

<b>STATE OF COLORADO</b> <b>OFFICE OF ADMINISTRATIVE COURTS</b> 1525 Sherman Street, 4 <sup>th</sup> Floor, Denver, Colorado 80203	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
<p><b>[Student] by and through his parents [Father] and [Mother],</b>  Petitioners,</p> <p>vs.</p> <p><b>CHEYENNE MOUNTAIN SCHOOL DISTRICT 12,</b>  Respondent.</p>	
<b>ORDER GRANTING RESPONDENT’S MOTION FOR SUMMARY JUDGMENT AND DECISION</b>	

This matter is before the undersigned Administrative Law Judge upon Petitioners’ filing of a complaint alleging that the Cheyenne Mountain School District 12 denied their son a free appropriate public education in violation of the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400 to 1482. On December 18, 2014, the Petitioners filed a Motion for Summary Judgment. The School District filed its response on December 23, 2014.

### Summary Judgment

Summary judgment is a drastic remedy and is appropriate only if the pleadings, supporting documents and affidavits, if any, show that there is no genuine issue as to material fact and that the moving party is entitled to summary judgment as a matter of law. *Casebolt v. Cowan*, 829 P.2d 352, 354 (Colo. 1992); Colo. R. Civ. P. 56(c). When determining whether summary judgment is appropriate, the ALJ must construe all favorable inferences that may reasonably be drawn from the undisputed facts in favor of the non-moving party and all doubts as to whether an issue of fact exists must be resolved against the moving party. *E.g., Mancuso v. United Bank of Pueblo*, 818 P.2d 732, 736 (Colo. 1991).

### Undisputed Facts

1. [Student] is an [age] year old child who resides in Falcon School District 49 (“Falcon”).
2. [Student] enrolled in [Charter School] for the 2012/2013 school year.
3. [Charter School] is located in Cheyenne Mountain School District 12 (“School District”).
4. [Student] enrolled in [Charter School] under Colorado’s “School Choice” law.

See Colo. Rev. Stat. §§ 22-36-101 through 106.

5. The Petitioners contend that [Student] is eligible for special education services due to a diagnosis of autism and speech and hearing impairment.

6. Prior to enrolling at [Charter School], [Student] attended [Elementary School] and [Preschool] in Falcon.

7. In December, 2009, an evaluation was performed in the Falcon School District.

8. The 2009 assessment makes no mention of autism and reports no medical diagnosis. See Resp. to M. for Summ. J. Ex. 10 (Higgins Affidavit) at Ex. A (2009 assessment).

9. On December 4, 2009, an IEP meeting was held and an IEP was developed for [Student]. Resp. to Mot. for Summ. J. Ex. 3.

10. Petitioners [Father] and [Mother] were present at the December 4, 2009 IEP meeting.

11. The December 4, 2009 IEP form indicates that [Student] was neither visually impaired nor hard of hearing. *Id.* at 4.

12. The December 4, 2009 IEP lists [Student]'s primary disability as follows: "Speech/Language Disability." *Id.* at 1.

13. Autism is not listed as a primary disability on the December 4, 2009 IEP.

14. The December 4, 2009 IEP recommended the following services:

[Student] will be enrolled in a 12 hour a week general education preschool program. He will:

\*attend a general education preschool class 11.5 hours per week.

\*receive speech 30 min. out of class and 15 min. in class.

\*receive services in accordance with the Falcon #49 preschool calendar. *Id.* at 8.

15. On December 1, 2010, an IEP meeting was held and an IEP was developed for [Student]. Resp. to Mot. for Summ. J. Ex. 4.

16. Petitioner [Mother] participated in the December 1, 2010 IEP meeting.

17. The December 1, 2010 IEP form indicates that [Student] was neither visually impaired nor hard of hearing. *Id.* at 4.

18. The December 1, 2010 IEP lists [Student]'s primary disability as follows: "Speech/Language Disability." *Id.* at 1.

19. Autism is not listed as a primary disability on the December 1, 2010 IEP.

20. The December 1, 2010 IEP recommended the following services:

[Student] will be enrolled in a 12 hour a week general education preschool program. He will:

\*attend a general education preschool class 11 hours per week.

\* [Student] will receive the following special education speech and/or language special education support services in accordance with the Falcon #49 school year calendar: 60 minutes per week of direct Speech and/or Language Therapy, outside the general education classroom setting.

\*receive services in accordance with the Falcon #49 preschool calendar. *Id.* at 9.

21. On December 7, 2011, an IEP meeting was held and an IEP was developed for [Student]. Resp. to Mot. for Summ. J. Ex. 5.

22. Petitioner [Mother] participated in the December 7, 2011 IEP meeting.

23. The December 7, 2011 IEP form indicates that [Student] was neither visually impaired nor hard of hearing. *Id.* at 4.

24. The December 7, 2011 IEP lists [Student]'s primary disability as follows: "Speech/Language Disability." *Id.* at 1.

25. Autism is not listed as a primary disability on the December 7, 2011 IEP.

26. The December 7, 2011 IEP recommended the following services:

[Student] is enrolled in a 12 hour a week general education preschool program. He will:

\* receive 30 minutes per week of direct Speech and/or Language Therapy, outside the general education classroom setting. Speech services will be provided by the Speech Language Pathologist/Clinician and/or the Speech Language Paraprofessional.

\* attend a general education preschool class 11.5 hours per week.

\*receive services in accordance with the Falcon D49 preschool calendar. *Id.* at 9.

27. On May 9, 2012, an IEP meeting was held and an IEP was developed for [Student]. Resp. to Mot. for Summ. J. Ex. 6.

28. Petitioner [Mother] was present at the May 9, 2012 IEP meeting.

29. The May 9, 2012 IEP lists [Student]'s primary disability as follows: "Speech/Language Impairment." *Id.* at 1.

30. Autism is not listed as a primary disability on the May 9, 2012 IEP. *Id.*

31. The May 9, 2012 IEP recommended the following services:

\*receive 30 minutes per week of direct Speech and/or Language Therapy, outside the general education classroom setting. Speech services will be provided by the Speech Language Pathologist/Clinician and/or the Speech Language Paraprofessional under the direct supervision of the Speech Language Pathologist/Clinician.

\*attend a general education preschool class 11.5 hours per week.

\*receive services when present and in accordance with the Falcon D49 school year calendar. Services may be disrupted during state and district testing windows. *Id.* at 3.

32. Further, the IEP team noted the following with respect to the Least Restrictive Environment (“LRE”): “The IEP team believes the selected LRE is the best placement for [Student] to receive a free and appropriate public education. ... More time in the special education setting was considered yet was found to not be necessary at that level of Intensity.” *Id.*

33. In addition, the IEP team noted, the following:

Based on [Student]’s progress with speech and language therapy as well as success in the classroom, [Student] would miss too much of his general education classroom for only 40-79% of the week. [Student]’s continued difficulty with pragmatic and grammatic language skills indicates that he is not ready for 100% inclusion in the general education classroom. Being in the class at least 80% of the time maximizes classroom learning while also providing opportunity outside the classroom for concentrated and focused special education speech and language services. This is the Least Restrictive Environment in which he can receive a Free Appropriate Public Education. *Id.* at 4.

34. On November 15, 2012, a team at [Charter School] convened to determine whether [Student] was eligible for special education and related services.

35. Respondent [Mother] attended the November 15, 2012 meeting.

36. In preparation for the November 15, 2012 IEP meeting, after receiving parental consent, the School District conducted an evaluation of [Student].

37. The November 15, 2012 evaluation report contains the following conclusion:

Currently, [Student]’s academic and speech-language skills allow him to access the general education curriculum. In addition, [Student]’s social skills are not impacting his friendships in the educational setting.

[Student]’s audiological testing responses do not meet the criteria established for a “deficiency in hearing sensitivity”. His current functioning allows him access to the general education curriculum. Pet’r Mot. for Summ. J. Ex. 2.

38. [Audiologist] is an audiologist who is employed by the Pikes Peak Board of Cooperative Educational Services. Resp. to Mot. for Summ. J. Ex. 7 (Collins Affidavit).

39. [Audiologist] was present and participated in the November 15, 2012 meeting. *Id.*

40. After reviewing the results of the evaluation, [Audiologist] concurred with the finding that [Student] does not qualify for special education services. *Id.*

41. After the team reached the conclusion that [Student] did not qualify for special education services, [Audiologist] contends that Petitioner [Mother] did not object or raise any concerns about the finding. *Id.*

42. [Kindergarten Teacher] is a full-day kindergarten teacher at [Charter School]. Response to Mot. for Summ. J. Ex. 8 (Blondin Affidavit).

43. [Student] was a student in [Kindergarten Teacher]'s kindergarten enrichment program during the 2012-13 school year. *Id.*

44. [Kindergarten Teacher] was present and participated in the November 15, 2012 meeting. *Id.*

45. After the team reached the conclusion that [Student] did not qualify for special education services, [Kindergarten Teacher] contends that Petitioner [Mother] did not object or raise any concerns about the finding. *Id.*

46. [Principal] is the K-6 principal at [Charter School]. Resp. to Mot. for Summ. J. Ex. 9 (Barr Affidavit).

47. [Principal] was present and participated in the November 15, 2012 meeting. *Id.*

48. After the team reached the conclusion that [Student] did not qualify for special education services, [Principal] contends that Petitioner [Mother] did not object or raise any concerns about the finding. *Id.*

49. In July 2014, the Petitioners requested an Independent Educational Evaluation for [Student] and their other son, [ ].

50. [Director] is the Director of Special Education for the School District. Resp. to Mot. for Summ. J. Ex. 10 ([Director] Affidavit).

51. [Director] responded to the Petitioners' request suggesting that if the Petitioners disagreed with the 2012 evaluation that [Student] was not in need of special education services, the District would "conduct a special education evaluation immediately upon [Student]'s return to [[Charter School]] in August 2014, once [they] have signed *Parental Consent for Prior Written Notice and Consent for Evaluation.*" *Id.* at Ex. B (attached to Ex. 10 – the [Director] Affidavit)(emphasis in original).

52. [Director] specifically asked the Petitioners the following: "Please clarify whether you are asking [the School District] to conduct a special education evaluation or whether you are disagreeing with the evaluation that was conducted almost 2 years ago." *Id.*

53. [Director] included the names and contact information for three Independent Educational Evaluators and included a Prior Written Notice and Consent for Evaluation form.

54. The Petitioners never responded to [Director's] letter seeking clarification.

55. The Petitioners never submitted the results of an IEE to the School District.

56. In [Director's] professional opinion, "[Student] has made good academic and social progress and has received a free and appropriate public education." Resp. to Mot. for Summ. J. Ex. 10 at 4.

57. [First Grade Teacher] is a first grade teacher at [Charter School]. Resp. to Mot. for Summ. J. Ex. 11 (Collier Affidavit).

58. [First Grade Teacher] was [Student]'s first grade homeroom teacher and taught him writing, grammar, science, cursive, and language arts. *Id.*

59. In [First Grade Teacher]'s opinion [Student] did well in school and is "not a child who was in need of special education or Response to Intervention services." *Id.* See Ex.'s 12 & 13 ([Student]'s report cards).

60. [First Grade Teacher] believes that "[Student] progressed academically and socially during his first grade year and [she] believ[es] he received a free appropriate public education in first grade at [Charter School]." *Id.*

61. [Second Grade Teacher] is a second grade teacher at [Charter School]. Resp. to Mot. for Summ. J. Ex. 14 (Harsell Affidavit).

62. [Second Grade Teacher] was [Student]'s teacher during the first semester of the 2014-15 school year. *Id.*

63. [Second Grade Teacher] taught [Student] grammar, poetry, writing and science. *Id.*

64. In [Second Grade Teacher]'s opinion. [Student] is a "very average, second grade appropriate student." *Id.*

65. [Second Grade Teacher] does "not believe [[Student]] needs to receive special education or Response to Intervention services." *Id.*

66. The Petitioners filed a due process complaint on November 13, 2014.

67. In the due process complaint, the Petitioners allege that [Student] was denied a free appropriate public education when the School District (1) failed to evaluate [Student] for autism and (2) failed to have the special education director, or designee, present at the November 15, 2012 meeting.

### **Discussion and Conclusions of Law**

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education ("FAPE") that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and revise an Individual Education Plan ("IEP") calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). When a student is enrolled in a public charter school, the local school district through which the school is chartered bears this responsibility. 20 U.S.C. § 1413(a)(5).

A school district satisfies the requirement for FAPE when, through the IEP, it provides a disabled student with a “basic floor of opportunity” that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). The school district is not required to maximize the potential of the disabled child, but must provide “some educational benefit.” *Id.* at 199-200. Although the benefit must be more than *de minimus*, *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726-27 (10th Cir. 1996), “some progress” toward the student’s educational goals is all the IDEA requires. *Thompson R2-J Sch. Dist. v. Luke P.*, 540 F.3d at 1150-52.

Where, as here, the complaint involves alleged procedural violations, a hearing officer may find that a child did not receive FAPE only if the procedural inadequacies: (1) impeded the child’s right to a FAPE, (2) significantly impeded the parent’s opportunity to participate in the decision making process regarding the provision of a FAPE, or (3) caused a deprivation of educational benefit. 34 CFR § 300.513(a)(2); *C.H. by Hayes v. Cape Henlopen Sch. Dist.*, 606 F.3d 59, 66 (3<sup>rd</sup> Cir. 2010) (“[a] procedural violation of the IDEA is not a per se denial of a FAPE; rather, a school district’s failure to comply with the procedural requirements of the Act will constitute a denial of a FAPE only if such violation causes substantive harm to the child or his parents.”)

Petitioners contend that “Respondent’s failure to assemble a complete IEP team denied [Student] a FAPE.” Pet’r Mot. for Summ. J. at 5. First, Petitioners suggest that ECEA Rule 4.02(6)(b)(ii) required the School District’s director of special education, or designee, to participate in the November 15, 2012 meeting. 1 Colo. Code Regs. 301-8 § 4.02(6)(b), provides, as follows:

Participants.

Meetings to determine if the child has a disability and is eligible for special education, whether held separately or in connection with a meeting to develop an IEP, must include:

4.02(6)(b)(i) A multidisciplinary team knowledgeable about the child and about the meaning of the evaluation data. The multidisciplinary team shall include:

4.02(6)(b)(i)(A) At least one teacher or other specialist with knowledge in the area of the child’s suspected disability;

4.02(6)(b)(i)(B) As necessary, other qualified professionals, e.g., an occupational therapist; a speech language pathologist; a physical therapist; and a school psychologist; and

4.02(6)(b)(i)(C) The parent of the child.

4.02(6)(b)(ii) At the discretion of the special education director for the administrative unit of residence, the special education director or designee for the administrative unit of residence.

Rule 4.02(6)(b)(ii) is clearly discretionary and did not require the attendance of the special education director at the November 15, 2012 meeting. Next, the Petitioners assert that Rule 4.03(9) required the special education director of the Falcon School District to attend the November 15, 2012 meeting. Rule 4.03(9) provides, as follows:

4.03(9) Participation of the Administrative Unit of Residence

If the administrative unit of residence is not responsible for a meeting, as set forth in Section 8.00 of these Rules, the administrative unit of attendance or state-operated program shall timely notify the Special Education Director/designee for the administrative unit of residence. Such notification shall be provided at the same time and in the same manner that the parent is notified of the meeting.

The rules under section 4.00 of the ECEA apply to child find, which is not at issue in this case. In addition, as the Respondent correctly points out in its Response, even if Rule 4.03(9) were at issue, it only applies to the development of IEP's. In this case, an IEP was never developed or proposed. Finally, the Petitioners contend that Rule 8.04(1) required the School District to notify the special education director at the Falcon School District of the November 15, 2012 meeting. Rule 8.04(1) provides, in part, as follows:

8.04(1) Responsibility for initial assessment and reevaluation shall be with the administrative unit in which the child attends school, or, if (s)he is not enrolled in school, it shall be the responsibility of the administrative unit in which the child resides. The administrative unit of attendance shall invite the Special Education Director or designee of the administrative unit of residence to participate in the process of the initial assessment or reevaluation.

In this case, [Student] was enrolled in the School District at the time the meeting was convened in November 2012. The initial assessment was conducted by the Falcon School District in 2009. It appears as though the School District erred in not inviting the special education director of the Falcon School District to the re-evaluation meeting. However, in order to prevail, the Petitioners must show that the procedural violation resulted in a denial of FAPE. It is undisputed that Petitioner [Mother] participated in the November 15, 2012 meeting and that she failed to raise an objection about the composition of those who participated in the meeting. Further, the facts clearly support a finding that [Student] is making progress and is receiving FAPE at [Charter School]. Consequently, the ALJ finds in favor of the Respondent with respect to the procedural violation claim.

The Petitioners next claim alleges that the School District failed to consider [Student]'s "diagnosis" of autism. The undisputed facts show that there is no history of a primary diagnosis of autism. In fact, every IEP that was developed for [Student] at Falcon lists the primary diagnosis as "Speech/Language Disability" or "Speech/Language Impairment." Autism is not listed on any of the IEP's in evidence in

this case. The Petitioners did not raise the issue at the November 2012 meeting and did not object at the time to the finding that [Student] was not in need of special education services or supports. In fact, the first time the School District became aware of the Petitioners' concerns was in July 2014. In response, the School District suggested a new evaluation (with the consent of the parents) or an IEE. The Petitioners failed to return the consent form and failed to provide the School District with the results of an IEE. In offering to conduct an evaluation or an IEE, the District met its responsibilities under the applicable law. Consequently, the ALJ finds in favor of the Respondent with respect to this claim as well.

### **Decision**

The ALJ finds that there are no genuine issues of material fact and that Summary Judgment is warranted in favor of the School District as a matter of law. The undisputed facts show that [Student] did not qualify for special education services or supports in November 2012 and that he has received FAPE in the School District. The Respondent's Motion for Summary Judgment is hereby Granted and the Petitioners' complaint is dismissed.

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

### **Done and Signed**

January 29, 2015

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David S. Cheval  
Administrative Law Judge