Before the Division of Administrative Hearings
State of Colorado

Case No. **ED 2000-25 (S98:120)**

Decision Upon State Level Review

[Student] by **[Mother]** and **[Father],**
Petitioner,
v.

Denver Public Schools,
Respondent.

I. Introductory Statement

The Colorado Department of Education received a request for a Due Process Hearing on June 23, 1999. The Impartial Heating Officer (IHO) heard this case on March 15 through 18, and 20, 1999. Jurisdiction is conferred by 20 U.S.C. §1415 (f)(1), 34 C.F.R. §300.507, and 1 CCR 301-8 §6.03(6). The Petitioner, [Student], appeared through her mother and father, [Mother] and [Father], and was represented by Margie Best, Esq. Michael Jackson, Esq., represented the Respondent Denver Public Schools, at the hearing.

The Impartial Hearing Officer (IHO) entered Findings and Decision on July 5, 2000. The Petitioner and the School District have both appealed that decision.

This decision will not contain the name of the Petitioner or Respondent other than on this first page and the Certificate of Service. State Plan, Part II, VII, 4, e, (3), and Part II, VII, 9, f. In this decision Petitioner [Student] will be referred to as the 'Student', [Mother] and [Father] as the 'Parents', [Mother] as the 'Mother', [High School] as the 'High School' and Denver Public Schools as the 'District'. The Code of Federal Regulations will be referred to as 'CFR'. The Rules of the Colorado Department of Education will be cited by State Rule Section number. Those rules are published in 1 C.C.R. 301-8. The Individuals with Disability Education Act, 20 USC §§1401 *et seq.* may referred to as the 'IDEA' or the 'Act'. An Individual Education Plan may be referred to as an "IEP". A "free appropriate public education" may be referred to as a "FAPE". A "significant identifiable emotional disability" may be referred to as a "SIED".

Neither party requested the opportunity to present additional evidence on state level review. No additional evidence was received. The record of the proceedings below consisting of exhibits, the transcript of the hearing before the

IHO and the IHO's Order have been received and considered. Briefs from both parties have also been received and considered. The transcripts of the hearing conducted by Independent Hearing Officer Alison Maynard from March 15, 1999 through March 18, 1999, and on March 20, 1999, have been read and considered.

II. Scope of Review

The decision of the Administrative Law Judge on state level review of the decision of an Impartial Hearing Officer is to be an independent decision. IDEA 20 U.S.C. § 1415(c) and (d); 34 CFR § 300.510; State Plan, Part II, A, VII, B, 9, b; and State Rule Section 6.03(11)(b)(v). The IDEA provides that a court reviewing a state level decision shall render an independent decision. IDEA §1415(e). Cases construing this provision have held that in conducting such review courts must give "due weight" to the findings at the state level. *Board of Education of Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982); *Doe v. Board of Education of Tullahoma City Schools,* 9 F3rd 455, (6th Cir., 1993). The reviewing agency must, while according the hearing examiner's decision due weight, independently decide based on a preponderance of the evidence whether the District has satisfied the requirements of IDEA. *Sioux Falls School District v. Koupal,* 526 NW 2d 248 (S.D. 1994). It is appropriate to apply this standard by analogy in the state administrative review level.

III. IHO Decision

It was the decision of the IHO that the District violated the provisions of 34 CFR §302 during the 1997-1998 school year. The IHO held that the IEP dated April 23, 1998, did not conform procedurally or substantially with the Act, 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, and that the Students placement at a private school was appropriate. The IHO ordered the District to reimburse the Parents 90% of the costs of the Student's education at the private school.

IV. Issues

After considering all evidence and legal argument, the ALJ has determined that the issue in this case is whether the Parents are entitled under the IDEA to the costs of the Student's placement in a private school. Resolution of this issue is dependent upon a determination of: (a) whether the District was providing a free appropriate education to the Student before the Student was removed from the public school; (b) whether the District provided the required notice to the Parents; (c) whether the Parents notified the District in writing before removing the Student from public school; (d) whether the actions taken by the Parents were reasonable, and; (e) whether the private school provided an appropriate education to the Student.

V. Findings of Fact

1. The Student, born [D.O.B.], was a student in the District at the High School in the ninth grade for the beginning of the 1997-1998 school year. On November 24, 1997 an allegation was made that the Student threatened another student with a knife. The Student last attended the High School on November 24, 1997.

2. An expulsion hearing was held on January 6, 1998. At that hearing the Parents expressed their desire to enroll the Student in the Street School, a school not under the control of the District. The Student was not expelled with the condition that she be withdrawn from the High School to attend Street School. If the Parents violated that condition the District could reinstate suspension or expulsion proceedings.

3. The Assistant Principal of the High School withdrew the Student from the High School shortly after the expulsion hearing. Street School had a waiting list and the Student was not able to immediately enroll in Street School. An opening in Street School occurred in March 1998, but the Student did not enroll in Street School at that time and she never attended Street School.

4. On January 6, 1998, two days after the suspension or expulsion hearing, the Mother wrote a letter to the High School requesting a disability evaluation. There was no response from the District and the Mother wrote to the High School again on February 2, 1998. On February 24, 1998, the District convened a Child Find Team, sought and received the Mother's consent to evaluate the Student, and evaluated the Student for disabilities.

5. The District provided the Parents with a brochure entitled "Education Rights of Parents Under Provision of the Individuals with Disability Education Act." The brochure did not advise the Parents of any requirement that they provide written notice prior to making a unilateral placement of the Student.

6. The IEP staffing team that included the Parents first met on March 10, 1998. The IEP staffing team did not include a teacher.

7. At the first meeting of the IEP staffing team on March 10, 1998, no determination was made as to whether the Student had a disability. The Mother suggested that a residential treatment facility would help the Student. Other members of the team from the District stated to the Mother that the District would not pay for residential treatment and suggested that the Mother look into the Denver Children's Home, which is not under the control of the District. The meeting was continued to March 19, 1998.

8. The Mother wrote a letter to the District on March 19, 1998. In the letter the Mother again expressed her opinion that a residential treatment facility

would assist the Student in her education. The Mother stated that she had checked out the Denver Children's Home and did not find placement there to be in the Student's best interest. The Mother stated her opinion that the Student needed a school that would provide academics as well as a structured environment. The Mother stated that she checked out several different schools in Colorado and out of state. She stated that she had chosen the [Private School] in [Other State]. The Parents did not state that they intended to unilaterally enroll the Student in the [Private School].

9. At the March 19, 1998, meeting the IEP staffing team determined that the Student had some significant social emotional problems that prevented her from ever doing better in school and that the Student suffered from a SIED. The team discussed the Parents pending move to another neighborhood in the District, and the different high school that would be involved. The IEP was not completed or agreed to by the IEP staffing team at this meeting. The meeting was again continued.

10. The staffing committee determined that the Student's educational affective needs were to improve all academics, organization, peer relationships, interpersonal relationship in general, attendance, career awareness options, and problem solving and decision making skills. The staffing committee determined that accommodations and modifications that the Student required were: (1) small group instruction; (2) positive reinforcement; (3) clear behavioral expectations; (4) constant consequences and immediate feedback; (5) home school communication with weekly progress reports; (6) a modified schedule; (7) one to one instruction moving toward small groups as indicated, and (8) a behavior management program. These determinations were based upon comments made by all participants at the meeting, were accurate, and were made in compliance with the IDEA.

11. The IEP staffing team met again on April 23, 1998, and the IEP for the Student was prepared. The IEP stated the District would provide the Student one-hour of homebound tutoring five days a week beginning March 19, 1998, and continuing through June 9, 1998. The IEP provided that Extended School Year Services would be determined by May 30, 1998. The IEP also provided that the Student would receive "Regular Education with Special Education Support" from August 1998 to March 1999, when this IEP ended. The Special Education from August 1998 to March 1999 was to consist of 135 minutes per day for five days per week.

12. The IEP staffing team excluded consideration of residential placement for the Student, stating that the District would not pay for residential placement. The IEP provided for homebound tutoring for the remainder of the spring 1999 term. The failure to include consideration of residential placement resulted in the loss of educational opportunity for the Student for the period from March 1999 to June 1999 and from August 1999 to March 2000.

13. The Parents were anxious for services to start for the Student, who had not been in school or received any services since November 1997. The Parents signed the IEP so that services could begin.

14. The District provided, and the Student received, a total of five hours of homebound tutoring in May 1998. The tutoring did not include math. The tutor was not provided a copy of the IEP and was not aware that the Student was in Special Education. An additional 25 hours of tutoring were to be provided, but the Student was not available, having either run away or having been placed in detention.

15. Five weeks of the initial twelve weeks of homebound tutoring had run before the home bound tutoring could start. The District offered, and the Parents accepted, five weeks of compensatory services over the summer.

16. The District denied Extended School Year services before a meeting was held on June 2, 1998 with the Parents. There was no indication that the Student had regressed over previous summer vacations, and there was no indication that the Student would regress over the summer months in 1998 if services were not provided. The District determined before a meeting that the Student was not eligible for Extended School Year services for the summer of 1998 and denied those services.

17. The five hours per week of homebound tutoring that the IEP provided for in the last part of the 1997-1998 school year did not meet the Student's educational needs to improve all academics, improve peer relationships, improve career awareness, and improve problem solving and decision making skills. The homebound tutoring did not provide the needed accommodations and modifications of clear behavior exceptions, constant consequences, immediate feedback and a behavior management program. The Student performed poorly at doing her assigned work between the tutoring sessions. She missed tutoring sessions as a result of running away, being placed in detention, and a hospital commitment for psychological evaluation. The Student did not receive educational benefit from the homebound tutoring.

18. The IEP provided for the Student to receive tutoring for about two hours per day in the classroom when the Fall semester 1998-1999 started in August 1998 until the plan ran out in March 1999. Such limited hours would not meet the Student's educational needs to improve all academics, improve peer relationships, improve career awareness, and improve problem solving and decision making skills. The two hours per day would not provide the needed accommodations and modifications of clear behavior exceptions, constant consequences, immediate feedback and a behavioral modification program. It is unlikely that the Student would have received educational benefit from two hours per day of instruction from August 1998 to March 1999.

19. The IEP lists several annual goals and short-term instructional objectives for most of the goals. However, no annual goals or other short term instruction goals are listed for the goal to improve math skills.

20. The IEP offered accommodations for the March-June 1998 period that entirely removed the Student from regular classes. The accommodations for the August 1998 to March 1999 period removed the student from school for most of the day. The IEP did not contain an explanation of the extent to which the Student would not participate with non-disabled students in the regular classes.

21. The April 1998 IEP was not reasonably calculated to enable the Student to receive educational benefits. The IEP did not provide for a FAPE for the Student.

22. The Parents told the Student's homebound teacher that the homebound instruction the Student was receiving was not sufficient. The teacher put the Parents' comments in a report dated June 2, 1998 that was reviewed by supervisors at the District.

23. Prior to June 23, 1998, the District never gave the Parents the required notice that they must give written notice of their intent to unilaterally place the Student in a private school at public expense.

24. On June 23, 1998, the Parents, through counsel wrote to the District and notified it that the Student will be placed in a residential program at the [Private School] due to the District's failure to propose an appropriate IEP and services for the Student. The District was requested to fund the special education placement and related services.

25. Also on June 23, 1998, the Parents, through counsel, wrote to the District and requested a Due Process Hearing under the IDEA and the Colorado Rules. This letter also requests the District fund the Student's placement at [Private School].

26. The District responded to the letters by a letter dated July 1, 1998. The District denied that it failed to develop an appropriate IEP and refused the Parents' request to fund the cost of a residential program.

27. The Student was enrolled at the [Private School] in [Other State] on June 25, 1998. The Parents did not give ten days written notice of their intent to place the Student in a private school.

28. [Private School] in [City], [Other State], is an approved residential special education school credited and licensed by the State of [Other State] and some other states, but not Colorado. [Private School] has an accredited high school curriculum. The staff of the [Private School] is appropriately certified and licensed by the State of [Other State] to provide an integrated twenty-four hour supervised educational program, including special education and related services

to students with behavioral, emotional and learning problems. At [Private School] the class sizes are small, the school is highly structured, and the Student is supervised twenty-four hours per day.

29. At [Private School] the Student receives special education and related support services that include academic instruction, PE, counseling, groups, life skills, and a behavioral management program designed to meet her needs. The Student has received good grades, her teachers reported that her attitude was good, that she could follow directions, her homework was submitted, and her attendance was good with no unexcused absences. [Private School] met the Student's need for a structured environment with immediate consequences and her other needs established by the IEP. [Private School] provided an educational benefit to the Student.

30. Tuition, room, and board at [Private School] is $44,592 per year. The District has not paid this expense, and the Parents are liable for the expense if it is determined that the District is not liable.

31. The action of the Parents in placing the Student in [Private School] was not unreasonable.

32. At the time the IHO conducted the Due Process Hearing in March 1999 there had been no further IEP staffing meetings for the Student to modify the IEP or to write the IEP for the next year. At a status conference held by the IHO in February 2000 it was determined that there still had been no action on modifying and extending the Student's IEP.

VI. Discussion and Conclusions of Law

1. The purpose of the IDEA is "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living;" and "to ensure that the rights of children with disabilities are protected." 20 USC § 1440(d)(A)&(B).

2. The Individuals with Disability Education Act (IDEA) requires the District to provide each child with a disability with a free appropriate public education (FAPE), tailored to the unique needs of the child through the establishment of an Individualized Education Program (IEP) for the child. 20 USC §1401(20).

3. The IDEA was amended by Congress in 1997. House Report No. 105-95. Those amendments, with exceptions not relevant here, were effective upon enactment on June 4, 1997. *See* Historical and Statutory Notes, *following* 20 USCA §1400, *at page 15-16.* The IHO did not apply these amendments to this

case. She determined that the amendments were not effective until July 1, 1998. *See* Decision of the Hearing Officer, *footnote 1, page 2,* (July 5, 2000). The IHO was incorrect. The amendments were effective prior to the relevant events in this action, and therefore do apply to this action.

4. There was evidence presented from which it could be determined that the Student did not have a emotional problem that interfered with her learning, so would not have had a SIED and should not have been classified as disabled. However, the Student's IEP staffing team determined that the Student suffered from a SIED and that she was a disabled student. The District then developed an IEP. This decision is limited to issues concerning whether the IEP that was developed was appropriate, and not whether the Student should have been identified as a disabled student in the first place. I make no determination as to whether the Student suffers from a SIED and is disabled. The determination of the IEP staffing team that the Student is disabled is a given and is not subject to challenge in this action concerning the private placement of the Student. The IEP staffing team's determination that the Petitioner is emotionally disabled means that the Student is entitled to the protections of the IDEA, including an IEP that conforms to the requirements of the IDEA.

5. A teacher must be in the IEP staffing team. 34 C.F.R. Sec. 330.344(a)(2). (July 1, 1997); State Rule Section 4.02(3)(a)(iii). There was no teacher on the Student's IEP staffing team. The District violated the federal rules.

6. The District must consider the continuum of alternative placements required by 34 C.R.S. Sec. 3000.551 and 3000.552(b) (7/1/97); State Rule Section 5.03(3). However, the District excluded consideration of residential placement, stating that it would not pay for such placement. In fact, the District is required to pay for residential treatment if necessary to provide special education and related services to a child with a disability. The District violated the federal rules.

7. In an IEP, the District must include a statement of measurable annual goals, including benchmarks or short-term objectives. 34 C.F.R. Sec. 300.347; State Rule Section 4.02(4)(e) and (f). The Student's IEP failed to include any way to measure the goal to improve math skills. The IEP was in violation of the federal rules.

8. An IEP must contain an explanation of the extent to which a student will not participate with non-disabled students in regular classes and activities. 34 C.F.R. Sec. 300.374(a)(4); State Rule Section 5.02(5). The IEP offered accommodations for the March-June 1998 period that entirely removed the Student from regular classes. The accommodations from the August 1998 to March 1999 period removed the student from school for most of the day. The IEP did not contain an explanation of the extent that the Student would not participate with non-disabled students in the regular classes. The IEP was in violation of the federal rules.

9. The IDEA places great emphasis on procedural safeguards to ensure that a free appropriate public education is provided. *District v. Rowley,* 458 U.S. 176 (1982). The District has failed to follow of the procedural safeguards of the IDEA and its regulations as set forth in paragraphs 4 through 7 of these Conclusions of Law.

10. The IDEA defines FAPE as "special education and related services" that are provided at public expense and under public supervision, meet state standards, and comply with the child's IEP." 20 USC §1401(18). "Special education" means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instructions in classrooms and other settings. 20 USC §1401(16).

11. The FAPE is to be provided in the least restrictive environment. State Rule Section 5.01. The least restrictive environment is one in which a child with disabilities is educated with children who do not have disabilities. State Rule Section 5.02. The education need not be provided in the least restrictive environment if the disability is such that education cannot be achieved in regular classes with supplementary services or the education of other children in such classes would be significantly impaired. State Rule Section 5.02. The rationale for providing services outside the regular classroom shall be based on student needs and shall be documented on the IEP. State Rule Section 5.02(5).

12. The Parents seek reimbursement for private school placement. Reimbursement for private school placement is governed by 34 CFR Section 400.403 that provides:

> Placement of children by parents if FAPE is at issue:
>
> (a) General. This part does not require an LEA (local education agency) to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility. However, the public agency shall include that child in the population whose needs are addressed consistent with Secs. 300.450-300.462.
>
> (b) Disagreements about FAPE. Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures of Secs. 300.500-300.517.
>
> (c) Reimbursement for private school placement. 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. A parental placement may be found to be appropriate by a hearing officer or a court even if it does not meet the State standards that apply to education provided by the … LEAs.

(d) Limitation on reimbursement. The cost of reimbursement described in paragraph (c) of this section may be reduced or denied—

(1) If—(i) At the most recent IEP meeting that the parents attended prior to removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section;

(2) If, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in Sec. 300.503(a)(1), of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for the evaluation; or

(3) Upon a judicial finding of unreasonableness with respect to actions taken by the parents.

(e) Exception. Notwithstanding the notice requirement in paragraph (d)(1) of this section, the cost of reimbursement may not be reduced or denied for failure to provide the notice if—

(1) The parent is illiterate and cannot write in English;

(2) Compliance with paragraph (d)(1) of this section would likely result in physical or serious emotional harm to the child;

(3) The school prevented the parent from providing the notice; or

(4) The parents had not received notice, pursuant to section 615 of the Act, of the notice requirement in paragraph (d)(1) of this section.

13. A school district is not required to pay the cost of education of a child with a disability at a private school or facility if the school district made a free appropriate public education available to the child and the parents elected to

place the child in a private school or facility. 20 USCA §1412(C)(I). However, a hearing officer or court may require the school district to reimburse the parents for the cost of a private school or facility if the school district had not made a free appropriate public education available to the child prior to the private enrollment. 20 USCA §1412(10)(C)(ii).

14. The April 1998 IEP proposed placements were five hours per week of homebound tutoring in the last part of the 1997-98 school year and for two hours of school per day for the 1998-1999 school year before March 1999. The IEP states that the Student needs structure, but the placements do not provide the needed structure. The IEP states that the goals are to improve peer relationships and attendance. The homebound tutoring does not provide any interactions with her peers, and attendance problems are not addressed by taking her out of school altogether. The placement was not reasonably calculated to meet these goals. The Student made no progress towards her goals in the homebound tutoring program, and is unlikely to have been able to make progress towards many of the goals with the two hours per day program in the 1998-98 school year. The IEP was not reasonably calculated to enable the student to receive educational benefit. The IEP did not provide for an appropriate education for the Student.

15. It has been found, and it is concluded, that the District did not make a FAPE available to the Student prior to the Parent's unilateral placement of the Student in [Private School], a private school.

16. To be reimbursed by the District, the unilateral parental placement must be proper under the IDEA. Private school placement is proper under the IDEA if the education provided by the private school is reasonably calculated to enable the student to receive educational benefits. The private placement school need not satisfy all of the specific requirements of a public school placement under the IDEA. 34 CFR Section 400.403(c); *Florence County School District Four v. Carter,* 510 U.S. 7 (1993). The unilateral parental placement need not be in the least restrictive environment. *Cleveland Heights-University Heights City School District v. Boss,* 144 F.3d 391 (6th Cir. 1998). The test for the parents' private placement is that it is appropriate, and not that it is perfect. *Warren G. v. Cumberland,* 109 F. 3rd 80, *citing Ridgewood v. N.E.,* 172 F. 3rd 238 (3rd Cir. 1999).

17. The [Private School] provided the structured learning environment and behavior management program that enabled the Student to receive educational benefit. The placement at [Private School] was appropriate.

18. The reimbursement for the costs of a private school or facility may be reduced if the parents at the most recent IEP meeting did not inform the IEP team that they were rejecting the placement proposed by the school district and state their concerns and their intent to enroll their child in a private school at public expense, or the parents did not give ten day written notice to the school

district at least 10 days prior to the removal of the child from public school. 20 USCA 1412(10)(C)(iii).

19. However, the reimbursement to the parents of a student may not be reduced or denied if the parents had not received notice as required by the IDEA. 20 USCA 1412(10)(C)(iv). The reimbursement to the parents may also be reduced or denied upon a judicial finding of unreasonableness with respect to actions taken by the parents. 34 CFR Section 400.403(D)(3).

20. The District did not provide the Parents notice that the Parent must provide prior written notice of a unilateral placement. The Parents did not act unreasonably when they placed the Student at the [Private School]. Therefore, the reimbursement to the Parents for the costs of the unilateral placement may not be reduced or denied.

21. The District was not providing a free appropriate education to the Student before the Student was removed from the public school. The District did not provide required notice to the Parents. The Parents did not notify the District in writing of their intent to enroll the Student in a private school at least ten days before removing the Student from public school. The actions taken by the Parents were reasonable given the situation they were in. The private school provided an appropriate education to the Student. The District is liable for the full costs of the Student's education and related services at [Private School] in [Other State], including the costs of room, board and transportation.

22. The liability of the District continues until the Student has left [Private School], or the District has modified or terminated the Student's IEP in conformity with the IDEA and its rules. State Rules Sections 4.01(4)(d), 5.04, and 6.02. Events subsequent to the hearing in this matter in March 2000 are not ripe for decision. If the District has held a meeting to extend, modify, or terminate the IEP of April 1999, then any decision from such a meeting would be subject to another request for a due process hearing. State Rule Sections 6.03

VII. Decision

Based upon the above findings and conclusions, it is the decision of the Administrative Law Judge that the District is liable under the IDEA to the Parents for reimbursement of the costs of the Student's placement at [Private School] in [Other State]. The Parents shall, within 20 days of this order, document to the District all their reimbursable costs incurred by the educational placement at [Private School] from June 25, 1998, to the date of this Decision. The District shall reimburse the Parents for any such expenses the Parents paid, and shall pay [Private School] for any liability of the Parents that the Parents have not paid.

This decision made upon a state level review is final except that either party has the right to bring civil action in an appropriate court of law, either federal or state. State Rule Section 6.03(12).

Dated: March 7, 2001.

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Bruce C. Friend
Administrative Law Judge
Division of Administrative Hearings