. She worked with [STUDENT] primarily at recess and during transition to and from recess. From time to time Ms. Haas and Ms. Ellis provided [STUDENT] with one-on-one education.

22. Frederick's regular school year is divided into three trimesters. [STUDENT]'s 4<sup>th</sup> Grade Report Card shows his progress. By the end of the third trimester, [STUDENT] was graded as "partially proficient" in all areas except science, in which he was marked "proficient." In the area of physical education, [STUDENT] was "partially proficient" or "meets expectations" in three areas but was "needs improvement" in the areas: "participates safely" and "works cooperatively with others."

23. Except for science and physical education, [STUDENT]'s marks remained steady and did not increase over the school year. According to the guide that comes with the report card, most students are expected to reach the "proficient" or next higher category, "advanced," by the third trimester.

24. During the 2005-06 school year Mrs. Spong kept a reading checklist for [STUDENT]. The reading checklist has 28 rows representing different reading skills and a column for each trimester. In the opinion of Mrs. Spong, [STUDENT] had demonstrated mastery in nine of these skills. The evidence does not disclose what level of mastery is expected of a typical student. Of these nine skills, [STUDENT] demonstrated mastery of six of these skills in the first trimester.

25. According to Mrs. Spong, [STUDENT] made improvements during the school year in reading, writing, science and math.

26. According to information on the 4<sup>th</sup> Grade Report Card, [STUDENT] was absent three and one half days for the first trimester, seven days for the second trimester and 18 and one half days the third trimester. There were a total of 171 school days in the 2005-06 school year. Additionally, [STUDENT] was tardy one day the first trimester, seven days the second trimester and four days the third trimester.

27. Information kept by Ms. McCall shows a different total: she recorded 17 absences for the year and 18 days tardy. According to her records, [STUDENT] left early twelve days before reading instruction.

28. [STUDENT] made friends at Frederick during the 2005-06 school year. Generally speaking, the other students enjoyed helping [STUDENT] and did not ostracize him because of his disability. As an example of his involvement with the other students, [STUDENT] participated in a Valentines Day candygram exchange.

29. In the spring, Mrs. Spong told [STUDENT]'s mother that the other children were starting to avoid [STUDENT] and were becoming afraid of him. Nevertheless, the children still tried to help him, according to Mrs. Spong.

30. At the end of the 2005-06 school year, the school intended to advance [STUDENT] to the fifth grade.

### *[STUDENT]'s Behavior*

31. From August 26, 2005 until September 6 2005, different Frederick personnel working with [STUDENT] made entries in a "Functional Analysis Worksheet" of behavior problems on [STUDENT]'s part. In the opinion of Ms. McCall, [STUDENT] had a rough transition into Frederick, but settled down soon after that. Consequently, Ms. McCall did not feel a need to continue to keep this record past September 6 and it was discontinued.

32. During the 2005-06 school year [STUDENT] saw a psychologist Dorothy Hansen, Psy. D. After [STUDENT] started school at Frederick, Dr. Hansen felt things were going fairly smoothly and determined to back off his therapy.

33. At the beginning of December, Ms. McCall observed an escalation of [STUDENT]'s behavior and the keeping of records of [STUDENT]'s behavior was resumed. A document titled "[STUDENT]'s Behavior Log" was used from December 2, 2005 until February 12, 2006. From February 9 (there was some overlap) until April 25, 2006, the "Functional Analysis Worksheet" was resumed. School personnel also charted [STUDENT]'s behavior in a "Behavior Plan Worksheet" for one week in February.

34. Although school personnel did not share "[STUDENT]'s Behavior Log" and "Functional Analysis Worksheet" with [STUDENT]'s parents, they did provide them with a written daily home/school communication log as well as a document titled "[STUDENT]'s Day" with the numbered day of the trimester.

35. Also, Ms. McCall had many conversations with [STUDENT]'s mother. Ms. McCall initiated calls to her by telephone 15 to 20 times during the 2005-06 school year. [STUDENT]'s mother initiated calls five to six times during this same period. Ms. McCall would also speak to [STUDENT]'s mother when she brought [STUDENT] to his mother's car at the end of the day.

36. The home/school communication log was titled "Notes From School" on one side to be completed by Ms. McCall. The other side was titled "Notes from Home," and was completed by [STUDENT]'s mother. Usually, but not always, the "Notes from Home" were done before the corresponding "Notes From School." On the "Notes From School" side there is a column for the morning and the afternoon. For each column there are four boxes for behavior: super, good, fair and poor. Each column also has a place for notes.

37. "[STUDENT]'s Day" consisted of two columns for morning and afternoon activities. The activities were set out and [STUDENT] would receive a sticker for completing the activity.

38. From August 26 to August 31, 2005, [STUDENT] lost his temper frequently and repeatedly asked to go home. He refused to enter the classroom or, having entered, to leave. He banged his head against the door, he threw a chair and a granola bar and he screamed and cried.

39. On October 3, 2005 [STUDENT]'s mother wrote on the "Notes from Home" form that she and her husband were very pleased with [STUDENT]'s placement and how much he was enjoying school.

40. On October 4, 2005 [STUDENT]'s mother wrote on the "Notes from Home" form that she and her husband were noticing a great deal of improvement in [STUDENT]'s reading. On October 18 [STUDENT]'s mother wrote: "We are seeing a Huge [emphasis in the original] improvement in his reading—thank you so much for all the hard work you are doing."

41. The November 15, 2005 "[STUDENT]'s Day" reported that [STUDENT] got angry in class, was rude to Mrs. Spong and stormed out.

42. The November 16, 2005 "[STUDENT]'s Day" reported that at the end of recess [STUDENT] used very crude language with Ms. Ellis. Also reported was the fact that he was very upset about short recess with lots of screaming and pounding.

43. On November 28, 2005, [STUDENT]'s mother wrote on the "Notes from Home" that [STUDENT] was reading for the first time on his own for pleasure.

44. As reflected in "[STUDENT]'s Behavior Log" for the morning of December 2, 2005, [STUDENT] stated: "I hate you, I want to tear down this building" and "I want to slap Mrs. Spong to death."

45. On the "Notes From School" form for December 2, 2005 Ms. McCall rated [STUDENT]'s behavior as between fair and good and wrote: "Very hard settling down, did not like any expectations on him."

46. As reflected in "[STUDENT]'s Behavior Log" for the morning of December 5, 2005, [STUDENT] stated: "I hate Mrs. Spong, I want to kill Mrs. Spong." On the corresponding "Notes From School," no box is checked for behavior and Ms McCall wrote: "Mondays seem to be hard with school expectations and routine."

47. On December 7, 2005 [STUDENT] became extremely agitated when Mrs. Spong handed him his class work for the day. He began throwing a tantrum and tried to leave to see Mrs. McCall. [STUDENT] was running out the door and Mrs. Spong went with him, as she was afraid he would knock over a first grade girl who was in a wheelchair. Mrs. Spong stood in front of the girl in the wheelchair, partially blocking [STUDENT]'s exit. [STUDENT] yelled "stupid teacher, I'm going to kill you!" and punched Mrs. Spong in the stomach.

48. The School District's record of disciplinary hearing signed by [STUDENT] and Mrs. Horning describes the December 7, 2005 incident with Mrs. Spong and the punch. It states that Mrs. Spong "blocked [[STUDENT]'s] exit using a non-defensive posture while talking calmly." The narrative does not mention a girl in a wheelchair.

49. Mrs. Horning and school psychologist Mary Beth Downing called [STUDENT]'s mother regarding this incident. Mary Beth Downing told [STUDENT]'s mother that she was conducting a threat assessment. [STUDENT]'s mother was very apologetic about the incident.

50. [STUDENT] was suspended from school for December 7 and 8, 2005.

51. On December 9 [STUDENT]'s mother met with school personnel. At that meeting [STUDENT]'s mother was told that [STUDENT] had said he would kill Mrs. Spong. Draft amendments to the BSP were discussed. The school proposed new language that stated that: "In the future, if [STUDENT] hits an adult or child, the police may be contacted."

52. By December Dr. Hansen felt that [STUDENT] was appearing worse. In a letter Dr. Hansen advised school personnel how to deal with [STUDENT] when he is having a "meltdown." She told them that when a child such as [STUDENT] suffers a "meltdown" the child should not be confronted or thwarted and that it is a good thing that the school was providing him a "safe place." She described calling the police in response to an outburst as a "last resort." Dr. Hansen's letter was dated December 18, 2005, but it was first sent to the school by fax January 25, 2006.

53. [STUDENT]'s mother and Dr. Hansen are critical of what they understood to have been Mrs. Spong's decision to prevent [STUDENT] from leaving the classroom. Taking the initiative to go to a calm place, rather than have a public scene, is something they had been trying to teach [STUDENT].

54. [STUDENT]'s mother is also critical of efforts that were made to immediately try to interact with [STUDENT] to calm him down when he entered his safe place, rather than allowing him time alone to calm himself.

55. In a letter dated December 12, 2005, [STUDENT]'s mother requested the IEP Team to have a meeting to create an addendum to the BSP.

56. In a letter dated December 13, 2005, [STUDENT]'s mother objected to the language about the police being called. She stated that she thought the proposed changes to the IEP reflected the response for a "typical child" [quotes in the original] and not a child with mental health needs acting out during a mental health crisis.

57. In [STUDENT]'s mother's view, [STUDENT] deteriorated during his year at Frederick. According to her, [STUDENT] ceased interest in things that he had formerly enjoyed such as going to his favorite restaurant, going to movies and going to the zoo.

58. Starting in December 2005 [STUDENT] saw child psychiatrist Dr. Asa Yancey who prescribed medication for him.

59. In late December 2005 and early January 2006, [STUDENT]'s mother asked to have [STUDENT] excused from three weeks of homework.

60. As reflected in "[STUDENT]'s Behavior Log" for January 4, 2006, [STUDENT] pushed an adult, screamed and told the adult to shut up.

61. The "Notes From School" form for January 4, 2006 does not reflect this incident. It is unclear from the evidence if the author of the "Notes From School" form was aware of the incident at the time the "Notes From School" form was completed.

62. As reflected in “[STUDENT]’s Behavior Log” for January 5, 2006, when [STUDENT] was on the playground he yelled at some girls and stated he wanted to kill them for lying. One of the girls told Mrs. Spong that she was afraid.

63. The “Notes From School” form for January 5, 2006 do not reflect this incident and report [STUDENT]’s behavior as “super.”

64. As reflected in “[STUDENT]’s Behavior Log” for January 9, 2006, when [STUDENT] was in the hallway he said he would kill Mrs. Spong and that he also would kill himself and blame her.

65. The “Notes From School” form for January 9, 2006 checks [STUDENT]’s behavior in the afternoon as “good,” but with the note: “long afternoon for [STUDENT], lots of yelling, hard to focus.”

66. A meeting between school personnel and [STUDENT]’s mother was originally scheduled for January 6, 2006, but was rescheduled for January 18, 2006 at [STUDENT]’s mother’s request. At the January 18, 2006 meeting amendments were made to [STUDENT]’s BSP and included a detailed flow chart titled: “[STUDENT]’s Crisis Plan.” In a nutshell, the changes provided that more consideration would be taken to see if [STUDENT] could participate with the rest of the class in classroom activities or whether his frustration required that he engage in some other activity. The amended BSP contained the language about calling the police objected to by [STUDENT]’s mother.

67. As reflected in “[STUDENT]’s Behavior Log” for January 19, 2006, [STUDENT] stated that he wished he were never born and that his family and friends would be happier. There is a note, “very depressed about the day.”

68. The “Notes From School” form for January 19, 2006 checks [STUDENT]’s behavior in the morning and afternoon as “fair,” with the notes “rough spots” and “restless today, very little work completed.”

69. Toward the end of January 2006, Ms. McCall asked the Behavioral Support Team (“BeST”) for help with [STUDENT]. Kim Perry, a School District behavioral coach, made observations for the BeST. She observed [STUDENT]’s behavior over seven days and made a two-page report. She noted 15 “episodes” during this time. She wrote: “most of his day is spent protesting, escaping or negotiating.” Based on these observations, Ms. Perry advised [STUDENT]’s teachers how to identify triggers to [STUDENT]’s behavior to help them with him.

70. On the January 30, 2006 “Notes from Home” form, [STUDENT]’s mother wrote that [STUDENT] had read for 90 minutes in four sessions.

71. On the February 2, 2006 “Notes from Home” form, [STUDENT]’s mother wrote:

“[STUDENT] read for 30 minutes last night without being asked to!!

Please thank Hannah, Rachel, Ms. Becky and Mrs. Shirl for the notes. It means so much to us to have [STUDENT] at a school where so many people really care about him. You are all so special to us!!"

72. As reflected in "[STUDENT]'s Behavior Log" for February 2, 2006, [STUDENT] ran down the hall yelling: "I want to kill everyone." After calming down he stated he really wants to kill himself. He then ran outside the building saying he was hoping to be hit by a car.

73. The "Notes From School" form for February 2, 2006 list [STUDENT]'s behavior as "good" and "fair." The comments are: "rocky morning, took lots of teacher patience. At 10:40, we sat down, talked about 'regrouping' and turning the day around. Finished morning doing modified activities." For the afternoon, the notes state: "still difficulty focusing on work ... needed lots of modifications."

74. "[STUDENT]'s Day" for February 2, 2006 reports: "Got very upset with friends, came inside, ran down hall way yelling, 'I want to kill everyone.'" The form also states: "We decided to finish the day quietly sitting in the office. [STUDENT] ran out of the building. He came back, once I found him. Sat quietly in hallway."

75. On February 14, 2006 Mary Beth Downing, a school psychologist, called [STUDENT]'s mother at home regarding the fact that [STUDENT] was making self-harming remarks and making remarks that he wanted to kill others within the school. Psychologist Downing called [STUDENT]'s mother to request a meeting with her and her husband to discuss strategies.

76. [STUDENT]'s mother became upset, came to school and removed [STUDENT] to go see Dr. Hansen.

77. On February 16, 2006 School personnel met with [STUDENT]'s parents to discuss his self-harming remarks. At that meeting school personnel stated that, based on School District recommendations, Frederick was reducing [STUDENT]'s academic expectations in response to [STUDENT]'s current behavior problems. The school obtained [STUDENT]'s parents' permission to do a reassessment of him.

78. Also at the meeting, school personnel asked [STUDENT]'s parents to limit [STUDENT]'s training to shoot a gun through his 4-H program as he was telling peers: "I will shoot you with my .22." School personnel also asked [STUDENT]'s parents to limit the movies he was watching as he was acting out dialogue from the movies. To the school personnel, the dialogue seemed inappropriate for a child his age. [STUDENT]'s mother stated that *Spiderman* was the most violent movie [STUDENT] had at home and that he had no violent video games.

79. On approximately February 21, 2006, based on recommendations from the BeST, Ms. McCall began to schedule regular breaks for [STUDENT].

80. In a letter dated March 10, 2006, [STUDENT]'s mother wrote the IEP team and Kathy McCall and objected to the language in the BSP that police would be called in certain circumstances if [STUDENT] acted out. [STUDENT]'s mother argued that

[STUDENT] was complying with the existing BSP by attempting to leave the classroom, that Mrs. Spong blocked him and that this is what caused the hitting incident.

81. On March 14, 2006, [STUDENT]'s "Functional Analysis Worksheet" says: "He is going to kill himself and blame me." However this comment is not reflected on "[STUDENT]'s Day" form sent home or on the "Notes From School" form where his behavior is marked as "super" for the morning and the afternoon. The evidence does not reveal whether the author of the forms sent home was aware of the comment recorded on the Functional Analysis Worksheet.

82. [STUDENT]'s mother wrote a long letter to Frederick attention to [STUDENT]'s IEP team and Kathy McCall dated March 15, 2006. The letter was complimentary of the work of the IEP team. The letter, though, expressed concern that [STUDENT]'s IEP was not meeting his needs and specifically referenced his lack of overall academic progress. [STUDENT]'s mother reiterated the 16 points she felt were necessary for [STUDENT]'s education set out in her earlier May 25, 2005 letter. The letter asked the School District to again have Margaret Wilson administer the Woodcock Johnson III test or other similar standardized test to [STUDENT].

83. The School District responded that it would not pay for a re-administration of the Woodcock Johnson III test.

84. [STUDENT]'s mother's request for a re-administration of the Woodcock Johnson III test or other similar test was not made for the reason that she disagreed with an evaluation obtained by the School District. The School District had obtained no such other evaluation.

*The March 23, 2006 IEP Team Meeting*

85. An IEP team meeting was held March 23, 2006. The purpose of the meeting from the point of view of the School District was to respond to [STUDENT]'s behaviors and to provide additional supports around his behaviors with less emphasis on academics. Prior to the meeting, the school prepared a draft of a new IEP form.

86. [STUDENT]'s mother was not ready for the school to draft new IEP goals as she was seeking an evaluation through John W. Kirk, Psy. D., a pediatric neuropsychologist, and she wanted to await the results of this evaluation, particularly the results of the Woodcock Johnson III test that Dr. Kirk had chosen to administer.

87. School personnel were opposed to using the Woodcock-Johnson test to measure [STUDENT]'s progress. The school personnel did not believe it would be helpful, as it did not show progress against the goals set out for [STUDENT] in his IEP. School personnel felt it was appropriate to measure [STUDENT]'s progress toward these goals via informal assessments, work samples and observations.

88. At the March 23, 2006 IEP meeting Ms. Horning told [STUDENT]'s parents that that the School would not delete the reference in the BSP to calling the police, and that an appeal was their remedy.

89. Also at the March 23, 2006 IEP meeting, [STUDENT]'s mother learned that a behavioral specialist, Kim Perry, had been brought in to observe [STUDENT].

90. In a letter dated March 28, 2006 [STUDENT]'s mother wrote to Frederick personnel, attention to [STUDENT]'s IEP team. She asked for a copy of the behavioral specialist's "reports and recommendations." She also expressed her view that it was important to use the Woodcock Johnson III test to compare [STUDENT]'s progress using the same data and measurements that were used at the beginning of the IEP process. The letter went on to state that [STUDENT]'s family had requested Dr. Kirk to conduct a comprehensive neuropsychological evaluation. [STUDENT]'s mother stated in the letter that she would be seeking reimbursement from the School District in obtaining reimbursement "pursuant to 34 C.F.R. 300.502."

91. Ms. McCall received the March 28, 2006 letter from [STUDENT]'s mother but neglected to forward Ms. Perry's two-page report.

92. In a letter dated March 29, 2006 Ms. McCall noted that she had consulted with one of the directors of Special Education, Marla Ladd, who had told her that the Woodcock Johnson III test was not an appropriate tool to evaluate [STUDENT]'s progress. In the letter, Ms. McCall offered to gather other data to assess [STUDENT]'s progress.

93. On April 25, 2006 [STUDENT]'s mother wrote on the "Notes from Home" form that [STUDENT] had read *Cat Kong* for one hour.

94. On April 25, 2006 [STUDENT] became angry because he was allowed only one piece of poster paper. He struck Ms. Ellis in the arm on his way leaving the classroom. [STUDENT] was given a one half-day in school suspension from school. [STUDENT]'s mother agreed to this suspension.

*John W. Kirk, Psy.D.*

95. In late February 2006 Theodore Henderson, M.D. with an organization called "Brain Matters" saw [STUDENT]. Dr. Henderson performed a brain spectroscopy scan of [STUDENT] that Dr. Henderson interpreted as suggestive of traumatic brain injury. Dr. Henderson recommended the performance of a neuropsychological evaluation. [STUDENT]'s mother, not Dr. Henderson, chose Dr. Kirk for the neuropsychological evaluation.

96. On April 26, 2006 Dr. Kirk observed [STUDENT] at school. One of [STUDENT]'s assignments that day was to write three sentences. He engaged in multiple negotiations with the paraprofessional who was administering the assignment. He ended up writing one sentence in an hour and 45 minutes. In mathematics class he was more productive and completed two math worksheets in 30 minutes. Despite being productive, though, he was extremely impulsive, often yelling out answers and interrupting other students. At lunch other students sat next to [STUDENT] and spoke with him. However, [STUDENT] made limited responses and demonstrated poor social awareness; he had difficulty interpreting other children's social cues and was focused on topics of personal interest.

97. Prior to April 26, 2006 Dr. Kirk evaluated [STUDENT] during three separate office visits lasting a total of nine hours. Dr. Kirk administered a number of tests that Dr. Kirk considered valid, as [STUDENT] cooperated, although [STUDENT] would often initially say that he could not perform certain tasks.

98. Dr. Kirk administered the Wechsler Intelligence Scale for Children, Fourth Edition (“WISC-IV”) on March 30, 2006 and compared it to a test using the same testing instrument administered on behalf of the School District June 21, 2005. In the opinion of Dr. Kirk, an examination of raw scores, rather than standard score performance, provides a more thorough indication of losses or gains in skills. The raw scores may be used to compare with [STUDENT]’s earlier performance on the same test. Standard score performance compares the examinee to same-age peers. In Dr. Kirk’s report written sometime after April 26, 2006 he wrote, and the ALJ finds as fact as follows:

[STUDENT]’s raw score performance over time revealed a generally stable performance to minimal areas of gain on measures of rapid visual information processing. Similar “plateauing” or minimal skill gains were noted on measures of verbal reasoning. His performance was lower on measures of short-term auditory attention and nonverbal reasoning, potentially related to declining skills or increased problems with impulse control and inattention.

99. Dr. Kirk also administered the Woodcock-Johnson III test on April 4, 2006 and compared it to results using the same testing instrument administered by the School District June 24, 2005. As with the WISC-IV test, Dr. Kirk felt that [STUDENT]’s raw scores on the Woodcock-Johnson III test were more significant. Dr. Kirk determined, and the ALJ finds as fact:

In general, [STUDENT] made minimal gains or no gains at all in various academic areas, which is concerning as he has basically completed an entire academic year at the time of testing. In summary, [STUDENT]’s broad reading was at the 1.9 grade equivalent, broad written language was at the 1.8 grade equivalent, and broad math was at the 1.8 grade equivalent.

100. Later in his report Dr. Kirk characterized [STUDENT]’s minimal or no gains reflected on the Woodcock Johnson III test as “extremely concerning, as he is a child of at least average intelligence.”

101. In his report Dr. Kirk gave a diagnosis of Pervasive Developmental Disorder, Not Otherwise Specified (PDD-NOS) as described in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Addition (“DSM-IV”). Dr. Kirk also determined that [STUDENT] met DSM IV diagnostic criteria for a Reading Disorder and a Disorder of Written Expression and that there was evidence that he meets DSM-IV diagnostic criteria for Mixed Expressive Receptive Language Disorder. Dr. Kirk felt that [STUDENT] did not meet the diagnostic criteria for Asperger’s Disorder or Autistic

Disorder. Dr. Kirk believes that one of the DSM-IV diagnostic criteria for Asperger's Disorder is missing in [STUDENT]'s case. That missing criterion is the absence of a clinically significant general delay in language (DSM-IV diagnostic criterion Asperger's Disorder 299.80 D.). This is not a significant deviation from other treaters who have diagnosed Asperger's Disorder in [STUDENT].

102. Dr. Kirk made lengthy recommendations for [STUDENT] in the areas of attention modulation, behavioral recommendations, medications, social skills training, organizational assistance, learning style, speech/language therapy, occupational therapy and adaptive behaviors. In the area of academic placement, Dr. Kirk recommended the following:

- A challenging academic setting with structure and support. Based on the observations of April 26, 2006, Dr. Kirk recommended a smaller special education classroom, rather than a one-on-one paraprofessional setting.
- Speech/languages and occupational therapy intervention services provided individually and in the classroom.
- Highly structured social skills training provided through a group setting and facilitated by a mental health professional.
- Dr. Kirk identified [STUDENT] as suffering from significant inattention and executive dysfunction. To respond to this, Dr. Kirk recommended a consistent behavioral management plan developed by a mental health professional and agreed to by all parties and which used positive reinforcement.
- The presentation of information in a way related to his areas of interests such as science and dinosaurs.
- Extended time on classroom assignments, but not without a time limit.
- Mental health services by a school counselor with a focus on the promotion of social skills development, appropriate communication of feelings, and regulation of emotions.

*Findings of Fact Regarding [STUDENT]'s Academic Progress in the 2005-06 School Year.*

103. The ALJ has found above that [STUDENT]'s August 12, 2005 IEP was reasonably calculated to provide him educational benefit. Judged in retrospect, however, positive academic and non-academic benefits were not demonstrated.

104. In making this finding of fact, the ALJ relies chiefly on the testimony and evaluation by Dr. Kirk. Dr. Kirk used objective, valid tests such as the WISC-IV and the Woodcock-Johnson III. Dr. Kirk compared [STUDENT]'s own performance at two points in time; he did not compare [STUDENT] to other test takers. This is the method of testing approved of by the Court in *Houston Independent School District v. Bobby R.*, 200 F.3d 341 (5<sup>th</sup> Cir. 2000). These tests are more reliable than the measurements of academic progress relied upon by the School District, which are not standardized and are subjective. It was in the interest of the School District and the School to have its own evaluations show progress. This interest, of course, could be very benign: teachers want to believe they are helping students and that their students are improving academically.

105. Nevertheless Dr. Kirk's impression that [STUDENT] was "plateauing" was also reflected in the School District's own data. [STUDENT] mastered only three of the 21 goals and objectives of his August 12, 2005 IEP. By the end of the third trimester, [STUDENT]'s 4<sup>th</sup> Grade Report Card marked him as "partially proficient" in all areas except science and physical education. Most students are expected to reach the "proficient" or next higher category, "advanced," by the third trimester, yet [STUDENT]'s marks did not increase.

106. The reading checklist for [STUDENT] that Mrs. Spong kept showed that [STUDENT] had mastered nine skills by the end of the school year. Yet he had mastered six of these nine skills by the first trimester: the first evaluation period. This mastery likely demonstrates skills [STUDENT] already had at the commencement of the school year. During the school year he added mastery of only three additional skills.

107. Dr. Kirk's opinion that [STUDENT] made little progress is also supported by the accounts of his behavior. A "plateauing" in [STUDENT]'s learning is to be expected in light of his frequent behavioral problems. The School District's behavioral coach Kim Perry wrote: "most of his day is spent protesting, escaping or negotiating." This is consistent with Dr. Kirk's observations of [STUDENT] on April 26, 2006. Little learning can be expected out of such a school day.

108. Finally, the School District argues that any failure on the part of [STUDENT] to progress academically is a result of his frequent absences and the fact that he was granted, at his mother's request, an excuse from three weeks of homework. The evidence does not sufficiently establish, however, the nature of these absences. The ALJ cannot make any finding of fact that these absences represent the fault of either party. More importantly, in light of [STUDENT]'s behavioral problems, the evidence is insufficient to find that any more attendance or homework would have achieved better academic results.

#### *Events of May 11, 2006*

109. On May 11, 2006 [STUDENT] became very upset about the fact that a certain book was unavailable at the library. He remained angry for about five minutes. On his way out of the special education room he pushed Ms. Ellis against her

midsection pinning her to the door. [STUDENT] received an in-school suspension for the remaining two thirds of the day.

110. Also on May 11, [STUDENT] yelled at Ms. Haas:

I wish Mrs. Horning had a gun to shoot me! Then I could blame her. I will put guns on her Christmas list so she will have one, so she can use it, so somebody else would call my mom, like you Mrs. Haas. My mom would call the police and get everyone in trouble.

111. Ms. Haas took [STUDENT] to a place where he was to de-escalate per his behavior plan. Ms. Haas reported this incident to Ms. Horning only.

112. School documents concerning the December 7 and 8, 2005, the April 25, 2006 and the May 11, 2006 suspensions are titled "record of disciplinary hearing." No adversarial disciplinary hearings were in fact held regarding these suspensions.

113. May 11, 2006 was [STUDENT]'s last day at Frederick. Thereafter the School District agreed to [STUDENT]'s mother's request to home school him.

*The May 23, 2006 IEP Team Meeting*

114. [STUDENT]'s mother and the IEP team met again May 23, 2006. In advance of the May 23, 2006 meeting, the School District prepared a new draft IEP. By the May 23, 2006 IEP meeting, the School District had Dr. Kirk's report.

115. At the May 23, 2006 meeting Ms. Mary Sires, the Executive Director of Student Services at the School District, stated that the IEP team was in agreement that [STUDENT] was going to need a more restrictive setting. The consensus of the meeting was that [STUDENT] should be placed in a day treatment program for the following school year. In making this decision, School District personnel relied in part on the recommendations of Dr. Kirk. Goals and objectives had been drafted but were not presented at the meeting, as the placement for the next year had not been determined. These draft goals and objectives were at a higher level than the goals and objectives of the August 12, 2005 IEP.

116. A number of participants at the meeting then left and a smaller group held a discussion. Included in this smaller group were counsel for the School District and for [STUDENT]. This smaller group all agreed that a return to Frederick was not appropriate for [STUDENT]. The School District offered five possible placements for [STUDENT]: Burlington Elementary, Reflections, the Littler Center, Cleo Wallace, and Flatiron Academy. It was later learned that Reflections would not accept a child as young as [STUDENT]. All of these schools cost much less than WINSi.

117. The placements offered by the School District were an attempt to begin dialogue with [STUDENT]'s representatives. The School District made no formal offer of placement that would have required [STUDENT]'s representatives to inform the IEP Team that they were rejecting a proposed placement as described in 20 U.S.C. Section 1412 (a)(10)(C)(iii)(I)(aa).

118. Flatiron Academy is on the Colorado Department of Education eligible facility list. Burlington and the Littler Center are not on the eligible facility list. There are no regular education students at WINSi.

119. [STUDENT]'s representatives have failed to supply sufficient evidence to prove that Flatiron Academy or any of the other schools offered by the School District would not have offered him a FAPE for the 2006-07 school year.

*Negotiations Over the Summer of 2006*

120. Counsel for [STUDENT] and for the School District had discussions over the summer of 2006 regarding possible placements for [STUDENT]. The discussions continued until August 21, 2006. In a fax of that date to Ms. Bouzari, the School District's counsel offered have [STUDENT] placed at Flatiron Academy. The letter stated that if that placement was rejected and that if [STUDENT] would be seeking a private placement, to forward a letter to that effect so that a due process hearing could be had.

121. Also on August 21, 2006, Ms. Bouzari sent a letter to counsel for the School District telling him that [STUDENT]'s parents had chosen to send [STUDENT] to WINSi and that they would be expecting the School District to pay for this placement.

122. Twenty U.S.C. Section 1412 (a)(10)(C)(iii)(I)(bb) provides that the cost of reimbursement for private placement may be reduced or denied if the parents do not give ten days notice prior to the removal of the child from public school. Ms. Bouzari's August 21, 2006 letter did not violate this requirement in that [STUDENT] had been removed from Frederick since May 11, 2006.

123. There was no failure on the part of the School District to "reconvene" the May 23, 2006 meeting. The parties were at an impasse and neither party indicated to the other that another meeting was desirable.

124. Over the summer, [STUDENT]'s parents discovered that what they thought was independent reading on [STUDENT]'s part was in fact merely looking at pictures.

*WINSi*

125. On September 18, 2006, [STUDENT] began attending WINSi in Boulder. WINSi is a multidisciplinary program that evaluates and treats individuals with a variety of learning disabilities and attention deficit hyperactivity disorder. It is not on the Colorado Department of Education list of facilities eligible to receive public education funding in order to provide its own school program. WINSi offers a nine week, five hours a day five days a week program that is delivered on a one-to-one basis. The nine-week program costs \$18,000 to \$20,000. Treatment sessions last for 50 minutes with a ten-minute break for recreational activities. At the end of the program the child is re-evaluated and the findings are communicated to the child's school.

126. WINSi offers the nine-week program during the summer so that students do not miss school. WINSi offers sessions during the school year as well. Personnel at WINSi try to be in contact with a student's regular school if the student is attending one.

127. At WINSi [STUDENT] receives speech/language therapy and a reading program that teaches him word meaning. WINSi also teaches [STUDENT] math skills, writing and touch-typing. Furthermore, he receives instruction in self-care, recreation therapy and improving social relationships. Only one of the staff at WINSi is a teacher and that person works as a teacher part-time.

128. It is his mother's impression that [STUDENT] is making improvement in his reading at WINSi.

129. According to Kytja K. S. Voeller, M.D., the Director of WINSi, [STUDENT] is expected to require more than the nine-week program; it is expected that he will need to stay into the spring and perhaps for the entire 2006-07 school year.

130. It was Dr. Kirk who first put [STUDENT]'s family in touch with WINSi. Dr. Kirk's office is in the same building as WINSi and Dr. Kirk regards Dr. Voeller as a colleague. [STUDENT]'s parents made an exhaustive search of other places for [STUDENT] to attend for the 2006-07 school year. Other than WINSi, the only programs they believed were appropriate were on the east coast and were far more expensive than WINSi.

131. In a letter to [STUDENT]'s mother dated October 10, 2006, Dr. Kirk discussed his investigation of [STUDENT]'s possible placement at Burlington Elementary School. Dr. Kirk opined that such a placement would not be appropriate.

132. Dr. Kirk went on to recommend that [STUDENT] continue at WINSi for the prescribed amount of treatment determined by Dr. Voeller. After completion of the WINSi program, Dr. Kirk recommended that [STUDENT] undergo another full neuropsychological evaluation to determine his needs at that time.

*Disclosure of Information Regarding [STUDENT]'s Behavior*

133. [STUDENT]'s mother ultimately saw "[STUDENT]'s Behavior Log" and the "Functional Analysis Worksheet" shortly before the hearing before the IHO. Had school personnel shared this information with [STUDENT]'s mother, it is her testimony that she would have insisted that Dr. Hansen be brought in as an active member of his IEP team and that his placement be revisited.

134. The ALJ finds that it would have been the better practice for the School to have shared "[STUDENT]'s Behavior Log" and the "Functional Analysis Worksheet" with [STUDENT]'s mother all along. Nevertheless, the ALJ finds that the school provided sufficient and timely communication of [STUDENT]'s behavior through other communication methods. While the "Notes From School" do not contain the explicit quotations that appear in "[STUDENT]'s Behavior Log" and the "Functional Analysis Worksheet," they often contain comments indicating that [STUDENT]'s behavior was not good. In particular the ALJ relies on the November 15 and 16 and the December 2 and 5, 2005 "Notes From School" discussed above. [STUDENT]'s mother was also

apprised of his conduct that led to his December 7 and 8, 2005 suspension. Additionally, “[STUDENT]’s Day” form for February 2, 2006 contains a quote from him “I want to kill everyone.”

135. [STUDENT]’s mother is particularly critical that she was not provided communication regarding [STUDENT]’s self-harming statements. These statements first appeared January 9 and 19 on the logs not shared with her. But on February 14, 2006, Mary Beth Downing told [STUDENT]’s mother of this behavior. The failure to report the self-harming statement of March 14, 2006, relied upon by [STUDENT]’s attorney in her appeal, came after this communication from Ms. Downing. In any case, these sorts of statements were not new for [STUDENT]. Self-harming statements by him were documented in evaluations done in preparation for his August 12, 2005 IEP.

136. Again, it would have been the better practice for the school to have shared “[STUDENT]’s Behavior Log” and the “Functional Analysis Worksheet” with [STUDENT]’s mother. However, the school’s failure to do so, with the consequent delay in forwarding this information regarding self-harming remarks, did not deprive [STUDENT] of a FAPE. In particular the school did not fail to provide sufficient mental health resources to [STUDENT] by this failure, as argued by his representatives.

#### *The IHO’s Prehearing Orders*

137. On November 1, 2006 the IHO issued a Supplemental Pre-Hearing Order. At the first day of hearing before him November 7, 2006 he interlineated and initialed some changes to the Order at the request of [STUDENT]’s counsel. As modified, the Order provided that the following issues were to be decided at the hearing:

1. Was a Free Appropriate Public Education provided by the Respondent to the student in the 2005-2006 school year?
2. Is the placement of the Student at WINSi for the 2006-2007 school year appropriate?
3. If the placement at WINSi is found to be appropriate, is the reimbursement for this placement requested by the Petitioners reasonable?
4. Is the Evaluation by Dr. Kirk an Independent Educational Evaluation as defined by Colorado Statutes and federal regulations and therefore the responsibility of the Respondent?

138. In his decision, the IHO set out the issues to be determined. The issues he listed were not the same as those in his Supplemental Pre-Hearing Order:

1. Was a Free Appropriate Public Education (FAPE) provided by the Respondent to the student at Frederick Elementary School for the 2005-2006 school year?

2. Was FAPE provided by an IEP to the Student for 2006-2007 school year by the Respondent
3. If not, is the placement of the Student at WINSi for the 2006-2007 school year appropriate?
4. If the placement at WINSi is found to be appropriate, what should the monetary reimbursement be by the Respondent?
5. Is the Evaluation by Dr. Kirk an Independent Educational Evaluation as defined by Colorado Statutes and federal regulations and therefore the responsibility of the Respondent?

As can be seen, issue no. 2 is a new issue not listed in the Supplemental Pre-Hearing Order

*Hearing Before the IHO*

139. The hearing before the IHO was held on November 7-8 and 13-14, 2006. The IHO issued his decision November 27, 2006.

140. At hearing, the School District had Ms. Sires testify in general that the four placements offered, Burlington Elementary, the Littler Center, Cleo Wallace, and Flatiron Academy, were appropriate for [STUDENT] (hearing transcript p. 714, l. 6 through 8). The School District then attempted to present more specific evidence regarding the appropriateness of Burlington for [STUDENT] (hearing transcript p. 714, l. 9 and 10.) The IHO sustained an objection by [STUDENT]'s attorney to this questioning. He did so on the grounds that at a pretrial conference he ruled that he would not permit testimony about other placements.

*The IHO Decision*

141. On November 27, 2006, the IHO issued his Finding of Fact, Conclusions of Law, and Final Order ("IHO Decision"). In pertinent part the IHO Decision finds that Ms. Sires testified that the four placements ultimately offered for the 2006-07 school year were all appropriate for [STUDENT]. This finding is apparently based on the unobjected to question at hearing transcript p. 714, l. 6 through 8, although the IHO cites an unrelated portion of the transcript for this testimony. The IHO only indicated that Ms. Sires so testified, he did not adopt her testimony as a finding of fact.

142. Later though, in finding of fact 47, the IHO found: "The testimony of the Mother that none of the placements suggested by the Respondent was suitable was undisputed by the Respondent." The record does not support this finding of the IHO; the portion of Ms. Sires's testimony that the IHO allowed and referenced contradicts it. Moreover, the IHO prevented the School District from presenting further evidence of the appropriateness of the four other placements.

143. The IHO found that FAPE was provided [STUDENT] for the 2005-06 school year, but that it ceased to be provided after the May 23, 2006 IEP meeting. The

IHO based this determination on the fact that no further attempts to convene another IEP meeting were made.

144. The IHO also denied [STUDENT]'s request for reimbursement of Dr. Kirk's evaluation.

145. The IHO ordered the School District to pay for [STUDENT]'s weekly program fees at WINSi for 36 weeks at \$1,800 per week as well as follow-up care in a total of \$16,000.

146. The IHO further ordered that the weekly program fees and follow-up care would be terminated as soon as a new IEP is generated if the IEP finds them unnecessary. He ordered the parties to conduct a new IEP meeting to attempt to find "a more reasonable alternative to WINSi following the doctrine of *Doe v. Board of Ed. of Tullahoma City School*, 9 F.3d 455, 459 (6<sup>th</sup> Cir. 1993)." By his use of the words "more reasonable" and by his reference to the *Tullahoma* case, the IHO indicated that he believed that WINSi was too expensive, but not unreasonable or inappropriate. At 459 the *Tullahoma* Court provides that the IDEA requires the educational equivalent of a serviceable Chevrolet and not a Cadillac.

#### *Events Following the IHO Decision*

147. On December 8, 2006 the School District appealed the IHO's decision to the OAC. On December 11, 2006 the IHO granted the School District's motion for a stay of his decision without comment. On December 15, 2006 [STUDENT]'s counsel filed a Notice of Cross Appeal with the OAC. Also on that day, [STUDENT]'s representatives filed a Motion to Lift Stay. On December 26, 2006 the School District responded in opposition.

148. On December 15, 2006 the ALJ issued a Directive for Certification of Record to the IHO. The IHO provided the record. The ALJ notes that the IHO did not forward copies of the exhibits of the School District where the same exhibit is found in [STUDENT]'s exhibits.

149. On December 15, 2006 [STUDENT] filed a motion to lift the stay and on December 26, 2006, the School District responded in opposition. Oral argument was held on the motions at a status conference before the ALJ January 3, 2007.

150. At the status conference, [STUDENT]'s representatives relied on Rules 6.03(14)(a) and (b) that provide:

(a) During the pendency of any due process hearing or appeal, unless the administrative unit and the parents agree otherwise, the child shall remain in his or her current educational placement.

(b) If the decision of a hearing officer in a due process hearing, or an administrative law judge in an appeal, agrees with the child's parents that a change of placement is appropriate, that placement shall be treated as an

agreement between the administrative unit and the parents for purposes of paragraph (a) above.

151. The School District did not dispute that these rules require the IHO's decision to be treated as an agreement. The School District asked for the stay based on the IHO's adding of the new issue no. 2. At the January 3, 2007 conference, the School District conceded that, but for the matter of issue no. 2, Rule 6.03 14(b) required it to pay for [STUDENT]'s education at WINSi. Therefore, on that same day, the ALJ issued an order lifting the stay.

#### *The January 3, 2007 Status Conference*

152. Also at the January 3, 2007 conference the parties disclosed that the new IEP meeting was scheduled for January 11, 2007. The parties disagreed as to whether the IHO decision required continued payment for education at WINSi if a new IEP could not be reached January 11.<sup>2</sup> The ALJ issued a written order dated January 3, 2007 that the IHO decision did not cover this issue, and that the ALJ declined to order the School District to pay for [STUDENT]'s education at WINSi past January 11, 2007.

153. At the January 3, 2007 conference a briefing schedule was established. Neither party requested oral argument. However, at the very end of [STUDENT]'s response brief submitted January 18, 2007, [STUDENT]'s attorney asked for oral argument.

154. In pertinent part, the School District challenged on appeal the IHO's addition of issue no. 2 and his finding that FAPE had been denied for the 2006-07 school year for failure to reconvene the May 23, 2006 IEP meeting. The School District also argued that [STUDENT]'s request for a hearing was untimely.

155. Also in pertinent part, [STUDENT]'s representatives challenged on appeal the IHO's decision that FAPE was provided for the 2005-06 school year and the decision to deny reimbursement for Dr. Kirk's evaluation.

### **Conclusions of Law**

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. Rule 6.03(11)(b)(iii) provides that the ALJ shall afford the parties an opportunity for oral or written argument or both, if appropriate. As the written argument has been extensive, the ALJ concludes that no oral argument is appropriate.

2. As described above, Rules 6.03(14)(a) and (b) require that the IHO's stay of his order be lifted.

#### *The 2005-06 School Year*

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<sup>2</sup> [STUDENT]'s representatives state in their response brief that the January 11, 2007 IEP meeting resulted in an impasse. As this information is not part of the evidence, no finding of fact may be made regarding this information.

3. In retrospect, [STUDENT]'s August 12, 2005 IEP did not provide him positive academic and non-academic benefits. The School District argues, though, and the ALJ agrees, that a retrospective analysis, or "Monday morning quarterbacking" should not be used to determine if FAPE has been provided. See *O'Toole v. Olathe District Schools*, 144 F.3d 692, 701-2 (10th Cir. 1998) and *Adams v. State of Oregon*, 195 F.3d 1141, 1149 (9th Cir. 1999). What matters is whether the IEP conformed with the requirements of the IDEA and was reasonably calculated to provide [STUDENT] educational benefit. *Urban v. Jefferson County School District R-1*, 89 F.3d 720, 726 (10th Cir. 1996). The ALJ has found that [STUDENT]'s August 12, 2005 IEP met this requirement.

[STUDENT]'s mother was included in the creation of the IEP. The School District reviewed the extensive documentation provided by [STUDENT]'s mother and employed a psychologist and special education teacher to evaluate [STUDENT] through the use of standardized tests. His IEP attempted to take into account his learning disabilities. The BSP set out extensive and comprehensive strategies to keep [STUDENT] focused and to prevent him from becoming upset. The BSP provided for a "safe place" for [STUDENT] to go when he did lose his temper.

4. Schools are nevertheless required to adjust their educational response when there are signs that the IEP is not working:

Of course, if a student had failed to make any progress under an IEP in one year, we would be hard pressed to understand how the subsequent year's IEP, if simply a copy of that which failed to produce any gains in a prior year, would be appropriate.

*Carlisle Area School v. Scott P.*, 62 F.3d 520, 534 (3rd Cir. 1995)

5. In this case the School District reacted in a timely manner to indications that [STUDENT] was not progressing. After a rough start at the beginning of the 2005-06 school year, the indications were that [STUDENT] had settled in. By December, though, [STUDENT]'s behavior started to deteriorate. December 7, 2005 was his first hitting incident. The school reacted and modified [STUDENT]'s BSP. The School District convened another IEP meeting March 23, 2006 to respond to [STUDENT]'s worsening behavior.

6. Also, the School provided communication of [STUDENT]'s behavior. While this communication could have provided the detail contained in "[STUDENT]'s Behavior Log" and the "Functional Analysis Worksheet," the ALJ has determined that the School's communication was sufficient and timely.

7. The most significant evidence that [STUDENT] was not progressing came with Dr. Kirk's report. But that was not available to the School District until the May 23, 2006 IEP meeting. By that time, the school year was almost over and, in any case, the school had acquiesced to [STUDENT]'s mother's request to home school him. At the May 23, 2006 IEP meeting, the School District did not insist that [STUDENT]'s plan for next year be a copy of the previous year's plan; it recognized a new environment was

required and offered other placements. Under all these circumstances, it cannot be said that the School District failed to make timely adjustments as [STUDENT]'s situation deteriorated.

*The 2006-07 School Year*

8. The School District argues that it was improper for the IHO to add issue no. 2 to the "Issues to be Determined." The School District relies on the requirement that the IHO's decision shall be within the scope of the issues presented on the record at Rule 6.03(6)(d)(v). The School District also objects to the IHO's restriction on its presentation of evidence as to the other placements it offered for the 2006-07 school year. The ALJ need not resolve these issues for the reason that neither party requested to present additional evidence to the ALJ as is permitted by Rule 6.03 (11)(b)(ii). As such, the parties acquiesced to the state of the record as presented to the IHO.

9. All this being said, a decision to pay for the cost of public school requires a showing by [STUDENT]'s representatives that the School District failed to offer FAPE. As it is [STUDENT]'s representatives that seek the relief of payment for a private school, they have the burden of proof. *Schaffer v. Weast*, 546 U.S. 49 (2005).

10. Twenty U.S.C. Section 1412(a)(10)(C)(i) provides:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility *if that agency made a free appropriate public education available to the child* and the parents elected to place the child in such private school or facility.

[Emphasis added.]

In this case, [STUDENT]'s representatives have failed to prove that Flatiron Academy, or any of the other placements offered by the School District would not have provided FAPE. That the placement for 2005-06 was not successful is not the issue. Properly, the School District recognized that a different approach was necessary for the next year and offered these new placements. In order to require the School District to pay for WINSi, [STUDENT]'s representatives were required to show that these placements were inadequate.

11. The IHO's order that the School District pay for [STUDENT]'s education at WINSi because the May 23, 2006 IEP meeting was not reconvened was erroneous. Negotiations proceeded over the summer of 2006 involving counsel for both parties, but the parties were unable to come to any agreement about [STUDENT]'s placement and any further IEP meeting would have been pointless. The matter came to a head August

21, 2006 when the School District told [STUDENT]'s representative to have [STUDENT] appear at Flatiron Academy or to ask for a hearing. [STUDENT]'s representative asked for that hearing and this proceeding followed.

*Compensation for Dr. Kirk's Evaluation*

12. [STUDENT]'s representatives rely on the authority of 34 C.F.R. Section 300.502(b) to request that Dr. Kirk's evaluation be made at public expense. That subsection at (b)(1) provides:

(1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency ....

In this case, there was no disagreement with an evaluation obtained by the public agency. No such other evaluation had been done. The School District is therefore not responsible for the cost of Dr. Kirk's evaluation.

*Issues of Timely Appeal*

13. The School District made no formal offer of placement at the May 23, 2006 IEP meeting requiring [STUDENT]'s representatives to inform the IEP Team that they were rejecting a proposed placement as described in 20 U.S.C. Section 1412 (a)(10)(C)(iii)(I)(aa).

14. Ms. Bouzari's August 21, 2006 letter telling the School District that [STUDENT] would be enrolling in WINSi did not violate the ten day notice requirement of 20 U.S.C. Section 1412 (a)(10)(C)(iii)(I)(bb) as [STUDENT] had been out of public school since May 11, 2006. [STUDENT]'s appeal in this matter was therefore timely.

**DECISION**

Based on the foregoing, the ALJ affirms the decision of IHO that FAPE was provided [STUDENT] for the 2005-06 school year; and reverses the IHO's decision that it was not provided for the 2006-07 school year. The School District is not required to pay for [STUDENT]'s education at WINSi. It may seek to recover any amount paid to [STUDENT]'s representatives for this education based on the IHO's decision and the ALJ's lifting of the stay. The ALJ affirms the IHO's decision to deny reimbursement for Dr. Kirk's evaluation.

Per Rule 6.03(12) the decision made upon a state level review shall be final except that either party has the right to bring a civil action in an appropriate court of law, either federal or state.

**DONE AND SIGNED**

February 27, 2007

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MATTHEW E. NORWOOD  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

Catherine A. Tallerico  
Adele L. Reester  
P.O. Box 978  
Longmont, CO 80502-0978

Eloise Henderson Bouzari  
7887 E. Belleview, Suite 1100  
Englewood, CO 80111

and to

Keith Kirchubel  
Colorado Department of Education  
201 East Colfax  
Denver, CO 80203-1704

on this \_\_\_\_ day of \_\_\_\_\_, 2007.

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Office of Administrative Courts