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| **STATE OF COLORADO**<br>**OFFICE OF ADMINISTRATIVE COURTS**<br>1525 Sherman Street, 4th Floor, Denver, Colorado 80203 | |
| **[Student], by and through his parents, [Father] and [Mother],**<br>Complainants,<br><br>vs.<br><br>**CHEYENNE MOUNTAIN SCHOOL DISTRICT 12,**<br>Respondent. | **COURT USE ONLY**<br><br>**CASE NUMBER:**<br><br>**EA 2016-0008** |

**AGENCY DECISION**

On March 10, 2016, the Colorado Department of Education ("CDE"), Exceptional Student Services Unit, received a due process complaint filed by [Parents] ("Complainants" or "Parents") on behalf of their minor son, [Student], alleging that Cheyenne Mountain School District 12 ("Respondent") violated the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 - 1482, ("IDEA"), under its implementing regulations at 34 C.F.R. § 300.511, and the Colorado Exceptional Children's Educational Act ("ECEA"), 1 CCR 301-8, by failing to provide him with a free appropriate public education ("FAPE"). Specifically, Parents allege that Respondent denied [Student] FAPE when it denied his enrollment at the [School] ("[School]") for the 2014-2015 school year. In their due process complaint Parents requested private school placement and compensatory education for their son.

The due process complaint was forwarded to the Office of Administrative Courts ("OAC") and assigned to Administrative Law Judge ("ALJ") Tanya T. Light for an impartial due process hearing. The hearing was convened in accordance with 20 U.S.C. § 1415(f), and held in Colorado Springs, Colorado on August 29, 2016, and by telephone on August 30, 2016.

[Student] was represented by his father, [Father]. Respondent was represented by Wm. Kelly Dude of Anderson, Dude & Lebel, P.C. At hearing, the ALJ admitted into evidence Complainants' exhibits 11, 12, 13 (the handwritten portion of Exhibit 13 is not admitted into evidence), 14, 15, 16, 28, 29, and 37, and Respondent's exhibit H. The proceedings were digitally recorded and a court reporter was present.

## ISSUE PRESENTED

Whether Respondent failed to provide [Student] FAPE as required by the IDEA when [School] did not permit him to enroll, and if so, whether Respondent should be required to provide [Student] private school tuition or compensatory education.

## FINDINGS OF FACT

### Background

1. [Student] is an [age] year old boy (date of birth [DOB]) who has been identified as having Autism Spectrum Disorder. In or around the fall of 2013, Complainants removed [Student] from enrollment in his school district of residence, [District of Residence], and enrolled him in [School], which is in the Cheyenne Mountain School District 12.

2. [School] now goes by the name [Charter School] ("[Charter School]"), and is a public charter school serving grades K through 12.[1] Complainants enrolled [Student] at [Charter School] pursuant to Colorado's School Choice law. § 22-36-101, *et. seq*. Approximately two-thirds of [Charter School]'s students are not residents in the district but "choice" in through open enrollment.

3. [Student] attended kindergarten at [Charter School] during the 2013-2014 school year.

4. On May 1, 2014, [Charter School] personnel and Complainants developed an Individualized Education Program ("IEP") for [Student]. The IEP listed [School] as [Student]'s school of attendance. Exhibit 12. The IEP called for [Student] to receive one-on-one paraprofessional support throughout the entire school day when he was not receiving direct services from special education staff. *Id.*

5. The May 1, 2014 IEP states that the special education and related services would be "provided in accordance with the [School] school calendar." Exhibit 12, p.19.

6. On May 22, 2014, [Charter School]'s executive director sent Complainants a letter stating that there was a lack of teaching staff at [Charter School] to appropriately educate [Student]; that [Charter School] would need to hire additional staff in order to meet [Student]'s IEP requirements; and, as a result, [Charter School] was denying his enrollment for the 2014-2015 school year in reliance on C.R.S. § 22-36-101(3).[2]

[1] It is not known when the name change occurred. Both names will be used interchangeably in this decision.
[2] Section 22-36-101(3) states: "Any school district may deny any of its resident pupils or any nonresident pupils from other school districts within the state permission to enroll in particular programs or schools within such school district only for any of the following reasons: (a) There is a lack of space or teaching staff within a particular program or school requested, in which case, priority shall be given to resident students applying for admission to such program or school. (b) The school requested does not offer appropriate programs or is not structured or equipped with the necessary facilities to meet special needs of the pupil or does not offer a particular program requested."

7. On July 16, 2014, Parents filed a due process complaint, case number EA 2014-0018, alleging that Respondent: 1) failed to appropriately evaluate [Student]; 2) failed to appropriately supervise him; 3) failed to provide appropriate goals and assessments; and 4) inappropriately re-evaluated him leading to denial of enrollment. Parents specifically stated that the refusal to allow [Student] to enroll in [School] for the 2014-2015 school year was not an issue they were raising in the July 16, 2014 due process complaint.

8. The May 1, 2014 IEP was the IEP in place at the time Parents filed case number EA 2014-0018.

9. On August 4, 2014, Parents filed a Motion for Preliminary Injunction and Finding of Contempt in case number EA 2014-0018 seeking a "stay put"[3] order directing Respondent to fund private school placement for [Student] during the pendency of the case. On August 8, 2014, the ALJ denied that motion, concluding that the stay put provision did not require Respondent to retain [Student] at [School] pending the outcome of the due process complaint, nor did it require Respondent to pay for private school placement.[4]

10. The first day of the 2014-2015 school year at [Charter School] was August 13, 2014. Exhibit 16. [Charter School] did not allow [Student] to enroll in part in reliance on the ALJ's denial of Parent's Motion for Preliminary Injunction and Finding of Contempt. Therefore, [Student] did not begin school at [Charter School] on August 13, 2014.

11. Parents did not enroll [Student] in any other school at the beginning of the 2014-2015 school year.

12. On September 23, 2014, the ALJ dismissed case EA 2014-0018 after hearing on the merits.

13. On September 24, 2014, Parents filed a Verified Motion for Temporary Restraining Order and Preliminary Injunction in the United States District Court for the District of Colorado, case number 14-CV-02651, requesting an order requiring Respondent to fund private school placement for [Student] or, in the alternative, enroll him at [School].

14. On October 17, 2014, Judge Philip A. Brimmer ordered that [Student]'s current educational placement was [School] for purposes of case number EA 2014-0018, and that Respondent maintain his educational placement there during the pendency of

[3] 20 U.S. § 1415(j) is referred to as the "stay put" provision and states: "Except as provided in subsection (k)(4), during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of the child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed."

[4] The undersigned did not preside over case number EA 2014-0018.

EA 2014-0018 and through any appeals. Judge Brimmer denied Parents' request for private school funding, and Parents appealed the denial to the Tenth Circuit Court of Appeals.

15. Parents enrolled [Student] at [School], now [Charter School], and he began attending classes on or around October 17, 2014 [Student] was still attending [Charter School] as of the date of the hearing in this case.

16. On March 10, 2016, Parents filed the present due process complaint and Respondent timely answered.

17. On March 30, 2016 and April 25, 2016, Respondent and Parents filed cross motions for summary judgment respectively. The parties filed lengthy responses and replies, and attached as exhibits numerous pleadings, orders, and transcripts from other cases involving the parties, including but not limited to case numbers EA 2014-0018 and 14-CV-02651. Much of what was filed and alleged in this case concerned matters already decided or on appeal elsewhere.

18. On June 8, 2016, after review of the filings and exhibits and after prehearing conferences with the parties, the undersigned issued an order stating that the only issue raised by Parents in the current due process complaint that was new[5] was that [Student] regressed during the time he was not permitted to attend [Charter School]. Thus, the undersigned ruled that the sole issue for hearing was whether [Student] was denied FAPE from August 13, 2014, the first day of the 2014-2015 school year at [Charter School], to October 15, 2014[6], the date that Judge Brimmer issued his order and [Student] was re-enrolled at [Charter School], and what remedy, if any, would be proper.

[Student]'s Grades

19. [Charter School] offers half and full day kindergarten. [Student] attended full day kindergarten in the 2013-2014 school year.

20. [Charter School]'s school year is divided into four quarters that are called "terms." [Student] was able to attend and complete the fourth term of kindergarten at [Charter School] before being dis-enrolled. He did not attend any of the first term of first grade, but started attending first grade partway through [Charter School]'s second term in October of 2014.

21. [Charter School]'s grading system utilizes "E, G, N, and U" for grades, and "3+, 3, 3-, 2+, 2, 2-, 1+, 1, and 1-" for "standards." Some subjects receive letter grades and some receive numbered standards. The letter grades have the following equivalents: E=A; G=B; N=C; and U=D. The numbered standards have the following equivalents: 3

[5] By "new" the ALJ meant issues that had not already been raised and decided in other cases or that were not on appeal.

[6] The ALJ mistakenly entered the wrong date in her order. Judge Brimmer's order was dated October 17, 2014.

= excellent; 2 = Satisfactory; and 1 = Needs Improvement.

22. The following grid compares [Student]'s grades or standards from the last term of kindergarten (Exhibit 28) to the second term of first grade (Exhibit 29), after he missed the first term of first grade.[7] Because [Student] did not attend school during the first term of first grade, he did not receive any grades or standards that term.

| **Subject** | **Kinder-Last Term Grade** | **First Grade-Second Term Grade** | **Trend** |
|---|---|---|---|
| Citizenship: | Two 2+s and two 2-s | Four 3's | Higher |
| History: | 2 | U | Lower |
| Math Grade | | | |
| and Level: | E- and at grade level | G and below grade level | Lower |
| Poetry: | 2 | E | Higher |
| Phonics: | 3 and at grade level | 3 and at grade level | Same |
| Reading Grade | | | |
| and Level: | E- and at grade level | E- and at grade level | Same |
| Spelling Grade | | | |
| and Grade Level: | E- and at grade level | E and at grade level | Higher |
| Work and | | | |
| study habits: | 2's and 3's | All 3's | Higher |

23. In History, [Student]'s grades and standards improved after the second term. He received an N+ in the third term of first grade and an N- in the fourth term.

24. [Student]'s May 2014 IEP does not specifically provide him with services in history.

25. In Math, [Student] received an E- and "at grade level" in the third and fourth terms of first grade.

26. [Student]'s May 2014 IEP does not specifically provide him with services in math.

27. [First Grade Teacher], [Student]'s first grade homeroom teacher, taught his grammar, poetry, and science classes and had him in her spelling and math groups. She credibly testified that she could not tell that he had not been in school for two months, nor did she notice that he was significantly behind.

[7] Many of [Student]'s subskills within general categories could not be compared because the subskills assessed were different from kindergarten to first grade. For example, in kindergarten, [Student]'s reading standards included the subskill "sounds words out," whereas first grade did not include that subskill. Similarly, first grade included grades and standards for subskills not listed on his kindergarten report card, such as "pays attention to punctuation." Therefore, this grid provides a general, not specific, picture of how [Student] tended to perform in different subjects at the end of kindergarten compared to when he was allowed to enroll at [Charter School].

28. Cheyenne Mountain School District 12's Director of Special Education, [Director of Special Education], credibly testified that it is not uncommon for students with and without special needs to have grades that are lower in the fall than the previous spring even when they do not miss two months of school like [Student] did.

29. By the fourth term of first grade [Student] was at or above grade level in all subjects. Exhibit 29. [First Grade Teacher] testified that she had "no qualms" about recommending [Student] to advance to second grade.

30. Comments from teachers on [Student]'s first grade report card indicated he was progressing in all areas. *Id.*

[Student]'s DIBELS Scores

31. In the Spring of 2014 [Student] was given the Dynamic Indicator of Basic Early Literacy Skills ("DIBELS") test to evaluate his reading skills. The "benchmark" score is the level at which it is hoped students will be achieving. In the spring of 2014 [Student]'s scores were:

LNF (letter name fluency, which assesses number of letters that can be read in one minute) = 25 (there is no benchmark on this assessment)
PSF (phoneme segmentation fluency) = 44 (benchmark = 40)
NWF (nonsense word fluency) – CLS (correct letter sounds) = 70 (benchmark = 28)

32. On October 27, 2014, after returning to [Charter School], [Student]'s DIBELS scores were:

LNF = 20
PSF = 13
NWF – CLS = 33

33. Eight days later, on November 4, 2014, he was tested again, and his scores were:

PSF = 40
NWF-CLS = 37 (Exhibit 13, pp. 3 and 4)
(LNF was not tested)

34. Thus, [Student]'s LNF score decreased from the end of kindergarten to the second term of first grade from 25 to 20 after missing approximately two months of school. His PSF score decreased from 44 to 13, and then increased to 40, which is the benchmark. His NWF-CLS significantly decreased from 70 to 33, then to 37, which is above the benchmark of 28.

35. [Director of Special Education] credibly testified that had [Student] been in school for the two months he was out she would have expected his DIBELS scores to be higher.

[Student]'s Placement in [Charter School]'s Achievement Grouping

36. [Charter School] places students in homogeneous groups in reading, math, and spelling based on where they score in achievement tests. This practice is called achievement grouping. [Student] was placed in some of the higher achievement groups at the end of kindergarten. His placement may have changed when he returned to [Charter School], but the evidence in the record is neither reliable nor persuasive that his placement changed for the worse, or if it did, that the change resulted from missing the first term of first grade.

[Student]'s November 2014 IEP

37. There are no documented concerns of the IEP team in [Student]'s November 2014 IEP that he was in need of compensatory services due to missing the first term of first grade.

[Student]'s November 5, 2015 IEP

38. In the Service Delivery Statement of [Student]'s November 5, 2015 IEP, it states "Services will continue to be provided at the [Charter School] so long as the mother's appeal of ALJ Spencer's due process decision assigned case number 14-CV-02651 remains pending." Exhibit H, p.23.

## DISCUSSION

### 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) (stating that "[t]he burden of proof . . . rests with the party claiming a deficiency in the school district's efforts"). Complainants therefore bear the burden of proving by a preponderance of the evidence that Respondent violated its obligations under IDEA by failing to provide [Student] FAPE.

### The Requirement of FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them 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). FAPE is defined as follows:

> special education and related services that -

(A) have been provided at public expense, under public supervision and direction, and without charge;

(B) meet the standards of the State educational agency;

(C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and

(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9).

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). The school district is not required to maximize the potential of the disabled child, but must provide "some educational benefit." *Id.* at 199-200. "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.

It is determined that a school district has provided a disabled student with FAPE when demonstrable evidence from the student's educational records establishes that the student made some measureable progress on the goals and objectives in his or her IEP. *Id*. Progress such as "achievement of passing marks" and "advancement from grade to grade" can be sufficient to demonstrate that the requisite educational benefit has been conferred. *Rowley* at 207, n. 28.

When, as here, a student is enrolled in a public charter school, the local school district through which the school is chartered bears the responsibility to develop, implement, and revise IEPs calculated to meet the student's specific educational needs. 20 U.S.C. §§1413(a)(5) and 1414(d). Courts have held that the school listed in the student's IEP is the dispositive factor when determining a student's "then-current educational placement of the child" pursuant to the IDEA's "stay-put" provision. 20 U.S. § 1415(j); *Erickson v Albuquerque Pub. Schools*, 199 F.3d 1116, 1121 (10th Cir. 1999).

Whether Respondent provided FAPE to [Student] During the Relevant Timeframe

On October 17, 2014, Judge Brimmer determined that [Charter School] was [Student]'s current educational placement for purposes of stay put for the duration of case EA 2014-0018. As of August 13, 2014, case EA 2014-0018 was open and pending. Moreover, the school placement listed in the IEP in place as of August 13, 2014 was [Charter School], and [Charter School] remained listed as [Student]'s placement at least through his November 2015 IEP. Thus, his educational placement pursuant to both his IEP and Judge Brimmer's order for the time period at issue in this case – August 13, 2014 through October 17, 2014, was always [Charter School]. The very definition of FAPE mandates that special education and related services be provided "in conformity with the individualized education program required under section 1414(d) of this title." 20 U.S.C.

§ 1401(9). [Charter School] did not provide [Student] any special education or related services from August 13, 2014, the first day of the school year, until October 17, 2014, the day that [Student] went back to [Charter School]. The ALJ concludes that Complainants have met their burden of proving by a preponderance of the evidence that Respondent did not provide FAPE to [Student] from August 13, 2014 to October 16, 2014 because it failed to provide him any special education or related services whatsoever.

Whether [Student] Regressed as Evidenced by His Grades

As explained above, it is clear that Respondent violated the IDEA and failed to provide [Student] FAPE when he was not permitted to enroll at [Charter School] at the beginning of the 2014-2015 school year and thus received no special educational services whatsoever. That fact is troublesome. The new issue Parents alleged in this due process complaint is that [Student] regressed academically as a result of Respondent's actions. However, the persuasive evidence in the record is that there was little to no regression in [Student]'s level of academic achievement as evidenced by his grades. In the subjects that could be fairly compared from the last term of kindergarten to the second term of first grade, [Student]'s grades went down in only two subjects, and in those two subjects his grades were back to where they had been in kindergarten, prior to the FAPE denial, by the third term. In the remainder of his comparable subjects his grades remained the same or improved. While it is true that [Student]'s grades were lower for one term in two subjects, as will be discussed below, the purpose of compensatory education is to put a student in the place he or she would have been had the deprivation not occurred. *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005). Concerning [Student]'s grades, he is already back to where he was prior to the denial, and thus the ALJ concludes that no compensatory educational services are warranted for any regression [Student] experienced as evidenced by his grades for his deprivation of FAPE.

Whether [Student] Regressed as Evidenced by His DIBELS Scores

On the other hand, [Student]'s DIBELS scores were markedly lower on October 27, 2014 than they had been in the spring of his kindergarten year, and [Director of Special Education] credibly testified that she would have expected them to be higher had he been in school those two months. The scores did somewhat improve just eight days later, but the NWF-CLS score remained markedly lower than it had been in the spring of [Student]'s kindergarten year. Although his scores were at or above benchmark levels, the ALJ concludes that [Student] did suffer regression in his early literacy skills as a result of Respondent's violation of FAPE as evidenced by his markedly lower DIBELS scores, specifically the NWF-CLS score.

Equitable Relief

When school districts fail to provide FAPE, district courts shall "grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The Tenth Circuit has held that compensatory education is an appropriate award, and its purpose is to "vindicate[ ] the student's substantive right to receive a FAPE and compensate[ ] for a past deprivation of educational opportunity rather than a deprivation of purely procedural

rights." *Garcia v. Board of Educ. of Albuquerque Public Schools*, 520 F.3d 1116, 1125 (10th Cir. 2008). The goal of compensatory education is to place the student back where he or she would have been had the school district provided the appropriate services. *Reid ex rel. Reid v. District of Columbia*, 401 F. 3d 516 (D.C. Cir. 2005).

The ALJ concludes that it is appropriate to grant [Student] equitable relief in order to address his regression as evidenced by his DIBELS scores and to place his early literacy skills back to where they would have been prior to the FAPE denial.

## DECISION

The ALJ concludes that Respondent did not provide FAPE to [Student] between August 13, 2014 and October 16, 2014. Accordingly, the ALJ ORDERS as follows:

Respondent shall re-test [Student]'s early literacy skills through the DIBELS test, or a test of Respondent's choosing that assesses the same or similar early literacy skills as the DIBELS test if Respondent believes the DIBELS test is no longer appropriate due to the passage of time. If [Student]'s scores are below benchmark levels, Respondent, in coordination with the IEP team, shall decide what compensatory services are necessary in order to improve [Student]'s scores up to benchmark levels and will implement those services accordingly. If [Student]'s scores are at benchmark levels, then nothing more is required of the District.

This decision is the final decision of the independent hearing officer, pursuant to 34 CFR §§ 300.514(a) and 515(a). In accordance with 34 CFR § 300.516, either party may challenge this decision in an appropriate court of law, either federal or state.

**DONE AND SIGNED:** _____

TANYA T. LIGHT
Administrative Law Judge