

STATE OF ARIZONA
IN THE OFFICE OF ADMINISTRATIVE HEARINGS

█, Student, by and through Parent(s)
█ and █,
Petitioners,
v.
CANDEO SCHOOLS, INC.,
Respondent.

No. 12C-DP-012-ADE

ADMINISTRATIVE LAW JUDGE
DECISION

HEARING: Conducted on November 17, 2011 and November 18, 2011. Written legal argument was filed following the parties' receipt of the Court Reporter's transcript.¹ The hearing record concluded on January 27, 2012.

APPEARANCES: Attorney Hope N. Kirsch represented Student █ and Parents █. and █. Attorneys Kevin M. Estevez and Tracy Banker represented Candeo Schools ("Candeo").

WITNESSES:² For Petitioners: Parent █; Joseph Gentry, Ph.D., BCBA; Joan Nelson, retired Special Education teacher. For Candeo: Christopher J. Nicholls, Ph.D.; Heather Van Buren ("Special Education Director"); Michelle Hudak ("Third Grade Math Teacher"); Rachel Hannah ("Third Grade Teacher"); Lisa Schoenfelder ("Fourth Grade General Education Teacher"); Sarah Hoagland ("Fourth Grade Math Teacher"); Stephanie Musser ("Executive Director"); Stacy Bodenstedt ("Former Special Education Director").

ADMINISTRATIVE LAW JUDGE: Kay A. Abramsohn

Parents, on behalf of Student, bring this due process action raising multiple issues, primarily asserting that Candeo failed to provide a free and appropriate public education ("FAPE") as a result of several alleged actions or inactions.³

Among the allegations in the amended due process complaint notice ("Complaint"),⁴ Petitioners alleged that Respondent had denied FAPE to Student

¹ Pursuant to discussion at the due process hearing, the Court Reporter's transcript is the official record of the due process hearing. Glennie Reporting Services transcribed the proceedings and the company provided its transcript to the parties and to the Tribunal. The Tribunal has, by statute, also made a digital recording of the proceedings.

² To avoid the use of proper names, and for confidentiality, witnesses are designated a generally descriptive title to be used in the body of the Decision if necessary. The witnesses' proper names are grouped here for ease of redaction.

³ Petitioners filed this due process complaint notice on September 12, 2011. Therefore, the allegations on which determinations will be made herein relate to actions or inactions of Candeo from September 12, 2009 through the end of academic year 2010-2011.

⁴ These allegations are taken from Petitioners' October 3, 2011 Supplemental Due Process Complaint, which was included as an attachment in Petitioners' response to Candeo's September 22, 2011 Motion to Dismiss for Lack of Jurisdiction and Objection to Sufficiency.

1 through several inactions: (1) not providing special education minutes during second
2 semester of academic year 2009-2010; (2) not providing math services the second
3 semester of 2009-2010 (*i.e.*, between December 10, 2009 and May of 2011); (3) not
4 providing social skills training in (a) weekly one-on-one sessions (for 55 weeks), (b)
5 lunch bunch (three times a week, for 55 weeks), (c) recess group (three times a week,
6 31 weeks), and (d) peer-mediated intervention (one time a week, 55 weeks); (4) failing
7 to address Student's lack of organizational skills; (5) failing to address Student's
8 difficulty with academics (specifically, math); (6) failing to appropriately modify
9 curriculum.⁵

10 Additionally, Petitioners alleged that Respondent had denied FAPE through (1)
11 refusal to perform an academic evaluation as recommended by Dr. Gentry; (2) refusal
12 to implement all of Dr. Gentry's recommendations,⁶ and, (3) failure to prepare a
13 Behavior Intervention Plan.

14 Finally, Petitioners alleged that Respondent failed to provide FAPE when
15 Student failed to meet the IEP goals stated in the IEP that expired on December 10,
16 2009.⁷

17 The law governing this due process proceeding is the Individuals with Disabilities
18 Education Act ("IDEA"), 20 United States Code (U.S.C.) §§ 1400-1482 (as re-
19 authorized and amended in 2004),⁸ and its implementing regulations, 34 Code of
20 Federal Regulations (C.F.R.) Part 300,⁹ as well as the Arizona Special Education
21 statutes, Arizona Revised Statutes (A.R.S.) §§ 15-761 through 15-774, and
22 implementing rules, Arizona Administrative Code (A.A.C.) R7-2-401 through R7-2-406.

23 ⁵ In the post-hearing legal memorandum, Petitioners notified the Tribunal that they withdrew, for
24 consideration in this matter, the allegations of failing to provide reading services one time per week (of the
25 five expected sessions) and writing two times per week (of the five expected sessions).

26 ⁶ Problematically, this issue is an issue that was mediated and remains a current issue, as allegedly
27 "breached," in the parties' mediation litigation. See Exhibit J (Issue 2) and Transcript (page 38). However,
28 the November 19, 2010 Prior Written Notice also indicates that the school, at that time, refused to
29 implement all of Dr. Gentry's recommendations. See Exhibit E, page 91.

30 ⁷ At hearing, Parent testified that they were not at due process "because of the progress [*i.e.*, the lack of
progress] that the student made at school." See Parent testimony, Transcript, page 258. Nevertheless,
Parent argued that Student should have made more progress and should have met the IEP goals with the
special education services and accommodations.

⁸ Through Public Law 108-446, known as the "Individuals with Disabilities Education Improvement Act of
2004," IDEA 2004 became effective on July 1, 2005.

⁹ The current federal regulations became effective October 13, 2006; several amendments were

1 The parties presented testimony and Exhibits at the two hearing sessions.
2 During the hearing sessions, Petitioners presented testimony from the witnesses noted
3 above and Exhibits designated A through F, J, K, L, M, and S. Respondent presented
4 evidence from the witnesses noted above and Exhibits designated 2, 3, 4, 5, 6, 7, 8, 9,
5 10, 11, 12, 14, 16, 17, 18, 19, 20, 21, 23, 26, 27, 28, 29, 31, 33, 34, 35, 38, 39, 41, 44,
6 46, 48, 50, 51, 52, 53, 55, 58, 59, 60, 62, 65, 66, 67, 71, 72, 73, 74, 75, 76, 79, 80, 83,
7 85, 86, 87, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 110, 112, 113 and
8 114.¹⁰

9 The Administrative Law Judge has considered the hearing record, including the
10 testimony and exhibits,¹¹ and now makes the following Findings of Fact, Conclusions of
11 Law, and Order finding:

- 12 (1) that Petitioners have not met the burden to show that
13 Candeo failed to provide special education minutes
14 during second semester 2009-2010 and, thereby, denied
15 FAPE;
- 16 (2) that Petitioners have not met the burden to show that
17 Candeo failed to provide math services between
18 December 10, 2009 through May of 2010 and, thereby,
19 denied FAPE;
- 20 (3) that Petitioners have not met the burden to show that
21 Candeo denied FAPE through refusal to provide social
22 skills training through additional weekly one-on-one
23 sessions (for 55 weeks);
- 24 (4) that Petitioners have not met the burden to show that
25 Candeo denied FAPE through refusal to provide social
26 skills training through lunch bunch three times a week
27 (for 55 weeks);
- 28 (5) that Petitioners have not met the burden to show that
29 Candeo denied FAPE through refusal to provide social
30 skills training through recess group three times a week
(for 31 weeks);
- (6) that Petitioners have not met the burden to show that
Candeo denied FAPE through refusal to provide social

subsequently promulgated, effective December 31, 2008.

¹⁰ The documents in Candeo's exhibits are also bates-stamp numbered; however, the bates-stamp numbers are numbers from another litigation between the parties.

¹¹ The Administrative Law Judge has read each witness-referenced Exhibit, even if not mentioned in this Decision. The Administrative Law Judge has also considered the testimony of every witness, even if not mentioned in this Decision.

skills training through peer-mediated intervention one time a week (for 55 weeks);

- (7) that Petitioners have not met the burden to show that Candeo failed to address Student's lack of organizational skills and, thereby, denied FAPE
- (8) that Petitioners have not met the burden to show that Candeo failed to address Student's difficulty with math and, thereby, denied FAPE;
- (9) that Petitioners have not met the burden to show that Candeo failed to "appropriately" modify curriculum and, thereby, denied FAPE;
- (10) that Petitioners have not met the burden to show that Candeo denied FAPE through refusal to perform an academic evaluation;
- (11) that Petitioners have not met the burden to show that Candeo denied FAPE through refusal to implement all of Dr. Gentry's recommendations;
- (12) that Petitioners have not met the burden to show that Candeo denied FAPE through failure to prepare a BIP; and
- (13) that Petitioners have not met the burden to show that Candeo denied FAPE for the reason that Student failed to meet her December 2008-December 2009 IEP goals.

As a result of these findings, the Complainant should be dismissed.

FINDINGS OF FACT

1. At the time of the due process complaint notice in this matter, Student was an [REDACTED] year old child; she had previously been determined eligible for special education and related services as a child categorized under other health impaired ("OHI"). Student has diagnoses of Attention Deficit Hyperactivity Disorder ("ADHD") and Bi-polar Disorder-Mixed.¹²

2. For the academic year 2008-2009, Student enrolled in [REDACTED] grade at Candeo, a Charter School.¹³ Student enrolled at Candeo absent any IEP. Early on, Student was reluctant to go to school and displayed "multiple meltdowns," "blatant emotional reactions and behavioral issues" and separation difficulties in coming to

¹² Parent indicated that Student was diagnosed in first grade.

¹³ Student attended a private school, [REDACTED], for [REDACTED] grade. See Exhibit B.

1 school.¹⁴ On November 4, 2008, Parents requested a psychoeducational evaluation
2 and a functional behavioral assessment ("FBA").¹⁵

3 3. In meetings December 3, 2008 and December 11, 2008, the IEP Team
4 determined Student's eligibility category to be OHI, but the IEP Team had also
5 considered the eligibility category of emotional disability, likely in response to Student's
6 demonstrated behaviors and the MET report (Paul Blandino, M.Ed.).¹⁶ The IEP Team
7 considered the psychoeducational evaluation, the behavior assessments, and the
8 [REDACTED] grade teacher's observations and assessments of Student's daily performance.
9 The IEP Team developed an Individual Educational Program ("IEP") for Student for the
10 period of December 11, 2008 to December 10, 2009, recognizing that she needed
11 specialized instruction and behavior interventions.¹⁷ In addition to the four goals set
12 forth therein, the IEP noted multiple accommodations and multiple specific behavior
13 supports for the purposes of allowing Student to progress toward the IEP goals.¹⁸

14 4. The IEP Team determined to provide the following behavior supports:
15 allowing frequent breaks; providing cooling off periods/place; a structured classroom
16 routine; using cues for transitions; obtaining Student's attention before instructing; using
17 positive re-enforcers and frequent feedback; teaching positive self-talk; using role-
18 playing of listening skills and good behavior; and implementing the behavior
19 intervention plan.¹⁹

21 ¹⁴ Parent testified that the day before they asked for a psychoeducational evaluation, Executive Director
22 had witnessed a "meltdown" and suggested that perhaps Candeo was not the school for Student. Parent
23 characterized this "suggestion" as a statement that Student's behaviors were not befitting the school. See
24 Transcript, pages 21-23. Executive Director, however, testified in more detail about the incident,
25 indicating that she had discussed the witnessed behavior with Parent and asked whether Student had
26 displayed such behavior at her prior school and, when Parent said "never," Executive Director has asked
27 Parent whether she thought this wasn't the school for Student if Student did not want to come to school.
28 See Transcript, page 543.

29 ¹⁵ See Exhibit B, page 14.

30 ¹⁶ See Exhibit B, pages 22-34. The purposes of the December 11, 2008 meeting were to consider
development of IEP, functional behavioral assessment (FBA) and behavior intervention plan (BIP). See
Exhibit B, page 37.

¹⁷ See Exhibit C, pages 39-47, December 11, 2008 IEP. This IEP was the IEP in place two years prior to
Petitioners' filing the instant Complaint.

¹⁸ See Exhibit C, pages 44 and 45.

¹⁹ Candeo considered that its Crisis Plan for Student contained the appropriate behavior interventions in
the event of Student's meltdowns and/or separation difficulties when Parent dropped off Student at school.
Student's classroom behavior demonstrated the need for behavior supports, not crisis interventions.

1 5. The IEP Team determined to provide the following special education
2 services: (a) 240 minutes per month of math instruction in the general education
3 classroom; (b) 240 minutes per month of consultation with general education teacher in
4 the general education classroom; and (c) 240 minutes per month of consultation for
5 behavior supports in any location on campus when needed.

6 6. Student's first goal was to increase her ability to independently complete,
7 and to identify each step, of all steps of a four-step task with success 4 of 5 times. Her
8 baseline was success in 2 of 5 trials.

9 7. In May 2009, Student's independent progress on this first goal was to the
10 level of 2.5 successful trials.²⁰ The then special education director noted that Student
11 continued to struggle with multi-step word tasks, with the example that if Student got the
12 first part wrong, she was not able to understand or reason that the remaining steps
13 were also wrong. However, Student was able to reason and answer multi-step
14 problems when she was given very specific step-by-step instructions.

15 8. Student's second goal was to increase effective interpersonal skills to
16 establish and maintain relationships with peers by identifying and utilizing two strategies
17 to recognize when she could successfully involve herself in [peer] conversations and
18 activities in success in 4 of 5 trials. Her baseline was success in 1 of 5 trials.

19 9. In May 2009, Student's increased progress on this second goal was to the
20 level of 3 successful trials. The then special education director noted that Student had
21 positive but short-lived relationships with her peers.

22 10. Student's third goal was to increase her ability to respond to peer conflicts
23 using socially acceptable words and actions with success in 4 of 5 trials. Her baseline
24 was success in 1 of 5 trials.

25 11. In May 2009, Student's increased progress on this third goal was to the
26 level of 3.5 successful trials. The then special education director noted that Student
27 had sought assistance from adults on the playground when Student experienced
28 conflict in organized games and was given suggestions for strategies to use so she
29 could independently rejoin her peers. Student was able to rejoin peers successfully but
30

²⁰ See Exhibit 2.

1 also would sometimes walk away (and not rejoin). Student was noted to be using
2 acceptable words to resolve conflicts but also used words that could be perceived as
3 bossy or rude when she was apparently trying to be humorous and playful.

4 12. Student's fourth goal was to complete 20 addition and subtraction math
5 problems (0-20) accurately within one minute. Her baseline was 8 accurate problems
6 per minute.

7 13. In May 2009, Student's progress on this fourth goal was to the level of 12
8 accurate problems per minute.

9 14. In November 2009, Candeo began the process for reviewing Student's
10 IEP, and the IEP Team agreed to meet on December 4, 2009.²¹ On December 4,
11 2009, Parent requested an Independent Educational Evaluation (IEE).²² On December
12 4, 2009, the IEP Team reviewed Student's present levels of performance. On
13 December 10, 2009, the IEP Team reconvened and reviewed other portions of the IEP.
14 At that time, the IEP Team and Parent determined that the December 11, 2008 IEP
15 would continue until the team could reconvene, agree and implement a new IEP based
16 on consideration of the results of the IEE.²³

17 15. In January 2010, Amy Serin, Ph.D. conducted a psychoeducational
18 evaluation.²⁴ Based on classroom observations, Dr. Serin noted, in pertinent part:

19 She appeared to have difficulty sustaining attention and
20 tracking tasks without having working memory failures. She
21 needed a higher level of structure and assistance than did
22 her peers. ... She seemed to have some difficulty
23 coordinating gross motor movements and with legible writing
24 of math symbols during sprints. It is apparent, based on the
25 observation, that [Student] requires more encouragement,
26 structure, assistance, and supervision that her peers in order
27 to be successful.

28 Based on the testing, Dr. Serin summarized the test results as follows:
29
30

31 ²¹ See Exhibit D, page 52, May 3, 2010 IEP Summary.

32 ²² Parent testified that they had requested the IEE because they were concerned about Student's reading
33 skills. See Transcript, page 34.

34 ²³ See Exhibit D, page 52, May 3, 2010 IEP Summary; see also Exhibit 28 (letter from Advocate dated
35 December 10, 2009) and Parent testimony, Transcript, pages 221 and 222.

36 ²⁴ See Exhibit 33, Psychoeducational evaluation, conducted in January 2010 (pages Berkley88-
37 Berkley102).

1 [Student] is a ■ year old child who completed the WISC-IV
2 and the WIAT-II. Her overall cognitive ability, as evaluated
3 by the WISC-IV, cannot easily be summarized, because her
4 verbal reasoning abilities are much better developed than her
5 nonverbal reasoning abilities. [Student's] reasoning abilities
6 on verbal tasks are generally in the Average range (VCI=96),
7 while her nonverbal reasoning abilities are significantly lower
8 and in the Low Average range (PRI=82). [Student's] general
9 working memory abilities are in the Low Average range
10 (WMI=88), and general processing speed abilities in the Low
11 Average range (PSI=80).

12 She demonstrated relatively weak skills in Math Reasoning,
13 Numerical Operations, Pseudoword Decoding, Reading
14 Comprehension, Word Reading, and Written Expression on
15 the WIAT-II.

16 Regarding Student's executive functioning, Dr. Serin summarized as follows, in
17 pertinent part:

18 [Student] struggles in many areas of executive functioning.
19 These problems are consistent with a prior medical
20 diagnosis of bipolar disorder, in which frontal-executive
21 processes are not smooth and efficient. ... The remedy for
22 executive function difficulties is external structure,
23 accommodation, and assistance as [Student] cannot self-
24 direct and overcome these problems with willpower or effort.
25 *Because [Student] struggles in so many areas, parents and*
26 *teachers should discuss the top priorities and then include*
27 *specific interventions* (appended to this report) as part of
28 [Student's] IEP plan.

29 Emphasis added here.

30 Finally, in overall summary, Dr. Serin noted, in pertinent part:

Student's FISQ should not be used as an overall summary
of her intellectual abilities because of higher abilities in
Verbal Comprehension vs. Perceptual Reasoning, Working
Memory, and Processing Speed. Because [Student] has
Average Verbal abilities, she may appear to be bright but
when other skills are necessary for successful task
completion, her ability to achieve may be lower than
average. Goals should be reasonably challenging and care
should be taken not to overwhelm [Student] given her
abilities and emotional challenges.

1 In addition, it appears that the presence of bipolar disorder is
2 creating problems with emotional regulation and other
3 executive function issues that will need to be accommodated
4 in home and at school so that [Student] can be successful.

5 Based on the differences between [Student's] Verbal
6 Comprehension Index and her Achievement scores, she
7 does meet criteria for specific learning disabilities in the
8 areas of Math, Reading, and Written Expression. However,
9 when discrepancy criteria are used to compare her
10 Perceptual Reasoning Index to her mathematical abilities,
11 no such discrepancy exists. *It appears that [Student] has*
12 *true learning disabilities in the areas of reading and writing,*
13 *and low achievement in math that is secondary to Low*
14 *Average Perceptual Reasoning abilities and Low Average*
15 *Working Memory. Another important consideration is the*
16 *possibility of a third factor that affects her Perceptual*
17 *Reasoning abilities and math achievement. If this is the*
18 *case, [Student] may fall more behind relative to her peers*
19 *without intervention. Therefore, math interventions are*
20 *recommended.*

21 Emphasis added here.

22 In her report, Dr. Serin proceeded to gave 18 recommendations for Candeo to consider
23 with regard to Student's performance expectations, education instruction suggestions
24 and accommodation suggestions. The second recommendation was as follows:

25 Parent and teachers should expect variability in [Student's]
26 performances from day to day and hour to hour that will
27 impede her ability to learn smoothly and efficiently.

28 The fourth recommendation was as follows:

29 Teachers and parents should keep in mind that [Student]
30 may not be able to master executive function skills and
academic skills to a grade appropriate level given her IQ
scores. Expectations should be reasonable. Also, teachers
and parents should keep in mind that a major goal for a child
with bipolar disorder is to keep her from becoming so
depressed that she attempts suicide. Given this fact, lofty
academic goals run the risk of overwhelming a child like
[Student] and creating too much stress that undermines the
most important goal for a child with bipolar disorder.

The fifth recommendation was as follows:

1 [Student] would benefit from additional help to remediate the
2 specific learning disabilities of reading and written
3 expression. Without intervention, it is likely that her
4 achievement will fall further and further below her peers.
5 She will also benefit from additional math help.

6 The eighteenth recommendation was that Student "should be retested at regular
7 intervals to assess progress."

8 16. On March 1, 2010, and March 3, 2010, the IEP Team met to consider the
9 IEE and develop a new IEP.²⁵ At that time, Student was determined to have a second
10 eligibility category of specific learning disability. However, due to Candeo's agreement
11 to gather additional data for possible new goals and the team's consideration of
12 additional parental concerns, IEP redrafting, and additional meetings regarding parental
13 concerns (outside the team setting), Student's new IEP was not completed until May 3,
14 2010.²⁶

15 17. At that point in May 2010, because Student had not demonstrated
16 behaviors that impeded her academic instruction ("learning"), Candeo staff expressed
17 no concerns with Student's behaviors. However, Candeo staff acknowledged there had
18 been three occurrences of separation anxiety and also acknowledged that "a crisis plan
19 is on record if problematic behaviors occur during parent drop off/pick up and/or effect
20 her instruction."²⁷ The IEP Team determined that the behavioral and organizational
21 goals needed to be tabled but monitored. The IEP Team determined a variety of
22 accommodations and curriculum modifications.²⁸ The IEP Team determined that
23 Student was eligible for services in math, reading and writing but determined that
24 Student would receive special education services in the areas of written expression,
25 reading fluency, reading comprehension, and basic reading skills, her specific learning
26 disability areas (as determined by Dr. Serin).

27
28 ²⁵ See Exhibit D, May 3, 2010 IEP, page 48.

29 ²⁶ See Exhibit D, page 52, May 3, 2010 IEP Summary. This IEP was developed for the period of May 3,
30 2010 through May 2, 2011.

²⁷ See Exhibit D, page 50 (summarization of current services). See *Id*, page 53, indicating that the "crisis
plan" is marked as Student's BIP; see also *Id*, page 67, the Crisis Plan.

²⁸ See Exhibit D, page 56.

18. Student's six goals in the May 3, 2010 IEP relate to her academic needs, categorized as language arts.²⁹ The IEP Team determined Student would not have a math problem solving goal. At hearing, Parent testified that she did want more time to be spent on reading and, although she had wanted to keep a math goal in the IEP, she was told the Team had to prioritize and choose a limited number of goals to work on.³⁰

19. In May 2010, the IEP Team determined to provide special education services within the resource room at one hour per day, four times per week.³¹ The IEP Team determined the following special education services: (a) 280 minutes per month of written expression instruction in the special education classroom; (b) 200 minutes per month of reading fluency instruction in the special education classroom; (c) 200 minutes per month of reading comprehension instruction in the special education classroom; and (d) 240 minutes per month of basic reading skills instruction in the special education classroom. Additionally, as supplemental aids, Student was to be provided study guides and graphic aids to help her retention, and was to have access to a cool-off place when needed. Student's IEP called for her to participate with her non-disabled peers "when not receiving special education services." Finally, Student's IEP called for the general education staff to receive in-service regarding Student's "needs for specialized services, how to properly read her annual IEP, know service times and locations, in addition to necessary accommodations."³²

20. On April 26, 2010, Parents filed an administrative complaint, which was mediated, and is presently the subject of continuing litigation.³³ Petitioners assert that the issues in that administrative complaint, the mediated agreement, and the mediation litigation are not part of the instant due process complaint.³⁴

²⁹ See Exhibit D, pages 54 and 55, reiterated on page 63.

³⁰ Parent testimony, Transcript, pages 608, 611 and 635. This also comports with Dr. Serin's recommendations not to overwhelm Student. In Parent's September 26, 2010 e-mail to [REDACTED] Grade Math Teacher, Parent states: "Also, think about her math skills. Math is NOT in her IEP. It was decided that reading was weaker and she was doing better in math. However, I have a hard time with the fact that her basic operation skills are so poor. ... It might be worth including addressing math in the next [IEP] revision." See Exhibit 67.

³¹ See Exhibit D, page 59.

³² *Id.*, page 59.

³³ See Exhibit J; see also Parent testimony, Transcript, pages 203 and 204.

³⁴ See Petitioner's October 3, 2011 Response to Candeo's Motion to Dismiss for Lack of Jurisdiction and Objection to Sufficiency.

1 21. As a result of the mediation, in September 2010, Joseph Gentry, Ph.D.,
2 BCBA, conducted an FBA.³⁵ Dr. Gentry recommended several social skills
3 interventions, several academic interventions and several behavioral interventions
4 ("consequence" interventions). Dr. Gentry was aware of Dr. Serin's January 2010
5 psychoeducational evaluation and reviewed it before conducting his observations. Dr.
6 Gentry also recommended a full educational evaluation in order to "ensure [Student]
7 has on-going and regular academic assessment to monitor her learning."³⁶ Dr. Gentry
8 testified that, during his observations, what he "noticed the most was [Student's] lack of
9 social awareness and social skills."³⁷ As his overall recommendations, Dr. Gentry
10 indicated that Student's social skills should be reassessed in six months and also
11 recommended that one or two social skills goals be added to Student's IEP.

12 22. On November 19, 2010, considering Dr. Gentry's FBA and
13 recommendations, the IEP Team developed an IEP Addendum, which added the
14 following two social emotional skills goals (encompassing seven social goals):

15 (a) develop more mature social skills through increasing her ability to gain
16 attention from teachers, adults and peers by (i) initiating eye contact, (ii) raising her
17 hand in group settings and waiting to be called upon, (iii) saying "excuse me" when
18 others are speaking, and (iv) waiting to be acknowledged before speaking, in 80% of
19 the opportunities within a 15 minute time frame; and,

20 (b) demonstrate effective communication skills at snack recess through (i)
21 initiating conversations with others, (ii) maintaining a conversation with others, and (iii)
22 seeing the conversation to its natural conclusion without walking away, in 80% of the
23 opportunities for a 15 minute time frame.³⁸

24 ³⁵ See Exhibit L, pages 233-240; see also Exhibit 70.

25 ³⁶ See Exhibit 79; see also Gentry testimony, Transcript, pages 161-164. Dr. Gentry acknowledged the
26 IDEA requirement to evaluate a child with a disability every three years, but opined that a school could do
27 an evaluation as often as every year or as often as the IEP Team agreed it was necessary. In response to
28 comments and suggested additions to the report from Parent regarding his draft report, among other
29 responses, Dr. Gentry noted that he had not done any academic testing and "can't do more than
30 recommend that they do some testing to see what is what and, then make some IEP goals from there."
See Exhibit 71, pages Gentry 122 and 123.

³⁷ Gentry testimony, Transcript, page 94-95.

³⁸ See Exhibit E, pages 78 and 79 (Progress Report pages). There were no baselines available on three
of these goals, for the reason that the goals were added based on parental request; however, Student's
baseline on raising her hand and waiting to be called on was 37% based on Dr. Gentry's FBA
observation(s).

1 23. In the November 19, 2010 Addendum, the IEP Team determined to
2 provide the following additional special education services: (a) behavior support for
3 social skills training in the general education classroom by the special education
4 teacher for 216 minutes per month (on 4 days a week for 15 minutes sessions); and (b)
5 behavior support for social skills training in the general education classroom by the
6 general education teacher at 162 minutes per month through activities during snack
7 recess (on 3 days a week for 15 minute sessions).³⁹ An additional supplemental aid
8 for Student was determined to be paraprofessional assistance to reinforce social skills
9 Student learned in the classroom (on 4 days a week for 15 minute sessions).⁴⁰

10 24. The November 19, 2010 Prior Written Notice indicates that Parent and the
11 IEP Team disagreed on several items. The IEP Team rejected adoption of "all" of Dr.
12 Gentry's recommendations as being excessive for the reasons that Student's level of
13 lack of social skills was not severe and to adopt all the recommendations would not
14 leave sufficient time for Student to access her educational instruction; Parent wanted
15 the IEP Team to adopt all of Dr. Gentry's recommendations "verbatim." The IEP Team
16 adopted two social skills goals at the rate of four days per week so that Student could
17 independently work at these goals one day a week; Parent wanted daily social skills
18 training all five days in the week. The IEP Team rejected the need for additional 1:1
19 social skills training; Parent wanted an additional 1:1 session weekly for practice and
20 feedback. The IEP Team offered 3 times per week of recess social skills sessions;
21 Parent wanted 5 times per week of lunch and recess social skills sessions. The IEP
22 Team rejected behavior data collection 2 times a week; Parent wanted such behavior
23 data collection. The IEP Team rejected a new academic evaluation because the
24 current evaluation by Dr. Serin was less than one year old; Parent wanted a full
25 academic evaluation based on Dr. Gentry's FBA recommendation.

26 25. On April 27, 2011 and May 6, 2011, the IEP Team met to develop a new
27 IEP for the period of April 27, 2011 to April 26, 2012.⁴¹ At that time, Student was in
28 [REDACTED] Grade and enroute to enter [REDACTED] Grade in August 2011. The IEP Team

29 ³⁹ In the November 2010 Addendum, the then existing May 2010 special education service minutes and
supplemental services were not changed. See Exhibit E, page 83.

30 ⁴⁰ The Addendum is signed-off as of December 14, 2010.

1 considered the multidisciplinary team evaluation, Student's academic performance and
2 achievements, Student's functional performance and available data. The IEP Team
3 recognized that Student continued to need some specific specialized instruction. While
4 the IEP Team noted progress and some of Student's achievements, Parents continued
5 to be concerned that, based on Student's grades (and test scores), that Student was
6 not performing as Parents expected, that Student was not demonstrating or
7 generalizing skills at home or while doing her homework, and that Student's
8 organizational skills were poor for school and at home (as tasks still needed to be
9 broken down for her and she needed prompting and external motivation).

10 26. At this time, the IEP Team determined that Student had improved her
11 social interactions over the school year, no longer demonstrated behaviors that
12 impeded her learning, and no longer needed a BIP (but recognized that the Crisis Plan
13 continued to be available for unexpected behavior events).⁴² Despite Student's
14 successes, the IEP Team determined to continue to provide behavior support
15 interventions to help Student "maintain appropriate peers interactions." The IEP Team
16 noted that "[s]ervices will address some of her social deficits in order to maintain
17 progress in the classroom setting as well as gain social interactions with her peers."⁴³
18 In addition to the ten new language arts goals, the IEP Team developed seven math
19 goals and four social emotional goals. The IEP also noted multiple accommodations
20 and curriculum modifications for the purposes of allowing Student to have meaningful
21 and productive learning experiences.

22 27. In the April 27, 2011 IEP, the IEP Team determined to provide the
23 following special education services:

24 (a) reading comprehension, reading fluency and basic reading in the special
25 education classroom for a total of 648 minutes per month (on 4 days a week for 45
26 minute sessions);

27 (b) written expression in the special education classroom for 576 minutes per
28 month (on 4 days a week for 40 minute sessions);

29 ⁴¹ See Exhibit F, April 27, 2011 IEP.

30 ⁴² See Exhibit F, pages 98-102.

⁴³ See Exhibit F, page 102.

1 (c) math calculation and math problem solving in the special education
2 classroom for 576 minutes per month (on 4 days a week for 40 minute sessions);

3 (d) behavior support in the general education classroom with the general
4 education teacher setting up activities for social skills work (during snack recess) for
5 162 minutes per month (on 3 days a week for 15 minute sessions);

6 (e) behavior support in the general education classroom for social skills work for
7 108 minutes per month (on 2 days a week for 15 minute sessions);

8 (f) behavior support for social skills training in the special education classroom by
9 the special education teacher for 216 minutes per month; and

10 (g) behavior support in the special education classroom by the special education
11 teacher for 108 minutes per month.⁴⁴

12 The IEP Team determined to continue supplemental aid for Student in the form of
13 paraprofessional assistance in both the general and special education settings in order
14 to reinforce Students' IEP goals (on 4 days a week for a total of 65 minute sessions).

15 28. Parents did not enroll Student at Candeo for [REDACTED] Grade, the academic
16 year of 2011-2012. Dr. Gentry reevaluated Student in early August 2011.⁴⁵ Parents
17 enrolled Student her in her public home school district for Fifth Grade, and filed this
18 Complaint on September 12, 2011.

19 29. With regard to their overall due process position, Parents argued that
20 Candeo had failed to provide FAPE because, with IEPs in place and with the various
21 accommodations and modifications in place, Student should have made met her IEP
22 goals. Parent argued that Candeo could not have provided FAPE because Student
23 continued to need more and more special education services and had to be given more
24 time in restrictive environments for her services. Parent argued that the whole point of
25 the IEPs and special education services was to make the student successful "and her
26 grades did not reflect that."⁴⁶ In support of these arguments, Parents argued that
27 Student remained below standard on the AIMS tests.⁴⁷

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29 ⁴⁴ See Exhibit F, page 113.

⁴⁵ See Exhibit L, pages 300-304.

⁴⁶ See Transcript, page 32.

⁴⁷ See Transcript, page 37-38.

1 30. In the Supplemental Complaint, Petitioners requested the following
2 remedies:

3 (a) Payment for private placement if her home district is unable to remedy
4 "deficiencies" caused by Candeo alleged violations and failure to provide FAPE;

5 (b) Payment for any and all programs such as tutoring, counseling,
6 organizational and social programs to compensate for the alleged "deprivations" of the
7 two years; and

8 (c) reimbursement of attorney's fees and expenses incurred in connection with
9 the alleged violations and the due process proceeding and hearing.

10 **CONCLUSIONS OF LAW**

11 1. Through the IDEA, Congress has sought to ensure that all children with
12 disabilities are offered a FAPE that meets their individual needs.⁴⁸ These needs
13 include academic, social, health, emotional, communicative, physical, and vocational
14 needs.⁴⁹ To do this, school districts are required to identify and evaluate all children
15 within their geographical boundaries who may be in need of special education and
16 services. The IDEA sets forth requirements for the identification, assessment and
17 placement of students who need special education, and seeks to ensure that they
18 receive a free appropriate public education. A FAPE consists of "personalized
19 instruction with sufficient support services to permit the child to benefit educationally
20 from that instruction."⁵⁰

21 2. Pursuant to IDEA, the District is required to annually review a student's
22 IEP to determine whether the annual goals are being achieved and to revise the IEP as
23 appropriate to address the lack of expected progress, the results of any reevaluations,
24 information about the student provided by parents, the student's anticipated needs and
25 any other unique matters.⁵¹ These IEP determinations and the placement decisions are
26 made by a group of people, the IEP Team which includes the parents, knowledgeable
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28 ⁴⁸ See 20 U.S.C. §1400(d); 34 C.F.R. § 300.1.

29 ⁴⁹ *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) (quoting H.R. Rep. No. 410, 1983
U.S.C.C.A.N. 2088, 2106).

30 ⁵⁰ *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176, 204 (1982).

⁵¹ See 34 C.F.R. § 300.324(b).

1 about the student, about the available evaluations and about the placement options.⁵²
2 One other mandate is that a school district ensure that a child's placement is
3 determined annually, is based on the IEP and is as close as possible to the child's
4 home.⁵³

5 3. A petitioner who files for a due process hearing alleging non-compliance
6 with the IDEA must bear the burden of proving that claim.⁵⁴ The standard of proof is
7 "preponderance of the evidence," meaning evidence showing that a particular fact is
8 "more probable than not."⁵⁵ Therefore, Petitioners bear the burden of proving by a
9 preponderance of evidence the allegations, claims and arguments raised.

10 4. In this case, Petitioner alleged that Candeo failed to implement the
11 December 11, 2008 IEP and alleged a failure to provide the services therein.⁵⁶ The
12 hearing record documented no evidence that Candeo failed to implement Student's
13 December 11, 2008 IEP or failed to provide the services set forth therein during the
14 second semester of 2009-2010. Parent did not provide any evidence regarding any
15 number of hours of special education specialized instruction that were or were not
16 provided to Student. Parent admitted that she was not at school to observe the services,
17 and could not be because Student acted differently when Parent was present and,
18 therefore Parent did not know how often the services were actually given or how often
19 any of the special education service professionals were in the classroom with Student.
20 Former Special Education Director testified that she did provide all the required special
21 education minutes and math services set forth in the IEP. [REDACTED] Grade Math Teacher
22 testified that the prior special education director had been in her classroom for 160
23 minutes per week,⁵⁷ which was approximately three times more than what had been
24 required in Student's IEP but also noted that Former Special Education Director was in

25 ⁵² See 34 C.F.R. §§ 300.116(a) and 300.501(c). The Administrative Law Judge is now bound to make
26 determinations within the confines of the IDEA and its purposes and mandates.

27 ⁵³ See 34 C.F.R. § 300.116(b).

28 ⁵⁴ *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005).

29 ⁵⁵ *Concrete Pipe & Prods. v. Constr. Laborers Pension Trust*, 508 U.S. 602, 622, 113 S. Ct. 2264, 2279
30 (1993) quoting *In re Winship*, 397 U.S. 358, 371-372 (1970); see also *Culpepper v. State*, 187 Ariz. 431,
437, 930 P.2d 508, 514 (Ct. App. 1996); *In the Matter of the Appeal in Maricopa County Juvenile Action No.*
J-84984, 138 Ariz. 282, 283, 674 P.2d 836, 837 (1983).

⁵⁶ The December 11, 2008 IEP continued in effect until the IEP Team developed the new IEP on May 3,
2010.

⁵⁷ See Exhibit 10.

1 the classroom less that that.⁵⁸ [REDACTED] Grade Math Teacher also indicated that, at first, the
2 math services were provided in the classroom but then, around March 2010, Student was
3 pulled out at "flex time" not only for math but for assistance with her homework. "Flex
4 time" was set at 30 minutes four days a week for a minimum of 120 minutes per week,
5 which totals more minutes per month than what had been required in Student's IEP.
6 Parent presented no legal support for the position that Candeo personnel was required to
7 maintain records and documentation of the minutes and should have provided such to
8 Parent. The December 11, 2008 IEP contained math instruction services. This IEP was
9 agreed by the IEP Team to be continued in place until the next IEP was created. The
10 next IEP was developed on May 3, 2010. Therefore, based on the above, the
11 Administrative Law Judge concludes that Parent has *not* demonstrated that Candeo
12 failed to implement the IEP by failing to provide special education minutes. The
13 Administrative Law Judge further concludes that Petitioner has *not* demonstrated that
14 Candeo failed to provide math services in the second semester of 2009-2010 (*i.e.*, from
15 December 11, 2009 to May 3, 2010).

16 5. Parents alleged that Candeo refused to provide social skills training through
17 weekly one-on-one sessions (for 55 weeks), through lunch bunch three times a week (for
18 55 weeks), through recess group three times a week (for 31 weeks) and through peer-
19 mediated interventions (for 55 weeks. The 55 week time period takes into account the
20 time frame between December 2009 and May 2011 (accounting for breaks in the school
21 year). The 31 week time period appears to be the time frame between December 2009
22 and November of 2010 (again, accounting for breaks in the school year). However, the
23 hearing record demonstrates that these specific requests were not made by Parents until
24 after Dr. Gentry's October 2010 report recommendations, which were discussed at the
25 November 19, 2010 IEP meeting and which were denied in the November 19, 2010
26 PWN. Therefore, the Administrative Law Judge concludes, at a minimum, that the time
27 periods alleged cannot be demonstrated for any such alleged refusal. With regard to
28 adopting such recommendations, the hearing record further documents that the IEP
29 Team considered Dr. Gentry's report and its multiple recommendations, but determined
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⁵⁸ See Transcript, pages 389-393.

1 that not all of the recommendations could be implemented because to do so would
2 significantly impact the time available for Student's academic instruction. This is a
3 reasonable review and consideration by the IEP Team, which is charged with determining
4 the individualized services necessary to allow a child with a disability to access
5 educational instruction and to obtain a meaningful educational benefit.⁵⁹ Parents cited
6 no legal support for any IDEA requirement to adopt each and every recommendation that
7 may be made by an evaluator or contained within an assessment. Interestingly, Parents
8 made no such claim with regard to Dr. Serin's recommendations, not all of which were
9 adopted and implemented. Likewise, the same can be said regarding parental
10 suggestions; there is no support in the IDEA for any mandate that each parental
11 recommendation or request must be accommodated and implemented in a student's IEP.
12 Therefore, based on the above, the Administrative Law Judge concludes that Parent has
13 *not* demonstrated that Candeo denied FAPE in refusing to provide, or failing to provide,
14 the requests for social skills trainings in weekly one-on-one sessions, through lunch
15 bunch three times a week, through recess group three times a week or through peer-
16 mediated interventions.

17 6. Each Candeo IEP presented set forth multiple accommodations in order to
18 permit Student to be able to more efficiently perform her academic work and/or her tests.
19 Therefore, the Administrative Law Judge concludes that Parent failed to demonstrate that
20 Candeo did not address Student's lack of organizational skills.

21 7. Each Candeo IEP presented set forth modifications to assist Student in
22 completing her academic work. Therefore, the Administrative Law Judge concludes that
23 Parent failed to demonstrate that Candeo did not "appropriately" modify Student's
24 instruction curriculum. Petitioners did not cite to any IDEA requirement or standard of
25 "appropriate." The IDEA requires that an IEP contain individualized services and goals
26 that meet the child's special needs and enable the child to be involved in and make
27 progress in the general education curriculum.⁶⁰

28 8. Parent failed to demonstrate that Candeo did not address Student's
29 difficulty with academics, specifically math. In addition to the hearing evidence that the
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⁵⁹ See 34 C.F.R. §§ 300.320 and 300.321.

⁶⁰ See 34 C.F.R. §§ 300.320 (a)(2).

1 math services were, in fact, provided pursuant to the December 11, 2008 IPE, the IEP
2 Team later came to a consensus that math goals should be tabled in order to concentrate
3 on the newly determined learning disability areas of reading and writing. Parent
4 acknowledged that Student was progressing and demonstrating more math skills, and
5 Parent and [REDACTED] Grade Math Teacher communicated regularly regarding Student and
6 her math homework noting her progress and good and bad days.⁶¹ [REDACTED] Grade Math
7 Teacher testified that Student started slowly but made progress in the [REDACTED] Grade math
8 problems and concepts.⁶² Additionally, Student was provided specific modifications to
9 assist her with math problem solving. Dr. Serin had determined that Student did not have
10 a learning disability in math, and the IEP Team determined to address, as Student's
11 priority, the discovered learning disabilities in reading and written expression. The IEP
12 Team gave great weight to Dr. Serin's recommendation "not to overwhelm [Student] given
13 her abilities and emotional challenges." Therefore, based on the above, the
14 Administrative Law Judge concludes that Parent has *not* demonstrated that Candeo
15 failed to address Student's difficulty with math academics.

16 9. The Administrative Law Judge concludes that Parent has *not* demonstrated
17 that Candeo violated the IDEA or denied FAPE by refusing to conduct an academic
18 evaluation in response to Dr. Gentry's October 2010 recommendations. The IDEA
19 requires a reevaluation at least once every three years, but also indicates that it need not
20 take place more frequently than annually, unless the parents and school agree to more
21 frequent evaluations.⁶³ Student was evaluated in November 2008 and in January 2010.
22 Both Dr. Serin and Dr. Gentry acknowledge that a child should be evaluated regularly in
23 order to determine their progress. The Administrative Law Judge concludes that Candeo
24 was not in violation of the IDEA in November 2010 by denying another evaluation
25 because the last evaluation was less than one year old at that time. Parent provided no
26 legal support for any requirement that another evaluation was required for Student at that
27 time.

28
29 ⁶¹ Dr. Serin had noted that Parents and Candeo should expect variability in Student's performance due to
her bipolar disorder.

30 ⁶² See Transcript, pages 528 and 529; see also pages 534 and 535.

⁶³ See 34 C.F.R. § 300.303(b).

1 10. The Administrative Law Judge concludes that Parent has *not* demonstrated
2 that Candeo violated the IDEA or denied FAPE by failing to create a document labeled
3 "Behavior Intervention Plan." In December 2008, long before Dr. Gentry's October 2010
4 evaluation, the IEP Team had created a crisis plan to deal specifically with Student's
5 behaviors at that time, which consisted of meltdowns and/or separation anxiety situations
6 that often prevented her from coming to school or resulted in her being taken home. The
7 IEP Team considered that crisis plan to be the BIP for Student. By the May 2010 IEP
8 meetings, Student's "crisis" behaviors had essentially abated and the Candeo staff
9 reported that there were no behaviors being displayed in the classroom that were
10 impeding Student's access to her educational instruction. The purpose of the FBA is to
11 assess the behaviors and functional social skills of the child in order to plan to monitor the
12 behavioral problems (deficits and excesses) and address problems that are interfering
13 with accessing educational curriculum.⁶⁴ In this case, the October 2010 assessment and
14 the November 2010 FBA demonstrated that Student's "behaviors" that needed to be
15 addressed consisted of poor social skills; the FBA resulted in the creation of seven social
16 skills interventions and objectives for Student. Based on the foregoing, the Administrative
17 Law Judge concludes that Candeo did not substantively or procedurally violate the IDEA
18 by failing to create a document labeled a BIP after conducting the FBA.

19 11. The IEP Team is the final decision maker, typically by consensus, with
20 regard to the necessary changes that will continue to provide the unique and specialized
21 services that the child requires. As previously stated, the hearing record documented that
22 the IEP Team considered Dr. Gentry's report and its multiple recommendations, but
23 determined that not all of the recommendations should be implemented. Parents cited no
24 legal support for any IDEA requirement to adopt each recommendation that may be made
25 by an evaluator or contained within an assessment. Therefore, based on the above, the
26 Administrative Law Judge concludes that Parent has *not* demonstrated that Candeo
27 violated the IDEA or denied FAPE in refusing to adopt and implement all of Dr. Gentry's
28 October 2010 recommendations "verbatim."
29
30

⁶⁴ See Gentry testimony, Transcript, pages 92-95.

1 12. The Administrative Law Judge concludes that Parents cannot
2 demonstrate that Candeo failed to provide FAPE based on its argument that Student
3 did not meet all her December 2008-December 2009 IEP goals. The standard to be
4 met for consideration in this matter is whether the IEPs, at the time they were created,
5 consisted of specialized instruction and services reasonably calculated to enable
6 Student to receive educational benefit.⁶⁵ The IDEA contains no particular substantive
7 educational standard and no mandate to maximize the potential of a child. The hearing
8 record demonstrates that Student made progress on the four specific goals set forth in
9 the December 11, 2008 IEP and, therefore, the IEP was designed to enable Student to
10 obtain educational benefit.

11 13. For the reasons stated herein, the Administrative Law Judge concludes
12 that Petitioners have not met their burden to demonstrate any of the allegations and,
13 therefore, Petitioners' claims in the Complaint must be denied and the Complaint must
14 be dismissed.

15 **ORDER**

16 Based on the findings and conclusions above,
17 IT IS ORDERED that Petitioners' Complaint is dismissed.
18 ORDERED this 23rd day of February, 2012.

19 OFFICE OF ADMINISTRATIVE HEARINGS

20 

21 Kay A. Abramsohn
22 Administrative Law Judge
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⁶⁵ See *Hendrick Hudson Central Sch. Dist. Bd. of Educ. v. Rowley*, 458 U.S. 176 (1982).

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