BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2005-0014

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

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

Appellant/Cross-Appellee,

v.

LOGAN VALLEY RE-1 SCHOOL DISTRICT,

Appellee/Cross-Appellant.

This is a state level review of a decision of a Federal Complaint Officer issued pursuant to the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. §§ 1400 *et seq*., 34 C.F.R. §§ 300.660-662 and the Colorado Department of Education (CDE) Procedure for Resolving Complaints About Programs Funded Under the Individuals with Disabilities Education Act Administered by CDE, September 22, 1999 ("CDE Federal Complaints Procedure").

PROCEDURAL BACKGROUND

On February 28, 2005, Federal Complaints Officer Charles M. Masner (FCO) received eight complaint letters filed by [PARENT] ([PARENT]) on behalf of her daughter [STUDENT] (the Student) against Logan Valley Re-1 School District (the District). The FCO subsequently consolidated the substance of the allegations contained in the letters into one complaint containing nine separate and distinct allegations (although the consolidated complaint indicated that there were eight allegations, it in fact listed nine). The complaint alleged that the District had failed to comply with IDEA on numerous grounds with respect to the education of the Student.

On March 2, 2005 the parties began mediation, subsequent to a request for mediation initiated by [PARENT] on February 16, 2005. The District's obligation to respond to the complaint was held in abeyance pending a determination of progress in mediation. On June 1, 2005 the District submitted its response to the complaint. The FCO granted [PARENT]'s request for additional time to reply to the District's response to the complaint,

giving her until July 15, 2005. This response was actually received by the FCO on July 14, 2005. The FCO then closed the record.

During the pendency of these issues before the FCO, the parties were engaged in mediation. As a result of the mediation, the extended time period for the filing of the school district's response to the complaint, and the extended time period for the filing of the complainant's response to the school district's filing, the FCO found exceptional circumstances for the extending of the time period for the decision of the complaint.

The FCO aggregated the substance of the complaints into nine separate allegations as follows:

1. The complainant alleges that her daughter has been inappropriately denied a positive behavioral support plan, causing her daughter to be inappropriately disciplined

2. The complainant alleges that her daughter has autism which the school district is refusing to appropriately recognize, and that the school district's inappropriate educational diagnosis is causing her daughter to be denied a free appropriate public education (FAPE)

3. The complainant alleges that the school district has abrogated her right to appropriately participate in individualized educational program (IEP) meetings

4. The complainant alleges that the school district has abrogated her right to an independent educational evaluation (IEE) for her daughter

5. The complainant alleges that her daughter has been denied two years of FAPE

6. The complainant alleges that the paraprofessional working with her daughter is not appropriately qualified

7. The complainant alleges that the school district has implemented an "isolation room" placement for her daughter that is not authorized by her daughter's IEP, and has resulted in her daughter being denied a placement in the least restrictive environment (LRE)

8. The complainant alleges that the school district has failed to appropriately give her notice of changes in placement of her daughter, or refusals to change the placement of her daughter

9. The complainant alleges that the school district has failed to provide her with a progress report for her daughter in order to show progress towards meeting her daughter's IEP goals

On August 4, 2005, the FCO issued his decision in the matter. The FCO determined

that the school district had not violated the provisions of the IDEA with regard to all allegations except allegation 4. With regard to allegation 4 the FCO determined that the school district had failed to comply with the IDEA by violating the parent's right to obtain an Independent Educational Evaluation.

On September 9, 2005, [PARENT], pursuant to 34 C.F.R. § 300.660(a)(ii) and CDE Federal Complaints Procedure, paragraphs 15-26, appealed the decision of the FCO. In her request for appeal she identifies nineteen separate issues she states have not been resolved.

In [PARENT]'s opening brief she expanded the nineteen issues stated in her appeal letter to thirty issues posed as questions. In the argument portion of her brief, however, she addresses nine issues that parallel the nine allegations as framed by the FCO.

After a review of the nineteen issues stated by [PARENT] in her appeal letter and the thirty issues identified in her opening brief, the ALJ concludes that all of these issues are subsumed within the nine allegations as determined by the FCO. Therefore, the ALJ assumes that [PARENT] is appealing all of the findings that were adverse to her position.

On September 15, 2005, the District filed a Notice of Cross-Appeal, appealing the finding by the FCO under allegation 4, that the District had violated the IDEA.

On September 15, 2005 the certified record, consisting of almost 800 pages of materials, was received by the ALJ.

On October 7, 2005, a telephone status conference was held with the parties. As a result of that conference it was determined that no additional evidence or testimony would be taken and that the time limits for the filing of briefs would be extended. [PARENT]'s opening brief was to be due on November 7, 2005. This was further extended at her request and was ultimately filed on November 18, 2005. The District's time to respond was likewise extended, and was filed on December 15, 2005. [PARENT] then was permitted to respond only to the arguments of the District that addressed the cross-appeal. The ALJ received the Reply Brief on January 19, 2006, making the appeal and cross-appeal ripe for decision. Due to the volume of materials involved in this case and the necessity for extensions of time requested by the parties, the ALJ has extended the deadline for the decision in this case pursuant to CDE Federal Complaints Procedure, paragraph 22.

[PARENT]'s Reply Brief addressed matters beyond the scope of the cross-appeal. Those matters were disregarded in the decision of this case and only the matters relating to the cross-appeal were considered.

In this appeal, [PARENT] represented herself on behalf of her child. The District is represented by Darryl L. Farrington, Esq., Semple, Miller, Mooney & Farrington, P.C.

SCOPE AND STANDARD OF REVIEW

The decision of the Administrative Law Judge on state level review of the decision of the FCO is to be an "independent" one. CDE Federal Complaints Procedure, paragraph 21. In the context of court reviews of state level decisions under the current and prior versions of the IDEA, 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); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), while still recognizing the statutory provisions for an independent decision and the taking of additional evidence, if necessary. *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999). It is appropriate to apply this standard by analogy at the state FCO administrative review level. Thus, in this proceeding the Administrative Law Judge gives "deference" to the FCO's findings of fact, *see Jefferson County School District R-1*, 19 IDELR 1112, 1113 (SEA Colo. 1993) (addressing the deference to be given on state level review to the findings of an impartial hearing officer), and accords the FCO's decision "due weight," while reaching an independent decision based on a preponderance of the evidence. *Sioux Falls School District v. Koupal*, 526 N.W.2d 248 (S.D. 1994).

ISSUES ON REVIEW

On appeal, [PARENT] asserts: (1) the FCO erred in ruling the District did not violate the IDEA with regard to allegations 1 through 3 and allegations 5 through 9; and, (2) the FCO was correct in ruling on allegation 4 that the District violated the IDEA by failing to provide the parent an Independent Educational Evaluation of her child.

The District has responded by asserting the FCO's decision was proper with regard to allegations 1 through 3 and allegations 5 through 9; and, (2) the District asserts the FCO erred in determining under allegation 4 that the District violated the IDEA by failing to provide the parent an Independent Educational Evaluation of her child.

The Administrative Law Judge concludes the District did not violate the IDEA with respect to any of the nine allegations. The Administrative Law Judge also concludes the FCO's order in this matter is reversed as there is no finding of a violation by the District.

FINDINGS OF FACT

Based on the record of the FCO proceedings, the Administrative Law Judge enters the following findings of fact:

1. The FCO's findings of fact give credence to the District's responses as being

factually accurate. The ALJ adopts the FCO's findings of fact as follows, and incorporates additional findings of fact as stated.

2. The District has provided five positive behavioral support plans for the student. Since enrolling in the District, the District has brought in an independent behavioral consultant that was approved by the parent. The independent behavioral consultant provided observation, assessments, and participated in the development of each behavioral plan along with school staff.

3. Suspension discipline provided by the building principal after being knocked to the ground from behind by the student was within the prerogatives of the principal and that discipline action was well within the days per year allowed for any student with or without a handicap.

4. The student has been provided with various behavioral support plans. Among these are the following:

a. Behavior Intervention Plan, dated 10/20/04
b. Behavior Intervention Plan, dated 10/07/04
c. Behavior Intervention Plan, dated 8/25/04
d. Special Education Transportation Form, dated 8/25/04
e. IEP, dated 8/25/04
f. Notice of Meeting, dated 8/12/04, Additional meeting
g. Behavior Plan for [student], dated 4/27/04
h. Behavior Support Plan, dated 3/18/04
i. Email from Sam Towers, Towers Behavior Services, dated 10/6/04
j. Towers Behavioral Services, Report dated 10/19/04, (Ten pages)

5. The District has been proactively engaged with [PARENT] in formulating behavioral plans designed to meet the student's needs. At a minimum, these efforts have taken place during the period of March 2004 through October 2004. The documentation of these plans indicates that [PARENT] was a contributor to these plans. One such plan, dated April 27, 2004 bears the signature of [PARENT]

6. The District IEP team meeting of October 20, 2004, with the parent and advocate present, thoroughly discussed the possible diagnosis of Autism by Dr. R.W. The IEP team requested a phone conference with Dr. R.W. to try to clarify her report but this request was denied by the parent, [PARENT]. The team was explicitly told by the parent, [PARENT] not to contact Children's Hospital with questions surrounding their evaluations. Also discussed at this meeting was an opinion from Dr. Pat Tomlan stating the autism condition did not exist according to the DSM IV criteria. This was an oral opinion expressed to the Special Education (SPED) director. The parent, [PARENT], requested this opinion be put in written form and placed in the file.

7. The District has scheduled and held five IEP meetings on 3/18/2004; 6/8/2004;

8/25/2004; 10/7/2004; and, 10/20/2004. The 6/8/2004 IEP meeting involved mediation. The parent and her advocate have been notified and allowed to participate in all IEP meetings. The length of these meetings lasted from two to eight hours each and have allowed for ample participation and presentation of points of view for all parties.

8. [PARENT] obtained an individual evaluation of the student at JFK Partner's/Children's Hospital in Denver. This evaluation was conducted on September 8 and 9, 2004.

9. On October 7, 2004, at the IEP meeting, [PARENT] requested a neuropsychological evaluation and an independent speech, learning and language assessment be conducted on the student. [PARENT] did not request this as the result of a disagreement with a District obtained evaluation.

10. The District has provided for independent behavioral contractor, Sam Towers, who was approved by the parent, [PARENT], to do classroom observation as well as behavioral assessment and behavioral plan development consulting with the parent and IEP team. Additionally, the District contracted with Dr. Pat Tomlan to do educational assessment prior to the 10/20/2004 IEP meeting. The parent never voiced an objection to either assessment and in fact cooperated in bringing her daughter in for these assessments prior to the start of school in the fall of 2004. In addition, when the parent presented evaluation results from Children's Hospital, the District incorporated those findings into its deliberations during the October 20, 2004 IEP development meeting. The District is required to "consider" all outside evaluation data but ultimately the IEP team must look at all of the data available, even that brought from other schools. Some items on the Children's Hospital evaluation were totally inconsistent with all of the other data available and the IEP team did not feel they were representative of the student's abilities.

11. Based upon the difference of professional opinion as to the diagnosis of Autism, the District offered to pay for a third evaluation for Autism and sensory-motor integration. This offer was stated in a letter to the parent [PARENT], dated October 28, 2004. In order to conduct this evaluation the parent was required to sign a release for the district allowing them to release educational records and assessments. The parent, [PARENT], did not respond to this offer. As a result of mediation meetings with the parent, [PARENT], the District agreed to use the Autism diagnosis from Children's Hospital, which was obtained independently by the parent thru Medicaid. The District agreed to this since Colorado is a "needs' based state and the IEP and services would be developed based upon identified student needs and not a particular diagnostic label. No services were denied to the student because of the presence or absence of a specific handicap. The IEP team made programming recommendations based on identified student needs and those interventions and services were successfully carried out per the IEP. The entire staff at the school felt that the SPED and regular education programs were working well together for the benefit of the student.

12. During the 2003-2004 school year the student attended Stevens Elementary School

for a total of 160 days of school during the year, receiving 1 hour per day, four days per week of SPED resource room assistance. During that time the student received regular and special education services per her IEP. At parent request, the student was transferred to Campbell Elementary School for the school year 2004-2005. During the first semester (8/26/04 thru 1/14/2005) the student attended 70 of 86 days. During this time both regular and special education services were provided per the IEP. During the second semester, January 2005, the parent and her advocate requested the student be placed at Kids Ark after they visited and stated they were impressed with the program. Kids Ark is a local privately run facility with a Day Treatment program. The District agreed to pay for the placement but [PARENT] refused to sign the placement agreement drafted by the District's counsel. [PARENT] then had her family doctor request that the student be placed on homebound status. The District questioned the reason given by the doctor for homebound status but [PARENT] forbade any discussion with the doctor. The District honored the homebound request and started offering homebound services on January 17, 2005 but because of numerous absences and the inability to get homebound teachers to work with the parent and her daughter, Dr. Summers wrote a letter officially withdrawing the District's offer to continue with those services but did encourage the parent to reenroll her daughter at Campbell Elementary School. [PARENT] chose not to reenroll.

13. The paraprofessional assigned to work with the student possesses an AA degree and additional hours of study from the University of Northern Colorado and meets the highly qualified requirement. The District provided additional training for the paraprofessional by providing consultation time with the SPED resources room teacher and the building principal. Behavior plans and positive reward systems were discussed as well as guidance being provided for proper use and instruction of the educational materials used. This is the same format used by SPED staff in the training of paraprofessionals for the specific needs of any student. All SPED paraprofessionals in the District are working on the general paraprofessional certification recommended by the Colorado Department of Education.

14. The October 20, 2004 IEP P4 (2 of 4) under Social Emotional states that the student will be allowed to choose to go with her paraprofessional to the calming area (counselor's office) to leave the classroom area to do homework. It is documented on the IEP that the student is distractible and that for portions of her day when she chooses to go to a quiet place to work, she is much more productive. This quiet study area was made available upon student request, which was part of the IEP plan, and is not punishment. It was an educational process, identified by the IEP team, which was an effective instructional technique that was used for short portions of the day as requested by the student.

15. The District has provided notice of changes of placement. All discussions of change of any programming have been done within the context of the numerous (5) IEP meetings that have been conducted for the parent beginning with the March 18, 2004 meeting, proceeding through the June 8, 2004 mediation meeting and ending with the October 20, 2004 meeting. The parent was given proper and timely notice for each meeting and has been represented by her advocate at each meeting. Both parties participated fully in the IEP process.

16. The District has provided all required progress reports for the student over the past year and one-half. In the Fall of 2004 the District offered transportation to bring the parent to school to participate in parent-teacher conferences but the parent declined. Subsequently, the building principal mailed the progress reports but the parent claimed she didn't receive them. The District then made copies of the reports available to be picked up at the administration offices and [PARENT] did pick them up.

DISCUSSION

Jurisdiction of Administrative Law Judge

The Administrative Law Judge has jurisdiction to conduct this review pursuant to the IDEA, 20 U.S.C. §§ 1400 *et seq*., 34 C.F.R. §§ 300.660-662, the Colorado Exceptional Children's Education Act, Title 22, Article 20, C.R.S. (ECEA), and the CDE Federal Complaints Procedure.

Statutory Background and Appeal Procedures

The IDEA, 20 U.S.C. §§ 1400 *et seq.*, is a comprehensive federal education statute that grants disabled students the right to a public education, provides financial assistance to states to meet their educational needs, and conditions a state's federal funding on its having in place a policy that ensures that a free appropriate public education is available to all children with disabilities. 20 U.S.C. §1412(a)(1); *Weber v. Cranston School Committee*, 212 F. 3d 41 (1st Cir. 2000). The IDEA requires the District to provide each child with a disability with a free appropriate public education (FAPE), tailored to the unique needs of the child through the establishment of an individualized education program (IEP). 20 U.S.C. § 1401(8); 20 U.S.C. § 1412(a)(1); 20 U.S.C. § 1414(d).

The IDEA provides certain procedural and substantive rights to parents of children with disabilities. In addition, it requires state educational agencies such as the CDE to establish procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education. 20 U.S.C. § 1415(a). Included among these procedures is the "opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C. § 1415(b)(6).

IDEA implementing regulations distinguish between the impartial due process hearing procedure under 20 U.S.C. § 1415(f) and other state and federal complaint procedures which are mandated under IDEA or otherwise available to redress complaints concerning violations of IDEA. *Compare* 34 C.F.R. §§ 300.507-300.510 *with* 34 C.F.R. §§ 300.660-300.662. In the present case, [PARENT], on behalf of the student, is pursuing a complaint under 34 C.F.R. §§ 300.660-300.662, the federal complaint resolution process ("CRP"), rather than the due process hearing procedure. As a result, the Complaint letter filed by [PARENT] on behalf of the student was referred to a Federal Complaints Officer who issued his Decision on August 4, 2005, pursuant to 34 C.F.R. §§ 300.660-300.662.

[PARENT] has appealed the FCO's Decision and the District has filed a Cross-Appeal. Although the federal regulations governing the CRP procedure specify certain minimum procedures that must be adopted by each state concerning the initial filing and handling of complaints (which procedures are distinct from IDEA due process hearing procedures), they do not provide a specific appeal process. Colorado has adopted the CDE Federal Complaints Procedure, paragraphs 15-26 (Appeal Procedure), which governs this appeal. Pursuant to this procedure, either party may obtain state level review of the decision of the FCO. Such review is to be conducted on behalf of the Commissioner of Education by a Colorado administrative law judge. CDE Federal Complaints Procedure, paragraph 15.

Under the CDE Federal Complaints Procedure, the parties may offer and the administrative law judge may seek or accept additional evidence, if needed. CDE Federal Complaint Procedure, paragraph 21. In this case, neither party sought to offer additional evidence. Instead, the parties have agreed to file written briefs. After reviewing the record, the ALJ has made additional findings as set forth above and otherwise relies on the findings of the FCO as also set forth above.

ISSUES RAISED ON APPEAL

I.

The complainant alleges that her daughter has been inappropriately denied a positive behavioral support plan, causing her daughter to be inappropriately disciplined

The ALJ concludes that the allegation as stated is unfounded and that the FCO appropriately found no violation. The District complied with IDEA by addressing behavioral intervention methodologies at various intervals over time. The FCO correctly concluded, that based upon the great weight of the evidence, [PARENT] disagrees with portions of the plan and/or the implementation of the plan. The FCO correctly concluded that these are matters to be addressed in Due Process hearings, and not within the parameters of a Federal Complaint.

The IDEA requires that all students with disabilities be provided a FAPE. 20 U.S.C. 1412(a)(1)(a); 34 C.F.R. 300.300(a)(1). As the local educational agency, the District has an obligation to provide special education to disabled students in compliance with the requirements of the IDEA, including procedural requirements, and the student's individualized education program ("IEP"). *See, e.g.,* 34 C.F.R.300.350, 300.342; 300.343; 300.500.[1]

As stated by the FCO, if the District and [PARENT] cannot agree, as part of a consensus IEP team process, about what the FAPE for [PARENT]'s daughter should be, then [PARENT] is entitled to a due process hearing to seek to have her definition of a FAPE for her daughter adopted and implemented by the District, as directed by the authority of an impartial hearing officer. 34 C.F.R. § 300.507 *et seq*.

II.

The complainant alleges that her daughter has autism, which the school district is refusing to appropriately recognize, and that the school district's inappropriate educational diagnosis is causing her daughter to be denied a free appropriate public education (FAPE)

Based upon the forgoing findings of fact, the ALJ concludes that the District has not violated the IDEA. The evidence establishes that the District has been active in trying to assess the needs of the student herein. A task made all that much more difficult when the parent decides to selectively provide information and then refuses to allow the District to contact health care providers so that they can clarify the disabilities found by that health care provider. When the District is denied relevant information that would aid them in assessing the educational needs of the student, and is denied the authorization to have a separate evaluation done to assess the child's needs, the District can hardly be considered derelict in its compliance with the IDEA.

The District did in fact agree that the student had a disability that qualified her for special education and they proceeded to establish an Individualized Education Program for that student.

The ALJ concludes that the District acted in good faith in attempting to assess the disabilities and needs of the student herein. Active resistance to those measures by the parent does not constitute a failure on the part of the District to comply with IDEA.

III.

[1] A "public agency" as referenced in these rules includes a local educational agency (LEA) such as the District. 34 C.F.R. 300.22.

The complainant alleges that the school district has abrogated her right to appropriately participate in individualized educational program (IEP) meetings

The District properly notified [PARENT] of the IEP team meetings. During the IEP team process, [PARENT] was present and able to participate fully in the formulation of the student's IEP. The fact that she may have chosen not to participate fully does not rise to the level of a violation of IDEA by the District. The District met its obligations under 34 C.F.R. § 300.345 and the IDEA to ensure that the student's parent was present at each IEP meeting and afforded the opportunity to participate.

Thus, the evidence failed to establish the District violated its general obligations under 34 C.F.R. 300.346 or the IDEA to properly develop, review, or revise the student's IEP hereunder.

IV.

The complainant alleges that the school district has abrogated her right to an independent educational evaluation (IEE) for her daughter

As stated by the Federal Complaints officer in his conclusions, the very narrow issue here is whether or not the School District violated the parent's rights to obtain an IEE under the IDEA.

The regulations concerning a parent's right to obtain an IEE are contained in 34 C.F.R. § 300.502. That regulation is cited herein in its entirety:

> Sec. 300.502 Independent educational evaluation.
>
> General. (1) The parents of a child with a disability have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.
>
> (2) Each public agency shall provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained, and the agency criteria applicable for independent educational evaluations as set forth in paragraph (e) of this section.
>
> (3) For the purposes of this part--
>
> (i) Independent educational evaluation means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question; and
>
> (ii) Public expense means that the public agency either pays for the full cost of the evaluation or ensures that the evaluation is otherwise provided at no cost to the parent, consistent with Sec. 300.301.
>
> (b) Parent right to evaluation at public expense. (1) A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency.
>
> (2) If a parent requests an independent educational evaluation at public expense, the public agency must, without unnecessary delay, either--

(i) Initiate a hearing under Sec. 300.507 to show that its evaluation is appropriate; or

(ii) Ensure that an independent educational evaluation is provided at public expense, unless the agency demonstrates in a hearing under Sec. 300.507 that the evaluation obtained by the parent did not meet agency criteria.

(3) If the public agency initiates a hearing and the final decision is that the agency's evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(4) If a parent requests an independent educational evaluation, the public agency may ask for the parent's reason why he or she objects to the public evaluation. However, the explanation by the parent may not be required and the public agency may not unreasonably delay either

providing the independent educational evaluation at public expense or initiating a due process hearing to defend the public evaluation.

(c) Parent-initiated evaluations. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation--

Must be considered by the public agency, if it meets agency criteria, in any decision made with respect to the provision of FAPE to the child; and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) Requests for evaluations by hearing officers. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) Agency criteria. (1) If an independent educational evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation, to the extent those criteria are consistent with the parent's right to an independent educational evaluation.

(2) Except for the criteria described in paragraph (e)(1) of this section, a public agency may not impose conditions or timelines related to obtaining an independent educational evaluation at public expense.

(Authority: 20 U.S.C. 1415(b)(1))

The Federal Complaints Officer's conclusions broadly overstate a parent's rights under this regulation. The regulation allows for a parent to initiate an independent evaluation at his or her own expense without limitation. If the parent chooses to do so then the results must be considered by the School district in accordance with § 300.502(c)(1).

The facts hereunder establish that the parent [PARENT] initiated an independent educational evaluation at her own expense in September 2004. Once she undertook to do so her only rights under the regulations concerning that evaluation are to have it considered by the IEP team. This was clearly done.

Subsequent to the inclusion of the parent-initiated Individual Education Evaluation into the student's IEP, the District continued to pursue what they believed to be an appropriate course of conduct to obtain additional evaluative information concerning the student. There was clearly some dispute, in the view of the District, with regard to the parent-initiated Independent Educational Evaluation. The letter of October 28, 2004 addresses concerns with regard to further evaluation of the student's sensory motor issues as well as further evaluation with regard to the Aspergers diagnosis.

At this point we do not have a parent disagreeing with an evaluation done by the District but an evaluation done by the parent with which the District disagrees. The parent has fully availed herself of her rights to obtain an Independent Educational Evaluation and to have the results of that evaluation considered by the School District. The School District is not precluded from trying to obtain further evaluations to clarify the existing discrepancies.

Based upon the allegation contained in the letter of complaint and as found in the findings of fact, the parent requested an IEE on October 7, 2004. She requested that it be done at Children's Hospital. Considering that she had already had a very extensive evaluation done on September 8-9, 2004 at Children's Hospital there would be no need to provide information to the parent with regard to where an IEE may be obtained.

Additionally, the ALJ concludes that it was not entirely clear as to what evaluation was being disputed. The regulation requires that the parent disagree with a specific evaluation. It then permits the District to request of the parent their reason for disagreeing. Thus, the regulation provides for a certain amount of give-and-take in attempting to address the evaluative needs of the student. This is precisely what the District was doing. The District, while disagreeing with the evaluation provided to them, attempted to address with the parent the appropriate testing. The letter of October 28, 2004 was just such an attempt. However, since no consent was forthcoming the District was not in a position to pursue that course of action.

The ALJ concludes that, although not a model of how to proceed under a request for an IEE, under the specific circumstances herein, the District substantially complied with the IDEA.

In her complaint letter of January 21, 2005, with regard to the specific allegation concerning the IEE, the parent states that she is "formally requesting that the district be compelled to pay for a speech & language evaluation, sensory integration evaluation, motor skills evaluation, neuropsychological evaluation, and the following tests: bender-gestalt, pal-rw, wechsle individual achievement-spelling, woodcock-johnson tests of achievement, woodcock-johnson psycho-educational battery (including comprehension), Peabody picture vocabulary test, test of language development, clinical evaluation of language function." {*sic*} In making these requests the parent has failed to identify what evaluations are being challenged as inaccurate that would be resolved by providing the foregoing tests and evaluations.

The FCO held that "The regulations are clear that when the school district receives a request for an IEE from the parent the school district must either ensure the provision of the IEE requested by the parent at no cost to the parent, or initiate a due process hearing to demonstrate to an impartial hearing officer that the school district's evaluation is appropriate." However, as the facts of this case indicate, it is not that simple. There is the pre-requisite that the parent disagree with an existing evaluation obtained by the school district. § 300.502(b)(1). The evidence here does not indicate that the parent disagreed

with any specific evaluation. Thus, the school district is under no obligation to provide for a plethora of evaluations and tests when there is no nexus between those evaluations and tests and a disputed, existing, school district obtained evaluation or test. The school district is required by § 300.502(b)(2)(i) to initiate a due process hearing "to show that its evaluation is appropriate." Thus, if there is no identifiable evaluation being called into question, there is no obligation on the part of the school district to comply with the provisions to either provide an evaluation at public expense or request a due process hearing. If the school district refuses to provide for these requested evaluations and tests, because they believe there is no identifiable evaluation being challenged then the parent has a right to ask for a due process hearing to resolve the disputed facts and establish what evaluation is being challenged.

V.

The complainant alleges that her daughter has been denied two years of FAPE

The ALJ concludes that the District based its Individual Education Program upon the specific needs of the student without regard to a diagnostic label. Based upon the information available to the District at the time of the formulation of the Individual Education Program for the student herein, the ALJ concludes that the District fully complied with IDEA and that the student was not deprived of a Free Appropriate Public Education.

The ALJ concludes, as did the FCO, that there was no denial by the District of a FAPE for this student due to any failure of the District to provide appropriate homebound services or an appropriate education at Campbell Elementary School.

As the FCO stated, [PARENT] is entitled to a due process hearing on these issues, wherein an impartial hearing officer can make a determination as to the specific process, practices, and methodology which [PARENT] believes constitutes a denial of FAPE under the circumstances of case.

VI.

The complainant alleges that the paraprofessional working with her daughter is not appropriately qualified

The ALJ concludes, as did the FCO, that the disagreement between [PARENT] and the District is about whether the educational methodology the District deemed appropriate, and the corresponding use of the paraprofessional to help implement that methodology, were sufficient to provide the student with a FAPE.

The education that the District provided for the student, including the behavioral methodology in which the paraprofessional assisted, were provided in accordance with a

valid IEP process.

Again, the forum of a due process hearing could be invoked by [PARENT] to address any shortcomings that would rise to the level of a violation of IDEA by the District in the formulation of the IEP.

VII.

The complainant alleges that the school district has implemented an "isolation room" placement for her daughter that is not authorized by her daughter's IEP, and has resulted in her daughter being denied a placement in the least restrictive environment (LRE)

The ALJ concludes in accordance with the FCO that the use of the isolation room was another IEP team decision that [PARENT] is entitled to challenge in a due process hearing.

VIII.

The complainant alleges that the school district has failed to appropriately give her notice of changes in placement of her daughter, or refusals to change the placement of her daughter

The ALJ concludes, as did the FCO, that the District is not under an obligation to respond in writing to every complaint or disagreement raised by [PARENT] The District, in providing a FAPE, is under an obligation to notify [PARENT] of the procedural safeguards available to her, including her right to request due process hearings in an appropriate case. The ALJ concludes that the District did so.

IX.

The complainant alleges that the school district has failed to provide her with a progress report for her daughter in order to show progress towards meeting her daughter's IEP goals

The ALJ concludes, as did the FCO, that the District substantially complied with its obligation to provide the student's progress reports to [PARENT]

CONCLUSION

The ALJ concludes, based upon all of the foregoing, that the common theme underlying all of the allegations is [PARENT]'s belief that her daughter is being denied a free appropriate public education. The ALJ concludes that the District is substantially complying with the provisions IDEA in its attempts to provide the student with FAPE. As detailed above, the District is thoroughly engaged in the process of carrying out its obligations under IDEA. [PARENT] clearly has differing views as to how that process should be implemented concerning her daughter and there have clearly been some errors and miscommunications between the parties.

Under 34 C.F.R. § 300.507, a parent has the right to initiate a due process hearing on any of the matters relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child. While there may be some overlap in the provisions affording a parent the right to a due process hearing and the right to make a complaint under the federal complaint process, it is clear that the allegations hereunder lend themselves to the due process hearing provisions.

The ALJ concludes that the procedure before the Federal Complaints Officer was carried out in accordance with the requirements of due process. At its core, due process consists of notice and an opportunity to be heard. The FCO received over 600 pages of materials from [PARENT] to consider in the decision of her complaints. CDE Federal Complaints Procedure, paragraph 21.

DECISION AND ORDER

Based upon an independent evaluation of the evidence before the FCO, the Administrative Law Judge determines and orders as follows:

1. The District has substantially complied with the provisions of the IDEA and its implementing regulations under Title 34 C.F.R., Subtitle B, Chapter III.

2. The ALJ concurs in the findings and conclusion of the FCO with regard to allegations 1 through 3 and 5 through 9.

3. Contrary to the determinations of the FCO, the record failed to establish that the District violated the IDEA or its implementing regulations by failing to provide [PARENT] with an Independent Educational Evaluation for her daughter.

4. It is ordered that the remedies ordered by the FCO are reversed. As there have been no violations found, no remedies are required.

5. The ALJ is cognizant of the difficulties raised by the case hereunder and, although not an ordered remedy, the District might be well advised to take into consideration a voluntary compliance with some or all of the FCO's remedies.

6. This 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, if administrative remedies have been exhausted.

DONE AND SIGNED
February 22, 2005

DONALD E. WALSH
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, certified, postage prepaid, at Denver, Colorado to:

[PARENT]
[address]

Darryl L Farrington Esq
1120 Lincoln St Ste 1308
Denver CO 80203

on this _____ day of February 2006.

_____
Technician IV