

IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION

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In the Matter of:

CHILD, by and through her Parents,

Petitioners,

v.

AURORA PUBLIC SCHOOLS,

Respondent.

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I. INTRODUCTORY STATEMENT

On June 14, 2005 a complaint was submitted by the Parents to the District on behalf of the Child. The complaint was pursuant to the Rules for the Administration of the Exceptional Children's Education Act, 1 C.C.R. 301-8, §§ 2220-R-1.00 et seq. Pursuant to those Rules, a prehearing conference was held with the hearing officer and the attorneys for all parties and the adoptive mother of the Child on July 15, 2005 in Denver, Colorado. The due process hearing pursuant to the Rules was held on July 27, 2005 in Aurora, Colorado.

The Individuals with Disabilities Education Act (IDEA), 20 USC §1415(f)(1), its implementing regulations, 34 C.F.R. §300.507, and the implementing regulations to the Colorado Exceptional Children's Educational Act (ECEA), 1 CCR 301-8-2220-R-6.03(6) confer jurisdiction. The Child appeared through her Parents. The School District appeared through Laura Munro, Director of Student Achievement, Diverse Learners. Teddi Ann Miskulin represented the petitioners and Kate J. Kelly and M. Gwyneth Whalen of the law firm of Caplan and Earnest, LLC represented the respondent.

## II. ISSUE

The issue in this hearing is as follows:

The District on June 9, 2005 decided that the Child was not eligible for services under the ECEA because she was able to receive educational benefit from regular education. The sole issue to be determined is whether or not that decision is correct.

## III. FINDINGS OF FACT

1. The Child was born on [DOB] and resides with her adoptive parents in Aurora, Colorado and is a resident of the Respondent School District.
2. The Child was adopted after a dependency and neglect lawsuit terminated her birth mother's parental rights with her biological father's rights at the discretion of her adoptive mother.
3. The Child has been the victim of neglect and abuse by her biological parents.
4. The Child has been diagnosed with Post Traumatic Stress Disorder, sleep disturbance, asthma, regulatory dysfunction, sensory integration dysfunction, and others. Her behavioral problems have risen to the level that prior to her third birthday, her physicians have prescribed medications for her. There is also a history of mental illness in her family.
5. Because of the problems noted in Findings 2, 3, and 4 above, on September 15, 2004 an Individualized Family Service Plan (hereafter IFSP) was established for the Child.
6. Pursuant to the IFSP, the Child began receiving occupational services and then became enrolled in the Creative Options Program at Jamaica Early Head Start. The Child's success in that program has been phenomenal based on her history. For example, the Child's teacher, Wendy Flanders, who has been the Child's teacher every school day from February, 2005 to the present for in excess of four hours a day, did not realize that the Child had any clinically significant problems until she read the IFSP. Ms. Flanders testified that the Child has been a typical student that does not need any special education or related services.
7. Kathleen McKean, a school psychologist employed by the District who evaluated the Child through observation and administering the Behavioral Assessment System for Children

which did not reveal anything clinically significant. She testified that the Child has done well in the Head Start program.

8. The District's occupational therapists, Jennifer Sterling and Jackie Chipouras, observed the Child on numerous occasions and administered several tests that all confirmed that the Child was functioning in the normal range in the school environment. Those other tests included but were not limited to: Peabody Developmental Motor Scales, 2nd Edition.

9. Marsha Faust Haxby and Andrea Zundel Beamen, other District special education experts, also observed, evaluated and tested the Child. They also testified that the Child progressed well in the Head Start program.

10. At the conclusion of the meeting on June 9, 2005 to form an Individualized Education Program (hereinafter IEP), the District determined that the Child did not have any condition rendering the Child unable to receive reasonable educational benefit from regular education.

11. The adoptive parents (hereafter referred to as the Parents) who had observed the history noted above, participated in the June 9, 2005 IEP team meeting and presented a very different picture of the Child to that meeting and to the Hearing Officer. Their testimony is that is that the Child has numerous problems which center on the Child's regulatory issues (sensory, emotional, and behavioral).

12. The Parent's observations were supported by expert opinion from an occupational therapist Karen Hess, by the observations and evaluation of Dr. Toni Linder of the University of Denver, and Ruth Benjamin-Wardle, an expert in special education.

13. The Child's dual nature of performing well at school but poorly in other situations was documented by Melissa Lemire, a clinical psychologist for Aurora Mental Health, who observed tantrums and rages in the home but testified that the Child did well in the Head Start classroom on the several occasions that she observed.

14. The Child's physician, Dr. Sheryl Stefaniak, testified regarding the Child's sleep problems, temper tantrums, etc., outside of the school setting.

15. Karen Hess, an occupational therapist who testified for the parents observed the Child in the Head Start classroom on four occasions. Ms. Hess testified that only on one occasion did the Child act inappropriately. That inappropriate behavior included scowling, spilled milk, disagreement with another student and falling on the floor.

#### IV. DISCUSSION AND CONCLUSIONS

If the three year old Child is not found eligible under the ECEA, she must leave the Head Start program and will most likely not receive services from the District until she becomes eligible for regular education. Her Parents and their supporting witnesses want the Child to remain in the Head Start program where she has found success because of the Child's behavioral problems that are exhibited outside of her school day and her potential for life long problems indicated by her early abuse and family (genetic) history.

The ECEA's standard for this determination is:

2.02(9) A preschool child with a disability shall be three through five years of age and shall, by reason of one or more of the following conditions, be unable to receive reasonable educational benefit from regular education: long-term physical impairment or illness, significant limited intellectual capacity, significant identifiable emotional disorder or identifiable perceptual or communicative disorders, or speech disorders.

There was no evidence presented by the Petitioners on behalf of the Child that the Child was not receiving reasonable benefit from regular education. In fact, the complaint letter stated in part:

We celebrate that [Child] has made great strides and has overcome many obstacles during the past year or so. However, without the intense supports and accommodations in place, [Child] would probably suffer a huge regression in the skills and knowledge she has obtained to this point in her life. [Child's] success is due in part to a stable home environment provided by the [Parents], her enrollment in the Creative Options Early Head Start program and the introduction of medications to help stabilize her. [Child] is currently taking Clonidine for sleep disturbance and a reduction of PTSD symptoms and Resperdal for anger and impulse control and PTSD symptoms. We would hope that in time, [Child's] accomplishments will result in her not needing such intensive support and accommodations to gain reasonable educational benefit from regular education. However, in the meantime, we do not want [Child] to be denied eligibility for Special Educational Service because of the pro-active approach the [Parents] have

taken to identify and meet [Child's] special needs. Dr. Gaensbauer, Dr. Stefaniak, Mrs. Lemire, Mrs. Brown and the Team at the Fisher Early Learning Center at the University of Denver all documented that the supports and accommodations already in place, as well as their individual recommendations are vital to [Child's] continued efforts to gain an appropriate education given her identified disabilities.

\* Child and Parent have been substituted in this quotation.

The Petitioner's position is that the Child is doing well and they want to maintain the structure and class size, etc. that has allowed for this success. In a perfect world, this preventative approach would prevail. Unfortunately, in the real world of scarce resources the law mandates that the Child is not eligible for the requested services until she is unable to benefit from regular education. Apparently to emphasize that fact, besides the above quoted standard, the ECEA Rules also state:

2.02(9)(b) Criteria for a preschool child being unable to receive reasonable educational benefit from regular education shall be a substantial discrepancy between the child's performance and behavior as compared to children of a comparable age.

As noted there is ample evidence that this Child has serious problems outside of the classroom requiring medication and intervention and that she has suffered abuse and has a family history of mental illness which would indicate that clinically significant problems may occur in the future. Nevertheless, established law puts the burden on the petitioner to prove that the legal standard for services established by the ECEA has been met. Johnson v. Indep. Sch. Dist. No. 4, 921 F.2d 1022 (10th Cir. 1991); Urban v. Jefferson County Sch. Dist. R-1, 870 F. Supp. 1558 (D. Colo. 1994) aff'd 89 F.3d 720 (10th Cir. 1996).

## V. DECISION

Based upon the above, it is the decision of the Impartial Hearing Officer that because the Child is able to receive reasonable educational benefit from regular education, despite her well documented problems, I hereby uphold the decision of the District denying services to the Child as stated in the June 9, 2005 IEP.

## VI. APPEAL RIGHTS

Enclosed with this decision, please find a copy of the appeal rights under the ECEA Rules, 1 CCR 301-8 2220-R-6.03(9) through (14).

Respectfully submitted,

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Gordon F. Esplin  
Impartial Hearing Officer

### CERTIFICATE OF MAILING

I certify that on July 29, 2005, I sent a copy of the IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION by certified mail to the following:

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