STATE OF COLORADO **OFFICE OF ADMINISTRATIVE COURTS** 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
[Father] and [Mother], Complainants, vs. **DENVER PUBLIC SCHOOLS,** Respondent.	▲ **COURT USE ONLY** ▲ **CASE NUMBER:** **EA 2015-0002**

DECISION

Complainants, on behalf of their minor son, [Student], filed a due process complaint pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.,* as implemented by federal regulation 34 CFR § 300.510 and state regulation 1 CCR 301-8, §§ 2220-R-6.02(7.5). Hearing was held May 20 through 22, June 26, and July 7 through 10, 2015, before Administrative Law Judge (ALJ) Robert Spencer at the Office of Administrative Courts, Denver, Colorado. Louise Bouzari, Esq. and Elena Veta Eisenberg, Esq. represented Complainants. Kathleen Sullivan, Esq. and Amber Elias, Esq. represented Denver Public Schools (the District).

Case Summary

The core issue is whether the District, despite its attempt to devise an educational program adequate to meet [Student]'s educational needs, is capable of meeting those needs given [Student]'s complex mental and physical disability.

[Student] is a teenage boy suffering from Prader-Willi Syndrome (PWS), a genetic disorder resulting in a number of physical, mental and behavioral problems, including a constant sense of hunger. [Student] is eligible for special educational services and has, since first grade, been educated in District schools pursuant to a series of individualized education programs (IEPs). However, during his 8th grade year, [Student] began to experience worsening symptoms of tantrums, physical aggression, and instances of refusing to go to school, that resulted in several inpatient and outpatient psychiatric hospitalizations. Beginning his 9th grade year, [Student] was to transition to his neighborhood high school ([High School]), but he refused to attend freshman orientation. Although the District felt confident that it could offer [Student] a free appropriate public education (FAPE) at [High School] ([High School]), and prepared a series of IEPs with that goal in mind, [Student]'s parents concluded that the District was unable to provide FAPE to [Student] and enrolled him in a residential facility in [State A] that specializes in the education of students with PWS. When the District declined to fund [Student]'s education

at that school, Complainants filed this due process complaint.

Complainants' primary contentions are, first, that due to [Student]'s extraordinarily severe and complex form of PWS, he requires "total food security" which the District is simply unable to provide. Second, Complainants contend that [Student] has already demonstrated refusal to attend school at [High School], and therefore the District's plan for him to attend that school is futile. Third, Complainants argue that because [Student] cannot receive FAFE at [High School] or for that matter at any school in the District, the District is obligated to fund his education at a residential facility competent to handle his severe form of PWS. In Complainants' opinion, [State A Facility] in [City], [State A] is such a facility.

The District responds that it has provided [Student] with FAPE for many years and remains able to do so. It argues that it has been extremely attentive to [Student]'s educational needs and Complainants' concerns about his need for food security. It says it has devised an IEP and implementation plan that is reasonably calculated to meet [Student]'s needs, including a detailed and comprehensive plan to provide the necessary food security and to overcome [Student]'s school refusal. It contends that [High School], which is [Student]'s neighborhood school, is the least restrictive environment in which [Student] may receive FAPE. On the other hand, it says that [State A Facility], which is a residential facility, is not appropriate because it is more restrictive and will isolate [Student] from exposure to his non-disabled peers.

For reasons explained below, the ALJ concludes that Complainants failed to meet their burden of proving that the District's plan is incapable of providing [Student] with FAPE.

Findings of Fact

[Student]

1. [Student] is a [age] year-old boy ([D.O.B.]) who, at the time the due process complaint was filed, lived with his parents [Father] and [Mother] in Denver, Colorado. [Student] has one sibling, [ ].

2. During infancy, [Student] was diagnosed with Prader-Willi Syndrome (PWS), a genetic disorder affecting chromosome 15. Normally, a child inherits one copy of this chromosome from each parent, but errors can occur in several ways. Most cases of PWS (about 70 percent) result when a portion of this chromosome is deleted from the paternal chromosome. The second most common type of PWS, known as maternal uniparental disomy or UPD, is present in about 25 percent of PWS cases. It occurs when the child receives two copies of chromosome 15 from the mother and none from the father. [Student] has this form of PWS. Ex. B.

3. All cases of PWS involve loss of function of genes in one or more regions of chromosome 15. PWS typically manifests itself in infancy by weak muscle tone, feeding difficulties, and delayed development. In childhood, affected individuals typically develop an insatiable appetite, which may lead to chronic overeating (hyperphagia) and obesity. If food intake is not carefully monitored and controlled, a person suffering PWS may overeat

to the point of gastric rupture and death.

4. People with PWS often suffer intellectual impairment and learning disabilities, as well as behavioral problems. Consistent with this experience, [Student] has been diagnosed with a mood disorder not otherwise specified, general anxiety disorder, autism spectrum disorder, and mild intellectual disability in the form of a non-verbal learning disability.

5. [Student] has received psychiatric care for a number of years. His psychiatrists have tried a variety of medications in an attempt to manage his mood disorder, generally without much success.

6. As a consequence of his relatively rare form of PWS, his additional related diagnoses, and his lack of a sustained response to medications, [Student]'s condition is particularly disabling.

7. Due to his disabilities, [Student] was identified early as a child needing special educational services under the IDEA. He attended District schools throughout his entire elementary and middle school career, first [Elementary School] and then [Middle School], with the support of an IEP.

8. The record does not disclose the details of [Student]'s academic routine in the earlier years, but in middle school his time was split between general education and special education classes designed to accommodate children with mild to moderate impairments. Generally, he did well in social studies, reading, and writing, but performed poorly in mathematics. Though generally not performing at grade level, [Student] did make academic progress throughout his elementary and middle school years.

9. During his middle school years, [Student] demonstrated more tantrums and verbally aggressive behavior, but was generally not physically threatening or violent in school. Typically, when [Student] experienced a tantrum, it would take 15 to 20 minutes to call him down to the point where he could return to class. There was never a need to physically restrain [Student] or call 911, and it was never necessary to call his parents to pick him up because his behaviors were out of control.

10. [Student]'s 8th grade special education teacher, [Special Education Teacher], testified that aside from two incidents, [Student] was not physically aggressive. One incident occurred in the school cafeteria when [Student] had a tantrum and started hitting his mother as she tried to dissuade him from leaving school early. When [Special Education Teacher] intervened, [Student] hit [Special Education Teacher]. No injuries were sustained and [Student] ultimately calmed down and returned to his classroom. The other incident involved [Student] grabbing for an item that was in a paraprofessional's hand, tearing the para's shirt in the process. Again, there was no injury and [Student] remained in school. Although there were other incidents of misbehavior, such as pulling a fire alarm for which [Student] received an in-school suspension, few involved physical aggression.

11. Similar behavior was noted in [Student]'s 5th, 6th and 7th grade years, though to a lesser extent. Ex. F, p. 26.

12. [Special Education Teacher] testified that, overall, he had a good relationship

with [Student] and recalls at the 8th grade graduation ceremony [Student] told [Special Education Teacher] he was the best teacher he ever had. [Special Education Teacher] also felt he had good communications with [Student]'s parents, and he attempted to meet with them briefly on a daily basis to share [Student]'s experience that day in school. In [Special Education Teacher]'s opinion, [Student]'s IEP was successfully implemented and [Student] was able to access his education despite his disabilities.

13. In January 2014, [Special Education Teacher] scheduled an IEP team meeting to discuss [Student]'s options for transition to high school in the following year. Ex. G.

The February 2014 Hospitalization

14. Although [Special Education Teacher] was not seeing it at school, [Student]'s behavior at home became increasingly problematic. On February 20, 2014, [Student]'s parents took him to the Children's Hospital Colorado (CHC) emergency department (ED) following a severe tantrum involving [Student]'s refusal to go to school. On that day, [Student] initially refused to go to school, but eventually did. After school, however, his behavior deteriorated and his parents brought him to the ED. He was admitted later that day to CHC's Neuropsychiatric Special Care Unit (NSC) for treatment of severe anxiety, obsessive-compulsive behavior, mood lability, and aggression. Ex. SS.

15. By March 6, 2014, [Student]'s symptoms resolved sufficiently that he could be discharged from inpatient hospitalization. He was transferred on that date to the NSC outpatient day treatment program with the primary goal of giving [Student]'s parents the opportunity to put behavioral strategies in place.

16. [Special Education Teacher] kept in contact with NSC's professional staff throughout [Student]'s inpatient and outpatient treatment with the view of facilitating [Student]'s return to school. [Student] did attend at least one day at school during the course of his day treatment without adverse incident, though on other days he refused to attend.

17. [Student] was discharged from day treatment on March 28, 2014 with a plan for him to transition back to school full time after spring break. From April 1 to April 6, [Student] and his parents travelled to [another State] on a family vacation. On April 8, 2014, [Student]'s parents brought him back to the CHC emergency department when he became anxious and refused to return to school that day. Ex. HHH. Complainants felt [Student] might ultimately require admission to a residential treatment facility because they could no longer manage his behaviors at home. Ex. HHH, p. 467.

18 [Student] was readmitted to the NSC day treatment program on April 9, 2014 to continue work on his behavioral dysregulation and severe anxiety. Ex. III. The intake notes reflect that Complainants believed [Student]'s behaviors were worsening and they felt trapped by his behavior. They again expressed interest in placing [Student] outside the home. Ex. III, p. 476. According to [Student]'s treating psychiatrist at NSC, [Psychiatrist], [Student]'s behavior was "not as bad as a lot of kids we see," but there was "a significant mismatch between his needs and the family's ability to manage their own anxiety." Ex. RR,

p. 343.

19. The day treatment plan was for [Student] to transition back to school. With this in mind, [Special Education Teacher] and [Student]'s treatment providers scheduled one or more trial transition days at school before [Student]'s final discharge. However, as of April 22, 2014, [Student] was still refusing to go to school.

20. On April 23, 2014, [Student] was readmitted to the NSC inpatient unit because of increased behavioral dysregulation and dangerous behaviors. His parents reported that [Student] said he wanted to kill himself, that he hit his mother, and that he tried to open the car door enroute to the ED. His parents felt completely overwhelmed by his behavior and unable to keep him safe. Ex. QQQ.

21. Because [Student] had no major behavioral problems while on the NSC inpatient unit and denied thoughts of harming himself, he was considered for discharge. According to [Psychiatrist]'s progress note, [Student]'s parents were hoping that [Student] could be discharged directly to residential placement, but [Psychiatrist] thought [Student] would not be approved for out-of-home placement because "he has not failed a lower level intervention." Ex. RRR, p. 504.

22. [Psychiatrist] therefore believed [Student] should be discharged to day treatment. Ex. SSS. According to [Psychiatrist]'s progress note of April 28, 2014, "[[Student]'s] maladaptive behaviors (whining and refusing until he gets what he wants) has been reinforced through the years and that intensive behavioral intervention is likely to have more of an impact than medication." Ex. SSS, p. 508.

23. [Student] was readmitted to day treatment on April 29, 2014. Due to [Student]'s resistance to returning to school, no school transition days were planned while he was in day treatment. However, the treatment team's plan was to get in-home behavioral therapy in place to assist him with the transition back to school.

24. By May 22, 2014, [Student] was no longer showing progress in the day treatment program and had reached maximum benefit. [Student] stated that he would rather go to school than remain at the NSC. The plan was to get [Student] back in school prior to the end of the school year after in-home therapy was in place, with the expectation that he would transition to high school in the fall. Ex. TTT-ZZZ. According to [Psychiatrist]'s progress note of May 22, 2014, [Father] believed "it is very unlikely that [Student] can continue to be successful in Denver Public Schools, but knows that they have to try." Ex. ZZZ, p. 538.

25. [Student] was discharged from day treatment on May 27, 2014. At the time of discharge, he continued to engage in perseverative behavior and continued to have significant anxiety. Ex. BBB. Nonetheless, he did return to school for the remainder of the semester and reportedly did well, although he did not return to the general education classroom. Ex. L, p. 93.

The May 2014 IEP

26. The IDEA requires that IEPs be reviewed annually for continued eligibility and

proper placement. [Student]'s IEP was due for annual review in May 2014, and the IEP team met for that purpose on May 13, 2014. Team members in attendance included [Student]'s parents, a parent advocate, a special education teacher, a general education teacher, and a school building representative. A variety of other District personnel also attended, including a speech language therapist, an occupational therapist, a school nurse, the school psychologist, a physical therapist, the school social worker, [Student]'s language arts special education teacher, and a representative of the transportation department. Ex. L, p. 63. [Psychiatrist] and an NSC therapist also participated by telephone in the IEP meeting.

27. Because [Student] had not been in school since February 2014 except for a few days, the District's representatives relied largely upon what was known of his educational progress prior to admission to the NSC. Based upon this information, [Student]'s overall performance was rated as high partially proficient in reading and partially proficient in writing, but he continued to struggle in math. [Special Education Teacher] characterized [Student] as being very bright with interests in current events, theatre, history and other topics; but had difficulty socially and could be very resistant to doing school work and other things he did not want to do. Nonetheless, [Special Education Teacher] considered [Student] to be generally well behaved in school. Prior to hospitalization, [Student]'s placement was "highly integrated" with 80% of his day spent in general and mild/moderate education classes. Ex. L.

28. The IEP team recommended that [Student] transition to his neighborhood high school, [High School], in the following year.[1] [High School] is a large two-story urban high school with an enrollment of approximately 2400 students.

29. The IEP team also recommended that [Student] remain in a highly integrated setting of special and general education classes with direct services for speech and mental health. In view of his hospitalization, the team noted that [Student] might need a "slow start" to begin the new school year. The IEP team also recommended that [Student] receive extended school year (ESY) services over the summer to compensate for being out of school for three months. Ex. L, pp. 93-94.

30. The IEP noted throughout that because [Student] had not been in school since February 2014, it "may not reflect the current state of [[Student]'s] behavior, ability, or skills." It also noted that [Student]'s parents felt the IEP was not an accurate reflection of [Student]'s current abilities and needs. Overall, [Student]'s parents felt that the IEP team relied too heavily upon [Student]'s performance prior to his hospitalization, and did not adequately consider the deterioration in his behavior at home that led to his hospitalization.[2] Nevertheless, [Student]'s parents expressed hope that [Student] would be able to attend [High School] the following year. Ex. L, p. 93.

ESY, NSC, Comprehensive Evaluations, and "Homebound" Education

1 [ ].

2 This discrepancy in viewpoint is underscored by the difference between the parent and teacher ratings on the BASC-2 (Behavior Assessment System for Children – 2) assessment, where the parents and teacher disagree in three of the five behavior domains. Ex. L, p. 80.

31. [Student] participated in ESY from June 13 to July 11, 2014 at the District's [Another Middle School]. He attended every day although he came in late on two days due to initial reluctance to attend school on those days. According to [ESY Principal], the ESY principal, [Student] exhibited no aggressive or refusal behaviors while at school and did a "fine job" socially.[3] He was especially excited to participate in a drama class where he put together a script and props for the play, "Annie," and involved other students in the project.

32. Despite his favorable attendance and performance at ESY, [Student]'s behavior at home escalated over the summer, including refusals to attend a private summer camp and refusal to attend freshman orientation at [High School]. [Student] told his parents that [High School] was "too big," had "too many classes," and had "too many people." He said he would "never go to [High School]." On July 17, 2014, [Mother] advised the District that despite a change in medications and the institution of in-home therapy, she and [Father] were certain that [Student] could not return to school in the fall and would require residential placement at a PWS-specific facility. Ex. R.

33. [Student]'s behavior at home escalated to the point that on three separate dates in August (the 1st , 14th, and 18th) he was taken to the CHC emergency department. At each visit, [Student] calmed and denied any thoughts to harm himself or others. He was released to home after the first two visits, but after the third he was re-admitted to the NSC inpatient unit. Ex. CCCC-JJJJ.

34. [Student]'s parents identified [Student]'s anxiety about going to high school as the trigger for much of his out-of-control behavior. They also advised the ED staff that they were pursuing residential or group home options for [Student] with their insurance company, but that this would take some time. [Student] told NSC staff that he wanted to go anywhere but home, and talked about a residential or group home placement. Ex. CCCC, p. 548, Ex. DDDD, p. 556, Ex. FFFF, p. 574. Nonetheless, [Student] quickly stabilized, did well on the inpatient unit, and on August 26, 2014 was discharged to the NSC day treatment program.

35. On August 20, 2014, the District convened an IEP team meeting, including Complainants, to discuss a transition plan for [Student]'s attendance at [High School], to discuss the need for a comprehensive evaluation of [Student], and to discuss Complainants' request for funding of residential placement. Ex. N, O.

36. Complainants consented to the District's request for a comprehensive reevaluation. To facilitate the evaluation, the District agreed to cover the expense of [Student]'s admission to the NSC day treatment program while the evaluation was being conducted and [Student]'s educational placement was further reviewed. Ex. R.

37. The evaluation included separate physical therapy, speech-language therapy, and cognitive assessments. The evaluation was conducted in a separate building on the [High School] campus on several days in late August and early September 2014, at times

3 Although [Student]'s behavior during ESY was generally good, he reportedly did shoplift an item of food during a school field trip.

that did not conflict with [Student]'s day treatment. [Student] attended and was cooperative in each assessment.

38. Cognitive assessment using the WIAT-III disclosed that [Student] fell within, or even above, the average range in a number of literacy skills including listening comprehension, sentence composition, word reading, essay composition, pseudoword decoding, and spelling; but fell well below average in math related skills and reading comprehension. Ex. V.

39. The District felt confident it could still meet [Student]'s educational needs and offered to address his school refusal by arranging for a short period of "homebound" education at [High School] as a transition to regular attendance. The District also offered to provide transportation to and from [High School]. Ex. U.

40. "Homebound" education is an alternative placement service intended for students who are unable to attend school. Although termed "homebound," [Student]'s classes were not held at his home because Complainants and the District felt that holding classes at home would be counterproductive.[4]

41. [Student] was to attend homebound classes from September 24 through November 21, 2014, three hours per day, five days per week. [Student] did attend 14 of the first 17 scheduled class days (he refused to attend on October 6, 9, and 10), but beginning October 17 he stopped attending due to his admission to [State B Facility] in [City], [State B]. Ex. Y.

42. [Student]'s homebound special education teacher, [Homebound Special Education Teacher], testified that she instructed [Student] in literacy, math, and geography. She also assigned homework in these subjects. On those days that he attended, [Student] had fun and did well, although he struggled with math. During the session, [Student] did especially well in a project involving reading, writing, and creating a poster about the Atlantic Ocean.

43. Apart from one incident, [Student] exhibited no behavior problems during homebound school. That incident occurred when [Student] and his mother arrived at school, but [Student] did not want to stay. When his mother insisted that he stay, he physically resisted. [Homebound Special Education Teacher] observed this and intervened to guide [Student] to his classroom. While doing so, [Student] pulled her hair. Nonetheless, with the assistance of the school security officer and school psychologist, [Homebound Special Education Teacher] was able to guide [Student] to the school clinic where he eventually calmed down and was able to complete the educational day. During the incident, [Student] was never physically restrained and no one was injured.

[State B Facility] – *Total Food Security*

44. In an effort to better understand and manage [Student]'s behavior, his parents arranged his admission to the [State B Facility] on October 20, 2014. [Student]

4 The homebound classes were originally to be held at the public library; however, when that location became problematic the location was changed over Complainants' objection to [High School].

remained an inpatient at [State B Facility] until his discharge on December 19, 2014.

45. Despite multiple medication trials, [Student] remained symptomatic during his stay at [State B Facility], including mood lability, irritability, anxiety, angry outbursts, excessive sleepiness, thought disturbances, and grandiosity. However, he did not exhibit any physical aggression. Ex. JJ, p. 256-7. According to his treating psychiatrist, [State B Facility Unit Director], M.D., his symptoms were at the high end, and his response to medication was at the low end, of that expected for PWS patients.

46. At the hearing, [State B Facility Unit Director] explained the need for total food security for people with PWS, and for [Student] specifically given the severity of his condition. Total food security is necessary because PWS sufferers have an intense and exquisite preoccupation with food despite adequate caloric intake. This preoccupation may lead the individual to engage in food-seeking behaviors, such as stealing food, taking food from trash cans, or making unauthorized purchases of food.

47. Total food security involves both physical and psychological security. Physical security means not allowing the individual to have access to food other than at set times, and then only a predetermined type and amount. It also involves eliminating any food-related sight, smell, or sound other than at set times. Psychological security means instilling in the individual the understanding that he has no hope of obtaining food other than at the prescribed time. With these measures in place, the individual is less likely to perseverate about food and is able to concentrate on other things, such as learning.

48. Total food security must be maintained across all settings, including home, school, and community. If total food security is not maintained, the individual's anxiety and preoccupation with food may lead to behavioral problems. If access to food is uncontrolled, the individual may overeat to the point of gastric rupture and death.

49. To keep abreast of [Student]'s progress at [State B Facility], the IEP team met by telephone with representatives of [State B Facility] on December 4, 2014. At that meeting, [Student]'s parents and [State B Facility] staff expressed concern that the District had "not adequately addressed [[Student]'s] previous and current psychiatric state as well as his mental health needs, and how this impacts his educational ability and behavior in the school setting." Ex. FF, p. 222.

50. While at [State B Facility], [Student] attended classes outside the PWS unit. [Student]'s instruction was provided by [Education Coordinator], PhD, who has special expertise in education of PWS students. Despite [Education Coordinator]'s expertise, [Student]'s lack of focus and verbal resistance generally impeded his ability to gain much educational benefit from his classes at [State B Facility].

51. [Education Coordinator] routinely assists school districts develop IEPs appropriate for PWS students. In December 2014, [Education Coordinator] participated in a telephone conference with District staff to discuss [Student]'s PWS-related needs and report her recommendations for [Student]'s educational placement. Prior to the conference, [Education Coordinator] provided the District with her written recommendations. Ex. BB. Specifically, her recommendations were:

- [[Student]] requires a placement where complete food security across all environments that he could come in contact with can be assured, including any school areas where instruction is delivered to [[Student]], as well as all areas that [[Student]] walks through or sees on his way to instructional areas.

- [[Student]] requires a placement where all professionals and paraprofessionals who work with [[Student]] during the school day are highly-trained about the diagnosis of PWS, the importance of food security, and how PWS affects [[Student]], and are experienced in dealing with students who have PWS.

- [[Student]] requires a placement with wrap-around mental health services so that his mental health challenges which severely impede his ability to access an education can be addressed in concert with his academic needs.

- [[Student]] requires placement that can successfully address [[Student]'s] severe school avoidance behavior.

- [[Student]] requires a placement that has a very small overall student population (less than 200 students) with a low teacher/student ratio (no more than 1:4.)

52. [Education Coordinator] noted that if her recommendations were followed with fidelity but [Student] could still not successfully access an education, then she would recommend placement in a residential, PWS-specific facility.

The December 2014 IEP

53. On December 15, 2014, the District provided Complainants with a draft IEP designed to transition [Student] to [High School] after his release from [State B Facility].[5] The IEP proposed placement at [High School] in the general education environment, as opposed to a residential setting, because [High School] would provide "social opportunities to develop relationships with peers including non-disabled peers." Ex. FF, p. 231.

54. The IEP also proposed to include many of [State B Facility]'s recommended accommodations and modifications, including:

- Train all professional and paraprofessionals who work with [Student] during the school day about the diagnosis of PWS, the importance of food security, and how PWS affects [Student].

- Arrange for an alternative setting for all scheduled mealtimes.

- Establish a structured routine to provide [Student] a clear visual schedule reflecting daily activities, alternating preferred with non-preferred activities.

- Adapt and/or modify assignments in all general education classes.

5 The draft EP is dated September 29, 2014 because that was the date of the initial meeting regarding the transition IEP. Ex. FF, p. 232.

- Develop a schedule of reinforcement and non-punitive consequences.
- Allow frequent breaks as needed.
- Develop a "schedule within a schedule" that not only tells [Student] what hours he has to attend his school sessions each day, but also what he has to accomplish, broken up into small, manageable tasks.
- Provide a clear plan for how food security will occur during community based activities (e.g. field trips, special events scheduled in the community, etc.)
- Provide an alternative setting for [Student] upon arriving at school so that he does not have to wait in the cafeteria or any other location where he may be exposed to food before the school day begins or after it ends.
- Provide close adult supervision at all times during the school day.

Ex. FF, p. 228.

55. [Student]'s IEP team met on December 17, 2014 to consider the draft proposal. Complainants, however, rejected the IEP as not appropriate to provide [Student] with FAPE. In particular, they noted that [Student] continued to struggle in the educational environment at [State B Facility] even though it was a highly restricted environment, and therefore they could not understand how [Student] could be successful in a less restrictive high school environment like [High School]. Complainants stated that they intended to file a due process complaint and seek an order compelling the District to pay for a PWS-specific residential placement. Ex. HH, p. 252.

56. At the hearing, Complainants described incidents at [High School] when they observed food or food-related items in areas such as the library, hallways, and nurse's office. In their opinion, food is "everywhere" at [High School] and the District is not capable of maintaining total food security.

57. The IEP team nonetheless determined that placement at [High School] was the most appropriate and least restrictive environment. The team, however, reduced [Student]'s exposure to the general education environment to 41 percent of the school day. Ex. HH, p. 250. The December 17th IEP also adopted the previously recommended accommodations and modifications. Ex. HH, p. 246.

58. The IEP recognized that due to the length of time [Student] had been out of school, a transition plan was needed. The transition plan called for [Student] to begin with "homebound" services at [High School] of the type he successfully received prior to going to [State B Facility], and then "fade" the homebound teacher as [Student] was able to access additional programming during the school day. Fifty minutes courses would be added one at a time in a small structured environment of special education and inclusion classes. Throughout the transition, the District would monitor [Student]'s attendance, participation, and anxiety level. Mental health services would be provided for 45 minutes per week, subject to being increased as needed. Changes would require prior written notice to the parents. Ex. HH, p. 249.

59. The IEP also noted that once a final discharge summary was received from

[State B Facility], the IEP team could be reconvened to consider any further recommendations [State B Facility] might have. The District would also work to identify a trainer to provide initial and ongoing instruction to the staff regarding PWS. Ex. HH, p. 251.

60. The IEP included a prepared statement by Complainants that it was not possible for the District to serve [Student] in the least restrictive environment at [High School], given his inability to function adequately in "the most restrictive environment" at [State B Facility]. Complainants again stated that they intended to file a due process complaint seeking an order for residential placement at the District's expense. Ex. HH, p. 252.

61. The District nonetheless stood ready to implement the December 2014 IEP immediately if [Student] returned to school after the holiday break.

[State A Facility]

62. Throughout the spring and summer of 2014, Complainants explored the possibility of placing [Student] in a PWS-specific residential facility. The motivation for doing so was driven largely by their need for emotional relief from the daily stress of dealing with [Student]'s behavioral issues at home. This is evident from many comments within the NSC treatment records regarding Complainants' level of stress.[6] For example:

> ● Family with high anxiety and difficulties implementing suggestions because of this. Ex. BBB, p. 448.
>
> ● [[Father]] shared that he is having a very hard time managing his own anxiety (which can manifest in stomach upset) and he wonders how long [[Student]] will be able to continue in the home. Ex. HHH, p. 468.
>
> ● [Complainants] think [[Student]] is unpredictable and they feel trapped by his behavior. [[Father]] said he has been unable to work and his anxiety has left him very ill. Family are interested in [[Student]] being placed outside the home. Ex. III, p. 476.
>
> ● The process for in home therapy has already started, but family does not feel capable of managing [[Student]] at home. The team has done some work in trying to identify a residential placement. Ex. QQQ, p. 501.
>
> ● [[Mother]] states that she is at wits end with [[Student]] at this point. [[Mother]] states that [[Student]] should be in a residential Prader Willi Syndrome facility and she is working towards this. Ex. QQQQ, p. 614.

63. An e-mail from [Mother] to [Student]'s psychiatrist, [Child Psychiatrist], poignantly summarizes the family's dilemma regarding residential placement:

> A problem I struggle with is the point at which we decide to put [[Student]] in a residential facility. I want [[Student]] to live with us but we have no certainty in our lives.

6 At the hearing, [Father] denied that the family's "miserable" home situation was a consideration in seeking residential placement. Under the circumstances, the ALJ does not find that assertion convincing.

Ex. RR, p. 350.

64. As part of their effort to locate a residential facility, Complainants submitted an application in May 2014 to the [State A Facility], a private residential facility in [City], [State A]. Ex. K.

65. [Student] was admitted to [State A Facility] a year later, on May 6, 2015.

66. [State A Facility] is a nationally recognized, accredited, center specializing in the education of individuals with PWS. It has been in operation since the late 1970's and is licensed by the [State A] Department of Elementary and Secondary Education to educate students age 8 to 22. It has a capacity of 46 students, all of whom live on campus.

67. To meets its residents' educational needs, it employs a ratio of seven students to one teacher and one paraprofessional. It works with a student's local school district to align its curriculum with that of the school district and to meet the student's IEP goals. Students typically attend classes five and a half hours per day, five days per week, for 216 days per year. In addition to academic classes, students have the opportunity to participate in sensory arts, theater, dance, yoga, recreational reading, and student council. [State A Facility] also provides a vocational program, offering a range of 50 on-campus jobs and six to ten off-campus jobs. [State A Facility] is capable of meeting its residents' needs for occupational, physical, and speech language therapy, and also hosts a medical team to meet residents' health needs.

68. [State A Facility] adopts a "No Doubt - No Hope" total food security philosophy. This means residents have no doubt about what they will eat and when, and no hope of obtaining access to unauthorized food. Classrooms, dormitories, and cafeteria are in separate buildings. Residents have no access to food, or exposure to food-related sights, sounds or smells, except during set dining periods. Non-negotiable menus are established in advance and caloric intake is carefully regulated.

69. [State A Facility]'s staff strives to make residents feel they are part of the [State A Facility] community. They have rarely encountered school-refusal by their students.

The March 2015 IEP and Implementation Plan

70. Prior to [Student]'s admission to [State A Facility], the District proceeded upon the assumption that [Student] would still return to the District. It therefore maintained its offer of FAPE and reconvened the IEP team on March 4, 2015 to review the discharge documents received from [State B Facility] and update [Student]'s IEP as necessary. The services to be provided under the new IEP remained essentially unchanged; however, the IEP team added a number of additional accommodations, including:

- Providing multiple PWS-trained paraprofessionals to support [Student].
- Allowing [Student] a time and safe place to "regroup and process" with appropriate support staff.

- Creating written implementation plans that could consistently be applied across all environments and shared with [Student].
- Consulting with [Student]'s in-home therapists and other providers.
- Providing food-free classrooms and food security across all settings, supported by trained 1:1 adult supervision.
- Training staff in how to support [Student] in the event of a breach of food security.
- Providing a consistent pre-arranged school schedule within a smaller footprint of the building.

Ex. LL, p. 298.

71. Complainants nonetheless stated that they intended to continue with their due process complaint. Ex. LL, p. 304.

72. In conjunction with the IEP, the District prepared an Implementation Plan to address such things as staff training in PWS, scheduling, and other measures to achieve food security; as well as transportation and behavioral support to ensure [Student]'s school attendance. Ex. NN. Specific aspects of the Implementation Plan included:

- Plan for food security. The need for food security is not a new concept to the District and had been part of [Student]'s 2013 IEP. Ex. F, p. 26. However, [Student]'s transition to high school required enhanced precautions. To meet that challenge, the District designated a specific area within the southeast wing of [High School], referred to as a "footprint," where [Student]'s classes and other activities would be located. Due to the relatively small size and location of the footprint, unintended exposure to food or food related items could be better monitored and controlled. Hallways within the footprint would be cleared of food and food related items, such as vending machines, food-related posters, garbage cans, and the like. The foot print allows for [Student] to enter and leave the school building through a secured door apart from the main lobby area, thus avoiding exposure to students who might be consuming food in the main lobby. [Associate Director], Associate Director of Special Education, and a number of other staff members responsible for implementation of [Student]'s IEP walked the footprint to ensure it would in fact provide the necessary level of food security.[7]

  [Student]'s schedule was adjusted to avoid travel within the footprint during unstructured times of the day, such as just before or after normal school hours, when inadvertent exposure to other students consuming food would be the most likely.

  [Student] would receive full-time in-school support of two paraprofessionals, one of whom would precede [Student] as he moves from class to class to ensure the

7 A potential flaw in the design of the footprint is that it is adjacent to the school cafeteria. Ex. QQ. However, [Student]'s schedule will be modified to avoid travel in the vicinity of the cafeteria during lunch hours.

hallways are clear of food or any suggestion of food. The second paraprofessional would accompany [Student] and remain with him to ensure he did not obtain access to unauthorized food. Both paras would be PWS trained.

[Student] would bring his lunch from home and have lunch within one of the classrooms in the footprint. He would eat under the supervision of a PWS-trained paraprofessional, and other students would be invited to join him for lunch to facilitate interaction with non-disabled peers.

Lapses in food security would be addressed immediately and reported to [Student]'s parents.

- Training plan. [Student]'s educational team and other key staff members would receive a minimum of two hours direct training in PWS, including the need for food security. They would view a PWS training video prepared by an expert in the field. Ongoing training would occur as needed.

- Plan to assure school attendance. To assure attendance, [Student] would be transported door-to-door on a dedicated bus. At least one behavioral specialist would accompany [Student] on the bus, along with a PWS-trained "bus paraprofessional." The bus driver would also receive PWS training. Once on the bus, [Student] would be transported directly to school. Behavioral specialists would assist [Student]'s parents in their home to get him ready for school in the morning and on the bus, as well as accompany him into the school building.

District behavioral specialists would work with [Student]'s family to develop plans to support [Student], including materials to assist him in his morning routine. Exhibit OO is an example of a social story designed to familiarize [Student] with each step of the morning process from getting dressed to arriving at the school.

73. As of the date of the hearing, Complainants have not agreed to the March 2015 IEP or Implementation Plan.

The Expert Testimony

74. Both parties presented testimony by medical and mental health experts, and experts in special education. Complainants' expert testimony is summarized as follows:

- [Clinical Psychologist] [Clinical Psychologist] is a licensed clinical psychologist and senior research specialist at Vanderbilt University. Ex. 30. She has extensive expertise in evaluating children with PWS, and personally evaluated [Student] in 2010 and 2012 in connection with a research study. She testified that the UPD variety of PWS makes [Student] more vulnerable to other physical and mental problems, including autism and psychosis. It is common for a person with this type of PWS to have higher verbal abilities, but lower performance abilities (such as tasks involving mathematics or design).

Because of [Student]'s PWS-driven preoccupation with food, total food security is essential for him to be able to learn. When food security is done well the PWS-sufferer can learn, but food security must be rigorous because lapses can

have serious and long-lasting consequences. The more severe the form of PWS, the greater the need for food security.

Ninety-nine percent of students with PWS can be managed outside a residential setting, but in [Clinical Psychologist]'s opinion [Student]'s form of PWS is among the most severe one percent of cases she has seen. Given [Student]'s extreme behavior, she believes the District cannot adequately provide the food security [Student] requires. However, [Clinical Psychologist] acknowledged that she has not observed [Student] at school nor spoken to his teachers.

● [Education Coordinator], Ph.D. [Education Coordinator] is the Inpatient Educational Coordinator at [State B Facility]. Ex. 19. She is trained and experienced in special education, including the education of students with PWS. She worked with [Student] during the two months he was at [State B Facility]. During that time, she found that [Student]'s psychiatric and behavioral issues dramatically interfered with his ability to attend classroom sessions and learn. He was never aggressive, but was verbally resistant to engaging in the academic process. He perseverated regarding food and had to be continually redirected.

[Education Coordinator] consults with school districts regarding recommendations for accommodations of students with PWS. She participated in at least one such conference call with the District. She found it unusual that the District staff with whom she spoke asked no questions about [Student]'s needs.[8]

[Education Coordinator] also discussed the recommendations contained within her December 2014 report to the District. Ex. BB. She stressed the need for "complete" food security, including absence of smells and sounds, given the severity of [Student]'s symptoms. If [Student] is exposed to food, it will increase his anxiety and impair his learning. Likewise, given the severity of [Student]'s symptoms, the school staff with whom he interacts must be highly trained and experienced in PWS, and he must have mental health support on a daily basis. She also believes a small-school environment is necessary to allow greater food security and reduce [Student]'s level of anxiety.

● [State B Facility Unit Director], M.D. [State B Facility Unit Director] is a psychiatrist and was, at the time [Student] was at [State B Facility], the Director of [State B Facility]'s [Specialized Unit]. Ex. 36. Ninety percent of his practice involves individuals with PWS. He found [Student]'s medical history unusual for the number of inpatient hospital admissions. He did not see much improvement in [Student] during his stay at [State B Facility]. Though [Student] did not engage in aggressive behavior, he had many other symptoms including anxiety, disturbed and rapid thoughts, and mood lability. In [State B Facility Unit Director's] opinion, [Student] was at the high end of the scale in terms of

8 The inference Complainants seek to draw is that the District lacked interest in meeting [Student]'s needs. However, based upon the testimony of the District's professional staff who appeared at the hearing, the ALJ finds the inference unwarranted.

symptoms and at the low end in responsiveness to medication and behavioral interventions. As with the other experts, he stressed the need for total food security.

[State B Facility Unit Director] acknowledged that most students with PWS do not require a residential placement, and he has not advised the District that [Student] requires one at this time. However, given the complexity of [Student]'s needs, [State B Facility Unit Director] has reservations about whether [Student] can be successful in his home school. A residential setting will be necessary if he cannot effectively function at home, in school, and in the community.

[State B Facility Unit Director] acknowledged it is important for [Student] to be with his peers, but defined his "true peer" as others with PWS.

● [Child Psychiatrist], M.D. [Child Psychiatrist] is [Student]'s treating child psychiatrist. Ex. 32. She testified that in his early years, [Student] did well across all settings despite his PWS, but starting in fifth grade he began to have increased anxiety and agitation. He was still able to access school and community, but in his middle school years he began to have increased oppositional behavior. His anxiety, aggression with his parents, and agitation increased dramatically. Refusal to go to school also became a problem. A variety of medications were tried with little success. She recounted the events that led to [Student]'s hospitalizations in early 2014. Judging by his recent loss of cognitive skills, [Child Psychiatrist] believes [Student] may be at the "prodromal" stage of a psychotic disorder. At this point, she believes that, from a medical perspective, it would be appropriate to place [Student] in a PWS-specific residential treatment facility.

● [PWS Services Manager] [PWS Services Manager] is a social worker and the manager of PWS services at [State A Facility]. Ex. 47. She testified that [State A Facility] uses a "strength-based approach" to behavior modification that focuses upon reinforcing what the resident is good at. She finds that the ABA (applied behavioral analysis) approach is counterproductive for individuals with PWS because it increases their level of anxiety.

[PWS Services Manager] discussed [State A Facility]'s comprehensive food security program, as well as its efforts to make residents feel included. Admission to [State A Facility] is typically the first opportunity a new resident has to be in contact with peers suffering from PWS. Access to this type of peer provides positive behavioral support. Because [State A Facility] is where his or her friends are, a resident's refusal to attend school is rare.

● [Director of Children's Services] [Director of Children's Services] is a special education teacher and the Director of Children's Services at [State A Facility]. Ex. 45. He provided additional information about [State A Facility], including its educational program and services, and its stringent food security.

● [Adolescent Psychiatrist], M.D. [Adolescent Psychiatrist] is a child and adolescent psychiatrist in private practice in [City], [State B]. Ex. 26. She is a

specialist in PWS and is a consultant for [State A Facility]. As such, she has participated in many IEP team meetings involving students with PWS across the country, and has worked with school districts to devise programs to keep students with PWS within the school. Although, in the majority of cases, it is possible for students with PWS to be educated in their local schools, some students require a more restrictive environment.

[Adolescent Psychiatrist] reiterated the testimony of other experts that total food security is essential to successfully manage the behavior of an individual with PWS, and for that individual to learn. Once food security expectations are violated, it is difficult to regain the individual's trust.

Those with PWS of the UPD variety are at higher risk of experiencing psychotic breaks. She acknowledged that [Student] has never been stabilized on medication, and that changes in medication may precipitate episodes of mood lability.

In addition to his other diagnoses, [Student] has a non-verbal learning disability (NVLD) that prevents him from appreciating the non-verbal aspects of communication, such as "reading between the lines," facial expressions, body language, and the like. Because people with NVLD must rely upon their verbal skills, they do not respond well to interventions that involve loss of communication, such as "time-outs." Specialized interventions are necessary. [Adolescent Psychiatrist] believes that due to the complexity and severity of [Student]'s condition, he requires the intervention of people with a high degree of training and experience in PWS.

[Adolescent Psychiatrist] believes that a residential setting is necessary because attempts to have [Student] attend his neighborhood school have been unsuccessful. A residential setting will minimize the number of transitions [Student] experiences in a day and he will be with those who are doing the same thing he is. Therefore his level of stress will be reduced. She believes that a residential setting like [State A Facility] where he is with others who suffer PWS will be [Student]'s least restrictive environment. She does not believe [Student] can receive an appropriate education in a typical public school.

75. The District's expert testimony is summarized as follows:

● [Behavioral Analyst], Ph.D. [Behavioral Analyst] holds a doctorate in special education. Ex. VVVV, p. 757. She is a professor in the School of Special Education at the University of Northern Colorado. She is a certified behavioral analyst. [Behavioral Analyst] consults with parents and school districts and helped develop hundreds of IEPs in her career.

The IDEA concept of inclusive education requires that, to the maximum extent possible, students with disabilities be educated in the least restrictive environment that still meets the students' needs. In her opinion, [High School] is the least restrictive environment because it will permit interaction with [Student]'s typically developing non-disabled peers. This is important because it is the

environment that is "most like what we all do" and thus is more likely to foster a successful transition from school to society. A residential setting is very controlled and requires a big adjustment when the child leaves school.

[Behavioral Analyst] has no special expertise in PWS, and agrees that in formulating an education plan it is important to understand the child's disability. Nonetheless, the appropriate plan must be tailored to the child's behavior, not the child's diagnoses. [Behavioral Analyst] has reviewed [Student]'s school and medical records and finds that his behaviors, though problematic, are not atypical for children with behavioral disabilities and "looked good by comparison" to others she's been involved with. [Student] has been able to establish good relationships with his teachers, who have successfully dealt with his adverse behaviors at school. The incidents of [Student]'s in-school acting out are minor compared to what she typically sees, and are very different from his reported behavior at home. It is not uncommon for a child to do better in school than at home.

[Behavioral Analyst] is aware that [Student]'s in-home behavior did not improve despite in-home behavioral therapy, but a quick response to therapy cannot be expected given the length of time that his behavior was not properly addressed.

[Behavioral Analyst] has reviewed [Student]'s IEP and Implementation Plan, and walked the plan's footprint at [High School]. She finds the plan "more than adequate" to address [Student]'s needs. She has spoken to [Student]'s IEP team members and finds them motivated and "incredibly aware" of [Student]'s needs and the plan to address them. [Student] had a positive educational experience within the District in the past, and [Behavioral Analyst] sees no evidence that [Student] cannot be successful at [High School].

- [Clinical Geneticist], M.D. [Clinical Geneticist] is a physician and clinical geneticist. Ex. VVVV, p. 669. Among other appointments, he is the Director of the Genetics Clinic at the University of Kansas Medical Center. [Clinical Geneticist] is an expert in PWS and has treated over 300 PWS patients.

[Clinical Geneticist] provided extensive expert testimony regarding the nature and cause of PWS, including the UPD subtype. PWS symptoms tend to increase in adolescence, and may be related to hormonal changes. Individuals with PWS are good at imitating the behavior of others, and therefore exposure to typically developing peers is important.

[Clinical Geneticist] has reviewed [Student]'s records and finds that although he presents with a host of significant problems and is at the upper limit of behavioral issues, his presentation is not unique. Food security is important because preoccupation with food is the individual's "driving force." However, in [Clinical Geneticist]'s experience, other school districts have been able to meet the needs of individuals with [Student]'s profile. "Peaks and valleys" in behavior are to be expected, but problems are typically overcome with time. The level of

expertise of those implementing the plan is not as important as the need for everyone to be aware of the plan and adhere to it.

● [School Psychologist], Ed.D. [School Psychologist] is a licensed school psychologist employed by the District at [High School]. Ex. VVVV, p. 776. She has evaluated 100 to 150 special education students, and attended 300 to 500 IEP meetings in her career. She works with students suffering significant psychiatric diagnosis.

[School Psychologist] performed the cognitive evaluations of [Student] in the fall of 2014, and spent approximately three hours with him at that time. She described the multiple assessment tools she used in performing her evaluation. The results of her evaluation disclosed the [Student] has very poor non-verbal skills, but high verbal skills. On the RCMAS (Revised Children's Manifest Anxiety Scale), [Student] was highly elevated in "worry," but overall his level of anxiety was not greatly out of the norm for students his age.

[School Psychologist] has no special expertise in PWS. However, she is aware of [Student]'s behaviors at home and in school and does not consider him to be among the "more challenging" students who have a longstanding history of physical violence. [Student]'s primary behavioral issues are his need for food security and his school refusal. She was involved in the development of [Student]'s IEP, and believes [High School] can address those issues and meet his educational needs.

● [Associate Director] [Associate Director] has a masters degree in learning disabilities, and is the District's Associate Director of Special Education. Ex. VVVV, p. 667. [Associate Director]'s testimony was primarily that of a fact witness, discussing in detail his interactions with [Student], [Student]'s parents and medical providers, and the District's staff involved in formulating [Student]'s IEPs and Implementation Plan. In his opinion, [Student]'s IEP and Implementation Plan are very appropriate and [Student]'s educational needs can be met at [High School]. He believes [Student] does not need residential placement to make academic progress.

● [Special Education Consultant], Ed.D [Special Educational Consultant] is a consultant in special education and has served as a court-appointed expert, special master, and implementation monitor in a variety of special education cases. Ex. VVVV, p. 778. He participated in the development of the federal IDEA regulations. He has served as an expert consultant for both complainants and respondents in a large number of IDEA cases.

[Special Educational Consultant] extensively studied [Student]'s school and medical records, as well as the expert reports generated in this case. In April of this year he came to Denver and spent an entire day at [High School] interviewing teachers, administrative staff, and therapists. He walked the Implementation Plan footprint. He visited [Middle School] and spoke with the administration, teachers, and paraprofessional staff who knew [Student].

[Special Educational Consultant] is impressed by all the resources the District has mustered in an effort to keep [Student] at his home school. He finds that the District has complied with all the procedural requirements of the IDEA, and that the content of [Student]s IEPs is exemplary and "way beyond" what is required by the IDEA. In his opinion, the IEPs are solid and well-constructed, take into account the concerns of [Student]'s parents and medical providers, and are tailored to meet [Student]'s needs. He is "at a loss" to see what more the District could do to keep [Student] in his home school.

[Special Educational Consultant] acknowledges that school districts must ensure a continuum of alternative educational settings is available, but residential placement is not required unless and until a child needs it. The IDEA presumes that a disabled child should remain in his or her neighborhood school with appropriate supports and services necessary to make educational progress. In his opinion, the District can accomplish that goal at [High School]. Residential placement for the remainder of [Student]'s educational career would be an injustice that would likely exacerbate his psychological issues. He believes it is a mistake to adopt the parents' assumption that [Student] cannot make it in public school and therefore isolate him in a residential facility.

Discussion

I. Controlling Legal Principles

Before discussing the merits, it is appropriate to identify the legal principles essential to resolving this case.

A. Burden of Proof

Although the IDEA does not explicitly assign the burden of proof, *Schaffer v. Weast*, 546 U.S. 49, 58 (2005) places the burden of persuasion "where it usually falls, upon the party seeking relief." *See also, Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d 1143, 1148 (10th Cir. 2008) ("The burden of proof . . . rests with the party claiming a deficiency in the school district's efforts.") Complainants therefore bear the burden of proving that the District failed to make a timely offer of FAPE.

B. The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available a free appropriate public education that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an individual education program (IEP) calculated to meet the student's specific educational needs. 20 U.S.C. § 1414(d).

A school district satisfies the requirement for FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide

educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). Congress sought to make public education available to disabled children, but in seeking to provide such access it did not impose upon a school district any greater substantive obligation that would be necessary to make such access meaningful. *Id.* at 192. Thus, the intent of the IDEA was "to open the door of public education" to disabled children, but not "to guarantee any particular level of education once inside." *Id.* Stated another way, the school is not required to maximize the potential of the disabled child, but must provide "some educational benefit." *Id.* at 200. Although the benefit must be more than *de minimus, Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 726-27 (10th Cir. 1996), "some progress" toward the student's educational goals is all the IDEA requires. *Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d at 1150-52.

C. Least Restrictive Environment

The IDEA requires that, to the maximum extent appropriate, children with disabilities be educated in the "least restrictive environment." 20 U.S.C. § 1412(a)(5). This means that disabled students must be educated "[t]o the maximum extent appropriate ... with children who are not disabled" in a "regular educational environment." 20 U.S.C. § 1412(a)(5)(A); *Miller ex rel. S.M. v. Bd. of Educ. of Albuquerque Pub. Schools*, 565 F.3d 1232, 1236 (10th Cir. 2009). Disabled students may be removed from the regular classroom setting only "when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Id*; 34 CFR § 300.114(a)(2)(ii). If meaningful education in the regular classroom cannot be achieved with the use of supplemental aids and services, the school district must mainstream the child to the maximum extent appropriate. *L.B. ex rel. K.B. v. Nebo Sch. Dist.,* 379 F.3d 966, 976 (10th Cir. 2004) (adopting the "Daniel R.R. test," *Daniel R.R. v. Bd. Of Educ.,* 874 F.2d 1036, 1048 (5th Cir. 1989)).

D. Private Residential Placement

A school district must ensure that a "continuum of alternative placements" is available to meet the needs of children with disabilities, including education in an institution or other setting as necessary. 34 CFR § 300.115. In an appropriate case, an alternative placement might include placement in a private residential facility. *Jefferson County Sch. Dist. v. Elizabeth E.,* 702 F.3d 1227 (10th Cir. 2012).

The IDEA, however, does not obligate a school district to pay the cost of educating a disabled child at a private school if the district made FAPE available to the child and the child's parents nonetheless elected to place the child at the private facility. 20 U.S.C. § 1412(a)(10)(C)(i); 34 CFR § 300.148(a). Only if the district has not made FAPE available to the child in a timely manner may the district may be required to pay for the cost of enrollment. 20 U.S.C. § 1412(a)(10)(C)(ii); 34 CFR § 300.148(c).

The fact that a child may be happier or may be making better progress at a private facility is not determinative. *O'Toole By and Through O'Toole v. Olathe Dist. Schools Unified Sch. Dist. No. 233,* 144 F.3d 692, 708 (10th Cir. 1998) (a disabled child is "not entitled . . . to placement in a residential school merely because the latter would more

nearly enable the child to reach his or her full potential.") Thus, an IEP is not inadequate "simply because parents show that a child makes better progress in a different program." *Id.* Courts must defer to the district's proposal if that plan is reasonably calculated to provide the child with a FAPE in the least restrictive environment, even if a parent believes a different placement would maximize a child's educational potential. *Ellenberg v. New Mexico Military Inst.*, 478 F.3d 1262, 1278 (10th Cir. 2007).

If the school district has not offered FAPE in a timely manner, the parents must still show that residential placement is "otherwise proper under the Act" in order to be entitled to reimbursement. *Florence County Sch. Dist. Four v. Carter,* 510 U.S. 7, 9 (1993). However, parents are not barred from reimbursement simply because the private school does not meet all the IDEA requirements that a public school must meet. Such requirements "cannot be read as applying to parental placements." *Richardson Ind. Sch. Dist. v. Michael Z.,* 580 F.3d 286, 295 (5th Cir. 2009) (citing *Carter,* 510 U.S. at 13). A parental private placement must be appropriate, but it does not have to be perfect. *Mary T. v. Sch. Dist. of Philadelphia*, 575 F.3d 235, 242 (3rd Cir. 2009).

II. Application of the Principles to this Case

Having identified the controlling legal principles, they will be applied to the facts at hand.

A. The District Made a Timely Offer of FAPE

Complainants do not argue that the District violated any of the procedural requirements of the IDEA, but rather contend that the District is incapable of providing FAPE. The ALJ, however, agrees with the District's educational expert, [Special Educational Consultant], that the District has offered a solid and well-constructed educational plan that takes into account the concerns of [Student]'s parents and medical providers, and is tailored to meet [Student]'s needs.

For the first eight years of his educational career, [Student], with the assistance of IEPs tailored to his needs, made substantial educational progress in District schools. Although he began to have significant behavioral problems in his 8th grade year that required several hospitalizations and courses of outpatient day treatment, both the District and, at least initially, [Student]'s parents hoped and planned for his return to District schools.

The District worked closely with [Student]'s parents and his medical providers to fulfill that expectation. In preparation for the transition to [High School], [Student]'s special education teacher, [Special Education Teacher], met with Complainants in February 2014 to discuss options for that transition. After [Student]'s hospitalization in February, [Special Education Teacher] and other District staff kept in close contact with [Student]'s medical providers to plan for his return to school. Although [Student] was only able to return for a few days between February and May 2014, he did graduate from 8th grade and was able to meaningfully participate in ESY during the summer. In May 2014, the IEP team, with the parents input, revised the IEP with the goal of adopting accommodations that would permit [Student] to successfully attend high school in the fall. With the consent of [Student]'s

parents, the District re-evaluated [Student] to ensure it had a good handle on his educational needs.

When behavioral problems surfaced again in the fall requiring additional day treatment, the District devised a temporary "home-bound" program to facilitate [Student]'s transition to high school once released from day treatment. Though the home-bound sessions were held at [High School], they were tailored to minimize the stresses that appeared to contribute to [Student]'s school refusal behavior and to ease his transition to the high school environment. [Student] attended most of these sessions and made academic progress. When the home-bound session was interrupted by [Student]'s admission to [State B Facility], the District IEP team participated in a lengthy phone conference with [State B Facility] staff in an effort to better understand [Student]'s needs. The IEP team then revised the IEP in December 2014 with these needs in mind and adopted many of [State B Facility]'s recommendations. After receiving the [State B Facility] discharge records in January 2015 and conducting further conversations with the parents, the IEP team again revised the IEP in March 2015 and adopted a comprehensive Implementation Plan specific to [Student]'s needs.

The District thus engaged in extensive efforts to understand [Student]'s special needs and to develop timely and reasonable plans to meet those needs. However, rather than agree to the plan, [Student]'s parents opted to enroll [Student] in a private residential facility, the [State A Facility]. Although this was clearly the parents' right, their unilateral decision did not obligate the District to pay the cost of that residential placement given the District's timely offer of FAPE.

B. The District's Plan Was Tailored to [Student]'s Special Needs

There is little doubt that [Student] has the cognitive capacity to make educational progress in a modified general educational setting, with the support of an IEP. To do so, however, a reasonable plan must be in place to meet two special needs. First, there must be a reasonable plan to provide total food security so that [Student] does not become preoccupied with seeking or thinking about food. Second, there must be a reasonable plan to overcome his school refusal behavior. The District has developed a reasonable plan to accommodate both these special needs.

The measures to ensure total food security include: (1) assignment of two PWS-trained paraprofessionals to accompany [Student] throughout his school day to eliminate unintended exposure to food; (2) assignment of a dedicated bus and bus route to eliminate exposure to food while enroute; (3) design of a small school footprint to minimize unintended exposure to food; (4) modification of [Student]'s class schedule to minimize his exposure to students at times when they might be consuming food; (5) arrangements for [Student] to eat his home-prepared lunch at school in a place where he will have the company of non-disabled peers apart from the general cafeteria; and (6) development of a plan to respond to inadvertent food exposures including prompt notification of [Student]'s parents. Although it is impossible to remove all food from [High School], the District's plan minimizes the risk that [Student] will be exposed to it.

The measures to overcome [Student]'s school refusal behavior include: (1)

assignment of two PWS-trained behavioral specialists to travel to [Student]'s home every school day morning to help him get ready and to accompany him on the bus; (2) development of a social story to help him establish a routine for getting up, getting ready, and getting to school; (3) adoption of a modified school schedule designed to ease [Student] into the high school routine; and (4) provision of support by the school psychologist.

Like any plan, this one is not foolproof, but it is reasonable and demonstrates the District's understanding of [Student]'s needs and its flexibility and commitment to meeting those needs. Rather than work with the District to modify the plan to strengthen potential weaknesses, [Student]'s parents took the view that the District is simply incapable of either providing the necessary food security or overcoming [Student]'s school refusal behavior. To the extent that the parents' view is supported by the testimony of their experts, the ALJ finds that testimony unconvincing. A school district should not be deprived of the opportunity to implement a reasonable plan to meet a student's special needs simply because there are some who think it can't be done.

As previously noted, an appropriate educational plan need not necessarily be a perfect plan. Nor need it guarantee success. To meet the requirements of the IDEA, it need only be reasonably calculated to provide meaningful educational progress. The District's plan meets that test. Like [Special Educational Consultant], the ALJ is at a loss to see what more the District could do.

C. [High School] is the Least Restrictive Environment

Complainants and several of their expert witnesses argue that [State A Facility] is the least restrictive environment because [Student] will be exposed to "peers" in the sense that his peers are other children with PWS. Complainants and their experts contend that such exposure will allow [Student] to appreciate that he is not alone in dealing with PWS. While the ALJ accepts the proposition that exposure to other children with PWS might be beneficial for [Student], the ALJ cannot accept the argument that [State A Facility] is therefore the "least restrictive environment."

As already noted, the "least restrictive environment" is defined by law as the environment where the disabled child may be educated "with children who are *nondisabled*" to the maximum extent possible. 34 CFR § 300.114(a)(2)(i). A residential setting where the child is exposed only, or even primarily, to other disabled children is clearly not the least restrictive environment within the meaning of the IDEA where, as here, there is a reasonable prospect of achieving educational progress in a neighborhood school with exposure to non-disabled peers.

D. [State A Facility]

The evidence is convincing that [State A Facility], apart from being a more restrictive environment, is an appropriate school for [Student]. It is highly regarded among the professionally community knowledgeable about PWS, is appropriately accredited, and is specially designed to meet the needs of a child with PWS. The ALJ has no reason to

believe that [Student] will not do well there.

However, the ALJ is not convinced by the testimony of Complainants' experts that [Student]'s disability is so severe that only [State A Facility] is capable of meeting his educational needs. Although there is little doubt that [Student]'s disabilities are severe and complex, it is undisputed that the majority of children with PWS are educated in their home schools. [Student] in fact has had success in District schools in the past and the District has been able to effectively manage [Student]'s behaviors when he is in school. Even during the tumultuous months of 2014 when [Student]'s in-home behaviors were at their worst, he was able to productively attend ESY and then "homebound" sessions at [High School] until he was hospitalized at [State B Facility].

That said, the fact that [State A Facility] may be an appropriate educational setting for [Student] does not mean the District must pay for it. Given that the District has offered a plan reasonably calculated to provide [Student] with educational benefit in his neighborhood school, it has met its duty under the IDEA.[9]

Moreover, the evidence suggests that although Complainants believe the District is unable to provide FAPE, their decision to place [Student] in a private residential setting is driven in large part by their inability to effectively deal with [Student] at home. This is understandable. Complainants have struggled valiantly to provide their son the best home, medical care, and education they can. They clearly love him, but his oppositional, defiant, and aggressive behaviors have taken their toll. Although these behaviors manifest somewhat at school, they are much, much worse at home. As a consequence, [Student]'s parents have reached the end of their rope and believe, with justification, that residential placement is the best alternative. However, the IDEA does not require a school district to pay for a residential program to remedy problems at home. *Thompson R2-J Sch. Dist. v. Luke P.,* 540 F.3d at 1152 (citing *Gonzalez v. Puerto Rico Dep't of Ed.*, 254 F.3d 350, 353 (1st Cir. 2001)).

Summary

The District has offered a plan that is reasonably calculated to meet [Student]'s unique educational needs in the least restrictive environment. Because it has made a timely offer of FAPE, it cannot be compelled to pay for residential placement unilaterally chosen by Complainants.

Decision

Complainants have not met their burden of proving that the District failed to make a timely offer of FAPE. Accordingly, judgment is entered in favor of the District.

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

9 In this regard, the case is similar to *Thompson R2-J Sch. Dist. v. Luke P.,* where the 10th Circuit declined to compel a school district to pay for residential placement even though the parents contended that the child's disability (autism) was so severe that only residential placement could provide an adequate education.

Done and Signed
July 31, 2015

ROBERT N. SPENCER
Administrative Law Judge

Exhibits admitted

For Complainants: exhibits 12, 13, 19, 20, 23, 27, 29-32, 34, 36, 37, 39, 40, 45, 47, 56, 63, 65, 69

For the District: exhibits B, C, F-HH, JJ-SS, UU, VV, YY, ZZ, BBB, CCC, EEE, FFF, HHH-KKK, MMM-JJJJ, LLLL-NNNN, PPPP-VVVV, XXXX*

* YYYY was also offered and admitted, but it was a duplicate of XXXX.