

COLORADO DEPARTMENT OF EDUCATION
Due Process Hearing L2002:107

In the matter of:

[STUDENT] by and through her parents,
Mr. and Mrs. [PARENTS],

Petitioner,

vs.

ACADEMY SCHOOL DISTRICT 20,

Respondent.

IMPARTIAL HEARING OFFICER DECISION AND ORDER

INTRODUCTION

A Due Process Hearing was held June 24, 25, 26, 27, 28 and July 1, 2002 at the administrative offices of the Respondent, 7610 North Union Boulevard, Colorado Springs, Colorado pursuant to notice. Jurisdiction is conferred by 20 U.S.C. Sec. 1401 *et seq.*, Individuals with Disabilities Education Act (IDEA) and the Colorado Exceptional Children's Education Act, C.R.S. 22-20-101 *et seq.* and companion regulations to the federal and state acts. Elizabeth Wylie Johnston of the Legal Center For People With Disabilities and Older People and Charles Lucy and J. Kevin Bridston, Holland & Hart, appeared on behalf of Petitioner. Brent Benrud and Robert Cohn, Stettner, Miller & Cohn, appeared on behalf of Respondent. The hearing was open to the public and [STUDENT] did not attend the hearing.

Petitioner maintained the request for Due Process Hearing was faxed to Respondent on April 18, 2002; however, Respondent claims it was not received until April 19, 2002. The Colorado Department of Education was advised of the request on April 23 and on April 26, 2002, the Impartial Hearing Officer (IHO) was formally notified of his selection.

An informal telephone setting conference was conducted on May 13, 2002 where it was stipulated that the 45-day timeline was to be extended through the completion of the hearing. Following notice, a prehearing conference took place on June 13, 2002 at Respondent's offices at which time the parties affirmed the extension. Following the prehearing conference and briefs on the issue, the IHO issued an order dated June 21, 2002, finding that Respondent had the burden of proof on the placement or least

restrictive environment issue and directing that Respondent should proceed with its case, followed by Petitioner. At the close of the hearing on July 1, and because of the multitude of video tapes introduced on the last day of the hearing and the number of issues presented, the parties stipulated to an extension of two weeks from July 1, 2002 for the IHO to prepare and issue his decision.

THE ISSUES

Petitioner's issues are identified as follows:

- a. Whether there were procedural violations of the IDEA such that [STUDENT] was denied a Free Appropriate Public Education (FAPE)?
- b. Whether the placements of [STUDENT] were appropriate and were in the least restrictive environment?
- c. Whether compensatory education should be provided as a result of denial of a FAPE?

FINDINGS OF FACT

1. [STUDENT] is a 12-year old child who resides with her parents in Colorado Springs, Colorado. She was enrolled at Respondent's Mountain Ridge Middle School for the school year 2001-2002 although she began the year part time at Explorer Elementary and part time at Mountain Ridge Middle School. [STUDENT] was diagnosed at birth with Down's syndrome. Her level of functioning was estimated by the Director of Special Education to be 2-3 years although Kenye Jarrett, a special education teacher and severe needs specialist for Respondent, testified that she is functioning as a 3-4 year old in many areas-in some areas higher and in some areas, lower.

2. [STUDENT]'s most recent Individualized Education Plan (IEP) listed her primary disability as Significant Limited Intellectual Capacity. Some of her strengths indicated were: good visual discrimination skills, able to identify letters, a small meaningful sight word vocabulary, tends to read single words but is learning short phrases, ability to count to 10 and identify numbers up to 6, recognizes coins and reacts positively to colors and textures. [STUDENT] enjoys when other students read to her, music, library and physical education and she is interested in cultures and historical eras.

3. The March 13, 2002 IEP stated the following regarding needs:

"[STUDENT] needs to follow school routines and learn to transition. [STUDENT] needs to learn comprehension skills relative to sight words. [STUDENT] needs to communicate her needs in a variety of school activities. [STUDENT] needs to direct and sustain attention to activities. Needs to increase number sense. Needs to develop sense of time, as related to school and classroom schedule. Needs to learn to adapt to

changes in schedule, with adult and peer assistance. Needs to learn modified concepts in content areas. Needs to learn from peer and adult models. Needs to follow routine using picture schedule. Needs to develop tolerance for a variety of expectations e.g. environment, people, noise. Needs to develop tolerance to a variety of expectations (i.e., environment, schedule, people). Needs to increase task completion."

One annual goal provided that [STUDENT] will successfully use appropriate verbal and nonverbal communicative behaviors in social context that are associated with expectations of grade-level peers. Related objectives stated were that [STUDENT] will actively and safely participate in age-appropriate peer and classroom activities and she will actively and safely follow peers during activities and transitions throughout the day.

4. [STUDENT] has, over the years, demonstrated several behavioral problems at school that are characterized as disruptive and sometimes physically aggressive or dangerous to other students or staff by Respondent but only as behavior issues by Petitioner, including grabbing of clothes, eyeglasses, necklaces, hitting, throwing objects, pulling hair, biting, pushing over furniture, clearing off desktops, etc. A number of behavior assessments have been made and behavior plans implemented to some degree of success. [STUDENT]'s behavior is often unpredicted but in other instances, can be anticipated by physical indicators such as an eye turning in, becoming noisy or loud or silly. In the opinion of Dr. Lewis Jackson, a behavioral psychologist and consultant to Respondent, [STUDENT] uses her problem behaviors to escape from activities and requirements she finds uncomfortable or undesirable and to express a need for a change when she feels out of control. [STUDENT] also uses her behaviors to try and obtain activities and experiences that are more desirable to her than what she is presently experiencing, and to express her reaction to interpersonal control situations that she finds invasive. [STUDENT]'s behavior problems are often brought about by the fact that she does not transition well to other tasks, locations, environments or people.

5. During the 1999-2000 and 2000-2001 school years, [STUDENT] was a student at Respondent's Explorer Elementary School. [STUDENT]'s 5th grade year (2000-2001) saw her included in the general education classroom but as the year went on, there were incidents such that [STUDENT] was not allowed in the general program at all. Later in the year, her behavior improved and [STUDENT] was gradually re-introduced into the general education system but never to the level of the start of the year. There were 4 or 5 days of suspension during [STUDENT]'s fifth grade year because of behavior.

6. An annual IEP review was conducted for [STUDENT] on April 12, 2001, toward the end of her 5th grade year. Goals and objectives included increasing time in general education from 2 hours per day to 4 hours per day over the course of the coming school year. [STUDENT] was to receive instruction with both a modified curriculum in the general education classroom and a parallel curriculum in the special education setting. Transition to Mountain Ridge Middle School was not discussed at this time.

7. [STUDENT]'s parents wanted her to remain at Explorer Elementary for the 2001-2002 school year rather than transition to Mountain Ridge Middle School with her age group peers. They felt that, because [STUDENT] was not familiar with the staff, students and routines of middle school and there was not enough time for a smooth, gradual transition, such an abrupt change might cause regression. Respondent was in favor of transition to middle school so that [STUDENT] could continue to be educated with age-appropriate peers. Respondent felt the goals and objectives of the IEP could be met and that middle school was the least restrictive placement. An outright transfer to middle school was deemed preferable rather than beginning at Explorer and doing partial days, or changing in mid-year. Also, Dr. Jackson, who had been retained by the Respondent, would be available to help with the transition.

8. The parents and Respondent entered into mediation in July and August 2001 to attempt to solve the disagreement as to which school [STUDENT] would attend in 2001-2002. A Memorandum Of Understanding was developed regarding staff training and an exchange of videotapes for familiarization of [STUDENT] to the school and her classmates to [STUDENT], implementation of Dr. Jackson's behavior plan, transition needs and classroom environment. The Memorandum sets forth a plan that [STUDENT] would start school at Explorer Elementary and finish at Mountain Ridge Middle School in the afternoon with a gradual increase in the time at middle school. There were to be weekly conference calls involving the parents, Dr. Jackson, special education teachers at both schools and middle school teachers working with [STUDENT]. The Memorandum states intent of the parties to have [STUDENT] in the regular education class except for behavior concerns to be addressed in accordance with the behavior plan. Respondent signed the Memorandum; however, the parents did not. It appears the conference calls were discontinued because of unavailability of the parties, particularly Dr. Jackson, around September 11, 2001. The video of [STUDENT] was developed but not shown to her classmates because of incompatible equipment.

9. On August 28, 2001 [STUDENT] was involved in an incident when she grabbed a teacher's eyeglasses and pulled them from her face, scratching the teacher's eyelid. Respondent also alleged that [STUDENT] also pushed the teacher who lost her footing but did not fall.

10. On September 7, 2001, [STUDENT] struck a staff member in the face causing swelling on her nose and lip and loosening front teeth. [STUDENT] was suspended for one day.

11. [STUDENT] slapped a student and grabbed her shirt, scratching the student on September 24, 2001 at Explorer Elementary. [STUDENT] was suspended for the balance of the day.

12. [STUDENT] was suspended for 2 days (9/18-9/19/01) for grabbing a student by the back of his shirt collar and choking him.

13. [STUDENT] was suspended a portion of the day of September 26, 2001 for grabbing a teacher, scratching her neck, pulling a tape deck off a shelf and attempting to grab a teacher and paraprofessional.

14. [STUDENT] was suspended October 1, 3 and 8, 2001 for behavior reasons.

15. On October 16, 2001 another incident happened at Explorer Elementary. [STUDENT] threw either a book or box of sandwich bags at another student. According to Mr. Norgard's (a paraprofessional) statement, [STUDENT] later grabbed a teacher's shirt and had to be physically restrained. According to Ms. Jarrett's analysis, [STUDENT] attacked the teacher, grabbed her shirt, scratched her neck and was pulling the shirt down so that the teacher was afraid of exposing herself to the class. According to Ms. Jarrett's statement, the teacher was frightened. The teacher's written account did not mention any concern of exposure but did state that "...students watched this happen in shock. Afterward, I was shaking and scared." Later, when [STUDENT] was brought back into the room, the teacher stated that "... she ([STUDENT]) reached out at me again. The aide had hold of one arm, and she was flailing her other arm out toward me. At this point, I asked the aide not to bring her back to the class because I was worried about my safety, as well as that of the students. I do not feel comfortable teaching with [STUDENT] in the room, as she is unpredictably violent and frightening to myself and the students." The incident was witnessed by parent advocate Sandra Martinez who did not observe anything being thrown at another student, did not see a scratch on the teacher or observe that the teacher was scared. [STUDENT]'s mother also observed the October 16, 2001 incident and did not observe any struggle nor perceive any need for intervention. [STUDENT] was suspended from school October 17 through October 24, 2001, the date of the next IEP meeting.

16. A Manifestation Review was conducted on October 24, 2001 where the team concluded that [STUDENT]'s behavior was a manifestation of her disability. The parents and their advocate in attendance disagreed with findings that there was sufficient current assessment data to determine the relationship between the disability and the misconduct, that the student had been offered an appropriate educational program, including supplemental aids and services and that the supplemental aids and services specified in the IEP were properly implemented.

17. An annual review IEP staffing was convened October 11, 2001 pursuant to notice for the purpose of determining how well the current program is meeting the identified needs, and to discuss any possible changes in the special education program. After approximately 2 hours, the meeting was continued to October 24. In the intervening period, the incident of October 16 had occurred. As a result, there was a change in the LRE to "...insure the safety of [STUDENT] and others in the school environment." As to service delivery,

"[STUDENT] will receive services similar to home-bound instruction; however, these services will be delivered at the school site in a 1:1 setting. Her instructional program will be designed by the SSN teacher and will be

carried out by a tutor and paraprofessional. Contact with other students will be increased as she demonstrates increasingly safe behaviors with others. Indirect assistive technology services 1-3 hours per month with daily programming carried out by SSN teacher, para, and tutor. Consultation with Behavior Specialist as needed to design and implement behavior plan." (Ex. 60)

Parents were to receive quarterly reports at report card time. The schedule contemplated a 2-hour daily routine with the staff to utilize other environments if behavior permitted and ability to introduce a peer in an environment other than [STUDENT]'s tutoring room in January, again if behavior permitted.

18. The October 11, 2001 IEP was issued and distributed to the parents on November 9 and tutoring of [STUDENT] began on November 12, 2001. The decision on change of placement to segregated tutoring was made on October 24.

19. On December 17, 2001, the Respondent authorized and agreed to pay Children's Hospital for a psychological evaluation, augmentative communication evaluation and developmental medical evaluation with Petitioner's consent. The Augmentative Communication and Learning Enhancement Report (Ex. 79) was dated January 2, 2002 and contained findings that (1) [STUDENT] has a severe expressive and receptive language delay secondary to Down's syndrome and that her ability to comprehend and respond to verbal communication is limited and varies given her level of motivation and the context of the interaction; (2) that she has strengths including the ability to repeat and label items within the immediate context of the conversation, the ability to indicate her immediate needs and desires using single words and phrases, the ability to imitate and learn behaviors provided visual models; and (3) [STUDENT]'s needs include pragmatic skills training to increase appropriate social interactions with both familiar and unfamiliar partners, including her parents, educators and peers, and augmented input in the form of visual representations to increase her comprehension skills, to clarify expectations for appropriate behavior and to help her maintain attention to task. The report included 7 detailed recommendations to be coordinated with the school team and other support networks to maximize functional outcomes.

20. The Medical Evaluation Summary (Ex. 80) of Dr. Goldson addressed conflicting reports of a seizure disorder and the possibility of a more comprehensive EEG being needed and treatment, if appropriate. He recommended that [STUDENT] be put on a diet because of her excessive weight, which can make behavior management and inclusion in the classroom more difficult. Dr. Goldson also indicated medication might be considered if there is evidence of anxiety or mood instability.

21. Dr. Epstein, a licensed clinical psychologist, undertook a psychological evaluation set forth in Exhibit 81. Dr. Epstein made the following recommendations to enhance [STUDENT]'s success in school:

"1. I would strongly recommend that the school district rehire Dr. Jackson as he is quite familiar with [[STUDENT]] and has developed solid behavioral programs in the past. It is essential that a specific plan be developed to address increasing [[STUDENT]'s] time in the school setting.

2. At present, she is receiving tutoring only, rather than being placed in the regular school setting. It would be important to reconsider specific interventions designed to begin to increase her time in school. Specifically, I would suggest that they work to have her attend 15 minutes as a beginning goal of time in school. I would have the task she is engaged in during this time be highly rewarding, rather than focused on academic skills. It will be important to retrain [[STUDENT]] in terms of her understanding that school can be a pleasurable place. For this reason, I would suggest that they use a plan similar to the one they used before. The transition would include 15-20 minutes on the initial day and an increase in her time of perhaps 10 minutes each day, assuming that she continues to be successful during this time. Once she has developed a routine with regard to attending school and have moved past her fear of school, then academic tasks and other specific skills can be targeted. Her initial programs in school should be programs and activities that are highly reinforcing and well within her ability.

3. I suggest the introduction of some method of reinforcement, both in terms of social praise as well as a token system that could be used to increase her motivation to complete tasks. She should have an opportunity at the end of each school day (even if the day is 15 minutes) to exchange tokens for some tangible reinforcer. Reinforcers might include 5-10 minutes of a favorite movie (tape 5-10 minutes, then leave blank tape so that you do not have to turn the tape off mid-scene), listening to a favorite song on a tape player, looking at a special book, etc. The reinforcers will continue to provide external motivation for compliance at school along with pairing something reinforcing with success in school.

4. It would appear that [[STUDENT]] is doing better now that she is taking clonidine to assist with her behavior. Her parents have discontinued the melatonin that they believe has been so harmful in terms of her behavioral problems. It will be important to see how [[STUDENT]] does in school now that her medications have been changed.

5. I would strongly recommend that [[STUDENT]] not participate in activities which are in the cafeteria. This seems to be quite overstimulating for her and is unlikely to be successful.

6. [[STUDENT]] would benefit from a sensory integration program which would be designed to help in regulating her underlying over-arousal issues.

7. [[STUDENT]] has mastered use of words gained from learning the vocabulary from flash-card tasks. It would be helpful to begin to work on action words as a current goal in terms of increasing her vocabulary.

8. [[STUDENT]'s] behavior can be improved by pairing reinforcers with appropriate behavior. For example, [[STUDENT]] could follow a basic simple schedule which could include a brief work activity and then access to a reinforcer. High interest reinforcers such as access to music or specific video tapes should be utilized to improve her motivation to comply with specific tasks. A work basket approach (from TEACCH, Chapel Hill, NC) would be a good system to allow [[STUDENT]] to predict how much work she needs to complete as well as increasing her independence.

9. [[STUDENT]] does appear to be tearful in the morning, particularly when she is not attending school. It may be that she has symptoms of depression which are superimposed on the rest of her issues. Consideration of an SSRI might be helpful (an anti-depressant) in terms of ameliorating some of these symptoms."

22. Dr. Epstein also authored a summary report at Exhibit 82. In that report she changed her recommendation from the use of Dr. Jackson to Dr. Braden as a consultant because of relative proximity to the parties.

23. At the request of Deb Montgomery, Director of Education for Respondent, Janet Filbin and Cyndi Boezio of the Colorado Department of Education observed [STUDENT] on November 30 and December 18, 2001. Sixteen recommendations were made to a team and [STUDENT]'s mother and are detailed on Exhibit 97. Without diminishing the importance of the other recommendations, it was a stated goal to have [STUDENT] included with her peers as much as possible by allowing a number of periods outside of the small, isolated classroom. It was suggested that [STUDENT] needed to have interactions with typical peers so that she receives the modeling and interactions that will increase her ability to interact with others in more socially acceptable ways such as by having students read a story to her or play computer games. Several recommendations dealt with communication issues and related behavior and the importance of scheduling. It was recommended that Respondent complete a functional behavior assessment that includes a detailed antecedent behavior consequence and that the SWAAC team should assess [STUDENT] so she is provided with appropriate technology to meet her communication needs because behavior is so closely linked with a student's ability to communicate.

24. On February 20, 2002, [STUDENT] reportedly had a good day at school and had worked with a peer tutor as permitted according to her behavior. Returning from the bathroom with her teacher, Bonnie Gavaletz, to the SSN room to task on a computer, [STUDENT] veered toward a medically fragile child and struck him in the face. Although the child was not hurt, written correspondence from the child's mother indicated that might not have been the case. That child's mother was most disturbed about the incident. [STUDENT] was returned to the segregated classroom. According to Exhibit 85, [STUDENT] was not permitted on campus beginning February 22 because of behavior detrimental to the welfare and safety of others pending a review staffing and decision on placement. On February 28, a review staffing was scheduled for March 13, 2002.

25. The March 13, 2002 meeting resulted in an IEP service delivery change. (Ex. 90) [STUDENT] was to receive homebound services while out of district placement options are pursued. The homebound program would be designed by the SSN teacher/specialist and will be carried out by a tutor and a paraprofessional. Homebound services were to be provided one hour per day, to be increased as tolerated up to two hours a day. The Recommended Placement in the Least Restrictive Environment sheet, however, provided that "Selected placement is out of district placement in a private separate school facility." No such facility was identified in the IEP although one possibility was discussed at the meeting. The recommendation for one hour per day tutoring was taken from a Behavior Support Observations and Recommendations memorandum dated January 29, 2002 (Ex. 88, JJJ) from Bernie Maly, Community Behavior Specialist for the Colorado Department Of Human Services. Mr. Maly testified during the hearing that he had stated one hour per session and did not necessarily mean to limit instruction to one hour per day.

26. Alternate placements in the Colorado Springs area have been identified since the March 13, 2002 IEP; however, none had indicated a willingness to accept [STUDENT] through the conclusion of the hearing on July 1, 2002.

27. Respondent left a message with [STUDENT]'s parents regarding homebound tutoring on February 21, 2002. There was correspondence back and forth between the parent's representative regarding a neutral site for tutoring. A local church was identified as an agreeable site; however, insurance problems needed to be addressed. As of the conclusion of the hearing, the insurance issue had not been resolved and the church site was not being utilized for tutoring purposes. In any event, [STUDENT] did not receive any educational services, tutoring or otherwise, from February 22, 2002 until May 15, 2002, when homebound tutoring began at [STUDENT]'s residence and continued until about June 20, 2002 for an hour per day, eventually extended to an hour and ten minutes. The last day of school was May 24, 2002.

28. [STUDENT]'s IEPs had, for some time, stated that [STUDENT] was eligible for extended school year services (ESY). In past years, she had attended a summer day camp at Respondent expense. [STUDENT] did not get registered in time to participate in the same program for the summer of 2002. The parties differ on who had the

responsibility to enroll [STUDENT]. [STUDENT] was enrolled in another level program for the summer and Respondent provided two support personnel to assist. Although supporting the 2002 summer program, Respondent was of the opinion that [STUDENT] would have been better served by homebound tutoring for her ESY services. It does not appear from the record that an IEP staffing was convened in 2002 to specifically address the ESY issue although there were discussions about doing so. Apparently, it had not been the practice of the parties in prior years to convene specifically for ESY. It appears the 2002 summer day camp was not successful.

29. [STUDENT]'s father testified that his educational goal for [STUDENT] was that she reach her best potential and that her basic needs included her integration with peers as much as possible. [STUDENT] had difficulty with transitions and the parents had wanted [STUDENT] to stay at Explorer elementary for another year. They had asked in January or February 2001 about [STUDENT] repeating the 5th grade but the special education teacher stated a preference to wait for the April IEP. After the 2000-2001 school year was finished, the parents were advised of the Respondent's wish to move [STUDENT] to middle school; hence, the mediation was brought about. [STUDENT]'s father believes that the mediation did not suffice for an IEP meeting in that there was no statement of goals or services and a behavior plan was not included in the Memorandum.

[STUDENT]'s father also was concerned with a change in principal at the middle school and that the middle school special education teacher did not have the necessary skills. He testified that he never saw an interim behavior plan and that the weekly conference calls between staff, Dr. Jackson and the parents had been helpful but were discontinued. He stated that the video he had prepared to familiarize [STUDENT] to the middle school students was never shown to them and the technical problem that prevented the Respondent from showing the video was easily resolved.

[STUDENT]'s father stated that the suspension of October 17, 2001 and homebound tutoring offered was a change in placement made without an IEP in place. [STUDENT] was out of school from October 17 to November 12, 2001 without services. The parents were concerned that home tutoring was not offering [STUDENT] any benefits and her isolation would likely cause regression. The father also testified that the segregated tutoring was terminated on February 22, 2002 and, although homebound tutoring was offered, this again was a change in placement without benefit of an IEP.

The parents did not agree with the October 11, 2001 IEP or the March 13, 2002 IEP. They are not necessarily opposed to a private school placement in the Colorado Springs area and are not insisting on a regular education placement for [STUDENT] at this time although that is a long-term goal. [STUDENT]'s father stated he is concerned with the safety of other children and apologized for an inappropriate statement made at a meeting. His conduct was out of frustration for critical comments about [STUDENT] rather than solutions to the behavior issue. [STUDENT]'s father stated Respondent staff's concerns of safety and [STUDENT] being dangerous are exaggerated.

30. Dr. Lewis Jackson was qualified to testify as an expert witness by Petitioner. He is a full professor of special education at UNC with over 25 years experience. He frequently acts as a consultant on behavioral issues. Dr. Jackson was first involved with [STUDENT] in the fall of 1999 when he developed a behavior support plan for her. When [STUDENT] was at Explorer Elementary, he had little contact with her but Respondent retained him when middle school became an issue in the fall of 2001.

Dr. Jackson referred to [STUDENT]'s behavior support plan as "dynamic" in the sense that as you learn about the child and the adults, the plan is modified as needed so everyone can grow with it. His behavioral assessment and plans are set forth in Exhibit AA. Dr. Jackson summarized:

"Summarizing, from a functional analysis perspective, behavioral events in the middle school during the fall of 2001 were sometimes the product of the earlier identified motivations. However, some proportion of them were also the results of behavioral expectations set in motion by the adults, they were the consequences of inconsistent and/or inexperienced program delivery, they were reactions to her transition from the elementary to the middle school, and they were the direct consequence of imposed absenteeism from school. In all cases, however, it had been my hope that 'inconsistent and inexperienced program delivery' could be taken out of the equation as the educational staff developed their knowledge about, and their skills for working with, [[STUDENT]]. A certain amount of learning time is normally required for any plan of this nature. However, the program was, in my opinion, terminated prematurely, and the kinds of additional analyses needed to sort out these program- and systems-related variables are now no longer possible."

"Recommendations

It is my view that [[STUDENT]] needs a positive behavior support plan modeled after one of the two types previously developed (solution focused; comprehensive). There, however, also needs to be a start-up period for the implementation that is of sufficient duration to allow for inevitable and unavoidable mistakes and for the necessary preparation of the staff. Movement into the general education environment must remain the goal, and the plan that is developed must include explicit steps and reasonable timelines for this process. Since questions can be raised about the probable impact of implementation problems on [[STUDENT]'s] behavior, measurement of progress under the new plan should focus not only on behavior change on the part of [[STUDENT]] but also on the implementation processes as they are carried out by the educational staff.

I am especially concerned with the problem behavior patterns that emerged out of the interpersonal relationships between [[STUDENT]] and the responding special education staff. [[STUDENT]'s] growth depends

on a process in which these individuals know how to conduct moment-to-moment problem solving, know how to develop and implement curriculum modifications, and know how to pull back from her such that the natural controls of the general education teacher, peers, and curriculum become the reasons that she no longer strikes out at her environment. If these natural forms of control never become operational--and they won't if present trends continue--[[STUDENT]] will remain dysfunctionally dependent on adult control, isolated from other human beings, and trapped within her present patterns of behavior. Special educators must truly be what they call themselves--specialists in disability and, in this case, specialists in severe disabilities. Changing the educational setting under the presumption that 'some other special educator' can do a better job is unlikely to benefit [[STUDENT]]. It is my professional opinion that the present special education team in the middle school needs to be held accountable for becoming appropriately acquainted with [[STUDENT]] and her needs, resolving the interpersonal interactions that are important sources for [[STUDENT]'s] behavioral outbursts, and implementing the kinds of quality educational interventions that our profession requires of them. If more training is needed, and this seems likely based on my observations, then the District must provide these individuals with this training so that they can perform the tasks that they have been hired to do."

Dr. Jackson's assessment was dated March 10, 2002 and appears to have been received by the Respondent on or about March 18 although Respondent had been requesting it for several months. His remarks were based on his prior experience with [STUDENT] and approximately 3 observations of her at school in the fall of 2001. He stated that she had been suspended on other dates he had planned to observe.

Dr. Jackson was not clear on whether the middle school special education teacher had the skills necessary but that, in time she and staff would learn. The larger problem was suspensions that were not handled properly. Dr. Jackson agreed that the needs of a child vs. the community must be balanced but is of the opinion that long-term suspensions are of no value to [STUDENT]. Although he admitted to stating to staff that [STUDENT] should be treated like any other student regarding behavior, he stated this was not his preference but was a negotiated position. Dr. Jackson did not find [STUDENT]'s behavior dangerous based on his observations and his viewing of the video tape (Ex. 105) although he did characterize her behavior as sometimes disruptive and aggressive. Dr. Jackson stated that the segregated setting at middle school was an "unnatural setting" and he saw no measurement of progress. [STUDENT]'s interaction was what one might expect with a bored child and bored adults. He stated that the segregated setting was an environment that will cause regression and sets up [STUDENT] for failure. Further, there was no way to achieve the goals and objectives in [STUDENT]'s IEP in such a setting. Dr. Jackson also stated that, notwithstanding Respondent testimony to the contrary, [STUDENT] is not receiving any educational

benefit with homebound tutoring, that they have not measured any such benefit and the research is against any such educational benefit for those like [STUDENT].

31. Daniel Faulkner, Pastoral Ministries Coordinator at Harvest Bible Fellowship, stated that [STUDENT] participates about 2 hours every Sunday at church. The first hour is in Sunday school and the remaining time is participating in youth activities. [STUDENT]'s involvement was described as successful with proper behavioral support. She interacts well with peers and thrives on peer interaction. He did not perceive any risk to the other children.

According to this witness, the church is still available for tutoring purposes if the Respondent will provide a certificate of insurance naming the church as an additional named insured.

32. Exhibit 105, videotapes, were admitted into evidence without being played at the hearing except for an excerpted version, which was viewed at the hearing. The tapes were reviewed by the IHO subsequent to the hearing. The "excerpted" tape showed tutoring during December 2001 and January 2002 and was introduced for the purpose of showing [STUDENT]'s behavior. Incidents depicted included hair pulling, hitting, throwing objects, etc. Witnesses Montgomery and Jarrett described [STUDENT]'s behavior on Exhibit 105 as representative although they did not see any real aggressive behavior.

The video also provided some evidence of the environment of the segregated room. It was small with no windows, carpet, folding table and 3-4 chairs, a mat in one corner, and a few posters. Certainly, the facilities were less than optimal.

Taken as a whole, the videos show a contrast in behavior of [STUDENT] and in quality of instruction. In certain instances, it is clear that staff is bored and less than enthusiastic about being there. Prompts and rewards are not always consistent and, at times, inappropriate, including one comment that [STUDENT]'s glasses would be taken away if she did not behave. One excerpt of Exhibit 105 (marked Petitioner UUUUU), taken on December 20, and shown at the hearing, is an example of good, compliant behavior of [STUDENT] with excellent technique on the part of an experienced teacher.

33. Respondent, not by way of any admission of wrongdoing on its part, has offered 60 days of compensatory education under the October, 2001 and March, 2002 IEPs because of the time [STUDENT] went without any educational benefits.

DISCUSSION

A. Burden of Proof. As previously noted, the IHO had placed the burden of proof on Respondent on issues of placement, including LRE. That order is reaffirmed. On issues of alleged procedural violations, the IHO hereby places that burden on Respondent also as Respondent is charged with the overall responsibility of providing

FAPE. On the issue of compensatory education, the burden of proof is with Petitioner as the party requesting affirmative relief.

B. Background. The IDEA, 20 U.S.C. 1401 *et seq.*, requires that a state must provide each child with a qualifying disability with a free appropriate public education or FAPE tailored to the needs of the child through the establishment of an individualized educational plan.

The Act defines FAPE as special education and related services, which are provided at public expense and under public supervision, which meet state standards and comply with the child's IEP. 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 instruction in classrooms and other settings and physical education instruction.

The IDEA provides each child with a disability with a basic floor of educational opportunity (*Hendrick Hudson District Board of Education v. Rowley*, 458 U.S. 176 (1982)). A state provides this basic floor of opportunity and satisfies the minimum requirements of the Act by providing a child with a disability with access to specialized instruction and related services which are individually designed and which provide educational benefit to the student. As established by *Rowley*, the requirements of the IDEA are satisfied and FAPE is provided if the state educational agency complies with the procedures of the Act and, additionally, if the IEP developed pursuant to procedures is reasonably calculated to enable a child to receive educational benefit. Although the school district is not required to maximize educational opportunities or provide the best possible education, the school district must provide a program calculated to provide more than a trivial educational benefit to the child.

C. The Procedural Issues. Where procedural violations are found to be serious, in contrast to merely trivial, a child may be denied a FAPE independent of any substantive violation of the IDEA. The parents assert various procedural violations occurred during the 2000-2001 and 2001-2002 school years.

1. A valid IEP was in place at the commencement of the 2001-2002 school year. Petitioner seems to maintain that a new IEP was required for commencement of the 2001-2001 school year. State of Colorado Rules For The Administration Of The Exceptional Children's Educational Act, Rule 5.04(1)(c), however, provides that a change from elementary school to middle school may be considered either a change in location or a change in program/services, depending on the circumstances. Here, [STUDENT]'s educational program was not materially altered from the April 2001 IEP nor was there impact on [STUDENT]'s total education. The change was essentially an administrative decision that went to mediation in which both parties participated after discussions between them came to a standstill. Accordingly, an IEP meeting and notice was not required for the transition from elementary to middle school. Since an IEP was not required for transition to middle school, it stands to reason that Petitioner's contention that the mediation would not suffice as an IEP likewise should fail. Additionally, since an IEP and behavior plan was in effect from the April 2001 IEP,

any allegations of procedural irregularity of not having a behavior plan in effect lacks merit.

2. Respondent failed to convene IEP meetings for considering a change in placement before removing [STUDENT] from the existing placement. On October 11, 2001, an IEP meeting was convened but not concluded, being re-scheduled for October 24. In the interim, on October 16, an incident occurred whereby [STUDENT] was suspended October 17-24. By October 24, [STUDENT] had been suspended 14 days. The manifestation review conducted on October 24 within the appropriate time frame found that [STUDENT]'s behavior for which she had been suspended was a manifestation of her disability. Per 34 CFR 300.519, a change in placement occurs if a child is subjected to a series of removals that, as here, constitute a pattern because they accumulate to more than 10 school days. 34 CFR 300.519 *et seq.*, when read together with 34 CFR 300.121, does not permit an interim placement for [STUDENT] as the Respondent did by offering a home tutor. Respondent had authority under 34 CFR 300.521 to seek an alternative interim placement in an expedited due process hearing because of its concern that the then current placement was substantially likely to result in injury to the child or to others. It failed to do so and it failed to await the October 24 IEP meeting to effect a change in placement. Therefore, from October 18 through October 24, a period of 5 school days, [STUDENT]'s interim placement offer of homebound tutoring was inappropriate.

Similarly, commencing February 22, 2002, [STUDENT] was suspended for behavior reasons and was offered homebound tutoring, a change in placement under both state and federal regulations. See, e.g., 5.04(2) of the Colorado ECEA Rules. The IHO is unaware of any authority that would have permitted an interim placement short of an expedited hearing as above referenced. [STUDENT]'s placement (homebound tutoring) was inappropriate from February 22 through March 13, 2002 when the next IEP was developed, or a total of 13 school days.

3. The Respondent failed to follow IDEA regulations governing the formulation of a recommended change in placement by not adequately considering less restrictive alternatives and the adequacy of supports and services. The IHO views this issue more properly discussed in the portion of the Decision dealing with substantive issues.

4. The lack of a formal written offer of placement at or prior to the March 13, 2002 IEP meeting did not result in a procedural violation. Petitioner argued that such a failure relegated [STUDENT] to homebound services while private placements were investigated and hindered the ability of the parents to participate meaningfully in the IEP process. The IHO concludes the March 13, 2002 IEP is no more than an interim document that says homebound tutoring will be utilized until a private placement is located. If one or more private placements are identified, another IEP meeting will be required because it will constitute a change in placement to a different restrictive environment. At that point, the parents will be entitled to notice and an opportunity to be heard.

5. The Respondent provided adequate evaluations and reports of progress. 34 CFR 300.347 states that an IEP shall contain a statement of how the child's parents will be regularly informed at least as often as parents are informed of their nondisabled children's progress. The March 13, 2002 IEP provides that parents will receive quarterly reports at report card time. Neither the IDEA nor the IEP state that those reports need to be written. In the case of [STUDENT], the exhibits and testimony of record show that the parents were receiving written and oral reports to more than satisfy the regulatory requirements and IEP requirements.

6. The Respondent was not procedurally required to convene an IEP meeting for the purpose of ESY. Both parties agree that [STUDENT] is eligible for ESY. As of the March 13, 2002 IEP, the Respondent's position was that ESY would be homebound tutoring although that was not the parent's choice and, indeed, had not been the practice in prior years. 34 CFR 300.309 provides that ESY services are those provided to a child with a disability beyond the normal school year, in accordance with the IEP and at no cost to the parents. Homebound tutoring was specified in the IEP as the interim environment. Therefore, from the procedural standpoint, no violation is apparent; although if homebound services are not a proper placement and not within the LRE, a substantive violation would exist.

D. Substantive Issues.

Least Restrictive Environment/Placement. The IDEA requires:

"Each public agency shall ensure- (1) That to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are nondisabled; and (2) That special classes, separate schooling or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 34 CFR 300.550

Colorado's regulations read:

"Least restrictive environment shall mean an environment in which a child with disabilities is educated with children who do not have disabilities, unless: the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, or when provided with supplementary aides and services, the nature or severity of the disability is so disruptive that the education of other children in such classes would be significantly impaired." 2220-R-5.02

Both parties in this proceeding cite *Daniel R. R. v. Board of Education*, 874 F. 2d 1036 (5th Cir. 1989), which stands for the proposition that if education in the regular classroom cannot be satisfactorily achieved, then it must be determined whether the school has mainstreamed the child to the maximum extent appropriate. In *Daniel R. R.*, the court considered a number of factors, which it stated were not necessarily exhaustive. Considered was whether the school has taken steps to accommodate the child in regular education, including supplementary aids and services and modification of the regular education program. If so, are the efforts sufficient? Will the child receive an education benefit from regular education and whether the child will benefit from related issues such as language models? Finally, the court stated consideration should be given to the effect the handicapped child's presence has on the regular classroom environment and thus, on the education of the other students.

"If we determine that education in the regular classroom cannot be achieved satisfactorily, we next ask whether the child has been mainstreamed to the maximum extent appropriate. The EHA and its regulations do not contemplate an all-or-nothing educational system in which handicapped children attend either regular or special education. Rather the Act and its regulations require schools to offer a continuum of services (*citations omitted*) Thus, the school must take intermediate steps where appropriate such as placing the child in regular education for some academic classes and in special education for others, mainstreaming the child for nonacademic classes only or providing interaction with nonhandicapped children during lunch and recess. The appropriate mix will vary from child to child and, it may be hoped, from school year to school year as the child develops. If the school officials have provided the maximum appropriate exposure to non-handicapped students, they have fulfilled their obligation under the EHA." (*Daniel R. R.*)

Here, [STUDENT] was removed from the regular classroom for safety reasons as stated in the October 2001 IEP. She was removed from the segregated classroom (with essentially homebound-like services) and limited access to her peers in the SSN room in February 2002. See March 13, 2002 IEP. She was not removed because she failed to receive an educational benefit. Indeed, she had been successfully integrated at Explorer in the 5th grade because they "made it work." She was not removed because she failed to benefit from nonacademic role models. Cost was not a factor. [STUDENT] was removed solely for safety reasons to more restrictive environments.

Certainly, [STUDENT]'s behavior can be disruptive in the classroom and admittedly, the state regulations do not require mainstreaming where, when provided with supplementary aids and services, the nature or severity of the disability is so disruptive that the education of other children in such classes would be significantly impaired. The IHO does not find [STUDENT]'s behavior to be so disruptive as to cause other children's education to be significantly impaired if she is provided with appropriate supplementary aids and services.

The IHO must agree with Dr. Jackson that [STUDENT] is not dangerous or violent as characterized by several of Respondent witnesses even though some people might perceive her otherwise. Aside from the evidence, the Respondent's position of an LRE of a private facility does not lend credence to the safety issue. And, all the staff testimony concerning their safety is surely not eliminated by homebound or homebound-like service.

The IHO concludes Respondent has not mainstreamed [STUDENT] to the maximum extent appropriate because it has not implemented or utilized, in all instances, proper supplementary aids and services. Dr. Jackson testified that [STUDENT] can be successful in a classroom setting but this has not been achieved because lack of proper behavioral supports. A behavior plan was in place but was a "dynamic" plan, requiring modification so that everyone could grow with it. Dr. Jackson felt there had been progress but terminating further development was premature. Dr. Jackson's views are largely supported by Dr. Epstein and two employees of CDE.

The IHO also concludes that homebound and homebound-like services have not provided educational benefit. While Respondent provided opinions otherwise, no one has quantitatively measured that and the IHO finds Dr. Jackson's testimony persuasive that the research is against educational benefit from homebound or homebound-like tutoring. Aside from the academic aspect, other aspects of the IEP dealing with school routine, transitions, communication, learning from adult and peer models cannot be achieved with homebound tutoring. There is no evidence that behavior can transition from homebound to a classroom.

The IHO concludes a substantive violation of the IDEA with respect to placement and the least restrictive environment. Goals and objectives of the IEPs cannot possibly be attained with a strict homebound or homebound-like placement. This has been brought about, in part, by its failure to give requisite attention to the continuum of possibilities and a refusal or inability to modify the behavior plan or applications thereof to address behavior incidents. [STUDENT] has been denied a FAPE since October 17, 2001 and compensatory education is appropriate.

This decision should not be construed as finding Respondent or its personnel acted in bad faith, intentionally violated the IDEA or that any of its actions were retaliatory toward [STUDENT] or her parents. To the contrary, the IHO believes staff has wanted to do what was right for [STUDENT] and it has a legitimate concern for the safety and education of staff and other students. Respondent has gone to great expense in retaining consultants and seeking expertise for the benefit of [STUDENT] and her parents. Unfortunately, some of the assistance it sought was not delivered as timely as might have been.

CONCLUSIONS OF LAW

1. The Respondent's procedural violations with respect to [STUDENT]'s interim placements during the 2001-2002 school year were not sufficiently egregious to constitute a denial of FAPE.

2. The balance of procedural violations alleged by Petitioner are without merit and do not constitute a violation of the IDEA.

3. The Respondent did violate the IDEA and failed to provide [STUDENT] with FAPE as it relates to placement and the least restrictive environment of [STUDENT] for the period from October 17, 2001 until the conclusion of school.

4. [STUDENT] did not receive any educational benefit from October 17, 2001 through the end of the 2001-2002 school year; accordingly, she is entitled to compensatory education for a period of 7 months.

ORDER

1. Respondent shall retain an educational consultant with expertise in behavioral developmental disabilities to update a functional behavioral assessment and develop and help it and the parents implement an appropriate behavioral intervention plan for [STUDENT] at school and at home because past strategies employed by Respondent with regard to [STUDENT] have not been successful or carried forward. The IHO, in his opinion, lacks authority to order that any particular expert be retained. Clearly, however, this should be someone available to the Respondent for field observations and training of personnel, as required.

2. Within 20 days from the date of this Order, the Respondent shall convene an IEP meeting to begin development of appropriate behavioral interventions to address [STUDENT]'s behaviors and to determine placement and the least restrictive environment consistent with this decision. The team shall consider such supplemental aids and services necessary so that [STUDENT] will be mainstreamed to the maximum extent appropriate under the law. The team shall consider the assessment and recommendations of Dr. Jackson, Dr. Epstein and CDE.

3. In addition to developing the IEP for [STUDENT], the IEP team will specifically determine how, when and where the 7 months of compensatory education shall be received by [STUDENT]. These compensatory services are in addition to services to be received for future school years and in addition to ESY services [STUDENT] might be otherwise entitled to. Consideration may be given to compensatory services beyond [STUDENT]'s 21st birthday.

4. Respondent shall give due consideration to the opinions and recommendations of the consultant to be retained. Respondent shall convene such future IEP meetings as may be appropriate or as is otherwise required under the law.

APPELLATE RIGHTS

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

Dated July 15, 2002

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

CERTIFICATE OF MAILING

I certify that on July 15, 2002 a true copy of the foregoing Decision and Order was mailed by certified mail to the parents in this proceeding at their address of record and, in addition, to:

Brent Benrud
Stettner, Miller & Cohn, PC
1380 Lawrence St., Suite 1000
Denver, CO 80204-2058

Elizabeth Wylie Johnston
The Legal Center
455 Sherman St., #130
Denver, CO 80203

Charles R. Lucy
J. Kevin Bridston
Holland & Hart
90 S. Cascade Ave., Ste. 1000
Colorado Springs, CO 80903-1645

Jennifer Rodriguez
Colorado Department of Education
Special Education Services Unit
201 E. Colfax
Denver, CO 80203

Academy School District 20
Attn: Deb Montgomery
1130 W. Woodman Rd.
Colorado Springs, CO 80919-2799

Fred B. Adam