DEPARTMENT OF EDUCATION, SPECIAL EDUCATION
STATE OF COLORADO

Case No. L2001:124

DECISION

[Student 1] and [Student 2] by and through their parent [Mother] and [Father]

Petitioner's

v.

Douglas County School District RE-1

Respondent

INTRODUCTORY STATEMENT

This matter was heard October 8, 9 and 10, 2001 at 312 Cantril St., Castle Rock, Colorado. Jurisdiction is conferred by the Individuals with Disability Education Act (IDEA), 20 U.S.C. Sec. 1412 et. seq., 34 C.F.R. Sec. 300 et. seq., and is governed by the Colorado Department of Education Rules for the Administration of the Exceptional Children's Educational Act.

Petitioner's appeared through the parents with Jack D. Robinson, esq. of the law firm Spies, Powers and Robinson, P.C. Respondent appeared through [Child Find Coordinator], Respondent's Early Childhood Development and Child Find Coordinator with Thomas S. Crabb, esq. of the law firm Caplan and Earnest, LLC.

Petitioner's filed a request for a Due Process Hearing on July 17, 2001. The 45 day hearing completion date was waived.

Petitioner's alleged the school district (1) violated 20 U.S.C. Sec. 1412 by failing to provide Petitioners with a free appropriate public education (FAPE) and (2) violated 20 U.S.C. Sec. 1412(a)(5) and 34 C.F.R. Sec. 300.550-552, the least restrictive environment (LRE) provisions of the IDEA by changing

students educational placement. In not doing so it is alleged the school district is failing to ensure a continuum of alternative placements are available and are failing to consider the harmful effect of the selected placement on the student.

PRELIMINARY MATTERS

On August 31, 2001 Petitioner filed a "Motion for Continuance" in which it was alleged that medical evaluations which Petitioner's had expected to be ready for this hearing would not be ready by the then scheduled September 17, 2001 hearing date. Petitioner's attorney represented that Respondent was aware the tests were being conducted and further represented the evaluation results would be "invaluable" and that the results might "obviate" any necessity for this hearing. Respondent objected to further delaying the hearing based upon the Petitioner's lack of timeliness in filing the motion. They further alleged that the tests were being made for medical rather than educational purposes and that any evidence possible of presentation would not be appropriate for purposes relating to Petitioners schooling. This IHO heard oral arguments by telephone conference and granted the Petitioner's Motion for a continuance.

Prior to commencing the Hearing Petitioner's raised the issue of the burden of proof. Petitioner's claim the school district has the burden of proving the placement set forth in the April 17, 2001 IEP's because said IEP's were not agreed upon by the parents and are therefore not in force. Respondent took the opposite position. Petitioner's attorney indicated that he was prepared to proceed to present his case first and allow this IHO to reserve his ruling on the issue. Respondent acquiesced and the hearing proceeded.

FINDINGS OF FACT

1 This case actually involves two children, twins who have different personalities and differences in degree of disability. Their disabilities are manifested similarly yet in differing degrees of limitation. Nevertheless their disabilities are so markedly similar that all agree their cases may be heard and decided together.

2 The twins weighed 2 lbs. and 2.1 lbs. respectively when prematurely delivered on [Date]. Had they remained in utero to their full term their birth dates would have been [Date]. Instead, they remained in the hospital for approximately 3 months

after birth, requiring oxygen for about 6 weeks of that period. (exh. p2 & p3).

3 Because they were premature they were given several follow-up evaluations until they were 18 months of age, at which time their birthing hospital believed their physical development was age appropriate (exh. P2 & P3).

4 On February 17, 2000 one of the twins, 3½ years after his delivery, was tested at Children's Hospital regarding a self-destructive behavior problem (exh P2).

5 In July and August, 2000 the school district collected information from the parents and tested the children through their "Child Find" program (exh. R1 and R2).

6 IEP's were prepared for each child on September 28, 2000 (exh. R4 & R5). Evidently the children were enrolled in the school's LEAP program and had begun to attend preschool because the twins mother wrote a most complimentary note to the school (exh. R6).

7 Mother wrote to the school district's Child Find coordinator January 10, 2001 complimenting those involved in the school district for the progress they had made with the twins in preschool. She requested the twins remain in preschool for the 2001-2002 school year, requesting the district consider their full term age of [Date] and using said date as the age for them to choose when to advance to Kindergarten instead of their premature birth date of [Date]. She had researched the issue and gave in detail her reasons therefor. (exh R9).

8 Preschool to Kindergarten Transition Action Plans were prepared regarding the twins and began processing within the district on January 23, 2001. It is not clear whether the district had then made a decision to move the children to Kindergarten. Certainly the form used would tend to make those involved in the process believe such was the case. (exh. R11 & R12).

9 Children's Hospital tested both children on February 8, 2001 and found one twin to have developmental delays and the other to have speech delays (exh. R38 and R39).

10 On April 17, 2001 an IEP staffing was held. While not reflected in the documents (exh. R33 and R34) I am under the impression that the attorneys were there also. IEP exh. R33

contains a preschool special education services page, DCSD NW 82 and a Kindergarten services page, DCSD NW 81. Likewise with exh. R34 at page CW DCSD 72 and page CW DCSD 71 for the other twin. Also, the parents continued to object to moving the children to Kindergarten, submitting exh. R32 to support their contention. The school teachers in the IEP team, who were in the majority, voted in favor of the kindergarten IEP and the parents voted in favor of the preschool IEP. I note that this IHO cannot recall ever before seeing an IEP with parallel preschool and kindergarten alternatives in it.

11 The University of Colorado JFK evaluations of the twins began August 8, 2001 and ended September 12, 2001. The reports, which were delaying this hearing, were submitted to both parents and school district. These reports identify the twins disability as an Autism Spectrum Disorder (ASD).(exh. P2 and P3).

12 Before the April 17, 2001 IEP meeting the parents had decided they wished their children to start kindergarten with the 2001-2002 group. Parents are well educated. They researched this matter extensively, counseled with educational and medical professionals and concluded that the additional maturity might provide their children with the best opportunity for their success in life as well as in the classroom.

13 This school district has a kindergarten enrollment policy, set by their school board, which allows a child to “enter kindergarten if he/she is five years old on or before September 15 of the year of enrollment” (exh. R41). School personnel tend to rigidly adhere to the policy although testimony indicated that a few exceptions are made. An option is given to parents to elect to delay their child’s enrollment for one year if 5 years old and born after September 15. School personnel tend to rigidly adhere to this policy although the testimony was that some exceptions are made. In cases where the child is not IDEA eligible the district does not assume the full cost of education until the child is enrolled the following year. It appears the majority of parents who exercise this option for their children are those who do so for their male children in order to allow them an extra maturation year.

14 At least one expert states unequivocally that boys do not mature as early as girls and are about five months behind at age five (exh. P6).

15 All agree that had the twins been born at full term the school district would have, consistent with their policy, not enrolled the twins in kindergarten until the 2002-2003 school year.

16 The parties agree that within either peer group the twins will be of suitable age, that is to say they will be neither the youngest nor oldest kindergarten children whether starting this year or next.

17 The uncontested testimony was that continuity in working with and training ASD children is a key ingredient to the achievement of a satisfactory outcome. The parents are pleased and impressed with school personnel and the program being operated by this school district.

18 Kindergarten begins to address academics as well as socialization while greater stress is placed on socialization in preschool although it too has an educational component. The April 17, 2001 preschool and kindergarten components in the twins IEP's, provide basically the same goals and objectives for the boys to achieve whether attending preschool or kindergarten. This is consistent with the district's policy stressing the transition from the one school setting to the other is to be essentially "seamless".

ISSUES

1 Petitioner's and Respondent each claims the burden of proof rests with the other. Who bears the burden of proof?

In this case Petitioner's have alleged the school district has failed to (a) provide a free appropriate public education as required under the IDEA and (b) by changing the twins educational placement they have failed to provide them with the least restrictive environment.

> "With respect to the issue of who bears the burden of proof, the Court must look to the nature of the challenge to the IEP. Where a change in the child's IEP is sought, regardless of whether the party seeking the change is the school district or the parents, the burden of showing the placement is appropriate rests with the school district." Furhmann v. East Hanover Board of Education, 993 F.2d 1031, 1035 (3d Cir. 1993)(citation omitted). This burden of proof is contrasted with the allocation where the issue is whether the IEP is appropriate. In this situation, the student or

> his parents bear the burden of proving by a preponderance of the evidence that the IEP devised by the school is inappropriate. (citation omitted)," Urban by Urban v. Jefferson County School District R-1, 870 F. Supp."

Here the school district and the parents have agreed to a stay put order issued pursuant to the April 17, 2001 IEP. The IEP's have a preschool schedule and a kindergarten schedule. The preschool schedule is being followed as the "stay put" during this appeal. The school district therefor would seem to be the proponent of the kindergarten schedule and opposed to the preschool schedule while the Petitioner takes the opposite position. To the extent each opposes the portion of the IEP provisions that they do, they shoulder the burden of proof responsibility.

The burden of proof as to which is the appropriate placement rests with the Respondent school district.

2 Did the school district violate the least restrictive environment (LRE) provision of the IDEA?

While alleged, any harmful effect to the boys as students was not proven to the satisfaction of this IHO.

The testimony elicited in this hearing failed to establish that either the preschool placement advocated by the parents or the kindergarten placement preferred by the school district violates the LRE requirement of 20 U.S.C. Sec 1412(a)(5) and 34 C.F.R. Sec.300.550-552. The children are being educated with non-disabled children, special classes with individualized instruction are not complained of, a continuum of education is provided and the placement provisions of LRE are being met.

As to this issue, Petitioner's complaint fails.

3 Did the school district fail to provide a free appropriate public education (FAPE)?

Regarding an IEP, a due process hearing officer may inquire into whether (1) the district complied with the procedures set forth in the IDEA, and (2) whether the IEP developed through the Act's procedures is reasonably calculated to enable the child to receive educational benefits. See Bd. of Education v. Rowley, 458 U.S. 176, 207.

In the instant case educational benefits will be provided in either preschool or kindergarten setting.

Next we address whether the procedures set forth in the act were followed. The focal issue of this case, clearly enunciated by the mother in her testimony, revolves around the twins age. Had they been carried to full term their birth date, then being [Month], would have allowed Parents to elect to have them retained in preschool this year. School IEP team teachers could not have required the move to kindergarten and this hearing need never have been held.

This IHO is persuaded the evidence here given established (a) the premature births of these boys was an extreme condition in that there actual gestation period in utero was 1/3 less than is normal. At birth, at only 2 pounds, their weight was only 1/3rd to 1/4th that of a full term baby. (b) Ample evidence was presented that there is a direct correlation between such births and maturity, especially in the beginning years, (c) the IEP team relied solely upon actual birth dates in rejecting preschool for the twins this school year, and (d) the parental right to elect to retain the twins, an election available to them only once in these twins lives, was not critically examined by school faculty.

This IHO determines, from the evidence presented at this hearing, that those school personnel involved in developing the twins April 17, 2001 IEP's considered many factors but as to age had pre-determined to advance them to kindergarten based solely upon their birth date. I find that they did so based upon what they believed to be school board policy from which they could not deviate. Except as to this issue it is to be noted that school personnel made accommodations to meet parental objections.

There was testimony showing the school district makes exceptions to the age rule, although it seldom does so. In this instance there was no evidence indicating a serious, thoughtful consideration of the mass of citations and articles the parents referred the school district to, regarding the slower maturation of premature children. This IHO considers this to be a case with an extreme fact situation which, by not being actually and thoughtfully considered consitutes a violation of procedure in failing to consider this factor.

Counsel for the school district has ably and correctly pointed out that it is the school board which has the right and duty to set the age rule here involved and that this IHO may not change their policy.

> "Due deference is to be afforded administrative decisions made by state officials who possess expertise in the field." Cited in Mather v. Hartford School District, 928 F. Supp. 437, 445 (U.S. Dist Ct., Vt., 1996).

Board policy is not here the issue though. The issue here regards whether the IEP decision to transition the children to kindergarten when the parents have presented valid reasons for wishing to retain them in preschool this school term constitutes an inappropriate FAPE placement.

Maturity does make an educational difference. The school board recognizes it by giving parents the right, in limited circumstances, to elect to retain age-appropriate children before they start kindergarten. Some exceptions are made to that policy. The policy is applied to children whose ages are much nearer to normal gestational birth periods. The extreme premature birth circumstances involving the twins is exceptional and, at least for FAPE purposes, should have been considered. The majority of the IEP team violated FAPE by considering only the school district's age policy and failing to fully consider all of those factors surrounding the twins births which has led parents to fight to retain them in preschool for this school year.

CONCLUSION

The April 17, 2001 IEP's as presently prepared include a preschool component which, without now implementing the kindergarten component, appears to provide educational benefits to the children and meets the parents original objections.

It is not the role of this IHO to substitute his judgment for or to change the twin's IEP's. See Mather v. Hartford School District,, 928 F. Supp. 437 (U.S. Dist. Ct. Vt., 1996, citing Board of Education v. Rowley, 458 U.S. 176, 207.

I therefor rule the school district's kindergarten schooling provisions as contained in the April 17, 2001 IEP are inappropriate and a FAPE violation.

Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by this Impartial Hearing Officer. An Administrative Law Judge shall be appointed to hear the appeal. Any party wishing to appeal the Impartial Hearing Officer's Order has the same rights as they had for this hearing.

Either party may appeal to a court of appropriate jurisdiction if dissatisfied with the final order.

This Order is entered this 6th day of November, 2001.

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Impartial Hearing Officer