COLORADO DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SERVICES UNIT
Due Process Hearing L2008:111

AMENDED ORDER OF DISMISSAL AND DECISION

In the Matter Of:

[STUDENT], through his parents [PARENTS],

Petitioners,

and

ACADEMY SCHOOL DISTRICT 20,

Respondent.

Academy School District 20 (District) filed a Motion to Dismiss, Supplement to Motion to Dismiss, and Reply in Support of the District's Motion to Dismiss in this matter. The District seeks the dismissal of the amended due process complaint and supplement. Petitioners filed a Response to Motion to Dismiss in which they object to dismissal of any portion of the amended complaint. Oral argument was held telephonically on the February 24, 2009. Matthew J. Werner, Alpern Myers Stuart LLC, represented Petitioners, and Alyssa C. Burghardt, Caplan and Earnest LLC, represented the District.

In the Order of Dismissal and Decision, the Impartial Hearing Officer (IHO) refer to [STUDENT] as the "Student;" [PARENTS] collectively as the "Parents;" and Academy School District 20 as the "District."

On March 2, 2009, the IHO issued an Order of Dismissal and Decision, which contained some typographical errors. The IHO now issues this Amended Order of Dismissal and Decision to correct those errors.

I. STATUS OF CASE

This matter arises 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)]. Because the IHO grants the District's motion to dismiss and dismisses the amended complaint in

its entirety, she issues this Order of Dismissal as a Decision pursuant to 1 CCR 301-8, 2220-R-6.02(7)(h).

In considering a motion to dismiss, the court must accept the allegations of the complaint as true. The court shall grant the motion when, accepting the allegations of the complaint as true, petitioner fails to state a claim for which relief may be granted. *Public Serv. Cop. v. Van Wyk,* 27 P.3d 377, 386-87 (Colo. 2001). The court must also draw all inferences in favor of the plaintiff. *Medina v. State,* 35 P.3d 443, 452 (Colo. 2001).

II. ISSUES AND RELIEF REQUESTED

Based on the Amended Due Process Complaint and Supplement to Due Process Complaint, Petitioners identified eight separate issues in this matter:

1. Whether the May 24, 2007 IEP determination that the Student did not qualify for services was erroneous and done to avoid implementing proper services for the Student.

2. Whether a manifestation hearing should have been held on or before May 29, 2008.

3. Whether [CHARTER SCHOOL] should have provided services to the Student on and after May 29, 2008.

4. Whether an expedited evaluation and manifestation hearing should have been conducted prior to school's resuming in August, 2008.

5. Whether the permanent restraining order violates the IDEA requirement to return the Student "to the placement from which the child was removed." 20 USC §1415(k)(1)(F)(iii).

6. Whether the refusal of [CHARTER SCHOOL] to vacate the permanent restraining order after the District determined that the behavior that was the basis for issuing it was a manifestation of the Student's disabilities denied the Student a FAPE at [CHARTER SCHOOL].

7. Whether Colorado law violates the IDEA by not providing for the resolution of the conflict between the expulsion statute, the restraining order statue, and the manifestation provisions of the IDEA.

8. Whether the District is under an obligation to reimburse Petitioners for an evaluation performed by [PRIVATE DOCTOR] and for her time at a September 10, 2008 manifestation/eligibility meeting.

Petitioners seek no specific relief in relation to the first four issues. In relation to issues 5, 6, and 7, Petitioners request an order requiring the District to remove the permanent restraining order immediately and allow the Student the option to return to [CHARTER SCHOOL]. In relation to issue 8, Petitioners seek an order of reimbursement for [PRIVATE DOCTOR]'s fees for performing the evaluation and for her time attending the September 10, 2008 meeting. In relation to all issues, Petitioners seek an order of attorney fees.

III. ALLEGATIONS/FINDINGS OF FACT

Based on the allegations of the amended complaint and the supplement and for the limited purposes of resolving the motion to dismiss, the IHO accepts as true the following:

1. During the 2007-08 school year, the Student was a student at [CHARTER SCHOOL], a charter school authorized by the District. In January, 2007, [CHARTER SCHOOL]'s IEP team found the Student eligible for services under the IDEA based on a [DISABILITY]. The Student received services under the IDEA for approximately four months until May 24, 2007, when his IEP team wrongfully determined that the Student was no longer eligible for such services. [CHARTER SCHOOL] set an IEP review of the Student for May 24, 2008.

2. On May 13, 2008, the Student wrote statements in a letter to a friend that threatened to harm students and staff at [CHARTER SCHOOL]. Based on these statements, [CHARTER SCHOOL] suspended the Student on May 14, 2008, eventually expelled him from school, and obtained a restraining order against him.

3. On May 20, 2008, a [CHARTER SCHOOL] administrator obtained a temporary restraining order on behalf of [CHARTER SCHOOL] that prevented the Student from attending [CHARTER SCHOOL] and all [CHARTER SCHOOL] activities including off-campus activities. The Student did not attend [CHARTER SCHOOL] for ten consecutive school days on or about May 29, 2008. Following a hearing on June 16, 2008, the temporary restraining order was made permanent.

4. On July 9, 2008, the Student's counsel requested an expedited evaluation and a manifestation hearing [20 U.S.C. § 1415(k)(5)(D)]; an interim alternative educational setting [20 U.S.C. § 1415(k)(1)(C), (D) and (E)]; and a functional behavioral assessment and behavior intervention services, including counseling [20 U.S.C. §1415(k)(1)(C) and (D) and (k)(2)].

5. [CHARTER SCHOOL] denied an expedited evaluation and manifestation hearing and did not provide interim educational or behavior intervention services. The Student's parents hired [PRIVATE DOCTOR], Ph.D., a licensed psychologist in Colorado, to conduct a psycho-educational evaluation

of the Student to address [CHARTER SCHOOL]'s denial of an expedited evaluation.

6. An expulsion hearing was held on August 13, 2008, and the Student was expelled. The hearing officer determined that the Student should be reevaluated under the IDEA, and if found eligible, a manifestation determination should be conducted.

7. The District intervened, conducted an evaluation, and held a manifestation hearing on September 10, 2008. The District determined that the Student was eligible for services under the IDEA and that his conduct was a manifestation of his disability. [PRIVATE DOCTOR] attended that meeting.

8. The Student has requested to return to [CHARTER SCHOOL]. Due to the restraining order, which remains in effect, this request has been denied. [CHARTER SCHOOL] has refused to modify or vacate the permanent restraining order against the Student.

9. Since September 11, 2008, the Student has been educated at [HIGH SCHOOL], a District non-charter school. Petitioners do not allege that the District has failed to provide the Student with a free appropriate public education since his evaluation in September of 2008.

10. The District is the administrative unit of [CHARTER SCHOOL].

IV. DISCUSSION AND CONCLUSIONS

Issues 5-7: **Restraining Order obtained and maintained by [CHARTER SCHOOL] against the Student a violation of the IDEA?**

The IHO addresses first the heart of Petitioners' due process complaint—Petitioners' disagreement with the restraining order obtained and maintained by [CHARTER SCHOOL] that prevents the Student from being educated there. Petitioners have identified three separate issues relating to the permanent restraining order obtained by [CHARTER SCHOOL]. These three issues essentially boil down to one: whether obtaining and keeping in force a restraining order that prevents the Student from continuing his education at [CHARTER SCHOOL], even after a determination that his conduct of making written threats to students and staff at [CHARTER SCHOOL] was a manifestation of his disabilities, violates the IDEA.

As background, a central requirement of the IDEA is the IEP. The written IEP specifies the program of services to which a student is entitled in order to receive a FAPE, *i.e.*, special education and related services in conformity with a student's IEP that are reasonably calculated to provide some educational benefit. 20 U.S.C. §1401(9); *Board of Education of the Hendrick Hudson Central School*

District v. Rowley, 458 U.S. 176 (1982). Once a child's educational program is determined, the school must attempt to place the child in the least restrictive environment (LRE), *i.e.,* it must educate the child among non-disabled children to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.500-300.556.

The parties agree, and the IHO finds, that the District, as the administrative unit of the charter school [CHARTER SCHOOL], is the legal entity responsible for assuring compliance with the IDEA and the Colorado Exceptional Children's Educational Act (ECEA). ECEA defines an administrative unit as a school district, among others, that provides educational services to exceptional children and that is responsible for the local administration of ECEA. Section 22-20-103(1), C.R.S.; 1 C.C.R. § §301-8, 2220-R-8.04(1)(d); 8.05(1)(d); 8.06(1)(d); and 8.07(1)(b)(Administrative unit of the charter school remains ultimately responsible for ensuring compliance with the IDEA and applicable state and federal rules.) For purposes of the IDEA, [CHARTER SCHOOL] is considered one of the District's schools. *See* Section 22-30.5-104(2)(b), C.R.S. (A charter school is "a public school of the school district that approves its charter application".); Section 22-30.5-104(4)(A charter school's status as a nonprofit corporation does "not affect its status as a public school for any purpose under Colorado law".); 1 CCR §301-8, 2220-R-4.03(8)(b)(iv) (While a charter contract may allow a charter school to provide special education services, the administrative unit "remains ultimately responsible for ensuring compliance with all special education requirements".).

Petitioners assert that the restraining order is an unlawful "change of placement" under the IDEA because it prevents the Student from returning to [CHARTER SCHOOL]. They contend that the District violated the requirement that a disabled student be returned "to the placement from which the child was removed" after his wrongful conduct was determined to be a manifestation of his disability. 20 U.S.C. §1415(k)(1)(F)(iii).

The IDEA does not directly define an educational placement. Petitioners rely on judicial authority interpreting the term "placement" in the context of the stay-put provision that requires that a student remain in the then-current educational placement" during the pendency of IDEA proceedings. 20 U.S.C. §1415(j). Petitioners contend that the purpose of the disciplinary language subsection 1415(k) parallels that of the stay-put language, *i.e.,* to "prevent school districts from 'effecting unilateral change in a child's educational program.'" *Erickson v. Albuquerque Public Schools,* 199 F3d 1116, 11221 (10th Cir. 1999), *citing Sesquenita Sch. Dist. v. Raelee S.,* 96 F.3d 83 (3d Cir. 1996). Educational placement in the stay-put setting has also been defined as "something more than the actual school attended by the child and something less than the child's ultimate educational goals." *Erickson v. Albuquerque Public Schools, supra, citing Board of Ed. of Community High Sch. Dis No. 218 v. Illinois State Bd. of Ed.,* 103 F.3d 545, 549 (7th Cir. 1996).

Petitioners contend that a change of placement occurs when the location of the school changes or the move is to a substantially different educational environment. *See J.S. Lenape Reg. High Sch. Dist. Bd. of Ed.,* 102 F. Supp.2d 540, 545 (N.J. 2000) (No change of placement when intra-district transfer based on subjective preferences rather than upon substantially different educational environments). Petitioners also rely on principles that appear to differentiate expulsions and subject them to stricter scrutiny. *Board of Ed. of Community High Sch. Dist. No. 218 v. Illinois State Bd. of Ed., supra* at 549 ("Generally speaking, where expulsion is at issue, a change of school is interpreted as a change in placement.") *Hale v. Poplar Bluffs R-1 Sch. Dist,* 280 F.3d 831, 834 (8th Cir. 2002). The facts in *Hale,* however, involved a change from home-based to school-based program, a change along the continuum of placements contemplated by the LRE requirement.

Petitioners assert that a hearing is necessary here to establish facts necessary to support their contention that [HIGH SCHOOL] is a substantially different educational environment for the Student than [CHARTER SCHOOL]. For instance, Petitioners intend to present evidence that [CHARTER SCHOOL] has a separate governing board, a separate curriculum, a different emphasis on parental involvement, and attendance by the Student's siblings. Further, Petitioners intend to present evidence of a motive by [CHARTER SCHOOL] staff to use the restraining order process to exclude disabled students such as the Student.

It is important to understand what Petitioners do not allege in this matter. Petitioners do not allege that [HIGH SCHOOL], the Student's current school, is failing to provide him a FAPE. They are not contesting the special education or related services being provided to the Student pursuant to his IEP at this school or that the Student is receiving a FAPE pursuant to *Rowley*. They simply assert that the Student has the right pursuant to 20 U.S.C. §1415(k)(1)(F)(iii) to return to [CHARTER SCHOOL], in their view the placement from which he was removed, once it was determined at the September 10, 2009 manifestation hearing that the conduct at issue was a manifestation of his disabilities.

Significant authority supports the conclusion, which the IHO adopts, that a change of educational placement does not encompass a mere change of schools or of locations, absent a significant change in the services a student receives pursuant to his IEP. The IDEA affords a student the right to a FAPE but not to receive that FAPE at a particular location. *Urban v. Jefferson County Sch. Dist. R-1,* 89 F.3d 720, 727 (10th Cir. 1996). *See also Murray v. Montrose County School District RE1-J,* 51 F.3d 921, 925 (10th Cir. 1995)(Disabled student has no right to receive special education and related services at neighborhood school.). A change in the location of educational services generally does not constitute a change of placement. *Urban v. Jefferson County Sch. Dist. R-1, supra; White v. Ascension Parish Sch. Bd.,* 343 F.3d 373, 379 (5th Cir. 2003)("'Educational

placement', as used in the IDEA, means educational program--not the particular institution where that program is implemented."); *Erickson v. Albuquerque Pub. Schs., supra* at *1122* ("An educational placement is changed when a fundamental change in, or elimination of, a basic element of the educational program has occurred."); *A.D. v. Kirby,* 975 F.2d 193, 206 (5th Cir. 1992)("An educational placement, for the purposes of EAHCA [IDEA predecessor], is not changed unless a fundamental change in, or elimination of, a basic element of the educational program has occurred."); *Lunceford v. District of Columbia Bd. of Educ.,* 745 F.2d 1577, 1582 (D.C. Cir. 1984)(Change in educational placement requires "a fundamental change in, or elimination of a basic element of the education program."); *Hill v. School Bd. for Pinellas Cty.,* 954 F. Supp. 251, 253-54 (M.D. Fl. 1997), *aff'd* 137 F.3d 1355 (11th Cir. 1998); *A.W. ex rel. Wilson v. Fairfax County School Bd.,* 372 F.3d 674, 682 (4th Cir. 2004)(No change in placement when "a new setting replicates the educational program contemplated by the student's original assignment and is consistent with the principles of 'mainstreaming' and affording access to a FAPE"); *Bd. of Educ. of Comm. High Sch. Dist. 218 v. Illinois State Bd. of Educ., supra* at 549 (No change in educational placement when three different residential programs were able to implement substantively identical IEP.); *J.S. v. Lenape Reg. High Sch. Dist. Bd. of Educ., supra* at 543 (A "mere switch in schools is not a 'change in placement' for the purposed of the IDEA.").

Further support exists for the proposition that the term "placement" in the IDEA is not the equivalent of "location." The United States Department of Education addressed this as follows:

> Historically, we have referred to "placement" as points along the continuum of placement options available for a child with a disability, and "location" as the physical surrounding, such as the classroom, in which a child with a disability receives special education and related services. . . . a public agency may have two or more equally appropriate locations that meet the child's special education and related services needs, and school administrators should have the flexibility to assign the child to a particular school or classroom, provided that determination is consistent with the decision of the group determining placement.

71 Fed. Reg. 46,588 (August 14, 2006). In addition, the Office of Special Education Programs came to the same conclusion. *Letter to Veazey*, 37 IDELR 10, p. 2 (OSEP 2001).

The IHO also notes that by law, there is no IDEA violation when a student commits a crime and law enforcement or judicial authorities relocate the student to an alternate education setting. 20 U.S.C. §1415(k)(6)(A). By analogy, when the Student wrote threatening statements that justified, in the view of the issuing court, a permanent restraining order, relocation of the Student to a non-charter

school within the District where he is also receiving a FAPE pursuant to his IEP does not constitute a change of placement.

The IHO concludes that only when there a fundamental change in the services provided by a student's IEP, such as the elimination of a basic element of those services, or in access to non-disabled peers does a change in placement occur pursuant to 20 U.S.C. §1415(k)(1)(F)(iii). *Erickson v. Albuquerque Pub. Schs., supra; A.D. v. Kirby, supra.* Petitioners allege no change in the services provided by the Student's IEP at [HIGH SCHOOL] or in the Student's access to non-disabled peers and have thus failed to allege a change of placement.[1] Rather, they concede that he is receiving a FAPE. Under these circumstances, the complaint fails to state a claim for relief pursuant to 20 U.S.C. §1415(k)(1)(F)(iii) based on an unlawful change of placement. The IHO therefore dismisses Issues 5, 6, and 7.

Issue 8: **Reimbursement for [PRIVATE DOCTOR]'s evaluation and time at September 10, 2008 manifestation/eligibility meeting**

Petitioners seek reimbursement of their expense in obtaining a July 1, 2008 evaluation of the Student by [PRIVATE DOCTOR]. Petitioners allege that they obtained this evaluation after the District denied their request to conduct an evaluation. A parent has the right to an independent educational evaluation (IEE) at public expense only if the parent "disagrees with an evaluation obtained by the public agency."[2] 20 U.S.C. §1400-1481, 34 C.F.R. § 300.502(b)(1). Petitioners here do not allege that they obtained an evaluation because they disagreed with a [CHARTER SCHOOL] evaluation of the Student. Rather, they allege that [CHARTER SCHOOL] refused to provide an evaluation so they obtained one themselves.

The IDEA does not provide for reimbursement when parents seek reimbursement for an IEE obtained after an alleged school district refusal to conduct an evaluation. *See Krista P. v. Manhattan Sch. Dist.,* 255 F. Supp. 3d 873, 889 (N.D. Ill. 2003) (There is ". . . nothing in the law which entitles a Parent to an IEE at public expense after a denial of a request for an [evaluation].") Rather, Petitioners' recourse, when a school district denies an evaluation, is to

[1] The District contends, alternatively, that the Student was not in a placement in May, 2008, and that thus no change of placement could occur. The Student did not have an IEP in place at this time, and the District thus contends that there was no "special education "placement" to which he could return. *See*, *e.g.*, *J.D. v. Manatee Cty. Sch. Bd.*, 340 F.Supp.2d 1316, 1319 (M.D. Fl. 2004) (A student who has been found eligible but does not have IEP does not have a current "educational placement" for purposes of the IDEA.) Based on her ruling, the IHO has not addressed this argument.

[2] An evaluation is defined as the "procedures used in accordance with 34 C.F.R. § § 300.304 through 300.311 to determine whether a child has a disability and the nature and extent of the special education and related services that the child needs." 34 C.F.R. § 300.15.

request a due process hearing. *Lewis-Palmer District 38,* 39 IDELR 147, p. 10 (CO SEA 2003).

Petitioners also seek reimbursement for the time [PRIVATE DOCTOR] spent at the manifestation/eligibility hearing on September 10, 2008. Petitioners concede that they have no authority supporting this claim for reimbursement. Authority addressing the issue of a consultant's attendance at an IEP meeting does, however, exist and establishes that there is no obligation for school districts to pay for the cost of parent consultants at such meetings. *See Arlington Cent. Sch. Dist. Bd. of Educ. V. Murphy,* 548 U.S. 291 (2006)(Prevailing parents may not recover the costs of experts or consultants.), S*heboygan*, 46 IDELH 204 at p. 5.

In relation to Issue 8, Petitioners therefore failed to state a claim for which relief can be granted. The IHO dismisses Issue 8.

Issues 1-4: **IEP Team Denial of Services on May 24, 2007; Entitlement to Manifestation Hearing before May 29, 2008; Eligibility for Services After May 29, 2008, Entitlement to Expedited Evaluation and Manifestation Hearing before August, 2008.**

Petitioners raise issues related to the Student's eligibility for special education services from the time the IEP team found him ineligible on May 24, 2007, until he began receiving them on September 11, 2008. Further, they assert that the Student was entitled to a manifestation hearing and expedited evaluation. As clarified at the oral argument on the motion to dismiss, Petitioners seek no specific relief in relation to these claims other than attorney fees. Petitioners are aware that if they prevailed on these issues, they could, for example, seek compensatory educational services. Petitioners have therefore consciously chosen to seek no direct relief in relation to these claims.

When Petitioners state facts upon which relief could be granted but choose to seek no relief, they fail to include an essential item of a complaint, *i.e.,* the relief sought, and the complaint is subject to dismissal. *See* 34 C.F.R. §300.508(b)(6)(Required contents of a due process complaint include a proposed resolution of the problem.)

Petitioners assert that the relief they seek in relation to Issues 1-4 is attorney fees. Federal courts have the discretion to award "reasonable attorneys' fees" to "the parent of a child with a disability" who is a "a prevailing party" under the IDEA. 20 U.S.C. §1415(i)(3)(B)(i)(I). A party prevails when "actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff." *Urban v. Jefferson County Sch. Dist. R-1, supra* at 729-730, *citing Farrar v. Hobby*, 506 U.S. 103, 112 (1992). The claim for attorney fees alone, however, is

not a resolution of a problem or relief in relation to the issues of the Student's entitlement to special education services, a manifestation hearing, or an expedited evaluation. Petitioners have not sought relief in relation to Issues 1-4.

Petitioners have therefore failed to state a claim for relief in relation to Issues 1-4, and these issues are dismissed.

V. DECISION

It is the Decision of the Impartial Hearing Officer that Petitioners' amended due process complaint, with its supplement, is dismissed in its entirety for failure to state a claim upon which relief can be granted. C.R.C.P. 12(b)(5).

VI. 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: March 9, 2009

Nancy Connick

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NANCY CONNICK
Impartial Hearing Officer

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of this **AMENDED ORDER OF DISMISSAL AND DECISION** on the parties by e-mail transmission on March 9, 2009, as follows:

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Nancy Connick