

**DIVISION OF ADMINISTRATIVE HEARINGS  
STATE OF COLORADO**

**CASE NO. ED 2000-21 S99:529**

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**DECISION UPON STATE LEVEL REVIEW**

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■■■■ ■■■■, through his parent ■■■■ ■■■■,

**Appellant,**

**v.**

**ARAPAHOE COUNTY SCHOOL DISTRICT 1, ENGLEWOOD SCHOOLS,**

**Appellee,**

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This decision constitutes the state level review of the decision of the federal complaints officer (“FCO”) in the above-captioned case, pursuant to the Individuals with Disabilities Education Act (“the IDEA” or “the Act”), 20 U.S.C. Sections 1401 *et seq.*, and the Colorado Department of Education Management Policies and Procedures regarding Federal Complaints,<sup>1</sup> adopted on September 22, 1999.

■■■■ ■■■■ (hereinafter referred to as “the student”) is a child with a disability under the IDEA. Arapahoe County School District 1, Englewood Schools, (hereinafter referred to as “the district”) was his resident school district at the time relevant to this action. On June 29, 2000, the student’s mother ■■■■ ■■■■ (hereinafter referred to as “the parent” or “mother”) filed a timely notice of appeal seeking to reverse the FCO’s findings on several issues regarding the implementation of her son’s individualized education plan (“IEP”) and her participation in the IEP process. The district raised two issues in its notice of cross appeal filed on July 7, 2000.

The student and his mother are representing themselves in this matter. Arapahoe County School District 1 is represented by Susan S. Schermerhorn, Esq., and Julie A. Tishkowski, Esq., of Caplan & Earnest, L.L.C.

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<sup>1</sup> The Colorado Department of Education (“CDE”) adopted the Federal Complaints procedure to resolve complaints about programs funded under the Individuals with Disabilities in Education Act that are administered by the CDE.

The student raises numerous issues on appeal, which are also posed in part by the school district's cross appeal: Whether the student was denied a free appropriate public education because his IEP was not properly implemented and because he was denied extended school year ("ESY") services; whether the mother was denied the opportunity to be a meaningful member of her son's IEP team; and whether the student and his mother were denied their right to a due process hearing.

For the reasons set forth below, the administrative law judge concludes that, at the time in question, the school district provided the student a free appropriate public education under the IDEA and properly implemented his IEP and appropriately denied him ESY services. The FCO improperly found that the district violated 34 C.F.R. Section 300.347(a)(3) and (4). The student's mother was an active member of her son's IEP team as were his private therapists. Finally, the student and his mother were not deprived of their right to a due process hearing, and the district did not run afoul of 34 C.F.R. Section 300.507(c)(4).

### **PROCEDURAL BACKGROUND/ISSUES ON APPEAL**

In late October 1999, the student's mother initiated this action by submitting a formal complaint to the FCO, which he received on October 28, 1999. In the complaint she alleged that the district violated the student's right to a free appropriate education under the IDEA. More specifically, she complained that in the 1998-99 school year, the school failed to implement her son's IEP by not providing one hour each of indirect physical, occupational, and speech therapy and special education services and two hours each of direct physical, occupational, and speech therapy and special education services. She also alleged that the decision to deny her son ESY services for the summer of 1999 was based on invalid data. And finally, she complained that she was denied the opportunity to be a meaningful member of her son's IEP team and that the school did not adequately explain her rights to her and thereby frustrated her pursuit of a due process hearing.

At the mother's request, the FCO convened a meeting attended by her, an ARC advocate, a representative of Parent Education and Assistance for Kids ("PEAK"), the FCO, district and school representatives, and the State Director of Special Education who attended on behalf of the Colorado Commissioner of Education at the mother's invitation. At the meeting, the mother gave a statement and submitted documents to the FCO. She also sought more time to provide additional documents, which she submitted on March 17, 2000. The district responded to the complaint and supporting documents on April 24, 2000. The mother and student did not file a reply, and the record was closed on May 12, 2000.

The FCO issued his decision on May 25, 2000. He concluded that the service delivery system for delivering physical, occupation and speech therapy and special education services contemplated by the student's IEP was not sufficiently clear. He faulted the district for the lack of clarity and thereby found that the school had violated 34 C.F.R. Section 300.347(a)(3) and (4). However, he also concluded that the student had not been denied required IEP services, in whatever manner they were delivered, and consequently, the school had not denied the student a FAPE. As for the ESY issue, the FCO determined there was insufficient evidence to support the mother's allegation that the decision to deny ESY services was based on invalid data. He also found insufficient evidence to support the allegation that the mother was denied the opportunity to be a meaningful member of her son's IEP team. Finally, the FCO found that the school should have processed the mother's May 24, 1999, request as one for a due process hearing. However, the school's failure to do so did not result in a denial of a FAPE.

The student appealed the FCO's decision. He filed his notice of appeal on June 29, 2000, and the school district submitted its notice of cross appeal on July 10, 2000. An evidentiary hearing, requested by the student, was set for October 11, 2000. Prior to the hearing, the district filed a motion to vacate the hearing on the grounds that it had no notice of what additional evidence the student intended to present and it was not clear from the notice of appeal what additional issues, if any, the student intended to pursue. The administrative law judge, therefore, continued the evidentiary hearing to November 13, 2000, and converted the October 11 hearing to a status/scheduling conference.

The evidentiary hearing was held on November 13, 2000, December 12, 2000, January 19, 2001, and February 23, 2001, before Administrative Law Judge Sunhee Juhon. The student submitted his written closing argument on April 16, 2001, and the district filed its written closing argument on April 30, 2001. The record closed on May 4, 2001, at which time the matter became ready for decision.

The student and his mother have raised several issues on appeal. They assert that the FCO's decision should be reversed because he failed to find that the student's IEP was not properly implemented and that the student was denied a FAPE, although he did find a violation of C.F.R. 300.347(a)(3) and (4) because the IEP was not clear on how the services of an occupational therapist, (OT), physical therapist (PT), speech/language professional (SLP) and special education teacher would be delivered. They also complain that refusing the student ESY services for the summer of 1999 amounted to a denial of a FAPE and that the decision to deny those services was based on invalid data. In addition, they contend that the mother was denied the opportunity to be a meaningful member of her son's IEP team. And finally, they assert that they were denied their right to a due process hearing.<sup>2</sup> They complain that the FCO did not provide them with any relief after finding that the district failed to act on their request for due process.

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<sup>2</sup> The student and mother also appealed the district's use of federal education funds. More specifically, the mother sought to know where the federal special education funds received by the

The school district's cross appeal challenges the FCO's finding that the school violated 34 C.F.R. Section 300.347(a)(3) and (4) by failing to make the IEP clear as to how special education and related services were to be provided to the student. The district also contests the FCO's finding that the school should have treated the mother's May 24, 1999, request as one for a due process hearing.

### **SCOPE OF REVIEW**

Because the student and his mother sought an evidentiary hearing and raised numerous factual issues on appeal, what follows is a discussion of the standard of review, particularly with respect to the level of deference to be given to the FCO's factual findings.

The standard to be applied upon state level review of a federal complaints officer's decision is not specified in the IDEA, its implementing regulations or state administrative guidelines. However, the Colorado Department of Education Management Policies and Procedures regarding "Federal Complaints," adopted on September 22, 1999, require the administrative law judge to

examine the certified record received from the Federal Complaints Officer; seek or accept additional evidence, if needed; afford the parties an opportunity for oral or written argument, or both, if appropriate, at a time and place reasonably convenient to the parties; determine that the procedure before the Federal Complaints Officer was in accordance with the requirements of due process; make a final and independent decision . . .

This procedure mirrors the appeals procedure set forth in the IDEA statute for appealing the decision of an impartial hearing officer ("IHO") in a due process proceeding. In the context of a due process proceeding, the administrative law judge making a state level review is required to make an independent decision based on an impartial review of the IHO's decision. 20 U.S.C. Section 1415(g). The administrative law judge may seek or accept additional evidence if needed. *Id.*; 34 C.F.R. Section 300.510(b)(3)-(4); Part II, Section A, VII, B 9 b of the State

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district for the education of her son were being spent since, according to her, he was not receiving special education services. The district objected to this issue on the ground that it was not raised below. At hearing, the administrative law judge agreed that this issue was outside her jurisdiction. Under 20 U.S.C. Section 1415(b) and (c), the state educational agency is authorized to decide "[c]omplaints 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. Section 1415(b)(1)(E); 20 U.S.C. Section 1415(b)(2); 20 U.S.C. Section 1415(c). Thus, issues concerning special education finances are not within the administrative law judge's purview.

Plan. Whether heard initially by an IHO or a FCO, upon issuance of a final state decision, any aggrieved party may file a civil action or review in state or federal court. See Paragraph 24 of the Colorado Department of Education Management Policies and Procedures regarding “Federal Complaints,” adopted on September 22, 1999. In the civil proceeding, the court may take additional evidence and is also required to render an independent decision, based on a preponderance of the evidence, while giving due weight to the findings at the state level. 20 U.S.C. Section 1415(l)(2): *Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley*, 458 U.S. 176, 206 (1982). Thus, an administrative law judge reviewing the decision of an FCO or an IHO is in an analogous position to a district court reviewing a state level decision.

Given the analogous positions of the administrative law judge and the civil court reviewing the state level decision, the case law establishing the standard and nature of review of state decisions at the district court level is instructive. (The authority of state level reviewing officers and district courts to take additional evidence makes the standard of review different from the standard typical in appellate review.) The appropriate standard of review of state level decisions has been characterized as *de novo*. *Kruell v. New Castle County Sch. Dist.*, 642 F.2d 687, 692 (3<sup>rd</sup> Cir. 1981). A district court has the discretion to give appropriate weight to the finding of the state administrative agency. *Town of Burlington v. Dep’t of Educ. for the Commonwealth of Massachusetts*, 736 F.2d 773, 791-92 (1<sup>st</sup> Cir. 1984), *aff’d sub nom Sch. Comm. of the Town of Burlington v. Dep’t. of Educ. of Massachusetts*, 471 U.S. 359 (1985). However, the court’s ability to take new evidence and the requirement that it make an independent decision limit the deference it might otherwise give to agency fact-finding. *Doyle v. Arlington County Sch. Bd.*, 953 F.2d 100 (4<sup>th</sup> Cir. 1991); *Kerkam v. McKenzie*, 862 F.2d 884 (D.C. Cir. 1988). The standard of review of conclusions of law is *de novo*. *Gregory K. v. Longview Sch. Dist.*, 811 F.2d 1307 (9<sup>th</sup> Cir. 1987).

### **FINDINGS OF FACT**

The FCO’s findings of fact were relatively few. Since, however, the findings essential to this case are disputed and additional evidence was presented at the state level proceeding, the administrative law judge has not adopted the findings of the FCO. Instead, the administrative law judge sets forth the following findings of facts based upon the entire record presented on state level review.

1. The student is a six-year-old boy (DOB [REDACTED]) who was born prematurely at 26-weeks gestation. He has had multiple medical problems since birth, including significant pulmonary disease, which has required him to use oxygen. He is a child with a physical disability for purposes of the IDEA.

2. At the time relevant to this action, the student was three years old and resided within the jurisdiction of the Englewood Public Schools in Arapahoe

County, Colorado. He was referred for special education services by the Englewood Public Schools Early Education Coordinator on May 11, 1998, when he was two years and eight months old.

3. During the 1998-99 school year, the only time period relevant to this action, the student attended preschool at Lowell Elementary, an Englewood public school.

#### A. Implementation of IEP.

4. On September 4, 1998, the student's IEP team convened. The IEP team comprised the mother, three of her son's private therapy providers, and district and school personnel. The team developed an IEP, which was to be implemented in an integrated developmental preschool setting. The IEP team had also considered an early childhood special education setting or provision of services in the home. The team concluded, however, that the student would most benefit from the environment of a general classroom, where he would have to learn the rules of the class and develop social skills by interacting with other students. According to the IEP, the student needs at the time were to improve his language processing and social pragmatic skills. He also needed to work on his feeding and oral motor skills and general motor skills and an awareness of his personal safety.

a. The student's IEP annual goals were (1) to improve mobility in the school environment;<sup>3</sup> (2) to follow classroom rules and routines with minimal prompts;<sup>4</sup> (3) to improve pragmatic, social interactive and receptive language

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<sup>3</sup> To implement the first annual goal, the IEP listed three short-term objectives: (A) "[student] will participate in music and movement activities following sequential movement directions, demonstration of balance skills and coordination"; (B) "[student] will explore manipulatives demonstrating a variety of building patterns, improving grading and control 75% of the time"; (C) "[student] will show awareness of self and safety during playground play 100% of the time."

<sup>4</sup> The short-term objectives listed for the second annual goal included: (A) "[student] will participate in the preschool mealtime routine by sitting at the table, trying food one time each day"; (B) "[student] will finish an activity before beginning the next with minimal prompts two times each day"; (C) "[student] will put together nesting cups and other seriation toys with at least five pieces independently four times out of five."

skills;<sup>5</sup> (4) to improve his ability to tolerate oral motor stimulation;<sup>6</sup> and (5) to increase his awareness of his physical needs.<sup>7</sup>

b. In terms of specific special education and related services to achieve these goals, the IEP provided that the student receive one hour of indirect and two hours of direct services per week from an early childhood special education teacher; one hour of indirect and two hours of direct services per week from a speech language professional; and one hour of indirect and one hour of direct service per week from a physical or occupational therapist. The direct services were to be delivered in the general classroom. The IEP also prescribed that the student should receive constant health care monitoring and reminders not to sit in a “W” position.

5. The student’s IEP was based largely on input from his mother and private therapists as the mother had declined a home visit where school staff would have been able to meet and observe the student at home.

6. Initially, the student attended preschool two mornings a week beginning in mid-September 1998 for a total of six hours. In early October, he added a third morning on Mondays, increasing his program to nine hours a week. Burt Ray, the student’s private nurse, attended preschool with him on Tuesdays and Thursdays to attend to his medical needs, including his oxygen.

7. Throughout the school year, the student missed numerous days of school due to his fragile health.

8. Lynnae Nicholson was the student’s general classroom teacher. Betsy Georgitis served as his early childhood special educator (ECSE), Marcia Blum as his physical therapist, and Jayne Gladwell as his speech/language professional. Gail Neubert, the Early Childhood Education Coordinator for the district, supervised these operations at Lowell. Joan Diedrich, Executive Director of Student Services, oversaw the early education and special education programs for the district.

9. The student’s classroom consisted of 15 students, of whom three or four had IEPs.

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<sup>5</sup> The short-term objectives for the third annual goal were: (A) “[student] will follow 2-3 step verbal directions with minimal prompts”; (B) “[student] will use words to interact with peers in a turn-taking fashion”; (C) “[student] will answer ‘what,’ ‘where,’ ‘who’ questions 80% of the time.”

<sup>6</sup> To implement the fourth annual goal, the IEP team established two short-term objectives: (A) “[student] will brush his teeth one time daily during preschool with minimal resistance”; (B) “[student] will try a variety of foods with varying textures using chewing skills.”

<sup>7</sup> For the fifth annual goal, the IEP set forth two short-term objectives: (A) “[student] will verbalize changes in physical status, i.e. stomach ache, pain, tiredness, oxygen needs”; (B) “[student] will become aware of oxygen tubing (25 foot cord) in classroom.”

10. In November 1998, the mother expressed concerns to Neubert that her son's IEP was not being implemented. Neubert investigated the mother's concerns. She met with the special service providers and reviewed their focus notes.<sup>8</sup> Based on her investigation, the student's IEP was being implemented.

11. In addition to the investigation, to address the mother's concerns, the special service providers suggested keeping a back-and forth book, a notebook in which the teachers and special care providers could make entries and notations and send the book home daily for parental review and input. The mother rejected the suggestion. The special services team offered, instead, to submit monthly progress reports to her beginning in December 1998.

12. The term "direct services" as used in the IEP means those services delivered directly to the student in the general classroom by the designated service provider.<sup>9</sup> When delivering direct services, the provider may work with the student one-on-one or in small or large groups. At times the provider may merely observe the student in the general classroom. Direct services does not mean that the provider must work with a student on an individual basis only. One of the goals of direct services, in addition to helping the student meet his IEP goals and objectives, is to have those services be tailored to the student's needs and to what is going on in the general classroom.

13. The student's providers testified persuasively that, in light of the student's IEP goals, it would not have been appropriate to remove the student from the classroom to receive these various services. The student needed to learn to follow classroom routines, participate in activities with other children, and to learn to model the appropriate behavior of his peers. Thus, delivery of direct services to the student individually or in large or small groups in the general classroom was appropriate and in keeping with the goals and objectives of his IEP.

14. The term "indirect services" means those services spent in consultation with other service providers preparing to deliver direct services. They include meetings spent among the service providers or with the classroom teacher. These services denote the time involved in addressing the student's needs and in preparing materials for classroom use.

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<sup>8</sup> The focus notes are notes maintained by the special service providers. Under each specific goal, the provider would date her entry and record her observations and interactions with the student.

<sup>9</sup> In contrast, direct services provided outside the general classroom means services provided in a non-inclusive setting, on a one-on-one basis. Such services are typically reserved for students with more serious needs, where more intensive intervention is required or where a removed setting is necessary for delivery of services.

15. Betsy Georgitis, the student's special education teacher, attended the student's class every Thursday for the duration of his preschool class, approximately three hours. On those days, she worked with the student in small or large groups or sometimes on an individual basis. She also coordinated her efforts with the general classroom teacher and the other service providers, by giving them materials prepared by her and coming up with strategies and interventions to help them work with the student toward his IEP goals and objectives. Georgitis, the other service providers and the classroom teacher met formally on a monthly basis and more frequently on an informal basis, thereby meeting the IEP requirement of two direct hours and one indirect hour of services.

16. Jane Gladwell was present in the student's preschool class for the entire three-hour period every Tuesday, and she worked with the student on a one-on-one basis or in small or large groups. In addition, she met formally and informally with the other service providers and spent time preparing materials and activities for the student and others in his class. In sum, she delivered at least two hours of direct and one hour of indirect speech/language therapy services as required by the student's IEP.

17. Marcia Blum, the physical therapist, was scheduled for the student's classroom on Mondays and testified that when he was absent, she would try to visit his class another day. The evidence as to her provision of services was not clear, in part because her testimony was less detailed and, thus, less convincing. She made very few focus note entries. She testified that she was available, not that she delivered services to the student. One of the few instances she recalled working with the student was when she observed him participating in Kindermusik class. The administrative law judge finds that while Blum worked with the student, she failed to do so as regularly as provided in his IEP.

18. Burt Ray, the student's private nurse who attended preschool with him on Tuesdays and Thursdays recalled that he had not met Blum until March 1999. The school district explained that this was due to the fact that he did not attend school with the student on Mondays. While this partly explains why Ray had never before met Blum, the administrative law judge still doubts that Blum worked with the student as much as required by his IEP. If she had worked with the student on other days because he had been absent on a Monday--since he only attended preschool six Mondays the entire school year--she would have been in his classroom on a Tuesday or Thursday and would likely have met Ray before March 1999.

19. Ray testified that the special service providers only worked with the student occasionally over the school year, but his recollection conflicts with the focus notes, which indicate much more frequent interactions. It is more likely that Ray concluded that the providers failed to work with the student because Ray's

expectations (a one-on-one therapeutic modality) about how the service should be provided was at variance with the providers' delivery system.

20. The student benefited from his education during the 1998-99 school year. Indeed, his mother does not dispute that he received some benefit. She maintains, however, that he did not receive the maximum benefit and optimal care. Nevertheless, the student met all of his IEP goals and all but one of his objectives, despite his numerous absences.

21. There was no evidence in the record, nor any presented at hearing, that the special education teacher, the physical therapist or the speech language professional failed to provide the one hour per week of indirect services.

22. The mother's evidence focused on the fact that her son still suffered significant developmental delays—he was approximately six months to one year behind—at the end of the school year, according to her private therapists and an independent evaluation she had conducted by the Sewall Child Development Center at The Children's Hospital on May 27, 1999 and June 2, 1999. Her evidence did not contradict that he had achieved most of his IEP goals, which did not necessarily aim to close the gap on those delays. Indeed, at the May 18, 1999, meeting itself, the mother did not disagree that the student had met his goals and objectives. She later raised concerns about his having met his goals and objectives and even questioned the appropriateness of the goals and objectives themselves.

23. Although the mother did not voice objections at the May 18, 1999, annual review, because of her later objections, the IEP team scheduled an additional IEP meeting for May 28, 1999. The IEP team deferred making any final decisions about the student's educational placement. The mother cancelled the meeting, however, because she felt that decisions concerning her son were a foregone conclusion. Also, she had already submitted a request for due process. However, she told the school district she wanted to cancel the meeting because one of the private therapists was not available and that she would get back to the school to reschedule. She did not, however.

## B. ESY Services.

24. Extended school year services are provided to students who have experienced unusual or substantial regression or loss of skills after school breaks and who require substantial amounts of time to recoup those skills. There are other considerations in determining a child's eligibility for these services.<sup>10</sup>

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<sup>10</sup> The IEP team is to consider numerous predictive factors:  
In what way does the student's disability and/or intensity of needs impact the maintenance of learned skills?

25. Georgitis, Gladwell and Blum met before and after the winter and spring breaks for the 1998-99 school year. They met to determine how the student was performing toward his IEP goals and objectives. They determined that the student did not regress or lose skills during those breaks from school. In reaching that conclusion, they relied on their focus notes, the general classroom teacher's observations, and their personal observations of the student's performance.

26. The special service providers recorded their findings on an ESY data sheet. An early copy of the ESY data sheet that had been provided to the mother on April 27, 1999, had not been initialed by Blum. This failure, however, does not controvert the testimony of Blum and Georgitis and Gladwell that Blum did participate in these ESY meetings.

27. The focus notes, which were relied on in part in making the ESY determination, were provided to the mother in May 1999.

28. When the IEP team, including the special service providers, met on May 18, 1999, for the student's IEP annual review, no decision had yet been made as to the student's eligibility for ESY services. At the May 18 meeting, the mother and the student's therapists provided input as to whether the student required ESY services.

29. There was no persuasive evidence that the student might experience significant regression and have recoument problems without ESY

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Are there behavioral or physical factors that negatively impact the student's ability to maintain learned skills?

Have there been extended absences that impact ability to maintain learned skills?

Have there been major life events that impact ability to maintain learned skills?

Have there been significant behavioral challenges that interfere with maintenance of learned skills?

What community/home resources are already planned or could be available in order for the student to maintain learned skills?

How does the parents' ability to provide educational structure at home impact the child's ability to maintain learned skills?

Does the lack of opportunities for the student to interact with non-disabled peers significantly interfere with maintenance of learned skills?

What community/home support is needed to provide necessary opportunities f/or this student?

Are there any objectives on the IEP that require ongoing support in order to maintain learned skills?

Are there other elements of the IEP such as a behavior plan or health care plan that require ongoing support in order to maintain learned skills?

Does this student require ongoing support in order to maintain learned vocational skills?

What support/services are essential, as well as reasonable, to meet this student's individual needs in order to maintain learned skills

How does the length of time that the student takes to learn a skill negatively impact the maintenance of learned skills?

Would the interruption of services be detrimental to the student's continued progress?

Has anything occurred additionally throughout the year that ought to be considered?

services. None of the district team members believed that the predictive factors as applied to the student warranted ESY services.

30. Although the student had many absences, they did not keep him from making reasonable progress toward his IEP goals and objectives.

### C. Participation in the IEP Process.

31. The mother was aware of her rights under the IDEA and participated in her son's IEP meetings. She was a member of the Parent Advisory Council at Lowell. The Parent Advisory Council consists of parents appointed by the superintendent who advise the school board on various matters.

32. In 1998, the mother received written notification of her rights. She signed a form indicating that she was aware of those rights.

33. The mother also participated in the Arapahoe Early Childhood Network, a support and advocacy group.

34. Earlier in the year, when the mother had expressed concerns that her son's IEP was not being implemented, the district made efforts to investigate her concerns and to address them with suggestions such as a "back-and-forth" book and monthly updates. They were also responsive in other ways.

35. Nicholson invited the mother and the private therapists to visit the classroom. The student's private physical therapist observed his classroom two times, and his occupational therapist visited on four occasions. In addition, Diedrich invited the mother to attend the Parents Encouraging Parents conference in February 1999, and drove her to the conference in Estes Park, Colorado, hoping they would have a chance to discuss any concerns she might have.

36. At the IEP meetings in September 1998 and May 1999, the mother and her therapists were encouraged to participate. Indeed, the IEP prepared in September 1998 was based largely on the input of the mother and the student's therapists. Neubert made several efforts to obtain reports and evaluations from the student's private therapists before the September 4, 1998, and the May 18, 1999, meetings. The mother objected to the therapists disclosure of information prior to the meetings themselves. Both the student's physical therapist, Leslie Ann Watson, and his occupational therapist, Deanne Chamberlain, testified that they participated in the student's IEP meetings. And Jill Frazier, a parent of a disabled child also enrolled at Lowell, who attended the May 18, 1999, IEP meeting at the mother's request, testified that the mother's input was invited and encouraged.

37. Throughout the IEP process and the evidentiary hearing, the mother was an active, well-informed and persistent advocate on behalf of her son.

#### D. Denial of Due Process.

38. On May 24, 1999, the mother hand-delivered a note to the district requesting the student's educational file. The note was entitled, "Notice Admin. Hearing & request for file." The note did not identify any particular issue or the basis for the request for hearing.

39. The mother promptly received copies of the student's records, and the note was forwarded by Neubert to Diedrich.

40. On May 25, 1999, the district sent to the mother a district form (which was developed by the CDE) for requesting a due process hearing. The mother did not submit the form or otherwise reply to the request for additional information.

41. Instead, the mother contacted the FCO, who told her she had requested a due process hearing. According to the mother, the FCO advised her that she did not need to fill out the district's form.

42. When the mother and Diedrich discussed the student's educational placement in July 1999, the mother did not discuss her due process request.

43. However, in a letter the mother wrote to Diedrich on August 6, 1999, she wrote "I understand that my participation in discussion will not adversely affect or delay the Request for Due Process dated May 24, 1999."

44. On August 11, 1999, the mother and district officials including Diedrich met again to discuss the student's educational placement. The district agreed to support finding an alternative placement for the student. The district facilitated a placement for the student in a preschool class operated by Sewall Rehabilitation at Bradley Elementary. The district understood that while the mother still had issues with the district's program, because she was satisfied with the Sewall placement that the conflict between her and the district was resolved.

45. On August 16, 1999, the FCO confirmed to Diedrich that the mother did not have a request for due process or a federal complaint on file with the office.

46. On October 20, 1999, the mother submitted a complaint to the FCO.

## **DISCUSSION AND CONCLUSIONS OF LAW**

The Individuals with Disabilities in Education Act provides federal money to state and local agencies for the education of disabled children. *Urban v. Jefferson County Sch. Dist. R-1*, 89 F.3d 720, 722 (10<sup>th</sup> Cir. 1996). To qualify for federal funding, a state must demonstrate that it has a policy that assures all disabled children the right to a free appropriate public education. 20 U.S.C. Section 1412(l); *Board of Education of the Hendrick Hudson Central Sch. Dist. Westchester County v. Rowley*, 458 U.S. 176, 180-81 (1982).

The IDEA defines “free appropriate public education” as follows:

The term “free appropriate public education” means special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge; (B) meet the standards of the State Educational Agency; (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and (D) are provided in conformity with the individualized education program required under section 1414(d) of this title.

20 U.S.C. Section 1401(8).

“Special education” under the Act is defined as “specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including—(A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education.” 20 U.S.C. Section 1401(25). The term “related services” means

transportation, and such developmental, corrective, and other supportive services (including speech language pathology and audiology services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, (except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

20 U.S.C. Section 1401(22).

A team of the disabled child's teachers, experts, and parents is charged with the responsibility of formulating an individualized education plan for the child. The IEP identifies the special education and related services that the child needs in order to receive a FAPE. 34 C.F.R. 300.340-350. At a minimum, under the IDEA and federal regulations, a FAPE is an education that provides, at public expense, "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203.

In *Rowley*, the Supreme Court established a two-pronged inquiry to determine whether the IDEA's requirements have been met: (1) Has the state complied with the procedures set forth in the Act? (2) Is the IEP developed through the IDEA's procedures reasonably calculated to enable the child to receive educational benefit? 458 U.S. at 206-07.

In this case, the student is disabled and is entitled to a free appropriate public education under the IDEA. The key issues are whether the student's IEP was properly implemented; whether ESY services were appropriately denied; whether the mother's procedural right to participate in the IEP process was violated; and whether the student and his mother were denied due process.

A. The District Implemented the Student's IEP.

The student's IEP provided that the student receive one hour of indirect and two hours of direct services per week from an early childhood special education teacher; one hour of indirect and two hours of direct services per week from a speech language professional; one hour of indirect and one hour of direct service per week from a physical or occupational therapist. The FCO made no specific finding as to whether these services were actually delivered. He merely faulted the IEP for failing to be specific as to how the services would be delivered but found that the student had not been denied a FAPE.

On appeal, the student and his mother contend that the FCO's decision was flawed because the FCO found a violation of 34 C.F.R. Section 300.347(a)(3) and (4) but no denial of a FAPE. They argue that the direct services by these providers were not provided as contemplated by the September 1998 IEP. They did not present any evidence as to whether the indirect services were provided and apparently did not take issue with that aspect of the service delivery. The focus of the student's case was on the alleged failure to deliver direct services. They did not challenge the IEP itself, only its implementation.<sup>11</sup>

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<sup>11</sup> After the May 18, 1999, IEP annual review, the mother and some of the private therapists complained about the goals and objectives identified in the September 1998 IEP. Prior to that time, neither the mother or her therapists challenged the appropriateness of the IEP itself. The mother did not challenge the IEP before the FCO or in her appeal. Therefore, for purposes of this opinion, the administrative law judge has not considered the adequacy of the IEP. See *O'Toole v. Olathe District Schools Unified School Dist No. 233*, 144 F.3d 692, 701-02 (10<sup>th</sup> Cir. 1998) ("the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not

The mother has the burden of proving that the integrated preschool program offered and implemented by Lowell in the 1998-99 school year was not reasonably calculated to confer an educational benefit on the student.

Upon reviewing the record before the FCO and the evidence submitted at the evidentiary hearing, the administrative law judge concludes that the IEP was sufficiently clear as to what related services were to be delivered to the student. Therefore, the district did not violate 34 C.F.R. Section 300.347(a)(3) and (4). Nor did the district deny the student a FAPE by failing to implement his IEP. Overall, the district delivered the special education and related services described in the student's IEP, which enabled him to make adequate progress toward his annual goals.

1. IEP Was Sufficiently Clear.

Code of Federal Regulations Section 300.347(a)(3) and (4) provide:

The IEP for each child with a disability must include—

(3) A statement of the special education and related services and supplementary aids and services to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided for the child—

- (i) To advance appropriately toward attaining the annual goals;
- (ii) To be involved in and progress in the general curriculum in accordance with paragraph (a)(1) of this section and to participate in extracurricular and other nonacademic activities; and
- (iii) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section;

(4) An explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in the activities described in

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at some later date.... Neither the statute or reason countenance "Monday Morning Quarterbacking" in evaluating the appropriateness of a child's placement." [citations omitted]).

paragraph (a)(3) of this section.

The FCO did not specify in what way the IEP was unclear as to the service delivery system for providing special education, speech therapy, and physical/occupational therapy. Granted, the IEP did not set forth the exact manner in which each service would be delivered, but that is not required by the statute or regulations. According to the cited regulatory provisions, the IEP need only state what special education and related services and supplementary aids and services would be provided to the child and what program modifications or supports for school personnel would be provided. The student's IEP complied with those requirements. The IEP provided that two hours each of direct service of special education and speech therapy and one hour of physical or occupational therapy would be provided per week in the general classroom of an integrated developmental preschool. The IEP also stated that the student would require constant health care monitoring and reminders not to sit in a "W" position.

Reviewing the statement of educational needs and the goals and objectives set forth in the student's IEP adds light to the special education and related services specified in the same document. According to the IEP, the student's needs at the time were to improve his language processing and social pragmatic skills. He also needed to work on his feeding and oral motor skills and general motor skills and an awareness of his personal safety. His goals and objective corresponded to these needs: (1) to improve mobility in the school environment; (2) to follow classroom rules and routines with minimal prompts; (3) to improve pragmatic, social interactive and receptive language skills; (4) to improve his ability to tolerate oral motor stimulation; and (5) to increase his awareness of his physical needs. It is clear that the student required speech therapy to help him with his social and language skills and with his feeding and oral motor skills. Similarly, the physical therapy would help him improve his mobility and increase his awareness of his physical needs. The special education program would help him learn to function in the classroom and to assist with his progress toward all of these goals and the specific objectives set forth in his IEP.

Given the student's stated needs, his objectives and goals, it is clear that the special education and related services were tailored to his disability. The fact that the IEP did not specify whether these services would be delivered one-on-one nor describe the curriculum these providers would use does not violate the regulations cited by the FCO. IEPs are not required to be that specific so that different methods and techniques can be used in the course of the student's education program. Furthermore, it could be inferred from the student's goals that the special education and related services, including the speech therapy and physical or occupational therapy, would not be provided on an individual basis only since the services were to be provided in the general classroom of an integrated classroom and so much of what the student's program focused on was his learning to function in a classroom with his peers.

As for Section 300.347(a)(4), there was no violation of this subsection since the IEP did not provide that the student would be segregated from his nondisabled peers for any part of his preschool program.

## 2. IEP Was Implemented.

The administrative law judge agrees with the FCO's finding that the student's IEP was implemented and that he was not denied special education or related services.

The dispute over whether the IEP was implemented focused in large part on the meaning of the term "direct." The apparent perception of the student's mother and his private therapists was that "direct" provision of service necessarily meant one-on-one delivery of service. All of the district's witnesses testified, however, that "direct" services in the general classroom included work with the student in small and large groups and on an individual basis. They also clarified that "indirect" (versus "direct") denoted that time dedicated to planning and preparing materials and consulting with other specialty service providers as opposed to working with the student in the classroom. Thus, as used in the IEP, "direct" does not mean time spent with the student individually, and "indirect" does not mean time spent with the student in large or small groups. This interpretation is borne out by the fact that if "direct" and "indirect" included all the hours spent with the student, then the providers would have been committed initially to providing a total of eight hours per week of related services despite the student being enrolled for only six hours per week.

That the IEP could have been clearer on this point, as suggested by the FCO, is not only the fault of the district. The mother had ample opportunity to seek clarification on this point during the IEP meetings and over the course of the school year.

At the evidentiary hearing, the student's general classroom teacher, his special education teacher, the school speech language professional and physical therapist all testified that they delivered those services required by the student's IEP.

### a. Special Education.

On Thursdays, Betsy Georgitis, the student's special education teacher attended the student's class for approximately three hours. She worked directly with the student in small or large groups or sometimes on an individual basis. She also coordinated her efforts with the general classroom teacher and the other service providers, by giving them materials prepared by her and by coming up with strategies and interventions to help them work with the student toward his IEP

goals and objectives. She provided indirect service by meeting with the general classroom teacher and other special service providers and by planning lessons and materials for her work with the student. In this manner, she met the two direct hours and one direct hour of special education services requirement of the IEP.

b. Speech/Language Therapy.

Similarly, Jane Gladwell provided speech and language therapy services in the student's preschool class for the entire three-hour period on Tuesdays. She worked directly with the student on a one-on-one basis or in small or large groups. In addition, she met formally and informally with the other service providers and spent time preparing materials and activities for the student and others in his class. In sum, she delivered at least two hours of direct and one hour of indirect speech/language therapy services as required by the student's IEP.

c. Physical/Occupational Therapy.

Like her peers, Marcia Blum testified that she provided physical therapy services on a regular basis. She normally attended the student's classroom on Mondays, and when he was absent, would try to reschedule her visits for another day. Her testimony, however, was less convincing than that of the other service providers because her recollections were not as detailed and her memory of the student was vaguer.

The student's private nurse Burt Ray, who attended class with the student on Tuesdays and Thursdays, testified that he did not meet Blum until March 1999. The district explained that because Blum normally attended class on Mondays, her schedule did not overlap with Ray's. Given, however, the student's frequent absences, the administrative law judge finds this explanation lacking. Had Blum in fact made up classes on other days, she would likely have met Ray earlier in the school year.

The focus notes also indicate, although not definitively, that Blum did not provide physical therapy services for one hour every week of the school year. While the focus notes do not necessarily reflect every time a provider interacted with the student, it is telling that Blum's entries were few and the least complete.

To counter the deficiency the school district explained that the other service providers worked in conjunction with Blum and provided physical therapy services. Because there is some overlap between the various services, the administrative law judge finds this explanation compelling. Based on the focus note entries of other providers and their testimony at hearing, the administrative law judge finds that the student received physical therapy services. The question that remains, however, is was the student denied a FAPE if the physical services were provided by someone other than the physical therapist and/or if those services fell short of the one hour of direct service per week required by the IEP? After reviewing the

evidence and case law, the administrative law judge concludes that in this case, the student was not denied a FAPE. See *Houston Indep. Sch. Dist. v. Bobby R.*, 200 F.3d 341, 348-49 (5<sup>th</sup> Cir. 2000) (local agency's failure to provide all the services and modifications outlined in an IEP does not constitute a *per se* violation of the IDEA when "significant provisions of the IEP were followed"), *cert. denied*, 531 U.S. 817 (2000) (citing *Gillette v. Fairland Bd. of Educ.*, 725 F. Supp. 343 (S.D. Ohio 1989), *rev'd on other grounds*, 932 F.2d 551 (6<sup>th</sup> Cir 1991)). The *Houston* court held that

To prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

*Houston*, 200 F.3d at 348-49.

When presented with a claim that a school district failed to implement a student's IEP, the administrative law judge must determine whether the alleged failure deprived the student of his entitlement to a "free appropriate public education." See *Ross v. Framingham Sch. Comm.*, 44 F. Supp.2d 104, 118 (D. Mass. 1999), *aff'd*, 229 F.3d 1133 (1<sup>st</sup> Cir. 2000), *cert. denied*, 532 U.S. 1089 (2001). The *Ross* court established these guidelines: (1) the failure to implement must not be a complete failure; (2) the variance of the special education and related services specified in the IEP from the implementation of those services must not deprive the student of a FAPE; and (3) the provision of special education and related services must enable the student to make progress toward the achievement of the goals stated in the IEP. *Id.* at 119.

After considering these guidelines, the administrative law judge concludes that the district, for the most part, delivered the special education and related services specified in the IEP. The district's compliance was substantial, and, therefore, not a complete failure to implement. As for the second guideline, the failure in part by the physical therapist was minor and did not deprive the student of a FAPE, particularly in light of the fact that other service providers filled in to provide those services. And finally, the student made progress toward the achievement of the goals stated in his IEP.

Moreover, to the extent the IEP was not as specific as it could have been, this deficiency is at most a technical one, particularly when a parent has had an

opportunity to explore related services. See *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 706-707 (10<sup>th</sup> Cir. 1998) (technical irregularities did not produce violation of the IDEA). In *Roland M. v. Concord Sch. Comm.*, 910 F.2d 983, 994 (1<sup>st</sup> Cir. 1990), *cert. denied*, 499 U.S. 912 (1991), the First Circuit ruled that “[b]efore an IEP is set aside, there must be some rational basis to believe that procedural inadequacies compromised the pupil’s right to an appropriate education, seriously hampered the parents’ opportunity to participate in the formulation process, or caused a deprivation of educational benefits.”

The most compelling evidence demonstrating that the student’s IEP was implemented was the progress he made toward his annual goals. His teacher and special service providers all testified that he had made progress toward achieving his goals, and his mother offered no evidence to the contrary. Indeed, the student met all of his goals and all but one of his short-term objectives.

The source of the mother’s discontent with her son’s program at Lowell was that it did not maximize his potential nor make adequate headway toward closing the gap on his developmental delays. At the end of the school year, the student was still about six months to a year behind in terms of his development. While the mother’s point that early intervention can make a significant difference in the developmental progress of a young child and her frustration that not more was done for him are understandable, the district did not fail its obligations under the IDEA. The student did accomplish most of the goals and objectives set forth in his IEP even if he continued to lag behind other children his age developmentally.

Moreover, neither federal or Colorado state law require local educational agencies to provide maximum educational benefit to disabled students as do some states. The IDEA does not require that a school district either maximize a student’s potential or provide the best possible education at public expense. *Rowley*, 458 U.S. at 198. As stated in *Rowley*, “the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside.” 458 U.S. at 192.

In addition, it is clear from the evidence that the district made numerous attempts to address the mother’s concerns about the implementation of her son’s IEP. Diedrich encouraged the mother’s participation in developing her son’s IEP and in various parent support groups. And, when the mother complained to the student’s providers, Neubert investigated her concerns and finding no violations suggested a back-and-forth book. The book was intended to keep the mother up to date on her son’s daily progress and to allow her to respond to them. The mother rejected this idea, and so the providers submitted monthly progress reports to her.

B. The District's Denial of Extended School Year Services Was Proper.

The student and his mother claim that the decision to deny the student ESY services was invalid because it was based on insufficient data. Although they purport to challenge the data, the heart of their complaint is that the denial of ESY services amounted to a denial of a FAPE. The student did not qualify for ESY services, and the data on which the decision was based in part was valid.

In *Johnson v. Indep. Sch. District No. 4 of Bixby, Tulsa County, Oklahoma*, 921 F.2d 1022 (10<sup>th</sup> Cir.1990), *cert. denied*, 500 U.S. 905 (1991), the Tenth Circuit set forth the essential inquiry when considering whether extended school year services are warranted under the IDEA:

The amount of regression suffered by a child during the summer months, considered together with the amount of time required to recoup those lost skills when school resumes in the fall, is an important consideration in assessing an individual child's need for continuation of his or her structured educational program in the summer months.

*Id.* at 1026.

The Fifth Circuit explained this regression-recoupment analysis in *Alamo Heights Independent Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153 (5<sup>th</sup> Cir. 1986):

“The basic substantive standard under the Act, then, is that each IEP must be formulated to provide some educational benefit to the child,” in accordance with “the unique needs” of that child. The some-educational-benefit standard does not mean that the requirements of the Act are satisfied so long as a handicapped child's progress, absent summer services, is not brought “to a virtual standstill.” Rather, if a child will experience severe or substantial regression during the summer months in the absence of a summer program, the handicapped child may be entitled to year-round services. The issue is whether the benefits accrued to the child during the regular school year will be significantly jeopardized if he is not provided an educational program during the summer months.

*Id.* at 1158 ( quoting *Crawford v. Pittman*, 708 F.2d 1028 (5<sup>th</sup> Cir. 1983)).

The *Johnson* court also held that the regression-recoupment analysis is not the only consideration, however. Additional factors play into what is an “appropriate” educational program. These other factors include the degree of impairment and the ability of the child’s parents to provide the educational structure at home; the child’s rate of progress; his behavioral and physical problems; the availability of alternative resources; the ability of the child to interact with non-disabled children; the areas of the child’s curriculum that need continuous attention; the child’s vocational needs; and whether the requested service is extraordinary to the child’s condition, as opposed to an integral part of a program for those with the child’s condition. *Johnson*, 921 F.2d at 1027. Thus, not only is retrospective data relevant. Predictive data, based on the opinion of professionals in consultation with the child’s parents should be considered along with the circumstances of the child’s individual situation at home and in his neighborhood and community. *Johnson*, 921 F.2d at 1028.

The student’s special education teacher and his special service providers testified that they met before and after the winter and spring breaks to discuss how the student was performing on his goals and objectives. They relied on their focus notes, teacher observations, and their current estimation of the student’s performance. After each break, they concluded that the student had not regressed or lost skills to an unusual degree and recorded their conclusions on an ESY data sheet.

When Georgitis, Blum, and Gladwell met in the spring of 1999 to prepare for the student’s annual review, they agreed that based on the information available to them, the student was not eligible for ESY services. They did not make a final determination as to eligibility as they did not yet have the benefit of the mother’s input or that of his private therapists. At the May 18, 1999, annual review of the student’s IEP, the student’s mother and father provided input as did his private occupational therapist, physical therapist and nurse.

In short, there was no persuasive evidence that the student might suffer significant regression and recoupment problems. Nor did consideration of the predictive factors alter the analysis and ultimate decision. While in some cases, numerous absences may qualify a child for ESY services, that was not the case here. Despite his many absences throughout the school year, the student had made reasonable progress toward his goals and objectives and, therefore, did not require extended services to allow him to catch up.

While ESY services most certainly would have benefited the student, that is not the standard for providing services. Moreover, an “appropriate” education is not one which guarantees to maximize the child’s potential. *Rowley*, 458 U.S. at 197 n.21.

As for the mother’s complaint that the ESY data sheet was invalid because Blum did not initial the form at the time it was completed, neither federal nor state

law prescribes how such data is to be compiled and maintained. Furthermore, to the extent there were deficiencies as to how the data was collected and reviewed, such a benign technical deficiency does not alter the validity of the decision. See *O'Toole*, 144 F.3d at 701 (“[t]echnical deviations . . . do not render an IEP entirely invalid; to hold otherwise would “exalt form over substance.”” [citations omitted]).

C. The Mother Was a Meaningful Member of Her Son’s IEP Team.

The IDEA “establishes various procedural safeguards that guarantee parents both an opportunity for meaningful input into all decisions affecting their child’s education and the right to seek review of any decisions they think inappropriate.” *Honig v. Doe*, 484 U.S. 305, 311-12 (1988). And “participation means something more than mere presence; it means being afforded the opportunity to be an equal collaborator, whose views are entitled to as much consideration and weight as those of other members of the team in the formulation and evaluation of their child’s education.” *V.W. v. Favolise*, 131 F.R.D. 654, 659 (D. Conn. 1990).

Indeed, according to the Supreme Court it is “no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, . . . , as it did upon the measurement of the resulting IEP against a substantive standard.” *Rowley*, 458 U.S. at 205-206.

The evidence at hearing established that the mother was aware of her rights under the IDEA. Indeed, when Neubert asked in the fall of 1998 if she wanted an explanation of her rights, she declined. The mother stated that she understood her rights and was a member of Arapahoe Early Childhood Network, a support and advocacy group.

At the September 4, 1998, and the May 18, 1999, IEP meetings, not only the mother but the private therapists she hired for her son provided substantial input. Indeed, the student’s IEP was based almost entirely on input from the mother and the private therapists as school officials had not been allowed by the mother to conduct a home visit. Jill Frazier, another parent of a disabled child who attended the meeting at the mother’s request, confirmed that the mother’s input was not only requested but encouraged.

Moreover, the mother was invited to visit her son’s classroom as often as she liked throughout the school year, and she had the advantage of having the student’s nurse keep her apprised of what was going on in the classroom. When she raised concerns about the implementation of her son’s IEP, Neubert conducted an investigation. Neubert visited the student’s classroom on several occasions, met with his service providers, and evaluated their work with him and his progress. When the mother rejected the idea of a back-and-forth book, which

would allow for almost daily communication between them and her, they provided her with monthly reports. And, in response to her requests for documentation, the district provided the mother with information and documentation exceeding what was required by her son's IEP and state and federal law.

The mother seemed to believe that the district IEP team members came to the IEP meetings with their minds already made up about ESY services and other matters and considered her input only perfunctorily. While these school officials may have attended these meetings with certain predispositions based on the information available to them, they did not decide matters in advance. In fact, although the mother and the private therapists did not raise objections to the ESY decision or to the conclusion that the student had met most of his goals and objectives at that meeting and only later raised concerns, school officials scheduled a later meeting on May 28, 1999, to revisit the issues raised by the mother. In other words, had school officials decided issues related to the student without giving consideration to the mother's concerns, they would have relied on the mother's silence at the meeting and pressed forward with their decisions. Instead, they deferred making any final decisions until getting further input from the mother and the therapists. And they met with the mother over the course of the summer to find an appropriate placement for the student.

Still the mother complains that the school did not comply with her requests, which often were not adequately specific. While parental input must be taken into consideration when deciding IEP goals and objectives, it cannot alone be the basis for compelling a school district to provide a certain educational plan. *Brougham v. Town of Yarmouth*, 823 F. Supp 9, 16 (D. Me. 1993); *Gill v. Columbia 93 Sch. Dist.* 31 IDELR 29 June 9, 1999). Parents, "no matter how well-motivated, do not have a right under the [IDEA] to compel a school district to provide a specific program or employ a specific methodology in providing for the education of their handicapped child." *Lachman v. Illinois Bd. of Educ.*, 852 F.2d 290 (7<sup>th</sup> Cir.), cert. denied, 488 U.S. 925 (1988).

The administrative law judge is particularly persuaded that the mother was a meaningful member of her son's IEP team after having observed her over the course of four days of hearing. The mother is an intelligent, capable and unrelenting advocate for her son. She is well-informed and conscientious. Having watched her advocate on behalf of her son and listening to the testimony of district staff, the student's private therapists, and Frazier, the administrative law judge is convinced that the mother was an active and meaningful member of her son's IEP team.

D. The Student Was Not Denied Due Process.

34 C.F.R. Section 300.507(c)(1) provides that a public agency must have procedures that require the parent of a child with a disability to provide notice to

the public agency in a request for hearing. 34 C.F.R. Section 300.507(c)(2) sets forth the content of that notice:

The notice required in paragraph (c)(1) of this section must include

- (i) The name of the child;
- (ii) The address of the residence of the child;
- (iii) The name of the school the child is attending;
- (iv) A description of the nature of the problem of the child relating to the proposed or refused initiation or change, including facts relating to the problem; and
- (v) A proposed resolution of the problem to the extent known and available to the parents at the time.

However, 34 C.F.R. Section 300.507(c)(4) provides: “A public agency may not deny or delay a parent’s right to a due process hearing for failure to provide the notice required in paragraphs (c)(1) and (2) of this section.”

When the student’s parents submitted a document entitled, “Notice Admin. Hearing & request for file” on May 24, 1999, the district’s actions indicated it understood what she was likely seeking. The following day, the district sent her a district form for requesting a due process hearing. The district’s attempt to comply with federal regulations is not an error that amounted to a denial of due process. While it would have been prudent for the district to treat the mother’s May 24, 1999, notice as a request for due process, its failure to do so does not amount to a violation of the IDEA. In this case, the district attempted to have the mother comply with 34 C.F.R. Section 300.507(c)(1) and (c)(2). There was no evidence that the district sought to thwart the mother’s request for due process. Sending a form to a parent does not amount to denying or delaying a parent’s right to due process.

At hearing, the district also presented evidence that the mother and district met throughout the summer of 1999 to discuss the student’s placement. A letter from the mother dated August 6, 1999, to Diedrich reaffirmed her request for a due process hearing. However, five days later, the district agreed to support an alternative placement for the student at a Sewall-related facility. Thus, by August 11, 1999, the district thought that while the mother still had issues with the district’s preschool program, the conflict between them had been resolved because she was satisfied with the Sewall placement. And on August 16, 1999, the FCO confirmed to Diedrich that the mother did not have a request for due process or a federal complaint on file with that office.

Thus, while the district should have taken action on the mother’s request for due process, it did not attempt to thwart or delay her request for due process. It sent to her the proper form, and when the form was not returned and the school and she successfully negotiated a placement for the student, it incorrectly assumed that she was no longer pursuing her due process request.

Moreover, from a practical perspective, the student and his mother have had what has amounted to due process, although in the form of a federal complaint. They were able to present considerable evidence to the FCO in a face-to face meeting. And they had an opportunity to present additional evidence after that meeting. Although they did not have the opportunity to present testimonial evidence to the FCO, they had the opportunity to do so before the administrative law judge over the course of the four-day evidentiary hearing. At the state level, they were permitted to present all evidence they believed to be relevant to their appeal. Indeed, at this point, if the case were remanded to the district to allow the mother to pursue a due process hearing, the relief would be redundant. The mother would essentially have another bite at the apple in presenting the same information already presented to the administrative law judge.

### **DECISION AND ORDER**

It is the decision of the administrative law judge that the FCO's decision is affirmed and reversed in part. The district provided the student with a free appropriate public education under the IDEA in the 1998-99 school year. The district implemented the student's IEP, and it did not violate 34 C.F.R. Section 300.347(a)(3) and (4). The district correctly denied the student ESY services and based its decision on valid--if not perfect--data. As for procedural compliance with the IDEA, the mother was a meaningful member of her son's IEP team as were his private therapists. And, finally the district did not deny the mother and her son their right to due process nor violate 34 C.F.R. Section 300.507(c)(4).

This decision of the administrative law judge is the final decision on state level review. Paragraph 24, Colorado Department of Education Management Policies and Procedures regarding Federal Complaints.

DATED: November \_\_\_\_\_, 2001  
Denver, Colorado

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SUNHEE JUHON  
Administrative Law Judge

**CERTIFICATE OF MAILING**

I certify that on this \_\_\_ day of November, 2001, I mailed a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW by depositing same in the U.S.Mail, postage prepaid, at Denver, Colorado, to:

Susan S. Schermerhorn, Esq.  
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Commissioner William Moloney  
Charles M. Masner  
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Secretary to Administrative Law Judge