COLORADO DEPARTMENT OF EDUCATION

EXCEPTIONAL STUDENT LEADERSHIP UNIT

Due Process Hearing No. L2008:102

IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION

In the matter of:

THE STUDENT, by and through his Parents,

Petitioner,

v.

SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Respondent.

I. INTRODUCTORY STATEMENT

On February 20, 2008, the Denver County 1 School District (hereafter "the District') and the Colorado Department of Education received the Due Process Complaint which requested a due process hearing in this case. The undersigned Impartial Hearing Officer (hereafter "IHO") heard the case on April 16 and 17, 2008 at the District's offices at 900 Grant Street, Denver, CO.

The Individuals with Disabilities Education Act (hereafter "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 Act (hereafter "ECEA"), 1 CCR 301-8 2220-R-6.03(6) confer

jurisdiction. The petitioner, STUDENT, appeared through his mother. The District appeared through Jennifer Reynolds, Autism Team Member. Jack D. Robinson of the law firm of Spies Powers & Robinson, P.C. represented the STUDENT. W. Stuart Stuller of the law firm of Caplan and Earnest, LLC and Lorna Candler, counsel for the District, represented the District.

II. ISSUES

The issues in this hearing as taken from the Due Process Complaint are as follows:

1. Did the District fail to timely conduct an initial evaluation of the STUDENT?

2. Did the District fail to timely develop an individualized education program for the STUDENT?

3. Did the District fail to make a free appropriate public education available to the STUDENT in a timely manner?

4. Are the Parents entitled to the reimbursement of the costs associated with the STUDENT's education that they privately incurred as a result of the District's failure to timely make a free appropriate education available to the STUDENT?

5. Is the [PRIVATE SCHOOL] an appropriate educational placement and program for the STUDENT?

6. Is the District required to place the STUDENT at the [PRIVATE SCHOOL]?

III. FINDINGS OF FACT

1. The STUDENT was born [DOB] in [OTHER STATE].

2. The STUDENT has a younger brother born [DOB] who currently attends school in the District.

3. The STUDENT, his brother and his parents currently reside within the District.

4. Prior to moving to Colorado, the STUDENT was identified as a child with autism. Autism is a behavioral syndrome involving impairment of communication skills and social development, and the presence of repetitive behaviors. Autism is called a spectrum disorder because of the great variation of the identifying characteristics with each individual.

5. While living in [OTHER STATE], the STUDENT received educational and related services at the [OUT OF STATE SCHOOL], [OTHER CITY, STATE], which is a private school. The parents paid for the costs of the services received by the STUDENT from the [OUT OF STATE SCHOOL].

6. During the summer of 2007, the family moved to Denver, CO from [OTHER STATE].

7. During August of 2007, the STUDENT began receiving educational and related services at the [PRIVATE SCHOOL], Denver, CO which was previously known as the [PRIVATE SCHOOL] and is a private school. The parents paid for the cost of those services.

8. The parents were and continue to be satisfied with the services provided the STUDENT at the [PRIVATE SCHOOL].

9. Most of the students at the [PRIVATE SCHOOL] are placed there by local school districts which pay for the education of those students.

10. About the first of December 2007, the parents determined that they were unable to continue to pay the costs of the services provided by the [PRIVATE SCHOOL] and withdrew the STUDENT from that program.

11. On December 13, 2007, the parents enrolled the STUDENT in the same neighborhood school that their younger son attended by providing information and completing District forms. The neighborhood school determined that it did not provide the services needed by the STUDENT. Therefore the neighborhood school made a referral to the District's Alternative Resource Team.

12. On December 18, 2007, the District's Alternative Resource Team recommended that the STUDENT attend school at the [ELEMENTARY SCHOOL] which is operated by the District. The parents did not participate in the decision making process, but were informed of this placement decision on December 19, 2007.

13. At [ELEMENTARY SCHOOL] the District provides specially trained staff and has created rooms specifically designed to educate and provide related services to children identified with autism.

14. On December 19, 2007, the parents visited [ELEMENTARY SCHOOL]. During the visit, they believed one student was physically abused and they did not believe other students received adequate instruction or supervision.

15. The District scheduled a meeting at [ELEMENTARY SCHOOL] for January 14, 2008 which was attended by the STUDENT's parents, the clinical director of the [PRIVATE SCHOOL], and several representatives of the District who produced a three page document. The top of each of the three pages states "Individualized Education Program (IEP)." On the last page is written the date 1-14-2008. Above the date it is written that: "<u>The following special education</u>

and related services will be provided on an interim basis, not to exceed 30 school days" (underlining added).

Type of Service Provided	Hours
Special educator	6.7 / day
Speech therapist	3 / month
OT / PT	3 / month
Social work / mental health consultation	30 minutes/ week

16. The document labeled IEP and dated 1-14-2008 is not an IEP that complies with the requirements of IDEA or with ECEA. From December 13, 2007 to the present the STUDENT has not had a current IEP compliant with the IDEA or with ECEA.

17. The District's witnesses testified that the interim services were to last no more than thirty school days from January 14, 2008 while the District determined what additional evaluations, if any, would be required to develop an IEP for the STUDENT that complies with legal requirements.

18. The parents rejected all services the District proposed pursuant to the 1-14-2008 document and filed the Due Process Complaint herein. The STUDENT has never attended school within or received services from the District.

19. The District's educators testified that the District could provide the STUDENT with a free appropriate public education at [ELEMENTARY SCHOOL] and wanted to meet with the parents to develop an IEP.

20. Carrie A. Clark, the Clinical Director of the [PRIVATE SCHOOL] testified that the [PRIVATE SCHOOL] could provide an appropriate education for the STUDENT.

21. Since approximately December 1, 2007, the STUDENT has been at home and not receiving services from the [PRIVATE SCHOOL] or any other agency or school. The parents have provided some therapy and medical interventions to the STUDENT since December 1, 2007.

22. The STUDENT's mother, Ms. Clark from the [PRIVATE SCHOOL] and the District's witnesses testified regarding the 12/7/07 Individualized Education Plan 07-08 and the Behavior Intervention Plan for the STUDENT prepared by the [PRIVATE SCHOOL] and the IEP goals and objectives 2006-2007 prepared by the [OUT OF STATE SCHOOL] in [OTHER STATE]. All the witnesses who testified regarding these documents did so with approval. There was no testimony that indicated that said documents were inadequate, incomplete or inappropriate in the program outlined therein for the benefit of the STUDENT. The District's witness testified that they advised the parents at the 1-14-08 meeting that the District would use the documents referred to above in this finding in providing services pursuant to the 1-14-2008 document. From the information available at the hearing it does not appear that any of these documents are IEPs as that term is defined by IDEA.

23. 45 school days in the District from December 13, 2007 is March 5, 2008.

24. 30 school days in the District from January 14, 2008 is February 27, 2008.

25. The District's witnesses testified that they wished to observe the STUDENT while the STUDENT received services pursuant to the January 14, 2008 document to help them determine how to best evaluate and prepare an IEP for the STUDENT. The director of the

[PRIVATE SCHOOL] testified that her staff in a similar manner observed the STUDENT while receiving service as they prepared their document labeled IEP.

IV. DISCUSSION AND CONCLUSIONS

A. The Timely Implementation of an IEP is a Central Requirement of the IDEA and Is the Central Issue of this Due Process Complaint.

Congress adopted the IDEA pursuant to its authority under the Spending Clause. Arlington Cent. Sch. Dist. v. Murphy, 126 S.Ct. 2455, 2458 (2006). Spending Clause legislation imposes conditions on states that Congress could not otherwise impose in exchange for funding that Congress would not have to provide so long as Congress sets forth those conditions "unambiguously." Murphy, 126S.Ct. at 2459. Colorado and the District accept these federal monies and are therefore bound by IDEA and its implementing regulations.

The central condition of the IDEA is that school districts make a "free appropriate public education ... available to children with disabilities." 20 U.S.C. §1412(a)(1)(A).

> The term "free appropriate public education" means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State educational agency; (C) include an appropriate preschool, elementary school, or secondary school education in the state involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title. 20 U.S.C. §1401(9).

Given these parameters the initial question in a due process hearing is whether or not the STUDENT's IEP was developed in accordance with procedural requirements. O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 701, 708 (10th Cir. 1998).

A free appropriate public education is owed to a child with a disability. 20 U.S.C. §1412(a)(1)(A). A child with a disability is a child with a qualifying disability who requires special education and related services by reason thereof. 20 U.S.C. §1401(3)(A). Thus, before a student is entitled to a free appropriate public education, a school district first must determine whether the child is a child with a disability, and therefore entitled to a free appropriate public education. This eligibility determination is made through an initial evaluation 20 U.S.C. §1414(a)(1). 20 U.S.C. §1414(a)(1)(C)(i) states:

> (i) IN GENERAL-Such initial evaluation shall consist of procedures–
> (I) to determine whether a child is a child with a disability (as defined in section 1402) within 60 days of receiving parental consent for the evaluation, or, if the State establishes a timeframe within which the evaluation must be conducted, within such timeframe; and
> (II) to determine the educational needs of such child.

Also see 34 CFR § 300.301(c).

The current Colorado rule found at 1 CCR 301-3, 2220R - 4.02(3)(c) states:

> Once a written special education referral has been initiated, the initial evaluation shall be completed within 60 calendar days from the point of initiation of the special education referral. The special education referral process is initiated when one of the following occurs:
> (i) The parent is informed of the special education referral as a result of the building level process or screening and the parent provides written consent to conduct the initial evaluation; or
> (ii) The request for an initial evaluation is received from the parent and the parent provides written consent to conduct the initial evaluation.

The above regulation was effective January 1, 2008. In the prior regulation the time period was 45 calendar days instead of the 60 days.

In its March 3, 2008 Response to the Due Process Claim the District alleges that:

> Nevertheless, the District has agreed to evaluate this student upon obtaining parental permission. On February 26, 2008, the District provided the mother with a request for parental consent in order to comprehensively evaluate her child. Upon obtaining the permission, the District will comprehensively evaluate the child and will use the results of the evaluations to finalize an IEP for the Student. As stated above, the District is willing and able to provide a FAPE to the student and will provide comparable services as designated in the [PRIVATE SCHOOL] Plan at either of our Multi Intensive Center Programs for autism located at [ELEMENTARY SCHOOL] or [OTHER ELEMENTARY SCHOOL].

The parties did not submit a copy of the parental consent to evaluation nor did they testify whether or not said consent was given, and if given, when it was given. To determine the appropriate time line, the IHO will assume the best possible circumstance for the Petitioner, to wit: that consent to evaluate was given on December 13, 2008 and that the 45 school day period applies. If those are the facts, the District was required to complete the evaluation and implement the IEP by March 5, 2008, so that FAPE could be provided that day.

The Due Process Complaint herein was filed February 20, 2008. The IDEA at 20 U.S.C. §1415(b)(6)(B) requires a complaint to set "forth an alleged violation" of IDEA. The "alleged violation" concept is repeated in the implementing regulations at 34 C.F.R. §300.507(a)(2) which states in part that "the due process complaint must allege a violation that occurred..." The State of Colorado has required that the federal regulation be observed 1 CCR 301-8, 2220-R-6.02(7)(a)(i). Therefore, the Due Process Complaint herein was filed before a violation of IDEA

occurred because the parents filed their complaint on February 20, 2008, prior to the March 5, 2008 deadline for the District to complete the evaluation and IEP and begin providing FAPE. Because of this conclusion which determines the first 3 of the 6 issues raised in the complaint against the parents' position it is not necessary to consider the last 3 issues which deal with their proposed remedy.

The proper implementation of IDEA for the benefit of a student requires a great deal of cooperation between the parents, the STUDENT, and the District. Part of this cooperation is working together during the initial 45 school days to develop the best possible plan given available resources for the STUDENT.

During this initial 45 day period that the District should have stated in the 1-14-08 document that the services outlined therein were for the purpose of observing and evaluating the STUDENT and were to be provided pursuant to the education plan and the behavior intervention plan developed by the [PRIVATE SCHOOL] and the goals and objectives prepared by the [OUT OF STATE SCHOOL]. It was a mistake which led to confusion to identify that document as an IEP or Individualized Education Plan.

The IHO did not find the January 14, 2008 document to be the District's proposed IEP pursuant to IDEA for the STUDENT because:

1. The document stated "The following special education and related service will be provided on an interim basis not to exceed 30 school days".

2. It is not clear to the IHO that the parents had consented to an evaluation to initiate the process of evaluation and preparation of an IEP on or before January 14, 2008.

3. The District's mislabeling of the January 14, 2008 document as an IEP was consistent with other educators who seem eager to label documents IEPs as demonstrated by the documents prepared by the [PRIVATE SCHOOL] and the [OUT OF STATE SCHOOL] which like the January 14, 2008 document are not IEPs pursuant to IDEA.

4. The parents had the assistance of experienced counsel who has previously been involved in and demonstrated expertise in cases involving IDEA.

5. The explanation by the District of the proposed process to evaluate the STUDENT while receiving services.

6. The parents' experience at the [PRIVATE SCHOOL] of having an education plan developed while the Student received services.

B. Other Issues Raised at Hearing and in the Briefs.

1. The Alternative Resource Team Made a Placement Determination Without the Participation of the Parents.

Pursuant to 20 U.S.C. §1414(e), the District "shall ensure that the parents of each child with a disability are members of any group that makes decisions on the educational placement of their child." See also 34 C.F.R. §300.327. Here, without the participation of the Parents, Alternative Resource Team directed that the STUDENT be placed at [ELEMENTARY SCHOOL].

2. Upon the STUDENT's Enrollment in the School District and Referral to Special Education, the School District Failed to Provide Prior Written Notice to the Parents to Initiate the Evaluation and Educational Placement.

Pursuant to 20 U.S.C. §1415(b)(3), the District is required to provide the Parents written notice (containing specific requirements) prior to its proposal to initiate the evaluation, initiate an educational placement, and/or initiate the provision of a free appropriate public education. The prior written notice required by §1415(b)(3) must include:

a. a description of the action proposed by the district (e.g. evaluation, placement, etc.);

b. an explanation of why the agency proposes to take the action and a description of each evaluation procedure, assessment, record, or report the agency used as a basis for the proposed action;

c. a statement that the parents of a child with a disability have protection under the procedural safeguards of the IDEA;

d. sources for parents to contact to obtain assistance in understanding the provisions of the IDEA;

e. a description of other options considered by the IEP Team and the reason why those options were rejected; and

f. a description of the factors that were relevant to the agency's proposal.

20 U.S.C. §1415(c)(1).

The Parents received no prior written notice in compliance with all of these provisions.

3. The District Failed to Provide the Parents Proper Notice of the Purpose of the January 14, 2008 Meeting.

Pursuant to 34 C.F.R. §300.322(a) and (b), the District is required to provide notice to the Parents that adequately informs them of the "purpose, time, and location of the meeting and who will be in attendance." With this Notice, the District must also inform the Parents of specific provisions of the IDEA "relating to the participation of other individuals on the IEP Team who have knowledge or special expertise about the child." Id. at §300(b)(1)(ii).

The District provided no notice to the Parents in compliance with this provision.

Because none of these issues were raised in the Due Process Complaint, said Complaint was not amended, and there has been no agreement by the District to the inclusion of these issues in this hearing, these violations cannot be part of this hearing, 20 U.S.C. §1415(f)(3)(13); and 34 CFR §300.511(d). These items require strict legal compliance, but are intended to facilitate the cooperation that should occur between all involved to assure proper services for the STUDENT.

V. DECISION

Though it was irresponsible for the District to have labeled the January 14, 2008 document an IEP, I find and conclude that at the time of their filing their Due Process Complaint, the parents should have known that the document was not the District's IEP pursuant to IDEA. Therefore, the Due Process Complaint was filed before the alleged violation of IDEA occurred and cannot be the basis of granting any relief. Furthermore, the Due Process Complaint failed to

allege other violations of IDEA that were raised by the parents in the hearing and in their post hearing brief, and likewise, cannot be the basis of granting any relief. The Due Process Complaint dated February 20, 2008 is hereby dismissed.

VI. APPEAL RIGHTS

Enclosed with this decision, please find a copy of your appeal rights under the ECEA, 1 CCR 301-8 2220-R-6.02(7)(j).

Respectfully submitted this 5th day of May, 2008.

_____.

Gordon F. Esplin
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CERTIFICATE OF SERVICE

I hereby certify that on May _____, 2008, I sent a copy of the IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION by certified Mail to the following:

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