

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 1525 Sherman Street, 4 th Floor, Denver, Colorado 80203	
[FATHER] and [MOTHER] on behalf of [STUDENT], a minor; Complainants vs. PIKES PEAK BOCES, for the [SCHOOL DISTRICT]; Respondent.	▲ COURT USE ONLY ▲
	CASE NUMBER: EA 20140020
DECISION	

This decision follows a hearing per the Individuals With Disabilities Education Act (“IDEA”) as described in 20 U.S.C. § 1415 and 34 C.F.R. § 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. A hearing was held December 10 to 12, 2014 at the Office of Administrative Courts (“OAC”) before Matthew E. Norwood, Administrative Law Judge (“ALJ”). Jack D. Robinson, Esq. appeared on behalf of the Complainants and Kathleen Sullivan, Esq. appeared on behalf of the Respondent. “BOCES” stands for “board of cooperative services,” and is defined at Section 22-5-103 (2), C.R.S. The [School District] and the BOCES will collectively be referred to as the “School District.”

Summary

The IDEA and the ECEA require that children with disabilities be educated to the maximum extent appropriate with non-disabled children. This concept is referred to as “mainstreaming” or “least restrictive environment,” often abbreviated as “LRE.” “[Student],” the nickname of the child in question, is autistic and is mostly non-verbal. The School District sought to remove him from his rural school in [City], Colorado, where he had been attending for many years. The School District believed he should be placed in a school for autistic children in Colorado Springs called “CoLA” for “Communication and Language Acquisition.” In [Rural School], [Student] was educated along with non-disabled students for part of the day. This would not occur at CoLA.

Prior to the School District’s decision, [Student] had been making satisfactory progress at the [Rural School]. [Student]’s parents objected to the School District’s action and submitted a due process complaint to the Colorado Department of Education. The hearing followed. In the meantime, [Student] has continued at his [Rural School] as a high school freshman.

Because [Student] is educated with non-disabled students in [Rural School], but would not be at CoLA, [Rural School] is [Student]’s least restrictive environment. Additionally, because [Student] can be educated satisfactorily at [Rural School], the School District’s action is prohibited by the IDEA and the ECEA. [Student] shall remain at the [Rural School].

In light of this determination, the ALJ has not resolved the Complainants’ allegations of procedural violations of the IDEA and ECEA by the School District.

Findings of Fact

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

1. [Student] is [age], born in [month, year]. [] He is autistic and mostly communicates through a communication device called a “Vantage Lite.” He also speaks some words.

2. [Rural School] is about [] miles [] of Colorado Springs. [Student]’s mother grew up in the area and she has family nearby.

3. The school at [Rural School] includes a preschool and grades kindergarten through twelve. The middle school and the high school are in the same building. [Student] has attended the school since preschool when he was three years old. [Student]’s sister attends the school but does not see him much during the day.

4. [Student] is almost always happy and well behaved, but will have an occasional melt down. [Student]’s family’s activities are centered on sports. His family enjoys attending sporting events, particularly where [Student]’s sister is competing. His parents plan to have him live with them after high school.

5. “CoLA” is at the “School of Excellence” in Colorado Springs. The CoLA program is designed for students with autism who are non-verbal. If [Student] were to attend CoLA, all his classmates would be autistic. At CoLA, the ratio of teachers to students is 1 to 1.5.

6. [Speech Language Pathologist], a speech language pathologist, wrote a report concerning [Student] based on a consult of February 2, 2012. Exhibit 16. She reported that [Student] was using his communication device to make requests, that he was making more verbal requests and that his verbal repertoire was increasing.

7. But she also wrote that his speech alone was insufficient to meet his daily communication needs, that his speech was imprecise and that understanding him depended on the context. Persons familiar with [Student] could understand him better than those less familiar, she wrote.

8. In March 2012 [Rural School] personnel had psychologist [Psychologist], Ph.D. consult on [Student]’s education. As a result, school personnel determined to change [Student]’s “programming” from “ABLLS” (“Assessment of Basic Language and

Learning Skills”) to “STAR” (Strategies for Teaching Based on Autism Research”) and “FACTER” (“Functional Assessment and Curriculum for Teaching Everyday Routines”). STAR and FACTER were implemented to build skills necessary to support his independence. In May 2013, a decision was made to change to “LINKS.” This program is designed to help a disabled student function in the world better.

9. In a March 7, 2012 report, exhibit 17, [Psychologist] wrote that [Student] should be included in activities with non-disabled peers, but that his progress in these activities should be monitored.

The May 2013 Triennial Review

10. In May 2013 the School District performed a triennial review of [Student]’s progress and prepared exhibit 35 in relation to that review. As reflected on exhibit 35, p. 636, [Student]’s ability with his communication device was improving. Also, he was demonstrating more adaptive behaviors such as listening, responding, transitioning from one activity to another and engaging with peers when prompted. Furthermore, he was beginning to identify and express simple feelings and use some self-regulation techniques. [Student] is described as engaging and social with a great sense of humor, but becoming physically aggressive when denied desired food, a desired item or when asked to perform an un-preferred task.

The August 12, 2013 IEP Team Meeting

11. An IEP is an “individualized education program” defined at 34 C.F.R. § 300.22. [Student]’s “IEP team” met on this date. An IEP team is described at 34 C.F.R. § 300.23. In [Student]’s case, the IEP team consisted of special education teachers as well as other School District personnel and [Student]’s father. The persons attending these meetings varied over time. [Rural School] Middle and High School Principal [Principal] often attended.

12. On August 12, 2013 the IEP team met. As reflected in the notes of that meeting, exhibit 36, p. 901, [Student] suffered a seizure over the previous summer break. He had since had no seizures after starting medication. The team discussed what to do in case [Student] seized at school.

13. [Student] did suffer a seizure for approximately two minutes in October 2013.

The September 25, 2013 IEP Team Meeting

14. The IEP team had a progress meeting on this date. The group set as a goal having [Student] initiate contact with his communication device without being prompted to do so.

15. School District psychologist [School Psychologist] prepared a report dated September 18, 2013 reporting that [Student] had mastered 26 targets, exhibit 39.

The October 23, 2013 Behavioral Incident

16. On this date [Student] acted up at school. He started crying and wailing and repeatedly bit himself on his hands and feet, leaving marks on both. He could not be calmed for approximately 25 minutes. [Student] attempted to strike [Adult], with his hands and feet. He did kick [Adult] in the leg and pinched and grabbed other adults in the room. Many adults were brought to the room, including [Principal].

The November 20, 2013 IEP Team Meeting

17. Notes of this meeting state that [Student] was doing very well, and the ALJ so finds. Exhibit 46, p. 989. [Student]’s father asked that [Psychologist] be brought in for a day of consultation to check on [Student]’s education.

18. On December 6, 2013, [Assistant Director], the Assistant Special Education Director of Pikes Peak BOCES, sent an email to [Student]’s father (exhibit E) saying that [School Psychologist] was the School District’s autism specialist working with [Student]. The email essentially denied the request for a consult from [Psychologist], saying that [School Psychologist] would request a consult if she thought one was necessary. [Assistant Director][Assistant Director] went on to state that a consult was not necessary: “[Student] is progressing well on his goals and objectives and is currently not showing a lack of response to the variety of interventions the team has in place.” The ALJ finds that [Student] was indeed progressing well as described by [Assistant Director].

19. [Student]’s father emailed back January 13, 2014 stating that he understood at the November 20 meeting that [Assistant Director] would consult with others about whether [Psychologist] would be brought in. He said he did not want to have to wait until the upcoming January 15, 2014 meeting to have this issue resolved.

The January 15, 2014 IEP Team Meeting

20. The IEP team met again on this date and [Student]’s father again expressed that he would like [Psychologist] to give her okay to [Student]’s education. [School Psychologist] stated that she employed “fidelity checks” to make sure [Student] was making progress. She said that she had been trained extensively by [Psychologist]. Exhibit 47, p. 993.

21. [School Psychologist] then asked [Psychologist] to email [Student]’s father, and [Psychologist] did so January 21, 2014, exhibit E. The email stated that [Psychologist] and others felt comfortable with [School Psychologist] supervising the staff handling [Student]’s programming.

The January 20, 2014 Behavioral Incident and the January 24, 2014 IEP Team Meeting

22. On January 20, 2014 [Student] became enraged and physically aggressive with his after-school caregiver or caregivers. Exhibit 48, p. 998. [Student]’s parents decided not to take him to that after-school location any longer. Following this incident, [Student]’s father quit his job and became the caretaker for [Student] after school.

23. In response to this incident, the IEP team met January 24, 2014. At that meeting, [Principal] asked [Student]’s father to identify why he believed [Rural School] was appropriate for [Student], as opposed to CoLA. [Student]’s father agreed to visit the CoLA program with [Rural School] special education teacher [Special Education Teacher], and did so.

24. At that visit, [Student]’s father did not like CoLA; he observed other children acting out and the place felt like an institution to him.

25. At hearing, [Student]’s father testified that he is concerned that [Student] would mimic the undesirable behaviors of fellow students at CoLA. The family has worked hard over the years to reduce these behaviors.

26. [Principal] testified that [Student] may be educated safely at the [Rural School]. The ALJ so finds. There is no evidence that [Student]’s participation in regular education activities disturbed those activities.

The April 24, 2014 IEP Team Meeting

27. The IEP team met again on this date. School District personnel expressed their opinions that [Student] would be better served at CoLA.

28. At the meeting, [Student]’s father noticed on the sign-in sheet that there was a line for two principals, one from [Rural School] and one from CoLA. He felt ambushed in that he was not aware that the meeting would discuss [Student]’s transfer to CoLA. He expressed his opposition to this and, after a time, left the meeting to attend a previously scheduled track practice. The representatives from CoLA had not yet arrived when the meeting first started. They arrived shortly thereafter and were there at the same time as [Student]’s father.

29. After [Student]’s father had left, the remaining members of the IEP team determined that [Student] should be sent to CoLA for high school starting in August 2014. They wrote that he needs to be in a program “designed specifically to meet the needs of students with the level of communication needs that [Student] displays.” Exhibit 50, p. 1032.

30. Exhibit 50, p. 1011 is the notice sent to [Student]’s parents about the April 24, 2014 meeting. The notice does not discuss a possible transfer of [Student] to CoLA. The parents also had not been given advanced warning that the School District would be seeking consent for further evaluations. Nor had the School District given the parents any prior indication that they were dissatisfied by [Student]’s progress at [Rural School].

31. On April 25, 2014 [Special Education Teacher] gave [Student]’s father a form to consent to an evaluation of [Student]. Exhibit 50, p. 1040. The form states that the IEP team would find it beneficial to have updated assessments, the last ones having been done in 2008. [Student]’s father stated that he would not sign the form until he had an opportunity to confer with others.

Exhibit 50’s Summary of [Student]’s Progress

32. School District personnel prepared Exhibit 50, pp. 1012 to 1042 for the April 24, 2014 meeting. It contains a summary of [Student]'s educational progress up to that time. As reflected in that summary, [Student]'s progress had been satisfactory.

33. As of April 2014, [Student] was in general education classes "less than" 40% of the time. If his behavior was good, he would spend a maximum of three hours and 45 minutes per day with non-disabled students. When he was not with non-disabled students, he was the only student in the special education room.

34. His general education classes were band, where he played the drum, art and physical education. [Student] particularly enjoyed physical education and he got along well with the non-disabled students there. [Student] also had a time set aside to go to the library with non-disabled students.

35. [Student] ate his breakfast and lunch in the cafeteria with non-disabled students. At lunch, [Student] was often distracted by the noise and movement of the cafeteria. But he was able to make genuine eye contact with one or two non-disabled peers 30% of the time when saying "hi" or "bye-bye."

36. [Student] had a 1 on 1 support staff paraprofessional assigned to him who monitored him throughout the day, including his use of the restroom. [Student] was able to use the restroom independently.

37. [Student] also attended track and field meets where he threw the shot put and ran in foot races. His father and his paraprofessional would run next to him. He rode the school bus to these meets.

38. [Rural School] had instituted a system of "A" and "B" times for [Student]. At "A" times he would be challenged more. "B" times were those where [Student] was less receptive and so he was not pushed. [Student] was kept back from band once in March and once in April 2014 due to behavioral agitation.

39. Exhibit 50 at p. 1018 states that behavioral incidents such as that of October 23, 2013 "have decreased significantly," and the ALJ so finds.

40. Exhibit 50 at p. 1019 discusses [Student]'s "LINKS Adjusted Independence Scores." This system monitors the extent to which [Student] had completed tasks identified for him as well as how much prompting or "cueing" by an adult was required. The tasks were broken down into steps. As reflected in his scores, [Student] made progress in the following areas:

a. In eating lunch, he made good progress since August 2013. Because of this good progress, steps were removed from his lunchtime routine to make it more challenging.

b. [Student] made progress in "purchasing an item at the school store" and his steps and "cueing" were reduced.

c. He made progress in using the library and cues were reduced.

d. He made “some progress” in “recreational activity” and his cues were reduced.

e. [Student]’s most difficult task was “socializing with friends” and he made little progress in this area.

f. To accommodate his progress in “transitioning between multiple locations,” his cues in this routine were made more advanced.

g. In the “changing activities routine,” “playing a game” and “crossing the street,” [Student] made progress and the routines were made more challenging for him. He had not yet transitioned to playing games with a peer.

41. In addition to the LINKS Adjusted Independence Scores, exhibit 50, p. 1019 identifies 100 “discrete trial” targets in the areas of functional communication, functional academics and life skills. Between September 9, 2013 and April 11, 2014 [Student] had mastered either 90 or 91 of these 100 targets. (Compare exhibit 49 and exhibit 50, p. 1019.)

42. [Student] had a tendency to answer “no” to any question, whether or not “no” was the correct answer. His speech therapist worked with [Student] on answering correctly. As of April 2014, [Student] had improved in this area. Exhibit 50, p. 1020.

The May 20, 2014 IEP Team Meeting

43. [Student]’s father and members of the IEP team met again on this date. Exhibit 53. Representatives of “The Resource Exchange” (“TRE”) also attended at [Student]’s father’s request. [Student]’s father expressed his concern that the bus ride to CoLA would take 40 minutes, whereas it took only three minutes to get him to school at that time. The ALJ finds that these time estimates are accurate.

44. [Student]’s father was also concerned that there would be inclement weather that would close down [the highway between home] and CoLA in Colorado Springs. When he had worked in Colorado Springs, [Student]’s father had been prevented from getting home due to bad weather on a number of occasions and had to stay at a hotel. [Student]’s father believes that [Student] would become very upset if he were required to stay overnight away from home.

45. [Student]’s father also expressed concerns over what would happen if [Student] had a seizure on the bus.

46. At the meeting, [Assistant Director] stated that there were an insufficient amount of IEP team members to change the decision to send [Student] to CoLA. [Student]’s father was told that the options were to meet again or for him to file a due process complaint.

47. Thereafter [Student]’s mother filed such a complaint with the Colorado Department of Education. [Student] has remained at the [Rural School] school and has started his freshman year in high school.

48. At the May 20 meeting, [Assistant Director] acknowledged that [Student] had made progress, but stated that it was as a result of his 1 on 1 instruction and the progress that had been made was not “generalizable,” *i.e.* it would not help him in other situations. She stated that the goal was to work on [Student]’s communication skills with other students like him. [Student]’s father said that the family was satisfied with [Student]’s progress even though it was slow.

49. At the hearing, multiple witnesses from the School District testified that [Student] would need to attend CoLA to make real progress on communication and socialization to succeed in post-secondary life. However, [Speech Language Pathologist], the speech pathologist, testified that [Student]’s communication was more likely to improve through interaction with non-disabled children.

Least Restrictive Environment

50. The ALJ specifically finds that the [Rural School] is less restrictive than CoLA as this term is described at 20 U.S.C. § 1412(a)(5)(A), 34 C.F.R. § 300.114 and 2220-R-2.28, 1 CCR 301-8. This is the case in that at CoLA, [Student] would not be educated to the maximum extent appropriate with children who are not disabled. As of April 2014 he spent “less than 40%” of his time and as much as three hours and 45 minutes per day with non-disabled students.

51. The ALJ also specifically finds that [Student]’s education in an environment that includes regular education classes can be achieved satisfactorily at [Rural School]. The educational benefit he received at [Rural School] was well in excess of merely “*de minimis*.” This is demonstrated by the above findings of fact, which are restated here:

a. As of February 2012, [Student] was making more verbal requests and his verbal repertoire was increasing.

b. As of May 2013 he was demonstrating more adaptive behaviors, was able to express simple feelings and use some self-regulation techniques.

c. He is described as doing “very well” in November 2013 following his October outburst. His behavioral incidents are described as having “decreased significantly” by April 2014.

d. As described in [Assistant Director]’s December 6, 2013 email to [Student]’s father, [Student] was progressing well on his goals and objectives.

e. Per [Principal], [Student] can be educated safely in [Rural School]. There is no evidence that [Student]’s participation in regular education activities disturbed those activities. Also, [Student] got along well with the other students in gym class.

f. As of April 2014, [Student] had improved on the LINKS Adjusted Independence Scores in: 1) eating lunch; 2) purchasing an item at the school store; 3) using the library, 4) recreational activity; 5) transitioning between multiple locations; 6)

changing activities; 7) playing a game; and 8) crossing the street. The only area in which he did not improve was “socializing with friends.”

g. He also completed either 90 or 91 of the 100 “discrete trial” targets that had been set out for him.

h. As of April 2014, [Student] had improved in correctly answering “yes” or “no.”

52. In light of [Student]’s progress at [Rural School], the ALJ finds that he received a free appropriate public education (“FAPE”) at that location. Neither party disputes this.

Conclusions of Law

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

1. Twenty U.S.C. § 1412(a)(5)(A) requires that:

To the maximum extent appropriate, children with disabilities ... are educated with children who are not disabled, and ... removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

2. Educating children in the least restrictive environment is a statutory mandate, not a question about educational methodology. *L.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 975 (10th Cir. 2004). The Court in *Nebo* adopted the two prong test for determining least restrictive environment set out in *Daniel R.R. v. Bd. of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989). Per that test, a court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate. *Nebo* at 975-7.

3. In *Walczak v. Florida Union Free Sch. Dist.*, 142 F.3d 119 (2d Cir. 1998) the Court determined that where a child had made meaningful progress in a day program, the school district was not required to place the child in a residential school. At 132 the Court rejected the parents’ argument that the least restrictive environment analysis did not apply because the child’s disabilities made complete “mainstreaming” impossible. Because the child was able to make “meaningful academic and social progress” in the day program and because “the overall picture is plainly one of improvement, not regression,” the more restrictive residential treatment was rejected. *Id.*

4. In *Bd. of Educ. v. Illinois State Bd. of Educ.*, 184 F.3d 912 (7th Cir. 1999), the Court held that the proposed placement of a child with Down’s syndrome in

programs with only disabled students violated the least restrictive environment requirement because the child could benefit from a more inclusive setting.

5. In *Girty v. Sch. Dist.*, 163 F. Supp. 2d 527, (W.D. Pa. 2001) the Court rejected the school district's plan to remove a mentally retarded child from his school and place him in a school outside of the district where he would learn life skills. The Court determined that the child could receive an adequate educational benefit in a regular education setting with appropriate supplementary aids and services. In rejecting the move, the Court noted that the child's teachers identified specific areas in which he had improved as well as the testimony that he made gradual progress on his IEP goals.

6. There was no evidence that [Student] was disruptive to his regular education schoolmates. This was a factor in determining the appropriateness of placement away from regular education students identified in *Oberti v. Bd. of Educ.*, 995 F.2d 1204 (3d Cir. 1993) at 1217.

7. Because the [Rural School] is the least restrictive environment for [Student] and because he was able to make satisfactory progress there, his removal to CoLA is prohibited by the above authority. To obtain an educational benefit mandated by IDEA, progress must merely be "more than de minimis." *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d 1143, 1148 (10th Cir. 2008), quoting *Urban ex rel. Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 727 (10th Cir. 1996). [Student]'s progress at [Rural School] was well in excess of de minimis.

8. In light of this determination, the ALJ need not resolve the allegations of the Complainants that the School District committed procedural violations of the IDEA and ECEA. These allegations were that the School District: 1) failed to provide notice that the April 24, 2014 IEP meeting would concern [Student]'s placement at CoLA; 2) failed to perform a reevaluation prior to a significant change of placement; and because of this failure, 3) deprived the parents of the right to an independent educational evaluation.

9. Any party aggrieved by the findings and decision of the ALJ has the right to bring a civil action consistent with the requirements set forth in 34 C.F.R. § 300.516.

DONE AND SIGNED

January 8, 2014

MATTHEW E. NORWOOD
Administrative Law Judge

Exhibits admitted:

For the School District: Exhibits 1-54, 56-64, 67 and 70. No other exhibits were offered.

For the Complainants: Exhibits A-E, G, H and N. No other exhibits were offered. A transcript of the audio recording at exhibit 51 was provided after the hearing and is admitted as evidence. It appears at the notebook containing exhibit 70. The transcript is missing pages 3-21.