# BEFORE THE IOWA DEPARTMENT OF EDUCATION (Cite as 28 D.o.E. App. Dec. 419)

In reason a child:	)
	) Dept. Ed. Docket No. SE-461 ) DIA No. 18DOESE0006
Complainant,	) DIA NO. 18DOESE0000
<b>v.</b>	)
COMMUNITY SCHOOL DISTRICT and AREA EDUCATION AGENCY,	DECISION
Respondents.	) )
Background	
On or about September 26, 2017, filed a Due Process Complaint on behalf of her daughter, against the Community School District and the Area Education Agency (Respondents) pursuant to the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 et seq., as implemented by 441 Iowa Administrative Code chapter 41. The Complaint generally alleged that the child was entitled to an IEP based on medical and educational diagnoses made by physicians and educational professionals. Respondents filed an Answer on October 9, 2017, denying all liability under the IDEA.	
Hearing in this matter was held before Administrative Law Judge David Lindgren on June 13 and 14, 2018, at the Area Education Agency building in Iowa. Present for that hearing were Complainant the child's father their advocate, Natalie Berkowitz, and their attorney, Nathan Mundy. Also present were attorneys Katherine Beenken and Carrie Weber, who represented the Community School District and the AEA. Pursuant to the Complainant's request, the hearing was held open to the public and it was reported by Certified Shorthand Reporter Edie Spriggs Daniels.	
The following persons testified at the hearing Dr. Dr. Exhibits A through G were admitted into the	and Complainant's

came in under Respondents' objection. Respondents Exhibits A through J were admitted without objection.

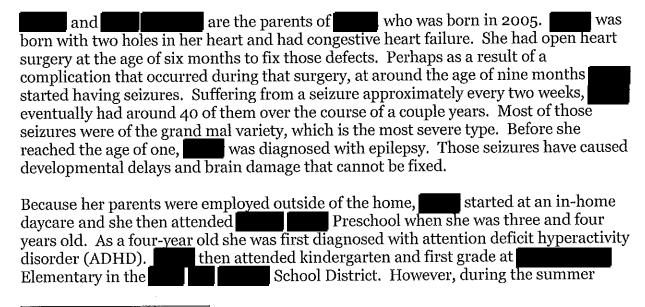
The evidentiary record was closed at the end of the hearing on June 14, 2018, and the parties agreed to a post-hearing briefing schedule in lieu of closing arguments. The case was considered fully submitted upon filing of the Complainant's Brief on July 6, 2018 and Respondent's Reply brief on July 28, 2018. The parties agreed to a continuance of the applicable timeframes in order to allow time for briefing and the drafting of this decision. See 34 C.F.R. § 300.515(a). The undersigned now issues the following decision.

#### **Issues Presented**

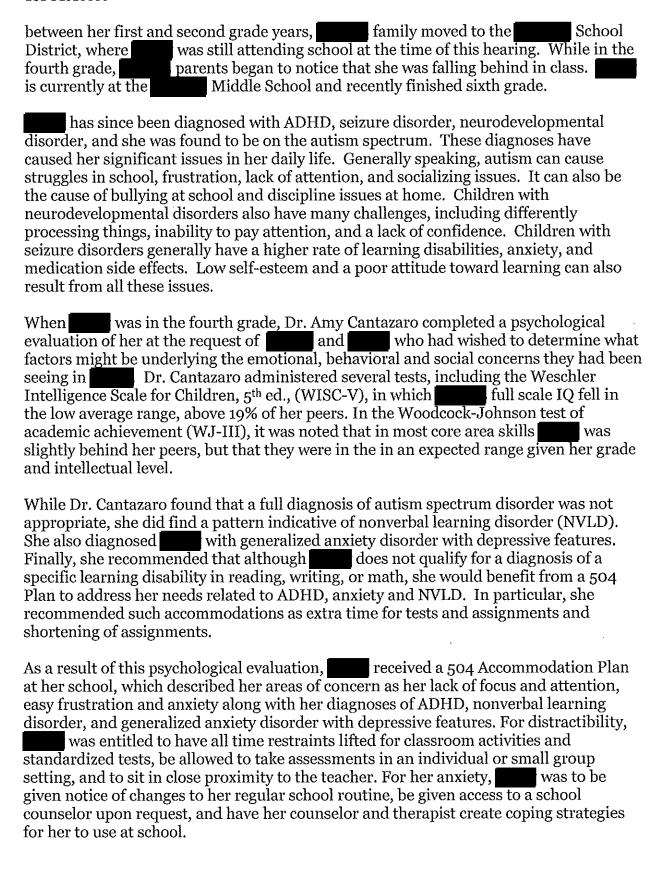
As dictated by 34 CFR § 300.511(d) and 281 IAC 41.511(4), the issues considered in this matter are limited to those raised in the due process complaint. In addition, in this case, Respondents consented to the inclusion certain additional issues. They include issues relevant to the July 26, 2017, disability suspect meeting, the second eligibility meeting of February 28, 2018, and the IEP dated March 21, 2018.

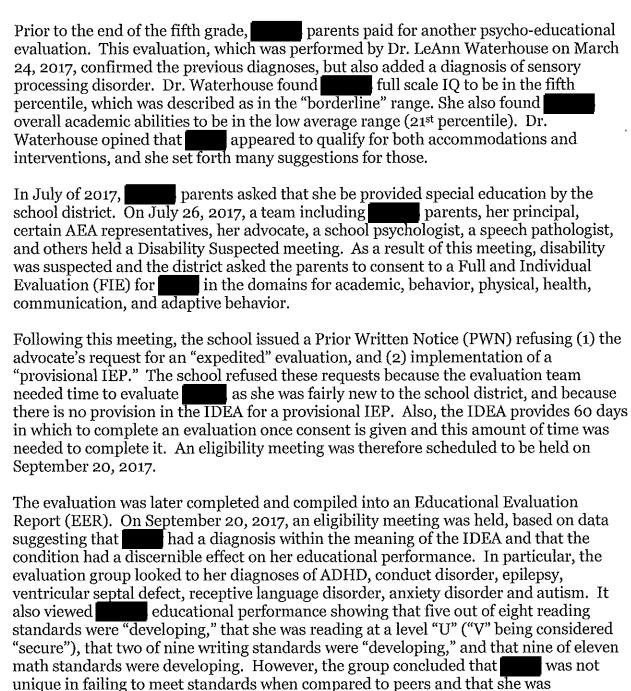
As articulated by the Complainants in post-hearing briefing, the following issues have been raised: First, whether the September 20, 2017, determination that was ineligible for special education was correct, and second, whether the IEP which was formed in February of 2018 provides a free and appropriate public education (FAPE). Complainants believe current IEP is not satisfactory and deprives her of FAPE because it is limited to math and does not provide her with ongoing supplemental instruction in the area of language arts.

## **Findings of Fact**



<sup>&</sup>lt;sup>1</sup> Because both parties labeled their Exhibits with letters, Respondents' Exhibits were referred to during the hearing by their page number (pages 1 through 277).

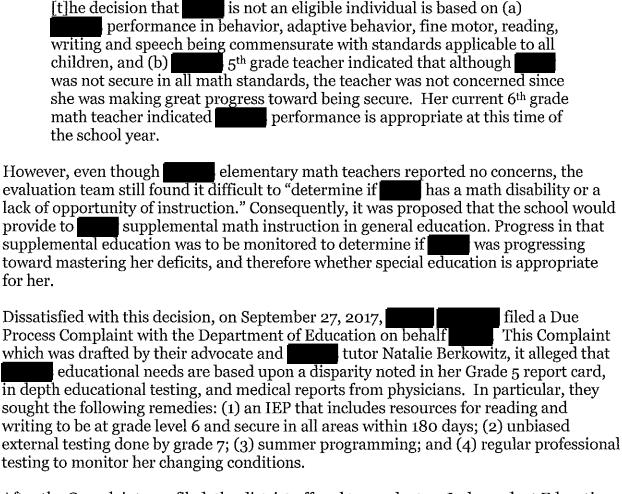




A Prior Written Notice (PWN) was subsequently provided to the parents noting the conclusion that is not an eligible individual under the IDEA. The PWN identified all of the information considered in making this decision, including report cards, teacher interviews, psychological evaluation reports, and other records.

Specifically, the PWN provided that

adequately progressing toward meeting standards.



After the Complaint was filed, the district offered to conduct an Independent Education Evaluation (IEE) at public expense. The parents accepted this offer and requested that Dr. David Beeman conduct the IEE. At this point, the Due Process Complaint was continued and put on hold, pending the results of the IEE. The school thereafter continued to provide with supplemental math instruction through interventions in general education and it continued to monitor her progress.

The parties received Dr. Beeman's report on January 30, 2018. Due to the fact that she had so recently undergone testing in her two previous psychological evaluations, Dr. Beeman found it unnecessary to have her take many of those tests again. However, he did re-administer certain portions of the WISC-V test and found her full scale IQ to be 85, or in the "low average" range. He also found that while her intelligence would preclude a diagnosis of intellectual disability, her extremely low adaptive functioning would be consistent with such a diagnosis.

Dr. Beeman's diagnostic impression was that had a neurocognitive disorder (including ADHS and NVLD), generalized anxiety disorder, and seizure disorder. In reviewing the totality of the data, he concluded that she required supports at least in mathematics through special education. However, with regard to reading and writing,

he found the assessments to be more mixed. And, he did suggest some supports and accommodations, some of which were already present in her 504 Plan.

the supplemental math instruction for that came as a result of the September 20, 2017 eligibility meeting. Saw every other day for a 41-minute period. Her goals was to bring up to grade level and to do so she found some targeted areas to work on. Due to this supplemental instruction, showed substantial progress in all areas. Instruction focused on her deficit areas, such as counting money, story problems, and fact fluency.

The eligibility team thereafter reconvened on February 28, 2018 and considered information from the math intervention and from Dr. Beeman's IEE report. After a review of this information and data, and after receiving parent and teacher reports, the district agreed to provide with an Individualized Education Plan (IEP) in math for the remainder of the school year. The IEP was drafted following the February 28, 2018, meeting and it was to include all the accommodations previously provided for in Section 504 Plan, as well as some new accommodations proposed as a result of the IEE process.

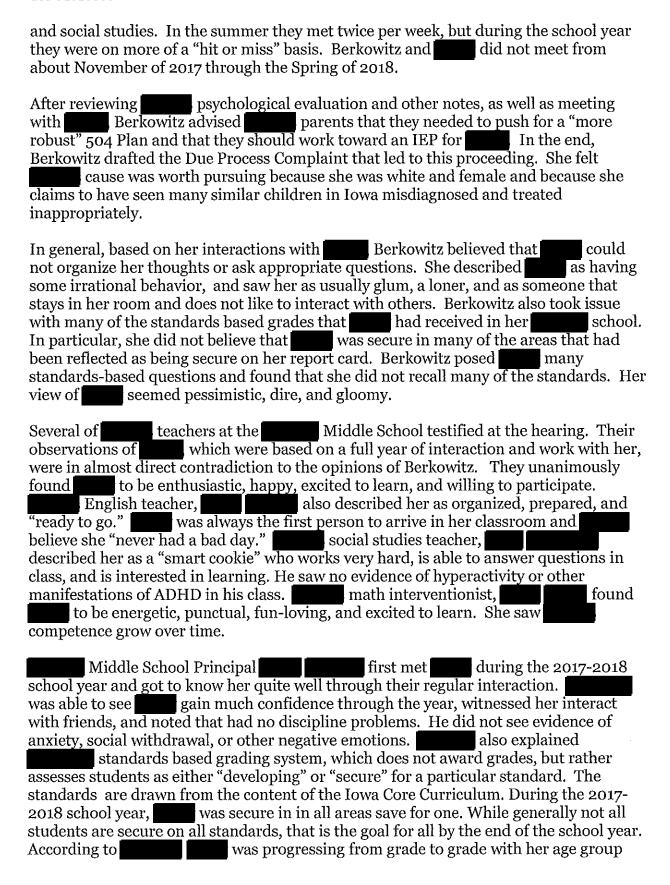
Specifically, the IEP team concluded that

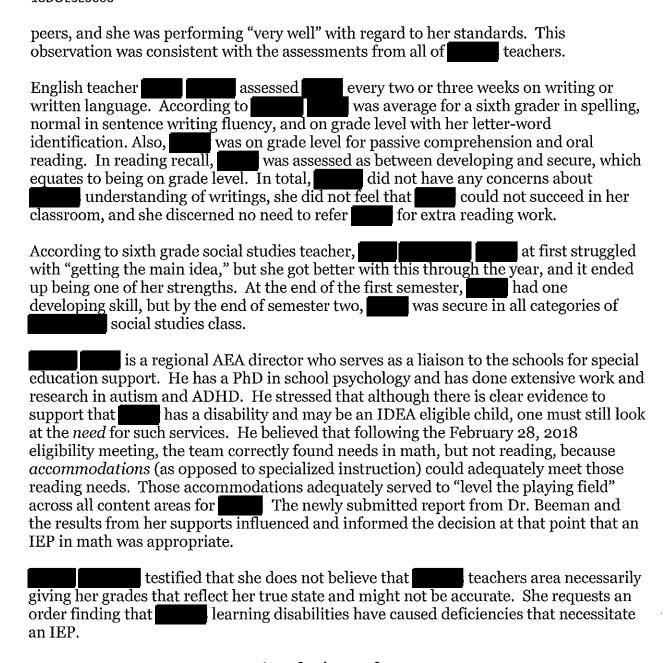
has difficulty retaining math skills in the general curriculum and keeping up with the classroom's instructional pace. She needs re-teaching of some skills. The needs more small group assistance with more opportunities for reteaching and practice of the skills that are taught. It disability in math could affect her in the community with shopping and solving real life math problems.

In light of this, was to be provided 41 minutes per day of specially designed math instruction in the general education setting, which was to be co-taught by the special education teacher and the general education teacher. She was also to be provided 410 minutes per month of supplemental math instruction in the special education setting, to be provided by her special education teacher. But, the team continued in the previous determination that did not require special education with regard to reading and writing.

The accommodations that continued to be provided in the IEP included, among other things, a lifting of time constraints, seating in proximity to the teacher, a breakdown of instructions, access to school personnel, advanced notice of changes to her school routine, and a take-home folder with all completed math work.

Natalie Berkowitz is a professional self-employed tutor and self-styled 504/IEP advocate for children with perceived needs. Berkowitz has tutored in Iowa for eight years and at the time of hearing was tutoring 25 students of all ages and capabilities, including many with disabilities. She began working with in July of 2017 and tutored her through the sixth grade in the areas of language arts, reading, science, math,





### **Conclusions of Law**

This case presents an issue of eligibility for benefits under the Individuals with Disabilities Education Act (IDEA). The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education, or FAPE. T.K. v. N.Y.C. Dep't of Educ., 810 F.3d 869, 875 (2d Cir. 2016). Iowa has adopted rules to implement the Federal IDEA at 281 Iowa Administrative Code (IAC) chapter 41.

Free appropriate public education (FAPE), as defined by the IDEA, means special education and related services that:

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary school, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. § 1401(9); 281 IAC 41.17.

Each state that receives federal special education funding must ensure that local educational agencies ("LEA") are in compliance with the IDEA. Honig v. Doe, 484 U.S. 305, 309, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). The IDEA imposes upon school districts the duty to seek out children with a disability and ensure that they receive the special education services they need. 20 USC § 1412(a)(3); 34 C.F.R. § 300.111 (a)(1)(i); Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 245 (2009).

To receive special education and related services under the IDEA, a child must first qualify as a "child with a disability." 20 U.S.C. 1401(3)(A). The term "child with a disability" means a child

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as "emotional disturbance"), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and
- (ii) who, by reason thereof, needs special education and related services.

Id; 281 IAC 41.8.

Respondents here have never challenged the fact that has a qualifying disability. They have conceded that point. Rather, they question the second prong: her *need* for special education and related services. This is the reason she was initially found ineligible for services and then later found eligible only in the areas of math.

Under the IDEA, the eligibility determination process has two essential stages: (1) the evaluations and written reports, and (2) the eligibility determination meeting. The IDEA requires local education agencies (typically, school boards) to conduct "full and individual evaluation[s]" consisting of procedures "to determine whether a child is a

child with a disability." 20 U.S.C. § 1414(a)(1)-(2); 281 IAC 41.301. These should include reevaluations as changing circumstances warrant. *Id*.

"In conducting the evaluation, the local educational agency shall . . . use a variety of assessment tools and strategies to gather relevant functional, development, and academic information, including information provided by the parent, that may assist in determining . . . whether the child is a child with a disability," and shall "not use any single measure of assessment as the sole criterion for determining whether a child is a child with a disability. *Id.* at § 1414(b)(2); 34 C.F.R. 300.304(b)(1)-(2). In other words, IDEA requires that evaluation be multi-faceted and multi-disciplinary, and the process must include input from the parents.

A state "may fashion its own procedures" for evaluating disability, so long as it satisfies IDEA's requirements. Shore Regional H.S. Bd. of Ed. Vs. P.S., 381 F.3d 194, 198 (3<sup>rd</sup> Cir. 2004). As noted, Iowa has developed and issued its own procedures by rule at 281 Iowa Administrative Code chapter 41. Once the evaluation of the student is complete, the school district is to convene a meeting to determine whether the student is eligible for special education.

In determining eligibility and educational need, the school district's interpretation of evaluation data "must . . . draw upon information from a variety of sources, including aptitude and achievement tests, parent input, and teacher recommendations, as well as information about the child's physical condition, social or cultural background, and adaptive behavior," and must "ensure that information obtained from all of these sources is documented and carefully considered." 34 C.F.R. § 300.306(c). Thus, federal regulations require school districts to draw upon a wide range of the data collected in its evaluation, documenting and carefully considering the data in arriving at its eligibility determination. <a href="V.M. v. Sparta Twp. Bd. Of Educ.">V.M. v. Sparta Twp. Bd. Of Educ.</a>, 2014 WL 3020189 (D.N.J. July 3, 2014).

On the issue of *need* for services, a student needs special education and related services when the student requires those services in order to receive an educational benefit from the educational program. <u>Marshall Joint Sch. Dist. No. 2 v. C.D.</u>, 54 IDELR 307 (7th Cir. 2010). If a child has a qualifying disability but only needs related services and not special education, the child is not a child with a disability under the IDEA. 34 CFR 300.8 (a)(2)(i).

An IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. However, the question is whether the IEP is reasonable, not whether it is ideal. <u>Endrew F. v. Douglas County Sch. Dist. RE-1</u>, 137 S.Ct. 988 (2017).

Under the IDEA, a parent or public agency may file a due process complaint relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of a free appropriate public education to the child. 34 C.F.R. § 300.507(a); 281 IAC 41.507(1). The burden of proof in an administrative hearing under the IDEA is properly placed upon the party seeking relief." Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49, 62, 126 S.Ct. 528, 163 L.Ed.2d 387 (2005). Complainants here have filed such an action and consequently hold the burden of proof.

Again, in this case, the Complainants do not purport to challenge any of the process by which the Respondents evaluated or considered situation. They do not bring any sort of procedural challenge and there is no allegation that any of the procedural safeguards from the Act were ignored. Rather, the Complainants dispute the conclusion that situation in need of specialized instruction in her current IEP for English, Social Studies, Science, or Writing." They filed this Due Process Complaint concerning the matters of her placement and the provision of FAPE to her, and they characterize this case as "an IDEA eligibility dispute."

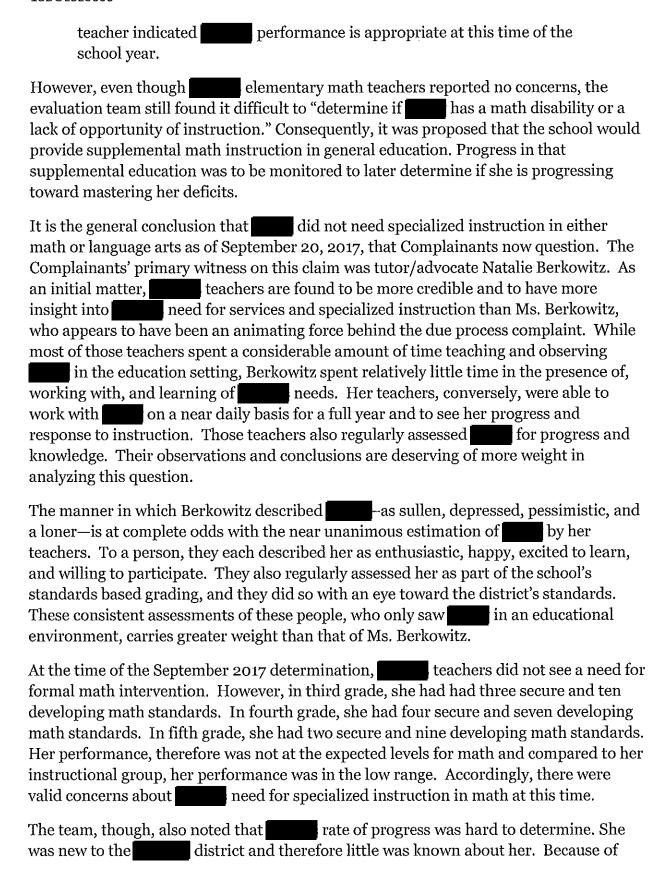
In particular, Complainants request an order finding that "the original determination of eligibility from the September 20<sup>th</sup> meeting be improper, and the subsequent remedial measure of the IEP granted on February 28<sup>th</sup> to be inadequate, as it does not contain specialized instruction for reading, writing, or science."

Therefore, the issues can effectively be broken down as follows: First, whether the September 20, 2017, determination that was altogether ineligible for special education was correct, and second, whether the IEP, which was adopted in February of 2018, provides a free and appropriate public education (FAPE). Complainants believe current IEP is not satisfactory and deprives her of FAPE because it does not provide her with ongoing supplemental instruction in the general area of language arts.

September 20, 2017 Ineligibility Determination

As noted previously, the eligibility team issued a PWN on September 20, 2017, in which it determined that is not an eligible individual under the IDEA. In particular, the PWN provided that

The decision that is not an eligible individual is based on (a) performance in behavior, adaptive behavior, fine motor, reading, writing and speech being commensurate with standards applicable to all children, and (b) 5<sup>th</sup> grade teacher indicated that although was not secure in all math standards, the teacher was not concerned since she was making great progress toward being secure. Her current 6<sup>th</sup> grade math



this lack of information about rate of progress, it could not be determined whether she had a disability in math that required specialized instruction. This data was necessary to distinguish between a math disability and perhaps either just a lack of educational opportunity or that she has the skills but has chosen not to use them. Because of this uncertainty, the district reasonably chose to continue with math interventions.

It was reasonable for the team to conclude that was then making adequate

progress toward being secure in math and that according to her teachers, performance was appropriate for the beginning of her sixth grade year. And,

had responded positively to such interventions. Consequently, it was also reasonable to conclude her instructional needs could be met in math within the general education continuum, along with accommodations, intervention, and math labs to review deficiencies. In sum, the evidence supports that based on information before did not meet criteria for eligibility in math. the team at the time, With regard to reading and writing, while had finished fifth grade at a reading level of "U" and therefore marked as "developing," she was only one level off the expected level of "V." Her teachers explained that was not the only peer marked as "developing" and that it was common to have developing standards. showed significant growth in reading during her fifth grade year. Simply put, teachers were not concerned with this area. Also, on her MAP testing the expected range and on the Iowa Assessments she was in the proficient range. Thus, her standardized testing scores in reading placed her squarely in the average range. Based on this information, the eligibility team's determination that need for specially designed instruction in reading or writing is reasonable and

#### February 28, 2018 IEP for Math

determination was in error.

Following the February 28, 2018 meeting, the district agreed to provide with an Individualized Education Plan (IEP) in math for the remainder of the school year. In doing so, it found that has difficulty retaining math skills in the general curriculum and keeping up with the classroom's instructional pace, that she needed reteaching of some skills and that she needs more small group assistance. However, with regard to reading and language arts, the team concluded that did not require special education. Complainants question this later decision.

appropriate. Complainants have not met their burden of proof to show that the team's

As our Supreme Court has clarified, FAPE must provide "'special education and related services' tailored to meet the unique needs of a particular child, 20 U.S.C. § 1401[9], and be 'reasonably calculated to enable the child to receive educational benefits,' <u>Rowley</u>, 102 S.Ct. 3034 (1982). The IEP is the centerpiece of the IDEA's education delivery

system for disabled children. Endrew F., 137 S.Ct at 994. An IEP must be reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances. However, the question is whether the IEP is reasonable, not whether it is ideal. *Id.* Complainant's appeal brings into question the substantive adequacy of the IEP provided to

The IEP team proposed that while disability may impact her reading comprehension, those needs are appropriately met with accommodations, and that she does not need specially designed instruction. Dr. explained the important distinction between accommodations and specially designed instruction in his hearing testimony. This decision appears to be supported by the record and is appropriate for her circumstances. The September 20, 2017, FIE results showed that performance was above at or above benchmark levels. Her reading was in the average range in most subtests, according to the three psychological evaluations. classroom teachers certainly noted no deficiencies in reading that would require special education.

As Dr. Beeman's concluded, in reviewing the totality of the data, required supports at least in mathematics through special education. However, with regard to reading and writing, he found the assessments to be more mixed. He therefore did suggest some supports and accommodations, some of which were already present in her 504 Plan. Those 504 accommodations, of course, were then rolled into her IEP.

Moreover, even though ended her fifth grade reading independently at Guided Reading Level "U" rather than the expected level of "V," this one level deficiency is not significant. She was only one level from being considered secure. Many other students were also assessed as "developing" and due to her significant growth during fifth grade, teachers were not concerned. Also, in the Spring of her fifth grade, MAF assessments showed that she was reading in the expected range and her Iowa Assessment scores placed her in the proficient range.

The accommodations that were proposed by the team, rather than specially designed instruction can adequately address needs in this area. Those accommodations were incorporated into the IEP. All of her needs can be adequately served by the accommodations incorporated into IEP, including:

- Lifting of time constraints
- Sitting in close proximity to the teacher
- Checking to make sure she understands directions
- "Chunking" assignments
- Providing notice of changes to routine
- · Taking assessments in individual or small group settings

With these accommodations which would help with reading comprehension, as opposed to specially designed instruction, has been able to perform on par with her peers and to progress from grade to grade. Here, while there is no dispute that possesses a qualifying disability, she does not require special education for her to receive an educational benefit in reading or writing, and she therefore is not a child with a disability under the IDEA. Her IEP is reasonable, and is reasonably calculated to enable her to make progress appropriate in light of her particular circumstances.

#### Order

Complainants have not proven that Respondents denied a free appropriate public education as alleged in the due process complaint. Respondents correctly denied an IEP in September of 2017 and the IEP that was subsequently adopted in February of 2018 provided her with FAPE. Complainants' requested relief is therefore denied and the due process complaint is dismissed.

Dated this 7<sup>th</sup> day of September, 2018.

David Lige

David Lindgren

Administrative Law Judge

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