DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT,
STATE OF COLORADO

CASE NO. L99:129

[Student], by and through his parents, [Parents],

Petitioners,

V.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW, DECISION AND ORDER

Impartial Due Process Hearing held on April 24 to 28, 2000.

Impartial Hearing Officer:	Myron A. Clark, Attorney at law, Reg. No. 5205 7369 Rochester Ct., Castle Rock, CO 80104 303 688-2546; Fax: 303 660-2095
Counsel for Petitioners:	Mr. Jack D. Robinson, Attorney at Law, Reg No. 22037 1660 Lincoln Street, #2220, Denver, CO 80264 303 830-7090; Fax 303 830-7089
Counsel for Respondents:	Ms. Cheryl M. Karstaedt, Attorney at Law, Reg. No. 7241; Ms. Julie Tishkowski, Attorney at Law, Reg. No. 2595 Canyon Blvd., #400 Boulder, CO 80302 303 443-8010; Fax 303 440-3967

The parents of a now 12 year old child with Perceptual Communicative Disorder (PCD) seek to have the Jefferson County School District (the District) reimburse them for expenses incurred in providing specialized reading instruction to their child, tutoring, transportation, reimbursement for an independent education evaluation, tuition for the current (1999-2000) school year at a private school, and tuition for the next two years (2000-2002) at the same private school. The District maintained that none of the requested expenses or costs were reimbursable under IDEA because the child had been offered and provided Free Appropriate Public Education (FAPE).

HELD: for the Parents, in part; for the District, in part.

The Impartial Hearing Officer(IHO) holds that as a result of the Individualized Education Program (IEP) developed for the child on April 21, 1998 FAPE was denied the child through the remainder of 1998 but that as a result of the IEP developed on and after October 29, 1998 and fully implemented beginning in 1999, FAPE was provided to the child and available from the District through its schools, thereafter.

STATEMENT OF THE CASE

1. By letter dated October 21, 1999, and received by the Respondent on October 21, 1999, Petitioners requested a Due Process hearing under the provision of the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400 et seq., as amended in 1997 (IDEA).

2. The issues set forth in Petitioners request, and which were considered by the IHO are:

1. Did the District violate the IDEA by failing to provide the child a free appropriate public education?
2. Is the District obligated to reimburse Petitioners for the costs associated with the Child's enrollment at a private school, including tuition and transportation?
3. Is the District obligated to reimburse Petitioners for the costs associated with retaining a tutor for the Child from July, 1998 through August 1999?

3. On February 8, 2000, Respondent filed a Motion to Dismiss based on the doctrine of Laches and the Statute of Limitations. The IHO granted this motion in part, limiting consideration at the Due Process Hearing to the IEP developed on April 21, 1998 and the IEP developed on and after October 29, 1998.

4. The child, currently attending a private school, was attending [Charter School], a charter school and part of the District's system, during the school years 1997-1999, as a fourth and fifth grader.

5. The child has been identified with Perceptual/Communicative Disorder and diagnosed with a developmental language disorder and a mixed developmental disorder. As a student with disabilities, the child is eligible to receive specially designed instruction and related services under IDEA.

6. The child began receiving special education and related services under IDEA in November 1991 and continued receiving special education and related services from the district through the end of the fifth grade, July, 1999.

7. On April 21, 1998, a triennial IEP meeting was held to determine what special education and related services should be provided to the child for the following year.

8. On October 29, 1998 an IEP team was assembled, at the behest of the child's parents, to address concerns with the adequacy of the April 21, 1998 IEP and its implementation and to develop a new IEP for the 1998-1999 school year. This first meeting lasted 5 hours.

9. Subsequent meetings and correspondence resulted in an agreed upon IEP on or about December 8, 1998 as demonstrated by Exhibit 000.

10. The 10/29/98 IEP was amended by an addendum in February of 1999.

11. According to the Petition, by letter dated June 10, 1999, the District was provided with written notice that the proposed placement by the district was rejected and the child would be enrolled in a private school. This letter was neither introduced, offered, or admitted into evidence.

12. The child is enrolled in and has attended a private school for all of the 1999-2000 school year.

FINDINGS OF FACT

After considering all of the evidence (even though only small portions of it are cited), the IHO makes the following findings of fact:

1. That he has jurisdiction over the subject matter of this Due Process Hearing pursuant to 20 U.S.C. 1400, et seq.

2. That the child is a resident of the District, and attended District schools from 1993-1999 and has been identified with Perceptual/Communicative Disorder and has been diagnosed with a developmental language disorder and is eligible to receive special education and related services under IDEA.

3. That the child was a student at [Charter School], a charter school, for, inter alia, 4th and 5th grades, 1997-1999, the period relevant to this proceeding.

4. That the child is currently attending a private school not part of the District.

5. That the child's attendance at a private school is the unilateral choice of the parent's without authorization from the District.

6. That the tuition for the private school is $11,000.00 for 1999-2000; $12,300.00 for 2000-2001 and $12,300.00 for 2001-2002.

7. That the Parents spent $553.00 for the F.A.S.T. Phonics program in the Summer of 1998.

8. That the Parents spent $660.00 for tutoring in 1998; and $2280.00 for tutoring in 1999.

9. That no expenditures were made for transportation.

10. That no expenditures were made for an Independent Educational Evaluation.

11. That the IEP of 4/21/98 was attended by the child's mother, the child's regular educator, the child's special educator, who also signed on behalf of the District, and an observer. Other than the Special Educator, no one was present on behalf of the District; and other than the Regular Educator, no one was present from the school administration.

12. That the IEP of 10/29/98, was attended by the child, the child's mother, the child's tutor, the director of the child's school, the child's regular teacher, the child's special education teachers, a representative from the district with responsibility for charter schools, and the Child's speech/language pathologist.

13. That the child made academic progress between April 21, 1998 and December 8, 1998.

14. That the child made academic progress between January 1, 1999 and July 2, 1999.

15. That the services required by the child to address his disabilities are available in what would be the child's neighborhood middle school should he decide to reenroll in the District.

16. Other findings of fact which also constitute, in part, conclusions of law are set forth below and incorporated herein by this reference.

ISSUES AND CONCLUSIONS OF LAW

Based upon the above findings of fact, and some contained herein below, and the testimony of the witnesses, together with review of all the evidence, and the arguments of counsel for both parties as well as the IHO's own legal research, the determination of the issues and conclusions of law are as follows:

1. It is undisputed that the burden is on the Parents to show, by a preponderance of the evidence, the inadequacy of an IEP, either in its development (procedural) or in tis implementation (substantive). See generally, Urban v. Jefferson County School District, R 1. 870 F. Supp. 1558 et seq. (1994). At the close of Petitioner's case in chief, Respondent moved for a directed verdict. The IHO denied the motion, finding that Petitioner had met that burden with regards to the 4/21/98 IEP and its implementation. None of the evidence produced subsequently by Respondent has overcome that initial determination.

Although attendees at the 4/21/98 IEP meeting, [Staff Member] and [Special Education Teacher], were technically able to sign on behalf of the school and District, this was merely a celebration of form over substance. Based on review of the IEP and the testimony of the Witnesses, the IHO finds that the IEP was not implemented in a way to provide educational benefit to the child, thereby denying him FAPE. During the Summer session of 1998, the child received no FAPE as a result of the District's efforts pursuant to the 4/21/98 IEP, however, the child did receive educational benefit as a result of the Parent's location of and payment for a specialized reading program. While there was little or no testimony concerning the period from September to October, 1998, the IHO finds that the denial of FAPE continued during this period with the exception of tutoring services obtained by and paid for by the parents.

Board of Education of the Hendrick Hudson Central School District, Westchester County, v. Rowley, 458 U.S. 176 (1982) requires that the IEP be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade. Rowley also holds that FAPE is provided when disabled children are given "access to specialized instruction and related services which are individually designed to provide an educational benefit.", at page 201. However, it is the finding of the IHO that the 4/21/98 IEP did not provide access to specialized instruction. Among other things, the Special Education teacher, [Special Education Teacher], was not available for the Summer session and no substitute was proposed or provided. The IHO also notes there were no accommodations included with the 4/21/98 IEP. The 4/21/98 IEP is so lacking in detail that it is not surprising its implementation fell short of providing FAPE. Under Polk v. Central Susquehanna Intermediated Unit, 853 F.2d. 171 (1988), an IEP must be reasonably calculated to confer meaningful benefit. A trivial amount of

educational benefit is not sufficient. The IHO finds that in formulating the 4/21/98 IEP, the District merely went through the motions, did not adequately implement the minimal goals they identified, did not consider the CSAP scores from March 2, 1998, and did not provide adequate special Education teachers to offer the child meaningful educational benefit.

2. To the contrary, the 10/29/98 IEP was everything the 4/21/98 IEP was not. This IEP was the product of involved members of the IEP team including two Special Education teachers, a speech therapist, the director of the school, a District representative, the child's mother, the child's tutor, and the child. The IHO finds, having listened to the tape of the 10/29/98 meeting and the 11/20/98 meeting that the Planning process was thorough and complete, and as demonstrated by subsequent correspondence from the mother acceptable to all. However, Petitioner's have subsequently challenged the implementation of this IEP as well.

Rowley, provides a two prong test to determine whether a FAPE is provided. First, have the procedural requirements of the IDEA been adequately complied with? The IHO finds that they have and notes the agreement on this question by the parties. However, the second prong of the Rowley test is whether the IEP was reasonably calculated to enable the child to receive educational benefit. The IHO finds, in this instance, that the 10/29/98 IEP did provide educational benefit to the child. This is amply demonstrated by the progress reports for the Winter and Spring of 1999, which were stipulated exhibits, admitted without objection. These exhibits, VVV, WWW, XXX, and YYY demonstrate the child's academic progress and support the finding that FAPE was provided to the child by the District pursuant to the 10/29/98 IEP. It is not necessary for every goal in the IEP to be met, nor for every objective of the IEP to be obtained. The test is whether the IEP was developed to provide an educational benefit. In addition, the testimony of the Child's special education teachers, regular teacher, and speech therapist establish that the child received reasonable educational benefit. It is also the finding of the IHO that because of the continued meetings and refinements to the 10/29/98 IEP, it was not fully implemented until December 8, 1998.

3. The test for reimbursement of costs for the unilateral placement of a child in a private school is set forth in School Committee of the Town of Burlington v. Department of Education, Massachusetts, 471 U.S. 359 (1985). The first requirement of Burlington is whether the IEP is appropriate. If the IEP is not appropriate, then the appropriateness of the unilateral private placement is considered. It that placement is deemed appropriate then the question of notice to the District is considered. The IHO does not have to consider whether the private school attended by the child is appropriate, nor whether the notice given the District was proper or effective because the IHO finds that the 10/29/98 IEP is appropriate both procedurally and substantively. Therefore the second and third prongs need not be addressed here. Pursuant to the requirements of 34 CFR 300.403, the IHO finds that the District had made, and continues to make, FAPE available to the child in a timely manner. Further, FAPE was

available to the child prior to his enrollment in the private school by his parents. Based on the uncontroverted testimony as to the programs, strategies and accommodations available to the child through the District in its Middle Schools, the IHO finds that FAPE is available through an appropriate IEP if the child chooses to return to the District's schools.

CONCLUSIONS AND ORDER

I. Pursuant to 34 CFR 300.26(3) the IHO concludes that the parents are entitled to reimbursement of their expenditures for the period during which the child was denied FAPE from April 21, 1998, to December 8, 1998. Based on the exhibits offered and admitted by Petitioner, Petitioner incurred expenses of $553.00 for provision of the F.A.S.T. Phonics program, and $600.00 in tutoring expenses through December 8, 1998. The District is therefore **ORDERED** to pay to Petitioners the sum of $1153.00.

2. Based on the IHO's finding that the October 29, 1998 IEP was appropriate procedurally and substantively, and that FAPE was provided to the child prior to the unilateral decision to enroll him in private school, the Petitioner's claims for reimbursement of tuition costs for the 1999-2000 school year are denied. And based on the finding that FAPE can be provided to the child by the District, pursuant to an appropriate IEP if the child reenrolls, the claim for future tuition costs is denied.

3. No evidence was produced as to transportation expenses and Petitioner withdrew their claim for an Independent Educational Evaluation so no damages are awarded on either claim.

WHEREFORE, the undersigned Impartial Hearing Officer enters these findings of fact, conclusions of law, decision and Order this 12th day of May, 2000. This Opinion will be sent by certified mail to the Attorney's for the Parties and the Colorado Department of Education. Attached hereto is section 6.03(10) of Rules for the Administration of the Exceptional children's Educational Act, which set forth the procedures for appealing this decision.

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