

**DUE PROCESS HEARING**

**BEFORE AN IMPARTIAL HEARING OFFICER**

**Case No. DP 2010:103**

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**CONSENT ORDER AND DECISION REGARDING PREVAILING PARTY STATUS**

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**In the Matter Of:**

**[Student], by and through [Student's] parents [Parent] and [Parent],**

**Petitioner,**

**and**

**HARRISON SCHOOL DISTRICT NO. 2,**

**Respondent.**

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**I. INTRODUCTION**

This matter is a due process hearing pursuant to the Individuals with Disabilities Education Act (IDEA) (20 USC §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-6.03(6)). [Student] (the Student), through [Student's] parents [Parent] and [Parent] (the Parents), requested a due process hearing in a complaint received by Harrison School District No. 2 (the District) on January 27, 2010. The Student was represented in these proceedings by Michael C. Cook, Esq. Wm. Kelly Dude, Esq. represented the District.

The Impartial hearing Officer (IHO) conducted an evidentiary hearing on the Parents' due process complaint on March 31 and April 1, 2 and 5, 2010, in Colorado Springs, Colorado. The parties were unable to complete the hearing on those days and an additional day of hearing was scheduled for May 4, 2010.

On May 3, 2010 the parties informed the IHO that they had reached a settlement of the due process complaint, but that they did not agree on whether the Parents are the prevailing party in this matter. The parties requested that the IHO determine whether the Parents are the prevailing party. The hearing was reconvened on May 4, 2010 for the purpose of reading into the record the

settlement reached by the parties. The parties stipulated at that time that this settlement agreement would be made an order of the IHO.

## II. RELIEF REQUESTED

The Parents requested the following relief in their due process complaint:

1. Appropriate compensatory special education and related services based on the District's failure to provide a free appropriate public education for all or part of the 2009 -10 school year, including:

A. Placement in an appropriate educational setting providing individual and small group instruction performed by highly qualified instructors utilizing research-based methodologies proven effective in educating children with autism and severe behavioral disorders for a minimum of 20-25 hours per week, including the 2009 -10 extended school year.

B. Speech therapy for a minimum of one hour per week, to include the 2009 -10 extended school year.

C. Occupational therapy for a minimum of one hour per week, to include the 2009 -10 extended school year.

D. A complete independent educational evaluation.

E. Parent training and counseling.

2. Reimbursement of the Parents' costs, disbursements, expert fees, independent educational evaluation costs and reasonable attorneys' fees.

At the conclusion of the April 5, 2010 hearing day the IHO ordered the Petitioner to clarify the issues and relief sought in this case. The IHO entered this order because the Student's educational program had changed since the filing of the due process complaint. In response to this order, on April 30, 2010 the Petitioner filed a Clarification of Issues and Relief Sought. As clarified, the relief requested by the Petitioner now included the following:

1. With regard to placement in an appropriate educational setting, the Parents agreed to the placement of the Student at [Facility School] as long as that placement was determined appropriate by the Student's Individualized Education Program (IEP) team.

2. The Petitioner continued to request that one hour per week of speech therapy and one hour per week of occupational therapy be provided to the Student, to include the extended school year in the summer of 2010.

3. The Petitioner withdrew the request for an independent educational evaluation at this time.

4. The Petitioner continued to request parent training and counseling.

5. The Petitioner continued to request reimbursement of the Parents' costs, disbursements, expert fees, independent educational evaluation costs and reasonable attorneys' fees.

### III. THE SETTLEMENT AGREEMENT

The settlement agreement was read into the record by the parties on May 4, 2010 and contained the following provisions:<sup>1</sup>

1. For the remainder of the 2009 -10 school year the Student's placement will be a full day placement at [Facility School] ([Facility School]).

2. For the remainder of the 2009 -10 school year the Student will receive one hour of direct speech therapy per week.

3. For the remainder of the 2009 -10 school year the Student will receive one hour of direct occupational therapy per week.

4. Parent counseling and training will be listed in the Student's IEP as a related service to be provided by [Facility School] for the remainder of the 2009 -10 school year and for the 2010 -11 school year. If [Facility School] offers parent counseling and training during the summer, that service will also be a related service during the extended school year in the summer of 2010.

5. The Student will receive six weeks of extended school year educational placement during the summer of 2010, to be provided 4 days per week for a minimum of six hours per day. Extended school year services will include one-half hour of direct speech therapy and one-half hour of direct occupational therapy per week.

6. The Student's 2010 -11 school year placement will be a full day placement at [Facility School]. This placement will include one-half hour of direct speech therapy and one-half hour of direct occupational therapy per week.

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1. At the May 4 hearing the parties stated that they would reduce this agreement to writing by May 19, 2010. The parties have not done so, nor have they provided a transcript of the May 4 hearing, although the briefs of each party set forth the settlement terms. The IHO's recitation of the settlement in this Order is based on the IHO's notes, which were read back to and agreed upon by the parties at the May 4 hearing, and is consistent with the description of the settlement in the briefs.

7. The Student's IEP team will develop the Student's IEP for the 2010 -11 school year to reflect this agreement. The IEP team will meet in the fall of 2010 to consider the Student's goals and objectives for the 2010 -11 school year. The goals and objectives for the 2010 – 11 school year will include transition to the public school system for the 2011 – 12 school year.

8. The District will reimburse the Parents at the rate of \$5.00 per day for breakfast and lunch for each day the Student attends [Facility School] from January 26, 2010 to the end of the 2010 – 11 school year.<sup>2</sup>

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

The only matter remaining for determination by the IHO is whether the Parents are the prevailing party in this matter. In order to make that determination the IHO must consider certain factual matters developed at the evidentiary hearing. Based on the evidence presented at the due process hearing the IHO makes the following Findings of Fact:

1. The Student began attending the District's schools in March, 2009. [Student] had been diagnosed with autism and mild mental retardation and the District determined that the Student was eligible for special education services. On April 1, 2009 the District's [Elementary School] adopted an IEP for the Student.

2. The April 1, 2009 IEP provided that the Student would attend the Communication and Social Development Program at [Elementary School] for 20 hours per week. Nineteen hours would be in a special education classroom. The Student would also receive one-half hour of speech/language therapy and one-half hour of occupational or physical therapy each week.

3. The April 1, 2009 IEP contained a Behavior Support Plan to deal with the Student's inappropriate behaviors. These behaviors impeded the Student's ability to make educational progress.

4. In the fall of 2009 the District performed a formal evaluation of the Student to see if [Student's] level of functioning had changed and to determine [Student's] educational placement.

5. The District's staff met with the Parents on November 2, 2009. They discussed the recent evaluation of the Student and concerns over the escalation of [Student's] bad behavior. At this time the District suggested the possibility of a homebound placement for the Student due to [Student's] increasing behavior issues. [Student's] misbehavior had become so intense that

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2. According to the District's brief, on May 18, 2010 the parties also agreed that the District would continue to provide transportation for the Student from [Student's] home to [Facility School].

the Student had become a danger to [him/herself] and others, and the interventions used by the staff had not been successful. The District considered homebound instruction as an appropriate interim step pending placement at [Facility School].

6. The District held an IEP team meeting on November 6, 2009. At this meeting the District decided to place the Student in homebound schooling as an interim measure until [Student] could be put in an appropriate placement.

7. The November 6 IEP changed the Student's placement to homebound tutoring for 6 hours weekly, with this program to be reviewed in January, 2010. Although the IEP also provided for 20 minutes of speech/ language therapy and 30 minutes of occupational or physical therapy weekly, the Parents declined these related services at this time.

8. Despite the plan of 6 hours of tutoring per week until January, in fact the Student was only tutored on four occasions in November. On December 4, 2009 the Student's mother called the tutor and advised her that no further tutoring sessions were required because the Student was going to attend [Facility School].

9. On January 15, 2010 the District conducted another IEP team meeting. At this time the District placed the Student at [Facility School]. The January 15 IEP provided for the Student to be in school two hours per day, with the number of hours to be increased as rapidly as possible based upon the Student's level of comfort with [Facility School]'s program.

10. The January 15 IEP provided for educational services to be delivered at [Facility School] through November 4, 2010, and anticipated that services would be provided during the extended school year in the summer of 2010.

11. [Facility School] is a school approved by the Colorado Department of Education. All of its teachers are licensed by the State and endorsed in special education. [Facility School] provides a specialized program for developmentally disabled children and serves children such as the Student who have dual diagnoses (autism and mild mental retardation). [Facility School] was an appropriate placement for a child with a dual diagnosis because it treats more than just autism in its program.

12. The placement of the Student at [Facility School] was acceptable to the Parents, but they did want the Student to attend [Facility School] full time and they were concerned that the Student's hours in school would not increase beyond two hours per day.

13. The staff at [Facility School] believed that two hours per day to start was a sufficient amount of time to get to know the Student, to perform an assessment and to plan [Student's] program. The Student had never attended school full time in any setting, had not been successful in a four hour per day program at [Elementary School], and had not been in any school since early November. Transitions are stressful for children with autism and a full day program might have been too much for the Student to tolerate at this time. It was preferable to allow the Student to start slow and increase [Student's] hours, than to start with more hours and not succeed. If the Student started a full-time program at [Facility School] and could not tolerate that program, and had to reduce [Student's] hours, the result would be detrimental to [Student's] progress.

14. The ultimate plan for the Student on January 15, 2010 was to increase [Student's] hours to full time at [Facility School] and eventually return [Student] to a District school.

15. The Student started school at [Facility School] for two hours daily on January 21, 2010. [Student] underwent a 20 day period of assessment when [Student] first started at [Facility School]. [Facility School] accepted the Student after the assessment.

16. The Student's hours were increased to four hours per day when [Facility School] staff believed the Student was having success in improvement of [Student's] behaviors and had observed a decrease in [Student's] level of anxiety. The Student began attending [Facility School] on a full day basis (6 hours daily) on March 30, 2010. [Facility School]'s goal for the Student remains to return [Student] to the District's schools.

17. [Facility School] utilizes an eclectic approach involving several methodologies and uses a system of rewards and building relationships. [Facility School] does not employ the Applied Behavior Analysis (ABA) methodology of treating autism. The Parents preferred an ABA approach for the Student and provided expert testimony that ABA would be the most effective approach for the Student. On March 3, 2010 the Parents' attorney, in a letter to District counsel, insisted that the ABA approach should commence immediately and continue to the 2010 – 11 school year.

18. The January 15, 2010 IEP states that the District will provide 15 minutes per week of indirect speech/language therapy and 15 minutes weekly of indirect occupational or physical therapy. Indirect services involve District staff consulting with [Facility School]. As of the time of the hearing the District had not provided these indirect services.

19. The January 15, 2010 IEP does not explicitly provide for parent training and counseling. However, the IEP does state that the [Facility School] social worker will support collaborative behavior strategies in the Parents' home.

In addition, as of March 1, 2010 [Facility School] had in effect a Therapeutic Treatment Plan for the Student for the 2009 -10 school year. This plan provides for monthly progress meetings with the Parents as well as bi-monthly team meetings with the Parents focused on skills training.

20. Due to scheduling difficulties, as of April 5, 2010 (when testimony was offered on this topic), [Facility School] had met with the Parents for a family therapy session only one time, and a second session was scheduled for April 8. [Facility School] planned to continue family therapy every two weeks.

## V. DISCUSSION AND CONCLUSIONS

A. The due process complaint in this case was filed pursuant to the IDEA. The IDEA provides that a court may award reasonable attorneys fees as part of the costs to a parent who is a prevailing party in a due process hearing. 20 U.S.C. §1415(i)(3)B(i)(I); 34 C.F.R. §300.517(a)(1)(i). Although an actual award of attorney fees and a determination of the amount of those fees can only be made by a court, in the first instance the IHO determines if the parent is the prevailing party.<sup>3</sup>

B. The fact that the relief granted to the Petitioner in this case came as the result of a settlement agreement does not prohibit the Parents from being considered the prevailing party. Where, as here, both parties agree that their negotiated settlement agreement is to be incorporated into an order of an IHO, a party to that agreement may be considered a prevailing party. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 604 (2001); *A.R. ex rel. R.V. v. New York City Department of Education*, 407 F. 3d 65, 75-76 (2d Cir. 2005); *V.M. and K.M. v. Brookland School District*, 50 IDELR 100 (E.D. Ark. 2008).

C. A party prevails when the relief accomplished materially alters the legal relationship between the parties in a manner that directly benefits that party. *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992); *Fowler v. Unified School District No. 259, Sedgwick County, Kansas*, 128 F. 3d 1431, 1439 (10<sup>th</sup> Cir. 1997); *Urban v. Jefferson County school District R-1*, 89 F. 3d 720, 729 (10<sup>th</sup> Cir, 1996). A prevailing party must succeed on any significant issue in litigation which achieves some of the benefit sought in bringing the action. *Park v. Anaheim Union High School District*, 464 F. 3d 1025, 1034 (9<sup>th</sup> Cir. 2006); *Wheeler v. Towanda Area School District*, 950 F. 2d 128, 131 (3d Cir, 1991).

A party is not required to succeed on all of his or her claims to be considered a prevailing party. A party prevails if he succeeds on any significant issue, even if it is not the most crucial of the claims, as long as the party obtains

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3. Even if the Parents are determined to be the prevailing party in this matter, she would not be entitled to the expert witness fees she has requested. *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006).

some of the relief sought. *Farrar v. Hobby*, *supra* at 111; *Park v. Anaheim Union High School District*, *supra* at 1035-36. The prevailing party inquiry does not depend on the amount of relief obtained, although the extent of the relief attained can affect the amount of the attorney fee award. *Texas State Teachers Association v. Garland Independent School District*, 489 U.S. 782, 790 (1989); *Aguirre v. Los Angeles Unified School District*, 461 F. 3d 1114, 1119 (9<sup>th</sup> Cir. 2006); *Linda T. ex rel. William A. v. Rice Lake Area School District*, 417 F. 3d 704, 708 (7<sup>th</sup> Cir. 2005); *see also*, *Farrar v. Hobby*, *supra* at 113-14.

D. The Parents are not the prevailing party with regard to the relief requested of an appropriate placement for the 2009 -10 school year and 2010 extended school year. Although the Parents preferred that the Student receive educational services that utilize the ABA methodology, the due process complaint did not explicitly demand ABA instruction. The only specific relief requested was 20-25 hours of educational interventions appropriate to children with autism and maladaptive behaviors. While that result was included in the settlement agreement for the 2009 -10 school year, the filing of the due process complaint and its settlement was not necessary to the attainment of that result.

The due process complaint was filed on January 27, 2010. By this time the District had already placed the Student at [Facility School]. The January 15 IEP provided for the delivery of educational services at [Facility School] through November 4, 2010, and anticipated that services would also be provided during the extended school year in the summer of 2010. The Student began with a two hour per day program at [Facility School] in order to evaluate [Student] and allow a less stressful transition into the school. Although the Parents objected to the length of the two hour program, at this time the plan was to increase the Student's educational program to full days as rapidly as possible, and to eventually return [Student] to the District's schools. By the time the evidentiary hearing commenced on March 31, 2010 the Student was already attending [Facility School] on a full day basis, 6 hours per day, which amounted to more than the 20 – 25 hours of appropriate instruction the Petitioner had requested in the due process complaint.

Therefore, the relief requested regarding an appropriate placement during the 2009 -10 school year and extended school year in 2010 would have occurred in the absence of the filing of the due process complaint and the settlement of that complaint. By the time the complaint was filed the Student was already in the appropriate placement that was later agreed to in the settlement, and before the hearing commenced the Student was receiving the level of educational services eventually described in the settlement agreement. The settlement did not materially alter the legal relationship between the parties or provide the Parents with any new benefit in this respect. There was no causal connection between the due process complaint and the relief obtained (*see Wheeler v. Towanda Area School District*, *supra* at 131 (the test for prevailing party status is whether such a causal connection exists)).



E. The settlement also provided the Student with a guaranteed placement at [Facility School] for the 2010 – 11 school year. In this respect the Parents have prevailed, because the settlement agreement materially altered the legal relationship between the parties, to the Parents' benefit. Prior to the filing of the due process complaint the District was not obligated to place the Student at [Facility School] after the 2009 -10 school year. All that the District was required to do was to develop a new IEP for the Student for the 2010 - 11 school year. Absent the settlement agreement the District could have developed an IEP that placed the Student somewhere other than [Facility School] for that school year. The settlement ensured that the Student would stay at [Facility School] in 2010-11.

The District argues that the Parents did not prevail when they obtained placement at [Facility School] because the Parents had insisted on a placement that was based upon the ABA methodology (see Findings of Fact, paragraph 17). An ABA based education was preferred by the Parents and they did not achieve that result in this proceeding. However, while they preferred an ABA approach, the due process complaint did not specifically demand placement in a program utilizing ABA methodology and the Parents were accepting of [Facility School] at the time the Student was placed there. In the settlement agreement the Parents obtained a guarantee that this acceptable placement would not change in the 2010 - 11 school year. This guaranteed result could not have been obtained absent the filing of and settlement of the due process complaint. The Parents therefore obtained some benefit from the filing of the due process complaint in that they locked in the District to a placement that is acceptable to the Parents for the 2010-11 school year.

F. The Student's January 15, 2010 IEP provided for 15 minutes per week of indirect speech therapy and 15 minutes per week of indirect occupational therapy. The due process complaint sought one hour per week of direct services for each of these therapies during the remainder of the 2009 -10 school year and during the 2010 extended school year.

The settlement agreement provides for the direct provision of one hour per week of speech therapy and one hour per week of occupational therapy for the remainder of the 2009 -10 school year, and one-half hour per week of direct services in each of these therapies in both the 2010 extended school year and the 2010 -11 school year.

The Parents have prevailed on their claim for increased speech and occupational therapy services. The settlement agreement obtained some benefit to the Parents and changed the legal relationship between the parties with regard to the provision of speech therapy and occupational therapy for the current school year, the extended school year in the summer of 2010 and the 2010 – 11 school year.

Absent the due process complaint and settlement agreement the Student would have received only 30 minutes per week of *indirect* services during the 2009 – 10 school year and 2010 extended school year. As a result of the settlement the Student received a significant increase to two hours of *direct* services weekly in speech and occupational therapy for the remainder of the 2009 -10 school year and one hour per week of direct services during the extended school year.

The District argues that the increase in these related services for the remainder of the 2009 -10 school year is for a period of less than one month, and that the due process complaint therefore made little difference. While that fact may affect the amount of attorneys' fees that may be awarded, it does not change the conclusion that the Parents prevailed on this issue. As a result of the due process complaint and settlement agreement, for the last few weeks of the 2009 -10 school year the Student was entitled to two hours per week of direct speech and occupational therapies from the District that the District was not required to provide under the January 15, 2010 IEP. In addition, the Student will receive one hour per week of these direct therapies during the 2010 extended school year that [Student] would not have received under the January 15 IEP.

Similarly, as a result of the due process complaint and settlement agreement the Student will receive direct speech and occupational therapy services from the District during the 2010 -11 school year. At the time of the filing of the complaint the District was not obligated to provide any of these related services during 2010 -11. Absent this settlement there was no guarantee that the IEP team would have included 30 minutes per week of these two direct therapies in the Student's 2010 – 11 IEP.

G. The due process complaint sought as relief parent counseling and training for the 2009 -10 school year. The settlement agreement provides for this service during the 2009 -10 and 2010 – 11 school years, and during the summer of 2010 extended school year if [Facility School] offers that counseling during the summer.

By the time the due process hearing commenced parent counseling and training was already in place for the Parents through the end of the 2009 -10 school year, as part of [Facility School]'s Therapeutic Treatment Plan for that school year. Even though these services were not provided for a period of time due to scheduling difficulties, this assistance was in place as an obligation of the District, to be provided through [Facility School], prior to the settlement. Therefore, the settlement agreement did not obtain a significant benefit or change the legal relationship of the parties with regard to parent training and counseling for the 2009 -10 school year; the Parents were entitled to this service during this period even in the absence of the settlement. The Parents therefore are not the prevailing party on the issue of parent training and counseling during the 2009 -10 school year.

However, as a result of the due process complaint and settlement agreement the Parents did prevail to the extent of obligating the District to make available parent counseling and training, to be provided by [Facility School], during the 2010 – 11 school year and possibly during the summer of 2010. The Therapeutic Treatment Plan at [Facility School] was for the 2009 -10 school year. Absent the settlement there was no guarantee that this service would be provided during the 2010 extended school year or in the 2010 -11 IEP. The settlement agreement therefore provided a significant benefit to the Parents and materially altered the legal relationship between the parties in this regard.

## VI. DECISION AND ORDER

A. The settlement agreement, as set forth above, is made an Order of the IHO.

B. The Parents are the prevailing party in this matter with regard to the following provisions of the settlement agreement:

1. The placement of the Student at [Facility School] for the 2010 – 11 school year.
2. The providing of increased speech and occupational therapy services in the 2009 -10 school year and the provision of these services through the extended school year in the summer of 2010 and the 2010 – 11 school year.
3. The granting of parent counseling and training to be provided by [Facility School] during the 2010 -11 school year and the providing of that counseling and training during the 2010 extended school year if it is offered by [Facility School] during the summer.<sup>4</sup>

C. The Parents are not the prevailing party in this matter with regard to the following provisions of the settlement agreement:

1. The placement of the Student at [Facility School] for the 2009 – 10 school year and the 2010 extended school year.
2. The providing of parent counseling and training by [Facility School] during the 2009 -10 school year.

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4. The Parents did not request breakfast and lunch reimbursement in the due process complaint and have not claimed to be the prevailing party as to that provision of the settlement agreement. In addition, neither party has addressed transportation as an issue related to prevailing party status (see footnote 2). Accordingly, the IHO reaches no conclusions regarding whether the Parents were the prevailing party as to those matters.

## VII. APPEAL RIGHTS

A copy of the parties' appeal rights is enclosed with this decision. 1 CCR 301-8, 2220-R-6.02(7)(j).

DATED: May 28, 2010

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MARSHALL A. SNIDER  
Impartial Hearing Officer

## CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this **CONSENT ORDER AND DECISION REGARDING PREVAILING PARTY STATUS** on the parties by certified mail, postage prepaid, on May 28, 2010, properly addressed to the following:

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511 N. Tejon Street  
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An additional copy has also been mailed to:

Jennifer Rodriguez  
Colorado Department of Education  
1560 Broadway, Suite 1175  
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Marshall A. Snider