

BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS  
STATE OF COLORADO

CASE NO. ED 98-14

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DECISION UPON STATE LEVEL REVIEW

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IN THE MATTER OF:

[student], by and through her mother, [parent],

Appellants,

v.

DOUGLAS COUNTY SCHOOL DISTRICT Re-1,

Appellant.

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This is a state level review of a decision of an impartial hearing officer pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§1400 et seq., Section 2220-R-6.03 et seq. (1 CCR 301-8).<sup>1/</sup>

A local level evidentiary hearing was held before Impartial Hearing Officer Raymond Lee Payne, Jr. ("IHO") in accordance with the IDEA from August 5, 6, 7, 10, 11, and 12, 1998. The IHO issued a written "Decision and Findings" on August 28, 1998 in Case No. L98:119.

An appeal of the IHO's Decision and Findings Hearing was filed by [student] ("Student") through her mother, [parent],<sup>2/</sup> pursuant to 20 U.S.C. §1415(c); 34 C.F.R. § 300.510; and 2220-R-6.03(9) and (10) (1 CCR 301-8). Neither party requested the opportunity to present additional evidence and no additional evidence was received. A transcript of the local level evidentiary hearing has been filed. Briefs were filed by the parties and oral argument was held on May 10, 1999.

The Student was represented by her mother who appeared and participated without counsel and on her own behalf. The Appellee, Douglas County School District Re-1 ("District"), was represented by Cheryl M. Karstaedt, Esq. and Thomas S. Crabb, Esq. of Caplan and Earnest, LLC.

## SCOPE OF REVIEW

The decision of the Administrative Law Judge on state level review of the decision of the IHO is to be an "independent" one. 20 U.S.C. §1415(c); 34 C.F.R. §300.510; 2220-R-6.03(11)(b)(v) (1 CCR 301-8); and State Plan, Part II, Section A, VII,9,b,5. In the context of court reviews of state level decisions, such independence has been construed to require that "due weight" be given to the administrative findings below, *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), while still recognizing the statutory provisions for an independent decision and the taking of additional evidence, if necessary. *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991). It is appropriate to apply this standard by analogy at the state administrative review level. Thus, in this proceeding it is sensible for the Administrative Law Judge to give "deference" to the IHO's findings of fact, *Jefferson County School District R-1*, 19 IDELR 1112, 1113 (SEA Colo. 1993), and to accord the hearing examiner's decision "due weight," while reaching an independent decision based on a preponderance of the evidence. *Sioux Falls School District v. Koupal*, 526 N.W.2d 248 (S.D. 1994).

## IMPARTIAL HEARING OFFICER DECISION

In his decision of August 28, 1998, the IHO identified the Student's claims as follows: (1) Did the District fail to comply with the requirements of the individualized education program ("IEP") process for meaningful parental participation? 2) Did the District fail to comply with the Student's 1997-1998 IEP? 3) Did the District fail to provide objective criteria, data collection, documentation and evaluation procedures? 4) Did the District err by failing to provide extended school year services? 5) Did the District fail to consider whether the Student requires assisted technology devices and services? 6) Did the District fail to properly consider independent educational evaluations? 7) Were the District's statements of the Student's present levels of educational performance incorrect or deficient? 8) Does the Student's IEP lack meaningful goals and objectives? 9) Were the Student's placement and services predetermined before IEP staffings? 10) Did the District fail to include all special education and related services needed by the Student in her IEP? 11) Did the District fail to provide appropriate support for school personnel? 12) Did the District fail to address program modifications in to the Student's IEP? 13) Did the District fail to address supplementary aids and services in the Student's IEP? 14) Did the District fail to provide an educational program reasonably calculated to provide an education benefit to the Student?

Having identified these issues, the IHO concluded in his Decision and Findings that the Student, through her mother, had failed to prove her claims by a preponderance of the evidence. The IHO further concluded that the District had complied with the IDEA and related state regulations with respect to the Student.

## ISSUES ON REVIEW,

On appeal, the Student's mother reiterates each of the issues identified by the IHO in his Decision and Findings. In her brief on appeal she asserts: 1) The District failed to permit meaningful parental participation; 2) The District failed to comply with the Student's IEP; 3) The District failed to evaluate or provide independent educational evaluation at public expense; 4) The District failed to appropriately address extended school year issues; 5) The description of the Student's present levels of performance in her IEP is deficient; 6) The goals and objectives in the Student's IEP are vague; 7) The District failed to provide appropriate related services; 8)

The District failed to properly determine appropriate service provider hours; and 9) The District failed to provide reasonable educational benefit to the Student. The Student's mother does not assert that any procedural errors occurred at the IHO due process hearing level.

These issues are best summarized as follows:

1. Did the District afford the Student's mother meaningful participation with respect to the Student's education?
2. Did the District properly develop and implement the Student's individualized educational program?
3. Did the District properly evaluate the Student and act properly in not paying for an independent educational evaluation of the Student obtained by the mother?
4. Did the District provide necessary related services and assistive technology for the Student?
5. Did the District properly determine it had no obligation to provide continuing extended school year services for the Student?
6. Did the District provide the Student with a free appropriate public education?

#### FINDINGS OF FACT

The Decision and Findings of the IHO contains only limited findings of fact. The Administrative Law Judge enters the following findings of fact, giving due deference to the findings of the IHO:

1. The Student was born on [ ]. At the time of the hearing before the IHO she was seven years old and beginning the second grade.
2. The Student qualifies for special education services as a result of a diagnosed physical disability which each has as its basis Attention Deficit Hyperactivity Disorder ("ADHD") and a Speech/Language problem which constitute educational disabilities and which prevent the Student from receiving educational benefit from regular education. The Student has been identified as eligible for special education since preschool as a result of these educational disabilities and has received special education services since that time. Her disabilities are mild in severity.

#### **Parental Participation in the Student's Education**

3. During the school year 1996-97, the Student was enrolled in kindergarten at the District's Roxborough Elementary School. No issues are raised in this matter regarding parental participation in the Student's education during her kindergarten year.
4. At the end of the Student's kindergarten year, the District conducted a triennial review of the Student, as required by the IDEA and applicable regulations.<sup>3f</sup> In the course of developing the Student's triennial IEP for the 1997-98 school year, three separate meetings were held on April 22, 1997, April 29, 1997 and May 13, 1997. The Student's mother was present at each of these meetings. In addition, on April 22, 1998, the Student's mother was

represented by an attorney, a parent advocate, the Student's grandmother, and by a friend of the mother. On April 29, 1997, the Student's mother was represented by a parent advocate. On May 13, 1997, the Student's mother was represented by an attorney, a parent advocate, Arapahoe Mental Health Child and Family Health Clinician Brian Tallant, and a friend. Also in attendance at the meetings were numerous school personnel, including various special education and regular education teachers and therapists.

5. In connection with the triennial review, numerous evaluations were performed on the Student, including a health assessment, a school/home/community/adaptive functioning assessment; adaptive behavior evaluation scales for home (with extensive input from the Student's mother and grandmother) and school; cognitive assessment; social/emotional assessment; communicative assessment; educational assessment by the Student's special education teacher and regular classroom teacher; physical/motor assessment; and hearing/audiology assessment.

6. The Student's mother and her representatives and the District's Special Education Team exchanged preliminary drafts of their ideas relating to the Student's needs, accommodations, goals and objectives before the first IEP meeting was held. The final version of the triennial IEP was the result of exchanging ideas and opinions at the IEP meetings and synthesizing the result.

7. The Student's triennial IEP is extensive and detailed, consisting of 43 pages. The Student's mother and her representatives had extensive input into developing the goals and objectives of the IEP and determining how they would be measured. Numerous goals and objectives were revised and redrafted at the mother's suggestion and these revisions were included in the final version of the IEP, including various recommendations from the mother's advisors. In the spirit of compromise and because of the mother's strong feelings on the subject, the District included in the IEP more time with various special education service providers than the Special Education Team members thought was necessary to meet the Students needs.

8. At the very beginning of the next school year (the 1997-98 academic year when the Student was in first grade), on September 16, 1997, the mother requested a review staffing to modify the Student's IEP goals and objectives. The District promptly complied with this request. A review staffing was held on September 23, 1997.

9. At the September 23, 1997 staffing, the Student's IEP was modified with respect to one of the matters raised by the mother. The Special Education Team agreed to provide extended school year services to the Student during an October school break. The IEP was not modified with respect to three other issues raised by the mother: right/left development, following directions, and an objective regarding rhyming. The Special Education Team determined not to add these matters to the Student's IEP because the team felt the Student's development in these areas was age-appropriate and did not require specific special education intervention. Nevertheless, the team indicated to the mother that these issues would be worked on in class since they were part of the first grade curriculum. In addition to these issues, at the September 23, 1997 staffing, Special Education Coordinator Jan Dougan agreed to look into finding an occupational therapist who could perform a sensory integration assessment as requested by the mother at that meeting.

10. On October 14, 1997, the mother requested another review staffing. This time, the mother gave no advance notice of the purpose of the meeting. The District complied with this request on a timely basis and the review staffing was held on November 3, 1997. At this meeting, the mother was represented by her attorney and a lay advocate. The mother raised a

number of issues regarding services not described in the Student's IEP, all of which were discussed by those present. The Special Education Team agreed to address some of the items in a variety of ways such as changing the prompt regarding toileting skills. However, with the exception of adding a baseline for one of the existing objectives on the Student's current IEP, the team determined it was unnecessary to make any changes in the IEP.

11. In December 1997, the mother requested a change in a scheduled meeting date to discuss extended school year ("ESY") services for the Student over the Christmas break, which meeting was ultimately scheduled and held at the convenience of the mother on December 16, 1997. Although it was the belief of the Special Education Team that the Student did not qualify for ESY for this period of time, the team agreed accommodate the mother by providing such services as a gesture of good faith. Further, despite its belief that it was not legally required to do so, the District reimbursed the Student's grandmother for providing the ESY services in question while the Student in South Dakota during the break, rather than requiring the ESY services to be provided locally.

12. The District also accommodated the mother's December 1997 request for advance dates for a second ESY meeting to be held in early 1998 to discuss ESY services for spring break. In addition, the District appropriately accommodated the mother's wishes in actually scheduling the meeting, which was ultimately held on February 24, 1998 and lasted 2-3 hours.

13. At the February 24, 1998 ESY meeting, the Student's mother was afforded an extended opportunity to explain why she believed ESY was appropriate for the Student during spring break. She was treated professionally and civilly by the Special Education Team. Also during the meeting, members of the Special Education Team explained why they did not feel the Student was eligible for ESY during this period. Ultimately, it was determined that ESY would not be provided to the child during spring break. There is no indication that the decision to deny ESY for spring break was predetermined, that the mother was treated in an intimidating fashion, or that the mother's input was not appropriately considered by the Special Education Team.

14. Three meetings, each lasting 2-3 hours, were held in April and May 1998 in connection with the Student's annual IEP review for the coming 1998-99 school year, the Student's second grade year. The District properly accommodated the mother's requests in scheduling these meetings.

15. Prior to the first of these meetings, held on April 14, 1998, members of the Special Education Team formulated a draft IEP for the mother's review and input. In addition, the mother and her representative were provided an opportunity for input into the agenda for each of these meetings.

16. The mother was represented at each of these meetings by legal counsel. In addition, at the first meeting she was also accompanied by her mother and clinical psychologist Dr. Margaret Charlton. At the second meeting, held on April 28, 1998, the Student's mother was accompanied by Occupational Therapist Patricia Kenyon.

17. The Special Education Team afforded the Student's mother and her representatives were provided an opportunity for active and effective participation in each of the meetings and in the development of the Student's 1998-99 IEP. The mother and her representative took advantage of that opportunity. Many changes in the initial IEP drafts were in fact made at the request of the mother and her representatives. For example, suggestions made by clinical psychologist Dr. Margaret Charlton at and following the first meeting were

incorporated in the Student's IEP and related documents. The team also carefully considered the assessment and suggestions of private occupational therapist Patricia Kenyon. In addition, many of the six pages of changes suggested by the mother's attorney prior to the final IEP meeting were also incorporated in the final IEP document.

18. The average IEP annual review in the District lasts one hour to one and one-half hours. In contrast, the Student's annual review meetings to prepare her 1998-99 IEP lasted approximately ten hours. Taking into consideration all the review staffings and additional meetings held between the Special Education Team and the Student's mother during the 1997-98 academic year, the District expended as much as 20 times more time on IEP-related meetings concerning this Student as compared with other special education students in the District.

19. During the 1997-98 academic year the Student's mother received, at her request, a "Back-and-Forth Book" from the Special Education Team. This book contained daily entries from team members concerning academic, physical and social/behavioral matters relating to the Student. It also contained daily comments from the mother concerning the Student's home activities and mood and any special requests or instructions to the team from the mother.

20. Also during this academic year and at the mother's request, the team provided detailed documentation to the mother regarding the student's daily progress toward achieving her IEP goals and objectives. When the mother explained to the team how and why a change in the manner of this documentation would be helpful to her, the team made the requested change. Other regular written communication from the team included weekly newsletters from the Student's teacher with personal notes, as appropriate, and report cards.

21. The quality of documentation provided by the District to the mother during the 1997-98 academic year in no way prevented the mother from participating in a meaningful way in the Student's education.

22. During the 1997-98 academic year and before that year as well, the Student's mother and her representatives regularly communicated with team members either orally or in writing, both for the purpose of sharing information and making requests concerning the Student's education. These communications were taken seriously and attended to by the District, even when issues raised by the mother (for example, with respect to toileting, playground safety and hyposensitivity) were not confirmed by any independent observations from team members.<sup>4/</sup>

23. The mother was an active, effective and meaningful participant in the Student's education both during the 1997-98 academic year and prior to that time. She had regular, significant and substantial input and impact relating to decisions concerning the Student's needs, goals, objectives, as well as the development of the Student's IEPs. She was also properly notified of meetings and accommodated in the scheduling of those meetings. The behavior of team members toward the mother was appropriate and in no way impeded her ability to participate fully and meaningfully in the Student's education.

#### **Development and Implementation of the Student's IEPs**

24. The Student's IEP for her kindergarten year was developed at transition staffings held on April 24, and June 6, 1996. No issues are raised in this proceeding concerning the

development and implementation of the Student's kindergarten year IEP and there is no indication that these were deficient in any way.<sup>5/</sup>

25. In meetings held to develop the Student's 1997-98 and 1998-99 IEPs, the District included the mother; the mother's representatives; the Student's regular education teachers; a representative from the District other than the Student's teacher who was qualified to provide or supervise the provision of special education services; as well as a number of other professionals involved in providing educational services to the Student.

26. Meetings held to develop the Student's 1997-98 and 1998-99 IEPs were held in a timely fashion and the IEPs were timely completed.

27. The Student's 1997-98 and 1998-99 IEPs contain a statement of the Student's present levels of educational performance and needs; a statement of measurable annual goals, including benchmarks or short-term objectives; and a statement of the special education and related services, supplementary aids, services and adaptations to be provided to or on behalf of the Student. In addition, the IEPs contain a statement of recommended placement in the least restrictive environment.

28. The Student's triennial 1997-98 IEP identified the following annual goals, each accompanied by short-term instructional objectives: 1) The Student will improve in her classroom survival skills; 2) The Student will improve in her friendship-making skills in all domains; 3) The Student will improve her skills for dealing with feelings; 4) The Student will continue to improve her expressive language skills; 5) The Student will continue to improve her articulation skills; 6) The Student will continue to improve fine motor and visual-motor skills in a school setting measured by teacher and therapist report; and 7) The Student will maintain age-appropriate academic skills. The record contains no indication that the mother disputes the goals and objectives contained in the 1997-98 triennial IEP.

29. The Student's 1997-98 triennial IEP also contains a variety of assessment data, including a reevaluation of whether she was educationally disabled under the IDEA; and written reports of assessments concerning the Student's health, adaptive behavior; school/home/community adaptive functioning, cognitive functioning; social/emotional functioning, communicative skills, educational functioning, physical/motor functioning; and hearing/ audiology.

30. Neither the mother nor her advisors contested the triennial IEP at the time it was completed in May 1997.

31. The Student's 1998-99 IEP identified the following annual goals, each accompanied by short-term instructional objectives: 1) The Student will continue to develop independence in the school setting; 2) The Student will continue to develop appropriate interpersonal and social skills; 3) The Student will continue to improve her oral language skills; 4) The Student will continue to improve her articulation skills; 5) The Student will continue to develop appropriate fine motor and visual-motor skills; 6) The Student will maintain age-appropriate academic skills.

32. The mother and her advisors participated actively, consistently and effectively in the development of the Student's 1997-98 and 1998-99 IEPs. The District seriously considered input from the mother and her advisors and adopted many suggestions made by them. In addition, the District expended considerable time, effort and expertise of its own in the

developing these IEPs. The District's preparation for IEP meetings for the Student was considerable. In fact, Dr. Charlton, the clinical psychologist advising the Student's mother, testified that the District had detailed objectives for the Student's 1997-98 IEP that were above and beyond what she had seen other school do in terms of preparation for IEP meetings.

33. The Student's 1997-98 and 1998-99 IEPs contain individualized and meaningful goals and objectives which address the Student's appropriately identified needs. In addition, the 1997-98 and 1998-99 IEPs provide appropriate objective criteria and evaluation procedures and schedules for determining, at least on an annual basis, whether the Student was achieving the short-term educational objectives set forth in the IEPs. The IEPs contain extensive short-term instructional objectives for each of the Student's numerous annual goals, along with detailed measurable criteria as well as evaluation procedures and schedules for each identified short-term objective. For example, four objectives are listed under the Student's 1998-99 IEP annual goal #1 ("the Student will continue to develop independence in the school setting"), and each of the objectives includes specific measurement criteria (e.g., "the Student will remain on task for 10 minutes without prompting during independent seat work"). Similar objectives and measurements appear in both IEPs for each of the listed annual goals.

34. The Student's 1997-98 and her 1998-99 IEP each contain an appropriate summary of her present level of performance, including educational attainment, social/emotional and life skills. The purpose of this aspect of the IEP documentation is to summarize the Student's strengths and weaknesses. These sections provide an adequate baseline to establish goals and monitor progress, especially when considered in combination with the IEPs' statement of educational needs.

35. The Student's triennial IEP was properly implemented during the 1997-98 school year. She received the special education services delineated in her IEP for the periods of time set forth in IEP, including implementation of her Behavior Management Plan, presence of an aide in class with her, speech/language pathologist services, and occupational therapy. In addition, specific issues listed in the IEP were regularly and consistently addressed by the Student's teacher and the Special Education Team throughout the academic year including motor issues, social and behavioral issues, and educational goals and objectives.

36. The Student's 1997-98 and 1998-99 IEPs both contain a goal indicating the Student will "maintain age-appropriate academic skills." These goals are sufficiently explicit, particularly since they are tied to the short-term instructional objective of meeting the District's very detailed "key-learnings" in the areas of math, reading and written language. The goals also take into consideration the Student's unique educational needs.

37. The Student's 1997-98 IEP provides that she is to receive 31 hours of paraprofessional services per week. There is no indication she did not receive all of these services. This IEP also provides, under "Statement of Educational Needs--Adaptations, Accommodations and Modifications," that the Student will have "additional trained support present at all recesses, PE and lunch." The record failed to establish additional trained support was not available during each of these times. Specifically with regard to lunch, the evidence indicated that an individual was available to assist the Student at lunch, although that individual's qualifications were not revealed in the record. The evidence also established that the mother had specifically informed the Special Education Team that the Student did not need an adult to eat lunch with her.



38. In addition to paraprofessional assistance during her first grade year, other support services were provided to the Student consistent with her IEP. For example, a speech/language pathologist worked with the Student one-on-one, in small groups and in the regular classroom 45 minutes per week and consulted with the Student's other providers 30 minutes per week. Also, an occupational therapist worked with the Student directly 30 minutes per week and consulted an additional 30 minutes per week.

39. The Student's Behavior Management Plan for the 1997-98 academic year listed "sensory menu within classroom--planned gross motor breaks (errands, drinks, jobs with carrying)" as an environmental strategy to deal with the Student's behavior issues. The uncontroverted evidence at hearing was that the District employed a series of sensory/motor activities to implement this provision and meet the Student's sensory needs during the 1997-98 school year. These activities included use of bars and swings during recess, wall push-ups, palm pushes and table push-ups as needed during the day, as well as use of a special seat cushion, squeeze toys, chewing gum and other tactile and sensory stimulation. The mother's psychologist advisor testified at hearing, and the Administrative Law Judge finds that the District was actually providing more sensory integration than the Student required.

40. The mother asserts the Behavior Management Plan was not properly implemented because sensory stimulation was provided to the Student on an as-needed basis rather than on a fixed schedule. However, the evidence indicates that the sensory stimulation which was provided at recess was provided on a scheduled basis. In addition, the evidence established that the decision as to whether to provide sensory stimulation on an as-needed basis rather than a fixed basis is a question of methodology for the delivery of special education services.

41. The mother also asserts the District failed to properly implement the sensory stimulation provisions of the Behavior Management Plan because the District did not grant the Student access to a water bottle. However, there is no indication in the written plan that such access was an element of the plan. Further, even if access to a water bottle was contemplated as part of the plan and was not granted to the student, the evidence failed to establish that such a deviation was in any way significant.

42. The mother also appears to assert, based on the testimony of a paraprofessional, that no sensory menu was in place in 1997-98. The evidence relied upon by the mother in this regard is equivocal and is inconsistent with other, more persuasive, evidence presented at hearing from other members of the Special Education Team and from the clinical psychologist advising the mother. The Administrative Law Judge finds a sensory menu was in place during the 1997-98 academic year.

43. The evidence failed to establish any material deviation from the Student's Behavior Management Plan with regard to sensory stimulation occurred. The Administrative Law Judge finds that during the 1997-98 academic year sensory integration techniques were implemented in accordance with the IEP.

44. The Mother asserts that an amendment to the Student's IEP required that changes be made to prompts regarding toileting skills and that such changes were not implemented. The record does not establish that any such amendment to the IEP was made (see finding of fact 10). Further, the evidence failed to establish that changes to the toileting prompts for the Student were not instituted by those individuals responsible for assisting the Student in this regard. The evidence indicated that, unlike other her classmates, the Student

was told she was required to go to the bathroom during class bathroom breaks, rather than merely being given an option. This appears to have been a change in the Student's previous toileting prompt.

45. The mother asserts that because the Student was unassisted with toileting she lost valuable time from class on several occasions during the 1997-98 school year. She points to one occasion when the Student was absent from the classroom and in the rest room for 25 minutes. The record contains no indication as to the circumstances of this incident. With regard to the other incidents, the record failed to establish that the Student's toileting issues were disability related or that her accidents resulted from a failure to comply with the IEP. Thus, no violation of the IEP or other failure to comply with IDEA was established based on toileting issues.

46. During the 1997-98 school year the Student achieved most of the goals and objectives in her triennial IEP and the Special Education Team was very pleased with her progress.

47. During the 1997-98 school year, the District provided appropriate documentation to the Student's mother concerning the Student's progress toward her educational objectives, including the "Back-and-Forth" book; daily documentation of objectives; report cards, and weekly newsletters from the Student's teacher with personal notes attached as appropriate. Although the mother complained generally to the Special Education Team in October 1997 that documentation concerning the achievement of objectives was not satisfactory to her, she did not specify what her objections were until April 1998, at which time the team altered its documentation style to satisfy the mother.

48. The record did not establish that the documentation provided to the mother up to April 1998 or after that time failed to comply with the requirement that objective criteria and evaluation procedures be in place to determine whether the Student was achieving the short-term educational objectives set forth in her IEP. Initial entries relating to documentation of objectives for the first grade year, which the mother objected to, included such terms as "worked on" "good" and "great" in connection with each of the Student's objectives that were worked on during any given day. In April 1998, the mother indicated that she preferred the previous year's documentation which used the symbols "+", "-", and "#" to designate whether the Student had worked on an objective on any given day, had achieved the objective or had not achieved the objective on that day. While the prior year's documentation may have been slightly more "objective" than the documentation used initially during the Student's first grade year, the documentation for both years conveyed essentially the same information. Documentation of goals and objectives in the first grade year was extremely detailed and extensive and conveyed a significant amount of information about the Student's progress toward achieving her goals and objectives.

49. The issue of the amount of service provider time that would be allocated to the Student was carefully considered in connection with the development of each of the Student's IEPs. Service provider time allocated in the Student's IEPs was based on the Special Education Team's understanding of the Student's needs, rather than on the convenience of the service provider or other extraneous factors. The record does not reflect that the amount of service provider time allocated to the Student in her IEPs was inadequate to meet her needs or enable her to benefit from her education. In making these allocations the Special Education Team took into consideration the Student's need for support and her concurrent need to become more independent.

50. The record does not reflect that any improper considerations or procedures were utilized in making decisions concerning the amount of service provider hours or paraprofessional hours to be provided to the Student as part of either her 1997-98 or 1998-99 IEP. The evidence did not establish that final determinations concerning paraprofessional hours or service provider hours were made before the Student's goals and objectives for the year were finalized.

51. There was a dispute in the evidence as to the progress the Student was making in socialization with her classmates during her first grade year. The Student's teachers and service providers, who saw her on a daily or regular basis, testified the Student was making significant progress in this area. In contrast, the mother's advisors who each observed the Student in class on only limited occasions, expressed some concern in this area. After weighing the evidence, the Administrative Law Judge finds the evidence did not establish either that the District failed to implement the Student's IEP socialization goals and objectives or that the Student failed to make appropriate progress in this area.

52. In determining the educational needs of the Student, the Special Education Team and the mother sometimes disagreed about whether particular needs identified by the mother were related to the Student's disabilities or were merely age-appropriate behaviors or issues. In connection with these disagreements and after thorough discussion, the team sometimes acquiesced to the mother's requests, although the team did not believe the issue in question was disability-related. On other occasions, the team did not agree to provide the service requested because the team did not believe the problem was disability-related or did not believe the issue identified by the mother was a problem at all. These instances involved honest disagreement over the needs of the child and the best way to meet those needs.

53. The District did not withhold from the mother documentation required by the IDEA to be provided to the mother.

#### **Evaluation of the Student and Payment for Independent Educational Evaluations**

54. The Student's fine motor abilities, including her handwriting, have been addressed in her 1997-98 triennial review IEP for first grade and in her 1998-99 IEP. Goals and objectives were established with respect to this issue. The record indicates that during first grade these goals and objectives were implemented in a manner consistent with the IEP provisions. The record does not indicate that the mother ever requested a specific assessment with regard to the Student's handwriting, that appropriate handwriting assessments were not performed, or that any specific assessment which was not performed was necessary in order to adequately provide devices and/or services to assist the Student with her handwriting or other fine motor issues. The evidence also failed to establish that the Student's handwriting and other fine motor issues were not being appropriately addressed by the District in the Student's IEPs or that the Student was not progressing in this area.

55. Following the mother's request on September 23, 1997, to have a sensory integration assessment performed on the Student (see finding of fact 9), the District attempted to obtain more explicit information from the mother as to the type of evaluation being requested. The mother did not respond to a written request for that information from the District's Director of Special Services.

56. After the mother's initial request for the assessment the District also attempted to locate an individual who would be able to perform a sensory integration assessment and informed the mother that it was making this attempt. However, before the District was able to arrange for the assessment, the mother informed the team in October 1997 that she had had the assessment performed at The Children's Hospital. The Children's Hospital assessment was performed in October 1997.

57. Prior to the hearing in this matter the mother had never requested reimbursement for the October 1997 sensory integration assessment performed at The Children's Hospital or for any other independent educational evaluation ("IEE") the mother may have had performed. The record contains no indication that the mother shared the October 1997 sensory integration assessment with team prior to the IEP meetings in the spring of 1998, although the mother did raise sensory integration issues with the Special Education Team prior to that time. The record also does not establish the cost of any such evaluation or any other IEEs that the mother may have had performed.

58. Sensory integration relates to the way in which an individual registers and perceives sensory information and organizes that information for functional use. Sensory integration disorders may cause individuals to be hyper- or hyposensitive to sensory stimulation. Such disorders may also interfere with an individual's ability to make sense of all the sensory information the individual is receiving. An individual with sensory integration difficulties may have an impaired ability to concentrate on important information coming into the system as well as an impaired ability to filter out unimportant stimuli. Sensory integration theory posits that sensory integration therapy and a sensory diet (specific sensory stimuli) may assist in alleviating these deficits and therefore may assist with learning.

59. Difficulty with sensory integration is a medical diagnosis, but is not an educational disability. Sensory integration therapy is merely a one methodology or technique (a somewhat controversial one) for addressing sensory integration disorders. Other recognized methodologies exist for the delivery of special education services for addressing these issues.

60. Because sensory integration therapy is a methodology and not a disability, the Special Education Team felt that it was under no legal obligation to accede to the mother's requests to consider and address sensory integration needs. Nevertheless, the team did honor the mother's request to consider and address this matter at the 1998 IEP meetings. In addition, prior to this time in connection with the 1997-98 triennial IEP (see findings of fact 39-43), the Student was in fact provided with a sensory diet and a behavior plan to address her sensory integration needs, which diet and plan were implemented and followed. Further, although Dr. Charlton (the mother's psychologist) had a preference that it be done on a more regular, fixed basis, she conceded that the District was doing more sensory integration than the Student actually needed.

61. The Student was properly assessed and evaluated by the District to in areas related to her disability to determine the nature and extent of the special education and related services that she required.

62. The record does not reflect that the Student requires any additional gross motor therapy to meet her sensory integration needs.

63. The District's evaluation of the Student for her triennial IEP and for her 1998-99 IEP was appropriate.

### **Provision of Necessary Related Services and Assistive Technology**

64. "Related services" under the IDEA includes transportation and "such developmental, corrective and other supportive services as are required to assist a child with a disability to benefit from special education." 34 C.F.R. §16. During the course of various staffings, the Special Education Team considered related services for the Student and authorized such services. Under the 1996-97 (kindergarten), 1997-98 and 1998-99 IEPs the Student was to receive related services in the form of speech/language services and occupational therapy. The mother does not contest that these services were provided as required by the IEPs in the kindergarten and first grade years.

65. The mother has made no request for related services beyond those provided for in the IEPs.

66. The record does not reflect that any related services other than speech/language and occupational therapy are required to assist the Student to benefit from special education.

67. "Assistive technology device" under the IDEA is any item, piece of equipment, or product system, whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of children with disabilities." 34 C.F.R. §300.5. During the course of staffings, the Special Education Team determined that no assistive technology devices were required to for the Student to benefit from her education. Nevertheless, when the mother requested pencil grips and the use of an Alpha Smart keyboard during the 1997-98 school year, the team made these available to the Student as an accommodation because the mother had asked for them.

68. The mother believes that because the Student has fine motor difficulties, a pencil grip will help the Student in her writing by assisting her to put less pressure on the pencil. The mother also believes that an Alpha Smart keyboard (a portable keyboard that can be attached to a computer to obtain a print-out) will assist the Student in the writing process by allowing the Student to put her thoughts into words without having to concentrate so much on the physical process of getting the words down on paper.

69. The mother does not contend that the requested pencil grips and Alpha Smart keyboard were not made available to the Student as promised. She also has not asserted that any other assistive technology devices should have been offered to the Student.

70. The record does not establish that any assistive devices other than pencil grips and the Alpha Smart keyboard would aid the Student in any way. The record does not reflect that any assistive technology device is actually required to assist the Student to benefit from special education.

### **Extended School Year Services**

71. Extended school year services ("ESY") are services provided to a student outside of the regular school year. The purpose of ESY is to prevent significant regression of a previously acquired skill which would jeopardize the educational benefits accrued by a student during the regular school year. ESY eligibility must be determined individually for each student.

72. As part of her 1996-97 IEP, the Student was provided with ESY during the summer of 1996. Services provided included a six-hour transition to kindergarten program conducted on six different days at Roxborough Elementary Schools; an extended day kindergarten program for four days during the summer; \$300 for private services/activities to occur in South Dakota while the Student was visiting her grandmother; and reimbursement for one hour of speech/language and one hour of occupational therapy per week during the first two-week break of the 1996-97 school year. Specific plans for additional ESY during the 1996-97 school year were deferred for later determination.

73. ESY continued to be offered to the Student during school breaks throughout her kindergarten year. With the exception of the Christmas 1996 break when the Student's mother did not make the Student available for ESY, the Student received ESY services during significant school breaks in her kindergarten year.

74. The Student's initial 1997-98 triennial IEP indicated that the Student was eligible for services beyond the regular school year in order to "maintain skills in S/L [speech/language], motor and social development." Pursuant to this provision the Student received ESY services during the summer preceding her first grade year.

75. Subsequently, several review staffings were held to consider the Student's continued eligibility for ESY services. ESY services were provided to the Student during the October 1997 break as well as during Christmas 1997 break, although the Special Education Team did not believe the Student was eligible for these services (see finding of facts 9 and 11). In February 1998, another review staffing was held to consider ESY services for the upcoming spring break. At this time the team, over the mother's objection, found the Student was not eligible for ESY during that period of time (see finding of fact 13).

76. During the Student's May 13, 1998 IEP meeting, the team determined, again over the mother's objection, that the Student was not eligible for ESY services for the upcoming summer break or subsequent breaks because "there was no documented history of regression."

77. The team utilized and applied the District's Guidelines for Extended School Year Consideration in making its determinations concerning ESY for the Student. These guidelines were intended by the District to implement the ESY analysis required by controlling case law.

78. In making ESY determinations with respect to the Student, the team individually considered for this Student whether such services were necessary to prevent significant regression of a previously acquired skill which would jeopardize the educational benefits accrued by the Student during the regular school year. Included in these deliberations was consideration of the Student's record of past regression and rate of recoupment. In addition, the team considered, among other things, whether it was likely that the Student would regress in the future without ESY services or if some other factor existed that would warrant the provision of ESY services in order to maintain the Student's skill levels during school breaks. After considering the factors set forth in the District's guidelines, the team determined the Student was not eligible for ESY services.

79. Prior to making its determinations that the Student was not eligible for ESY services during the 1998 spring and summer breaks, the team spent considerable time at IEP meetings discussing whether the Student had regressed at school during unsupported breaks and considering predictive data. The team considered the opinions of professionals and the Student's mother in making these determinations.

80. The mother presented anecdotal evidence during IEP meetings that the Student experienced some behavioral regression immediately following the Student's unsupported Christmas 1996 (kindergarten) break. No school records were presented to support this claim. There were no assertions or evidence of any academic regression following that break. In addition, there was no evidence that the behavioral regression the Student may have experienced was attributable to the break or was unreasonably lengthy. There was also no evidence that the Student was unable to recoup quickly any behavioral skills lost in connection with that break.

81. At hearing, the mother attempted to establish that following her unsupported spring 1998 break the student experienced a significant behavioral regression. The evidence as a whole did not support a finding that a significant behavioral regression occurred as a result of the unsupported break. Although the Student's behavior following the 1998 spring break was less under control than it had been earlier in the school year, the evidence indicated that this behavioral change had actually occurred prior to spring break and carried over following spring break.

82. With the questionable exception of the Student's 1996 Christmas break experience, there was no evidence available to the team at the time it made its ESY determinations and no evidence presented at hearing that would indicate the Student failed to maintain her skills or regressed academically or socially as a result of unsupported breaks. Further, there was no evidence presented to the team or at hearing to suggest that the Student experienced any prolonged educational regression or that unsupported breaks would significantly jeopardize the educational benefits derived by the Student during regular school programming. Instead the vast majority of data available to the team and presented at hearing indicates the contrary. For example, the record reflects that the Student experienced a positive jump in her academic performance after the 1998 spring break.

83. The Student's level of educational achievement is not jeopardized by breaks in her structured educational programming.

84. The Student was not entitled to ESY during the spring and summer of 1998.

### **Free Appropriate Public Education**

85. The Student's 1996-97 IEP, like her IEPs for 1997-98 and 1998-99, contains a statement of the Student's present levels of performance and needs; a statement of measurable annual goals, including benchmarks or short-term objectives; and a statement of the special education and related services and supplementary aids and services to be provided to or on behalf of the Student. In addition, the kindergarten IEP contains a statement of recommended placement in the least restrictive environment. The IEP also contains a full set of goals, objectives and related services.

86. There is no indication in the record that the kindergarten IEP was flawed in any way, either in content or the procedures by which it was developed. There is also no evidence that the kindergarten IEP was not reasonably calculated to enable the Student to receive educational benefit.

87. During the Student's kindergarten year the Student experienced significant growth in her academics, social skills, fine and gross motor skills and speech/language abilities.

The Student also made substantial progress in acquiring independence and impulse control. In the course of the hearing, the mother acknowledged the progress made by the Student during that time and indicated that she did not take issue with the Student's 1996-97 IEP. There is no evidence that the mother takes issue with the Student's progress during her kindergarten year or that the Student did not receive meaningful educational benefits from her kindergarten education.

88. The Student's triennial IEP for the 1997-98 school year, including the statement of measurable annual goals with short-term objectives and statement of services to be provided to or on behalf of the Student, was individually developed and reasonably calculated to enable the Student to receive educational benefit.

89. During the Student's first grade year her progress in language arts was outstanding, as observed by her teacher and therapist and as established by objective testing and documentation. During this time, the Student's reading ability progressed from level 3 to level 20, placing her exactly at grade level. She also made significant progress in math, with results ranging from average to low-average. The Student's speech/language skills improved significantly. Her speech/language therapist indicated the Student had improved to the point where she might no longer qualify as having a speech/language disability. The Student therefore achieved all of her academic goals and objectives for the year. She also achieved most of her expressive language goals and objectives. The Student was promoted to second grade with academic skills that were generally age and grade appropriate and was generally functioning within the key learnings at her age level.

90. The mother presented evidence from a psychologist in support of the position that the Student was functioning six months to one year below her grade level at the end of the first grade. This evidence was not convincing since it did not involve any assessment of the Student's performance in the classroom. In addition, testing methods or assessments utilized by the psychologist were called into question. In contrast, evidence from the District concerning the Student's first grade progress was based on the Student's actual performance in the classroom. The Administrative Law Judge considers the latter information more reliable and more persuasive as to the Student's actual progress during first grade and her level of achievement at the end of that year.

91. In addition to making substantial and meaningful academic progress in the first grade, the Student also made substantial and meaningful progress on her other goals as well. She achieved at least four out of five of her classroom survival skills objectives; four out of five of her friendship-making skills; two out of four of her objectives for dealing with feelings; two out of four of her fine motor and visual motor objectives. She also achieved her articulation goal and objective. In addition, she made substantial progress toward mastering each of the objectives that were not achieved.

92. At hearing, both the Student's mother and her grandmother acknowledged that the student had benefited from her first grade education and had made progress academically during the year. The mother's psychologist advisor, Dr. Chariton, agreed that during the Student's first grade year the District was doing an excellent job of meeting the Student's needs and was very impressed with the services being provided to the Student. The Student's pediatrician also stated during the year that the Student had made remarkable progress.



93. The Student's IEP for her first grade year was reasonably calculated to enable the Student to receive educational benefits and during her first grade year the Student received substantial educational benefit from her program at the District.

94. At the end of her first grade year, IEP staffings were held to prepare for the Student's second grade year (see findings of fact 25-34). At the conclusion of those meetings it was determined that the Student was not eligible for ESY any longer. Thus, the Student's 1998-99 IEP did not provide for ESY for the summer of 1998. The evidence failed to establish that the decision not to provide ESY services for the summer of 1998 resulted in the Student's IEP not being reasonably calculated to provide educational benefit to the Student.

95. At the conclusion of the 1998-99 IEP meetings it was also determined that paraprofessional services for the Student would be decreased from 31 hours per week to 10 hours per week for the Student's second grade year. Provider hours for the Student's other service providers, including speech/language and occupational therapy, were also established at this time. These hours were decreased slightly from the preceding year.

96. The evidence failed to establish that the paraprofessional hours and other service provider hours allocated to the Student for her second grade year were not reasonably calculated to accomplish the goals and objectives of the Student's 1998-99 IEP or were not reasonably calculated to provide educational benefit to the Student.

97. The evidence did not establish that any aspect of the 1998-99 IEP failed to comply with IDEA or that the 1998-99 IEP is not reasonably calculated to provide educational benefit to the Student.

98. After the 1998-99 IEP was developed, the mother objected to certain aspects of the it. She requested a due process hearing to deal with her objections to the 1998-99 IEP and other issues of concern. This proceeding ensued.

99. Because of the mother's objection to the new IEP, a stay-put order has been in place with respect to the Student's education pending the conclusion of this proceeding. Thus, her prior IEP is in effect. With the exception of her academic goals which have been altered to be grade-appropriate for her current level of schooling, all other aspects of her triennial IEP have remained in effect.

100. The Student's triennial IEP and her IEP for the 1998-99 school year, including the statements of measurable annual goals with short-term objectives and statement of services to be provided to or on behalf of the Student, were individually developed and reasonably calculated to enable the Student to receive educational benefit.

101. The mother has resourcefully located and enlisted additional help for the Student through utilization of school and other non-school related resources. Those outside sources include counseling, occupational therapy aid through the Children's Hospital, and speech therapy and counseling through Aurora Mental Health. The mother has also enlisted an imposing support group which includes grandparents, a child advocate and attorneys.

102. The fact that the mother has enlisted additional help and support does not suggest or establish that the Student is only receiving benefit from these sources and is not receiving educational benefit from her schooling. On the contrary, the evidence established the Student is receiving substantial benefit from her schooling.

## **DISCUSSION**

### **Statutory Background and Burden of Proof**

The IDEA, 20 U.S.C. §§1400 *et seq.*, 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 20 U.S.C. §1401(20). The IDEA provides certain procedural and substantive to rights to parents of children with disabilities and permits parents who believe those rights have been violated seek administrative and judicial review. The IDEA sets forth a procedure by which IDEA issues may be reviewed by an impartial hearing officer at the local level (IHO). 20 U.S.C. §§1415(a), (b), (d); 34 C.F.R. §§300.506. An administrative appeal of that decision may then be taken at the state level. 20 U.S.C. §1415(c); 34 C.F.R. §§300.509-510.

In the present proceeding, following a local level hearing, the Student's mother now appeals the decision of the IHO to the state level. In this appeal the mother has the burden of proof to demonstrate that the District has not provided educational services to the Student in compliance with the IDEA. *A.E. v. Independent School District No. 25*, 936 F.2d 472, 475 (10th Cir. 1991); *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990), *cert. denied* 500 U.S. 905 (1991); *Chuhuran v. Walled Lake Consolidated Schools*, 839 F. Supp. 465 (E.D. Mich. 1993).

### **Issues Raised on Appeal**

#### **A. Parental Participation in the Student's Education**

The mother asserts that she were denied meaningful participation in the Student's education because objective criteria was not included in the Student's IEP; the Special Education Team failed to consider Sensory Integrative Evaluation ("SIPT") evaluations; the Special Education Team's behavior toward the mother was demeaning and intimidating; IEP meetings were not held at mutually agreeable times and places; and the Special Education Team failed provide necessary information requested by the mother. The IHO held that the mother failed to prove her claim. The Administrative Law Judge agrees with the IHO and concludes the mother was afforded a meaningful opportunity to participate in the Student's education.

The IDEA relies heavily on compliance with procedural requirements to ensure that the goal of providing students with a free appropriate public education will be achieved. Of particular importance in this scheme are the various procedural safeguards established in the IDEA to assure that parents will have an opportunity for "meaningful input into all decisions affecting their child's education and the right to seek review of any decisions they think inappropriate. *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). Meaningful parental participation is achieved when the parent is afforded a meaningful and adequate opportunity to participate in the process of formulating the Student's IEP. See *Urban v. Jefferson County School District R-1*, 89 F.3d 720 (10th Cir. 1996).

However, the requirement for meaningful parental participation is not synonymous with authority to dictate the contents of the Student's IEP. Under the IDEA the parent is an equal partner, see *Scituate School Committee v. Robert B.*, 620 F. Supp. 1224, 1229 (D. R.I. 1985), *aff'd* 795 F.2d 77 (1st Cir. 1986), but has no right to dictate the terms of an IEP; the parent's

right is to be involved in the process of developing the Student's IEP. In this case, the record clearly reflects that the mother was afforded the right to participate fully, actively, consistently and meaningfully in the development and formation of the Student's IEPs and the services that would be provided to the Student. Thus, the meaningful parental participation requirements of IDEA have been satisfied. *Board of Education v. Rowley*, 458 U.S. 176, 205 (1982) ("Rowley").

The mother asserts that her mere presence at IEP meetings does not establish that meaningful participation occurred. She argues that various factors impeded her ability to participate effectively and violated the IDEA's meaningful participation requirement. While the Administrative Law Judge agrees with the mother that mere attendance at required meetings does not equate with meaningful participation, the Administrative Law Judge disagrees with the assertion that meaningful participation did not occur in this case.

The evidence established that the mother has been a very active participant in the Student's education from the beginning. In addition, the Special Education Team has spent extensive periods of time in IEP meetings developing and fine-tuning the Student's educational program. The mother has been present for these meetings and often has been both represented by counsel and accompanied by other advisors. At these meetings, the mother and her representatives have been given extensive opportunities to provide input and many of their suggestions and requests have been incorporated into the Student's IEPs. Significantly more time has been spent by the team developing and amending the Student's IEP than is usually the case with other special education students.

In addition to participating in IEP meetings, the mother has been involved in the Student's education through extensive ongoing communication with the Special Education Team, both oral and written, including the daily "Back-and-Forth book, written documentation of objectives, and regular contacts with the Student's teacher.

Although the mother asserts her participation was hindered because objective criteria was not included in the Student's IEP, the record does not support such a claim. Documentation and assessments provided for the development of both the triennial IEP and the 1998-99 IEP were detailed and in some cases exhaustive. Appropriate objective measures were included. To the extent the mother's argument in this regard references the daily documentation of objectives provided by the Student's first grade teacher, such argument is without merit. The Student's IEP required that classroom documentation of objectives would be completed daily and sent home quarterly. This required was fully implemented. Further, the material provided in that document, in combination with the other documentation concerning the Student's progress which was available to the mother, was more than sufficient to allow the mother to participate meaningfully in IEP meetings. In addition, documentation concerning the Student's progress generated during the year and available at IEP meetings also complied in all respects with the requirements of 20 C.F.R. §346(a)(5) that IEPs include "appropriate objective criteria and evaluation procedures and schedules for determining ... whether the short term instructional objectives are being achieved."

The mother also argues that meaningful participation was impeded because the Special Education Team failed to consider SIPT evaluations; the team's behavior toward the mother was demeaning and intimidating; IEP meetings were not held at mutually agreeable times and places; and the team failed provide necessary information requested by the mother. The record did not provide any factual basis for any of these claims.

Thus, the record clearly established the mother was afforded meaningful parental participation with respect to the Student's education.

### **B. Development and Implementation of the Student's IEPs**

The mother asserts that the District failed properly to develop and implement the Student's IEPs by, among other things, failing to have trained support during lunch; failing to have a sensory menu or diet in place and/or failing to follow that menu; and failing to assist the Student with toileting and self-monitoring of toileting. The record does not support those assertions. The IHO determined the mother had failed to meet her burden of proof on this issue. The Administrative Law Judge agrees with the IHO.

First, the record is clear that the District properly complied with all procedural requirements with respect to the IEPs. As required by the IDEA, the IEPs were in writing and included a statement of present levels of educational performance and needs; a statement of measurable annual goals, including benchmarks or short-term objectives; and a statement of the special education and related services and supplementary aids and services to be provided to or on behalf of the Student. See 20 U.S.C. §1401(20). In addition, the triennial IEP contained extensive assessments and a reevaluation as to whether the Student was educationally disabled as defined by the IDEA, as well as a statement of her educational needs.

The evidence also established that the District was not merely providing minimally adequate services to the Student. The Student's IEPs were extremely long and detailed. The objectives in the Student's IEPs were characterized by the mother's psychologist advisor as above and beyond what other school districts do. In addition, the IEP goals were appropriate for their intended purpose, which is to provide an overall direction for the Student's educational program. IEPs are not intended to serve as a detailed instructional plan, but merely to form a basis for developing such plans. 34 C.F.R. Part 300, Appendix C, question 37.

The District also complied with all requirements in holding IEP meetings. All appropriate personnel required by 34 C.F.R. §300.344 were present at these meetings. In addition, each of the mother's concerns was seriously and extensively addressed and considered.

In addition, the record does not establish that the District failed to implement the Student's triennial IEP in the Student's first grade year. On the contrary, the record revealed that the District did fully implement the Student's IEP during that year. The Student received the special education services described in her IEP for the periods of time and in the manner required by the IEP. Specifically, the Student's Behavior Management Plan was implemented, there was always an aide in class with the Student, and she received speech/language service and occupational therapy as provided in the IEP. In addition, the specific goals and objectives of the IEP were consistently addressed by the Student's teacher and the Special Education Team throughout the year, including motor issues, social and behavioral issues, and educational goals and objectives.

The mother asserts specifically that no trained support was available during lunch. The record does not support this assertion. The evidence established that an individual was available to assist the Student at lunch, although the qualifications of that individual are not disclosed in the record. The record also established that the mother specifically informed the Special Education Team that the Student did not need to have an adult eat with her.

Also contrary to the mother's assertion, the evidence did not establish that the District failed to implement the Student's sensory menu or diet. The mother claims, first, that there was no implementation at all of this provision. The Administrative Law Judge has found to the contrary. The record revealed that the District employed a series of sensory/motor activities to implement the sensory menu provision of her Behavior Management Plan, using such items as bars and swings during recess, wall push-ups, palm pushes, table push-ups, a special seat cushion, squeeze toys and chewing gum. These actions constituted compliance with the IEP.

The mother also argues that the provision was not implemented properly because it was not implemented on a regular basis but instead was implemented on an as-needed basis and therefore did not properly constitute a "sensory menu" or "diet." The record did not establish that all aspects of sensory plan were implemented on an as-needed basis. For example, sensory activities at recess were done on a regular basis. Further, the evidence established that the District was providing more sensory integration than the Student actually needed and that the manner in which sensory stimulation was delivered (whether on an as-needed basis or on a fixed basis) was merely a matter of methodology. When, as here, a child is receiving benefit from special education, matters of methodology are appropriately left to the educators to decide and cannot be a basis for invalidating an IEP or determining that the IDEA has been violated. *Rowley*, 458 U.S. at 207-8; *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 294-297 (7th Cir. 1988) cert. denied 488 U.S. 925 (1988) (when a child is receiving benefit from her IEP, due process challenges to educational methodology are not proper under the IDEA; questions concerning educational methodology are best left to educators to determine); *Mather v. Hartford School District*, 928 F.Supp. 437, 447 (D. Vt. 1996); *Evans v. District No. 17*, 841 F.2d 824, 831 (8th Cir. 1988).

Thus, the mother's disagreement as to the District's method of delivery of sensory and sensory motor activities to implement the sensory menu provision of the Student's Behavior Management Plan cannot be a basis for finding any violation of IDEA occurred in this case.

Other IEP implementation issues which were raised by the mother at various points in the hearing process but not included in her brief, also do not establish any violation of the IEP and the IDEA. The Administrative Law Judge has specifically found, for example, that documentation and communication with the mother were more than adequate, that the service provider time allocated to the student in the IEP was provided to her, and that the Student's socialization issues were addressed by the Special Education Team.

The mother also asserts the District failed to assist the Student with toileting and self-monitoring of toileting skills as required by the IEP. The Administrative Law Judge has found that the mother failed to establish lack of compliance in this area.

Finally, even if some lapse occurred in the development of some aspect of the Student's IEP, no showing has been made that such lapse was substantial, interfered with parental participation, compromised the Student's right to an appropriate education or resulted in any significant loss of educational benefit to the Student. Under these circumstances, no violation of the IDEA has been established. See *O'Toole v. Olathe District Schools*, 144 F.3d 692 (10th Cir. 1998); *Roland M. v. Concord School Committee*, 910 F.983, 994 (1st Cir. 1990), cert. denied 499 U.S. 912 (1991).

### **C. Evaluation of the Student and Payment for Independent Educational Evaluations.**

The mother claims that she is entitled to certain evaluations of the Student and reimbursement for Independent Educational Evaluations. The IHO found the mother had failed to sustain her burden of proof on this issue. The Administrative Law Judge finds that the evaluations of the Student performed by the District were appropriate and the mother has failed to establish she is entitled to reimbursement for any independent educational evaluations that were performed.

A parent is entitled to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. 34 C.F.R. §503(b). However, the public agency may initiate a hearing pursuant to 34 C.F.R. §506 to show its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation which must be considered by the public agency, but not at public expense. 34 C.F.R. §503(b) and (c). An evaluation is defined as procedures used to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs. 34 C.F.R. §§300.500 and 300.530-300.534. A child is to be assessed in all areas related to the suspected disability, including, if appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities. 34 C.F.R. §300.532.

The mother asserts, first, that the District failed to assess the Student's below-grade level handwriting and thus failed to provide an appropriate level of educational benefit or support. The record does not indicate that the mother ever requested a specific assessment with regard to the Student's handwriting, that appropriate handwriting assessments were not performed, or that any specific assessment which was not performed was necessary in order to adequately provide devices and/or services to assist the Student with her handwriting or other fine motor issues. The evidence also failed to establish that the Student's handwriting and other fine motor issues were not being appropriately addressed by the District in the Student's IEP or that the Student was not progressing in this area. Therefore, the mother failed to establish the factual predicate for this claim.

The mother also asserts that the District's failure to evaluate the Student regarding her sensory integration and sensory needs constituted a violation of the IDEA. However, "sensory integration and sensory needs" are not an educational disability and do not give rise to eligibility for special education and related services under the IDEA. Instead, the evaluation sought by the mother related to the methodology by which services would be provided to the Student. In addition, the evidence established that the District's overall evaluations of the Student were appropriate, covered the Student's needs and the Student was receiving a FAPE. Under these circumstances, no requirement existed for the District to evaluate the Student's sensory integration and sensory needs. *Rowley*, 458 U.S. at 207-8; *Lachman v. Illinois State Board of Education*, 852 F.2d at 294-297; *Mather v. Hartford School District*, 928 F.Supp. at 447; *Evans v. District No. 17*, 841 F.2d at 831; *O'Toole v. Olathe District Schools*, 144 F.3d 692 (10th Cir. 1998).

Finally, the evidence established that the District did address the Student's sensory education needs by discussing this issue at a number of IEP meetings; considering the sensory integration evaluations that were performed privately for the mother; and through the Behavior Management Plan, providing the Student with a sensory integration plan and diet to address the Student's sensory integration issues and needs.

Thus, no showing has been made that the District violated the IDEA in connection with the manner in which it evaluated and addressed the sensory integration needs of the Student and no order for reimbursement of any IEEs performed on behalf of the mother is appropriate.

A reimbursement order is inappropriate for an additional reason. Although the mother asserts she is entitled to reimbursement for the independent educational evaluations she may have had performed for the Student, the record contains only oblique references to the sensory integration IEEs and no reference to any other IEEs. In addition, the record contains no indication of the cost of such IEEs. Under these circumstances, no reimbursement order can be entered. *San Mateo Foster City School District* 28 IDELR 527, 535 (SEA Cal. 1998); *Melrose Public Schools*, 27 IDELR 1178, 1182 (SEA Mass. 1998); see *Board of Education of Smithtown Central School District*, 22 IDELR 818 (SEA New York 1995).

#### **D. Provision of Necessary Related Services and Assistive Technology**

The mother asserts that the District failed to provide necessary related services and assistive technology to the Student. She does not specify in her brief what related services and assistive technology are at issue. The IHO determined the mother failed to meet her burden of proof concerning this contention. The Administrative Law Judge concurs with the IHO.

Under the IDEA, the District is required to provide related services and/or assistive technology if they are required for the Student to receive a FAPE. 20 U.S.C. §§1401(17) and (26); 34 C.F.R. §§ 300.5, 300.16 and 300.308; 2220-R-5.03(1)(c), 1 CCR 301-8. *Letter to Naon*, 22 IDELR 888 (OSEP 1995); *Letter to Lieberman*, 17 EHLR 119 (OSEP 1990). Only those related services or assistive technologies determined by the team to be required need be addressed in the IEP. *Letter to Anonymous* 24 IDELR 854 (OSEP 1996).

In this case, the Special Education Team decided at IEP meetings what related services were required in order for the Student to benefit from her education and included these (for example, speech/language services and occupational therapy) in the Student's IEP. These services were then provided to the Student in compliance with the IEP. There is no indication in the record that any additional related services were required for the Student to benefit from her education and receive a FAPE. The mother has never requested any additional related services other than those provided for in the Student's IEP.

The team also determined that no assistive technology was required for the Student to receive a FAPE. There is no indication in the record that any assistive technology was required for the Student to benefit from her education and receive a FAPE. Nevertheless, when the mother requested a pencil grip and Alpha Smart keyboard, these were provided to the Student as an accommodation. No further assistive technology has been requested by the mother.

The Administrative Law Judge has found that the Student's IEPs are reasonably calculated to provide educational benefit to the Student. In addition, the Administrative Law Judge has found that the Student has been making educational progress without related services not specified in her IEP. The Administrative Law Judge has also found that the Student is making educational progress without assistive technologies which have not been provided to the Student by the District. Thus, the District has been providing a FAPE to the Student with only those related services and assistive technologies specified in the IEP and/or provided to the Student. Under these circumstances, no other related services or assistive technologies need be specified in the IEP or provided to the Student. *Laredo Independent School District, 27 IDELR 856, 858 (SEA Tex. 1997)*; *Board of Education of Smithtown Central School District, 22 IDELR 818, 822 (SEA N.Y. 1995)*.

### **E. Extended School Year Services**

The mother asserts that the District violated the IDEA by failing to provide ESY services to the Student in the spring and summer of 1998. At the close of the mother's case, the IHO determined the mother had failed to meet her burden of proof concerning this issue and dismissed this aspect of the case. The Administrative Law Judge also determines that the mother has failed to meet her burden of establishing that the District was required to provide the ESY services in question.

The Student is only entitled to ESY services if educational benefits acquired during the regular school year would be significantly jeopardized in the absence of special educational services being provided during school breaks. *Johnson v. Independent School District No. 4, 921 F.2d 1022, 1027-31 and n. 9 (10th Cir. 1990) cert. denied 500 U.S. 905 (1991)*. This determination is appropriately made by considering past data, including information about past regression and rates of recoupment, as well as predictive data.

The District's consideration of the ESY issue with respect to the Student complied with all legal requirements. In considering the mother's ESY requests at staffing meetings, the District applied its Guidelines for Extended School Year Consideration. These guidelines were intended by the District to track the ESY analysis contained in *Johnson* and do, in fact, track that analysis. The record reflects that in making its ESY determinations the District considered information from the team indicating that the Student maintains her skills and does not regress academically or socially as a result of unsupported breaks. The record at hearing further established that the facts relied on by the team in making these ESY determinations were in fact accurate.



The evidence available to the team at the time it made its determinations and the evidence presented at hearing indicated the Student maintains her skills and does not regress academically or socially as a result of unsupported breaks. Certainly no information presented suggested that the Student experienced any prolonged educational regression or that unsupported breaks would significantly jeopardize the educational benefits derived by the Student during regular school programming.

Thus, the record established that the Student's level of educational achievement is not jeopardized by breaks in her structured educational program. The Special Education Team made its ESY determinations concerning the Student in compliance with applicable procedural and substantive requirements.

### **F. Free Appropriate Public Education**

The mother asserts that the District denied the Student a free appropriate public education. The IHO found that the Student was not denied a FAPE. The Administrative Law Judge also concludes no denial of a FAPE occurred.

The IDEA defines free appropriate public education as "special education and related services" which are provided at public expense and under public supervision, meet state standards and comply with the child's individualized education program. 20 U.S.C. §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 instruction in classrooms and other settings and physical education instruction. 20 U.S.C. §1401(16).

The IDEA provides each child with a disability with a basic floor of educational opportunity, *Rowley, supra*. A state provides this basic floor of opportunity and satisfies the minimum requirements of the IDEA by providing a child with a disability with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley at 201*. The school district is not required to maximize educational opportunities or provide the best possible education, *Mather v. Hartford School District*, 928 F. Supp. 437 (D.Vt. 1996), but must offer a program calculated to provide more than a trivial educational benefit to the child, *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), and that is likely to produce meaningful progress. *Mather at 445-6; Board of Education v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986).

As established by *Rowley*, a FAPE is provided if, first, there has been compliance with the procedural requirements of the IDEA and, second, the IEP developed pursuant to these procedures is reasonably calculated to enable the child to receive educational benefits.

The evidence established that the District provided the Student with a FAPE since it followed the procedures required by IDEA and the IEPs developed for the Student were reasonably calculated to enable her to receive educational benefits. *Rowley at 206-7*. Furthermore, the evidence indicated that the triennial IEP was appropriately implemented and the Student benefited substantially from her education in kindergarten and first grade.

The evidence also established that each of the three IEPs discussed at the hearing, the ones developed for kindergarten, first and second grade, were each reasonably calculated to provide educational benefit to the Student. The IEPs were individually developed for the

Student, properly identified her levels of performance and needs and contained goals and objectives designed to meet those needs.

In addition, the Student made substantial and meaningful progress toward her goals and objectives and received meaningful educational benefit in both kindergarten and first grade. In kindergarten, the Student experienced significant growth in her academics, social skills, fine and gross motor skills and speech/language abilities. She also made substantial progress in acquiring independence and impulse control. <sup>6/</sup>

During her first grade year the Student's reading ability increased from 3 to 20, exactly at grade level and she also made significant in progress in math, with results ranging from average to low-average. The Student also made significant improvement in speech/language skills. The Student therefore achieved all of her academic goals and objectives for the year and most of her expressive language goals and objectives. Further, she achieved many of her other goals and objectives as well and made substantial progress toward goals and objectives that were not achieved.

The mother appears to assert that the District failed to provide FAPE because the District did not provide the implement the Student's Behavioral Management Plan in the manner preferred by the mother and her psychologist with respect to the Student's sensory integration deficits. The evidence established that sensory integration and sensory integration issues are not educational disabilities. The evidence also established that the Behavioral Management Plan was implemented with respect to sensory integration issues, although the Special Education Team differed somewhat from the mother's psychologist on how the sensory integration modalities should be delivered. In addition, the Student received substantial educational benefit during her first grade year. The evidence did not establish that the Student failed to benefit from the sensory diet as delivered by the District; the mother's expert merely testified that she believed her preferred delivery method would be more effective than the District's delivery method in dealing with the Student's sensory issues. In light of all these factors, there is no evidence that this dispute was anything other than a dispute over methodology. Such disputes are not subject to appeal under the IDEA. Instead, questions of methodology, when the Student is receiving a FAPE, are left to the school districts to determine. *Rowley at 207; Lachman at 296-7.*

It is unclear whether the mother explicitly intended to assert that the 1998-99 IEP was not reasonably calculated to provide educational benefit because it failed to provide for ESY services, decreased the Student's paraprofessional hours and slightly reduced the Student's other service provider hours. In any event, the evidence established that the team's ESY, paraprofessional and service provider decisions were appropriate. Neither the elimination of ESY nor the decrease in paraprofessional and other service provider hours will affect the Student's ability to receive a FAPE from the education provided to her by the District.

The evidence established that the District complied with the procedural requirements of the IDEA in developing the Student's first and second grade IEPs; the Student's IEPs for kindergarten, first and second grade were reasonably calculated to provide educational benefit; and the Student actually received substantial educational benefit from the education provided by the District in kindergarten and first grade. The District provided the Student with more than a basic floor of educational opportunity and provided the Student with a free appropriate public education in compliance with the IDEA.

## **DECISION AND ORDER**

The Administrative Law Judge determines and orders with respect to each of the issues presented at hearing and as to the Student's kindergarten, first and second grade IEPs:

1. The District afforded the Student's meaningful participation with respect to the Student's education.

2. The District properly developed and implemented the Student's individualized educational program.

3. The the District properly evaluated the Student and the mother failed to establish the District acted improperly in not paying for an independent educational evaluations of the Student obtained by the mother. No order for reimbursement of any IEEs performed on behalf of the mother is appropriate.

4. The District provided necessary related services and assistive technology to the Student.

5. The District properly determined it had no obligation to provide continuing extended school year services for the Student for the spring and summer of 1998.

6. The District provided the Student with a free appropriate public education.

7. No violation of the IDEA has been established.

8. The IHO's decision is therefore upheld.

9. This decision of the Administrative Law Judge is the final decision on state level review except that any party may bring a timely civil action in an appropriate federal or state court. 20 U.S.C. §1415(e); 34 C.F.R. §300.511.

**DONE AND SIGNED**

August 30, 1999

JUDITH F. SCHULMAN  
Administrative Law Judge

## FOOTNOTES

- <sup>1/</sup> This proceeding is also held pursuant to Section B, VII of the State Plan of the Colorado Department of Education, Fiscal Years 1995-97 ("State Plan"), Part II, Section A, VII, to the extent the State Plan is not inconsistent with current provisions of the IDEA.
- <sup>2/</sup> Consistent with the requirements of the State Plan, Part II, Section A, VII, 4,e,(3) and Part II, Section A, VII, 9, f, this decision is written so that it does not contain the name of the student or the parent other than on the first page. The student will be referred to as the "Student," and her mother will be referred to as the "Student's mother" or as her "mother."
- <sup>3/</sup> The IDEA and its implementing regulations require an annual review of the educational program of each child with a disability. Every three years a more extensive assessment and evaluation of each child, the triennial review, is conducted.
- <sup>4/</sup> Although the mother sent the team a written notice on October 1, 1997 that she was ceasing verbal communications with Tamra Turner, the Student's special education teacher, because of disparaging comments concerning the mother's parenting skills allegedly made by Ms. Turner at the September 23, 1997 review staffing, the record does not support a determination that such statements were in fact made by Ms. Turner. Instead, the mother misinterpreted comments made by Turner. The mother maintained effective oral communication during the academic year with other members of the team and written communication with the team as a whole.
- <sup>5/</sup> Because the development and implementation of the kindergarten IEP were not at issue in this matter, the Administrative Law Judge makes no specific findings concerning these matters.
- <sup>6/</sup> It is not actually clear from the record whether the mother intended to raise any questions concerning the Student's kindergarten progress or whether she intended to concede that a FAPE had been provided by the District for that year.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

[parent]

Cheryl M. Karstaedt, Esq.  
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Jennifer A. Rodriguez  
Special Education Services Unit  
Colorado Department of Education  
201 E. Colfax Avenue  
Denver, CO 80203

on this 31<sup>st</sup> day of August, 1999.

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Secretary to Administrative Law Judge