STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, Colorado 80203	
[MOTHER] and [FATHER], Parents of [STUDENT], Complainants, vs. **JEFFERSON COUNTY SCHOOL DISTRICT R-1,** Respondent.	**COURT USE ONLY** **CASE NUMBER:** **EA 20180019**
DECISION	

This decision follows a hearing per the Individuals with Disabilities Education Act ("IDEA") as described in 20 U.S.C. Section 1415 and 34 C.F.R. Section 300 and also per the Exceptional Children's Educational Act ("ECEA") as described in Section 22-20-101, C.R.S. and 1 CCR 301-8. The hearing was held October 1 and 2 and 4 and 5, 2018 at the Office of Administrative Courts ("OAC"), courtroom 2, before Matthew E. Norwood, Administrative Law Judge ("ALJ"). [Mother], [Student]'s mother, spoke for the Complainants. Elliot V. Hood, Esq., spoke for the Respondent ("School District"). The hearing was taken down by Laurel S. Tubbs, a court reporter of the Steven-Koenig court reporting firm. The ALJ also recorded the hearing.

Summary

[Student], the student in question, suffers from [ ] muscular dystrophy ("[ ]MD"). Summarized, the Complainants assert that the School District denied [Student] a free appropriate public education ("FAPE") in failing to provide physical therapy ("PT") and occupational therapy ("OT") services, and in failing to insure that he achieve satisfactory academic progress. The School District denies this. The ALJ finds and concludes that no violation of the IDEA or ECEA has been established by the Complainants.

Findings of Fact

Based on the evidence presented at the hearing, the ALJ makes the following findings of fact:

1. [Student], the student in question, was born in [Month] 2004 and suffers from [ ] muscular dystrophy. He is now 14 years old. The condition causes progressive muscular degeneration and weakness. As of April 13, 2016, [Student] used a power

wheelchair ("PWC") to travel distances outside of his classroom. He also needed staff assistance with mobility and personal care. Exhibit 1, p. 6 of 12. [1]

2. In May of 2018, [Student] was diagnosed with a learning disability in reading, writing and mathematics. He also suffers from attention-deficit/hyperactivity disorder ("ADHD"). Exhibit C, p. 144.

3. [Student] and his family moved to Jefferson County, Colorado from [Other State] in October 2015. [Student] had been on an "IEP" at his [Other State] school. An IEP or "individualized education program" is defined at 34 C.F.R. Section 300.22. Persons involved in special education also refer to the document that memorializes the program as the "IEP."

4. [Student] began school in the fifth grade at [Elementary School] in the School District in October 2015.

5. Although the complaint is submitted on behalf of both of [Student]'s parents, it is written in the first person by [Mother]. It alleges that the School District failed to adopt the [Other State] IEP and took away 90% of the services set out in that program. It also alleges that [Student] failed to receive occupational therapy and physical therapy from October 2015 to April 2016 until the School District completed its evaluations. However, [Mother] agrees with the School District that a two-year time limit (as set out in 20 U.S.C. Section 1415 (f)(3)(C)) applies to IDEA complaints. The Colorado Department of Education received the complaint in this case April 4, 2018. The ALJ will therefore not consider School District conduct as a violation of the IDEA more than two years before this date.

6. In addition, the parties entered into a settlement agreement that resolves any pending disputes prior to June 21, 2016. Exhibit 45. The ALJ will therefore make no findings of IDEA violations for conduct prior to that date either.

7. The School District has not agreed to any expansion of the issues from those listed in the complaint.

The April 13, 2016 IEP—Exhibit 2

8. The School District performed a number of tests to establish [Student]'s academic performance and his ability to communicate. It also made health and motor assessments. It summarized these tests in an evaluation report dated April 13, 2016. Exhibit 1. Per p. 12 of 12 of this report:

> [Student]'s phonics and decoding ability, written expression, and math skills in the areas of basic concepts, operations and

[1] The School District's exhibits are numbered and appear in a three-ring binder identified as "Respondent's Hearing Exhibits – Witness Copy." The Complainants' exhibits are lettered and are in plastic folders. The School District has also placed a copy of the Complainants' lettered exhibits in a three-ring binder marked as "MGW Working Copy." This binder is easier to reference in that it is in a binder format and has page numbers. [Mother] has provided a typed statement prior to most of her exhibits and has also written comments on her exhibits. The parties agree that the typed statements and the written comments are not to be admitted or considered as evidence. The ALJ has kept the typed statements in the copies of the Complainants' exhibits.

applications are below grade and age expectations at this point in time.

9. The School District sent [Student]'s parents a notice of an IEP meeting for April 13, 2016. Exhibit 1 (the two-page notice). That meeting was held and [Mother] attended with other School District personnel. Exhibit 2, p. 2 of 15. This group made up the "IEP team" as described at 34 C.F.R. Section 300.23.

10. Exhibit 2 contains a 16-page document that sets out [Student]'s IEP. The document was created following the April 13, 2016 meeting. The 16-page document shows [Student] as in the fifth grade. This was the case in April 2016.

11. [Mother] is critical of the School District for not creating a new IEP at the beginning of the school year, and, in particular, for not creating a new IEP at the beginning of the seventh grade when [Student] transitioned to middle school. The April 2016 IEP was meant to run for one year into April 2017 and sixth grade. IEP's are to be reviewed no less than annually. Thirty four C.F.R. Section 300.324(b)(1)(i). It would be impractical for a school's special education personnel to create new IEP's for all disabled students at the beginning of the school year or at any other one time. The IEP's for different students must be spread out over the year so that personnel can be available.

12. As of April 2016, [Student] could still walk but needed to conserve energy, so his distances were limited to 150 feet. Exhibit 2, p. 3 of 16.

13. Page 15 of 16 of the April 13, 2016 IEP sets out in a grid the amounts of time allocated for specialized instruction and related services (as required by 34 C.F.R. Section 300.320(a)(4)) for [Student]. Those services include speech/language therapy, sped (special education) classroom instruction, physical therapy and occupational therapy.

14. Occupational therapy and physical therapy overlap. Occupational therapy concentrates on fine motor and self-help skills. Physical therapy concentrates on walking, standing and transfers. See exhibit 44, the School District's guidelines for occupational therapy.

15. Extended school year (summer school or "ESY") services were offered, but [Student]'s parents did not want them.

16. Exhibit 2 sets out goals for [Student] in reading, writing, mathematics and physical motor skills. Exhibit 29 tracks [Student]'s progress towards these goals. He was evaluated for progress against these goals May 31, 2016, November 30, 2016 and February 2017. Exhibit 29. That exhibit documents progress in reading, writing and mathematics. It shows a fall off in some physical motor skills. This is to be expected with the progression of [Student]'s muscular dystrophy. Exhibit E shows an additional evaluation toward these goals for May 2017.

Sixth grade—[Elementary School]

17. [Mother] asserts in the complaint that she did not receive a copy of the April 13, 2016 IEP until November of 2016 when [Student] was in sixth grade.

18. [Mother] wrote in an email dated August 29, 2016 to [District Administrator] of the School District: "Also, I will need a new finalized copy of [Student]'s IEP, as I don't recall receiving one this year!" Exhibit AA (this exhibit is not paginated). [District Administrator] wrote back the same day stating that she would send home a copy of the current IEP in a manila folder in [Student]'s back pack. *Id*.

19. Based on this interchange it is not clear that the School District failed to provide [Mother] with the April 13, 2016 IEP. Her reference to "this year" may indicate that [Mother] thought there would be a new IEP for 6th grade. As discussed, the April 13, 2016 IEP was the current one. In any case, [District Administrator] provided a copy.

20. In her complaint [Mother] states that service providers were not performing their services as had been agreed upon. In particular, that [Student] had no one-on-one para (paraprofessional). Also, she alleges that school work was not coming home and that she had no correspondence from the teacher. But [Mother] has identified no provision of the April 13, 2016 IEP where a one-on-one para is provided for. The ALJ has found no such provision in his own review.

21. Certainly, school work should be sent home for review by a parent and teachers should communicate. In her August 29, 2016 email, [District Administrator] wrote that [Student]'s teacher would leave notes about projects and assignments in a log. She wrote also that [Student] would write his assignments and due dates in the homework section of the log. Exhibit AA.

22. [Mother] became angry at the idea that [Student] would be making such entries himself. She wrote in a response that appears at exhibit 40:

> And what else do we think the teacher should include in the log?! The teacher is the one [supposed] to be writing in it!

23. She followed this statement with an emoji of an astonished face and an emoji of a pistol. The pistol emoji was very worrisome to school personnel. Physical Therapist Sue Russell-Tyson found it particularly upsetting.

24. [Mother] and School District personnel met at [Elementary School] on September 2, 2016. Because of the pistol emoji, the School District had a security guard sit in on the meeting. [Mother] asked him to leave, but he would not. Matters escalated and [Mother] was issued a ticket for disorderly conduct and trespassing. She was not allowed on school grounds for approximately three months. The ticket was ultimately dismissed.

25. On September 22, 2016 [District Administrator] called [Mother] about concerns of the bus driver in getting [Student] off the bus and into his wheelchair. She wanted to have [Mother]'s permission to have the school's physical therapist arrange the wheelchair seatbelt to be used in a fashion that would not require [Student] to get out of his wheelchair when riding on the bus. It is not clear from the evidence how this issue was ultimately resolved.

The September 27, 2016 IEP Amendments—Exhibit 3

26. [Mother] and School District personnel had another meeting September 27, 2016. The meeting was preceded by a prior written notice as required by 34 C.F.R.

Section 300.322(a)(1). There is insufficient evidence that the School District ever failed to provide prior written notice of an IEP meeting.

27. Because [Mother] was prohibited from going to [Elementary School], the meeting was held at the School District Education Center, and [Mother] attended. At the meeting, [Student]'s IEP was amended, exhibit 3. The amendment erroneously shows the meeting as having occurred on September 16, when it in fact occurred September 27, 2016. See the attendance list at exhibit 4, which shows the September 27 date.

28. Despite the September 2 incident with the security guard, there was general agreement as to the amendments. They included:

a. A determination that no school-based health plan was required and that [Student] did not currently require a toileting plan. However, a toileting plan for the para to follow in the future was added. [Student]'s mobility needs would be met by a physical therapist.

b. A stretching plan was documented. It was agreed that the para would not perform hands-on stretches.

c. Monthly mental health services were added to help [Student] cope with the progression of his illness and the loss of some of his abilities.

d. There was an agreement to make a plan for falls, toileting and evacuation from the building.

29. As of October 3, 2016, [Student] had 14 unexcused period absences from school. Exhibit J.

30. On October 19, 2016, School District personnel, [Mother] and [Mother's Sister-in-Law], [Mother]'s sister-in-law, participated in a telephone conference documented in exhibit 5. [Student] felt that receiving occupational therapy services in gym class was embarrassing and it was agreed that these would be provided in art class instead.

31. At the time, [Student]'s special education teacher, a woman, was a standby when he went to the bathroom. It was agreed that a man would take over as this was less embarrassing for [Student].

32. It was also clarified that a para would supervise [Student]'s self-stretching exercises three days per week and an actual physical therapist along with the para would supervise two days per week. It was agreed that [Student]'s para would sit with him at lunch to encourage movement.

33. [Mother] asserts in the complaint that Physical Therapist [Physical Therapist] improperly billed Medicaid for his services. There is insufficient evidence to support this allegation. In any case, improperly billing to Medicaid, or Medicaid fraud, is not really relevant to this IDEA complaint.

34. In the complaint, [Mother] further alleges:

> During one incident, [Physical Therapist] once removed [Student] from the wheelchair, never lifted him with a hoyer, and put him on a PT table, telling him to stretch himself. When

> [Student] requested his wheelchair, [Physical Therapist] told him no, you will stay on the mat, until I complete my paperwork. Ultimately, he took my son's legs away from him, which is a form of restraining my child, and borders corporal punishment (2/6/17).

35. There is insufficient evidence to establish this allegation. [Student], who was present in the courtroom for part of the hearing, did not testify. [Physical Therapist] did not testify either. He is retired.

36. [Mother] also alleges:

> In another instance, during a school lockdown drill, [Physical Therapist], forced [Student] to go to PT, instead of participating in the safety drill.

37. When this occurred is not alleged. There is also insufficient evidence to establish this allegation.

The December 5, 2016 Special Evaluation Report

38. [Student] was being seen by Children's Hospital for his [ ] muscular dystrophy. At some point, [Children's Hospital Physical Therapist #1] with Children's Hospital emailed the School District encouraging a formal evaluation. Children's Hospital Physical Therapist [Children's Hospital Physical Therapist #2] also recommended that the School District end [Student]'s self-stretching. The School District itself believed that [Student]'s occupational and physical therapy services should be re-evaluated.

39. The re-evaluation was performed and School District Occupational Therapist [Occupational Therapist] created a "Special Evaluation Report" dated December 5, 2016. Exhibit 7. As documented in the December 5, 2016 report, [Student]'s writing was legible from a physical motor standpoint. The report incorporated recommendations by [Children's Hospital Physical Therapist #2]. The Special Evaluation Report documented [Student]'s walking ability as follows:

a. As of May 2, 2016, [Student] could walk 130 feet.

b. On October 26, 2016 he could walk 20 feet from his desk to his power wheelchair.

c. On November 15, 2016, [Student] could park his wheelchair four feet from a mat table and could walk the distance between the wheelchair and the table.

d. As of December 1, 2016 [Student] could stand and use the urinal by himself.

40. Children's Hospital records provide that [Student] had stopped walking two months prior to November 4, 2016. Exhibit C, p. 59. He could still put weight through his legs for stand-pivot transfers as of November 4, 2016. *Id*. According to [Children's Hospital Physical Therapist #3], a physical therapist at Children's Hospital, [Student]'s function really declined in the summer of 2017 between sixth and seventh grade. Following this decline he really needed a lot of support just for transfers.

41. [Mother] alleges in the complaint:

> [Occupational Therapist]—OT, intentionally writing false information on an IEP, regarding occupational therapy evaluations. And for not rendering direct services, listed on IEP. Deciding that she had met all service minutes, mid school year, (December 2016) without consulting with a parent. [Occupational Therapist] hardly met with [Student] prior, according to the minutes she submitted. Yet mid year, she decided all of her IEP minutes had been met. She was asked to do a formal evaluation, which she never did, then decided she was finished with [Student] all together (12/2016)
>
> [Occupational Therapist] then delegated, direct services, to a paraprofessional ([Paraprofessional]). [Occupational Therapist] also bullied [Student]. Her daily/weekly logs were complaints about and arguments with my son. I have then all saved. (no evaluation completed).

42. These allegations are far-fetched and unsupported by the evidence. [Occupational Therapist] denied them. No specific proof of these allegations or of any false information was supplied.

43. [Mother] asserted at hearing that it was illegal to have a para perform delegated tasks from an occupational therapist such as [Occupational Therapist]. She relied on the regulations at 3 C.C.R. 715-1. This allegation was not made in the complaint.

44. Rule 5, 3 C.C.R. 715 permits an occupational therapist to delegate tasks to occupational therapist assistants ("OTA's") and to aides. There is insufficient evidence that any School District occupational therapist improperly delegated tasks in contravention of these rules. And as with the allegations of Medicaid fraud, the fact that School District occupational or physical therapists may have delegated tasks contrary to licensing regulations does not, by itself, establish a denial of FAPE. The ALJ makes no such finding of improper delegation.

The December 9, 2016 IEP Amendment—Exhibit 8

45. Members of the IEP team, including [Mother], met December 9, 2016 to consider [Occupational Therapist]'s December 5, 2016 report and to amend the IEP. Consistent with [Children's Hospital Physical Therapist #2]'s recommendations, self-stretching was eliminated from the physical therapy goal. Also, 90 minutes of occupational therapy services outside of the general services classroom were eliminated.

46. The elimination of these 90 minutes may be what [Mother] is referring to when she asserts that [Occupational Therapist] decided that "she had met all service minutes, mid-school year." But this was done so that [Student] would not have to be removed from his general education classroom for occupational therapy. It was hoped that his academics would thereby improve. [Mother] agreed with this change at the December 9, 2016 meeting.

47. The IEP team, including [Mother], also agreed to have [Mother] consult in person with the school occupational and physical providers and to also have [Children's Hospital Physical Therapist #2] from Children's Hospital come by in person to give her

recommendations. On December 1, 2016, [Children's Hospital Physical Therapist #2] did come to [Elementary School] to help instruct on stretching. The team, including [Mother], further agreed that [Student] would participate in all safety drills.

48. In December 2016, a behavior checklist had been implemented to improve [Student]'s behavior in related service sessions (occupational and physical therapy). The checklist is not described in exhibit 8. In her complaint, [Mother] objects that the checklist constitutes a "behavioral intervention plan" or "BIP." She states that this was done without her being notified or signing a "formal behavioral assessment" or "FBA."

49. Thirty four C.F.R. Section 300.530(e) provides that when a school district determines to change the placement of a child because of a violation of a code of student conduct, it must determine if the conduct that led to the behavior was a "manifestation" of the disability. If so, 34 C.F.R. Section 300.530(f) requires that 1) an FBA be conducted and a BIP put in place, or 2) the child be returned to the placement from which he was removed. None of the triggering events requiring an FBA or a BIP are present in this case.

50. In her complaint, [Mother] further alleges that [Student] was left on the toilet for almost two hours on December 20, 2016. The ALJ is unaware of any contemporaneous documentation of this incident from [Mother] or anyone else. Again, [Student] did not testify to this at the hearing. There is insufficient evidence to establish that this occurred.

51. [Student] fell out of his wheelchair January 26, 2017. He was reaching down to grab a pencil, but his electric wheelchair turned on and he fell to the side with the chair landing partially on top of him. Exhibit C, p. 84. The wheelchair has a seatbelt for him, but he was not wearing it. [Student] suffered a knee contusion, but was still able to bear weight. Exhibit C, p. 84 and p. 87.

52. Because there had been no prior falls, the school did not yet have a "fall plan" for [Student]. (The September 27, 2016 amendment had mentioned an agreement to make a fall plan.) The school nurse developed a fall plan after this January 26, 2017 event.

53. In March of 2017 [Student] slipped off of his chair and landed on the bar in front of his chair.

The April 4, 2017 IEP—Exhibit 9

54. In accordance with the annual need to do so, a new IEP was agreed to by the team on this date. The IEP had a new set of goals for reading, writing, mathematics, physical motor skills and, social/emotional wellness. The IEP set out methods to measure [Student]'s progress towards these goals.

55. As reflected in exhibit 9, [Student] had a new para as of January 2017: a [Paraprofessional]. [Student] liked [Paraprofessional] and [Student]'s behavior had improved significantly since [Paraprofessional] began working with him.

56. In pertinent part, the IEP provided that:

a. When [Student] was on the first floor of the building and there is an alarm, he would exit the main entrance in his power wheelchair. If he was on the second floor, he would be transferred to an evacuation chair, taken down the stairs, and again, taken out the main entrance.

b. He would use a hand-held urinal to urinate. He would transfer from the wheelchair to the commode for a bowel movement.

c. In the case of a fall, [Student] was not to be moved. Calls would then be made to 911, a parent, the School District nurse and the physical therapist.

d. [Student] was able to write several multi-paragraph writing pieces.

e. He was most recently in the 7th percentile for math, with a math assessment planned for May 2017.

f. He was in the 14th percentile for reading, again with an assessment planned for May 2017.

g. His family had opted him out of taking the Colorado state assessment.

h. He was able to type one and one half to two pages at a sitting.

i. As before, a grid of [Student]'s related services appears on exhibit 9 at page 16 of 18.

j. Extended school year services were offered, but [Student]'s parents again did not want them.

57. [Mother] was pleased with [Student]'s academic performance and was also pleased about the outcome of this IEP meeting.

58. The complaint alleges that [Speech-Language Pathologist], a Speech-Language Pathologist ("SLP"), did not meet with [Student] and that she thereby committed Medicaid fraud. This allegation is not supported by the evidence. The April 4, 2017 IEP, exhibit 9, p. 7 of 18 to 8 of 18 describes [Speech-Language Pathologist]'s activities:

> The SLP has also observed [Student] several times over the past year, usually in small group settings. His voice quality, volume, and articulation continue to be fully adequate for clear communication in the school setting. There have been no concerns regarding [Student]'s communication abilities from any of the school staff over the past year.

Seventh grade—[Middle School]

59. [Mother] alleges that there was no IEP for seventh grade and that the school was still using the sixth grade IEP. But again, the April 2017 IEP was in effect for the first part of seventh grade at this new school.

60. On August 29, 2017 [Student] fell at school. [Mother] alleges that the fall plan was not followed, but does not specify in what respect. She alleges that no incident report was created, but also alleges that she received an incident report weeks later.

61. The IEP team, including [Mother], met September 8, 2017, exhibit 10. At that meeting it was agreed that if [Student] suffered a hard fall, 911 would be called. If he suffered a "guided fall," [Mother] was to be called and an incident report prepared. Exhibit 10 documents that [Mother] was provided a copy of the incident report for the August 29, 2017 fall at the September 6, 2017 meeting (not "weeks" later). A second IEP team meeting was held September 12, 2017. Exhibit 11.

62. As of September 29, 2017, [Mother] received some sort of report from the school that [Student]'s division and multiplication skills needed work. [Mother] alleges that a mathematics goal had been removed from the April 2017 IEP, and that the removed goal had not been met. In fact, the April 2017 IEP at exhibit 9, p. 11 of 18 has as a goal:

> When given 4 real-world math problems requiring [Student] to divide up to a 5-digit dividend and a 2-digit divisor, [Student] will answer 3 out of 4 questions correctly as measured by a teacher-created test by April 2018.

63. This goal was never removed, and whether it was met would not be known until the IEP scheduled for April 2018. As discussed below, [Student] began "home bound" schooling in October 2017. As the name indicates, home bound schooling is instruction at home. A new math goal was created for [Student]'s home bound services on December 8, 2017, see that IEP discussed below and at exhibit 28. In that IEP at exhibit 28, p. 7 of 15, the goal was modified to:

> By December 2018, [Student] will be able to solve real-world and mathematical problems involving the four operations with rational numbers for an accuracy of at least 75% as measured by weekly assessment.

64. [Mother] alleges that as of September 2017 [Student] was being yanked up under his arms and dragged to a toilet. [Middle School Physical Therapist] was the physical therapist at [Middle School]. Per [Mother], [Middle School Physical Therapist] is the only service provider that followed the IEP. [Middle School Physical Therapist] testified that this dragging never happened, and the ALJ finds that this allegation is unproven.

65. [Children's Hospital Physical Therapist #3], the Children's Hospital Physical Therapist, went to [Middle School] on October 10, 2017 and trained approximately five School District employees on transfers for [Student]. Prior to that training the school was using one person to lift [Student] and a second to help with his clothing. In October 2017 [Student] did not require a "completely dependent transfer" for the bathroom. To be "completely dependent" means that he would be completely unable to pivot, stand or assist with transfers. [Children's Hospital Physical Therapist #3] was concerned that [Student] would need this kind of transfer in the future and that the school was not yet ready to provide it.

66. [Motor Coordinator] is the "Motor Coordinator" for the School District. Her job is to support the occupational and physical therapists in the School District. The ALJ credits her testimony that her therapists know the children they work with really well and

that if any of the children were to suffer deterioration, they would contact any private therapists to discuss the situation.

67. [Mother] testified that the School District, [Elementary School] and [Middle School] personnel had inadequate plans and procedures for [Student] to use the bathroom. Yet she has not identified, and the records do not reflect, a single incident when [Student] had any kind of a bathroom accident. From this the ALJ finds that the arrangement the schools had set up for toileting was working as a practical matter.

68. As of October 11, 2017, the equipment manager at [Middle School] had modified five desks for [Student]'s use with a wheelchair for [Student]'s five classes. While the desks could fit a wheelchair, they were designed to look similar to other desks so that [Student] would not feel conspicuous. The school also planned to purchase a "Sit-to-Stand" Hoyer lift to help [Student] in the bathroom. Exhibit 15. The school physical therapist [Middle School Physical Therapist] felt that an "Easy Pivot" chair would be best for [Student], but [Mother] insisted on the "Sit-to-Stand." A picture of the "Easy Pivot" appears at exhibit 17. A special toilet seat was also purchased at [Mother]'s request. *Id.*

The October 26, 2017 email—Exhibit 19

69. [Mother] sent an email to School District personnel on this date. She was upset that a substitute para would be assisting [Student] the following day. She reported that as of a month to two weeks previously, [Student] was no longer weight-bearing. This was the first the School District had been told this.

70. [Mother]'s email states that there is no current IEP. This statement was based on her not understanding that the April 2017 IEP, with the September modifications, was the current IEP. [Mother] also reported that [Student] had fallen at home the previous week.

71. Finally [Mother] said that she would be keeping [Student] at home and would the School District provide a teacher at their home two hours per day. The school treated this as a request for home bound services. The School District complied with this request. The log at exhibit 38 documents home bound instruction from November 2017 to March of 2018.

72. When [Motor Coordinator], the Motor Coordinator, learned from the October 27, 2017 email that [Student] was no longer weight bearing, she was concerned that the "Sit to Stand" was no longer safe. Exhibit 22. She believed that a more traditional Hoyer lift (not the "Sit-to-Stand" Hoyer) would be best. She invited [Mother] to come to the school Friday, November 3, 2017 to attend a staff training on this Hoyer.

73. [Motor Coordinator] asked [Mother] to sign a permission so that [Middle School Physical Therapist] could speak directly to [Children's Hospital Physical Therapist #1], a physical therapist at Children's Hospital. [Mother] refused, insisting that all communication go through her. Exhibit 22.

74. [Mother] and School District personnel gathered for the November 3, 2017 training, but it could not occur because the battery for the Hoyer lift had not been charged ahead of time. [Mother] also believed that the bucket sling on the Hoyer lift was incorrect

for [Student]. [Motor Coordinator], the Motor Coordinator, could not attend the meeting because of a conflict.

75. [Special Education Director], also known as [Special Education Director], is one of four special education directors for Jefferson County. She was mortified when she learned that the training had failed because of the uncharged battery. She set up a new training date for November 10, 2017 and required all of [Student]'s providers to attend. A new "Y" sling had also been obtained. [Mother] did not attend this meeting.

76. In order to be certain that staff could safely operate the Hoyer, [Special Education Director] herself wore a pair of pants over another and had staff lift and lower her onto the toilet seat. She had staff remove and put back her outer pants so she could be sure this could be done for [Student].

77. [Special Education Director] sent an email to [Mother] on November 15, 2017 reporting the success School District personnel had had in using the Hoyer. Exhibit 36. [Special Education Director] encouraged [Mother] to come in and try the lift with [Student] after the Thanksgiving break. She also let [Mother] know about the new desks that had been ordered.

78. As is set out in exhibit 36, [Mother] had asked at some time prior to November 15, 2017 for an independent educational evaluation ("IEE") as these are described at 34 C.F.R. Section 300.502. Per 34 C.F.R. Section 300.502(a)(2), school districts are to provide information about where such an evaluation may be obtained. [Special Education Director] had earlier suggested an occupational therapist from Adams 12 school district who would be independent but whom the School District believed was qualified and who would not charge an exorbitant rate. In exhibit 36 [Special Education Director] enquired whether [Mother] had contacted this person.

The December 8, 2017 IEP—Exhibit 28

79. The IEP team met again on this date and created another IEP for home bound services for the spring semester. [Mother] attended the meeting by conference call, but then hung up before goals for [Student] were discussed. Again, the IEP contains measurable goals in mathematics, reading, writing and social and emotional wellness.

80. The IEP describes math and reading tests [Student] took in October 2017. [Student]'s score in math put him at the 19th percentile and his score in reading put him at the 2nd percentile. (It is unclear from the record whether the tests in reading and mathematics that were scheduled for May 2017 in the April 2017 IEP occurred.)

81. Following the meeting, the School District received a report dated December 18, 2017 from [Nurse Practitioner], a nurse practitioner at Children's Hospital. The content of the report was added to the IEP document by [Director of Health Services], R.N., the Director of Health Services for the School District. [Nurse Practitioner] reported a significant deterioration in [Student]'s mobility in the last few months. She also reported a worsening of his scoliosis and a decline in his respiratory status.

Compliance with the IDEA

82. The complaint from [Mother] asks for "compensatory funding" for two years of "unrendered services." No dollar amount is listed. In closing argument [Mother] asked

for $200,000 from the School District for mental health services for [Student]'s anxiety and depression and for medical equipment such as a Hoyer lift. There is no itemization identifying how this amount was arrived at. There is no evidence of any amount spent on compensatory education.

83. The ALJ specifically finds as fact that [Student]'s IEP's were reasonably calculated to enable him to receive educational benefits. This was certainly the case in terms of physical therapy, occupational therapy and other related services. These services are the focus of the complaint. The School District's performance in these areas, far from being deficient, was exemplary. The IEP's were designed so that [Student]'s deterioration from muscular dystrophy would not interfere with his schooling. The IEP's were also amended more frequently than annually to take into account new information. The School District performed special evaluations such as [Occupational Therapist]'s December 5, 2016 report to insure that its information was current.

84. In academics, [Student]'s scores in math had improved by October 2017. It is concerning, however, that his reading scores declined in terms of his percentile. Still it is clear that [Student]'s IEP's were designed for him to obtain educational benefit in reading, writing, mathematics and other academic areas. The evidence establishes that the School District was making a good faith effort through its IEP's to make academic progress with [Student]. Also, [Student]'s progress certainly exceeded the "barely more than *de minimis*" standard set out in *Endrew F. v. Douglas County School District RE-1*, 580 U.S.___, 137 S. Ct. 988, 992 (2017).

85. To the extent that there are other allegations in [Mother]'s complaint that have not been specifically discussed above, the ALJ finds that there is insufficient evidence to establish any violations of the IDEA or ECEA on the part of the School District in relation to these other allegations.

86. There is insufficient evidence of any procedural violations of the IDEA or the ECEA or that any procedural violations impeded [Student]'s right to a FAPE.

Conclusions of Law

Based upon the foregoing findings of fact, the ALJ enters the following conclusions of law:

1. A FAPE is available to all children with disabilities between the ages of three and 21. Twenty U.S.C. Section 1412(a)(1)(A).

2. The burden of proof in an administrative hearing challenging an IEP is placed on the Complainants, the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). The Complainants have failed to establish a violation of the IDEA or ECEA on the part of the School District.

3. The issues to be addressed at a due process hearing are limited to those identified in the complaint, unless otherwise agreed to. Twenty U.S.C. Section 1415(f)(3)(B). The School District has not agreed to any expansion of the issues from those listed in the complaint.

4. To comply with the IDEA, a school district must satisfy the two-part test set out in *Board of Education v. Rowley*, 458 U.S. 176 (1982). It must first meet procedural requirements. Second, the IEP must be reasonably calculated to enable the child to receive educational benefits. The ALJ concludes that the School District has met this two part test.

5. The IDEA requires only a "basic floor of opportunity" to provide "some educational benefit," and does not require schools to "maximize each child's potential." *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1149 (10th Cir. 2008), *citing Rowley*. The IDEA does not guarantee any substantive outcome. *M.M. ex rel. Matthews v. Government of the District of Columbia,* 607 F. Supp. 2d 168, 174 (D.D.C. 2009). While [Student]'s scores in reading in October 2017 were disappointing, his IEP's were nevertheless reasonably calculated to achieve success. An IEP must be appropriately ambitious in light of a child's circumstances and every child should have the chance to meet challenging objectives. Barely more than *de minimis* progress is not satisfactory under the IDEA. *Endrew F. v. Douglas County School District RE-1*, 580 U.S.__, 137 S. Ct. 988, 992 (2017).

6. There is insufficient evidence of any procedural violations of the IDEA or ECEA or that any procedural violations impeded [Student]'s right to a FAPE. Relief for procedural errors is limited to cases of substantive harm to the child or his parents, deprivation of an IEP or loss of an educational opportunity. *Systema ex rel. Systema v. Academy School District No. 20*, 538 F.3d 1306, 1313 (10th Cir. 2008).

7. Tort-like remedies for damages or "pain and suffering" are not available under the IDEA. *Polera v. Board of Education*, 288 F.3d 478, 484-486 (2d Cir. 2002). Had it been established that the School District denied a FAPE, the ALJ would have discretion to grant equitable relief in the form of reimbursement for the expenses of compensatory education. Twenty U.S.C. Section 1415(i)(2)(C)(iii). *Ferren C. v. School District of Philadelphia,* 595 F. Supp. 2d 566 (E.D. Pa. 2009). The evidence fails to establish any such expenses or a basis to impose such relief.

8. The ALJ concludes that no violation of the IDEA or ECEA has been established.

DONE AND SIGNED

October 22, 2018

MATTHEW E. NORWOOD
Administrative Law Judge