DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT
STATE OF COLORADO

Due Process Hearing No L2005:110

FINDINGS OF FACT, CONCLUSIONS OF LAW, OPINION AND ORDER

[redacted], by and through her parents
[redacted] and [redacted]

Petitioners,

and

MESA COUNTY VALLEY SCHOOL DISTRICT NO. 51,

Respondent.

THIS MATTER came to hearing on the 11th and 12th days of July, 2005, in Grand Junction, Colorado. Petitioners appeared Pro Se, Respondent appeared through Attorneys David Price and Leah Gates. Petitioner requested a Due Process Hearing on May 3, 2005, requiring a decision by June 17, 2005, but said date was extended to July 18, 2005 by mutual agreement of the parties.

Petitioner complains that the child's IEP, dated March 12, 2004, a copy of which is in evidence as Exhibit P-6, is inadequate both procedurally and substantively and that the child did not receive FAPE as a result.

The bases for the claim of procedural deficiency are: 1. the purported lack of involvement of the parents in the IEP process. 2. failure to establish baselines against which to measure progress and 3. the failure of the District to include any Goals, Objectives, Accomodations or Modifications pertaining to Math.

The basis for the claim of substantive deficiency is the failure of both the Special Education teacher and the regular classroom teacher to follow the IEP, particularly in regard to the Accomodations and Modifications set forth therein.

Finally, Petitioner points to the child's purported lack of progress as the basis for the claim that the child did not receive a Free Appropriate Public Education.

FINDINGS OF FACT

The IHO makes the following findings of fact:

1. Based on the testimony of her teachers, the child has an excellent attitude towards school and its demands and an excellent record of attendance.
2. The child is socially well adjusted and is eager to learn.
3. The Special Education teacher and both regular education teachers had

an excellent understanding of the child's IEP and consciously sought to achieve the Goals and Objectives and comply with the Accomodations and Modifications set forth therein.

4. The parents were directly responsible for changesin the IEP during the 2004-2005 school year.

5. The notices of IEP meetings, both for annual review and other purposes were adequate and the IHO finds that the parents had actual timely notice of all IEP meetings.

6. From March 2005 on, the District tried, on several occaisions, to concuct an annual review that included the parents but the parents, for various reasons, including refusing to discuss the IEP because it was in litigation, did not attend or participate in an annual review meeting.

7. The parents and/or their representative did meet, on several occaisions, with Theresa Bandel-Schott, the districts Special Education coordinator, to discuss changes to the child's IEP.

8. On April 26, 2005, a notice of meeting for annual review of the IEP and transition to Middle School was sent to the parents by having the child carry the notice home.

9. The notice was for a meeting on May 6, 2005. The IHO finds the parents properly received thisnotice on April 26, 2005.

10. On May 3, 2005, the parents filed a request for due process dated April 28, 2005, and refused to discuss the IEP at the meeting on May 6, 2005, claiming the IEP was "in litigation".

11. By letter of December 8, 2004, the parents sought to terminate the provision of the IEP mandating 3.0 hours per week of direct services to the child in the areas of reading and writing.

12. The direct services were, in fact, terminated around December 8, 2004 and were not resumed for the balance of the school year.

13. The IHO finds that this termination of direct services to the child, contrary to the then provisions of the IEP was ill-advised and detrimental to the child.

14. The child progressed in writing during the school year, but progress in reading was marginal at best.

15. That based on her discussions with the parents and Lynn Simpson, their attorney, Ms. Bendel-Schott developed and drafted an IEP dated May 6, 2005, admitted into evidence as Exhibit A-1.

16. Exhibits P-6, the March 12, 2004 IEP and A-1, the May 6, 2005 draft IEP are substantially similiar, and, in fact, nearly identical. The primary difference is page "18 of 23" in Ex. A-1 which is an amalgum of several pages in Ex. P-6. the rest of the goals and Objectives are identical, as are the Accomodations and Modifications.

CONCLUSIONS OF LAW

1. In Colorado, controlling federal case law clearly establishes that the burden of proof is on the Petitioners in this case to demonstrate by a preponderance of the evidence that the child's IEP is in violation of IDEA, 20 U.S.C. sections 1400 et seq., A.E. v. Independent Sch. Dist. No. 25, 936 F 2d 472, 475 (10th Cir. 1991); Logue v. Unified Sch. Dist. No. 512, 28 IDELR 609 (10th Cir. 1998). The Tenth Circuit has held with respect to the IDEA that "the Act creates a 'presumption in favor of the

education placement established by [a child's individualized education plan],' and 'the party attacking its terms should bear the burden of showing why the educational setting established by the [individualized education plan] is not appropriate.'" Johnson v. Independent School District No. 4, 921 F. 2d 1022, 1026 (10th Cir. 1991), (quoting Alamo Heights Independent School District v. State Board of Education, 790 F. 2d 1153, 1158 (5th Cir. 1986).

2. The IDEA requires school districts 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. 34 C.F.R. section 300.1. The Supreme Court has set forth the standard for determining when a student is provided a FAPE. Citing the language and legislative history of the IDEA, the court held that school districts have met their obligation to provide FAPE when disabled children are given "access to specialized instruction and related services which are individually designed to provide an educational benefit." Board of Education of Hendrick Hudson School District v. Rowley, 458 U.S. 176, 201(1982). Therefore, the district in this case has met its legal obligation to provide FAPE if it has followed the procedures outlined in the IDEA and if the IEP developed for the child through those procedures is reasonably calculated to enable her to recieve educational benefit. Id. at 206-207; Urban v. Jefferson County School Dist. R-1, 870 F. Supp. 1558, 1567(D. Colo. 1994), aff'd, 89 F. 3d 720 (10th Cir. 1996).

3. "The school district is required by the statute and regulations to provide an appropriate education, not the best possible education, or the placement the parents prefer" Heather S. v. Wisconsin, 125 F. 3d 1045, 1057 (7th Cir. 1997).

4. The United States Supreme Court has held that the IDEA "establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child;s education and the right to seek review of any decisions they think inappropriate." Honig v. Doe, 484 U.S. 305, 311-312 (1988). Meaningful parental participation has occurred if the parent was given a meaningful, adequate opportunity to participate in the formulation and development of the child's IEP. Scituate School Committee v. Robert B., 620 F. Supp. 1224, 1230 (D.R.I. 1985). The IDEA does not provide the parents with authority to dictate the content of the child's IEP and the services that will be provided to the child. Moreover, the parents in this case, no matter how well-motivated, do not have a right under IDEA to compel the District to provide a specific placement for their child. Lachman v. Illinois State Board of Education, 852 F. 2d 290, 297 (7th Cir. 1988); Gregory K. v. Longview School District, 811 F. 2d 1307, 1324-1315 (9th Cir. 1987); Brougham v. Town of Yarmouth, 823 F. Supp. 9, 16 (D. Me. 1993).

5. The least restrictive environment ("LRE") requirement under IREA does not mandate that students with disabilities receive all of their special education and related services in regular education classrooms. See, e.g., Letter to Holmes, 213 IDELR 101 (OSERS 1987)("The department has never intended to imply that the regular classroom is always the appropriate location of services for handicapped children"). Rather, the IDEA only requires that to the maximum extent appropriate, children with disabilities be educated with children who are not disabled, and that

special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the child's disability is such that education in regular classrooms with the use of supplementary aids and services cannot be achieved. 20 U.S.C. section 1412(a)(5)(A); 34 C.F.R. section 300.550(b).

6. The IDEA does not require the District to place a child with disabilities in a less restrictive setting when the IEP team determines that the child's educational needs require a more restrictive setting. Such requirement would, in essence, be setting the child up for failure. Rather, as the Sixth Circuit held, mainstreaming is not required in all cases, and is not appropriate if the disabled child would not benefit from mainstreaming, *if any benefit from mainstreaming is outweighed by the benefits gained in a more restrictive setting.* Kari H. v. Franklin Special Sch. Dist., 125 F. 3d 7855, (6th Cir. 1997)(unpublished decision)(emphasis added).

OPINION

Obviously, the issue here is whether, in light of the mid-year changes to the child's IEP, the child received FAPE. The short answer is that the termination of Pull-outs and small group instruction was an alteration of the IEP that caused it to become deficient and FAPE was denied.

1. On December 8, 2004, the parents requested that direct services outside the regular classroom be terminated. The purpose of these services was to provide small group instruction to the child for 3.0 hours per week designed to assist her in the areas of reading and writing.

2. At or about the 8th of December, 2004, and for the balance of the school year, the direct, out of regular classroom services were, in fact, terminated. While the special ed. teacher did provide SRA materials to the child, the structure that was resulting in progress for the child was removed.

3. Until the IEP was modified to remove the special service for the child, the child was making progress and receiving FAPE.

4. The District erred in ceding control of the IEP to the parents. Admittedly, the parents had concerns about the child's social situation and the potential embarrassment to the child of leaving the general classroom to recieve special services. Allowing this concern to completely overwhelm and effectively terminate the small group instruction available during the pull-outs caused the progress the child was making to slow to the point of failure. This change to the IEP, caused it to become inadequate and denied educational benefit to the child. It isinstructive to read the Recommened placement set out in the May 6, 2005 draft IEP, Ex. A-1, "The school staff feels that the child(sic) needs small group and one on one instruction to meet her needs in reading and written language." Well, the school staff is right.

5. The other area of concern regarding the adequacy of the IEP and, therefore, the provision of FAPE, is Math. While the testimony suggests that the Math deficiency demonstrated bythe child is a result of difficulty in comprehension of math terms, there is little support for this position. The last qualifying math testing was administered 5 years ago when the child was in the 1st grade. Subsequent progress reports show progress in math is no better than progress, in any, in reading and

writing. As Ex. H-7 shows, the child scored lower in Math than in language, the area of her primary disability. Exhibit H-17 demonstrates that math achievement has declined over the last two years. Exhibits D-3, D-4, and D-5 reinforce this conumdrum in that the progress reports for the past three years show continued difficulty in Math. The Districts failure to test in the area of math, particularly at the last tri-ennial or since, denies FAPE to the child.

6. The IHO finds that there are no procedural inadequacies to either the existing IEP, Ex. P-6, or the proposed IEP, Ex. A-1. With the exception of addressing math needs, and requiring qualifying testing, the draft IEP of May 6, 2005, Ex. A-1, is adequate and designed to provide educational benefit and FAPE. The IHO recommends the District , forthwith, convene the IEP team with an eye towards adopting this document as the Child's current IEP. The parents are to be provided the opportunity to participate in the meeting. It is instructive to note that the May 6, 2005 draft IEP is virtually identical to the March 12, 2004 IEP. The only difference is in the Goals and Objectives where one page of the May 6, 2005 IEP is an amalgum of several pages from the March 12, 2004 IEP.

7. The May 6, 2005 draft IEP was crafted, in large part by Ms. Bendel-Schott, the District's Special Education coordinator, in consultation with the parents and the parents attorney. The parents cannot be heard to complain of having no involvement in its creation, particularly when it so closely parallels the March 12, 2004 IEP which the parents have embraced.

8. There is no question the parentshave the child's best interest at heart. However, that does not justify the actions of the District in changing the IEP. If the parents are not on board as to the need for small group and one on one pull-outs, the District must proceed without them. While the concerns about the child's self-esteem are real and must be considered, The IHO finds that any potential social stigma will 1. be outweighed by the educational benefits derived from resumed small group sessions, 2. be more easily handled in the context of middle school where everyone changes classes several times per day and 3. have to be tolerated as part of the requirements of FAPE. In this case, the least restrictive environment includes at least 3.0 hours per week of direct outside general clasroom services.

ORDER

Based on the forgoing findings and legal authority, the IHO hereby **Orders:**

1. The district shall, at its earliest opportunity, provide special needs testing to the child in the area of math, administering a test such as the Woodcock-Johnson series, to determine whether the child has a primary or secondary disability in math.

2. The district shall, at its earliest opportunity, convene the IEP team, including providing an opportunity for the parents to attend, but proceeding without them if necessary, to consider adoption of the May 6, 2005 draft IEP. Until such new IEP is adopted, the March 12, 2004 IEP remains in effect, including the 3.0 hours per week of direct outside regular classroom services.

Done this 15th day of July, 2005

Myron A. Clark, Impartial Hearing Officer

CERTIFICATE OF SERVICE

This will certify that on the 15th day of July, 2005, by facsimile and certified mail, proper postage pre-paid, the foregoing Findings, Conclusions, Opinion and Order was transmitted to the following:

Via Fax to:
Mr. David Price: 970 242-3086
[redacted]

Via Certified Mail to:
[redacted]

Ms. Judy Thornburg
Executive Director Student Services
2523 Patterson Road
Grand Junction, CO 81505

Myron A. Clark