

In the matter of:

[STUDENT] by and through his parents,  
[PARENTS],

Petitioner,

vs.

ACADEMY SCHOOL DISTRICT 20,

Respondent.

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### **IMPARTIAL HEARING OFFICER DECISION**

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#### INTRODUCTION

A Due Process Hearing was held January 27, 28, 29, 30 and February 4, 2003 at the administrative offices of the Respondent, 7610 North Union Boulevard, Colorado Springs, Colorado pursuant to notice. Jurisdiction is conferred by 20 U.S.C. Sec. 1401 *et seq.*, Individuals with Disabilities Education Act (IDEA) and the Colorado Exceptional Children's Education Act, C.R.S. 22-20-101 *et seq.* and companion regulations to the federal and state acts. Michael C. Cook, Michael C. Cook, P.C., 509 N. Tejon St., Colorado Springs, CO 80903 appeared on behalf of Petitioner. Brent Benrud and Robert Cohn, Stettner, Miller & Cohn, P.C., 1380 Lawrence St., #1000, Denver, CO 80204 appeared on behalf of Respondent. The hearing was open to the public and [STUDENT] did not attend the hearing in person.

Petitioner submitted the Demand for Impartial Due Process Hearing to Respondent on November 15, 2002 and the Colorado Department of Education was advised of the request on the same date.

An informal telephone setting conference was conducted on December 10, 2002 where the parties agreed to an extension of the 45-day timeline through completion of the Due Process Hearing and a reasonable time thereafter, not to exceed 30 days, to enable the IHO to obtain the transcript and prepare the final order. Following notice, a prehearing conference took place on January 13, 2003 at Respondent's offices. The Impartial Hearing Officer ("IHO") entered a Prehearing Conference Order dated January 21, 2003 finding he had jurisdiction under the IDEA to hear the matter but that he lacked jurisdiction over Section 504 claims and issues; stating a stipulation between the parties that [STUDENT] is a person with a disability, having been diagnosed with autism, and that he was eligible for and received services under Part C of IDEA; that Petitioner had the burden of proof on substantive issues of whether the Respondent's proposed IEPs for [STUDENT] for the 2001-2002 and 2002-2003 school years are appropriate and calculated to confer education benefit to him under the IDEA and CECEA, including extended school year services and Petitioner's claims for reimbursement of expenses; and addressing certain procedural matters attending to the hearing.

At the close of the hearing on February 4, 2003, because the transcript was expected to take some time to prepare, the parties orally stipulated to an extension of the 45-day rule to allow the IHO 30 days from receipt of the transcript in which to render a written decision. (TR. 827)

## THE ISSUES

The issues in this proceeding as agreed in the prehearing conference were whether the Respondent's proposed Individualized Education Programs ("IEP") were appropriate for [STUDENT] for the 2001-2002 and 2002-2003 school years and were calculated to confer educational benefits to him under the IDEA and CECEA, including extended year services, and, if not, whether Petitioner was entitled to reimbursement of expenses. At the prehearing conference, it was agreed that only substantive issues existed in contrast to procedural issues. However, Petitioner subsequently raised a procedural issue regarding the 2001-2002 IEP, maintaining that any claimed discussions or offers for increased services beyond those set out in the draft IEP were in violation of the requirement that an IEP be in written form. In addition to being untimely, Petitioner has waived assertion of this issue by itself introducing testimony of discussions beyond the development of the initial draft IEP. Petitioner has cited *Burilovich v. Board of Education of the Lincoln Consolidated Schools*, 208 F. 3rd 560, for the proposition that the Court refused to recognize verbal proposals as part of an IEP. A fair reading of that proceeding shows, however, that not to be the case and, in any event, the case is distinguished on the facts.

## FINDINGS OF FACT

1. [STUDENT] was born [date of birth] and resides with his parents in Colorado Springs, Colorado. He was diagnosed with autism in January 2001 although [PARENTS] had suspicions as early as around his second birthday in 2000. They had observed [STUDENT] was not interacting with other children the way he should. [STUDENT] would sit in the corner making unusual sounds, not socializing, not respond to his name and not make real eye contact. [PARENTS] began doing some research on autism, treatments and resources and became interested in the concept of Applied Behavioral Analysis. Soon thereafter, [PARENTS] contracted with Denver Disability Consultants to begin a home program of treatment, initially consisting of about 10 hours per week of in-home therapy.

2. [PARENTS] completed an intake form from Resources For Young Children And Families, Inc. on February 3, 2001 and an Individualized Family Service Plan (IFSP) was completed in April 2001. Funding for [STUDENT'S] in-home program was obtained under Part C of IDEA in May 2001 through [STUDENT'S] third birthday. [STUDENT] was receiving 16 1/2 hours per week of in-home 1:1 therapy in early May and that was increased to 30 hours later in the month.

3. Respondent undertook a play-based assessment of [STUDENT] on May 4, 2001. The learning skills assessment form notes that [STUDENT'S] abilities were difficult to fully assess due to autism but that he did possess some good skills. He had good vocalizations and expressed emotions, was beginning to imitate phrases, recognized groups of things as same or different, and was curious. Concerns included eye contact, interactions with people, language delays and frustration. Needs stated were a preschool environment for increased exposure to peers, structured program and opportunities to model. Under the topic home activity ideas, it was stated: "keep doing what you're doing! Great supportive environment." The socialization section noted some eye contact and concerns that [STUDENT] does not follow directions, is easily frustrated but recovers quickly, does not want to share and lacks social skills. There was stated a need to interact with other children his age, follow directions and decrease sensitivity to sounds. The communication skills portion of the assessment indicated a need to improve functional language and overall communication skills, eye contact and attention span and exposure to peers in a structured language based setting. A motor skill analysis indicated a need for a structured preschool setting to increase socialization and functional motor skills.

4. Exhibit 3 is a draft IEP dated May 11, 2001. The record differs as to whether the initial meeting was held on May 11 or May 18, 2001. Those in attendance were [PARENTS] and their representative specialist, the director of special education, a special education teacher, an occupational therapist, social worker and the autism specialist for Respondent. Included in the exhibit is essentially a restatement of the evaluation data from the child find assessment of May 4, 2001 that is carried over into a present level of functioning. Educational needs included a structured, language-based preschool environment for increased exposure to same-age peers to model socialization, language and imitation skills; to improve functional language and overall communication skills; to increase eye contact and attention

span; to increase functional motor skills (fine and gross); to follow directions; and decrease sensitivity to sounds. Hand written needs stated were schedule of reinforcement for compliance and play skills (functional). [STUDENT] was found to have a disability as defined in the State Rules for the Administration of the Exceptional Children's Education Act and there was found to be a substantial discrepancy between the child's performance and behavior as compared to children of a comparable age.

5. Goals and objectives for [STUDENT] were stated. Mrs. [PARENT] did not have a problem with the stated goals and objectives in the 2001-2002 IEP at one point in her testimony although she also stated they were too lofty given the services that were being offered to meet those goals and objectives. [PARENTS] presented Respondent with their specialist's list of goals and objectives at the May 2001 IEP meeting.

6. The 2001-2002 IEP draft stated the following service delivery: "[STUDENT] will attend an integrated preschool setting with support from Speech/Language. Occupational Therapy will provide consultation on an as-needed basis." A total of 10.75 hours per week was shown on the draft. Extended school year services were to be reconsidered at a later time. The recommended placement in the least restrictive environment portion of the IEP did not show home to have been considered. As an explanation for the integrated setting the IEP stated that "[STUDENT'S] goals can best be met in a structured, integrated preschool setting with services provided by speech and language and where he can be exposed to same age peers who can provide modeling of appropriate social language and social skills." During the IEP discussions, Respondent offered to increase the number of service hours to 15.25 hours per week.

7. [PARENTS] did not consent to the initial placement in an integrated setting. Because of parent concerns, the IEP development was tabled. Subsequently, [PARENTS] furnished letters to Respondent from two behavior specialists, a neurologist, and from a staff member of JFK Center for Developmental Disabilities. (Exhibit 7)

8. An informal meeting was held on August 2, 2001 with [PARENTS], the director and assistant director of special education and a special education teacher. Respondent did not consider this an IEP meeting as it was held during the summer and there was not sufficient staff to constitute an IEP team. At that meeting, Respondent offered the possibility of expanding the program for [STUDENT] to 20 hours per week. A further offer may have been made subsequently; however, it now appears from the record as a whole that such an offer may have been made during mediation. Accordingly, such further offer is not considered by the IHO in making his decision. Respondent's director of special education directed a letter to [PARENTS] dated August 17, 2001 effectively confirming a telephone conversation the previous day that Respondent was willing to provide services in its preschool program but that [PARENTS] were declining and desiring to continue [STUDENT'S] in-home program. A final 2001-2002 IEP was never developed.

9. The next apparent contact between the parties was pertaining to the development of an IEP for the 2002-2003 school year in October 2002. Exhibit 14, dated November 20, 2002, was apparently updated following the meeting that date and was faxed to the parents on November 22, 2002. In preparation for this meeting, the Mullen Scales of Early Learning and Vineland Adaptive Behavior Scales standardized assessments were undertaken and summary results were appended to Exhibit 14. The Mullen evaluation, administered by Respondent on October 29, 2002 showed the following results:

	<u>Age equivalent</u>
Visual Reception	2y7m
Fine Motor	2y2m
Receptive Language	1y1m
Expressive Language	2y8m

The Vineland Adaptive Behavior Scales was administered November 4, 2002. The scores were:

Age equivalent

Receptive Communication	2y2m
Expressive Communication	1y11m
Personal Living Skills	1y10m
Domestic Living Skills	2y6m
Community Living Skills	2y2m
Interpersonal Socialization	1y9m
Play & Leisure	1y5m
Gross Motor Skills	5y3m
Fine Motor Skills	5y11m

Educational needs stated were: increase interactions with peers and adults; participate in group instruction; decrease self-stimulatory behaviors that interfere with learning; follow novel directions; and, increase skills with drawing and cutting to be able to participate more independently in arts and crafts. Social/Emotional/Adaptive behavior needs were: initiate interactions with peers and a variety of adults; continue to increase imitation of peers; develop imaginary play skills and play schemes; engage in cooperative play with a peer; 1:1 instruction to learn social and play skills; and increase tolerance to non-preferred activities. Communicative needs were: generalization of learning; initiation of interactions; spontaneous requesting and use of words; spontaneous imitation of words and phrases; ability to respond to novel tasks, information; following non-routine, verbal directions; identifying objects by feature; prosody in verbalizations; use of carrier phrases; understanding preposition; and respond to interactions from peers. Cognitive needs were: development of pragmatic/functional language skills; increase existing exposure/experience with a variety of foods; and continue to develop play skills and have social interaction opportunities. Transitional needs were related to toilet training, dressing and undressing and decreasing autistic mannerisms.

10. The 2002-2003 IEP stated that: "[STUDENT] will participate in an extended day preschool for 22.5 hours per week, including 5 hours a week of 1:1 discrete trial training. Consultation with occupational therapist. Consultation with autism specialist and district consultants." EYS was to be determined by April 15, 2003. Placement was to be in an early childhood integrated setting designed primarily for children without disabilities. Regarding justification: "The integrated preschool setting is the most appropriate placement to meet [STUDENT'S] needs and goals within the least restrictive environment. It is a structured, integrated setting with opportunities to learn and generalize new skills with peers and a variety of adults. The classroom is service [d] by a speech therapist and an occupational therapist."

The 2002-2003 IEP (Exhibit 14) was a final document. It was not agreed to or signed by [PARENTS].

11. It was stipulated by the parties that [STUDENT] is a child with a disability, that of autism. Autism may be defined as a disruption of the normal developmental processes that affects all areas of essential human behaviors such as social interactions, the ability to communicate ideas and feelings, imagination, fine and gross motor skills, and the establishment of relationships with others.

12. Since his third birthday, [STUDENT] has remained enrolled in his home program consisting of 1:1 instruction utilizing ABA and discrete trial teaching techniques. In November, 2002, [PARENTS] enrolled [STUDENT] in a private preschool, 9 hours per week, with a 1:1 aide, at their expense; however, they continued a 23 hour per week home program continued through completion of the hearing. It was not disputed that the ABA 1:1 home-based program provided [STUDENT] with an educational benefit. See, for example, Exhibits M and N for recognizable gains between February 2001 and January 2003 in age equivalency and the testimony of [PARENTS].

13. [PARENTS] and their consultant maintain that [STUDENT] was denied a Free Appropriate Public Education ("FAPE") in that the services offered on both IEPs was not tailored to meet his individual needs. Specifically, it is argued that the IEPs did not include continuation of home-based ABA therapy or a

home component thereof; that there was no research provided [PARENTS] supporting Respondent's programs under either IEP; proposed changes in the initial (2001-2002) IEP were not reduced to writing; that the number of service hours offered were inadequate; that neither IEP provided for parent counseling or training as related services; that teachers and aides were not properly trained to provide therapy for [STUDENT]; that the 2002-2003 IEP provided for "errorless" teaching strategies that were not appropriate for [STUDENT]; and that [STUDENT'S] EYS needs and regression was not addressed adequately.

14. [PARENTS] seek reimbursement of actual costs incurred and those anticipated through August 31, 2003 of \$84,348 because of the alleged inappropriate programs of Respondent and Respondent's failure to provide [STUDENT] a FAPE. Respondent did not refute Petitioner's calculations.

15. There is no issue but what Respondent's special education teachers meet the threshold requirements under Section 2220-R-3.04 of the ECEA Regulations. They are appropriately licensed. The regulations permit each district to establish its own qualifications and requirements for paraprofessionals.

The National Research Council, in its text entitled *Educating Children with Autism* (Ex. J-1) stated:

"Teachers are faced with a huge task. They must be familiar with theory and research concerning best practices for children with autistic spectrum disorders, including methods of applied behavior analysis, naturalistic learning, assistive technology, socialization, communication, inclusion, adaptation of the environment, language interventions, assessment, and the effective use of data collection systems. Specific problems in generalization and maintenance of behaviors also affect the need for training in methods of teaching children with autistic spectrum disorders. The wide range of IQ scores and verbal skills associated with autistic spectrum disorders, from profound mental retardation and severe language impairments to superior intelligence, intensify the need for personnel training. To enable teachers to adequately work with parents and with other professionals to set appropriate goals, teachers need familiarity with the course of autistic spectrum disorders and the range of possible outcomes." (Page 225)

The Respondent has an autism team in place consisting of its autism specialist, a school psychologist, a school social worker, a speech language pathologist, three special education teachers, an occupational therapist. Its director of special education is knowledgeable and experienced. The autism specialist, well trained in her field, was knowledgeable regarding different methodologies and strategies, and her testimony in this proceeding was credible and persuasive. The special education teachers who would have been [STUDENT'S] primary in the classroom both testified and were found to be intelligent, enthusiastic, sufficiently experienced and capable. Adequate supervision, support and training are in place, including that commencing in 2002 from J.F.K. Center for Developmental disabilities. Testimony indicated approximately 30 children being educated in the district with autism equally or more severe than [STUDENT]. The IHO finds Respondent personnel have sufficient skills and resources to enable Respondent to deliver [STUDENT] appropriate services resulting in a meaningful educational benefit.

16. Respondent has characterized its program of educating students with autism as "eclectic" or consisting of a number of different methodologies and teaching strategies. It has used elements of the LEAP model (Learning Experiences Alternative Program), the Denver Model, TEACCH (Treatment and Education of Autistic and Related Communication Handicapped Children), Lovaas / ABA (sometimes known as Discrete Trial or Applied Behavior Analysis, and PECS (Picture Exchange Communication System). For the current 2002-2003 school year, Respondent considers itself more aligned with the Denver Model. These and other models or strategies are discussed in the NRC text (*supra*). The NRC publication did not make any recommendation as to which of the 10 methodologies studied was preferred. It appears all had demonstrated some measure of success.

17. The NRC publication states:

"The consensus across programs is generally strong concerning the need for: early entry into an intervention program; active engagement in intensive instructional programming for the equivalent of a full school day, including services that may be offered in different sites, for a minimum of 5 days a week with full-year programming; use of planned teaching opportunities, organized around relatively brief periods of time for the youngest children (e.g., 15- to 20-minute intervals); and sufficient amounts of adult attention in one-to-one or very small group instruction to meet individualized goals. Overall, effective programs are more similar than different in terms of levels of organization, staffing, ongoing monitoring, and the use of certain techniques, such as discrete trials, incidental learning, and structured teaching periods. However, there are real differences in philosophy and practice that provide a range of alternatives for parents and school systems." (Page 6)

18. As to hours of instruction, the parties agree that it is the quality of hours, rather than the quantity, which is important. Of the various methodologies reviewed by NRC, there is a range of a low of 12 hours per week to as high as 40 hours per week. Ex. J-1, page 150. The usual setting also varies. The Lovass method, for instance, uses the home as a setting whereas the TEACCH method uses schools and clinics and the Denver Model uses school, home and community.

#### DISCUSSION

Respondent must provide [STUDENT] with a FAPE through development and implementation of an IEP. A free appropriate public education is one that is "reasonably calculated to enable the child to receive educational benefit." *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U. S. 176. The IDEA does not require Respondent to provide a perfect or ideal education to students with disabilities, but the educational program must be reasonably calculated to allow the child to achieve passing grades and advance from grade to grade. (*Rowley*). The educational benefit must be meaningful and not trivial or *de minimus*. *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F. 2d 171.

This was a case that was not supposed not be about competing methodology, but that became a central theme. It is a case about whether the Respondent's proposed programs for the 2001-2002 and 2002-2003 school years were designed to meet [STUDENT'S] individual needs and whether they were reasonably calculated to confer a meaningful educational benefit.

[STUDENT] is autistic and, during periods relevant to this proceeding, had delays in fine motor skills, communication, daily living skills and socialization. In the development of the draft 2001-2002 IEP and in the 2002-2003 IEP evaluations were undertaken and goals and objectives were developed that were essentially agreed to by the parties as appropriate. Needs, strengths and concerns were stated. Differences of opinion lie in service delivery and placement in the least restrictive environment. CECEA regulations provide in pertinent part that LRE "...shall mean an environment in which a child with disabilities is educated with children who do not have disabilities, unless:

the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily..." (Rule 5.02)

The IHO is convinced that [STUDENT'S] disability is not so severe such that education in regular classes cannot be accomplished and a meaningful educational benefit derived. The evidence was that the district had approximately 30 autistic students with the same or more severe level of disability being provided an education. Respondent staff testimony was that they could serve [STUDENT'S] needs and provide the required educational benefit. Respondent demonstrated an intent to provide the for 1:1 supplementary staff if that was necessary for [STUDENT]. Class size of approximately 8-10 students and staff numbers were adequate for such coverage. Sufficient supplementary aids and services were either in place or would have been acquired based on the individual needs of the students, including [STUDENT].

Continuation of a home-based ABA therapy or a home component was not necessary to provide [STUDENT] a meaningful educational benefit during either of the school years in question. It is

undisputed that intensive intervention is beneficial to children with autism. In all likelihood, a home component would have been ideal for [STUDENT]; however, the IDEA does not require the opportunity for a perfect or ideal education. The IHO concludes that Respondent offered sufficient quality hours under both proposed IEPs to meet the requisite standard required under state and federal law.

The IEPs are not deficient because they deferred any decision on EYS. In both instances, Respondent indicated a willingness to consider EYS, as indeed they should, as the consensus seems to be that a year around program is necessary and appropriate for children with autism. In the development of these IEPs, however, it was premature to determine the exact need and extent services would be required.

The IHO need not reach a determination in this proceeding as to whether parent counseling and training is a related service and required to be offered as a part of the IEPs. Both parties agreed on the necessity to coordinate and communicate between home and school. [PARENTS] in this instance appear quite knowledgeable about autism and desire to be actively involved in [STUDENT'S] education. Respondent has evidenced an intent to counsel with [PARENTS], as they require.

The 2002-2003 IEP was not deficient merely because it included errorless learning strategies. Certainly, Petitioner presented competent evidence that this strategy would not work with [STUDENT]. However, what may not work for one instructor may work for another in a different setting. An educational strategy is a work in progress and an IEP can and should be revised whenever necessary to provide a meaningful education to a student. Respondent has demonstrated flexibility such that it can attend to [STUDENT'S] educational needs. A better practice in this instance would have been to note [PARENTS] concerns.

Burden of proof aside, Respondent has demonstrated that, if implemented, the IEPs were appropriate, designed to meet [STUDENT'S] individual needs and reasonably calculated to confer a meaningful educational benefit on [STUDENT]. Its program for education of students with autism, although eclectic, is research based and satisfies the IDEA and CECEA.

#### CONCLUSIONS OF LAW

1. Respondent did not deny [STUDENT] a FAPE during either the 2001-2002 or 2002-2003 school years.
2. The 2001-2002 draft IEP as modified and the final 2002-2003 IEP were appropriate, designed to meet [STUDENT'S] individual needs and reasonably calculated to confer a meaningful educational benefit on [STUDENT].
3. The early childhood integrated preschool setting was the appropriate LRE.
4. Since [STUDENT] was not denied a FAPE by Respondent, Petitioner's request for reimbursement is denied.

#### APPELLATE RIGHTS

Appellate rights from the regulations enacted pursuant to the Colorado ECEA are attached hereto and are made a part of this Decision and Order.

Dated: April 8, 2003

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Fred B. Adam, #15729  
Impartial Hearing Officer  
413 N. Wilcox, #102  
Castle Rock, CO 80104  
303-688-1273

CERTIFICATE OF MAILING

I certify that on April 8, 2003 a true copy of the foregoing Decision was mailed by certified mail to [PARENTS] in this proceeding at their address of record and, in addition, to:

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