

BEFORE AN IMPARTIAL HEARING OFFICER
STATE OF COLORADO
Due Process Hearing L 2001:104 (2002:104)

FINDINGS OF FACT AND DECISION

In the Matter of the Educational Placement of a Student,

[student],

Concerning

LEWIS-PALMER SCHOOL DISTRICT #38

and

[parent], Parent of the Student

FINDINGS OF FACT AND DECISION

Introduction

The Parent of the Student (hereafter referred to as the “Mother”) requested a due process hearing regarding the student. To comply with Rule 6.03(6)(d)(iii) of the Rules for the Administration of the Exceptional Children’s Educational Act, the name of the Student and that of her mother will not be used. That request was received by the Lewis-Palmer School District #38 (hereafter the “District”) on February 27, 2002. By agreement of the parties the time for the independent hearing officer (hereafter “IHO”) to submit a final decision was extended to May 24, 2002.

The request for hearing alleged that the District failed to provide the Student with a “free appropriate public education” (hereafter “FAPE”) pursuant to the Education of Individuals with Disabilities Act, 20 USCA § 1400 et seq. (hereafter “IDEA”) because she was placed in classes where the text books and other curriculum were too advanced for the Student which resulted in the Student’s receiving failing grades in those classes and not receiving credit toward graduation. The requested relief was that the District be ordered to award credit for those classes which the Student failed and that the District should be ordered to pay for the Student’s tuition at the private school the Student currently attends.

The Mother was advised of the availability of low cost or free advocacy and legal services to assist her with the hearing, but she chose not to seek assistance and proceeded on her own in presenting her case. The District was represented throughout these proceedings by the law firm of Stettner, Miller, and Cohn, P.C. by Brent P. Benrud, Esquire of that firm.

A prehearing conference was held on April 5, 2002 wherein it was agreed that the issues for decision by the hearing officer were:

- a. Did the Student receive a Free Appropriate Public Education during the 2000-2001 school year when she attended 9th grade at the Lewis-Palmer High School?
- b. Was the parent required to give prior notice to the District of her placement of the Student in a private school, and if so, was the required notice given?
- c. Is the District required to pay the costs of educating the Student in the private school?
- d. Is the District required to award academic credit towards graduation for the classes in which the student was enrolled during the 2000-2001 school year even though the Student received failing grades in those classes?

The due process hearing was held on May 16 and 17, 2002 at the District's offices at 146 Jefferson Street in Monument, Colorado.

Upon consideration of the testimony of the witnesses and the documents entered into evidence the IHO makes the following findings of fact:

FINDINGS OF FACT

1. The Student is a female who was born [].
2. The Student has been diagnosed with:
 - a. Neurofibromatosis, Type One (NF-1)
 - b. Attention Deficit Hyperactivity Disorder, Inattentive Type
 - c. Dyslexia
 - d. Disorder of Written Expression.

3. The school year in question is the academic year which began in the District on August 24, 2000 and concluded on June 8, 2001. (Hereafter the 2000-2001 school year).

4. During the 2000-2001 school year the Student attended the Lewis Palmer High School which is within and operated by the District.

5. During the 2000-2001 school year the Student was enrolled in the ninth grade.

6. Prior to the 2000-2001 school year, the Student had been identified as a “child with a disability” by Widefield School District #3 which is also within the State of Colorado.

7. The Student had been receiving “special education and related services” from the Widefield School District #3 at Janitell Junior High based on an Individualized Education Program (hereafter “IEP”).

8. The Widefield School District #3 did the testing, evaluations and assessments required by the Colorado Department of Education for a triennial review during 1999 which resulted in an IEP dated May 11, 1999.

9. The Widefield School District #3 subsequently prepared an IEP based on an annual review which was dated April 13, 2000.

10. When the Student transferred into the District during August of 2000, the director of special education for the district, pursuant to Rule 4.03 of the Rules for the Administration of the Exceptional Children’s Educational Act decided to immediately provide services to the Student pursuant to the April 13, 2000 IEP prepared by the Widefield School District #3.

11. The April 13, 2000 IEP stated the following regarding the Student’s then present level of functioning, achievement, and performance:

Educational

How does this child/student perform within the curriculum and on age appropriate tasks?

Strengths

[The Student] continues to demonstrate that she is capable of being successful in school when she tries (e.g. remaining eligible during sports seasons). Testing indicates that math is the Student's strongest area; written language her weakest.

Concerns:

The main reason for poor grades during 7th and 8th grades is failure to turn in assignments. Teachers have consistently reported "poor use of class time" and "does not work to ability".

Social/Emotional/Adaptive Behavior:

How does the child/student manage feelings and interact with others? How well does the child/student adapt to different environments, i.e. home, school and community.

Strengths:

[The Student] has several friends at school and generally interacts appropriately with peers.

Concerns:

[The Student] continues to receive office referrals for disciplinary issues. During the current school year, [the Student] has received 17 consequences for 10 total incidents (5 days of I.S.S.), primarily for skipping teacher and administrator detentions.

12. In the Statement of Educational Needs the April 13, 2000 IEP states:

[The Student] needs basic classes offering modified curriculum and sped personnel support in Language Arts, Social Studies, and Math.

[The Student] needs additional support/instruction in a Resource class.

[The Student] needs to improve her reading and written language skills.

[The Student] needs to take personal responsibility for her education (i.e. turning in assignments, complete and on time).

[The Student] needs to reduce the number of office referrals (skipping teacher detentions, etc.)

13. Regarding reading, the April 13, 2000 IEP lists the following goal:

(#2) [The Student] will increase her reading comprehension level to 7.0 G.E.

Baseline: 5.9 G.E. - McCall-Crabbs Rdg Tests

14. The Mother testified that the Student was provided 9th grade text books by the District for the 2000-2001 school year which the Student could not understand. Therefore, the Student was unable to do her assignments which resulted in her failing her classes during that school year.

15. The Mother further testified that the Student was sexually assaulted on December 15, 2000 when two male students knocked the Student to the floor and grabbed her breasts and buttocks. The Mother further testified that the above described attack was not dealt with properly by the District in that the boys were not adequately punished, and therefore continued to harass the Student throughout the remainder of the school year. The Mother claims the hostile environment contributed to the Student's failure in her classes.

16. The assistant principal and a deputy El Paso County Sheriff investigated the December 15, 2000 incident involving the Student and two boys. They independently talked to the Student and the boys. They concluded that the Student was pushed or pulled to the floor but they did not believe there was any touching of the Student's breasts or buttocks. They asked the Student to report any further problems. No further problems were reported.

17. On October 25, 2000 the District conducted an additional meeting of the IEP team which was attended by the Parent, the Student, the special education director, a special education teacher, a general education teacher, the building principal, a school psychologist and a school counselor.

18. As a result of the October 25, 2000 meeting the District prepared an IEP. That IEP incorporated the assessment information from the IEPs prepared by Widefield School District #3.

19. The October 25, 2000 IEP noted the following under present level of functioning, achievement, and performance.

Educational: How does this child/student perform within the curriculum and on age appropriate tasks?

Strengths:

Related to Math standards:

Math is a strength for [the Student]. She has demonstrated the ability to transfer calculation skills to applied problems.

Concerns:

Related to access skills:

[The Student's] teachers at Janitell noted that poor grades were linked to "missing homework", "poor use of class time", and/or "behavior is affecting performance". [The Student's] grade reports were erratic (i.e. 1st quarter last year no grades were lower than a C; subsequent report cards contained several D's). Teacher observation at LPHS indicate continued problems in work completion, also attendance/tardy issues are affecting her performance. She [the Student] has received detentions for tardies and has not shown up for them. She currently has been assigned a Saturday school for this. [The Student] does not always take advantage of extra assistance offered her.

Relating to Reading/Writing Standards:

[The Student's] low written language skills will impact her ability to achieve at expected grade level in reading and writing standards.

Social/Emotional/Adaptive Behavior: How does this child/student manage feelings and interact with others? How well does the child/student adapt to different environments, i.e., home, school, and community?

Strengths:

[The Student] can be very personable; grade reports in some classes include the comment that [the Student] displays “positive attitude and behavior”.

Concerns:

At Janitell, [the Student] received in-school suspension/detention for being “disrespectful/defiant”. At LPHS, [the Student] has received several detentions for tardiness.

20. Regarding educational needs the October 25, 2000 IEP stated:

Related to Access skills:

-[The Student] needs to attend daily -at 9 absences she will be placed on documentation requiring a Dr.’s note to excuse absences.

-[The Student] needs to reduce tardiness -Through Nov. 9, 2000 she will be allowed to stay for Access on the days she is tardy. After that, she will follow regular school policy.

-[The Student] needs to improve her assignment completion rate

-[The Student] needs to accept individual teacher instruction and to make a greater effort on new and different tasks.

-[The Student] needs to follow all school rules and follow regular consequences.

-[The Student] will complete weekly grade checks.

Related to Reading/Writing Standards:

-[The Student] needs basic courses/Special Ed support in academic classes.

-[The Student] needs to continue to improve reading and written language skills.

21. During the 2000-2001 school year the Student was enrolled in math, English, resource room, civics, science and health.

22. The special education teacher testified that:

a.) The math class was taught at a level comparable to third to sixth grades by a special education teacher and a general education teacher.

b.) There were 15-16 students in the class.

c.) She worked with the Student individually frequently during the course.

d.) The student was able to do the work and in fact received low B's and high C's on the work completed.

e.) In her opinion the frequent absences of the Student and refusal to do work caused the Student's failure and not problems with reading the text.

23. The special education teacher testified that:

a.) The English class was taught on an elementary school level.

b.) The civics and earth sciences classes were taught at levels varying from elementary to high school level.

24. A psychologist for the District testified that the assessment information regarding the Student indicated that she could learn and because of the oral instruction and one on one assistance received by the Student her reading problems should not cause her to fail her classes.

The psychologist further testified that the Student was not depressed.

25. The general education English teacher testified that:

a.) The English class was designed for special needs students.

b.) There were 8-10 students.

c.) Two teachers taught the class.

d.) The reading level of the text was third grade eight month.

- e.) She worked individually each day with the Student.
- f.) The Student was able to receive passing grades on the work turned in.
- g.) The Student failed to complete too many assignments to pass the class.

26. The English teacher further testified that the following techniques were employed to assist the Student:

- a.) The Student was seated next to the teacher.
- b.) Visual aids were used.
- c.) One on one assistance was given when needed.
- d.) The Student was given extra time on tests.
- e.) The Student was assisted in maintaining a planner.
- f.) Study guides were reviewed with the Student.
- g.) There was class discussion.
- h.) There was group language practice.
- i.) There was chalk board work.

27. The civics teacher testified as follows:

- a.) The Student received passing grades at first then quit turning in work.
- b.) The Student missed one entire week on class.
- c.) The text was at an 8.1 level.

28. The civics teacher testified that the following techniques were used to assist the Student:

- a.) A para educator was available in class each day to help one on one.
- b.) Short lectures were used.

c.) Work sheets and study guides were used.

d.) Tests were modified for the Student and read to the Student.

29. The Student participated in a resource room during the 2000-2001 School year where she received one on one assistance with her work in her other classes for approximately 53 minutes a day along with approximately 15 minutes per day of instruction on learning strategies.

30. The para educator who was assigned to the resource room testified for at least one trimester she worked during the entire resource room period exclusively with the Student but a major problem was that the Student often did not want help.

31. The resource room teacher testified that:

a.) She read to the Student from the texts and would discuss what was read.

b.) She would write for the Student.

c.) She helped the Student with tests.

d.) The Student often refused to do school work.

e.) The Students primary problems were absences and lack of organizational skills.

f.) The Student was reading below grade level but with all the other support, her reading deficit did not cause her to fail.

32. During the School year, the Student was absent as follows:

1st period class	-20 days
2nd period class	-14 days
3rd period class	-14 days
4th period class	-13 days
5th period class	-16 days

33. After June 8, 2001, the Mother withdrew the Student from the District and enrolled her in a private school.

ANALYSIS

“If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made [a free appropriate public education] available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.” 34C.F.R.§300.403(c). Thus, the central issue in determining parent eligibility for reimbursement of private school tuition is whether the school district provided the child with FAPE.

Section 602 of the IDEA includes the following definition of FAPE:

- (8) FREE APPROPRIATE PUBLIC EDUCATION - the term “free appropriate public education” means special education and related services that --
- (A) have been provided at public expense, under public supervision and direction, and without charge;
 - (B) meet the standards of the State educational agency;
 - (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
 - (D) are provided in conformity with the individualized educational program required under section 614(d) [29 U.S.C.§ 1414(d)].

29 U.S.C.§ 1401(8).

The regulations enacted pursuant the Colorado Exceptional Children’s Education Act (ECEA) [C.R.S. §§ 22-20-101, et seq.] also include a definition of “Free Appropriate Public Education”.

5.01 Free Appropriate Public Education

Each administrative unit shall provide a free appropriate public education in the least restrictive environment to children with disabilities within its jurisdiction, including children with disabilities who have been suspended or expelled from school. Each administrative unit shall ensure that FAPE is available to any individual child with a disability who needs special education and related services, even if the child is advancing from grade to grade. A “free appropriate public” education shall be defined as:

- 5.01(1) “Free” education shall be the provision of special education without cost to the child or to his/her parent(s) or guardian except for those fees that are imposed on non-disabled children or their parents(s).
- 5.01(2) “Appropriate” education shall be the provision of educational services that meet the individual needs of children with disabilities as identified on the individualized education programs (IEPs).
- 5.01(3) “Public” education shall be the provision of educational services at public expense, under public supervision and direction and without charge to the family, that meets the standards of the Department of Education and are provided in conformity with an IEP.

Rules for the Administration of the Exceptional Children’s Education Act § 2220-R-5.01.

In Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176(1982), the United States Supreme Court addressed the meaning of “free appropriate public education”. The Court found that the IDEA requires school districts to provide disabled students with a “basic floor of opportunity”; the Act does not require school districts to ‘maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children.’ Rowley, 458 U.S. at 200. With this in mind, the Court wrote,

Insofar as a State is required to provide a handicapped child with a “free appropriate public education”, we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State’s educational standards, must approximate the grade

levels used in the State's regular education, and must comport with the child's IEP. In additions, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

Rowley, 458 U.S. at 203-04.

DECISION

The District has withdrawn its issue regarding notice from a parent to the District that the Student was to be placed in a private school. Therefore that issue will not be discussed.

1. Did the Student receive FAPE during the 2000-2001 school year when she attended 9th grade at Lewis Palmer High School?

There has been no allegation or evidence that the education received was not free, was not provided in the least restrictive environment, and did not meet the standards of the Colorado Department of Education as to teacher certification, etc. Therefore the IHO hereby decides that the education provided by the District was free, was in the least restrictive environment, and met the standards of the Colorado Department of Education as to teacher certification, etc.

The area in dispute is whether or not the education was appropriate.

First the IHO determines that the District did not maintain a hostile learning environment because of the regrettable incident with the two boys on December 15, 2000.

The IHO has made this decision because:

- 1.) This was the only such incident regarding the Student that according to the evidence presented was reported to the District.
- 2.) The Student continued in the same program from the date of the incident on December 15, 2000 until the end of school on June 8, 2001.
- 3.) The officials who investigated the incident determined that it was “horseplay” by the boys.
- 4.) The Student when testifying at the hearing did not appear upset about the incident and could not remember the details of the incident.

The IHO hereby determines that the District provided an appropriate education to the Student because the law does not guaranty the Student’s success but only a “basic floor of opportunity” and “to permit the child to benefit educationally from instruction”. While the Student’s lack of reading ability impedes her ability to learn, the IHO determines that the preponderance of the evidence presented at the hearing was that the District’s staff who taught the Student were highly competent educators who utilized numerous teaching strategies to minimize the Student’s reading problems so that she could benefit from the educational services provided.

From the IHO’s review of the IEP and the testimony provided at the hearing the IHO determines that the preponderance of the evidence was: The IEP was appropriate and the education provided pursuant to the IEP comported with the IEP, met the needs of the Student as set forth in the IEP, permitted the Student to benefit from that education and was reasonably calculated to enable the Student to achieve passing grades and advance to the 10th grade.

The evidence indicated the likely explanation for the Student's inability to pass her classes were her high rate of absences and tardies, her unwillingness to do the work, and lack of parental assistance in completing her work.

In sum the IHO has determined that the District provided FAPE to the Student. Because of that determination it is not necessary to discuss the requested remedies of requiring the District to pay for the current private school tuition or to award credit for the classes failed.

WHEREFORE, the IHO determines that the Mother's request herein is without merit and no relief is awarded. Attached hereto is a copy of the State's rules regarding State level review [Rules 6.03 (9) and 6.03 (10)].

Dated this _____ day of May, 2002 by:

Gordon F. Esplin
Independent Hearing Officer

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of this document has been sent to the following this _____ day of _____, 2002 by certified mail.

1. [parent], Parent of the Student
2. Brent P. Benrund, Esq.
Attorney for the District
Stettner, Miller and Cohn, P.C,
1380 Lawrence Street, Suite 100
Denver, CO 80204-2058

3. Charles M. Masner
Special Education Services Unit
Colorado Department of Education
201 East Colfax Avenue
Denver CO 80203-1704