BEFORE THE OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO

CASE NO. EA 20090002

DECISION UPON STATE LEVEL REVIEW

[STUDENT], through [STUDENT'S] parents and next friends, [PARENT] and [PARENT],

Petitioners,

v.

ACADEMY SCHOOL DISTRICT 20

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 the Amended Order of Dismissal and Decision of Nancy Connick, 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, Matthew Werner, Esq. appeared on behalf of the Petitioners and Alyssa Burghardt, Esq. appeared on behalf of the Respondent ("School District"). The child in this case will be referred to as the "Student."

Summary

After the Student wrote a threatening note, the County Court of El Paso County entered a permanent restraining order against [STUDENT]. The restraining order prevented the Student from returning to [STUDENT'S] former school, a charter school in the School District. The Petitioners seek to have the Student returned to the charter

[1] The ECEA is at 1 CCR 301-8. All citations to the ECEA will be made by Rule number only. In addition, the prefix 2220-R- will be left off all rule citations.

school, to have their attorney fees paid and to receive reimbursement for hiring a psychologist.

The ALJ affirms the decision of the IHO to dismiss the complaint. This is the final decision on state level review.

Background

The IHO's Decision

This case is unusual in that no evidentiary hearing was held by the IHO. Rather, the IHO granted the School District's motion to dismiss on the grounds that the Petitioners had failed to state a claim upon which relief could be granted in accordance with C.R.C.P. 12(b)(5). The IHO issued her decision dated March 2, 2009 and then issued an Amended Order of Dismissal and Decision dated March 9, 2009 amending some minor typographical errors.

The Timeliness of the Appeal

On April 16, 2009 the Office of Administrative Courts ("OAC") received the Petitioners' Notice of Appeal. This is the only copy of the Notice of Appeal received by the OAC. On April 30, 2009 the School District moved to dismiss the appeal as untimely. Rule 6.02(7)(j)(ii)(A) requires that appealing parties "shall file with or mail to" the OAC their notice of appeal. The School District's motion asserted that the March 2, 2009 version of the IHO's decision had been e-mailed to both parties that same day, making the deadline for appeal April 1, 2009. The School District acknowledged that it had received a copy of the Petitioners' Notice of Appeal on March 31, 2009.

On May 4, 2009 the Petitioners filed a Verified Response to Motion to Dismiss in which counsel for the Petitioners asserted that he had mailed the Notice of Appeal to the OAC April 1, 2009 and then mailed a second copy April 13, 2009.

The School District filed a reply May 5, 2009 in which it accepted counsel's representation of mailing on April 1, and withdrew the Motion to Dismiss. Similarly, the ALJ will accept this representation of counsel that he timely mailed a copy to the OAC in compliance with the Rule. The appeal in this case is therefore timely.

The Prehearing Conference

On May 6, 2009 a prehearing conference was held by telephone with counsel and the ALJ participating. In light of the IHO's granting of the School District's motion to dismiss for failure to state a claim, the ALJ determined to first review the IHO's decision. Only if the ALJ were to disagree with the decision would it be necessary to determine if additional evidence, briefing or oral argument would be required. The parties agreed to rely on the pleadings and submissions considered by the IHO. The parties further agreed to waive the 30-day time limit at Rule 6.02(7)(j)(iv).

Findings of Fact

Based on the record below, the ALJ enters the following findings of fact. It is important to note that the findings of fact of the IHO and the ALJ were not made after an evidentiary hearing but were, instead, made on the basis of the School District's January 30, 2009 Motion to Dismiss ("Motion"). Because the Motion relied on C.R.C.P. 12(b)(5), the facts of the complaint should be taken as true. *Denver & R.G.W.R.R. v. Wood*, 28 Colo. App. 534, 476 P.2d 299 (1970). While some of the below facts are undisputed, others are facts that must be considered to be true for purposes of analyzing the Motion, but which are disputed, or likely are disputed, by the School District. These disputed facts have not been subjected to the truth-finding process of an adversary hearing.

1. The [CHARTER SCHOOL] is a charter school authorized by the School District. The School District is the administrative unit of [CHARTER SCHOOL].

2. The Student's [SIBLINGS] attend [CHARTER SCHOOL] and the Student's mother is a substitute teacher at the school. Both of the Student's parents were involved in [CHARTER SCHOOL] from its inception and have volunteered hundreds of hours at the school.

3. In January 2007, [CHARTER SCHOOL]'s IEP team found the Student to be 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 [STUDENT'S] 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, approximately one year later.

4. 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.

5. On May 20, 2008, [CHARTER SCHOOL] obtained a temporary restraining order from the County Court of El Paso County. The temporary restraining order prevented the Student from attending [CHARTER SCHOOL] and all [CHARTER SCHOOL] activities including off-campus activities. Following a hearing on June 16, 2008, the temporary restraining order was made permanent.

6. [CHARTER SCHOOL] sought the restraining order against the Student to circumvent the manifestation process of the IDEA.

7. The Student's parents hired [PSYCHOLOGIST], Ph.D., a psychologist licensed in Colorado, to conduct an evaluation of the Student.

8. The School District did not perform an independent education evaluation ("IEE") as described in 34 C.F.R. Section 300.502(a)(3)(i).

9. On July 9, 2008 the Student's attorney requested an expedited evaluation and a manifestation hearing per 20 U.S.C. Section 1415(k)(5)(D), an interim alternative

educational setting per 20 U.S.C. Section 1415(k)(1)(C), (D) and (E), and a functional behavioral assessment and behavior intervention services, including counseling per 20 U.S.C. Section 1415(k)(1)(C) and (D) and (k)(2).

10. [CHARTER SCHOOL] denied an expedited evaluation and manifestation hearing and did not provide interim educational or behavior intervention services.

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

12. The School District intervened, conducted an evaluation, and held a manifestation hearing September 10, 2008. The School District determined that the Student was eligible for services under the IDEA and that [STUDENT'S] conduct was a manifestation of [STUDENT'S] disability. [PSYCHOLOGIST] attended that meeting.

13. The Petitioners have requested that [CHARTER SCHOOL] allow the Student to return to [CHARTER SCHOOL]. Due to the restraining order, which remains in effect, this request has been denied. [CHARTER SCHOOL] has refused to petition the court to modify or vacate the permanent restraining order against the Student.

14. Since September 11, 2008, the Student has been educated at [HIGH SCHOOLS], a School District school.

15. The Petitioners do not allege that the School District has failed to provide the Student a free appropriate public education ("FAPE") since [STUDENT'S] evaluation in September 2008.

16. On January 16, 2009 the Petitioners filed an Amended Due Process Complaint. On February 3, 2009 the Petitioners supplemented the Amended Due Process Complaint to add claims regarding the reimbursement of [PSYCHOLOGIST]. As summarized by the IHO, the issues are as follows. For ease of reference, the ALJ will use the same numbering as applied by the IHO:

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 U.S.C. 1415(k)(1)(F)(iii).

6. Whether the refusal of [CHARTER SCHOOL] to vacate the permanent restraining order after the School 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 statute, and the manifestation provisions of the IDEA.

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

17. Before the IHO, the Petitioners sought no specific relief in relation to issues 1-4.

18. As to issues 5-7, the Petitioners requested an order requiring the School District to remove the permanent restraining order immediately and allow the Student the option to return to [CHARTER SCHOOL].

19. In relation to issue 8, the Petitioners sought an order of reimbursement for [PSYCHOLOGIST]'s fess for performing the evaluation and for her time attending the September 10, 2008 meeting.

20. The Petitioners also sought attorney fees in relation to all issues.

21. As stated, the School District filed its Motion January 30, 2009, which it supplemented February 6, 2009. The Petitioners responded February 13, 2009 and the School District replied February 20, 2009. On February 24, 2009 the IHO heard oral argument regarding the Motion.

22. Also as set forth above, the IHO issued her Order of Dismissal and Decision March 2, 2009 and her Amended Order of Dismissal and Decision March 9, 2009.

23. In the Notice of Appeal filed with the OAC, the Petitioners have compressed the issues from those before the IHO. Compare the April 16, 2009 Notice of Appeal to the January 16, 2009 Amended Due Process Complaint before the IHO. Nevertheless, the issues raised on appeal before the ALJ are all the same as those discussed by the IHO.

Conclusions of Law

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law. The ALJ will consider the issues in the same order as did the IHO.

Issues 5-7, the Restraining Order

1. The Petitioners contend that the restraining order is an unlawful change of placement under the IDEA because it prevents the Student from returning to [CHARTER SCHOOL]. As argued by the School District and as found by the IHO, a mere change of schools or of locations, absent a significant change in the services a student receives pursuant to [STUDENT'S] IEP, is not a change of educational placement under the IDEA. The IDEA does not provide a right to receive services at a particular location. *Urban v. Jefferson County School District R-1*, 89 F.3d 720, 727 (10th Cir. 1996). There is no presumption that the neighborhood school is the least restrictive environment. *Murray v. Montrose County School District RE1-J*, 51 F.3d 921, 928 (10th Cir. 1995). Parental participation in sight selection is not required as part of the creation of the IEP. *White v. Ascension Parish School Board*, 343 F.3d 373, 379 (5th Cir. 2003). "An educational placement is changed when a fundamental change in, or elimination of, a basic element of the educational program has occurred." *Erickson v. Albuquerque Public Schools*, 199 F.3d 1116,1122 (10th Cir. 1999)(*citing Sherri A.D. v. Kirby*, 975 F.2d 193, 206 (5th Cir. 1992)).

2. There is no allegation that the Student has been denied a FAPE at [STUDENT'S] current school. Therefore, based on the authority of the above cases, the ALJ concludes, as did the IHO, that the provision of services to [STUDENT] at [STUDENT'S] new school was not in violation of the IDEA. This resolves issues 5-7.

Issue 8, Reimbursement for [PSYCHOLOGIST]

3. The reimbursement sought is for two expenses related to [PSYCHOLOGIST]. First, the Petitioners seek reimbursement for the expense of [PSYCHOLOGIST]'s evaluation, which they characterize as an IEE. Thirty-four C.F.R. Section 300.502(b)(1) provides that parents have the right to an IEE at public expense if the parents disagree with an evaluation obtained by the School District. Here, there was no such evaluation by the School District and the right to an IEE at public expense was not triggered. *Krista P. v. Manhattan School District*, 255 F. Supp. 3d 873, 889 (N.D. Ill. 2003).

4. Second, the Petitioners seek reimbursement for the time spent by [PSYCHOLOGIST] attending the September 10, 2008 hearing. As conceded by the Petitioners in oral argument, there is no authority under 34 C.F.R. Section 300.502(b)(1) for such reimbursement. Also, *Arlington Central School District Board of Education v. Murphy*, 548 U.S. 291 (2006) provides that prevailing parents may not recover the costs of experts or consultants.

Issues 1-4

5. Key to the IHO's resolution of these issues was the fact that the Petitioners sought no specific relief. It is true that they sought attorney fees in general. However, the ALJ agrees with the IHO and determines that, absent an underlying claim for relief, there can be no change in the legal relationship between the parties and one cannot be a "prevailing party" as required by 20 U.S.C. Section 1415(i)(3)(B)(i)(I).

6. 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, supra* at 728-72, (*citing Farrar v. Hobby*, 506 U.S. 103, 112, (1992)). Favorable, but *de minimis* success is insufficient for the award of attorney fees. *Linda T. ex rel. William A. v. Rice Lake Area School District*, 417 F.3d 704, 707-708 (7th Cir. 2005).

7. Here, where there is no underlying claim for relief as to issues 1-4 and where the Petitioners cannot prevail on the remaining issues, attorney fees are not appropriate.

DECISION

Based on the foregoing, the ALJ affirms the decision of IHO to dismiss the Petitioners' complaint in its entirety for failure to state a claim upon which relief can be granted. C.R.C.P. 12(b)(5).

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

June 8, 2009

MATTHEW E. NORWOOD
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:

Matthew J. Werner, Esq.
Alpern Myers Stuart, LLC
14 North Sierra Madre Street, Suite A
Colorado Springs, CO 80903

Alyssa C. Burghardt, Esq.
Caplan and Earnest, LLC
1800 Broadway, Suite 200
Boulder, CO 80302-5289

and to

Jennifer Rodriguez
Colorado Department of Education
201 East Colfax
Denver, CO 80203-1704

on this ___ day of June, 2009.

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Office of Administrative Courts