BEFORE THE OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

CASE NO. EA 20070001

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY JUDGMENT AND DECISION UPON STATE LEVEL REVIEW

[STUDENT], BY HIS PARENT, [PARENT],

Petitioner,

v.

CHERRY CREEK SCHOOL DISTRICT,

Respondent.

This matter is the state level review before Matthew E. Norwood, an Administrative Law Judge ("ALJ") of the Office of Administrative Courts ("OAC") as described in 20 U.S.C. Section 1415(g). The subject of the review is a decision of Raymond Lee Payne, Jr., an Impartial Hearing Officer ("IHO"), pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400 *et seq*.; the regulations at 34 C.F.R. Section 300 and the regulations to the Colorado Exceptional Children's Educational Act ("ECEA").[1]

In this appeal [PARENT], Petitioner's father, represents the Petitioner. In order to preserve confidentiality, the Petitioner will be referred to by initials or as "the Student." Last names will be marked out of any public copy of this decision. Darryl L. Farrington, Esq. and Susanne Starecki Kim, Esq. represent the Respondent ("School District").

Scope of Review

The ALJ on state level review is to issue an "independent" decision. 20 U.S.C. Section 1415(g). In the context of court reviews of state level decisions, such independence has been construed to require that "due weight" be given to the administrative findings below. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). It is appropriate to apply this same standard by analogy at the state administrative review level. Thus it is sensible for the ALJ to give deference to the IHO's findings of

[1] The ECEA is at 1 CCR 301-8. All citations to the ECEA will be made by Rule number only.

fact and to accord the IHO's decision "due weight," while reaching an independent decision based on a preponderance of the evidence.

Summary

As will be discussed in greater detail below, the IHO issued a Final Judgement January 22, 2007. In summary, this Final Judgement dismissed the Student's complaint on the grounds that the School District had agreed to resume after-school tutoring. However, the Student does not believe that all issues have been resolved between the parties and that the IHO's decision, made without an evidentiary hearing, was improper. For this reason the Student has appealed to an ALJ.

The School District, in contrast, believes that all pertinent issues have been resolved and that this appeal should be dismissed on the grounds of mootness. On March 7, 2007 the parties agreed in a telephone conference before the ALJ to attempt to resolve this case by filing motions for summary judgment. Those motions have been filed and responded to and the ALJ grants the School District's motion for summary judgment, denies the Student's motion for summary judgment, and issues this Decision Upon State Level Review.

Findings of Fact

Based on the motions for summary judgment, the attachments thereto, and the orders of the IHO, the ALJ enters the following findings of fact:

The Student

1. The Student was born [DOB] and was seven years old at the start of the 2005-06 school year.

The February 2, 2006 IEP

2. On February 2, 2006 an Individualized Education Program ("IEP") team met to formulate an IEP for the Student's attendance at [Elementary] in the School District for the first grade. The document setting out at least parts of the IEP ("the February 2, 2006 IEP document") identifies the Student as having a primary disability of "physical disability/other physical disability" and a secondary disability of "speech/language disability."

3. Although not set out in the February 2, 2006 IEP document, the School District, following the February 2, 2006 IEP meeting, provided to the Student three hours per week of tutoring through a Ms. Jerri Piazza. The Student's parents have a high regard for Ms. Piazza's abilities and believe she has made progress with their son where others have been unsuccessful.

4. According to the Student's parents, they had asked School District representatives to set out Ms. Piazza's services in the February 2, 2006 IEP document, but the School District would not agree to this. According to the parents, they

acquiesced to the tutoring being absent from the February 2, 2006 IEP document because they had received assurances from Dr. Ed Steinberg that "We're going to see that [the Student] gets everything he needs." Dr. Steinberg was the then Director of Special Education for the School District. He has since left the School District.

The School District's Discontinuation of the Tutoring

5. However, in September 2006 (the beginning of the 2006-07 school year), Anita Manning, the School District's Elementary Special Education Director, called the Student's parents and told them Ms. Piazza's after-school tutoring should be eliminated.

6. The Student's father wrote a letter to Ms. Manning dated September 22, 2006 objecting to this proposal. He proposed discussing the matter at the upcoming IEP meeting scheduled for October 12, 2006. That meeting was later postponed to November 2, 2006.

7. Nevertheless, in a letter dated October 13, 2006, Ms. Manning wrote to the Student's parents informing them that the tutoring would be discontinued. Ms. Manning gave her understanding of why the tutoring had been provided, something the Student's parents dispute. She stated that the tutoring had been authorized as a time limited, compensatory arrangement related to the Student's previous placement. According to her, that tutoring was to have been terminated, at the latest, at the end of the summer or extended school year ("ESY") of the 2005-06 school year. She stated in the letter that the tutoring would be terminated October 20, 2006. She further stated that School District would pay for the tutoring up until that date.

8. As the tutoring was later restored, it is not necessary for the ALJ to resolve any factual disputes regarding any agreements or understandings regarding this tutoring.

Appeal to the IHO

9. In a letter dated October 31, 2006, the Student's father requested of the School District a due process hearing per the IDEA and ECEA. The Student's father filed an Amended Request for a Due Process Hearing dated December 4, 2006. Both requests for hearing ended with the following language:

> Pursuant to 20 U.S.C.A. Section 1415(b)(7)(A)(ii)(IV) (West Supp. 2006) and 1 Colo. Code Regs. 301-8, Section 2220-R-6.03(3)(a)(iii) (2005), the proposed resolution of the problem, to the extent known and available at this time, is the following:
>
> 1) [The School District] shall immediately reinstitute the identical special education services eliminated by Anita Manning in her letter of October 13, 2006.
>
> 2) [The School District] shall during the pendency of this due process hearing or appeal reinstate [the Student's] education placement ("stay put") as it was on October 12, 2006.

> By proposing these remedies, we are not limiting the possibilities of seeking and receiving additional relief that may be awarded pursuant to 20 U.S.C.A. Section 1415, including sections 1415(i)(2)(C)(iii) and 1415(i)(3)(B)(i)(I).

10. The Student's father submitted to the IHO a motion dated December 4, 2006 and titled "Motion for Bifurcated Hearing and Expedited Ruling on Motion for "Stay Put" and Motion for Order for Burden Going Forward." This motion asked the IHO to make an expedited ruling restoring the tutoring before the due process hearing.

The School District's Response

11. The School District filed a "Response Pursuant to 34 CFR 300.508(e) and Reply to Petitioner's Motion for Bifurcated Hearing and Expedited Ruling on Motion for "Stay Put" and Motion for Order for Burden Going Forward with Commitment to Resolve and Motion to Dismiss" ("Response") dated December 14, 2006. In this Response the School District asserted that the tutoring was not required as part of the IEP. The School District also opposed a "stay put" order requiring the continuance of the tutoring.

12. Most important for this appeal, though, the School District's Response moved to dismiss the appeal with prejudice on the grounds that the School District was agreeing to the proposed resolution in the Amended Request for a Due Process Hearing dated December 4, 2006. The Response indicated that this proposed resolution was *not* acceptable to the Student's representatives. The School District went on to commit to do the following:

> 1. Reinstate the after school tutoring through Jerri Piazza, to the extent she is available, through the 2006-07 school year.
>
> 2. Reimburse the Student for any payments made to the after-school tutor during the pendency of the appeal in order to continue the same amount of tutoring.

Further Proceedings Before the IHO

13. The Student's father wrote a letter dated December 15, 2006 to the IHO and copied it to counsel for the School District. The letter objected to the School District's commitment as presenting settlement discussions that the Student's father believed should have been kept confidential.

14. The IHO issued an untitled order dated December 22, 2006. The order denied the motion to dismiss within the Response. The IHO determined that the issue of any tutoring the Student's parents had paid for in the interim, which he called "compensatory relief," might require further attention. The IHO instructed the parties to notify him if they reached an agreement regarding payment for compensatory tutoring. If no agreement could be reached the IHO stated that he would address this issue at hearing. The IHO also reduced the amount of hearing days from four days to one.

15. The Student responded to the School District's Response with a document dated December 29, 2006 titled "Response to Respondent's Commitment to Resolve Motion to Dismiss with Prejudice. In this filing, the Student's father indicated that the Student's parents were not seeking reimbursement. The Student's father went on to object to dismissal for the reason that dismissal would not resolve the issue of whether the tutoring should be part of the IEP.

16. Then the Student's father filed a "Petitioner's Motion for Summary Judgment for Stay Put" dated January 2, 2007. The motion sought summary judgment on the issue of maintaining the tutoring services during the pendency of the appeal.

17. Also dated January 2, 2007, the Student's father filed a "Reply to Petitioner's Motion for Bifurcated Hearing and Expedited Ruling on Motion for "Say Put" and Motion for Order for Burden Going Forward." The motion sought a reformation of the IEP to include the tutoring and an assignment of the burden of proof to the School District.

18. The Student's father filed a Request for Final Decision and Order dated January 5, 2007 indicating again that there was no dispute about reimbursement for tutorial fees. Per this motion, the Student's parents were waiving any fees they had privately incurred for payment for tutorial services while the School District had discontinued them. The Student's father requested the IHO to enter a final order so that he could file an appeal.

19. The School District filed a "Stipulation Concerning Petitioner's Request for Final Order" dated January 16, 2007 indicating that it agreed that a final order was appropriate as compensatory education was no longer an issue.

20. The IHO therefore issued a Final Judgement dated January 22, 2007 ordering the School District to restore the tutoring for the remainder of the 2006-07 school year. The Final Judgement did not state whether it was with or without prejudice.

Appeal to the ALJ

21. The Student's father appealed to the ALJ February 21, 2007. As stated above, on March 7, 2007 the parties agreed in a telephone conference before the ALJ to attempt to resolve this case by filing motions for summary judgment. In his initial motion for summary judgment and in his response to the School District's motion for summary judgment, the Student's father requested oral argument.

Additional Findings of Fact

22. Any future case regarding tutoring likely will occur in the context of a new IEP.

23. By agreeing to restore tutoring, the School District has not conceded that the tutoring is part of the IEP.

Conclusions of Law

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

1. Rule 6.03(11)(b)(iii) provides that the ALJ shall afford the parties an opportunity for oral or written argument or both, if appropriate. As the written argument has been extensive, the ALJ concludes that no oral argument is appropriate or required.

2. Summary judgment is proper when the pleadings, affidavits, depositions, or admissions show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. C.R.C.P. 56(c).

3. Here the School District argues that, as it has acceded to everything requested by the Student's father, this case is moot and the IHO's order was proper.

4. The Student's father argues that this is not the case, that the IHO's order is inadequate in that it does not decide the issue of whether the tutoring should be part of the IEP. The Student's father argues that the tutoring should be seen as part of the IEP and that summary judgment should be rendered in the Student's favor because of the School District's concessions in this case. Alternatively, the Student's father argues that if the School District has not conceded to the inclusion of tutoring in the IEP, an evidentiary hearing should be held before the ALJ as to this issue.

Mootness

5. A case is moot when a ruling would have no practical legal effect. *Van Schaack Holdings, Ltd. v. Fulenwider*, 798 P.2d 424, 426 (Colo. 1990). This rule is applicable to this case and the ALJ grants the School District's motion for summary judgment on the grounds of mootness. *See also Dennin v. Connecticut Interscholastic Athletic Conference Inc.*, 94 F.3d 96, 100 (2nd Cir. 1996), where the Court held that an appeal was moot where a disabled student was allowed a waiver to the age requirement and was allowed to swim for a single season.

6. The Student's father argues against the application of the mootness doctrine for the reason that he believes there should be a determination as to whether the tutoring should be considered part of the IEP. However, an opinion on this issue would have no practical legal effect. The Student has been provided all of the relief he sought in his requests for due process hearing. The relief the Student seeks now is additional to that requested and is sought for a potential future dispute between the parties, not the present controversy. However, courts are not to consider uncertain or contingent future matters because the injury is speculative and may never occur. *Stell v. Boulder County Department of Social Services*, 92 P.3d 910, 914 (Colo. 2004).

The IHO has ordered that, pursuant to the School District's concession, that tutoring be continued until the end of the 2006-07 school year. By that time the parties will likely need to create a new IEP plan for the following school year. At this point it cannot be said with any certainty whether the Student will continue to require tutoring

or, if he does, that the School District will not provide it. If the parties are in disagreement on this point the School District may decide to provide tutoring simply to avoid litigation.

Of course, if the parties are unable to agree upon the IEP, the Student may appeal. Any such appeal, though, would take place after the completion of the 2006-07 school year. It can be expected that the academic picture presented will be different than that at the time this controversy arose.

7. Because the School District's restoration of tutoring makes this case moot, the ALJ need not resolve allegations of improper disclosure of settlement discussions or allegations of bias on the part of the IHO.

Exceptions to the Mootness Doctrine

8. As the parties have discussed, there are two exceptions to the mootness doctrine. First, a court may choose to hear an otherwise moot case if it presents a controversy capable of repetition, yet evading review. Second, a court may consider issues involving a question of great public importance or an allegedly recurring constitutional violation. *Taxpayers Against Congestion v. RTD*, 140 P.3d 343, 346 (Colo.App. 2006). The Student's case does not raise the constitutional or public importance issues in the second exception.

9. "An issue is capable of repetition, yet evades review when the 'time required to complete the legal process will necessarily render each specific challenge moot.'" *Freedom From Religion v. Romer*, 921 P.2d 84, 88 (Colo.App. 1996) quoting *Rocky Mountain Association of Credit Management v. District Court*, 193 Colo. 344, 346, 565 P.2d 1345, 1346 (1977). The ALJ will assume for the sake of argument that, after the 2006-07 school year, the School District will again deny the tutoring service. The Student will again have the right to appeal and will have the right to argue for continuance of the tutoring under applicable "stay put" regulations. Under this scenario the time required to complete the legal process will not prevent its resolution.

10. Continuing the hypothetical, the ALJ will assume that following such an appeal the School District will then agree to restore tutoring and, in order to resolve all potential issues, will also agree to pay for any interim education paid for by the parents. This hypothetical scenario appears remote. Also, the injury complained of is minor. That injury being: not having the tutoring in the IEP document itself but being provided the tutoring services nevertheless.

11. The ALJ acknowledges that the "capable of repetition, yet evading review" exception to mootness may be applied even if the precise factual circumstances are unlikely to recur. *Cloverleaf Kennel Club, Inc. v. Colorado Racing Commission*, 620 P.2d 1051, 1054 (Colo. 1980).[2] However, Colorado law also provides that a decision to hear a case under this exception to the mootness doctrine is discretionary with the

[2] In federal courts, the "capable of repetition, yet evading review" exception requires "a reasonable expectation that the same complaining party will be subjected to the same action again." *Grant v. Meyer*, 828 F.2d 1446, 1449 (10th Cir. 1987). *See also Dennin, supra* at 101.

court. *Nationsbank of Georgia v. Conifer Asset*, 928 P.2d 760, 763 (Colo.App. 1996). In declining to exercise discretion to allow this exception to the mootness doctrine, the ALJ considers factors in addition to the unlikelihood of repetition and the relatively minor nature of the injury. The ALJ also considers the fact that a repeat of this scenario would likely occur under the framework of a different IEP and after more schooling; the Student's abilities and needs may be quite different.

Also, a Decision Upon State Level Review regarding this particular IEP would not provide the clarification justifying hearing an otherwise moot case. *See, for example, Simpson v. Bijou Irrigation Co.*, 69 P.3d 50, 71 (Colo. 2003) where trial courts had three times struck down the argument of the State Engineer, but where the decisions had not been further appealed. There, the Colorado Supreme Court determined to resolve the pertinent issue. The Student's case does not raise the same need for clarification as in *Bijou Irrigation*. Finally, the ALJ considers the costs to the parties from further litigation where it is speculative whether the issue will be of concern in the future.

12. In opposing the School District's motion for summary judgment the Student raises the concern that any decision in this case could be used as precedent in future litigation about the content of the IEP by way of the doctrines of *res judicata* and collateral estoppel. The Student's father is concerned that the dismissal in this case could be used to foreclose him from arguing that the tutoring should be part of the IEP.

Res judicata or "claim preclusion" "operates as a bar to a second action on the same claim as one litigated in a prior proceeding when there is a final judgment, identity of subject matter, claims for relief, and parties to the action. [Citations omitted] *Res judicata* not only bars issues actually decided, but also any issues that should have been raised in the first proceeding but were not." *Denver v. Block 173 Associates*, 814 P.2d 824, 830 (Colo. 1991).

The related doctrine of "collateral estoppel" or "issue preclusion" holds that the final decision on an issue actually litigated and determined is conclusive of that issue in any subsequent suit. *Pomeroy v. Waitkus*, 183 Colo. 344, 517 P.2d 396 (1973). "Collateral estoppel is broader than res judicata since it applies to claims for relief different from those litigated in the first action, but narrower in that it only applies to issues actually litigated. [Citation omitted.] Collateral estoppel bars relitigation of issues if (1) the issue is identical to an issue actually and necessarily adjudicated at a prior proceeding; (2) the party against whom estoppel is asserted is a party or in privity with a party in the prior proceeding; (3) there was a final judgment on the merits; and (4) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the prior proceeding. *Denver v. Block 173 Associates* at 831.

13. Unless otherwise specified in an order, a dismissal by a court is a dismissal without prejudice. C.R.C.P. 41(a)(2). The IHO did not specify that his dismissal was with prejudice and therefore it should be considered without. The doctrine of claim preclusion would not prevent the Student from relitigating the issue of whether the tutoring is part of the IEP. The IHO's decision and this Decision Upon State

Level Review are not decisions upon the merits of the case as would be required for the application of this doctrine. *McBride v. Colorado*, 626 P.2d 760, 761 (Colo. App. 1981).

14. Nor would issue preclusion apply in any potential future litigation between the parties, as the issue of what is included in the IEP has not been "actually litigated."

15. In order to provide additional assurance to the Student, the ALJ hereby concludes that this Decision Upon State Level Review does not and should not constitute a decision upon the merits of any aspect of the IEP. The doctrines of *res judicata* and collateral estoppel should not be applied to this Decision Upon State Level Review to foreclose future litigation about the scope of the IEP.

DECISION

Based on the foregoing, the ALJ affirms the decision of IHO to restore the Student's tutoring and to dismiss this case.

Per Rule 6.03(12) the decision made upon a state level review shall be final except that either party has the right to bring a civil action in an appropriate court of law, either federal or state.

DONE AND SIGNED

April 11, 2007

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MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

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

[PARENT]

Darryl L. Farrington, Esq.
Susanne S. Kim, Esq.
1120 Lincoln Street, Suite 1308
Denver, CO 80203

and to

Keith Kirchubel
Colorado Department of Education
201 East Colfax
Denver, CO 80203-1704

on this ___ day of _____, 2007.

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Office of Administrative Courts