

DUE PROCESS HEARING
BEFORE AN IMPARTIAL HEARING OFFICER

CASE NO. DP2009-120

DECISION

In the Matter Of:

[Student], Student, by ant through [Student's] Parents, [Parents]

Petitioner,

And

PUEBLO CITY SCHOOLS, District #60

Respondent

Petitioner filed her Request for a Due Process Hearing on September 28, 2009. A full day Hearing of this expedited case was held on October 12, 2009. The School District's Director for Special Services was unable to secure a non-school facility for the Hearing on such short notice. Petitioner waived her request for a neutral location and agreed to use of a meeting room in Pueblo City Schools District #60 Administrative building, 315 W. 11th St., Pueblo Colorado. The Hearing commenced at 9:00 a.m. and continued until approximately 5:00 p.m. with a 45 minute lunch break and a number of short breaks.

Attending were Petitioner with her student child and [Advocate] a child advocacy specialist who assisted Petitioner in her presentation. Representing the School District was [Special Education Director], the District's Director for Special Education and [Education Specialist], an education specialist. Neither of the parties were represented by attorney's.

The student is an intelligent [age] year old, mature for [Student's] age and able to communicate quite well. [Student] testified [Student] has as disabilities an Attention Deficit Disorder (ADD), Attention Deficit Hyperactive Disorder (ADHD), Obsessive Compulsive Disorder (OCD) and an Oppositional Defiant Disorder (ODD).

On September 8, 2009 Student and a classmate got into an argument. It resulted in a scuffle during which Student struck [Student's] classmate. Both were reprimanded and told they were to attend a Saturday class. The following day, September 9, the school principal talked to Student regarding the incident. Later [Student] was escorted by a teacher to class. The student

became angry and demonstrated [Student's] displeasure at being escorted by summarily demanding to call [Student's] mother without first seeking permission to do so, then marching to the principal's office where [Student] informed school personnel present that [Student's] IEP allowed [Student's] the freedom to not be escorted. When the school personnel would not agree to [Student's] demand [Student] demanded [Student] be allowed to call [Student's] mother. As [Student] became angrier [Student] forced [Student's] way past [Student's] teacher, who was blocking [Student's] passage through a doorway into the hall, by running into the teacher. As [Student] was escaping [Student] continued running and screaming. [Student] ran out of the school building with school personnel in pursuit. The school psychologist persuaded Student to re-enter the school building. Student then demanded [Student] be allowed to go to lunch in the lunch room with other students, Student later began to have a breathing problem which caused the school to call for an ambulance just before Student's mother arrived. Student then began breathing normally, and went home in a family vehicle.

A meeting was held with the mother and an IEP team at 2:00 p.m. that very afternoon. Mother stated that while she wanted the meeting she did not understand at the time that it included a manifestation component. She agreed at the time with the team's change of placement decision, She stated that while she did sign as an attendee her consent was not an informed consent. To be noted is that mother had undergone [] surgery on September 1st. She collapsed in the hallway after the meeting ended. The following day mother decided she did not wish her [Student] to change schools as recommended by the IEP team.

In her Due Process Petition mother alleged the violations of her [Student's] right to a Free Appropriate Public Education to be as follows:

1. School staff unlawfully secluded student

Webster's New Twentieth Century Dictionary, Second Edition defines seclusion as the keeping away or apart; to isolate. A review of the Mother's allegation that Colorado law forbids the restricting of student's freedom by physically blocking a doorway so student was prevented from leaving the room is not supported. This IHO assumes Petitioner was referring to CRS 26-20-101 et. seq. "The Protection of Persons from Restraint Act". In reviewing the Act and its application to this situation it appears the school personnel acted properly under the circumstances. Assuming Student was isolated from other students during the period in question this IHO fails to find the school personnel did so unlawfully.

2. An earlier more restrictive IEP was used rather than the IEP in effect on September 8 and 9, 2009

Petitioner charged the Student's IEP allowed [Student] to go to each of [Student's] classes without a school escort, a provision required of [Student] in [Student's] previous IEP. A review of both Petitioner's and Respondent's exhibits show them to have both included in their exhibits a copy of Student's 5/11/09 IEP. This was the IEP plan then in effect. The behavior part of the plan provides for Student to be escorted to [Student's] classes and to lunch. Petitioner had requested more freedom for Student requesting [Student] be allowed to proceed unescorted to classes. The testimony was that the IEP team had agreed to allowing Student to

attempt to show [Student] could responsibly get to classes unattended. This IHO finds that such permission was contingent upon Student's behavior and that the escort provision of [Student's] IEP remained the same as it had previously been. It was therefore not more restrictive.

3. A valid Manifestation Hearing was not held before Student's Suspension

Petitioner stated that she believed the IEP meeting she attended in the afternoon following the disruptions earlier in the day of September 9, 2009 did not include a manifestation component and was therefore not valid. Having undergone a [] operation at the first of the month, she was then under a lot of stress, resulting in her collapse in the building immediately after the meeting. In spite of her physical condition her concern for her [Student] carried her through and ably allowed her to represent her [Student's] interests at the meeting. Petitioner subsequently informed school authorities that she wished her [Student] to return to the school [Student] had been attending. However her change of mind could not change Student's IEP as it was then set forth. A subsequent IEP meeting would be required to be held with revisions or amendments made in order to comply with CFR §300.324 (6).

The IEP team found Student understood [Student's] assault upon a teacher to be wrong and [Student's] behavior was not caused by [Student's] ability to control [Student's] behavior. The team decided upon a change of placement. Student was also found to have violated the School's Code of Student Conduct and was suspended. I find a valid Manifestation Hearing was held by the IEP team on September 9, 2009 pursuant to 34 CFR §300.530(e).

4. The District failed to provide schooling to student while [Student] was suspended

The testimony revealed that the Special Services Director was diligently attempting to find an alternative placement for Student while the Principal of the school Student had been attending refused to let [Student's] attend his school. While suspended, the school Student had been attending delivered [Student's] school assignments to [Student's] home. The Director finally found a facility that would admit Student and [Student] began attending an alternate school fifteen school days after [Student's] suspension. Also to be noted is that while Petitioner may have been somewhat confused she had agreed to a change in placement for the Student.

"A free appropriate public education must be available to all children including children with disabilities who have been suspended or expelled from school" 34 CFR §300.101.

In the instant case Petitioner testified and the District failed to deny, that Student was denied educational services for a period of 3 weeks which equates to 15 school days.

When student had been removed from [Student's] then current placement because [Student] violated a school code of conduct, was suspended and was to be placed elsewhere the District must continue to provide educational services 34 CFR §300.530(d) (1)(I) after 10 school days 34 CFR §300.530(b) unless the student inflicts serious bodily injury upon another person 34 CFR §300.530(g)(3) as defined in Title 18 U.S.C.(3)(h). As so defined no serious injury occurred during the incidents on September 8 and 9, 2009. I find Student did not receive educational services for five school days.

In conclusion it appears Student's disruptive behavior is escalating. It is interfering with [Student's] ability to learn. [Student's] behavior created a chaotic situation throughout the school [Student] was then attending and produced negative consequences for herself. The analysis of [Student's] IEP team in finding that [Student's] then present program failed to produce positive progress appears sound. Their decision to make a change in placement and to recommend a different approach appears to be in this student's best interest. Both parent and school personnel have been attentive and caring to the needs of a student with very serious emotional and behavioral problems.

This IHO therefor determines that the Respondent shall make such change in student's school placement from [Middle School] to such other school as will best serve the needs of this Student. Respondent shall also provide Respondent with 5 days of ESY schooling to replace the extra days lost before [Student] could again attend school.

Petitioner's Request to: a. reinstate student in [Middle School] is denied ; b. require the school to follow IEP procedure is denied as their procedure was proper; c. change students school advisor is now a moot issue with the above change in placement ruling and; d. requiring the school to designate additional agents for Petitioner is not an education issue and therefor is not within the jurisdiction of this IHO to decide.

Done this _____ day of October, 2009.

Impartial Hearing Officer

RIGHT OF APPEAL

If either Petitioner or Respondent is aggrieved by the findings and decision in the hearing, an appeal may be brought to the Colorado Department of Personnel and Administration, Office of Administrative Courts.

If there is an appeal, the Office of Administrative Courts must conduct an impartial review of the findings and decision appealed. The Official conducting the review must:

1. Examine the entire hearing record;
2. Ensure that the procedures at the hearing were consistent with the requirements of due process;
3. Seek additional evidence if necessary. If a hearing is held to receive additional evidence you have the right to:
 - a. Be accompanied and advised by a lawyer and/or persons with special knowledge or training regarding the problems of children with disabilities;
 - b. Present evidence and confront, cross examine, and require the attendance of

witnesses;

- c. Prohibit the introduction of any evidence at the hearing that has not been disclosed to the other party at least five business days before the hearing;
- d. Obtain a written, or, at your option, electronic, word-for-word record of the hearing; and
- e. Obtain written, or, at your option, electronic findings of fact and decisions.

4. Give the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

5. Make an independent decision on completion of the review; and

6. Give you and the administrative unit a copy of the written, or, at your option, electronic findings of facts and decisions.

CERTIFICATE OF MAILING

I certify I sent a copy of this DUE PROCESS HEARING DECISION by United States Mail, Certified, Postage Prepaid, this _____ day Of October, 2009, addressed to the following parties:

[Petitioners]

[Special Education Director], Director Special Education
Pueblo City Schools - District #60
315 W. 11th St.
Pueblo, CO 81003

Also mailed by regular mail to

Jennifer Rodriguez
Colorado Department of Education
Special Services Unit
1560 Broadway Suite 1175
Denver, CO80202
