

WYOMING DEPARTMENT OF EDUCATION  
SPECIAL PROGRAMS DIVISION  
DUE PROCESS HEARING

In Re the Matter of: ]  
] ]  
] ]  
] ]  
Petitioner, ] Case #: H-0182-12  
] ]  
v. ] ]  
] ]  
County School District # ]

**DECISION AND ORDER**

THIS MATTER, having come before the Independent Hearing Officer (IHO),  
, for a Due Process Complaint filed by Petitioners, who are the Parents and  
legal Guardians of the Student, and a Due Process Hearing occurring in , Wyoming  
on January 7-11, 2013, and with closing arguments provided by the parties via telephone  
conference on January 15, 2013. The following evidence was presented and considered by  
the IHO to be dispositive of the issues in this matter:

**Witnesses:**

Mother;  
Father:

- Residence Manager and Owner;
- , Licensed Child Psychologist;
- Special Education Director;
- , Licensed Child Psychologist;
- Special Education Teacher and Student's Special Education Case Manager;
- Program Manager for
- Direct Residential Services provider at and at
- Speech and Language Pathologist;
- , Behaviorist providing consultative services to the District;

**Exhibits:**

JE<sup>1</sup>1–2/24/11 IEP;  
JE 2–8/8/11 e-mail from Mother to ;  
JE 3–10/12/11 e-mail from to Mother re:  
JE 4–10/27/11 e-mail from Mother to IEP team members re: partial placement/residential placement in and I-Pad use at home.  
JE 6–11/1/11 e-mail from to Mother re:  
JE 7–11/4/11 e-mail from to Mother re: I-Pad;  
JE 8–11/7/11 e-mail string re: I-Pad;  
JE 9–11/15/11 e-mail from to IEP team members re: I-Pad use at home;  
JE 10–e-mail string beginning 12/30/11 re: and I-Pad;  
JE 11–IEP Amendment;  
JE 12–1/24/12 e-mail string regarding setting;  
JE 13–1/29/12 e-mail from Mother to re: closing door on student’s time at high school;  
JE 14–2/1/12 e-mail String and response from re: questions regarding services;  
JE 15–2/3/12 IEP Amendment;  
JE16–Notice of Team meeting dated 2/6/2012;  
JE 18–e-mail string dated 2/19/2012 with District Response re: services for Student;  
JE 19–2/22/12 IEP;  
JE 20–Prior Written Notice regarding 2/22/12 IEP;  
JE 21–3/8/12 e-mail string re: issues at  
JE 22–3/9/12 e-mail re: safety issued at  
JE 23–3/12/12 e-mail re: inquiries regarding services and  
JE 24–e-mail inquiry of by Mother;  
JE 25–e-mail inquiry of Mother to  
JE 26– 3/15/12 e-mail from to Mother regarding follow up contract;  
JE 27–3/16/12 e-mail from Mother to IEP team re: decision not to take Student back to  
  
JE 28–Notice of Team Meeting on 4/5/12 to determine placement;  
JE 29–3/28/12 cover letter to Parents regarding history of recent issues regarding placement;  
JE 30– Written proposal for “ prepared by and and presented at April 5, meeting;  
JE 31–4/5/12 e-mail from Mother requesting contract with and rejecting services from Renew in Gillette;  
JE 32–4/9/12 Prior Written Notice re: rejection of proposal and commensurate proposal of District regarding services for Student;  
JE 33–4/10/12 letter from District to Parents re: cover letter for April 9, 2012 PWN (JE 32);  
JE 34–4/12/12 Parents response to 4/10 District Letter;  
JE 35–4/17/12 District letter regarding placement proposal;

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<sup>1</sup>. “JE” signifies “Joint Exhibit” which was stipulated to by the parties.

JE 36–4/18/12 Mother’s response to JE 35;  
JE 37–4/19/12 District’s response to JE 36;  
JE 39–6/20/12 e-mail from            to Parents re: late mailing of 2/22/12 IEP and Prior Written Notice;  
JE 40–7/3/12 letter from District to Parents re: request IEP meeting for ESY;  
JE 41- 7/3/12 Notice of Team Meeting re: ESY for summer 2012;  
JE 42–7/11/12 Revised Notice of Team Meeting re: Moving date for ESY meeting to 7/19/12;  
JE 43– 7/19/12 Prior Written Notice re: ESY services and lack of commitment from Parents for ESY and I-Pad use at home;  
JE 44-ESY IEP meeting notes and cover e-mail dated 7/20/12;  
JE 45–Response of Parents to 7/19 e-mail to Parents from District;  
JE 47–7/24/12 letter from District to Parents re: attempted clarification of several issues;  
JE 48–8/9/12 Parents response to July 19, 2012 PWN and District’s 7/24/12 letter;  
JE 49–8/15/12 District letter to Parents regarding several issues;  
JE 50–Prior Written Notice and Consent to Evaluation dated 8/15/12;  
JE 51–8/21/12 District response to Parents 8/20/12 correspondence;  
JE 52–9/7/12 cover letter of Parents regarding Consent to re-evaluation;  
JE 53–10/2/12 e-mail from            to parents regarding re-evaluation;  
JE 54–10/22/12 response by District to letter from Parents’ attorney to the District’s Attorney;  
JE 56–            IEP Goal Progress reporting by            ;  
JE 57–            contract and supporting documents for services to Student;  
Pet.<sup>2</sup>. 4–Summary of Parents out of Pocket Expenses;  
Pet. 5–Invoices from             
Res.<sup>3</sup> 152 –Timestamp of reported observations of            while Student at             
Res. 154–DDD Waiver Certificate;

### Issues

The issues presented at the Due Process Hearing as contained in the Due Process Complaint filed on the Student’s behalf are stated verbatim as follows<sup>4</sup>:

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<sup>2</sup>. “Pet.” signifies Petitioner’s Exhibit.

<sup>3</sup>. “Res.” signifies Respondent’s Exhibit.

<sup>4</sup>. The Petitioners agreed to dismiss issue #7 prior to the hearing and the issue was dismissed.

1. The District has failed to provide a free and appropriate public education by failing to implement the child's IEP of February 2012 and by proposing to change the placement determined by the IEP team based on factors other than the individualized needs of the child as set forth in the IEP. The IEP team determined that the child should receive instruction in a natural occurring setting for acquisition of skills in order to address transition goals and make progress towards annual goals. The IEP team determined that a transition facility is the best placement to assist in his post-secondary transition goals. The IEP team determined that the appropriate placement was a residential placement at a transitional facility outside the District in Wyoming where the child had been receiving special education and related services under the auspices of the District since December of 2011. The parents necessarily removed the child from that facility for health and safety reasons unrelated to the IEP on or about March 9, 2012. The parents requested that he receive the special education and related services required by the IEP in a comparable transitional facility to replace the first. Instead, the District said the parents had rejected the placement and the District proposed to change the placement to an in-District placement not based upon the IEP.

The District's proposed change in placement was not justified by any change in circumstances, was predetermined, was without individualized and specific placement and services, was based on an inadequate evaluation of the child and was based on availability of services rather than the individualized needs of the child. The proposed placement consists of a number of locations and is based upon availability of services and convenience for the District and factors other than the individualized needs of the child.

2. The District has failed to provide a free and appropriate public education by failing to implement the child's IEP's requirements for provision of supplementary aids and services that a communication device be provided when needed, as often as appropriate and in all environments. The District provided an iPad as assistive technology and restricted its use to school. The District has failed and refused to provide an iPad when needed and in all environments, providing an iPad only at school and refusing to provide it for use outside of school. The parents began requesting that the iPad provided by the school for use at school be provided for use outside of the school beginning in October of 2011 and the District refused. The parents have repeatedly renewed that request since that time and the District has continued to refuse.
3. The District has failed to provide a free and appropriate public education by failing to provide supplemental aids in the form of assistive technology and services required

to maximize accessibility to special education and related services. The District failed to develop an appropriate communications program based upon a comprehensive assessment of the child's communication abilities and requirements and consideration of assistive technology needs.

4. The District has failed to provide a free and appropriate public education by failing to provide transition services based upon results of the transition assessment in order to meet the measurable post-secondary goals and the measurable annual goals set forth in the IEP. The results of the transition assessment determined that the child needs support and additional opportunities to communicate and function within an independent or structured living environment and the IEP team determined that placement in a transitional facility in order for him to receive instruction in a natural occurring setting would be reasonable for acquisition of skills in order to address transition goals and make progress towards his annual goals.
5. The District has failed to provide a free and appropriate public education by failing to develop and implement the IEP's requirements for the provision of ESY services.
6. The District has failed to provide the parents with a complete and executed copy of the child's IEP at the conclusion of the IEP meeting on February 22, 2012 and did not provide one until June 20, 2012.

### **Remedies Requested**

In their Due Process Complaint, Petitioners have requested the following remedies:

1. Implementation of placement required by the February 22, 2012 IEP.
2. Reimbursement of costs of placement and services and related expenses incurred by parents from March of 2012.
3. Compensatory education.
4. Other relief as appropriate.

### **Findings**

The IHO makes the following findings:

#### **Background:**

1. The Student is a 20 year old male. According to his mother, the Student developed normally through the first year of his life and was speaking. At 18 months of age,

Student was given MMR vaccines and Mother started to notice changes such as lack of eye contact and the Student began acting as if he was deaf.

2. The evidence shows that through the course of Student's educational life, the Parents have been very engaged with school officials, and have taken the time to become knowledgeable about their son's disabilities and how best to address those. The evidence also shows that the Parents are very loving and want the best that they can provide for their son. It is clear that their son is a high needs individual who requires considerable care and devotion, which the Parents have willingly provided.
3. Student's current diagnosis is severe autism and severe mental retardation.  
*Test.* Student is an "individual whose needs are so severe that he has to have not just an IEP but a fairly significant one." *Test.*
4. Autism is defined as a "communications disorder." *Test.* Student is "non-verbal" in his ability to communicate. Student is extremely deficient in his social communication functioning, meaning his deficits are in expressive and pragmatic communications. *Id.*
5. In order to be able to functionally communicate with school staff, peers, family members and community members, Student requires a program which trains or attempts to train him to master specific communications skills along a continuum which runs from the most basic one word terms to more complex phrases or sentences. Without such sequential training and skill level mastery, Student will continue to suffer deficits in his ability to effectively communicate, albeit in a non-verbal way. *Id.*
6. Student currently has extreme difficulty with intellectual functioning which includes the ability to think, reason and problem solve. *Id.* Student also has current significant difficulties with practical independent living skills. The current adaptive functioning for Student in terms of his independent living skills are quite low, almost across the board. *Id.* Student will never be able to live alone, independently without considerable support and supervision for daily living skills. *Id. Mother Test., Father Test.*
7. At age 2, the Parents took Student to an audiologist because the Student began to be abnormally sensitive to noises and quit talking. According to Mother, at age 3, Student started to use squeaking noises and began to withdraw.

8. In 1996, Student began to work with an Occupational Therapist (“OT”). The OT evaluated Student as having “sensory issues.”
9. Eventually, in about the summer of 1996, the Student was diagnosed with ADHD, not otherwise specified. This led the Parents to seek an evaluation by a Neurologist, who in turn recommended a psychologist with experience with Autism. At that point, Student was diagnosed with severe autism, which the Parents were told was a “communication disability.”
10. The symptoms observed by the psychologist named \_\_\_\_\_ were:
  - a. “Stemming”, which is the flipping of the Student’s hands very hard, walking repeatedly in circles and making sounds. These symptoms were constant;
  - b. An inability to communicate;
  - c. The ability to process information, but the inability to turn that processed information into words; and
  - d. The symptoms became more pronounced when Student was upset or frustrated.
11. According to Student’s Mother, a picture exchange communication system (PECS) was developed for student. The PECS system used pictures relevant to Student’s environment which were intended to assist Student in learning a process of communication because he was non-verbal. The Parents began using a digital camera to acquire pictures for Student’s PECS. The use of the PECS system for student began at home. *Mother’s testimony.*
12. According to Mother, Student’s mental equivalent age at age 5 was 9 months to 1 ½ years, while his physical development was age appropriate.
13. Student was provided special education services by an organization called Region until he turned six. *Id.*
14. At age six, the Region Case Manager wrote a transition Individualized Education Program for Student which would allow Student to transition to kindergarten in a public school setting. *Id.* In kindergarten, Student’s teacher reported that Student was disruptive and affected the other student’s ability to learn. An IEP was created for Student which allowed him to be segregated within the classroom. *Id.*
15. Student’s education setting through grade school was primarily a resource room. During that time, Student received speech and OT services. In third grade, Student

also began to attend adaptive P.E. Throughout grade school, Student used the PECS as an integral part of his life, including education. *Id.*

16. At the end of his sixth grade year, Student was placed at a facility operated by the Board of Cooperative Education Services, know commonly as “BOCES.” At the time student was at BOCES, Student began to experience negative behavior issues related to frustration over his inability to communicate. According to Mother, placement of the Student was because of “behaviors.”
17. Student attended BOCES for 1 ½ years. He received speech therapy, OT and adaptive PE services. According to his mother, while at BOCES, Student’s behaviors improved.
18. During the spring of Student’s 7<sup>th</sup> grade year, his teacher left BOCES. Subsequent to the teacher’s leaving BOCES, the Student’s negative behaviors became a problem and he was sent home over various incidents. The most common negative behavior was scratching and squeezing hard the hands of staff and others as a result of Student’s frustration. This sort of squeezing and scratching has continued for Student through his high school years when he becomes frustrated. *Id.*
19. As a result of the negative behaviors, the BOCES staff and the Parents met to address Student’s negative behaviors. *Id.* Later that fall, Student left BOCES out of health and safety concerns and as a result of a communications rupture between staff and the Parents. According to Mother, the BOCES staff was afraid of what Student would do physically. *Id.*
20. After Student’s departure from BOCES, the teacher assigned to Student in \_\_\_\_\_ (District) wanted the parents to look at \_\_\_\_\_, Wyoming<sup>5</sup> instead of \_\_\_\_\_ for the Student’s education. *Id.* \_\_\_\_\_ is part of the District and is 30 minutes away from \_\_\_\_\_. \_\_\_\_\_ has the closest schools to the location of Student and Parents’ residence, which is approximately 15 minutes from \_\_\_\_\_. *Id.*
21. Student then re-enrolled for Public School within the District. The Superintendent of the District recommended that Mother home school Student until a proper program for Student could be worked out. Mother then home schooled Student for approximately 6-9 months. *Id.*

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<sup>5</sup>. \_\_\_\_\_ County School District # \_\_\_\_\_ encompasses

22. During Student's 8<sup>th</sup> grade year, he returned to school in \_\_\_\_\_ and was placed in the resource room in the High School Building. He was assigned a Special Education teacher, and received OT, Speech Therapy and Adaptive P.E. Services. *Id.*
23. During his 8<sup>th</sup> grade year, his "behavior" started to escalate, including the squeezing and scratching of staff hands and wrists to the point he would draw blood. This forced the staff to wear leather gloves to protect themselves. *Id.*
24. In February of Student's 8<sup>th</sup> Grade year a Behavior Intervention Plan (BIP) was developed for Student. During the summer of that year, an Extended School Year (ESY) was utilized to provide services to Student during the summer break.
25. For 9<sup>th</sup> Grade, the Student continued to receive Speech, OT and adaptive PE services and ESY, along with the implementation of the BIP. Student's negative behaviors began to escalate slowly and became concerning. *Id.* The District then hired Behaviorist, \_\_\_\_\_, ( \_\_\_\_\_ ) to consult regarding the Student's behaviors. \_\_\_\_\_ developed a new BIP which had a positive impact upon Student's behavior. *Id.* \_\_\_\_\_ *test.*
26. During Student's 10<sup>th</sup> Grade year, while Student was 16, the District and Parents began to discuss a "Transitional IEP" whose purpose was to:
  - a. Create linkages between the parent and Student's post secondary life in order to address Student's ability to function as independently as possible in his post secondary school life;
  - b. Create long term goals, addressing Student's ability to function as independently as possible in a post secondary group home setting which was most likely going to be the long term living environment for Student; and
  - c. To address the concerns over the still primary non-verbal and social communications deficits of Student. *Mother Test.;* \_\_\_\_\_ *Test.;* *Father Test.*
27. During the 10<sup>th</sup> Grade year, the Student received his education in the \_\_\_\_\_ High School resource room, and the added service of the \_\_\_\_\_ Life Skill Center setting with transportation to \_\_\_\_\_ as a related service. *Mother Test.* The life skills center was described to Mother as a place her son could work on IEP transition goals.<sup>6</sup> *Id.* The 10<sup>th</sup> Grade year also included ESY in both the \_\_\_\_\_ Resource

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<sup>6</sup>. The Life Skill Center is set up to assist disabled students in learning skills necessary for post secondary life. The setting simulates a normal living environment. It has a kitchen,

Room and the Life Skills center. In addition, Student was taken on social outings to various locations to work on his skills in the community. *Id.*

28. The fall of 2011 was Student's 11<sup>th</sup> grade school year. His education setting was the High School Resource Room, and the Life Skills Center for up to twice per week. *Id.* Special Education Teacher, , became involved with Student for the first time during the 11<sup>th</sup> Grade School year. *Id.*, *Test.*
29. During the Student's 12<sup>th</sup> Grade year, the iPad came onto the scene. *Id.* An IEP was developed for the Student on 2/24/11. *JL 1.* The 2011 IEP describes Student's present level of performance in relevant part:
- a. Academia—The Student works on several things, “from general communication of desires to word meaning/association, differentiation of items, basic assembly, patterning, ability to cognitively differentiate colors, numbers, shapes, writes his name . . . He is gaining the ability to become more social and has, recently and sparingly, began communicating his desires without prompt.”
  - b. Occupational Therapy: “[Student] has greatly improved in the area of initiating tasks without prompts. He still needs verbal cues or signs about 40% of the time, . . . He had demonstrated very good behavior in OT this last year. He gets loud at times but it seems like they are happy, excited demonstrations instead of angry ones.”
  - c. Speech-Language Intervention: The following obtained data reflects [Student's] performance in receptive and expressive language skills:
    - i. Recognizing and using sentence structures/carrier phrases with 80% accuracy in a visual field of 3 and with 67% accuracy in a visual field of 5.
    - ii. Responding to the question “What do you want?” with 83-92% accuracy while visual scanning/tracking items within a communications book.

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laundry facilities, a bathroom, bedroom, etc. Over 100 “skill boxes” are located at the Life Skills Center. Those skill boxes contain items oriented toward individual activities such as sorting, counting, folding, using money. At the Life Skills Center, students like the one in this case learn to apply practical skills in a daily living environment such as cleaning, making beds, doing the dishes, etc. The Center also provides opportunities to learn vocational skills and to work with peers. *N Test.*

- iii. Is commenting about things in his academic environment in response to a question:
    - by using the carrier phrase “I am going to *f*” with 85% accuracy in a visual field of 4 and with 56% accuracy in a visual field of 16.
    - by using the carrier phrase “I see *f*” with 75-100% accuracy in a visual field of 4.
30. The 2011 IEP also provided for ESY services. *Id.*
31. The 2/11 IEP provided for Transition Services. “Transition Services” are to provide a linkage between the Parents and the Post Secondary Life of the Student in preparing the Student for life after public school when he ages out at 21. *Test.* Under 34 CFR § 300.43, the IDEA defines “transition services” as a coordinated set of activities for a child with a disability that:
- a. Is designed to be within a results-oriented process, that is focused on improving the academic and functional achievement of the child with a disability to facilitate the child's movement from school to post-school activities, including post secondary education, vocational education, integrated employment (including supported employment), continuing and adult education, adult services, independent living, or community participation.
  - b. Is based on the individual child's needs, taking into account the child's strengths, preferences and interests.
  - c. Includes instruction, related services, community experiences, the development of employment and other post-school adult living objectives, and, when appropriate, acquisition of daily living skills and functional vocational evaluation.
32. The transition services portion of the Student’s 2/11 IEP provides that upon the completion of public school, the Student “will participate in habilitative and functional skills training through his home or outside agency.” According to a functional assessment, the Student’s needs included:
- a. Support for communication, safety and independence in the “training/education environment.”
  - b. Additional training in following directions and completing work within given time frame.
  - c. Ability to communicate wants/needs with familiar and unfamiliar individuals and behavior regulation.

33. In addition, the 2011 IEP provided that habilitative and functional training skills through his home or outside agency would be performed by School Staff for Transition Service Activities which included following a schedule, independent work skills, safety skills.
34. The program under the 2011 IEP provided Student with life skills training at the Life Skills Center two days per week. was Student's classroom teacher and continues to remain so to this day. *Mothers Test.*
35. The Measurable Post Secondary goal toward functional Independent living on the 2011 IEP was that upon completion of public school, Student would utilize a PECS at home and in the community. That skill was to be practiced with the aid of a communication book, and with school staff responsible.
36. The supplementary aid to use for communication training was a "PECS" communication symbol book." The location of the use of the PECS book was in "all areas", meaning, all environments. *Id.* The particular PECS system had been in use by Student since 2009, and he immediately took ownership in it. It has been Student's voice. *Test.*
37. The progress of Student in meeting the goals in his 2011 IEP was objectively measured from a noted baseline for each goal. *JE 1.* The monitoring on his 2011 IEP through 1/4/12 showed that Student was making good progress at reaching the measurable annual goals set under that IEP which were geared to allow Student to function in his Post Secondary life, which was likely to be in a group home setting. Since 2010, the educational program for Student, therefore, had shifted from academics in the traditional sense, to a focus on learning and mastering basic skills necessary to function in the home and community. This included an emphasis on training and mastery of activities of daily living which includes personal hygiene, cleaning, laundry, interpersonal communications, counting money, shopping, learning basic employment skills, etc. *Id; see also Mother Test. Test. Father Test.*

### **2012 IEP and Move to Transition Facility**

38. It should be noted that the parties all agree that the February 22, 2012 IEP is adequate to provide FAPE to student, and they have so-stipulated. The Petitioners' Expert, also admits that the 2012 IEP is well written and adequately addresses the Student's needs. The Petitioners do contend, however, that the February 22, 2012 IEP (2012 IEP) was not properly implemented. Therefore, the IHO's Findings shall address the implementation contention presented by Petitioners.

39. Because the parties do contest the meaning of certain provisions of the IEP, it is necessary to set out salient historical facts in order to provide a proper context required to determine the intended meaning of those contested phrases and terms contained in the 2012 IEP<sup>7</sup>.
40. As early as the fall of 2010, the Parents began to look for possible group homes for Student. They looked at \_\_\_\_\_ Center in \_\_\_\_\_, South Dakota, and \_\_\_\_\_ in \_\_\_\_\_, Wyoming.
41. In investigating facilities, the Parents looked at the types of programs offered and the experience of the facility staff related to autistic clientele. *Mother Test.*
42. In the fall of 2010, negative behaviors for the Student began to escalate, and Student was hurting his service providers. A person from the \_\_\_\_\_ Skills Center reported to Mother that Student was out of control. *Id.*
43. Ultimately, Mother began to be concerned about the repetition that the Life Skills Center was creating for her son in \_\_\_\_\_ because it was a simulated environment which was too repetitious and boring for Student. Father testified that it was becoming frustrating for Student to travel to the Life Skills Center and make a bed he had not slept in, or do dishes he had not used. To the Parents, the \_\_\_\_\_ Skills Center was only a practice in a simulated environment which was hard for the Student to continue to attend because it was too simulated. Mother used the word “fake” in her diary. She testified the reason that she used the word “fake” when describing the Life Skills Center, she meant it was not in a naturally occurring setting, like the location in which he lived.
44. During the middle of 2011, Mother began to feel that the Life Skill Center was not working for her son. She then sent an e-mail to \_\_\_\_\_ on August 8, 2011. In the e-mail, Mother pitched the concept of having her son be “finished with school in the traditional sense”, and to move to more of a work and independent living type program. *JE 2*. She also expressed her concern that Student was almost 19, and that he was running out of time to make the transition to post secondary life. *Id., Mother Test.*

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<sup>7</sup>. The IHO is mindful of the fact that the applicable statute of limitations to bring a due process complaint is two years. The reference to any information or facts which preceded the two year statute of limitations are only intended to provide context to the claims in this case, and are not considered for any other purpose.

45. In September, 2011, Mother had a face-to-face meeting with District personnel because she was concerned that her son's negative behaviors (scratching and grabbing others) both at school and at home were getting more pronounced. She explained she wanted to look for an alternative placement for the Life Skills Center. Mother also testified that she was looking for a facility that was what she believed was "a lot more appropriate" for her son and provided more of a social setting for him. *Mother Test.*
46. According to Mother, \_\_\_\_\_ agreed with Mother that Student may be losing interest in the programming at the Life Skills Center. \_\_\_\_\_ then gave her a possible recommendation of \_\_\_\_\_ which is a residential facility in Wyoming that operates group homes for developmentally disabled individuals. \_\_\_\_\_ is a state certified facility which provides residential and day habilitation services. *Id.* \_\_\_\_\_ was and is at all times relevant a CARF accredited facility and is certified by the State of Wyoming as a Certified Home and Community-Based Waiver to provide Child Services, Adult Services, and ABI Services which can be compensated by the District under IDEA. *Res. 154; N \_\_\_\_\_ Test; \_\_\_\_\_ Test.*
47. On October 12, 2011, \_\_\_\_\_ sent Mother an e-mail addressing \_\_\_\_\_ as a possible placement for Student. In the e-mail, \_\_\_\_\_ indicated that he met with \_\_\_\_\_ (Behaviorist hired by District on a Consultative basis), and that \_\_\_\_\_ recommended \_\_\_\_\_ as a place to investigate. *JE 3.*
48. Because the Parents wanted to look at moving their son from a school setting to an alternative placement, they investigated \_\_\_\_\_. In mid-October, 2011, the Parents traveled to \_\_\_\_\_ and met with an individual from the Easter Seals organization. Subsequently, the Parents went to \_\_\_\_\_. The services offered were explained to them. They also toured the day habilitation (day-hab) facility and a group home which had an opening. The Parents were please with what they saw and heard and were quite interested in \_\_\_\_\_ as a possible placement for their son. *Mother's Test.*
49. At the time that the Parents visited \_\_\_\_\_ they were aware that the facility did not have a special education teacher on staff. They assumed \_\_\_\_\_ would continue to provide that sort of support while he was at \_\_\_\_\_. *Id.*
50. On October 27, 2011, Mother sent members of the IEP Team ( \_\_\_\_\_, \_\_\_\_\_, and \_\_\_\_\_ ) an e-mail explaining how she envisioned a potential placement at \_\_\_\_\_. To that end, she envisioned having the Student at \_\_\_\_\_ for 2-3 days a week initially, and the remaining school days each week in \_\_\_\_\_. *JE 4,*

51. On November 1, 2011, Special Education Director \_\_\_\_\_ responded to Mother's October 27 e-mail. In the e-mail, \_\_\_\_\_ indicated that she was familiar with the owner of \_\_\_\_\_ ( \_\_\_\_\_ ). She spoke very highly of \_\_\_\_\_'s knowledge and desire to provide services to adult students. In the e-mail, \_\_\_\_\_ stated: "I'm sure \_\_\_\_\_ would work well with us to provide appropriate transition services." *JE 6.* It is important to note that \_\_\_\_\_ and no one from the District had investigated \_\_\_\_\_ at that point in time as a possible transition facility for placement of Student. \_\_\_\_\_ *Test.*
52. Subsequently, \_\_\_\_\_ and Mother did meet face-to-face about \_\_\_\_\_ as a possible transition facility for Student. At the meeting, \_\_\_\_\_ indicated that District would give its blessing to a transition placement at \_\_\_\_\_ but the District would need to investigate the facility first. \_\_\_\_\_ then recommended that the whole IEP team take a look at the facility. A meeting was then set up to inspect \_\_\_\_\_ as a possible transition facility for Student on December 5, 2011. *Mother Test., N Test.* The parties agreed that at some point in time, a residential placement was necessary so that the Student would have the opportunity to generalize learned skills related to communication and activities of daily living to his environment.
53. On December 5, 2011 N \_\_\_\_\_, \_\_\_\_\_, \_\_\_\_\_ and the OT traveled to Wyoming and were met at \_\_\_\_\_ by the Parents who traveled separately. An intake meeting was held at the office of \_\_\_\_\_ *Id.* When \_\_\_\_\_ arrived, she was impressed with all of the certificates which lined the wall in the building. Everyone appeared to be satisfied that \_\_\_\_\_ would be a good initial placement for Student to start his transition to his post secondary school life. *Id.*
54. At the meeting, it was discussed that Mother would likely bring Student to \_\_\_\_\_ the first few times through the upcoming Christmas Break. *Id.* Because \_\_\_\_\_ had an important late meeting she needed to attend back at the District, the IEP team did not have time to inspect the group home which would be the residential facility for Student. The plan was that the IEP team members would come back and further inspect the facility. *Id.*
55. Between December 5 and December 21, 2011, Mother spoke with \_\_\_\_\_ about the idea of moving Student to \_\_\_\_\_ *Mother Test.* Mother indicated that \_\_\_\_\_ seemed excited about the idea. As a result, mother took Student's bed and some of his personal belongings to what would be his new room at \_\_\_\_\_ on December 21, 2011. Mother did take her son to \_\_\_\_\_ the first few times and allowed Student

to remain at the group home overnight while Mother stayed in a local Motel. Student seemed to like the facility. *Id.*

56. After December 28, 2011, B. contacted Mother to see how Student's stays at had gone. Mother indicated that his stays went well, and that the Parents wanted to begin to transition Student to that facility when school started. *Id.* and Mother then agreed that would pick Student up and take him to the first Thursday in January, 2012.
57. On December 31, 2011, sent Mother an e-mail discussing an upcoming meeting at At that time, indicated that he was working on Student's PECS book with "fresh and updated pictures for ." *JE 10, Test. Mother Test.* To that end, the plan was to develop a PECS book with pictures relevant to Student's living environment at in order that he could more easily communicate while there. *Id.*
58. Another meeting was set up in so that the IEP team could further inspect the facilities at The meeting occurred on January 2, 2012. That meeting involved N, , the OT and Mother. This time, Mother traveled with the District members of the IEP team. *Test., Mother Test.* The parties did inspect the group home where Student would have his stay. The parties were satisfied, and the Special Education Director agreed to give a try as a facility which would provide educational opportunities in a natural living environment for Student to transition to his post secondary life.
59. In early January, 2012, the Parents then agreed that , as Student's Special Education Teacher and case manager, would take Student to on January 5, 2011 and he would stay that night in He would then bring the Student home from at the end of the school day on January 6, 2012. During his stay, would take the time to train staff about Student's IEP and ways to implement Students education programming. *Id., Test.* indicated that they would "play it by ear" to see if Student could add another day at based upon the progress and reaction of Student to the transition to *Id.* All agreed that because Student often has difficulty with transitions, the process of assimilating Student might be a slow one, but eventually, the goal was going to be that Student would be able to remain at during the entire school week, meaning 5 days and four nights. *Id.*
60. The specific agreed plan for early January, 2012 was that Student would go to school in the first three days, and would attend the last two days of

that week. At that point, because Student was going to get his life skills training at the plan was for him to eventually no longer attend the Life Skills Center in because would replace that educational setting. *Mother Test.* The District, through the Special Education Director, had found that was accredited and qualified to provide transition services for Student with the support, supervision and resources brought to bear by the IEP team. The District then agreed to provide the financial support and transportation services which would allow Student to stay at during the regular school calendar. B was then going to be the person responsible to transport Student to and from from his home near . *Mother Test., Test., Test., JE 57.*

61. The first week of school in January, 2012, Student did attend High School the first three days of the week, and took him to in on the 5<sup>th</sup> as planned. *Mother Test., Test.* brought the PECS book with him. spent a good deal of time on the 5<sup>th</sup> and 6<sup>th</sup> training the Staff regarding ways to implement the education program for Student. *Test.* The training provided to the staff by included the PECS book, daily life skills methodologies, toileting function, cleaning up after self and other basic activities of daily living. *Test.* The Student's stay at was positive and everyone felt like his educational goals could be met if he was able to make the transition. *Id., Mother Test., Father Test., Test.* However, because this was such a big transition, everyone agreed that Student's service delivery plan under the IEP may need to be revised if turned out to be an unworkable placement for the Student. *Id., Test.*
62. In the early part of February, 2012, informed Mother that because Student had been placed in his 2011 IEP needed to be amended. *Mother Test.* After speaking to Mother, prepared an amendment to the IEP and hand delivered it to Mother. *Mother Test., Test., JE 11.* According to N and B because was Student's Case Manager and Special Education Teacher, had the authority to call IEP team meetings, prepare Prior Written Notices, and amend IEP's. The IEP Amendment is dated 1/23/12. The IEP Amendment Summary prepared by states: "Due to [Student's] beginning the process of working on his post-educational transition goals, [Student's] IEP goals and services will continue to be provided in the school and transition setting appropriate." *Id.* I find that at that time, it is very clear that educational services necessary to meet the stated goals of the Student were a combination involving educational settings at encompassing a residential component, and the those in the District. Credible evidence reveals that Student continued at that time to receive services in the District

each week and at the remaining days per week until at least the date of the IEP amendment. *Mother Test.*, *Test.*

63. Near the end of January, 2012, Student was having very negative behaviors at the skills Center. *Mother Test.* On January 29, 2012, Mother was worried about what she perceived to be negative behaviors at the Life Skills Center. On January 29, 2012, Mother sent an e-mail to indicating that Student seems to be more settled at and is fairly happy there, and likewise expressed concerns that her Son's attendance at the School setting is causing negativeness and unhappiness. Mother then stated; "How about tomorrow (the 30<sup>th</sup>) you make it evident to [Student] that he is 'closing the door' on his time at the high school . . . he is officially done with ." The e-mail went onto state: "And then if this week goes well, Tues-Friday and we feel that [Student] needs another Tues-Friday week next week, then he can just stay home with me on the Monday(s) until he is ready for the full five day week in *JE 13.*
64. On February 1, 2012, in anticipation of the upcoming annual IEP meeting scheduled for February 22, 2012, Mother again sent an e-mail to and asked a series of questions. responded to the e-mail, and her response is highlighted in JE 14. It is important to note that Mother was concerned about ESY services for the 2012 Summer and wanted to know how those would be addressed at Student's upcoming annual IEP meeting. To that, responded that ESY would be discussed at the upcoming IEP meeting, but no schedule would actually be set. *Id.* In addition, Mother inquired about whether the District would be responsible for regular reporting and progress monitoring until the end of the school year of Student's 21<sup>st</sup> birthday while he was at To that responded that would provide weekly plans for staff at as skills are determined necessary for Student "in the residential setting." *Id.*
65. also informed Mother in the e-mail: "Generally – the district does not pay for a 'night time' residential placement—we will need to write his goals to reflect the residential skills which we are targeting." *Id.*
66. On February 2, 2012<sup>8</sup>, prepared another amendment to Student's IEP. *JE 15.* The amendment was prepared because Student would no longer be going to the Life Skills Center at Mother's request. The IEP Amendment states: "Due to the nature of the adult transition services being provided, the parents have advised

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<sup>8</sup>. Student had been at 12-14 days between December 21, 2011 and February 6, 2012. *Mother Test.*

that the days after the beginning of February, [Student] will remain at home on normal school days to lessen the stress of having to transition between too many settings. This will continue until [Student] able to fully transition to \_\_\_\_\_ on a more consistent basis that includes a five day week. This will occur approximately February 27.” *Id.*

67. In accordance with a Notice of Team Meeting, the IEP team members were notified of an annual IEP meeting which was to be set for February 22, 2012. *JE 16.* The stated purpose of the meeting was for review/revision of IEP, development of annual IEP, development of post secondary transition services and to discuss ESY. *Id.* \_\_\_\_\_ was notified of the team meeting on the notice, because she was one of the Student’s primary care providers for Student at \_\_\_\_\_ *Mother Test., Test.*
68. Prior to the IEP meeting on February 22, 2012, Student was receiving the following services at \_\_\_\_\_
- a. 1-2 staff members working with Student daily to implement his IEP. That was a combination of \_\_\_\_\_ (as house manager) and \_\_\_\_\_ or \_\_\_\_\_,
  - b. \_\_\_\_\_ had trained the \_\_\_\_\_ staff and between he and \_\_\_\_\_, it was determined what programing and services would be provided to Student each week at \_\_\_\_\_
69. I find by credible evidence that as of the beginning of IEP meeting dated February 22, 2012, the IEP team intended that Student receive services which would focus on his ability to communicate, OT and his daily living skills as a means of transitioning to his post secondary life, which was perceived by all relevant members of the IEP team to be a group home or some other residential setting.
70. I further find that by virtue of the February, 2012 Amendment to the 2011 IEP, the parties intended for Student to gradually transition to receive educational services and supports under his IEP to a residential facility with an overnight component so that the environment would be less and less simulated, like that of the \_\_\_\_\_ Life Skills Center. The intent of the IEP team, therefore, was to instill services in a more naturally occurring environment where the activities and tasks to be learned by Student were relevant to his life and living environment.
71. I also find that a placement focusing on a residential component was a long term goal of the IEP team because none of the IEP team members knew whether \_\_\_\_\_ would work for Student in the short term. The plan was not to immediately place \_\_\_\_\_

Student full time in a residential facility, but to slowly transition him to that while services intended to assist student to transition to his post secondary life would serve to supplement and support Student's progress at [redacted] A residential facility, albeit [redacted] was the primary focus of the IEP team as an educational setting. The educational settings under the amended IEP for 2011 were certainly not set in stone, but were intended to be flexible as Student's needs and progress manifested itself.

72. An IEP meeting was held on February 22, 2012. Many of the participants could not attend in person because a bad storm had hit the area. They did, however, attend by telephone. The parents, [redacted], and other members of the IEP team attended. At the IEP meeting, it was discussed that Behaviorist, [redacted] had observed Student at [redacted]. The week prior to the IEP meeting, Student had gone and stayed in [redacted] at [redacted] for four school days. *Mother Test.*
73. At the 2/22/12 IEP meeting, [redacted] went through the proposed IEP, line by line. *Test.* No one had any objection to the proposed IEP. *Id. JE 19.* The only part of the 2/22/12 IEP that was not discussed are the narrative portions submitted by the Speech and Language Pathologist and the OT. *Id., Mother Test.*
74. At the 2/22/12 IEP meeting, there was no discussion about how long Student would remain at [redacted]. There was no discussion about [redacted] being a permanent placement or a temporary placement. *Mother Test.* I find by credible evidence that the District did not want to commit to a long term arrangement, because District IEP team members were unsure whether or not the placement would work in the long term. [redacted] *Test.* The 2012 IEP was a snapshot in time, reflecting that Student was spending a good deal of time at [redacted] but there was no guarantee that he would remain there. That is why the District executed a contract on February 20, 2012 which contracted services with [redacted] only through the end of the regular school year. The termination date for that contract was June 30, 2012. *JE 57; [redacted] Test.*
75. At the IEP meeting and before, there was a consensus that Student would start to attend [redacted] five days per week beginning February 27, 2012. *JE 18, JE 15.* ESY was also discussed at the February 22 IEP meeting.
76. I find by credible evidence that even though the Parents do not recall ESY being discussed for 2012 at the IEP meeting, the concept of having another IEP meeting in April or May to address ESY was discussed. [redacted] *Test.* Even if it was not discussed at the IEP meeting, it was certainly mentioned in an e-mail response

from [redacted] to Mother on February 6, 2012, where [redacted] stated that the ESY meeting would be set up closer to the end of the school year after the team has been given an opportunity to know Student's needs. *JE 14*. In addition, a [redacted] e-mail response (highlighted portion) to Mother on February 19, 2012 makes it very clear that the ESY issue would be re-visited at the end of the school year: "Summer ESY services will need to be addressed again in May. [redacted] will be hired to provide transition/transportation services as determined then." *JE 18*.

77. On February 29, 2012 a Prior Written Notice related to the February 22, 2012 IEP was developed. *JE 20*. Unfortunately, the February 22, 2012 IEP and the commensurate Prior Written Notice (*JE 19, and 20*) were not mailed to the Parents until June 20, 2012, and this was admitted by B [redacted]. *Mother Test., JE 39*. I find that this late mailing of the February, 2012 IEP and Prior Written Notice until June 20, 2012 is a procedural violation of IDEA.

### Departure From

78. Student continued to be taken to [redacted] by [redacted] at the beginning of the school week, and [redacted] would pick him up on Friday of the School week after the IEP meeting on February 22, 2012. This testimony is undisputed.
79. Unfortunately, Mother was given information from [redacted] at [redacted] which caused her to question the health and safety of her son while continuing to stay there. [redacted] testified that she had in fact conveyed the concerns to Mother, and also [redacted] himself agreed that [redacted] had expressed the concerns to him. Those concerns expressed to Mother were as follows:
- a. Utility disconnect notices were observed for the group home where Student was living at [redacted]
  - b. There were concerns about the fact that there was not enough food in the group home which was appropriate for Student. This fact is important because Student is motivated by food, and if he does not have the right food and snacks, it results in negative behaviors, which inhibit learning. According to [redacted], a food delivery had not been made;
  - c. [redacted] had explained to Mother that [redacted] employee pay checks had been bouncing. [redacted] clarified in her testimony that employee paychecks were late. The IHO finds that Mother understood [redacted] to mean that employee paychecks did in fact bounce; and
  - d. A woman associated with [redacted] called upset. She informed Mother that she had just come from an intake meeting regarding another client, who was [redacted]

a violent offender and also had sexual deviant tendencies. This was extremely upsetting to Mother, because her son was autistic and non-verbal. He would therefore, not be able to defend himself, or explain any incidents or concerns he might have about the potential resident.

80. On March 9, 2012, Mother received a phone call from \_\_\_\_\_ at \_\_\_\_\_. She informed Mother that \_\_\_\_\_ and \_\_\_\_\_, (Student's primary care givers and service providers at \_\_\_\_\_ had quit their employment the day before. She indicated that she was scared to death to take care of Student, because she had no training and was worried that Student would get upset and possibly hurt her. When \_\_\_\_\_ brought Student home that day, he in fact confirmed to Mother that \_\_\_\_\_ and \_\_\_\_\_ did quit their employment at \_\_\_\_\_. At that time, Mother told \_\_\_\_\_ to contact her early the following Monday to determine if Mother wanted to send Student back to \_\_\_\_\_. Student was upset all weekend. *Mother Test.*
81. On March 8, 2012, an e-mail was sent to \_\_\_\_\_ from \_\_\_\_\_ (Owner of \_\_\_\_\_) indicating that \_\_\_\_\_ and \_\_\_\_\_ did in fact terminate their employment at \_\_\_\_\_ on March 8, 2012. *JE 12.* In the e-mail, \_\_\_\_\_ assured \_\_\_\_\_ that she had staff stepping up, and assured her that services to Student would "in no way be affected." *Id.*
82. On March 9, 2012, \_\_\_\_\_ responded to a message sent by Mother. *Id.; JE 22.* \_\_\_\_\_ stated to Mother: "Yes [Mother], I am concerned too!! \_\_\_\_\_ was reassuring . . . . but she would due to the fact that they are providing services to us."
83. Out of concern for the health and well being of her son, on Monday morning, March 12, 2012, Mother called \_\_\_\_\_ and informed him that he should not pick Student up to go back to \_\_\_\_\_. On that same date, Mother also sent \_\_\_\_\_ an e-mail indicating that her son would not be sent back to \_\_\_\_\_ until further notice and/or when the timing was appropriate. *JE 23.* In that e-mail, Mother expressed her concern about the new staff member who would be her son's care giver at \_\_\_\_\_. She additionally asked for the position of the District and recommendations. *Id.* She then expressed her concerns about the health and safety of her son consistent with her testimony. *Id.*

84. I find by credible evidence that Mother's initial removal of her son from [redacted] was for health and safety reasons.<sup>9</sup> Any reasonable parent under the same circumstances, armed with the knowledge given to her about the concerns at [redacted] would have removed their child from that environment. The removal would be reasonable unless and until reasonable assurances could be made that the concerns were misplaced or the issues no longer existed.
85. I find it unreasonable that the Parent's desire to permanently remove their son from [redacted] after reasonable assurance were made that he could receive appropriate services. I state this for the following reasons:
- a. On March 13, 2012, Mother sent the owner of [redacted] and e-mail making inquiries about the status of [redacted] and requesting assurances. *JE 24*;
  - b. Sometime between March 13, 2012 and March 15, 2012, Mother received a response from [redacted] intended to allay her concerns. *Mother Test*. The exact response was not provided during the course of the hearing;
  - c. On March 15, 2012, Mother sent an e-mail to [redacted] making further inquiries. *JE 25*. According to Mother, up to this point, she was not satisfied with the response from [redacted] and believed the information she had received was conflicting;
  - d. On March 15, 2012, [redacted] sent Mother an e-mail indicating that he was going to make further inquiries of [redacted] and also expressed that he was willing to pick the Student up and take him to [redacted] or to work with him at school on the following Monday. *JE 26*. [redacted] also suggested a possible alternative placement in [redacted] known as RENEW. *Id.* To that end, [redacted] indicated that [redacted] in [redacted] "does a pretty good job.";
  - e. Because Mother was worried about negative behaviors, she communicated to the IEP team that the Parents had made a decision to no longer contract services with [redacted] Mother further indicated: "At this time, we will just keep [Student] home and do not wish for him to return to [redacted] school building either. Perhaps a 'life skills' field trip with [redacted] to [redacted] once in a while will help for the time being.";
  - f. On March 19, 2012, Mother called [redacted] and asked where they go from here. [redacted] indicated he did not know, but suggested they all take a breath. *Mother Test*;

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<sup>9</sup>. I note that according to 34 § 300.148(d)(i)(2), a parent may withdraw a student from a private school setting and unilaterally place the student another setting for a situation likely to result in serious emotional harm to the child.

- g. On March 27, 2012 a Notice of Team Meeting was prepared by B to “Determine Placement.” The Notice provided that a IEP team meeting would take place on April 5, 2012. *JE 28*. The Notice is further clarified with an attachment which explains why the meeting is convened. *Id.* The clarification provides that the meeting is convened to discuss options for Student which would facilitate implementing his annual goals; and
- h. A cover letter dated March 28, 2012 accompanied the Notice of Team Meeting. *JE 29*. In that letter, again attempted to instill confidence in Mother that was a proper placement. This included reminding the Parents that would return to to provide staff training during Student’s waking hours.
86. I do not find it reasonable for the Parents to even fail to consider as the placement for their son after all of the assurances made and offers made by the District to make sure that remained a viable and appropriate placement. The parents certainly could have gone to and investigated further. Moreover, the Parents did not give the District a chance to train the staff that would be taking care of their son and providing him services. The Parents provided no reasonable explanation as to why they would not at least give a chance to perform and provide transition services under the supervision and with the support of the District.
87. On the other hand, I do find it reasonable and appropriate that the District attempted to work with the Parents and to participate in making sure that remained an appropriate provider to assist in meeting Student’s IEP goals. The District’s offers prior to April 5, 2012 were appropriate and consistent with the spirit and intent of the 2012 IEP’s transition services goals.
88. I also find that because Student was not receiving any services between March 15- and at least April 5, 2012, the Student was denied FAPE during that time period. That denial of FAPE during that time period cannot be attributed to the District. Instead, it can be attributed, at least in part, to the Parents as a direct result of the self imposed exclusion of Student from any educational services during that time period.

**April 5, 2012 Meeting and its Impact**

89. A meeting was held on April 5, 2012, with H , , (Students DD Waiver Case Manager), , and Mother in attendance. At the meeting, and presented a proposal (*JE 31*) for was going to be a residential facility that could provide a residential

setting for Student. However, \_\_\_\_\_ was not accredited or qualified by the State of Wyoming to provide and/or be paid for residential services under an IEP.

\_\_\_\_\_ was essentially a sole proprietorship of \_\_\_\_\_, which had not purchased insurance, or obtained the necessary state accreditation or certification which can even be considered by the District as a service provider for disabled students. *Mother, \_\_\_\_\_ Test.*

90. There was no discussion at the April 5 meeting about amending the 2012 IEP. *Mother Test.* It is disputed as to what alternative facility was recommended by the District at the April 5, 2012 meeting. \_\_\_\_\_ indicated in her testimony that she does not remember BOCES being discussed, even though the PWN for that meeting reflects it. *JE 32.* The fact remains that the District did not recommend any facilities with an overnight or residential component, or any facility which was beyond daily commuting distance from the District. The District did propose \_\_\_\_\_ in \_\_\_\_\_, Wyoming as a possible placement to provide day services with no overnight component. Mother was concerned about \_\_\_\_\_ for the same reason that she was concerned about the Life Skills Center in \_\_\_\_\_ –it was a simulated environment and not a naturally occurring setting. *Mother Test.*
91. After the April 5 meeting, the Parents sent \_\_\_\_\_ an E-mail stating: “We are rejecting services at \_\_\_\_\_ in \_\_\_\_\_ and are requesting services stated in our son’s IEP to be contracted with \_\_\_\_\_ in \_\_\_\_\_ WY. *JE 31.*
92. A Prior Written Notice was prepared by \_\_\_\_\_, \_\_\_\_\_ and \_\_\_\_\_ as a result of the April 5 meeting. *JE 32.* The PWN indicates that District proposed that services be provided to Student within daily commuting distance from the District as an alternative to the proposal presented for \_\_\_\_\_ by \_\_\_\_\_. Conspicuously missing from the proposal is any reference or proposal that the Student utilize the proposed day services in order to work toward transitioning to a residential facility like \_\_\_\_\_. *Id.*
93. The IHO finds by credible evidence that the April 5, 2012 PWN (*JE 32*) is inconsistent with Student’s 2012 IEP and agrees with \_\_\_\_\_ on that point. I also find the proposed plan contained in the April 5, 2012 PWN fails to address the Student’s goals. An IEP must include: “The projected date for the beginning of the services and modifications described in paragraph (a)(4) of this section, and the anticipated frequency, location, and duration of those services and modifications. 34 C.F.R. § 300.320(a)(7). I agree with \_\_\_\_\_ that the District’s proposal contained in the April 5 PWN is vague and appears to be somewhat stitched together. The proposal does not address frequency of services or the responsible provider.

Likewise, the proposal does not address the duration of the specific services. I do not find the PWN to be meaningful, except for the fact that it clearly articulates that the District is not considering an overnight or residential component for the Student which is what the 2012 IEP contemplated. Instead, the PWN also makes it clear that only daytime services will be provided in simulated environments. I also agree with that the activities the District proposed on the April 5 PWN “do not appear to be an equivalent kind of set of activities” that can be considered as being offered in the transition facility contemplated by the 2012 IEP.

94. I also agree with that the 2012 IEP contemplates the provision of services to a “transition facility” which clearly contemplated an overnight component in a residential setting, not just the artificial setting proposed by the District for day services at other facilities. Had the April 5 PWN spoke of utilizing those day services in the context of working toward the goal of transitioning the Student to a residential facility which was intended to serve as a transitional facility, I believe the April 5 PWN would have been consistent with the 2012 IEP. As will be discussed more fully below, the 2012 IEP contemplated at least a gradual transition from the implementation of educational services outside of a simulated day facility to a residential facility with an environment which would be consistent with what was likely going to be the post secondary environment for the Student.

### **Meaning and Intent of 2012 IEP**

95. There is a dispute between the Parents and District as to the meaning and intention of the 2012 IEP. The Parents contend that the IEP requires placement at a residential facility which will provide services in a naturally occurring setting, and not an artificial one like the Life Skills Center. The District contends that it is not required to provide or pay for residential services with an overnight component. I find that both parties are partially correct and partially incorrect. The IEP is not intended to be as rigid on either extreme as the parties contend. Based upon the history and communications of the parties regarding transition services provided to Student, the IEP was intended to be flexible while working toward meeting Student’s ultimate goal of receiving educational services in a residential facility. The IEP provided for an anticipated gradual transition from services provided at Life Skills and other locations in the Community on a continuum of moving toward the provision of those services to a residential facility as the Student assimilated to that environment. The ultimate goal was that eventually the Student’s services devoted to developing life and communication skills would be provided in an environment akin to where he would live after he aged out of the public school system at age 21.

96. I consider the IEP found at JE 19 and the PWN found at JE 20 to encompass the 2012 IEP.
97. At the time the IEP was created, Student was still transitioning to being full time at \_\_\_\_\_  
As of February 22, 2012, Student was still not spending every school day at \_\_\_\_\_  
The consensus amongst the IEP members on February 22, 2012 was that Student would make the full transition to \_\_\_\_\_ as a transition facility on February 27, 2012. At that time, he would receive all of the services required to work toward educational success for the annual goals set forth in his IEP.
98. \_\_\_\_\_ was working out to be a success for student, and he was transitioning to it faster than anyone imaged as of February 22, 2012. With that said, I believe that Student was intended under the IEP to receive services at a transition facility which was intended to have an overnight and residential living component. It could have been Jodi's Heart<sup>10</sup> or a comparable residential facility. In order for Student to receive a FAPE under the IEP, a residential educational setting was required upon successful transition to that facility. The transitional facility must have an overnight component in order for the student to receive educational benefit.
99. When looking at the history and context of the Student's placement at \_\_\_\_\_ in conjunction with the IEP, the intent and meaning of the IEP is clearly revealed.
100. The Preferences section of the IEP describes certain activities preferred by the Student which imply \_\_\_\_\_ as his current placement. The Educational Concerns located on the first page state in relevant part: "[Student's] educational needs are those of a home-living and self-care and has begun the transition process to an adult transition facility." I believe that statement speaks volumes in that it succinctly states the educational focus and the contemplated educational setting as being a residential facility. That statement is also consistent with the Parents expressed desires that their son be moved away from an artificial environment which simulates daily living skills and training, to one that is a naturally occurring environment similar to where their son will live when he ages out of public school.
101. In the Present Level of Academic Achievement and Functional Performance Section on Page one, the IEP states that Student has mastered many activities of daily living

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<sup>10</sup>. At the hearing, it was learned through the testimony of \_\_\_\_\_ that \_\_\_\_\_ would soon be closing its doors as a result of a major medical issue for one of its principle owners.

“in classroom model situations with familiar staff and peers. [Student] has not evidenced generalizing and applying these skills independent of the model classroom.”

102. The subject IEP contains a “Transition Services” Section. A statement expresses: “Upon completion of public education, [Student] will participate in habilitative, independent living, and functional skills training through an outside agency.”
103. That Section also provides: “As per functional Assessment, [Student] will need support and additional opportunities to communicate and function within a independent or structured environment.”
104. That Section related to transition services also speaks to the fact that the District and “Transition Facility” will be responsible to provide transition service activities to the Student throughout the IEP year. According to \_\_\_\_\_, the identification of both the school and the transition facility were discussed during the February 22, 2012 IEP meeting as a fall back in case \_\_\_\_\_ turned out to fail as a provider. That way the District could take on that responsibility if there was an issue with \_\_\_\_\_
105. On the page entitled Special Education Services, it is clear that services were intended to be provided at \_\_\_\_\_ or another comparable facility. At the time, it was \_\_\_\_\_ as the educational setting. However, I believe that another comparable residential facility was contemplated and intended as an educational setting for the Student. All Special Educational services identified on that page of the IEP were identified to be provided at the “Transition Facility.” I do not agree with \_\_\_\_\_ that the term was intended to mean anyplace that \_\_\_\_\_ offered the individualized education program for Student. In fact, based upon the circumstances, communications and history leading up to the IEP, the evidence weighs heavily in favor of the term “Transition Facility” meaning a group home with an overnight component.
106. The IEP Team Members were all aware that Student had nearly transitioned fully to the group home setting in \_\_\_\_\_ and that he was no longer receiving any services locally within the District as of February 22. The Related Services Section also bears this out, where it identifies transportation services for 180 minutes two times per week. This time allotment is certainly consistent with the fact that \_\_\_\_\_ would transport Student 160 miles to \_\_\_\_\_ at the beginning of the school week and return to \_\_\_\_\_ to retrieve him from \_\_\_\_\_ at the end of the week.

107. Finally, I believe the “Justification” Section lends itself to demonstrating a clear intent that Student that the subject IEP required services in a residential setting. That section states:

[Student’s] comprehensive educational needs cannot be met within the general education environment. For [Student] to receive instruction in a naturally occurring setting would be reasonable for acquisition of skills in order to address transition goals and make progress toward his annual goals. As such, the team feels that a transition facility is the best placement to assist in [Student’s] post-secondary transition goals.

108. I find that the simulated environment of the Life Skills Center and some other day facilities within daily commuting distance from the District were necessary to address Student’s short term goal of transitioning into a residential educational setting with a naturally occurring setting. However, the weight of the evidence reveals that such a simulated educational setting was not intended to be the primary setting, but was only transitory.

109. That finding is further bolstered by the 2/29/12 PWN (JE 20) which provided that “placement of the student is proposed at a transition facility in WY.” At the time, that transition facility was

110. Consistent with the testimony of \_\_\_\_\_, the PWN<sup>11</sup> shows that the IEP was intended to be used as an assessment tool to “wait and see” how Student was doing in the \_\_\_\_\_ group home educational setting: “This placement is done so that the ability of the student to transition and practice home living skills can be assessed.” I further find that the weight of credible evidence indicates that all members of the IEP team were hopeful that \_\_\_\_\_ would be a long term educational placement, but left room for the possibility that it might end up being inappropriate for the Student.

111. The parties have stipulated that the subject IEP is adequate and appropriate. With that in mind, I find that the 2012 IEP requires an educational setting for the provision of services in a residential setting in order to meet the educational goals set forth in that

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<sup>11</sup>. It is certainly undisputed that the parents did not receive the 2/29/12 PWN until June 20, 2012. For purposes of determining the meaning of the IEP, the timing of the parents’ receipt of the PWN is irrelevant, because the information contained in that document clearly reflects the desire and approval of the District it relates to the educational environment under the IEP.

IEP. The IEP is intended to allow transition to a residential facility. The IEP contemplates that a qualified residential facility is required by the District to be considered and utilized as the Student assimilates to such a facility as an educational setting.

112. The District contends that it cannot legally provide residential services to the Student within daily commuting distance, and therefore can only provide daytime services in more localized transition facilities. The District has cited no legal authority to support such a proposition. Even if the District cannot provide such services with an overnight component within daily commuting distance, the IEP requires that the Student receive those residential services somewhere. Therefore, it is incumbent upon the District to find an educational setting which will provide appropriate educational services in an appropriate residential setting.

### **Issues Related to Use of iPad**

113. As a means of utilizing technology to assist Student to communicate more effectively, the District purchased an iPad for student to use at school. The iPad was introduced in June, 2011. The full implementation of the iPad as the primary communication device for the Student was a long term goal for the Student, but only after he demonstrated mastery within the fourth, fifth and sixth stage of the use of the PECS communication book. As of early, 2012, Student had demonstrated mastery of the first, second and third stages of the PECS through the use of his PECS book.  
*Test.; JE 7.*
114. The iPad issued by the school and used in the educational programming for Student was loaded with software known as proloquo2go. The software allowed the iPad to use a picture exchange communication system while utilizing a similar methodology as the PECS book utilized by Student. The software allowed the downloading of photographs or pictures from the Student's PECS book. The iPad software allowed for the construction of sentences by Students through the use of carrier phrases in the same manner as the PECS book Student had been attempting to master. *Test, Mother Test.*
115. Sometime in the early fall of 2011, Mother had pitched the idea of allowing her son to take the school issued iPad home. explained to Mother that it could not go home. There is a dispute about the reasoning given to Mother as to why it could not go home as explained by . *Mother Test.* That disputed fact, however, is not important, because , as the Speech and Language Therapist for Student made it very clear to Mother that she had concerns related to Student's progress at mastering

the PECS system before he transitioned to the iPad as a voice communications device.

*Test.* In looking at an e-mail from to Mother dated November 7, 2011 I do not find 's statement for the reasons that the iPad cannot be sent home with Student at that time to be inconsistent with rationale on that subject. *JE 8.*

116. Mother did not think that the explanation of the District personnel regarding the reason for not sending the iPad home to be very credible, because the District had previously sent three other electronic communications devices home with her son to use to communicate. testified credibly at the hearing about the rationale for sending those home in relation to her reasoning for not sending the iPad home until Student mastered all six phases of use of the PECS book. indicated that the devices that were sent home were essentially being modified and set up by more than one person. Mother would input information on those devices, and two District Personnel would do the same. According to , three different cooks were essentially spoiling the broth. This caused the screens on the devices to freeze often, which in turn caused frustration on the part of the Student and as a consequence, Student was not allowing him to progress as he should have. was concerned that this same process which created confusion and frustration for Student would play itself out with Student. In light of the history of problems associated with the previous three electronic communications devices, I cannot state that the rationale for to wait to send the iPad home until Student mastered all six phases of the PECS book to be unsound.
117. This is borne out by the results of the November, 2012 re-evaluation of student. According to , when she observed Student, he only used his iPad purchased by his parents as a recreation device and for listening to music. Even though his mother testified that the iPad has the proloquo2go communications software loaded that was installed in his school iPad, Student was not using the iPad as a communications device. testified that Student regressed his abilities to use the PECS book as a result of transitioning to the iPad purchased for his personal use before he mastered all six phases of the PECS book. The IHO finds the testimony of credible.
118. On November 4, 2011, ( sent Mother an e-mail explaining generally that Student was making good progress with his use of the PECS book which had led her to the idea of beginning to transition Student to the iPad. *JE 7.*
119. Mother disputed the reason that both and gave her for not sending the iPad home. The IHO finds that the basis for not sending the iPad home to be credible

and rationale, inasmuch as the reason was to see that Student moved ahead of his mastery of all levels of the PECS book as a communications tool. The rationale was properly placed in context through the testimony of . explained that the iPad is not something that she uses solely for recreation or sensory purposes. It was her hope that once Student demonstrated mastery within each of the fourth, fifth and sixth stages of the use of the PECS communication book, he would be able to transition to use of the iPad in all environments outside of school in order that he would be more successful with the iPad and its use as a communications tool.

120. This issue became more concerning of Mother. On November 15, 2011 she communicated that she wanted to meet with District personnel for expanded use of the iPad at home and in the community. *JE 9*. It is certainly understandable why Mother would want the transition from the PECS book to the iPad, because the iPad and its communications software are much more compact and portable for the student. However, the mastery of the methodology of learning how to communicate by the Student is an important foundation before the transition to the iPad as a primary communications device is considered. The iPad itself is more than a communications device. It has many other applications beyond communications which can serve to distract Student from its primary reason for use in the first place—a communications device.
121. On November 21, 2011, a meeting was held between Mother, , and regarding the use of the iPad outside of the school setting. According to Mother, expressed concerns about the iPad going home with Student because he was not fully proficient in its use as a communications device. I find that when looking at the totality of the evidence, that what intended to convey to Mother at the meeting was that it was premature for Student to begin using the iPad at home until he mastered all stages of the use of the PECS book.
122. The Parents offered no evidence that the methodology employed by the District as it pertains to waiting to transition from the PECS book to the iPad was unsound, or would not provide educational progress for the Student. The totality of the evidence shows that student was making good progress using the PECS book in all environments in conjunction with the controlled transitional use of the iPad at school.
123. It is important to note that Student appears to have actually regressed in his ability to communicate. On November 29 and 30, 2012, observed him for purposes of a three year re-evaluation. Student had the iPad which was purchased for his use. The iPad had the same communications software loaded as the school I-Pad which was previously issued to him and used as part of his education program prior to his

placement at \_\_\_\_\_ At the time of the re-evaluation, Student had completely regressed in cueing vs. prompting and what he knows to be true verbally as indicated by the output message on the iPad. To that end, Student showed complete regression in that the iPad was no longer a communications device, but a toy to play music.

*Test.*

124. In order to overcome the regression demonstrated in his ability to communicate, he would need to start at the beginning with the PECS book and work to demonstrate mastery of the first three phases of the PECS program. Because Student has been exposed to those phases and had previously mastered them, \_\_\_\_\_ believes the ability for Student to master those first three phases would not take long. He would then be required to work on the transition phases of the fourth thru sixth steps for each individual carrier phrase and begin transitioning those items to the iPad as a voice output device.
125. I do not find that the failure to implement the iPad at home or other environments as planned by the District until Student is ready for that phase of his education to be a denial of a FAPE. The Student was making good progress with the methodology and plan to transition from the PECS book to the I-Pad prior to his placement at \_\_\_\_\_ This is evidenced through the testimony of \_\_\_\_\_ and the progress reported on the 2011 IEP. *See also JE 7.*

## **ESY**

126. The Parents contend that the District failed to provide FAPE to Student because it did not offer ESY services.
127. The District did provide a Notice of Team Meeting related to ESY for Student on July 3, 2012 for a meeting scheduled for July 11, 2012. *JE 41.* This notice was provided only after the District was informed that the Parents were interested in ESY during the July 2, 2012 mediation. The Parents could not attend the July 11 meeting because of a death in the family, so the meeting was rescheduled for July 19, 2012. *JE 42.*
128. A meeting was held on July 19, 2012, where ESY was discussed. The District proposed ESY services for Student beginning on July 23, 2012 and ending on August 17, 2012. *JE 43.* The parents rejected the ESY proposal primarily because they believed it was too late in the summer to provide ESY.
129. I find that it was not too late in the summer to provide ESY. I also find that because the District had not had an opportunity to assess the progress of Student to meet his

annual IEP goals, the District was unable to even determine what services the Student would need. At that point, Student was residing at \_\_\_\_\_ and was being provided residential care and some services from \_\_\_\_\_.

130. As early as April 17, 2012, the District informed the Parents that they could not consider \_\_\_\_\_ as a proper educational placement unless it could be verified that \_\_\_\_\_ possesses the proper certifications and licensure. *JE 33*. The District reiterated this position regarding the need to verify accreditation and certification in another letter. *JE 37*. The Parents were unable to verify that \_\_\_\_\_ met the criteria which would have qualified to provide Special Education Services.
131. I find that Student did not receive FAPE during the summer of 2012, and that ESY was required. I also find that it was certainly reasonable for the District to believe that the Student had been withdrawn from special education services offered by the District under the 2012 IEP when the Parents rejected \_\_\_\_\_ as the proper placement to meet Student's IEP goals of transitioning him to his post secondary environment and life.
132. In addition, I find that \_\_\_\_\_ is not a proper educational placement for Student as services cannot legally be provided at that location by the District. I further find that \_\_\_\_\_ is not an appropriate placement for Student for more pragmatic and substantive reasons:
  - a. \_\_\_\_\_ testified that Student is happy and well adjusted to his living arrangements at \_\_\_\_\_ as part of a family package where he has a role and understands the dynamics of that environment. I agree with \_\_\_\_\_ that changing that dynamic from a home environment where care and sustenance is provided to one where \_\_\_\_\_ is now going to make Student perform certain tasks, will be very difficult. This is especially true in light of the fact that Student suffers from social and communications deficits; and
  - b. As stated previously, Student has completely regressed in his ability to communicate to the point that he will need to start over with each phase of his PECS book as revealed in the November, 2012 re-evaluation. Furthermore, \_\_\_\_\_ also observed Student and was able to objectively rate him against his performance noted in the 2011 IEP progress notes. \_\_\_\_\_ testified that in November, 2012, Student had showed improvement at a social level. However, Student showed an overall loss of abilities and skills when compared against the IEP of 2011 and when looking at the baseline goals for the 2012 IEP. When looking across all IEP goals, Student showed an average of an 83% loss of skills, amounting to a profound loss of function. This is true, even

when the overall gains made regarding the social goal are factored against the other functional losses. This indicates that the unilateral placement of Student by Parents at \_\_\_\_\_ is having a detrimental impact on the education of Student.

133. The IHO agrees that Student did not receive FAPE from March 9, 2012 to the present date. The weight of the evidence is that Student was receiving his education at \_\_\_\_\_ for most of that time period. The proof is in the proverbial pudding. Relying upon \_\_\_\_\_ as an education setting has only caused the Student to regress without the supports which could have been provided by the District. The Parents were aware that the District could not provide services at \_\_\_\_\_. The Parents made a conscious choice to continue with \_\_\_\_\_.
134. On August 9, 2012, the Parents did notify the District that they had found another facility known as \_\_\_\_\_ located in \_\_\_\_\_ Wyoming which they believed was accredited. They made it clear that they did want to continue to receive services under the 2012 IEP. *JE 48.* In that letter, the Parents correctly pointed out to the District that the IEP required the use of a licensed transition facility to address Student's transition needs. *Id.*
135. In keeping with the spirit and intent of the IEP, the District reacted in a timely manner to inspect the \_\_\_\_\_. *JE 49.* Members of the IEP team did investigate Harmony House, but found it to be an inappropriate placement for Student under the IEP for various reasons. According to \_\_\_\_\_, it was a home, which was not certified or accredited. It had numerous cats on location, and \_\_\_\_\_ was told by the owners the cats were kept to keep the mice away. The location of what would have been Student's room was in a corner of the basement, and there was no secondary escape in the event of a fire. The facility was not insured. I find that the \_\_\_\_\_ was not appropriate as a placement for Student under the 2012 IEP.

### **Conclusions**

In a due process hearing, the petitioning party has the burden of persuasion. (*Schaffer v. Weast* (2005) 546 U.S. 49, 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387].) In addition, "a party who has the burden of persuasion 'loses if the evidence is closely balanced.'" *Id.* Therefore, Student has the burden of persuasion for the issues raised in the Due Process Complaint.

According to the Supreme Court in *Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), "the 'basic floor of opportunity' provided by the [IDEA] consists of

access to specialized instruction and related services which are individually designed to provide educational benefit to "a child with special needs." *Rowley* rejected an interpretation of the IDEA that would require a school district to "maximize the potential" of each special needs child "commensurate with the opportunity provided" to typically developing peers. (*Id.* at p. 200.)

A school district is not required to place a student in a program preferred by a parent, even if that program will result in greater educational benefit to the student. *Id.* For a school district's offer of special education services to a disabled pupil to constitute a FAPE under the IDEA, a school district's offer of educational services and/or placement must be designed to meet the student's unique needs, comport with the student's IEP, and be reasonably calculated to provide the pupil with some educational benefit in the least restrictive environment. *Id.* Whether a student was denied a FAPE is determined by looking to what was reasonable at the time, not in hindsight. (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. of Education* (3d Cir. 1993) 993 F.2d 1031, 1041.).

#### **Issue #1 and 4–Attempt to Change Placement and Failure to Implement IEP**

1. The Tenth Circuit has expressed the purpose of IDEA as it pertains to the goal of a student's ability to live independently. "To the extent that a child's problems pertain only outside the educational realm, then, 'other resources [not IDEA] must be looked to.'" *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1151-1152 (10th Cir. Colo. 2008) Quoting *Gonzalez*, 254 F.3d at 353.
2. A school district may place a student with a disability in or refer the student to a private school or facility in order to provide special education or related services. 34 CFR 300.145. The placement is required to be provided at no cost to the parents and must be accompanied by an IEP that complies with the provisions of 34 CFR 300.320 through 34 CFR 300.325. See 34 CFR 300.146 (a).
3. When the student is severely cognitively disabled, that education consists of training in basic self-help skills and social skills, such as toilet training, dressing, feeding and communication, 24-hour-per-day programming and supervision may be necessary for the student to make consistent educational progress. If a student who meets those criteria is not placed in a residential facility, home care by less-well trained personnel may erode any progress the student makes in a day program. See, *Kruelle v. New Castle County Sch. Dist.*, 552 IDELR 350 (3d Cir. 1981); *M.C. & G.C. v. Central Regional Sch. Dist.*, 22 IDELR 1036 (D.N.J. 1995), *aff'd*, 23 IDELR 1181 (3d Cir. 1996).

4. A residential placement may be required for a student with severe mental disabilities who requires generalization of daily life skills in order to learn. This is often required for students whose education consists of training in basic self-help skills and social skills, such as toilet training, dressing, feeding, and communication. *See Abrahamson v. Hershman*, 554 IDELR 403 (1st Cir. 1983).
5. A number variable can be considered in making a placement determination, the most important being those that meet the LRE considerations contained in 34 CFR 300.114 through 34 CFR 300.118, 34 CFR 300.116, and 65 Fed. Reg. 36,591 (2000). What is material in making the placement decision will vary, at least to some extent, based upon the child's unique and individual needs. *Letter to Anonymous*, 21 IDELR 674 (OSEP 1994). *See Board of Educ. of the Williamsville Cent. Sch. Dist.* 37 IDELR 79 (SEA NY 2001) (finding that a school thousands of miles from the student's home to be the least restrictive environment).
6. A placement decision is not required to be a determination of the specific classroom within the designated school or other facility or any specific teachers assigned to those classrooms. While the child's IEP team may make such placement decisions, the IDEA likewise allows districts to treat such matters as administrative decisions made by school personnel. *Letter to Wessels*, 16 IDELR 735 (OSEP 1990).
7. “[T]he term 'educational placement' refers ‘‘only to the general type of educational program in which a child is placed.’” “[T]he requirement that an IEP specify the 'location' does not mean that the IEP must specify a specific school site.’ *Id.* The [District] may select the specific school without the advice of the parents so long as it conforms to the program offered in the IEP. *Id.* at 420.” *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 191-192 (2d Cir. N.Y. 2012)(quoting *T.Y. v. N.Y. City Dep't of Educ.*, 584 F.3d 412, 419 (2d Cir. N.Y. 2009).
8. I have previously found that the IEP contemplated that the Student be given an opportunity to transition from a simulated Life Skill setting to a naturally occurring setting in a residential facility. The Parents appear to contend that such a setting is one that they choose in order for their child to receive FAPE. The law does not require a specific residential facility, only one which provides a FAPE and will meet his IEP goals lending themselves to an educational benefit. To that end, it is clear that

when the Student was intended to transition to a residential facility, by necessity, he needed to continue to receive his services in a simulated setting which would allow him to generalize those skills.

9. The requirements for transition services recognize that other agencies may be involved in providing or paying for transition services. Accordingly, the statement of transition services in a student's IEP must include, if appropriate, "a statement of each public agency's and each participating agency's responsibilities or linkages, or both, before the student leaves the school setting." 34 CFR § 300.346(b)(1). The District responsible for the student's education retains responsibility for seeing that transition services are provided. Therefore, the regulations provide that if a participating agency is unable to provide agreed transition services, the public agency responsible for the student's education shall, as soon as possible, initiate a meeting for the purpose of identifying alternative strategies to meet the transition objectives and, if necessary, revising the student's IEP. See *Letter to Bereuter*, 20 IDELR 536 (OSERS 1993).
10. If a participating agency, other than the District, fails to provide necessary transition services described in the IEP as required by 34 CFR 300.320 (b), the District must reconvene the IEP team to identify alternative strategies to meet the transition objectives for the child set out in the IEP. 34 CFR 300.324 (c). School Districts are not allowed to unilaterally require parents to take on the responsibility for transition services. *In re Child with Disabilities*, 21 IDELR 624 (SEA CT 1994). The District is responsible to the student for ensuring that transition services called for in the student's IEP are implemented. *Gallup-McKinley County Schs.*, 108 LRP 21191 (SEA NM 2007) (citing *Martinsville (VA) City Pub. Schs.*, 16 IDELR 1088 (OCR 1990)).
11. The parties have agreed the IEP is adequate and appropriate. "When an IEP adequately provides a FAPE, it is within the discretion of the IHO and SRO to amend it to include omitted services." *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 188 (2d Cir. N.Y. 2012). There is a fundamental dispute in interpreting the provision of the 2012 IEP regarding the meaning of the term "transition facility." As the IHO, I have the authority to clarify the meaning of that term. With that in mind, the IEP requires the District to ensure that the transition services called for in the IEP are implemented. In this case, when issues arose at \_\_\_\_\_ the Parents acted reasonably in removing him from that environment. The District continued to assure

the Parents that \_\_\_\_\_ was an appropriate and safe placement for the Student. The Parents rejected that.

12. The District called a Team meeting which took place on April 5, 2012. The District did look to alternative placements for the Student, but failed to investigate or suggest residential settings comparable to the setting at \_\_\_\_\_. Instead, the District offered to provide services with third party agencies which were within daily commuting distance. Certainly, it is fair to believe that the Student would need to utilize services offered by the District on a daily basis until the Student was capable of assimilating fully to a residential training facility in the same manner he did at \_\_\_\_\_. That portion of the District's April 5, proposal is adequate and consistent with the Student's IEP. However, the District's failure to even consider a transition to a residential facility out of the District is not consistent with the 2012 IEP and does not provide a FAPE for Student.
13. "[T]o prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit." *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. Tex. 2000)
14. Had the District made an ultimate residential placement which was to serve as a transition facility intended to meet Student's post secondary goals, it would have met its requirements to provide a FAPE for the student under his 2012 IEP. The District failed to do so, and the Student has suffered a regression of functioning as a result.
15. The inquiry does not end there, however, because the Parents are requesting compensatory education for the time lost when their child did not receive a FAPE for a period of time after April 5, 2012. Even though I find the District should have been more diligent in investigating and suggesting potential residential transition facilities prior to April 5, 2012, I do not believe the District to be the cause of the loss of a FAPE for Student.

16. I find it unreasonable for the Parents to make a unilateral decision to fail to give a second chance to provide services for their son after March 9, 2012. I believe the District made a concerted effort to provide assurances that Student would receive comparable services necessary to meet his educational goals in the setting that had to offer. This is certainly true, when considering that the District offered continued support, training and oversight as it relates to as a continued placement.
17. I further find it unreasonable for the Parents to have continued to place their son at while being fully informed that educational services necessary to meet the Student's goals could not be provided at that facility. As a consequence, the weight of the evidence shows a direct correlation to Student's unilateral Parent placement at to the significant regression he has experienced in his functioning as observed during the November, 2012 re-evaluation.
18. Now, I will discuss the impact of the April 9, 2012 PWN which arose out of the April 5 IEP Team meeting. The Parents contend that through the April 9, 2012 PWN, the District proposed a change in placement because the proposal did not allow for a residential component for a transition facility. That certainly was the case, but the proposal had no meaningful impact on the 2012 IEP.
19. In *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1315 (10th Cir. Colo. 2008) the Tenth Circuit has stated that I am only to consider the 2012 IEP and not consider subsequent offers:

Specifically, we consider whether the district court should consider only the IEP itself, or whether it should extend its review to the offers made by the District during the August 2, 2001 meeting. The Sytsemas contend that the court must analyze only whether the provisions of the IEP, as written, substantively comply with the Act. The District, on the other hand, asserts that the court should consider both the written IEP as well as the subsequent offers. Based on the Act and the relevant case law, we conclude that the court should consider only the written IEP during its review.

20. After it became clear that the Student was no longer going to attend the District called a Team meeting on April 5, 2012 to attempt to fill the void in the ability to fully implement the Student's 2012 IEP. The District listened to a proposal related to placement of the Student at Ultimately, was properly rejected as a placement because educational benefit could not be achieved at that setting. However, the Parents unilaterally placed their son with anyway.
21. It does appear that the PWN which arose out of the April 5, 2012 Team meeting served as the catalyst for this dispute. I fail, however, to see how the PWN has a bearing on this case, in light of the fact that the Parents placed their son with  
Certainly, no evidence was presented to demonstrate how the April 9 PWN either directly or indirectly prevented a FAPE for the Student. Any analysis of this issue certainly causes me to engage in speculation as to the impact that PWN may have had on the education of the Student by engaging in a "what if" inquiry-- which is something I cannot do. The Parents have not met their burden of proof on this issue.

### **Issue #2 and 3-iPad**

22. Under IDEA "assistive technology device" is defined as "any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability." 34 CFR 300.5.
23. Districts are not required to provide a specific assistive device as recommended by parents or agree even with each request. *See A.S. and W.S. v. Trumbull Bd. of Educ.*, 45 IDELR 40 (D. Conn. 2006); *Eric H. v. Methacton Sch. Dist.*, 38 IDELR 182 (E.D. Pa. 2003). *See also Smith v. District of Columbia*, 58 IDELR 155 (D.D.C. 2012). (finding that even though Parent believed Student would make greater progress with a laptop provided, student's slow-but-steady progress reflected his ability to learn without laptop).
24. A district's assessment of a 19-year-old's needs, and its choosing a device that matched those needs defeated a parent's claim that the student required an iPad2. Because the district in that reasonably determined that a device with a dynamic interface would allow a nonverbal student to communicate with others, to access his

curriculum, and express his wants and needs, the School District provided FAPE. *Los Angeles Unified Sch. Dist.*, 11 LRP 75098 (SEA CA 10/31/11). In another case where a computer program designed to address language skills may have been the best available technology to address a student's language processing difficulties, a district's IEP which failed to include the use of the program, offered the student educational benefit. *Fort Bend Indep. Sch. Dist.*, 34 IDELR 246 (SEA TX 2001).

25. In addition, the IDEA does not require the IEP to include the particular instructional methodology. If the IEP team identifies that a specific methodology is necessary to receive FAPE, the IEP shall include those methods in the IEP. 71 Fed. Reg. 46,665 (2006).
26. "IDEA does not require a public school to provide what is best for a special needs child, only that it provide an IEP that is 'reasonably calculated' to provide an 'appropriate' education as defined in federal and state law.". *G.D. v. Westmoreland Sch. Dist.*, 930 F.2d 942, 948 (1st Cir. 1991). *See also Lt. T.B. ex rel. N.B. v. Warwick Sch. Com.*, 361 F.3d 80, 83 (1st Cir. 2004).
27. Given the fundamental importance of the human need to communicate coupled with the fact that nearly all other educational and daily living skills experiences for the Student were in varying degrees dependent upon at least functional language and communication, the District did properly address the student's communication needs, resulting in educational progress for the Student.
28. The mastery of the PECS book and the six stages of mastery is an educational methodology which employed and its use demonstrated good functional progress by the Student. Educational methodologies are generally not subject to challenge.
29. Certainly, the Parents believed the iPad was the best system to promote functional language and communications skills for their son. Ultimately, if the Student masters all levels associated with the PECS book, the goal is to transition those skills, carrier phrases and pictures used in the PECS book fully to the iPad for use as a language and communications device for the Student.

30. The Student has demonstrated that since his Parents acquired an iPad for his use at home, he has completely regressed in his ability to communicate functionally. Instead, the Student has demonstrated that the iPad's primary use for him is a recreational device and not a communications device. The Parents have not met their burden on the issue related to the iPad.

**Issue #5—Failure to Offer ESY**

31. I do agree that ESY was a service which the Student required in order to receive a FAPE. The failure of the Student to receive ESY was a result of almost no communication from the Parents regarding the status of their son's educational placement and setting since the Parents pulled him out of \_\_\_\_\_ after March 9, 2010.
32. The Parents contend the District failed to implement ESY Services in accordance with the requirements of the IEP. Based upon the totality of the evidence, I cannot find that the District was required to implement ESY services. The communications of the parties prior to February 22, 2012 demonstrate that ESY services would be discussed in April or May of 2012, depending on what needs the student had. At that time, the Student's educational setting included \_\_\_\_\_. The IEP and the commensurate PWN clearly state that the placement at \_\_\_\_\_ is for assessment purposes. I do not find that the Parents have established by a preponderance of the evidence that clearly defined ESY services were stated in the IEP.
33. Because ESY services are intended to prevent regression rather than advance educational goals, it is not unreasonable, like in this case for the District to decide to wait until the spring to determine what skills a student would need to maintain over the summer. *Reinholdson v. School Board of Independent School District No. 11*, 44 IDELR 42 (D. Minn. 2005).
34. The District was informed that the Parents were going to place their son at \_\_\_\_\_ a facility which was not accredited or certified to provide Special Education Services. For that reason, the District could not devote resources to provide support to \_\_\_\_\_ as an educational setting. The District did offer an alternative placement within \_\_\_\_\_ daily commuting distance which did not contain an overnight or residential

component.

35. In May, 2012, the District did receive a request from the Parents to mediate. During the mediation which was held on July 2, 2012, the District became aware of the Parents desire to consider ESY services. The District did send out a Notice regarding ESY services on July 13, 2012. There was no commitment one way or the other from the Parents regarding ESY services prior to the July 19, 2012 ESY Team meeting.
36. In early July, 2012, the District did convene an IEP team meeting to discuss ESY. The meeting was held on July 17, 2012. The IEP team suggested dates and a duration for ESY for Student. The parents rejected the request in part because they did not believe ample time would be allowed before the end of summer to effectively provide ESY services to Student. Parents also rejected the ESY because it did not contain a residential component. No evidence was provided at the hearing indicating that a residential component was necessary for or clearly contemplated ESY under the 2012 IEP, even though such evidence was offered in the context of the need for such residential component during regular school year. The issue is very close, but I do believe that when looking at the totality of the evidence, the Parents have proved with a preponderance of the evidence that the District did not offer ESY services or failed to provide a FAPE by doing so.

#### **Issue # 6—Failure to Provide IEP and PWN to Parents**

37. In matters alleging procedural violations, a denial of FAPE may only be shown if the procedural violations impeded the child's right to FAPE, significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits. (34 C.F.R. § 300.513(a); *see also W.G. v. Board of Trustees of Target Range School District No. 23* 960 F.2d 1479, 1484 (9th Cir. 1992).
38. Procedural failures under IDEA amount to substantive failures, only those procedural inadequacies effectively result in a denial of a FAPE. *Sytsema v. Acad. Sch. Dist. No. 20*, 538 F.3d 1306, 1313 (10th Cir. Colo. 2008).

39. Compliance with the IDEA's procedural requirements for IEP construction and implementation is a factor in determining whether a student with a disability has received FAPE. Noncompliance is not always a fatal defect resulting in an IDEA violation. Courts often have held that procedural violations do not deny FAPE unless they result in a substantial deprivation of a student's or parent's rights. Courts have applied that general principle in connection with failures regarding procedural requirements for transition planning. See, e.g., *Chuhuran v. Walled Lake Consolidated Schs.*, 22 IDELR 450 (6th Cir. 1995) ( failure to prepare a written transition plan was a non-material technical defect because the student had been provided adequate transition services). See also *Urban v. Jefferson County Sch. Dist. R-1*, 24 IDELR 465 (10th Cir. 1996) (even though an IEP failed to contain a specific statement of transition services, appropriate services had been implemented, and the IEP contained statements that addressed the student's needs for community and daily living skills).
40. Parents must be given written notice a reasonable time before the public agency proposes to, or refused to, initiate or change the identification, evaluation, educational placement or provision of FAPE to a child. (20 U.S.C. § 1415(b) & ( c); 34 C.F.R. 300.503(a). The notice must include: a description of the proposed action; an explanation of why the agency proposes to, or refuses to, act; a description of the assessments or reports supporting the action; a statement that parents have procedural rights; sources for parents to consult for assistance regarding the notice; a description of other options considered by the IEP team and why those options were rejected; and a description of any other factors relevant to the agency decision. (20 U.S.C. § 1415(b) & ( c ); 34 C.F.R. § 300.503(b); As discussed in, above, a denial of a FAPE may only be shown if a procedural violation significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of FAPE, or caused a deprivation of educational benefits.
41. The concern raised by the Parents rightly revolves around the fact that they were not provided a copy of the February 22, 2012 IEP and accompanying PWN until June 20, 2012. This is an admitted violation of the IDEA.
42. I find no prejudice or denial of a FAPE as a result of the failure to provide the PWN and the 2012 IEP until June 20, 2012. In this case, the Parents were provided a copy of the 2012 IEP, exclusive of the narratives inserted by the OT and the Speech and

Language Therapist, prior to the February 22, 2-12 IEP meeting. *JE 19*. The Parents participated in the IEP meeting and went over the IEP word for word. The PWN did not change any aspect of the IEP, but rather served to clarify the services in the manner the Parents have clearly and expressly desired. The Student received full services under the IEP until the Parents pulled him out of and rejected offers to re-enroll him.

43. The Parents likewise were given an opportunity to and Mother did participate in a Team Meeting on April 5, 2012, where they and proposed the program as a placement. The Parents were sent a PWN arising out of that meeting on April 9, 2012. I see no substantive harm suffered as a result of the procedural failure to provide the February IEP and PWN. The Parents have failed to meet their burden on this issue.

### Reimbursement

44. Federal law provides that a hearing officer may grant such relief as he determines is appropriate based on the findings. *Anaheim Union High School Dist.*, 34 IDELR 192 (Hearing Officer Decision, 2/16/01); *Hacienda La Puente Schools v. Honig*, 976 F.2d 487 (9th Cir. 1992).
45. “[T]he IDEA allows parents to reject an IEP they feel is inadequate, place their child in an appropriate private school, and seek tuition reimbursement from the school district.” *R.E. v. New York City Dep't of Educ.*, 694 F.3d 167, 186 (2d Cir. N.Y. 2012).
46. Parents who make unilateral placements to private school, "do so at their own financial risk. They are entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Florence Cnty. Sch. Dist Four v. Carter*, 510 U.S. 7, 15, 114 S. Ct. 361, 126 L. Ed. 2d 284 (1993).
47. In keeping with the principles espoused under the provisions of IDEA found at 20 U.S.C. § 1421, the Tenth Circuit has indicated that if a unilateral placement is to a facility which is not accredited by the State, then the Parents are not entitled to

reimbursement for such placement. *Jefferson County Sch. v. Elizabeth E.*, 2012 U.S. App. LEXIS 26608 (10th Cir. Colo. Dec. 28, 2012)

48. In this case, it is not in dispute that \_\_\_\_\_ is not a State accredited or State certified entity. Therefore, the IHO is without any legal authority to award reimbursement for the cost of placing Student at \_\_\_\_\_

### **ORDER**

It is hereby ordered, adjudged and decreed as follows:

- a. As to Issues 1 and 4:
  - i. No later than 30 days from the date of this Order, the District shall immediately investigate and actually propose to the Parents an educational setting of appropriate accredited transitional facilities. Such a facilities shall contain an overnight/residential component comparable to that offered by \_\_\_\_\_ when that facility was Student's educational setting. The Distance or closeness to the District of the overnight/residential facilities shall not be determinative.
  - ii. Because the Student may need time to acclimate and assimilate to gradually transition to a suggested transitional facility with an overnight component in a natural occurring setting, the IEP team shall develop an appropriate and clearly stated transition plan which incorporates appropriate day services within or near the District and related services necessary to meet Student's 2012 Annual IEP Goals no later than 45 days from this Order. Said transition plan shall be developed with the 2012 IEP Annual Goals in mind.
- b. Issues 2, 3, 5 and 6 of the Due Process Complaint are dismissed.
- c. The request for reimbursement is denied.
- d. The request for compensatory education is denied.
- e. In accordance with 34 C.F.R. §300.516, any parties aggrieved by this decision must bring a civil action within 90 days of the date of the hearing officer's decision. The action may be brought in any State court of competent

jurisdiction or in a district court of the United States.

**DATED this 18<sup>th</sup> day of January, 2013.**



Independent Hearing Officer