

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO**

CASE NO. ED 2002-013

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[STUDENT], by and through her parent, [PARENT],

Appellant,

v.

JEFFERSON COUNTY SCHOOL DISTRICT R-1,

Appellee.

This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.* ("IDEA"). [STUDENT] ("[STUDENT]") was represented by her mother, [PARENT] ("[PARENT]"), who was *pro se*. Appellee Jefferson County School District R-1 ("District") was represented by Julie Tishkowski, Esq., and Colleen A. O'Laughlin, Esq., of Caplan and Earnest, LLC.

This matter involves an appeal by [PARENT] on behalf of [STUDENT]. Appellant appeals the limited legal issue of whether the IHO erred in dismissing her claims by improperly placing on her the burden of proof in this matter. Both parties submitted a brief, and Appellant submitted a reply. A transcript of the due process hearing was prepared and submitted.

PROCEDURAL BACKGROUND

By letter dated June 24, 2002, [STUDENT], by her parent [PARENT], filed a request for a due process hearing in this matter. In general terms, the request disputed that the District was providing [STUDENT] with a free appropriate public education ("FAPE"), and alleged that [STUDENT]'s Individualized Educational Program ("IEP") did not consider [PARENT]'s concerns for enhancing [STUDENT]'s education. Bruce C. Bernstein was selected as the Impartial Hearing Officer ("IHO"), and an evidentiary hearing was held August 26-28, 2002, in Case No. L2002:114. The IHO issued a Final Decision on October 10, 2002.

As relevant here, the IHO's Final Decision denied [STUDENT] the relief she sought in that [STUDENT]'s appeal was dismissed. Also, the IHO placed the burden of proof on the Petitioner.

[PARENT] subsequently filed an appeal on the limited legal issue of whether the IHO erred in dismissing her claims by improperly placing on her the burden of proof in this matter. The ALJ has reviewed the transcript of the hearing, the record of the hearing before the IHO, and the briefs submitted and now issues this decision upon state level review.

ISSUES ON APPEAL

[PARENT] raises one issue on appeal: whether the impartial hearing officer erred in dismissing her claims by improperly placing on her the burden of proof in this matter. .

FINDINGS OF FACT

1. In this appeal, the facts are not in dispute. Appellant only appeals the legal conclusion that she had the burden of proof as the person attacking the educational placement of [STUDENT].

2. The IHO, in the due process hearing, placed the burden of proof on Appellant because she challenged the appropriateness of the IEP that recommended placement at the Sobesky Academy as the setting that would provide [STUDENT] a FAPE in the least restrictive environment given her disability and needs.

3. Appellant did not raise the issue of which party had the burden of proof at the due process hearing, nor did Appellant ask for a continuance of the due process hearing upon finding that she was to present her case first.

4. At the conclusion of Appellant's presentation of evidence, and prior to presenting its evidence in response to Appellant's allegations, the District requested that the IHO dismiss with prejudice Appellant's claims on the basis of her failure to present a *prima facie* case.

5. On October 10, 2002, the IHO issued a Decision, in which he made factual findings and granted the District's motion to dismiss. Not only did he find that Appellant had failed to establish a factual basis for her claims, but his findings demonstrate that the evidence presented by Appellant supported the District's position in the case.

6. On November 1, 2002, Appellant filed a Notice of Appeal of the limited legal issue of whether the IHO erred in dismissing her claims by improperly placing on her the burden of proof in this matter.

DISCUSSION

I. Scope of Review

Pursuant to IDEA and ECEA, the ALJ must conduct an impartial review of the IHO's decision, examine "the entire hearing record," and make an "independent" decision on state level review. 20 U.S.C. § 1415(c); 34 C.F.R. § 300.510; and Section 2220-R-6.03(11)(b)(v) (1 CCR 301-8). In reviewing the Decision of the IHO, the ALJ must give "due weight" to the factual findings of the IHO. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982); *Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

In this appeal, the facts are not in dispute. Appellant only appeals the legal conclusion that she had the burden of proof as the person attacking the educational placement of [STUDENT].

II. General Legal Background

In administrative hearings held pursuant to the IDEA in Colorado, decisions from the Tenth Circuit Court of Appeals are controlling. The Court specifically has decided that parents, who are attacking the educational setting proposed in an IEP, bear the burden of proof. *A.E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 475 (10th Cir. 1991) ("The burden of proof rests upon the party attacking the child's IEP."); *Johnson v. Independent Sch. Dist. No. 4*, 921 F.2d 1022, 1026 (10th Cir. 1990) ("The burden of proof in these matters rests with the party attacking the child's individual education plan."), cert. denied, 500 U.S. 905 (1991); *Logue v. Unified Sch. Dist. No. 512*, 153 F.3d 727 (10th Cir. 1998) ("The burden of proof rests with the party attacking the IEP.") (unpublished decision).

The Tenth Circuit has made clear that the burden of proof rests with the parents even where, as here, Appellant is challenging the educational setting proposed by the District: "The Act placed primary responsibility for formulating handicapped children's education in the hands of state and local school agencies in cooperation with each child's parents. In deference to this statutory scheme and the reliance it places on the expertise of local education authorities, ... the act creates a presumption in favor of the educational placement established by a child's individualized education plan, and the party attacking its terms should bear the burden of showing why the educational setting established by the individualized education plan is not appropriate." *Johnson*, 921 F.2d at 1026.

The IHO, in this due process hearing, properly placed the burden on Appellant because she challenged the appropriateness of the IEP that recommended placement at the Sobesky Academy as the setting that would provide [STUDENT] in the least restrictive environment appropriate given her disability and needs. In granting the District's motion to dismiss, the IHO concluded that Appellant failed to meet her burden.

In her brief, Appellant relies exclusively on two administrative decisions issued by impartial hearing officers in separate state due process proceedings to support her position that the IHO erred by improperly placing on her the burden of proof in this matter. Neither decision was appealed by the parties involved. Based on these decisions, it is Appellant's position that the District had the burden of showing that the 2002-2003 IEP proposed for [STUDENT] was appropriate. Specifically, she states "the District needed to show that it provided supplementary aids and services and modifications for [STUDENT]'s program and they did not work." With regard to the allocation of the burden of proving the appropriateness of [STUDENT]'s placement, Appellant's position is unsupportable according to controlling federal precedent.

According to the IHO decisions cited by Appellant, the burden of proof would fall on the District "as [the District] is charged with the overall responsibility of providing FAPE." *Academy School District 20*, L2002:107 (July 15, 2002). The IHO in this case cited no legal authority for this reasoning. Likewise, the IHO in *Elizabeth C-1 School District*, 2000:136 (November 30, 2001), miscited Tenth Circuit precedent and declined to follow it. Rather, he inappropriately followed a Third Circuit decision and ultimately held that the "proponent rule", set out in the Colorado Administrative Procedure Act, which is not applicable to these proceedings, was controlling. Neither IHO decision was reviewed by the Division of Administrative Hearings.

Tenth Circuit decisions take precedence over IHO decisions. The IHO decisions upon which Appellant relies are either unsupported or supported by inapplicable authority.

CONCLUSIONS OF LAW AND DECISION

1. The ALJ has jurisdiction to hear this matter pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 *et seq.*; Colorado Exceptional Children's Education Act, Section 22-20-101 *et seq.*, C.R.S. (1997); and Section 2220-R-603(10), 1 CCR 301-8.

2. The IHO's determination that Appellant had the burden of proof as the party challenging the IEP and placement is upheld.

3. The IHO's determination to grant the District's motion to dismiss [PARENT]'s appeal is upheld. The appeal filed by [PARENT] is dismissed in its entirety.

4. This decision of the ALJ is the final decision on state level review, except that any party has the right to bring a timely civil action in an appropriate court of law, either federal or state. Section 2220-R-6.03(12) (1 CCR 301-8).

DONE AND SIGNED

April _____, 2003

KATHLEEN T. MURAMOTO
Administrative Law Judge

CERTIFICATE OF MAILING

I certify that a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** was placed in the U.S. Mail, postage prepaid, at Denver, Colorado, to:

Colleen A. O’Laughlin, Esq.
Julie A. Tishkowski, Esq.
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2595 Canyon Blvd., Suite 400
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[parent]

Bruce C. Bernstein
Impartial Hearing Officer
1828 Clarkson Street, #100
Denver, CO 80218

and via Interoffice Mail to: Charles Masner, Director, Special Education, Colorado Department of Education, 201 E. Colfax Ave., No. 300, Denver, CO 80203-1704, on April _____, 2003.

Secretary to Administrative Law Judge