

**COLORADO DEPARTMENT OF EDUCATION  
SPECIAL EDUCATION SERVICES UNIT  
Due Process Hearing L2008:114**

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**IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION**

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**In the Matter Of:**

**[STUDENT], through her parents [FATHER] and [MOTHER],**

**Petitioners,**

**and**

**CHEYENNE MOUNTAIN SCHOOL DISTRICT 12,**

**Respondent.**

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This due process hearing was held on January 7 and 9, 2009, in Colorado Springs, Colorado, pursuant to the Individuals with Disabilities Education Act (IDEA) [20 U.S.C. §1415(f)(1)], its implementing regulations [34 CFR §300.507(a)], and the implementing regulations of the Colorado Exceptional Children's Educational Act [1 CCR 301-8, 2220-R-6.02(7)]. Parent [FATHER] appeared *pro se* for Petitioners. Parent [MOTHER], a native [NATIONALITY] speaker, has limited English reading and comprehension skills. She waived the opportunity to participate in this proceeding and authorized [FATHER] to make all educational decisions. Cheyenne Mountain School District 12 offered to provide an interpreter to allow her to participate in the hearing, and [FATHER] declined on his wife's behalf. Wm. Kelly Dude, Esq., represented the District.

In the Findings and Decision, the Impartial Hearing Officer (IHO) will refer to [STUDENT] as the "Student;" [FATHER] as the "Father;" [MOTHER] as the "Mother;" Father and Mother collectively as the "Parents;" and Cheyenne Mountain School District 12 as the "District."

On October 24, 2008, the Parents requested a due process hearing on behalf of the Student. On December 2 and 5, 2008, respectively, following the filing of an amended complaint in this matter, the Parents and the District agreed in writing to waive the resolution process pursuant to 34 CFR §300.510. The 45-day timeline for the due process hearing in 34 CFR §300.515(a) therefore began to run on December 6, 2008. The deadline for mailing this decision to the parties is January 20, 2009. At hearing, the parties agreed to waive the requirements of 1 CCR 301-8, 2220-R-6.02(7)(h)(ii)(B), and to accept mailing of the Findings and

Decision by electronic transmission. The IHO issues these Findings and Decision pursuant to 1 CCR 301-8, 2220-R-6.02(7)(h).

## **I. PRELIMINARY MATTERS**

At the outset of the hearing, the Parents moved to amend the amended complaint previously filed in this matter. The procedural history is as follows. The Parents filed a due process complaint on October 24, 2008. The District responded by filing a motion to dismiss. At a prehearing conference on November 20, 2008, the IHO granted the Parents leave to file an amended complaint. The Parents filed an amended complaint on November 24, 2008. When the Parents submitted their exhibits in this matter on January 2, 2009, they included as an exhibit the amended complaint with certain revisions to it. On January 5, 2009, the District objected to any amendment to the amended complaint. In e-mail correspondence, the Parents indicated that the January 2 exhibit was the same as the November 24 amended complaint and simply added support to help summarize key issues. The IHO disagreed, as the revisions contained in the January 2 exhibit do raise additional issues not included in the amended complaint. On January 7, 2009, the first day of hearing, the Parents therefore moved to amend the amended complaint. The District objected.

Pursuant to 34 CFR §300.507(d)(3)(ii), in the absence of consent, the IHO may only allow amendment of a complaint not later than five days before the due process hearing begins. Here, the Parents did not seek amendment until the day of hearing. The IHO therefore denied the request to amend the November 24, 2009 amended complaint. The Parents also requested a continuance to permit them to amend the complaint. The District objected. The circumstances underlying this matter have not changed since the Parents filed their original due process complaint. In fact, the Student has not been in a District school since before the original due process complaint was filed. The Parents had one opportunity to amend their complaint, and the IHO sought to assist the Parents in clarifying the issues at the Prehearing Conference. The Parents therefore had ample opportunity before the hearing to raise all relevant issues. The Parents did not assert that they were previously unable to raise the additional claims contained in the January 2, 2009 exhibit in the original or amended complaint. The District was ready to proceed, had made extensive preparations, had three witnesses available at hearing, and had multiple witnesses on call. Under these circumstances, the Parents failed to show good cause for a continuance, and the IHO denied this request.

Despite the fact that the Student is currently being home-schooled, both parties seek a ruling on the merits of this matter. The District is prepared to begin providing services to the Student immediately upon her re-enrollment.

## II. INVOLUNTARY DISMISSAL AT CLOSE OF PARENTS' CASE

The Parents presented the testimony of [SPECIAL EDUCATION TEACHER], the Student's special education teacher; [SPECIAL EDUCATION DIRECTOR], Director of Special Education, and the Father. The IHO admitted the Parents' Exhibits 1, 2a, 9, 12, 13, 14 and 15. The parties stipulated to the admission of Respondents' Exhibits A through W. These exhibits include the written testimony of twelve District witnesses. Before the Parents rested their case, the IHO on more than one occasion advised the Parents of their burden of proof in this matter. After the Parents completed the presentation of their evidence, the District moved for an involuntary dismissal on the grounds that upon the facts and law, the Parents had shown no right to relief. C.R.C.P. 41(b)(1).

In an administrative proceeding such as this conducted pursuant to the State Administrative Procedure Act, the rules of evidence and requirements of proof conform, to the extent practicable, with those in civil nonjury cases in the district courts. Section 24-4-105(7), C.R.S. Under C.R.C.P. 41(b), in a trial to the court, after the plaintiff has completed the presentation of evidence, a respondent may move for dismissal of the action on the ground that the plaintiff has shown no right to relief. The standard for the trial court in ruling on such a motion is whether, in light of all the evidence, a judgment for the respondent should be entered. The trial court may determine the facts and render judgment against the plaintiff. ) *Am. Guar. & Liab. Ins. Co. v. King*, 97 P.3d 161, 168 (Colo.App.2003); *Smith v. Weindrop*, 833 P.2d 856,(Colo. App. 1992); *American National Bank v. First National Bank*, 28 Colo. App. 486, 476 P.2d 304 (1970). The IHO followed this standard in ruling on the District's motion to dismiss.

Due to the admission of the District's exhibits, a substantial portion of the District's case was before the IHO at the time she ruled on the District's motion to dismiss. The IHO found that the Parents had shown no right to relief and that judgment should be entered in favor of the District. The IHO dismissed the due process complaint in its entirety. The Findings of Fact and Discussion and Conclusions below support this dismissal.

## III. ISSUES AND RELIEF REQUESTED

Based on the Amended Complaint and through clarifications at hearing, the Parents identified three separate issues in this matter:

1. Did the District violate isolation time-out, seclusion time-out and restraint requirements by failing to report to the Parents its use of the sensory room at [ELEMENTARY SCHOOL] for the Student or by failing to place use provisions in the Student's Individualized Education Program (IEP)?

2. Did the District deny the Student a free appropriate public education (FAPE) by failing to provide her a dedicated one-on-one paraprofessional, *i.e.*, the same individual assigned to the Student throughout the entire school day?

3. Did the District fail to place the Student in the least restrictive environment (LRE) by placing her in the CSSI program at [ELEMENTARY SCHOOL] instead of in her home school, [HOME SCHOOL]?

As amplified at hearing, the Parents request relief as follows: 1) immediate transfer of the Student from [ELEMENTARY SCHOOL] to the home school, [HOME SCHOOL]; 2) assignment to the Student of a full-time one-one-one dedicated paraprofessional, *i.e.*, a single individual assigned to the Student for the entire school day; and 3) full disclosure on the daily communication logs of the frequency and length of time-outs and inclusion of time-out information in the Student's IEP. While the Parents also requested in the amended complaint that they be provided the District policy for addressing Parents as Partners in Education Act, they did not present evidence in support of this request for relief at hearing. The IHO therefore deems this request abandoned.

#### **IV. FINDINGS OF FACT**

Based on the evidence presented at the due process hearing, the IHO makes the following Findings of Fact:

1. The Student is [AGE] with a date of birth of [DOB]. She has a diagnosis of Autism and is in [GRADE LEVEL]. Autism is a developmental disability that significantly affects verbal and non-verbal communication and social interactions. Autism is a spectrum disorder with children at different levels of abilities in relation to the core deficits of communication, social skills, and sensory processing, as well as academics and life skills functioning. Autism affects a child's educational performance.

2. Until October 22, 2008, the Student attended [ELEMENTARY SCHOOL]. On that date, the Parents withdrew the Student from the District for home schooling. Many of the Parents' concerns, including those giving rise to the withdrawal, arise from circumstances regarding their son, who is also autistic and attended [ELEMENTARY SCHOOL] until the Parents withdrew both children on October 22, 2008. This proceeding is limited, however, to issues regarding the Student.

3. The Student was a student in the District since August, 2007. She completed first grade and the first couple of months of second grade at [ELEMENTARY SCHOOL] before the Parents withdrew her. While at [ELEMENTARY SCHOOL], the Student was in the Communication Social/Sensory Integration (CSSI) program. Other District elementary schools are able to provide appropriate services to some higher functioning autistic students through their resources rooms, where special education teachers provide

services on a pull-out basis. The CSSI program is specifically designed for autistic students who require constant supervision and significant modifications in the areas of communication and social skills to access the general education curriculum. The CSSI program provides support to students based on their individual needs. The Student has high academic and behavioral intervention needs.

4. The District developed the CSSI program approximately two years ago in response to an increased number of Autism Spectrum Disorder (ASD) children in an attempt to better meet their needs. The CSSI program uses behavioral strategies, visual strategies, social skills and functional life skills to enhance the educational needs of ASD children. The CSSI program is based on research and best practices to educate children with ASD. It is an inclusion-based program with access to the general education classroom with typically developing peers. The CSSI program seeks to increase the autistic child's functional independent skills, assist in learning, encourage socialization, and reduce maladaptive behaviors.

5. The CSSI program provides a pool of professionals and resources to address ASD students' needs. There are five staff members in the CSSI program: the special education teacher and four paraprofessionals (3.5 FTE) trained to work with ASD students. Each knows the Student extremely well. In addition, an occupational therapist and a speech/language pathologist provide services. The occupational therapist provided the Student support on fine motor and visual motor skill development. There is a high level of collaboration among these team members and the general education teacher. Including the Student and her brother, there were seven students in the CSSI program.

6. The CSSI program places students, including the Student, in the general education classroom to the maximum extent possible. There is also a CSSI classroom for academic pull-out instruction and behavioral intervention. In addition, there is a sensory room, as described below.

7. The CSSI program has specific entry and exit requirements. Generally, no student is eligible to participate in the CSSI program until substantial efforts to maintain the student with supplementary supports and aids are proven insufficient to meet the student's needs in the general education setting. For a new student who has previously been substantially educated in a self-contained program, however, the criteria permit direct enrollment into the CSSI program with permission of the Special Education Director. In the Student's case, the District's Special Education Director [SPECIAL EDUCATION DIRECTOR] directly enrolled the Student in the CSSI program with the Parents' consent based on her having been substantially educated in a self-contained program, as reflected in her IEP from [OTHER STATE]. The IEP team also found this placement appropriate.

8. The Student has significant needs. She is significantly impacted by her level of autism. The Student accessed the general education curriculum with modifications and behavioral support. The special education teacher in the CSSI program, [SPECIAL EDUCATION TEACHER], provided specific programming, as well as curriculum modifications for the Student. The Student engaged in off-task behavior that interfered with her learning. This required a trained teacher or paraprofessional to redirect her attention back to the task at hand.

9. [SPECIAL EDUCATION TEACHER] worked directly with the Student throughout her day. [SPECIAL EDUCATION TEACHER] modified the Student's second grade curriculum to match her ability level. In addition, the Student worked with the paraprofessional staff, the general education (second grade) teacher, the occupational therapist, and the speech/language therapist. The Student is unable to obtain sufficient services in the general education classroom alone and received services in the CSSI classroom.

10. The Student requires constant 100% supervision while at school to ensure her progress. While in the CSSI program, the Student received 100% supervision throughout her day in all settings by either the special education teacher or a paraprofessional. At times, more than one these staff members worked with the Student. While in academic or structured settings, a staff member was within two arms' lengths of the Student.

11. The Student's running behavior requires staff intervention. When the Student runs, it is not uncommon for two or three staff members to be required to bring her back from the far reaches of the school building or playground. The Student has never run off the [ELEMENTARY SCHOOL] campus.

12. The Student's verbal output is limited to "ba," which means a variety of things. She uses only a handful of signs to indicate, for example, "more," "eat," and "drink." She answers some yes or no questions by shaking her head. She engages in self-stimulating behaviors (generally repetitive in nature) as a means of self-regulating and removing herself from an over-stimulating environment.

13. Under the Student's current IEP, she spent about 40% of her time in the general education classroom and 60% of her time in the CSSI classroom. She received a minimum of 90 minutes/week of Speech Language Services, 90 minutes/week of Occupational Therapy Services, and 1260 minutes/week of specific special education services.

14. The Student's education occurred in the general education classroom to the maximum extent possible. Her education occurred in the CSSI classroom when it was necessary for the curriculum to be taught in isolation to ensure that the skill was learned before it could be generalized or when her behaviors became disruptive and interfered with the learning of others.

15. **Time-Outs.** Within the CSSI classroom, there is a room known as the sensory room. It has partition walls that do not go all the way to the ceiling. The sensory room has a door with a window and without a lock. It has two other windows, and a portion of the partition walls are glass. The room contains a platform swing, exercise balls, a mini trampoline, a basketball hoop, an exercise bicycle, a tricycle, bean bags, mats for relaxing, and variously sized and weighted balls. There is also a quiet area where students can relax and escape from stimulating situations.

16. Students in the CSSI program use the sensory room for different purposes. Children with autism have sensory-related needs. Access to the sensory room addresses these needs and then allows children to focus on academic tasks. Students may spend time in the sensory room as a reward, on a scheduled break as a part of a sensory diet, or for de-escalation of inappropriate behaviors. Children with autism often become over-stimulated, and a sensory diet involves sensory stimulation from physical or sensory activity to help them self regulate those behaviors.

17. The Student used the sensory room on a scheduled basis every 60 minutes as a part of a sensory diet. In addition, the Student chose to go to the sensory room as a reward. As with other students in the CSSI program, the Student was able to earn breaks of five to ten minutes after earning five tokens. During the break time, students can pick an activity such as using the computer, reading a book, using blocks, or using the sensory room. The Student chose her activity with the assistance of a communication device, pointing/leading to the activity or answering yes or no questions. The Student generally chose the sensory room.

18. The CSSI staff did not put the Student in the sensory room for de-escalation of inappropriate behaviors or as punishment. At all times when the Student was in the sensory room, a CSSI staff member was in the room with her. She was not left alone in the sensory room. In addition, the door to the sensory room was always left open when the Student was in it.

19. When the Student engaged in inappropriate behavior that was not caused by over-stimulation or lack of communication skills, the staff gave her what they refer to as a "time-out." For the Student, this involved having the Student put her head down on her desk for approximately 20 seconds. After this, a staff member talked to the Student about her behavior and about more appropriate replacement behaviors to be used the next time. The Student then returned to her daily schedule.

20. The CSSI program does not use seclusion time-outs, *i.e.*, placement of a student alone in a locked room. District personnel never placed the Student or any other student in a locked room at [ELEMENTARY SCHOOL]. Specifically, the sensory room does not lock and could not be locked by shutting the door. The Parents concede that there is no evidence that the Student was

placed in a seclusion time-out. The IHO finds that the District never placed the Student in a seclusion time-out.

21. The CSSI program does not use isolation time-outs, *i.e.*, isolation of a child from all probable reinforcers by being placed in a different room under the constant supervision of a qualified staff. While the CSSI program does place some students alone in the sensory room, the sensory room contains sensory reinforcers, *e.g.*, equipment needed to provide the stimulation the body is seeking. Parents concede that there is no evidence that the Student was placed in an isolation time-out. The IHO finds that the District never placed the Student in an isolation time-out.

22. The Parents concede and the IHO finds that the District has not used restraint with the Student.

23. The record does not establish the possibility that restraint might be used as part of crisis management for the Student. Rather, during over one school year of instruction in the District, school personnel have not used bodily physical force, mechanical devices, chemicals or seclusion to control the Student's behavior. There is no evidence to suggest that the Student's behaviors would escalate so substantially that restraint might be necessary in the future.

24. [ELEMENTARY SCHOOL] provides a daily one-page communication log to the Parents providing information on the components of the Student's day, including her behavior and activities. If the Parents requested that the District include information in this daily log about any isolation time-outs, the CSSI program would comply with such a request. Since the CSSI program does not use seclusion time-outs with any of its students, such a request regarding seclusion time-outs would not be applicable.

25. The Student does not need and therefore does not have a behavior plan.

26. **Dedicated One-on-One Paraprofessional.** The Parents seek to have one person assigned as the Student's paraprofessional throughout every day. The IHO uses the term "dedicated paraprofessional" to express this concept. A paraprofessional is also known as a para educator. The Parents seek to have the dedicated paraprofessional at the Student's side at all times when she is not receiving direct instruction from the special or regular education teacher or receiving related services from the occupational therapist or speech/language therapist. For example, the dedicated paraprofessional would assist the Student in the regular education classroom after the regular education teacher gave an assignment and as the Student was working on it. While they prefer to have a dedicated paraprofessional with autism training, this is not



necessary in their view so long as the paraprofessional enjoys working with children and is willing to accept parental input.<sup>1</sup>

27. While in the CSSI program, the Student was receiving one-on-one supervision at all times, but the paraprofessionals working with the Student were intentionally rotated. This practice reflects the CSSI program's philosophy that it is critical to assist ASD children such as the Student to generalize their skills across different people and different settings. Generalization refers to the ability to apply skills to different people and environments. Children with autism often learn a skill in a particular environment or with a particular person and then are unable to perform the task in a different setting or with a different person. The way to learn generalization is to provide autistic children opportunities to practice skills in multiple settings with multiple people. Only when a skill is generalized is it truly mastered.

28. The Parents provided no expert opinion that the assignment of a dedicated one-on-one paraprofessional would provide a FAPE to the Student. Rather, the Parents rely on the testimony of the Father, whose only background in autism and special education is attendance at some unspecified seminars.

29. The Father testified that the Student needs the predictability of a single person, which can only be provided by a dedicated paraprofessional. In the last year, the Student has not run away from the Father, as he defines that term,<sup>2</sup> at all and has run away from the Mother only five times. The Father believes this is because the Student knows the boundaries he sets, because he can anticipate her actions, because he provides proper supervision, and because there is no confusion caused by exposure to multiple people.

30. The Father's success with preventing the Student from running does not suggest that a dedicated one-on-one paraprofessional would be more successful in preventing the Student from engaging in running behavior. Such running behavior in the CSSI program with multiple paraprofessionals has in fact declined. There is also no evidence that multiple paraprofessionals have been unable to meet the Student's acknowledged need for constant prompting to perform, as suggested by the Parents. These factors support the need for the 100% supervision being provided the Student but not for a dedicated paraprofessional.

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<sup>1</sup> There are certain practical difficulties with the Parents' proposal. For example, any employee must receive two 15-minute breaks, a lunch hour, sick leave, and leave for training purposes. In addition, providing full-time supervision for a high-intensity autistic child such as the Student is extremely taxing, and it would likely be difficult to recruit and retain personnel for such a position. While certain practical considerations might have to be considered, the IHO addresses first whether the Parents have established that the District has failed to provide a FAPE by failing to provide a dedicated one-on-one professional.

<sup>2</sup> It is not entirely clear how the Father defines "running," since he believes that the term does not include running for short distances.

31. [SPECIAL EDUCATION TEACHER], [SPECIAL EDUCATION DIRECTOR], [ASSISTANT SPECIAL EDUCATION DIRECTOR] (Assistant Director of Special Education), the Student's speech/language pathologist and her occupational therapist all testified that having multiple paraprofessionals work with the Student was of greater educational benefit to her than having a dedicated paraprofessional due to the need to work toward generalization. These same witnesses also credibly testified that a dedicated paraprofessional would not provide a FAPE to the Student. The IHO finds this testimony to be more persuasive than that of the Father.

32. If the Student had a dedicated paraprofessional and that paraprofessional were sick, on vacation, at lunch or on breaks, the Student would be likely to fail. While children with autism need predictability, but this can be achieved with more than one paraprofessional familiar with the student's needs. Autistic children also need to learn strategies to deal with the inevitable changes that life will bring.

33. If the Student had a dedicated paraprofessional, it is more likely than not that she would become dependent on that paraprofessional to learn for her and communicate for her and not learn to interact and communicate with other people to the same extent. It is also likely that her running would escalate to get more attention. Assigning the Student a dedicated paraprofessional would inhibit her ability to learn skills she needs.

34. The Student made significant progress in academics, speech, occupational therapy skills, social skills and behavior skills during her time in the CSSI program at [ELEMENTARY SCHOOL]. When the Student arrived at [ELEMENTARY SCHOOL], she was unable to hold a pencil. When she left, she could write her name independently and copy words and sentences with accurate sizing and spacing. Upon enrollment, the Student wrote hand over hand but progressed beyond this during her time in the CSSI program. She also learned her colors both receptively and expressively, learned very good matching skills, and learned to count and identify shapes with the use of a communication device. She also learned to express her wants and needs with the communication device. She learned to answer yes and no questions with good accuracy, which reflects an improvement in her communication skills. She mastered all her 2007-2008 IEP goals and was progressing on her 2008-2009 IEP goals. In addition, while in second grade, she progressed in terms of being able to attend to tasks for a longer period of time.

35. The Parents believe that this progress is essentially to be expected and not attributable to the CSSI program. The IHO disagrees. The Parents offer no evidence to refute the Student's progress at school.

36. The Student's progress is documented by the Assessment of Basic Language and Learning Skills-Revised skill tracking system (ABLRS) administered by the District, which demonstrates significant progress. ABLRS is a

research-based assessment for children with autism that tracks skills in every area of learning. The District administered the ABLLS assessment first on August 27, 2007, shortly after the Student's enrollment in the District and before her first IEP. It administered the second on October 20, 2008. A comparison of the results of these assessments documents the Student's significant overall progress. While the Parents contend that the initial assessment understated the Student's abilities in August, 2007, because she had not previously taken this assessment, the Father conceded that he was unsure whether the Student had previously taken the assessment. In addition, there is no persuasive evidence that the ABLLS assessment underrates the performance of students taking it for the first time. Based on the testimony of [SPECIAL EDUCATION TEACHER], [SPECIAL EDUCATION DIRECTOR], and [ASSISTANT SPECIAL EDUCATION DIRECTOR], the IHO finds that the ABLLS accurately reflected the Student's significant progress.

37. The Student received specialized instruction both in the regular education classroom and in the CSSI classroom. This instruction was individually designed for the Student and in fact provided her educational benefit, as demonstrated by her academic and behavioral progress.

38. The Student receives a FAPE in the CSSI program at [ELEMENTARY SCHOOL] with multiple paraprofessionals assigned to her. Assignment of a dedicated paraprofessional is not necessary to provide the Student a FAPE and is in fact detrimental to her education.

39. **LRE.** The Parents request that the Student be transferred immediately to [HOME SCHOOL] with a dedicated paraprofessional. The Parents believe that the Student's needs can be met in the general education classroom at [HOME SCHOOL] with pullouts for occupational and speech therapy, behavioral issues, and for some instruction in the resource room. They wish special education services to be provided by the current special education teacher, [HOME SCHOOL SPECIAL EDUCATION TEACHER].

40. [HOME SCHOOL]'s special education teacher, [HOME SCHOOL SPECIAL EDUCATION TEACHER], provides services in a resource room to 20 special education students with mild to moderate disabilities. She is assisted by two or three paraprofessionals. While [HOME SCHOOL] services two students with autism, they are high functioning, verbal students who do not need intensive, direct instruction in the core autism deficits of communication, social skills and sensory processing.

41. [HOME SCHOOL] does not have a team of staff members trained in educating autistic children. [HOME SCHOOL]'s special education program is not designed to address the intense needs of the Student's level of autism. The CSSI program provides additional interventions and supports that the Student needs to access the general education environment. The Student struggles in the general education classroom. She needs support with social interactions,

sensory processing delays, and lack of communication skills. In particular, she needs sensory stimulation at least every 60 minutes, a modified curriculum, behavioral strategies to decrease her running and inappropriate behaviors, and an intensive communication program, because she is non-verbal.

42. Placement of the Student at [HOME SCHOOL] would fail to provide her a FAPE in the LRE for a variety of reasons:

a. As discussed more fully above, exposure to one dedicated paraprofessional at [HOME SCHOOL], in contrast to the four paraprofessionals in the CSSI program at [ELEMENTARY SCHOOL], would be contrary to the Student's need to work on generalizing her skills and would cause dependence. The CSSI program is designed to help the Student work on generalization skills.

b. The special education teacher at [HOME SCHOOL] does not have the training in autism necessary to implement an autism program needed by the Student targeting social skills, communication, a modified curriculum, and sensory integration.

c. It is also more likely than not that at [HOME SCHOOL], the Student would spend less time in the general education classroom. In the CSSI program, the Student receives instruction in the general education classroom (approximately 40%) and in the CSSI classroom (approximately 60%). The Student is unable to access the general education classroom without a modified curriculum and significant support. In the program as designed at [HOME SCHOOL], [HOME SCHOOL SPECIAL EDUCATION TEACHER] has a significant caseload of mild to moderately disabled students. She does not accompany these students in the general education classroom to modify their curriculum to their level and would be unable to do so for the Student. The work in the general classroom would be difficult for the Student, and she would likely respond with frustration and running behavior. The [HOME SCHOOL] program is not designed to provide the type of intensive curriculum modification provided in the CSSI program and needed by the Student.

d. When the Student became over-stimulated in the [HOME SCHOOL] general education classroom, she would be unable to access the sensory equipment in the sensory room needed to help her learn self-regulation of those behaviors. It is therefore likely that the Student would spend less time in the general education classroom and more time in the resource room. The sensory equipment currently at [HOME SCHOOL] is significantly less than that in the CSSI program at [ELEMENTARY SCHOOL], and there is no sensory room. [HOME SCHOOL] only has a similar platform swing, a weighted vest and one weighted ball. To replicate the CSSI sensory room at [HOME SCHOOL] necessary to meet the Student's needs would cost approximately \$14,000 to \$15,000.

e. At [HOME SCHOOL], the Student would be educated primarily by a paraprofessional in a one-on-one setting and not generalized across various settings, as occurred in the CSSI program. The Student's instruction would be provided by a person less trained than [SPECIAL EDUCATION TEACHER].

43. The Student needs the intensive level of programming offered by the CSSI program, including social skills, communication skills, sensory skills, and specialized instruction from a teacher trained in autism, to provide her a FAPE. This is currently offered only in the CSSI program at [ELEMENTARY SCHOOL], not at [HOME SCHOOL]. The Student cannot receive an appropriate education in a regular classroom, even with the use of supplemental aids and services. The CSSI program allows the Student to receive a modified curriculum, have access to a sensory room, attend classes with typical peers when her behavior and instructional needs allow, and be supported by a staff that has been specifically trained in educating children with autism.

44. The District will be closing [ELEMENTARY SCHOOL] at the end of the 2008-2009 school year and moving the CSSI program to [HOME SCHOOL]. This will involve transferring [SPECIAL EDUCATION TEACHER] to [HOME SCHOOL] to join the current special education teacher at [HOME SCHOOL]. In addition, the District will move or construct a new sensory room at [HOME SCHOOL].

45. The Student does not go to school with the children in her neighborhood and does not know them.

## V. DISCUSSION AND CONCLUSIONS

### **Issue 1: District's Use of Sensory Room Not a Violation of Isolation Time-Outs, Seclusion Time-Outs, or Restraint By Failure to Report Use to Parents or Place Provisions in IEP**

The Parents rely on the Colorado Department of Education (CDE) *Guidelines for the Use of Non-Exclusionary and Exclusion Time-Out* (Time-Out Guidelines) and CDE Rules for the Administration of the Protection of Persons from Restraint Act, 1 CCR 301-45. The Parents do not contend that the District used the sensory room to place the Student in an isolation time-out, a seclusion time-out, or in restraint, as those terms are defined by the Time-Out Guidelines and restraint rules. They essentially concede that the District was therefore under no obligation to inform them of any instance when the Student was placed in an isolation time-out, a seclusion time-out or under restraint. The Parents do contend, however, that there is a possibility that restraint might be used as part of crisis management for the Student. They therefore assert that the Student's IEP must contain certain required information pursuant to Rule 2620-R-2.02(1)(a)(v), 1 CCR 301-45.

The Time-Out Guidelines define an exclusion time-out as follows:

**Exclusion time-out** is the removal of the child/youth from the current environment to another location within the same room where the student cannot observe ongoing activities. Examples of exclusion are sitting behind a partition or sitting in a corner. Time effective in changing behavior will vary according to the age of the student. According to research, the maximum effective time is 2-5 minutes\*. [Footnote not included.]

The rule contains no requirement for notification to parents when a child is placed in an exclusion time-out, and the Student has never been placed in an exclusion time-out. The District therefore did not violate the Time-Out Guidelines in relation to exclusion time-outs.

The Time-Out Guidelines define an isolation time-out as follows:

**Isolation time-out** is the isolation of the child/youth from all probable reinforcers by being placed in a different room under the constant supervision of a qualified staff. Isolation requires a previously defined time duration. The length of time should not exceed one minute per year of age of the student with a maximum of 12 minutes\*. [Additional footnote not included.]

The CSSI program does not use isolation time-outs, and the Student has never been placed in an isolation time-out. The rule contains no requirement for notification to parents when a child is placed in an isolation time-out. The District therefore did not violate the Time-Out Guidelines in relation to isolation time-outs.

The only requirement for notification to parents or for inclusion of information in the IEP is found in relation to restraints. Rules 2260-R-2.02(1)(a)(v) and 2.04, 1 CCR 301-45. Rule 2260-R-2.02(1)(a)(v) requires that “a student’s behavior plan or IEP must address the specific circumstances, procedures and staff involved if there is a possibility that restraint might be used as part of crisis management.” Rule 2260-R-2.04 requires verbal and written notification to parents when restraint is used. “Restraint” is defined in 2260-R-2.00(1) as follows:

“Restraint” means any method or device used to limit freedom of movement, including but not limited to bodily physical force, mechanical devices, chemicals, and seclusion. The holding of a student for any length of time with any purpose or intent other than providing safety and/or comfort and support is considered a restraint.

Since the CSSI program never used restraint with the Student, it did not violate Rule 2260-R-2.04. Likewise, the Parents failed to offer any persuasive

evidence that there was a possibility that restraint might be used as a part of crisis management for the Student. The Student had never previously been in restraint or even an isolation time-out. She only used the sensory room on a scheduled basis approximately every 60 minutes as a part of a sensory diet or at her request as a reward. As there was no evidence that restraint might be used as part of crisis management for the Student, the District did not violate in 2260-R-2.00(1) by failing to include provisions about restraint in the Student's IEP. The Student had no behavior plan.

The record fails to support the Parents' assertion that the District's use of the sensory room at [ELEMENTARY SCHOOL] violated the cited CDE Guidelines or rules. It fails to support the Parents' requested relief that the IEP address the specific circumstances, procedures and staff involved in the event a restraint might be used as part of crisis management or that the District report time-outs or restraints. The IHO therefore dismissed this portion of the due process complaint.

## **Issue 2: District Provided a FAPE No Dedicated One-on-One Paraprofessional Required**

The Parents contend that the District's failure to assign the Student a one-on-one dedicated paraprofessional denies her a FAPE based on safety and academic considerations. They believe that a dedicated paraprofessional would be less confusing to the Student, would better anticipate her actions, would reduce her running behavior, and would help focus the Student on the task at hand.

IDEA requires that disabled students receive a FAPE. 20 U.S.C. §1412 (a)(1)(A). In *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982) (*Rowley*), the United States Supreme Court held that IDEA minimally requires a state to provide a disabled student with 1) access to specialized instruction and related services 2) that are individually designed 3) to provide educational benefit to the student. *Rowley* at 201. IDEA is designed to enable children with disabilities to have access to a FAPE designed to meet their particular needs. *O'Toole v. Olathe District Schools Unified District No. 233*, 144 F.3d 692, 698 (10th Cir. 1998); *Murray v. Montrose County School District RE1-J*, 51 F.3d 921, 925 (10th Cir. 1995).

IDEA requires that a student receive some educational benefit in order to obtain a FAPE. It does not require a school district to provide services needed to maximize a student's educational potential. *Rowley* at 198-200; *Thompson R2-J School District v. Luke P.*, 540 F.3d 1143, 1149 (10<sup>th</sup> Cir. 2008); *Johnson v. Independent School District No. 4 of Bixby*, 921 F. 2d 1022, 1028-29 (10th Cir. 1990); *Urban v. Jefferson County School District R-1*, 870 F. Supp. 1558, 1562 (D. Colo. 1994). A school district meets this requirement and confers sufficient educational benefit when the student is making progress toward his educational

goals. See *O'Toole v. Olathe District Schools Unified District No. 233*, *supra* at 707 n. 20. *Rowley* established that if a state educational agency complies with the procedures of IDEA and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with IDEA. *Rowley* at 206-07; *O'Toole v. Olathe District Schools Unified District No. 233*, *supra* at 701; *Johnson v. Independent School District No. 4 of Bixby*, *supra* at 1025-26.

In applying these principles, the IHO concludes that the District has provided a FAPE to the Student at the CSSI program at [ELEMENTARY SCHOOL]. There the Student has access to specialized instruction and related services that are individually designed to provide her educational benefit. The Student received specialized instruction both in the regular education classroom and in the CSSI classroom. This instruction was individually designed for the Student and in fact provided her educational benefit, as demonstrated by her significant academic and behavioral progress.

The dedicated one-on-one paraprofessional requested by the Parents would not provide the Student educational benefit but would rather impede her educational progress. Assignment of a dedicated paraprofessional would hinder progress toward the Student's generalization across environments, an important goal for her. It would also make the Student dependent on the paraprofessional for communication and learning. The record establishes that the District provided the Student a FAPE by assigning her paraprofessionals on a rotational basis. The Parents are not entitled to relief on the basis that the District failed to provide the Student a FAPE by failing to assign her a dedicated one-on-one paraprofessional. The IHO therefore dismissed this portion of the due process complaint.

### **Issue 3: LRE**

The Parents contend that the Student should be educated in her home school, [HOME SCHOOL], and request an immediate transfer to [HOME SCHOOL]. In support of this request for a transfer to the home school, the Parents assert that as an autistic child, the Student benefits from modeling. They believe that in the CSSI program, the Student is overexposed to autistic peers. The Parents also rely on the fact that the Student does not know the children in her neighborhood because she does not go to school with them. They assert that this decreases her opportunities for friendships and communications with non-disabled peers and supports a transfer to [HOME SCHOOL]. The Parents assert that the Student's needs can be met in the [HOME SCHOOL] general education classroom with pullouts for occupational and speech therapy, behavioral issues, and for instruction in the resource room.

The Parents' request that the Student be transferred to [HOME SCHOOL] is inextricably tied to their request that the Student be assigned a dedicated



paraprofessional. The Parents only want the Student to be at [HOME SCHOOL] with a dedicated paraprofessional and the current [HOME SCHOOL] program of a special education teacher, [HOME SCHOOL SPECIAL EDUCATION TEACHER], using a resource room. They believe they have the right for the Student to be educated in the home school and seek to decrease her exposure to disabled students. The Parents rely on *Oberti v. Board of Education of Borough of Clementon School District*, 995 P.2d 1204 (3d. Cir. 1993) and 20 U.S.C. §1412(a)(5).

Educating children in the least restrictive environment in which they can receive an appropriate education is one of IDEA's most important substantive requirements. *Murray v. Montrose County School District RE1-J, supra* at 926. Through the least restrictive environment requirement, IDEA mandates that children be educated in regular classrooms with children who are not disabled to the maximum extent appropriate:

(5) Least restrictive environment

(A) In general

To the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability of a child is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. §1412(a)(5)(A).

Federal and Colorado regulations reiterate the principle that children with disabilities must be educated with nondisabled children to the maximum extent possible and provide that “[s]pecial classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.” 34 CFR §300.114(a)(2) and 1 CCR 301-8, 2220-R-2.28(2).

The Tenth Circuit Court of Appeals addressed the requirement of LRE in *L.B. v. Nebo School District*, 379 F.3d 966 (10th Cir. 2004). In determining whether a school district violated the LRE requirement, the court adopted the two-part test adopted in *Daniel R.R. v. Board of Education*, 874 F.2d 1036, 1048 (5th Cir. 1989). Under that test, a court determines whether: 1) education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and 2) if not, if the school district has mainstreamed the child to the maximum extent appropriate. *L.B. v. Nebo School District, supra* at 976.

In applying these principles, the IHO concluded that the Student's placement at the CSSI program at [ELEMENTARY SCHOOL], not at [HOME SCHOOL], provided her with an appropriate education in the least restrictive environment. The Student has intensive needs for programming offered only by the CSSI program, including social skills, communication skills, sensory skills, and specialized instruction from a teacher trained in autism. Education in a regular classroom with a special education teacher without special training in autism, with the use of supplemental aids and services, such as would be offered at [HOME SCHOOL], would not provide an appropriate education to the Student. At the CSSI program, the District has mainstreamed the Student to the maximum extent possible and has provided the Student the LRE.

The Parents rely on two sources of authority for the proposition that they have the right for the Student to be educated in her home school. They cite 20 U.S.C. §1412(a)(5) and *Oberti v. Board of Education of Borough of Clementon School District, supra*. The mandate of cite 20 U.S.C. §1412(a)(5) embodies the principle of LRE, that children with disabilities must be educated with children who are not disabled to the maximum extent appropriate, and that their removal from regular educational environment can only occur under prescribed circumstances cited above. It does not, however, imply a right to be educated in the home or neighborhood school. The Tenth Circuit Court of Appeals addressed this issue in *Murray v. Montrose County School District RE1-J, supra*. The court concluded that while 20 U.S.C. §1412(a)(5) “. . . clearly commands schools to include or mainstream disabled children as much as possible, it says nothing about where, within a school district, that inclusion shall take place.” *Id* at 928-929. Further, to the extent that the court in *Oberti v. Board of Education of Borough of Clementon School District, supra*, implied a presumption of neighborhood schooling, the Tenth Circuit disagreed. In this circuit, no presumption of schooling in the home or neighborhood school therefore exists.

The Parents were not entitled to relief on the basis that the District failed to provide the Student the LRE by failing to place her at her home school, [HOME SCHOOL]. The IHO concluded that the Student's placement in the CSSI program at [ELEMENTARY SCHOOL] is in the LRE. The IHO therefore dismissed this portion of the due process complaint.

## **VI. DECISION**

Based upon the above Findings and Conclusions, it is the Decision of the Impartial Hearing Officer that the Parents' amended due process complaint is dismissed in its entirety. The Parents' request for relief is denied and dismissed.

## **VII. APPEAL RIGHTS**

A copy of the parties' appeal rights may be accessed at <http://www.cde.state.co.us/spedlaw/download/ECEARules2008.pdf> beginning on page 61 and is provided concurrently with this decision. 1 CCR 301-8, 2220-R-6.02(7)(j) through (m).

DATED: January 20, 2009



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NANCY CONNICK  
Impartial Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of **IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION** by e-mail transmission on January 20, 2009, to the following:

[Petitioners]

Wm. Kelly Dude, Esq.  
Attorney for Respondent  
wkdude@adllaw.com

Jennifer Rodriguez  
Colorado Department of Education  
rodriguez\_j@cde.state.co.us



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Nancy Connick