BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2003-024

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[STUDENT], by and through his parents, [PARENT] and [PARENT],

Appellant

v.

COLORADO SPRINGS SCHOOL DISTRICT NO. 11,

Appellee.

This matter is a state level review of a decision of the Impartial Hearing Officer (IHO) pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq.* (the IDEA). Michael C. Cook, Esq. represented Appellant [STUDENT] ([STUDENT]), who appeared through his parents [PARENTS]. Brent E. Rychener, Esq. and Deborah S. Menkins, Esq. represented Colorado Springs School District No. 11 (the District).

SCOPE OF REVIEW

On November 20, 2003 the IHO issued an order in which he concluded that as a matter of law the extended school year guidelines of the Colorado Department of Education did not violate the IDEA. The Administrative Law Judge, as the officer making the state level review in this case, is required to make an independent decision on the matters presented to the IHO. 20 U.S.C. §1415(g).

FINDINGS OF FACT

The facts necessary to a decision in this matter are not in dispute. [STUDENT] was born on [DOB] and has been diagnosed with autism. There is no question that he is disabled and entitled to a free appropriate public education pursuant to the IDEA.

On May 6, 2003 a meeting was held with [STUDENT]'s parents, teachers, service providers and others involved in his education to develop [STUDENT]'s individualized education program (IEP) for the 2003-04 school year. The IEP

team determined that [STUDENT] was eligible for extended school year (ESY) services during the summer of 2003. The IEP team proposed that ESY services would be designed to maintain [STUDENT]'s learned skills from his 2002-03 IEP, so that those skills would not be in jeopardy of being lost. The ESY services did not continue work on unmastered goals from the 2002-03 IEP or address new goals and objectives established for the 2003-04 school year. The District provided ESY services to [STUDENT] from June 9 to August 1, 2003.

The Colorado Department of Education (CDE) has established a process for providing ESY services. This process was developed by a task force of Colorado educators brought together by the CDE. This task force reviewed court cases and concluded that ESY services are designed to allow the student to maintain learned skills during the extended school year, not to develop new skills. CDE distributed materials from the task force to local education agencies in Colorado on March 6, 1998. In transmitting these materials the Special Education Services Unit of CDE intended that schools across the state would use these materials to become consistent in implementing the ESY process. The District followed CDE's process, as set forth in these materials, when it developed [STUDENT]'s ESY program for the summer of 2003.[1]

THE PROCEEDINGS BEFORE THE IHO

[STUDENT]'s parents filed a request for a due process hearing on July 7, 2003. In this request [STUDENT]'s parents claimed, among other things, that [STUDENT] was denied a free appropriate public education (FAPE) under the IDEA because the 2003 ESY services were insufficient in terms of the number of hours of services, and because the ESY services were limited to maintaining [STUDENT]'s skills rather than teaching new skills.

On September 3, 2003 the parties entered into a stipulation to bifurcate the due process hearing into two stages. In the first stage the parties would present to the IHO the legal issue of whether the ESY guidelines of the CDE for determining ESY services and the District's ESY policy violated the IDEA by limiting required ESY services to maintaining learned skills rather than developing new skills. The parties stipulated that the IHO should determine the applicable legal standard before undertaking a full evidentiary hearing.

The IHO conducted a hearing on the ESY standard on September 23, 2003. On November 20, 2003 the IHO issued an order on the limited issue presented at the bifurcated hearing of whether the CDE guidelines for ESY services violated the IDEA. The IHO concluded that the CDE guidelines did not violate the IDEA. The parents have appealed that IHO order and that appeal is the subject of this state level review.

DISCUSSION AND CONCLUSIONS OF LAW

1. The District's ESY policy states that ESY services are designed to provide maintenance of skills and to prevent significant regression.

I. Statutory Background

The IDEA requires that disabled students receive a free appropriate public education. 20 U.S.C. §1401 *et seq*. In *Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 206 (1982) (*Rowley*) the Supreme Court held that the IDEA's minimum requirement is that the state provide a disabled student with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. *Rowley* established that if a state educational agency complies with the procedures of the IDEA, and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with the IDEA. *Rowley* at 206-07; *see also Barnett v. Fairfax County School Board, supra* at 152-53; *Cain v. Yukon Public Schools, District I-27*, 775 F.2d 15 (10th Cir. 1985); *Troutman v. School District of Greenville County*, EHLR DEC 554:487 (D. S.Car. March 11, 1983).

II. The District Has Complied With Federal Regulations

Federal regulations implementing the IDEA require that ESY be available as necessary to provide children with disabilities with a free appropriate public education. 34 CFR § 300.309(a)(1). This regulation further defines ESY services as:

> [S]pecial education and related services that
>
> (1) Are provided to a child with a disability
>
> (i) Beyond the normal school year of the public agency;
> (ii) In accordance with the child's IEP; and
> (iii) At no cost to the parents of the child; and
>
> (2) Meet the standards of the SEA.

34 CFR § 300.309(b).

The reference to "the SEA" in this regulation is to a state educational agency, which in Colorado is CDE. CDE does not have a regulation adopted pursuant to the Colorado Administrative Procedure Act (Section 24-4-103, C.R.S.) that establishes ESY standards. However, CDE has approved of a process that it intended that schools across the state would follow to be consistent in implementing ESY. This process, including the provision that ESY is to be designed to allow the student to maintain learned skills during the extended school year, not to develop new skills, thus is the standard set by CDE, the state educational agency. In limiting [STUDENT]'s ESY to the maintenance of learned

skills the District met the standards of the CDE. Therefore, the District has complied with 34 CFR § 300.309(b).

In addition, the Federal regulation requires that a public agency not "unilaterally limit the type, amount, or duration of [ESY] services". 34 CFR § 300.309(a)(3)(ii). The CDE process does not limit the type, amount or duration of services. Rather, it limits the goals of those services. Nothing in the CDE process requires a school district to ignore the individual needs of a student in determining the type, amount, or duration of ESY services required for a student to maintain learned skills during the extended school year.

II. The CDE Standards are Presumptively Valid and Entitled to Deference

[STUDENT]'s parents contend that the CDE standard for ESY violates the IDEA because it is not individualized and does not provide [STUDENT] with educational benefit. Accordingly, [STUDENT]'s parents argue that by applying the CDE standard the District denied [STUDENT] a free appropriate public education.

CDE administers the IDEA in Colorado. An agency's construction of the statute it administers is entitled to great weight. *See Janssen v. Industrial Claim Appeals Office,* 40 P.3d 1 (Colo. App. 2001); *Mile High Greyhound Park v. Colorado Racing Commission,* 12 P.3d 351 (Colo. App. 2000). In addition, a presumption of validity attaches to the acts of administrative agencies. *Mountain States Telephone and Telegraph Co. v. Public Utilities Co*., 763 P.2d 1020, 1028 (Colo. 1988); *Saint Luke's Hospital v. Colorado Civil Rights Commission,* 702 P.2d 758 (Colo. App. 1985). Therefore, great weight must be given to the CDE determination that ESY services need only allow a student to maintain learned skills during the extended school year, not to develop new skills.

Deference to a policy of CDE is consistent with the treatment of federal special education guidelines by the federal courts. In *Michael C. v. Radnor Township School District*, 202 F.3d 642 (3d Cir. 2000) the Third Circuit held that a well reasoned and persuasive policy memorandum of the United States Department of Education's Office of Special Education Programs was entitled to deference in the courts, even though OSEP did not adopt the policy memorandum as a regulation and it did not have the effect of law. *Radnor Township* at 649-50.

As will be discussed in Part III, A of this Discussion, the CDE policy on ESY is supported by substantial judicial authority. Therefore, even though the CDE process for ESY was not adopted as a regulation, this guideline for compliance with the IDEA in providing ESY services is entitled to great weight and deference.

III. The CDE Process is Consistent with the Provision of a Free Appropriate Public Education

As noted above, [STUDENT]'s parents contend that the CDE process for ESY, which was followed by the District in [STUDENT]'s case, violates the IDEA. They maintain that the ESY guideline is a blanket process that does not provide for individualization in a student's education program, and that ESY services that maintain learned skills but do not develop new skills fail to provide [STUDENT] with educational benefit. Accordingly, [STUDENT]'s parents argue that by applying the CDE standard the District denied [STUDENT] a free appropriate public education.

A. Several courts have addressed the issue of the nature of ESY services that must be provided to ensure that a student obtains a free appropriate public education. At least four United State Circuit Courts of Appeal have concluded that ESY services are necessary to a free appropriate public education when the benefits that a child gains during the regular school year would be significantly jeopardized if the child does not receive ESY services during the summer months. *M.M. v. School District of Greenville County*, 303 F.3d 523, 537-38 (4th Cir. 2002); *Johnson v. Independent School District No. 4 of Bixby*, 921 F.2d 1022, 1027 (10th Cir. 1990); *Cordrey v. Euckert*, 917 F.2d 1460, 1473 (6th Cir. 1990); *Alamo Heights Independent School District v. State Board of Education*, 790 F.2d 1153, 1158 (5th Cir. 1986). *See also Hoeft v. Tucson Unified School District,* 967 F.2d 1298 (9th Cir. 1992). These court decisions dealt with the issue of when ESY services are required to be provided, rather than the nature of those services. Nevertheless, they establish that FAPE is provided when ESY services are offered that prevent the gains of the regular school year from being significantly jeopardized.

In a more recent decision the Fourth Circuit applied the "significantly jeopardized" standard to a situation similar to that at issue in the present case. In *J.H. v. Henrico County School Board*, 326 F. 3d 560 (4th Cir. 2003) the parents objected to the amount of ESY service offered by the school board to a child with autism. The parents wanted the school board to provide the child with the same level of service as was provided during the regular school year, so that the student could master the unmet goals in his IEP. The school board asserted that it was only required to provide ESY services that would maintain the progress the student had made during the regular school year. The hearing officer's ruling fell between these two claims: the hearing officer determined that the purpose of ESY was to go beyond maintaining skills, but was not to allow the student to master his IEP goals. Rather, the hearing officer decided that ESY services were required to allow the student to make reasonable progress on unmet IEP goals.

M.M. v. School District of Greenville County had held that "ESY Services are only necessary to a FAPE when the benefits a disabled child gains during a regular school year will be significantly jeopardized if he is not provided with an educational program during the summer months." 303 F.3d at 537-38. In *J.H. v.*

Henrico County School Board the Fourth Circuit extended that reasoning from a determination of *whether* ESY services were required by FAPE to a decision that this same standard would be used to decide the adequacy of the *content* of ESY services. The court in *J.H. v. Henrico County School Board* concluded that the level of ESY services would be appropriate if they were adequate to prevent the gains the student had made during his regular school year from being significantly jeopardized.

These decisions support the CDE process for determining ESY services. CDE has stated that ESY services should be designed to allow the student to maintain learned skills during the extended school year, not to develop new skills. That guideline is in effect the same standard as that determined in the above cases as being necessary to provision of FAPE; that the ESY services prevent the gains of the regular school year from being significantly jeopardized.

B. Despite this authority [STUDENT]'s parents argue here that [STUDENT] was denied FAPE because the District has not followed the minimum requirements in *Rowley* that the state provide a disabled student with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201.

1. [STUDENT]'s parents first argue that [STUDENT]'s plan was not individually designed to address [STUDENT]'s unique needs because it adhered to a blanket policy that ESY services only maintain existing skills. However, the CDE and District policies do not prevent the instruction and services [STUDENT] received from being individually designed. As noted in Part I of this discussion the CDE process does not limit the type, amount or duration of services. Rather, it limits the goals of those services. In compliance with 34 CFR § 300.309(a)(3)(ii) nothing in the CDE process requires a school district to ignore the individual needs of a student in determining the type, amount, or duration of ESY services necessary for the student to maintain learned skills during the extended school year.

2. [STUDENT]'s parents also argue that the CDE guideline violates the mandate of *Rowley* and the IDEA because merely maintaining skills does not provide educational benefit to a student. In essence, the parents argue that a student must make progress toward his IEP goals in order to obtain meaningful educational benefit and that, as a matter of law, simply maintaining skills does not provide the required benefit. However, summer ESY services are not required to be provided so that a student can obtain additional educational benefit to that gained in the regular school year. A school district does not provide classes beyond the regular school year to students who are not disabled, even though those students could benefit as well. Rather, ESY is considered the exception, not the rule, under the IDEA. *Cordrey v. Euckert, supra* at 1473. Accordingly, the court in *Cordrey v. Euckert* held that if a child benefits meaningfully from his IEP during the regular school year, ESY is not required,

except when necessary to prevent the benefits gained in the regular school year from being significantly jeopardized. 917 F.2d at 1473, 1475.

The court's analysis in this regard in *Cordrey v. Euckert* is consistent with the cases discussed above in Part III, A of this Discussion. Those cases hold that ESY services are necessary to a free appropriate public education only when the benefits that a child gains during the regular school year would be significantly jeopardized if the child does not receive ESY during the summer months. These cases establish that the provision of FAPE requires that an IEP must be designed to accomplish educational benefit during the regular school year and that the purpose of ESY is to prevent the gains of the regular school year from being significantly jeopardized. Provision of FAPE does not require a school district to pursue the IEP goals over a 12-month period. *See J.H. v. Henrico County School Board, supra*; *Cordrey v. Euckert, supra.*[2]

3. The IHO received testimony from an expert witness presented by [STUDENT]'s parents. This witness testified, in effect, that as a general matter an ESY program designed only to maintain the learned skills of an autistic child will result in jeopardizing the benefits the child received in the prior school year. However, the issue before the IHO, and on this state level review, was limited to the legal issue of whether the ESY process established by CDE and used by the District violates the IDEA on its face. It is possible in an individual case, based on the particular facts of that case, that an ESY program as designed would significantly jeopardize the benefits previously gained by the child. To decide whether that occurred in [STUDENT]'s case would require much more extensive evidence than was presented in the limited hearing conducted by the IHO. This factual issue was not before the IHO and is not before the Administrative Law Judge on this state level review.

4. The Administrative Law Judge therefore concludes that an ESY process designed to maintain existing skills, but not to develop new skills, does not on its face deny a student FAPE or violate the IDEA.

2. 34 CFR § 300.309(b)(1)(ii) provides that ESY services must be provided "in accordance with the child's IEP". [student]'s parents have cited no authority to support the proposition that this provision requires that a regular school year IEP be extended through the summer. Such a reading of this regulation would be contrary to the substantial judicial authority discussed above that regular school year IEP goals do not have to be pursued in an ESY program.

DECISION AND ORDER

It is the Decision of the Administrative Law Judge Upon State Level Review that the IHO's Order of November 20, 2003 is affirmed. The appeal of the IHO's order of November 20, 2003 is denied and dismissed.

DATED this ____ day of April, 2004

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MARSHALL A. SNIDER
Deputy Chief Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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on this _____ day of _____, 2004.

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