DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT
STATE OF COLORADO

Case No L2001:123

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

[Student] by and through his parents
[Mother] and [Father],

Petitioners,

And

THOMPSON R-2J SCHOOL DISTRICT,

Respondent.

This matter came before the Impartial Hearing Officer (IHO) based upon a request filed on behalf of the child by his parents on July 11, 2001. The IHO was notified of his appointment on July 20, 2001. By stipulation dated August 2, 2001, the parties agreed to extend the 45 day deadline for hearing and decision to October 12, 2001. By motion dated September 20, 2001, petitioners requested a continuance, which request was granted by Order of October 8, 2001. The final deadline for hearing and decision is January 11, 2002.

After pre-hearing on November 30, 2001, hearing was held for 6 days, from December 11 to 14, 2001; and December 17 and 18, 2001. Petitioner appeared and was represented by Mr. Jack D. Robinson, 1660 Lincoln St., #2220, Denver, Colorado 80264, Atty Reg. No. #22037. Respondents appeared and were represented by Ms. Julie A. Tishkowski, and Mr. W. Stuart Stuller, 2595 Canyon Blvd., #400, Boulder, CO 80302-6703. During the hearing, Petitioners offered Exhibits 1-44 and Respondents offered Exhibits 1-60. By stipulation, all offered exhibits were admitted except for Respondent's Exhibit 55 which was withdrawn by Respondents. In addition to these exhibits, the record consists of the initial request for hearing filed by Petitioners; Respondents Motion for Discovery and responses thereto; Petitioners Motion for continuance and responses thereto; Petitioners Motion to Strike and Motion in Limine Re: [Expert Witness 2] and responses thereto; and all ORDERS of the IHO and the scheduling letters of August 23, 2001 and September 30, 2001.

FACTS AND ISSUES

The Child involved in this hearing was born on [D.O.B] and was diagnosed as a child with autism by [Doctor], on or about February 29, 2000, shortly after his 3rd birthday. It is uncontested and agreed to by the parties, and is hereby found by the IHO that the child is a child with autism and eligible for special education services from the Thompson School District R2J, the Respondent herein.

On [Date], the child turned 3 years of age. At that time, the child was receiving services pursuant to The Individuals with Disabilities Education Act, hereafter IDEA, Part C (20 U.S.C. §1431 et seq.). Services under Part C began in November of 1999 and were administered by the [CCB] Community Centered Board. The child became eligible for services from Respondent on February 5, 2000, but he was, at that time, still eligible for, and receiving services from, [CCB], which eligibility continued through June 30, 2000 under the terms of IDEA Part C.

On February 22, 2000, a referral was made to the Respondent district for an assessment of the child and subsequent Individualized Educational Program, hereafter IEP. A play based assessment was conducted by the district on March 9, 2000 and the initial IEP meeting was held on April 18, 2000. The IEP meeting was continued for various reasons until an initial IEP was completed on September 8, 2000.

After 2 quarterly reviews of the initial IEP, held on November 2, 2000 and January 11, 2001, an annual review IEP meeting was held on April 20, 2001 and continued to May 16, 2001; June 25, 2001 and a new IEP was finalized on July 24, 2001. As stated above, this request for Due Process Hearing was filed on July 11, 2001. Since July 24, 2001, there have been no additional IEP meetings.

Petitioners seek reimbursement of expenses and costs of treatment and services for the child beginning on his third birthday and continuing to and through the date of this hearing and decision. Petitioners claim, inter alia, that Respondent failed to provide a Free Appropriate Public Education, hereafter FAPE, to the child because the District delayed implementation of an appropriate IEP, thereby violating IDEA both procedurally and substantively and causing the Petitioners to implement and pay for an appropriate IEP in lieu of the District's obligation to do so.

Additionally, Petitioners claim that the most recent IEP violates IDEA by changing the child's placement and program. Petitioners claim that the Districts procedures for developing the child's IEP were flawed by failing to include the child's parents. Petitioners seek to have the most recent IEP of July 24, 2001 declared invalid due to a failure to follow regulations mandating assessments and evaluations prior to significant changes in placement.

Petitioners claim that the proposed placement of the child is inappropriate and that Respondent has not satisfied its burden of showing the proposed placement to be appropriate. Likewise, the District claims the IEP is appropriate and that the parents have not met their burden of showing it to be inappropriate. Generally, the Petitioner has the burden of proving its claims by a preponderance of the Evidence. However, based on Urban v. Jefferson County School District R1, 870 F. Supp. 1558 (D. Colo. 1994), The District bears the burden of showing a change of placement is appropriate, also by a preponderance of the Evidence.

Throughout these proceedings, and from the time prior to his 3rd birthday, the child has been placed in his home and has received services there and continues to receive services there. During the period when the District was providing services to the child, from October 24, 2000 to May 30, 2001, the services were provided in the child's home. The services being provided to the Child are consistent with those set forth in the initial IEP finalized on September 8, 2000.

FINDINGS

It is apparent that there is a procedural failure by the District to comply with the requirements of 2220-R §4.02(9) which requires a re-evaluation prior to a significant change in

placement. The IHO finds that §4.02(9) is mandatory as a pre-requisite to a significant change in placement. While the testimony suggested that such a re-evaluation did occur when [Staff 1], [Staff 2] and [Tutor 2] met sometime after the May 16, 2001 IEP meeting, without the rest of the IEP team present, the re-evaluation which resulted in the recommended change in placement was deficient in several respects, and none of the deficiencies can be categorized as de minimus. The regulations specifically require documentation of such a re-evaluation. In fact, §4.02(9) requires that the assessment protocol set forth in §4.01(3)(i) shall be followed. §4.01(3)(i) requires documentation of the assessment. Review of the Draft IEP's of May 16, 2001 (Exhibit P-35), and June 25,2001 (Exhibit P-44), and the finalized IEP dated July 24, 2001 (Exhibit P-36) reveal no Documentation of Evaluation Data and yet the Placement recommendation changed from "Home" to "Early Childhood Integrated Setting". There is a specific form designed for use in an IEP for Documentation of Evaluation Data. In fact, such a form was used by the District as part of the Initial IEP dated September 8, 2000 (Exhibit P-14). No such form appears in any of drafts or the finalized lEP for the 2001-2002 school year. This suggests, and the IHO finds, that no evaluation or assessment was done prior to the placement change, and it certainly confirms that there was no documentation of any such evaluation or assessment.

In this case, the procedures set forth in §4.01(3)(i) including §4.01(3)(i)(iii) are significant. The testimony of [Doctor 2] is unrefuted and unchallenged that the child can suffer sever setbacks if he is allowed to eat certain foods, some of which foods, the IHO takes notice, are extremely popular with pre-school children. There was no Health Assessment done in this instance despite the districts knowledge of these health concerns and the nurses recommendation for developing a health plan (see Exhibit R-11). The IHO finds that the proposed change of Placement from Home to Early Childhood Integrated Setting is, Indeed, significant as contemplated by 2220-R §5.04(2). The IHO finds that all the criteria of §5.04(2)(a) apply here.

Finally, §4.02(9)(b) requires an IEP meeting be held after the re-evaluations are completed. Since it is the finding of the IHO that the re-evaluations have not been completed in accordance with the rules for the administration of the ECEA (Exceptional Children's Educational Act), the IEP proposed on June 25, 2O01 (Exhibit P-44) and adopted on July 24, 2001 (Exhibit P-36) is hereby found to be not appropriate and therefore invalid and this matter is remanded to the District for further action consistent with this opinion as set forth below.

Prior to the annual IEP review of April 20, 2001, the testimony established that the Director of Special Education services for the District, [Director], authorized the continuation of the September 8, 2000 IEP, including the provision of ESY services (Extended School Year). It is interesting to note that between the May 16, 2001 IEP meeting and the June 25,2001 IEP meeting, this authorization was apparently withdrawn since the ESY category was changed to "to be determined" and the beginning date for proposed services became August 29, 2001 (later changed to August 27) rather than June 4, 2001, effectively removing services from the child for the duration of the school year Summer break, again with no complying reevaluation or re-assessment. While the IHO finds adequate evidence and authority to declare the July 24, 2001 IEP invalid elsewhere, this is merely an additional example of the procedural inconsistencies contained in the process and the document.

One of the primary issues surrounding the development of the IEP for the 2001-2002 school year was the departure of [Tutor] on May 4, 2001. [Tutor] was the primary tutor provided by the District and provided thirteen hours of service per week to the child. At the April 20, 2001 annual lEP meeting, the parents raised the issue of her replacement in the context of continuing services to the child. The evidence and notes from the meeting demonstrate that there was no replacement for [Tutor] immediately available. The IHO finds that the District did not

have the ability to provide services to the child after the 4th of May, 2001. Aside from the District's failure to ever identify an actual person available to replace [Tutor], the ECEA rules require distict personnel to be qualified, See §3.04 generally. While it appears the unidentified replacement for [Tutor] was prepared to receive training from PBM/SAIL, whatever training was actually provided came from another tutor, also unidentified, and any other qualifications of the mystery replacement tutor were not revealed. Under these facts, the IHO finds that the District was not prepared to replace [Tutor] after May 4, 2001 and, in fact, did not and has not replaced [Tutor] and did not provide service to the child from May 4, 2001 on. The IHO recognizes that [Tutor 2] continued to provide 2 hours per week of direct services through the end of May, 2001, and that she and [Tutor 3] began providing service prior to October 24, 2000.

It is undisputed that the PBM/SAIL based program set forth in the September 8, 2000 IEP provided significant educational benefit and FAPE to the child during the 2000-2001 school year. As stated above, [Director] specifically authorized the continuation of this program prior to the April 20, 2001 annual review, including ESY services. Two weeks after the April 20, 2001 meeting, [Tutor] resigned. On May 30, 2001, [Tutor 2] ceased providing direct services, and all district services to the child ceased. The district made no credible effort to provide ESY services, electing instead to reassign the child to the District's LEAP based program beginning in late August, 2001. It is the finding of the IHO that under these circumstances the IEP dated July 24, 2001 is not likely to, and is not designed to, provide significant educational benefit to this child, and its implementation, without correcting the noted procedural defiencies, would not provide FAPE.

That being the case, the only operational IEP remains that of September 8, 2000 (Exhibit P-16), which, as recently as May 16, 2001 was still endorsed by the District. As stated above, all parties agree that FAPE was provided during most of the 2000-2001 school year and there has been no evidence that FAPE does not continue to be provided under that IEP. Therefore, the IHO finds that the September 8, 2000 IEP continues in effect and the District's obligation to provide 17.25 hours of service per week including ESY services continues. The IHO finds that the District last provided services designed to provide significant educational benefit to the child on May 4, 2001. The IHO specifically finds that the requirements set forth in Florence County School District Four v. Carter, 510 US 7(1993), are met in that the child's placement is proper under the IDEA, and the placement proposed by the July 24, 2001 violates the IDEA. The IHO finds that the parents through the PBM/SAIL program have continued to provide services to the child designed to provide significant educational benefit for the period from July 9, 2000 to date.

This is not to say that the PBM/SAIL program is any better or worse than the LEAP program, or Ann Rogers, or other approaches in the literature. In fact, all the testimony confirms that there is no single right approach to treating children with Autism. Because of the IHO's finding on the procedural deficiencies of 2001-2002 IEP process, it is not necessary to determine which program is appropriate, but to forestall such arguments in the future, the IHO finds that either the PBM/SAIL program of the LEAP program are designed to provide significant educational benefit when properly implemented and should provide FAPE to the child.

DAMAGES

The IHO has determined that the district has failed to provide FAPE from May 5, 2001 to date. Questions remaining are 1. what are the costs for which the District should reimburse the Parents? and 2. what about the period from February 5, 2000 to September 8, 2000?

First, the costs. Part of the process of determining what financial liability, if any, is to be borne by the District requires reviewing the process leading up to the District's decision to provide 17.25 hours of service as set forth in Exhibit P-14. This initial IEP is the result of a process that began with the initial IEP meeting on April 18, 2000 which followed the play based assessment on March 9, 2000. At the April 18, 2000 meeting, the parents suggested a program requiring 35-40 hours per week of one on one treatment. This suggestion ultimately resulted in the adoption, by the District, of a plan to provide the child with at least 34 hours of one on one time using an Applied behaviour Analysis program including, inter alia, discrete trials, imbedded skills, occupational and speech therapy and some incidental learning. Of these 34 hours, the parents asked the District to provide 17 hours. The District ultimately agreed, through the IEP, to provide 17.25 hours per week including ESY services. Although the IEP was not finalized until September 8, 2000, services to the child began on July 9, 2000, at the parents expense.

An Issue was raised as to whether the District agreed to provide funding of 50% of the entire cost of the PBM/SAIL program. The Petitioners claim the District agreed to 50%, and that with indirect costs included, the District has not, from July 9, 2000 to date, paid its fair share. The District counters that it agreed to provide 17.25 hours per week which was designed to, and did, provide significant educational benefit without more and therefore its obligation to provide FAPE was satisfied by the 17.25 hours and it was relieved from any further liability. The IHO has reviewed the exhibits and testimony on this issue, particularly the testimony of Petitioner, [Staff 1], and [Director], as well as Exhibit R-24. Exhibit R-24 contains notes which were made by [Staff 1] at the August 15, 2000 continued initial IEP meeting. Among other things, the notes state: "34 hours per week would like 17 hours"; "40 hrs/20 hrs.";and "50% funding level". The mother testified that these notes record the agreement and conclusions reached by the IEP team that the District will provide 50% of the PBM/SAIL program. [Staff 1] testified that the notes merely reflected what was said at the meeting. However, [Director] testified that the notes recorded determinations made by the District, suggesting that the District determined that undertaking 50% of the program was its committment. [Director], however, also testified that the District's provision of 17 -20 hours per week was arrived at independently based on the child's needs and age. Despite credibility concerns, it is the finding of the IHO that there is no "agreement" binding on Respondent to provide 50% of the cost of the home based PBM/SAIL program to the parents. Rather, based on the testimony cited above and that of the experts who testified including [Expert Witness 1] and [Expert Witness 2] and [Expert Witness 3], the IHO finds that 17 hours per week of services is an appropriate level reasonably calculated to provide meaningful educational benefit to the child thus fulfilling the obligation of the district to provide FAPE. The IHO finds that there is no enforceable contract or agreement under which the district can be made to pay 50% of all costs associated with the PBM/SAIL program as implemented. It is to be noted that parents certainly may, and often do, supplement the services set forth in an IEP with additional appropriate services at their own expense. Whether and how this occurs does not, in this case, obligate the District to share in the attendant costs of such supplementation.

Prior to September 8, 2000, there was no IEP in place to govern the administration of services to the child. Several Issues require resolution as to whether the District has any financial obligation to the parents for this period. They include, when the District's obligation to provide services began? Did the existing services under Part C of IDEA satisfy any obligation? and was lack of Parental consent a bar to the provision of service?

Initially, the IHO finds that, based on Exhibits R-1, R-2, R-3, and R-18, the requirements of 2220-R §4.01(2)(c) were met on March 9, 2000 upon the provision of consent to the assessment by the child's mother. Since consent is an integral part of the referral process, the date of the referral's initiation cannot be any earlier than the Parent's consent. The Thompson School district

calendar for the 1999-2000 school year shows the 45th day from March 9, 2000 to be May 19, 2000. During this period, the parents had elected to continue to receive services under Part C of IDEA. While the Parent has the option to have the child continue to receive Part C services until June 30, 2000, that does not relieve the District of its obligation under 2220-R §4.01(2)(c) to complete the IEP within 45 school days. However, because the child was receiving services under Part C, the obligation of the District to provide services did not ripen until July 1, 2000. The IHO finds that the District was responsible for the provision of services reasonably calculated to provide significant educational benefit commencing on July 1, 2000. The evidence shows that the provision of such services to the child began on July 9, 2000 with the initiation of the PBM/SAIL program which was subsequently approved and adopted by the September 8, 2000 IEP.

2220-R §6.02(2) requires written informed consent prior to initial placement of the child. In this case, consent was provided on September 29, 2000, 3 weeks after the initial IEP was finalized, and 4 weeks before the District began providing direct services to the child under the IEP on October 24, 2000. While parental consent is a pre-requisite to providing services, it is unreasonable to expect a parent to consent to a placement or provision of service without knowing, with finality, what the placement and services will be. In other words, the parent could not meaningfully consent prior to the finalization of the IEP on September 8, 2000. Under the circumstances, a consent signed on September 29,2000 does not bar recovery of reimbursement for services provided and paid for by the parent where the services are included in the IEP and ultimately accepted by the District and where the test of the Carter case (supra) are met as they are here. A public placement would have violated the IDEA because the approved placement was private (in the home) and the placement was proper under the IDEA.

In sum, the period from [Date], the child's third birthday; and October 24, 2000, the date the District began providing services under the IEP, is broken down as follows: The District had no obligation to provide service prior to the expiration of Part C services on June 30, 2000. However, the District was obligated to complete the IEP on or before [Date] and to provide service beginning July 1, 2000. As will be discussed further below, the District is obligated to reimburse Petitioners for services paid for by them from July 9, 2000, the date services began under the PBM/SAIL program and October 23, 2000, the day before the District began providing services under the IEP. The IHO finds that the period from July 1 through July 8, 2000 is a period of such short duration about which there is no reliable, relevant and probative evidence as to specific expenses requiring reimbursement that this period will be excluded from any calculations.

The period from October 24, 2000 to May 4, 2001 is a period during which the child received appropriate services from the District and although there were de minimis failures of service provisions during this period such failures do not warrant a finding of liability. See San Francisco United School District, 29 IDELR 153, (SEA CA 1998).

From May 5 to the present, based on the finding that the September 8, 2000 IEP remains in effect due to the procedural failures discussed above in developing the July 24, 2001 IEP, the District is liable to reimburse Petitioners on the same basis as the period from July 9 to October 23, 2000.

The IHO finds that the appropriate remedy consists of two components. The first is a remand to the District with instructions to perform a re-assessment or re-evaluation of the child, including the development of a health plan and a comprehensive transition plan, prior to commencing a new IEP process to determine placement and services. If, after the new IEP is finalized, there are disputes about appropriateness or whether the IEP is designed to provide

significant educational benefit, this IHO will retain jurisdiction to hear issues arising from the new IHO process only.

Secondly, the IHO finds that the appropriate reimbursement to petitioner is an amount equal to the amount being paid [Tutor], [Tutor2] and [Tutor 3] make this determination, the IHO requires the District to provide compensation information for the individuals involved on a monthly, weekly and daily basis, or an hourly basis if appropriate. By way of example, If [Tutor] were receiving $1200.00 per month but only $600.00 per month was attributable to services provided this child, the IHO requires a break down from the District as to how much per month(in this example $600.00), how much per week(in this example $138.57 based on 4.33 weeks per month), and how much per day ($20.00 in this example based on 30 days per month) each of the 3 providers was being paid for services to this child. If there have been salary increases during the pendency of this action, they should be accounted for.

The IHO recognizes that the parents contracted for services with individual tutors but finds that the parents actions in so contracting do not bind the District but the District is responsible for what it should have paid if it had commenced service on July 9, 2000 and continued service after May 4, 2001.

Summary of Issues

Although the issues as presented at the hearing have been discussed above, the IHO believes it will be useful to review the 10 issues presented by Petitioner and make appropriate short comments as to each one.

1. Did the District violate 2220-R §4.01(1) by failing to timely and appropriately identify the child's disability and evaluate him for needed special education and related services?
No. As discussed above, any delay was de minimis and the IHO has made his calculations from the time the parental consent was signed, the earliest moment from which calculations can be made.

2. Did the District violate 2220-R §4.01(2) by failing to timely initiate a special education referral, conduct assessments, make a determination as to disability and develop the Child's IEP?

Yes as to the IEP, No as to the others, see above.

3. Did the District violate the IDEA by failing to provide the child a FAPE from the date he was determined to be eligible for special education and related services to the present?
Yes, in part, excluding the period October 24, 2000 through May 4, 2001.

4. Did the district violate the IDEA by failing to provide the child the special education and related services as required by his IEP's?
Yes, in part, see above.

5. Did the District violate 20 U.S.C. §1414(d)(1)(B) by developing the child's IEP at one or more IEP meetings without the appropriate group of individuals present to compose the IEP team?
No. If a member of the IEP team chooses not to attend a scheduled meeting, or does not attend for any reason, that does mean they are no longer a member of the IEP team, it simply

means they chose not to attend. It is also possible to provide necessary input in writing, as [Expert Witness 1] did for the 2001-2002 IEP meetings from April 20, 2001 on.

6. Did the District violate 20 U.S.C. §1414(f) by failing to ensure that the parents were members of the IEP team that made the decision on the educational placement of their child?

No. The parents were and are members of the IEP team. As stated above, the occurances between May 16, 2001 and June 25, 2001 suffered from other fatal procedural errors. Again, if a parent chooses not to attend an IEP meeting, it does not mean they are not members of the IEP team. The IHO understands the concerns regarding the secret meetings of District staff resulting in substantive changes in recommendations but the IHO does not intend to rule in any way which will prevent District staff from conferring at their pleasure concerning the students of the District.

7. Did the District violate 20 U.S.C. §1414 (d)(I)(iii) by failing to include in one or more of the child's IEPs an accurate statement of the special education and related services and supplementary aids and services to be provided to the child that would advance him appropriately towards attaining his annual goals and objectives?

No. The September 8, 2000 IEP has been found to be adequate and designed to provide significant Educational Benefit and FAPE.

8. Did the District violate the IDEA by failing to develop appropriate IEPs for the child that would provide him a FAPE.

No. See above. No determination has been made as to whether the July 24, 2001 IEP would provide FAPE since it has been found defective on procedural grounds.

9. Did the District violate the IDEA by changing the Child's educational program and placement from a homebound-setting to a classroom setting?

Yes, because of the way they did it.

10. Did the District violate the IDEA by unilaterally changing the child's educational program and placement without first conducting an evaluation?

Yes, although the IHO disagrees with the word "Unilaterally".

ORDER

Based on the foregoing, the IHO hereby ORDERS this matter be remanded to the Respondent District for further action as set forth above, including the conduct of an evaluation with respect to proposing a significant change of placement, the development of a health plan, the development of a comprehensive transition plan if needed, and a subsequent IEP. Also, the IHO ORDERS the District, within 30 days, to reimburse the Petitioners the amount derived from performing the computations set forth above for the period from July 9, 2000 to October 23, 2000 and from May 5, 2001 to date, and continuing until a new IEP is finalized or services are reinstated under the September 8, 2000 IEP. Such computations shall be submitted to the IHO for review and approval prior to disbursement.

The IHO retains such jurisdiction as is permitted by law, and will review the new IEP in the context of a continued hearing if requested by either party .

Done this Eleventh day of January, 2002

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Myron A. Clark
Impartial Hearing Officer