

STATE OF COLORADO OFFICE OF ADMINISTRATIVE COURTS 633 17 th Street, Suite 1300 Denver, Colorado 80202	▲ COURT USE ONLY ▲
CHEYENNE MOUNTAIN SCHOOL DISTRICT #12, Appellant, vs. [STUDENT], by and through his parents, [PARENT] and [PARENT], Appellees.	
DECISION UPON STATE LEVEL REVIEW	

This matter is before Administrative Law Judge (ALJ) Robert Spencer upon Appellant's appeal of aspects of a decision by an Impartial Hearing Officer (IHO). This state level review is governed by the Individuals With Disabilities Education Act (IDEA), 20 U.S.C. §§ 1400 *et seq.* and its implementing regulations at 34 CFR § 300.510; and the state Exceptional Children's Educational Act (ECEA), §§ 22-20-101 *et seq.* and its implementing regulations at 1 CCR 301-8, § 2220-R-6.02(7)(j).

This appeal was filed January 13, 2009. Per regulation § 6.02(7)(j)(iii)(A), the ALJ stayed briefing upon the appeal pending a telephone status conference to determine whether there was a need for additional evidence, oral argument or hearing. The status conference was held February 25, 2009.¹ Finding no need for additional evidence, argument or hearing, the ALJ set a briefing schedule that closed March 9, 2009.² By agreement of the participating party, the due date for the ALJ's final decision is March 19, 2009.

W. Kelly Dude, Esq. of the law offices of Anderson Dude & Lebel, PC, represented the Cheyenne Mountain School District #12. There was no appearance for [STUDENT] or [STUDENT'S] parents, and they did not participate in this appeal. For purposes of confidentiality, the ALJ will refer to Appellees by the child's initials, [STUDENT].

Background

[STUDENT] is an [AGE] boy with autism. He and his family live within the Cheyenne Mountain School District #12 (the District).

Pursuant to an Individualized Education Plan (IEP) developed by the District,

¹ Though receiving notice, Appellees chose not to participate in the status conference.

² Only Appellant submitted a brief.

[STUDENT] attended [ELEMENTARY SCHOOL #2] in Colorado Springs, Colorado. [ELEMENTARY SCHOOL #2] offers a program, known as CSSI, that is specifically designed for education of autistic children.³ Because the CSSI program was available only at [ELEMENTARY SCHOOL #2], [STUDENT] was placed there rather than at his local neighborhood school, [ELEMENTARY SCHOOL #1]. [STUDENT] attended [ELEMENTARY SCHOOL #2] for approximately 15 months, but in October 2008 [STUDENT]'s parents removed him from school as the result of a dispute with the District about the location and nature of educational services provided. Following an unsuccessful resolution meeting, [STUDENT]'s parents filed a Due Process Complaint Notice on October 24, 2008.

[STUDENT]'s due process complaint identified four demands, which were modified slightly prior to the due process hearing. As presented at the hearing, [STUDENT]'s demands are summarized as follows:

1. That [STUDENT] be transferred from [ELEMENTARY SCHOOL #2] to his home school, [ELEMENTARY SCHOOL #1], for a trial of one semester. If that trial is not successful, the District is to provide four hours per day of homebound educational services to [STUDENT].
2. That [STUDENT] be assigned a full time 1-on-1 paraprofessional who has a minimum of two years experience working with autistic children and 40 hours of autism training. At the hearing, the IHO permitted further specification of this issue to include a demand that the paraprofessional at all times remain "within arm's length" of [STUDENT].⁴
3. That the District discontinue submitting [STUDENT] to "time outs." As it developed at the hearing, this demand actually related to the parents' objection to the District's placement of [STUDENT] alone in an unlocked "sensory room" to regain composure after behavioral outbursts.⁵
4. That the District allow one parent to observe [STUDENT]'s instruction and interact with paraprofessionals and other school staff a specified amount of time each week.

During the hearing, held December 4 and 5, 2008, the IHO properly confined the scope of the hearing to these issues. In a detailed and thorough decision dated December 17, 2008, the IHO rejected each of [STUDENT]'s specified issues, and concluded that the IEP "as actually delivered" by the District "easily exceeds" the test for a free appropriate public education (FAPE). IHO Decision, p. 10.

³ CSSI is the Communication Social/Sensory Integration program. The program is a compilation of best practices in developmental, cognitive and behavioral approaches to educating children with autism.

⁴ In his decision, the IHO addressed demand #2 as two separate issues. See IHO Decision, p. 9.

⁵ In his decision, the IHO addressed this demand as part of his discussion of demand #1.

Specifically, the IHO found, with record support, that [STUDENT] was making educational progress at [ELEMENTARY SCHOOL #2], and that transfer to [ELEMENTARY SCHOOL #1] would not result in FAPE even if equivalent special education services were available at that school because the opportunity for essential peer interaction at [ELEMENTARY SCHOOL #1] would be limited and result in a more restrictive environment than the one existing at [ELEMENTARY SCHOOL #2].⁶ Homebound education would be even a more restrictive environment with little educational value. Use of the sensory room at [ELEMENTARY SCHOOL #2] was appropriate and necessary to assist [STUDENT] de-escalate and return to his studies. Assignment of a full time paraprofessional to work 1-on-1 with [STUDENT] is unnecessary and unwise. The practice of “rotating” paraprofessional assignments, as is done at [ELEMENTARY SCHOOL #2], is essential for FAPE because controlled exposure to different paraprofessional staff helps the autistic student adapt to change. A requirement to have paraprofessional staff within arm’s reach of [STUDENT] at all times, to prevent assaultive or self-injurious behavior, is unnecessary and counterproductive. Finally, the IHO rejected [STUDENT]’s demand to allow one parent to observe and interact with staff during the school day because no credible evidence established that doing so would result in any benefit to [STUDENT], and to the contrary would be disruptive to [STUDENT] and other students’ education. *Neither party appealed any of these findings or conclusions.*

The IHO, however, also found that certain aspects of the services actually being provided to [STUDENT] were not sufficiently spelled out in the IEP, and ordered the District to amend the IEP to include those elements. Specifically, the IHO concluded his decision by ordering the District:

... to forthwith amend the Student’s current IEP to include that special education staff regularly working with [[STUDENT]] in the CSSI Lab have a strong background, education and training and at least two full school years of experience in working with children with autism in particular and elementary school aged children with autism in particular, and to include that Speech Therapy services be provided as early as possible in the morning.⁷

On appeal, the District applauds the IHO’s finding of FAPE, but objects to his order to amend the wording of the IEP. The District argues that the amendments impose obligations upon the District that cannot be met and go beyond what is required by the IEP. The District contends that in light of the finding of FAPE, the IHO had no authority to gratuitously order amendments to the IEP, and that in any event the order has no factual support in the record. [STUDENT] filed no response to the District’s objections.

In the absence of any appeal by [STUDENT], the IHO’s finding of FAPE is

⁶ Ironically, for reasons not related to [STUDENT], the District plans to move the CSSI program from [ELEMENTARY SCHOOL #2] to [ELEMENTARY SCHOOL #1] the next school year.

⁷ IHO Decision, p. 12.

binding and will not be further addressed. However, for the reasons explained below, the ALJ agrees with the District that the IHO erred by ordering amendments to the wording of the IEP. Accordingly, that limited aspect of the IHO's decision is reversed.

Findings of Fact

The record supports the IHO's findings of fact and the ALJ adopts them as written, with the following exceptions:

Finding of Fact 20: This finding, as written by the IHO, reads as follows:

20. The CSSI program has a staff/student ratio at or very close to 1:1. Staff includes a special education teacher plus several paraprofessionals, all carefully selected for a strong background, education and training and at least two years experience in working with children with autism. I especially find, particularly from the testimony of Respondent's Special Education Director, that this highly trained staff is absolutely essential for the educational progress of [[STUDENT]].

This finding lacks evidentiary support. Although the Special Education Director, [SPECIAL EDUCATION DIRECTOR], testified that [STUDENT]'s special education teacher and paraprofessionals must have sufficient training and expertise to understand [STUDENT]'s disability (autism), neither [SPECIAL EDUCATION DIRECTOR] nor any other witness testified that a minimum number of years of experience in working with children with autism was necessary to provide FAPE. See [SPECIAL EDUCATION DIRECTOR] testimony, Transcript, Vol. II, p. 157, lines 20-22; p. 165, lines 20-21; p. 169, lines 10-14. Even [STUDENT]'s father stated that he did not think it was necessary for [STUDENT]'s special education teacher to have any minimum amount of experience with autistic children, provided she was appropriately licensed as a special education teacher. Transcript, Vol. II, p. 156, lines 19-24. Although [STUDENT] did request assignment of a paraprofessional with a minimum of two years experience and 40 hours of training in autism (see Issue #2, above), no evidence was offered at the hearing to support that request. In fact, [SPECIAL EDUCATION DIRECTOR] testified that it was not the District's practice to specify the staff's expertise in an IEP. Transcript, Vol. II, p. 165, lines 5-8.

Therefore, based upon the testimony actually presented at the hearing, the ALJ revises finding of fact #20 as follows:

20. The CSSI program has a staff/student ratio at or very close to 1:1. Staff includes a special education teacher plus several paraprofessionals who all have training and expertise in working with children with autism. [STUDENT]'s educational progress depends upon his special education teacher and paraprofessional staff having this expertise.

Finding of Fact 22: A typographical error appears in subparagraph A. It should read, "Respondent does *not* view its job as ending with the close of the school day."

Discussion and Conclusions of Law

The Requirement of a FAPE

The purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. § 1400(d)(1)(A). Central to the IDEA is the requirement that local school districts develop, implement, and annually revise an IEP calculated to meet the eligible student's specific educational needs. 20 U.S.C. § 1414(d). A school district satisfies the requirement for a FAPE when, through the IEP, it provides a disabled student with a "basic floor of opportunity" that consists of access to specialized instruction and related services that are individually designed to provide educational benefit to the student. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 201 (1982). The school district is not required to maximize the potential of the handicapped child, but must provide "some educational benefit." *Id.* at 199-200. Although that benefit must be more than *de minimus*, *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 726-27 (10th Cir. 1996), "some progress" toward the student's educational goals is all the IDEA requires. *Thompson R2-J School Dist. v. Luke P.*, 540 F.3d 1143 (10th Cir. 2008), *cert. denied*. Finally, in providing FAPE, children should be educated in the "least restrictive environment," meaning that, "[t]o the maximum extent appropriate," disabled children should be educated in public classrooms, alongside children who are not disabled. 20 U.S.C. § 1412(a)(5)(A).

Scope of Review

The IDEA establishes procedural safeguards that give parents of a disabled child the right to file a complaint and attend a due process hearing before an impartial hearing officer to determine whether the school district is meeting its obligation to provide FAPE. 20 U.S.C. § 1415. The burden of proof in such a challenge rests with the party claiming a deficiency in the school district's efforts. *Thompson, supra* at 1148, (citing *Schaffer v. Weast*, 546 U.S. 49 (2005)).

Following the due process hearing, either party may petition for state level review before an administrative law judge. 20 U.S.C. § 1415(g); 1 CCR 301-8, 2220-R-6, § 6.02(7)(j). The ALJ is to issue an "independent" decision upon the specified issues. 20 U.S.C. § 1415(g). In the context of a district court review of a state level decision, such independence has been construed to require that "due weight" be given to the administrative findings below. *Bd. of Educ. v. Rowley*, 458 U.S. 176, 206 (1982). In reviewing the decision of the IHO, the ALJ is in a position analogous to a district court reviewing a state level decision. Therefore, it is appropriate for the ALJ to apply a "modified de novo standard" in reviewing a hearing officer's decision and decide, based on a preponderance of the evidence in the administrative record, whether the requirements of the IDEA are met. *L.B. and J.B. on behalf of K.B. v. Nebo Sch. Dist.*, 379 F.3d 966, 974 (10th Cir. 2004). In so doing, the ALJ must give due weight to the hearing officer's findings of fact, which are considered *prima facie* correct. *Id.*

Review upon appeal is limited to the issues identified in the notices of appeal and cross appeal (if any). Regulation § 6.02(7)(j)(ii)(C)(IV) and (D). Because [STUDENT] did not file a cross appeal, the scope of this appeal is limited to the two issues stated within the District's notice of appeal which, stated in reverse order, are summarized as follows:

- I. Was the IHO's order supported by credible evidence?
- II. Did the IHO exceed his authority by ordering the District to amend its IEP?

Issue I: Is the Order Supported by the Evidence

The District argues that neither the IHO's order regarding staff experience nor his order regarding timing of speech therapy is supported by evidence in the record. The ALJ agrees, in part.

As noted in the ALJ's discussion related to revised Finding of Fact 20, the evidence does not support the IHO's finding that "two full years of experience in working with children with autism" is necessary for [STUDENT] to receive FAPE. Although competent testimony does support the conclusion that the special education teacher and the paraprofessionals must have training and expertise in dealing with autistic students, the record does not support a finding of any minimum number of years of experience. The IHO therefore had no factual basis for this aspect of his order, and it must be reversed.

On the other hand, the IHO's order to amend the IEP to require that speech therapy be provided "as early as possible in the morning" is supported by testimony in the record. The IHO's Finding of Fact 26 reads, in pertinent part, as follows:

26. In addition to the specially trained special education teacher and paraprofessionals, CSSI students have access to other professionals. [[STUDENT]] receives services from a Speech Therapist and from an Occupational Therapist. I find from the testimony of the Speech Therapist that provision of her services to [[STUDENT]] more or less the first thing in the morning is necessary for [[STUDENT]] to have substantial benefit from same
...

This finding is supported by testimony in the record. [STUDENT]'s speech therapist, [SPEECH THERAPIST], testified that she chose to work with [STUDENT] the first thing in the morning because it is a "significant factor" that contributes to her success:

Q. Now, you suggested that maybe the time of the day might affect a student's performance or behavior. Can you explain that, why seeing a child first thing in the morning as opposed to sometime in the afternoon might make a difference?

A. Yeah, I think that seeing a child first thing in the morning

when, you know, they're rested, they're fresh, everything – nothing hopefully has gone wrong with [[STUDENT]] or any other child at that time of day. They're just a lot more awake and responsive. That's particularly why I've chosen that time to work with [[STUDENT]], and I think it does make a difference. *I think it is definitely a significant factor that contributes to the success that I've had with him.*

[SPEECH THERAPIST] testimony, transcript Vol. I, p. 48, lines 1-13, *italics added.*⁸

Because this aspect of the IHO's order is based directly upon the competent testimony of [SPEECH THERAPIST], it cannot be reversed for lack of evidentiary support.

Issue II: Did the IHO Have Authority to Order IEP Amendments

The District argues that because the IHO found that the District was actually providing FAPE to [STUDENT], he was without authority to order amendments to the IEP requiring services the District does not or cannot provide. The ALJ agrees that the IHO exceeded his authority, for the following reasons.

First, the IDEA limits the issues considered at a due process hearing to those raised in the complaining party's complaint. This rule derives from several sections in the IDEA. Section 1415(b)(7)(A)(ii)(III) requires a party who files a due process complaint to include in the complaint "a description of the nature of the problem ... including facts relating to such problem." Section 1415(b)(7)(B) conditions the party's right to a due process hearing upon compliance with this notice requirement. Finally, § 1415(f)(3)(B) states that the party requesting the due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice ... unless the other party agrees otherwise."

Although this rule is most often used to prevent the complainant from expanding the scope of the due process hearing without notice, the philosophy behind the rule applies equally well to expansion of the issues by the IHO. The legislative history of the 2004 amendments to the IDEA shows that in limiting the due process hearing to the issues designated in the complaint, Congress' intent was "to ensure that the other party, which is generally the school district, will have an awareness and understanding of the issues forming the basis of the complaint" and thus "avoid the case of a school district having to prepare for and attend a due process hearing based upon an insufficient notice." Sen. Rep. No. 108-185, 108th Cong., 1st Sess., "Notice of Complaint," pp. 34-35 (2003). Obviously, a school district cannot adequately prepare for and defend issues that are raised *sua sponte* by the IHO in the middle of the hearing.

⁸ [STUDENT]'s father disagreed with [SPEECH THERAPIST], and felt that the success of [STUDENT]'s speech therapy was related to the way in which the therapy was rendered, not the time of day. Transcript, Vol. II, p. 296, line 25 to p. 297, line 20. [SPEECH THERAPIST] also admitted to some uncertainty – "I don't know if it is proximity that is leading to my success or whether it's the time of day that's leading to my success." Transcript, Vol. I, p. 33, lines 4-6.

Here, the issue when during the day speech therapy should be scheduled was totally extraneous to the limited issues designated by [STUDENT]. The scheduling of [STUDENT]'s speech therapy was not only absent from [STUDENT]'s notice of issues, but [STUDENT]'s father was clear that the timing of the therapy was of no concern.⁹ The IHO's injection of this extraneous issue into the case stands in stark contrast to the great pains he took to clarify the issues prehearing, and to limit the parties to those issues during the hearing.¹⁰ As the IHO candidly acknowledged, by choosing to criticize the sufficiency of the wording of the IEP he was "off on a frolic of [his] own." Transcript, Vol. II, p. 205, lines 18-19; p. 207, line 3.

By raising an issue that was not within the scope of [STUDENT]'s complaint, the IHO deprived the District of notice and a fair opportunity to meet the issue. In so doing, he exceeded his authority and the order must be reversed.

The IHO also exceeded his authority because the scheduling of speech therapy is a matter of specific methodology that must be left to the discretion of the District. [STUDENT]'s parents were not concerned about the timing of [STUDENT]'s speech therapy instruction, and made no allegation that early morning therapy was necessary for FAPE. But even if they had, they would not have the right to dictate the timing of that therapy. Parents, no matter how well motivated, do not have a right to compel a school district to provide a specific program or employ specific methodology in providing for the education of their handicapped child. *Lachman v. Illinois State Bd. of Educ.*, 852 F.2d 290, 297 (7th Cir. 1988); *M.M. ex rel. C.M. v. School Bd. of Miami-Dade*, 437 F.3d 1085, 1102 (11th Cir. 2006). Furthermore, although the IDEA requires that an IEP include a written statement of "the special education and related services and supplementary aids and services" to be provided, it does not require the District to specify the details of how those educational services are to be provided. 20 U.S.C. § 1414(d)(1)(A)(i)(IV). The IHO therefore erred by issuing orders invading the District's discretion to control the specific methodology of [STUDENT]'s FAPE.¹¹

Summary

In the absence of any appeal of the IHO's decision rejecting [STUDENT]'s complaint and finding that the District provided FAPE to [STUDENT], those aspects of the IHO's decision are affirmed. However, the IHO's order that the District amend its IEP to specify experience requirements not supported by the evidence, and to direct that speech therapy be provided early in the morning, exceeds his authority and is

⁹ Transcript, Vol. II, p. 296, line 25 to p. 297, line 8.

¹⁰ For example, prior to the hearing, the IHO ordered [STUDENT] to specify "the exact, specific and detailed relief" he wanted the IHO to order. See IHO Procedural Order #1, p. 2. During the hearing, the IHO reminded the parties that the issues were limited to the four issues specified in [STUDENT]'s amended complaint. *For example*, see Transcript Vol. II, p. 205, lines 5-9, "The moving target stopped with the identification of the four issues. Unless the parties agree to expand the hearing to a fifth or sixth or a tenth issue, which I have not heard anyone agreeing to do, those are the four issues."

¹¹ Logically, the District must retain the discretion to arrange the schedule upon which services are rendered. Although speech therapy may be most effective if given early in the morning, other factors must be considered including the essential educational activities that may compete for that time slot.

reversed.

Decision

The penultimate paragraph on page 12 of the IHO decision, requiring amendment of [STUDENT]'s IEP, is reversed. The remainder of the decision is affirmed.

This decision is the final decision on state level review. Any party has the right to challenge this decision in an appropriate court of law, either federal or state.

Done and Signed

March 11, 2009

ROBERT N. SPENCER
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 March 2009.

Court Clerk