

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, Denver, Colorado 80203	
<b>[Parent],</b> Complainant,  vs.  <b>EAST CENTRAL BOARD OF COOPERATIVE EDUCATIONAL SERVICES,</b> Respondent.	▲ <b>COURT USE ONLY</b> ▲
	<b>CASE NUMBER:</b>  <b>EA 2015-0001</b>  <b>Consolidated</b>
<b>AGENCY DECISION</b>	

On February 6, 2015, the Colorado Department of Education, Exceptional Student Services Unit (“CDE”) received a due process complaint filed by [Parent] (“Complainant” or “[Parent]”) on behalf of her minor child, [Student] (“[Student]” or “Student”), alleging that the East Central Board of Cooperative Educational Services (“Respondent” or “BOCES”) had denied [Student] a free and appropriate public education under the Individuals with Disabilities Education Act, 20 U.S.C. § 1415(f), its implementing regulations at 34 C.F.R. § 300.511, and Colorado’s Exceptional Children’s Educational Act (“ECEA”), 1 CCR 301-8. The complaint was forwarded to the Office of Administrative Courts (“OAC”) and assigned to Administrative Law Judge (“ALJ”) Keith J. Kirchubel for an impartial due process hearing.

On April 17, 2015, the CDE received a due process complaint filed by the BOCES seeking authority to conduct a reevaluation of the Student based on [Parent]’s refusal to provide consent for such reevaluation. That complaint was also forwarded to the OAC for resolution and, based on the common facts underlying both cases and a finding that administrative efficiency would be enhanced, the two cases were consolidated for hearing by an Order issued on May 4, 2015.

Hearing was held in Denver, Colorado on May 14, May 15, June 8, and June 9, 2015. Complainant appeared and represented herself at hearing. The BOCES was represented by Alyssa Burghardt, Esq., and Meghan Pound, Esq. At hearing, the ALJ admitted into evidence Complainant’s exhibits B, C1, C2, D, M (pages 4, and 8-15 only), P (pages 31-42 only), BB (page 186 only), CC (excluding all handwriting present on

pages 36-48), and DD.<sup>1</sup> The ALJ also admitted the BOCES's exhibits 1-8, 10-13, 14 (pages 1 and 5-15 only), 16, 18-19, and 22-23. The proceedings were digitally recorded, and were also stenographically recorded on May 14, 15, and June 9. Following conclusion of the hearing, the parties each submitted a written closing brief.

## **ISSUES PRESENTED**

Whether the Student's October 4, 2013 individualized education program ("IEP") was reasonably calculated to provide her with a free appropriate public education ("FAPE") as required by the Individuals with Disabilities Education Act ("IDEA") during the Student's kindergarten and first grade years;<sup>2</sup> whether the Student's 2013 IEP was fully and appropriately implemented during her kindergarten and first grade years; whether the BOCES committed any procedural violations of the IDEA in developing an IEP during the period October, 2014, through April, 2015; whether the IEP developed for the Student and presented to Complainant on April 3, 2015, is reasonably calculated to provide the Student with a FAPE going forward. Additionally, the BOCES complaint raises the issue of whether the reevaluation of the Student should be authorized and conducted without the consent of her parents.

## **FINDINGS OF FACT:**

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

1. [Student] is a seven year-old girl who just completed first grade. She attends school in the [City], Colorado, School District (the "District"). The District is a member of the BOCES. There is no dispute that the Student is a child with a disability and therefore entitled to a FAPE. The Student has been identified as a child with developmental delay as her primary disability.

2. The Student's primary diagnosis is Down Syndrome, a genetic disorder. She has low muscle tone, but is active at school and enjoys recess on the playground. She has difficulty with sensing how much food is in her mouth and this results in a risk of choking and aspiration when eating. Her visual acuity in both eyes is impaired and was measured at 20/125 with glasses prior to entering kindergarten. She also has substantial hearing loss in her left ear. She is able to use both conceptual signs and spoken language.

3. The BOCES is an organization that pools resources for the purpose of serving special education students within its member districts. At the time of hearing, the BOCES provided special education services to approximately 937 students in

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<sup>1</sup> Complainant's Exhibit B and the referenced pages of Complainant's Exhibit P were admitted as administrative hearsay.

<sup>2</sup> As discussed below, the October 4, 2013 IEP was implemented with two amendments for the first grade year.

twenty member districts. For purposes of development and implementation of the Student's IEP, the BOCES is the responsible Administrative Unit.

#### **A. Kindergarten (2013-2014 Academic Year)**

4. [Student] was first identified as a child with a disability prior to her enrollment in kindergarten. During the 2013-2014 academic year, [Student] attended kindergarten. An IEP dated October 4, 2013, was implemented during that year. Hearing Exhibit No. 1.

5. The October 4, 2013 IEP identified a number of strengths for [Student]. These included her willingness to help and her eagerness to learn. She was noted to be caring, loving, and motivated to be included in activities with other students. She is quick to pick up on new academic skills. Areas of comparative weakness noted in the IEP were verbal communication, balance, and fine motor skills.

6. Based on the testimony of the Student's teachers, paraprofessional aides, and specialty service providers, [Student] also had problems with appropriate behaviors during the kindergarten year. She would get out of her chair, fall on the floor, and crawl under her desk when she was supposed to be attending to instruction. She also threw items and hit other children in the class. The Student's occupational therapist<sup>3</sup> implemented a "sensory diet" in the form of a weighted vest, joint compressions, and a fidget tool in an attempt to reduce the occurrence of these disruptive and potentially harmful behaviors. [Occupational Therapist] stated that [Student] "does a lot of kicking" and that placing elastic bands on the legs of her chair gives her something to press against. This pressure can reduce fidgeting and give a person sensory input that tends to reinforce for the brain where body parts are. [Occupational Therapist] notified [Parent] that the sensory was going to be tried, but did not consult with her in advance about the specific strategies. [Occupational Therapist] characterized this type of involvement on her part as typical for students who need help with attending. [Occupational Therapist] testified that she felt these measures were working for [Student] but were discontinued at the request of her parents. [Student] was consistently provided with positive reinforcement including thumbs-up, stickers, or other rewards for good behavior. School personnel also provided written accounts of the Student's behaviors to her parents until the parents requested that this form of communication be stopped.

7. The kindergarten IEP included a description of the Student's needs and impact of her disabilities. There it is noted that she required a sign language interpreter and a paraprofessional for her communication needs. Also, communication cues are set forth, including gaining the attention of [Student] and also speaking and saying "look and listen" to her before giving direction. Sign language was to be delivered in Conceptually Accurate Signed English ("CASE") but the IEP noted that both [Student] and the family were working on acquisition of American Sign Language ("ASL") as well. [Student] was also to be given extra time for processing information.

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<sup>3</sup> [Occupational Therapist], O.T.

8. [Student] also had needs in the areas of physical and occupational therapy to improve her gross motor and fine motor skills, her strength, and endurance. The Student's physical therapist<sup>4</sup> testified that the main goal for [Student] is for her to increase physical mobility and participate in school activities as independently as possible.

9. The IEP indicated that [Student] needed to continue to improve articulation skills, following multi-step directions, and interacting with all peers.

10. With regard to the Student's hearing deficit, the IEP prescribed use of a Red Cat sound field system, an FM amplification system, as well as a hearing aid in all settings other than physical education in the gym.<sup>5</sup> As noted above, the Student's language development was further supported by the use of CASE by a full-time interpreter as well as use of an electronic device called a Nova Chat that provides visual images to reinforce vocabulary.

11. Language development was further addressed in the kindergarten IEP by use of a list that featured a word, an image of the idea represented by the word, and the sign for each word that was added to the Student's vocabulary. This list accompanied [Student] back and forth from home to school to promote consistency across her learning environments.

12. The IEP included a transportation safety plan that prescribed the use of a secured safety seat with a five-point harness and specified that [Student] was to be carried on and off the bus. The record at hearing did not establish why the Student needed to be carried on and off the bus. Additionally, [Student] was to be accompanied at all times by an interpreter paraprofessional. The transportation plan included instructions for the event of an accident.

13. The IEP also included an extensive feeding plan for [Student]. All meals and snacks were monitored in 1:1 supervision by a trained adult to cut food and be sure that the Student took small bites, chewed, took a drink, and cleared her mouth before taking another bite. [Student] was also to be watched to be sure that she did not aspirate any food.<sup>6</sup>

14. The kindergarten IEP featured goals and objectives in the areas of gross motor and fine motor skills, speech and language (vocabulary acquisition, articulation, phonemic awareness), physical mobility, mathematics, participation in collaborative conversations with adults and peers, writing, use of multimodal communication, and use of a visual task strip. There was no testimony at hearing that these goals and objectives were inappropriate for [Student].

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<sup>4</sup> [Physical Therapist], D.P.T.

<sup>5</sup> During kindergarten, the Student's hearing aid was maintained by her family.

<sup>6</sup> [Advocate] testified that she had seen an untrained adult feeding [Student] during an observation at school. She did not say when that occurred, how she knew that the adult was untrained or if she had observed the situation more than once.

15. In addition, the IEP specified accommodations and modifications to facilitate the Student's ability to access the curriculum. These provisions included preferential seating to favor the Student's good (right) ear, access to her hearing aid and FM system in class, the special communication strategies introduced above plus the minimization of background noise, use of simplified directions and increased processing time, large print font for reading materials, full-time support of a sign language interpreter, regular communication between school staff and parents to reinforce concepts taught at school and to allow pre-teaching of anticipated topics, use of visuals and visual schedules<sup>7</sup> that feature high contrast, and use of the Nova Chat.

16. In kindergarten and beyond, [Parent] emphasized her preference for [Student] to be educated in the regular education classroom to the maximum extent. Also, despite the presence of a full-time interpreter and a full-time paraprofessional aide during class, meals, and transportation, [Parent] desired for the Student's interaction with her peers to be minimally impacted by the provisions of the IEP. The kindergarten IEP specified that [Student] be educated in the general education classroom in excess of eighty percent of the day.

17. In response to the fidgeting and disruptive behaviors noted in Finding of Fact No. 6, above, the Student would be given a "time out" during which her chair was pulled back from her desk. [Kindergarten Teacher], who was [Student]'s general education kindergarten teacher, testified that time outs were largely effective in correcting the Student's behaviors.<sup>8</sup> If [Student] persisted in the behavior, she had her chair turned around so that she was no longer facing the front of the classroom. [Paraprofessional], who served as the Student's paraprofessional aide during kindergarten and first grade, testified that turning the chair was not necessarily a form of punishment but rather an additional way to signal to [Student] that she needed to refocus. [Paraprofessional] testified that this measure was used for other kindergartners as well and seemed effective for [Student]. Eventually, [Paraprofessional] discontinued this measure during kindergarten because she was asked to stop.

18. During kindergarten, [Student] also received "stop and think" notices and office referrals. A stop and think notice is issued by the teacher to respond to inappropriate behaviors that are not deemed serious. Three stop and think notices issued within a three to four week period for similar behavior equate to an office referral. Office referrals are handled by the principal and arise from more serious or dangerous behavior problems or minor problems that are repeated. Hearing Exhibit M.

19. [Kindergarten Teacher] testified that she tracked the Student's behaviors to see if they correlated to an activity or a time of day. Although positive behavior supports were also used, these were not logged consistently during the kindergarten year. [Kindergarten Teacher] testified that [Student] made progress on reading and math goals, as well as the social-emotional skills that are part of the basic curriculum for

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<sup>7</sup> [Student] likes predictability and the visual schedules help her to know what activity is coming next.

<sup>8</sup> [Special Education Teacher] was the Student's special education teacher in kindergarten.

every kindergarten student. [Kindergarten Teacher] completed [Student]'s progress reports and interpreted them as reflecting progress even if the marks given were not progressively higher. She explained that the nature of the assignments change during the course of the year, becoming progressively more demanding. By way of example, [Kindergarten Teacher] testified that as a writing assignment during the first trimester, students are asked to draw a picture with detail and to label it. During the third trimester, students are asked to write three sentences using first letter capitalization and punctuation. Thus, a student who was "progressing" in reading during the first trimester, and "needing improvement" during the second trimester could nonetheless be said to be progressing overall if the nature of the assignments in the second trimester were factored in.

20. [Kindergarten Teacher] and [Paraprofessional] confirmed that there were changes in the staff that worked with [Student] during her kindergarten year. For example, [Kindergarten Teacher] took a leave of absence for a number of days in February, 2014. Prior to that time, [Kindergarten Teacher] had attempted to communicate regularly with [Parent] regarding [Student]'s experiences at school. However, [Kindergarten Teacher] found that she was spending hours reading and responding to email correspondence from [Parent] that she found overly critical of her work with [Student]. [Kindergarten Teacher] felt an inordinate amount of stress and took time away from the classroom. Likewise, the Student worked with more than one paraprofessional aide during the kindergarten year. While these changes in staffing may have had some impact on [Student], there was no evidence from which the ALJ could determine the nature and extent of any such impact. For example, the disciplinary issues that were covered in depth from October, 2013, were not correlated in any way to [Kindergarten Teacher]'s leave of absence in 2014, or the transition in paraprofessional aides.

21. [Former Special Education Director],<sup>9</sup> who served as the BOCES Special Education Director during [Student]'s kindergarten year, described [Kindergarten Teacher] as a master teacher. [Former Special Education Director] participated in the development of the kindergarten IEP and testified that it was comprehensive and responsive to [Student]'s unique needs. She observed the Student's class on multiple occasions as the supervisor of [Special Education Teacher]. She determined that the kindergarten IEP was fully implemented and that [Student] made progress academically, socially, and behaviorally. She observed [Student] receiving positive reinforcement in the forms of verbal comments, star stickers, and "high fives" on a regular basis.

22. [Educational Audiologist], Educational Audiologist for the BOCES since January, 2014, has worked with [Student] and consulted with her IEP team regarding the impacts of the Student's unilateral hearing loss, auditory supports (amplification systems, hearing aid), and seating. She established that hearing loss on one side makes it difficult to know where sound is coming from and more difficult to discriminate

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<sup>9</sup> [Former Special Education Director] holds a Master's degree in Special Education and a post-Master's Certificate in Special Education Administration. She worked in all aspects of special education in a 25 year career.

from background noise. She stated that the kindergarten and first grade IEPs specified appropriate supports for [Student] and that the measures were fully implemented during both years.

23. Consistent with the testimony of [Speech Language Pathologist], discussed below, [Educational Audiologist] has observed [Student] use English as her primary perceptive and expressive language. [Educational Audiologist], who is fluent in both ASL and CASE, testified that she has only signed individual words to [Student] twice in the last year to assist her understanding. She further explained that as ASL is a separate language, it does not follow the word order of English. CASE does follow English word order. Thus for a person like [Student] who is able to hear, CASE is easier to pair with what is being spoken.

24. The personnel who testified, including the Student's kindergarten teacher, paraprofessional aide, audiologist, occupational therapist, vision specialist, special education coordinator, and Special Education Director confirmed that the October 4, 2013 IEP was appropriate for the unique needs of the Student, and was implemented during the Student's kindergarten year.<sup>10</sup> [Advocate], an educator and advocate for students with extensive experience who has worked with [Student] in tutoring sessions observed [Student]'s kindergarten class an average of twice per month. [Advocate] emphasized the need for [Student] to have maximum inclusion in the regular education classroom and for the myriad adults involved in the delivery of instruction, interpretation, and related services to move away from [Student] while she is doing tasks, if possible. [Advocate] did not testify that the IEP was not being fairly and completely implemented.

25. [Parent] presented the testimony of [Transportation Director], the Transportation Director for the District. [Transportation Director] related an incident that occurred in May, 2014, while [Student] was being transported to school. The bus driver reported to [Transportation Director] that another driver had pulled in front of the bus in the area of an intersection, causing the bus driver to apply the brakes abruptly to avoid a collision. There was no contact between the bus and the other vehicle and there was no damage sustained by the bus. The sudden stop caused the bus driver to have soreness in her neck. With this information, [Transportation Director] contacted [Parent] and advised her about the incident. There was no information in the record that would lead to the conclusion that [Student] was involved in an "accident" as referenced in the IEP. [Transportation Director] was unaware of any adverse health effects suffered by [Student].<sup>11</sup>

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<sup>10</sup> The ALJ sustained two motions made by counsel for Respondent during the course of the hearing to exclude testimony of witnesses intended to be presented in support of the Complaint. The two witnesses, [Witness 1] and [Witness 2] had no percipient testimony to offer. [Parent] sought to elicit expert opinion from these witnesses but had not complied with a Prehearing Order dated March 17, 2015, requiring disclosure of the scope of such testimony and the credentials of the proposed expert.

<sup>11</sup> In the course of questioning [Transportation Director] regarding the incident, [Parent] briefly referenced two letters from a doctor who apparently saw [Student] afterwards. These documents were not offered and are not in the record.

26. In September, 2014, the State Complaints Officer for the CDE rendered a decision on a Complaint by [Parent] finding failures to implement the Student's October, 2013 IEP during the kindergarten year. Hearing Exhibit B. The ALJ admitted the decision as administrative hearsay, but advised the parties that the findings therein would not be binding for purposes of determining the issue of implementation raised by [Parent] in this proceeding. Many of the witnesses who were interviewed during the State Complaint process<sup>12</sup> testified at hearing that the findings were inconsistent with the accounts they had provided and with the actual course of events during the 2013-2014 year. In response to the results of the State Complaint process, the BOCES agreed to implement a number of prescribed corrective actions.<sup>13</sup>

27. With regard to implementation of the kindergarten IEP, the ALJ finds that the factual bases for the State Complaint result were not established at hearing. Specifically, there was no evidence that the positive behavior supports were not consistently and faithfully implemented. While there was not documentation of every bit of encouragement given to the Student during kindergarten, the ALJ found the testimony of [Occupational Therapist], [Kindergarten Teacher], [Former Special Education Director], and [Paraprofessional] credible that various forms of positive reinforcement were used throughout the day. In addition, the testimony at hearing established that visuals and visual schedules were used to help Student understand the curriculum and the transitions she encountered during the school day. There was no evidence at hearing that the Student's feeding plan was not adequately implemented during kindergarten. With regard to the transportation plan, the only specific incident described was the May, 2014 incident recounted in Finding of Fact No. 25. The ALJ finds that the incident did not constitute an accident and that the BOCES's response did not amount to a failure to implement the transportation plan.

## **B. First Grade (2014-2015 Academic Year)**

28. The IEP in place for the Student's first grade year was substantially similar to the kindergarten IEP discussed above. On June 11, 2014, [Parent] agreed to amendments to the IEP to change the location of [Student]'s lunch to the cafeteria and to modify an articulation goal in the category of speech and language. Hearing Exhibit No. 2.<sup>14</sup>

29. The Student's IEP was due for annual review on October 3, 2014. [Special Education Director] attempted to schedule an IEP team meeting on that date, but in consultation with [Parent] agreed to hold the IEP team meeting on October 29. Throughout the first grade year, meetings were held to develop a new IEP for [Student]. That process is discussed separately below.

30. In October, 2014, at the request of [Principal], [Physical Therapist] informally assessed [Student]'s ability to climb on and off the school bus. [Physical

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<sup>12</sup> The State Complaints Officer is not empowered to administer oaths to the persons interviewed.

<sup>13</sup> Compliance with the Corrective Action Plan was not identified as an issue for this proceeding.

<sup>14</sup> This IEP, as the last agreed-upon and implemented plan for [Student], remains her "stay put" placement during the pendency of the due process case pursuant to the IDEA.

Therapist] did not know whether this observation was conducted with [Parent]'s permission or advance knowledge, but [Physical Therapist] testified that she commonly conducts assessments of students on her case load without arranging them with parents in advance. Her purpose in doing so is to ensure that students are safe and independent in accessing the school environment. [Physical Therapist] established that [Student] had met her physical education goal as of August, 2014, and is active on the playground. [Physical Therapist] has observed her using the stairs around school and climbing on equipment with supervision. For purposes of the particular observation of [Student] on the bus, [Physical Therapist] directed that one adult be in front of the Student and another adult behind. Two trials were conducted in which [Physical Therapist] concluded that [Student] could safely and independently mount and dismount the three stairs on the bus using the handrail. [Advocate] was present for the trials as was [Student]'s interpreter, her paraprofessional aide, [Principal], and [Transportation Director].

31. [Occupational Therapist] established that [Student] made good progress on her occupational therapy goals during first grade. The Student improved on fine motor skills including cutting small shapes with scissors and writing numbers without a box to guide the formation of the number. She also improved on gross motor skills including hopping up and down with someone to help balance her and independently on her own.

32. [Speech Language Pathologist] served as the Student's speech language pathologist during the first grade year. She established that [Student] responds to spoken language despite her hearing loss. [Student] maintains eye contact with [Speech Language Pathologist] while they are working together and only refers to the interpreter for help approximately ten to fifteen percent of the time. [Speech Language Pathologist] provided one hour of direct services to [Student] in the general education classroom per week and thirty minutes of services outside of the classroom. In class, [Speech Language Pathologist] reinforced language concepts and supported the Student with pronunciation and articulation during reading group. For example, if [Student] was having difficulty with pronunciation, [Speech Language Pathologist] demonstrated the correct position of her mouth and tongue to make the appropriate sound. [Speech Language Pathologist] also programmed vocabulary and sight words<sup>15</sup> into the Nova Chat which is a tablet-like device that generates audible sounds of words. During pull-out time, [Speech Language Pathologist] worked on the Student's vocabulary goal. She stated that [Student] was very attentive to tasks during this time and did very well on progressing toward the goal. In her testimony, [Advocate] confirmed that [Student] learns effectively in 1:1 settings based on her observations and time tutoring [Student]. [Speech Language Pathologist] documented that [Student] progressed and/or met her speech language goals. Hearing Exhibit No. 10.

33. [Speech Language Pathologist] was more directly involved with [Student] regarding her IEP goals than any other provider during first grade. Accordingly, she

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<sup>15</sup> Sight words are words that are very common in language and which children are encouraged to recognize on sight as they may be difficult to sound out such as 'they,' 'what,' and 'why.'

worked in close proximity with the Student's paraprofessional aides. [Speech Language Pathologist] confirmed that the aides took a "back seat" when the Student was working with a teacher or service provider. This minimized the number of adults that were close to [Student] in the general education classroom.

34. During [Student]'s first grade year, the BOCES took responsibility for the provision and maintenance of her hearing aid.

35. [Vision specialist] testified in his role as the Student's vision specialist. He regularly observed [Student] in the kindergarten and first grade classrooms to monitor her access to accommodations and to assess her progress as a vision-impaired student. Principally, [Vision specialist] ensured that the Student received printed material in large font and high-contrast formats. [Vision specialist] established that [Student] has become more mature in that she attended longer to visual stimuli and advocated for herself when the learning media did not suit her needs.

36. Complainant presented the testimony of [Paraprofessional] regarding an incident where [Student] had a bowel movement in her pants, reached her hand into her pants, and then wiped feces on [Paraprofessional]. [Paraprofessional] said that she did not become mad at [Student] but proceeded to clean the Student and then herself. Later the same day, [Paraprofessional] described the incident to [Student]'s sister, who attended school in the District and was getting on the bus with [Student]. [Paraprofessional] stated that her purpose in relating the incident to the sister was so that the Student's parents would be aware of the incident. [Paraprofessional] was subsequently told that it was not appropriate to use a sibling to communicate private information about a student to the student's family.

37. [Paraprofessional] worked with [Student] consistently throughout the second half of first grade and testified that she thinks [Student] is a great little girl whom she loves to help. [Paraprofessional] likes to see her growth and accomplishments. [Student] hugged and smiled at [Paraprofessional] and told [Paraprofessional] that she loved her. [Paraprofessional] established that she routinely gave praise and positive support to the Student. She also described stepping back from the Student's desk when the teacher or a specialist was working with her. [Paraprofessional] is trained in the protocol for feeding [Student] and implemented it during kindergarten and first grade.

38. [First grade teacher] testified in the capacity of the Student's first grade general education teacher.<sup>16</sup> She acknowledged that [Student] is the first child with Down Syndrome that she has taught in eighteen years. During the Student's first grade year there were sixteen children in the class, three of whom had IEPs. [First grade teacher] testified to her implementation of the accommodations and modifications in the Student's IEP including the Red Cat and FM systems to amplify sound for [Student], seating in the front, extra time for tasks, extra breaks during the day, and the use of high contrast print for handouts. The interpreter was positioned directly in front of [Student].

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<sup>16</sup> [First Grade Special Education Teacher] was [Student]'s special education teacher in first grade.

39. [First grade teacher] characterized the Student's strengths as being excited about learning and wanting to raise her hand and contribute. She established that [Student] made progress on her goals in reading (from level one to independent level four), mathematics (counting), writing, letter formation, making comments that were on-topic during class, raising her hand, and staying in her seat (not lying on the floor). [First grade teacher] testified that [Student] responded well to prompts like "eyes on me." [First grade teacher] regularly checked for understanding with [Student] by observing whether the Student was attending, asking [Student] to repeat back the instruction(s), and giving [Student] a "thumbs up."

40. [First grade teacher] reviewed the report card that she prepared for the Student through the end of first grade. Hearing Exhibit No. 23. She testified that [Student] made progress at her own level, but did not achieve grade-level proficiency in all areas. In math, she was able to write numbers with less support and to write numbers in the correct sequence (i.e. "1" and then "2" to form 12). [First grade teacher] discussed a math survey that was given to [Student] three times during first grade. Hearing Exhibit No. 12, pages 5 through 43. On the first attempt, [Student] was unable to complete the survey. On the second attempt she scored 22 percent correct, and on the third attempt she scored 60 percent correct. She was also able to place numbers in a sentence with an addition sign and an equal sign already in place. In writing she increased her stamina and ability to write strings of letters. In reading, [Student] showed growth as charted by [First grade teacher] on Hearing Exhibit No. 12. She also made progress in social interaction with her peers, including during buddy reading.

41. [First grade teacher] described a number of behavioral problems that [Student] demonstrated in first grade. She had difficulty keeping her hands to herself. [First grade teacher] wrote up a number of stop and think notices for [Student] when she was unable to follow classroom procedures. [First grade teacher] felt that the notices were one way to communicate with the parent regarding classroom behavior. [First grade teacher] also acknowledged the services of two behavior specialists, [Behavior Specialist 1] and [Behavior Specialist 2]. These two assisted in the development of a visual notebook for [Student] that operated on a "first, then" principle. The paraprofessional aide could show [Student] a task, and then [Student] could choose the appropriate reward for completing the task.

42. [First grade teacher] testified that [Student]'s first grade year was the most difficult of her career. She had taught [Parent]'s older child and had a positive experience. However, within the first week of the 2014-2015 year, the relationship with [Parent] deteriorated. [First grade teacher] felt that [Parent] questioned every aspect of [First grade teacher]'s teaching process and the two could not agree on what was necessary to help [Student]. Eventually, [First grade teacher], like [Kindergarten Teacher] the previous year, requested and took a leave of absence primarily to separate herself from the situation with [Parent]. It was the first time in eighteen years she had ever needed to step away, and she was not sure that she would come back to teach. After two weeks during which she sought medical treatment, [First grade teacher] did return and complete the year as the Student's first grade teacher.

43. [Parent] questioned [First grade teacher] and [Principal] about the leave of absence that occurred in November, 2014. [Parent]'s concern was the extent to which the leave represented an interruption in [Student]'s routine. [Principal] stated that he supported [First grade teacher]'s need for time away and did his best to replace her with a minimum of disruption to the entire class. However, due to the suddenness of [First grade teacher]'s absence and the District being in a relatively rural area, [Principal] was unable to find one substitute that could cover both weeks.

44. [Principal] testified regarding positive behavior supports and discipline imposed on [Student] during first grade. [Principal] observed Student's first grade class on a number of occasions and saw her receive "a lot" of verbal positive behavior support. He has heard [Student] refer to herself as "bad" and in those situations told her that it was not true or tried to compliment her in some way. He stated that the entire school benefits from positive behavior support that is implemented through a program called ROCK slips.<sup>17</sup> Students earn slips for positive contributions and can convert them to school scrip or special acknowledgement. [Principal] acknowledged that [Student] was suspended for nine days during first grade for serious behavior problems including throwing rocks and spitting at adult staff, and punching and pushing other students. He testified that appropriate discipline fits within positive behavior support because it should make a student aware of unacceptable behavior and learn to be compassionate and respectful.

45. [Principal] is aware that the CDE State Complaints Officer directed that a Behavior Intervention Plan ("BIP") be created for [Student]. On October 30, 2014, [Parent] signed a consent form for the functional behavior assessment that is a necessary prerequisite to the BIP. However, at [Parent]'s request, the functional behavior assessment was delayed due to issues with the Student's hearing aid. Later, she rescinded her consent for the assessment. Hearing Exhibit No. 6.

46. [Principal] established that [Student] was frequently absent during first grade. Hearing Exhibit No. 11. He correlated school attendance to the ability to progress on goals and objectives.

47. [Parent] presented the testimony of District Superintendent [Superintendent]. The only apparent reason for [Superintendent]'s testimony was for [Parent] to establish that he had once used the word "handicapped" to refer to his own daughter during a meeting he had with [Parent]. She told [Superintendent] that she found the work offensive. He stated that he had always referred to his daughter's disability as a handicap, but apologized to [Parent] nonetheless.

### **C. IEP Development beginning in October, 2014**

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<sup>17</sup> "Respect, Ownership, Compassion, Knowledge."

48. [Special Education Director] established that multiple IEP team meetings were convened for the purpose of updating the October 4, 2013 plan.<sup>18</sup> The first of these occurred on October 29 and 30, 2014. These two meetings were facilitated by a neutral third-party named [Facilitator]. [Facilitator] is a trained facilitator who participated with the consent of all parties. [Special Education Director] estimated that the two facilitated meetings lasted approximately six hours in total. [Parent] was present as was [Advocate] in the capacity of her advocate. The IEP team was properly constituted with the inclusion of a BOCES designee, [Student]’s general education teacher, and special education teachers and service providers.

49. At the request of the facilitator, no draft IEP was prepared in advance of the October meetings. During those meetings, [Student]’s strengths were discussed in detail as were certain goals and objectives. The meetings did not result in agreement on a new IEP.

50. A further IEP team meeting was convened on December 16, 2014. That meeting was not facilitated at the request of [Parent] who felt that [Facilitator]’s efforts were not successful. The IEP team was properly constituted again, including [Parent], [Advocate], as well as attorneys for Complainant and Respondent. [Special Education Director] presented [Parent] with a draft IEP that is set forth at pages 70 to 90 of Hearing Exhibit CC. The IEP team discussed at length the Student’s present levels of performance and [Parent]’s concerns in multiple areas. Hearing Exhibit No. 3 at pages 27 and 28. The meeting started at 10:00 a.m. and lasted until 1:30 p.m. when counsel for Complainant needed to leave. The meeting did not result in agreement on a new IEP.

51. [Special Education Director] provided [Parent] with another draft IEP setting forth information discussed at the December 16 team meeting. Hearing Exhibit CC at pages 91-119. Additional draft IEP documents were generated to reflect the progress made at the various meetings although [Special Education Director] could not recall transmitting each version that was presented to her in cross-examination. To the extent that the Student’s time in the general education setting was shown as less than eighty percent on such drafts, [Special Education Director] testified that the correct percentage could only be calculated once all services were quantified. Thus, any representation that the Student would be in the general education setting for less than eighty percent of the time was either preliminary or a typographical error. [Special Education Director] acknowledged that [Parent] consistently advocated for the Student to receive services in the general education classroom as much as possible.

52. The IEP team met again on February 4, 2015, without the participation of legal counsel. [Parent] and [Advocate] attended, as well as [Special Education Director] as BOCES designee and the necessary members of the Student’s general and special education team. The meeting did not result in agreement on a new IEP.

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<sup>18</sup> [Special Education Director] is the Special Education Director for the BOCES. She has more than 28 years of experience in special education and holds a Master of Arts Degree in Education Leadership. She has participated in the development of hundreds of IEPs for children with multiple disabilities.

53. Pursuant to an agreement that excused most members of the IEP team, [Parent], [Advocate], [Special Education Director], and [Assistant Special Education Director]<sup>19</sup> met as a limited team on March 13, March 20, and April 3, 2015. Beginning with these meetings, [Special Education Director] began to track version changes in the IEP drafts using colored highlighters. The changes from the March 13 meeting were highlighted in blue, and the changes from the March 20 meeting were highlighted in orange. [Assistant Special Education Director] established that five special education goals suggested by [Parent] were incorporated into the April, 2015 IEP. She also confirmed that [Parent] and [Advocate] had specific input that was incorporated into the statements of likes, strengths, needs, and parent concerns at pages 2, 3, 5, and 6 of Hearing Exhibit No. 5. Lastly, [Parent]'s emphasis on [Student] being integrated in the general education classroom more than eighty percent of the time is reflected in the April, 2015 IEP.

54. On April 3, 2015, the BOCES provided [Parent] with prior written notice that an IEP with that same date was approved for implementation at the beginning of [Student]'s second grade year on August 19, 2015. Hearing Exhibit No. 3.

55. [Special Education Director] reviewed a series of correspondence related to scheduling the various IEP team meetings. Hearing Exhibit No. 4. The correspondence revealed that on multiple occasions the team meetings were canceled or rescheduled to accommodate [Parent]'s unavailability. Moreover, the notes from the meetings that actually were held demonstrate that [Parent] and her advocate were fully involved in the development process. The parent's views were consistently documented and in many cases incorporated into the IEP as evidenced by [Assistant Special Education Director]'s testimony.

56. [Special Education Director] testified that in her experience, IEP team meetings usually last two or three hours and result in agreement about the educational programming appropriate for a student. The process described above featuring seven meetings over a period of more than five months is unique to [Student]. [Assistant Special Education Director] estimated that during [Student]'s kindergarten year, she spent an average of five hours per week communicating with [Parent]. For first grade, that estimate increased to ten hours per week. [Assistant Special Education Director] attends all meetings that involve [Student] because they tend to be more difficult and challenging than for other special education students. She takes the lead on communication with [Parent] because other staff expressed feelings of being criticized and second-guessed by the parent in such communications.

57. The April, 2015 IEP specified 655 minutes per week of direct instruction for [Student] from a special education teacher addressed to goals in reading, writing, and mathematics. All of these services are proposed to be delivered in the general education classroom setting. [Assistant Special Education Director] clarified that "direct instruction" does not equate to one-on-one time with [Student] that would tend to isolate

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<sup>19</sup> [Assistant Special Education Director] served as Assistant Special Education Director at the BOCES from 2012 to the present.

her from her peers. In addition, a teacher of Deaf and Hard of Hearing will provide 60 minutes of direct services to [Student] per week to increase oral expression and listening skills, as well as sign language vocabulary and usage based on grade-level curriculum. Assuming 240 minutes per month of TOD services, the IEP contemplates delivery of 180 minutes outside the general education classroom, and 60 minutes in the general education classroom. The IEP further specifies 30 minutes per week of direct occupational therapy services, discussed in greater detail below. Direct services by a speech language pathologist are specified at 45 minutes per week in the general classroom, and 45 minutes per week outside of the general classroom, plus 40 minutes per month of indirect consultation. The April, 2015 IEP specifies that the Student will participate in the general education classroom more than eighty percent of the time. A sign language interpreter will be available for 2,550 minutes per week including all class time as well as transportation time. Additionally, [Student] will receive support from a paraprofessional aide for 460 minutes per week addressed to specials,<sup>20</sup> toileting, lunch, and recess.

58. [Special Education Director] testified that the April, 2015 IEP contemplated a co-teaching model where a general education teacher and a special education teacher would be present in the classroom at all times. Neither teacher would have an individualized responsibility for any particular student, including [Student]. [Former Special Education Director] described variants of co-teaching that differ in the way the two teachers develop and present curriculum. The co-teaching model was not described in the IEP because particular modes of teaching are left to the teachers to determine according to their experience. [Advocate], who attended all of the IEP team meetings, testified that the BOCES demonstrated a good grasp of the co-teaching model.

59. In terms of indirect services, the April, 2015 IEP specifies physical therapy consultation with the occupational therapist and other members of [Student]'s educational team, consultation by the vision specialist and the audiologist to ensure adequate supports.

60. [First grade teacher] participated as a member of the IEP team, contributing to the section on [Student]'s likes. She is identified in the April, 2015 IEP as the classroom teacher and described the Student's academic levels. Hearing Exhibit 3 at page 4. She concurred in the proposal to increase the service level for the Student's special education teacher going forward to provide to support for the regular education teacher in [Student]'s class.

61. [Occupational Therapist] testified that she participated and consulted with [Parent] regarding updated gross motor standards as team members meeting for [Student]'s new IEP. [Occupational Therapist] testified that the occupational therapy goals present in the proposed IEP of April 3, 2015, are appropriate for the Student. The proposed IEP addresses skills calculated to improve her access to the educational environment including fine motor, gross motor, and sensory processing to facilitate

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<sup>20</sup> Such as physical education or music.

attention and participation. [Occupational Therapist] endorsed an increase in direct delivery time for occupational therapy services from 40 minutes per month to 30 minutes per week outside of the classroom to enable [Student] to focus on skill acquisition.

62. [Physical Therapist] testified that she participated in IEP team meetings and discussed with [Parent] the Student's gross motor development. [Physical Therapist] wrote the first paragraph of the present levels of performance on page 3 of Hearing Exhibit No. 3, and she attested to the accuracy of the information. She also advocated for a goal in the April, 2015 IEP that specified that [Student] would ascend and descend the stairs of the bus using the protocols discussed in relation to the October, 2014 observation discussed above.

63. [Speech Language Pathologist] participated in the IEP team meetings related to development of the April, 2015 plan. Although [Speech Language Pathologist] believes that [Student] can acquire new vocabulary without the use of the Nova Chat, she nonetheless endorsed its inclusion as an assistive device in the IEP at least until [Student] has been reevaluated in the area of speech and language.<sup>21</sup> She testified that the proposed speech language goals on page 13 of Hearing Exhibit No. 3 are appropriate for [Student]. There is no testimony in the record establishing the contrary. [Speech Language Pathologist] feels that increasing the pull-out time to 45 minutes per week will enable [Student] to make more concentrated progress on sentence construction and pronunciation because of less background noise and distraction. [Speech Language Pathologist] focuses on skill building outside of the classroom, and then works on generalizing the skill to produce effective communication with peers and others inside the classroom.

64. [Vision specialist] participated in the IEP team meetings and provided input to the learning media plan in the April, 2015 IEP. He confirmed that the entire team, including [Parent] had input on the plan.

65. [Advocate] testified that the number of special education instruction minutes specified in the April, 2015 IEP were not typical. She did not, however, express any specific reason why the level of service was inappropriate to [Student]'s needs or state an alternative level of service that she deemed to be appropriate. From the context of the statement, it appears to reflect her concern that too much direct service from a special education teacher could lead to [Student] being isolated from her peers. However, as discussed above, in a co-teaching model, the presence of the special education teacher in the classroom would not dictate that the teacher would be one-on-one with [Student] for any amount of time. [Advocate] was also concerned regarding the extent to which the measurement standard for the speech language goal on page 17 of Hearing Exhibit No. 3 was clear. Although a goal of eighty percent accuracy is specified for the ability to sequence scenes or events in a story, [Advocate] could not tell whether that measurement was to be applied to a single trial or over a longer period of time.

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<sup>21</sup> There is no goal associated with use of the Nova Chat in the April, 2015 IEP.

66. [Advocate] also testified that [Student] has “learned dependency” arising out of so much close contact with teachers and specialists. [Assistant Special Education Director] defined learned dependency as the Student over-relying on adults around her to do things rather than doing them herself. In her multiple observations of [Student] from preschool age, [Assistant Special Education Director] has not seen signs of learned dependency. She testified that [1<sup>st</sup> Grade Paraprofessional], [Student]’s paraprofessional aide for much of the first grade year, moved away and left the Student to work independently on a task. [Advocate] opined that in some cases, one adult can be too many. However, she also testified that in her experience with teaching skills to [Student] and observing her in a summer extended school year setting, the Student benefits from one-on-one interaction. She conceded that work on articulation would be an appropriate time for [Student] to be pulled out of the general education classroom.

67. [Advocate] testified that [Student] needs trained assistance with feeding, needs visuals to prompt, needs an interpreter, needs toileting support, needs checks for understanding, and needs redirection. She did not explain how [Student] can receive this level of support from adults at school and on the bus without learning to rely on it.

68. [Advocate] testified that a ratio of five positive behavioral reinforcements to one redirection comports with “best practice.” In her observations of [Student] during kindergarten and first grade, [Advocate] became concerned that the Student was not receiving positive feedback from school staff in this proportion. The ALJ was not directed to any component of the kindergarten or first grade IEP that specified that [Student] was to receive more positive reinforcement than redirection.

#### **D. BOCES Request for Reevaluation**

69. In December, 2014, [Special Education Director] initiated correspondence with [Parent] regarding a functional behavior assessment for [Student] as well as the BOCES’s desire to conduct a full reevaluation of her. [Parent] objected to the former on the basis of the problem with the Student’s hearing aid and an asserted connection between the behavior specialist, [Behavior Specialist 1], and [Facilitator]. Hearing Exhibit No. 6. With regard to the proposed reevaluation, [Parent] expressed her disapproval of any cognitive assessment of [Student].

70. On April 27, 2015, the BOCES provided prior written notice to [Parent] of its intent to conduct reevaluation of [Student] in all areas of suspected disability. Hearing Exhibit No. 5. The notice identified the areas to be evaluated and the persons proposed to conduct the constituent assessments.

71. [Former Special Education Director] endorsed the inclusion of cognitive testing as part of the broad reevaluation of [Student]. She established that Down Syndrome is frequently associated with intellectual disability in the mild-to-moderate (impaired) range. She testified that cognitive testing assesses visual skill, auditory skill, information processing, and attending, all of which can help to better understand

behaviors. [Former Special Education Director] believes that determination of the Student's intellectual quotient ("IQ") can be relevant to establish eligibility for some non-educational services. She also noted that although IQ was not necessary for determination of developmental delay as a primary disability for child under eight years of age, [Student] turns eight in [Month], 2015. She testified that knowing a person's IQ is necessary in educational programming for understanding effective learning modalities and to provide a benchmark for performance expectations. [Parent] has adamantly opposed any determination of the Student's IQ.

72. [Occupational Therapist] proposes to assess [Student] in the areas visual motor integration ("VMI"), gross and fine motor skills, and sensory processing in seven different areas. Hearing Exhibit No. 5. [Occupational Therapist] endorsed the VMI as an unbiased and effective way to measure progress with standardized criteria. The motor coordination subtest is especially helpful with regard to "pencil and paper" skills that are essential to success in all areas of written expression. The sensory processing component obtains input from various adults in the Student's life, including her parents, teachers, specialists, and other staff in the transportation and cafeteria services. No evidence was presented to dispute the appropriateness of these assessments.

73. [Physical Therapist] proposes assessment of [Student] using the Movement Opportunities via Education profile. This is an informal tool that guides observation of gross motor skills applicable to sitting, walking, transfers, and using ramps and stairs in a school setting. [Physical Therapist] established that the assessment is appropriate and that she is qualified to administer it.

74. [Speech Language Pathologist] proposes to assess [Student]'s perceptive and expressive language skills using the Oral and Written Language Scales. For articulation, [Speech Language Pathologist] proposes the Arizona Articulation Proficiency Scale which requires the Student to produce speech sounds. [Speech Language Pathologist] is qualified to administer the assessments based on instruction she received in her Master's program and from experience.

75. [Vision specialist] proposes to review current medical information about [Student]'s eye health and assess whether any modification to her prescription, including bifocal lenses, may be appropriate. He will observe [Student] in her classroom to ensure that appropriate font size, contrast, and magnification are available to the Student. [Orientation and Mobility Specialist], a certified orientation and mobility specialist with nearly 30 years of experience assessing people with visual impairments, proposes to assist [Vision specialist] with a functional vision assessment of the Student.

76. [Audiologist], who holds a Master of Sciences degree in Audiology, has specialized in speech and language issues for children in her nearly 25 year career. She proposes to review background information, including records of audiometric testing, for [Student] to establish a baseline on the Student's hearing loss and communication abilities. She testified that observing and meeting [Student] would also be helpful to gain a better understanding of the Student's levels of interaction, tendency to fatigue, and academic/social/emotional abilities. [Audiologist] would then select an

appropriate battery of assessments from hundreds that are available and which she is qualified to administer. At Hearing Exhibit No. 5, [Audiologist] described a representative assessment to judge listening difficulty in multiple conditions. [Educational Audiologist] is also qualified to administer the assessments in Hearing Exhibit No. 5. She emphasized the need for complete medical records directly from the Children's Hospital where [Student] has undergone audiometric testing under sedation that cannot be replicated by the BOCES.

## DISCUSSION

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

Under the IDEA, a complainant has the burden of proving by a preponderance of the evidence that the District failed to provide the student with a FAPE. *Thompson R2-J Sch. Dist. V. Luke*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008). It is determined that a school district has provided a disabled student with a FAPE when demonstrable evidence from the student’s educational records establishes that the student made some measureable progress on the goals and objectives in her IEP. *Id.* In this case, since Complainant is challenging the BOCES’s development of the kindergarten, first grade, and April, 2015 IEPs, she has the burden of establishing that any failure to comply with the procedural requirements in developing that plan actually resulted in a denial of FAPE,<sup>22</sup> and that the proposed placement and services were not reasonably calculated to confer educational benefit on [Student].

In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase “free appropriate public education”. In that decision the Court held that the statutory definition of FAPE requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held

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<sup>22</sup> *Erickson v. Abuquerque Public Schools*, 199 F.3d 1116, 1123 (10<sup>th</sup> Cir. 1999); *O’Toole v. Olathe Dist. Schools Unified School Dist. No. 233*, 144 F.3d 692, 707 (10<sup>th</sup> Cir. 1998).

that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children; the school district's obligation extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit *id.* at 200.

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

- (A) a statement of the present levels of educational performance of such child;
- (B) a statement of annual goals, including short-term instructional objectives;
- (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;
- (D) the projected date for initiation and anticipated duration of such services; and
- (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

A hearing officer's determination of whether a student received a FAPE must be based on substantive grounds. 34 C.F.R. 300.513 (a)(1). In matters alleging a procedural violation, a hearing officer may find that a student did not receive a FAPE only if the procedural inadequacies – (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provisions of a FAPE to the parent's child; or (iii) caused deprivation of educational benefit. 34 CFR 300.513 (a)(2)(i) – (iii).

The BOCES is required to obtain parental consent before conducting an evaluation. 20 U.S.C. § 1414(a)(1)(D)(i)(I) and (c)(3). If, as here, the parents refuse consent, the BOCES may file a due process complaint to pursue the evaluation. 20 U.S.C. § 1414(a)(1)(D)(ii)(I).

Owing to the fact that, with the exception of [Advocate], every witness at the hearing was either affiliated with or testifying in support of the BOCES, the record as a whole is extremely one-sided. [Parent] chose not to testify and attempted to carry her evidentiary burden almost entirely by cross-examination. As a result, the ALJ was

forced to obtain an understanding of [Student], her disabilities, and her unique educational needs in a way that was very fragmented to say the least. For example, nearly half a day of hearing had elapsed before there was evidence in the record that [Student] can walk, climb stairs, and enjoy recess on the playground. Meanwhile, [Parent] chose to focus on extremely narrow factual details as purported examples of the BOCES's disregard for its responsibility toward [Student]. The testimony of [Superintendent] is a prime example of this approach. [Parent] spent valuable time establishing that he had used the word "handicapped" in reference to his own child and that it had offended her. That time would have been better spent on facts relevant to better understanding [Student]'s unique educational needs and whether she had been provided with a FAPE.

Turning first to the adequacy of the kindergarten IEP, Complainant failed to establish that the program was developed so as to deny [Student] a FAPE. The IEP featured goals and objectives that addressed the Student's needs in gross motor, fine motor, speech and language, mobility, mathematics, vocabulary, and social communication. She was supported by a sign language interpreter, a paraprofessional aide, a special education teacher, and numerous specialists who facilitated her inclusion in the general education classroom more than eighty percent of the time. The IEP provided appropriate safety protections related to the Student's feeding and transportation. Finally, the IEP featured accommodations and modifications that reasonably and adequately related to her hearing deficit (multiple amplification devices, the Nova Chat tablet, preferential seating), her vision deficit (large font and high contrast written materials), her need for additional time on tasks and additional breaks, and use of visuals and visual schedules to assist her understanding of tasks and expectations. The record contains no evidence that the kindergarten IEP materially failed to address the Student's unique needs. Accordingly, the ALJ finds and concludes that Complainant did not meet her burden of showing that the October 4, 2013 IEP was not reasonably calculated to confer educational benefit on [Student]. The overwhelming weight of the evidence showed that it was.

With regard to the implementation of the kindergarten IEP, numerous witnesses established that [Student] made progress on her IEP goals and objectives. There was no testimony to the contrary and [Kindergarten Teacher] adequately explained how the progress reports demonstrated progress across the board. [Parent] inquired regarding a number of individual incidents that might be construed to show a failure to implement the IEP with fidelity. The first of these was the May, 2014 bus incident that resulted in [Student] being seen by a doctor. The ALJ has found and concludes that the incident did not amount to an accident and therefore did not trigger all provisions of the transportation safety plan. [Advocate] testified in passing to the feeding plan not being followed on one occasion, but her account lacked sufficient detail from which the ALJ could determine anything specific about the incident, including whether it represented a substantial failure on the part of the BOCES. [Parent] inquired at length about redirections, discipline and whether positive behavior supports were used during the kindergarten year. Certainly, behavior was an issue early on, but [Kindergarten Teacher] established that it improved over the course of the year. [Former Special

Education Director], [Assistant Special Education Director], [Paraprofessional], and [Kindergarten Teacher] all testified that positive behavior reinforcement was used in conjunction with redirections, even if they were not documented in a way that permitted a ratio of one to the other to be determined. Given the nature of some of the Student's behaviors, the ALJ finds it unremarkable that more time was spent documenting them than was spent documenting the number of times staff gave [Student] a thumb's up or a verbal pat on the back. Moreover, [Kindergarten Teacher] established that she put time into documenting redirections to try to understand if there was a correlation between the behaviors and what was happening in class at the time. Finally, questioning by [Parent] indicated concern that changes in the staff involved in [Student]'s kindergarten could have detrimentally impacted the Student. The ALJ found no factual support for such adverse impact in the record. Accordingly, the ALJ finds and concludes that the kindergarten IEP was fully and appropriately implemented.

The IEP in place for [Student]'s first grade year was substantially similar to the kindergarten IEP but for two amendments agreed upon by Complainant and the BOCES. The record reflects that the BOCES initiated the process of updating the IEP in October, 2014, and diligently worked to complete that process over a number of months. Due to [Parent]'s repeated pattern of canceling and rescheduling IEP team meetings and the contentious nature of the meetings, the update was not completed in time to benefit [Student] during first grade. The ALJ finds that the BOCES acted appropriately in initiating the IEP update and accommodating [Parent]'s schedule so that she could be fully involved as an IEP team member. Therefore, the fact that the October 4, 2013 IEP, with amendments, was still in place during first grade does not represent a failure by the BOCES to attempt to serve the Student. In addition, in the absence of information from a reevaluation for which [Parent] has not given consent, the ALJ is unable to say that the Student's unique needs had changed in a way that would render the October 4, 2013 IEP inappropriate for first grade. Nor was there evidence in the record from any other source that established that the specially designed instruction, goals and objectives, and accommodations and modifications set forth in the amended IEP were not reasonably calculated to confer educational benefit on [Student] during first grade. Thus, the ALJ finds and concludes that Complainant failed to meet her burden in this regard.

[First grade teacher], [Occupational Therapist], [Speech Language Pathologist], [Physical Therapist], and [Paraprofessional] all established that [Student] progressed on academics and on her goals and objectives during first grade. [Parent] presented no evidence to contradict these witnesses. In addition, the record reflects that the program of accommodations and modifications were implemented with substantial fidelity. [Parent] highlighted the incident of [Physical Therapist]'s trial with [Student] mounting and dismounting the bus as a potential violation of the transportation safety plan. However, [Physical Therapist] established that such observations are typical in her profession and that the trial was carried out with great care and consideration for the Student's physical well-being. [Advocate] observed the trial and had nothing to say about it in her testimony to suggest that it was inappropriate. [Physical Therapist] testified that [Student] had met her gross motor goal as of August, 2014, and used stairs

safely with supervision. There was no evidence in the record explaining why [Student] needed to be carried on and off the bus and the ALJ finds that [Physical Therapist] was qualified to determine that a trial of [Student]'s ability was appropriate.

[Parent]'s questioning of [Paraprofessional] indicated Complainant's belief that [Paraprofessional]'s disclosure of the incident with the Student's bowel movement to the Student's sister was a serious breach of [Student]'s privacy. The ALJ can sympathize with this concern. However, [Paraprofessional] indicated that she had been advised by the BOCES that her disclosure was not appropriate. Thus, the ALJ finds and concludes that [Paraprofessional] made a mistake in response to what can only be characterized as a serious and very troubling incident. The BOCES subsequently addressed that mistake with [Paraprofessional] and there was no further issue regarding the privacy of [Student]. This individual failure did not amount to a material failure to implement the first grade IEP in the judgment of the ALJ.

The evidence regarding the disciplinary measures and use of redirections or positive behavioral reinforcement during first grade tracked what occurred in kindergarten to some degree. [Student] seemed to have more difficulty with behaviors early in the school year, but improved thereafter. Certainly, the behaviors that led to the numerous suspensions were more serious than in kindergarten and warrant the attention of the IEP team. In that regard the BOCES sought consent to perform a functional behavioral assessment in October, 2014. [Parent] initially gave such consent, but then revoked it. Problems with [Student]'s hearing aid and the protracted IEP process have further delayed the study of the Student's behavior issues. With this record, the ALJ cannot conclude that the BOCES failed in any substantial way to address the Student's behaviors. [First grade teacher] confirmed that she would check for understanding and give [Student] a "thumb's up" as a form of positive support. On the evidence presented, the ALJ finds and concludes that Complainant did not establish that the manner in which [Student] was redirected or disciplined constituted a failure to adequately implement the first grade IEP.

Finally, [Parent] inquired regarding [First grade teacher]'s two week leave of absence and what steps she took to avoid any disruption in the Student's education. This inference that [First grade teacher]'s need for personal time to seek medical help in order to preserve her health and her eighteen year career should be viewed in terms of potential adverse impact on the Student is insensitive to say the least. As with [Kindergarten Teacher]'s leave, there is absolutely no evidence that [First grade teacher]'s time away had any detrimental effect on [Student]. [Parent]'s response is instructive and troubling. She seems to assume that every action by BOCES or District personnel is taken without regard for the educational needs of [Student], or worse. The record at hearing leaves the ALJ with the opposite view. The personnel who testified demonstrated real appreciation for the strengths of the Student, and real commitment to work with the family on her needs. Unfortunately, [Parent]'s attitude has infused nearly all aspects of [Student]'s education with conflict and mistrust.

The record with respect to the development of the April, 2015 IEP demonstrates that every effort was taken to include [Parent] and [Advocate]. The IEP review was initiated by the BOCES in a timely manner. The services of a facilitator were engaged to improve the prospects of reaching agreement. However, after two meetings, [Parent] forbade further involvement by the facilitator. Subsequent meetings were held, always with deference to [Parent]'s availability. The testimony of [Assistant Special Education Director], the inclusion of [Parent]'s input regarding the Student's strengths and needs, and the evidence of numerous revisions to drafts reflecting incorporation of provisions advocated by [Parent] and [Advocate] demonstrate that the parent was a fully included member of the IEP team. There is no evidence that any aspect of the proposed IEP was pre-determined and not subject to discussion and/or revision as appropriate. The ALJ finds and concludes that there is no evidence of procedural violation in development of the April, 2015 IEP.

As for the content of the April, 2015 IEP, the program reflects substantial inclusion as advocated by [Parent] and substantial support from a special education teacher providing in excess of 650 minutes of direct instruction per week. [Advocate] expressed satisfaction with the co-teaching model so long as [Student] is not one-on-one with a teacher all the time. There is nothing in the IEP to suggest that this is the case. With regard to the proposed goals and objectives in the IEP, [Advocate] identified one measurement that is vague. The ALJ concurs that the identified objective can and should be modified to be more clear, but finds that this one flaw does not render the entire IEP fatally deficient. [Assistant Special Education Director] and [Special Education Director] agreed that [Student] should not be subject to excessive involvement from adult staff and specialists. However, [Speech Language Pathologist] and [Advocate] also established that [Student] benefits from one-on-one time where she can focus on skill acquisition without noise or interruption. Thus, an appropriate balance needs to be struck to permit [Student] to experience the general education setting, but to be educated in a pull-out situation where appropriate. The April, 2015 IEP appears to reflect this balance in that [Student] will be able to receive specially designed instruction and services in the general education classroom for 745 minutes per week on average (reading, math, writing, oral expression and sign language vocabulary, and speech language pathology) and 90 minutes per week outside of the classroom (occupational therapy, oral expression and sign language vocabulary, and speech language pathology). The IEP also provides a full-time sign language interpreter for [Student], a 1:1 paraprofessional aide for specials, toileting, lunch, and recess, and indirect or consultative services from the teacher of the Deaf and Hard of Hearing, physical therapist, occupational therapist, speech language pathologist, vision therapist, and audiologist. The IEP maintains the accommodations and modifications necessary for [Student] including a BOCES-provided hearing aid, the FM amplification system, the large font and high contrast print materials, preferential seating, extra processing time and extra breaks, and use of visuals and visual schedules. On the basis of this evidence, the ALJ finds and concludes that Complainant failed to demonstrate that the April, 2015 IEP is not reasonably calculated to confer educational benefit on [Student].

Lastly, with regard to the proposed reevaluation of [Student], the record reflects that the battery of assessments is appropriate to the areas of need connected with the Student's disabilities. The persons who testified and will be conducting the assessments are qualified to do so. [Parent] presented no evidence to contradict the appropriateness of the requested assessments with the exception of the IQ component of the cognitive assessment. In that regard, the ALJ finds and concludes that the testimony of [Former Special Education Director] was not sufficiently detailed to establish that the Student's IQ is a necessary metric for purposes of special education programming. In all other respects, the ALJ finds and concludes that the BOCES shall be permitted to conduct the reevaluation. In addition, the BOCES demonstrated the need for eye health records and audiometric information pertaining to [Student] in the possession of Children's Hospital. Those medical records shall be released to the BOCES with the condition that they be maintained in accordance with the Student's privacy rights under the federal Health Insurance Portability and Accountability Act ("HIPAA"). Finally, the BOCES agreed to allow a Statewide Assistive Augmentative/Alternative Communication ("SWAAAC") team to perform the assistive technology assessment per parent's request.

## **DECISION**

The ALJ concludes that the Complainant failed to meet her burden of establishing that [Student] was denied a free appropriate education as required under the Individuals with Disabilities Education Act in the development of [Student]'s October 4, 2013 IEP, in the implementation of that IEP, in the development of the amended IEP for first grade, in the implementation of that IEP, and in the development of the April, 2015 IEP. Complainant is not entitled to any relief requested.

The BOCES met its burden of establishing that [Student] should be reevaluated in all areas related to her disabilities. The BOCES may evaluate [Student]'s cognitive functioning to exclude determination of her intellectual quotient; educational performance including academic performance; communication skills and needs, including speech language skills and assistive technology needs; fine gross, and sensory motor skills; and health including vision and hearing, using accredited evaluators of its choosing.

The specific assessments to be conducted by each evaluator will be determined by each evaluator based on his or her review of records, observations, and/or administration of preliminary assessments.

A SWAAAC team may perform the assistive technology assessment.

By July 31, 2015, Complainant will (a) sign releases and any other forms necessary to allow the Colorado School for the Deaf and Blind, SWAAAC team members, and any other outside evaluators to review the Student's records and conduct assessments; and (b) sign any releases necessary to allow the BOCES to obtain copies

of the Student's most recent eye health report, records of audiometric testing, and hearing aid evaluations directly from the Student's health care providers. The BOCES and any person accessing the medical records just referenced shall maintain the Student's privacy rights in accordance with HIPAA.

Complainant will make [Student] available for assessments, complete all parent questionnaire forms requested, and otherwise cooperate in completion of the evaluation.

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

**DATED AND SIGNED**

July 14, 2015

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KEITH J. KIRCHUBEL  
Administrative Law Judge