

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	
<b>[PARENTS]</b> , on behalf of <b>[STUDENT]</b> ,  Complainants,  vs.  <b>DENVER PUBLIC SCHOOLS,</b>  Respondent.	▲ <b>COURT USE ONLY</b> ▲
	<b>CASE NUMBER:</b>  <b>EA 2023-0019</b>
<b>DECISION</b>	

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 remotely October 30 and November 1, 2023 before Matthew E. Norwood, Administrative Law Judge (“ALJ”). Jack D. Robinson, Esq., appeared on behalf of the Complainants. Robert P. Montgomery, Esq., appeared on behalf of the Respondent (“School District”).

### Summary

The Complainants assert that their son “[Student]” was denied a free appropriate public education (“FAPE”). [Student] has been identified as having the disability of autism spectrum disorder and a speech or language impairment. For the 2021-2022 school year, he attended [Elementary School] in the School District. At the end of that school year, his parents placed him at the [Facility School], a special school that focuses on students such as [Student] who use a speech generating device. He has not returned to a School District school.

In an October 26, 2022 Settlement Agreement, the parties resolved any IDEA and ECEA claim the Complainants might have prior to that date. It was agreed that the Complainants would not seek educational services from the School District for the remainder of the 2022-2023 school year, including the summer of 2023. The School District agreed that it would pay part of [Student’s] tuition at the [Facility School].

[Student’s] parents reenrolled [Student] with the School District in July 2023. Rather than schooling in a School District school, they sought additional compensation for his education at the [Facility School]. The School District offered to educate him using an individualized education program (“IEP”) that had been created in November of 2022, after the October 2022 Settlement Agreement and in anticipation of [Student’s] eventual

return to a School District school. The Complainants allege that this IEP did not provide a FAPE for the same reasons that caused the dispute resulting in the October 2022 settlement.

Following the presentation of the Complainants' evidence at the hearing, the School District moved the ALJ to dismiss the case. It asserted that any deficiency in the November 2022 IEP had been previously resolved. The Complainants had failed to prove any denial of FAPE for the current 2023-2024 school year. This was the only relevant time frame remaining in light of the Settlement Agreement. The ALJ therefore granted the motion to dismiss.

The Complainants have failed to establish any procedural violations on the part of the School District, or that the November 2022 IEP was other than reasonably calculated to enable [Student] to receive educational benefits. No violation of the IDEA or the ECEA has been established and no compensatory services or other remedies are ordered.

### **Findings of Fact**

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

1. “[Student]” is the student in question, born in [Month]2013, and now ten years old. He is the only child of the Complainants [Parent 1], his father, and [Parent 2], his mother.

2. As of [Month/Date], 2022, [Student] was a nine-year-old second grade student at [Elementary School] in the School District. There, he received education through an IEP and attended general education as well as education in the “Multi-Intensive Autism” classroom. Exhibit K (the Complainant’s exhibits are lettered) and exhibit 4 (the School District’s exhibits are numbered). He has a diagnosis of autism spectrum disorder and has the disability of a speech language impairment. The School District provided him a one-on-one paraprofessional to keep him out of unsafe situations, to help him pay attention, to assist with transitions throughout the day, and to assist with communication. At that time, he was able to speak only a few words and used a speech generating device.

3. As of April 18, 2022, [Student] changed speech generating devices from “TouchChat” to “Words for Life (LAMP)”. This change caused an increase in negative behaviors such as self-injurious behavior. His IEP team discussed placing him in the Multi-Intensive Autism classroom for an additional school year, the 2022-2023 school year. Exhibits M and 4.

#### *The April 18, 2022 IEP*

4. Exhibits L and 5 show an April 18, 2022 IEP for [Student]. At that time, he had not met the mathematics goal of identifying numbers 11-20, or single digit addition to sums of ten. He had not met the reading goal of identifying CVC (consonant-vowel-consonant) words or pre-primer sight words on flashcards. He had not met the goals set

for him in “social/emotional/wellness.” He would play next to or in proximity with peers, but would not engage in back and forth play independently.

5. The April 18, 2022 IEP set out the same or similar goals in mathematics and reading. He was given the social/emotional/wellness goal of being able to answer conversational questions and to safely transition between preferred and non-preferred activities. He received the communication goal of improving overall speech intelligibility by speaking two to three word phrases. He was given the language goal of being able to answer “who and where” questions either verbally or with his speech generating device. All of these goals had a “projected achievement date” of April 18, 2023.

*The [Facility School]*

6. [Student] began attending The [Facility School] on June 8, 2022. He has not returned to a School District school since. The [Facility School] describes itself as a fully immersive AAC (augmentative and alternative communication) program. All staff are trained to incorporate such devices in their instruction.

7. The [Facility School] was approved as a “facility school” as defined at 222-R-2.01, 1 CCR 304-1 in June 2023 under the name “[School Name].” See the Facility Schools Directory at <https://www.cde.state.co.us/facilityschools>. The [Facility School] is located within the boundaries of Jeffco Public Schools. The [Facility School] educates only disabled students.

*The August 23, 2022 IEP*

8. Exhibits Q and 8 show an August 23, 2022 IEP for [Student]. The IEP has the same goals as the April 18, 2022 IEP, but with the date for achievement pushed back to August 23, 2023. The IEP was prepared in the event of [Student’s] return to public school; he was receiving instruction at the [Facility School] at the time.

9. The August 23, 2022 IEP provided for [Student] to receive instruction in the general education classroom with non-disabled peers 40% to 79% of the time.

10. At the meeting related to this IEP, [Parent 1] (“[Parent 1]”) stated that it was a priority for the parents that [Student] be in the general education classroom with typical peers. He stated that [Student] was not having his needs met by the School District. [Parent 1] described significant self-harm such as hair-pulling and scratching on [Student’s] part in the previous year. He reported that the family had found a placement that can meet [Student’s] needs in a much smaller environment. He described the ultimate goal as getting [Student] to communicate. He stated that, despite everyone’s best intentions and skill set, they had failed. He stated that over the summer, the family had found a better environment for [Student]. He described this environment as a last resort placement, the goal being not to have [Student] isolated. Exhibit Q, p. 14/28. The placement [Parent 1] was describing was at the [Facility School].

11. [Parent 2] stated at the meeting that the family was supplementing the School District’s educational services with an outside speech and behavior therapist for “apraxia.” As understood by [Parent 2], apraxia consists of being able to think of a word,

but being unable to physically verbalize it. She reported that the family had found a place that can provide apraxia therapy daily, and that they use a “PEAK” curriculum.

12. The ALJ has been unable to discover in the evidence a formal, written diagnosis of apraxia for [Student] done by a neurologist, physician, or other professional qualified to make such a diagnosis.

13. [Parent 2] related that during the Covid pandemic, when school was remote, the family had seen a lot of progress in [Student]. She reported that when he came back to school he went back to using diapers and self-harming. She described the programming at the new setting as “miraculous.” She described wanting [Student] to have intensive care for a little bit, and that the goal of the [Facility School] was to get all students back into a public school. Exhibit Q, p. 14/28.

14. [Parent 2] testified consistently with this statement at the hearing. She reported that [Student] had returned to using diapers at night for a time. Photos of [Student’s] head after hair pulling as well as injuries to [Parent 2] from [Student] appear at exhibit HH. The photos have dates of March, August and September 2022.

15. [Parent 2] testified that as of Christmas break in December 2022, [Student’s] bad behavior had stopped. He was again out of diapers and had friends at the [Immersive Program].

#### *The Settlement Agreement*

16. Exhibit 10 is Settlement Agreement and Release of Claims effective October 26, 2022. The Settlement Agreement resolved a dispute between [Student’s] parents and the School District as to whether the School District had provided a FAPE to [Student]. The Settlement Agreement released the School District from any and all claims that could have been asserted against the School District in a due process hearing prior to October 26, 2022. The agreement provided that [Student’s] parents would not seek educational services from the School District for the remainder of the 2022-2023 school year, including the summer of 2023. In return, the School District agreed to pay a portion of [Student’s] tuition at the [Facility School].

17. The parties in this case do not challenge the validity of the Settlement Agreement.

#### *The November 3, 2022 IEP*

18. Exhibits T and 13 show a November 3, 2022 IEP for [Student]. It provided that it was to run until November 2, 2023. The IEP was again prepared in the event of [Student’s] return to public school. There is insufficient evidence that [Student’s] parents disagreed with the terms of the November 3, 2022 IEP at that time.

19. The IEP had the same goals as the April 18, 2022 and August 23, 2022 IEP’s, but with the date for achievement pushed back to November 2, 2023. The goals were written based on the last information that the IEP team collected on [Student’s] needs while he was attending [Elementary School]. The plan was to reassess his

baselines and goals when he returned to a School District school and to develop a new IEP. Exhibit T, p. 29/30.

20. The IEP provided that the IEP team would work with [Student's] outside BCBA (Board Certified Behavior Analyst) to train the school team on [Student's] current behavior plan to transition [Student] back to school.

21. The IEP reduced [Student's] time in the general education classroom with non-disabled peers to less than 40% of the time. This was done based on his experience at the [Immersive Program] where the use of communication devices was more intensive and where his peers used communication devices.

22. In relation to the November 3, 2022 IEP, the School District prepared a Special Evaluation Report, exhibit S. This report referenced information provided by the [Facility School], specifically a September 23, 2022 "Evaluation Report," exhibit X.

*The [Facility School] September 23, 2022 Evaluation Report*

23. This report, exhibit X, comes with a cautionary note:

It is important to note that [[Student]] is still very new to the [Facility School] structure, routine, and expectations in an AAC immersion environment. Therefore, baseline data reported should be interpreted with caution, as it is strongly felt [[Student]] possesses far more skills than he is currently able to demonstrate given the changes in his routine, educators, and environment.

24. The [Facility School] Evaluation Report scored [Student] on a scale of 1-4 in relation to ten goals. The scale was:

1 - Emerging: able to meet with significant support (20-40% of the time)

2 - Developing: meets inconsistently or partially provided moderate support (40-60% of the time)

3 - Approaching Proficiency: meets consistently provided minimal support (60-80% of the time)

4 - Proficient: meets consistently and independently (80% of the time or more)

25. The ten goals had subparts and so the total possible could be more than 4. [Student's] scores as of September 23, 2022, after the summer program, were: LZ Goal 1 - Initiate Communication, 2 out of 12; LZ Goal 2 - Share Information, 3 out of 12, LZ Goal 3 - Contribute in a Group, 2 out of 16; LZ Goal 4 - Communication in place of Behavior, 1 out of 12; LZ Goal 5 - Peer Engagement, 0 out of 12; LZ Goal 6 – Phonics, 4 out of 20; LZ Goal 7 - Reading Fluency, 0 out of 8; LZ Goal 8 - Reading Comprehension, 1 out of 16; LZ Goal 9 - Written Composition/Generative Language, 0 out of 16; LZ Goal 10 - Math Foundations, 6 out of 20. [Student's] September 2022 Baseline Raw Score was therefore 19 out of 144.

26. The Evaluation Report does not discuss autism or apraxia.

*The [Facility School's] March 2023 Progress Summary*

27. The [Facility School] prepared a March 2023 "Progress Summary," exhibit Y. The Progress Summary demonstrated minimal improvement at the [Facility School] according to the [Facility School's] criteria. He had met "approaching proficiency" or "proficiency" in only two categories. The March 2023 Progress Summary does not reflect the total points possible for the ten goals that appeared in the September 23, 2022 Evaluation Report.

28. As to LZ Goal 1 - Initiate Communication, [Student] had stayed at a 2; as to LZ Goal 2 - Share Information, [Student] had stayed at a 3; as to LZ Goal 3 - Contribute in a Group, [Student] had gone from a 2 to a 2.5; as to LZ Goal 4 – Communication in place of Behavior, [Student] had gone from a 2 to a 3; as to LZ Goal 5 - Peer Engagement, [Student] had gone from a 0 to a 1; as to LZ Goal 6 – Phonics, [Student] had gone from a 4 to a 5; as to LZ Goal 7 - Reading Fluency, [Student] had gone from a 0 to a 1; as to LZ Goal 8 - Reading Comprehension, [Student] had gone from a 1 to a 3; as to LZ Goal 9 - Written Composition/Generative Language, [Student] had gone from a 0 to a 1; as to LZ Goal 10 - Math Foundations, [Student] had gone from a 6 to a 6.75. The Progress Summary does not show a Baseline Raw Score out of the 144 total as did the Evaluation Report.

29. The Progress Summary does not discuss autism or apraxia. It does not set a date for [Student's] return to public school.

*Fall of 2023*

30. Exhibit 21 is an October 16, 2023 draft of a "[Facility School] Student Education Plan." It does not use the same ten goals as appear on the September 2022 Evaluation Report and the March 2023 Progress Summary.

31. [Student] mother re-enrolled [Student] with the School District in July of 2023. Her objective in doing so was not to have [Student] attend a School District school, but rather to have the School District help pay the tuition at the [Facility School] for the 2023-2024 school year. [Student's] parents have kept him at the [Facility School] up until the present.

32. The School District responded by proposing to provide special education to [Student] through the November 3, 2023 IEP. This was unacceptable to [Student] parents, and they filed their complaint in this matter July 19, 2023. It is the Complainants' position that the November 3, 2023 fails to offer FAPE. They assert that this is so in that it contains some of the same terms that were in previous IEP's that were in place in the 2021-2022 school year when [Student] was attending [Elementary School]. The Complainants allege that these terms were insufficient for him at that time.

33. In the first place, this has not been established. More importantly, any such claim has been resolved by the Settlement Agreement. There is therefore no basis to find that the November 3, 2023 IEP was deficient in light of *previous* events. Without

reference to these previous events, whatever they show, there is no evidence at all that the November 3, 2022 IEP is deficient *going forward*.

34. The November 3, 2022 IEP recognizes the passage of time that will have occurred prior to its terms being implemented. The IEP was created after the Settlement Agreement with the understanding that [Student] would not be returning to the School District prior to the fall of 2023, at the earliest. Again, the November 3, 2022 IEP anticipates a reassessment of [Student's] baselines and goals if he were to return to a School District school and the development of a new IEP. Again, it provided that the IEP team would work with [Student's] outside BCBA to train the school team on [Student] current behavior plan to transition [Student] back to school. It also reduced his time in the general education classroom.

35. [Parent 2] sees the [Facility School] as providing a better learning environment for [Student] and sees him as having improved dramatically while there. His academic improvement is not particularly shown by the [Facility School] own evaluations of his progress. A comparison of the [Facility School's] September 2022 Evaluation Report and the March 2023 Progress Summary shows little improvement. The ALJ will assume for the sake of argument that [Student] has made more improvement at the [Facility School] than he would have at [Elementary School]. But this does not mean that the November 3, 2023 IEP has been shown to be deficient. If he has improved, and now that he is older, the goals in the November 3, 2022 IEP should be more achievable.

36. The November 3, 2022 IEP also provided [Student] the least restrictive environment ("LRE"), as this is defined at 34 C.F.R. Section 300.114, *vis a vis* continued schooling at the [Facility School]. That IEP set out general education less than 40% of the time. This was with non-disabled, "neuro-typical" classmates. He does not have the opportunity for education with such peers at the [Facility School].

37. The Complainants have failed to prove a violation of the IDEA or ECEA on the part of the School District. They have not established a failure on the part of the School District to comply with the two-part test set out in *Board of Education v. Rowley*, 458 U.S. 176 (1982). That two-part test is first, that the School District has failed to meet procedural requirements. It is second, that the IEP is reasonably calculated to enable the child to receive educational benefits.

38. The ALJ finds that no violation of the IDEA or ECEA has been established.

### **Conclusions of Law**

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

1. Hearings per the ECEA are with an ALJ of the Office of Administrative Courts. Section 6.02(7.5)(c), 1 CCR 301-8. To the extent practicable, the Colorado Rules of Civil Procedure apply to matters before the OAC. Rule 15, 1 CCR 104-1. The ALJ is permitted to take any action in accordance, to the extent practicable, with the procedure in the district courts. Section 24-4-105(4)(a), C.R.S. As stated, following the

Complainant's presentation of evidence, the School District moved to dismiss and the ALJ granted the motion. As here, where the ALJ is the trier of fact, the ALJ may grant the motion per C.R.C.P. 41(b)(1).

2. 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). 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 prove a violation of the IDEA or ECEA on the part of the School District.

3. 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). The ALJ has found above and concludes here that the Complainants have not established a failure on the part of the School District to meet this two-part test.

4. 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 (10<sup>th</sup> Cir. 2008), *citing Rowley*. The IDEA does not guarantee any substantive outcome. *M.M. v. Government of the District of Columbia*, 607 F. Supp. 2d 168, 174 (D.D.C. 2009). The sufficiency of an IEP must be judged prospectively as of the time of its drafting. *R.E. v. N.Y.C. Dep't of Educ.*, 694 F.3d 167, 185 (2d Cir. 2012). An IEP must be appropriately ambitious in light of a child's circumstances and every child should have the chance to meet challenging objectives. *Andrew F. v. Douglas County School District RE-1*, 580 U.S. 386, 402 (2017). If progressing smoothly through the regular curriculum is not a reasonable prospect for a child, the IEP need not aim for grade-level advancement. *Id.* Barely more than *de minimis* progress is not satisfactory under the IDEA. *Id.*

5. The least restrictive environment ("LRE") requirement mandates that disabled children be educated in regular classrooms to the maximum extent possible. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10<sup>th</sup> Cir. 2004).

6. The ALJ concludes that no violation of the IDEA or ECEA has been established. No compensatory services or other remedies are ordered.

7. Any party aggrieved by the above findings and decision has the right to bring a civil action consistent with the requirements as set forth in 34 C.F.R. Section 300.516.

**DONE AND SIGNED**

November 7, 2023



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MATTHEW E. NORWOOD  
Administrative Law Judge

Exhibits:

At the outset of the hearing, the parties stipulated to the admission of the following exhibits for the Complainants: J, K, L, M, Q, S, T, and X. These exhibits are the same, respectively, as the School District's exhibits 2, 3, 5, 4, 8, 12, 13, and 9. The parties also stipulated to the admission of the School District's exhibits 10 and 11.

During the hearing, the following exhibits were offered by the Complainants and were admitted: HH, H, N, II, CC, QQ, MM, NN, and Y.

During the hearing, the following exhibits were offered by the School District: 21 and 22. Exhibit 21, but not 22, was admitted.