

<p style="text-align: center;">STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4th Floor, Denver, Colorado 80203</p>	
<p>[PARENT], ON BEHALF OF HER MINOR CHILD, [STUDENT],</p> <p>Complainant,</p> <p>vs.</p> <p>DENVER PUBLIC SCHOOLS,</p> <p>Respondent.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p>CASE NUMBER:</p> <p>EA 2020-0023</p>
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 remotely February 22, 2021 before Matthew E. Norwood, Administrative Law Judge (“ALJ”). Alan Davis, Esq., appeared on behalf of the Complainant. Robert P. Montgomery, Esq., appeared on behalf of the Respondent (“School District”).

Summary

“[Student]” is the child in question. Her mother is the Complainant. The Complainant’s due process complaint (as described in 34 C.F.R. Section 300.508) is dated June 8, 2020. It alleges that the School District denied [Student] a free appropriate public education (“FAPE”) as required by the IDEA and ECEA. The period in question is [Student]’s third, fourth, and fifth grade education, school years 2018-2019, 2019-2020, and 2020-2021. [Student] is currently in fifth grade.

[Student] performed poorly in third grade at [Elementary School 1] and the School District had her evaluated in February 2019. In light of her deficits, it determined to have her attend a “center program” at [Elementary School 2], and to reduce her time in the general education classroom. The Complainant does not dispute that a center program is appropriate and that her general education classroom time should be reduced. The Complainant believes that [Student] should be taught at a first grade level and should have been held back, rather than transitioning to fourth grade. She also seeks, amongst other relief, payment for a “Brain Balance” program.

Following the Complainant’s presentation of evidence, the School District moved for a directed verdict per C.R.C.P. 50. As here, where the ALJ is the trier of fact, such a

motion is to be treated as a motion to dismiss per C.R.C.P. 41(b)(1). *Campbell v. Commercial Credit Plan, Inc.*, 670 P.2d 813 (Colo. App. 1983). The ALJ granted the motion.

Findings of Fact

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

1. An IDEA due process hearing is confined to the facts two years prior to the filing of the complaint. 34 C.F.R. Sections 300.507(a)(2) and 300.511(e). The June 8, 2020 date of the due process complaint makes the cutoff June 8, 2018, the end of second grade. Still, the ALJ will discuss facts prior to this date that are germane to facts within the relevant time period.

2. [Student] was born in [Month/Year]. At all relevant times she was educated by the School District. Her parents are divorced and share custody of her. Her [Grandparent], participated in meetings with the School District.

3. In May of 2015 [Student] was first evaluated for special education and qualified for an individualized education program ("IEP") under the category "developmental delay." She continued to qualify for special education based on evaluations of May 2017 and March 2019. Exhibit ZZZ.

4. In September 2016, [Student] was evaluated by "Brain Balance of Denver." The evaluation is not in evidence, but is apparently based on parent observations only. Exhibit 5, p. 3. Brain Balance also offers programs for students with learning disabilities. [Student] was evaluated only, she did not undergo a Brain Balance program. Whether Brain Balance evaluations and programs are scientifically valid is not established by the evidence. No expert qualified to give an opinion in this area testified at the hearing.

5. In May of 2017 the School District performed an evaluation of [Student]. Exhibit J. The evaluation summary (exhibit J, pp. 15-16) assigned a cognitive score for her in the below average range. The summary stated that she required extensive supports to access the general education curriculum. Her expressive and receptive language skills were described as moderately affected and it also described significant deficits in reading and math.

Second grade

6. Exhibit P documents an October 26, 2017 IEP at the beginning of second grade. [Student] started at [Elementary School 1] that year. Her IEP provided for 40% to 79% time in the general education classroom. Exhibit P contains various goals and objectives for [Student]. Exhibit P describes [Student]'s parents as very happy with her improvement that year.

7. [Student]'s mother was pleased with the education [Student] received in second grade. She does believe that [Student] began to go downhill after the Christmas break that year.

8. Exhibit V shows [Student] as improving in reading, mathematics, language, and “physical motor.”

Third grade and the October 23, 2018 IEP—Exhibit BB

9. [Student] began third grade at [Elementary School 1] in the fall of 2018. An IEP was developed for her at that time, and was documented in exhibit BB, dated October 23, 2018. Again, the School District proposed that [Student]’s education be within the general education classroom 40% to 79% of the time.

10. [Student]’s mother objected to this. She believed [Student] should spend more time out of the general education classroom and in a specialized classroom.

11. Nevertheless, exhibit BB did provide for instruction outside the general education classroom in literacy, speech and language, psychological services, math, and occupational therapy. The time outside of the general education classroom was to total 16 ½ hours per week. Exhibit BB, p. 15.

12. Apparently in response to [Student]’s mother’s request for more time out of the general education classroom, the School District wrote in exhibit BB, p. 16:

It was considered to increase [[Student]]’s time outside of the general classroom to focus on academic skills. This was rejected because [[Student]] benefits significantly from the behavior and academic model of her peers. At this time, she has demonstrated growth using the current setting code and would benefit from continued inclusion in the general classroom. [[Student]] needs to continue to be pulled out of the general education classroom for small group instruction.

13. At the time of exhibit BB, the School District was aware that [Student] was at the overall reading grade equivalent of 1.2, *i.e.* the beginning of first grade. She had been evaluated in various subparts of reading in the single digit percentiles. Exhibit BB, p. 5.

14. Exhibit BB contains measurable goals in the areas of: 1) reading, 2) social/emotional wellness, 3) mathematics, 4) physical motor skills, and 5) language. It also provides a number of accommodations to help her. As stated in exhibit BB, the School District determined that [Student] was not eligible for extended school year (“ESY”), *i.e.* summer school, services.

The March 15, 2019 intelligence assessment—exhibit HH

15. On February 26, 2019, School District Education Specialist [Education Specialist] evaluated [Student] using, among other tests, the Wechsler Intelligence Scales for Children, Fifth Edition. The results of these tests appear in [Education Specialist]’s March 15, 2019 report, Exhibit HH. [Student]’s “verbal comprehension index” was in the 14th percentile or “low average.” But her “full scale IQ” was in the 2nd percentile or “extremely low.”

16. Consistent with this evaluation, [Student]’s mother describes [Student] as having an “invisible disability.” She means by this that [Student]’s deficits are not readily apparent because her verbal skills are relatively good. It is also apparent that [Student]

is a pleasant child who does not cause trouble in the classroom, and this likely masks her deficits.

17. As testified to by [Student]’s mother, [Student]’s deficits cause her great frustration and stress. Often, she does not want to attend school. This ultimately manifested itself in her compulsively chewing her knuckles, causing sores as described below.

18. [Student] will reverse her letters and numbers and will sometimes write right to left. Undated examples of her school work appear at exhibit SSS, pp. 2-5, and 13-18.

The end of third grade and the April 15, 2019 and May 15, 2019 IEP’s—Exhibits 3 and 4

19. Toward the end of [Student]’s third grade year, two documents were drawn up to review [Student]’s progress on her IEP, exhibits 3 and 4. The two documents are generally the same, and this decision will discuss the second, exhibit 4. Exhibit QQ is dated May 4, 2019 and describes concerns [Grandparent] had with scheduling an IEP meeting and other issues. Apparently because of these concerns, a second meeting was held May 15, 2019.

20. Exhibit 4 documents the results of [Education Specialist]’s March 15, 2019 assessment, exhibit HH.

21. Exhibit PP is an April 29, 2019 email from [Grandparent] to [Elementary School 1] [Principal] asking [Principal] to have the School District pay for the Brain Balance program.

22. Exhibit 4 comments on [Student]’s progress or lack thereof toward the goals identified in exhibit BB. As to reading, [Student] had essentially made no progress. She was still at the beginning of first grade level. As to social/emotional wellness, [Student] had not made much progress either. Exhibit 4 does document improvement in her identifying her feelings and in identifying whether problems were big or small.

23. There was no real progress in mathematics. There was some progress in her physical motor skills; she was able to do two jumping jacks.

24. Her best area was language. She “partially met” two and “met” two of the five objectives that had been identified in exhibit BB.

25. Exhibit 4 contains new measurable goals in the areas of: 1) reading, 2) writing, 3) mathematics, 4) social/emotional wellness, 5) communication, 6) physical motor, and 7) self-determination. Again, the School District wrote that ESY was not required.

26. Exhibit YY contains graphs and other measures showing specifically how the progress would be measured in the areas of: 1) reading, 2) writing, 3) mathematics, 4) social/emotional wellness, 5) communication, 6) physical motor, and 7) self-determination.

27. A meeting was held to discuss [Student]’s IEP at exhibit 4. [Student]’s mother and [Grandparent] were present at the meeting. The meeting was contentious and emotional for [Student]’s mother. The School District documented a number of

concerns on the part of [Student]'s mother, many of which were testified to by her at the hearing:

- [[Student]'s mother's] dreams for [[Student]] include increased self-esteem, not hating school, and not hurting herself. [[Student]] is anxious and depressed and she doesn't want this for her anymore.
- [[Student]'s mother] feels like [[Student]] is a 1st grader in a 3rd grade classroom. Asking her to be on a 3rd grade level mentally and emotionally is too much for her.

...
- [[Student]'s mother] says it makes her feel sick to think about [[Student]] being in an "MI-S setting like [Elementary School 3]."
- ...
- [[Student]'s mother] wants to know what else can be done this year as gen ed. is too much for [[Student]]. [[Student]'s mother] asked, "Can we get her out of the classroom a little bit more?" ... She has an invisible disability. She says she's being bullied. Mom says that she's in harm's way and things are getting worse. ... She needs to be monitored like a kindergartener, according to [[Student]'s mother].
- [[Student]'s mother] would like 100% adult supervision for [[Student]] at all times.

28. The "MI-S setting like [Elementary School 3]," describes "multi-intensive small groups." An "MI-S" or "MI" type of education is provided in a "center program," a school that specializes in students with learning disabilities.

29. The School District rejected [Student]'s mother's request to hold [Student] back, or "retained," for another year of 3rd grade.

30. Exhibit AAA is a June 3, 2019 email from [Principal], the then principal at [Elementary School 1]. As she says in the email, she was leaving that position. She writes that she believes that [Student] should attend a center program for fourth grade. She also writes that holding her back in third grade went against "all current published educational research." Despite this, [Principal] agreed to recommend, in order to satisfy the family, that [Student] be permitted to repeat third grade in the event she were to stay at [Elementary School 1].

Fourth grade at [Elementary School 2] and the August 27, 2019 IEP—Exhibit 5

31. [Student] in fact attended a center program at [Elementary School 2] for fourth grade, the 2019-2020 school year. Her August 27, 2019 IEP is documented in exhibit 5. Her time in the general education classroom was limited to 40%. Exhibit 5 also provides for goals and objectives. The objectives are set out as increasing levels of

achievement in the areas of: 1) reading, 2) writing, 3) mathematics, 4) social/emotional wellness, 5) communication, 6) physical motor, and 7) self-determination.

32. As to the goals set out in the May 15, 2019 IEP, exhibit 4, there was little progress by August 27, 2019. [Student] had not attended summer school.

The January 29, 2020 IEP—Exhibit 6

33. Another meeting of the “IEP team” was held on this date. This meeting was also emotional for [Student]’s mother. Exhibit 6 documents comments on the goals set out in the August 27, 2019 IEP, exhibit 5.

34. [Special Education Teacher] was [Student]’s special education teacher for fourth grade. She writes that [Student] had declined in reading over the previous summer and recommended ESY for the upcoming summer break. [Special Education Teacher] also wrote that [Student]’s reading had increased from a “DRA-6” to a “DRA-10” over the fall semester, but she does not describe where this puts her in relation to her peers. In the area of writing, [Special Education Teacher] describes one objective met, and progress as to another objective.

35. [Special Education Teacher] also completed the mathematics portion of exhibit 6. She describes progress made as to two objectives and one objective met. [Special Education Teacher] documents an initial math assessment September 6, 2019, and subsequent assessments on October 18, 2019, November 21, 2019, and December 15, 2019. [Special Education Teacher] documents slow, incremental progress.

36. A [Educator 1] wrote up the section on social/emotional wellness. She documented one objective met, and progress made as to three other objectives.

37. A [Educator 2] wrote the section on communication. She wrote that two objectives were met, one objective was not met, one objective was described as “in progress (being modified),” and one objective was not commented on.

38. A [Educator 3] wrote the physical motor section. She wrote, “progress made” as to two objectives.

39. [Special Education Teacher] completed the self-determination section. She wrote that [Student] made progress in that she was able to work independently for more than ten minutes on a task she liked, but only three to five minutes on a task she did not.

40. Exhibit 6 proposed new goals in the areas of: 1) reading, 2) writing, 3) mathematics, 4) and 5) social/emotional wellness, and 6) and 7) communication.

41. Exhibit 6 at pp. 10-11 documents comments from [Student]’s mother. She describes [Principal]’s recommendation that [Student] attend a center program like [Elementary School 2] as a “perfect emergency intervention.”

42. [Student]’s mother’s comments in exhibit 6 are that [Student] is overwhelmed and extremely stressed because of school “24/7.” She reported that she chews her knuckles so much that they are scarred. A photo of the sores on [Student]’s knuckles from her compulsive chewing appears at exhibit HHHH. This photo was taken some time after [Student] finished third grade. Persons at the meeting from the school responded that this was a new phenomenon.

43. Exhibit VVV is a February 12, 2020 “support plan” to help [Student] when she picks and chews on her hands.

44. [Student]’s mother wanted her to be taught at the “foundational” level, not the “instructional” level. By this, she meant that she should be taught simple first grade type material, not fourth grade material. [Student]’s mother wanted her to receive one to one instruction.

45. [Student]’s mother reported in exhibit 6 that [Student] was being bullied. However, exhibit 6 does not describe the bullying in detail, or who was doing it. [Student]’s mother testified that [Student] was asked to escort a male student to the restroom and that that boy then exposed himself to her.

46. Exhibit 6 documents many, many complaints and concerns from [Student]’s mother and [Grandparent]. At the meeting, there was a dispute as to how many jumping jacks [Student] could do. The School District personnel said five, but [Grandparent] said that she could not complete a single one.

47. At this meeting, [Student] was approved for ESY for the following summer.

The Summit Psychological Assessment & Conclusion—Exhibit ZZZ

48. [Student]’s mother requested that the School District perform an independent evaluation of [Student] at the School District’s expense. The School District agreed and [Student]’s mother selected the evaluator. That evaluator was psychologist [Psychologist], Ph.D., and [Psychologist]’s March 12, 2020 report is exhibit ZZZ. As reflected in that report, [Psychologist] evaluated [Student] on six separate dates in January and February of 2020, including an observation of [Student] in her classroom on February 20, 2020.

49. [Psychologist] had [Student]’s special education teacher, [Special Education Teacher], complete a questionnaire. [Special Education Teacher] reported that [Student] was able to read independently and complete math problems at the first-grade level. She reported that [Student] flipped words and letters and wrote backwards. She also reported that [Student] was friendly and kind, but can become easily distracted, and that her academic performance was inconsistent. [Special Education Teacher] reported that she shows progress and regression depending on the day.

50. [Psychologist] also administered the Wechsler test on January 28, 2020. [Student]’s full-scale IQ score put her at the 3rd percentile or “very low” range. [Psychologist] made the diagnosis of “intellectual disability: mild.” She did not make a diagnosis of ADHD, but did note symptoms of this condition. [Psychologist] reported that [Student] needed supports in the areas of academic learning, independent problem-solving, organizing her thoughts, social interactions, and self-regulation.

The April 22, 2020 IEP—Exhibit 7.

51. This exhibit documents an IEP review of this date. Exhibit 7 discusses [Psychologist]’s evaluation. It also discusses [Student]’s progress on her goals, although the goals are not precisely the same as set out in exhibit 6 from January 29, 2020. Exhibit 7 at p. 6 describes progress in the areas of reading, writing, math, self-determination, and

communication. It is not really clear if there was progress in the remaining two areas: motor skills and social/emotional welfare.

52. Exhibit 7 proposed goals in the areas of: 1) reading, 2) writing, 3) mathematics, 4) social/emotional wellness, and 5) communication.

Fifth Grade—the February 2, 2021 IEP—Exhibit 112.

53. This exhibit also documents an IEP review of this date. As of this date, [Student] was in fifth grade and was receiving remote instruction during the pandemic. Her home school remained [Elementary School 2]. Exhibit 112, pp. 4 to 5 describe progress toward [Student]'s goals, although the headings reading, writing, mathematics, social/emotional wellness, and communication are not set out. Exhibit 112, p. 6 does describe partial progress toward the goal of communication. Exhibit 112, p. 7 describes the goals of motor and social/emotional, but does not make clear whether progress has been made. [Student]'s mother testified that [Student] experienced less stress from school during the remote learning caused by the pandemic.

Insufficient evidence of a violation of the IDEA or ECEA

54. The evidence supplied by the Complainant fails to establish any procedural violations of the IDEA or the ECEA or that any procedural violations impeded [Student]'s right to a FAPE.

55. The ALJ specifically finds that [Student]'s IEP was reasonably calculated to enable her to receive educational benefits.

56. [Student]'s mother wanted her held back after third grade, but the School District did not do this. As shown in [Principal]'s email, exhibit AAA, to do so would go against all current published educational research. Instead, the School District had [Student] attend the center program at [Elementary School 2].

57. To the extent that the due process complaint alleges a failure to follow the Brain Balance evaluation, no violation has been established. [Student] was only evaluated; she did not participate in the Brain Balance program. The evaluation is not in evidence. In any case, there is no evidence that the Brain Balance evaluation or program is scientifically valid. The School District was entitled to rely on its own educational expertise in formulating [Student]'s IEP.

58. The ALJ credits [Student]'s mother's testimony that [Student]'s deficits are not immediately obvious because her verbal skills are relatively good. Still, through [Education Specialist]'s March 2019 report, exhibit HH, the School District obtained new, objective measures of these deficits. It then had her attend the center program at [Elementary School 2], and placed a 40% limit on [Student]'s time in the general education classroom.

59. The School District also paid for the independent evaluation done in March of 2020 by [Psychologist], exhibit ZZZ. This evaluation produced results consistent with [Education Specialist]'s. [Psychologist] recommended support in academic learning. She did not recommend the Brain Balance program.

60. It is the case that [Student] often performed poorly and did not meet many of her goals. But the IDEA does not guarantee a particular result. It requires that the

School District prepare an IEP reasonably calculated to produce educational benefits. The School District did this. The IEP documents at exhibits BB, 4, 5 and 6, demonstrate that the School District set out an appropriately ambitious program with measurable goals. It reflected on her progress towards these goals in subsequent reviews. It performed its own testing and paid for an independent evaluation. Based on its testing and other information, it altered its IEP to better serve [Student].

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. 20 U.S.C. Section 1412(a)(1)(A).

2. The burden of proof in an administrative hearing challenging an IEP is placed on the Complainant, the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49, 58 (2005). The Complainant has 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 the two-year period prior to the complaint. 34 C.F.R. Sections 300.507(a)(2) and 300.511(e).

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 has found above and concludes here 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). An IEP must be appropriately ambitious in light of a child’s circumstances and every child should have the chance to meet challenging objectives. *Endrew F. v. Douglas County School District RE-1*, 580 U.S. ___, 137 S. Ct. 1000 (2017).

6. Disabled children are to be educated in regular education classrooms to the maximum extent possible. *L.B. ex rel. K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 976 (10th Cir. 2004).

7. In considering a motion to dismiss per C.R.C.P. 41(1)(b), the ALJ is not to determine merely whether the Complainant has shown a *prima facie* case, and is not to view the evidence in the light most favorable to her. *Teodono v. Bachman*, 158 Colo. 1, 4040 P.2d 284 (1965), *Rowe v. Bowers*, 160 Colo. 379, 417 P.2d 503 (1966). Rather, he may determine the facts and render judgment on the merits.

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

9. Any party aggrieved by the findings and this 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

March 1, 2021



MATTHEW E. NORWOOD
Administrative Law Judge

Exhibits:

The exhibits identified by the School District are numbered and those identified by the Complainant are lettered. The parties stipulated to the admission of the following exhibits: 3,7, 112, J, P, BB, GG, HH, LL, UU, YY, AAA, HHH, RRR, VVV, and ZZZ.

The Complainant also offered the following exhibits which were all admitted: LLLL, p. 2, MMM, p. 1, HHHH, p. 2, QQ, PP, TT, CC, SSS, pp. 2-5 and 13-18, and UUU.

The School District also offered the following exhibits which were all admitted: 17, pp. 3-4 and 7, 12 and V.