

**BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO**

CASE NO. ED 2001-015

DECISION UPON STATE LEVEL REVIEW

MONTROSE COUNTY SCHOOL DISTRICT RE-1J

Appellant,

v.

[student], through his educational liaison, [educational liaison] of DENVER HUMAN SERVICES,

Appellee.

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.*, 20 U.S.C. §1415(b)(6), 34 C.F.R. §§ 330.660-662 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 May 21, 2001, Federal Complaints Officer Charles M. Masner (FCO) received a complaint letter filed on behalf of [student] (Student) by [educational liaison], educational liaison with the Denver Department of Human Services (DDHS)¹ against Montrose County RE-1J School District (the District). The complaint alleged that the District had failed to comply with IDEA with respect to the education of [student]. The District filed a written response on June 15, 2001, denying the District's allegations and the District filed a reply on June 27, 2001. The FCO reviewed the documents and written arguments submitted to him by the parties and conducted an investigation but did not hold a hearing concerning the complaint.

Following this review, the FCO issued a decision on July 20, 2001 (Decision), resolving certain issues raised in the complaint but reserving ruling on the issue of compensatory education and the identification of a replacement Educational Surrogate

¹ Although the complaint letter bears a date of February 21, 2001, it was postmarked May 19, 2001 and received by the FCO on May 21, 2001.

Parent (ESP) for the Student. On September 5, 2001, the FCO entered his final order (Order) in this matter, determining that the issue of replacing the Student's ESP was moot. In addition, having determined that the parties were unable to resolve the issue of compensatory education, the FCO entered an order regarding that issue.

The District appeals the FCO's Decision pursuant to 34 C.F.R. §300.660(a)(ii) and CDE Federal Complaints Procedure, paragraphs 15-26. Pursuant to that appeal, a state level review proceeding has been conducted. The parties have filed briefs and supporting affidavits. In addition, a hearing was held on March 11, 2002 for the purpose of taking oral testimony. No additional oral argument was requested or determined to be required.

In this appeal, the Student is represented through his educational liaison, [educational liaison], of the Denver Department by Assistant Denver City Attorney Suzanne A. Fasing. The District is represented by Susan S. Schermerhorn, Cheryl M. Karstaedt and Kathleen M. Shannon or Caplan and Earnest LLC.

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).

FEDERAL COMPLAINTS OFFICER DECISION AND ORDER

In his Decision, the FCO identified the Student's claim as asserting that he did not receive a free appropriate public education (FAPE) from the beginning of the 2000-2001 school year until an Individualized Education Program (IEP) for the Student was created and implemented in February 2001.

The FCO concluded in his Decision that the District violated the Student's right to FAPE by failing timely to have in place and implement a valid IEP for the Student when he

transferred into the District at the beginning of the 2002-2001 school year. In addition, in his subsequent Order the FCO determined the Student was potentially entitled to compensatory education. However, because the Student was no longer in residing in the District and his placement was not stable, the FCO ruled that the Student's new service provider should make an initial determination as to whether compensatory education is warranted. The FCO further ruled that "[s]hould the IEP team in the new school district determine that compensatory education is warranted, that school district shall have the authority of this Order , and the governing Decision, to enforce any legal obligation the new school district decides to seek to enforce, against the school district subject to this Complaint, in assisting it in providing compensatory education to this student. That compensatory education could include the purchase of services for which reimbursement would be appropriate."

ISSUES ON REVIEW

On appeal, the District asserts: (1) the FCO erred in determining the District failed to provide the Student with a FAPE; (2) the FCO's order was inconsistent with federal and state mandates and a 1986 Interagency Agreement with respect to placement of students with disabilities; (3) the FCO erred in determining the District may be liable for compensatory education services despite the fact that the Student is no longer a resident of the District and also erred in authorizing the Student's IEP team in his new school district to determine the nature and amount of the District's compensatory education liability; and (4) the FCO erred in ordering the District to submit the FCO's decision to the Student's new IEP team.

The Student has responded by asserting the FCO's decision was proper. With respect specifically to the issue of compensatory education, the Student argues that ordering compensatory education for a non-resident student is appropriate. In addition, he asserts the FCO's order merely authorizes the new district to initiate a separate enforcement action against the District concerning the issue of compensatory education.

The Administrative Law Judge determines that the FCO properly determined the District failed to provide the Student with a FAPE. The Administrative Law Judge concludes, however, that the remedy ordered by the FCO is not supported by the IDEA and is not appropriate. The Administrative Law Judge therefore orders an alternative remedy.

FINDINGS OF FACT

Based on the written and testimonial record, the Administrative Law Judge enters the following findings of fact, giving due deference to the findings of the FCO:

1. The Student was born on []. In August 2000, when he was placed in Montrose, Colorado, he was 12 years old.

2. It is undisputed that the Student is a “child with a disability” under the IDEA, having been identified as meeting the state regulatory criteria for having an educational disability, namely, “significant identifiable emotional disability” (SIED). He is eligible for special education services on this basis. State Board of Education Rules for the Administration of the Exceptional Children’s Act (“State Board Rules”), 2220-R-2.02(5), 1 CCR 301-8.

3. The Student is in the custody of DDHS because parental rights were terminated. The Student had been subjected to neglect as well as physical and sexual abuse prior to the termination of parental rights.

4. Following termination of parental rights, the Student was placed in foster homes and, ultimately, on November 16, 1998, in a residential treatment program at Colorado Christian Home Tennyson Center (CCH). While at CCH, the Student engaged in physically, verbally and sexually aggressive behaviors. This behavior included conduct characterized by his CCH case manager as sexual predation in which the Student would seek out weaker and/or younger peers and groom them toward becoming consenting sexual partners. Because the Student did not demonstrate hoped for progress, his initially-scheduled discharge from CCH was delayed.

5. The Student was originally evaluated and placed in special education services in 1999. On February 18, 2000, an annual IEP review was conducted for the Student at CCH. The February 2000 IEP identified the Student’s annual goals as improving self-esteem, improving skills to develop positive peer relationships, and improving auditory and reading comprehension skills. Special education and related services identified for the coming year were 30 hours per week of special education in a self-contained classroom. The Student’s “Recommended Placement in the Least Restrictive Environment (Special Education Instructional Setting)” was a private residential facility. The IEP noted that this setting was required in order to provide a structured environment with treatment services to help the Student deal with this anger and identify his feelings.

6. The annual goals listed in the Student’s February 2000 IEP, including those addressing self-esteem and peer relationships, are all related to addressing the Student’s educational needs and deficits. Similarly, the recommendation for continued residential treatment facility placement was related to the Student’s educational needs.

7. In June 2000, a determination was made to keep the Student at CCH until an opening became available at a more restrictive facility. However, between June 2000 and July 18, 2000, the Student’s behavior at CCH deteriorated significantly. He became increasingly violent and he began to assault staff, sending one staff member to the hospital. A staffing was held on July 18, 2000 concerning CCH’s ability to continue to contain the Student’s behaviors. At that meeting the Student was unable to commit himself to safe behavior at CCH. CCH determined that it would no longer be able to provide residential placement for the Student as a result of his assaultive behavior and attacks on staff, and provided notice to DDHS that the placement would be terminated after 30 days.

8. The Student continued in his CCH placement until August 8, 2000, when he was removed to the Dahlia Detention Center following further physical attacks on staff. Plans to return the Student from the detention center to more secure setting at CCH for the remaining 11 days of the 30-day notice period were interrupted by the entry of an August 16, 2000 court order terminating the CCH placement. Thus, the Student was discharged from CCH on August 16, 2000.

9. The August 16, 2000 CCH Discharge Summary recommended, in part, that the Student:

transition to a facility with a strong program for addressing children with the depths of his sexual history, such as the Emily Griffith Center. Unless [the Student] is capable of getting to the place where he can talk about his abuse, he will continue to exhibit depressive symptoms, and act out in aggressive/violent ways as means of coping. It is further recommended that academically [the Student] remain in a day treatment classroom to provide containment for the emotional concerns that interferes (*sic*) with his learning as he acts out behaviorally.

10. Prior to the issuance of the August 16, 2001 court order, DDHS' Placement Evaluation Team (PET) considered the Student's placement and determined that he should be placed in the [foster home] foster home in Montrose pending residential placement at the Emily Griffith Center where an opening was anticipated in March 2001. The [foster home] foster home was considered by PET to be the most appropriate placement for the Student that was available at that time.

11. The [foster home] placement option was presented to, and approved, by the Denver Juvenile Court. Neither the Student's DDHS educational liaison nor his caseworker as of August 18, 2000 was involved in the PET placement decision or have any knowledge as to how or why the PET team made this placement decision.

12. DDHS did not contact, consult or work cooperatively with the District prior to arranging for the [foster home] placement or recommending this placement to the court. Nor did DDHS make any effort to ascertain whether the District could provide the necessary and appropriate educational services to meet the Student's special needs. In addition, at no time between February and August 16, 2000, did DDHS attempt to convene an IEP staffing prior to making the placement change to the [foster home] foster home.

13. Top of the Trails placement agency is a private child placement agency with which DDHS contracted to locate a foster home for the Student. The Student was placed at the [foster home] foster home under the auspices of Top of the Trails following the issuance of August 16, 2000 court order. As was the case with DDHS, Top of the Trails did not contact the District prior to arranging for the Student's placement in the [foster home] home.

14. On August 30, 2000, the Student's foster parents requested that the Student be permitted to enroll in 6th grade at Columbine Middle School (the District's only middle school) and provided the District with information regarding the Student, including his February 2000 IEP, but not including his discharge summary from CCH. At this time, District school psychologist Dr. Ramona Noland informed the Student's foster mother that the District needed to obtain additional information concerning the Student's educational needs prior to placing him and that a meeting would be scheduled as soon as possible to review the information and plan for the Student's education.

15. In an effort to obtain the CCH discharge summary, Dr. Noland spoke with the coordinator of Top of the Trails and the Student's DDHS caseworker, neither of whom had a copy of the document. Dr. Noland then spoke with the Student's case manager at CCH who conveyed to Dr. Noland the information contained in the discharge summary as well as the information set forth in paragraphs 4, 7 and 8 above. In addition, as noted in a written statement prepared by Dr. Noland:

Mr. Groskopf [the Student's case manager] was emphatic that an educational placement in a public school, even in a classroom for the emotionally disturbed student, was never even considered by the CCH staff as a possible recommendation. [The Student's] recommendation had always been a much more restrictive placement such as a residential treatment facility. Public school would be considered a much less restrictive environment and in his opinion was a placement that would not only be potentially dangerous for staff and other students, but [was] also clearly setting [the Student] up for additional juvenile charges.

16. As a result of her review of the documentation provided by the Student's foster mother as well as the information conveyed by the Student's CCH case manager, Dr. Noland became concerned about placing the Student in a public school due to his history of sexual abuse, sexual acting out and aggressive behaviors.

17. On September 5, 2000, the District requested the Colorado Department of Education (CDOE) appoint an Educational Surrogate Parent (ESP) for the Student.

18. On September 6, 2000, CDE formally appointed [educational surrogate parent] as the Student's ESP and instructed [educational surrogate parent] that she was expected to represent the Student's needs and interests in all special education matters, with the same rights a parent would have in working with the school to provide appropriate educational services for the Student.

19. On September 7, 2000, the District held a transfer student IEP review meeting. In attendance were [educational surrogate parent], the Student's foster mother, Dr. Noland, the District's Director of Student Services, three representatives from Columbine Middle School: the principal, counselor and SIED teacher; and two

representatives from Top of the Trail Placement Agency: the coordinator, Beth Johnston, and case manager Cecilia Simmons.

20. There are no residential treatment facilities in Montrose County under the control of the District. The only day-treatment program available in Montrose County is funded by the Montrose Department of Social Services and placement in that facility is controlled by the County Department of Social Services, not the District. While Columbine Middle School maintains an SIED classroom, the students are not self-contained (housed in that classroom 100% of their school day). Columbine does not have an active crisis intervention team with personnel trained to deal with the level of behaviors discussed in the Student's documentation.

21. At the September 7 review meeting, the Student's existing February 2000 IEP and his discharge summary were reviewed. During the course of the meeting, Beth Johnston informed the IEP team that Top of the Trail and DDHS were actively looking for a residential facility for the Student.

22. Also during the course of the review meeting the District informed Ms. Johnston as to the status of residential and day treatment facilities in Montrose County and the available means for accessing those facilities, as well as the status of Columbine's SIED classroom and the lack of an active crisis intervention team at Columbine.

23. At the conclusion of the review meeting, the participants, including the Student's ESP, agreed that the District could not provide for the needs of the Student within District facilities. Top of the Trail was encouraged to work with DDHS to secure an appropriate therapeutic and educational placement for the Student.²

24. The Student's ESP agreed with the determination that the District could not provide services for the Student because the District did not have the kind of intensive self-contained classroom services that were recommended for the Student by his CCH IEP team upon his discharge from CCH.

25. As a result of comments made during the review meeting by Top of the Trail representatives, both the District and the Student's ESP were under the misimpression that the Student's placement in Montrose was anticipated to be quite short-term and temporary. In fact, DHHS and Top of the Trail intended the Student to remain at the [foster home] foster home placement until March 2001, when placement at Emily Griffith was anticipated.

26. Following the September 7, 2000 meeting, District personnel had no further contact with anyone associated with the Student until the end of September 2000 and assumed during this interim period that the Student had been placed elsewhere. At the end

² Although it is undisputed the ESP agreed with this conclusion, there is no document signed by the ESP reflecting an agreement that services should not be provided by the District.

of September, both the Student's DDHS educational liaison and his DHHS caseworker contacted the District, informed the District that the Student was still at the [foster home] foster home, and insisted that the District provide educational services for the Student.

27. Initially, the District's Director of Student Services responded to these requests by stating that the Student had been inappropriately placed in violation of appropriate procedures and that the District would not provide educational services for him. Instead, it was the position of the District that DDHS could pay for tutoring for the Student.

28. Following these conversations with the District, the Student's DDHS educational liaison contacted CDE for assistance. Thereafter, the District agreed to provide homebound services to the Student. In so doing, it was the District's intention to provide the Student with educational services to the extent possible without putting the Student and other students at risk.

29. Beginning on October 13, 2000 and continuing until February 2001, the District provided 1.5 hours of direct one on one instruction from a licensed educator for approximately three or four days per week. These sessions were conducted in the library by the District's homebound instructor. Carol Wood, whose duties largely consist of providing services to expelled and suspended students. Based on the CCH discharge summary, the Student's ESP agreed with this arrangement for providing educational services to the Student.

30. Ms. Wood was never given the Student's February 2000 IEP and had no conversations with the school psychologist prior to January 30, 2001 concerning the Student's educational needs or goals. She had no knowledge of the Student's IEP goals and objectives during the course of her tutoring sessions with the Student nor was she informed of her responsibilities related to implementing the Student's IEP. Ms. Wood focused her tutoring sessions on all major subject areas, including math, reading, social studies and language arts. Lessons in science were eliminated shortly before February 2001, as a result of an across-the-board budget-based cutback in Ms. Wood's hours.

31. At no time prior to January 2001 did the District refer the Student for an assessment and planning or initiate the development of a new IEP.

32. The Student's February 2000 IEP goals and objectives were never directly addressed in the homebound setting. The daily log kept by Ms. Wood in connection with the Student's homebound instruction indicates that the Student made some academic progress. However, there is no indication that the Student made any progress with respect to his specific IEP goals and objectives. Because the IEP was not available to Ms. Wood, her log does not specifically address the comprehension goals or the specific objectives and evaluation procedures and strategies contained in the IEP. In addition, based on her notes, Ms. Wood did not address at all the Student's IEP self-esteem and peer relationship goals.

33. Between September 13, 2000 and February 7, 2001, the Student attended weekly psychotherapy sessions with Shaun Sowle, LCSW. In a February 7, 2001 report Mr. Sowle indicated the Student appeared to be successful in his current placement of five months and did not appear to be at risk of physically assaultive behavior or sexually acting out with other children. Mr. Sowle recommended that the Student be given an opportunity to attend regular school.

34. On January 15, 29 and February 1, 2001, the District's psychologist conducted an emotion/social and education evaluation of the Student. In her psycho-educational report, Dr. Noland noted testing results which indicated the Student's reading was average, his spelling and writing fluency skills were within the lower end of average, his ability to produce his thoughts in writing using complete sentences was at the lower end of the low average and his math skills ranged from severely delayed to low average. In addition, Dr. Noland noted Carol Wood's report that the Student was cooperative and willing to work but had much difficulty with content questions and when working independently. Ms. Wood also reported to Dr. Noland that the Student was currently working on reading assignment at the 4th or 5th grade level and multiplication facts in math. In her assessment, Dr. Noland indicated that the Student was demonstrating a significant weakness with math skills. She also noted his ability independently to perform grade level academic work appeared to be a significant weakness. Dr. Noland also noted that the Student's foster mother reported he was not having any social/emotional or behavioral concerns in the home setting.

35. At its review staffing in February 2001, the IEP team (including DDHS representatives who participated by telephone) agreed that the Student should receive special education services in a self-contained classroom between 21 and 60% of the time, 11.15 hours per week of direct services outside the classroom and 6 hours per week at an alternative educational setting. The District provided these special education services pursuant to the February 2001 IEP until the end of the 2000-2001 school year.

36. As a result of his progress in Montrose, DDHS determined not to move the Student to Emily Griffith Treatment Center in March 2001, as originally planned. Instead, he remained with the [foster home] foster family.

37. On May 15, 2001 the IEP team reconvened and revised the Student's IEP, increasing the amount of time he would be in the District's middle school.

38. In July 2001, the Student was removed from the [foster home] foster home and placed in the Marilee Shelter in Denver as a results of threatening behavior toward his foster family members. Following his placement in the Marilee Shelter, the Student was placed in a residential treatment center in Ft. Collins, from which he was also removed due to out of control behavior leading to the filing of criminal charges. The Student was then placed at the Gilliam Youth Center and eventually was moved to the Jefferson Hills residential treatment center, located within the Jefferson County School District. As of the time of the evidentiary hearing in this matter (March 2002) a tentative discharge date of

April 30, 2002 was set and it was anticipated that the Student would be returned to foster care in a rural setting. Plans were in place to have the Jefferson County School District perform an IEP review prior to the Student's discharge.

DISCUSSION

Jurisdiction

The Administrative Law Judge has jurisdiction to conduct this review pursuant to the IDEA, 20 U.S.C. §§1400 *et seq.*, 20 U.S.C. §1415(b)(6), 34 C.F.R. §§330.660-662, 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 which 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). 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 to 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. §§507-510 *with* 34 C.F.R. §§660-662. In the present case, DDHS on behalf of the Student has chosen to pursue a complaint under 34 C.F.R. §§660-662, the federal complaints procedure, rather than the due process hearing procedure. As a result, the Complaint letter filed on behalf of the Student was referred to a Federal Complaints Officer who issued a Decision on July 20, 2001 and a follow up Order on September 21, 2001 pursuant to 34 C.F.R. §§660-662. The District has appealed the FCO's Decision.

Although the federal regulations governing the procedure chosen by DDHS 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 Complaint Procedure, paragraphs 15-26, which governs this appeal. Pursuant to this procedure, either party may obtain state level review of the decision of the FCO, which review shall be conducted on behalf of the Commissioner of Education by a Colorado administrative law judge. CDE Federal Complaints Procedure, paragraph 1.

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, additional evidence was received through the filing of affidavits and the taking of testimony. The Administrative Law Judge has considered this additional information in rendering this Decision Upon State Level Review.

Issues Raised on Appeal

A. Provision of a FAPE.

The District asserts that the FCO erred in determining the District denied the Student a FAPE. The FCO found that the District failed to comply with federal and state regulatory mandates with respect to transfer IEPs and failed to implement a valid IEP for the Student in the fall of 2000, thereby denying the Student a FAPE. The Administrative Law Judge concludes that the District failed to provide the Student with a FAPE up until February 2001 in two ways: (1) the District failed to provide the Student with any special education services (or any education at all) prior to October 13, 2000, and (2) failed to provide the Student with special education consistent with a valid IEP between October 13, 2000 and February 2001.

The IDEA defines free appropriate public education as "special education and related services" which are provided at public expense, under public supervision and direction, meet state standards and comply with the child's individualized education program. 20 U.S.C. §1401(8). Special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instruction in classrooms and other settings and physical education instruction. 20 U.S.C. §1401(25).

The IDEA provides each child with a disability with a basic floor of educational opportunity, *Board of Education v. Rowley, supra*. A state provides this basic floor of opportunity and satisfies the minimum requirements of the IDEA by providing a child with a disability with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. The school district is not required to maximize educational opportunities or provide the best

possible education, *Mather v. Hartford School District*, 928 F. Supp. 437 (D.Vt. 1996), but must offer a program calculated to provide more than a trivial educational benefit to the child, *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), and that is likely to produce meaningful progress. *Mather at 445-6*; *Board of Education v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986).

As established by *Rowley*, a FAPE is provided if, first, there has been compliance with the procedural requirements of the IDEA and, second, the IEP developed pursuant to these procedures is reasonably calculated to enable the child to receive educational benefits.

In this case, the parties dispute whether appropriate procedures were followed with respect to the Student's IEP and whether a valid IEP for the Student was appropriately developed and adequately implemented. In addition, the parties dispute whether state statutory and regulatory provisions regarding placement relieved the District of obligations it otherwise would have had under IDEA and its implementing regulations to provide the Student with special education services consistent with a valid IEP. The Administrative Law Judge concludes the District failed to comply with controlling procedures and failed adequately to implement a valid IEP. The Administrative Law Judge also concludes (see part B, *infra*) that the District was not relieved of its obligations by state provisions regarding placement issues.

An individualized education plan ("IEP") is a written statement for each child with a disability that is developed, reviewed and revised in accordance with the requirements of IDEA. 20 U.S.C. §1414(d)(1)(A). Each IEP must include "a statement of the special education and related services and supplementary aids and services to be provided to the child." 20 U.S.C. §1414(d)(1)(A)(iii). In order to provide a FAPE, special education services must be provided in conformity with the IEP. 20 U.S.C. Section 1401(8)(d); 34 C.F.R. 300.13(d).

Further, IEP services must be provided promptly by school districts. Pursuant to federal regulations, each public agency³ must have an IEP in effect for each special education child at the beginning of each school year, which IEP is to be implemented as soon as possible following all required IEP meetings and accessible to all of the child's teachers. 34 C.F.R. 300.342 and 300.343.

Colorado regulations implementing ECEA, Section 22-20-101, C.R.S. *et seq.*, establish explicit procedures for providing special education services to transfer students such [student]. As acknowledged by the District in its opening brief, in the case of transfer students State Board of Education Regulation 2220-R-4.03 requires a school district to either implement the child's current IEP, provide interim special education services while awaiting the child's IEP, or refer the child for an assessment while providing services as

³ A "public agency" includes a local educational agency (LEA) such as the District. 34 C.F.R. 300.22.

indicated on the IEP or as agreed upon in writing by the parents and the director of special education. Furthermore, the rule provides explicit time limits within which these services must be provided (services must be provided immediately or within a maximum of three days of requested enrollment unless another option is agreed upon in writing by the parents).⁴

The District did not comply with its obligation under IDEA or Colorado regulations timely to provide special education and related services to the Student in conformity with his IEP. When the District failed to implement the Student's February 2000 IEP (the IEP in effect at the time of transfer) and failed to develop a new IEP, it denied him a FAPE. This is true for a period of time before October 13, 2000 and for the period from October 13, 2000 until February 2001.

Until October 13, 2000, the District did not provide any educational services at all to the Student. Although there may have been some confusion immediately after August 30, 2000 as to whether the Student was to remain in the Montrose placement or would be removed by DDHS, any possible confusion ceased by the end of September 2000. At that time, DDHS made it abundantly clear to the District that the Student would be remaining in his Montrose foster home until a place became available at the Emily Griffith Center, which

⁴ Rule 4.03, Procedures for Transfer Students, provides in pertinent part as follows:

If a child moves into an administrative unit and is known to have been receiving special education services, the director of special education or designee, shall pursue one of the following options:

(1) Provide services immediately in accordance with the child's IEP

(2) Provide the child with interim special education and related services agreed to by the parent(s) and the director of special education or designee, while waiting for the record of the IEP. Such interim services shall be documented in the student's record and provided for no more than 15 school days

(3) Refer the child for a complete assessment and planning in accordance with these Rules in the meantime providing services as indicated on the last agreed upon IEP or providing special education and related services as agreed to by the parents and the director of special education and documented in the student's record. Such assessment and planning shall be completed within 30 school days.

(4) Services to a child moving into an administrative unit and known to have been receiving special education services, utilizing one of the above three options, shall commence according to the following:

(a) immediately, if the services/program are available,

(b) within 3 school days of requested enrollment if the services/program need to be developed, or

(c) other options agreed to in writing by the parent(s).

was not expected to occur until March 2001. DDHS also made it clear at the end of September that it expected the District to provide special education services to the Student during the course of the Montrose placement. Despite this, the District provided no services at all to the Student until October 13, 2000. The District's failure to provide services to the Student from at least the end of September 2000 until October 13, 2000 therefore constituted a failure to provide a FAPE in violation of IDEA.

Beginning on October 13, 2000 and continuing until February 2001, the District provided homebound instruction to the Student for approximately four and one-half to six hours per week. However, the homebound instructor was not provided with the Student's IEP, had no conversations with the District's psychologist about the Student's IEP goals and objectives, and had no knowledge at all of the content of the IEP. Under these circumstances, there is no conceivable way that the instruction received by the Student was specially designed instruction provided in conformity with the Student's IEP to meet his unique special education needs. See 20 U.S.C. Section 1401(25); 20 U.S.C. Section 1401(8)(d); 34 C.F.R. 300.13(d). Therefore, the District failed to provide a FAPE to the Student during this time.

The District asserts that the Student made educational progress during this period of time and any violation of IDEA was merely procedural and did not amount to the denial of a FAPE. The Administrative Law Judge disagrees with this analysis. As a factual matter, the Administrative Law Judge has found that the Student's February 2000 IEP goals and objectives were never directly addressed in the homebound setting and there is no indication that the Student made any progress with respect to his specific IEP goals and objectives. Thus, although the Student made some academic progress during the fall of 2000, such progress was not in the areas of his special education needs. By failing to address any of the goals and objectives in the Student's IEP, the District violated the Student's right under the IDEA to receive a FAPE. See 34 C.F.R. 300.350 (public agency must provide special education services in accordance with the child's IEP).

In enacting the IDEA, Congress placed a great deal of emphasis on the IEP and IEP planning and development as providing a mechanism by which the rights of the IDEA would be achieved and the responsibilities of the IDEA would be regulated. *O'Toole v. Olathe District Schools*, 144 F.3d 692 (10th Cir. 1998); *Rowley* at 206. The District's failure to address directly the Student's special education needs as identified in his IEP constituted a substantial deprivation to the Student and was not merely procedural in nature.⁵ The mere fact that the Student may have received some incidental benefit from his homebound instruction in no way compensates for the District's failure to address the Student's special

⁵ Both the IDEA regulations cited above and the appendix to the regulations emphasize the importance of providing educational services listed in an IEP, thus indicating the wholesale failure to provide such services is not merely a "procedural" violation of no import. Appendix A to 34 C.F.R. part 300, at question 31 specifically notes that services listed in an IEP must be provided to a child in order to comply with IDEA. ("The public agency must ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. . . . the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the student's needs as specified in the IEP").

education needs and requirements. Such a defense, if accepted, would render the entire process of developing and implementing IEPs a sham. A district could agree to provide special education pursuant to an established IEP and then studiously ignore the IEP as long as the district provided unrelated services to the student that conferred at least minimal educational benefit.

This is clearly not a result contemplated by the IDEA. Students are entitled to the educational services listed in an IEP. Substantial deviations from that which is contained in an IEP may result in a violation of the IDEA and the denial of a FAPE. Such is true in the instant case where the deviation was substantial and resulted in a failure to address any of the Student's special education goals and objectives for a period of at least four months.

The District additionally argues that it could not comply with the Student's February 2001 IEP because that IEP provided for a residential treatment center placement and self-contained classroom setting, both of which the District was unable to provide. The Administrative Law Judge need not reach the issue of whether the District had any authority or responsibility to assure a residential placement for the Student in conformity with the February 2000 IEP. Nor does the Administrative Law Judge need to address the issue of whether the District was required to provide a fully self-contained classroom setting for the Student. In this case, the District provided no instruction at all until October 13, 2000. Following that date, the District did not make even a minimal attempt to provide special education services to the Student in the homebound setting selected by the District. The District's failure to provide the Student's existing IEP to the homebound instructor or inform her of its contents and its failure until January 2001 to reassess and evaluate the Student or draft an alternative IEP, constitutes a clear IDEA violation (denial of a FAPE) which makes it unnecessary to address these more difficult issues.

In sum, the District failed to provide the Student with a FAPE up until February 2001 by failing to provide the Student with any special education services (or any education at all) prior to October 13, 2000, and by failing to provide the Student with special education consistent with a valid IEP between October 13, 2000 and February 2001.

B. Impact of Federal and State Provisions Concerning Placement of Students with Disabilities.

The District also argues that the FCO's Order failed to address the role and responsibilities of DDHS and thus erred in its conclusion that the District was solely responsible for any alleged denial of a FAPE to the Student. Specifically, the District asserts the because Colorado, through statutory provisions and an Interagency Agreement, has provided specific procedures to be followed by departments of human services in the case of special education transfers of students such as [student], and because such procedures are authorized under IDEA, the FCO erred in failing to hold DDHS at least partially responsible for its failure to comply with these requirements. The Administrative Law Judge is unpersuaded by the District's argument.

The District begins its argument with the assertion, supported by 20 U.S.C. Section 1412(a)(11) and 34 C.F.R. 300.600, that IDEA places ultimate responsibility for the education of eligible students with the State Education Agency (SEA), in this case CDE. Furthermore, as also noted by the District, the IDEA requires each state ensure that an “interagency agreement or other mechanism for interagency coordination is in effect between each noneducational public agency and the SEA, in order to ensure that all [required] services . . . that are needed to ensure FAPE are provided, including the provision of these services during the pendency of any dispute.” 34 C.F.R. 300.142(a).

The District asserts that consistent with these provisions and the IDEA’s acknowledgement that it “does not limit the responsibility of agencies other than educational agencies for providing or paying some or all of the costs of FAPE to children with disabilities in the State,” 34 C.F.R. 300.600(c), Colorado law contains numerous statutory provisions addressing the placement of children with disabilities when other agencies are involved. For example, as pointed out by the District, with respect to out-of-home placements by agencies such as DDHS, Section 22-20-108(7)(b), C.R.S. of ECEA provides:

(b) The agency responsible for out-of-home placement of a child with a disability, prior to the placement of such child, shall work cooperatively with the administrative unit of attendance in which the agency wishes to place the child to ensure that the appropriate educational and residential services are available. In no event shall a child be placed in an administrative unit which is unable to ensure the provision of educational and residential services which are appropriate for said child. The costs of educating such children shall be the responsibility of the school district of residence, and such school district shall pay to the administrative unit of attendance the tuition cost approved by the state board pursuant to section 22-20-109.

Thus, ECEA provides that under circumstances such as those presented in this case, DDHS, as the agency responsible for the Student’s out-of-home placement, was required to work cooperatively with the District (the administrative unit of attendance) prior to placing the Student in the District in order to assure that “appropriate educational and residential services” were available in the District.⁶

Similarly, Section 19-1-115.5(2)(b), C.R.S. provides with respect agencies such as DDHS:

(b) In every proceeding pursuant to this title in which the court contemplates placing a child out of home, the county department shall

⁶ The Administrative Law Judge is unconvinced by DDHS’ argument that this section does not apply to foster care placements but instead applies only to placements in residential treatment centers outside the Student’s current district of residence. Such an interpretation is contrary to the plain language of both Section 22-20-108(7)(a) and 22-20-108(7)(b), C.R.S.

make recommendations to the court concerning the proposed placement. Such recommendations shall include information about placement facilities that are most able to serve appropriately the best interests of the child. In making its recommendations to the court, the county department shall consider:

(l) The special needs, if any, of the child to be placed, including the ability of the proposed out-of-home placement facility and the school district in which the proposed out-of-home placement facility is located to provide the necessary services to meet those needs.

This section of the Colorado Children's Code, like Section 22-20-108(7)(b) of ECEA, imposes obligations on county departments of human services in connection with foster care placements (in this case, court-approved foster care placements) to consider the ability of the school district in which the proposed foster home is located to provide needed special education services.

The District also points to a 1986 Interagency Agreement entered into between CDE and the Colorado Department of Social Services [now known as the Colorado Department of Human Services] for the purpose of coordinating their obligations and responsibilities (and the obligations and responsibilities of county departments of human services and local school boards) concerning the education of children with disabilities under IDEA and ECEA. Among the relevant provisions of this Agreement are the following:

[W]hen the local county department of Social Services is initiating the placement request, it must take steps to assure the participation of the local district of jurisdiction by notifying in writing the director of special education. [citations omitted] The county department of Social Services shall invite the director of special education to attend all meetings which are scheduled to discuss out-of-home placement or alternatives for educationally handicapped students for whom the district is responsible for providing special educational and educationally related services.

Agreement, paragraph 1, p. 2.

If either agency makes a unilateral placement, that agency shall be responsible for all the costs of that placement beyond the average or actual ARB.

Agreement, paragraph 1.a, p. 2.

When the court or joint staffing between Education and Social Services rule that an out-of-home group care or alternative placement should be made or continued: (1) The referring county Social Services Department shall be responsible for funding the child's care and maintenance in the residential placement.

Agreement, Residential Placements, p. 3.

As the District asserts, these provisions clearly contemplate that prior to placing a child with disabilities outside the most current district of residence, the appropriate county human service department must notify the projected receiving school district and include that district in placement planning. This Agreement also indicates financial responsibility (as between the District and DDHS) for various placement options.

The District asserts that DDHS has failed to comply with the above statutory and other provisions⁷ which imposed upon DDHS, prior to effectuating the Student's Montrose placement, the obligation to consider the ability of the District to meet the Student's educational needs. These provisions further obligated DDHS to provide advance notice of the contemplated transfer to the District and to include the District in placement planning.

It appears that DDHS failed completely to comply with its obligations under these provisions. It is also clear that DDHS' apparent lack of compliance placed the District in an extremely difficult position. The Student's most current IEP called for a residential placement and a self-contained classroom. In addition, the Student's discharge summary from CCH, which was less than one month old at the time the Student's foster mother sought enrollment for the Student in the District, indicated the Student was out of control and required a very restrictive setting (more restrictive than the residential setting available at CCH) to prevent danger to himself, his fellow students, and school staff. This troubling information was corroborated by Dr. Noland's telephone conversation with the Student's CCH case manager.

Despite this available information and without any advance warning, collaborative planning, or a further IEP staffing, DDHS presented the District with a unilateral decision to change the Student's placement to a setting that was less restrictive than the Student's immediate prior placement at which he had been judged too violent to remain. DDHS' PET team had apparently agreed to a foster home and public school placement for the Student while awaiting (for a projected six-month period) an available space at Emily Griffith. The record contains no information concerning the basis for the DDHS' determination that foster care and public school was a safe and appropriate "interim" setting for the Student, despite the fact that such placement was inconsistent with the Student's existing IEP and the CCH

⁷ The District did not specifically identify Section 19-1-115.5, but did assert violations of Section 22-20108(7)(b) and the Agreement.

discharge recommendations. There is also no indication that DDHS provided the District with any information that might have assuaged the District's safety concerns regarding DDHS' unilateral placement determination.

It also appears that the District did not have available to it a residential treatment center or a day treatment center into which it could place the Student as an alternative to a public school placement. To the extent such facilities were available in Montrose County, they apparently were not under the control of the District and the District apparently could not effectuate placements into them. In addition, the Columbine Middle School did not have the type of self-contained SIED classroom apparently contemplated by the most current IEP, nor did it have available the type of crisis intervention team that appeared to be warranted in light of the Student's most recent difficulties at CCH.

In light of all these factors it is understandable that the District was concerned about the Student attending Columbine Middle School, even in the semi self-contained SIED classroom available there. Nevertheless, the District's actions with respect to the Student failed to comply with its obligations under IDEA and applicable state statutes, regulations and the Interagency Agreement. The District not only did not comply with the Student's IEP as written;⁸ it also failed to make any serious attempt prior to February 2001, to provide any special education services to the Student at all. The District merely provided a homebound instructor to the Student as it does for suspended and expelled students. The District never bothered to inform the homebound teacher of the content of the Student's IEP and, until February 2001 never completed a reassessment of the Student or developed a new IEP that was consistent with the Student's identified needs.

As the administrative unit of attendance, the District had an obligation to provide special education services to the Student that would comply with the requirements of IDEA. See 34 C.F.R. 300.342; 300.343; 300.050. The statutory and regulatory provisions and the Agreement cited above did not absolve the District of its obligations in this regard, even if DDHS totally failed to comply with its own obligations under those provisions. While these provisions may comply with the State's obligations under IDEA to provide for interagency coordination and while these provisions may establish some rights and obligations among various state agencies, they do not permit the District to ignore its IDEA responsibilities merely because another agency has behaved improperly.

Contrary to the arguments of the District, nothing in the provisions cited by the District allows the District to decline to provide a FAPE to a child with disabilities as a remedy for DDHS's asserted failure to comply with those provisions. Whatever recourse may be contemplated by the provisions, it is apparent that absolving the school district of attendance of its obligations under the IDEA is certainly not an option. The provisions themselves make this quite clear. For example, although Section 22-20-108(7)(b) provides

⁸ As noted, the evidence indicated the District likely would not have been able to comply with the residential placement aspect of the Student's IEP. It appears the District had no authority or ability to place in a residential facility either within or outside the District.

that a child shall not be placed in an administrative unit which is unable to ensure the provision of appropriate educational and residential services, it does not indicate that a District into which a child has been placed in violation of this section may simply ignore its IDEA obligations. Similarly, no such remedy is indicated in Section 19-1-115.5(2)(b). Furthermore, the Interagency Agreement explicitly provides that “[t]he administrative unit of jurisdiction must assure that special education and related services are provided in accordance with the individualized education program.” (Agreement, p. 4).

IDEA regulations are also relevant in determining this issue. 34 C.F.R. 300.142(a) specifically provides that that an interagency agreement or mechanism must be in place at the state level to assure necessary FAPE-related services are provided. The regulation further requires the interagency agreement to address how special education services will be provided during the pendency of any interagency.

In compliance with this requirement, the Colorado Agreement contains just such a provision. Contrary to the arguments of the District, this provision does not support the District’s assertion that its obligations under IDEA were somehow diminished as a result of DDHS’ apparent failure to comply with its placement obligations. To the contrary, the dispute provision of Colorado’s Agreement clearly required the District to provide IDEA services to the Student while the dispute was being resolved:

In the event that a disagreement exists between the administrative unit of jurisdiction and the county department of Social Services regarding placement, manner of placement or any costs accruing to either a county department of Social Services or an administrative unit, the Commissioner of Education and the Executive Director of the Department of Social Services or their designees shall review all such disagreements and make a final written determination. *Such disagreements shall not interfere with the provision of appropriate educational and educationally related services prior to the disagreement being settled.*

Agreement, paragraph 3, p. 3. [Emphasis supplied].

Thus, the appropriate procedure for the District to have followed would have been to provide services to the Student under IDEA while simultaneously notifying CDE of the ongoing dispute with DDHS.⁹ The District did not avail itself of this remedy and instead stood on its “rights,” all the while failing to provide any services (and, later, appropriate services) to the Student. As the FCO stated in his Decision, “to the extent there is an interagency disagreement . . . the law does not authorize that disagreement to be resolved at the education expense of the student.” Accordingly, the fact that DDHS failed to comply with its collaborative obligations under Section 22-20-108(7)(b), 19-1-115.5(2)(b) and the

⁹ The District’s position that this provision is inapplicable because there was no disagreement with DDHS is inconsistent with its other assertions and is unpersuasive.

Interagency Agreement does not alter in any way the District's obligations to comply with the IDEA.

C. Compensatory Education.

The District argues that the FCO's Order concerning compensatory education is not consistent with IDEA. The Administrative Law Judge agrees with the District that the remedy prescribed by the FCO constitutes an improper delegation of the FCO's responsibilities or is otherwise unauthorized by the IDEA. Consequently, the relief ordered by the FCO cannot stand.

The FCO ordered that it would "be up to the IEP team in the school district to which [the] Student is transferred" to make the determination as to whether and how much compensatory education is appropriate. He further ordered: "[s]hould the IEP team in the new school district determine that compensatory education is warranted, that school district shall have the authority of this Order, and the governing Decision, to enforce any legal obligation the new school district decides to seek to enforce, against the school district subject to this Complaint, in assisting it in providing compensatory education to this student. That compensatory education could include the purchase of services for which reimbursement would be appropriate."

As an initial matter, the parties dispute the FCO's intent in entering this Order. The Administrative Law Judge determines it is unnecessary to resolve this dispute. Whether the FCO's Order is interpreted as authorizing the IEP team in the Student's new district actually to require the District to provide compensatory services/reimbursement to the new district or is interpreted merely as authorizing the IEP team in the new district to bring a separate enforce action against the District for compensatory services/reimbursement, no such order is permissible in this proceeding.

This proceeding is governed by the provisions of the IDEA and its implementing regulations, including 34 C.F.R. §§300.660-662. Cases decided under IDEA¹⁰ have clearly established that although monetary damages are not available under the Act for failure to provide required services, compensatory relief is available. *School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Mass.*, 471 U.S. 359 (1985) (*Burlington*). Such relief may be in the form of reimbursement of tuition costs already incurred by the parents of children with disabilities or payment of the prospective cost of compensatory educational services. *Hall v. Knott County Board of Education*, 941 F. 2d 402 (6th Cir. 1991); *Miener v. State of Missouri*, 800 F. 2d 749 (8th Cir. 1986). While IDEA does not provide a general damages remedy for violation of duties imposed by the Act, a judgment that simply reimburses a parent for the cost of obtaining educational services that ought to have been provided free does not constitute damages. *Hall, supra*.

¹⁰ 20 U.S.C. §1415(l)(2) and its predecessor provide that the court shall grant such relief as it determines is "appropriate."

Similarly, pursuant to 34 C.F.R. §300.660(b) governing this federal complaint procedure, the following remedies are available in this proceeding:

Remedies for denial of appropriate services. In resolving a complaint in which it has been found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, must address:

(1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child.

It is apparent that the language of this federal complaints procedure regulation merely echoes existing case law and is not intended to provide any greater scope of relief in the current proceeding than would be available in a civil proceeding following a due process hearing.

Neither the case law nor the provisions of 34 C.F.R. §300.660(b) permit the FCO to enter an order which allows a subsequent school district that has not been involved in any aspect of the Student's education within the District to require the District to provide compensatory services or reimbursement for such services. Such an order would constitute an inappropriate delegation of the FCO's responsibilities under 34 C.F.R. §300.660(b), improperly permitting another school district that is not a party to this dispute to determine what, if any, compensatory services are owed by the District to the Student. Similarly, if the FCO's Order is construed as permitting the new school district to bring an enforcement action for compensatory services or reimbursement, the Order, so construed is impermissible. Neither the IDEA nor 34 C.F.R. §300.660(b) contemplate one school district suing another with respect to appropriate relief. As asserted by the District, it is the responsibility of the FCO, not a court through a separate enforcement action initiated by a non-party to this dispute, to investigate the complaint filed in this matter, determine if it is valid, and award an appropriate remedy, if any is warranted. Thus, the relief ordered by the FCO must be discarded.

Although the relief awarded by the FCO's cannot stand, the Administrative Law Judge has determined that a violation of IDEA occurred. The Administrative Law Judge further determines that awarding relief in the form of reimbursement for compensatory education is appropriate in this case. The Student suffered a substantial deprivation from the end of September 2000 until February 2001 as a result of the District's failure to provide any services at all until October 13 and its subsequent failure to provide special education services consistent with a valid IEP. Thus, an award of compensatory education is appropriate. *Urban v. Jefferson County School District R-1*, 89 F.3d 720 (10th Cir. 1996); *O'Toole, supra*.

Although the District was not the only entity at fault in this matter, equitable principles indicate that the Student, who was not to blame but became a pawn in an interagency dispute, should receive compensatory education to make up for the special education he did not receive in the fall of 2000 and early winter of 2001 as a result of the District's IDEA violations. See *Burlington, supra*. The fact that DDHS apparently did not comply with its obligations to cooperate and collaborate with the District does not alter this result. The Student should not suffer for the failure of two public entities to resolve their ongoing disagreement.

The District also asserts that if compensatory education is ordered in this matter, DDHS should be required to pay for it since, according to the District, it was DDHS that was responsible for any FAPE denial. The Administrative Law Judge has made no determination that DDHS was responsible for the denial of a FAPE in this matter, nor would it be appropriate to do so. DDHS is not an LEA and has no direct responsibility under IDEA or ECEA to provide special education services to the Student. The Administrative Law Judge cannot order DDHS provide compensatory education or reimbursement for compensatory education. Thus, the Administrative Law Judge lacks jurisdiction to enter any such order and declines to do so.¹¹

The District also asserts no authority exists to order the District to provide compensatory education services to a student who is no longer a resident. The Administrative Law Judge disagrees. Although the District cannot provide actual services to a non-resident student, it can provide reimbursement to a subsequent district for services purchased during a later placement to compensate for services the District should have provided in the first instance. Such required reimbursement does not amount to impermissible monetary damages, see *Hall, supra*. In addition, the relief requested is not moot simply because it is prospective in nature and the Student is no longer in attendance in the District. *Neshaminy School District v. Karla B.*, No. 96-3865, 1997 WL 137197 (E.D. Pa. March 20, 1997). Such an order merely reimburses the Student for services the District should have previously provided and does not require the Student's current attendance in the District. Logically, school districts must be subject to awards for compensatory relief even after aggrieved students have moved away in order to prevent districts from intentionally refusing services as a means of encouraging students to seek educational services elsewhere.

There are a number of factors at work in this case, as noted by the FCO, that make the award of compensatory education difficult. As noted, the Student is not currently a resident of the district and has not had a stable placement in the recent past. In addition,

¹¹ This action is the result of a complaint brought on behalf of the Student under the State's FCO procedures alleging a violation of the IDEA. It is not a forum in which to resolve the interagency dispute that may have arisen between the District and DDHS with respect to ultimate financial responsibility for the education of the Student. If the District believes its financial obligations to provide compensatory education reimbursement should be made the responsibility of DDHS, it may seek appropriate recourse pursuant to the Interagency Agreement.

he has spent a considerable period of time in residential placements where the provision of compensatory services is likely to be impractical or unsuitable. In light of all these factors, it is appropriate to identify a specific maximum number of hours of compensatory educational services to which the Student is entitled as a result of the District's failure to provide a FAPE. The Student's existing or future IEP team may then determine, based on the Student's then-existing educational and related circumstances, whether to utilize the compensatory educational services made available pursuant to the Administrative Law Judge's order.

After considering all the factors at issue in this matter, the Administrative Law Judge concludes that the Student is entitled to a maximum of 50 hours of compensatory educational services in the form of tutoring to compensate for the District's violations. Thus, the District shall be obligated to pay for a maximum of 50 hours of tutoring services to be provided to the Student by or through his new district within one year of the date of this order for the purpose of addressing the Student's special education needs, subject to the following terms and limitations:

1. Such tutoring services shall be provided to the Student only if the Student's IEP team, including his ESP, agreed that such services are appropriate and warranted in light of the Student's then-existing educational placement, schedule and special education needs and circumstances.

2. Such tutoring services shall be provided to the Student within one year from the date of this order. The District shall not be responsible for reimbursement for any tutoring services provided to the Student after that date.

3. With respect to any tutoring services provided to the Student pursuant to this order, the Student's then-current school district shall hire a qualified individual to provide tutoring to the Student pursuant to customary procedures utilized by the then-current district when it provides such services. Montrose County School District RE-1J shall be billed for the actual costs incurred by the Student's then-current district in providing the tutoring services to the Student and the Montrose County School District RE-1J shall promptly reimburse such costs to the then-current school district.

D. FCO's Order Regarding Submission of the Decision to the Student's New IEP Team.

The District argues that the FCO's order requiring the District to submit the FCO's decision to the Student's new IEP team is inappropriate. The Administrative Law Judge agrees. The evidence indicated that the District has not been advised on a regular basis concerning the current placement of the Student, nor is it the responsibility of the District to seek out this information. Instead, it is the responsibility of DDHS to provide the Student's current school district and IEP team with a copy of this Order. It is therefore ordered that DDHS provide a copy of this order to the Student's current school district and IEP team and

to any other school district of attendance that the Student may be in within one year of the date of this order.

DECISION AND ORDER

The Administrative Law Judge determines and orders as follows:

1. By failing to provide the Student with any special education services from at least the end of September 2000 until October 13, 2000 and by failing between October 13, 2000 and February 2001 to implement the Student's existing IEP or to develop and implement a new IEP, the District did not comply with its obligations under IDEA or Colorado regulations timely to provide special education and related services to the Student in conformity with his IEP and therefore denied the Student a FAPE.

2. The FCO's order with respect to compensatory education is not authorized under the IDEA and is stricken.

3. In place of the FCO's award, it is ordered the Montrose County School District RE-1J shall be obligated to pay for a maximum of 50 hours of tutoring services to be provided to the Student by his new district within one year of the date of this order, for the purpose of addressing the Student's special education needs, subject to the following terms and limitations:

a. Such tutoring services shall be provided to the Student only if the Student's IEP team, including his ESP, agreed that such services are appropriate and warranted in light of the Student's then-existing educational placement, schedule and special education needs and circumstances.

b. Such tutoring services shall be provided to the Student within one year from the date of this order. Montrose County School District RE-1J shall not be responsible for reimbursement for any tutoring services provided to the Student after that date.

c. With respect to any tutoring services provided to the Student pursuant to this order, the Student's then-current school district shall hire a qualified individual to provide tutoring to the Student pursuant to customary procedures utilized by the then-current district when it provides such services. Montrose County School District RE-1J shall be billed for the actual costs incurred by the Student's then-current district in providing the tutoring services to the Student and the Montrose County School District RE-1J shall promptly reimburse such costs to the then-current school district.

4. DDHS, rather than the District is ordered to provide a copy of this order to the Student's current school district and IEP team and to any other school district of attendance that the Student may be in within one year of the date of this order.

5. 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

May ____, 2002

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above Agency Decision was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

Suzanne A. Fasing
Assistant City Attorney
1200 Federal Blvd.
Denver, CO 80204-3221

Kathleen M. Shannon
Susan S. Schermerhorn
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Caplan and Earnest LLC
2595 Canyon Boulevard, Suite 400
Boulder, CO 80302-6737

on this ____ day of May, 2002.

Secretary to Administrative Law Judge