

STATE OF ARIZONA  
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

█████, Student, by and through Parent █████, No. 14C-DP-066-ADE  
Petitioners,  
v.  
KYRENE Elementary School,  
Respondent.

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**HEARING:** Sessions conducted on November 4, 5, 6, 9, 10, and 13, 2015, on December 4 and 21, 2015, and on January 11, 2016, followed by extended post-hearing legal memoranda submission and extended review.

**APPEARANCES:** Student █████ ("Student") and Parent █████ ("Parent") were represented at hearing by Richard J. Murphy, Esq.<sup>1</sup>

Erin H. Walz, Esq., Heather R. Pierson, Esq., and R. Scott Currey, Esq., represented Kyrene Elementary School KESD ("KESD" or "KESD"); counsel was accompanied by Shari Dukes, Ph.D., KESD Director of Student Learning and Support Services.

**WITNESSES:**<sup>2</sup>

- Parent ("**Parent**");
- David Jefferson, Advocate ("Advocate");
- Laura Passmore, Advocate from AZ Educational Partners ("Ms. Passmore");
- Courtney Joseph, 2013-2014 Teacher ("**Ms. J.**, 13-14Teacher");
- Lisa Roberts, 2012-2013 Behavior Intervention Teacher ("**BITeacher**");
- Jacob Boney, Ph.D., BCBA-D ("Dr. Boney");
- Deborah Pettitt, M.C., L.P.C. ("Ms. Pettitt");
- James P. Schieffer, 2012-2013 ESY Teacher ("**ESY Teacher**");
- Paul Beljan, Psy.D., Pediatric Neuropsychologist ("Dr. Beljan");
- Anne Prengel, Certified Occupational Therapist Assistant ("Ms. Prengel");
- Barbara Diane Forbes, Speech and Language Pathologist [Student's 1st Grade, 2012] ("Ms. Forbes");
- Lisa Wolford, Jan. 2012-June 2013 Special Education Teacher [Student's 1st Grade, 2012] ("**Ms. W.**, 12-13Teacher");
- Marti Baio, Director, Baio Enterprises, Speech and Language Pathologist ("Ms. Baio");
- Lynn Carahaly, Pediatric Speech Language Pathologist ("Ms. Carahaly");

<sup>1</sup> On September 10, 2015, Mr. Murphy appeared in place of previous legal counsel.

<sup>2</sup> Throughout the body of this Decision, proper names of Student, Parents, and Student's teachers are not used in order to protect the confidentiality of Student and to promote ease of redaction. Where necessary, pseudonyms (designated here in bold typeface) will be used instead. Pseudonyms are not used for administrators, service providers, evaluators, and other professionals.

- Sonia Gonzalez, Director of AZ Aspire Academy Director ("Ms. Gonzalez");
- Aimee Piller, Owner, Piller Child Development, Occupational Therapist ("Ms. Piller"); and,
- Shari Dukes, Ph.D., KESD Director of Student Learning and Support Services ("Dr. Dukes").

**HEARING RECORD:** Certified Court Reporters Kate E. Roundy and Sheryl L. Henke, recorded the proceedings as the official record of the hearing.<sup>3</sup>

**ADMINISTRATIVE LAW JUDGE:** Kay A. Abramsohn

Parent brings this due process action on behalf of Student, claiming that KESD violated the Individuals with Disabilities Education Act ("IDEA"), alleging procedural and substantive errors. The law governing these proceedings is the IDEA found at 20 United States Code ("U.S.C.") §§ 1400-1482 (as re-authorized and amended in 2004),<sup>4</sup> and its implementing regulations, 34 Code of Federal Regulations ("C.F.R.") Part 300, as well as the Arizona Special Education statutes, Arizona Revised Statutes ("A.R.S.") §§ 15-761 through 15-774, and implementing rules, Arizona Administrative Code ("A.A.C.") R7-2-401 through R7-2-406.

### **Procedural History**

The due process complaint notice ("Complaint") in this matter was filed on June 25, 2014. The matter suffered a protracted pre-hearing process including the first continuance, motions for and a change of judge, an extended amended complaint process, conflict resetting of tentatively scheduled hearing dates, and additional resets or continuances. Procedurally, there had been a stipulated agreement of the parties at a March 2015 pre-hearing conference and the due process hearing in this matter was scheduled to be completed in five days in May 2015. However, in September of 2015, following the emergency continuance of the May 2015 dates, Petitioners substituted new legal counsel

<sup>3</sup> The parties stipulated that the court reporter's transcript would be the official record of the proceedings. However, by statute, the Tribunal is required to make an audio recording. The parties received portions of the transcript as the hearing progressed for their use in case presentation and argument preparation. However, the Tribunal received the entire transcript after the final hearing session. The Tribunal does not begin its review process with the use of a transcript until the hearing sessions are complete and the post-hearing submissions are complete for the reason that parties often stipulate, concede, and/or withdraw issues that, therefore, would not be considered or addressed in a final decision.

<sup>4</sup> By Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of 2004," IDEA 2004 became effective on July 1, 2005.

1 and, shortly before the then rescheduled October five hearing dates, Petitioners  
2 requested a further continuance. A nine-day due process hearing commenced in  
3 November 2015 and ended in January 2016.<sup>5</sup> The hearing sessions were followed by post-  
4 hearing legal argument as discussed at the close of the hearing sessions.<sup>6</sup> Petitioners did  
5 not agree to simultaneous closing briefs for a close of the hearing record, and subsequently  
6 later filed a request to extend the post-hearing submission process. The due process  
7 timeline is recalculated by the Administrative Law Judge after a multiple-day due process  
8 hearing, taking into account any further proceedings such as post-hearing legal  
9 memoranda in closing argument. Based on Petitioners' request for a written record, the  
10 request for non-concurrent extended post-hearing written legal memorandum  
11 submission, and the parties' subsequently submitted written arguments to the tribunal,  
12 there is no calculated 45<sup>th</sup> day.

### 13 **Evidence and Issues at Hearing**

14 The parties presented testimony and Exhibits at formal evidentiary hearing  
15 sessions held on nine days: November 4, 5, 6, 9, 10, and 13, 2015, on December 4 and  
16 21, 2015, and on January 11, 2016.

### 17 **EXHIBITS**

18 The parties provided pre-marked proposed Exhibits, which they had not compared  
19 for any duplicative Exhibits. The parties would not stipulate to any proposed Exhibits and  
20 they did not specifically request admission of any Exhibit until the final day of the hearing,  
21 each acknowledging at that time that only the Exhibits that were presented through a  
22 witness should be admitted and considered. The parties indicated as follows:

- 23 1. Petitioners had pre-marked Exhibits 1 through 84.<sup>7</sup> Petitioners requested the  
24 admission of all their documents but agreed to the admission of any of their  
25 Exhibits regarding which a witness testified.

26  
27 <sup>5</sup> Due to the substitution of counsel, the Tribunal granted a great deal of leeway to Petitioners with regard  
28 to the presentation of evidence and the case presentation time subsequently went well beyond the  
29 previously-stipulated five days; this leeway also resulted in a record with presentation of a large body of  
30 evidence, some of which was subsequently seen as being beyond the issues set for hearing.

<sup>6</sup> Each recalendaring within the hearing process, each additional day of hearing sessions, and each  
extension of the matter caused the hearing record review time to be adjusted, increased and recalendared  
due to the Tribunal's existing calendar.

<sup>7</sup> Each of Petitioners' Exhibits are separately paginated.

- 1 2. KESD specifically objected to Petitioners' Exhibits that KESD believed were not  
2 used by Petitioners, as follows: 21, pages 17 and 18 of 23, 24, 32, 35, 41, 42,  
3 44, 45, 47, 51, 56, 58, 61, and 63, and to any other Exhibit to which it had  
4 objected during the course of the hearing.<sup>8</sup>
- 5 3. Petitioners, after considering KESD's stated objection, subsequently withdrew  
6 Exhibits 21, pages 17 and 18 of 23,<sup>9</sup> 24, 32, 41, 42, 44, 45, 47, 58, 61, and 63.
- 7 4. Therefore, Petitioners' Exhibits 1 - 20, 22, 23 (pages 1 - 16), 25 - 31, 33 - 40,<sup>10</sup>  
8 43, 46, 48 - 57, 59, 60, 62, and 64 - 84 were admitted to the hearing record.
- 9 5. KESD had pre-marked Exhibits A - Z, AA - ZZ, AAA - ZZZ and AAAA - QQQQ.<sup>11</sup>  
10 KESD requested admission of all of their Exhibits regarding which testimony  
11 was offered, agreeing that some pre-marked Exhibits were not used during the  
12 hearing.
- 13 6. KESD did not offer or provide a list of the KESD Exhibits that were either used  
14 or not used during the course of the hearing.<sup>12</sup>
- 15 7. Therefore, the KESD Exhibits A - Z, AA - ZZ, AAA - ZZZ and AAAA - QQQQ  
16 are admitted only to the extent that a witness presented testimony regarding  
17 the Exhibit(s) as is reflected in the official hearing record.<sup>13</sup>
- 18

19 <sup>8</sup> KESD gave no indication of the "any other" Exhibit to which it had objected during the hearing.

20 <sup>9</sup> These two pages were calendar pages on which Petitioners had summarily noted some data from the  
21 specific documents contained in Exhibit 23.

22 <sup>10</sup> Exhibit 35, as utilized, and admitted, does not contain pages 29 and 30; original pages 25 through 30  
23 were removed and replaced with four new pages, which, had they simply been numbered consecutively  
24 within Exhibit 35, would have consecutively been numbered 25, 26, 27 and 28. The four new pages are  
25 pages 1 through 4 of a neurosequential model of therapeutics ("NMT") assessment conducted by Ms. Pettitt  
26 in April of 2013.

27 <sup>11</sup> Exhibit A begins with bates-number KESD00426 and the pages thereafter follow in numeration; however,  
28 not all of KESD's Exhibits are consecutively numbered from the initial bates-numbering. KESD noted that  
29 some of the resumes in Exhibit NNNN were not used.

30 <sup>12</sup> The Administrative Law Judge attempted to verify all of KESD's documents to which a witness for either  
party testified during an extensive review process by searching the official record (*i.e.*, the transcripts) for  
the word "Exhibit", finding that, in many instances throughout the hearing sessions, counsels did not specify  
the Exhibit to which they referred a witness by using the word "Exhibit" but many times only referred the  
witness to another Exhibit by saying the letter designation, such as "J" or the "next Exhibit."

<sup>13</sup> The Administrative Law Judge believes that the following are KESD's Exhibits to which a witness testified:  
A through C, F, G, I, J, M, O through Q, S through Y, CC through EE, GG, HH, JJ, LL, QQ, SS through VV,  
XX through ZZ, AAA, CCC, EEE, HHH, III, KKK, LLL, OOO, PPP, RRR, SSS, VVV through ZZZ, AAAA  
through QQQQ. Additionally, due to illegibility of some pages within Petitioners' Exhibit 2, the  
Administrative Law Judge reviewed and considered KESD Exhibit D, a somewhat duplicative Exhibit which  
turned out to be a portion of the documents comprising Petitioners' Exhibit 2.



1 8. Petitioners noted a concern with Exhibit U and one page thereof; as a result,  
2 page KESD00618 was removed from Exhibit U.

### 3 ISSUES

4 The initial Complaint, consisting of 21 pages, and the Amended Complaint,  
5 consisting of 40 pages, contained extensive allegations, some over the entire period,  
6 some with unspecified dates or periods, and most replete with information indeterminate  
7 as to relevancy. Using the Complaint and Amended Complaint as a base, the  
8 Administrative Law Judge culled from the documents the concerns most closely  
9 resembling possible IDEA complaints, set forth those issues to the parties and requested  
10 clarification from the parties. Based on that review, in ORDER dated March 19, 2015, the  
11 Administrative Law Judge determined the issues for due process unless those issues  
12 were further clarified, withdrawn, resolved by the parties, or dismissed prior to hearing.

13 Preliminarily, neither the initial Complaint nor the Amended Complaint contained  
14 any assertion that an exception to the two-year limitation period found at 34 CFR §  
15 300.511(e) and (f) would apply. Thus, Petitioners' case was limited to the alleged actions  
16 and inactions of KESD during the two-year period prior to the June 25, 2014 filing of the  
17 Complaint, *i.e.*, from June 25, 2012 to June 25, 2014. As is typically the case, an  
18 individualized education program ("IEP") was already in existence at the beginning of the  
19 two-year claim period; in this case, the existing documents were Student's IEP and BSP  
20 dated February 14, 2012 along with an IEP Amendment dated April 11, 2012. Therefore,  
21 while the development and drafting of such existing IEPs or Amendments that were  
22 created prior to a determined two-year period is not at issue, substance and  
23 implementation issues, springing from those existing IEPs, that took place during the  
24 determined two-year period, may be raised in due process if the issue was raised in the  
25 Complaint. See 34 C.F.R. § 300.511(d).

26 Neither the initial Complaint nor the Amended Complaint contains an allegation  
27 regarding any of the specified academic goals in the IEPs. Beyond claiming that the  
28 increased frequency of Student's behaviors and the increased number of KESD's  
29 restraints called for modifications to the BSP or BIP, and that the lack of changes in  
30 Student's IEP at the October 2, 2013 meeting resulted in a failure to provide FAPE,

1 Petitioners made no allegation in the initial Complaint or the Amended Complaint that the  
2 behavior goals in the IEPs were inappropriate.

3 At a pre-hearing conference, Petitioners withdrew one claim and also agreed that  
4 Section 504 issues were not within the jurisdiction of the Tribunal.<sup>14</sup> Additionally, at  
5 hearing, Petitioners confirmed withdrawal of a second claim.

6 1. Petitioners allege that KESD violated IDEA, since February of 2011 or during  
7 the claim period, by not evaluating or reevaluating Student in all areas of  
8 suspected disability<sup>15</sup> and not conducting the following:

- 9 a. an academic assessment to determine if Student had a specific learning  
10 disability;
- 11 b. a cognitive assessment to determine if Student had an intellectual  
12 disability;
- 13 c. an assistive technology ("AT") assessment to determine if technology  
14 could be used to increase, maintain or improve Student's functional  
15 capabilities;
- 16 d. an occupational therapy ("OT") assessment to determine if Student's  
17 needs had changed and any needed accommodations, modifications, or  
18 additional OT related services;
- 19 e. a physical therapy ("PT") assessment to determine if Student needed  
20 accommodations, modifications, or PT to address gross motor skills;
- 21 f. a functional behavioral assessment ("FBA") to determine whether  
22 Student's behaviors were the result of manifestations of his health  
23 impairment and required modifications to behavior interventions;
- 24 g. a speech and language assessment to determine if Student's  
25 communication needs had changed and any needed accommodations,  
26 modifications, or speech language related services; and,
- 27 h. opthalologic and an audiologic assessments.

28 <sup>14</sup> The Administrative Law Judge's restatement of the issues were listed in the same order as Petitioners  
29 had listed them in the Complaint and Amended Complaint. Prior to the hearing, several issues were clarified  
30 by the parties and the Tribunal also noted an adjustment to one stated issue. The clarifications and  
adjustment are incorporated within the listing of the issues herein.

<sup>15</sup> See 34 C.F.R. § 300.304(c)(4).

- 1       2. Petitioners allege that KESD failed to provide FAPE to Student by not funding  
2       an FBA independent education evaluation ("IEE"), which Parent requested on  
3       December 20, 2013.
- 4       3. Petitioners allege that KESD failed to provide FAPE to Student by not fully  
5       developing and providing relevant direct special education goals, services, and  
6       related services, to address Student's academic achievement, speech and  
7       language/communication needs, OT needs, PT needs, AT needs, social  
8       emotional support needs, behavioral support needs, counseling needs, and  
9       social skills needs.
- 10      4. Petitioners allege that KESD failed to provide FAPE to Student by failing to  
11      implement Student's IEPs as follows:
- 12          a. Regarding the February 2012 IEP, Petitioners allege that KESD failed  
13          to provide training after August 17, 2012, to Student's transportation  
14          providers and failed to provide a behavioral support plan ("BSP") for  
15          transportation.
- 16          b. Regarding the January 2013 IEP, Petitioners allege that KESD
- 17              i. failed to implement the BSP when it used physical restraints and  
18              seclusion;
- 19              ii. transported Student with untrained staff;
- 20              iii. failed to provide the listed speech and language services and OT  
21              services from September 9, 2011 to the present;
- 22              iv. failed to implement the listed small group language instruction;
- 23              v. *WITHDRAWN*.<sup>16</sup>
- 24              vi. failed to provide the listed accommodations;
- 25              vii. failed to provide "appropriate" transportation services;<sup>17</sup>
- 26              viii. failed to provide the listed instructional supports;
- 27              ix. failed to provide the listed social supports; and,
- 28              x. failed to implement or allow Student his self-advocacy skills.

29  
30      <sup>16</sup> This allegation was repetitive of Issue #5; Issue #5 was withdrawn.

<sup>17</sup> This allegation is repetitive of, or related to, Issue #4(b)(ii) herein.

1 **5. WITHDRAWN.**<sup>18</sup>

2 **6.** Petitioners allege that KESD procedurally violated IDEA by making  
3 "inappropriate decisions and changes" outside of the IEP team process and  
4 absent meaningful parental participation when KESD took the following  
5 actions:

- 6 a. Determined possible placement options and, on or about October 3,  
7 2013, e-mailed Parent various options;  
8 b. Offered to place Student in a private day placement for nine weeks in  
9 October of 2013 but unilaterally created a transition plan requiring  
10 Student to return to KESD's educational setting [REDACTED] Elementary]  
11 without first considering his present levels, progress or needs at the time  
12 of return;  
13 c. Failing to discuss and determine appropriate transportation needs for  
14 fall semester of 2013;<sup>19</sup>  
15 d. Failing to train transportation staff in fall semester of 2013;<sup>20</sup>  
16 e. Failing to develop a transportation BSP in fall semester of 2013;  
17 f. Failing to amend the IEP to reflect the "change" in Student's educational  
18 placement and least restrictive environment to a private day placement  
19 in fall semester of 2013; and,  
20 g. Unilaterally creating an "inappropriate" BSP for transportation to the  
21 private day placement in fall semester of 2013.<sup>21</sup>  
22 h. Unilaterally creating an inappropriate BSP for the fall semester of  
23 2013.<sup>22</sup>

24 **7.** Petitioners allege that KESD violated IDEA by attempting to contract with  
25 Parent outside the IEP process, or coerce Parent to sign a contract for funding,  
26 regarding the "private placement" and refusing to fund the private placement,

27 <sup>18</sup> At the due process hearing, Petitioners' withdrew Issue #5.

28 <sup>19</sup> This issue is repetitive of Issue #4(b)(vii).

29 <sup>20</sup> This issue is repetitive of Issue #4(b)(ii).

30 <sup>21</sup> This issue is repetitive of, or related to, Issue #4(b)(vii).

<sup>22</sup> In an April 15, 2015 ORDER, the Administrative Law Judge added this issue in the event that, as presented in the Amended Complaint, it was a separate allegation from the allegation stated in Issue #4(B)(vii).

and *subsequently* violated the IDEA by refusing to hold IEP or multidisciplinary evaluation team ("MET") meetings or provide any IEP services to Student.<sup>23</sup>

8. Petitioners allege that, during the claim period *but not as a part of any IEP*, KESD failed to provide FAPE to Student by failing to provide the IEP team and KESD' staff with "sufficient support services" from Deborah Pettitt.

9. WITHDRAWN.<sup>24</sup>

10. Petitioners allege that KESD denied FAPE to Student by unilaterally withdrawing Student from the KESD on October 14, 2013 and, thereafter, refusing to provide any IDEA special education services unless and until Student re-enrolled in KESD.

11. Petitioners allege that KESD denied FAPE to Student by failing to provide, pursuant to Parent's request, "a full set of all of [Student's] educational records, email communications, and the bus video. . . ." <sup>25</sup>

12. JURISDICTION. *Petitioners allege that KESD violated Section 504 of the Rehabilitation Act of 1973 [Public Law No. 93-112, 87 Stat. 394 (September 26, 1973), codified at 29 U.S.C. § 701 et seq.] by discriminating, retaliating, or harassing Petitioners or otherwise failing to meet the procedural mandates of Section 504, including the inappropriate use of force, restraint, and seclusion upon [Student] and the intentional infliction of emotional distress and resulting Post Traumatic Stress Disorder caused by KESD.*<sup>26</sup>

Respondent argued that the following portions of issues were not addressed by Petitioners through presentation of evidence or through legal argument and, thus, were abandoned:

<sup>23</sup> Parent gave ten-day notice of private placement on September 19, 2013; the alleged actions set forth in this issue took place thereafter.

<sup>24</sup> At the October 19, 2015 pre-hearing conference, Petitioners' withdrew Issue #9.

<sup>25</sup> See 34 C.F.R. § 300.611(b).

<sup>26</sup> Petitioners' Amended Complaint specifies that Petitioners reserve this claim for adjudication in a court of general and trial jurisdiction. The IDEA provides no jurisdiction for "Section 504" allegations; therefore, "Section 504" allegations will not be adjudicated through the IDEA due process hearing process.

1. Issue #1, for the relevant time period, regarding alleged failure to conduct academic, cognitive, assistive technology, physical therapy, ophthalmologic, and audiologic assessments.<sup>27</sup>
2. Issue #3, for an unspecified time period, regarding fully developing and providing relevant direct special education goals and services and related services.
3. Issue #4(a), for the February 2012 IEP as implemented after August 17, 2012, regarding training to transportation providers and a BSP for transportation.
4. Issue #4(b), for the January 2013 IEP, regarding untrained transportation staff, and regarding *implementation* of speech and occupational therapy services, small group language instruction, listed accommodations, instructional supports, social supports, and allowing self-advocacy skills.

### **DISCUSSION**

The Administrative Law Judge has considered the entire hearing record including the testimony and the admitted Exhibits,<sup>28</sup> and now makes the following Findings of Fact, Conclusions of Law, and Decision finding that Petitioners have failed to demonstrate that KESD violated the IDEA through the relevant allegations set forth in the Amended Complaint.

### **FINDINGS OF FACT**

1. The claims in the instant matter are based on alleged actions and alleged inactions that occurred after June 25, 2012, and through the filing of the Complaint on June 25, 2014. At the due process hearing, Petitioners summarized their claims at issue in this matter to be: that the decisions made by the KESD on October 2, 2013, and the KESD's actions and inactions thereafter, constituted a denial of FAPE and that the "crux"

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<sup>27</sup> KESD indicated that none of Petitioners' witnesses provided testimony regarding a recommendation, or a need, for such assessments. Dr. Dukes testified that at no time did Parent or the IEP Team request such assessments. Transcript ("TR") Volume ("Vol.") 8 at 2217-18

<sup>28</sup> The Administrative Law Judge has read and considered each page of each admitted Exhibit, even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if the witness is not specifically mentioned in this Decision. The preparation of the Findings of Fact without any "characterization," and geared to set an entire backdrop for the issues, necessitated a page by page review. The review of the "used" Exhibit in relation to counsels-lead testimony and relevant issues took an extraordinary amount of time; the parties were extremely understanding and patient in regard to the review.

1 of the case was "at least" 13 physical restraints of Student over 22 school days.<sup>29</sup>  
2 Petitioners believe that the KESD had not "appropriately" evaluated Student on his return  
3 to KESD in January 2012 or at any time during the Complaint period.<sup>30</sup> The factual  
4 findings, including the backdrop of the matter, are based on the entire hearing record;  
5 however, the determinations herein are focused primarily on the period after October 2,  
6 2013.

### 7 Prior Periods/Background<sup>31</sup>

8 2. Student, born in a foreign country in [REDACTED] of 2005, has complex and multiple  
9 disabilities, which have been diagnosed over a period of time. Parent adopted Student  
10 in 2007. In 2008, a multidisciplinary evaluation team had determined Student's special  
11 education eligibility category to be other health impaired ("OHI") and speech language  
12 impairment ("SLI").<sup>32</sup> In March of 2010, Student was reevaluated as a part of his  
13 transitioning from preschool to kindergarten; additional speech language testing was not  
14 done, however, the IEP team agreed that Student continued to qualify for and need  
15 speech/language services as a related service for kindergarten.<sup>33</sup>

16 3. In February of 2011, Student was reevaluated and while no additional  
17 speech language assessment was completed, the IEP team agreed that Student  
18 continued to need speech/language services as a related service.<sup>34</sup>

19 4. In April of 2011, KESD conducted a functional behavioral assessment  
20 ("FBA").<sup>35</sup> In the Fall of 2011, Student began first grade in KESD in a "self-contained ED  
21 classroom." A due process complaint during the first semester of academic year 2011-  
22 2012 was settled through mediation; Parent had placed Student at a behavioral hospital

23 <sup>29</sup> TR Vol. 1 at 12-15.

24 <sup>30</sup> Any claim related to a time or time-frame prior to June 25, 2012 is outside the limitations period.

25 <sup>31</sup> Sole information was culled from the parties' post-hearing chronology/timeline documents and the  
26 applicable IEP documents.

27 <sup>32</sup> Student's eligibility categories have not changed; over the years, KESD has recognized Student's deficits  
28 in expressive and receptive language.

29 <sup>33</sup> There is no indication in the hearing record that KESD ever determined that Student did not need speech  
30 and language services; speech and language an eligibility category for Student over the years.

31 <sup>34</sup> 34 C.F.R. § 300.303(b)(2) mandates a reevaluation every three years unless the school and parent agree  
it is not necessary. 34 C.F.R. § 300.303(b)(1) provides that reevaluations may not occur more than once  
a year unless the parent and the school agree otherwise. Therefore, unless Parent and KESD came to  
some other agreement, Student's next reevaluation would have been conducted in/about February of 2014.

<sup>35</sup> According to Dr. Dukes, this was a "second" FBA. TR Vol. 5 at 2273-74. April 2011 is outside the  
limitation period; the April 2011 FBA is not contained in the hearing record.

1 and residential treatment center/school in Colorado and requested the KESD to place  
2 Student at the facility, which had an on-campus school program.<sup>36</sup>

3 5. A neuropsychological screening evaluation was conducted in December of  
4 2011 by Alison Walls, Psy.D., while Student was at the Colorado facility.<sup>37</sup> See Exhibit  
5 27.

6 6. On January 23, 2012, Student returned to the KESD as a first grader.

7 7. When Student returned from Colorado, he began to have therapy sessions  
8 with Deborah Pettitt, a licensed professional counselor.<sup>38</sup> Ms. Pettitt observed Student at  
9 the KESD classroom prior to beginning therapy sessions.<sup>39</sup> TR Vol. 1 at 693-94; TR Vol.  
10 5 at 1408.

11 8. On February 14, 2012, KESD developed its IEP and a BSP ("BSP") for  
12 Student.<sup>40</sup> Parent indicated Student's May 2011 diagnoses of bi-polar disorder, reactive  
13 attachment disorder ("RAD"), and fetal alcohol effects. Exhibit A at KESD00428. The  
14 BSP for Student indicates past behavior support discussions took place in November  
15 2010, February 2011, April 2011, and September 2011. In addition to the February 16,  
16 2011 MET Report, as a part of the information considered, the IEP team utilized the  
17 December 14, 2011 Neuropsychological Screening Assessment and the documents  
18 received from the Colorado private placement.<sup>41</sup>

19 <sup>36</sup> Parent had begun looking for a residential program in May of 2011 and, after "qualifying" in September  
20 of 2011, Student was placed on a waiting list for admission, which happened in October 2011. TR Vol. 4  
21 at 1169-70. Student was subsequently discharged from the Colorado residential treatment program  
22 because, following their own assessments, the Colorado facility determined Student did not meet the  
23 program's criteria. TR Vol 4 at 1174 and 1178.

24 <sup>37</sup> The Walls evaluation is also referenced and summarized in Paul Beljan's December 10, 2013  
25 neuropsychological evaluation report (Exhibit 29).

26 <sup>38</sup> See Exhibit 35 at 1, summary letter dated September 19, 2013. Ms. Pettitt has a Masters in Counseling  
27 and holds Arizona licensure as a Licensed Professional Counselor. She is a Registered Play Therapist,  
28 one of few whose therapy practice includes a focus on trauma and attachment and development disorders  
29 in children. TR Vol. 2 at 685-88; see also Exhibit 34 (listing of Ms. Pettitt's various trainings from 1995  
30 through 2010). The only therapy records from Ms. Pettitt that are admitted in the hearing record date from  
September 25, 2013 and forward; therapy records from January 2012 to September 2013 are not available  
for any comparative review of Student's behaviors, the progression of Student's therapy, the number and  
timing of his sessions, and Ms. Pettitt's prior observations and analyses of his progress or status.

<sup>39</sup> Ms. W. believed this observation took place in February of 2012. TR Vol. 5 at 1408

<sup>40</sup> See Exhibit A. Parent initialed that she had been informed of rights, which is the documented indication  
that Parent had been provided her procedural safeguards. *Id.* at KESD00426.

<sup>41</sup> Ms. W. recalled using the Kaufmann information data from the Colorado facility, but did not recall seeing  
the Walls Neuropsychological Screening Assessment in preparing the February 2012 IEP. TR Vol. 5 at  
1405-07 and 1438-42. However, portions of the February 14, 2012 IEP (*i.e.*, present levels) contain  
information that is verbatim of information on the Walls Assessment, which is specifically listed in the



1           9.       As stated in the IEP in the summary of present levels, Student's behavior  
2 needs "greatly impact his ability to successfully participate in general education . . . he  
3 needs support that is too extensive to be met in the general education classroom."<sup>42</sup> The  
4 IEP team placed Student in an extended resource ED classroom<sup>43</sup> with Ms. W. When  
5 reviewing the available Colorado information, Ms. W. found Colorado had indicated that  
6 Student had no academic skills in place and the facility had been working on "mostly  
7 behavior management." TR Vol. 5 at 1344-45.

8           10.      Ms. Pettitt is not listed as an attendee at the February 14, 2012 IEP meeting;  
9 however, she is listed as an attendee at the April 11, 2012 IEP meeting.<sup>44</sup> Ms. Pettitt did  
10 not provide strategies for KESD to use at that time; however, she did advise Ms. W. that  
11 the strategies the IEP Team had in place were appropriate and were strategies to help  
12 Student be successful. TR Vol. 5 at 1409. Under a contract with KESD, Ms. Pettitt  
13 provided training materials and information regarding "trauma brain" to Student's teacher,  
14 Ms. W., and Ms. W.'s team.<sup>45</sup> *Id.* at 694. In March of 2012, Ms. W. reached out to Ms.  
15 Pettitt for information regarding some extended "uncharacteristic" behavior incidents and  
16 for verification that she was utilizing the appropriate supports; Ms. W. was informed of  
17 medication changes.<sup>46</sup> TR Vol. 5 at 1409. In November of 2012, on request from Parent,  
18 Ms. W. again reached out to Ms. Pettitt about Student's therapy. TR Vol. 5 at 1408-09.

19           11.      Ms. W. had prior experience teaching students with RAD. TR Vol. 5 at 1339.  
20 Regarding whether Student should have been evaluated at that time, Ms. W. opined that

21  
22 February 14, 2012 prior written notice as having been relied on. See Exhibit A at KESD00429; see also  
23 Exhibit B at KESD00445 and Exhibit 27.

24 <sup>42</sup> See Exhibit A at KESD00430 (Effect of disability on progress in the General Curriculum and Needs of  
25 Student to Access the General Curriculum). The Colorado information noted as a recommendation: "Due  
26 to [Student's] emotional outbursts, it may be difficult to him to function in a regular education program. He  
27 would benefit from being in a self-contained special education class where he can get more one on one  
28 attention and have an opportunity to take small breaks when needed." *Id.* at KESD00430 (Summary of  
29 Current Assessments).

30 <sup>43</sup> See Exhibit A at KESD00431.

<sup>44</sup> See Exhibit D at KESD00477.

<sup>45</sup> See Exhibit 35 at 32, written contract for a capped amount to "collaborate" with the KESD regarding  
Student, for the period from January 13, 2012 through March 30, 2012; additional hours were set at \$140.00  
an hour. The capped amount calculates to 6 hours at \$140.00 an hour.

<sup>46</sup> At hearing, Ms. W. indicated that she had initially reached out to Parent about the uncharacteristic  
behaviors, and Ms. W. described that conversation with Parent as "very hostile." TR Vol. 5 at 1409. Emails  
between Parent and Ms. W. in March of 2012 regarding bus and recess incidents mention medication  
changes. See Exhibit 67 at 1-3.

1 this would have been a very hard time for a student with RAD to be evaluated "because  
2 you haven't built a relationship with [Student]" and there's not yet trust or rapport. TR Vol.  
3 5 at 1346-47. Ms. W. also opined that no further FBA needed to be done regarding  
4 Student because she understood why his behaviors would occur (*i.e.*, the "functions" of  
5 his behaviors) due to "[Student's] past and the things that have occurred in his past that  
6 would be indicators for or reasons for outburst and meltdowns and aggressive or unsafe  
7 behaviors."<sup>47</sup> TR Vol. 5 at 1415-16. Ms. W. expected that things occurring outside of  
8 school could also affect Student's behaviors. TR Vol. 5 at 1420.

9 12. Some of the strategies Parent had suggested to use for Student at that time  
10 were not appropriate for a school setting, but Ms. W. was able to use many of Parent's  
11 suggested strategies. TR Vol. 5 at 1342-44. Ms. W. was able to adjust and change  
12 strategies as certain of Student's behaviors decreased and as he evolved and grew. *Id.*  
13 Ms. W. acknowledged that, based on the information contained in the daily point cards,  
14 "it took some time for Student to settle into the school routine in the 2012/2013 school  
15 year." TR Vol. 5 at 1419.

16 13. Parent's recollection and understanding of Student's return to school in  
17 January 2012, and being in Ms. W.'s classroom, was that Ms. W. spent four to six weeks,  
18 one-on-one, building a relationship with Student, mostly playing games and trying to get  
19 to know him. TR Vol. 4 at 1180-81. Parent did not recall any documentation of restraints  
20 from January to May of 2012. TR Vol. 4 at 1182

21 14. The February 14, 2012 IEP contained several academic goals, including  
22 Language – Traditional (1) and Writing – Elementary (2).<sup>48</sup> In addition to the specially  
23 designed instruction in education and social support services, the IEP provided for  
24 transportation, occupational therapy and speech therapy as related services.<sup>49</sup> Multiple  
25

26 <sup>47</sup> Ms. W. was experienced in the drafting of FBA s. TR Vol. 5 at 1418.

27 <sup>48</sup> Regarding Student's current performance information, the Colorado information indicated that Student  
28 had received "much" one on one teaching, was working "below" a 1<sup>st</sup> grade level, and that "[Student] did  
29 minimal to no work even with modifications. He spent most of his day playing with toys. He was not able to  
30 do any work independently." Exhibit A at KESD00429 (Summary of Current Assessments).

<sup>49</sup> The IEP contains standard indications regarding transportation: that Student will receive special  
educational transportation for the duration of the IEP due to his disability and in order to access the  
educational program site, that it will be curb to curb transportation due to his disability, and that "Adult  
Assistance to address needs that are indicated in the IEP will be provided." Exhibit A at KESD00434.

accommodations in the classroom environment, in instructional strategies or procedures, and in social interactions were set forth in the IEP.<sup>50</sup>

15. At that time, Student's weaknesses were noted as follows:<sup>51</sup>

[Student] continues to hit, kick, bite, scratch, cuss, throw objects, make inappropriate comments, and yell when he becomes frustrated, angry, sad, and/or overwhelmed. In order to reduce these behaviors, [Student] has been given strategies to let out these behaviors in a more appropriate way than hurting others and/or himself. When he scratches, [Student] is given a carpet square to scratch; when he throws objects, he is given a soft ball to throw; when he spits, he is given a cup to spit in; when he bites, he is given a chew stick (sensory item); when he kicks, he is given a soft place to kick; when he pinches, he is given theraputty to pinch; and when he yells, he is taken to a quiet place to yell as loud as he needs to. These strategies were used frequently the first 2 days [Student] entered the program. After the first 2 days, the behaviors reduced drastically, and [Student] started asking for some of the items prior to exhibiting the behaviors against others. Now the team is working on using more appropriate strategies like verbalizing his needs; asking for a hug, to be held, or to take a break, instead of the items listed above. As far as the cussing/ saying inappropriate comments, the team tries to ignore the words/comments as much as possible. If a negative reaction is given to [Student] when his inappropriate behaviors occur, he is more likely to Exhibit the behaviors again. It is best not to have a negative reaction, but have more of a matter of fact attitude. Don't show [Student] that his behaviors bother you, but instead give him ways to express those behaviors in a safer, more appropriate manner. By doing this, [Student] is less likely to continue with the negative behavior or at least not Exhibit the behavior as much as if you make a big deal out of it.

[Student] will also mimic other students' inappropriate behaviors. At this time, the team has found that removing [Student] from the environment when behaviors escalate is the best strategy to de-escalate his behaviors. Once [Student] is removed from the environment, he is calmed quickly by cradling him in your arms, hugging him and/or singing a soft song to him. Once he is calm, the staff discusses coping strategies (asking for a hug, to be held, sensory object) to use when an upsetting situation has occurs. Student is now starting to use some of these strategies independently when he becomes upset.

At this time, [Student] is being monitored at all times. Even during "fun" activities like choice time, [Student] has a tendency to Exhibit negative

<sup>50</sup> The IEP Team members were Parent, a Behavior Intervention Teacher, a Speech Language Pathologist, an Occupational Therapist, a General Education Teacher, the Special Education Teacher and the Principal/designated school representative.

<sup>51</sup> Exhibit A at KESD00429-30.

1 behaviors. If an adult is not supervising. One of the only times that an adult  
2 is not right by his side is during recess. Other than that, [Student] needs the  
3 constant support of an adult in order for him and others to be safe. [Student]  
4 does need to be monitored around peers. He has kicked, hit, poked,  
5 scratched, spit, kissed, thrown objects, and says inappropriate  
6 words/makes inappropriate comments when working with peers. He needs  
to be removed from the situation when these behaviors occur. [Student] has  
lost privileges (think-time, losing item/toy) when inappropriate behaviors  
occur with peers.

7 16. KESD developed two behavioral goals for Student. The two behavior goals  
8 were as follows:

9 a. When upset, frustrated, or angry, [Student] will increase coping skills and self-  
10 advocacy skills by using identified strategies, including verbal requests ("I need a  
11 hug.", "I need to be held.", "I need a break." etc.) and sensory strategies  
12 (theraputty, trampoline, weighted blanket/vest/lap pad, textured balls, etc.)  
independently to de-escalate or prevent behavior from escalating, on 4/5  
occasions . . . .<sup>52</sup>

13 b. Across all settings, [Student] will maintain safe behavior by keeping his  
14 hand/feet/objects/body (including spitting) to himself (in reference to intent to harm  
15 others) with 0 incidents per day . . . .<sup>53</sup>

16 17. Student's progress was measured through daily point cards and reported  
17 quarterly.<sup>54</sup>

18 18. KESD had correctly determined that Student's behaviors impeded his  
19 learning. The February 14, 2012 BSP contains the following three target behaviors:<sup>55</sup>

- 20 a. Spitting, directed at people and objects.  
21 b. Inappropriate comments, including swearing and saying he will do things to  
22 people (wipe a booger on them, hit them, and rip their heads off and eat it, etc.).  
23 c. Physical aggression, including hitting, pinching, pulling hair, kicking, scratching,  
24 throwing items at people, and self-injurious behaviors.

25 <sup>52</sup> This goal was a new goal; under Present Levels, Additional Information, Progress, the prior IEP had  
26 apparently contained three behavior goals, one of which became Goal #2, but two of which were not wholly  
27 incorporated into the February 2012 IEP. Regarding new Goal #1, Student's "score" at that time was noted  
to be "2/5." Exhibit A at KESD00433.

28 <sup>53</sup> On Goal #2, Student's "score" at that time was noted to be an "avg. of 8.9 per day." *Id.*; see also Exhibit  
D at KESD00481, progress reporting data from January 23, 2012 to February 2, 2012.

29 <sup>54</sup> Progress Reports on these behavior goals are found Exhibit 19 at 9-11 (Goal #1) and at 12-15 (Goal #2)  
30 for the 2012 -2013 academic year and continuing through a portion of the next academic year, to an October  
1, 2013 progress report.

<sup>55</sup> Exhibit A at KESD00038-41.

19. The baseline data for the targeted behaviors were taken from Daily Point Sheets dated January 23, 2011 through February 2, 2011.<sup>56</sup> The baseline data was:

- a. Spitting: average of 4.8 incidents per day;
- b. Inappropriate comments: average of 1.9 comments per day; and,
- c. Physical aggression/unsafe body: average of 4 incidents per day.

20. The IEP Team had identified the following fifteen (15) antecedents:

- a. Distractions;
- b. Anxiety over work;
- c. When unsure what is expected or what to do next;
- d. Given down time;
- e. When play is not structured;
- f. When feeling overwhelmed;
- g. When unsuccessful at task;
- h. When needing sensory input;
- i. When desiring imaginative play;
- j. When desiring interaction with others;
- k. Less structure;
- l. Large group settings;
- m. Long periods of time (more than 5 minutes);
- n. During times where there is more auditory and visual stimulation (including other students "melting down"); and,
- o. Easily frustrated.

21. The IEP Team set forth the following twenty-six (26) environmental positive supports:<sup>57</sup>

- a. Verbal time warning;
- b. Sensory items (wobble seat, texture items – example: Velcro, silky, sand paper), "Sensory bounce", breaks for physical activity such as jumping, running, etc.;
- c. Allowed to stand instead of sit;
- d. Small group setting for academic;
- e. Separate desk if needed to reduce stimulation;
- f. Be predictable, consistent, and repetitive. Students with RAD are very sensitive to changes in schedules, transitions, surprises, and other chaotic social situations. This may help [Student] feel safe and secure, which in turn will reduce anxiety and fear;
- g. Model, narrate, and teach [Student] appropriate social behaviors (explain what you are doing and why);

<sup>56</sup> *Id.* a KESD00438. The referenced daily sheets are not a part of the hearing record.

<sup>57</sup> The identified instructional supports are not restated here; none of the Amended Complaint issues go to instructional matters.

- h. Avoid power struggles. When intervening, present yourself in a matter of fact style. This may [reduce Student's] desire to control the situation;
- i. When possible use humor. [Student] may be attempting to get an emotional response from you or engage you in a power struggle;
- j. Identify a place for [Student] to go to regain composure during time of frustration and anxiety;
- k. Limit group activities;
- l. Give immediate feedback, gratification and consequences;
- m. Allow choices – reinforce the idea that [Student] continually makes choices, and then move to making “better” choices;
- n. Choose your battles;
- o. Create activities to help build [Student's] self-esteem;
- p. Provide movement activities – dancing, rhythmic movement, sitting in a rocking chair;
- q. Insist on eye contact;
- r. Acknowledge good decisions and behavior; give matter-of-fact consequences for inappropriate behavior or poor decisions;
- s. Avoid harsh, punitive consequences, as those will only reinforce the student's mistrust of adults;
- t. Standard rewards don't work (rewards, treats, etc.);
- u. Be consistent and specific. Do not allow any “slack”, as [Student] may view that as room to manipulate or try to regain control;
- v. Use a team approach – one person should not be responsible alone;
- w. Insist on the use of titles to reinforce rank ([teacher name], [name], etc.);
- x. Use natural consequences when possible (“You made a mess. Clean it up.”);
- y. Have a crisis plan, including a place that [Student] can go to regain control if need be; and
- z. If [Student] is stressed, try to determine if he is bored, tired, or overwhelmed and adjust accordingly.

22. The IEP Team identified interventions for the targeted behaviors:

- a. If [Student] is hitting, kicking or demonstrating other frustrated behaviors, staff will get down to his level and ask him, “Are you mad?” and/or “What do you need?”
- b. Process with [Student] by prompting him to use a coping strategy. For example, if someone is being loud, prompt him to say, “Please be quiet” or cover his ears.
- c. [Student] often calms when staff holds him on their lap, rocks him, and sings him a song.
- d. [Student] often calms when he is removed to a quiet place/removed from the situation. Staff may take him for a walk around the school, or to another area of the school until he is calm. Staff will hold [Student's] hand.
- e. Staff will process with [Student] and prompt him to use a coping strategy (if this has not been done already).
- f. If [Student] is an immediate danger to himself or others, the KESD policy for safe crisis management will be used. The most effective method for safe crisis management at this time is to turn [Student] toward you and hug him with his arms

1 down and/or hold him on your lap and cradle him with his arms down or one arm  
2 down if he wants to suck on his fingers.<sup>58</sup>

3 23. The IEP Team indicated positive replacement behaviors:

- 4 a. [Student's] use of his words to appropriately express his needs, wants  
5 and frustration.  
6 b. [Student's] self-advocacy by requesting to utilize a coping strategy/tool when  
7 he is upset/frustrated/angry or thinks he will become upset/frustrated/angry.

8 The positive reinforcements that could be used when Student used appropriate behavior  
9 were earning tickets for the class store, positive praise, and computer time.

10 24. On April 11, 2012, KESD developed an IEP Amendment, which resulted in  
11 a determination of ESY eligibility for summer 2012.<sup>59</sup> The IEP Amendment made no  
12 changes with regard to Student's category of eligibility or the BSP.

13 25. The 2012 summer ESY services for Student were four (4) hours per day, 4  
14 days a week of instruction in reading, writing, math and social skills. See Exhibit D at  
15 KESD00491. ESY Teacher received background information and behavior information  
16 regarding Student through Parent and Ms. Pettitt, who apparently also came in for an  
17 observation.<sup>60</sup> TR Vol. 3 at 824-25; see also Exhibit 64 at 1-12.

18 26. Student had the same ESY Teacher for 2012 and 2013. There was less  
19 academic rigor in the summer ESY sessions which is a very different environment from  
20 the regular school year. ESY Teacher noted Student received anywhere from 45 minutes  
21 to 1 ½ hours of academic instruction depending on how he was feeling or his fatigue level,  
22 and the rest of the time Student was engaged in preferred activities. ESY Teacher  
23 recalled no restraints of Student.

24 27. During ESY 2012, Parent discussed Student's continuing "bus" behaviors  
25 with ESY Teacher, who discussed Student's bus behaviors with the bus driver. See  
26

27 <sup>58</sup> At hearing, Ms. W. acknowledged that the hold described herein is different from the NCI hold. TR VOL  
28 5 at 1490. Ms. W. noted that an NCI hold would be documented on NCI forms if a student was taken to the  
29 seclusion room. TR Vol. 5 at 1427 and 1467.

30 <sup>59</sup> See Exhibit 2; the copies within this document are not very legible. The Tribunal reviewed KESD Exhibit  
D, which is a better copy; while the Administrative Law Judge could not locate a witness's testimony  
referencing Exhibit D, the creation of a useable record called for its admission post-hearing.

<sup>60</sup> See Exhibit 64 at 004.

1 Exhibit 64 at 004.<sup>61</sup> Although the dates were not clearly delineated, Ms. W. did a write-  
2 up of strategies to support Student while he was on the bus, and Ms. W. and Ms. Pettit  
3 provided training to the transportation personnel. TR Vol. 5 at 1411.

4 28. Student maintained progress on his behavioral and academic goals in ESY  
5 2013. See Exhibit J. On Behavior goal #1, Student's score was noted to be an average  
6 of 3.3 disrespectful or disruptive incidents per day. *Id.* at 534; see also Exhibit 19 at 11.  
7 On Behavior goal #2, Student's score was noted to be an average of 2.7 unsafe  
8 hands/feet per week. *Id.* at 535; see also Exhibit 19 at 13. There are no progress reports  
9 for ESY 2012 and there are no daily point cards for ESY 2012 or 2013 in the hearing  
10 record. See Exhibit 19 at 9 and 15.

### 11 Academic Year 2012-2013

12 29. Student began 2<sup>nd</sup> grade in August of 2012; school started on August 6,  
13 2012. Student's teacher was again Ms. W; her class had from 6 to 9 students over the  
14 academic year.<sup>62</sup> Ms. W.'s classroom had two fulltime instructional assistants ("IA") and  
15 one part-time IA; the part-time IA had been added to the classroom because Student was  
16 in the classroom. TR Vol. 5 at 1348-49.

17 30. On August 1, 2012, Parent was notified that there would be a new bus driver  
18 and she immediately contacted KESD Transportation regarding Parent's prior request for  
19 Dino to continue to be the bus driver. Exhibit 74 at 001-02 and Exhibit DD at KESD02013-  
20 15. KESD Transportation informed Parent that they try to honor requests, but that doing  
21 so was not always possible. Parent responded:

22 Due to his disability, we need to limit changes. We need Dino unless he isn't  
23 working there. He has received training from the specialist. The KESD didn't  
24 get a contract again so we can't get [the new driver] trained to meet

25 <sup>61</sup> At hearing, Parent stated that Student was "okay" during the ESY 2012 transportation even though it was  
26 a new driver, because she kept telling him it was temporary and that "Dino" would be back. TR Vol. 4 at  
27 1184. However, at the time and in her e-mail to ESY Teacher dated June 13, 2012, Parent wrote:

28 [Student] is really scared on the bus. We need to talk to Bill about showing some  
29 emotions and interact with [Student] so he feels safe. . . . [Student] took off his shoes  
30 and was throwing them on the bus . . . when he is at his point he is close if not already  
in rage! He is back in the orphanage and is scared out of his mind . . . then he won't  
remember anything he did after the event. *It took me an hour yesterday to calm him  
down and get him back on track . . . I couldn't leave the nanny with him. I am going to  
talk to the bus driver this morning and if you could also do the same that would be great.  
Since this really makes him become unstable and he will go backwards in therapy.*  
Emphasis added here.

<sup>62</sup> TR Vol. 5 at 1348.



1 [Student's] disability. Please make the correction and assign Dino as his  
2 bus driver. Dino spoke to his therapist several times and we were all on the  
same page. This is also why he has the same teachers and assistants."

3 KESD Transportation responded, in part: "I totally understand your concerns . . . . Any  
4 special training needed to support [Student] will be provided by Special Programs."

5 Parent responded:

6 Safety is going to be a factor. You need to call Shari [D]ukes at the KESD  
7 immediately to get her to assign a contract. I guarantee that the bus driver  
8 and or assistant will be hurt! Please assign Dino to [REDACTED] or get Shari to get  
a contract so the therapist can talk to the bus driver before Monday.

9 While Dr. Dukes was still discussing the matter with Transportation, on August 3, 2012,  
10 Parent wrote:

11 FYI, I made this request last year. Dino took the summer off. We had issues  
12 on the ESY bus!!! I just kept letting [Student] know that he was just  
13 temporary for the summer. Just like his teacher. Let me know if I need to  
14 proceed with an appeal process. I will be contacting my attorney today if  
15 this is not corrected. It seems that you do not have [Student's] best interest  
16 at heart. 1 – keeping his therapist on (unless you have a specialist in this  
17 area now); 2 – implementing him into secondary subjects with assistant; 3  
– keeping him in "safe" environment this means same bus driver, same  
teacher, etc (which I thought was all set last year).  
Please feel free to contact me on my cell phone [number]. [W]e are driving  
18 back from California.

19 Dr. Dukes informed Parent of her conversation with Director of Transportation and  
20 indicated:

21 [Director of Transportation] has assigned a driver that has experience and  
22 is eager to work with [Student]. . . . [they] met and determined that  
23 minimizing the amount of time on the van may assist and developed a  
24 schedule that would have [Student] as the last student picked up in the  
25 morning and the first student to be dropped off in the afternoon. [Ms. W.]  
will also support by providing [them] with key strategies that work best for  
[Student].<sup>63</sup>

26 Parent responded:

27 You don't get it. He has reactive attachment disorder. He is finally attached  
28 to Dino. We will be starting over and regressing. I know his disability. This  
29 should [have] been discussed with me or at [a] meeting with his therapist

30 <sup>63</sup> Exhibit DD at KESD02017.

1 [to go over] his needs. I guess next step is an appeal? Thought you got it.  
2 Guess not. Will go the legal way.<sup>64</sup>

3 Parent responded again about an hour later:

4 I have a letter from [Student's] doctor. What is your fax number so I can fax  
5 it to you? Not following the doctors instructions would violate [Student's]  
6 disability. [T]he doctor state that he will regress back into a trauma state and  
7 not be able to function in school.<sup>65</sup>

8 31. On August 6, 2012, at 7:17 a.m., Parent wrote to Ms. W.:

9 [Student] almost didn't get on the bus. He is very afraid. I reminded him that  
10 everything is the same. *He may not be able to function this am due to his*  
11 *anxiety.* Maybe u could rock him for awhile when he get there to help.<sup>66</sup>

12 Emphasis added here.

13 32. On August 17, 2012, at an IEP meeting, the KESD agreed to continue to  
14 collaborate and provide training for transportation staff in proactive and positive strategies  
15 for Student on the bus, and to communicate and collaborate with Ms. Pettitt as needed  
16 pursuant to a release in place.<sup>67</sup> See Exhibit F at KESD00502. The IEP Team noted that  
17 the implementing staff had no questions regarding effective strategies and that current  
18 strategies, as recommended by Ms. Pettitt last year, were effective. The IEP Team  
19 indicated that if questions arose, the KESD would contact Ms. Pettitt and consider, at that  
20 time, the need for any contract. The IEP Team specified that Ms. Pettitt had observed  
21 Student in the class last school year and had "praised the staff for their strategies."

22 33. Parent had requested that KESD provide the transportation staff with  
23 specialized training by Deborah Pettitt regarding strategies to use during bus  
24 transportation and/or reassign "Dino" to again be the bus driver for Student. See Exhibit  
25 74 at 001-07. On August 27, 2012, Dino was reassigned to be the bus driver for Student's

26 <sup>64</sup> *Id.* at KESD02018

27 <sup>65</sup> *Id.* at KESD02019. Parent's statement here indicates Student's bus fears were present in the academic  
28 year 2012-2013, not just in 2013-2014. At hearing, Parent indicated that she had provided other  
29 "acceptable" people to be the bus driver, mentioning the driver from the ESY session, who Parent indicated  
30 "was familiar with [Student]" and with whom Student had become "somewhat acclimated" in the four-week  
31 ESY session. TR Vol. 4 at 1289-90.

32 <sup>66</sup> *Id.* at KESD02020.

33 <sup>67</sup> Ms. W. was well aware of Student's behavior issues on the bus, noting that they were the same issues  
as in the classroom: "throwing things, spitting, scratching, hitting, [and] saying inappropriate things." TR  
Vol. 5 at 1410.

1 transportation; Dino was the bus driver until January of 2013, when he left that position  
2 for personal reasons. TR Vol. 4 at 1190.

3 34. From August of 2012 through May of 2013, the available daily point sheets  
4 demonstrated that Student had a majority of school days each month with problematic  
5 behaviors ranging from not following directions and not staying on task to the unsafe  
6 behaviors and hitting, throwing, scratching or spitting. The number of Student's behavior  
7 incidences were tracked as points; the higher the number, the more behavior incidents.  
8 Ms. W. indicated that many of Student's behaviors took place at "transition" times, such  
9 as first thing in the morning, when he was hungry and needed to eat, and getting off/on  
10 the bus, in addition to coming back to school after a weekend or a holiday.<sup>68</sup> See Exhibit  
11 EEEE at KESD00619-804; see also Exhibit 22 at 1-138.

12 35. From August of 2012 through May of 2013, the available daily point sheets  
13 demonstrated the number of days in each month with five or less points: August (3);  
14 September (5); October (6); November (9); December (7); January (4); February (8);  
15 March (7); April (10); May (5).

16 36. From August of 2012 through May of 2013, the available daily point sheets  
17 demonstrated the number of days in each month with ten or more points: August (14);  
18 September (11); October (8); November (5); December (6); January (11);<sup>69</sup> February (3);  
19 March (5);<sup>70</sup> April (7); May (6).

20 37. From August of 2012 through May of 2013, the available daily point sheets  
21 demonstrated the number of days in each month specifying the problems of scratching,  
22 spitting, and/or unsafe hands/feet:<sup>71</sup> August (12); September (13); October (12);  
23 November (11); December (5); January (11); February (5); March (5); April (9); May (6).

24 38. From August of 2012 through May of 2013, the available daily point sheets  
25 demonstrated the number of days in each month specifying a criss-cross, a restraint, a

26 <sup>68</sup> TR Vol. 5 at 1357-58 and 1360-61; see also Exhibit EEEE at KESD00638, KESD00639, and KESD00649.

27 <sup>69</sup> On the January 11, 2013 point sheet, Parent commented: "I am thinking this is a 'terrible two' situation."  
28 Exhibit EEEE at KESD00716-17

29 <sup>70</sup> Each of these day occurred after Spring Break.

30 <sup>71</sup> These particular behavior problem counts are noted here because these behaviors are among the  
identified three target behaviors that interfere with Student's learning. Exhibit A at KESD00438. These  
days are likely included in the counts for (a) and (b); however, some of these incidents may have occurred  
on a day with more than five but less than ten incidents.

1 removal to another setting/room (using various methods, including just holding his hands  
2 and walking with him) or "went to sensory room": August (4);<sup>72</sup> September (1);<sup>73</sup> October  
3 (4);<sup>74</sup> November (3);<sup>75</sup> December (4);<sup>76</sup> January (4);<sup>77</sup> February (2);<sup>78</sup> March (4);<sup>79</sup> April  
4 (6);<sup>80</sup> May (6).<sup>81</sup>

5 39. During the first six weeks of school in 2012-2013, the daily point cards  
6 demonstrate, among others, the following total incidences of behaviors:<sup>82</sup>

- 7 a. Monday, August 6<sup>th</sup>: no behaviors noted.
- 8 b. Tuesday, August 7<sup>th</sup>: 13 behaviors noted (morning and afternoon), including  
9 spitting.
- 10 c. Wednesday, August 8<sup>th</sup>: 11 behaviors noted (morning), including scratching  
11 another student on the face, with no trigger identified, and unsafe hands/feet  
12 (kicking). Parent noted "call me. He is very sad!"
- 13 d. Thursday, August 9<sup>th</sup>: minor behaviors (morning) of not following directions and  
14 crying. Student fell asleep in late morning.

15  
16 <sup>72</sup> August dates: 8-13-12 (removal after kicked another student taken to sensory room), KESD00625; 8-20-  
17 12 (moved to quiet place), KESD00630; 8-30-12 (taken to "room out-side time-out room"); 8-31-12 (one-  
18 person safe hold), KESD00639.

19 <sup>73</sup> September date: 9-11-12, Student crossed his own arms, KESD00645.

20 <sup>74</sup> October date: 10-16-12 (removal from room), KESD00700; 10-19-12 (physical intervention for refocus),  
21 KESD00703; 10-26-12 (point sheet has written in "crossing arms" but no points), KESD00708; 10-30-12  
22 (criss-cross and removal from room), KESD00710.

23 <sup>75</sup> November dates: 11-5-12 (removal from Art class to room), KESD00691; 11-29-12 (criss-cross),  
24 KESD00671; 11-30-12 (criss-cross), KESD00672.

25 <sup>76</sup> December dates: 12-3-12 (removal from Art class to room), KESD00673; 12-4-12 (criss-cross, *two times*  
26 and taken to swing), KESD00674; 12-17-12 (taken to sensory room), KESD00683.

27 <sup>77</sup> January dates: 1-7-13 (criss-cross), KESD00712; 1-11-13 (removal to quiet room), KESD00716; 1-29-  
28 13 (criss-cross), KESD00728; 1-31-13 (criss-cross and removal to quiet room), KESD00730;

29 <sup>78</sup> February dates: 2-6-13 (moved to quiet room), KESD00734; 2-7-13 (removal from PE to room),  
30 KESD00735; 2-12-13 (criss-crossed), KESD00738;

<sup>79</sup> March dates: 3-18-13 (criss-cross to remove to another room), KESD00757; 3-20-13 ("restrained" and  
removed from recess to room), KESD00759; 3-25-13 (criss-cross and remove from lunch recess to quiet  
rom), KESD00762; 3-26-13 (criss-cross, at afternoon recess), KESD00763;

<sup>80</sup> April dates: 4-9-13 (criss-cross and removal from Recess to sensory room), KESD00772; 4-18-13  
(removal from PE to room), KESD00779; 4-22-13 (criss-cross and removal to sensory room), KESD00781;  
4-29-13 ("moved" away from others), KESD00786; 4-30-13 (criss-cross and taken to sensory room *two*  
*times*) KESD00787;

<sup>81</sup> May dates: 5-1-13 (criss-cross), KESD00788; 5-6-13 (removal to sensory room, and escorted from  
reading aloud), KESD00792; 5-7-13 ("restrained" after kicking another student at morning meeting and  
taken to seclusion, and removal from Recess line-up to sensory room), KESD00793; 5-8-13 (removal to  
sensory room), KESD00794; 5-9-13 (removal by holding hands to next room), KESD00796; 5-18-13  
(removal from room to sensory room), KESD00798;

<sup>82</sup> See Exhibit EEEE.

1 e. Friday, August 10<sup>th</sup>: 12 behaviors (morning), including crying, inappropriate  
2 sounds/language/gestures ("inappropriate SLG"), and unsafe hands/feet. Parent  
3 wrote "This tracking sheet doesn't track what is mentally going on with [Student].  
4 He has lots of anxiety on the bus – stomach hurts, throwing up, undressing,  
5 throwing shoes, etc."

6 f. Monday, August 13<sup>th</sup>: 21 behaviors (morning), including inappropriate SLG,  
7 unsafe hands/feet (kicking another Student), threatening, and spitting. Parent  
8 wrote "As you can see the bus ride is giving anxiety. It's taking valuable time to get  
9 his mind calm again. Same thing in PM at home."

10 g. Tuesday, August 14<sup>th</sup>: 51 behaviors (44 in morning), including crying,  
11 inappropriate SLG, yelling, unsafe hands/feet (scratching), and spitting.

12 h. Wednesday, August 15<sup>th</sup>: 21 behaviors (morning), including crying,  
13 inappropriate SLG, unsafe hands/feet (scratching), and spitting.

14 i. Thursday, August 16<sup>th</sup>: 1 behavior in morning (inappropriate SLG). Student fell  
15 asleep in the late morning.

16 j. Friday, August 17<sup>th</sup>: 26 behaviors (morning), including inappropriate SLG,  
17 unsafe hands/feet (kicking), and spitting.<sup>83</sup>

18 k. Monday, August 20<sup>th</sup>: 30 behaviors (morning and afternoon), including  
19 inappropriate SLG, teasing, antagonizing, unsafe hands/feet, and spitting.

20 l. Tuesday, August 21<sup>th</sup>: 41 behaviors (38 in morning), including crying, yelling,  
21 inappropriate SLG, unsafe hands/feet (kicking), spitting and scratching. Earlier in  
22 the day, during transportation, there had been an incident on the bus.<sup>84</sup>

23 m. Wednesday, August 22<sup>nd</sup>: 7 minor behaviors (morning), including crying and  
24 yelling. Student fell asleep mid-morning.

25 n. Thursday, August 23<sup>rd</sup>: 4 behaviors (afternoon), including unsafe hand/feet.

26  
27  
28 <sup>83</sup> At an August 17, 2012 IEP meeting that was requested by Parent, among other things, Parent expressed  
29 her concerns about transportation; KESD determined to "continue to collaborate with and provide training  
30 for relevant transportation staff in proactive and positive strategies for [Student] while on bus." See Exhibit  
F.

<sup>84</sup> A transportation aide had slapped Student on the face. See Exhibit 3 (law enforcement report); Exhibit  
74 (emails regarding transportation, pages 006-08); TR Vol. 4 at 1187-90; Exhibit 82 (video).

1 o. Friday, August 24<sup>th</sup>: 41 behaviors (morning), including crying, yelling,  
2 inappropriate SLG, unsafe hands/feet (kicking), spitting, scratching and he bit a  
3 teacher. Parent wrote: "FYI – spit at assistant on bus & told her he didn't like her  
4 since she was different! He is telling us what he needs. He should be able to  
5 progress now that Dino is bus driver again.<sup>85</sup> I need you to add this to his record  
6 so we can avoid things in future."

7 p. Monday, August 27<sup>th</sup>: 63 behaviors (morning), including crying, yelling, took of  
8 his shoes to throw at a student, tried to stab teacher with a pencil, inappropriate  
9 SLG, unsafe hands/feet, spitting and scratching. Ms. W. noted "[Student] did not  
10 like that Mr. Dino looked different. It seemed to set him off for the 1<sup>st</sup> part of the  
11 morning."

12 q. Tuesday, August 28<sup>th</sup>: 14 behaviors (morning), including taking off his shoes  
13 three times (twice to throw at a student), inappropriate SLG and unsafe hands/feet.

14 r. Wednesday, August 29<sup>th</sup>: 14 behaviors (morning), including taking off his shoes  
15 to throw at teacher, inappropriate SLG, unsafe hands/feet, scratching and biting.<sup>86</sup>

16 s. Thursday, August 30<sup>th</sup>: 16 behaviors (morning), including inappropriate SLG,  
17 unsafe hands/feet, and scratching. Ms. W. noted: "[Student] had a hard time on  
18 the bus (standing up; not following directions). His behaviors con't once off the bus  
19 (Scratching, kicking, inappropriate comments). Teacher took him to the room out-  
20 side time-out room[,] discussed what was wrong and what he needed. He stated  
21 he was mad because he couldn't stand up on the bus. When asked what he  
22 needed, he said a hug and song. He was able to return to the classroom w/in 5  
23 min." Parent wrote: "I suggest not talking but going to holding and rocking. His  
24 brain is in trauma & needs to go back to a relaxed state before you can talk to him."

25 t. Friday, August 31<sup>st</sup>: 33 behaviors (morning), including crying, inappropriate  
26 SLG, unsafe hands/feet, scratching and spitting. Ms. W. noted that he threw sand

27  
28 <sup>85</sup> At hearing, Parent testified that she had contacted "Dino" and he then requested to be Student's driver  
again. TR Vol. 4 at 1190

29 <sup>86</sup> The comments on why Student was taking off his shoes included: from teacher, Student had said "just  
30 because it will hurt her & make her cry;" apparently from Parent, it could be a variety of things, such as "his  
socks bother him/ he doesn't like his friends/ he doesn't want to complete work/sometimes he just smiles .  
.. and doesn't give an answer." Exhibit EEEE at KESD00637.

1 and scratched the teacher during recess; also that he was "put in one person safe  
2 hold, and told he was not being safe to himself & others, after talked about how to  
3 be safe, returned to play." Parent wrote: "I would suggest rocking or hugging him  
4 vs. safe mode."

5 u. Tuesday, September 4<sup>th</sup>: 32 behaviors (morning), including yelling, unsafe  
6 hands/feet, spitting, and scratching. Ms. W. noted that Student did not want to go  
7 out to recess with the 2<sup>nd</sup> grade friends, scratched the teacher, and said  
8 inappropriate things.

9 v. Wednesday, September 5<sup>th</sup>: 36 behaviors (morning), including inappropriate  
10 SLG, unsafe hands/feet, spitting, and scratching. Ms. W. noted that Student tried  
11 to take off his clothes, but the aide was able to stop his shirt from coming off; Ms.  
12 W. noted that when asked why, Student had said "it would be fun for everyone to  
13 see [my] peepee." Parent wrote: "[p]lease use three deep breaths when [Student]  
14 is frustrated before going to arms crossed. Please add to sheet when [Student]  
15 has to have his arms crossed."<sup>87</sup>

16 w. Thursday, September 6<sup>th</sup>: 45 behaviors (all early morning), including unsafe  
17 hands/feet (pinching) and scratching.

18 x. Friday, September 7<sup>th</sup>: 41 behaviors (morning), including unsafe hands/feet  
19 and scratching.<sup>88</sup>

20 y. Monday, September 10<sup>th</sup>: no behaviors.

21 z. Tuesday, September 11<sup>th</sup>: 25 behaviors (morning and afternoon), including  
22 unsafe hands/feet. Ms. W. noted that [Student] had "used his words a lot today to  
23 state his needs. He also crossed his [own] arms when he was frustrated. He said  
24 it helped him stay safe."<sup>89</sup>

25 aa. Wednesday, September 12<sup>th</sup>: 4 behaviors (morning), including unsafe  
26 hands/feet, and Student asked three times for a break when he was tired.

27 <sup>87</sup> At hearing, Parent explained that she was concerned about Student's behaviors, how bad or unsafe they  
28 were or if they were minor, whether they were escalating, whether de-escalation strategies were being  
29 used, and whether Student's arms were being crossed. TR Vol. 4 1192-96. Parent was not certain whether  
30 she had been informed of Student's arms having been crossed or whether Ms. Pettitt had made the  
suggestion. *Id.* at 1194-95.

<sup>88</sup> This daily sheet is out of order within Exhibit EEEE, and is found at KESD00620.

<sup>89</sup> Exhibit EEEE at KESD00645.

1 bb. Thursday, September 13<sup>th</sup>: 9 behaviors (morning), including unsafe hands/feet.

2 cc. Friday, September 14<sup>th</sup>: 1 behavior (morning) of unsafe hands/feet.

3 dd. Monday, September 17<sup>th</sup>: 29 behaviors (morning), including 10 unsafe  
4 hands/feet.

5 ee. Tuesday, September 18<sup>th</sup>: 6 behaviors (morning), including crying.

6 ff. Wednesday, September 19<sup>th</sup>: 61 behaviors (morning), including 10 unsafe  
7 hands/feet, 7 yelling, and 1 inappropriate SLG. Ms. W. noted that it was a "tough"  
8 day and that after singing, rocking and hugging, he said that he was "mad" that  
9 mom woke him up and that he just wanted to watch "Good Boy" all day.

10 gg. Thursday, September 20<sup>th</sup>: 3 behaviors (morning), including 1 unsafe  
11 hands/feet.

12 hh. Friday, September 21<sup>st</sup>: 11 behaviors (morning), including 5 unsafe hands/feet,  
13 and Student slept in the afternoon.

14 40. In a series of e-mails on August 21 and August 22, 2012, Parent indicated  
15 to Ms. W. that Student was mentioning to her that his arms were being crossed. In her  
16 email, Parent stated: "Also, he has mentioned this a couple of times and wanted me to  
17 tell you about it. I guess one of the assistant crosses his arms. He really doesn't like this,  
18 I am not sure if this is part of yoga or something else." See Exhibit 70 at 001 and 002.

19 41. Ms. W. responded, reminding Parent as follows:

20 As per KESD policy, we use safe non-violent crisis intervention (NCI) as a  
21 last resort in order to keep everyone safe. The crossing of his arms is one  
22 of the safe NCI holds that we use when [Student] is not being safe to himself  
23 or others. It is typically used to remove him from a situation that causes him  
24 to escalate. Once he is removed from the situation we use the other  
25 strategies (rocking, singing humming, etc.) in order for him to calm down.

26 Parent responded as follows:

27 Maybe we could use something else before going to this method. I just grab  
28 both of his hands and hold them together in one of my hands. The crossing  
29 of his arms is really upsetting him. . . . so just trying to think of things to do  
30 before doing the cross of arms. . . . even say to him ["Student] we are going  
to need to cross your arms if you can't turn it around[."] Or say ["C]an I see  
you give yourself a big hug?["]

Ms. W. responded as follows:



1 As per KESD policy, we use safe non-violent crisis intervention (NCI) as a  
2 last resort in order to keep everyone safe. These NCI holds are approved  
3 by the KESD and are safe.

4 Parent responded, asking:

5 Are we using the techniques that Deborah recommended before using  
6 restraints?

7 42. On August 23, 2012, Parent advised Ms. W. that Ms. Pettitt believed that,  
8 due to "the things that have been happening with [Student]," it would be beneficial for Ms.  
9 Pettitt to be contracted for 3 visits (*i.e.*, observations). Parent wrote:

10 [Ms. Pettitt] specializes in [Student's] disorder and is one of the few (2 to be  
11 exact) that have treatments that work with these kids. I know in the past the  
12 school KESD informed me that they didn't have anyone on staff that  
13 specialized in this disorder. . . . In addition, [Ms. Pettitt] knows . . . the case  
14 the best and her methods are showing progress in the disorder. . . . We are  
15 only in our third week and we have had issues, so we need to do what's in  
16 the best interest of [Student] and having everyone on board with a plan from  
17 a professional (which isn't me) is what's needed at this time.

18 43. On August 30, 2012, Ms. W. informed Parent that they (*i.e.*, the IEP Team  
19 named) did not feel that another observation would be necessary and that they would not  
20 pay for another observation but would pay for up to two hours of consultation in the 2012-  
21 2013 school year "to consult and share strategies that may help if behavior changes start  
22 to occur and the current strategies are no longer effective." See Exhibit HH at  
23 KESD02105.

24 44. In September of 2012, KESD again contracted with Ms. Pettitt to  
25 "collaborate" regarding Student.<sup>90</sup>

26 45. The PWN dated September 10, 2012, sets forth the KESD's agreement to  
27 contract with Ms. Pettitt for up to 2 hours of consultation time for the 2012-2013 school  
28 years as deemed necessary by Ms. W. and implementing staff. See Exhibit G.<sup>91</sup>

29 <sup>90</sup> See Exhibit 35 at 31, written contract for a capped amount for the period from September 5, 2012 through  
30 December 20, 2012; additional hours were set at \$140.00 an hour. The capped amount calculates to 2  
hours at \$140.00 an hour.

<sup>91</sup> See also Exhibit HH, emails regarding Ms. Pettitt's consultation(s) with Ms. W.

1           46.     On September 4, 2012, Ms. Pettitt documented a 40-minute phone consult  
2 with Ms. W.<sup>92</sup> Exhibit HH. In her memorialization, Ms. Pettitt noted that she had shared  
3 some therapy information with Ms. W., that she had some additional neurosequential  
4 assessment information to share, and that she was planning to use the 2 hours of  
5 consultation for that sharing<sup>93</sup> and for one more phone consult. Finally, Ms. Pettitt  
6 indicated in her memorialization that she was not aware whether anyone had agreed to  
7 pay her for that 40-minute time period of work and the additional time spent setting up the  
8 phone meeting and responding to e-mails.

9           47.     In September 2012, Parent requested that Ms. W. provide data comparing  
10 the last 4 weeks of 2011-2012 to the first 4 weeks of 2012-2013.<sup>94</sup> See Exhibit JJ at  
11 KESD02114-15; *see also* Exhibit 72 at 2.

12           48.     On September 10, 2012, Ms. W. provided the comparisons, respectively,  
13 as follows: for not following directions, 40 to 56 incidences; for not respecting others, 53  
14 to 31 incidences; for not respecting property, 19 to 13 incidences; for inappropriate  
15 sounds, language and comments, 38 to 42 incidences; and, for unsafe behaviors, 195 to  
16 105 incidences. Ms. W. opined that Student's behaviors had "stayed consistent." TR Vol.  
17 5 at 1424.

18           49.     On December 13, 2012, Parent e-mailed Ms. W. concerned that a meeting  
19 regarding transportation had taken place without her being present, noting that she had  
20 come out to the bus that morning to discover that Dino and the regular aide/monitor were  
21 not on the bus and that Dino had taken another job. See Exhibit LL. Parent stated that  
22 they needed to "make sure that [the regular aide/monitor] was on the bus for 4 to 6 weeks  
23 minimum until [Student] establishes the trust with the new bus driver."

24           50.     Ms. W. responded to Parent that it was not an IEP meeting and that  
25 Transportation had informed her that Dino's last day would be January 7, 2013; she  
26 indicated that Dino was going to inform Parent. M. W. also noted that Dino had called in  
27 sick that day and that the aid/monitor was late, so they had determined to send a bus with  
28 different staff. Ms. W. noted that she had met with the new transportation staff (after the

29 <sup>92</sup> There is no indication of the impetus or initiator of the phone consult.

30 <sup>93</sup> It is noted that Ms. Pettitt's plans for the 2 consultation hours were clearly at odds with KESD's offer to contract with Ms. Pettitt for consultation as Ms. W. deemed necessary.

<sup>94</sup> Ms. W. verified this request. TR Vol. 5 at 1424.

1 morning drop off) and "discussed successful strategies that we have been using as well  
2 as new strategies that [Ms. Pettitt] and I discussed last week when we met."

3 51. Among her responsive statements, Parent indicated that she wanted to be  
4 informed of all meetings regarding Student and she informed Ms. W. that if the  
5 aide/monitor was not going to be on the bus, Transportation was to call Parent and Parent  
6 "would take him to school that day, so he doesn't get set back and isn't traumatized  
7 (survival mode)."<sup>95</sup> *Id.* at KESD02142. Regarding other IEP goals, Parent was in  
8 agreement not to force Student to remain the entire time in Art, but "we do need to move  
9 forward to getting him to the point that he can be in a regular classroom next year."

10 52. On January 31, 2013, KESD developed an IEP and a BSP for Student.<sup>96</sup>  
11 As stated in the present levels, Student's behavior needs "greatly impact his ability to  
12 successfully participate in general education . . . he needs support that is too extensive  
13 to be met in the general education classroom."<sup>97</sup> The IEP team noted that Parent reported  
14 to Student was developmentally working at a 2 to 3 year old level at this time. See Exhibit  
15 I at KESD00521.

16 53. The IEP team had considered the following information: (a) Academics,  
17 DIBELS, QRI-II, Brigance, Scott Foresman, observation during academic groups; (b)  
18 Behavior, the daily point cards, teacher observation and input, and parent and therapist  
19 input; (c) Speech, therapy data, observation/input, past evaluation information, work  
20 samples; and (d) Occupational therapy, therapy data, observation/input, and work  
21 samples. See Exhibit K.

22 54. The IEP team determined that Student's least restrictive environment was  
23 Level C, inside general education classroom less than 40% of the time.<sup>98</sup> Student's  
24 teacher remained Ms. W. at this time.

25 <sup>95</sup> When asked whether, eventually, this particular aide/monitor was not on the bus and whether that had  
26 traumatized Student, Parent said yes, but she could not remember whether it had caused trauma. TR Vol.  
27 4 at 1296

28 <sup>96</sup> See Exhibit I. The IEP Team members were Parent, Ms. Pettitt, BITEacher, Ms. W., a Speech Language  
29 Pathologist, an Occupational Therapist and OT Assistant, a General Education Teacher, an SEI Teacher,  
30 the Principal and an Assistant Principal. The BSP for Student indicates past behavior support discussions  
took place in November 2010, February 2011, April 2011, and September 2011. Although she was present  
at that meeting, at hearing, Parent argued that she did not "participate" in the meeting, stating "they went  
over it with us." TR Vol. 4 at 1297.

<sup>97</sup> Exhibit I at KESD00520.

<sup>98</sup> Exhibit I at KESD00528.

1           55. The January 2013 IEP contains multiple academic goals for Writing –  
2 Elementary (3), Language – Integrated Language (2), Reading – Elementary (2), and  
3 Math – Elementary (3).<sup>99</sup> In addition to the specially designed instruction in education  
4 and social support services, the IEP provided for transportation, occupational therapy and  
5 speech therapy as related services.<sup>100</sup>

6           56. KESD again developed two behavioral goals for Student. The two behavior  
7 goals in the January 2013 IEP were as follows:

8           a. When upset, frustrated, or angry, [Student] will increase coping skills and  
9 self-advocacy skills by using identified strategies (deep breaths, verbal  
10 requests for break/hug/snack/swing, counting, going to quiet spot in room)  
11 independently to decrease disrespectful and disruptive behavior to less  
than 2 per day as measured by daily point cards and reported on  
quarterly.<sup>101</sup>

12           b. Across all settings, [Student] will maintain safe behavior by keeping his  
13 hand/feet/objects/body (including spitting) to himself (in reference to intent  
14 to harm others) with 5 or less incidents per week as measured by daily point  
cards reported on quarterly.<sup>102</sup>

15           57. Over the past year, Student's progress on Goal #1 from the February 2012  
16 IEP was noted to have been "almost met," his progress measured to be at "3 to 4 out of  
17 5" occasions when he was able to use coping skills and independently de-escalate or  
18 prevent his behavior from escalating; the goal had been to do so on 4 of 5 occasions.  
19 The January 2013 IEP set a goal to use coping skills to independently decrease  
20 disrespectful and disruptive behaviors to only two *times a day*. On Goal #1, Student's  
21

22  
23 <sup>99</sup> Ms. W. noted that she was working on second grade curriculum with Student at that time. TR Vol. 5 at  
1503.

24 <sup>100</sup> KESD found that no additional information was necessary regarding continuing Student's  
25 speech/language services. TR Vol. 4 at 1090-91. The Speech/Language Pathologist, Ms. Forbes, opined  
26 that Student's language deficits did not contribute to his behaviors. TR Vol. 4 at 1162-63. The team  
considered whether additional occupational service time was needed, but determined that it was not  
because Student was showing progress on his OT goals as he was able to work on OT goals throughout  
the day. See Exhibit 6 (PWN dated February 1, 2013) at 022-23.

27 <sup>101</sup> Exhibit I at KESD00523. On Goal #1, Student's score at that time was noted to be an "avg. of 4.5 per  
28 day." Goal #1 was now monitoring Student's ability to use behavior strategy skills through tracking the  
decreases in disrespectful and disruptive behaviors rather than just tracking the number of times he used  
a strategy. TR Vol. 5 at 1390. Ms. W. noted that the behaviors were still present but Student was able to  
29 use calming strategies and return to the task or classroom. Exhibit I at 1391.

30 <sup>102</sup> Exhibit I at KESD00530. On Goal #2, Student's score at that time was noted to be an "avg. of 10.6 per  
week."

1 "score" in January 2013 was noted to be "avg. of 4.5 per day" with the comment that he  
2 "spends a majority of day working one-on-one with SPED staff."<sup>103</sup>

3 58. Over the past year, Student's progress on Goal #2 from the February 2012  
4 IEP was noted to have been "not met" with an average of 2.1 incidents a day of unsafe  
5 behaviors. The January 2013 IEP set a goal to be 5 or fewer incidents per week. On  
6 Goal #2, Student's "score" in January 2013 was noted to be "avg. of 10.6 per week" with  
7 the comment that he "spends a majority of day working one-on-one with SPED staff."<sup>104</sup>

8 59. In the January 2013 BSP, KESD again determined that behaviors impede  
9 Student's learning. The IEP Team identified the two overall problematic behaviors:

- 10 a. Unsafe behaviors, including spitting, kicking, scratching, biting, hitting, throwing  
11 objects, pinching, and self-injurious behavior; and
- 12 b. Disrespectful and disruptive behaviors, including inappropriate language,  
13 threatening comments, calling names, mimicking others, yelling, crying, talking  
14 out, and making noises at inappropriate times.

15 60. The baseline data for the targeted behaviors were as follows:<sup>105</sup>

- 16 a. Unsafe behaviors: average of 4.5 per day.
- 17 b. Disrespectful/disruptive behaviors: average of 10.6 per week.

18 61. The IEP Team indicated the replacement behaviors sought were:

- 19 a. Student will be able to use coping strategies and self-advocacy skills (taking  
20 deep breaths, counting, going to quiet safe place, using his words to express  
21 feelings, ask for a break/use a break card, rock in rocking chair, laying in pillows,  
22 using his coping cards, asking to swing) in order to prevent unsafe behaviors from  
23 occurring; and

24 <sup>103</sup> Regarding Goal #1, in May 2012, KESD had noted an increase in disruptive and disrespectful behaviors  
25 for that quarterly report in several circumstances when given a direction: to stop a desirable activity; to do  
26 something he did not want to do; and to stop doing something he did not want to stop. The results of such  
27 staff directions were Student's meltdowns including crying, name calling, inappropriate words and unsafe  
28 behaviors. See Exhibit 19 at 11.

29 <sup>104</sup> Regarding Goal #2, in May 2012, KESD noted that Student had "really progressed" on this goal and was  
30 "using his words a lot more than unsafe behaviors." Exhibit 19 at 12. In December of 2012, KESD noted  
that Student was showing progress (*i.e.*, from the baseline since February of 2012) but that unsafe  
behaviors occurred when he was frustrated with academic tasks, when asked to stop a desirable activity,  
when tired or hungry, when he is not getting attention, and when he "has to go to Art or Music." At the  
score level of 2.1 incidents per day in both December 2012 and January 2013, KESD noted that Student  
had made "tremendous" progress on this goal despite not meeting it. Exhibit 19.

<sup>105</sup> The IEP indicated that a "summary graph/chart of data collected" was attached. Neither KESD's Exhibit  
I nor Petitioner's Exhibit 6 contain such attachments. Exhibit EEEE (pages KESD00619-730) contains the  
daily point sheets, designated as "Point Cards," for dates from August 6, 2012 through January 31, 2013.

b. Student will use above coping strategies when becoming overwhelmed and/or frustrated instead of exhibiting disrespectful and disruptive behaviors.  
The following positive reinforcements could be used for Student when he used appropriate behaviors: classroom incentives (earning money to purchase items at the class store; positive praise; earning choice time at the end of the day if work is complete and behavior is good; being recognized as a role model student; high fives, knuckles, hugs, dancing with teacher, and, imaginative play make [Student] very happy.

62. The IEP Team identified the following antecedents:

- a. Distractions;
- b. Anxiety over work;
- c. When unsure what is expected or what to do next;
- d. Given down time
- e. When play is not structured;
- f. When feeling overwhelmed;
- g. When unsuccessful at task;
- h. When needing sensory input;
- i. When desiring imaginative play;
- j. When desiring interaction with others;
- k. Large group settings;
- l. Long periods of time (more than 5 minutes);
- m. During times where there is more auditory and visual stimulation (including other students "melting down");
- n. When asked to stop a desired activity (choice time/computer);
- o. When the bell rings;
- p. When staff is not in close proximity;
- q. When hungry and/or tired; and
- r. When he gets hurt or scared.

63. The IEP Team set forth the following twenty-five (25) positive supports:<sup>106</sup>

- a. Verbal time warning (this works sometime and is a trigger other times. Example: giving him a reminder to shut down computer works, but giving him a reminder to clean up when playing with toys is a trigger);
- b. Allowed to stand instead of sit;
- c. One-on-one support for academic lessons;
- d. Separate desk if needed to reduce stimulation;
- e. Be predictable, consistent, and repetitive. Students with RAD are very sensitive to changes in schedules, transitions, surprises, and chaotic social situations. This may help [Student] feel safe and secure, which in turn will reduce anxiety and fear;
- f. Model, narrate, and teach [Student] appropriate social behaviors (Explain what you are doing and why);

<sup>106</sup> The identified instructional supports are not restated here; none of the Amended Complaint issues go to instructional matters.

- g. Avoid power struggles. When intervening, present yourself in a matter of fact style. This may reduce [Student's] desire to control the situation;
- h. When possible use humor. [Student] may be attempting to get an emotional response from you or engage you in a power struggle;
- i. Identify a place for [Student] to go to regain composure during times of frustration and anxiety;
- j. Limit group activities, as this may increase the [Student's] anxiety and need to control;
- k. Give immediate feedback, gratification and consequences;
- l. Allow choices – reinforce the idea that [Student] continually makes choices, and then move to making “better” choices;
- m. Choose your battles;
- n. Create activities to help build [Student's] self-esteem;
- o. Provide movement activities – dancing, rhythmic movement, sitting in a rocking chair;
- p. Insist on eye contact;
- q. Acknowledge good decisions and behavior; give matter-of-fact consequences for inappropriate behavior or poor decisions;
- r. Avoid harsh, punitive consequences, as those will only reinforce the student's mistrust of adults;
- s. Be consistent and specific. Do not allow any “slack”, as [Student] may view that as room to manipulate or try to regain control;
- t. Use a team approach – one person should not be responsible alone;
- u. Insist on the use of titles to reinforce rank ([teacher name], [name], etc.);
- v. Use natural consequences when possible (“You made a mess. Clean it up.”);
- w. Have a crisis plan, including a place that [Student] can go . . . to regain control if need be;
- x. If [Student] is stressed, try to determine if he is bored, tired, or overwhelmed and adjust accordingly; and
- y. Saying “You do good things, you get good things” is quick verbal reminder that usually helps [Student] get back on track.

64. The IEP Team had identified specific interventions for two types of Student's behaviors, as follows:

i. For unsafe behaviors:

A. If staff can see [Student's] behaviors start to escalate or can predict that behaviors may escalate due to a change/undesirable activity, the staff will be proactive and go over coping strategies with him prior to the change/undesirable activity occurring or prior to the behaviors escalating.

B. If [Student] is Exhibiting unsafe behaviors, the staff will use NCI techniques (crisscross his arms) to move him to safe place.

1 C. Once in the safe place, the staff will get down to his level and ask him, "Why  
2 are you mad?" and/or "What do you need?" and remind him to use coping  
3 strategies/model coping strategies in order to help him calm down.

4 D. If [Student] is unable to calm down, the staff will take him to swing, rub his back,  
5 or just let him sit in a chair with teacher sitting next to him until he is calm.

6 E. When calm, staff will process with [Student] by prompting him to use a coping  
7 strategy. For example, if someone is being loud, prompt him to say "Please be  
8 quiet" or cover his ears.

9 F. When [Student] is calm and has had time to process with the staff, he will return  
10 to class.

11 ii. For disruptive/disrespectful behaviors:

12 A. If [Student] is exhibiting disruptive/disrespectful behaviors, the staff will get on  
13 his level and remind him of the appropriate behavior to Exhibit and remind him of  
14 his coping strategies if appropriate.

15 B. If behaviors continue, the staff will take [Student] by his hand and remove him  
16 from the situation.

17 C. Once in the safe place, the staff will get down to his level and ask him, "Why  
18 are you mad?" and/or "What do you need?" and remind him of coping  
19 strategies/model coping strategies in order to help him calm down.

20 D. If [Student] is unable to calm down, the staff will take him to swing, rub his back,  
21 or just let him sit in a chair with teacher sitting next to him until he is calm.

22 E. When calm, process with [Student] by prompting him to use a coping strategy.  
23 For example, if he was overwhelmed/frustrated over a situation remind him to take  
24 deep breaths and use his words to express his feelings to that the teacher can help  
25 him get to a safe place.

26 F. When [Student] is calm and has had time to process with the staff, he will return  
27 to class.

28 65. In the January 2013 IEP, Student's BSP was modified from the prior BSP  
29 dated February 14, 2012. The changes to the BSP included varying the interventions  
30 based on Student's specific Exhibited behaviors, whether they were unsafe behaviors or  
were only disruptive or disrespectful behaviors.



1       66. At hearing, Ms. W. stated that the change to using an NCI hold was based  
2 on "the need to get [Student] to a safe place" and that they were "moving on" from  
3 "cradling him and what we were doing before ... into the next strategy." TR Vol. 5 at  
4 1495.

5       67. Parent and Student's private therapist, Deborah Pettitt were present at the  
6 January 31, 2013 meeting at which time the new BSP was developed.

7       68. In December 2012, Parent had previously indicated to Ms. W. that Student  
8 was like a 2-year old. See Exhibit 74 at 009, indicating: "[Student] loves taking apart and  
9 putting things together right now ... just like any two year old. ... He has a very small  
10 circle of trust ... teachers, nannies, assistants, bus driver, bus assistant, and parent. He  
11 is socially a two year old, so we need to treat him like a two year old ... give him lots of  
12 love and chances to succeed. He really is a sweet kid with a nasty disorder that he is on  
13 the extreme side of." <sup>107</sup>

14       69. At hearing, Deborah Pettitt indicated that, at the time of his return to KESD  
15 in January 2012, Student was "probably 18 months emotionally." See TR Vol. 3 at 695.  
16 At hearing, when discussing an observation of Student at KESD, Ms. Pettitt indicated that  
17 Student "[was] an emotional two year old." *Id.* at 781. Other than Parent's and Ms.  
18 Pettitt's statements in 2012, there were apparently no further indications of Student's  
19 emotional developmental age as the 2012-2013 academic year continued. Ms. Pettitt  
20 observed Student several times, the dates of which are not all contained in the hearing  
21 record. <sup>108</sup>

22       70. In January 2013, Student's strengths regarding behaviors were noted as  
23 follows: <sup>109</sup>

24       [Student] is becoming more independent. Although [Student] needs one-on-  
25 one support (someone in close proximity) throughout the day, he does not  
26 need the physical guidance (holding hands sitting on lap, rocking, etc.) that  
27 he needed a year ago. . . . [Student is able to use his words to express his  
28 needs/ wants/feelings much more than he did a year ago with teacher  
29 support. . . . [Student's] unsafe behaviors have reduced over the past year.

30 <sup>107</sup> In this regard, Parent is referencing Student's RAD.

<sup>108</sup> However, it is known that Ms. Pettitt observed Student on August 15, 2013. *Id.* at 800.

<sup>109</sup> See Exhibit I at KESD00519.

1 If he starts to get distracted during tasks, counting or using an element of  
2 surprise (increasing voice volume, singing a song, using pretend play) may  
3 help him focus. . . . [Student] has decreased the behaviors of throwing and  
spitting food at others during snack and lunch.

4 Student's weaknesses regarding behaviors were noted as follows:<sup>110</sup>

5 [Student] continues to need constant supervision throughout the day.  
6 Although he does not need constant physical contact, a  
7 teacher/instructional assistant needs to be in close proximity at all times . .  
8 . . . Behaviors that [Student] Exhibits when he gets  
9 upset/frustrated/overwhelmed include: yelling, inappropriate language.  
10 comments, kicking, scratching, spitting, biting, calling names, mimicking  
11 others, making threats, telling others to shut-up and throwing objects; when  
12 triggers are observed, the adults are able to work with [Student] on calming  
13 strategies prior to behaviors escalating to an elevated level. [Student] is  
14 very impulsive; therefore it is hard at times to tell when or why a behavior  
15 may occur. There have been times that [Student] is sitting nice working  
16 hard or playing and he starts yelling at students, calling name, using bad  
17 language and throwing items. When asked what happened or why he  
18 started the behavior he will often reply with a negative comment about  
19 others. After some questioning, it usually turns out that he is tired, hungry,  
20 stressed/overwhelmed (this is seen when going to art and music was  
21 attempted) or he doesn't know why and he will ask for a hug or says he's  
22 sorry. There are time when [Student] gets into a negative frame of mind  
23 and it takes a long time for him to come out of it even when calming  
24 strategies are used that typically work. When this happens, [Student] is  
25 removed from the room and taken to the sensory room. The sensory room  
26 does not necessarily help him come out of this state, but it is a quiet, more  
27 private place for him to be in order for the episode to come to an end. At the  
28 end of the episode, [Student] may be able to explain why the episode  
29 happened (same as above) or not have an explanation at all. [Student]  
30 does need consistent snacks . . . as well as times to rest throughout the  
day. If he is hungry and/or tired, behaviors will escalate.

24 The Additional information considered by the IEP team indicated:

25 [Student] does attend social skills group in the resource classroom.  
26 [Student] does go to recess with his 2<sup>nd</sup> grade general education class with  
27 the support of extended resource staff. [Student] does attend PE with his  
28 2<sup>nd</sup> grade general education class with the support of the extended resource  
29 staff. [Student] was introduced to art and music, but became very frustrated  
30 and overwhelmed by this experience. He would often get stomach pains  
and have meltdowns prior to going to these specials classes. While in the  
classes, [Student's] behaviors would start to escalate so he would be

<sup>110</sup> *Id.* at KESD00520.

1 removed to a safe place where he would then express his feelings of not  
2 wanting to go to art and music because it was too much for him (too many  
3 students, too many directions, too long to sit, too many noises, etc.). After  
4 several attempts to change strategies in order for him to be successful in  
these classes with no positive results, [Student] was no longer expected to  
attend art and music.<sup>111</sup>

5 71. In April 2013, at a "retention meeting," the parties agreed that Student would  
6 repeat second grade in the coming academic year due to Student's emotional and social  
7 skills level.<sup>112</sup> Ms. W. recalled that Ms. Pettitt was on the phone at the retention meeting.  
8 TR Vol. 5 at 1408.

9 72. During January 2013 through May 2013, Student's unsafe behaviors and  
10 hitting, throwing, scratching and spitting increased, and Student was restrained more  
11 frequently during that time period than he had been in the Fall of 2012. Ms. W. was still  
12 Student's teacher; however, there had been a change in the bus driver in January 2013.<sup>113</sup>

13 73. During December 2012 through May 2013, the daily point cards<sup>114</sup> indicated  
14 the number of days in the months specifying the problems of scratching, spitting, and/or  
15 unsafe hands/feet:<sup>115</sup> December (5); January (11); February (5); March (5); April (9); and,  
16 May (6).

17 74. During December 2012 through May 2013, the daily point cards indicated  
18 the number of days in the month specifying a criss-cross, a restraint, a removal to another  
19 setting/room (using various methods, including just holding his hands and walking with  
20  
21  
22  
23  
24  
25  
26

27 <sup>111</sup> Ms. W. confirmed these efforts to introduce Student to general education specials, on Parent's requests.  
28 TR Vol. 5 at 1374-75, and at 1456-58.

29 <sup>112</sup> See Exhibit NN at KESD02281-82 and Exhibit OO at KESD02285; see also TR Vol. 4 at 1200-01.

30 <sup>113</sup> TR Vol. 4 at 1190.

<sup>114</sup> See Exhibit EEEE.

<sup>115</sup> These behaviors are among the identified target behaviors that interfere with Student's learning. Exhibit  
I at KESD00530.

1 him) or "went to sensory room": December (4);<sup>116</sup> January; <sup>117</sup> February (2);<sup>118</sup> March  
2 (4);<sup>119</sup> April (6);<sup>120</sup> and, May (6).<sup>121</sup>

3 75. In response to Student's arms being crossed that day,<sup>122</sup> Parent responded  
4 on the May 1, 2013 daily point card that the KESD should contract with Ms. Pettitt "for the  
5 next semester so she can give you solutions to recess & time when no triggers or things  
6 don't work. [Student] really is hating his arms crossed. It's causing him stress & trauma."

7 76. A series of e-mails in May 2013 addresses the subject of Student's arms  
8 being crossed. See Exhibit 70 at 003-05. On May 2, 2013, Parent wrote:

9 I have noticed we are doing this more often. [Student] had a dream about it  
10 last night and this morning he was crying and didn't want to go to school.  
11 When I asked him why he said 'my teachers and [Ms. W.] don't like me'. I  
12 told him that's not true, he then said 'they cross my arms and I don't like it.'  
13 I explained that it was due to scratching hitting etc. [Student] started crying  
14 and said 'I can't.' *So the crossing of arms is causing him trauma right now,*  
15 *he is telling us what he needs is love and hugs. We don't want to set him*  
16 *back in therapy, since we seem to be moving forward at a great pace. A*  
17 *solution would be to grab his hands and remove him or you could get*  
18 *another contract with Deborah to work out other solutions. We do not want*  
19 *to criss cross his arms at this time, since it's causing him nightmares, stress*  
20 *and trauma. We need another solution that would not violate his disorder.*

21 <sup>116</sup> December dates: 12-3-12 (removal from Art class to room), KESD00673; 12-4-12 (criss-cross, *two times*  
22 *and taken to swing*), KESD00674; and, 12-17-12 (taken to sensory room), KESD00683.

23 <sup>117</sup> January dates: 1-7-13 (criss-cross), KESD00712; 1-11-13 (removal to quiet room), KESD00716; 1-29-  
24 13 (criss-cross), KESD00728; and, 1-31-13 (criss-cross and removal to quiet room), KESD00730.

25 <sup>118</sup> February dates: 2-6-13 (moved to quiet room), KESD00734; 2-7-13 (removal from PE to room),  
26 KESD00735; and, 2-12-13 (criss-cross), KESD00738.

27 <sup>119</sup> March dates: 3-18-13 (criss-cross to remove to another room), KESD00757; 3-20-13 ("restrained" and  
28 removed from recess to room), KESD00759; 3-25-13 (criss-cross and remove from lunch recess to quiet  
29 room), KESD00762; and, 3-26-13 (criss-cross, at afternoon recess), KESD00763.

30 <sup>120</sup> April dates: 4-9-13 (criss-cross and removal from Recess to sensory room), KESD00772; 4-18-13  
(removal from PE to room), KESD00779; 4-22-13 (criss-cross and removal to sensory room), KESD00781;  
4-29-13 ("moved" away from others), KESD00786; and, 4-30-13 (criss-cross and taken to sensory room  
*two times*) KESD00787.

<sup>121</sup> May dates: 5-1-13 (criss-cross), KESD00788; 5-6-13 (removal to sensory room, and escorted from  
reading aloud), KESD00792; 5-7-13 ("restrained" and taken to seclusion; Student was angry about having  
a substitute and when directed to sit down and get ready for morning meeting, turned and kicked another  
student "very hard in the ribs;" and, removal from Recess line-up to sensory room), KESD00793; 5-8-13  
(removal to sensory room), KESD00794; 5-9-13 (removal by holding hands to next room), KESD00796;  
and, 5-18-13 (removal from room to sensory room), KESD00798.

<sup>122</sup> The daily point card indicated that Student had become "upset, tried to scratch and bite teacher." Exhibit  
EEEE at KESD00788.

1 FYI, it was done the last two days, so are we trying everything else  
2 first????? Before it was done a few times a month.<sup>123</sup>

3 Emphasis added here.

4 Ms. W. responded as follows:

5 Honestly [Parent], [Student] Exhibits similar behaviors you described . . . at  
6 school regarding things that happen at home and Kids Club.<sup>124</sup> We all want  
7 [Student] to be safe both physically and emotionally. Physical intervention  
8 is always our last resort when working with students.<sup>125</sup> We try every  
9 positive strategy we can prior to using physical intervention with all of our  
10 students.<sup>126</sup>

11 We have been very careful about when we cross his arms. When I see  
12 others getting hurt, this needs to be dealt with fast and safely. We do not  
13 hold his arms for longer than it takes to get him away from peers so that  
14 they are safe. We use the appropriate hold to make sure he is safe. We take  
15 him to a safe place to provide the strategies he needs in order for him to  
16 calm down and move forward.

17 We have seen an increase in behaviors this week. I do believe that a lot of  
18 this has to do with [Student] not feeling well. At the beginning of the week,  
19 he complained a lot about his nose and throat hurting. He was very tired  
20 and you could tell that he wasn't himself. I think that is why the positive  
21 strategies weren't working and he resorted to more physical behaviors. He  
22 seemed to feel better yesterday and was back to [Student].

23 <sup>123</sup> Parent's statements again demonstrate that Student was exhibiting the same behaviors, and if restrained  
24 due to those behaviors, having the same "emotional" reactions earlier in 2013, not just in August and  
25 September of 2013.

26 <sup>124</sup> Student began to go to "Kids Club" at KESD in January 2013. TR Vol. 5 at 1569-70. Parent indicated  
27 that she met with somebody in Kids Club and that they had indicated to her that they had looked at Student's  
28 IEP and had talked with Ms. W. about Student. Ms. Pettitt had not been called upon to provide any training  
29 or input for the Kids Club personnel.

30 <sup>125</sup> At hearing, Ms. W. confirmed that restraint was a last resort and that all other measures were tried before  
31 restraint unless it was a situation of immediate danger to Student others around him. TR Vol. 5 T 1506.

32 <sup>126</sup> At hearing, Ms. W. noted that Parent was consistently against the crossing of Student's arms but Ms.  
33 W. had found that using Parent's preferred method "was not safe for Student or helping to get him moved  
34 to a safe place." TR Vol. 5 at 1425. Ms. W. felt that the issue of crossing of Student's arms "took over  
35 everything" and Ms. W. found that Student was "repeating the same things that Mom was writing in her e-  
36 mails to me," concluding that he had "had to get that information from somewhere." *Id.* at 1426. Ms. W.  
37 indicated that as soon as Student got off the bus, he would say to her "my mom says you can't crisscross  
38 my arms, so you can't crisscross my arms." *Id.* Ms. W. further indicated that the NCI forms for holds and  
39 escorts were only used when a student was taken to the seclusion room, and that data about her holds and  
40 escorts were found on the daily point cards. *Id.* at 1427 and 1465-67. Ms. W. did not ever take Student to  
41 the seclusion room and she further noted that the "restraint" and "seclusion room" notation on the May 7,  
42 2013 daily point card was not in her handwriting and that she did not know who had made that notation. *Id.*  
43 at 1497.

1 Parent responded as follows:

2 If we could just try everything else before we cross his arms that would be  
3 wonderful. If it's a safety factor, here's what I do . . . just grabbing his hands  
4 and pulling him out of the situation is just as effective and quicker than  
5 crossing his arms. At kids club, Beth is the only one trained in the crossing  
6 of his arms. Ms. Parker just holds his hands which works just as well and  
7 doesn't cause him trauma or they just have him go do relaxation and he  
8 falls asleep (which is what he needs.)

9 77. Ms. W. described the NCI hold as putting the student's hand under each  
10 arm and then standing behind the student while holding the student's wrists. TR Vol. 5  
11 at 1428. Ms. W. indicated that when she would attempt to use Parent's preferred method  
12 of holding Student's arms above his head to try to move Student to a safe place that "his  
13 whole body just twisted and his legs went everywhere" causing more damage and being  
14 dangerous for those around him and for himself. TR Vol. 5 at 1429.

15 78. Parent's preferred method, on recommendation of Ms. Pettitt, for the  
16 needed intervention at such times was to hold both of Student's hands above his head  
17 and walk him somewhere.<sup>127</sup> At hearing, Parent gave a variant description of the  
18 preferred method as being that the person should grab "both of his arms" and "holding  
19 him" walk him back and forth or up and down the hallway.<sup>128</sup>

20 79. Ms. W. described Student as having a good sense of humor, and an  
21 adorable smile, noting that he would take her hand and kiss it and call her a princess. TR  
22 Vol. 5 at 1431. However, Ms. W. also noted that Student would at times, threaten her, to  
23 kill her, cut her head off and hand it from the ceiling.<sup>129</sup> TR Vol. 5 at 1422. Ms. W. would  
24 use humor to redirect Student from such statements. *Id.*

25 <sup>127</sup> BITeacher testimony, TR Vol. 2 at 592-94.

26 <sup>128</sup> TR Vol. 4 at 1205.

27 <sup>129</sup> Similar threatening statements were made in the next academic year regarding Ms. J.; therefore, it  
28 cannot be concluded that only the actions of Ms. J. in the Fall of 2013, and any alleged trauma therewith,  
29 caused Student to harbor such thoughts and/or make such statements. At hearing, Parent indicated that,  
30 with respect to Student saying such things to Ms. W., Parent believed that he was saying these things to  
garner attention or to get a reaction. TR Vol. 4 at 1208. If that is the case psychologically, then it cannot  
reasonably be believed that the statements were being made in September of 2013 to Ms. J. as a result of  
the restraints Student experienced in 2013. The hearing record documents that Student experienced  
multiple restraints in academic year 2012-2013, and it cannot be denied that he said the same things to, or  
about, Ms. W. and Ms. J.

1 80. Ms. W. was aware of Student's behavior incidents on the bus, indicating at  
2 hearing that she had prepared strategies for support for Student to be safe on the bus  
3 and that she and Ms. Pettitt had provided training to bus personnel.<sup>130</sup> TR Vol. 5 at 1410-  
4 11.

5 81. When her opinion was sought in the Fall of 2013 in regard to whether her  
6 data demonstrated the need for Student to have a different placement, Ms. W. indicated  
7 that it did not. TR Vol. 5 at 1414 and 1463.

8 82. At hearing, BITeacher explained that Parent's "preferred" and  
9 recommended method is not a physical restraint and she indicated, therefore, a restraint  
10 form would not have been filled out when they used the "preferred" method, for the reason  
11 that the KESD personnel is not physically restraining Student, but is only taking his hands  
12 and walking with him to remove him from the setting.<sup>131</sup> BITeacher further noted that  
13 there could be times when a student might be a danger to himself or others and the KESD  
14 personnel might not do a physical restraint but might de-escalate the situation through  
15 other means.<sup>132</sup>

16 83. BITeacher disagreed with Petitioners' position that an FBA needed to be  
17 done for Student in 2013. BITeacher opined that no further FBA needed to be done  
18 regarding Student because KESD was seeing progress when looking at his accessing  
19 academic learning.<sup>133</sup> TR Vol. 2 at 610-11. BITeacher agreed that an FBA could be used  
20 to determine what the function of a behavior might be, indicating that an FBA would  
21 typically be considered "if the school team is not sure what the function of the behavior  
22 was and [an] FBA has not been conducted . . . and the behavior was resistant to  
23 interventions." TR Vol. 2 at 567. BITeacher acknowledged that a KESD IEP team would  
24 consider conducting an FBA in a situation where, when not under the IDEA disciplinary  
25 provisions, they were seeing patterns of behavior that were resistant to interventions  
26 when supports were in place and a student was still not accessing academic learning and  
27

28 <sup>130</sup> At the October 2, 2013 IEP meeting, transportation personnel indicated that the transportation staff had  
29 been trained, just not trained in the NCI methods. See Exhibit 84 at 26.

30 <sup>131</sup> TR Vol. 2 at 592-94.

<sup>132</sup> *Id.* at 595

<sup>133</sup> She further indicated that when a student is making progress, KESD would not conduct additional  
evaluations. TR Vol. 2 at 610-11.

1 not making academic progress. TR Vol. 2 at 610-11. BITeacher noted that an FBA was  
2 just one mechanism used to develop a behavior intervention or support plan, and that  
3 data collection, such as Antecedent Behavior Consequence data, could be used and  
4 reviewed. TR Vol. at 567 and 569. BITeacher disagreed with Petitioners' position that an  
5 increase in the use of a restraint, by itself, was an indicator that a behavior was resistant  
6 to intervention. TR Vol. at 568. BITeacher informed the IEP team that, at school, they  
7 were seeing the same behaviors they had been seeing in the prior year but were not  
8 seeing the types of behaviors that Parent was reporting seeing at home. See Exhibit 76  
9 at 34.

10 84. With regard to parental notification, BITeacher indicated that, under the  
11 former and existing policy, a parent was to be notified regarding a physical restraint of  
12 their student.<sup>134</sup>

13 85. In her response on the May 7, 2013 daily point card, Parent expressed her  
14 concern about Student's arms being crossed, indicating that it was her belief, along with  
15 Ms. Pettitt's, that the crossing of Student's arms was putting him in a trauma mode,  
16 bringing back memories of being in the orphanage where multiple medical procedures  
17 were done during which crossing of his arms was "one" of the methods used to restrain  
18 him<sup>135</sup> (i.e., hold him down on the bed<sup>136</sup>). Parent wrote that Student would "keep doing  
19 these behaviors<sup>137</sup> to test to see if you cross his arms." Parent further indicated: "[s]o, it's  
20 professionally recommended that we just grab both hands, remove him & rock him. This  
21 will take time for him to trust you won't cross arms."

22 86. Ms. W. left her particular KESD position after May of 2013. She attributed  
23 her decision to not continue on at that particular school and classroom to being

24 <sup>134</sup> Petitioners ventured into evidence and proffered arguments about non-compliance with a former, and/or  
25 a newer, KESD policy for notification of a parent in the event of a physical restraint, and by what notification  
26 method. Those efforts were cut short at hearing, as being beyond the issues raised in the Complaint and  
27 also beyond the scope of this IDEA due process notice. Concerns about alleged violations of KESD policy  
28 would, more appropriately, have been raised as a "state complaint" matter. Additionally, the KESD Policy  
29 had not been proposed as an Exhibit at disclosure; therefore, Petitioners' request to consider the admission  
30 of a KESD policy, as informative to the circumstance of whether KESD appropriately determined Student's  
needs, was denied. TR Vol. 2 at 579; TR Vol. 8 at 2273.

<sup>135</sup> Exhibit 22 at 127-28; cf. Exhibit EEEE at KESD00793 for May 7<sup>th</sup> and KESD00795 (page 00795 is out  
of order in Exhibit EEEE.). See also Parent testimony, TR Vol. 4 at 1203-05.

<sup>136</sup> Advocate testimony, TR Vol. 1, at 194; see also Parent testimony, TR Vol. 4 at 1299-1300.

<sup>137</sup> The daily point card for this May 8, 2013 indicated behaviors of inappropriate SLG and yelling. There is  
no evidence that KESD was crossing Student's arms for the behaviors of inappropriate SLG or yelling.



1 emotionally exhausted as to working with Student due to having fought constant  
2 complaints and issues from Parent about every change or everything that was done in  
3 the classroom regarding Student, and feeling as having been treated by Parent as having  
4 no expertise and being given no recognition by Parent for the tremendous amount of  
5 support she had given to Student and for the progress he had made during the three  
6 semesters with her, and, finally, further sensing that she would be facing the same  
7 situations for the next "retention" year that Student would be in her classroom. TR Vol. 5  
8 at 1432-35 and 1445-50.

9 87. Student's May 22, 2013 progress report on Goal #1 noted the following:

10 [Student] did Exhibit more disruptive/disrespectful behaviors this quarter.  
11 The staff really saw an increase when given a direction to stop a desirable  
12 activity/when told to do something he didn't want to do/stop something he  
13 didn't want to stop. (example: [Student], it is time to shut-down the  
14 computer; [Student], Please sit in big space; [Student], chew with your  
15 mouth closed.). These directions lead to meltdowns of crying, name calling,  
16 inappropriate words, and unsafe behaviors. Calming techniques were used  
17 to move [Student] past these behaviors to return to a good place. Calming  
18 strategies are listed in his IEP and BSP.<sup>138</sup>

19 88. Student's May 22, 2013 progress report on Goal #2 noted the following:

20 [Student] did Exhibit more aggressive behaviors this quarter. The staff really  
21 saw an increase when given a direction to stop a desirable activity/when  
22 told to do something he didn't want to do/stop something he didn't want to  
23 stop. (example: [Student], it is time to shut-down the computer; [Student],  
24 Please sit in big space; [Student], chew with your mouth closed.). These  
25 directions lead to meltdowns of crying, name calling, inappropriate words,  
26 and unsafe behaviors. Calming techniques were used to move [Student]  
27 past these behaviors to return to a good place. Calming strategies are listed  
28 in his IEP and BSP.<sup>139</sup>

29 89. Student attended ESY 2013, and had the same ESY teacher as in ESY  
30 2012. ESY Teacher indicated that there is far less academic rigor in ESY and that Student  
was able to do more "preferred" activities; ESY Teacher estimated that Student  
participated in academics perhaps forty-five (45) minutes to an hour and a half hour during  
a four hour ESY day "depending on how he was feeling or his fatigue level." TR Vol. 3

<sup>138</sup> Exhibit J at KESD00543.

<sup>139</sup> *Id.* at KESD00544

1 at 834-36. Parent observed an ESY session in 2013, and noted that it was very low key  
2 with Student and only 2 other children, and low stimulation in a calm and relaxed situation.  
3 TR Vol. 4 at 1210. Student's June 27, 2013 progress reports on behavior goals during  
4 ESY indicated that he "maintained" progress.<sup>140</sup>

5 **Academic Year 2013-2014**

6 90. On July 31, 2013, KESD notified Parent that Student would have a new  
7 teacher, Ms. J., because Ms. W. had taken a different position.<sup>141</sup> This notification was a  
8 telephone call; the participants were BITeacher, Ms. J., Ms. W., and the School  
9 Principal.<sup>142</sup>

10 91. Parent immediately contacted Dr. Dukes and requested another contract  
11 with Ms. Pettitt.<sup>143</sup> Parent indicated:

12 As you know [Student] has come a long way with overcoming his [RAD].  
13 This disorder has to do with the neglect and abuse when he was a baby so  
14 he has trouble feeling safe . . . and this is the aggressions we see as a  
15 reaction to his feeling safe. . . . we need to have Deborah . . . contracted  
16 again with the KESD for at least the first quarter. She can do LICENSED  
17 therapy techniques with brushes and rapid eye movements . . . to help his  
18 'survival' brain feel safe. . . . Please have the contract sent to Deborah by  
19 Friday, August 2<sup>nd</sup> @ 2 pm, since I am meeting with everyone at school at  
20 this time and can make the arrangements.

21 Unfortunately, we WILL see regression . . . just don't want him to get frozen  
22 in survival mode and end up in residential care gain, so it is very important  
23 we get Deborah out to the school next week to reduce the regression and  
24 also educate the new teacher on RAD so she has a better understanding.  
25 Also, I want to make sure his new teacher has read the books on RAD . . .  
26 not just learning techniques that were working for [Student], because they  
27 might change or might not work with the new teacher and we want to make  
28 sure she has a tool belt of ideas and not use the wrong one and make him  
29 regress.

30 We have increased his dosage of guanfacine to help him with this change.

When I told [Student], he started crying . . . tears running down his face  
(saw him go back to the sadness of the orphanage) and cried for about 45  
minutes . . . tried to redirect him and let him know he still has aides, principal

<sup>140</sup> *Id.* at KESD00543 and 00544. ESY Teacher indicated that, at the end of ESY, there is a report of progress form to be filled out; the hearing record contains no data/daily sheets regarding ESY. ESY Teacher did not recall any restraints during ESY 2012. TR Vol. 3 at 828-29.

<sup>141</sup> Exhibit 72 at 006-07.

<sup>142</sup> TR Vol. 2 at 472.

<sup>143</sup> See Exhibit 72 at 006-07.

1 and friends at the same school. He just kept saying 'But I love [Ms. W.]' So,  
2 I have a request . . . if we can go visit [Ms. W.] at her new school and  
3 classroom during this transition a few times. This way [Student] KNOWS  
4 that she didn't leave him. . . .

5 Finally, the new teacher will need to bond with [Student] . . . just like a baby,  
6 so 3 to 5 time a day, she will need to go to a quiet area and rock him for the  
7 first 4 to 6 weeks. . . .

8 Hopefully, with Deborah[']s help in the classroom, this will still be a good fit  
9 for [Student]. . . . I hope to have the same success with the new teacher . .  
10 . If not we will need to reevaluate.

11 We will need to have an IEP meeting either the 4<sup>th</sup> and 8<sup>th</sup> week of school,  
12 due to this change in teacher.

13 92. On August 1, 2013, Dr. Dukes responded:

14 The Paloma team does understand the potential impact of change and  
15 steps to take with [Student] to minimize this transition time to a new teacher.  
16 [Ms. W. and BITeacher] have been working very closely with [Student] over  
17 the years and have shared what they know works for [Student] with [Ms. J.].  
18 The information that you share with [Ms. J.] and the team on Friday will be  
19 valuable to continuing that great work. . . .

20 Ms. Pettitt and other individuals that may be working with [Student] are  
21 welcome to contact [Ms. J., Ms. R.] . . . with information that will support  
22 [Student] during the school day. At this time, since we have a team very  
23 knowledgeable about [Student] I do not feel any contract is needed between  
24 the KESD and Ms. Pettitt[t]. With that said, I will develop a contract for a one  
25 hour phone consultation with the teacher, behavior intervention teacher and  
26 Ms. Pettitt for the purposes of transition. The contact will be initiated today  
27 and end no later than August 16. . . .

28 I hope that you will provide [Ms. J.] and the Paloma team all the support you  
29 provided to Ms. W. since that was and will continue to be essential for  
30 [Student's] success."<sup>144</sup>

31 93. On August 1, 2013, Parent responded:

32 I need to contract an IN person contract with Deborah or hire a LICENSED  
33 RAD therapist who can come to the school . . . they are the only ones that  
34 can do these 'brain' techniques. . . . She needs to be present with the new  
35 teacher and [Student] in order to physically be able to do this and help the  
36 brain rewire to form a safety bond. Please call me immediately if you cannot  
37 make this happen, since I am trying to help the new teacher and [Student]

<sup>144</sup> *Id.* at 008.

1 be successful. Again, the techniques for teaching can be shared but the  
2 brain has [its] own agenda and is not wired correctly . . . only a licensed  
3 professional can assist with this or all the techniques in the world will not  
4 work anymore! Also we would need to have a follow up IEP at week 4 and  
5 8, to see if more time is needed or if [Student] is adjusting. Remember when  
6 I explained that if [Student] does not like the new teacher we can't force it  
7 and it will not work, so we need to keep our fingers crossed and I am praying  
8 . . .<sup>145</sup>

9 94. On August 1, 2013, Dr. Dukes responded:<sup>146</sup>

10 As I first understood your request for Ms. Pettitt it was for transition support  
11 due to [Student] having a new teacher. Now it seems as you are asking for  
12 something different. I believe the best place to have this conversation is with  
13 [Student's] school team tomorrow. I will check with BITeacher about the  
14 time and if I am able to attend I will or will follow up with [her] later in day.

15 95. On August 1, 2013, frustrated with the short notice regarding a new teacher  
16 and that she had not been able to speak to Dr. Dukes that day, Parent responded:<sup>147</sup>

17 I am trying to do what is best for ALL involved . . . new teacher and [Student].  
18 [Student] cannot learn if he is in survival brain (when the demon &  
19 aggressive behaviors are present). He needs to be in safe brain (which is  
20 the normal or when he can learn). I finally called [BITeacher] and she called  
21 me back and I think she understands what is going on with [him]. His  
22 bond/trust (keeps him in safe brain) was stronger and closer than I even  
23 was aware of. . . .

24 Again, this could of all been avoided . . . stress for me and anxiety for  
25 [Student]. We know [Student] has a 'social' disorder and has a hard time  
26 with trust and attachment, so I should have been notified back in JUNE  
27 when this happen[ed].<sup>148</sup> Then we could have time for . . . [Ms. Pettitt & Dr.  
28 Saba Mansoor] to work with [Student]. [RAD] is treatable but takes many  
29 hours of therapy and time. 2 days is not sufficient and is completely not in  
30 the best interest of your new teacher or [Student]!

FYI – You have no idea how bad this can be with aggression and abuse  
from a child. Remember he was in the hospital at age 6. . . .

96. On August 2, 2013, Dr. Dukes responded:<sup>149</sup>

<sup>145</sup> *Id.* at 011.

<sup>146</sup> *Id.* at 015.

<sup>147</sup> *Id.* at 014-15

<sup>148</sup> At hearing, Parent believed that she should have been notified of Ms. W. taking another position. TR  
Vol. 4 at 1304.

<sup>149</sup> Exhibit 72 at 014.

1 [BITeacher] and I are meeting this morning to discuss the needs of [Student]  
2 since she spoke with you yesterday. I do understand and like you want  
3 [Student] to be successful. With the beginning of the year, there are a  
4 number of activities that take place and I have to rely on my key leaders to  
5 ensure all the many things that need to be in place for first day of school are  
6 being addressed. BITeacher has worked with you closely and I have utmost  
7 confidence in her ability to gather and share information with me so the right  
8 decision will be made. I will have BITeacher contact you today so you will  
9 know what will take place August 5. I will touch base with Ms. W. this  
10 morning to see what we can do to help with [Student] feeling more  
11 comfortable about Ms. W. not being present at Paloma.

12 97. In July 2013, as part of her preparation for the 2013-2014 academic year,  
13 Ms. J. received 8 hour of the KESD's non-violent crisis intervention training from Anita  
14 Holm, the KESD's trainer.<sup>150</sup> That training consisted of 4 hours of training on de-  
15 escalation and prevention strategies and 4 hour of practical application including "hands-  
16 on modeling" and "practicing interventions." TR Vol. 2 at 309.

17 98. Additionally, specific to Student, Ms. J. and BITeacher met with Parent and  
18 Student during Meet the Teacher week (one week before school started) and when Ms.  
19 W. arrived at that meeting, through Ms. W.'s interactions with Student, Ms. W.  
20 demonstrated to Ms. J. many of the behavioral intervention strategies for working with  
21 Student. TR Vol. 2 at 472-75.

22 99. At hearing, Ms. J.'s description of the "crossing of arms" is summarized  
23 herein as follows:

24 The child's [fore]arms are placed under the armpits and the adult stands  
25 behind the child, holding against the child's forearms or wrists in order to  
26 keep the child's arms from flailing about; the hold is like a tight hug with  
27 deep pressure, designed to be a calming technique on the body to help the  
28 child de-escalate.<sup>151</sup>

29 Ms. J. found that when she did use the crossing of arms, Student "was able to calm down."  
30 TR Vol. at 464.

100. Prior to August 5, 2013, the first day of school, Ms. J. was in contact with  
Parent regarding Parent's concerns and suggestions for working with Student. Ms. J.

<sup>150</sup> Ms. Holm did not testify at hearing.

<sup>151</sup> TR Vol. 2 at 463-64.

1 and Parent met on "Meet the Teacher Night; Ms. W. was also present.<sup>152</sup> Ms. J. and  
2 Parent had an informal meeting on August 2, 2013. TR Vol. 4 at 1310-11. Ms. J. and  
3 Parent exchanged e-mails while Student was in attendance at school. TR Vol. 2 page  
4 314-15. On August 1, 2013, Parent e-mailed to Ms. J. information regarding RAD, child  
5 trauma and offered to lend to Ms. J. her reading resources. Exhibit 71 at 001. Parent  
6 also supplied to Ms. J. the records from the Colorado behavioral health facility. *Id.* Ms.  
7 J. had multiple conversations with Ms. W. and BITeacher (the primary support contact)  
8 regarding Student.<sup>153</sup> Ms. J. attempted to reach Ms. Pettitt, but was unable to have more  
9 discussion with Ms. Pettitt prior to the first day of school.

10 101. KESD's NCI Physical Intervention Log Sheets utilize two terms: "physical  
11 hold" and "physical escort."<sup>154</sup>

12 102. At hearing, regarding KESD's terminology of interventions, Ms. J. described  
13 a "physical hold" as referencing the same terminology of the word "restraint" being used  
14 by Petitioners, which could also be called a "physical intervention." TR Vol. 2 at 317.

15 103. Ms. J. explained that a "physical hold" while stationary is the NCI  
16 intervention, and a "physical hold" while moving is a "physical escort." TR Vol. 2 at 544;  
17 *see also* TR Vol. 2 at 463.

18 104. Ms. J. described the NCI hold as a safety hold designed to not be harmful  
19 to a student and to help calm them down, although she further indicated that the NCI hold  
20 is *not* used as a calming intervention.<sup>155</sup> TR Vol. 2 at 543.

21 105. Ms. J. explained that the physical hold was used "as needed for his  
22 escalation of behaviors." TR Vol. 2 at 543. Ms. J. indicated that they would always try to  
23

24 <sup>152</sup> "Meet the Teacher Night" was on August 1, 2013. TR Vol. 4 at 1309; *see also* TR Vol. 5 at 1412. .

25 <sup>153</sup> Although KESD had a new behavior support person, BITeacher remained the behavior support person  
26 for Student and the primary behavior support contact for Ms. J., due to BITeacher's existing relationship  
27 with Parent regarding Student and BITeacher's knowledge of Student's disabilities and needs.

28 <sup>154</sup> The NCI forms prepared with regard to physical interventions and escorts of Student in the Fall of 2013  
29 are found in Exhibit GGGG, while the same forms are found at Exhibit 23; the quality of the copies in Exhibit  
30 23 is poor.

31 <sup>155</sup> It is noted that Ms. W. and Ms. J. each described the NCI hold, a restraint, a bit differently. Ms. Pettitt  
32 indicated that she had seen each of them do a "crisscrossing of arms" and that the holds were "drastically  
33 different." TR Vol. 3 at 793-94. She indicated that she had seen Ms. J. doing a restraint on the bus; this  
34 could only have been from viewing the bus camera video from August 29, 2013, as there is no evidence  
35 that Ms. Pettitt was present on that day at that time. The date of the observation of Ms. W. doing a restraint  
36 is not known. Ms. Pettitt was not pressed on the differences she observed.

1 use the Parent's preferred method of escort, holding hands above head, resorting to the  
2 NCI intervention only if the preferred method was "unsuccessful." TR Vol. 2 at 373.

3 106. Ms. J. used the strategies listed in the BSP to try to deescalate Student's  
4 behaviors with a final resort to physical intervention if the behaviors continued to escalate  
5 to unsafe behavior. TR Vol. 2 at 546-47; at 464-65; and at 386-87. Ms. J. disagreed that  
6 there needed to be changes in the BSP simply because there had been an increase in  
7 restraints. TR Vol. 2 at 468-69. Ms. J. echoed the prior teacher, Ms. W., regarding  
8 determining whether a student's behaviors were impeding academic progress before  
9 making changes, whether to a BSP or even LRE. TR Vol. 2 at 469.

10 107. Ms. J. understood the BSP strategies' purpose as being to help Student  
11 obtain the skills to self-regulate and reduce his negative behaviors on his own throughout  
12 the day. TR Vol. 2 page 325. Ms. J. informed the IEP Team that she was seeing the  
13 same behaviors that had been seen the prior year and that Student was not making  
14 threats to her. Exhibit 76 at 33-34 and 79, respectively.

15 108. For academic year 2013-2014, the daily point sheets ("Daily") tracked  
16 Student's successes through recording a success level of the day, using the number  
17 designations of 1 through 5, each representing a specific number of times Student was  
18 redirected and either maintained physical control *or* was redirected and lost physical  
19 control in various activities/behaviors.<sup>156</sup> Exhibit FFFF at KESD00805-28; *see also*  
20 Exhibit 22 at 139-75.<sup>157</sup> The six activities or behaviors being tracked were following  
21 directions, maintaining physical control, maintaining verbal control, staying on task,  
22 staying in his seat, and, specific to Goal #1, Student's increased use of coping skills and  
23 self-advocacy through using the identified verbal and sensory strategies to maintain  
24 control or calm down.

25 <sup>156</sup> KESD's new Behavior Intervention Teacher, Ms. Ludwick, had determined to track Student's daily  
26 behavior data in a more positive manner and she changed the daily point sheets to the new format. TR  
27 Vol. 2 at 340-42.

28 <sup>157</sup> In general, the documents contained in these two Exhibits were not always legible, apparently due to  
29 copying of the original and, perhaps, being copies of copies. Additionally, some of the Daily forms appear  
30 to be an initial or "starting point" form on which Ms. J. was keeping track of the behaviors or making changes  
in the tracking of scoring, while others appear to be a final typed form, with no handwritten numbers or  
hash-marks. For example, in Exhibit FFFF at KESD00805, a form for the first day of school, contains  
typewritten zeros as a starting point over which Ms. J. had written in various scores. For example, in Exhibit  
22, page 161 is an initial form while page 162 is the final form. In some instances, portions of the forms for  
a particular day simply cannot be completely read; *see* Exhibit 22 at 161 and 163.

1 109. Additionally, the Daily separately identified the successive various periods  
2 or activities by subject matter up to and through Lunch; this category designation was  
3 changed after one week into the school year to reflect the specific time period of the  
4 morning, not a particular subject/activity during a time period.<sup>158</sup>

5 110. Ms. J. entered the scores on the Daily at the end of the day. TR Vol. 2 at  
6 354. The Daily WAS placed in Student's backpack.

7 111. Scoring on the Daily was as follows:

8 a. a score of "1" indicated that Student "Falls far below" his goal, with six (6) or  
9 more redirects and his loss of physical control.<sup>159</sup>

10 b. a score of "2" indicated that Student was "Approaching" his goal, with four (4)  
11 to six (6) redirects and he maintained physical control.

12 c. a score of "3" indicated that Student "Meets" his goal, with two (2) to four (4)  
13 redirects and he maintained physical control.

14 d. a score of "4" indicated that Student "Exceeds" his goal, with only one  
15 redirection, his work was completed and he maintained both verbal and physical  
16 control.

17 e. a score of "5" indicated that Student "Exceeds" his goal, with zero redirects and  
18 he completed his work and maintained both verbal and physical control.<sup>160</sup>

19 112. When looking at the score during any one particular time period, essentially,  
20 the fewer "points" obtained indicated less success at the goal, while the more points  
21 obtained indicated greater success at the goal. During any one particular time period, a  
22 score of 30 points would demonstrate 100% success; looking at the scores across all  
23 seven morning periods, a score of 35 would demonstrate 100% success rate. When  
24 looking at the first and second periods of the day, it is evident that this was typically  
25 Student's most difficult timeframe.

26 113. "Redirection" was described as a verbal prompt or physical prompt, like  
27 pointing something out or demonstrating something, for the purpose of redirecting  
28 Student "back to the task [at hand] or the first step in trying to deescalate the situation."  
29 462.

30 <sup>158</sup> Compare Exhibit FFFF at KESD00811-12.

<sup>159</sup> A score of "1" on the daily point sheet indicated not just a loss of physical control but also unsafe behaviors. TR Vol. 2 at 459-60. If there was a remaining zero on the form, Ms. J. indicated that it should not be a zero. Regarding August 6, 2013, on KESD00807, Ms. J. indicated that, under "physical control" where a zero remained, it was most likely supposed to be a "1" because she had overwritten the zero under "verbal control" with the numeral "1." *Id.* at 338-40.

<sup>160</sup> The scoring designation of "5" was added to the format several days into the school year.



114. A "loss of physical control" was described as when a student "becomes a danger to self or others" or perhaps is "kicking property or running throughout the classroom and they are not able to deescalate themselves." TR Vol. 2 page 458. Acknowledging that spitting, hitting and kicking were a loss of control, Ms. J. indicated several other examples of loss of physical control, such as running out of the classroom, kicking the wall, and standing on top of the tables. TR Vol. 2 page 458-509.

115. As it related to his behavior goals, a loss of physical control was problematic because it could lead to Student escalating to further unsafe behaviors. TR Vol. 2 at 460.<sup>161</sup> At hearing, Ms. J. indicated that when Student's loss of physical control was harming others, that was when they would intervene, with a physical intervention, and fill out an NCI form. TR Vol. 2 at 460

116. The first day of school was August 5, 2013. Student was repeating second grade. The hearing record did not specify whether Student rode the bus that day.<sup>162</sup>

117. The Daily for August 5, 2013 demonstrated that, during the first morning period (7:45 a.m. to 8:45 a.m.), Student needed 6 or more redirects and lost physical and verbal control.<sup>163</sup> During second period, Student was completely on track and needed no redirects.<sup>164</sup> During fourth period and for the remainder of the day, Student met or exceeded his goal, needing 4 or fewer redirects in each time period as to the various categories.

118. On August 5, 2013, Student was "anxious," and at 8:35 a.m., he hit another student in the back and the IA "physically escorted" Student from the classroom to a time-out chair from which Student determined to go into the quiet room on his own, where he threw his shoes at the IA.<sup>165</sup> See Exhibit GGGG at KESD00829.

119. On the bus on the morning of August 6, 2013, Student threw a toy at the bus driver, threw his back pack at the monitor and hit the monitor; additionally, Student

<sup>161</sup> In this interchange, Ms. J. referenced Goal #1 at that time in regard to "intent to harm others."

<sup>162</sup> The hearing record did not contain a schedule of the days on which Student did or did not ride the bus to school. At hearing, Ms. J. could not recall whether Student had ridden the bus that first day. TR Vol. 2 at 329. The hearing record contains information regarding incidents on the bus at Exhibit OOOO.

<sup>163</sup> Exhibit FFFF at KESD00805.

<sup>164</sup> There are no scores for third period.

<sup>165</sup> At hearing, Parent indicated that she did not find out on August 5, 2013 that Student had been "restrained" on August 5, 2013 but she further specified that it was usually the first thing Student would tell her when he came home if someone had "crossed" his arms. TR Vol. 4 at 1215, 1217, 1218.

1 repeatedly swore at the monitor and called her "stupid" and a "butthole." See Exhibit  
2 OOOO at KESD03526.<sup>166</sup>

3 120. On August 6, 2013, the Daily demonstrated that, during the first morning  
4 period, Student needed 6 or more redirects and lost physical and verbal control.<sup>167</sup> During  
5 second period, Student used coping and self-advocacy skills, and exceeded the goals as  
6 to staying seated, but required 6 or fewer redirects as to several behaviors. During third  
7 period, Student was completely on track and needed no redirects. During fourth period,  
8 fifth and sixth periods, Student fluctuated from needing two to 6 redirects and being on  
9 task. During Lunch, Student needed 6 or more redirects and lost physical and verbal  
10 control. Ms. J. noted that, at the end of the day, Student threw his glasses and broke  
11 them.

12 121. Through BITeacher, on August 7, 2013, Parent requested that only Ms. J.  
13 and the IA work with Student "for right now." See Exhibit 71 at 004. Parent advised that  
14 Student was "in 'fear' mode even at home ... having nightmares and doesn't want to go  
15 to school today." Parent further indicated that she would "come to school on Friday  
16 around 12:30 and stay until release to try to help [Student] and you."

17 122. For August 7, 2013, Ms. J. noted that she had revised the Daily "for half  
18 day."<sup>168</sup> She further noted that Student had used his coping skills and self-advocacy.  
19 Scoring for the first two periods documented that Student met or exceeded goals while,  
20 for periods three and four, Student required 6 or more redirects and lost control, regaining  
21 control in period 5 and at Lunch.

22 123. On August 8, 2013, the Daily demonstrated that, during the second morning  
23 period, Student needed 6 or more redirects and lost physical and verbal control (spitting,  
24 scratching, and running through the classroom), but was able to use coping skills and  
25 strategies.<sup>169</sup> Student was able to move to the seclusion room<sup>170</sup> on his own after being

26 <sup>166</sup> Each of the bus misconduct reports in Exhibit OOOO contains a note indicating that "Student has had  
27 an opportunity to review and respond to this incident." There is no additional hearing evidence regarding  
28 such review and response.

29 <sup>167</sup> Exhibit FFFF at KESD00807.

30 <sup>168</sup> *Id.* at KESD00809; there is no Daily for this date in Exhibit 22.

<sup>169</sup> *Id.* at KESD00810.

<sup>170</sup> Given the hearing record's description of the sensory room, the same room is also used as a seclusion room when the door is closed. There is no indication that Student was "secluded" (*i.e.*, in the sensory room with the door closed) on August 8, 2013.

1 asked to do to, without a physical escort. During remainder of the day, except for fourth  
2 period when he needed 6 or more redirects and lost physical control, Student nearly  
3 always met or exceeded his goal, needing less than 4 redirects in each time period as to  
4 the various categories. Ms. J. noted that Student "has been bouncing back from his  
5 behaviors quickly."

6 124. On August 8, 2013, Parent emailed Ms. J. regarding the Daily. See Exhibit  
7 71 at 008. Parent stated:

8 Those spitting, scratching are all signs that he is not feeling  
9 safe! Once he is feeling safe those behaviors will disappear.  
10 His arms are a mess from his biting and scratching. If he does  
11 these things his brain needs to go back to infancy... so you  
12 should immediately rock him and hold him like a baby for 20  
13 minutes. If you send him to the other room without you, then  
14 you are not helping him to attach to a "safe figure" and it will  
15 get worse and he will keep doing it, until he can trust you to  
16 protect him. Grab him and hold him like a baby and don't let  
17 go every time he does this!

18 If you send him to the other room for his behavior you are  
19 damaging his self-esteem since it's what his brain is telling  
20 him to do to keep safe. ... So, no consequences ... Instead  
21 treat with love when he does something wrong.

22 He knows it's wrong but can't help it ... and he is telling me  
23 that "I can't have a good day at school and I don't want to go  
24 to school". I am reminding him that he is brave and I know it's  
25 hard but he can do it ... but need everyone on the same page.  
26 So ignore the little things and hold him like a baby while  
27 rocking him on the other behaviors and don't say anything ...  
28 actions, actions, actions ... rock, hold and sing nursery  
29 rhymes. Great thing is that when you finally see the bond  
30 starting it is really rewarding.

125. Parent was in the classroom on August 9, 2013 for one-half day.<sup>171</sup> Parent's  
observations were not examined at hearing. The hearing record does not contain a Daily  
for August 9, 2013.

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<sup>171</sup> See Exhibit O at KESD00586.

1 126. On August 12, 2013, the Daily demonstrated that, during the first morning  
2 period, Student needed 6 or more redirects and lost physical and verbal control.<sup>172</sup> During  
3 the remainder of the day, Student met or exceeded his goal, needing 4 or fewer redirects  
4 in each time period as to the various categories.

5 127. On August 12, 2013, Student became aggressive toward another student  
6 and Ms. J. physically escorted Student from the classroom to the sensory room for "cool-  
7 off time." See Exhibit GGGG at KESD00830.

8 128. On August 12, 2013, Parent e-mailed Ms. J. regarding Student having  
9 informed her that his arms had been crossed by "Ms. Mack" after lunch. See Exhibit 70  
10 at 0006. Parent reiterated that she did not want Student's arms to be crossed, noting her  
11 desire to have this put in his IEP.

12 129. BITeacher responded to Parent, copying Ms. J., Ms. Ludwick, and Ms.  
13 Pettitt. See Exhibit 70 at 006. BIT noted that she had spoken to Parent after school that  
14 day and that Parent "understands" that Ms. Mack had been following the policy and  
15 procedure as instructed through non-violent crisis intervention. BITeacher further noted  
16 that Anita Holm would come out on August 14, 2013 "to explore options with the team vs.  
17 crossing arms." BITeacher also noted that, effective August 13, 2013:

18 [Student] will be 1:1 with an adult, away from the group. This will give him  
19 time to feel safe at school and will decrease the chances of aggression  
20 towards peers. The team will continue to grab his hands to keep safe is  
21 needed. Hopefully, Anita will assist the team in finding an alternative that  
22 will keep everyone safe.

23 [REDACTED] I will keep you posted about our safe options.

24 130. On August 13, 2013, the Daily demonstrated that, during first, second, and  
25 third period, Student was approaching or exceeding his goals, but during the fourth period  
26 and sixth period, Student needed 6 or more redirects and lost physical and verbal  
27 control.<sup>173</sup> During Lunch, Student needed 4 to 6 redirects and lost control. Ms. J. noted  
28 that he had lost physical control "a few times" and had been escorted to the sensory room  
29 to calm down.<sup>174</sup>

30 <sup>172</sup> Exhibit FFFF at KESD00811.

<sup>173</sup> Exhibit FFFF at KESD00812.

<sup>174</sup> There is no intervention form for August 13, 2013; therefore, an appropriate presumption would be that the preferred escort method was used.

131. On August 14, 2013, the Daily demonstrated that, during the first three morning periods, Student was approaching or meeting his goal, but during the fourth period, Student needed 6 or more redirects and lost physical and verbal control, but also used his coping skills and strategies.<sup>175</sup> During fifth and sixth period, Student approached or met his goal, needing less than 6 redirects in each time period as to the various categories. During the last period, Student was completely on track and needed no redirects.

132. Anita Holm visited the classroom on August 14, 2013.<sup>176</sup> BITeacher indicated at hearing that Ms. Holm witnessed a "hands above head hold" on that day.<sup>177</sup> There is no intervention sheet for this day. BITeacher explained that "hands above head hold" was not considered to be a restraint because they were not using the NCI hold. TR Vol. 2 at 596.

133. After that visit and observation, Ms. Holm advised the team that, in the event Student would go limp and "fall" during the "hands above head hold" that they should proceed to the NCI hold at that time.<sup>178</sup>

134. On August 15, 2013, the Daily demonstrated that, during the first two periods, Student needed 6 or more redirects and lost physical and verbal control.<sup>179</sup> During the remainder of the day, Student approached or met his goal, needing 6 or fewer redirects in each time period as to the various categories. Ms. J. noted that he "spent a lot of time in the sensory room today" and "ended the day by working very hard on his reading packet and reading a story."

135. On August 19, 2013,<sup>180</sup> the Daily demonstrated that, during the fourth period (Recess, 9:55 a.m. to 11:05 a.m.), Student needed 6 or more redirects and lost physical

<sup>175</sup> Exhibit FFFF at KESD00813.

<sup>176</sup> The PWN dated September 20, 2013 indicated that Ms. Pettitt conducted one observation and, in a face-to-face meeting with the school team, she had indicated to them that Student was "starting to build trust" with new members of the team and that she was "pleased with the progress" that Student was making. See Exhibit O. The PWN does not specifically note the date of the observation, but indicates that Ms. Pettitt had not contacted the school team "since the August 15<sup>th</sup> meeting with any questions or concerns." Ms. Pettitt indicated that she had observed on August 15, 2013. TR Vol. 3 at 800.

<sup>177</sup> TR Vol. 2 at 591-94.

<sup>178</sup> BITeacher testimony, TR Vol. 2 at 593; see also Exhibit 76 at 26.

<sup>179</sup> Exhibit FFFF at KESD00814.

<sup>180</sup> There is no Daily for August 16, 2013.

1 and verbal control.<sup>181</sup> During the remainder of the day, Student met or exceeded his goal,  
2 needing less than 4 redirects in each time period as to the various categories.

3 136. At recess, Student began to, and continued to, curse. When he was  
4 prompted to go inside, his behavior escalated, he lost physical control (kicking, hitting,  
5 spitting, scratching Ms. J. and the IA), and Ms. J. escorted Student inside to the sensory  
6 room. Ms. J. used the preferred method, hands above the head. See Exhibit GGGG at  
7 KESD00831.

8 137. On August 20, 2013, the Daily demonstrated that, for the entire day, Student  
9 fluctuated between approaching or exceeding his goals, needing less than 4 redirects in  
10 each time period as to the various categories.<sup>182</sup> Additionally, Student used his coping  
11 skills and strategies, asking to take breaks and lay down.

12 138. On August 21, 2013, the Daily demonstrated that, during the first period,  
13 Student needed 6 or more redirects and lost physical and verbal control.<sup>183</sup> During the  
14 remainder of the day, Student approached, met or exceeded his goal, needing less than  
15 4 redirects in each time period as to the various categories. Ms. J. noted that Student  
16 was "tense and anxious" even before school work began.

17 139. During breakfast, Student began escalating and lost physical and verbal  
18 control (kicking, hitting, spitting, yelling and cursing).<sup>184</sup> At 7:54 a.m., Ms. J. intervened  
19 with the NCI hold after trying the preferred method. At 7:56 a.m., Ms. J. physically  
20 escorted Student to the sensory room where Student had some calming time and was  
21 then able to return and begin his work. See Exhibit GGGG at KESD00833.

22 140. However, at 10:45 a.m., Student became frustrated and lost physical and  
23 verbal control (yelling, kicking, biting, and screaming); the IA physically escorted Student  
24 from the classroom to a quiet room where Student had some calming time and laid down,  
25 then was able to return to work. See Exhibit GGGG at KESD00832.

26 141. On August 22, 2013, the Daily demonstrated that, throughout the day,  
27 Student met or exceeded his goal, needing less than 4 redirects in each time period as  
28

29 <sup>181</sup> *Id.* at KESD00815.

<sup>182</sup> *Id.* at KESD00816

<sup>183</sup> *Id.* at KESD00817.

<sup>184</sup> *Id.* at KESD00833.

1 to the various categories.<sup>185</sup> Ms. J. noted that Student went into the sensory room on his  
2 own before school work started for the day.

3 142. On the bus to go home in the afternoon on August 22, 2013, there was a  
4 behavior incident. Exhibit OOOO at KESD03524. Student threw his crackers on the floor  
5 after being told not to eat on the bus ("per KESD policy").<sup>186</sup> Student became upset and  
6 shouted at the driver and monitor and called them names (buttholes and stupid idiot).  
7 Student continued to kick at the bus guard in front of the first row despite being repeatedly  
8 asked to stop. Student kept removing his seatbelt and, when the monitor rebuckled it,  
9 Student hit her and pulled her hair (several times) and he hit the monitor on the back.  
10 When Student was dropped off, Parent told the driver and monitor that Student was  
11 allowed to eat on the bus and that "he acts this way because he does not feel safe on the  
12 bus." Parent requested that the monitor "sit beside [Student] & rock him & rub his  
13 back."<sup>187</sup>

14 143. On August 23, 2013, the Daily demonstrated that, during the fourth period  
15 (Recess), Student needed 6 or more redirects and lost physical and verbal control.<sup>188</sup>  
16 During the remainder of the day, Student met or exceeded his goal, needing less than 4  
17 redirects in each time period as to the various categories.

18 144. During breakfast, Student began escalating and lost physical and verbal  
19 control (hiding, spitting, cursing/yelling and kicking).<sup>189</sup> At 7:36 a.m., Ms. J. escorted  
20 Student with the preferred method and when that did not work to deescalate Student, she  
21 used NCI hold. Ms. J. took Student to a quiet room for 5 minutes and then they used the  
22 swing in sensory room. See Exhibit GGGG at KESD00834.

23 145. However, at 10:48 a.m., Student became frustrated during alphabet writing  
24 and he lost physical and verbal control (through spitting, yelling, throwing materials and  
25 biting). At 10:50, Ms. J. escorted Student using the preferred method, hands above the  
26

27 <sup>185</sup> Exhibit FFFF at KESD00818.

28 <sup>186</sup> There was a reference in the hearing record to another student having told Student he could not eat on  
29 the bus, but the documentation of the behavior incident appears to indicate that a bus staff person told  
30 Student he could not eat on the bus.

<sup>187</sup> The School Bus Misconduct Report further notes "[p]er KESD policy we can't touch children, so the  
monitor will not do this." *Id.*

<sup>188</sup> Exhibit FFFF at KESD00819.

<sup>189</sup> Exhibit FFFF at KESD00834.

1 head, from the classroom to a quiet room where Student had five minutes of calming time  
2 and he was able to help clean up the mess he had made. See Exhibit GGGG at  
3 KESD00835.

4 146. On August 26, 2013, the Daily demonstrated that, during the first period,  
5 Student needed 6 or more redirects and lost physical and verbal control.<sup>190</sup> During the  
6 remainder of the day, Student approached, met, or exceeded his goal, needing less than  
7 4 redirects in each time period as to the various categories.

8 147. On August 27, 2013, the Daily demonstrated that for the entire day, Student  
9 met or exceeded his goal, needing less than 4 redirects in each time period as to the  
10 various categories.<sup>191</sup>

11 148. Parent observed the classroom on August 27, 2013. At hearing, regarding  
12 the observation, Parent indicated that she had felt the classroom was not as serene as  
13 Ms. W.'s classroom had been, because you could hear children in the other classrooms;  
14 Parent felt that it was disturbing to Student. TR Vol. 4 at 1224. The August 27, 2013  
15 observation was an observation of the IA, Kim, with Student. However, Parent also  
16 testified that Ms. J. come into the room one time, went over to the desk and tapped the  
17 desk with her finger to remind Student that he needed to finish his work before going to  
18 lunch. Parent's believes that such an action was an inappropriate way to deal with  
19 Student and that, if Parent had not been there as an attachment figure, Ms. J.'s action  
20 would have triggered Student. Parent's reflections on the observation are set forth in an  
21 e-mail exchange with Ms. J. on August 28, 2013. See Exhibit 70 at 008-09.

22 149. On August 28, 2013, the Daily demonstrated that, during the first three  
23 periods, Student needed 6 or more redirects and lost physical and verbal control.  
24 Following that, Student met or exceeded his goal, needing less than 4 redirects in each  
25 time period as to the various categories. Ms. J. noted that Student slept in the quiet room  
26 and, after he woke up, he ate a good lunch, read books with Ms. J., and colored with the  
27 IA.  
28  
29

30 <sup>190</sup> Exhibit FFFF at KESD00820.

<sup>191</sup> Exhibit FFFF at KESD00821.



1 150. During first period, at 8:45 a.m., Student began escalating and lost physical  
2 control (hitting, kicking, spitting, and biting).<sup>192</sup> Ms. J. physically intervened, taking  
3 Student to sensory room. When trying to have Student come back to class, Ms. J.  
4 attempted to use the preferred method and when that did not deescalate Student, she  
5 used NCI hold. Ms. J. took Student to a quiet room for 5 minutes where they practiced  
6 relaxation (deep breaths). See Exhibit GGGG at KESD00836.

7 151. Later, Student was anxious and was not yet calmed down from the prior  
8 incident, he again escalated and lost physical and verbal control (hiding, throwing,  
9 scratching, biting, spitting, yelling, hitting, kicking, and cursing). Ms. J. again physically  
10 intervened, trying to use the preferred method but ended up using the NCI hold. Student  
11 was taken to sensory room and then quiet room where he was able to calm down and  
12 continue with the day. See Exhibit GGGG at KESD00837.

13 152. At hearing, Parent testified that Ms. J. had called her<sup>193</sup> on August 28, 2013,  
14 because, in Parent's words, Student was having a "meltdown." TR Vol. 4 at 1229-30.  
15 Parent indicated that she recalled this day (and the incident) because Student had wanted  
16 her to go to school with him. Parent recalled talking with Student on the phone and,  
17 although she did not mention any trigger, she recalled that she discussed several options  
18 with Student and that he chose to "do the swing."

19 153. On August 28, 2013 at 11:15 p.m., sent Ms. J. "a quick note" indicating she  
20 would send a more detailed note "with things from the observation" in the next day or so.  
21 See Exhibit 70 at 008-09. Parent noted that these would be "little things I see but could  
22 become huge things and setting off a trigger." Parent wrote as follows:

23 Kim is EXCELLENT . . . her strengths are perfect . . . great tone, body  
24 language, moving slowly with words and body movements, eye contacts,  
25 non-verbal's, and just her nurturing you FEEL that she is completely  
26 RELAXED with [Student].

27 I spoke to [BITeacher] today and she just wanted me to share with you a  
28 few things. I know all of us just want to do what is best for [Student] and I  
29 want to help eliminate any frustration. I can only imagine how hard is it being

30 <sup>192</sup> Exhibit FFFF at KESD00836.

<sup>193</sup> Parent indicated, several times, that she was always available as a resource to the teachers to talk with Student to try to calm him down if needed. TR Vol. 4 at 1231-33.

1 a teacher . . . I could never do it. So, I completely trust that [Student] is and  
2 will get a great education.

3 After discussing things with [Ms. Pettitt] today, we just want [Student] to  
4 remain in his therapeutic window (regulated<sup>194</sup>) for the next week. So do  
5 NOT worry about doing his work or getting it done, we just need to take care  
6 of his heart right now. Maybe reduce the amount of time or amount of things  
7 or eliminate & substitute for something else right now . . . for example  
8 instead of 5 math problems do 1 and then after 1 week of being regulated  
9 you can increase. Again we know he can do 2<sup>nd</sup> grade work and is repeating  
10 2<sup>nd</sup> grade, so no sense of urgency. I know [Ms. W.] didn't do anything (math,  
11 reading, writing) for the first few weeks. She just played games with him.

12 [Ms. Pettitt] and I are both concerned with some things that I am seeing [at]  
13 home that I haven't seen since he was first released from residential care,  
14 so we are walking a fine line and don't want to end up back in residential  
15 care.<sup>195</sup> Here are the things he has started to do again at home: Getting up  
16 in the middle of the night – he either chases the dogs out the doggie door  
17 and then he goes out the doggie door in the back yard. Or I am finding him  
18 under the dining room table in the morning. (when he goes under the desk  
19 – this is orphanage behavior and he doesn't feel safe – maybe offer him a  
20 blanket or pillow if he does hit and let him do relaxation). Not eating –  
21 hoarding food between his lip and bottom front teeth, gagging and acting  
22 like he is going to throw up (hasn't thrown up yet at home, but is heading in  
23 this direction). Getting sick – running nose, coughing. Scratching and biting  
24 himself.

25 We CANNOT cross his arms . . . his abusers did this and we don't want to  
26 add a trigger that when he sees you that he thinks you crossed my arms  
27 and are an abuser who I can't trust and you need to go to jail. We need to  
28 have another hold technique AFTER we have tried EVERYTHING else.  
29 Myself and [Ms. Pettitt] are happy to give ideas or a list of things that can  
30 be done before a restraint is [used]. I have been informed that we are  
crossing his arms several times in a day and in a week, so therefore, we  
are not using it [as] an absolute resort. We can give several other steps and  
ideas to do, sometimes it's just giving him space/distance. [Student] is  
ONLY focused [on] the crossing of arms and this is ALL he talks about and  
is very frustrated since he has voiced several times that he doesn't like it  
and no one is listening to him . . . brings up those abusive memories. (so  
put yourself in his position . . . if your abuser crossed your arms and you

<sup>194</sup> Based on her testimony at hearing, Parent uses the term "regulated" in the context of Student's behaviors being regulated in that the strategies being used would keep his behaviors regulated. TR Vol. 4 at 1227-28

<sup>195</sup> At hearing, Parent indicated that she had spoken with Ms. Pettitt about the symptoms she was seeing at home, and that Ms. Pettitt believed that Student was "stable enough not to go into residential care." TR Vol. 4 at 1228.

1 voiced several times you don't like it and it keeps happening, then you lose  
2 ALL trust and that person is in the same category as the abuser). We need  
3 to listen to him, since he is using his words. We need everyone to become  
4 an "attachment" figure not an "abusive" figure. Crossing his hands and  
5 pulling him should be sufficient . . . he is small and easy to control . . . then  
6 you let him go in the sensory room just using your calm. Soft tone voice,  
7 letting him know you are there and he is safe. He has NEVER seeked [sic]  
8 out and attacked someone. Again, we are here to help and give you  
9 solutions on things that work for [Student] . . . we just don't want to intensify  
10 the trigger by crossing his arms.

11 I have been there and get it . . . trust me my arms were full of scabs and  
12 marks from the scratches he would do and bite marks too. I have no marks  
13 . . . again I keep my distance and use words . . . . If he can't scratch and/or  
14 bite you, he will try to scratch or bite himself . . . again I just verbalize at a  
15 safe distance . . . usually just the clearing on my throat . . . similar to what I  
16 use with my dogs works for him . . . if not, then I say "Ouch, don't scratch  
17 yourself . . . . Ouch, don't bite yourself . . . be nice to yourself (then do the  
18 sad face look or fake crying or that hurts)." And then I say instead lets  
19 [breathe], 1 – and do it with him . . . blow in his face and he will try to do the  
20 same back, 2 and 3. Breathing really works with him.

21 Again, key for the remaining of this week and next week is to keep him in  
22 the therapeutic window and regulated . . . give him the sense of control . . .  
23 lots of choices . . . pick things that he likes . . . animals, dogs, things about  
24 new York, Disneyland and Disney movies, computer . . . look at webcams  
25 of zoo's etc., take a nature walk, take a trip to the library, playing a game  
26 with cars, building something, drawing a flower for his teacher, nurse, mom,  
27 making paper airplanes, take a trip to visit the nurse, principal, the ladies in  
28 the front office, the maintenance guy (he can watch what he is doing and  
29 ask questions), the ladies in the cafeteria, Miss Beth (kids club), eating lots  
30 of snacks . . . (use peanuts for math . . . okay [Student] get 3 peanuts, now  
get 5, so 3+5 is . . . okay lets count them . . . yeah it's 8 . . . then he gets to  
eat them).

Remember you can always call and I can calm [Student] and find out what  
the trigger is for you . . . It's usually something small that none of us even  
notice! Make sure Kim has my number and she know[s] she can also call  
[phone number].

I promise you, someday it will just click and all make sense.

154. The morning of August 29, 2013, Ms. J. responded, stating "Thank you  
[Parent], we will definitely try some of those things with him during this therapeutic

1 window. Those strategies are all very helpful and provide us different options to use when  
2 approaching a situation with [Student.]." EEE at KESD02955.

3 155. On August 29, 2013, the Daily demonstrated that Student met his goals  
4 during the first period, but then during the second period, Student needed 6 or more  
5 redirects and lost physical and verbal control.<sup>196</sup> After that, Student was approaching,  
6 meeting or exceeding his goals for the remainder of the day. Ms. J. noted that Student  
7 used rest and quiet strategies during 9:55 a.m. to 11:05 a.m.

8 156. At 9:40 a.m., Student began escalating and lost physical control (hiding  
9 under a table, throwing things, kicking, biting, spitting and scratching).<sup>197</sup> The IA  
10 physically intervened, attempting to use the preferred method and when that did not  
11 deescalate Student, she used NCI hold and took Student to the time-out room where he  
12 rested, missing recess (because he was sleeping). See Exhibit GGGG at KESD00838.

13 157. On the bus in the afternoon on August 29, 2013, another incident took  
14 place.<sup>198</sup> Exhibit OOOO at KESD03525. "His teacher" walked Student to the bus. At  
15 that time, Student was eating a chocolate and she asked him to finish chewing before he  
16 climbed the stairs; he responded that he could eat on the bus. On the bus, Student was  
17 upset and called another student a "butthole." When told by the driver and monitor that  
18 "we do not name call on the bus," Student then called both of them "buttholes" and  
19 "stupid." Student kept taking off his seatbelt and laughing and was told he needed to  
20 keep it on for safety reasons, but he told the monitor "No." The monitor rebuckled it at  
21 least 5 or 6 times and Student began hitting and kicking and pulling the monitor's hair.  
22 Student took off his shoe and threw it at the monitor; he pulled off her ID badge and threw  
23 it at her. The bus driver returned to the school.

24 158. Ms. J. was called to the school bus to assist with Student's behaviors at the  
25 end of the day on August 29, 2013. Ms. J. made a notation that another student had told  
26 Student he could not eat his snack, and Student was upset. On the bus, Student would

27 <sup>196</sup> Exhibit FFFF at KESD00823.

28 <sup>197</sup> Exhibit FFFF at KESD00836.

29 <sup>198</sup> This incident prompted multiple emails regarding transportation services. See Exhibit LLL. The driver,  
30 a harness, and a booster seat were discussed. KESD proposed that Parent consider driving Student to  
school to avoid the potential impact of personnel changes. As to parental transportation and logistics,  
Parent responded "NO NO NO" and that her work and the school were in opposite directions. Parent also  
indicated, among other emotional reasons and statements, "Student loves the bus!"

1 not leave his seatbelt fastened, was throwing his shoes, hitting, kicking, spitting and  
2 scratching. When the video is viewed, Ms. J. is seen getting on the bus, asking Student  
3 whether he wants her to cross his arms, and Student continues to hit and kick Ms. J.  
4 before she took his hands into her hands.<sup>199</sup> Ms. J. used the preferred method to contain  
5 Student's arms and hands, and then escorted Student from the bus to a quiet area in the  
6 school hallway, where they "talked about what happened and what to do next time." See  
7 Exhibit GGGG at KESD00839.

8 159. On August 30, 2013, the Daily demonstrated that, during the first period,  
9 Student needed 6 or more redirects and lost physical and verbal control.<sup>200</sup> During the  
10 remainder of the day, Student approached, met, or exceeded his goal, needing less than  
11 4 redirects in each time period as to the various categories. There are no indications of  
12 any escorts or restraints.

13 160. In the evening on September 2, 2013, after her discussions with Ms. Pettitt,  
14 Parent penned a lengthy email regarding her and Ms. Pettitt's ideas to help "with [Student]  
15 and any RAD child!" See Exhibit 71 at 012-16.

16 161. On September 3, 2013, the Daily demonstrated that, during the entire day,  
17 with two exceptions of loss of physical and verbal control between 9:55 a.m. and 11:05  
18 a.m., Student approached, met, or exceeded his goal, needing less than 4 redirects in  
19 each time period as to the various categories.<sup>201</sup>

20 162. However, during Lunch, Student lost physical control (through spitting and  
21 biting). Ms. J. intervened and, using the preferred method,<sup>202</sup> escorted Student from lunch  
22 to the quiet area (hallway) and, once he calmed down, he returned to finish lunch. See  
23 Exhibit GGGG at KESD00840.

24 163. On September 4, 2013, the Daily demonstrated that, during the entire day,  
25 Student approached, met, or exceeded his goal, needing less than 4 redirects in each  
26 time period as to the various categories.<sup>203</sup> There are no indications of any escorts or  
27 restraints on September 4, 2013.

28 <sup>199</sup> The video is at Exhibit 83.

29 <sup>200</sup> Exhibit FFFF at KESD00824.

30 <sup>201</sup> Exhibit FFFF at KESD00825.

<sup>202</sup> See Exhibit 71 at 017.

<sup>203</sup> Exhibit FFFF at KESD00826.

1 164. On September 5, 2013 at 6:48 a.m., Parent e-mailed Ms. J. and BITeacher,  
2 with the subject line: "FINAL WARNING – YOU CANNOT CROSS [STUDENT'S] ARMS  
3 – HE IS HAVING A MENTAL BREAKDOWN."<sup>204</sup> See Exhibit 70 at 011. Parent stated:

4 NOT SURE IF HE IS ABLE TO GO TO SCHOOL . . . CROSSING OF ARMS  
5 AND NOT FEELING SAFE ON BUS. PLEASE MAKE SURE ALL  
6 CONTACT PEOPLE WITH [STUDENT] ARE FORWARDED THIS EMAIL  
7 OR COMMUNICATED WITH . . . LIKE THE IA'S! I KNOW THE OTHER  
8 OPTIONS . . . I HAVE CONTACTED OTHER SCHOOLS IN AZ AND OUT  
9 OF STATE AND THEY HAVE DIFFERENT HOLDS THAT ARE NOT  
10 CROSSING ARMS! MOST JUST USE CROSSING HANDS!

11 165. BITeacher responded at 8:47 a.m.:

12 [Parent], As we have stated, we will cross arms for containment only as last  
13 resort. As per KESD policy, we use safe non-violent crisis intervention (NCI)  
14 through CPI (Crisis Prevention Institute). I also investigated SAMA (the one  
15 you referred me to that was used in Colorado). They do cross arms. It is not  
16 stated that way. When they need to intervene for containment, they push  
17 on the upper arms which forces the arms to be crossed. The difference is  
18 that they hold the arms crossed just above the elbow, where NCI is a hold  
19 of arms just above the wrists. Both methods of containment involve  
20 crossing arms. This is only used if [Student] is a danger to self or others.  
21 We will attempt every other method prior to crossing arms. Many times, the  
22 other methods work to remove him safely. We do understand your concern  
23 and are evaluating options carefully due to his needs and history.<sup>205</sup>

24 166. At 9:01 a.m., Parent responded to BITeacher:

25 I have requested this several time with no response. Please provide a list  
26 of things you are doing before crossing the arms . . . also, he is one on one,  
27 so Kim or [Ms. J.] could just back away from him until he calms down.  
28 CROSSING OF ARMS IS HAPPENING DAILY . . . ARE YOU AWARE OF  
29 THIS?<sup>206</sup>

30 167. BITeacher responded at 10:07 am, attaching a list.<sup>207</sup> She indicated to  
Parent:

<sup>204</sup> According to the hearing record, the morning of August 29<sup>th</sup> was the last time that anyone had crossed Student's arms; that was seven days before September 5<sup>th</sup>.

<sup>205</sup> Exhibit 70 at 010-11.

<sup>206</sup> *Id.* at 010. The hearing record does not bear out Parent's statement that Student's arms were being crossed "daily." The Daily shows that the NCI hold was last used on August 29, 2013.

<sup>207</sup> The attached list does not appear in the hearing record. At the October 2, 2013 IEP meeting, BITeacher read out a list of the strategies used by staff prior to using any grabbing and holding of his hands or the NCI hold. See Exhibit 76 at 28-29

1 Attached are some of the things that have been attempted consistently. Kim  
2 and [Ms. J.] do back away. It is only when [Student] goes after them in an  
3 aggressive manner<sup>208</sup> that containment may be necessary because they  
4 are not using seclusion and are always within eyesight.

5 168. Parent responded at 10:54 a.m.:

6 FYI . . . these are not being used . . . [Student] has NEVER gone after  
7 someone, so if they just back away and use the right side of their brain to  
8 relate to him . . . "I know you are mad, let's stomp our feet, hit the pillow,  
9 scratch the pillow, it's over there in the corner." Also, do not change from  
10 Kim to [Ms. J.] or have anyone else come in. I need to know exactly what  
11 is used each time documented . . . since it's not happening and I don't  
12 believe you at this point. And you are not in the classroom to know this . . .

13 <sup>209</sup>

14 169. On September 5, 2013, the Daily demonstrated that, during the first period,  
15 Student needed 6 or more redirects and lost physical and verbal control, but for the  
16 remainder of the day, Student approached, met or exceeded his goal, needing less than  
17 4 redirects in each time period as to the various categories.<sup>210</sup>

18 170. When Student lost physical control (kicking, scratching, spitting and hitting),  
19 Ms. J. intervened and, using the preferred method, escorted Student to the  
20 quiet/seclusion room, where he had some quiet minutes and did relaxation techniques.  
21 See Exhibit GGGG at KESD00841.

22 171. On September 6, 2013, the Daily demonstrated that, until Lunch and  
23 afterwards, Student approached, met or exceeded his goal, needing less than 4 redirects  
24 in each time period as to the various categories.<sup>211</sup> After 12:00 noon, Student needed 6  
25 or more redirects and lost physical and verbal control across the categories.

26 172. At 8:45 a.m., Student had become upset by another student's behavior and  
27 Student escalated, kicking and spitting on the IA. Ms. J. intervened and physically

28 <sup>208</sup> The use of this terminology ("goes after them in an aggressive manner") was not clarified through the  
29 hearing record.

30 <sup>209</sup> Exhibit 70 at 010. The hearing record documents that Student had kicked and hit other students, the  
teacher and the IA. Neither BITeacher nor Parent had the luxury or opportunity to be in the classroom at  
all times. Neither counsel queried Parent on her observation(s) and whether she had seen or had not seen  
Ms. J. or the IA use any of the positive supports or interventions.

<sup>210</sup> Exhibit FFFF at KESD00827.

<sup>211</sup> Exhibit FFFF at KESD00828.

1 escorted Student to the sensory room, where he "immediately" calmed down. See Exhibit  
2 GGGG at KESD00842.

3 173. Later in the day, Student had gone to take his medications but when using  
4 the bathroom, chose to urinate on the floor and then hit, kicked, spit on, and scratched  
5 the IA, and hit, kicked, and scratched Ms. J. At 1:30 p.m., Ms. J. physically escorted  
6 Student, after trying to escort with the preferred method, from the health office to the quiet  
7 area in the hallway. Student agreed to help clean up the mess but when asked to "have  
8 a serious face," he scratched his own face, which the nurse then took care of. See Exhibit  
9 GGGG at KESD00843.

10 174. September 6, 2013, was the last day that Student attended at KESD in the  
11 2013-2014 academic year. The Dailies indicate Student's absence on the school days  
12 from September 9, 2013 through October 4, 2013: See Exhibit 22 at 165-75.

13 175. On October 14, 2013, Student was officially withdrawn by KESD; the stated  
14 reason is "transfer to another school."<sup>212</sup> See Exhibit 43; see *also* Exhibit Q, PWN dated  
15 November 8, 2013.

16 176. At hearing, Parent indicated that Student was not attendance at any school  
17 from September 7, 2013 to October 20, 2013.<sup>213</sup> TR Vol. 4 at 1237.

18 177. At hearing, Parent indicated that, as early as August, she had been looking  
19 at other schools; and that she would take Student with her. TR Vol. 4 at 1243. Parent  
20 indicated that, when Student met people at the other schools, he would ask them whether  
21 they were going to cross his arms.

22 178. In September 2013, Parent sought the help of Advocate.

23 179. In September 2013, Parent and Advocate sought a neuropsychological  
24 evaluation from Paul Beljan, Psy.D.<sup>214</sup> See Exhibit 29. The first session, of six needed  
25 to complete Student's assessment(s), was September 30, 2013, and the final session  
26

27  
28 <sup>212</sup> Exhibit 43; see *also* Exhibit Q, PWN dated November 8, 2013.

29 <sup>213</sup> Notifications to KESD regarding Student's non-attendance or absences after September 6, 2013 were  
30 not specifically discussed.

<sup>214</sup> Dr. Paul Beljan is a pediatric neuropsychologist; his practice is primarily administration of  
neuropsychological evaluations to try to determine what difficulties a child is having and what they are  
capable of doing. TR VOL 3 at 845-46. He also performs approximately 15 IEEs on an annual basis.



1 was October 31, 2013.<sup>215</sup> The report was prepared on December 10, 2013. Dr. Beljan  
2 determined the following diagnoses: Mild Mental Impairment/Developmental Disorder;  
3 Attention-Deficit/Hyperactivity Disorder Combined type (ADHD); Cognitive Disorder NOS,  
4 noting severe executive functioning deficit; learning disorders in reading (Dyslexia), in  
5 written expression (Dysgraphia), in math (Dyscalculia); developmental coordination  
6 disorder; RAD Dysinhibited type; PTSD; and, fetal alcohol and drug exposure (A/DRND  
7 [FAS]).<sup>216</sup>

8 180. Regarding prior District evaluations (back to 2009), Dr. Beljan noted that  
9 they “consistently indicated sensory motor, emotional regulation and behavioral  
10 concerns” and “concerns with adaptive functioning, including communication, social skills,  
11 and motor skills” and “receptive and expressive language delays.” See Exhibit 29 at 35.  
12 With reservations about the administration of the 2012 evaluation, Dr. Beljan noted that  
13 the evaluation had demonstrated Student’s “delayed” abilities with tasks that assess basic  
14 academic skills, including “direction, position, quantity, time and sequences[] as well as  
15 on tasks of visual motion integration, and measures of self-awareness and social  
16 awareness.”

17 181. Reading Dr. Beljan’s report provides insight and analysis into the  
18 psychological and/or physical root causes of many of functional deficits and behavioral  
19 issues that arise for Student in not only the education setting but also in any environment.  
20 *Id.* at 35-39. Dr. Beljan discussed Student’s impairments in working memory (a limited  
21 ability to retain bits of information and call upon them for habitual use in either self-  
22 direction or planning ahead – he impulsively acts before he thinks and has difficulty  
23 learning from previous experience), planning and organization, sustaining attention and  
24 limited focus (experiencing meltdowns behavior secondary to “agitation” caused by  
25 inability to perform tasks required of him), encoding and decoding information written and  
26 spoken (especially quickly spoken amounts of comprehensive or complex language), in

27  
28 <sup>215</sup> At hearing, Dr. Beljan indicated that the first and final sessions were likely sessions with Parent. TR Vol.  
29 3 at 848. Based on the listed dates, it can be said that Dr. Beljan never observed Student at KESD; the  
30 report contains no indication of an observation of Student at Brightmont.

<sup>216</sup> Dr. Beljan noted the existence of the Kilenfelter syndrome diagnosis and the prior diagnosis of Mixed  
Receptive-Expressive Language Disorder. See Exhibit 29 at 35; see *a/so* Exhibit 37 (Lynn Carahaly’s  
speech/language evaluation).

1 reading for recognition and retention, fine and gross motor control (poor pencil grip and  
2 difficulty manipulating paper tasks), establishing relationships and adapting to stimulus  
3 and changing stimulus in his environment (associated with his RAD). In comparison to  
4 the accommodations and interventions already in place at KESD and KESD's knowledge  
5 of the functions of Student's behaviors, Dr. Beljan's assessment and analysis confirms  
6 what was largely already known at KESD. In addition to having speech/language and  
7 occupations therapies, Dr. Beljan recommended that Student be provided with:

8 One-on-one instruction with a consistent teacher who is well-trained and  
9 well-versed in the socio-emotional, behavioral, and educational needs of  
10 children with [Student's] diagnoses. . . . [Student] is not able to participate  
11 in large or small group activities with chronologically or developmentally  
12 similar peers. Small group participation is an appropriate future goal . . . ;  
13 however, his current emotional, behavioral, and educational needs  
14 necessitate and warrant the provision of consistent one-on-one education  
15 in a small and environmentally low stimulation environment. If [Student's]  
16 public school district is unable to provide this type and level of care in his  
17 education, [Parent] is encouraged to consider and pursue private  
18 educational placement to fulfill [Student's] needs.

19 Dr. Beljan noted that:

20 A detailed, coherent, organized and measureable behavior plan should be  
21 developed and regularly reviewed by educational professionals. Everyone  
22 working with [Student] should be on the same page with regard to this  
23 educational plan. The plan should focus on establishing a nonrestrictive  
24 environment that may become progressively restrictive only in response to  
25 only the most severe behavior. Documentation should be available . . . that  
26 any staff member imposing such restrictive procedure has completed a  
27 thorough training course and how to conduct such a procedure.

28 182. On September 19, 2013, the IEP team met at the request of Parent.<sup>217</sup>  
29 Parent and Advocate were present at the meeting and Ms. Pettitt was on the telephone.  
30 As summarized in the PWN, the team reviewed the January 2013 present levels and then

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<sup>217</sup> On July 31, 2013, in her email to Dr. Dukes regarding the new teacher, Parent had requested that they have an IEP meeting "either the 4<sup>th</sup> and 8<sup>th</sup> week of school." Exhibit 72 at 006-07. KESD had scheduled an IEP meeting that was postponed to September 19, 2013 on request of Parent to give her and Advocate more time to review information and prepare for the meeting. TR Vol. 1 at 33-34; see also Exhibit 9 at 008-10.

1 reviewed Student's goals to determine his level of progress.<sup>218</sup> Regarding the IEP goals,  
2 the PWN states:

3 The IEP goals and [Student's] progress on the goals were discussed. Each  
4 goal was reviewed in relation to the measurement tool used to measure  
5 progress. On the 12 goals on the IEP, [Student] has demonstrated progress  
6 on 11 of the goals. On one goal (Goal 1 of IEP – Increase Coping  
7 Strategies) a question was raised about the measurement tool.<sup>219</sup> The  
8 School IEP team members, agreed to review the data collected,  
9 measurement tool and point sheet to compare data collection during the  
10 2012-2013 school year with current year to ensure alignment.

11 Regarding additional information, the PWN states:

12 [Student's] outside provider presented concerns regarding the use of NCI  
13 holds, specifically crossing the arms [of Student] when he is a danger to self  
14 or others. The provider did not provide any suggestions to replace the NCI  
15 hold other than for team members to walk away. She indicated that he is  
16 showing signs of distress and post traumatic stress disorder as evidenced  
17 in play therapy outside the school day. The members of the school team  
18 indicated the behaviors displayed currently are similar to last year and have  
19 not impeded his progress on his goals.

20 183. Regarding data, the IEP team agreed to change how Student's progress  
21 would be reported on Goal #1, and that his progress would now be reported as a daily  
22 average rather than a percentage. The information would continue to be documented on  
23 the Daily.

24 184. Regarding non-violent crisis intervention, while the IEP team agreed to  
25 continue to try to use Parent's preferred method, the IEP team determined not to use, as  
26 the only method, Parent's requested "hands held above Student's head" while walking  
27 him to another area for the reason that Parent's preferred method has been attempted  
28

29 <sup>218</sup> Data regarding Student's behaviors was also discussed at length due to Advocate and Parent wanting  
30 additional explanation and clarification.

<sup>219</sup> Parent's position regarding the available data was that because the Fall 2013 data was not tracking the  
specific number of times that Student used his skills, and also was not accurate as to the incidences of  
problem behaviors (the data being taken in a different measurement manner than the 2012-2013  
measurement), KESD could not make an appropriate determination regarding whether Student's behavior  
needs were being met or whether he needed more supports in order to make progress on his behavior  
goals. However, the hearing record demonstrates that Parent's primary concern was that because Student  
was demonstrating emotional trauma to his therapists and was experiencing variant, regressive, behaviors  
at home, which she and the therapists attributed to his reactions to being restrained at school, his [behavior]  
needs were not being met at KESD and he could not be maintained in that setting. Parent believed that  
Student needed a change to a private school that "might be more oriented to be able to meet his needs."  
TR Vol. 1 at 119.

1 and is unsuccessful at time due to Student's continued physical aggression towards the  
2 staff and himself.

3 185. Regarding supportive strategies for the bus transportation, the IEP team  
4 determined to have Student use a booster seat with a locking seat belt device, and to  
5 initially have his teacher ride the bus for the purpose of modeling some effective strategies  
6 for Student while on the bus.<sup>220</sup> The current strategies already implemented were noted  
7 to be allowing Student to snack on the bus, the availability of an empty bag, his teacher  
8 going onto the bus with Student at the end of the day, and having him sit away from other  
9 students.

10 186. Although at the hearing, Parent testified that at the September 19, 2013  
11 meeting she had wanted to make sure that there was a plan in place for Student and that  
12 she wanted to work with KESD, this apparently was not necessarily the case because, at  
13 the end of the one hour meeting, Advocate gave to KESD Parent's written notice of intent  
14 to obtain private placement and seek reimbursement from KESD.<sup>221</sup> See Exhibit 62 at  
15 001. At the end of the meeting, Advocate also provided two previously prepared letters  
16 from Student's outside providers. Because the meeting had ended, the school team  
17 agreed to reconvene at a later date to discuss and consider the information contained in  
18 the letter.

19 187. Ms. Pettitt had prepared a summary letter for Parent to present to the IEP  
20 Team on September 19, 2013. See Exhibit W. Ms. Pettitt wrote:

21 [Student] has been in therapy with me since he returned home from  
22 residential treatment in February [2012]. Diagnosed with Reactive  
23 Attachment Disorder, his issues were severe but he made significant  
24 progress in therapy. He was able to become regulated at home and begin  
25 to attach to his mother, using her as a secure base. He maintained in school  
26 last year with the individual attention of his teacher [Ms. W.] who was  
27 sensitive to his emotional delays and needs.

28 <sup>220</sup> A car seat/booster seat with a locking seat belt device had been used for some undefined period during  
29 the time when Dino was the bus driver. See Exhibit 84 at 27-29.

30 <sup>221</sup> See Exhibit 84 at 36-37. While a transcript of a meeting may not be entirely accurate and may not  
correctly identify a speaker, at a minimum, if a parent or advocate has reviewed a prepared transcript, it is  
reasonable to presume that they would try to assure that their own voices or words are accurately  
transcribed. Therefore, based on Advocate's statements (TR Vol. 1 at 209-10), the Administrative Law  
Judge presumes that the Advocate's statements in providing the ten-day letter and the two outside  
professionals' letters were accurately transcribed.

1 At the beginning of this school year in August of [2013] his mother was  
2 informed that there would be a new teacher and new aides in his room.  
3 Though she attempted to help [Student] with this major adjustment, his life  
4 totally changed when all the personnel in his room changed.

5 [Student] went from looking forward to school to being fearful. He reverted  
6 to old behaviors like biting and scratching. He returned to disturbing sleep  
7 behaviors that were only occurring when he first came home from the  
8 orphanage in [REDACTED]. He now sleeps in a fetal position and wakes up  
9 throughout the night often wandering outside.

10 [Student's] presentation in therapy shows extreme emotional distress over  
11 school. He plays out being hurt by his teacher and sending her to jail to be  
12 guarded by police and army men so that he won't be hurt anymore. This  
13 severe reaction stems from his early abuse and life in the [REDACTED]  
14 orphanage. He had chronic hospitalizations and was held down for many  
15 painful procedures. When he is restrained it triggers a trauma response in  
16 his brain stem and midbrain. His trauma induces response is to fight back  
17 which sets up a vicious cycle.

18 [Student's] emotional state has deteriorated to the point of being highly  
19 traumatized by school. The inability to regulate him based on his special  
20 needs and the restraint used there have been emotionally damaging. It is  
21 difficult to believe that he could return to such a situation as he is presently  
22 showing symptoms of Post Traumatic Stress Disorder.

23 I encourage all involved in [Student's] case to come together to discover a  
24 plan that will enable [Student] to once again enjoy school. He will have to  
25 continue therapy in order to recover from his traumatic experiences and find  
26 the courage to try again.<sup>222</sup>

27 188. Saba Mansoor, M.D., a child psychiatrist, had been seeing Student since  
28 he was released from Phoenix Children's Hospital.<sup>223</sup> After a follow-up appointment on  
29 September 16, 2013, Dr. Mansoor wrote a summary letter, which Parent provided to the  
30 IEP Team on September 19, 2013. See Exhibit V; see also Exhibit 31. Dr. Mansoor  
wrote:

I am extremely concerned by the severe regression in such a small period  
of time. I last saw him on 7/30/2013 and he was doing very well. I was  
informed by his mother that he is being physically restrained in school by

<sup>222</sup> The only therapy records from Ms. Pettitt that are admitted in the hearing record date from September 25, 2013 and forward. At hearing, Ms. Pettitt indicated that she had been seeing Student once every other week "before this occurred," and after that she was seeing him weekly. TR Vol. 3 at 795. Student's therapy records from January 2012 to September 2013 are not available in the hearing record for any comparative review of Student's behaviors, the progression of Student's therapy, the number and timing of his sessions, and Ms. Pettitt's prior observations and analyses of his progress or status.

<sup>223</sup> See TR Vol. 4 at 1241. Student was in Phoenix Children's Hospital in May of 2011. *Id.* at 1169. None of his Student's treatment records prior to September of 2013 were presented to the hearing record. See Exhibit 31.

1 his arms being wrapped around him. This type of physical restraint is  
2 emotionally damaging to him because of his past trauma and Reactive  
Attachment Disorder. I strongly advise against this type of restraint.

3 In the past he has become very depressed and suicidal which resulted in  
4 admission to a psychiatric hospital and then a residential treatment facility.  
5 He recently was depressed again and mood has improved since he has  
6 been at home. However, sleep is disturbed and today in session he made  
7 very concerning statements about wanting to "blow up his school" and "burn  
my teacher". When [Student] feels unsafe in an environment he tends to  
make these threatening statements as a way of protecting himself. . . .

8 I suggest that [Student] remain at home till we can find or create an  
9 environment that helps him feel safe again.

10 Dr. Mansoor did not testify at the hearing; there is nonspecificity in the time periods and  
11 a lack of comparative details for in her summary.

12 189. KESD sent transportation to pick up Student on September 20, 2013, and  
13 on September 21, 2013.<sup>224</sup> TR Vol. 4 at 1236-37. At hearing, Parent indicated that she  
14 did not understand why they sent a bus for Student because she had given KESD the  
15 ten-day notice. Parent further indicated that she called KESD transportation and told  
16 them that Student "was not going to school until further notice." See TR Vol. 5 at 1532.

17 190. In September of 2013, Parent met with Sonia Gonzales, then the Outreach  
18 Director at Brightmont Academy ("Brightmont"), regarding Student's possible enrollment  
19 at Brightmont.<sup>225</sup> After a determination that Brightmont might be a good fit for a student,  
20 Mary Gillespie, the Director at Brightmont, handled registration matters; as Director, she  
21 also oversaw educational instruction of students at Brightmont.<sup>226</sup> Ms. Gonzales felt that  
22 Brightmont, with its one-to-one environment is able to provide stabilization for students  
23 with behavior triggers and, therefore, would be good for Student, with a goal of returning  
24 a student to a regular education setting after he was emotionally stabilized.<sup>227</sup> Sonia  
25

26  
27 <sup>224</sup> The hearing record was not clear whether transportation had also been sent for Student on the school  
days following September 6, 2013.

28 <sup>225</sup> TR Vol. 6 at 1791. Ms. Gonzales left Brightmont in July of 2014 and approximately six months later  
opened a private day school, AZ Assist, now AZ Aspire. Parent moved Student from Brightmont to AZ  
29 Aspire effective April 13, 2015, indicating that she could not afford the Brightmont tuition and, logistically,  
she wanted to move him closer to home. See Exhibit 47.

30 <sup>226</sup> *Id.* at 1790, 1797.

<sup>227</sup> *Id.* at 1795, 1801-02.

1 indicated that Ms. Pettitt provided insight for Brightmont regarding Student, in that Ms.  
2 Pettitt provided "perspective on why Student would have . . . outbursts, where they came  
3 from and why they occurred."<sup>228</sup> Sonia indicated that Ms. Pettitt said to "remember  
4 Student is 18 months old . . . that his mind has halted at a certain age."<sup>229</sup> Sonia was not  
5 cognizant of the contractual relationship of KESD and Brightmont, except to understand  
6 that KESD was paying for Student's placement for a period of time, which she understood  
7 to have changed in January 2014.<sup>230</sup>

8 191. On September 20, 2013, the day after Parent gave KESD the ten-day  
9 written notice of intent to obtain private placement, Parent "registered" Student at  
10 Brightmont. See QQQQ at KESD03535 and KESD03536. At hearing, Parent indicated  
11 that she began to take Student to Brightmont for tutoring "to see if it would be a good  
12 match for him." TR Vol. 5 at 1520-21. Within its records, Brightmont noted that Student  
13 "started as a student here the 20<sup>th</sup> of September, 2013. . ." and that "[w]hile he was here  
14 due to a KESD agreement, he had four hours of direct instruction with a teacher."<sup>231</sup>

15 192. Student received "education services" at Brightmont from October 18, 2013  
16 to December 20, 2013 under a contract with KESD.<sup>232</sup> Student was offered "education  
17 services . . . as a private enrollment beginning in February 2014." *Id.* at KESD03535; see  
18 also TR Vol. 4 at 1257.

19 193. All of Student's "education services" at Brightmont were one-on-one  
20 services; Brightmont provided no structured academic classes with more than one  
21  
22

23 <sup>228</sup> *Id.* at 1800

24 <sup>229</sup> *Id.* at 1801.

25 <sup>230</sup> *Id.* at 1805

26 <sup>231</sup> See Exhibit QQQQ at KESD03616, an unsigned statement dated March 14, 2014. Of note, the hearing  
27 record reflects that the number of hours Student was provided fluctuated over time; one of the possible  
28 factors for this was the contract agreement, either with KESD, or later, with Parent. See TR Vol. 6 at 1837;  
29 see also QQQQ at KESD03621-28. The March 14, 2014 statement indicates that Student was "currently"  
30 receiving 2 hours of direct instruction and 2 hours of "monitoring" with/by an adult during which he plays  
games, works puzzles, is read to, or is allowed computer time "to play educational games." QQQQ at  
KESD03616.

<sup>232</sup> Regarding "tutoring," the documented billing for tuition as of September 30, 2013 was only \$270.00,  
which was far less than the second billing for tuition on October 31, 2013 for \$3,500.00. See Exhibit 46 at  
002. Tuition at Brightmont was based on the number of hours of instruction. TR Vol. 6 at 1853; see also  
Exhibit 46 at 001.

1 student in the class.<sup>233</sup> At hearing, Ms. Gonzales opined that Student received "some  
2 academic" instruction from the beginning, but she could not be more specific. TR Vol. 6  
3 at 1849.

4 194. At the September 19, 2016 IEP meeting, Ms. Gonzales informed the IEP  
5 Team that Student would be matched with a certified special education teacher who was  
6 "highly trained" in his disabilities. See Exhibit 76 at 70. Sonia further indicated: "[w]e  
7 would never put a staff member in with a student that wasn't specifically trained for that  
8 student. See Exhibit 76 at 78. On at least two occasions, Ms. Gonzales was called upon  
9 to provide, or continue with, instruction for Student when a teacher was called away from  
10 the room.<sup>234</sup> TR Vol. 6 at 1854-55.

11 195. Student had several teachers at Brightmont; the specific dates for each  
12 teacher are not known. In the beginning, Parent came to school with Student; the length  
13 of timeframe for this circumstance is not known.<sup>235</sup> The first teacher assigned to Student,  
14 Catherine Wood, was older and was "not comfortable" in the circumstance of Student's  
15 behavior and instruction needs.<sup>236</sup> Ms. Gillespie took over until another teacher, Tommy  
16 Ferraro, was assigned to Student "for quite a while."<sup>237</sup> However, Mr. Ferraro did not work  
17 out and then Ms. Gillespie again took over until Yasmin (no last name) was assigned to  
18 Student.<sup>238</sup>

19 196. At hearing, Ms. Gonzales' recollection was that Student's behaviors were  
20 daily when he first came to Brightmont but the "level and severities of his anger"  
21 decreased "as he became more comfortable in the setting and felt more safe."<sup>239</sup> TR Vol.

22 <sup>233</sup> TR VOL 6 at 1838-39. Ms. Gonzales indicated that the "core classes" were reading, writing and math."  
23 TR Vol. 6 at 1856. Ms. Gonzales indicated that, after she left, Ms. Gillespie made some changes in the  
24 curriculum and grouped some elementary students.

25 <sup>234</sup> Ms. Gonzales is not a special education teacher. TR Vol. 6 at 1831.

26 <sup>235</sup> Ms. Gonzales responded that this was "helpful" because "[s]he had a nice attachment with him. He felt  
27 safe with her." TR VOL 6 at 1799-1800.

28 <sup>236</sup> TR Vol. 6 at 1798. Ms. Gonzales indicated that Ms. Woods was a special education teacher. TR Vol.  
29 6 at 1831. At hearing, Parent indicated that Ms. Woods was Student's teacher for "a few days." TR Vol. 5  
30 at 1554.

<sup>237</sup> TR Vol. 6 at 1799. Ms. Gonzales indicated that Ms. Gillespie was a special education teacher. TR Vol.  
6 at 1831. Ms. Gonzales did not know if Mr. Ferraro was a special education teacher. TR Vol. 6 at 1831

<sup>238</sup> Ms. Gonzales did not know if Yasmin was a special education teacher. TR Vol. 6 at 1832.

<sup>239</sup> At hearing, Ms. Gonzales indicated that, at AZ Aspire, Student's unsafe and disrespectful behaviors  
were "down to just verbal escalation maybe once a month, and not seeing any physical escalation" and that  
they continue to regard Student's chronological age as not matching his emotional level. TR VOL 6 at  
1812. Ms. Gonzales further indicated that a "provider," Colton, who she indicated was an attachment figure,



6 at 1811. However, Ms. Gonzales was not there every day. While she could not recall how often, she witnessed Student's off-task behaviors that she understood eventually escalated to physical aggression; she did not witness the physical aggression. TR Vol. 6 at 1836-37. At Brightmont, Student was one-on-one with a teacher but had some opportunities to be in a computer lab setting, a room in which there might be other students. TR Vol. 6 at 1821.

197. Student's Brightmont educational records, obtained under a subpoena, do not contain: a copy of Student's KESD January 2013 IEP; any Brightmont individual learning program;<sup>240</sup> any Brightmont educational curriculum; any Brightmont collected data; any Brightmont progress reports; or, any Brightmont report cards regarding the "education services" that Student received from October 18, 2013 through December 20, 2013.<sup>241</sup> The Brightmont records do contain some data and progress reports from a later timeframe.

198. Within the Brightmont records, one page contains the following handwritten note, dated October 15, 2013:<sup>242</sup>

At about 2:15 pm on October 15<sup>th</sup> [Student] started to draw inappropriate [sic] pictures on the white board. While drawing these pictures he started laughing and became silly. I asked him to stop drawing the pictures and come read with me. At that point his laughing became more frenzied, until he started throwing anything he could get his hands on. *At that time, Mary entered the room and held his hands down at his side, he proceeded to kick an [sic] spit at her until she and his mom could talk him down.* [Signed] Catherine Wood.

Emphasis added here.

still comes to school with Student every day. TR Vol. 6 at 1818. Student was attending AZ Aspire from 2:00 p.m. to 4:00 or 4:30 p.m., as/after other students were leaving the campus or were gone. TR Vol. 6 at 1820. The reasons for limited attendance were stated to be financial for Parent and to be sure that Student would be able to stabilize himself and not be a trigger for any of the other students. TR Vol. 6 at 1821.

<sup>240</sup> Ms. Gonzales indicated that every student at Brightmont had an individualized learning plan ("ILP"). TR VOL 6 at 1859. Ms. Gonzales further indicated that it would have been Ms. Gillespie's responsibility to send progress reports to KESD, which were usually done through email. TR Vol. 6 at 1860-61.

<sup>241</sup> At hearing, Ms. Gonzales indicated, with a KESD placement, that Brightmont's policy was to send attendance and progress reports every two weeks to KESD and to parent. TR Vol. 6 at 1805.

<sup>242</sup> See Exhibit QQQQ at KESD03617.

199. Within the Brightmont records, there is a handwritten note from "Tommy" dated January 15, 2014.<sup>243</sup>

Just a quick note to let you know the progress [Student] has been making with me.

Playing with cars has decreased and when played has become less violent. We now go on adventures outside which consist of walking the perimeter of the parking lot and exploring the plants, flowers and "fly white spider" which are just seeds from a local tree.

When we return, Student goes on the computer for learning games, then is rewarded with a "shooting" game which really doesn't consist of "shooting" at all, but rather a cartoon character dressed as a white knight with mice, rabbits and teddy bears storming a castle filled with cartooned zombies. This is a far cry from the shooting games he used to play with simulated humans shooting each other dropping dead in a pool of blood.<sup>244</sup>

[Student] is also learning transitional skills and the realization that when it's time to leave an activity it is not the end of it and that it can be picked up again the following day.

He is also learning to compromise and be patient. He has limited his tantrums and complaints recently as well. This may have to do with me making funny faces and voices when I have to say "no," so he ends up laughing, which may help diffuse [sic] the anger. As they say, whatever works.

If you have any questions, please feel free to consult me.

Also, please check his backpack for additional paperwork & make sure he brings a jacket for our outdoor activities.

200. Within the Brightmont records, one undated and unsigned page contains the several entries regarding Student's behaviors in January 2014.<sup>245</sup>

[Student] is an energetic and bright boy, capable of achieving things he wishes to. I have seen him do simple addition effortlessly and basic writing

<sup>243</sup> See Exhibit QQQQ at KESD03618-19

<sup>244</sup> At hearing, Advocate and Parent were extremely concerned with Student's September 2013 stated threats of violence to KESD teachers and KESD (that he would "kill the teacher, chop off her head and burn the school"). TR Vol. 1 at 35. However, going back, the record demonstrates that Student had said the same things about the teacher that he "loved," and who "was sensitive to his emotional delays and needs," i.e., Ms. W. See Exhibit 72 at 006-07; see also Exhibit W. At hearing, Ms. W. noted that "all the time," Student said to her that he was going to cut off her head, hang it from the ceiling and kill her, and she indicated how she would use humor to defuse the statements. TR Vol. 5 at 1422. Considering circumstances going forward, at Brightmont as late as January 2014, Student was specifically noted to have a "compulsion for shooting, violence and death" when he was found to be manipulating his computer time to seek out "violent shooting games." See Exhibit QQQQ at KESD03620. Therefore, Petitioners' argument that these threats and Student's "emotional regression" were a function of his time at KESD under a new teacher, Ms. J., due to the number of "restraints" he experienced fails to persuade the Administrative Law Judge. The hearing record demonstrate that Student had many fears, as a result of his early childhood, and they are consistently played out amongst many adults in multiple circumstances.

<sup>245</sup> See Exhibit QQQQ at KESD03620.

1 skills without much guidance. I have also seen him struggle when he has  
2 decided that he doesn't want to do something or has precluded that it will  
3 be boring. On these occasions, when pressed, he can explode into a  
4 battery of colorful language, hitting, kicking, screaming and spitting. When  
5 working with [Student] one never knows when he will suddenly go from a  
6 Green day to a Red. He is very temperamental and manipulative.

7 Jan 20-22: [Student] did very well with reading, writing and math, producing  
8 some good papers. He likes to get outside for "adventures" and use this as  
9 a reward for accomplishing class work. I have found that allowing him to  
10 explore his little boy helps him to gain confidence, through his outside play  
11 needs to be closely monitored.

12 Jan 23: He had a major meltdown and once under control, he rested for  
13 most of the day. This upheaval was of the destructive nature and since then,  
14 Mary and I have taken steps to modify his classroom to avoid the  
15 destruction of property and eliminate the potential of [Student] harming  
16 himself as well.

17 It is also recommended that his small metal cars be taken home as he will  
18 throw them when angry or if within the context of a game, one "dies" he will  
19 throw it behind him without looking to see if there is someone there.  
20 I have reduced his computer time dramatically as once on for educational  
21 games, he will manipulate the system until he has found violent shooting  
22 games. He has a compulsion for shooting, violence and death.

23 Jan 24: A much better day.  
24 This week has been fine. One or two fits here and there, but nothing major.

25 Jan 28: Came to school so energetic that I had to get him outside for a game  
26 just to get him to settle down.

27 Though a daily dose of reading, writing, math and formal exercise would be  
28 preferable, sometimes a teacher has to gauge the overall situation and do  
29 what best for the child that day rather than what might be preferred.

30 201. Brightmont's Progress Reports for January, February and March of 2014  
are sparse and contain little academic information.

202. The sole January report is a "general" report, indicating that Student  
completed 40 hours in 10 days (January 20th through January 31st).<sup>246</sup> His progress was  
noted to be below average as to assessment, level of performance, and progress rates.<sup>247</sup>

<sup>246</sup> Exhibit QQQQ at KESD03621.

<sup>247</sup> This document contains two references to "comments" on the back side, which was not copied.

1 While it was noted that he "usually" participated, demonstrated a positive attitude, and  
2 followed directions, it was also noted that he infrequently completed class work.

3 203. The Math report of February 10th through 21st indicates that Student  
4 completed 40 hours in 10 days.<sup>248</sup> The report indicates that "[c]lass was modified in  
5 accordance with [Student's] IEP. No projects associated with this class." His progress  
6 was noted to be average as to assessment, below average in level of performance and  
7 progress rates. The author noted that Student was "adept" at finding answers to simple  
8 addition problems but needs a lot of encouragement to stay focused; a "reward" system  
9 was determined to be useful. While it was noted that he "usually" participated,  
10 demonstrated a positive attitude, and followed directions, it was also noted that he  
11 infrequently completed class work. General comments indicate:

12 [Student] has come a long way in the time I have been working with him.  
13 Though he may still lash out with verbal assaults, along with kicking, and  
14 hitting, he can make transitions from one activity to another these days. He  
15 enjoys being at school and usually any difficulty in transitioning comes when  
16 it's time for him to leave.

17 204. The Writing report of February 10th through 21st indicates that Student  
18 completed 40 hours in 10 days.<sup>249</sup> The report indicates that "[c]lass was modified in  
19 accordance with [Student's] IEP. No projects associated with this class." His progress  
20 was noted to be average as to assessment, below average in level of performance and  
21 progress rates. The author noted that Student was currently learning phonics and putting  
22 simple words together. While it was noted that he "usually" participated, demonstrated a  
23 positive attitude, and followed directions, it was also noted that he infrequently completed  
24 class work. General comments indicate:

25 [Student] is improving in making his letters and writing out words. He can  
26 spell his name with accuracy every time. He sometimes requires a guiding  
27 hand when drawing shapes he might be unfamiliar with, but quickly adapts  
28 and becomes independent.

29 205. The Reading report of February 10th through 21st indicates that Student  
30 completed 40 hours in 10 days.<sup>250</sup> The report indicates that "[c]lass was modified in

<sup>248</sup> Exhibit QQQQ at KESD03624.

<sup>249</sup> Exhibit QQQQ at KESD03625.

<sup>250</sup> Exhibit QQQQ at KESD03626.

1 accordance with [Student's] IEP. No projects associated with this class." His progress  
2 was noted to be average as to assessment, below average in level of performance and  
3 progress rates. The author noted that Student was currently learning phonics and putting  
4 simple words together. While it was noted that he "usually" participated, demonstrated a  
5 positive attitude, and followed directions, it was also noted that he infrequently completed  
6 class work. General comments indicate:

7 Mary works with him when [Student] first arrives and helps determine at  
8 what level of stress he might be in. This generally is regulated between  
9 Green (peacefully) to Red (hostile). He reads with Mary encouraged to  
pronounce vowels and worked properly.

10 206. The Writing report of February 24th through March 7th indicates that  
11 Student completed 60 hours in 10 days.<sup>251</sup> The remainder of the report is the same as  
12 the report from the prior period (February 10<sup>th</sup> – 21<sup>st</sup>).

13 207. The Math report of February 24th through March 7th indicates that Student  
14 completed 60 hours in 10 days.<sup>252</sup> The report indicates that "[c]lass was modified in  
15 accordance with [Student's] IEP. No projects associated with this class." His progress  
16 was noted to be above average as to assessment, and below average in level of  
17 performance and progress rates. The author noted that Student was steadily progressing  
18 and seemed to be enjoying math when it was presented in a fun way; Student was  
19 introduced to abacus and a calculator to help with the more difficult math problems. While  
20 it was noted that he "usually" participated, demonstrated a positive attitude, and followed  
21 directions, it was also noted that he infrequently completed class work. General  
22 comments indicate:

23 [Student] usually comes to school tired, so it is important that he be  
24 stimulated via a puzzle or game so he can concentrate on reading, writing  
and math during the time of instruction.

25 208. The Writing report of March 10th through March 21st indicates that Student  
26 completed 20 hours in 10 days.<sup>253</sup> The remainder of the report is the same as the report  
27 from the prior period (February 24<sup>th</sup> – March 7<sup>th</sup>).

28  
29 <sup>251</sup> Exhibit QQQQ at KESD03627.

30 <sup>252</sup> Exhibit QQQQ at KESD03628.

<sup>253</sup> Exhibit QQQQ at KESD03622.

1           209. The Math report of March 10th through March 21st indicates that Student  
2 completed 20 hours in 10 days.<sup>254</sup> The remainder of the report is the same as the report  
3 from the prior period (February 24<sup>th</sup> – March 7<sup>th</sup>).

4           210. Brightmont's Daily Behavior Tracking charts ("Chart") begin on April 7, 2014  
5 and end on September 15, 2014.<sup>255</sup> Exhibit QQQQ at KESD03629-73. The unsafe  
6 behaviors to be tracked were spitting, kicking, biting, throwing, pinching and self-injury.  
7 The disrespectful behaviors to be tracked were inappropriate language and noises,  
8 threats, name calling, yelling, talking out, and mimicking others. The Chart called for all  
9 of Student's unprompted and independent coping strategies to be tracked with tally  
10 marks. The Chart called for tally marks "for every occurrence separated by more than 5  
11 seconds" and for the person to "[r]ecord the duration (in minutes) for episodes lasting  
12 longer than a few seconds."<sup>256</sup> Many of the copies are not legible due to the poor quality  
13 of the copy.<sup>257</sup>

14           211. In May of 2014, the following circumstances were noted:<sup>258</sup>

- 15           a. On May 5, Student had a "little bit of a bad time for about 15 minutes. After that  
16 he did all he was asked to do. . . ."
- 17           b. On May 12, Student was taken off the computer because he "hit Mary's arm +  
18 called names. He exposed private part to me, he calm [sic] down and apologized."
- 19           c. On May 13, he "suddenly started spitting, kicking, biting and calling names to  
20 Mary and me."
- 21           d. On May 15, he "suddenly started calling names, throw [sic] his eyeglasses and  
22 sandals."
- 23           e. On May 19, the Chart indicates "overall a good day."<sup>259</sup>
- 24           f. On May 20, Student "had a small episode, he throw my phone at me and called  
25 me names. He was fine after (illegible) talk."
- 26           g. On May 22, he "had a small (5 mins) episode or kicking and scratching, but he  
27 calm [sic] down after we talk about it."

28 <sup>254</sup> Exhibit QQQQ at KESD03623.

29 <sup>255</sup> At hearing, Parent indicated that she had never before seen the Brightmont charts. TR Vol. 5 at 1568.  
30 However, she also indicated that she felt that she was "adequately updated" on Student's behavior  
progress. TR Vol. 5 at 1571. Parent's testimony did not elaborate on the type of updates she was receiving,  
except that she had "regular contact" with his teachers and Ms. Gillespie. *Id.* Parent indicated that she did  
not feel Student needed an IEP at Brightmont because the focus was to stabilize him emotionally. TR Vol.  
5 at 1575.

<sup>256</sup> Even on days on which problematic behaviors were noted, none of the Charts contain any tally marks.

<sup>257</sup> The entries thereon, whether legible or not, are contained in afternoon hour slots; one can presume that  
Student continued to attend only in the afternoon.

<sup>258</sup> Exhibit QQQQ at KESD03637-54.

<sup>259</sup> Given Student's known behaviors, this notation would lead a reasonable person to believe that there  
were some behavior occurrences that took place that day.

- 1 h. On May 23, he "had a short episode, throw thing around, kick and scratch."  
2 i. On May 28, he "had a small episode, he kicked and wrinkled the sheet of  
3 paper."  
4 j. For May 29, most of the Chart notations are illegible but the words "spitting,  
5 biting, scratching, and calling me names" and ugly names" can be seen. Also,  
6 there is a notation that states "[a]fter he calm down, I called you. . . ."  
7 k. For May 30, most of the notations are illegible but the words "episode" and  
8 "throw things" can be seen.

9  
10 212. Carey Ann Burgess was called upon by Parent to develop a data collection  
11 procedure for Brightmont.<sup>260</sup> See Exhibit 33, report dated June 13, 2014. Ms. Burgess  
12 noted:

13 [Parent] sought out consultation for her son, [Student], after removing him  
14 from [KESD] and placing him at Brightmont. [Student] has had difficulty in  
15 the past with aggressive behaviors causing [KESD] to use restraint and  
16 seclusion procedures. [Parent] moved [Student] into Brightmont after a  
17 series of restraint procedures were used with [Student] in a very short period  
18 of time . . . . Upon his placement at Brightmont, she wanted to develop a  
19 plan that would help him demonstrate success. This evaluator was initially  
20 called in to develop a data collection procedure for the staff at Brightmont,  
21 but upon a few observations, it was the recommendation of this evaluator  
22 that a comprehensive Functional Behavioral Assessment (FBA) and BSP  
23 (BSP) be developed to support [Student] in his new setting. [Parent's]  
24 reported goals are to create an environment where [Student] feels safe at  
25 school, and where the staff are provided with the support and strategies that  
26 they need to help [Student] achieve social and academic success at  
27 Brightmont.

28 Through interviews with Parent and Brightmont staff, her own observations,<sup>261</sup> review of  
29 Student's prior FBA from KESD, and review of "data collected at Brightmont and [KESD],  
30 Ms. Burgess found that there were two sets of behaviors that interfered with his education:  
31 off-task behaviors and physical and verbal aggression.

32 213. The identified off-task behaviors were: asking questions unrelated to the  
33 task at hand; leaving the work area; picking his nose; climbing under the desk; going to

34  
35  
36  
37  
38 <sup>260</sup> Carey Ann Burgess, MS, BCBA, is the Director of Behavioral Consultative Services at Arizona Autism  
39 United. At hearing, Parent indicated that she had believed that Brightmont was, but she could not say for  
40 sure, whether Brightmont had been collecting data on Student's behaviors. TR Vol. 5 at 1561. The hearing  
record only reflects data information beginning in April 2014.

<sup>261</sup> At hearing, with regard to the timing of the report, Parent indicated that Ms. Burgess had gone to  
Brightmont "several times" and "[Student] wasn't exhibiting any behaviors." TR Vol. 5 at 1561.

1 sleep; repeating unrelated and odd phrases; ignoring teachers' directions; dropping  
2 teaching materials on the floor; and, making inappropriate comments.<sup>262</sup>

3 214. The identified aggression behaviors were: striking other persons; spitting,  
4 throwing items, throwing items at other people, scratching, stabbing with a pencil, biting,  
5 attempting to do any of the above-stated actions; calling people names; and, using  
6 profanity.<sup>263</sup>

7 215. Ms. Burgess found that the most likely trigger events for off-task behaviors  
8 and aggression were when he was given an academic task/demand involving a pencil  
9 and paper task, and that he was less likely to have the off-task behaviors and aggression  
10 when he was given an academic task/demand involving the computer.<sup>264</sup> Because staff  
11 indicated that Student was "the most tired" on the days when he was having the most  
12 difficulty with aggression, Ms. Burgess noted that being tired was probably a triggering  
13 event for aggression.

14 216. Ms. Burgess determined that Student was engaging in these problematic  
15 behaviors in order to escape from less preferred tasks while simultaneously receiving the  
16 attention of the staff/personnel. She found that these behaviors happened more  
17 frequently when Student was in the presence of persons who were less familiar and less  
18 trusted and that, when allowed to engage in preferred activities and garner the attention  
19 of familiar persons, he was "unlikely" to engage in these behaviors. Ms. Burges found  
20 that Student's off-task behavior was typically the pre-cursor to aggression.

21 217. On October 2, 2013, the IEP team met to discuss the outside evaluators'  
22 information, questions about the data, and Parent's notice. See Exhibit P; see a/so Exhibit  
23 76. Parent and Advocate were present at the meeting and Ms. Pettitt was on the  
24 telephone; Ms. Gonzales, as Brightmont's representative, was also present. See Exhibit  
25 76. As summarized in the PWN dated October 4, 2013, using the KESD data and shared  
26 information, the team reviewed the recommendations and Parent's request, and KESD

27  
28 <sup>262</sup> These are some of the same behaviors Student displayed at KESD.

29 <sup>263</sup> These are the very same behaviors Student displayed at KESD.

30 <sup>264</sup> The behavior trigger presenting itself as the situation of Student not wanting to perform non-preferred activity was well known to KESD. The specific identification of a pencil and paper task versus a computer task may have been an enlightenment; any regular or specific use of a computer at KESD was not highlighted in the hearing record.



1 determined that the KESD current placement in a self-contained classroom was an  
2 appropriate placement. See Exhibit P. At the meeting, the school-based member of the  
3 team had indicated that Student's behaviors were the same as the prior year and they  
4 were not seeing the behaviors Parent had reported happening at home as happening at  
5 school. Exhibit 76 at 78-80 and 84-85. The school-based members of the IEP team  
6 refused the Parent's request for placement in a special day school as being the least  
7 restrictive environment ("LRE") for Student.

8 218. The IEP team also considered several other options for Student, including  
9 homebound instruction, shortened school day (similar to an ESY schedule of 4 days  
10 instead of 5), or location changes. Additionally, the IEP Team offered, not as an agreed  
11 change of placement, but in an effort to continue to work in collaboration with Parent, to  
12 financially support the parental placement in a special day school for the 2<sup>nd</sup> Quarter of  
13 the academic year (beginning no later than October 21, 2013) with a planned transition  
14 return to a self-contained classroom in the District. The transition plan was to include up  
15 to 4 hours of consult time with outside therapist (presumably Ms. Pettitt), two visits by  
16 Student to the District's Manitas location, two visits by the Manitas teacher to the parental  
17 placement, and two meetings with Parent and the Manitas team. KESD agreed to provide  
18 transportation to the parental placement.

19 219. On October 3, 2013, Dr. Dukes emailed Parent with the various options  
20 discussed at the IEP meeting and, others that might be possible, for Parent's  
21 consideration. See Exhibit OOO. The options included: remaining in the current  
22 classroom for a half day or full day; moving to a different District school (same self-  
23 contained placement) for a half day or full day; homebound instruction at 4 hours a day  
24 with a timeline re-integration plan for a District setting; parental placement at special day  
25 school with KESD providing financial support for half days only from October 21<sup>st</sup> to  
26 December 20<sup>th</sup>, with a plan for re-integration back to a District setting for the start of 2<sup>nd</sup>  
27 semester in January 2014; and, homebound instruction for two to four weeks with a re-  
28 integration plan for another District setting. Dr. Dukes indicated, that with any of the  
29 options, that there would be discussion of a role for Ms. Pettitt and there would be  
30 opportunities for Student to meet the staff.

1           220. On October 4, 2013, Parent replied that she would propose the 4<sup>th</sup> option,  
2 parental placement, at Brightmont.<sup>265</sup> *Id.* However, Parent also made several specific  
3 "requests." Parent proposed that that Student begin at Brightmont one week earlier, on  
4 October 14<sup>th</sup>, and that he attend for 2 hours a day for that one week "as a transition period  
5 back to school." Further, Parent proposed that Student stay at Brightmont until January  
6 10, 2014 for approximately 9 more days of instruction to make up for the time he "missed"  
7 in September, and that KESD cover that additional instruction. Further, Parent requested  
8 that KESD provide 4 hours of consultation time with Ms. Pettitt. Regarding Student's  
9 transition back to KESD, Parent requested to tour the Manitas site and to have an IEP  
10 meeting in December to discuss Student's progress and the transition back to KESD.  
11 Parent requested that there be a conference call with herself and Brightmont every 3  
12 weeks to discuss his progress and that "someone" from KESD observe Student at  
13 Brightmont two times, once in November and once in December. Parent asked that  
14 Student be allowed to gain exposure to the new District location, program, staff and that  
15 Ms. Pettitt and KESD work together on that plan; Parent wanted assurance that a  
16 transition plan would include training everyone working with Student regarding his specific  
17 disabilities.

18           221. On October 4, 2013, Dr. Dukes responded, indicating that KESD was willing  
19 to have Student start as early as October 15, 2013 as long as everything was in place.  
20 See Exhibit PPP. KESD wanted to have a smooth transition, including training of the  
21 teacher, bus driver and monitor regarding Student's disability and effective strategies and  
22 the completion of the necessary paperwork. KESD indicated that it would provide  
23 transportation and KESD provided some details regarding timing that needed to be  
24 worked out with Brightmont as to Student's instruction time. Additionally, KESD indicated  
25 that it would contract with Ms. Pettitt for 2 hours with Brightmont staff and 2 hours with  
26 Manitas staff, and would set up two meetings for Parent and the Manitas team while  
27 Student would have 2 visits before December 20, 2013' additionally, the Manitas teacher  
28 and a BIT would complete 2 visits at Brightmont. KESD maintained its offer for financial  
29

30 <sup>265</sup> At hearing, Parent acknowledged having requested several specific things relative to Option #4 as the  
"transition" plan for Student to return to KESD. TR Vol. 5 at 1522-27.

1 support from the determined first day to December 20, 2013 and Student would start back  
2 at Manitas on January 6, 2014 on a return from winter break.

3 222. On October 4, 2013, Parent responded that she had reviewed the  
4 information and would "fully respond at a later date." *Id.* Parent indicated that, due to the  
5 logistics and the cost of a driver and an aide, she preferred that a transportation company  
6 be used so that Student could be transported in a car, thereby reducing his sensory  
7 issues.

8 223. On October 11, 2013, KESD confirmed a training session for October 18,  
9 2017 with Ms. Pettitt with the following people: Brightmont teacher, Ms. J., BITeacher,  
10 and transportation staff. See Exhibit RRR.

11 224. On October 11, 2013, KESD confirmed with Parent that a training was set  
12 for October 18, 2013 and that Student would then be able to start at Brightmont on  
13 October 18, 2013. See Exhibit SSS at KESD03199. Additionally, KESD indicated that it  
14 would provide transportation through Care Transit and requested Parent's input on the  
15 need for a monitor. KESD asked for Parent's consent to provide Brightmont with  
16 Student's IEP, BSP and evaluations.

17 225. On October 17, 2013, Parent created a lengthy email presenting her  
18 responses to various KESD emails and their statements, and addressing a multitude of  
19 concerns. See Exhibit SSS at KESD03196-98.<sup>266</sup> Regarding the arranged October 18,  
20 2013 training, Parent indicated that she would attend "if I am able to coordinate this with  
21 my schedule." Regarding Student going to Brightmont on October 18, 2013, Parent  
22 requested a change in the arranged "12:00 – 4:00" hours for attendance to the hours of  
23 "12:30 – 4:30 or 1:00 – 5:00" due to Student's slow eating habits and the probability of  
24 missing instruction time if he were to eat after he arrived at Brightmont.<sup>267</sup> Parent  
25 indicated that a bus monitor was a good idea and could be phased out if Student did well

26 <sup>266</sup> It must be noted that the hearing record contains multiple emails containing responses to embedded  
27 information and other responses, and cell phone responses, making the effort to locate complete original  
28 emails difficult to impossible while attempting to cull the chronology of the offers, acknowledgments,  
29 agreements or understanding between the parties. Additionally, the same emails were contained within  
30 multiple Exhibits as they were often copied to multiple persons; however, the entire email chain was not  
always present and the emails were sometimes not assembled chronologically.

<sup>267</sup> KESD had apparently also indicated to Parent that the time frame of 12:00 – 4:00 had been selected to  
minimize Student's time on the KESD bus, from 11:21 pick up, and a drop off back home at 4:36, and that  
Student was permitted to eat on the KESD bus.

1 with the transportation. Parent gave her consent for KESD to provide "whatever  
2 documents you feel appropriate to assist Brightmont in educating [Student]."

3 226. Regarding Student returning to KESD at the Manitas location, Parent  
4 stated:

5 I am in agreement that [Student] should not return to Paloma. I have asked  
6 to tour Manitas but did not say I agree that this is an appropriate placement  
7 for Student. I would like to see their program in November and at that time  
8 would feel comfortable commenting on the appropriateness of the school to  
9 meet [Student's] needs.

10 227. KESD had previously advised Parent:

11 The IEP team determined that a self-contained classroom would continue  
12 to be the appropriate LRE to address [Student's] needs. As the district  
13 determines location, your input and concerns as well as information from  
14 the school based members of the IEP team were considered in determining  
15 the location of Manitas. The teacher at Manitas will be at the training  
16 tomorrow. I am happy to work with you on a time to meet at Manitas to meet  
17 the team. ... The Manitas team is committed to a smooth transition.

18 228. Regarding coordinating the teams and meetings with Manitas, KESD  
19 indicated that it would set up a meeting prior to November 22, 2013 and during the week  
20 of December 16, 2013, while the Manitas teacher and the behavior intervention teacher  
21 would complete 2 visits to Brightmont and Student would also visit Manitas at least 2  
22 times before December 20, 2013.<sup>268</sup>

23 229. On October 18, 2013, Parent responded to KESD with continued concerns  
24 regarding transportation. See Exhibit SSS at KESD03193-95.<sup>269</sup> Parent indicated her  
25 beliefs as follows:

26 1. Emotional Trauma Association - I am extremely concerned that [Student]  
27 associates transportation on a school bus with the traumatic experiences  
28 he had when he was assaulted by the school [aide] and with his experiences  
29 over the past few months while at Paloma. I believe that any transportation  
30 by school bus at this time would be a trigger for [Student] and would result  
in the infliction of emotional distress. This may be a goal we can work  
toward, but [Student] is not ready at this time.

<sup>268</sup> Parent had requested to tour Manitas prior to the first meeting "to see the program." KESD had indicated that it would work with Parent on a time for that tour.

<sup>269</sup> Although Parent also raised continued concerns regarding support for school personnel from Ms. Pettitt and any other outside professionals, her primary concern in this email response is transportation.

1 2. Sensory over stimulation / increased arousal level created by the bus –  
2 [Student] has a complex sensory profile. I am concerned that transportation  
3 by bus to Brightmont will overstimulate [Student]. I fear that this increased  
4 arousal level will become a barrier to learning.

5 3. Prior history during bus transportation – Based on the information you  
6 provided the transportation will take 35-40 minutes. [Student] struggled to  
7 experience success on the 5-7 minute bus ride from our home to Paloma.  
8 [Student] is routinely transported in a passenger car. These experiences  
9 are not traumatic and [Student] is accustomed to them.

10 4. Availability of other options – I see three viable options for [Student's]  
11 transportation.

12 - The District can provide transportation by District employees in a car / van  
13 to Brightmont.

14 - The District can work with Care Transit as originally planned.

15 - I can contract with Com Trans to provide transportation.

16 230. Parent attended the October 18, 2013 training session. *Id.* at KESD03203.  
17 Parent raised questions about transportation, apparently not wanting KESD to transport  
18 Student. In an October 18, 2013 email to Parent, KESD confirmed its offer of  
19 transportation for Student and asked Parent to advise whether she wanted to use other  
20 transportation or use KESD transportation.

21 231. On October 21, 2013, Parent indicated that she was "willing" to utilize KESD  
22 transportation. *Id.* at KESD03202-03. However, Parent further indicated that due to the  
23 "negative" experiences Student had had on the bus it was no longer a positive thing, and  
24 she indicated that Ms. Pettitt also did not feel that riding the bus was a viable option.<sup>270</sup>  
25 Parent complained that the transportation staff had only attended half of the two hour  
26 training and queried whether there was a plan to provide the rest of the training. Parent  
27 indicated other possible transportation options being Care Transit, ComTrans and KESD  
28  
29  
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<sup>270</sup> Parent stated as follows:

In the past, there was a time when [Student] liked riding the bus and saw it as a positive thing. Between the physical assault that occurred as a result of the poorly trained bus [aide] and the myriad of negative experiences he has had related to the bus, it is no longer a positive.

It must be noted that the physical assault took place on August 22, 2012. While Parent does not specify any other particular negative experience that took place on the bus, the hearing record reflects multiple instances of situations in which Student's anxiety and fears resulted in behaviors that, at those times, Parent attributed solely to riding the bus. One example is the ESY 2012 bus behavior concerns, as noted in Exhibit 64 at 004.

1 transportation in a van or a car.<sup>271</sup> Parent again indicated that she was "willing" to have  
2 KESD transport Student but "insisted" on having a plan in place for the transportation that  
3 would "not intentionally inflict emotional distress on him." Finally, Parent stated that  
4 "transporting [Student] on the bus is not an option that will meet his emotional needs.  
5 Please let me know what options you propose to address the concerns I am sharing in  
6 this email."

7 232. It is not clear what method of transportation, or by whom, was provided for  
8 Student from October 18, 2013, the date on which Brightmont began to provide  
9 "educational services," to the time when Student was transported by Com Trans.  
10 According to the records provided by Parent, Student began to be transported by Com  
11 Trans on October 24, 2013. See Exhibit 51.

12 233. The hearing record demonstrated that, on October 28, 2013, the KESD  
13 transportation arrived at Student's home only to find that he was leaving the home and  
14 being transported in a Com Trans van. See Exhibit UUU. KESD noted that it was still  
15 offering transportation and that its personnel had participated in training with Ms. Pettitt  
16 in order to effectively provide transportation. KESD requested an update from Parent  
17 regarding transportation.

18 234. On October 28, 2013, Ms. Pettitt followed up with KESD's Behavior  
19 Intervention Specialist, Heather Ludwick, regarding the transportation plan.<sup>272</sup> See  
20 Exhibit VVV. Ms. Pettitt also indicated, in pertinent part: "I thought that our meeting went  
21 well and everyone wanted to incorporate the behavior interventions that we talked about.  
22 I can give you notes from the meeting but I think people are waiting for a safety plan and  
23 I thought that was coming from the school."<sup>273</sup>

24  
25  
26 <sup>271</sup> KESD had indicated to Parent in her email that Care Transit had declined to transport Student after  
27 having a conversation with Parent. Parent responded that she had had an "extremely limited" conversation  
28 with Care Transit and had not provided her name or Student's name; at hearing, Parent indicated that she  
29 had expected Care Transit personnel to be at the meeting and was confused about the presence of KESD  
30 transportation personnel.

<sup>272</sup> KESD had also offered that the behavior intervention specialist and/or an IA ride the bus with Student  
initially to ensure a smooth transition. See Exhibit Q at KESD00593.

<sup>273</sup> Based on the hearing record, the Administrative Law Judge determined that the "meeting" Ms. Pettitt  
references in this email was the completed training session with the bus transportation personnel that  
Parent had specifically requested be provided.

1           235. On October 29, 2013, Ms. Ludwick, provided Ms. Pettitt and Parent a copy  
2 of the BSP, which included a section for bus behaviors. *Id.* Regarding bus behaviors,  
3 the BSP provides as follows:<sup>274</sup>

4           1. If [Student] is exhibiting unsafe behaviors on the bus. The monitor will  
5 talk to [Student] in a calm voice. She will ask him questions and attempt to  
6 distract [Student] from whatever is upsetting him.

7           2. If [Student] continued to Exhibit unsafe behaviors on the bus, the monitor  
8 will make sure proximity is a safe distance away and wait quietly for him to  
9 calm down.

10          3. If [Student] is throwing things or unbuckles his seat belt and is unsafe to  
11 himself or others, the bus monitor will use [Parent's] preferred method of  
12 restraint (crossing of the hands). If the monitor is unable to maintain  
13 [Student] with [Parent's] preferred method, the monitor will then use the  
14 district's non-violent crisis intervention to calm [Student] and get him back  
15 in his seat.

16           i. Proactive strategies that the bus driver and monitor will attempt  
17 prior to [Student] getting upset, throwing things or getting out of his  
18 seat are as follows:

19           1. Monitor rubbing his arms and providing sensory input.

20           2. Snacks.

21           3. Encouraging [Student] to talk and ask questions.

22           4. Encouraging [Student] to utilize whatever safe friend he brought  
23 with him on the bus.

24           5. Bus driver playing music that [Student] enjoys.

25           6. Having [Student] learn different things about the bus, by talking  
26 to him and allowing him to do things like honk the horn.

27           236. On November 4, 2013, Parent advised KESD that she had reviewed the  
28 BSP regarding the transportation and that she did "not agree with the approach you have  
29 unilaterally arrived at."<sup>275</sup> Exhibit WWW. Parent reiterated her intent to provide  
30 transportation and seek reimbursement, stating: "as [the District is] unwilling to provide  
appropriate transportation." Parent indicated that "Com Trans is providing transportation  
for [Student]. I am happy to report that [Student] is experiencing tremendous success. . .  
. I remain ready and willing to allow the District to transport [Student] to school. Before

<sup>274</sup> Exhibit VVV at KESD03245-46.

<sup>275</sup> Parent further indicated her belief that the IEP team should be making the determinations about a behavior support plan for Student. See Exhibit WWW. However, the hearing record demonstrates that the BSP as to the bus behaviors was a result of the interactions and suggestions obtained at the bus staff training in October 2013. See Exhibit VVV.

1 this can occur, I must insist an appropriate plan is developed to meet his unique needs  
2 and that conforms to the procedural requirements of the IDEA."<sup>276</sup>

3 237. On November 4, 2013, Parent requested that KESD provide the related  
4 services of speech and OT that were specified in Student's IEP. See Exhibit 65 at 009  
5 and Exhibit 66 at 005.

6 238. On November 8, 2013, KESD issued a PWN refusing Parent's request for  
7 KESD to provide the related services speech and OT at Brightmont because Brightmont  
8 was not a District LRE placement but, in a continued effort to work with Parent, KESD  
9 agreed to provide the speech and OT at the Manitas location under a service plan even  
10 though Student was withdrawn from District.<sup>277</sup> See Exhibit Q at KESD00592-93; see  
11 also Exhibit 12. KESD also indicated that, although KESD transportation was offered and  
12 declined by Parent, KESD would reimburse Parent for her mileage at the district rates for  
13 October 18, 2013 through December 20, 2013 (for 22 days of instruction). KESD refused  
14 to provide District funding for Student to continue until January 10, 2014<sup>278</sup> at the parental  
15 private placement, noting that the "purpose of the district funded parental private  
16 placement was for transition purposes only" and that January 6, 2014 was the start of the  
17 next academic quarter at KESD. KESD agreed to additional training by Ms. Pettitt and to  
18 other components of a transition plan back to Manitas.

19 239. KESD agreed to arrange a MET meeting to review the outside evaluations  
20 and requested that Parent provide those evaluations at least three days before the  
21 meeting. Exhibit Q at KESD00593; see also Exhibit 12. KESD indicated that an IEP  
22 meeting would also take place at that time, or at a later time, but prior to December 20,  
23 2013.

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27  
28 <sup>276</sup> The hearing record does not contain information regarding the specifics or details of the transportation  
services provided by Com Trans and any specific behavior supports in place.

29 <sup>277</sup> As a follow-up, on November 18, 2013, KESD requested of Parent whether she wanted KESD to prepare  
a service plan for the speech and OT services. See Exhibit 65 at 012.

30 <sup>278</sup> At hearing, Parent acknowledged that KESD had not agreed to extend its offered reimbursement for an  
extra week in January 2014. TR Vol. 5 at 1548-49.



1           240. On November 18, 2013, KESD forwarded a transition plan to Parent, Ms.  
2 Pettitt, Ms. Ludwick, and Ms. Gillespie, among others.<sup>279</sup> See Exhibit XXX. Dr. Dukes  
3 indicated as follows:

4           I have provided a copy of the transition plan with next steps and suggested  
5 dates. Please review and provide any feedback as to activity and dates. If  
6 you should have any questions, please do not hesitate to contact me.

7           The transition plan contained a chart with a list of possible dates and times "when the  
8 [Manitas] school team (teacher, BIT, school psychologist and principal) can complete an  
9 observation, training, meet with [Student], and hold an IEP meeting."

10           November 25, 2013 was the first listed date on that chart.

11           241. On Friday, November 22, 2013, Parent requested information regarding the  
12 agreed-to tour of Manitas, indicating that she was on her way to see the program because  
13 "I never heard back from you. I am guessing that means I can stop by any time, so have  
14 some free time this morning and am on my way by the school to tour the program." See  
15 Exhibit YYY. Parent further stated "I would appreciate it if you could let the school team  
16 know I am on the way and I thank you in advance for allowing me to see the proposed  
17 program without placing a lot of arbitrary hoops in my path that I must jump through first."

18           242. KESD responded to Parent that it had not heard from Parent with regard to  
19 the proposed dates that had been provided to her four days earlier on Monday, and that  
20 the Manitas tour could take place the following Monday. *Id.*

21           243. On December 3, 2013, the IEP team convened to discuss the outside  
22 evaluations. See Exhibit S; see also Exhibit 13. However, Parent had not provided the  
23 evaluation(s) until the afternoon before and, as a result of that late notice on what outside  
24 evaluations were being provided to be discussed at the meeting, the OT was not able to  
25 be present at the meeting the next day. At the meeting, the outside Speech Language  
26 therapist Ms. Carahaly was present by phone and her speech language evaluation<sup>280</sup> was  
27 discussed in depth. *Id.* Parent indicated that she was not willing to move forward with  
28

29 <sup>279</sup> At hearing, Parent agreed that this was an elaboration on the transition plan regarding the items that  
30 Parent had requested for the transition plan. TR Vol. 5 at 1533-34.

<sup>280</sup> See Exhibit 37.

any part of the transition plan.<sup>281</sup> The team agreed to meet again on December 19, 2013. Parent agreed to provide the neuropsychology report no later than December 12, 2013 and, if received, the team agreed to have the review of existing data (RED) draft available on December 17, 2013.<sup>282</sup> The RED would be the first step in Student's three year re-evaluation process.<sup>283</sup>

244. On December 4, 2013, Ms. Pettitt advised KESD that she was available to do training at Manitas, but that she felt that Student was "not ready to move to a typical self-contained classroom." See Exhibit ZZZ. Ms. Pettitt indicated that Parent had expressed to her that she felt she "was not part of transition planning." Ms. Pettitt requested to know what the next step would be for "everyone ... to come together to create a plan on which all can agree." Ms. Pettitt further indicated that the "earliest I would expect [Student] to be ready for school visitors at Brightmont might be the end of January."

245. On December 18, 2013, KESD responded to Parent and Ms. Pettitt regarding Parent's allegation about not being included in the transition planning and the request for Student to remain at Brightmont later than December 20, 2013, i.e., until the end of January. See Exhibit AAAA at KESD03342. KESD provided copies of the various communications (here, 3 emails and 2 PWNs) that dealt with some aspect of transitions, demonstrating that Parent had continued to make certain requests for changes to the initial agreed transition plan.<sup>284</sup> KESD specified that it had created the transition chart so for Ms. Pettitt "to be familiar with the plan." KESD again noted that it was trying to work with Parent and, in the "spirit of cooperation," determined that it would agree to fund, with certain conditions, Student's parental private placement at Brightmont (covering tuition and transportation daily rate) from January 6, 2014 through January 31, 2014. KESD

<sup>281</sup> The IEP team reported this, in a subsequent PWN, as having been indicated at the December 3, 2013 meeting. See Exhibit T at KESD00615. Exhibits 77 and 78 contain two "transcript" portions of the December 3, 2013 meeting, and it appears that the recording stopped at a certain point and picked up again. Parent may have given this indication at some point in the unrecorded portion of the meeting; the first portion of the meeting has some discussion about Parent believing she was left out of the process. However, the overall hearing record documents that, beginning with the October 2, 2013 IEP meeting and in emails between the parties, a transition plan back to KESD was and would be a part of the overall plan for Student and that various meetings and visitations regarding transition had been a part of the transition plan as indicated in the back-and-forth since that October meeting.

<sup>282</sup> Exhibit T at KESD00602-11.

<sup>283</sup> Exhibit T at KESD00614.

<sup>284</sup> See Exhibit P, PWN dated October 4, 2103.

1 specified that the enclosed agreement would "replace any prior transition plan  
2 agreements." KESD requested that, if they agreed, to "please let me know and we will  
3 sign and move forward."

4 246. KESD's written document set forth a very brief history and indicated that  
5 KESD was willing to reimburse Parent for tuition at 20 hours a week (at \$350.00) for four  
6 weeks and travel reimbursement at the District rate for January 6, 2014 through January  
7 31, 2014 only if certain specific conditions were met. See Exhibit AAAA at KESD03342.  
8 The seven conditions were indicated as:

- 9 1. Parent would enroll Student at Manitas by December 20, 2013 with a  
10 start date of January 3, 2014.
- 11 2. Parent would attend a MET and an IEP meeting that would take place by  
12 January 29, 2014.
- 13 3. Parent would give written consent and make Student available during  
14 January 6, 2014 and January 22, 2014 for any additional evaluation  
15 determined to be needed by the RED team.
- 16 4. Parent would allow at least 2 observations at Brightmont prior to January  
17 22, 2014 - one by evaluators and one by [Manitas] teacher and behavior  
18 intervention specialist.
- 19 5. Parent will ensure all Brightmont documents are provided to KESD no  
20 later than January 17, 2014.
- 21 6. Parent will provide Brightmont statements for reimbursement of  
22 Brightmont tuition no later than February 7, 2014.
- 23 7. Parent will provide a mileage form no later than February 7, 2014.

24 247. On December 19, 2013, the IEP team met to discuss the existing data,  
25 including a complete file review and review of the outside evaluations provided by Parent.  
26 See Exhibit T; see also Exhibit 15. Parent, Advocate, BTeacher, Ms. Ludwick,  
27 Brightmont staff (Director Mary Gillespie and Teacher Tommy Ferraro), Speech  
28 Language staff and OT staff as well as outside OT therapist Ms. Pillar were present,  
29 among several others. The team determined the need to collect additional academic  
30 evaluations/testing and curriculum-based measurements of current academic

1 performance to determine the amount of possible academic regression experienced since  
2 parental private placement at Brightmont; the IEP team noted seeing discrepancies  
3 between information about Student's academic levels in Dr. Beljan's December 10, 2013  
4 report<sup>285</sup> in comparison to the existing KESD reports. The team also determined the need  
5 to collect additional information: academic progress, data from curriculum-based  
6 assessments, strategies that were "yielding success" in, and observation(s) in, his current  
7 educational environment; additional speech language evaluation; and, language  
8 sampling.<sup>286</sup>

9 248. At the meeting, the Brightmont representatives described Student's typical  
10 day as follows: arrival, an interaction with his teacher, exercises, going for a walk, doing  
11 a worksheet, bouncing on a ball, doing a worksheet, preferred time on the computer,  
12 sitting on a bean bag and possibly more preferred time on the computer. *Id.* Brightmont  
13 representatives did not have additional information at the meeting regarding what the  
14 curriculum was, how much time was spent on the named activities, the specific academic  
15 tasks that Student was being asked to perform, or his behavioral progress.

16 249. Mr. Ferraro had been working with Student for about a month.<sup>287</sup> *Id.* Mr.  
17 Ferraro advised the team that, when he began to work with Student, he had no transition  
18 skills and his behaviors included kicking, scratching, and name-calling. Mr. Ferraro  
19 reported his successes with Student being attributable to taking him on walks, going on  
20 "activities," visiting other offices, "allowing him to be a boy," and using strategies to "teach"  
21 Student more appropriate behavior.<sup>288</sup> Mr. Ferraro indicated that Student did not have  
22 any sensory issue triggers while they were on their daily outdoor adventures.

23 250. In regard to sensory input and issues, Dr. Beljan indicated that the reason  
24 Student is able to manage his sensory issues when on such "adventures" is that there is

25  
26 <sup>285</sup> The team also noted Dr. Beljan's report did not include a report on all academic areas, and he was not  
27 certain at the time of the meeting whether specific subtests were attempted or not attempted; Dr. Beljan  
28 was participating in the meeting telephonically.

29 <sup>286</sup> The team determined that the FBA information needed to be added to the RED report; the dates of which  
30 were not stated in the PWN. The hearing record indicates the existence of a 2009 FBA and a 2011 FBA,  
neither of which are contained in the hearing record.

<sup>287</sup> Student had had a succession of teachers at Brightmont prior to Mr. Ferraro. The PWN indicates that  
Mr. Ferraro only held a substitute certificate and had had no relevant teaching experience.

<sup>288</sup> The one example noted in the PWN by the IEP team was when Student called him a "shithead," Mr.  
Ferraro would tell him "No, I am not a shithead, I am a poo-poo head."

1 "no pressure on him to do anything," Student is being allowed to do something that he  
2 wants to do, and there is one person with him that can immediately respond to his needs.  
3 Dr. Beljan noted that, when "expectations" are placed on Student, Student's needs would  
4 look very different.

5 251. Parent was adamant that she did not want anyone from KESD to observe  
6 Student at Brightmont. The IEP team determined that an observation would be very  
7 important and, while they reluctantly agreed to view a start-to-finish (4 hour) video to try  
8 to garner the needed information, the team agreed to work on a plan for an observation  
9 if the video presentation did not provide the needed information.

10 252. At the end of the December 19, 2013 IEP meeting, Advocate presented to  
11 KESD Parent's "signed agreement." See Exhibit T at KESD00615; see also Exhibit 79 at  
12 36. Through Advocate, Parent indicated to the District's representative that she did not  
13 have any questions about the KESD document and that she did not want to have a  
14 meeting with Dr. Dukes prior to providing her document.

15 253. The signed document which Advocate provided, had been created by  
16 Parent and was not the same written agreement that KESD had sent to Ms. Pettitt and  
17 Parent the day before. See Exhibit DDDD at KESD03391-92. Based on the exchange  
18 at the meeting, the District's representative apparently did not know the document she  
19 was presented with was not the same agreement document that KESD had sent to Ms.  
20 Pettitt and Parent the day before. See Exhibit 79 at 36.

21 254. With assistance or guidance from Advocate and Ms. Pettitt, Parent rewrote,  
22 and signed, an agreement document. See TR Vol. 5 at 1542. Parent's document  
23 provided a lengthy history, stating her position that, with KESD having agreed "to fund  
24 [Student's] placement," KESD had "changed [Student's] [LRE] to a private day school"  
25 and "made no provision for how [Student] would receive the related services specified in  
26 his IEP."<sup>289</sup> Parent wrote that the October 4, 2013 PWN "was not an accurate recitation  
27 of what occurred at the meeting." Parent wrote that she "did not agree with the District's  
28 arbitrary timeline and instead proposed that the IEP team hold a meeting the week of

29 <sup>289</sup> At hearing, Parent indicated that, on December 19, 2013, and at the time of the October 2, 2013 IEP  
30 meeting, she did not know the terminology, i.e., the acronym LRE. TR Vol. 5 at 1543 and 1545. At  
hearing, Parent indicated that she and Advocate had not discussed LRE and that he had not clarified this  
for her. TR Vol. 5 at 1546.

1 December 16, 2013, and after that meeting if the IEP team and [Parent] agreed that a  
2 change in LRE back to the District was appropriate, that change would occur on January  
3 10, 2014.”

4 255. Regarding reimbursement terms, Parent’s document indicated that KESD  
5 would “reimburse [Parent] for the cost of tuition 20 hour per week at whatever rate is  
6 typical and customary for Brightmont.” Parent’s document indicated that the  
7 “reimbursement would be for four weeks and travel reimbursement would be provided for  
8 all costs associated with Comtrans to transport [Student] to and from Brightmont from  
9 January 2 – 312, 2014. The reimbursement rate will be whatever [Parent] has paid to  
10 Comtrans.”

11 256. Parent’s document indicated that the reimbursement would occur only if  
12 certain specified conditions were met. The nine conditions Parent wrote are as follows:

- 13 1. The District by their agreement in October 2013 changed  
14 [Student’s] LRE to a private day school.
- 15 2. [Parent] and the IEP team will hold a MET and IEP meeting that  
16 will take place no later than January 29, 2014.
- 17 3. Parent cannot agree to allow testing at this time, because at this  
18 point no testing has been proposed.<sup>290</sup> The IDEA provides parents  
19 with rights related to evaluations. One of those rights is the right to  
20 provide informed consent for evaluations. Once evaluations are  
21 proposed by the IEP tea, [Parent] will consider any proposed  
22 evaluations and will notify the District if she will offer permission and  
23 consent for testing within 5 business days. [Parent] is not expected  
24 to provide consent for evaluations that have not been discussed or  
25 proposed.
- 26 4. [Parent] will discuss options for [KESD] employees to conduct  
27 observations. This discussion will occur at an IEP meeting to be held  
28 before January 29, 2014. Any in person observations must occur  
29 only after [Ms. Pettitt] provides a recommendation that the  
30 observations are appropriate and will not cause emotional trauma to  
[Student]. Ms. Pettitt will determine when and how direct  
observations will occur and what involvement she will have in

<sup>290</sup> Parent prepared her written agreement with these specific conditions prior to the December 19, 2013 meeting at which time multiple assessments as well as observations, were discussed and proposed to be conducted. Therefore, the language “at this point” clearly refers to a time prior to the meeting. However, the hearing record contains no indication that Parent at any point thereafter, and prior to the filing of the Complaint, subsequently agreed to the proposed evaluations. According to the PWN dated December 19, 2013, Parent indicated on December 3, 2013 that she was not willing to move forward with any part of a transition plan back to KESD, which had included observations and meetings to discuss Student’s needs; Parent had earlier specified that she wanted to discuss the transition after seeing the Manitas program.

1 facilitating the interactions. [Parent] will provide the District copies of  
2 two hours of video recording of [Student's] instruction at Brightmont.  
3 This offer of video recording is contingent on the Brightmont staff  
4 providing consent for the recording.

5 5. [Parent] will ensure that Brightmont provides bi-weekly progress  
6 reports to the District regarding [Student's] progress in their  
7 programs.

8 6. [Parent] will provide statements from Brightmont no later than  
9 February 7, 2014 for reimbursement of tuition.

10 7. [Parent] will provide invoices from Comtrans for [Student's]  
11 transportation no later than February 7, 2014.

12 8. The District will develop a plan to provide speech and language  
13 services and occupational therapy services to [Student] at his school  
14 of attendance Brightmont [A]cademy beginning on January 6, 2014.  
15 The District also agrees to provide compensatory services for all  
16 missed sessions this school year.

17 9. The District will provide payment to Brightmont for the outstanding  
18 tuition from October 20, 2013 through December 19, 2013 by  
19 December 24, 2013.

20  
21 257. The PWN dated December 19, 2013 indicates that the two "agreements"  
22 were not the same document. See Exhibit T at KESD00615. As a result, KESD indicated  
23 the following:

24 As the terms of the agreement offered by the district were not agreed to or  
25 adhered to by [Parent], that agreement is now null and void. As [Student]  
26 is not currently a student enrolled in [KESD], no further MET/IEP meetings  
27 will take place. Should [Parent] choose to enroll [Student] as a student in  
28 [KESD], we are willing and able to implement his IEP as written and proceed  
29 with the evaluation process.

30 258. On December 20, 2013, Parent requested an IEE. See Exhibit BBBB; see  
also Exhibit 69. Parent indicated that she disagreed with "the [FBA] completed on  
[Student] in December and January 2013, which was the basis for the [BSP] that was  
adopted as part of [Student's] January 2013 IEP."<sup>291</sup> Parent indicated that she had  
selected Joseph Gentry as the provider.

259. On December 20, 2013, KESD responded indicating that it would provide  
the IEE procedures and contact the requested provider. *Id.*

<sup>291</sup> The hearing record does not reference any FBA that had been done in "December or January of 2013" that had been the basis of the January 2013 BSP.

1           260. On December 20, 2013, KESD issued its PWN refusing to complete an  
2 IEE, indicating the reason for the refusal to be that Student was "not currently attending  
3 a school in the District" and because he was not enrolled, the "District is not obligated to  
4 provide an IEE." See Exhibit U. KESD noted that it was willing to consider the IEE request  
5 if Student is enrolled in a school in the District.

## 6                           CONCLUSIONS OF LAW

### 7                           APPLICABLE LAW

#### 8                           FAPE

9           1. Through the IDEA, Congress has sought to ensure that all children with  
10 disabilities are offered a FAPE (free appropriate public education) that meets their  
11 individual needs.<sup>292</sup> These needs include academic, social, health, emotional,  
12 communicative, physical, and vocational needs.<sup>293</sup> To provide a FAPE, a school district  
13 must identify and evaluate all children within their geographical boundaries who may be  
14 in need of special education and services. The IDEA sets forth requirements for the  
15 identification, assessment, and placement of students who need special education, and  
16 seeks to ensure that they receive a FAPE. A FAPE consists of "personalized instruction  
17 with sufficient support services to permit the child to benefit educationally from that  
18 instruction."<sup>294</sup> The FAPE standard is satisfied if the child's IEP sets forth his or her  
19 individualized educational program that is "reasonably calculated to enable the child to  
20 receive educational benefit."<sup>295</sup> The IDEA mandates that school districts provide a "basic  
21 floor of opportunity."<sup>296</sup> The IDEA does not require that each child's potential be  
22 maximized.<sup>297</sup> A child receives a FAPE if a program of specialized instruction "(1)  
23 addresses the child's "unique" needs, (2) provides adequate support services so the child  
24

25 <sup>292</sup> 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

26 <sup>293</sup> *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9<sup>th</sup> Cir. 1996) (quoting H.R. Rep. No. 410, 1983  
U.S.C.C.A.N. 2088, 2106).

27 <sup>294</sup> *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

28 <sup>295</sup> *Id.*, 458 U.S. at 207. In 2017, in *Endrew F. v. Douglas County Sch. Dist. RE-1*, 580 U.S. \_\_\_, 137 S.  
29 Ct. 988, 2017 West Law 1234151 (March 22, 2017), the Supreme Court reiterated the *Rowley* standard,  
adding that a school "must offer an IEP that is reasonably calculated to enable a child to make progress  
30 appropriate in light of the child's circumstances," but the Court declined to elaborate on what "appropriate  
progress" would look like case to case (*i.e.*, in light of a child's circumstances).

<sup>296</sup> *Rowley*, 458 U.S. at 200.

<sup>297</sup> *Id.* at 198.



1 can take advantage of the educational opportunities and (3) is in accord with the child's  
2 individualized educational program."<sup>298</sup>

### 3 The IEP

4 2. Once a student is determined eligible for special education services, a team  
5 composed of the student's parents, teachers, and others familiar with the student  
6 formulate an IEP (individualized education program) that generally sets forth the student's  
7 current levels of educational and functional performance and sets annual goals that the  
8 IEP team believes will enable the student to make progress in the general education  
9 curriculum.<sup>299</sup> The IEP tells how the student will be educated, especially with regard to  
10 the student's unique needs that result from the student's disability, and what services will  
11 be provided to aid the student. The student's parents have a right to participate in the  
12 formulation of an IEP.<sup>300</sup> The IEP team must consider the strengths of the student,  
13 concerns of the parents, evaluation results, and the academic, developmental, and  
14 functional needs of the student.<sup>301</sup>

### 15 Substantive versus Procedural

16 3. A determination of whether or not a student received a FAPE must be based  
17 on substantive grounds.<sup>302</sup> For a substantive analysis of an IEP, the review of the IEP is  
18 limited to the contents of the document.<sup>303</sup> Therefore, any question regarding whether an  
19 IEP is reasonably calculated to provide educational benefit to a student must be decided  
20 on the basis of the content of the IEP itself.

21 4. Procedural violations in and of themselves do not necessarily deny a student  
22 a FAPE. If a procedural violation is alleged and found, it must be determined whether the  
23 procedural violation either (1) impeded the student's right to a FAPE; (2) significantly  
24 impeded the parents' opportunity to participate in the decision-making process; or (3)

25 <sup>298</sup> *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1033 (9<sup>th</sup> Cir. 2006) (citing *Capistrano Unified*  
26 *Sch. Dist. v. Wartenberg*, 59 F.3d 884, 893 (9<sup>th</sup> Cir. 1995)).

27 <sup>299</sup> 20 U.S.C. § 1414(d); 34 C.F.R. §§ 300.320 to 300.324.

28 <sup>300</sup> 20 U.S.C. § 1414(d)(1)(B); 34 C.F.R. §§ 300.321(a)(1).

29 <sup>301</sup> 20 U.S.C. § 1414(d)(3)(A); 34 C.F.R. §§ 300.324(a).

30 <sup>302</sup> 20 U.S.C. § 1415(f)(3)(E)(i); 34 C.F.R. §§ 300.513(a)(1).

<sup>303</sup> *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 768 (6<sup>th</sup> Cir. 2001) ("only those services identified or  
described in the . . . IEP should have been considered in evaluating the appropriateness of the program  
offered) (relying on *Union Sch. Dist. v. Smith*, 15 F.3d 1519, 1526 (9<sup>th</sup> Cir. 1994) (IDEA requirement of a  
formal, written offer should be enforced rigorously)).

caused a deprivation of educational benefit.<sup>304</sup> If one of those three impediments has occurred, the student has been denied a FAPE due to the procedural violation.

### **Reimbursement for Parental Private School Placement**

5. Parents who dispute whether an IEP provides a FAPE to a student, and who as a result enroll that student in a private program, may receive reimbursement for the costs of that private enrollment under certain circumstances.<sup>305</sup> The program offered by the school KESD must fail to provide a FAPE to Student *and* the private school must be an "appropriate" placement.<sup>306</sup> A private school placement may be appropriate even if it does not operate under public school standards.<sup>307</sup> When parents dispute that an IEP has provided FAPE, parents may "enroll the child in a private preschool, elementary school, or secondary school without the consent of or referral by the [school district]. . ." and seek reimbursement from the school KESD for the expense of that enrollment from a court or hearing officer.<sup>308</sup> Indeed, parents have "an equitable right to reimbursement for the cost of providing an appropriate [private] education when a school district has failed to offer a child a [free appropriate public education]."<sup>309</sup> Furthermore, the private placement does not have to meet IDEA requirements.<sup>310</sup> However, an award for reimbursement can be reduced or denied in various circumstances.<sup>311</sup>

### **Burden of Proof and Basis of Decision**

6. A parent who requests a due process hearing alleging non-compliance with the IDEA must bear the burden of proving that claim.<sup>312</sup> The standard of proof is "preponderance of the evidence," meaning evidence showing that a particular fact is "more

<sup>304</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

<sup>305</sup> 34 C.F.R. § 300.148(c) and (d).

<sup>306</sup> *Id.*

<sup>307</sup> *Id.*

<sup>308</sup> 34 C.F.R. § 300.148(b) and (c).

<sup>309</sup> *Union School Dist. v. Smith*, 15 F.3d 1519, 1524 (9<sup>th</sup> Cir. 1994) (quoting *W.G. v. Bd. of Trustees*, 960 F.2d 1479, 1485 (9<sup>th</sup> Cir. 1992)).

<sup>310</sup> *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 7, 13 (1993).

<sup>311</sup> 34 C.F.R. § 300.148(d). An award may be reduced or denied if the parents have not given adequate notice as set forth in the IDEA. 34 C.F.R. § 300.148(d)(1). See *Anchorage School KESD v. M.P.*, 689 F.3d 1047, 1059 (9<sup>th</sup> Cir. 2012) lists other equitable factors that might reduce reimbursement, none of which have been raised here.

<sup>312</sup> *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

probable than not.”<sup>313</sup> Therefore, in this case Petitioners bear the burden of proving by a preponderance of evidence that KESD substantively violated the IDEA through the alleged actions or inactions. If a procedural violation is alleged and demonstrated, Petitioners must then show that the procedural violation either (1) impeded Student’s right to a FAPE, (2) significantly impeded Parents’ opportunity to participate in the decision-making process, or (3) caused a deprivation of educational benefit to Student.<sup>314</sup> In order to be reimbursed in any amount for a private parental placement, Parents must also show that the program offered by KESD failed to provide a FAPE to Student *and* that the private parental placement was appropriate.

## **DECISION**

### **New Issue**

7. In its post-hearing legal memorandum on page 25, Petitioners argued that KESD “failed to provide [Student] FAPE by refusing to develop an IEP based on his present levels in December 19, 2013.” This is an entirely new claim. This claim was not raised in the Complaint or Amended Complaint, and such a claim was not “clarified” as a part of the pre-hearing filings.<sup>315</sup> Further, it clearly is not an issue within the issues articulated in the March 19, 2015 ORDER as moving forward to hearing. Petitioners’ effort, essentially at the end of the due process hearing, to fit such a claim under Issue 7 or Issue 10 fails as neither of those issues deal with “developing” an IEP. The Tribunal will not consider this new claim in the instant matter.

### **Issue #12**

8. Petitioners alleged that KESD violated §504 of the Rehabilitation Act of 1973 through certain actions. However, Petitioners acknowledged there is no authority within the IDEA for a determination regarding “Section 504” allegations and, therefore, Issue #12 is dismissed.

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<sup>313</sup> *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279 (1993) quoting *In re Winship*, 397 U.S. 358, 371-72 (1970); see also *Culpepper v. State*, 187 Ariz. 431, 437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No. J-84984*, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

<sup>314</sup> 20 U.S.C. § 1415(f)(3)(E)(ii); 34 C.F.R. §§ 300.513(a)(2).

<sup>315</sup> Petitioners footnoted that this is an issue that was directly plead in a subsequent due process filing, No. 16C-DP-026-ADE. That Complaint was filed on December 22, 2015, near the end of the hearing sessions in the instant case. Based on motions from the parties, that Complaint is stayed pending the outcome of the instant matter.

**Issue #9**

9. Withdrawn by Petitioners at the October 29, 2015 pre-hearing conference, Issue #9 is dismissed.

**Issue #5**

10. Withdrawn by Petitioners at the time of the due process hearing, Issue #5 is dismissed.

**Issue #10**

11. Petitioners alleged that KESD denied FAPE to Student by unilaterally withdrawing Student from the KESD on October 14, 2013 and, thereafter, refusing to provide any IDEA special education services unless and until Student re-enrolled in KESD. Based on the hearing record and the culled argument, Petitioners' allegation is essentially two-fold, that the withdrawal was a denial of FAPE but more importantly, in this particular allegation, that the failure to provide special education services (here, the speech and OT services) to a child residing within the KESD boundaries thereafter, was a denial of FAPE.

12. The withdrawal of students from Arizona schools is governed by state law; the actions necessary for enrollments and withdrawals are a matter of Arizona law and, as such, withdrawals are not adjudicated through the IDEA due process hearing process. Therefore, the withdrawal itself is not under review in this matter because the allegation that a withdrawal is a denial of FAPE does not fall within the IDEA process. However, whether KESD had an obligation to provide FAPE or any services to Student after a statutory withdrawal remains disputed between the parties.

13. KESD argues that the issue of any IDEA obligation to a child with a disability that is no longer enrolled in a school district has been determined through previous due process cases at the Tribunal. KESD notes that, in Docket 14C-DP-022, the Tribunal ruled that a withdrawal of a student is governed by state law and an allegation that a district withdrawal denied FAPE does not fall within IDEA due process.<sup>316</sup>

14. In a subsequent case involving that same child, the parents failed to bring the child to the IEP-offered developmental program and the district subsequently

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<sup>316</sup> This case is on appeal; however, the Tribunal is not aware of any court rulings on the appeal which might have reversed the Administrative Law Judge determination on the withdrawal and FAPE question.

1 withdrew the child due to non-attendance. The Tribunal ruled that the school district had  
2 made its offer of FAPE and, awaiting re-enrollment, the school district had no other IDEA  
3 obligation to offer or provide individualized special education instruction or services until  
4 parents re-enrolled the child. The record demonstrated that during the time period from  
5 the IEP offer to the withdrawal, as is required in the IDEA for an identified student enrolled  
6 in the district, that school district continued to empanel Student's IEP team, for two more  
7 meetings, continuing to offer the child the individualized special education services set  
8 forth in the IEP. The Administrative Law Judge concluded that the hearing record  
9 demonstrated that the school district had appropriately made its offer of individualized  
10 special education services to the child and awaited the child's presence at the  
11 developmental program.<sup>317</sup>

12 15. September 6, 2013 was Student's last day of attendance at KESD in the  
13 academic year 2013-2014. On September 19, 2013, Parent gave KESD a ten-day written  
14 notice of Parent's intent to obtain private placement. Parent "registered" Student at  
15 Brightmont on September 20, 2013, and Student began to receive some tutoring at  
16 Brightmont. While Petitioners opined that KESD did not do so in a timely manner and  
17 could or should have taken action on September 23, 2013 with regard to Student's  
18 absences, the fact is that, pursuant to state statute, KESD withdrew Student on October  
19 14, 2013; the official reason noted was a transfer to another school.<sup>318</sup> Parent has not  
20 re-enrolled Student at KESD. Therefore, although the hearing record and this decision  
21 have provided the factual background regarding the KESD withdrawal of Student, the  
22 Administrative Law Judge Decision makes no other determinations regarding the  
23 withdrawal itself.

24 16. The hearing record demonstrates after Parent's ten-day notice of intent to  
25 obtain private placement, KESD continued to empanel Student's IEP team and continued  
26 to offer Student individualized special education services.<sup>319</sup> Having made its offer, as

27 <sup>317</sup> Docket 15C-DP-023-ADE. That case is also on appeal.

28 <sup>318</sup> Student had not been in attendance and, following the October 2, 2013 IEP meeting. KESD refused to  
29 offer private placement as Student's LRE. Having received the KESD offered options for continued  
30 collaboration, on October 4, 2013, Parent notified KESD that she chose Option #4, private placement with  
a future transition plan back to the District.

<sup>319</sup> Having already identified Student as a child with a disability, KESD had no continuing obligation to "find"  
Student as a child residing within its boundaries.

evidenced in the October 4, 2013 PWN, KESD continued to work with Parent regarding Student and his needs. Not as a part of an agreed IEP placement, KESD offered, in a collaborative spirit, to financially support the parental placement at the private school with a plan to transition Student back to the self-contained KESD placement. KESD acknowledges, knowing their history, that this approach was also taken in an effort to work together to diffuse the dispute and avoid possible litigation. KESD convened three IEP or MET meetings - October 2, 2013, December 3, 2013, and December 19, 2013. In between those meetings, the back and forth emails demonstrate KESD's efforts to negotiate and resolve the dispute and to work with Parent regarding Parent's various concerns raised and requests made. Parent's efforts at, and after, the IEP meetings of September 2013 and October 2013 could be described as concentrated on KESD completing, correcting or explaining information contained in the daily point sheets versus progress reports. Absent any IDEA, IEP or contractual obligation to do so, KESD contracted with Ms. Pettitt for training of not only KESD personnel and bus transportation staff but also Brightmont personnel regarding Student, his behaviors, and strategies. Specific to the IEP speech and OT services, although Student was in a private placement and KESD was under no obligation to provide the services, KESD planned to and made arrangements to offer these services to Student in a different KESD location.<sup>320</sup> The hearing record demonstrated that KESD met its IDEA obligations to Student after Parent gave the ten-day notice and after the official withdrawal.

17. Based on the foregoing, the Administrative Law Judge concludes that, after October 14, 2013, KESD had no IDEA obligation to offer or provide individualized special education services to Student, a child with a disability no longer enrolled with the KESD, until Parents re-enrolled Student. Issue # 10 is dismissed.

#### **Issue #1**

#### **General**

18. Petitioners allege that KESD violated IDEA, since February of 2011 or during the claim period, by not evaluating or reevaluating Student in all areas of suspected

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<sup>320</sup> The IDEA does not require that a school provide special education instruction or related services to a child with a disability at a private school if it made FAPE available and parents have placed the child at the private school 34 C.F.R. § 300.148(a).

1 disability.<sup>321</sup> 34 C.F.R. § 300.304(c)(4) calls for evaluations, primarily in the context of a  
2 child's disability (*i.e.*, eligibility for specialized instruction) and secondarily in the context  
3 of garnering information to assist in enabling the child to access the general education  
4 curriculum. Student was previously identified and no specific or additional evaluation was  
5 needed to maintain Student's status as a child with a disability. The question remains  
6 whether assessments were needed during the claim period, and whether the failure to  
7 provide such in the listed areas would be considered a failure to provide FAPE, in the  
8 listed areas. Petitioners argued that KESD failed to evaluate Student in light of his  
9 "changing educational needs" and that evaluations "would have assisted [KESD] in  
10 developing [Student's] IEPs."

11 19. The claim period in this matter is the two years prior to June 25, 2014, *i.e.*,  
12 from June 25, 2012 to June 25, 2014. Student's three-year evaluation was due to be  
13 done in February 2014.<sup>322</sup> Clearly, at that time and for that purpose, KESD would be  
14 called upon to re-examine Student progress and determine the need for additional  
15 information in any and all areas previously identified and any new areas of concern. In  
16 the instant case, KESD arranged a MET/IEP meeting for December 19, 2013, and a RED  
17 report was being prepared for that meeting, at which time the team planned out the  
18 beginning of the three-year re-evaluation process. The December 19, 2013 PWN clearly  
19 indicates that the team discussed the proposed evaluations and observations that would  
20 assist in determining Student's existing educational needs. Although in the Complaint  
21 Parent is arguing that KESD failed to evaluate Student, at the December 19, 2013 IEP  
22 meeting, Parent was "adamant" that she did not want any observations by KESD at  
23 Brightmont and she specified, in writing, that she would not allow any testing at that time.

24 20. There is no indication in the hearing record whether, once the proposed  
25 evaluations and observations and the need for them were discussed by the team, that  
26 Parent softened her position and agreed that they should be done. Of note, on the very  
27 next day, Parent requested an IEE from Dr. Joseph Gentry, stating that she disagreed

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29 <sup>321</sup> See 34 C.F.R. § 300.304(c)(4).

30 <sup>322</sup> KESD argument, Response Memorandum, page 4. While the hearing record demonstrated that  
Student's last FBA was in April 2011, it is presumed that KESD would have undertaken any needed  
evaluations in preparation for what was likely a January annual IEP meeting.

1 with an "FBA" which she was indicating "was the basis for [BSP] that was adopted as part  
2 of [Student's] January 2013 IEP."<sup>323</sup>

3 21. While Petitioners' Complaint specified 9 assessment areas, Petitioners  
4 presented evidence regarding speech/language, occupational, and an FBA. The  
5 allegations regarding any need for, or a failure to provide, evaluations in the areas of  
6 opthologic, audiologic, PT, and AT were not presented for consideration and, therefore,  
7 are dismissed.

### 8 Neuropsychological Evaluation

9 22. As a part of its case, Petitioners disclosed and presented a December 2013  
10 neuropsychological evaluation report from Dr. Beljan, which was reviewed in depth at the  
11 hearing. Petitioners argued that a neuropsychological evaluation should have been  
12 conducted when Student returned from Colorado based on the 2011 Colorado screening.  
13 KESD argued that this is a new claim. In its Closing, Petitioners argued that this was not  
14 a new claim and that a neuropsychological evaluation was, essentially, a more  
15 comprehensive evaluation that "encompasses academic and cognitive assessments ...  
16 along with other assessments to get a more complete picture of the student's needs."  
17 Petitioners also argued that the Amended Complaint had included a reference to the 2011  
18 Colorado neuropsychological screening, stating that a neuropsychological evaluation  
19 should be conducted.

20 23. On review of the determined issues for hearing, a need for and failure to  
21 have provided a neuropsychological evaluation was *not* among the issues culled from the  
22 Complaint or the Amended Complaint and was *not* determined to be an issue for  
23 hearing.<sup>324</sup> Petitioners may not raise an issue at hearing that was not raised in the  
24 complaint notice unless the other party agrees. 34 C.F.R. § 300.511(d). The inclusion of  
25 a new claim is not permitted absent an allowed or agreed amendment or an agreement  
26 from the other party. In this case, Petitioners did not move for the amendment of the  
27 complaint issues; it was not allowed as an amendment more than five days before the  
28

29 <sup>323</sup> The Tribunal is unable to determine to which "FBA" or evaluations Parent was referring.

30 <sup>324</sup> Petitioners had ample opportunity to amend the issues in the initial Complaint and, later, to specifically  
clarify the culled issues; a neuropsychological evaluation was not noted as a clarification.



1 hearing, and KESD has requested that this issue not be considered and determined. The  
2 Tribunal will not consider this new claim in the instant matter.

### 3 **Occupational Therapy Evaluation**

4 24. Petitioners alleged that an OT assessment needed to be done to determine  
5 if Student's needs had changed and if there were any needed accommodations,  
6 modifications, or additional OT related services.

7 25. Petitioners argued that an OT evaluation had needed to be done because  
8 the 2011 Colorado screening had noted sensory deficiencies and because Ms. Piller's  
9 September 25, 2013 evaluation had revealed "significant" sensory deficiencies.  
10 Petitioners argued that the January 2013 IEP only contained one direct OT service that  
11 was related to his fine motor skills while Ms. Piller had recommended some OT services  
12 for sensory needs that she determined.<sup>325</sup>

13 26. KESD argued that KESD had sufficient information to address Student's OT  
14 needs and that the outside evaluation from Ms. Piller reinforced the information already  
15 known to, relied on, and/or used by KESD in determining and providing speech and OT  
16 services to Student.<sup>326</sup> KESD also argued that because Ms. Piller had not observed  
17 Student in a school setting, her recommendations would not be as relevant."

18 27. The hearing record demonstrated that the January 2013 IEP contained 26  
19 environmental supports, some of which are directed to Student's sensory needs, and it  
20 contained various strategies or interventions some of which were specifically directed to  
21 Student's sensory needs. At hearing, Ms. Prengel reviewed each of Ms. Piller's  
22 recommendations and determined that each one was already being used or done by  
23 KESD.<sup>327</sup> While Ms. Piller's recommendations were not each contained within an IEP  
24 goal, they were addressed by KESD in some manner as to Student's behaviors,  
25 strategies or interventions. This claim is dismissed.

### 26 **Speech and Language Evaluation**

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28  
29 <sup>325</sup> See Exhibit 39.

30 <sup>326</sup> Ms. Prengel testimony, TR Vol. 4 at 1025-30 and 1074-75.

<sup>327</sup> See TR Vol. 4 at 1025-30.

1           28.     Petitioners alleged that a speech and language assessment was need to  
2 determine if Student's communication needs had changed and if there were any needed  
3 accommodations, modifications, or speech language related services.

4           29.     Petitioners argued that Student's last speech evaluation was in February  
5 2009 and that he should have been reevaluated in 2012, apparently tying in the three-  
6 year re-evaluation concept. Clearly, any such alleged inaction as to a February 2012  
7 date is beyond the limitations period. This argument fails.

8           30.     Petitioners also argued that KESD should have known that a speech and  
9 language evaluation needed to be done for two reasons: at the January 2013 IEP  
10 meeting, Parent had asked whether one needed to be done<sup>328</sup> and, in preparation for the  
11 September 2013 IEP meeting, Parent had emailed Ms. Forbes to review the 2009  
12 evaluation.<sup>329</sup> Petitioners noted that, in January 2013, KESD had indicated that it was not  
13 needed because Student clearly continued to qualify under Speech/Language  
14 Impairment; Petitioners stated that KESD only evaluates to determine eligibility or exiting.  
15 However, that statement is taken out of context and fails to fails to account for the  
16 remainder of the cross-questions and answers of Ms. Forbes.<sup>330</sup>

17           31.     KESD argued that KESD had sufficient information to address Student's  
18 speech needs and that the outside evaluation from Ms. Carahaly reinforced the  
19 information already known to, relied on, and/or used by KESD in determining and  
20 providing speech and language services to Student.<sup>331</sup>

21           32.     With regard to the Parent's review request prior to the September 19, 2013  
22 meeting, Ms. Forbes replied to Parent on September 19, 2013 as follows:

23           I do not have any additional concerns regarding [Student's] speech and  
24 language skills. His IEP goal continue to be very appropriate for his age and  
25 to provide support to him in the general education curriculum. [Student] is  
26 making steady progress on his language goals. I continue to collect data on

27 <sup>328</sup> Ms. Forbes recollection was that Parent had asked about why it had been so long since an evaluation  
28 was done, and that she had explained that the areas needing an evaluation were discussed at "every" MET  
29 meeting and that the team had felt that they had enough information to continue his eligibility for  
30 speech/language related services; Ms. Forbes further recalled that Parent had not requested at that time  
that an evaluation be done. See TR Vol. 4 at 1090.

<sup>329</sup> Petitioners referenced the emails contained in Exhibit 65.

<sup>330</sup> See TR Vol. 4 at 1147-48.

<sup>331</sup> Ms. Forbes testimony, TR Vol. 4 at 1090-92, and 1104-07.

1 his present levels and to consult with the team on [Student's] language. I  
2 have attached the speech/language update.

3 33. The hearing record demonstrates that the IEP team had the information  
4 needed to determine whether Student needed speech and language services. This claim  
5 is dismissed.

### 6 **Functional Behavioral Assessment**

7 34. With regard to an FBA, Petitioners alleged that an FBA needed to be done  
8 to determine whether Student's behaviors were the result of manifestations of his health  
9 impairment and required modifications to behavior interventions.<sup>332</sup>

10 35. The allegation of a need for an FBA appears to be the result of Parent's  
11 serious concerns at the "crossing" of Student's arms, "restraints", which she and Student's  
12 therapists were seeing as harmful, allegedly causing trauma and emotional distress to  
13 Student, and which were seemingly being used "daily" by KESD in the first three weeks  
14 of school rather than using all the other BSP interventions first. Petitioners argued that  
15 KESD did not understand the functions of Student's behaviors and were punishing him  
16 for his behaviors by using restraints instead of following the BSP which, they argue, may  
17 have been inappropriate and needed to be modified. Petitioners did not argue that the  
18 other interventions (the nonrestraint interventions) in the BSP for Student's behaviors  
19 were inappropriate. Petitioners argued that Student was being restrained more than ever  
20 before and that these actions were causing trauma, which indicated that KESD needed  
21 to stop restraining Student *and* that Student needed a different learning environment.

22 36. Separating Petitioners' argument points into two components, it is clear that  
23 Petitioner's arguments on causing trauma and emotional distress are more appropriately  
24 argued in relation to a Section 504 issue that Petitioners acknowledge will not be  
25 determined under the IDEA case. The other component is whether Student needed a  
26 new learning environment and whether KESD failed to offer FAPE when it denied a  
27 private school placement after the October 2, 2013 IEP meeting.

28  
29 <sup>332</sup> See 34 C.F.R. § 300.502. Requisite FBAs are addressed in the IDEA in the context of disciplinary  
30 issues. See 34 C.F.R. § 300.530(d)(1)(ii). There were no facts alleged in the Amended Complaint, and no  
evidence presented during the due process hearing, regarding any disciplinary action resulting in any  
change of placement.

1 37. Petitioners' arguments in support of this claim spring from multiple  
2 concerns, some of which were not identified as specific issues for hearing. Additionally,  
3 in application, these arguments reach out across the various identified hearing issues.  
4 The FAPE-failure allegations made in Issue #4 and Issue #6 regarding IEPs, BSPs, and  
5 BIPs needing modifications and regarding untrained personnel (*i.e.*, needing to have been  
6 trained in appropriate strategies and interventions), along with the allegation in Issue #8  
7 regarding a failure to provide "sufficient support services" to staff through contracting with  
8 Ms. Pettitt for training, along with the vague allegations in Issue #3 regarding failure to  
9 develop and provide goals and services to address Student's various needs, all circle  
10 back to the allegation and argument that an FBA needed to be done.

11 38. KESD called it the Great Data Debate. That was not a misnomer. From  
12 the September 19, 2013 meeting and forward, Parent and Advocate questioned any and  
13 all of the data information provided by KESD. Not only did Petitioners question the  
14 accuracy and calculations of KESD data, the "inaccuracy" thereof was then argued across  
15 the instant case as the support for nearly all the remaining arguments in the case. KESD  
16 acknowledged that some of the data was not accurate and that as a result of the  
17 September 2013 meeting, KESD reviewed the data "in several different ways" due to the  
18 confusion.<sup>333</sup>

19 39. It must be noted that Petitioners did not raise an IDEA allegation of a  
20 procedural violation, or FAPE-failure, due to the data, inaccuracy of the data, lack of data,  
21 or recordkeeping. Petitioners did not raise an allegation of a FAPE-failure due to lack of  
22 progress. Yet these arguments were consistently presented throughout the arguments  
23 regarding a need for an FBA. Therefore, while the proffered evidence may or may not  
24 demonstrate such facts, because these procedural allegations were not plead, there are  
25 no procedural violations determined in the instant case in this regard.

26 40. Essentially, and for a large portion of the hearing and argument, Petitioners  
27 argued that the KESD data regarding Student's behaviors was inaccurate and had not  
28 been recorded or kept in a manner that permitted either Parent to understand what was

29 <sup>333</sup> KESD Response Memorandum at 17. Additionally, the hearing record demonstrated that, after the  
30 October IEP meeting, although it had indicated that it would, KESD did not provide a summary of specifically  
questioned data.

1 happening in school or KESD to correctly understand Student's behaviors and needs and  
2 to provide appropriate strategies and interventions. Petitioners argued that, as a result  
3 of the inaccuracies, Parent was not provided with, or had no access to, "educational  
4 records" (in the instance of behaviors and restraints) and was unable to participate in the  
5 process.<sup>334</sup> Inextricably linked into those "inaccuracy" arguments were Petitioners'  
6 arguments that KESD did not really know the functions of Student's behaviors and,  
7 therefore, was not and could not have been properly addressing Student's behaviors,  
8 and, thus, KESD (a) had failed to create an appropriate BSP or BIP, (b) had failed in the  
9 implementation of the existing BSP or BIP, resulting in the "dramatic" increase in  
10 restraints in 22 days of school, and (c) failed to offer the proper LRE for Student.

11 41. Regarding timing, Petitioners argued that FBA should have been done in  
12 January 2012 when he returned from Colorado and/or should have been done as soon  
13 as the restraints increased. Clearly, the alleged inaction in January 2012 fails as outside  
14 the claim period.

15 42. The entirety of the available behavior records was reviewed by the  
16 Administrative Law Judge, page by page, wringing out of the hearing record a voluminous  
17 amount of information about Student's behaviors.<sup>335</sup> The entirety of the hearing record  
18 was culled, page by page, for any detail that might contribute to the strength of all of the  
19 parties' arguments.

20 43. The hearing record, and the available historical and then-current factual  
21 backdrop, demonstrated that Student's behaviors, and the functions, remained the same  
22 across the entire claim period, irrespective of the number of times the behaviors occurred.  
23 Behavior performance reports in the IEPs, daily point sheets, bus incident sheets, and  
24 the testimony of his teachers corroborate the information about consistent behaviors. At  
25 school, Student was known to kick, bite, hit, scratch, spit, yell, throw things, use  
26

27 <sup>334</sup> The Tribunal understands this to be a procedural portion of the "records" claim; the other more  
28 substantive legal issue regarding allegations of failure to provide "educational records" remains to be  
29 addressed in Issue #11.

30 <sup>335</sup> The Administrative Law Judge culled through each Exhibit that to find any Exhibit that contained any  
behavior goal(s) description, behavior summary, present level of behavior, behavior tracking, behavior  
incident, compilation of data, and behavior progress report; that review and the time to compare the review  
to the parties' arguments in framing the evidence took much longer than was anticipated.

1 inappropriate language, and call names, among a few demonstrated others.<sup>336</sup> The  
2 hearing record demonstrated that the incidences of Student's behaviors fluctuated. Some  
3 of the functions were: when he was tired; when he was hungry (because he had poor  
4 eating habits); when he was frustrated or overwhelmed; when he was overstimulated;  
5 when he was afraid and not feeling safe; when he was "testing" the persons around him  
6 and seeking attention; when he did not want to do what was being asked of him; and  
7 when he was asked to stop a preferred activity, among others. The hearing record  
8 demonstrated that changes in Student's environment or tasks were problematic for him,  
9 causing him to react in various ways, and not always in the same way. The known  
10 calming interventions were of removing him from the trigger, quiet time, allowing him to  
11 sleep, sensory activity time, singing, and loving-type interactions of cradling and hugging.

12 44. Given that KESD acknowledged that the data was not accurate, the  
13 question becomes whether the records provided, and the hearing record, demonstrated  
14 the need for an FBA, or a failure to implement the BSP in the January 2013 IEP, or a  
15 unilateral development of an "inappropriate BSP" for the 2013 fall semester.<sup>337</sup> Those  
16 are the stated issues that deal with development and utilization of a BSP.

17 45. On review, overall, the accuracy or inaccuracy of the data, and coming to  
18 any agreement on what is, or is not, an accurate number or accurate percentage,  
19 contributes little to the outcome of the arguments regarding the stated issues. In this  
20 case, Petitioners' expert and KESD personnel provided conflicting opinions regarding  
21 whether the number of restraints, in any period of time, indicated that an FBA was needed.  
22 Although Dr. Boney recommended that an FBA should be conducted if a restraint occurs  
23 more than 3 times in 90 days,<sup>338</sup> he provided no support for such a practice other than to  
24 reference his knowledge of other "school district policies." TR Vol. 6 at 1752. Additionally,  
25 Dr. Boney acknowledged that he did not know when the IDEA required that an FBA be  
26 completed.<sup>339</sup> *Id.* at 1753.

27 <sup>336</sup> KESD personnel indicated that they did not see the behaviors in school that Parent was seeing at home.  
28 <sup>337</sup> Issues 1(f), 4(b)(i), and 6(h), respectively. Issues 4(b)(i) and 6(h) will be addressed elsewhere in this  
29 decision.

30 <sup>338</sup> TR Vol 2 at 659.

<sup>339</sup> In preparation for his testimony, Dr. Boney reviewed the April 2011 FBA and the successive BSPs  
prepared for Student. TR Vol. 2 at 638-40. There is no indication that he reviewed the entirety of Student's  
IEPs that contained behavior goals, targeted behaviors, antecedents, environmental supports, stated

1           46. Under the IDEA, an FBA is mandated in the area of discipline; however, in  
2 other circumstances, an FBA is only required to be "considered" when a child's behavior  
3 impedes his learning or the learning of others.<sup>340</sup> In this case, BITeacher indicated that,  
4 if an IEP team was uncertain about the function of a child's behavior and the behavior  
5 was resistant to intervention and impacting the child's access to learning, the IEP team  
6 would consider the need for an FBA. TR Vol. 2 at 567, 610-11 and TR Vol. 7 at 1976-77.  
7 BITeacher opined that an increase in the use of a restraint was not, by itself, an indicator  
8 that a behavior was resistant to the interventions. TR Vol. 2 at 568. BITeacher identified  
9 the function of Student's behaviors as being task avoidance and attention; Ms. W. echoed  
10 this position. TR Vol. 7 at 1977; TR Vol. 5 at 1447. Therefore, while Ms. Burgess  
11 identified these functions in her September 2013 assessment, it is clear that these  
12 functions were already known to KESD. TR Vol. 7 at 1978

13           47. The hearing record demonstrated that KESD was well aware of the  
14 functions of Student's behaviors. Not only had Parent continually provided her advice  
15 and information to KESD, which was based on Ms. Pettitt's advice, the KESD teachers  
16 and the behavior intervention specialists knew Student well and were in the classroom  
17 working with Student, and experiencing his behaviors and outbursts. Ms. Pettitt was the  
18 RAD therapy specialist working with Student since January 2012; KESD repeatedly  
19 utilized her input.<sup>341</sup> KESD knew the interventions that worked, but tried others when  
20 something did not work. KESD received continual feedback from Parent in regard to the  
21 daily point sheets and Parent acknowledged to them often that sometimes it was hard to  
22 tell what the trigger was but that she usually could and that they could contact her,  
23 essentially, whenever they needed to. Student's 2012 and 2013 IEPs contained lengthy  
24 lists of behavior antecedents, interventions and supports. Parent's RAD expert, Ms.

25  
26 interventions, and positive reinforcements. Dr. Boney opined that the successive KESD BSPs were  
27 "flawed" in certain ways (failure to take baseline data for use of coping strategies and the replacement  
28 strategies were not "prescribed based on [behavior] function") because they were based on a flaws within  
29 the April 2011 FBA. TR Vol. 2 at 641-42 and 644-45. This testimony is discounted because the April 2011  
30 FBA is not a part of the record and the Tribunal is unable to determine reliability of the testimony, and thus,  
the provided opinions.

<sup>340</sup> 34 C.F.R. § 300.324(a)(2)(i).

<sup>341</sup> A PWN from August 17, 2012 indicated that the IEP Team at that time had no questions regarding  
effective strategies because the current strategies that had been recommended by Ms. Pettitt "last year"  
were effective. See Exhibit F at KESD00502.

Pettitt, provided her input to the IEP teams, provided training in Student's disability, and was consulted regarding useful strategies; she offered encouraging advice to KESD teachers, acknowledging more than once that the strategies KESD was using were appropriate. Therefore, the hearing record demonstrates that there was no need for an FBA to be completed at any time during the claim period. That it not to say that the time was not ripe for the completion of a new FBA as a part of the three-year re-evaluation process that KESD began to undertake. However, Petitioners have not demonstrated that, during the claim period, Student needed an FBA in order for KESD to determine whether Student's behaviors were the result of manifestations of his health impairment and required BSP modifications. This claim is dismissed.

### Issue #2

48. Petitioners allege that KESD failed to provide FAPE to Student by not funding an FBA independent education evaluation ("IEE") which Parent requested on December 20, 2013.<sup>342</sup> Parent's request stated that she disagreed with the "FBA" that was the basis for the BSP adopted in the January 2013 IEP; Parent's reference to a "December and January 2013" FBA is not clear because there is no document known to the hearing record that was indicated to be an FBA in a month of December or in the month of January 2013.<sup>343</sup>

49. Parent had participated in a December 19, 2013 IEP meeting at which KESD discussed the proposed evaluations and observations needed to prepare for a three-year re-evaluation process. At that meeting, Parent gave KESD a written statement refusing to agree to any evaluations or observations that she did not know about. Parent got two responses from KESD on December 20, 2013. KESD indicated that it would provide the IEE criteria and KESD issued a PWN indicating that it would not complete an IEE because Student was not attending a KESD school.

<sup>342</sup> See 34 C.F.R. § 300.502. Requisite functional behavioral assessments ("FBA") are addressed in the IDEA in the context of disciplinary issues. See 34 C.F.R. § 300.530(d)(1)(ii). There were no facts alleged in the Amended Complaint, and no evidence presented during the due process hearing, regarding any disciplinary action resulting in any change of placement.

<sup>343</sup> The record reflects an April 2011 FBA; however, that document is not a part of the hearing. An April 2011 evaluation represents an action beyond the claim period and, therefore, may not form the basis of a claim in this matter.



1 50. Petitioner argued that, once KESD acknowledged the email and indicated  
2 that it would provide the IEE criteria, KESD had "agreed" to the IEE and was required to  
3 provide the criteria and was required to fund the IEE.<sup>344</sup> Petitioner claimed retaliation.  
4 KESD argued that the claim was a disagreement with an evaluation that was more than  
5 2 years old and was, therefore, beyond the IDEA limitations period. KESD also argued  
6 that Parent had already having indicated to KESD that Student would not be returning  
7 under the transition plan.<sup>345</sup> KESD appropriately determined not to move forward with an  
8 IEE for both reasons, Student was not enrolled in KESD and the request was untimely.  
9 Issue #2 is dismissed.

### 10 Issue #3

11 51. Petitioners allege that KESD failed to provide FAPE to Student by not fully  
12 developing and providing relevant direct special education goals and services, and  
13 related services, to address Student's academic achievement, speech and  
14 language/communication needs, OT needs, PT needs, AT needs, social emotional  
15 support needs, behavioral support needs, counseling needs, and social skills needs.<sup>346</sup>

16 52. These blanket allegations were made without the benefit of any clarification,  
17 which was requested by the Tribunal, prior to hearing. Petitioners did not specify any  
18 particular goals or services in the January 2013 IEP that are alleged to be inadequate to  
19 address Student's needs. Petitioners did not specify any particular goals or services that  
20 had been requested, considered, and refused, to address Student's needs.<sup>347</sup> While  
21 Petitioners attempted to tie some of its arguments into this issue, this claim is vague and,  
22 as written, the hearing record does not provide specifics that, at hearing, should be  
23 considered as having been plead in the Amended Complaint. Issue #3 is dismissed.

### 24 Issue #4(a)

25  
26 <sup>344</sup> Petitioner also relied on its argument that the Brightmont placement that KESD was paying for was not  
27 a private placement but was a District educational placement. That is

28 <sup>345</sup> See Exhibit T.

29 <sup>346</sup> The Amended Complaint did not specify any particular missing or erroneous goals and services on any  
30 of Student's IEPs in the relevant time period but continued to make the blanket allegation of inappropriate  
KESD actions and failures to provide "appropriate" goals and services.

<sup>347</sup> The general references in Issue #3 to "not fully developed" and "relevant" goals were not sufficient as a  
"description of the nature of the problem" with "facts relating to the problem." See 34 C.F.R. § 300.508(b)  
requirements.

53. Petitioners allege that KESD failed to provide FAPE to Student by failing to implement Student's February 2012 IEP in failing to provide training after August 17, 2012 to Student's transportation providers and failing to provide a BSP for transportation. However, a PWN dated August 17, 2012, indicated that KESD agreed: to continue to collaborate and provide training for transportation staff in proactive and positive strategies for Student on the bus; to communicate and collaborate with Ms. Pettitt as needed; that the implementing staff had no questions regarding effective strategies; and, that current strategies, as recommended by Ms. Pettitt last year, were effective. See Exhibit F at KESD00502. Based on that Exhibit, the hearing record indicates that this claim has little merit. While the PWN does not detail that there was a new BSP for the bus transportation, it also indicates that the existing strategies were going to be continued because they were determined by the IEP team to be effective. Petitioners failed to bring forward any other evidence related to this claim. KESD argued that Petitioners did not address the claim in its legal arguments. The claim is dismissed.

**Issue #4(b)**

54. Petitioners allege that KESD failed to provide FAPE to Student by failing to implement Student's January 2013 IEP in several ways. However, only one of the nine stated claims was argued: a failure to implement the BSP when KESD used physical restraints and seclusion. The remaining unaddressed claims are dismissed.

55. The Administrative Law Judge reviewed in detail the totality of the hearing evidence regarding both unsafe and disrespectful behaviors that were tracked and reported in an effort to determine a causal function or a failure of application of the BSP, *i.e.* implementation.

56. Regarding seclusion, the hearing record demonstrated no evidence of Student being secluded. KESD denied that Student was secluded at any time. Ms. W. indicated that she had never secluded Student. TR Vol. 5 at 1497. At an IEP meeting, BITeacher indicated that Student was never secluded. Exhibit 76 at 28-29. Although two daily sheets<sup>348</sup> contained the term "seclusion room," KESD explained the utilization of the room known as the sensory room being used in two ways, either as a sensory room, *i.e.*,

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<sup>348</sup> Exhibit FFFF at KESD00810 and Exhibit GGGG at KESD00841.

1 with the door open and with an adult present, or as a seclusion room which would be with  
2 the door shut.

3 57. Regarding "restraints", Petitioners alleged and argued there was a  
4 "dramatic" increase in restraints in the fall of 2013. Petitioners argued that the changes  
5 made to the BSP in the January 2013 IEP made it more likely that Student was going to  
6 be restrained and that KESD was restraining him at times when he was not an immediate  
7 danger to himself or others. The latter half of this argument fails, as the standard was no  
8 longer the use of a hold only when he was an immediate danger to himself, the standard  
9 now was the circumstance of unsafe behaviors.

10 58. One must keep in mind that the precipitating factor in the instant case is  
11 Parent's serious concerns at the "crossing" of Student's arms, "restraints", which she and  
12 Student's therapists were seeing as harmful, allegedly causing trauma and emotional  
13 distress to Student.

14 59. In the February 2012 IEP, the BSP called for the "KESD policy for safe crisis  
15 management" to be used when Student was "an immediate danger to himself or others."  
16 The safe hold was described as "turn[ing] Student toward you and hug him with his arms  
17 down and/or hold him on your lap and cradle him with his arms down or one arm down if  
18 he wants to suck on his fingers."

19 60. At the January 2013 IEP meeting, Student's BSP was modified and varied  
20 the interventions to be called upon based on Student's specific exhibited behaviors,  
21 whether they were unsafe behaviors or were only disruptive or disrespectful behaviors.  
22 The January 2013 BSP called for the possible use of an NCI hold in the event that Student  
23 was exhibiting the "unsafe behaviors," defined to be spitting, kicking, scratching, biting,  
24 hitting, throwing objects, pinching and self-injurious behaviors. See Exhibit I at  
25 KESD00530.

26 61. At hearing, Ms. W. stated that the change in intervention to using the NCI  
27 hold for the January 2013 BSP was based on "the need to get [Student] to a safe place"  
28 and that they were "moving on" from "cradling him and what we were doing before ... into  
29 the next strategy." TR Vol. 5 at 1495. Parent and Ms. Pettitt were present at the January  
30 2013 IEP meeting when the new BSP was developed.

1           62. The hearing record demonstrates that there were restraints in each  
2 academic month of 2013 that Student was enrolled. The daily point cards show a  
3 minimum of: 3 in January; 1 in February; 4 in March; 4 in April; and 2 in May.<sup>349</sup> When  
4 Student returned in the fall, according to Petitioners, there were 16 between August 5,  
5 2013 and September 6, 2013. The circular concern is whether the restraints occurred  
6 because Student's unsafe behaviors increased or did his unsafe behaviors increase  
7 because he was being restrained. Petitioners essentially argued that the circumstance  
8 was more the latter and, that with a new teacher and feeling unsafe, as Student was being  
9 restrained more often, he was in chaos leading to the increase in behaviors.<sup>350</sup> Petitioners  
10 discounted the circumstance of Student experiencing difficulties at transition times such  
11 as at the beginning of a school year, arguing that he has not had any difficulty with  
12 transitions to, and with, ESY. At hearing, Parent indicated that she did not believe that  
13 Student had "a difficult time" at the beginning of the 2012-2013 school year because Ms.  
14 W. was present as an attachment figure. TR Vol. 4 at 1313. However, the daily point  
15 sheets for August and September of 2012, demonstrate otherwise; they show that the  
16 problem behaviors and the patterns of problem behaviors, and the functions of those  
17 behaviors, were essentially no different in 2012 as they were in 2013. In August 2012,  
18 Student had 17 days with five or more problem behaviors during the day and with four  
19 removals or restraints. In September 2012, Student had 16 days with five or more  
20 problem behaviors during the day and, in a surprise circumstance, on September 11,  
21 2012, Student crossed his own arms. See Exhibit EEEE at KESD00645.

23 <sup>349</sup> These numbers may not be accurate as the daily point sheets also document many "removals," the  
24 manner of which are not more clearly detailed.

25 <sup>350</sup> Petitioners argued that Ms. J. was "well intentioned" but "unprepared" to deal with Student's needs in  
26 the circumstance of Student's disrespectful and unsafe behaviors increasing in frequency and intensity.  
27 Closing argument, Opening at 1. However, the hearing record demonstrated otherwise; Ms. J. was  
28 prepared for having Student in her class. Her preparation included contact with Parent, meeting Parent  
29 and Student at Meet the Teacher night (and Ms. W. was also present at that meeting), obtaining information  
30 regarding Student and RAD from Parent, multiple conversations with Ms. W. and BTeacher regarding  
Student along with access to Student's prior behavior information. Additionally, she had received 8 hours  
of non-violent crisis intervention training. More likely, it was Student who was unprepared. Parent indicated  
that Student was upset and cried when she told him that Ms. W. was not going to be his teacher, and she  
indicated that she "tried to redirect him." Parent did not indicate that she had discussed how to do this with  
Ms. Pettitt, yet she berated KESD for not having told her earlier "in June" so that they would have had time  
for his therapists to work with him. See Exhibit 72 at 006-07, 014-15.

1           63.     Additionally, the hearing record demonstrated Student's bus behaviors  
2     were consistent, irrespective of the driver. See Transportation emails, Exhibit 74. It is  
3     noted that when KESD offered to provide transportation to the parental private placement  
4     which would have been a 35-40 minute ride, Parent told KESD that Student "*struggled* to  
5     experience success on the 5-7 minute bus ride from our home to Paloma." Exhibit SSS  
6     at KESD03193-95 (emphasis added). The Dailies in August and September of 2013  
7     demonstrate Student's nearly constant early morning behaviors after arriving at school.  
8     The hearing record does not demonstrate an overuse of restraints; the hearing record  
9     demonstrates an increase in unsafe behaviors in August and September of 2013, and  
10    that KESD sometimes used the NCI hold, "restraints," when other interventions failed to  
11    deescalate Student's unsafe behaviors if, and when, Parent's preferred method failed.<sup>351</sup>

12           64.     Finally, the hearing record demonstrated that Student's behaviors, through  
13    no fault of his own, but as attributed to RAD, continued to be present at Brightmont. On  
14    October 15, 2013, Ms. Wood wrote about Student being asked to stop drawing  
15    inappropriate pictures on the white board and his reaction beginning to laugh and become  
16    more silly and more frenzied with the behavior escalating to throwing "anything he could  
17    get his hands on" resulting in Ms. Gillespie coming into the room and, essentially,  
18    restraining Student. Ms. Woods noted that "Mary entered the room and held his hands  
19    down at his side, he proceeded to kick [and] spit at her until she and his mom could talk  
20    him down."<sup>352</sup>

21           65.     Student is a complex child and his behaviors are not completely predictable,  
22    or as the hearing record indicates, not always manageable with minor interventions. The  
23    KESD BSPs cannot be viewed as a cure or preventative method, but only as the possible  
24    strategies that might be able to manage Student's behaviors.

25  
26           <sup>351</sup> TR Vol. 2 at 373, 386-87, 546-47, and 464-65.

27           <sup>352</sup> In considering those actions, it must be noted that the intervention at Brightmont was not at all what  
28    Parent would have expected of KESD personnel, as she had asked KESD not to have another person  
29    come onto the scene and to have only one person deal with Student's behavior, and there is no mention of  
30    any calming technique attempted to be used as Student began or continued his behavior episode.  
   Additionally, the hearing record demonstrates that Student's behaviors were not abated at Brightmont. See  
   Exhibit QQQQ at KESD03620, January 2014 comments regarding Student's explosive behavior episodes,  
   especially as to January 23, 2014, indicating that when working with Student "one never knows when he  
   will suddenly go from a Green day to a Red. He is very temperamental and manipulative." It is not at all  
   clear that Brightmont staff was well-informed regarding Student and his disability.

1           66. Based on the foregoing, Petitioner's argument fails that KESD failed to  
2 implement the January 2013 BSP when it used restraints. Issue #4 is dismissed.

3                           **Issue #6**

4           67. Petitioners allege that KESD procedurally violated the IDEA when it made  
5 "inappropriate decisions and changes" outside of the IEP team process and absent  
6 meaningful parental participation in several ways. Overall, Petitioners argue that each  
7 action KESD made or took after the October 2, 2013 IEP meeting should have been made  
8 or taken at an IEP meeting, and because the decisions were not made through the IEP  
9 team, these were procedural violation of the IDEA and Parent was prevented from  
10 participating in the decisions being made.

11           68. The communication record demonstrates that KESD reached out to Parent,  
12 after she gave KESD her September 19, 2013 ten-day notice of private placement, in  
13 order to work with her with KESD offering options for Student and offering plans to  
14 continue to provide special education and related services and FAPE to Student. At the  
15 October 2, 2013 IEP meeting, the IEP team discussed the outside evaluators' reports and  
16 the available data in light of Parent's ten-day notice. At the IEP meeting, the IEP team  
17 determined that the KESD educational placement of self-contained classroom was the  
18 appropriate placement. The IEP team declined to place Student at Brightmont as a KESD  
19 placement but KESD offered, in its effort to work collaboratively with Parent, to financially  
20 support the parental placement and to plan a transition back to a KESD self-contained  
21 classroom. At that time, Parent had already registered Student at Brightmont. After the  
22 October 2, 2013 IEP meeting, KESD listed out not only the options discussed at the IEP  
23 meeting, but also other possible options for Parent to review and consider regarding the  
24 provision of services to Student. Parent was immediately responsive, and she chose  
25 "Option #4," the parental placement at Brightmont with a transition back to KESD, and  
26 she asked for some other specific items. All of the communication between the parties  
27 from that point forward was, in reality, a negotiation geared toward a transition plan  
28 bringing Student back from the parental private placement to continue receiving his  
29 determined special education services through KESD. The hearing record demonstrates  
30 agreement or concessions to, and planned actions (the training of various personnel and  
observations), by KESD in response to Parent's requests regarding the transition plan.

1 The negotiations taking place were neither unilateral nor being done without the  
2 participation of Parent. This argument fails.

3 69. Within the allegations of unilateral determinations outside the IEP process,  
4 Petitioners had alleged that KESD failed to amend the IEP to reflect the "change" in  
5 Student's educational placement to Brightmont. However, the allegation is based on  
6 untrue facts.<sup>353</sup> KESD had not changed Student's educational placement from self-  
7 contained to private day school. KESD clearly declined to make such a change and the  
8 PWN was explicit on this point. See Exhibit P. At hearing, Parent acknowledged that she  
9 now understood that KESD had not changed Student's LRE at the October 2, 2013  
10 meeting. TR Vol. 5 at 1543, 1546. Having declined to change Student's educational  
11 placement, KESD was under no obligation to create a new IEP for the reason that the  
12 January 2013 IEP was still in place.<sup>354</sup>

13 70. Petitioners argued that KESD should be found to have "consented" to the  
14 Brightmont placement, and equitably reimburse Parent, because KESD "decided" a start  
15 date, a start time, the number of hours for attendance, and the date on which Student  
16 would return. The hearing record appeared to indicate that the start date was a function  
17 of being just after the academic fall break, that Brightmont and KESD together determined  
18 the hours, and that the date on which the transition plan indicated that Student would  
19 return when transition was discussed in the IEP meeting, was the logical date due to the  
20 spring semester beginning on that date. This argument fails.

21 71. Within the allegations of unilateral determinations outside the IEP process,  
22 Petitioners had also alleged that KESD had failed to take several other actions.  
23 Petitioners are alleging that KESD made decisions outside the IEP process not to train  
24 transportation staff, not to develop a transportation plan, and not to discuss transportation  
25 needs "in fall semester of 2013." KESD notes that the timing of these allegations was  
26 never specified, whether it was before school began or once transportation to Brightmont  
27 was being discussed. While the hearing record does not indicate any parental concerns

28 <sup>353</sup> While Petitioners argued that, because KESD paid for or offered to pay for Brightmont services, KESD  
29 had "placed" Student at Brightmont, this is simply a falsity and the argument cannot succeed.

30 <sup>354</sup> Nowhere in the Amended Complaint did Petitioners allege that the January 2013 IEP failed to provide  
FAPE or that October 2, 2013 "offer" of FAPE (*i.e.*, the KESD denial of private day placement) was a  
violation of IDEA for failure to provide FAPE.

1 in August 2013 with bus transportation and does not indicate any particular decisions that  
2 were made for August 2013 regarding bus transportation, the hearing record contains  
3 multiple emails regarding the KESD transportation offer, training of transportation  
4 personnel, and a BSP plan for transportation to Brightmont which all occurred after Parent  
5 gave the ten-day notice. Therefore, the hearing record evidences that this claim should  
6 fail.

7 72. Parent had given notice and KESD had declined the requested educational  
8 placement at Brightmont. The two most evident possibilities at that point were either the  
9 parties coming to a resolution of the issues and concerns that each of them had or due  
10 process. Resolution of issues that arise between parents and school districts may come  
11 about through informal meetings, through negotiation, and through mediation;  
12 correspondence between the parties is typically a part of that informal resolution or  
13 negotiation process. The IDEA does not require that all negotiations and discussions  
14 between parents and schools be conducted through IEP meetings. Clearly, Parent was  
15 aware that KESD was receiving, and was responsive to, her various previous emails  
16 regarding Student. The hearing record is replete with parental email-requests made to  
17 KESD and with KESD responsive actions. Issue #6 fails.

#### 18 Issue #7

19 73. Petitioners allege that KESD violated IDEA by attempting to contract with  
20 Parent outside the IEP process, or coerce Parent to sign a contract for funding, regarding  
21 the "private placement" and refusing to fund the private placement, and *subsequently*  
22 violated the IDEA by refusing to hold IEP or multidisciplinary evaluation team ("MET")  
23 meetings or provide any IEP services to Student.<sup>355</sup>

24 74. This allegation contains two separate allegations. Petitioners allege that it  
25 was a violation for KESD to "attempt to contract" with or "coerce" Parent into signing a  
26 contract for funding the private placement and, related, a violation for KESD to refuse to  
27 fund the private placement.<sup>356</sup> Petitioners also allege that "subsequently" it was a  
28 violation to refuse to hold IEP meetings or MET meeting and a violation to not provide

29 <sup>355</sup> See 34 C.F.R. § 300.148 regarding private placement. Parent gave ten-day notice of private placement  
30 on September 19, 2013, and the alleged actions set forth in this issue took place thereafter.

<sup>356</sup> The hearing record demonstrated that KESD did financially support the parental private placement at  
Brightmont as it had agreed to do for the KESD-agreed time period to do so.



any IEP services to Student; the presumption is that "subsequent" refers to the time period after Parent gave KESD the ten-day notice.

75. The IDEA due process setting is for consideration and determination of identification, evaluation and placement issues. Parties' efforts to settle a dispute, or provide agreements for issues raised outside a due process situation simply do not fall within the authority given to hearing officers for IDEA due process matters. This claim is dismissed.

76. Petitioner alleged that KESD refused to hold IEP meetings or MET meeting and refused to provide any IEP services to Student after the ten-day notice. This allegation is simply false. KESD did not refuse to hold any meeting. KESD did not refuse to provide speech or OT services. After Parent gave the ten-day notice and after Parent enrolled Student at Brightmont, KESD conducted three IEP or MET meetings, a meeting on October 2, 2013, a meeting on December 3, 2013, and a meeting on December 19, 2013, all in efforts to collaborate and try to resolve the concerns and issues Parent was raising. The hearing record contains multiple email communication between the parties in regard to these meetings and in regard to efforts to work together on a transition plan to have Student return to KESD. When requested by Parent, KESD agreed and made arrangements and offered to provide speech and OT services to Student at a KESD campus, notwithstanding that Student was enrolled elsewhere. See Exhibit Q at KESD00592-93. Related to its arguments and position that KESD had "consented" to the Brightmont placement, Petitioner's Closing arguments state that that KESD had "fulfilled" its IDEA obligations when it trained the Brightmont personnel and the transportation personnel and when it continued to have IEP meetings, including reviewing the outside evaluations. Closing argument, Opening Memorandum at 27-29. Issue #7 fails.

#### **Issue #8**

77. Petitioners allege that, during the claim period but not as a part of any IEP, KESD failed to provide FAPE to Student by failing to provide the IEP team and KESD staff with "sufficient support services" from Deborah Pettitt.<sup>357</sup> However, after the

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<sup>357</sup> In the pre-hearing process, this allegation was thought to be about a contract that KESD was not fulfilling, and the parties were informed that contract issues were not properly before the Tribunal and are not adjudicated through the IDEA due process hearing process.

1 presentation of evidence, it appears that Petitioners are alleging that KESD had an IDEA  
2 obligation to include, or should have included, in Student's IEP, and should have provided  
3 support services to the KESD personnel through an outside therapist. This allegation  
4 fails for two reasons, there is no IDEA requirement for schools to obtain outside services  
5 from a student's therapist or to place such services in an IEP, and the allegation is  
6 outweighed by the evidence.

7 78. The hearing record demonstrated multiple contracts with Ms. Pettitt at  
8 Parent's request: a contract for September 5, 2012 through December 20, 2012 and, a  
9 contract for January 13, 2012 through March 30, 2012.<sup>358</sup> When Parent found out about  
10 the new teacher for fall of 2013, she demanded that KESD give a contract to Ms. Pettitt  
11 so that she could educate the new teacher on RAD and also be with her, or be available  
12 for her regarding Student and his disability. Exhibit 72 at 006-07. In emails regarding this  
13 situation, KESD agreed to contract with Ms. Pettitt for a one hour consultation. *Id.* at 008.  
14 After the October 2, 2013 IEP meeting, as a part of the overall transition plan for Student,  
15 KESD agreed to contract with Ms. Pettitt for 2 hours training/consultation with Brightmont  
16 staff and 2 hours with KESD Manitas staff. Exhibit PPP.

17 79. At hearing, Ms. Pettitt indicated that she usually gets paid by parents and  
18 that KESD was the only school district that had ever paid her for her involvement. TR  
19 Vol. 3 at 751.

20 80. As noted by KESD, Petitioners failed to argue in support of this allegation.  
21 Issue #8 is dismissed.

#### 22 Issue #11

23 81. Petitioners allege that KESD denied FAPE to Student by failing to provide,  
24 pursuant to Parent's request, "a full set of all of [Student's] educational records, email  
25 communications, and the bus video. . . ." <sup>359</sup>

26 82. The IDEA defines "education records" as "the type of records covered under  
27 the definition of 'education records' in 34 C.F.R. Part 99." 34 C.F.R. Part 99 contains the  
28 federal regulations promulgated to implement the Family Educational Rights and Privacy  
29 Act ("FERPA") found at 20 U.S.C. § 1232g. Pursuant to 34 C.F.R. § 300.613, parents

30 <sup>358</sup> See Exhibit 35 at 31 and 32; see also Exhibit G.

<sup>359</sup> See 34 C.F.R. § 300.611(b).

1 have the right to review and inspect a student's education records that are collected and  
2 maintained by the school. Typically, issues regarding "education records" are resolved  
3 by the parties.

4 83. A failure to provide educational records, if proven, would be considered to  
5 be a procedural violation, which "may" be found to be a failure to provide FAPE for a  
6 Student if the procedural failure "[s]ignificantly impeded the parent's opportunity to  
7 participate in the decision-making process regarding the provision of a FAPE to the  
8 parent's child." 34 C.F.R. § 300.513.

9 84. For these parties, this issue was addressed through a state administrative  
10 complaint in 2014. See Exhibit MMMM. It appears that, on behalf of Student and Parent,  
11 Advocate filed the state complaint on February 13, 2014, regarding an October 22, 2013  
12 request to KESD from Parent for specified records. While Advocate acknowledged that  
13 KESD had provided 600+ pages or records, he indicated that certain specific records had  
14 not been included. The Letter of Finding discussed the distinction between an  
15 "educational record" and other records. With regard to any need for compliance by KESD,  
16 the Letter of Findings indicated that KESD needed to provide copies of all emails even if  
17 Parent would already have a copy of the emails sent to her and KESD needed to provide  
18 copies of daily point sheets. Regarding the requested bus video(s), the Letter of Finding  
19 noted that its investigation revealed that KESD believed that at the time the request came  
20 the tapes had been reused and taped over, and that such tapes were not "maintained" as  
21 an educational record. The Letter of Finding determined that there was no evidence the  
22 bus tape was directly related to Student and that there was no evidence that a bus video  
23 was "collected, maintained, or used by the District under Part B of the IDEA."

24 85. At the first pre-hearing conference in this matter, the availability of Student's  
25 education records was discussed and the parties determined to meet to conduct the  
26 review and inspection, and KESD offered to provide a copy of any of Student's education  
27 records found on such a review not to have already been provided to Parent. At a March  
28 11, 2015 pre-hearing conference, KESD indicated that records had been provided;  
29 Petitioners acknowledged that they received records but indicated that the records were  
30 records Petitioners already had. Petitioners continued to assert at that time that they  
sought "records" that they believed were educational records, including e-mails and a bus

1 video, which Petitioners believed were records that were "maintained," or "should be  
2 maintained and not destroyed," by KESD.

3 86. KESD subsequently located bus video from the two bus incidents (August  
4 22, 2012, and August 29, 2013) and provided those to Parent in May of 2015.<sup>360</sup> By  
5 stipulated agreement, the bus videos were proposed for admission despite the disclosure  
6 deadline having passed. See Exhibits 82 and 83. In Closing, Petitioners argued that  
7 KESD failing to provide these within 45 days of the request<sup>361</sup> and not until May 2015 had  
8 "denied Parent the opportunity to participate in the process."

9 87. In Closing, Petitioners argued that, after the October 2, 2013 meeting,  
10 KESD had agreed to review the behavior information and data, updating it as found to be  
11 needed, and to review the data regarding "all" IEP goals. Petitioners argued that they  
12 had not received this information and should have received it prior to the due process  
13 hearing. Petitioners also argued that Ms. J.'s lesson plans that she prepared and shared  
14 with the IA should have been provided prior to the hearing.

15 88. The hearing record demonstrated that Parent's and Advocate's concerns  
16 about the behavior tracking and data charts were discussed at the September 2013, the  
17 October 2013, and the December 2013 IEP meetings. The hearing record contained a  
18 great deal of testimony regarding data, inaccuracies, its review and agreements to review,  
19 summarize or rechart/correct behavior data. The question is whether such review  
20 information, summaries and recharted data, or the referenced lesson plans, would be  
21 considered to be an "educational record." KESD argued that they were not educational  
22 records as they met the rule's exception for "sole possession" documents.<sup>362</sup> Petitioners'  
23 argument fails regarding the data review information, summaries and charts referenced.  
24 The Tribunal concludes that those documents were not created and maintained by KESD  
25 as an "educational record."

26 89. Regarding the bus videos, there is simply no evidence that bus  
27 transportation surveillance videos for a school system transportation department are

28 <sup>360</sup> KESD did not indicate where the videos were and/or how the videos came to be located.

29 <sup>361</sup> The Letter of Finding does not give the exact date of a request for the bus video(s), but indicates that it  
30 was "more than two months after" the August 2013 incident; the indication is that it would have also been  
more than a year after an August 2012 incident. Exhibit MMMM.

<sup>362</sup> 34 C.F.R. § 99.3.

1 created and maintained as an "educational record" for any particular student. A bus  
2 transportation surveillance video would contain recordings of any and all students on the  
3 particular bus; therefore, it is not plausible to believe that they would be maintained as an  
4 "educational record" for any one particular student. It would be reasonable to presume  
5 that such video tapes would be maintained as a transportation record, and reasonable to  
6 also presume such videos to be available, if available at all without violating confidentiality  
7 of a student, as a public record. The hearing record contains no testimony regarding the  
8 maintenance, storage, or re-utilization of bus video surveillance tapes. Issue #11 is  
9 dismissed.

10 90. Because the evidentiary record does not demonstrated any violation of the  
11 IDEA by KESD and, therefore, no remedies would be fashioned, the Administrative Law  
12 Judge does not address Petitioners' requested remedies. The Administrative Law Judge  
13 concludes that Petitioners' Amended Complaint shall be dismissed.

#### 14 **RULING**

15 Based on the findings and conclusions above,  
16 IT IS HEREBY ORDERED that Petitioners' Amended Complaint is dismissed in its  
17 entirety.

18 ORDERED this day, August 22, 2017.

19 /s/ Kay A. Abramsohn  
20 Administrative Law Judge  
21

#### 22 **RIGHT TO SEEK JUDICIAL REVIEW**

23 Pursuant to 20 U.S.C. § 1415(i) and A.R.S. § 15-766(E)(3), this  
24 Decision and Order is the final decision at the administrative level.  
25 Furthermore, any party aggrieved by the findings and decisions made  
26 herein has the right to bring a civil action, with respect to the complaint  
27 presented, in any State court of competent jurisdiction or in a KESD court  
28 of the United States. Pursuant to Arizona Administrative Code § R7-2-  
29  
30

1 405(H)(8), any party may appeal the decision to a court of competent  
2 jurisdiction within thirty-five (35) days of receipt of the decision.

3 Copy e-mailed August 22, 2017 to:

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