

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
<p>[FATHER] AND [MOTHER], parents on behalf of themselves and [Student],</p> <p>Complainants,</p> <p>vs.</p> <p>BOULDER VALLEY SCHOOL DISTRICT, RE-2,</p> <p>Respondent.</p>	▲ COURT USE ONLY ▲
	<p>CASE NUMBER:</p> <p>EA 2021-0017</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 October 11-14, 2021 before Matthew E. Norwood, Administrative Law Judge (“ALJ”). Kathryn Newell, Esq., and Cassandra Netzke, Esq., appeared on behalf of the Complainants. Robert P. Montgomery, Esq., appeared on behalf of the Respondent (“School District”).

Summary

The Complainants assert that [Student] was denied a free appropriate public education (“FAPE”). [Student] is autistic and was placed on an individualized education program (“IEP”) dated October 17, 2018, October 19, 2019, and February 1, 2021. These IEP’s were also amended over time. They were for his first, second, and third grades. Complainants agree that the February 1, 2021 IEP provided a FAPE.

The ALJ specifically focusses on the goals identified in the IEP’s, and the evidence of the School District’s review of those goals over time. As shown by this goal setting and review, the IEP’s were reasonably calculated to provide [Student] an educational benefit over the years in question. Additionally, [Student] made progress on the goals over this time period, and a FAPE was provided. No violation of the IDEA or the ECEA is 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. An IDEA due process hearing is confined to the facts two years prior to the filing of the complaint. Thirty-four C.F.R. Sections 300.507(a)(2) and 300.511(e). The April 16, 2021 date of the initial due process complaint makes the two-year cutoff April 16, 2019. Still, the ALJ will discuss facts prior to this date that are germane to facts within the relevant time period. The Complainants have amended their complaint with a new one dated July 26, 2021.

2. “[Student]” is the student in question. He was born in [Month, Year]. He and his family moved from [Country] to the School District in 2018. At that time, he spoke only [Language]. Exhibit 3.

3. Exhibit 1 contains reports from a psychologist who saw him in [Country] in February, May and July 2018. The reports have been translated into English and shared with the School District. As reflected in those reports, [Student] was diagnosed with autism spectrum disorder at two years old. As of February 2018, he showed low attention and distraction and a high level of activity and impulsive behavior. He had language difficulties and learning difficulties. The psychologist in [Country] stated that [Student] had difficulty in adjusting when moving to a new setting.

4. His parents have reported that he was unable to put words together until he was four years old. Exhibit 3.

5. As of May 2018, he also had the diagnosis of attention deficit hyperactivity disorder (“ADHD”). In [Country] he received speech therapy and occupational therapy. He was identified as having a difficulty with math. *Id.*

6. His psychologist in [Country] and many of his School District teachers comment that [Student] is happy, warm and loving.

7. [Student]’s parents engaged the services of an advocate, [Advocate], upon moving into the School District. [Advocate] helped the family find a school for [Student] and his [Siblings]. With [Advocate]’s assistance, the family chose [Elementary School] in [City]. The parents discontinued [Advocate]’s advocacy services in approximately May 2019.

8. [Elementary School] is organized into “learning communities.” First and second grades are one such community, with the teachers collaborating in teaching all of the students in the two grades.

First Grade—the 2018-2019 school year.

9. The School District determined [Student] as eligible for special education. Exhibit 3. The School District’s speech-language pathologist, [Speech Language Pathologist], worked with a [Language] interpreter to give [Student] language tasks to learn his expressive and receptive language skills. Because he spoke only [Language], standardized testing could not be completed. With the use of the interpreter, School District occupational therapist [Occupational Therapist] evaluated [Student]’s ability to complete tasks. Exhibit 3, p. 24.

10. At [Elementary School], [Student] was provided picture communication cards for such things as asking for water, or asking for a break. *Id.*, p. 28

11. On September 19, 2018, special education teacher [Special Education Teacher] evaluated [Student] with the WIAT-III (Wechsler Individual Achievement Test—Third Edition). *Id.* [Student]’s scores put him at the 73rd percentile for listening comprehension (grade 2.5), but only in the 1st percentile in math problem solving (pre-K). That day his motor skills were found to be below average or well below average. Exhibit 3.

12. Also on September 19, 2018, [Student] was evaluated using the BASC-3 (Behavior Assessment Scale of Children 3rd Edition). This test measures adaptive behavior based on input from parents and a teacher. His scores were in the “clinically significant” or “at risk” ranges. *Id.*

13. [Student] was also observed on multiple occasions in the fall of 2018 by the school psychologist [School Psychologist]. *Id.* He had a paraprofessional (“para”) in the fall of 2018.

14. [Student] engaged in aggressive acts about two and one half times per day in September 2018. *Id.*, p. 22.

The October 17, 2018 IEP—first grade

15. [Student]’s IEP team, including School District personnel, his parents, and [Advocate] established an IEP for him on this date. Exhibit 4. Such teams are described at 34 C.F.R. Section 300.23. Such IEP’s are meant to cover one year. His primary disability was identified as autism spectrum disorders (“ASD”). The test results from exhibit 3 were incorporated in the IEP document, exhibit 4.

16. Exhibit 4 contains eight measureable annual goals in the areas of reading (two goals), mathematics, social/emotional wellness (two goals), communication, and physical motor (two goals). The team deferred until January 2019 the decision as to extended school year (“ESY”) (summer school).

17. The first reading goal was:

By October 2019, [[Student]] will be able to correctly recite letter names on an un-timed, first grade level assessment, a goal of 52 letter names, uppercase and lowercase, as measured by the team in the school setting using progress monitoring and charting using a district approved Letter Naming Fluency assessment in four out of five trials.

18. The second goal was the same with the substitution of “Letter Sound Fluency assessment.”

19. The mathematics goal was:

By October 2019, [[Student]] will be able to orally count on an un-timed, first grade level assessment, a goal of 30 numbers, as measured by the team in the school setting using progress monitoring and charting using a district approved Oral Counting assessment in four out of five trials.

20. The first social/emotional wellness goal was:

[[Student]] will decrease his physical aggression from a baseline of 9.33 instances per day to zero instances per day (over 15 days of data collection) for three consecutive weeks across all settings and all people.

21. The second social emotional wellness goal was:

[[Student]] will increase his functional communication skills by being able to ask for a break, (with the absence of putting his fist up) in a classroom appropriate voice volume, and physical proximity from a baseline of 50% of time to 90% of the time across all settings for four consecutive weeks and two data collection days per week.

22. The communication goal was:

By October 2019, [[Student]] will engage in a role play activity on how to interact with peers in at least 3 social situations in a small group setting and then use the learned skills in a real life situations (i.e. lunch, recess, whole group learning) by utilizing at least 3 skills per situation with no more than 3 reminders and cues from the SLP in the general education setting.

For example: [[Student]] watches a video on how to go to recess, wait for the swings, go on the swings, and then get off the swings and give a peer a turn. He then goes to recess with the SLP to see if he can follow those steps.

23. The first physical motor goal was:

By 10/16/2019, [[Student]] will demonstrate improved bilateral coordination as demonstrated by the ability to cut within 1/4 inch of a line on complex shapes on 4/5 opportunities over a 1 month period.

24. The second physical motor goal was:

By 10/16/2019 [[Student]] will improve visual motor skills as demonstrated by the ability to legibly form 26/26 lower case letters with proper sizing, formation, and orientation to the line on 4/5 opportunities over a 1 month period.

25. The IEP provided for special education, occupational therapy, psychological or social worker services, and instruction from a speech language pathologist. He was to receive placement in the general education classroom at least 80% of the time. This provided the “least restrictive environment” (“LRE”). It also provided him with access to the general education curriculum to teach him socially appropriate interaction with peers. Exhibit 4, p. 23.

26. [Student]’s student support team (“SST”) met October 10, 2018. The team included [Student]’s first and second grade teachers, his special education teacher, and other School District providers. At the meeting, the option of an “intensive learning center”

("ILC") was discussed. Exhibit 5, p. 1. An ILC is a more restrictive educational environment at a different school for children with conditions such as autism. The instruction in an ILC may be in the RISE (Reaching Independence through Structured Environments) and the AIM (Achieving with Individualization and Modification) programs. RISE is generally for students at grade level, and AIM is generally for students below grade level. [Student]'s parents opposed placing [Student] in an ILC. They wanted him to stay at [Elementary School] with his siblings.

27. The SST met again April 10, 2019 and discussed the fact that when [Student] does not have a para ("paraprofessional") with him, there is a spike in physical aggression. Exhibit 5. The SST met once again May 2019. [Student]'s parents were in attendance. There was a discussion concerning [Student]'s need for one-on-one support, and whether an ILC would be a better fit. [Student]'s parents identified their biggest focus as his social and emotional success.

The October 9, 2019 IEP—second grade

28. The IEP team met again on this date and established an IEP for the coming school year. Exhibit X. That IEP was amended and finalized March 2, 2020. Exhibit T. It was amended again and finalized on October 6, 2020. Exhibit 6. By October 2019, [Student] had obtained limited English proficiency. He had been working with an English language specialist. Autism spectrum disorders ("ASD") was again identified as the primary disability. It was again determined that he should spend 80% of his time in the general education classroom for the same reasons as previously identified. The IEP again provided for special education, occupational therapy, psychological or social worker services, and instruction from a speech language pathologist.

29. [Student]'s general education teacher for second grade was [2nd Grade Teacher]. Because of [Elementary School]'s learning communities structure, she was familiar with him from the previous year. She reported at the meeting that [Student] had been able to thrive both academically and socially. She noted an improvement in behavior that would permit his teachers to address academics. Exhibit X, p. 4.

30. In September 2019, the School District administered certain tests to [Student]. Exhibit X. He was administered the "Fountas and Pinnel BAS" assessment to determine his reading level. He was assessed at "A," the lowest level. On the "WIST" test, he was not able to identify any sight words. Sight words are simple short words such as "and" and "the" that are to be identified by sight, not by sounding out. He was given the "i-Ready" test of reading progress, on which he was scored "K" or kindergarten level. He scored a zero on the writing test Wilson Assessment of Decoding and Encoding ("WADE"). He scored below average or well below average on the Aims Web+ Math Benchmark test.

31. The IEP document at exhibit X comments on [Student]'s progress on his goals from the October 17, 2018 IEP document, exhibit 4. As to the first and second reading goals, "recite letter names," and "recite letter sounds," exhibit X notes:

Level of progress – Not Met: [[Student]] is able to understand 3/26 letters in the WADE assessment given in September of 2019.

Level of progress- Not Met: [[Student]] is able to understand 5/26 letter sounds in the WADE assessment given in September of 2019.

32. As to the earlier mathematics goal of “orally count to 30 in an untimed first grade level assessment,” exhibit X notes:

Level of progress -- progress made: [[Student]] is still working on counting sequentially to 20. Currently, he can count to 13 independently and is practicing counting forward in order to learn how to add using Touch Math.

33. As to the earlier first social/emotional wellness goal of decreasing physical aggression, exhibit X says:

At present, the behaviors of concern previously targeted, (e.g., physical aggression, loud vocalizations/yelling at adults or peers, and damaging objects/items/throwing objects/items) have lessened in frequency and intensity as compared to last year.

34. As to the second social/emotional goal of being “able to ask for a break,” exhibit X says:

Level of progress -- progress made: [[Student]] has demonstrated he can independently ask for a break in 45% of the reported data times. In 36% of the time, [[Student]] has been able to take a break after teacher prompting.

35. As to the earlier communication goal of “role play activity on how to interact with peers,” exhibit X provides:

[[Student]] has been receiving 120 minutes of direct speech language therapy a month to address his social language skills. Therapy has focused on increasing positive social interactions with peers using role play and real time events in a small group setting and in the learning community. ... Overall, [[Student]] has made good growth over the last year,

36. As to the earlier first physical motor goal of bilateral coordination, an occupational therapist reports in exhibit X:

PROGRESS MADE - [[Student]] is able to cut simple shapes on the lines. He cuts complex shapes between 1/4" and 1/2" from the lines and struggles to control the scissors with changes in direction and small detailed portions of the picture.

37. Again, the earlier second physical motor goal was: “improved visual motor skills, as demonstrated by the ability to legibly form 26/26 lower case letters with proper sizing, formation, and orientation to the line on 4/5 opportunities over a 1 month period. Exhibit X gives a current baseline of: “[[Student]] writes 19/26 lower case letters with correct formation, placement, and size.”

38. In the parent input portion of exhibit X, [Student]'s parents identified concerns about his emotional health and social skills, as well as creating meaningful relationships with other students. They wanted him to have one real friend and to be able to truly interact with friends after school. They had concerns about his progress in all academic areas. His father was concerned about how [Student] would ultimately be able to live independently.

39. The IEP document at exhibit X set out ten new measurable goals: reading (two goals), mathematics, social/emotional wellness (two goals), communication (two goals), and physical motor (two goals). No determination was made as to ESY. Exhibit X still has the old language from the previous IEP document that the decision as to ESY would be made no later than January 31, 2019.

40. The first reading goal was:

By October 2020 [[Student]] will orally sequence the main events of a fiction story that is read to him given a progression of scaffolded prompting (visual-->verbal-->gestural--> modeling), including the introduction (characters, setting & problem), 2- 3 events and the conclusion/solution for 3/5 stories read to him across three data collection days.

41. The second reading goal was:

When presented with 10 words on the pre--primer sight word list, [[Student]] will be able to read 8/10 words with 100% accuracy in 5 non-consecutive days given a progression of scaffolded prompting When presented with all learned words on the pre--primer sight word list, [[Student]] will be able to read 8/10 words with 100% accuracy in 5 non-consecutive days given a progression of scaffolded prompting

42. The mathematics goal was:

By October of 2020, when given an assessment focused on number sense to 30 (counting, adding and subtracting) [[Student]] will be able to orally or physically write the correct answer in 8/10 opportunities in 5 non-consecutive days ... given a progression of scaffolded prompting

43. The first social/emotional wellness goal was:

By October 2020, [[Student]] will decrease his physical aggression toward people or objects from a baseline of 3 instances per day to zero instances per day (over 5 days of data collection) across all settings and all people. Baseline: 3 instances per day.

44. The second social/emotional wellness goal was:

By October 2020, [[Student]] will increase his functional communication skills by being able to ask for a break, in a classroom appropriate voice volume, and physical proximity

from a baseline of 45% of the time to 75% of the time across all settings for four consecutive weeks.

45. The first communication goal was:

By October 2020, [[Student]] will increase his ability to effectively engage in social interactions by completing the following steps, given 1 or fewer cues/prompts from the therapist, in 60% of structured social interactions in a small group setting over 3 data collection days as measured by the speech-language pathologist, general education teachers, and other service providers: 1. Initiate or respond to a topic initiating statement using an appropriate comment or question. 2. Provide an additional comment, or ask his peer a follow-up question to information shared making sure to match the topic and mood. 3. Terminate/shift the topic with an appropriate comment/question.

46. The second communication goal was:

By October 2020, [[Student]] will use the fluency enhancing techniques of easy speech and easy onset at the phrase level, given one therapist prompt as needed, in 70% of drilled opportunities as measured by the speech language pathologist.

47. The first physical motor goal was:

By 10/2020, [[Student]] will improve bilateral skills and motor planning to independently cut simple pictures with external parts (i.e. house with chimney or dog with tail) within 1/8" of the line across 4/5 data days, as measured by teacher and therapist observation and review of work samples.

48. The second physical motor goal was:

By 10/2020 [[Student]] will improve fine motor and visual motor skills to writing a 3-5 word sentence without a model, on 3- lined or 4-lined paper, with 80% accuracy to formation, line placement, and letter size across 4/5 data days as measured by teacher and therapist observation and review of written work.

Covid-19

49. The pandemic started in mid-March 2020. The School District was required to conduct educational activities remotely; it had no choice. [Student] began on-line learning which lasted until the end of that school year. For the first seven weeks of the 2020-2021 school year, he remained on-line. He resumed in-person learning October 20, 2020 for four weeks, before transitioning back to on-line. Exhibit EEE.

50. The School District developed a plan to reintroduce students to in-person learning as soon as health conditions improved and it was permitted to do so. Exhibit 35.

51. Over the summer of 2020, [Student]'s parents hired a private tutor, [Private Tutor], to help him with his education. [Private Tutor] was critical of the School District's education of [Student]. She is not licensed as a teacher or principal in Colorado. She has never been a special education teacher, and has performed no formal tests of [Student]. She has not observed him in the classroom.

52. The IEP was modified September 18, 2020 to change the "service delivery statement" to remote learning. Exhibit V.

53. That same month, [Student]'s parents had a discussion with [Special Education Director], the School District's director of special education, about their concerns with [Student]'s ability to do on-line learning. [Special Education Director] explained that if [Student] were to enter an ILC, in person learning was allowed under the School District's Covid restrictions. The parents rejected this.

54. [Special Education Director] also suggested that [Student] be reevaluated. Such reevaluation was initiated in November 2020. Exhibit 16. The results of the evaluation appear at exhibit 18. They include a WIAT-4 test administered December 8, 2020 (a new version of the WIAT-3 described above), an Adaptive Behavior Assessment System-Third Edition (ABAS-3), evaluated by school psychologist [School Psychologist 2] January 4, 2021, and a Behavior Assessment System for Children-Second Edition (BASC-3), also evaluated by [School Psychologist 2] January 4, 2021.

55. As of October 8, 2020, the Complainants' attorney had requested that the annual review of the IEP be postponed. Exhibit TT.

56. On January 19, 2021, School District personnel and [Student]'s parents met to discuss a proposed new IEP. Exhibit ZZ, exhibit CCC, pp. 31-34. Also present were counsel for the School District and the parents. Counsel for the parents is identified as "Katie," and is likely Ms. Newell. Counsel for the School District is identified as "Kathleen." Counsel for the parents asked whether [Student]'s disability could be changed from "autism spectrum disorders" ("ASD") to "specific learning disability" ("SLD"). However, she agreed that ASD was appropriate for the present time. She was critical that [Student] had had little academic progress because, according to her, the school had been too focused on behaviors. However, she also stated that any delays were not due to lack of instruction. *Id.*

57. As is also shown on exhibit ZZ, the parents, School District personnel, and counsel for both parties met again February 1, 2020. Counsel for the parents stated that the parents believe that [Student] does not have an intellectual disability, but a learning disability. Counsel stated that the IEP should reflect either ASD or SLD. The resource teacher stated that the effect of any SLD was reflected in the new IEP.

58. The notes from the meeting appear to indicate that School District personnel recommended an ILC and the RISE program for [Student] and that [Student]'s parents rejected an ILC placement. [Student]'s mother rejected RISE because she understood it to be designed for children at grade level, and [Student] was not at this level. Testimony from the School District at hearing was that the RISE program would be appropriate for [Student], even though he was not at grade level. In fact, when [Student] did transition to an ILC program, his progress improved.

59. [Student] performed better in the ILC program at [Elementary School 2] than he had at [Elementary School]. He is less frustrated and his behavior is better. As shown on exhibit HHH, his “i-Ready” reading score of May 2021, he achieved a 30 point increase from his winter score. He was able to identify certain sight words with 100% accuracy and was able to sound out certain words. Again, the Complainants agree that the February 1, 2021 IEP provided a FAPE.

The February 1, 2021 IEP—third grade

60. At the February 1, 2021 meeting, the IEP team established an IEP for the remainder of the 2020-2021 school year. Exhibit CCC. At this meeting, the team determined to transfer [Student] from [Elementary School] to [Elementary School 2], an ILC- RISE program. By this time, instruction was being delivered in a “hybrid” form: two days in person and two days remotely. The ILC program at [Elementary School 2] was a *more* restrictive environment than what [Student] experienced at [Elementary School].

61. The IEP lists [Student]’s primary disability as “Autism Spectrum Disorders.” The secondary optional disability was changed from “Other Health Impairment: Speech or Language Impairment” to “Other Health Impairment: Specific Learning Disability, Speech or Language Impairment.”

62. Exhibit CCC documents progress, or lack thereof, on the previous goals from exhibit X, T, and 6, all titled the October 19, 2019 IEP. As to the first reading goal of “orally sequence the main events of a fiction story,” exhibit CCC provides:

Progress: Goal Met. When read aloud a story, [[Student]] can successfully orally sequence the main events of a fiction story. When given 5 stories, [[Student]] successfully stated the main events and conclusion in 3 out of 5 stories. [[Student]] benefits from explicit modeling of skills from the teacher following the "I Do", "We Do", "You Do" procedure.

63. As to the second reading goal of orally identifying words from a pre-primer sight word list, exhibit CCC provides:

Progress: Goal not met. ... When reading sight words or high frequency words, [[Student]] on average reads 2 out of 10 reviewed words correctly. [[Student]] practices reading and writing the same sight words for several weeks before new words are introduced. [[Student]] has difficulty retaining skills that he has learned in previous weeks and benefits from repeated teachings in order to demonstrate mastery to partial mastery in his reading skills.

64. Separate from the goals in the previous IEP, [Student]’s overall reading performance improved from July 2019 to March 2021. Exhibit WW.

65. As to the earlier mathematics goal of orally or physically writing the correct answer in 8/10 opportunities, exhibit CCC says:

Progress: Goal Met. [[Student]] works in a math small group everyday for 20 minutes. [[Student]] has made steady growth

in his math abilities. [[Student]] can successfully identify numbers 1-30 in number form and when represented on a ten frame. [[Student]] can successfully answer questions involving counting and adding with numbers 1-30. He demonstrates understandings of subtraction with numbers 1-10. ... [[Student]] has memorized his partners to 10 and can easily recall every number combination that equals 10. [[Student]] can successfully sequence numbers 1-30 and responds well to using a number line. [[Student]] seems to enjoy math and continues to work hard.

66. As to the earlier first social/emotional wellness goal of decreasing physical aggression toward people or objects, exhibit CCC states:

Progress: Goal not met. [[Student]] continues to impulsively approach his peers in an unsafe way (kicking them, hitting them with a nearby classroom object, pulling chairs out from under them, pushing students). On average, [[Student]] consistently demonstrates 6-8 unsafe behaviors each day. When prompted to apologize and restore his actions, [[Student]] is compliant. These instances of physical aggression towards peers are unprovoked and oftentimes very quick, random and sporadic.

67. As to the second social/emotional goal of being able to ask for a break, exhibit CCC describes [Student]'s sessions with school psychologist [School Psychologist 2]:

[[Student]] is able to identify situations that may lead to big emotions and can articulate what strategies to help calm down, primarily deep breaths. We have also started work on how to appropriately ask for a break when you feel big emotions and different types of break activities to help you regulate. Although he can appropriately request a break during role plays in sessions, he requires additional support selecting appropriate break activities.

68. As to the previous first communication goal of increasing [Student]'s "ability to effectively engage in social interactions," exhibit CCC states:

In regards to social skills and interpersonal interactions, [[Student]] has a strong interest in interacting with others. During sessions with prompting he is able to provide socially appropriate greetings and initial questions such as, "how are you?" He will continue a conversation by responding to questions but needs support to engage in reciprocal interactions.

69. As to this same previous goal, exhibit CCC also describes a report from a speech language pathologist:

Understands social cues of others, shows flexibility, thinking about thinking, and perspective taking. Generalization of skills is a need, helping him apply skills in general education setting.

70. As to the second communication goal of using fluency enhancing techniques, there is no specific discussion of progress or lack thereof. Exhibit CCC does contain a new goal in this same area, and sets out a previous "baseline" of: "At the phrase level: easy speech= 75%, easy onset= 75%, phrasing/chunking= 100%." The ALJ understands this baseline to be his progress as to that goal as of February 1, 2021.

71. As to the earlier physical motor goal of improving bilateral skills and motor planning, there is again no specific discussion of progress or lack thereof. But there is also another "baseline" of: "Cuts simple curves at an average of 1/4" away from the line, with cues for hand position and motor planning." Again, the "baseline" represent his current level of performance.

72. As to the earlier physical motor goal of improving fine motor and visual motor skills, there is again no specific discussion of progress or lack thereof. Again there is a "baseline" of: "Copies single sentences on graph paper with 95% accuracy, inconsistently."

73. In addition to the specific comments on the goals in exhibit CCC, the School District kept periodic data of how he was progressing. Exhibit Y contains reports on these goals as of November 1, 2019, February 13, 2020, and May 21, 2020.

74. Exhibit CCC contains the results from a WIAT-4 test of [Student] performed December 8, 2020. See also exhibit 18. The test showed him as below average in reading, significantly below average in certain elements of reading, below average in mathematics, significantly below average in written expression, below average in oral language, average in listening comprehension, and below average in oral expression.

75. The IEP document, exhibit CCC, set out twelve new measureable goals: reading, mathematics (two goals), writing, social/emotional wellness (three goals), communication (three goals), and physical motor (two goals).

76. It is clear, and the ALJ specifically finds, that as reflected in the October 18, 2018, October 19, 2019, and February 1, 2021 IEP documents, the School District provided a FAPE to [Student]. The IEP's were reasonably calculated to enable him to receive educational benefits. They were tailored to [Student]'s individual needs based on his disabilities. The goals were thoughtful and appropriately ambitious. But grade level advancement was not a reasonable prospect for [Student].

77. The School District paid attention to the previous goals in the October 18, 2018 and October 19, 2019 IEP's. The documents demonstrate that the IEP team worked toward the goals over time and appropriately monitored progress. In those instances when [Student] did not meet the goal, the team frankly acknowledged this; there was no attempt to present an overly rosy picture. Most importantly, [Student] made real substantive progress toward the goals, as is shown. This progress was more than *de minimis*. Complainants do not really challenge the School District's determinations of progress made or goals met.

78. At the February 1, 2021 meeting, the IEP team determined that [Student] did not require an unreasonably long period of time to re-learn previously learned skills after a break. Consequently, ESY services were not described in the IEP. [Student]'s parents and their attorney proposed that the determination of whether to offer ESY services would be revised after the collection of additional progress data to determine if there were, in fact, problems with regression after breaks. Exhibit CCC, p. 22.

Findings of Fact Regarding Specific Issues Raised by Complainants

79. The Complainants have supplied insufficient evidence of any procedural violations on the part of the School District that impeded [Student]'s right to a FAPE, that significantly impeded the parents' opportunity to participate in the decision-making process, or that caused a deprivation to an educational benefit. Such a showing is required in order show a denial of a FAPE. Thirty-four C.F.R. Section 300.513(a)(2).

A. Specific Learning Disability ("SLD")

80. The Complainants take issue with the fact that the IEP documents in this case identify [Student] as having the diagnosis of ASD and not SLD. These two diagnoses are described at Sections 2.08(1)(a) and 2.08(8)(a), 1 CCR 301-8. Whether categorized as ASD or SLD, such children are "children with disabilities." *Id.* Complainants concede that the February 1, 2021 IEP document provided FAPE. That document identifies ASD as the primary disability. Exhibit CCC, p. 1 of 43. SLD is identified as an optional, secondary disability along with "speech language impairment." *Id.*

81. But this criticism is an academic one. Complainants have presented no substantive evidence that making such an SLD determination would have had any practical significance for the programming of [Student]'s education. *Fort Osage R-1 Sch. Dist. v. Sims ex rel. B.S.*, 641 F.3d 996, 1004 (8th Cir. 2011) (parents failed to show that lack of an autism diagnosis compromised their daughter's right to an appropriate education). As found, [Student]'s IEP's were tailored to his individual needs based on his disabilities and reasonably calculated to provide him an educational benefit. In addition, he made progress on the goals identified.

82. Furthermore, [Student] presents a complicated picture. There is no dispute that he is correctly identified as autistic, and that this condition plays a major role in his academic difficulties. There is also no dispute that he is correctly diagnosed with ADHD. According to the school psychologist [School Psychologist 2], autism is the "primary driver" of [Student]'s academic delays and his primary disability. [Student] initially came to the School District with essentially no knowledge of English. Thirty-four C.F.R. Sections 300.309(a)(1), (2) and (3) provide that the IEP team may determine that a child has an SLD upon failure to achieve grade level standards if such failure is not primarily the result of other factors, including limited English proficiency. See also the Rule 2.08(8)(a), 1 CCR 301-8 that has similar exceptions. In light of [Student]'s complicated presentation, second guessing the School District on the issue of SLD determination is unjustified.

83. The Complainants are also critical of the School District for failing to order a reevaluation of [Student] as early as April 2019. Such reevaluations are described at

34 C.F.R. Section 300.303(a). The School District had performed a comprehensive evaluation of [Student], in his native language, as of September 2018. Exhibit 3. School districts are afforded a reasonable time to monitor progress before exploring further evaluation. *Ridley Sch. Dist. v. M.R.*, 680 F.3d 260, 273 (3d Cir. 2012). As stated, the School District did order a reevaluation in November of 2020. Exhibit 16. There was no violation of the IDEA or the ECEA in this respect.

84. Complainants rely on *Timothy O. v. Paso Robles Unified Sch. Dist.*, 822 F.3d 1105 (9th Cir. 2016). But that case is inapplicable to the facts here. In *Paso Robles*, the school district failed to evaluate for autism and relied on the informal observations of a staff member who opined that the child did not exhibit autistic behavior. Boulder Valley School District had identified [Student] as having autism from the beginning.

B. Extended School Year (“ESY”)

85. ESY is indicated when “the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.” *Johnson v. Indep. Sch. Dist. No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990), quoting *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir. 1986). The Colorado Department of Education Extended School Year Services Guidance Manual provides that ESY services are to prevent severe regression. Exhibit 37, p. 8. They are not “compensatory education.” *Id.*

86. The Complainants assert in general that [Student]’s learning disabilities and his failure to meet academic goals required ESY. But the evidence fails to establish the necessary *regression* required for ESY. Complainants state in their own closing statement, p. 30, that “the data regarding regression/recoupment is inconclusive.” Exhibit EEE is from [Special Education Teacher 2], a School District special education teacher for [Student]. It provides that there is no evidence of such regression. As reflected in that document, the School District did provide some “compensatory services” over the summer of 2021. See also exhibit 26. These were designed to remedy limited progress made in reading and mathematics because of [Student]’s difficulties with on-line learning. They were not provided to avoid regression over that summer.

87. The Complainants argue that the School District should have provided ESY over the summers of 2019, 2020, and 2021. Complainants’ closing statement at 27. Why 2021 is included is not clear in that Complainants agree that the February 1, 2021 IEP provided a FAPE. And that IEP states that [Student] “did not require an unreasonably long period of time to relearn previously learned skills.” Exhibit CCC, p. 22.

88. Also, no decision as to ESY over the summer of 2019 was made in the October 17, 2018 IEP, exhibit 4. As described above, the complaint in this case cannot encompass decisions prior to April 2019. There is insufficient evidence that the School District made an erroneous determination as to ESY in the few months from April 2019 to the beginning of the summer break that same year.

89. As to the summer of 2020, public health restrictions required that there be no in-person instruction over that summer. [Student]’s parents were opposed to remote instruction and, as indicated in their testimony, would not have accepted such instruction for [Student]. Any offer of ESY for that summer would have been rejected.

90. There is insufficient evidence of any failure on the part of the School District to include the parents in ESY decisions. There is insufficient evidence that the School District made such decisions unilaterally without involving the parents.

C. On-Line Learning

91. The Complainants assert that on-line learning deprived [Student] of a FAPE. They have not, however, provided sufficient evidence of what the School District was to do differently in light of official requirements that teaching be remote. The School District offered [Student]'s parents the option of an ILC where in person learning was available sooner. The parents initially rejected this. No doubt on-line learning was difficult for [Student], as it was for many disabled and non-disabled students. But, as found, the October 9, 2019 IEP, the IEP covering the period of remote learning, was reasonably calculated to enable [Student] to obtain educational benefits. As shown in exhibit CCC, [Student] made progress in that IEP.

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 Complainant, 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. The issues to be addressed at a due process hearing are limited to the two-year period prior to the complaint. Thirty-four 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. 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. ___, 137 S. Ct. 988, 992 (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.*

at 1000. Barely more than *de minimis* progress is not satisfactory under the IDEA. *Id.* at 1000-1001.

6. As stated, 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 the child's 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. The ALJ concludes that no violation of the IDEA or ECEA has been established. No compensatory services or other remedies are ordered.

DONE AND SIGNED

November 22, 2021



MATTHEW E. NORWOOD
Administrative Law Judge

Exhibits:

The exhibits identified by the Complainants are numbered, and those identified by the School District are lettered. In an October 1, 2021 stipulation, the parties agreed to the admission as evidence of a number of exhibits. Refer to that stipulation for a complete list of those exhibits.

In addition, the Complainants moved the admission of the following exhibits, and they were admitted: Exhibit 30, pp. 1-21; exhibit 20, exhibit 29, pp. 144-145; exhibit 15, p. 2; exhibit 21, pp. 1-2; exhibit 19, exhibit 37; exhibit 29, pp. 69-70, 81-85, 129-130, 165-166; exhibit 22, exhibit 2, p. 1; exhibit 11, p. 6; exhibit 1, exhibit 2, p. 3, exhibit 38, exhibit 11, p. 8; exhibit 12pp. 3-4, 11-13, 16-18; exhibit 21, p. 4, exhibit 17, exhibit 29, p. 168.

The School District also moved the admission of the following exhibits, and they were admitted: exhibit 12, pp. 5-6; exhibit 11, p.1, pp. 4-5; exhibit 12, pp. 7-8, exhibit DDDDD; exhibit AAAA; exhibit BBBB; exhibit EEEE; exhibit KKKK; exhibit 27; exhibit HHHHH; exhibit IIII; exhibit MMMM; exhibit NNNN; exhibit AAAAA; exhibit BBBBB; exhibit EEEEE.