DUE PROCESS HEARING

BEFORE AN IMPARTIAL HEARING OFFICER

Due Process Hearing 2009:112

In the matter of:

[Student], by and through [Student's] Parent,

[Parent], Petitioner,

v.

PUEBLO SCHOOL DISTRICT 60,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER OF THE IMPARTIAL HEARING OFFICER

This matter is before Impartial Hearing Officer (IHO) Gordon F. Esplin upon Petitioner filing [Student's] due process complaint on April 20, 2009 against the Respondent, Pueblo School District 60, alleging that the district failed to provide petitioner's child (hereafter the Student) with a free appropriate public education (FAPE) during the entire 2006-2007 and 2007-2008 school years and during the fall of the 2008 school year. The Petitioner has requested the IHO award the reimbursement of expenses incurred in educating the student in a private placement and award compensatory education. The District has denied the allegations and the requested relief.

By their conduct and pleadings the parties have admitted that the student is a child with disabilities entitled to services from the District pursuant to the Individual with Disabilities Education Act (IDEA) 20 U.S.C. §§ 1400 *et seq.* and its implementing regulations at 34 CFR § 300.510; and the state Exceptional Children's Education Act (ECEA), §§ 22-20-101 *et seq.* and its implementing regulations at 1 CCR 301-8, §§ 2220-R-6.02(9) to (12). The foregoing authority confer jurisdiction on the IHO and govern these proceedings.

After commencing these proceedings the parties attempted to resolve their differences. To accommodate those efforts they agreed to extend the time for conducting the hearing and for the IHO to submit his decision until October 16, 2009. The Petitioner was represented by Kate Gerland, Esq. and Louise Bouzari of the Law Offices of Louise Bouzari, LLC. The District was represented by James R. Gerler, Esq. of Petersen & Fonda P.C.

FINDINGS OF FACT

BACKGROUND

1. The Student was born [Date of Birth].

2. Petitioner started adoption proceedings to adopt the Student when the Student was [age] years old.

3. Petitioner formally adopted the Student when the Student was [age] years old.

4. [personally identifiable information redacted]

5. The Student has been diagnosed with [diagnosis 1], [diagnosis 2], [diagnosis 3], [diagnosis 4], [diagnosis 5], [diagnosis 6], and [diagnosis 7].

6. The Student's health problems include [health conditions]. [Student] has had [ ] surgery and [ ] surgery twice, but Petitioner testified that the Student's [ ] is "fine" at the present time although [Student] continues to have yearly [ ] exams.

7. The Student does not have postural problems and does not need a special chair to assist [Student] with sitting.

8. The Student has a very limited ability to communicate with language.

9. The Student has many behaviors which make it difficult for [Student] to learn such as when asked to do a task, [Student] may fall on the floor, feign illness, tantrum, spit, kick or scream.

SCHOOL HISTORY

10. The Student began attending preschool in Pueblo School District 60 at [Elementary School].

11. The Student began attending [Elementary School] in February of 2005.

12. When the Student was attending preschool at [Elementary School], [Student] loved school. [Student] was happy in the mornings and wanted to go to school.

13. The Petitioner was very satisfied with the educational and related services provided to the Student during the 2005-2006 school year.

14. During the 2006-2007 school year the Student attended kindergarten three days a week at [School 2], a school solely operated by the District along with two days a week at [Private Entity] (hereafter "[Private Entity]") which is a private entity that provides behavioral therapy and educational services to disabled children. The District paid for the services provided by [Private Entity].

15. The last day the Student attended [School 2] was April 9, 2007.

16. All of the objectives on the Student's Individual Education Plan (IEP) at [School 2] had been carried over from the previous year. In the spring of 2007, 28 academic objectives which had been in place for two years remained unmet. The District's records show that the Student made little or no progress toward those objectives. The Student's Kindergarten progress report was the only data kept on the Student's progress while at [School 2]. That progress report shows

that the Student did not learn any sounds, letters, colors, numbers, or shapes while [Student] was a student at [School 2] and did not advance in any area of the kindergarten curriculum. At the final IEP meeting of the year, the Student's IEP goals were carried over again to the next year.

17. The founder and executive director of [Private Entity] is [Executive Director]. At various times during the years 2005 through 2008, [Executive Director] served as a paid consultant to the district to assist the district in its programs for children with behavioral problems.

18. The Student attended [Private Entity] full-time from April 12, 2007 through the summer of 2007. District 60 funded the Student's [Private Entity] tuition during this period. When the District was paying for the Student to attend [Private Entity], it also paid for [Student's] transportation to that facility.

19. During the 2007-2008 school year, the Student attended first grade at [School 3] three days a week, and [Private Entity] two days a week. District 60 funded the Student's [Private Entity] tuition during this period.

20. Like the goals of the previous two years, the goals in the Student's 10-11-07 IEP were also unmet in May of 2008 and carried over unchanged into the next school year. The baselines were not changed.

21. At the end of the 2007-2008 school year, the district convened a meeting to review and modify the Student's IEP. In the notes of that May 21, 2008 meeting, it is noted that the "District's position is for [the Student] to eventually be a full time student within the district and [Student] can be weaned off of [Private Entity]. District has offered one day a week for 4 hours a day for next semester [at [Private Entity]]."

22. The Student's IEP team determined that the Student qualified for Extended School Services ("ESY") for the summer of 2008.

23. Petitioner requested that the Student attend [Private Entity] during the summer of 2008. The District determined that its summer program would meet the Student's needs and therefore declined to pay for the Student's participation in the [Private Entity] summer program.

24. The Student began the 2008-2009 school year by attending second grade at [School 3] three days a week with service at [Private Entity] two days a week.

25. The Student continued the [School 3]/[Private Entity] split arrangement until October 24, 2008. On October 14, 2008, Petitioner gave a 10-day notice that [Petitioner] would be placing the Student full-time at [Private Entity], and would be seeking reimbursement from the District. The Student began attending [Private Entity] full-time on October 24, 2008 and is currently enrolled in [Private Entity] at Petitioner's expense.

26. [Private Entity] is providing the Student with academic education, carefully structured social skills training, and appropriate behavioral supports. Since the Student began attending [Private Entity] full time, [Student's] negative behaviors have significantly decreased. During the same time period, [Student's] social skills and ability to attend have improved significantly.

27. While at [School 2] and [Elementary School] the Student was routinely placed in a secure wrap around table which wraps around the front and sides of the child sitting in it. The table is bolted to a floor board and a bar can be added to the back of the table, with an option to be locked in place, which limits the mobility of the child. The Student sat in a chair that was not bolted to the floor, but the child was restrained by the desk in front and to the sides when the bar was placed behind the student. That table with locking bars is a mechanical restraint that violated the Colorado Restraint Act and the Colorado Department of Education Guidelines for the Administration of the Protection of Persons From Restraint Act.

28. [Professor], in his report concerning the Student's restraint table, stated that it would necessitate two years of therapy of at least 10 hours per week to remediate the consequences of the use of that desk. In the Meeting Notes, Page 4 of Exhibit 5, the impressions of [Executive Director] of [Private Entity] were set forth as follows:

> Impressions: Although the Student's [diagnosis 3] symptoms are apparent, my impressions on both visits were [Student] is thriving and doing well in the [Elementary School] pre-school class. I observed the staff handling [Student's] behavior in an appropriate manner, specifically using methods to modify [Student's] behavior so [Student] may be more independent in the future. The desk [Student] sits in during the teaching time was confining but I observed no dangerous restraints. [Student] appeared to be happy in the classroom enjoying both peers and staff.

Similarly, in [Executive Director]'s January 27, 2006 report, beginning at Page 5 of Exhibit 6, she states:

> Worked well at [Student's] desk which closed the chair in from the rear. There were no other restraints observed.

28. All use of restraints occurred on or prior to April 9, 2007.

[PROFESSOR]'S OPINIONS

29. Petitioner retained [Professor], professor of educational psychology at the University of Colorado at Denver as an expert witness. [Professor] earned a Ph.D. in Special Education from Peabody College at Vanderbilt University.

30. [Professor] testified in this matter. The IHO has confidence in the testimony of [Professor] because of:

a) his extensive and impressive education, professional experience, professional affiliations, honors, publications/research which all involve learning about assisting disabled children to learn.

b) he was able to explain the applicable concepts in this matter in a clear, logical manner without the use of professional jargon and acronyms.

c) most of his experience as an expert witness in due process hearings has been as an expert witness for school districts, for example, he was a school district witness in Thompson R2-J School District v. Luke. P, 540 F.3d 1143 (10th Ar. 2008). [Professor]'s ability to testify for districts and parents indicates that he does not have a bias other than the best interests of children.

d) he has spent tens of thousands of hours observing children.

31. On October 9, 2008, [Professor] observed the Student at [School 3] for two hours. He was confident this was a typical day for the Student because of the following:

a) He asked if there was anything unusual like the child being ill, bad day, etc. which was answered in the negative.

b) There was nothing unusual in the Student's behavior that was not consistent with [Student's] IEP and [Student's] behavior when he had observed [Student's] two days earlier at [Private Entity].

c) He was told that these were the same adults that usually worked with the Student, i.e. the classroom's best para educator, same teacher, etc.

d) The key to the appropriateness of an education is observing the adults. The teaching behavior of adults is usually consistent.

e) There were no variations in the level of teaching, i.e. it was consistent throughout this observation.

32. Two days earlier [Professor] observed the Student in the [Private Entity] program.

33. Exhibit 42 is [Professor]'s comparison of the instruction provided to the Student by [Private Entity] and [School 3].

34. [Professor] concluded that [Private Entity] provided the Student with a highly structured, consistent and intensive instructional approach. Just what [Student] needs.

35. [Professor] concluded that [School 3] provided an inadequate and inappropriate educational experience.

36. At the time that [Professor] observed the Student at [Private Entity] and [School 3], during October 2008, the respondent district was providing both those educational programs to the Student and had been doing so for the preceding school year.

37. In [Professor]'s opinion, [School 3] is not the Student's least restrictive appropriate environment, because simply sharing space with typically developing children is not developmentally relevant.

38. In [Professor]'s opinion, splitting time between [School 3] and [Private Entity] was also inappropriate, because [Student's] time at [School 3] was merely "time-out from instruction," and it is inappropriate to the point of being detrimental for a child with the Student's level of educational need to spend only two days a week receiving effective and appropriate instruction.

THE DISTRICT'S SERVICES

39. The Student benefited from the exposure to the P.E. and Music classes at [School 3]. The Music Teacher – [Music Teacher] testified he used a hula hoop initially to define the space in which the Student was to sit and the ultimate removal of the hula hoop as a boundary with success shows improvement. [Music Teacher] observed positive relationships with mainstream children in Music. All [School 3] Staff who testified observed positive relationships with other mainstream children being reciprocal. The P. E. teacher, [P. E. teacher]'s testimony was consistent with that of [Music Teacher] in terms of relationships with other children. The Student improved such skills as dribbling a basketball and kicking a soccer ball. 40. The Student benefited at [School 3] from the services offered by [Speech Therapist], the Speech Therapist, even though speech therapy opportunities were limited as a result of the Student's not being at [School 3] full time.

41. Similarly, [Physical Therapist] - the Physical Therapist, noted improvement with the Student using the therapy ball to improve balance. Other improvement was noted by the Student's ability to climb the ladder of the slide by alternating feet on the steps.

42. The District provided the following services at [Private Entity]:

a) during the 2006-2007 kindergarten year the Student attended the [Private Entity] program 2 days a week as a District placement,

b) the summer of 2007 the Student attended [Private Entity] as a District placement,

c) the 2007-2008 first grade year the Student attended [Private Entity] two days a week as a District placement, and

d) the start of the 2008-2009 school year up to October 24, 2008 the Student attended [Private Entity] 2 days a week as a District placement.

43. Additionally, during the kindergarten, first grade, and the first few weeks of the second grade year before the Petitioner withdrew the Student from the District's school, the District provided daily instruction (usually three days a week, because the Student was at [Private Entity] the other two days) in classrooms designated for special education students under the direction of certified and licensed teachers. The Student always was monitored one on one by a paraprofessional and/or the teacher.

BEHAVIORAL ASSESSMENT AND PLANNING

44. The District conducted a Functional Behavior Assessment on the Student in order to create a Behavior Support Plan. Both the Functional Behavior Assessment and the resulting Behavior Support Plan had significant flaws. The staff never attempted to collect data regarding when the negative behaviors occurred most often, nor did they collect any data to determine which tasks or demands triggered the Student's avoidant behavior. There was no attempt to test the accuracy of any hypothesis. The interventions chosen were often just as likely to maintain the Student's negative behaviors than to extinguish them.

45. The goals in the Behavior Support Plan were vague and contained no criteria for mastery. Vague goals make it more likely that interventions will be implemented inconsistently and ineffectively. The Behavior Support Plan also failed to provide any strategies for teaching replacement behaviors.

46. The plan was never implemented as written because the Behavior Support Plan called for daily progress monitoring.

47. [School Psychologist], the school psychologist who created the plan, testified that he had expected the staff to do daily progress monitoring. However, no such records were ever kept. The Daily Behavior Checklist, which was only filled out intermittently, did not provide any information about the frequency or duration of the Student's avoidant behaviors. The checklist did not provide any information about whether the Student was increasing [Student's] task completion or earning more reinforcers.

ESY

48. Prior to the end of the 2007-2008 school year, [Special Education Director], the District's Special Education Director, determined that no district students would be placed at [Private Entity] for Extended School Year (ESY) for the summer of 2008.

49. The Student's IEP team determined that the Student qualified for ESY for the summer of 2008.

DATA

50. The District did not regularly or systematically keep written data regarding the Student that would be useful in eliminating undesirable behavior or in achieving educational progress.

[PRIVATE ENTITY]

51. [Private Entity] is a small clinical program with approximately thirty students that provides therapeutic and academic services to children with severe behavioral problems.

52. There are no teachers at [Private Entity] that are certified by the Colorado Department of Education.

53. There are no mainstream or neurologically typical students at [Private Entity].

54. [Private Entity] focuses on therapies not education. It employs psychologists not educators.

CONCLUSIONS OF LAW

I. Free Appropriate Public Education.

Under the IDEA, the District is required to provide a free appropriate public education ("FAPE") to all children with disabilities. 20 U.S.C. §1412 (a)(1)(A). In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court held that in order to satisfy the IDEA's requirement that educational services be "appropriate" the District must provide a disabled student with 1) access to specialized instruction and related services; 2) which are individually designed; 3) to provide educational benefit to the student. *Rowley* at 201. The Tenth Circuit "has interpreted the *Rowley* standard to require an educational benefit that is more than *de minimus*." *Sytsema v. Academy Sch. Dist. No. 20*, 538 F.3d 1306, 1311, 1313 (10th Cir. 2008).

This case is unique in that the District during the two years prior to the filing of the due process complaint provided educational services via contract with the provider ([Private Entity]) that is the Petitioner's desired placement and was praised by Petitioner's expert witness. Based on the evidence before me, the Student clearly received beneficial educational services, at least from [Private Entity] if not from the District employees. Therefore, the Student had "access to specialized instruction and related services" as mandated by Rowley.

The other two parts of the Rowley standard, i.e. the services must be individually designed to provide educational benefit to the Student, require additional analysis. Though the Student was receiving instruction and related services, it is not the contracted service provider's ([Private Entity]) responsibility to individually design those services and monitor their implementation to make sure that the Student receives educational benefit. The design and monitoring processes are the District's sole responsibility governed by those portions of the law regarding the creation and implementation of the IEP.

A. The Student's IEP did not meet the standards of IDEA. An Individualized Education Program means a written statement that includes a statement of measurable goals and a statement of how the child's progress toward meeting the annual goals will be measured. 20 U.S.C. §1414 (d)(1)(A)(II) and (III); 34 C.F.R. 300.320(a)(2)(i) and (3)(i). The objectives in the Student's IEPs are vague, and even where baselines have been provided, the vagueness of the objective renders the baseline meaningless.

Exhibit 12, page 5, which is part of the 4-24-07 IEP states the following goals and objectives which I have embellished with my comments:

1. Will follow directions promptly. - no baseline

IHO's suggestion: Each school day, will sit in chair and open book within 1 minute of being instructed to do so by [Student's] paraprofessional instructor.

2. Will abide by rules and regulations of immediate environment. - no baseline

IHO' suggestion: Each school day will cease hitting or taking objects being used by fellow students and will comply within 1 minute after being so instructed by [Student's] paraprofessional educator until behavior is eliminated.

3. Will conform to reasonable requests from authority figures. - no baseline

IHO's comment: What is reasonable? Who is an authority figure? This probably cannot be fixed except by something like my suggestions for 1 and 2 above.

4. Will predict consequences of breaking rules. - no baseline

IHO's comment - this is probably impossible to fix. How are we to know what goes on in the student's mind.

Exhibit 12, page 6

1. Will label 8 basic colors on request. - no baseline

IHO's suggestion: Within 30 seconds of being asked by the paraprofessional educator will correctly match the label green with a green object. Will do likewise for the colors, red, blue, black, and yellow.

Most if not all of the remaining goals are likewise vague and with no baselines. They contain phrases like, "will spontaneously", "with little prompting", "with some

attention/supervision", "easy/familiar task", "difficult/novel task", etc. These are not measurable annual goals.

Not only were the objectives not measurable, no serious attempt was ever made to record or measure the Student's progress. The IEPs did not provide any objective criteria to measure student progress. "In this case the violation was far from technical, and its absence was not harmless. The omission went to the heart of the substance of the plan…." *Cleveland Heights-University Heights City School Dist. v. Boss By and Through Boss,* 144 F.3d 391, 399 (6th Cir. 1998).

One court explained the importance of measurable goals and data this way: "Needless to say, it would be extraordinarily difficult for meaningful programs to be fashioned prospectively for [the student] without reasonable records to demonstrate where he had been and what he previously had and had not been able to achieve. […] The omission of such information must necessarily have a detrimental effect on educational programs formed and implemented for [the student] on a going forward basis, inasmuch as such programs would be based on imperfect (and/or simply missing) data about [the student's] achievement." *Escambia County Bd. of Educ. v. Benton*, 406 F.Supp.2d 1248, 1275 (S.D. Ala. 2005).

Relying upon general and subjective recollections is not sufficient under the IDEA to evaluate the progress of a child with disabilities. The IDEA requires IEP teams to create measurable goals and then to actually measure the child's progress toward those goals. The District never did this for the Student and its failure resulted in substantive educational harm to the Student.

Additionally, the IEP team must review the child's IEP periodically, but not less than annually, to determine whether the annual goals of the child are being achieved and revise the IEP to address any lack of expected progress toward the annual goals. 34 C.F.R. 300.324(b). The District never addressed the Student's consistent failure to meet [Student's] educational and behavioral goals. Apparently, the IEP team did not expect the Student to make any progress. The District was content with the Student not making any measurable progress. The ability to evaluate whether the services provided are actually effective is an essential component of the provision of an appropriate education.

The District did not attempt to create measurable goals for The Student; it did not attempt to measure [Student's] progress; and it did not reevaluate its program when The Student failed to progress.

B. The District's failure to keep data and analyze its techniques prevented it from properly implementing the IEP. It was again and again emphasized by the Petitioner's expert witnesses that the education of severely handicapped children, like the Student, is data driven. Written data is key to knowing if any learning is occurring. Written data is key to knowing if different goals or different teaching strategies need to be employed. The District did not keep or use written data regarding the learning opportunities it provided the Student. "[A]n IEP is a program, consisting of both the written IEP document, and the subsequent implementation of that document. While we evaluate the adequacy of the document from the perspective of the time it is written, the implementation of the program is an on-going, dynamic activity, which

obviously must be evaluated as such." *O'Toole v. Olathe Dist. Sch. Unified Sch. Dist. No. 233*, 144 F.3d 692, 702 (10th Cir. 1998).

The District staff did not keep real time records of the Student's progress or lack of progress. Both the Student's Behavior Support Plan and [Student's] IEPs call for data collection. The Behavior Support Plan calls for daily progress monitoring. Behavior sheets were only filled out intermittently and the sheets, even when used, did not record the information required by [Student's] Behavior Support Plan. Staff at [School 3] have not kept any data of the Student's progress toward [Student's] IEP goals. The Student's IEPs from [School 3] only allude to the vaguest form of progress monitoring through "formal or informal" measures. However, the data collection practices at [School 3] have not met even this minimal standard, as [Witness] testified that no progress monitoring at all was done except for mental notation.

The only records that [School 3] did keep - [Student's] IEPs and report cards - show that the Student did not receive educational benefit during [Student's] time at [School 3]. [School 3] provided the Student with a fundamentally inadequate and inappropriate educational experience.

C. <u>The District's Behavioral Support Plan and Functional Behavior Assessment were not well thought out and there was no written data kept to determine its effectiveness.</u>

When a child's behavior impedes the child's learning, the IEP team is required to use "positive behavior interventions and supports, and other strategies, to address that behavior." 34 C.F.R. §300.324(2)(i). However, the District's Behavior Support Plan and Functional Behavioral Assessment were not reasonably calculated to provide the Student with educational benefit. The

District did not actually attempt to determine the functions of the Student's behavior. Rather, it relied on previous assumptions regarding function. The hypotheses of the FBA were never tested. In fact, the interventions chosen were more likely to increase the Student's negative behaviors than to reduce them. The plan also failed to address the need to teach replacement behaviors. The progress monitoring called for in the plan was never conducted. Furthermore, the plan was never reviewed to determine if it was effective.

II. [Private Entity] is an appropriate placement for the Student.

The IDEA requires that "once the parents prove that the school district failed to offer an appropriate program, parents are entitled to reimbursement for private school placement so long as the private school placement was reasonably calculated to provide educational benefits." *Knable v. Bexley City Sch. Dist.*, 238 F.3d 755, 771 (6th Cir. 2000) (citing *Florence County Sch. Dist. Four v. Carter*, 510 U.S. 1 (1993)).

The appropriateness of [Private Entity] is also supported by the careful and extensive data collected at [Private Entity] along with the observations of [Professor].

Least Restrictive Appropriate Environment (LRE):

The IDEA requires that children are educated with non-disabled peers "to the maximum extent appropriate" and are removed from the regular education environment only "when the nature and severity of the disability of a child is such that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily." 20 U.S.C. §1412(5)(A). "In selecting the LRE, consideration is given to any potential harmful effect on the child or on the quality of services that he or she needs." 34 C.F.R. 300.116(d).

In Rowley, the Court points out that the Education for All Handicapped Children Act was passed in response to Congress' perception that a majority of handicapped in the United States "were either totally excluded from schools or [were] sitting idly in regular education classrooms awaiting the time when they were old enough to 'drop out.'" *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 179 (1982)(quoting H.R. Rep. No. 94-332 p. 2 (1975). Clearly, merely sitting in a general education classroom is no better than being excluded from that classroom if child does not receive benefit.

"[T]he IDEA requires that disabled students be educated in the least restrictive *appropriate* educational environment." *Warren G. v. Cumberland County Sch. Dist.*, 190 F.3d 80, 84 (3d Cir. 1999) (emphasis in original) (quotation omitted). Furthermore, "[m]ainstreaming which results in total failure, where separate teaching would produce superior results, is not appropriate and satisfactory." *Capistrano Unified Sch. Dist v. Wartenberg*, 59 F.3d 884, 897 (9th Cir. 1995). In other words, an "inappropriate, although less restrictive, placement is impermissible." *Briere v. Fair Haven Grade Sch. Dist.*, 948 F. Supp. 1242, 1257 (D. Vt. 1996). "Least restrictive environment" means the least restrictive environment in which educational progress rather than educational regression can take place." *Board of Educ. v. Diamond*, 808 F.2d 987, 992 (3rd Cir. 1986).

There are no mainstream or neurologically typical students at [Private Entity]. All students at [Private Entity] have significant behavioral problems. Nevertheless, at [Private Entity], the Student is provided with highly structured and supported social opportunities at a sufficient intensity to provide significant educational benefit. [Private Entity] is not an ideal

long term solution in that its small size precludes the richness of the services provided by the District such as music taught by a full time music educator, physical education taught by a full time physical education teacher, speech therapy and physical therapy provided by therapists who are qualified and licensed in those disciplines, etc. along with the opportunity to be associated with a large and vibrant mainstream student population.

III. Illegal Restraints.

There was substantial testimony regarding the use of illegal restraints that occurred more than two years prior to the filing of Petitioner's complaint. The parties agree that there was no use of the restraint during the two years immediately preceding the filing of Petitioner's complaint. Furthermore, the IHO has no jurisdiction to award monetary damages to compensate the Student for the use of restraints or to sanction the District for its use of the restraints.

IV. 2008 ESY.

Petitioner has alleged and forcefully argued that [Special Education Director]'s unilateral decision to not fund District students at [Private Entity] during the summer of 2008 violated IDEA.

There was too little evidence as to what occurred in the District's 2008 summer program to determine whether or not it was identical to the program offered by [Private Entity]. Based on the evidence regarding the two programs at other times, it may be a safe assumption that there was a disparity between the two. Nevertheless, there is no evidence. Perchance a world class

provider came in for the summer, maybe not. The IHO's job is to make determinations based on evidence, not speculation or assumptions.

There is evidence that the District's Special Education Director determined that the location of the Student's 2008 ESY services would be at [School 3]. Colorado law states that "Decisions regarding the location in which a child's IEP will be implemented [...] shall be made by the Director of Special Education or designee." 1CCR 301-8 4.03(8). Because of insufficient evidence regarding the 2008 ESY program offered by the District, I must conclude that the Director acted within her authority and only determined the location of services.

DECISION

WHEREFORE, The IHO has concluded that the District did not make a FAPE available to the Student during the 2006-2007, 2007-2008 school years and during the fall of 2008, and that the Petitioner's private placement of the Student at [Private Entity] is appropriate. Petitioner is therefore entitled to reimbursement by the District for the cost of the Student's enrollment at [Private Entity].

THEREFORE, I hereby order that:

A. The District shall reimburse Petitioner for the Student's tuition at [Private Entity] from October 24, 2008 until the District is able to provide FAPE as set forth in C below. The District's responsibility shall include the cost of extended school year services and transportation to and from [Private Entity]. Within 10 days of receipt of this Order, Petitioner shall submit a bill of costs to the District from October 24, 2008 until the date of the bill of costs. Within 30 days of receipt of the bill of costs, District shall submit payment to Petitioner.

B. The District shall then pay for the Student's education at [Private Entity] until it is prepared to provide the compensatory education set forth in paragraph C. The Student shall be entitled to four hours per day, four days a week at [Private Entity].

C. As compensatory education, the District shall provide the following: The District shall retain an outside consultant who is expert in the education of children with behavior disorders to advise the District regarding the creation of an appropriate IEP for the Student and to periodically monitor its implementation by the District in District schools for the initial calendar year after the Student returns to the District's school. The outside consultant shall be a person agreed upon by the Petitioner and the District, or it may be [Professor] or [Executive Director] or it may be someone designated by the Commissioner of the Colorado Department of Education. Thirty days after the District provides written notice to Petitioner and Petitioner's counsel that the District has retained the outside consultant and is prepared in all ways to provide FAPE to the Student in District schools, the District's obligation to provide services to the Student at [Private Entity] shall cease. If during the first year after the Student again receives services in a District school, the outside consultant notifies the parties that the District's IEP or its implementation, in the consultant's opinion, does not provide the student a FAPE, the Student shall immediately be enrolled at [Private Entity] for four days a week, four hours a day at the District's expense. At that time either party may request a due process hearing to determine future educational placement for the Student, but the Student's placement shall be at [Private Entity] until all administrative and legal proceedings have been completed.

It is so ordered this 16th day of October, 2009 by

Gordon F. Esplin
Impartial Due Process Hearing Officer
215 West Oak Street, Suite 500
P. O. Box 1067
Fort Collins, CO 80522-1067
Phone: 970-484-2685

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2009, I sent a copy of this ORDER and a copy of Section 6.02(7)(j) of the ECEA Rules by certified mail to the following:

Ms. Jennifer Rodriguez, Senior Consultant, Dispute Resolution
Colorado Department of Education, Exceptional Student Leadership Unit
1560 Broadway, Suite 1175
Denver, CO 80202

James Gerler, Esq.
Petersen & Fonda PC
215 W. Second St.
Pueblo, CO 81003

Kate Gerland, Esq.
Law Offices of Louise Bouzari, LLC
7887 E. Belleview Ave, Suite 1100
Englewood, CO 80111