

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ <b>COURT USE ONLY</b> ▲</p>
<p><b>[Student], a minor, by and through his parents, [Father] and [Mother],</b> Complainants,</p> <p>vs.</p> <p><b>DENVER PUBLIC SCHOOLS,</b> Respondent.</p>	
<b>DECISION</b>	

Complainants, on behalf of their minor son, [Student], on September 22, 2016, filed a due process complaint pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.*, as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, §§ 2220-R-6.02(7.5). Hearing was held May 31, 2017 and June 1, 2017, before Administrative Law Judge (ALJ) Hollyce Farrell at the Office of Administrative Courts, Denver, Colorado. Complainants represented themselves. Kathleen Sullivan, Esq. represented Denver Public Schools (the District). At hearing, Complainants' Exhibits 1, 5, 6, 14, 15, 24-27, 29-47, 50-56, 58-65, 70-73, 75-77, 79-85, 87, 89, 91, 92, 95-101, 103, 104, 106-108, 111-116, 118-133, 135, 136, 138-142, 145-157, 159-169, 171-182, 184-188 and 239 were admitted into evidence. Complainants' Exhibits 189 through 236 were offered, but not admitted. The ALJ took judicial notice of Complainants' Exhibits 237 and 239. Respondent's Exhibits 1 through 21 were admitted into evidence. The hearing was digitally recorded in Courtroom 5.

### Case Summary

The core issue is whether the District provided [Student] a free appropriate public education (FAPE) from September 2014 through February 2017. For reasons explained below, the ALJ concludes that Complainants met their burden of proving that the District has failed to provide [Student] with FAPE, including related services from September 22, 2014 – November 2014, March 2015 – May 2015, October 2015 – March 2016, and January 31, 2017 – February 10, 2017. The history between [Student] and the District began in the fall of 2011; however, due to the statute of limitations, the only disputes that can be addressed in this Decision are from September 22, 2014 through the dates of the hearing.

## Findings of Fact

### History

1. [Student] is a 12 year-old boy (d.o.b. [DOB]) who lives with his parents, [Father] and [Mother] in Denver, Colorado. [Student] has one sibling, an adult sister. [Student] is, by many accounts, a very sweet and gentle child. He is extremely sensitive, has a strong sense of empathy, and thinks deeply on many levels.

2. [Student] has been identified as a highly gifted and talented (HGT) child who has a very high intelligence quotient. He has been tested by the District and is in the 99<sup>th</sup> percentile for HGT children. He has also been diagnosed with autism spectrum disorder, obsessive compulsive disorder, generalized anxiety, encopresis, sleep disorder, Ehlers-Danlos Syndrome (EDS), Tourette's disorder and an eating disorder where he will eat very few foods. He also has a sensory processing disorder and tics. He is considered a twice exceptional child based on his disabilities and his identification of being highly gifted and talented. [Student]'s needs are severe and complex.

3. Because of his sleep disorder, [Student]'s parents have a very difficult time getting him to go to sleep at night, even with the aid of medication. Because he goes to bed so late, [Student] sleeps until at least 10:00 in the morning. His sleep disorder limits the hours in which he can receive educational instruction.

4. [Student]'s EDS, a collagen defect, causes him to be physically fragile because his joints can be easily dislocated. His EDS affects all systems of his body.

5. [Student] began attending school at [Elementary School] ([Elementary School]) when he was a first grade student in the fall of 2011. [Elementary School] is an HGT magnet school which serves twice exceptional students and students with anxiety and encopresis, as well as typically developing students and students who are disabled, but not twice exceptional.

6. [Elementary School] develops plans for its students with encopresis which allow them to successfully attend school. Because [Student] reached a point where he could no longer attend school, [Elementary School] was never able to develop an encopresis plan for him.

7. There are students at [Elementary School] with similar intellectual abilities to [Student].

8. For the first few months of his first grade year, [Student] attended school all day. At some point during those first months, [Student]'s teacher noticed that he seemed extremely detached and was displaying some obsessive behaviors. Around this same time, [Student] increasingly did not want to attend school, and his parents had difficulty getting him to attend because of his anxiety about going to school.

9. While [Student] is in school, he was often willing to engage and had a lot to offer his classmates.

10. School personnel, including the principal, and [Student]'s parents expended great effort to get [Student] to school each day. For example, the principal came to the family's home to encourage [Student] to go to school and other school personnel would encourage him to get out of the car if his family was able to drive him there. [Student]'s parents spent hours trying to convince him to go to school, but to little or no avail.

11. [Student]'s parents, at first, tried to physically force [Student] to go to school but eventually stopped as they were afraid of injury to [Student] because of his EDS and afraid of physical injury to themselves. Indeed, both of [Student]'s parents suffered injuries in trying to get [Student] to attend school. [Student] was attending school less and less frequently.

12. [Student]'s anxiety, encopresis and his sleep disorder contributed to his refusal to attend school.

13. Because of his diagnoses, [Student] also attended almost no school during his second grade year which was the 2012-2013 school year. During second grade, [Student] was diagnosed with autism and was placed on an Individualized Education Program (IEP). His placement was determined as homebound.

14. In the 2013-2014 school year, which was [Student]'s third grade year, during the fall semester, [Student] attended school for one to two hours in the afternoons accompanied by his mother in the classroom, and he attended chess club. After the District determined that [Student]'s mother could be on campus, but not in the classroom with [Student], [Student] would not return to school after the Thanksgiving break. Homebound services were resumed in the spring semester of that year.

15. The District attempted different ways to provide educational services to [Student] during his third grade year. Most of the attempts were minimally successful, and some were not successful at all.

16. [Student]'s parents allege that the District did not provide [Student] with a FAPE during his first through third grade years. However, because the statute of limitations had run by the time Complainant's filed their due process complaint, those allegations are not relevant to this case.

17. In September of 2014, [Elementary School Psychologist], the school psychologist at [Elementary School], proposed to assess [Student]'s social/emotional level. She sent a questionnaire to [Student]'s parents to complete their portion of the assessment, but they did not return it, even after [Elementary School Psychologist] followed up with them. [Elementary School] also sent a sensory evaluation for the family to complete, but the parents did not return it.

18. On September 19, 2014, [Student]'s treating psychiatrist, [Psychiatrist], at [Hospital] ([Hospital]), wrote a report to [Student]'s IEP team. [Psychiatrist] noted that [Student]'s anxiety was severe enough that it interfered with his ability to leave his house, and that he had difficulties being away from his parents. She further noted that [Student]'s anxiety could best be targeted through cognitive behavioral therapy. Moreover, she wrote that [Student] needed a setting that was cognitively appropriate for his skills and allows him

to interact with same age, typically developing peers.

19. On September 23, 2014, an IEP meeting was held regarding [Student]. The IEP meeting was held to determine what services were best suited to provide [Student] with a FAPE. [Student]'s parents, as members of the IEP team participated in the meeting; their advocate, [Advocate], also attended the meeting. The IEP team considered [Psychiatrist]'s September 19, 2014 report. Although, [Student]'s parents participated in the meeting, they did not feel that they were given adequate time to provide input.

20. However, in the section entitled Parent/Student Input, the IEP states that [Student]'s parents reported that [Student] had excessive anxiety and refused to go to school. The IEP further states that the parents reported [Student]'s interests and activities of enjoyment. The IEP states that [Student]'s parents were concerned about [Student] not having his educational needs met and that he was not able to access instruction and peers. They were further concerned with the overall quality of programming that [Student] had received since the fall of 2012. The ALJ finds that [Student]'s parents' input was considered at the September 23, 2014 IEP meeting and at all subsequent IEP meetings.

21. Throughout the efforts to obtain services for [Student], [Student]'s father sent many lengthy emails to the District, including [Associate Director of Special Education], the District's Associate Director of Special Education. It is not [Associate Director of Special Education]'s practice to communicate important matters by email, so he preferred to schedule meetings to discuss the concerns on a one-on-one basis. [Associate Director of Special Education] was not ignoring the parents' concerns.

22. [Student]'s parents were often in disagreement with the other members of the IEP team regarding which services were appropriate for [Student] and how those services should be delivered. However, the ALJ finds as fact that the District did properly consider the parents' input for the IEPs which are relevant to this appeal.

23. One purpose of the September 23, 2014 IEP meeting was to figure out the next steps that should be taken for [Student] because he could not transition back to school.

24. At the conclusion of the September 23, 2014 IEP meeting, the IEP proposed that [Student] attend [Elementary School], beginning two hours per day while being supported by mental health services by a school psychologist and speech language therapy.

25. The September 23, 2014 IEP noted that there was no physician's statement indicating that [Student] was unable to attend school. In fact, [Psychiatrist]'s September 19, 2014 report supported a return to school for [Student].

26. [Student] did not return to school in accordance with the September 23, 2014 IEP.

27. When the IEP meeting concluded on September 23, 2014, the team agreed that a second meeting needed to be scheduled for the purpose of further discussion. That meeting was held on November 4, 2014.

28. In the interim, on October 17, 2014, [Student]'s parents and their advocate, [Advocate], met with [Associate Chief of Equity and Opportunity], the District's [Associate Chief of Equity and Opportunity]; [Program Manager], the District's Program Manager for Instruction and Professional Development; and [Special Education Lead]. This meeting was not an IEP meeting.

29. At the October 2014 meeting, [Associate Chief of Equity and Opportunity] and [Program Manager] were in agreement that [Student]'s homebound services should be reinstated and that occupational therapy and cognitive therapy were appropriate for [Student].

30. Another IEP meeting was held on November 4, 2014. The IEP team established goals for [Student], and the Service Delivery Statement provided that all of [Student]'s instruction and his psychological services would be provided in the home. [Student] was to receive 600 minutes, or 10 hours, of specialized instruction per week; 2 hours of psychological services per month; and 2 hours of speech/language therapy per month.

31. The IEP demonstrates that the team considered the disadvantages of [Student] not being able to attend school, but ultimately agreed that homebound education was the most appropriate given the parents' input that he was unable to attend school. The IEP stated that the District would provide [Student] access to Skype so he could start building social connections to [Elementary School]. Although the District provided an iPad to [Student], it never provided the software which enabled him to connect to [Elementary School] via Skype.

32. Cognitive and occupational therapies were not identified as a need for [Student] during the evaluation process and those services were not included in [Student]'s IEP after either the September 23 and November 4, 2014 meetings. Occupational therapy was not included in any of [Student]'s IEPs because the District never got consent from the parents to conduct those evaluations. The first time the District was made aware that an evaluation had been done was during the discovery process of the due process complaint which is the subject of this appeal.

33. Cognitive therapy was not provided [Student] and it was not a service in his IEPs. However, mental health services were provided through a school psychologist who used some cognitive therapy methods. Moreover, [Student] has received some cognitive therapy at [Hospital].

34. The District did find a therapist, [Therapist], to provide cognitive therapy to [Student]. However, [Therapist] did not have experience with twice exceptional children and he and [Student]'s parents both felt that he was not the appropriate therapist to be working with [Student]. The District did not locate another therapist to work with [Student], but did offer and provide psychological services, as outline in the IEP.

35. The District finds teachers and other providers to work with homebound students by contacting its Alternative Placement Services Program (APS), which then emails such positions to its staff members; a staff member can apply for a position if he or

she is interested in it.

36. By February of 2015, although it had made many attempts to procure a primary teacher for [Student], including contacting a teacher recommended by [Student]'s parents, the District had not been able to find a primary teacher to work with [Student].

37. For example, on November 12, 2014, [Student]'s father stated that he only wanted an out-of-district teacher, [Out-of-district Teacher], to work with [Student]. The APS coordinator explained that it could take up to 8 weeks to complete the hiring process, but would provide an interim teacher. [Student]'s father was adamant that only [Out-of-district Teacher] provide instructional services to [Student].

38. The District called and left messages for [Out-of-district Teacher] on November 13 and November 14, 2014, but [Out-of-district Teacher] did not return the calls until November 20 when he called to tentatively decline the position. [Student]'s father indicated on November 21, 2014 that he wanted to wait until [Out-of-district Teacher] had given a definitive answer before looking for another teacher.

39. On November 21, 2014, the APS coordinator offered the position to all of the APS teachers and support partners, asking that the email be forwarded to all of the special education teachers within the network.

40. On December 8, 2014, a teacher, [Teacher], expressed interest in the position of working with [Student], but stated that she could only work with him one hour per day. The APS coordinator contacted [Student]'s father who stated that two teachers would be acceptable but he needed professional portfolios of every provider coming into the home, and that he needed to interview [Teacher] to determine if she was appropriate to meet with [Student].

41. [Teacher] called [Student]'s father on December 9, 2014, but received no answer. After she spoke with [Student]'s father on December 16, 2014, [Teacher] called APS and declined the assignment because she did not believe it would work for her.

42. Another teacher expressed interest in the assignment and left a message for [Student]'s father on January 6, 2015, and told APS she was waiting on a return call.

43. The District reached out to the family's advocate, [Advocate], to help find a teacher for [Student], but without success.

44. On January 16, 2015, [Student]'s father called APS and stated that he had received several voicemails from APS but was too busy and overwhelmed to return the calls. He further stated that he would not allow any providers to work with [Student] unless they specialized in twice exceptional students. He also indicated that he wanted services to start for [Student] at 11:00 a.m. daily, and expressed displeasure with all of [Student]'s providers. He stated that none of them could work with [Student], and he requested all new providers. He also suggested that he be able to interview all future applicants. Although it was making reasonable efforts, the District was unable to find a teacher who could work with [Student] and was also acceptable to the family.

Services provided during 2014-2015 School Year

45. [Associate Director of Special Education] contacted [Teacher #2], a full-time District employee, to see if she could work with [Student] two hours per week. Because she already had other duties within the District, [Teacher #2] was only able to provide an hour of instruction to [Student] each week, and although she was able to provide more than an hour on some days, she acknowledged at hearing that she averaged about one hour per day with [Student].

46. [Teacher #2] started working with [Student] during the second week of March 2015. At this time, [Student] had not had a teacher or been provided educational services since August of 2014.

47. [Teacher #2] became [Student]'s primary teacher in March of 2015. The District attempted to find an additional teacher to provide the other hour of instruction mandated in the IEP, but was unable to do so during the time period that [Student] was able to receive instruction between 1:00 p.m. and 4:00 p.m.

48. During the summer months, [Teacher #2] was able to spend more time with [Student] to provide compensatory services. However, during the summer, [Teacher #2] noticed a decline in [Student]'s ability to stay focused, was having more physical issues, was tired and had issues with his diet disorder and possibly issues with his medications.

49. [Teacher #2] covered as many core school subjects with [Student] as she could in their limited time together. Specifically, she covered literature, writing, mathematics, science, geography, art and music. [Teacher #2] used middle school materials to work with [Student] because the 4<sup>th</sup> grade curriculum was not at a high enough level for him.

50. During the time [Teacher #2] worked with [Student], she contacted another District staff member regarding HGT services for [Student], but she is not aware if any HGT services were made available to [Student]. Aside from an HGT teacher being present at [Student]'s IEP meetings, no HGT services were provided to [Student] in the homebound setting, other than [Teacher #2] consulting with the District HGT manager in working with [Student] and the District sending home some HGT assignments for [Student] to complete.

51. [Teacher #2] tried to assist [Student] in getting assistive technology on his District provided iPad. She was able to get a Google sign in for him so they could work on the speech and text component of their curriculum, but they had trouble getting it to work. They also were unable to load the ALEKs math program loaded into the iPad. [Teacher #2] and [Student] were able to use the iPad for robotics, reading and research. They were also able to use [Student]'s mother's computer for science lessons. [Teacher #2] customized the curriculum she used with [Student] in order to meet his unique needs.

52. [Teacher #2] developed a good relationship with [Student], but [Teacher #2] noticed that [Student]'s ability to engage in instruction depended upon his interest in the topic they were studying.

53. [School Psychologist], a licensed teacher and licensed school psychologist, saw the APS posting for a school psychologist to work with [Student], and indicated that she was interested in the position. When [School Psychologist] told the District she was

interested in the position, it sent her a copy of [Student]'s IEP and she contacted [Student]'s family, who deemed that she would be an appropriate fit for [Student].

54. [School Psychologist] would have been able to start working with [Student] in January of 2015, but his parents did not want her to begin work until [Student]'s primary teacher was in place so they could work around the primary teacher's schedule. As a result, [School Psychologist] did not begin working with [Student] until April of 2015. She worked with him one hour every two weeks. In the summer months of 2015, [School Psychologist] worked more frequently than every other week with [Student] because she was providing compensatory services.

55. When [School Psychologist] first began working with [Student] in the spring of 2015, he had a hard time sitting still; he primarily wanted to sit on the couch and play video games and talk about items that were interesting to him; [School Psychologist] had a difficult time getting [Student] to do his curriculum.

56. [School Psychologist] primarily worked with [Student] on his social skills and his anxiety. In working with [Student], [School Psychologist] used research based studies which addressed cognitive behavior.

57. [Speech Therapist], is a certified speech therapist, who is licensed with the Colorado Department of Education. During her career, [Speech Therapist] has worked with people who have medically complex backgrounds.

58. [Speech Therapist] began working with [Student] in April of 2015 to provide him with speech therapy. Prior to working with him, she reviewed his IEP and contacted his primary teacher, [Teacher #2].

59. [Speech Therapist] worked with [Student] through the summer of 2015, during the 2015-2016 school year and then during the 2016-2017 school year. [Speech Therapist] worked with [Student] on his pragmatic and social language and his executive function skills. She worked with him 30 minutes each week during the school year and more hours during the summer of 2015 to provide compensatory services.

60. Like [School Psychologist], [Speech Therapist] was available and willing to work with [Student] in January of 2015, but his parents wanted to wait until the primary teacher was in place so she did not begin working with [Student] until April of 2015.

61. In her work with [Student], [Speech Therapist] noted that he had difficulty with time management which was related to both his HGT and his autism. [Speech Therapist] also was aware that [Student] has sleep issues and ED, and was sometimes fatigued or complained of pain when they were working together.

62. [Student] participated very well in lessons with [Speech Therapist] during the summer of 2015.

63. An IEP meeting was held on May 29, 2015, and the team concluded that homebound services should be continued. As with the previous IEP, the District was to provide technology that would allow [Student] to participate in classroom instruction by video conferencing (Skype). However, that technology was never provided to [Student].



The ALECKs math program was also not provided to [Student].

Services provided during the 2015-2016 School Year

64. [Teacher #2] began working with [Student] in the fall of the 2015-2016 school year. Unfortunately, [Teacher #2] was involved in a serious boating accident and was unable to work with [Student] until February or March 2016. During the time period from October 2015 to February or March of 2016, [Student] did not have a primary teacher. The District attempted to find a substitute teacher for [Teacher #2] by having APS send out an email, but no one expressed interest in the position. [Student] was not provided educational services from October 2015 until [Teacher #2] returned in February or March of 2016.

65. When she returned to teaching [Student], [Teacher #2] found it was more difficult to engage [Student] in instruction and noticed that [Student] had more problem behaviors such as wanting to play video games and with clay figures. [Teacher #2] would leave work for [Student] to complete, but he would not complete it, and his parents said they couldn't get him to do the work.

66. In April of 2016, [Teacher #2] was able to find another teacher to provide an additional hour of education to [Student] for the remainder of the school year.

67. [Teacher #2] stopped working with [Student] in May of 2016 as her workload had increased and she could no longer provide homebound services to him. At that time, [Teacher #2] noted that [Student] could only maintain focus for 10 to 15 minutes, and could not have tolerated 20 hours of instruction per week.

OCR Complaint

68. In 2016, [Student]'s parents filed a complaint against the District with the United States Department of Education, Office for Civil Rights (OCR).

69. Before the OCR conducted its investigation, the District agreed that it owed 150 hours of compensatory services to [Student]. Based upon the District's acknowledgment regarding compensatory services, the parties entered into a resolution agreement which ended the OCR investigation.

70. As of the date of hearing, the District has not provided the compensatory services to [Student], but remains willing to do so. Without [Student] attending school and having a limited ability to focus for more than an hour or two per day, it has been difficult, if not impossible, for the District to provide the agreed upon compensatory services in a homebound placement.

July 2016 IEP Meeting and Services provided during the 2016-2017 School Year

71. In July 2016, [Student]'s IEP team convened to update his IEP. The July 2016 IEP proposed homebound services with a transition to attendance at [Middle School] ([Middle School]), another HGT magnet school. [Teacher #2], [School Psychologist] and [Speech Therapist] also expressed concerns at the IEP meeting that [Student] was not progressing, and they had a consensus that that homebound services were not appropriate for [Student], and that he needed a more clinical approach such as day treatment, and

then a return to homebound services. [Student]'s parents opposed this suggestion.

72. It is [Teacher #2]'s opinion that [Student] needs more intensive clinical services in order to learn academics if the goal is for him to grow up and get out of the house and have a life. She further testified that she District has "probably not" fully served [Student].

73. In August of 2016, the District provided [Homebound Teacher], who has a Master's degree in special education and a Master's degree in school psychology and is licensed in Colorado as a special education teacher and general education teacher in Colorado, as a homebound primary teacher for [Student].

74. In providing services to [Student], [Homebound Teacher] was working with the July 2016 IEP. He was providing homebound services, and also working on a transition plan to get [Student] to attend [Middle School].

75. [Homebound Teacher] has experience working with twice exceptional students such as [Student].

76. [Homebound Teacher] was able to get [Student] to attend two after school clubs at [Middle School], but [Student] only went a few times from the end of September to the middle of October. After that time period, [Student] refused to go.

77. When [Student] became a sixth grade student, the District provided him with a laptop computer and had access to the ALECKs math program and other programs he needed for instruction.

78. [Homebound Teacher]'s original plan was to go through the lessons with [Student], but after about a week and a half, he had a difficult time getting [Student] to comply regardless of [Homebound Teacher]'s attempts to differentiate instruction, give tokens for compliant behavior, praise and allowing [Student] to talk first during a lesson. It was a constant struggle for [Homebound Teacher] to get [Student] off of his iPad and engage in instruction.

79. In October 2016, [Student]'s IEP team met to discuss a transition schedule to get [Student] into public school, which included being provided the 150 hours of compensatory services. During the meeting, [Student]'s parents stated that they were having a very difficult time getting [Student] to come out of his bedroom and that because of his sensory issues, they could not get [Student] to wear pants. They further stated that they did not think [Student] would be able to attend school.

80. During the October 2016 meeting, the District and [Student]'s parents tried to develop options that would assist [Student] and his ability to engage. The District received a signed consent from [Student]'s parents to evaluate his (1) social and emotional status; (2) his health; and (3) his motor abilities. The evaluation would include an occupational therapy and physical therapy evaluation which would also review [Student]'s encopresis and toileting issues. By the February 2017 IEP meeting, these evaluations had not been done.

81. All of [Student]'s providers from the District felt that it was important for

[Student] to have interaction with his peers, and ideally should be in school as much as possible.

82. As with the other teachers, [Student] began refusing to come downstairs for instruction and when he did, he would not work at the table, but insisted on working on the couch and could not wear pants during instruction because of his sensory issues. Out of 67 instructional visits with [Homebound Teacher], [Student] was not ready 58 times.

83. [Homebound Teacher] was asked to provide 10 hours of per week of instruction to [Student], and his work schedule allowed him to do so. However, many, many times [Student] could not sustain the full instructional time. [Homebound Teacher] noticed a decline in [Student]'s willingness to engage in anything academic.

84. [School Psychologist] worked with [Student] during the 2016-2017 school year, [Student]'s fifth grade year. During that school year, compared to the previous years she had worked with him, [School Psychologist] noticed that [Student] was in a slump and acted like a different child than he had been before then. His engagement and his willingness to participate in instruction declined. For example, one time he wouldn't come downstairs for instruction; after waiting for 20 minutes, [School Psychologist] left [Student]'s home. She typically had to wait for him to come downstairs unless there had been a teacher working with him immediately before she got there, and when [Student] did come downstairs, she was only able to work with him for about half of their allotted time together because he wanted to talk about his interests. [Student] no longer would sit at the dining room table, but wanted to sit on the couch, and could not wear pants.

85. At the beginning of the 2016-2017 school year, [Speech Therapist] noticed, as [School Psychologist] did, a change in [Student]. He had been working with her at the dining room table, but by October or November, he would only work on the couch, and was unable to wear pants because of his sensory issues. [Student] would cover himself with a blanket during lessons.

86. [Speech Therapist] also noticed that some days [Student] was more participatory than others and that some days it took him longer to get ready for his session with her. She was not always able to wait for him to get ready and prepared for his lessons, and would she would have to leave without working with [Student]. She found that doing the lessons on the couch was not the most comfortable way to provide services.

87. When [Student] did come downstairs for his lessons, he would sometimes shut down if he was not interested in the topic, or would complain that he was hungry, had headaches or was fatigued.

88. It was the consensus of all of [Student]'s providers that he was not making meaningful adequate progress towards his IEP goals.

89. The reason for [Student]'s decline in engagement was not established.

#### Modified Rules for Homebound Services

90. The District's Alternative Placement Services Program (APS) has a list of rules that a homebound student is required to follow. Some of the rules are designed to

make sure the student is ready to learn when teachers arrive to provide instruction.

91. When [Student] began staying upstairs when instructors arrived, would not sit at the table, and could not wear pants, [Associate Director of Special Education] conferred with the District's legal team and modified the guidelines for [Student] to include the requirement of sitting at a table and wearing pants or shorts for instruction. The modified rules also stated that if a provider waited 15 minutes, and [Student] had not come downstairs, the teacher was to leave, and [Student] would be marked as a "No Show."

92. The modified rules were conveyed to [Student]'s parents in an email dated February 6, 2017. Because [Student] could not or wear pants and would not sit at the table, he has not received educational services since January 31, 2017. The modified rules were not meant as a punishment for [Student]; they were to ensure that he was ready and able to receive instruction when his providers arrived without distraction.

93. In response to [Student]'s modified guidelines for APS services, [Student]'s father wrote [Associate Director of Special Education] and informed him that [Student] was working with an Applied Behavioral Analysis therapist and an occupational therapist to address his sensory processing issues and his inability to wear pants.

94. When [Associate Director of Special Education] received the correspondence from [Student]'s father, the District requested a further evaluation to determine the scope of the problem. However, [Student]'s parents did not return the sensory profile they were asked to complete and did not return the consents for the proposed evaluations.

#### February 2017 IEP Meeting

95. The District prepared an evaluation report in November 2016 which included communicative status assessments, academic performance assessments, social and emotional assessments and health assessments. The evaluation showed that [Student] had a decline in his ability to access homebound services. There was no disagreement amongst [Student]'s providers regarding his ability to engage, and that he was actually regressing.

96. Because of the concerns, the District convened an IEP meeting on February 10, 2017 to discuss [Student]'s educational needs. Because the due process complaint in this case had been filed, the District's attorney attended the meeting. Appellant's father was present, but his mother was unable to attend because of [Student]'s need to have a parent with him.

97. At the meeting, [School Psychologist] shared her concerns regarding [Student], and proposed that [Student] be educated in a residential setting because he was not making progress in the homebound setting and his family could not get him out of the house to go to school because of his fears.

98. [School Psychologist] was also concerned because [Student] had regressed to a third grade level.

99. [Speech Therapist] had also considered that residential placement might be appropriate for [Student] and when it was proposed in the February 2017 IEP meeting, she

agreed with the proposal. She has worked in in-patient settings and thought such a setting would be the most appropriate setting for [Student] because of the intensive services he needs.

100. Prior to the February 2017 IEP meeting, nobody had discussed with [Speech Therapist] the possibility of [Student] going to a residential facility, and nobody told her what recommendation to make during the meeting.

101. At the February 2017 IEP meeting, [Speech Therapist] told the team that [Student] has stopped making measurable progress, and was, in fact, going backwards in willingness to participate with her and his other providers.

102. [Homebound Teacher] attended the February 2017 IEP meeting. Prior to the meeting, nobody had discussed the possibility of [Student] going into residential placement with him. Prior to the meeting, it was [Homebound Teacher]'s independent opinion that day treatment or residential treatment would be appropriate for [Student] because of the lack of progress he was making with homebound instruction.

103. During the meeting, the November assessment report, input from [Student]'s providers, [Student]'s medical information and information from [Student]'s father were considered. The team initially discussed day treatment as a possible placement for [Student], but determined that it would be too stressful and difficult for [Student] and his parents to get him to a day treatment program every day.

104. The IEP team, with the exception of [Student]'s parents, ultimately determined that residential services were appropriate for [Student]. In [Associate Director of Special Education]'s career as an educator, [Student] is only the second student he has recommended for residential placement.

105. The ALJ finds that the offer of residential treatment was an offer of FAPE in the least restrict environment (LRE) for [Student]. [Student] is unable to attend school and is not making progress towards his IEP goals with homebound instruction. [Student] needs a clinical setting in order to address his disabilities so he can receive educational services and a day treatment program is not feasible given [Student]'s inability to go to school each day.

106. When it is determined that residential services are appropriate for a student, the District's procedure is to send the referral to out of District placement to find an appropriate facility.

107. Once a residential facility is identified as a possible placement, the student's IEP is sent to the facility. If the facility determines it can meet the student's needs, the facility's staff members will discuss the child's needs with the family to see if facility is appropriate for the child.

108. As of the last day of hearing, the District had been unable to find an appropriate facility for [Student].

109. At hearing, [Associate Director of Special Education] testified that because the District has been unable to find a facility appropriate and willing to accept [Student], the

IEP team needs to reconvene to determine what services for [Student] are appropriate.

## Discussion

### *Burden of Proof*

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion “where it usually falls, upon the party seeking relief.” See also *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10<sup>th</sup> Cir. 2008) (“The burden of proof . . . rests with the party claiming a deficiency in the school district’s efforts.”) Petitioners therefore bear the burden of proving that the District violated its obligations under IDEA and failed to provide [Student] with a free appropriate public education.

### *FAPE*

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 FAPE is defined as “special education and related services . . . provided in conformity with an individualized education program.” 20 U.S.C. § 1401(9). 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 *Rowley*, the Court held that the statutory definition of FAPE requires states to provide each child with specially designed instruction, and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Id.* at 201. The Court also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child’s potential commensurate with the opportunity provided other children; the school district’s obligation extends only so far as to provide “a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit.” *Id.* at 200. In *Andrew F. v. Douglas County Sch. Dist. RE-1*, 69 IDELR 174 (U.S. 2017) the United States Supreme Court ruled that *de minimis* progress is not a sufficient goal in providing specialized education services to a child, and that the unique circumstances of the child must be considered.

To determine whether the District has complied with the requirement to provide FAPE, the United States Supreme Court established the following two-prong test:

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 benefit?

*Rowley*, 458 U.S. at 206-7.

The 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).

A parent or public agency may file a due process complaint relating to, among other things, the provision of FAPE. The due process complaint must allege a violation that occurred not more than two years before the date the parent knew or should have known about the alleged action that forms the basis of the complaint. 34 C.F.R. § 300.507 (a)(1) and (2). 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, in the least restrictive environment.

In their due process complaint, Complainants allege that the District has failed to provide [Student] with a FAPE during since his first grade year with the District. Because of the statute of limitations, the ALJ can consider only the time period from September 22, 2014 through the date of the hearing.

#### *Allegations of Procedural Violations*

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

[Student]'s parents allege that in developing [Student]'s IEPs, the District did not allow them to have meaningful participation, which resulted in a denial of FAPE. The ALJ finds that this allegation is not supported by the evidence produced at hearing. No IEP meeting was held without proper notice to [Student]'s parents. At least one of [Student]'s parents was present at every IEP meeting, and each IEP reflects that his parents' input

was considered. Sometimes, [Student]'s advocate was also present. In addition, the record demonstrated that the District considered the medical reports submitted by [Student]'s parents as well as the many detailed emails [Student]'s father sent to various members of the District regarding his questions and concerns. Unfortunately, [Student]'s parents and the remainder of his IEP team were not in agreement about the services and goals included in [Student]'s IEPs. The fact that [Student]'s parents disagreed with the District and the other members of the IEP team does not negate the fact that they had been afforded meaningful participation in the creation of his IEPs. See *Colo. Springs Sch. Dist. 11*, 111 LRP 21581 (SEA Colo. 2011).

[Student]'s parents further allege that the presence of the District's attorney at the last two IEP meetings was a procedural violation of the IDEA. That allegation is not founded. The District's attorney was in attendance at the meeting, but there is no evidence to suggest that she was a member of the IEP team. Moreover, there is no evidence to suggest that the attorney's presence resulted in any denial of the parents' participation in the meeting or otherwise deprived [Student] of a FAPE. There is nothing in the IDEA which prevents the District or the parents from having an attorney present during an IEP meeting. The credible evidence in this case demonstrates that the procedural violations, if any, did not impede [Student]'s right to a FAPE, nor did they significantly impede the parents' opportunity to participate in the decision-making process, nor did they cause a deprivation of [Student]'s educational benefit.

#### *Allegations of Substantive Violations*

Complainants allege many substantive violations of the IDEA which have resulted in a denial of a FAPE for [Student]. Specifically, Complainants allege: (1) the District failed to consider [Student]'s unique needs in compliance with *Andrew F. v. Douglas County Sch. Dist. RE-1*, 2017, 69 IDELR 174 (U.S. 2017) as it has not provided [Student] with gifted and talented services; (2) the District failed to provide [Student] a FAPE by failing to provide him with adequate assistive technology, occupational therapy, and cognitive behavior therapy and all of the instructional services identified in the IEP. The parties agreed that issues which developed through the date of the hearing could also be considered; thus, although it was not an issue when Complainant's filed their complaint, Complainants allegation that the District failed to make an offer of FAPE when it offered residential treatment during the February 2017 IEP meeting was also considered. Each of these allegations will be addressed more fully below:

#### *Failure to Provide HGT Services*

There is no doubt that [Student] is a highly gifted and talented student with a very high intelligence quotient, and that if had been able to physically attend either [Elementary School] or [Middle School], he would have been provided with HGT services. There is also no doubt that [Student] received very little in the way of HGT services while he was receiving a homebound education; his teacher consulted with the HGT teacher, and a few HGT worksheets or assignments were sent to the home for [Student] to complete.



Although being HGT is part of [Student]’s identity, the IDEA does not recognize twice-exceptional as a category. Instead, the provision of HGT services is based on state law. See §§ 22-20-201 through 206, C.R.S. In spite of this, [Teacher #2] adapted [Student]’s curriculum to reflect his high intelligence and the fact that he was learning at a level which was advanced from his peers. [Student]’s IEPs were developed to address his unique needs. He was provided a homebound education during specific hours to accommodate his sleep schedule. He was also provided with speech and language services and mental health services. Moreover, the reports from his medical providers were also considered in developing his IEPs. Ultimately, the claim that there has been a denial of FAPE based on the lack of HGT services fails as HGT services are not included in the IDEA.

### Assistive Technology

While a [Elementary School] student, [Student] was provided with an iPad. His IEP contemplated that he would have access to Skype so he could somewhat participate in the classroom in an effort to provide him with social instruction and help me make some social connections. education classroom. Unfortunately, the District was never able to provide the software which would have enabled to him to participate, albeit limited, with the classroom at [Elementary School]. The District was also unable to provide software for a math program. [Teacher #2] testified that she and [Student] were able to use the iPad to access robotics and to do research. They were also able to use [Student]’s mother’s computer for his science lesson. Neither [Teacher #2], nor any other District provider, indicated that lack of assistive technology was an impediment in providing [Student] with an education. When [Student] became a [Middle School] student, he received a Chromebook computer which had the math software and other special software [Student] needed. While it may have been advantageous for [Student] to have access to Skype and other instructional software, there is insufficient evidence to for the ALJ to conclude that [Student] was not denied a FAPE based on the lack of assistive technology.

### Occupational Therapy

Occupational therapy is considered a “related therapy” under the IDEA. 34 C.F.R. 34(a). Before a related therapy, which is considered a significant change in placement, can be considered by a child’s IEP team, the IDEA requires that there be an evaluation to determine if the service is necessary. 34 C.F.R. §§ 300.303-206, 1 C.C.R. 301-8, 2220-R4.03(8)(b)(ii). The District has offered to evaluate [Student] to determine whether he was in need of occupational therapy several times. Each time, for different reasons, [Student]’s parents refused the evaluations or wanted to defer them. For the first time, during the discovery process in preparation for this due process hearing, the District learned that [Student] had an occupational therapy evaluation at [Hospital]. Because the IEP team did not have the benefit of the occupational therapy evaluation and could not add that related service to his IEP during any of the IEP meetings. For the foregoing reasons, the ALJ doesn’t find a violation of the IDEA based on the failure to offer occupational therapy.

### Cognitive Therapy

Cognitive therapy has never been included in any of [Student]’s IEPs prior to the February 10, 2017 meeting. Complainants argue that it is a violation of the IDEA and a failure to provide [Student] with a FAPE to have not provided [Student] with cognitive behavioral therapy. After the September 23, 2014 IEP meeting, [Student]’s parents had a meeting with their advocate, [Advocate], [Associate Chief of Equity and Opportunity], the District’s Associate Chief of Equity and Opportunity; [Program Manager], the District’s Program Manager for Instruction and Professional Development; and [Special Education Lead] in October of 2014. The meeting was not an IEP meeting. However, at that time, the District offered to refer [Student] to a clinical psychologist, [Therapist] to provide cognitive behavioral therapy to [Student]. After meeting with [Therapist] three or four times, [Student]’s parents concluded that [Therapist] was not qualified to work with [Student]. [Therapist], himself, agreed that he had no experience working with twice exceptional students, and no services were provided. Additionally, cognitive therapy is a clinical service, not and not an educational service.

The District’s IEPs have always included psychological services by a school psychologist to assist [Student] in accessing his education. That school psychologist has incorporated some cognitive therapy into her work with [Student]. [Student]’s parents stated that they were happy with the services provided by the school psychologists who worked with [Student]. [Student]’s parents also acknowledged that they previously obtained cognitive behavioral therapy from [Hospital], and that [Student] was still receiving services at [Hospital]. The ALJ finds that the District’s failure to provide cognitive therapy did not constitute a denial of a FAPE.

### Delivery of Services

#### Compensatory Education

Awarded pursuant to 20 U.S.C. § 1415(i)(2)(C)(iii), compensatory education is an “equitable remedy that provides in-kind special education and other related services for denials of a free and appropriate public education . . . or a replacement education services that the students should have received in the first place.” Perry A. Zirkel, *Compensatory Education: An Annotated Update of the Law*, 291 Educ. L. Resp. 1 (2013) (internal quotation marks omitted); *Collingswood Borough Bd. Of Educ.*, 694 F.3d 488, 497 (3<sup>rd</sup> Cir. 2012) (“[C]ompensatory education is an equitable remedy that compensates a special needs students for rights the district already denied him”) (internal quotation marks omitted); *R.P. v. Prescott Unified Sch. Dist.*, 63 F.3d 1117, 1125 (9<sup>th</sup> Cir. 2011) (“Compensatory education is an equitable remedy that seeks to make up for educational services that the child should have received in the first place, and aims to place the disabled position in the same position they would have occupied for the school district’s violations of IDEA”) (internal quotation marks omitted).

Compensatory education can take a number of forms. For example, a court may

order a district to pay for the student to receive services from a private school or provider. See e.g., *Draper v. Atlanta Indep. Sch. Sys.*, 49 IDELR 211 (11<sup>th</sup> Cir. 2008), *cert denied*, 110 LRP 57226, 131 S. Ct. 342 (2010). Compensatory education may include awards of services themselves. *Reid v. District of Columbia*, 43 IDELR 32 (D.C. Cir. 2005). While awards of compensatory education typically take the form of prospective services, they may also take the form of reimbursement for private services that the student has already received. See, e.g. *I.T. v. Department of Educ., State of Hawaii*, 62 IDELR 178, (D. Hawaii 2013). [Student] is entitled to compensatory services for a number of time periods as is discussed more fully below.

September 2014 through March 2015

[Student]’s September 23, 2014 IEP proposed that [Student] attend his neighborhood school two hours per day with the support of mental health services through the school psychologist and speech language services. This proposal seemed reasonable given the supports offered to [Student] and [Psychiatrist]’s September 19, 2014 report. Unfortunately, however, [Student] was not able to attend school. Obviously, [Student]’s parents were very concerned when his IEP provided for services to be provided at school and [Student] was not able to do receive them. Thus, the October meeting between [Student]’s parents and their advocate had the October meeting with [Associate Chief of Equity and Opportunity] and other school personnel to discuss [Student]’s needs. After the October meeting, IEP team reconvened to amend [Student]’s IEP. At that meeting, [Student]’s IEP was amended. Under the amended IEP, [Student] would return to homebound services, receiving 2 hours each day of educational instruction, 120 minutes of speech therapy for month and 120 minutes of mental health services by a school psychologist each month. The District began searching for personnel to fulfill these positions.

As noted in the findings of fact of this Decision, the District began searching for a appropriate personnel to provide services to [Student]. From November 12, 2014 through November 21, 2014, [Student]’s parents stated that they wanted only wanted [Out-of-district Teacher], a non-District employee to provide [Student]’s educational services. While the District agreed to comply with this request, [Out-of-district Teacher] did not accept the position. The District offered other at least two other teachers to work with [Student], but neither were acceptable to the family, or available to work within the hours [Student] was available for instruction. Ultimately on January 16, 2015, [Student]’s father explained that he was too overwhelmed to return the telephone calls from APS and that he would only allow teachers who specialized in twice exceptional students. The ALJ concludes that the restrictions placed by the [Student]’s family prevented [Student] from having an educational teacher in place from November 12, 2014 through at least January 16, 2015. The District continued to make reasonable efforts to find a teacher for [Student] until one was located.

Qualified school personnel had been identified to provide [Student] with mental health services and speech language services as early as January of 2015. Both of those

individuals, [School Psychologist] and [Speech Therapist], who were accepted by the family, were able to provide services in January of 2015, but the family did not want to accept their services until [Student]’s primary education teacher was in place.

The IDEA requires that IEP services be provided by qualified personnel. Pursuant to 34 C.F.R. § 300.156, a state must ensure that its local education agencies recruit, hire, train and retain highly qualified personnel to provide special education service, and that each person employed as a special education teacher is highly qualified to as a special education teacher. There was no evidence that the special education teachers offered by the District were not qualified to provide services to [Student]. There is no violation of the IDEA if the school district provides qualified teachers and those teachers are not found suitable by a student’s parents. *Tewksbury (MA) Public Schools*, 115 LRP 14778 (OCR 2014). The ALJ finds that the District offered qualified personnel to work with [Student] at [Elementary School] from September 2014 through November of 2014 at [Elementary School]. [Student] was not able to attend [Elementary School] because of his disabilities. From November 2014 through March 2015, but the qualified providers were rejected by [Student]’s family. It is not reasonable for [Student]’s parents to insist upon interviewing each individual, and then vetoing those that they feel do not have an appropriate connection with [Student]. [T]he IDEA . . . does not require special education providers to have every conceivable credential relevant to every child’s disability.” *T.W. ex rel. McCullough v. Unified Sch. Dist.* No. 259, No. 04-3093, 135 Appx. 122, 128-129 (10<sup>th</sup> Cir. 2005).

The District did violate the IDEA by not providing a FAPE from the time period between September 2014 and November of 2014, but not from November to March 2015. From September 2014 to November 2014, although the District offered [Student] education at [Elementary School] with appropriate supports, [Student] was not able to attend. From November to at least March 2015, the [Student]’s parents rejected services from qualified providers and the District continued to seek a general education teacher by posting the position and by even consulting the family’s advocate in search of a teacher, but none was found until [Teacher #2] agreed to provide partial services in March of 2015. The District offered FAPE from November 2014 through March of 2015, and, therefore, no compensatory services are due during that time period.

#### March 2015 through May 2015

According to his IEP, [Student] was to receive 2 hours of educational instruction per day. However, because [Teacher #2] was only able to provide [Student] one hour of education per day, [Student] did not receive the educational services to which he was entitled between March 2015 and May 2015. [Student] was denied a FAPE for that time period, and is entitled to one hour of compensatory services for the school days from the middle of March 2015 until the end of the school year in 2015. The District is entitled to a credit for any compensatory services it provided to [Student] during the summer months of 2015.

October 2015 through March of 2016

As stated in the findings of fact, [Teacher #2] was involved in a serious boating accident in October of 2015, and was not able to provide education services to [Student] until March of 2016. Although the District attempted to find a substitute teacher for [Student] during the time period [Teacher #2] was recovering, it was not able to do so. Nevertheless, [Student] went without educational services during the time period from October 2015 through March of 2016. The District denied [Student] a FAPE during that time period, and [Student] is entitled to receive compensatory services for services he should have been receiving under his IEP during that time period, but did not.

April and May of 2016

[Teacher #2] was teaching [Student] one hour per day during this time period. The testimony at hearing was that another teacher was providing an additional hour per day of instruction. During this period, [Student] was receiving two hours of instruction per day, he was not denied a FAPE, and is not entitled to any compensatory services.

January 31, 2017 through February 10, 2017

[Student] received no services from January 31, 2017 through February 10, 2017 based on the requirements, amongst others, that he wear pants or shorts, while working with his District providers. The ALJ finds that [Student]'s disabilities prevented him from wearing pants or shorts, and he was denied a FAPE during that time period, and is, thus entitled to compensatory services.

February 10, 2017 and forward

At the February 10, 2017 IEP meeting, the IEP team members, with the exception of [Student]'s father, concluded that a private residential placement was the least restrictive environment in which [Student] could receive an education. The ALJ agrees. The IDEA requires that, to the maximum extent appropriate, children with disabilities be educated in the "least restrictive environment." 20 U.S.C. § 1412(a)(5). This means that disabled students must be educated "[t]o the maximum extent appropriate ... with children who are not disabled" in a "regular educational environment." 20 U.S.C. § 1412(a)(5)(A); *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schools*, 565 F.3d 1232, 1236 (10th Cir. 2009). Disabled students may be removed from the regular classroom setting only "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id.*; 34 CFR § 300.114(a)(2)(ii). If meaningful education in the regular classroom cannot be achieved with the use of supplemental aids and services, the school district must mainstream the child to the maximum extent appropriate. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10<sup>th</sup> Cir. 2004) (adopting the "Daniel R.R. test," *Daniel R.R. v. Bd. Of Educ.*, 874 F.2d 1036, 1048 (5<sup>th</sup> Cir. 1989)). [Student] cannot attend public school, and has been regressing in his abilities while receiving homebound services. A day treatment facility is not feasible for [Student] or his parents because of the stress and risk of injury

that would occur in trying to get [Student] to a day facility each day, and it has become a practicable impossibility for the District to provide in-home services to [Student].

It is the District's responsibility to provide a meaningful education for [Student], and it has considered and tried many options to fulfill its obligation to [Student]. A school district must ensure that a "continuum of alternative placements" is available to meet the needs of children with disabilities, including education in an institution or other setting as necessary. 34 CFR § 300.115. In an appropriate case, an alternative placement might include placement in a private residential facility. *Jefferson County Sch. Dist. v. Elizabeth E.*, 702 F.3d 1227 (10<sup>th</sup> Cir. 2012). Residential placement is the most appropriate placement for [Student] to receive the services he needs. As of the date of the hearing, the District had not found an appropriate facility for [Student]. When it does, it must also provide compensatory services for the educational services he has missed during the specific time periods listed in this decision since September of 2014.

### **Decision**

The February 10, 2017 IEP is reasonably calculated to provide [Student] with FAPE in the LRE. Absent residential placement, [Student] is unable to receive FAPE and/or receive the compensatory educational services he is entitled to receive based on the periods he was denied FAPE by the District (September 2014 – November 2014, March – May 2015, October 2015 – March 2016, and January 31, 2017 – February 10, 2010).

Complainants have established that the District denied [Student] FAPE between September 2014 – November 2014, March – May 2015, October 2015 – March 2016, and January 31, 2017 – February 10, 2017. During these periods, [Student] is entitled to receive compensatory services. Complainants have failed to establish that the District's February 10, 2017 IEP is a denial of FAPE. In order to receive FAPE and to receive adequate compensatory educational services for the denials of FAPE found herein, [Student] needs to be in a residential setting. While it is not the norm to provide compensatory services through a residential setting, because of [Student]'s inability to receive education in any other setting, the ALJ believes this is the only remedy for the denial of FAPE and ongoing provision of FAPE.

Any party aggrieved by this Decision has the right to bring a civil action consistent with the requirements set forth in 34 CFR § 300.516.

### **Done and Signed**

July 17, 2017

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HOLLYCE FARRELL  
Administrative Law Judge