DEPARTMENT OF EDUCATION, SPECIAL EDUCATION, STATE OF COLORADO

Case No. L98:120

DECISION OF THE HEARING OFFICER

[student], by [parents],

PETITIONER,

v.

DENVER PUBLIC SCHOOLS,

RESPONDENT.

The due process hearing in this matter was held March 15-18 and 20, 1999, at the administrative offices of Denver Public Schools, 900 Grant St., 7th floor, Denver, Colorado. Following are the findings and decision of the hearing officer, with personally identifiable information removed.

Petitioner's identifying information is:

[ ]

Petitioner's last school within Denver Public Schools was Manual High School, which she attended in the 1997-98 school year; her student number at Manual was [ ]. She currently attends a private school known as Elan School in Maine. Her date of birth is [ ].

Dated this 5th day of July, 2000.

BY THE IMPARTIAL HEARING OFFICER:

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Alison Maynard

DEPARTMENT OF EDUCATION, SPECIAL EDUCATION, STATE OF COLORADO

Case No. L98:120

I. INTRODUCTION AND JURISDICTION

The hearing in this matter was held March 15-18 and 20, 1999, at the administration offices of Denver Public Schools, 777 Grant St., Denver, Colorado. Jurisdiction was conferred by the "Individuals with Disabilities Education Act" ("IDEA"), P.L. 94-142 (20 U.S.C. Sec. 1415); 34 C.F.R. Sec. 300 et seq. (1997); and 2220-R-6.03 of the Colorado Rules for the Administration of the Exceptional Children's Educational Act. Petitioner was represented by Margie Best, Esq., of the Law Offices of Margie Best, P.C. 29 So. LaSalle St., Suite 915, Chicago, IL 60603. Respondent Denver Public Schools ("the District" or "DPS") was represented by Michael Jackson, Esq., General Counsel, Denver Public Schools, 900 Grant St., Denver, CO 80203.

The hearing was convened pursuant to a complaint filed by Petitioner with the Colorado Department of Education on June 23, 1998.[1] The parties twice consented to indefinite extensions of time of the 45-day period within which a decision must normally be rendered, as memorialized by orders of the IHO dated July 23, 1998, and November 9, 1998. The hearing was originally set for October 14-16, 1998, but continued on the joint motion of the parties to March 15-18 and 20, 1999. Extensions of time were also sought and obtained by the parties for briefing following the hearing, in order to explore settlement possibilities; the case came at issue with the filing of the Petitioner's reply brief on August 12, 1999.

II. GENERAL MATTERS

The hearing was, theoretically, bifurcated. "Phase 1" consisted of eligibility and placement issues under IDEA. "Phase 2," to be heard depending on the outcome of Phase 1, was for the purpose of deciding whether the parents were entitled to reimbursement for their unilateral placement of Petitioner in a private boarding school in Maine. Because I have now seen, from case law, that the right to reimbursement is closely intertwined with a finding of appropriateness of the placement, and decided that I have enough information to rule, I decide the Phase 2 issue here, as well.

III. FINDINGS OF FACT

A. Background.

1. Petitioner was born in [ ] in Denver, and attended kindergarten and first grade in Georgia. Her family returned to Denver, and she attended second grade through three-quarters of sixth grade in elementary schools in Respondent's district, Denver Public Schools ("DPS"). During most of this period, Petitioner's grades were A's and B's and her attendance was good,

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[1] The Individuals with Disabilities Education Act ("IDEA"') was revised by Congress in 1997. See Individuals with Disabilities Education Act Amendments of 1997, Pub.L. No. 105-17, 11 Stat. 37 (codified as amended at 20 U.S.C. § 1400 *et seq.* (1998)). Although the events giving rise to this action occurred both before and after the enactment of these amendments, the IHO has determined that the amendments do not affect the outcome of this decision, because the due process complaint was filed June 23, 1998, and the effective date of the applicable sections of the IDEA was July 1, 1998.

Petitioner's Exhibit 9, at 281. In 1992, her parents divorced, and in 1996 her mother remarried. The stepfather adopted Petitioner in 1997.

2. Petitioner began having problems at school in the sixth grade, in 1995. Her grades dropped markedly, resulting in a GPA at the end of that year of 1.429. For her last quarter of sixth grade through the end of the seventh grade (from April 1995 through June 1996), her mother placed her at a private Catholic school, Holy Family. She had a "disastrous year" there, obtaining 12 F's in the seventh grade and 38 "areas of concern." She was returned to Denver Public Schools for eighth grade, at Morey Middle School, where she had spotty attendance, numerous detentions and suspensions, and a GPA of 1.857. Despite her bad report cards, however, Petitioner's IQ tests in the average range.

3. From approximately the sixth grade on, Petitioner had also begun fighting with her mother, at one point giving her a black eye. Once, after Petitioner had come home and gone to take a shower, the mother checked the pockets of a "big, black coat" her daughter was fond of wearing, and found marijuana in the pocket, whereupon she called the police. Petitioner's parents secured counseling for their daughter, and the family as a whole, from Mental Health Corporation of Denver in 1995; from the Denver Department of Social Services in 1996 (including family therapy, anger management, and mentor services four times a week for the first four months, and then twice a week); and from Catholic Charities once a week in 1997-98. Thus, for approximately three years there were ongoing interventions by mental health professionals. See Respondents' Exhibit D-2, 14 pages in. Petitioner also ran away from home approximately five times between ages 12 and 15.

4. From Morey Middle School, in 1997 Petitioner matriculated at Manual High School, still in Respondent's district, for a mandatory four-week summer program prior to entering ninth grade. She showed promise in summer school. Her attendance was good, and her grades for that program, as well as for the first quarter of high school, were also good.

5. By the fall, however, Petitioner had begun to backslide. She was developing gang associations and a pattern, evidenced from her attendance records, of coming to school in the morning, but then being unaccounted for during the rest of the school day. From September 11 through November 19, 1997, Petitioner was present at school but not in class for 76 class periods.

6. Petitioner's parents were unaware of the absences. Manual High School had a phone reporting system that only reported students who had been absent from the beginning of school throughout the day, rather than for individual class periods following the first class period. Respondent did not notify Petitioner's mother about the student's attendance problems until November 21, 1997, when Petitioner was assigned after-school detention for truancy. The mother met with school officials to discuss the problem on November 24, 1997.

7. The next day, November 25, Petitioner allegedly drew a knife on another student at school. She was automatically suspended and the suspension was extended until the end of the holidays. Six weeks after the incident, on January 6, 1998, the District convened an expulsion hearing. At the time of this hearing, Petitioner had never been identified as eligible for special education.

8. The "expulsion hearing" did not result in expulsion. Vol. IV, at 16. No weapon had been found, and Petitioner denied the charges against her. The hearing officer, Robert Conklin, found that Petitioner had committed the offense charged, but did not expel her, "expulsion"

being defined as removal from all Denver Public Schools for a specific period of time. He ordered, instead, that she be "withdrawn" from Manual High School to attend Street School, an alternative high school which is not under DPS's control. He did so based on his understanding of the parents' wishes. In fact, Petitioner was free to enroll in any other high school within DPS, since she had not been expelled, but he did not inform the parents that was the case at the hearing. Vol. IV, at 132, lines 5-8; 213, lines 2-16; 217, lines 16-24. Reinforcing a conclusion that Petitioner could not return to any other high school in DPS, were "resource lists" for *suspended and expelled* students, which were given to the parents after the hearing and listed Street School and other alternative programs, but obviously no DPS schools. Id. at 415-421. The hearing officer's decision letter, sent over three weeks later, on January 28, also stated that, if Petitioner violated the condition that she "withdraw from Manual to attend Street School," the District could reinstate suspension or expulsion proceedings. P. 9, at 414.

9. Petitioner was withdrawn from Manual by unilateral action of an assistant principal there, Kevin Romero, immediately after the January 6 hearing, as required;[2] but Street School turned out to have a waiting list. Petitioner was not in school, at all, therefore, and was locked in conflict with her mother and stepfather at home. She ran away over the next few months, and, during this period, threw a brick through a window, so that a warrant for her arrest was issued. She also went through a juvenile court proceeding stemming from the November 1997 weapons charge, and was ordered to perform community service and find a job (as conditions of pleading to a lesser charge of truancy). She failed to perform these obligations and was placed in detention for two weeks, see Petitioner's Exhibit 9, pages 524-527; Vol. IV, at 121, lines 5-9. She then ran away from detention.

10. Around the time of the expulsion hearing, Petitioner's mother had been advised, by a family friend in New Jersey, that her child should be assessed for eligibility for special education. On January 8, 1998, the mother wrote a letter to the "Manual High School Study Team" requesting an "independent evaluation," therefore. Petitioner's Exhibit 9, at 411. That letter is missing from DPS files. She wrote again on February 2, and hand-delivered that letter to Assistant Principal Robert Sims. Vol. IV, at 111, 116; Petitioner's Exhibit 9, at 423. Finally, DPS convened a Child Find team, asking Petitioner's mother, on February 24, 1998, for consent to evaluate Petitioner, and evaluating Petitioner for the first time on that date.

11. The staffing team met as a group for the first time on March 10, 1998, but made no determination as to whether Petitioner had a disability. Several staff members were disinclined to believe she did. E.g., Vol. III, at 13, lines 23-25. Petitioner's test score's are almost uniformly average; she has no learning disabilities, and the records of Petitioner's prior mental health interventions are not reflective of a person with an emotional disability, Vol. I, at 58, lines 20-25. However, Petitioner's aunt provided information to the team about the student's spending three weeks at a time in the basement, by herself; refusing to mix with members of her extended family; being physically abusive to her mother, I at 32, lines 12-25; and refusing to go to school, III, at 78 lines 2-3.

12. The team did not finish its work on March 10. It continued the meeting to March 19, 1998, and at that time determined that Petitioner was emotionally disabled. The IEP states that Petitioner threatens students at school; is verbally aggressive at home and school; has a severe

[2] The withdrawal form, Respondent's Exhibit A- 1, 10 pages in, shows Mr. Romero himself believed Petitioner had been expelled, even though he was at the expulsion hearing. Robert Sims, another assistant principal at Manual, testified he, too, believed Petitioner had been expelled and was required to attend an alternative school. Vol. IV, at 6, lines 1-4.

reaction to authority figures; and doesn't attend school. It states that during the previous three years, the behaviors have been chronic. Exhibit D-2, 13-14 pages in. Specifically, in the words of school psychologist Sue Hamm, "[S]he had what I consider some significant social emotional problems that prevented her from ever doing better in school." Vol. I, at 17, line 23, through 19, line 19; and see 55, line 15, through 56, line 14, and 59, lines 1-9.

13. Towards the close of the March 19 meeting, one of the members of the team conferred with the expulsion hearing officer to learn whether the placement they were considering was consistent with his decision. Vol. IV, at 41, 133. Petitioner had not been in school for over four months, at that point. Some of the team members were not aware of that fact; others believed she could not even *return* to school within DPS. E.g., Vol. I (video), at 22, lines 16-19, and 20, lines 1-6; II, at 6, lines 6-8; I, at 41, lines 6-7, and at 43, lines 14-16; III, at 68, lines 7-22. There was discussion during this meeting about the family's imminent move to Montbello, another neighborhood in Denver, and accommodations which could be made for Petitioner at Montbello High School, see I, at 39, line 10, through 40, line 11, and at 83, lines 9-16; thus, at least by that time, Petitioner's parents were aware that other placement opportunities within Denver Public Schools were available. Linda Glass Wright, the coordinator at the Department of Special Education who oversaw Manual High School, explained the options available at Montbello as follows:

> Because [Petitioner] had not been in school, she wouldn't go to school, that we needed to help [her] attach to someone that she could trust, feel comfortable with. And so Pat-and we had talked about three classes, and Pat Otelee would be the teacher in all three classrooms or courses. That way [Petitioner] would be involved with one teacher versus three or possibly five teachers, if she had a full day.

III at 39, lines 9-17. The team also discussed Petitioner's starting the school day later, so that other students would arrive at school before her. Id. at 39, line 24, through 40, line 5. Their intention was to have had Petitioner attend school for only two hours a day. Vol. V, at 186, lines 4-6.

14. Petitioner's mother began asking for a residential placement at this point, and the team did discuss the possibility of such a placement in Denver. The only residential facility considered, or possibly even available, was Savio House, but a prerequisite for placement at Savio House is that the student have been expelled and ordered there by a court as the result of a "serious felony." The team toyed with the idea of *asking* that Petitioner be expelled in order to qualify for this placement. Petitioner's mother instead requested a residential placement at a private school known as Elan in Maine, but the coordinator of the team told her, "The District will not pay for that," III, at 27, lines 11-17. Residential placement was excluded from consideration, therefore.

15. The team met again on April 23, 1998, and added another goal to the IEP being developed: to improve math skills. Petitioner's Exhibit 9, at 479. The team formalized the "Homebound" placement for the end of the 1997-98 school year at that time, and the parents, although unhappy, both signed the IEP. The IEP called for one hour of homebound tutoring five days a week, beginning March 19 and running through June 9,1998. One of the team members justified that placement as follows:

> [A]s a committee, we decided that would be an approriate starting point for her to once again become engaged with a public school because of her record of being a nonattender, and we wanted her, a young lady with much potential, to be at a place

where she could begin to have a support person to help her connect back to the public school.

II, at 28, lines 10- 17. Because five weeks of the total 12-week period covered by the IEP had already run, five weeks of compensatory services were to be offered over the summer, Respondent's Exhibit D-2, last page. Extended School Year ("ESY") services were denied on May 30, 1998, however, for the reason that Petitioner had not attended school for a period long enough to document regression. Id.

16. As to the placement for the following school year (1998-99), although the IEP is anything but clear, I find it was intended to be Montbello High School, for two hours a day. There is no, statement on the IEP as to the location where services would be provided: this conclusion is based on numerical codes on the IEP, see Exhibit D-5[3], read together with the testimonies of team coordinator Linda Glass-Wright and Petitioner's mother, as well as page 3 (bearing the date 4/23/98) of the IEP. The accommodations offered are characterized on the IEP as "special education, modified day, *no regular education"* (emphasis added), for 120 minutes a day five times a week.

17. Subsequent to finalization of the IEP in April 1998, some homebound tutoring took place, mostly at Petitioner's grandmother's home, amounting to a total of five hours of instruction in May 1998. This instruction included no math. The tutor, Rick Cosby, who had been Petitioner's geography teacher at Manual, expected to render an additional 25 hours of services, but Petitioner was unavailable, either having run away or spending time in detention. Vol. II, at 153-154; and see Petitioner's Exhibit 10, at 529; Vol. V, at 118, line 25, through 119, and at 172, lines 7-12. During his brief interaction with Petitioner, Mr. Cosby taught only English and history; he was not provided a copy of her IEP, and was unaware that she was in special education. Vol. II, at 134, lines 2-9.

18. On or around June 20, 1998, the mother had Petitioner committed to the Cleo Wallace Center for a psychiatric evaluation. Petitioner's Exhibit 10. On June 23, she filed the request for due process hearing, and on June 25 removed Petitioner from the hospital and sent her to Elan School, the private residential school in Maine. Vol. IV, at 148. On June 29, 1998, Assistant Principal Romero at Manual sent a letter to the parents informing them that, because their daughter had earned only 10 semester hours as a freshman, she could not be reclassified as a sophomore, and was being retained as a freshman for the 1998-99 school year.

19. As of the time of the due process hearing in March 1999, Petitioner had been at Elan School for 10 months, and was doing well. Her grades were good. Her teachers said her attitude was good, she could follow directions, her homework was being submitted, and her attendance was "every day," with no unexcused absences. She had been involved in no fighting or other "severe disruptive behavior." Vol. IV, at 153-55. Class sizes at the school are small, the school is highly structured, and Petitioner is supervised 24 hours a day. Vol. I, at 172, line 19, through 173, line 2; 176, lines 5-10. The mother testified that all of Petitioner's educational and affective needs, as identified on her IEP (Exhibit 9, at 463), were being met, Vol. IV, at 154. Petitioner had an 84.5 average in "refresher math," and was maintaining a B average overall.

[3] D-5 is the exhibit number I have given to the stipulated submission by the parties faxed me on March 23, 2000. It is the key to the numerical placement codes, and has been inserted in Respondent's exhibit notebook at the end of Exhibit D. The conclusion that the placement was Montbello High School comes from my interpretation of Code 46, which states "home school." This presumably means the neighborhood school, something different from "home schooling," as is apparent from an examination of Code 53.

Petitioner's Exhibit 11, at 568-69. Elan provides educational benefit to the student, therefore; DPS agrees this is the case. However, a residential placement is not the only placement which would provide educational benefit to Petitioner. This is the opinion of Petitioner's own expert, Greggus Yahr, Ph.D. Vol. I, at 148, lines 10- 14.

20. In February 2000, the IHO convened a status conference with the parties, and was assured by Petitioner's counsel that Petitioner was still at Elan, and still doing well. Petitioner's needs are not being met specifically through special education, however, nor has she had her IEP revisited since April 23, 1998. The tuition at Elan is $44,592 per year for academic instruction, including room and board, year-round. Vol. IV, at 157. Accrued fees for Petitioner's placement at Elan, from June 25, 1998, through the end of June, 2000, are therefore in the neighborhood of $90,000.00.

IV. CONCLUSIONS OF LAW

In reviewing the adequacy of an IEP, a hearing officer "begin[s] ... by asking whether the State complied with IDEA procedures, including whether the IEP conformed with the requirements of the Act. [She] then determine[s] whether the IEP was reasonably calculated to enable [the student] to receive educational benefits." Urban v. Jefferson County Sch. Dist. R- 1, 89 F.3d 720, 726 (10th Cir. 1996) (citation omitted), relying on Board of Educ. v. Rowley, 458 U.S. 201, 206-07, 102 S.Ct. at 3051. Petitioner's IEP was inadequate, and she was denied FAPE, since IDEA was not complied with, and her IEP was not reasonably calculated to enable her to receive educational benefits.

A. *The IEP did not conform, procedurally or substantively, with the requirements of the Act..*

1. Procedural violations. There were three main procedural violations of IDEA, each of which will be examined for materiality, noting that:

> Procedural flaws do not automatically require a finding of a denial of a FAPE [free appropriate public education]. However, procedural inadequacies that result in the loss of educational opportunity... clearly result in the denial of a [free appropriate public education].

W.G. v. Board of Trustees, 960 F.2d 1479, 1484 (9th Cir. 1992).

(a) Omission of a teacher from the IEP team. The first procedural violation is that there was no teacher on the IEP team, as required by 34 C.F.R. Sec. 300.344(a)(2) (July 1, 1997).[4] Although Petitioner was not attending school within DPS by the time the team convened, the District was nevertheless under an obligation to find a teacher who knew her. I conclude that this procedural violation did not result in the loss of educational opportunity to the student, however. Indeed, it is likely the District which suffered most from the exclusion, since the insights of a teacher, such as Mr. Cosby, into the Student's performance and behavior in the classroom would have been highly relevant to the eligibility determination-which I have had concerns about, as explained below.

(b) Failure to consider the continuum of alternative placements. The second procedural violation *did* result in the loss of educational opportunity, and that was that the team failed to

[4] The 1997 version of the regulations is applied here, given that they were in effect on the date the due process hearing request was filed.

consider the continuum of alternative placements required by 34 C.F.R. Sec. 300.551 and 300.552(b)(7-1-97). The placement for the end of the 1997-98 school year ("Homebound") resulted because the team artificially excluded all other possible placements within DPS from consideration, believing it was thus restricted by the expulsion hearing officer's order. Sue Hamm stated, for example, "I felt that Homebound could serve her needs as *long as she couldn't attend the public school, which was our understanding."* Vol. I (video), at 22, lines 16-19 (emphasis added). Dr. Hamm further was under the impression that Petitioner had been suspended until the fall of 1999. Id. at 20, lines 1-3.[5] She went on to admit that she would probably not have recommended Homebound for a student *with that profile.* Id. at 22, lines 21-24.

For both the 1997-98 and 1998-99 school years, the team excluded residential placement from consideration as a possible placement, its coordinator dismissing this idea out of hand with, "The District will not pay for that." In fact, if a residential placement is "necessary to provide special education and related services" to a child with a disability, the District is *required* to pay for it. 34 C.F.R. Sec. 300.302 (7-1-97). The team had a responsibility to determine in the first instance whether such a placement was "necessary," without permitting cost concerns to interfere with its professional judgment. Indications are that the team found such a placement desirable, at the very least, given its interest in Savio House, to the point of considering asking that Petitioner be expelled so that she could be placed there.

I conclude that the team's failure to consider the continuum of alternative placements resulted in a loss of educational opportunity for the student for the period March - May, 1998, since Homebound was clearly selected only because the team thought no other options were available. As to the 1998-99 school year, the "continuum" of options was limited only by the exclusion from consideration of residential placement, and that I find not material. Greggus Yahr testified that residential placement was not the only placement which would "work" to satisfy Petitioner's academic needs, Vol. I, at 148, lines 10-14; thus, this procedural violation did not result in a loss of educational benefits for the student for 1998-99.

(C) Procedural irregularity in ESY determination. The determination which the records indicate was made on May 30,1998, denying Petitioner Extended School Year ("ESY") services, was made outside a regularly convened IEP meeting, without notice to the parents. It is, for this reason, invalid. It is not only procedurally invalid, but substantively invalid, for the reason that Petitioner lost five months of the 1997-98 school year due to the actions of the District: she was not expelled, yet the order resulting from the expulsion hearing caused virtually everyone involved with her to believe she was. The letter from Assistant Principal Romero to the parents informing them that their daughter would be retained as a freshman at Manual (the more frustrating, surely, since Romero had personal knowledge Petitioner could not even return to Manual) causes me to conclude that there was regression as a matter of law. Because of her regression, Petitioner was entitled to ESY services, and lost educational opportunity in not having been provided them.

2. Substantive violations. "Substantive violations" of IDEA arise for those features of the IEP which do not conform with the requirements of the Act. I have had trouble deciding that the IEP did not conform with the Act--a decision which has triggered expensive consequences for the District--since this student was very close to having no IEP at all. She was almost not

[5] Even if Dr. Hamm meant to say "1998," rather than 1999, her understanding that Petitioner was under suspension was erroneous.

determined eligible for special education. She is not learning disabled, and, although she has a host of emotional difficulties, most of these difficulties manifest themselves only at home. The types of difficulties Petitioner has have been held, in other cases, not to constitute an emotional disability entitling a student to special education. In Springer v. Fairfax County School Board, 134 F.3d 659 (4th Cir. 1998), for example, the student exhibited the same sorts of behavioral problems Petitioner has here: he had been arrested for possessing burglary tools and tampering with an automobile; he frequently sneaked out of his parents' house and stayed out all night with friends; he stole from his parents and others; he often broke school rules and had a high rate of absenteeism; he was disciplined for driving recklessly on school property, cutting classes, forgery, leaving school grounds without permission, and fighting. Despite scoring in the average to superior range of intellectual ability on standardized tests, he failed three of his seven courses for the year because of a week of joy-riding and skipping school, thus missing his final exams. The parents' request that the District fund their son's private residential placement in Springer was denied, because the School Board determined that he was not suffering from a "serious emotional disturbance" and was, therefore, ineligible for special education services. The court stated, "[T]he applicable IDEA regulations do not equate mere juvenile delinquency with a 'serious emotional disturbance.'" 134 F.3d at 661.

"Serious emotional disturbance" is defined by the regulations as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance-

(A) An inability to learn that cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have a serious emotional disturbance.

34 C.F.R. §3.00.7(9) (1997).

The difference between Springer and the present case is Dr. Hamm's opinion that Petitioner *is* emotionally disabled: her behaviors interfere with her learning. It is an expert opinion which not only is not contested by the District, but comes from the District. There is no competent evidence in the record to the contrary. The IEP team's ultimate determination that Petitioner is emotionally disabled means that Petitioner is entitled to all the protections of IDEA, including an IEP which conforms with the requirements of the Act.

Thus, we proceed to an examination of whether this IEP conformed with the substantive requirements of the Act.

(1) 34 C.F.R. Sec. 300.347(a)(2), part of the regulations which govern the content of an IEP, requires an IEP to include:

> A statement of measurable annual goals, including benchmarks or short-term objectives, related to-
>
> (i) Meeting the child's needs that result from the child's disability to enable the child to be involved in and progress in the general curriculum (i.e., the same curriculum as for nondisabled children) ... ; and
>
> (ii) Meeting each of the child s other educational needs that result from the child's disability[.]

In the present case, Petitioner's IEP lists several annual goals and short-term instructional objectives for each of those goals--*except* "improve math skills." Petitioner's Exhibit 9, at 464, 472. There are no short-term objectives stated for the math goal. This deficiency is not de minimis: the IEP does not conform with the requirements of the Act, because of it.

(2) 34 C.F.R. §300.347(a)(3) requires the IEP to contain:

> A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child-
>
> (i) to advance appropriately toward attaining the annual goals;
>
> (ii) to be involved and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and
>
> (iii) to be educated and participate with other children with disabilities and nondisabled children in the activities described in this section.

There are two statements on the IEP which appear geared towards satisfying this requirement. The first is at page 1 (Exhibit D-2, 7 pages in), where "Adaptations: Accommodations and Modifications" are listed, and says:

> Small group instruction
> Positive reinforcement
> Clear behavioral expectations
> Consistent consequences
> Immediate feedback
> Home-school communication
> Weekly progress reports
> Modified schedule.

A "General Addendum" to page 1, dated April 23, 1998, states as further "adaptions" [sic]:

> modified schedule

one to one instruction moving toward small groups as indicated
behavior management program.

Even taken together as a "statement," this list is vague. The accommodations discussed by the team (such as starting the school day later and having a single teacher) are not even mentioned. There is no information about what the "modified schedule" will consist of, nor any evidence that a "behavior management program" was developed. Until the details of the aids and services to be provided are spelled out, the IEP is not sufficient. Supporting this conclusion are Question and Answer no. 48 in Appendix C of Part 300 of title 34, C.F.R., which state:

> Q If modifications are necessary for a child with a disability to participate in a regular education program, must they be included in the IEP?
>
> A Yes. If modifications (supplementary aids and services) to the regular education program are necessary to ensure the child's participation in that program, those modifications must be described in the child's IEP (e.g., for a child with a hearing impairment, special seating arrangements or the provision of assignments in writing). This applies to any regular education program in which the student may participate, including physical education, art, music, and vocational education.

(3) 34 C.F.R. See. 300.347(a)(4) requires the IEP to contain:

> An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in paragraph (a)(3) of this section.

The accommodations offered for both March - June 1998 and 1998-99 would have entirely removed Petitioner from regular classes, and from school altogether for all or most of the day, yet no explanation of this strategy is provided. This requirement of the regulations is also not met, therefore.

(4) 34 C.F.R. Sec. 300.347(a)(7) requires the IEP to include a statement of:

> (i) How the child's progress toward the annual goals described in paragraph (a)(2) of this section will be measured[.]

There is, in this IEP, an indication of how the child's progress will be measured for all of the annual goals except, again, that of "improve math skills," where the page is blank. Thus, to the extent of the math skills goal, the IEP does not conform to the requirements of the Act.

B. *Because the proposed placements did not implement the goals of the IEP, the IEP was not reasonably calculated to enable the student to receive educational benefit.*

1. *The Homebound placement, March to June 1998, was not reasonably calculated to enable the student to receive educational benefit.*

(a) The IEP states that the Petitioner needs structure. Inexplicably, the team placed her in the home, with *no* structure, 24 hours a day, and the results were disastrous. It was predictable from her history, known to the IEP team, that she would not succeed in completing even the few Homebound sessions which were scheduled, since she ran away, got into trouble,

and spent time in detention. The Homebound placement bore no relationship to the need of this student for structure.

(b) Two of Petitioner's IEP goals--improving peer relationships and improving attendance--could not be implemented in the Homebound placement, as was admitted by both Linda Glass-Wright, the coordinator of the IEP team, Vol. III, at 32, and Sue Hamm, the team psychologist, Vol. I (video transcript), at 14, lines 23-25. The student was at home having no interaction with peers; and her chronic attendance problem was not addressed by taking her out of school altogether. She made no progress towards these goals, therefore.

(c) The correct standard for measuring educational benefit under the IDEA is not merely whether the placement is reasonably calculated to provide the child with educational benefits, but whether the child makes progress toward the goals set forth in her IEP. County of San Diego v. California Special Education Hearings Office, 93 F.3d 1458, 1467 (9th Cir. 1996).[6] On that point, Petitioner also made no progress towards her goal of "improve math skills." This goal might easily have been implemented, but was not because no one from the District told Mr. Cosby what his tutoring needed to accomplish.

(d) One of the reasons the IEP team members gave for selecting Homebound was to provide Petitioner with a "support person" who could help her "reconnect back to the public schools," presumably a strategy that would solve the attendance problem by making her want to go to school voluntarily. This strategy might have made sense in theory, but made no sense as applied. The person selected, Mr. Cosby, was a teacher at Manual, a school Petitioner was barred from attending. The Homebound placement as implemented bore no relationship to even this modest goal, therefore.

2. The "Neighborhood School" placement, August 1998 to May 1999, was not reasonably calculated to enable the student to receive educational benefit.

I earlier found that the intended placement for the following school year must have been Montbello. The IEP nowhere states this, however. And, despite the testimony from team members at the hearing as to the many modifications they intended to be made for Petitioner, the IEP nowhere describes such modifications. It does not state which courses she will take or when she will attend, or what she will be doing during the sizable portion of the day when she is not in school. If there was a “support person" strategy in mind, that person is not named, and-like Mr. Cosby-probably does not know anything about her role, since she was not a member of the IEP team. A school day of only two hours, with the student roaming around the rest of the time, is, again, the antithesis of "structure," one of Petitioner's stated needs. Because of the school district's failure to show that this IEP met this need, or addressed any of Petitioner's school-related behavioral problems-specifically class cutting and her disobedience to authority figures-the placement for August 1998 to May 1999, too, was inadequate.

C. The placement at Elan was appropriate.

[6] Although there is then done, normally, a comparison of placements to choose the "least restrictive environment” ("LRE”) among them, I do not reach that point here, since there must first be "qualifying placements" to compare: that is, placements in which the IEP can be implemented. County of San Diego v. California Special Education Hearings Office, 93 F.3d 1458, 1468, 1468 (9th Cir. 1996) ("While every effort is to be made to place a student in the least restrictive environment, it must be the least restrictive environment *which also meets the child's IEP goals"* (emphasis added)). The placements selected for Petitioner are such that her IEP cannot be implemented.

Having found the School District's proposed placements inappropriate, the next step is to address whether Petitioner's unilateral placement at Elan was appropriate. If it was, Petitioner's parents may be entitled to retroactive reimbursement from the School District for the placement from the point of enrollment at Elan through the completion of the review process, which at this point (July 2000) is roughly contemporaneous with the completion of the 1999/2000 school year. School Committee of the Town of Burlington v. Dept. of Education, 105 S.Ct. 1996, 2004 (1985). 34 C.F.R. Sec. 300.403(c) states:

> 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 FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

Having found the IEP proposed by the district was inadequate, and that the educational placement at Elan was appropriate, I am authorized "to grant such relief as [I determine] is appropriate." 20 U.S.C. Sec. 1415(e)(2). This language means that "equitable considerations [may. be considered] in fashioning relief " Burlington, 105 S.Ct. at 2005.

D. Reimbursement of the parents is required, based on equitable considerations. In balancing the equities, as directed by Burlington, I do not find the balance tilts wholly the parents' way. Their placement of Petitioner at a boarding school in Maine, about as far away as they could ship her, was not motivated solely by educational reasons, but largely because they wanted relief from the conflict in their home life. The District is not responsible for this conflict at home, and, if the burden on the District in having to relieve the parents of such a conflict were the only weight on the scales, I would not hold it liable for the cost of residential placement. A school district does not remain responsible for the entire cost of a placement when that placement was made due to multiple problems that are intertwined with the educational problems. See Board of Educ. of Oak Park v. Ill. Board of Educ., 21 F.Supp. 862 (N.D. Ill. 1998). Moreover, although a residential school may be a wonderful place for Petitioner-even the best place--it is not required to address her educational needs. Compare id.

Yet on the other side of the balance is the District's wrongful exclusion of Petitioner from school for months on end-a violation of Colorado's own compulsory attendance law--as well as a series of acts taken by various employees, putatively under the aegis of special education, which bore no relationship to the goals in Petitioner's IEP and, in fact, caused her to deteriorate instead of advance. The harm done to Petitioner by the District from her actual exclusion from school from January to May 1998, and the harm which would have been done her by the future exclusion which was planned for the 1998-99 school year, is (and promised to be) far more serious than the harm done to the District by the parents' decision to place her at Elan. The District's harm is merely monetary. The parents had no other recourse than to take the drastic action they took. Regardless of their other motivations, they were justified in sending their daughter to a private school; and the District, having passed up a host of opportunities to provide this student a FAPE in the Denver area, must, as a result, pay for her education at a private boarding school in Maine, instead.

Balancing the equities in accordance with the foregoing causes me to apportion the cost of Petitioner's educational experience at Elan, from June 25, 1998, through the date of this opinion, at 10% for the parents, and 90% for the District.

V. ORDER

Based on the foregoing findings and conclusions, I hereby make the following order:

A. Petitioners' parents shall, within seven days of the date of this order, document to the District all their reimbursable costs incurred by the educational placement at Elan, from June 25,1998, to July 5, 2000. Reimbursable costs shall include room, board, tuition, books, and transportation. If not documented by receipts or other reliable records, such costs may not be reimbursed. The District shall, 10 days from being provided that statement of costs, reimburse Petitioner's parents for 90% of the total.

B. Petitioner will return to her home in Denver within 10 days of the date of this order. The cost of her transportation will be the last expense the District shall be required to pay under this order. (This reimbursement is in addition to those expenses set forth in paragraph (A), above; and is limited to 90% of the cost of an economy-fare air ticket).

C. An IEP team will convene within one week of Petitioner's return to Denver to evaluate her and revisit her eligibility for special education; and, if she is found still to be eligible, revise her IEP and ensure it is implemented. The team shall include those persons required or permitted by the regulations to be part of an IEP team, but this time mandatorily including the Student herself, as well as (by telephone) that teacher (or those teachers) at Elan whom the Student designates.

VI. APPEAL RIGHTS

This decision will go to Petitioner's counsel, the superintendent of Denver Public Schools, the District's counsel, and the Colorado Department of Education. The original has been retained by the hearing officer, pending any appeal of this matter.

If dissatisfied with these findings, conclusions, or decision, either party may request a state level review by filing or mailing a notice of appeal and designation of the transcript with or to the State Division of Administrative Hearings within 30 days after receipt of the hearing officer's decision. Within five days of receipt of a notice of appeal, any other party may file a cross-appeal. The rules governing the filing of an appeal or cross-appeal are found in the applicable regulations for state-level review, 1 CCR 301-8, Sec. 2220-R- 1.6.03(l0), a copy of which (along with Subsec. 6.03(11), dealing with state level review procedures) is attached as Appendix A.

Dated this 5th day of July, 2000.

BY THE IMPARTIAL HEARING OFFICER:

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