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STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
[Mother] and [Father], parents of [Student] Complainant, vs. **ACADEMY DISTRICT 20 (D20),** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **EA 2024-0014**

AGENCY DECISION

On February 15, 2024, the Colorado Department of Education (CDE), Exceptional Student Services Unit, received a Due Process Complaint filed for [Parents], on behalf of their minor daughter, [Student], alleging that Academy District 20 (the District), violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1482, (IDEA), under its implementing regulations at 34 C.F.R. § 300.511, and Colorado's Exceptional Children's Education Act, C.R.S. § 22-10-101 and the accompanying administrative rules 1 CCR § 301-8 (CECA) by failing to provide [Student] with a free appropriate public education (FAPE). On February 20, 2024, CDE referred the complaint to the Office of Administrative Courts (OAC) and assigned it to the undersigned ALJ.

On February 26, 2024, the District filed its Response, and on February 29, 2024, the District Filed a Motion to Dismiss Due Process Complaint for Insufficiency, on the grounds that it failed to include the name of the school [Student] is attending. On March 4, 2024, the ALJ granted the motion and dismissed the Due Process Complaint without prejudice, and granted Complainants permission to amend the complaint by identifying the school.

On March 14, 2024, Complainants filed their Amended Due Process Complaint, naming the school. The District filed its Amended Response on March 21, 2024.

In their amended complaint, Complainants allege that the District failed to provide FAPE by 1) denying [Student] services and accommodations as required by her previous and current IEPs under 34 C.F.R. § 300.101 and *Endrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 137 S. Ct. 988; 2) creating goals wholly inconsiderate of [Student]'s individual circumstances and failing to provide her with services sufficient to permit her to meaningfully benefit and make process considering her circumstances; 3) denying [Student] either a

homebound placement and a private, separated, placement, based on district policy; and 4) by predetermining [Student]'s placement. As compensation, Complainants seek an order directing the District to provide and pay for homebound services tailored for [Student]'s actual needs, compensatory services dating back no later than August 2023, and compensation for all out-of-pocket expenses [Student] and her parents have incurred as a result of alleged IDEA violations.

The District maintains that it complied with all procedural requirements, including considering parents' input, in developing an IEP for [Student]. They further maintain that the IEP is reasonably calculated to enable her to make progress in light of her circumstances at school, and that she is not at significant medical risk in this environment.

Following the Pre-Hearing Conference on April 15, 2024, at which the hearing date and related deadlines were set, the District filed its Motion to Consolidate on April 16, 2024, arguing that the interests of judicial economy supported the consolidation of the first two of Complainants' four due process claims. Complainants' Response filed on April 22, 2024 was rejected by the OAC electronic database, thus it was never set for the ALJ's review. On April 30, 2024, Complainants filed their Status re: Response to Motion to Consolidate explaining that their pleadings had been rejected and acknowledging that the rejected pleadings were also not provided to the District. On May 2, 2024, Complainants filed their Motion for Continuance of Administrative Hearing, which was also not provided to the District. On May 8, 2024, the District filed Respondent's Motion to Exclude Complainant's [sic] Claims, Exhibits and Witnesses and Dismiss, based on the fact that neither the OAC nor the District had received pleadings the Complainants were required to file. The Motion also indicated that the District knew about, but had not been provided the Motion for Continuance by Complainants.

On May 10, 2024, the ALJ issued the Order denying the Motion to Consolidate, as well as the Motion to Exclude & Dismiss, and gave the District until May 19, 2024 to file its response to Complainants' Motion for Continuance. The District filed its Response on May 17, 2024, and the ALJ issued the Order denying the Motion on May 23, 2024.

On May 28, 2024, Complainants filed an Emergency Motion for Status Conference on the basis that the District had failed to provide Discovery and Exhibits by the deadline set out in the Case Management Order, May 27, 2024 (the Friday before the Memorial Day holiday on Monday). The subsequent status conference on May 29, 2024, revealed that although Complainants had received an e-mail with the required disclosures from the District the previous Friday, Complainants were unable to open all of the links. Complainants waited until Tuesday to contact the District and corrected links were provided by the end of the day. The ALJ directed that because only Complainants knew which disclosures they had not received, they should make a list as a prerequisite to excluding them. No request was made to continue the hearing, although Complainants did request twice that the ALJ recuse herself. That request was denied.

The hearing was convened in accordance with 20 U.S.C. § 1415(f) and held before the undersigned ALJ at the OAC on June 3-6, 2024 in Courtroom 1. The proceedings were recorded. Igor Raykin, Esq. and Conor O'Donnell of Kishinevsky & Raykin, LLC, represented Complainants. John Stanek, Of Counsel for Orten Cavanaugh Homes & Hunt, LLC, represented the District, along with Tonya Thompson, Esq., counsel for the District. [Executive Director],

Executive Director of Special Education for the District served as the District's advisory witness. At hearing, the ALJ admitted into evidence the following exhibits offered by Complainants: 1, 2, 9, 10, 20, 23, 30, 45, 49, 53, 65, 79, 91, 92, 99, 101-106, 108-111, 113, 116, 117, 121, and 124-131. The ALJ also admitted into evidence the following exhibits offered by the District: A-I, L-M, P-V, X-Z, AA, BB, DD-LL, PP-UU, WW-ZZ, AAA-RRR, SSS p. 31 time 32:43-33:17, VVV, and WWW. Complainants both testified. Complainants also called [Respiratory Therapist], Respiratory Therapist for [Student] and the District, qualified and admitted as an expert witness without objection. Complainants called [Private Duty Nurse], Private Duty Nurse for [Student], as a rebuttal witness. The District called [Executive Director]; [Principal], Principal of [School]; [Teacher], 4th Grade Teacher at [School]; [Nurse Facilitator], RN, Nurse Facilitator/Team Lead for the District; [Physical Therapist], Physical Therapist for the District; [SSN Teacher], Significant Support Needs (SSN) teacher at [School]; [School Psychologist], School Psychologist; [Occupational Therapist], Occupational Therapist for the District; [Speech-Language Pathologist], Speech-Language Pathologist for the District; and [School Nurse], RN, School Nurse.

ISSUES PRESENTED

The ALJ must determine whether Complainants have established by a preponderance of evidence that the District violated both procedural and substantive requirements of the IDEA and denied FAPE to [Student]. And, if so, whether [Student] is entitled to an award of homebound services tailored for [Student]'s actual needs (paid for by the District), compensatory services dating back no later than August 2023, and/or compensation for all out-of-pocket expenses.

FINDINGS OF FACT

1. [Student] was born [DOB] with Arnold-Chiari type II malformation, Spina Bifida (myelomeningocele) with hydrocephalus, and resulting paralysis, including vocal cord paralysis, hyperinsulemia, hypoxemia, and a variety of other disabling and life-limiting conditions.[1] These have resulted in on-going medical involvement, beginning with her first surgery/hospitalization beginning just days after her birth in [Other State].

2. [Student]'s medical history includes multiple surgeries and hospitalizations related to the surgeries as well as to her heightened susceptibility to respiratory infections, due to chronic respiratory failure, tracheostomy and ventilator dependence, complicated by MRSA. She takes all of her nutrition via gastronomy tube feeds. Her medical records also document a history of global developmental delay.

3. In addition to her medical complexity, [Student] is completely dependent on others for 24/7 assistance with all activities of daily living. The IEP evaluation at issue in the Due Process Complaint finds that she meets the criteria for Orthopedic Impairment, Autism Spectrum Disorder, Multiple Disabilities, Other Health Impairment, Speech or Language Impairment, and

[1] This is not a comprehensive list of [Student]'s medical history and diagnoses, but rather an overview of the conditions that relate to the question of what constitutes appropriate educational progress in light of her circumstances and the Least Restrictive Environment in which [Student] will be reasonably able to make such progress.

Intellectual Disability. Exhibits GG–LL. She is identified in the Individual Education Plan dated September 29, 2024 (the draft-IEP)[2] as a student with Multiple Disabilities and Other Health Needs.

4. [Student] resided with her parents and sister in [Other State], where she received Special Education services pursuant to IDEA. The least restrictive environment (LRE) for those services was consistently determined to be a homebound placement, due to [Student]'s medical fragility.

5. In December 2022, [Student] moved with her parents and younger sister to [City], Colorado in order to obtain medical care a recently diagnosed degenerative eye disease for which they could not obtain adequate care in [Other State].

6. When [Student] and her family first moved to [City], they obtained housing in [Other School District] and sought to continue [Student]'s education pursuant to the IEPs she had had in [Other State]. Specifically, they sought to continue her homebound placement as the LRE for FAPE due to her on-going medical fragility.

7. [Other School District] did not accept the [Other State] IEP and determined that a full evaluation was required. Among the few reasons suggested for the evaluation was that there was no "formative cognitive measure" in the [Other State] IEP.

8. On or about March 3, [Other School District] completed their evaluation and met with parents with a proposed IEP. That document provides for a placement of 40-79% in the general education population, but specifies 180 minutes per week of Special Education provided in 3 weekly sessions with a homebound tutor and 5 hours per month of Speech-Language Therapy, Physical Therapy, and Occupational Therapy. Exhibit 109.

9. On March 3, 2023, [Other School District] developed an Interim Service Plan (ISP), providing for "180 minutes a week of Academic Instruction for IEP goals" by a "Homebound Tutor." The reason indicated for the change is "A licensed physician has determined that your student is unable to attend school due to a health-related concern." Exhibit QQ.

10. [Parents] testified credibly that because [Other School District] could not find a tutor to provide homebound services, they worked with the school to bring [Student] to the school for 1:1 sessions in a separate classroom. Although the copy of the ISP admitted as Exhibit QQ is not signed, no other testimony or evidence contradicted the [Parents'] testimony on this issue.

11. [Student]'s Initial Care Plan Assessment outlines her need for 112 hours per week of PDN services, unrelated to her educational needs.[3] These include activities of daily living, her medication and medical device regimens, enteral nutrition, blood sugar maintenance, and

[2] The IEP proposed by the District on 9/29/24 and identified as Exhibit E was never adopted because Complainants objected to the placement of [Student] and filed a state complaint and then this Due Process Complaint seeking relief. Because it is the IEP at issue, the ALJ will refer to it as "the draft IEP" to distinguish it from other IEP's involved in the complaint and its resolution.

[3] Although some OT and PT services necessarily overlap in that therapy provided for purposes of daily living activities can be utilized for/benefit access to education.

catheterization, as well as Speech-Language Therapy, Physical Therapy, and Occupational Therapy. Exhibit 1. Her Home Health Care Certification and Plan of Care for the period 1/11/2024-03/10/2024 outlines care consistent with this assessment and notes that she has a "significant risk of hospitalization." Exhibit 2, p. 10.

12. On or about DATE, the [Parents] found permanent housing in District 20 (D20). They sought to continue the same IEP provisions in D20 as they had had in [Other School District].[4] The [Other School District] evaluation had been completed less than six months before the move into D20. Nevertheless, D20 refused to provide comparable service delivery unless the [Parents] consented to a full re-evaluation.

13. Multiple witnesses for the District, including [Executive Director] and [School Psychologist], confirmed that D20 would not and did not continue to provide homebound or 1:1 instruction for [Student] in a separate classroom, nor did they implement the ISP. They treated the [Parents'] request as a request for a change in placement and insisted this required a new evaluation.

14. [Father] testified about [Student]'s medical history and daily care regimen, including PDN and therapy services. He explained the household protocols requiring visitors who have had potential exposure to infectious disease, as well as how household members who are sick sequester themselves from [Student] because of her heightened risk of infection.

15. [Father] testified regarding [Student]'s doctor's recommendations that she be educated at home rather than in a setting in which she is exposed to germs from other children, especially during "viral season (late fall through early spring)" (Exhibit 92) and that "she is at high risk for poor outcomes she get a viral illness" (Exhibit EE). He also testified that [Student's Doctor 1] had helped him to complete the application for Homebound Instruction. Exhibit 91.

16. [Father] testified about the IEP process in D20 that he did not feel that members of the IEP team listened to the concerns he and [Mother] expressed about [Student]'s medical fragility and her infection risk. He also testified that [Principal] told them that either [Student] would have to be in school all day or she would get no services.

17. [Father] testified about the concerns her and [Mother] repeatedly expressed about the overall IEP and its specific goals for [Student] and the inappropriateness of the proposed schedule.

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[4] Respondent contends that the ALJ "cannot address any issue regarding D20's adoption of, transfer and reconsideration of the [Other School District] IEP," citing 20 U.S.C. §1415(f)(3)(B), which prohibits the party requesting the Due Process Hearing from raising issues not contained in the notice filed under subsection (b)(7). Reference to the [Other School District] IEP and its transfer to D20 is included in ¶¶18-23 of the notice. The first of the four claims of FAPE denial refers to "previous and current IEPs." The continuity or lack thereof between the IEPs and location of services in the [Other School District] IEP and subsequent modification relative to D20's IEP was explored at length by Respondent's witnesses and is the subject of the Respondent's Exhibits QQ, RR, and SS.

18. [Father] testified that [Student] had been hospitalized at least once a year throughout most of her life and that her most recent hospitalization was about two months ago.

19. [Mother's] testimony confirmed that of [Father] regarding household protocols for limiting [Student]'s exposure to infection. She also testified about the [Parents'] younger daughter who also has special needs. However, she does attend public school because the socialization is beneficial for her.

20. [Mother] also testified about the general inappropriateness of the Draft IEP schedule for [Student]. Her specific criticisms included the proposal for Spanish, recess, physical education, and lunch. In addition, she does not believe the IEP reflects any consideration of [Student]'s risk of infection. Although [Student] has received limited services in the school setting, she believes that it is reasonable for [Student] not to have interaction with other children if this puts her at risk of being hospitalized.

21. [Executive Director] testified regarding her education and experience. Exhibit LLL. She also explained the continuum of placement from least to most restrictive. She noted that a Significant Support Needs (SSN) classroom, such as the District proposes for [Student] falls about the middle of the spectrum. She shared her position that most children in a homebound placement are very sick, unable to leave their home or the hospital.

22. [Executive Director] also testified about the district policy for homebound placement, distinguishing it from temporary Homebound Support and placement in the home. She noted that this is available even for students who do not have an IEP, but who have an acute temporary need to learn at home or in the hospital. She further testified that IDEA provides for a free *public* education, seeming to suggest that education services provided in the *home* are not *public*.

23. [Executive Director] testified that of approximately 2700 students in the District who have an IEP, none are on a Homebound placement. She said that it is not her role to override the specific IEP team's decision regarding placement for services, and that the IEP team for [Student] did not recommend because they believe they can provide services at school.

24. [Executive Director] shared the District's goal of inclusion and to increase time in the general education classroom for children with special needs. She noted that the general goal of IDEA is to have students with disabilities interact with their non-disabled peers. She testified to her belief that the primary medical need for [Student] to access general education is a full-time nurse (PDN).

25. [Executive Director] testified that she believes an IEP of 19 hours/week of in-school services is appropriate for [Student] despite the IEP's finding that [Student] can only tolerate about an hour at a time of special education services. Exhibit E, p. 27. She noted that it is not the District's practice to start where the student is, because the goal is to gain stamina.

26. [Executive Director] testified that the IEP from [Other School District] was never implemented because the District did not receive a signed copy. She specifically noted that

she/the District did not believe the IEP presented by the [Parents] was fake, they simply treated it as irrelevant to the development of the Draft IEP. She further noted, though, that they treated the [Other State] IEP's providing for no in-school instruction as superseded by the [Other School District] designation of 40-79% of time in general education. Thus, the [Parents'] request for homebound or 1:1 instruction in a "clean room" was treated as a request for modification.

27. [Respiratory Therapist] was admitted as an expert witness as a Certified Respiratory Care Practitioner. She is the District's Respiratory Therapy consultant and trainer for District nurses who assist students who have tracheostomies and are ventilator-dependent. [Student] is her client. She also has two clients who have thracheostomies and are ventilator-dependent. In her expert opinion only one of these two students is doing well attending school. The other has frequent illnesses and other issues.

28. [Principal], the [School] Principal testified regarding the process of transferring in [Student] from [Other School District], beginning in August. He attended the Draft IEP meetings. His testimony made it clear that he did not consider [Student] at heightened risk of infection from instruction at school versus in a homebound placement.

29. [Teacher], 4th grade teacher[5] at [School], testified about accommodations for [Student]'s special needs built into the Draft IEP. These include breaks for distractions and wiping down surfaces and sending [Student] to the office to address medical concerns. She acknowledged that all educational goals, except socialization, could be met through 1:1 instruction for [Student] in a clean room.

30. [Nurse Facilitator], RN, was not qualified as an expert witness but as a fact witness and member of the Draft IEP team. She testified to her experience working with students who have tracheostomies and are ventilator-dependent. She also testified about the depth of skill among her nursing team in the District.

31. [Nurse Facilitator] knows and has worked with [Respiratory Therapist]. She wrote the medical section of the Draft IEP in collaboration with [School Nurse]. [Nurse Facilitator] was the person who contacted [Student's Doctor 1] and [Student's Doctor 2].

32. [Nurse Facilitator] testified about her conversations with the doctors. Her answer to the question of whether she included information in the doctors' letters[6] recommending against an in-school placement for [Student] was "yes and no." She clarified that she used them for listing [Student]'s medical diagnoses.

33. [Nurse Facilitator] testified that because [Student] does not have a diagnosis of being immunocompromised and the doctors did not indicate that this was their concern for [Student], she determined that a homebound placement was not necessary and did not meet District policy for providing.

34. [Nurse Facilitator] also discounted [Student's Doctor 1]'s recommendation because she

[5] Exhibit KKK is her resume.
[6] Exhibits EE and FF.

concluded that [Student's Doctor 1] does not have experience working with children with special needs in a special education setting. She explained to [Student's Doctor 1] how the District policy for Homebound placement works and its limitations. This explanation is reflected in [Student's Doctor 1]'s notes sent to [Father] and admitted as Exhibits 10 and 110.[7]

35. [Nurse Facilitator] testified that in the 12 years she has been with the District, she has never seen a case of Homebound placement. She expressed her belief that the policy would only be applicable to a child whose health prevented them from leaving their home except to see their doctor.[8]

36. [Nurse Facilitator] testified that she did not remember conversations during the IEP process about [Student]'s frequent hospitalizations. She also testified that she believes every child should receive instruction at school and that [Student] is like other students who have tracheostomies and are dependent on ventilators.

37. [Nurse Facilitator] testified that a nurse was hired by the District in August to provide for [Student]'s needs while she is at school. She believes this fully accommodates [Student]'s medical needs.

38. [Private Duty Nurse], [Student]'s PDN testified regarding her negative impression of the SSN classroom and its inappropriateness for [Student]. [Principal] testified in rebuttal that some of the behavior that distressed her and [Student] was not neglect of a student, but behavior modification for that student, supervised by his PT provider.

39. [Physical Therapist] testified regarding her evaluation of [Student] for the draft IEP. This included seeing [Student] in her wheelchair, which she can operate herself, as well as her stroller. [Physical Therapist] shared her impression that [Student] has untapped capabilities that have not been fostered in homebound learning.

40. [Physical Therapist] also testified that [Private Duty Nurse] replaced a tracheostomy tube that had fallen on the ground, without cleaning it, and that she forgot [Student]'s emergency bag. [Private Duty Nurse] was asked about this incident and denied that it took place. The ALJ finds [Private Duty Nurse's] testimony more credible regarding this interaction.

41. [Physical Therapist] testified about the purpose of building recess into [Student]'s IEP. The goal is fostering [Student]'s independence and endurance.

42. [SSN Teacher], SSN teacher for [School], testified consistently with other District witnesses regarding the development of the Draft IEP and her belief that [Student] has the capacity for accessing special education in the school setting.

43. On Cross Examination, [SSN Teacher] acknowledged that the IEP services contemplated in the Draft IEP could be provided at home and in a clean room, but that instruction in the SSN

[7] Respondent's objection to Exhibit 10 was sustained on direct examination of [Father]. Respondent offered it for admission during examination of [Nurse Facilitator].
[8] Exhibit PP is the written policy regarding Homebound placement.

room cannot be 1:1. She also noted that "you can look at [[Student]'s] previous IEP and see growth."

44. [School Psychologist], School Psychologist, testified that she believed the District was legally obligated to implement the [Other School District] IEP with in-school instruction, in general education 40-79% of the time until a re-evaluation and new IEP could be produced, because the homebound placement the [Parents] were requesting for [Student] was a significant change. She also testified that when the ISP was received, the District was unable to comply with the homebound tutoring provision because they could not locate a tutor, although they had already hired a nurse for [Student].

45. [School Psychologist] further testified that an additional reason the ISP was not implemented was because the [Parents] refused to bring [Student] to school for the SLT, PT, and OT also included.

46. [School Psychologist] also testified that the IEP team is required to consider at least two placement options and they usually consider three. She also testified that IEPs are always based on a full day at school or the goal of working up to a full day.

47. [School Psychologist], like [Nurse Facilitator], and [Physical Therapist], made clear in her testimony that she believes the [Parents] have been providing insufficient special education for [Student] and underrealizing her potential; that requiring her to transition from her prior Homebound LRE to a full day in school is a better choice.

48. Specifically, [School Psychologist] testified, "knowing she's [[Student]] never been in a school placement tells me how much more could she do if she was in school or had been in school." She confirmed that this belief weighed heavily in her recommendation about placement for [Student].

49. There is no evidence that [School Psychologist] or any other member of the Draft IEP team seriously considered the [Parents'] input about [Student]'s medical fragility and higher risk of both infection and serious consequences of infection or her medical history in determining that a full day of school was the appropriate placement for [Student]'s special education services.

50. Although the Draft IEP uses standard language to indicate that alternative placements were considered, there is no evidence that any were. None are mentioned in the Draft IEP. No District witness offered any testimony about alternative placements considered. Exhibit E.

51. The Draft IEP also does not offer any consideration of the potential disadvantages to the proposed placement. One of [Student]'s IEP identifications is ASD, which includes the definitional component, "The child seeks consistency in environmental events to the point of exhibiting significant rigidity in routines and displays marked distress over changes in the routine…"

52. In addition to the failure to demonstrate consideration of parental and medical concerns regarding heightened infection risk, nothing in the Draft IEP and no witness testimony considers

the likelihood of [Student] resisting the dramatic change in her placement. The Draft IEP calls for an almost 200% increase in [Student]'s special education services, from 600 to 1140 min/week, as well as an expansion in every area and type of learning. No consideration of the relative pros and cons of this increase is offered in the Draft IEP or witness testimony.

53. [Occupational Therapist], Occupational Therapist for the District; [Speech-Language Pathologist], Speech-Language Pathologist for the District; and [School Nurse], RN, School Nurse all testified as well. Each recounted their portion of the Draft IEP, and each confirmed the District position that students with tracheostomies who are ventilator-dependent do not need homebound placements, and that they can provide accommodations for [Student] that are substantially the same as other students with these challenges to accessing education.

54. Taken together, the District's witness testimony and exhibits confirm that the Draft IEP Team never seriously considered a Homebound placement for [Student], in part because they did not ever seek to work collaboratively with the [Parents] or take their information about [Student]'s infection risk seriously, in part because their understanding of home as a placement is too restrictive.

55. The evidence also demonstrates that the District predetermined the in-school placement, at least as early as August. The District obdurately refused to consider the parents' input and substituted their own collective judgment, making no effort to collaborate with parents.

CONCLUSIONS OF LAW AND DISCUSSION

Impartial Due Process Hearing

The IDEA provides that whenever a due process complaint is filed, parents must have the opportunity for an impartial due process hearing. Such a hearing involves an impartial hearing officer, who is not just free of a personal interest in the proceeding, but who possesses the knowledge and ability to understand the Act, to conduct hearings and to render and write decisions according appropriate standards of legal practice. § 300.511(c)(1) Decisions must be based on substantive grounds. If a procedural violation is alleged impeded the child's right to FAPE, the parent's opportunity to participate in decision-making or deprived the child of an educational benefit. § 300.513 Finally, the party requesting the due process hearing may not raise issues at hearing that were not plead in the complaint. § 300.511(d)

The party seeking relief bears the burden of persuasion at the due process hearing. *Schaffer ex rel. Schaffer v. Weast*, 546 U.S. 49 at 51 (2005). If the court finds that a school district has violated the IDEA, it may grant such discretionary equitable relief as it deems appropriate. *Florence Cty. Sch. Dist. Four*, 510 U.S. at 12, 15-16. In this case, Complainants have the burden of proving the violations pled in their complaint and that they are entitled to relief as provided for in the IDEA.

Complainants assert that the District violated the IDEA, 20 U.S.C. § 1400, et. seq., and accompanying regulations at 3§300, et. seq., and the Colorado Exceptional Children's Educational Act, C.R.S. § 22-20-101, et. seq. by failing to provide FAPE. More specifically,

Complainants allege four claims of denial of FAPE for [Student]: 1) by denying her services and accommodations as required by her previous and current IEPs; 2) by creating goals wholly inconsiderate of her individual circumstances and failed to provide her with services sufficient to permit her to meaningfully benefit and make progress considering her circumstances; 3) by denying her either a homebound placement and a private, separate placement, based on District policy; and 4) by predetermining her placement.

Many due process complaints involve allegations that the placement for a child is too restrictive. In this case, the allegation is that the Draft IEP does not provide FAPE for [Student] because the placement for the educational services is not restrictive *enough*. Complainants argue that in light of [Student]'s unique combination of medical conditions she is at significantly higher risk of infection than even the "average" child with a tracheostomy who is ventilator-dependent, and that the potential consequences of contracting the kind of infection common to public elementary schools, would be life-threatening to her. While atypical, this claim is supported by a body of case law setting out the parameters of when a child with a disability needs an environment that reduces their contact with non-disabled peers in order to meaningfully benefit and make progress toward her special education goals.

Complainants have provided no statutory/regulatory authority or case law to support their first allegation, *requiring* a new school to adopt a prior IEP from a different state or school district even in the same state. However, provisions do exist conditioning a reevaluation within a year on parental consent and *requiring* an IEP Team reevaluating a student to consider evaluations provided by the parents, with no requirement that they be signed copies. §§ 1414(a)(2)(B)(i), §300.303(a)(2) and 1414(c)(1)(A)(i) In this case, the District both ignored and insisted they were bound by [Other School District] IEPs in determining what placement was appropriate for the division of [Student]'s special education services. Moreover, their tactics in obtaining consent for a reevaluation barely 6 months after the [Other School District] evaluation do not bear close scrutiny.

Respondents argue in their Closing Statement that the ALJ is prohibited from considering addressing "any issue regarding D20's adoption of, transfer and reconsideration of the [Other School District] IEP. As indicated in FN 4, the Complaint does indeed discuss the [Other School District] IEP at length, the reference to "previous and current" IEPs in the first claim is sufficient to put Respondent's on notice and give the ALJ authority under the relevant regulations to address the issue as it related to Complainants claims more broadly. Moreover, there was extensive testimony from Respondent's witnesses at hearing to make it necessary for the ALJ to make findings regarding the relationship between the two IEPs and their connection to Complainants claims for relief.

Free Appropriate Public Education ("FAPE")

"The core of the statute … is the cooperative process that it established between parents and schools." Schaffer v. Weast, 546 U.S. 49, 53 (2005). The "central vehicle for this collaboration" is the process through which the school and the parents work together to create and then to regularly update an [IEP]". Id. In Garcia v. Board of Education of Albuquerque Public Schools, 520 F.3d 1116 (10th Cir. 2008). This basic premise of IDEA is particularly relevant to analysis and resolution of the claims at issue here and to understanding the ways in

which each side's refusal of collaboration has contributed to the denial of FAPE for [Student]. While parents bear some responsibility for the hostilities, their hypervigilance is understandable in light of their fear for their daughter's safety and their desire to obtain an appropriate education for her, one which maximizes her potential without further limiting her life, by exposing her needlessly to harm. The District, on the other hand, claims to have provided FAPE for thousands of children, and might reasonably be expected to have acquired compassion and the capacity to partner with parents whose excesses are motivated by their love for their unique child.

Pursuant to § 300.301(a), the District must conduct a full and individual evaluation before the *initial* provision of special education and related services can be provided to a child with disabilities. As part of that evaluation, the District must review any existing evaluations and data provided by the parent, classroom-based observations, observations by teachers and related service providers, and use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the child. § 1414 (c)(1)(A)(i), §§ 300.305(a)(1) and 300.304(b). The child is to be assessed in all areas related to the suspected disability, including, as appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.. § 300.304(c)(4). Once a decision has been made that a child has a disability and needs special education and related services, subsequent IEPs may be more flexible and coordinated, so long as all team members, including parents, agree that there has been no change in need or functioning. § 300.306(c)(2).

In *Board of Ed. Hendrick Hudson Central School Dist., Westchester Cty. v. Rowley*, 458 U.S. 186 (1982), the Supreme Court held that the appropriateness of a public entity's actions under the IDEA is to be determined according to the following two-fold standard: "First, has the state complied with the procedures set forth in the Act? And second, is the individualized education program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?" *Id.*, at 206-207. In 2017, in *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*, 137 S. Ct. 988 (2017), the Supreme Court provided further guidance to determine whether an IEP is reasonably calculated to enable the Student to make progress in light of their circumstances. The qualification that an IEP is "reasonably calculated" to enable progress reflects:

> A recognition that crafting an appropriate program of education requires a prospective judgment by school officials [and] contemplated that this fact-intensive exercise will be informed not only by the expertise of school officials, *but also by input of the child's parents* or guardians [*emphasis added*]. Any review of the IEP must appreciate that the question is whether the IEP is reasonable not whether the court regards it as ideal. *Id*., at 999.

In *Endrew F.,* the Supreme Court was finding a new middle ground between a *de minimus* standard that was meaningless in practice and judges who were expanding the law to comport with their idiosyncratic ideal standards. Here it appears the District has set an ideal standard. Although they are likely motivated by a desire to provide opportunities for [Student], the District also seems to have judged the [Parents] for what they see as the [Parents'] overprotectiveness. Thus, this may have skewed their evaluation of [Student]'s current educational needs through a reactive underestimation of

how her disabling medical conditions limit her ability to access education. An evaluation that takes [Student]'s needs into account must consider her unusual susceptibility to viral and bacterial infections common to elementary schools.

Three factors are demonstrated in witness testimony and Exhibits: 1) the District's view of [Student] as "a child with a tracheostomy who is ventilator-dependent;" 2) their discounting of her doctors' ability to understand the intersection of her medical conditions and her educational needs/abilities; and 3) their limited and limiting concept of the appropriateness of "home" as a placement that for some children is the LRE in which they are able to make reasonable progress toward the educational goals appropriately contained in their IEPs.

Although typically, the IDEA is a tool for expanding access for children with disabilities to general education, there are circumstances when the LRE actually reduces a child's time in general education. In *Albuquerque Pub. Sch. v. Sledge*, Civ. No. 18-1029 KK/LF, Civ. No. 18-1041 KK/LF (D. N.M. Aug 08, 2019), e.g., the court found that "an educational program that puts a child's life or health at unreasonable risk is not "reasonably calculated to enable the child to receive educational benefits," and therefore not a FAPE. *Endrew F.*, 137 S. Ct. at 995-96; *Garcia v. Bd. of Educ. of Albuquerque Pub. Schs.*, 520 F.3d 1116, 1125 (10th Cir. 2008). *Albuquerque Pub. Sch. v. Sledge*. In that case, the child suffered from a seizure disorder that regularly put the child's life at risk without immediate intervention. The District refused a homebound placement, even though the required intervention involved cannabis and the public school district could not include a remedy on the federal Controlled Substances Act (CSA), and there was no legal exception that allowed school staff to provide the life-saving remedy.

Complainants argue here that an IEP that places [Student] in the general education population puts her at similar risk. Testimony also supports the contention that she fits the District's narrow model in that she rarely if ever leaves her house, except to go to the doctor. However, the Courts do not require that the child's life be at unreasonable risk to find that a homebound placement is the LRE for a particular child to receive FAPE. In *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1185 (11th Cir. 2014), the Court noted that "The IDEA clearly contemplates that a state might be required to place a student in one-on-one homebound instruction to meet the student's needs, evidenced by its definition of "special education" to include "instruction conducted ... in the home." 20 U.S.C. § 1401(29); see also34 C.F.R. § 300.115 (listing home instruction as part of the continuum of alternative placements states must make available to students to comply with the IDEA). The child at issue in *Miami-Dade* suffered from developmental and digestive disorders exacerbated by the growth of the school he attended. Although the alternative placement was not ideal, the Court found that the more restrictive environment/reduction in contact with non-disabled peers increased the child's access to FAPE. Several other cases appropriately cited by Complainants in their Closing Argument stand for the same proposition. They highlight the obdurate quality of the District's refusal to consider whether the more restrictive environment for which the [Parents] are advocating would actually deliver FAPE more reasonably to [Student].

Predetermination & Obdurate Insistence

Complainant also alleges that the District predetermined [Student]'s placement, depriving

them of the meaningful participation in the IEP process which IDEA required the District provide. Indeed, although the Draft IEP says "The team (including parents) discussed the different LRE placement considerations available to provide [[Student]] access to meaningful instruction and participation toward the attainment of the Extended Evidence Outcomes of the Colorado Academic Standards," there is no evidence in the record that this is more than standard boilerplate. The District witnesses were uniform in their testimony about placement of [Student] in the general education population 40-79% of the time. The full-time nurse for [Student] contemplated by this placement had been hired by August. The District might argue a proactive need to have staff in place even if they aren't needed. However, testimony revealed no effort whatsoever to identify a tutor for the ISP. Although several of the District's witnesses testified that they believed the ISP had been implemented, when pressed, [School Psychologist] acknowledged that no services were provided. In part this was because no tutor for 1:1 home instruction was ever identified. In part this was because the District took the bizarre position that the [Parents] had to agree to bring [Student] to school for related services, if they wanted her to have instruction at home in academics.

The [Parents] provided extensive medical records by the District. However, there is no evidence that the District considered this information, except to inform [Student]'s doctors why the District would not comply with their recommendations that [Student] receive her instruction at home. The evidence also shows that the District relied primarily on its experience with *other* students with tracheostomies who are also ventilator-dependent, rather than [Student]'s medical records, to determine the placement and goals for the Draft IEP.

The evidence, thus, supports Claimants' allegation that the District impermissibly and obdurately predetermined [Student]'s placement, depriving them of meaningful participation in the IEP development process. "Predetermination occurs when an educational agency has made its determination prior to the IEP meeting, including when it presents one placement option at the meeting and is unwilling to consider other alternatives." *H.B. v. Las Virgenes Unified School Dist*, 239 Fed. Appx. 342 (9th Cir. 2007). Predetermination can deprive a child of FAPE. *Deal v. Hamilton County Bd. of Education*, 392 F.3d 840 (6th Cir. 2004). As indicated in *Miami*, there "must be evidence the state has an open mind and might possibly be swayed by the parents' opinions and support for the IEP provisions they believe are necessary for their child." *Id at 1188.* Nothing in the record suggests the District considered any other placement than the one ultimately offered in the Draft IEP.

The District is not bound to accept parents' opinion about placement. They are also not bound to adopt or continue prior placement decisions. They are, however, required to actually consider them. Exhibit E., p. 27, in the Recommended Placement section contains 3 prompts to guide the narrative description of LRE. Each box is checked in the Draft IEP. The middle box invites a description of "Possible disadvantages or potential harmful effects on the student or on the quality of the services needed." The narrative description below includes no discussion of the possible disadvantages of the placement. It contains no discussion or acknowledgment of the dramatic change in placement that the Draft IEP represents or the potential disruption it will pose to a child identified as ASD. It contains no discussion of the potential advantages of a Homebound placement or discussion of the relative merits and drawbacks of each placement. It does not identify any other placement considered. Earlier in the document at the bottom of p. 15,

the parents ask why their request for homebound tutoring was denied. The answer provided is "The team explained that [[Student]'s offer of FAPE is based on her IEP goals and individualized set of needs, related services, supports, equipment to ensure meaningful access to her education."

Respondent's Closing Statement notes that "A child's IEP educational needs and placement determinations must be drawn from a variety of sources, not a single evaluation. 34 C.F.R. § 300.306.(c)(1)(i)." What it fails to note is that since she started school in 2018, [Student] has never had an evaluation that recommended so much time in the general education population. The Draft IEP notes in several places that [Student] has a solid foundation of knowledge and skill, suggesting that she has been making progress appropriate in light of her circumstances. Exhibit GG, the Determination of Eligibility: Autism Spectrum Disorder, notes that, "the child's performance is not due to a lack of appropriate instruction in reading, including the essential components of reading instruction . . . [or] due to a lack of appropriate instruction in math."

The ALJ therefore concludes that the evidence demonstrates that the September 2023 evaluation was not tailored to address [Student]'s specific needs. It fails to address her medical history and current prognoses or the evidence that her prior IEPs were reasonably calculated to enable [Student] to make progress appropriate in light of her circumstances. It provides no grounds for the dramatic changes the Draft IEP proposes or evidence that any potential gains outweigh potential harms. The evidence demonstrates that the District failed to work collaboratively with the [Parents], but instead predetermined [Student]'s placement deprived parents of meaningful participation in the process and [Student] of FAPE. Far from including Complainants at every step, the District instead made its decision independently of parents and of [Student]'s actual circumstances.

The IDEA requires that a student's recommended program must be provided in the least restrictive environment ("LRE"). "To the maximum extent *appropriate*, children with disabilities, . . . are educated with children who are not disabled, and . . . removal of children with disabilities from the regular educational environment occurs *only when the nature or severity of the disability of a child is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.*§ 1412(a)(5)(A);§§ 300.114(a)(2)(i), 300.116(a)(2). But "[t]he IDEA clearly contemplates that a state might be required to place a student in one-on-one homebound instruction *to meet the student's needs*, evidenced by its definition of "special education" to include "instruction conducted ... in the home." § 1401(29) . *R.L. v. Miami-Dade Cnty. Sch. Bd.*, 757 F.3d 1173, 1185 (11th Cir. 2014),

ORDER

The ALJ concludes that the Complainants met their burden of proof to establish that the District violated the IDEA and failed to provide the [Student] with FAPE by 1) failing to justify its dramatic departure from prior placements; 2) the creation of goals wholly inconsiderate of her individual circumstances; 3) denied a homebound placement on the basis of district policy which too narrowly interprets regulations and is inconsistent with case law; and 4) obdurately predetermined her placement in general education 40-79% of the time.

Therefore, Complainants are entitled to equitable relief in the form of compensatory special education services, prospective education services in a homebound placement, and reimbursement of out of pocket expenses Complainants have incurred due to the District's IDEA violations. This Decision is the final decision of the independent hearing officer, pursuant to 34 C.F.R. §§ 300.514(a) and 300.515(a). In accord with 34 C.F.R. § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

DONE AND SIGNED this 22nd day of July 2024.

/s/ LILITH Z. COLE
Lilith Z. Cole
Administrative Law Judge