BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2001013 S2001:521

DECISION UPON STATE LEVEL REVIEW

In the Matter of:

AURORA PUBLIC SCHOOLS,

Appellant,

v.

[REDACTED] [REDACTED], through his parent, [REDACTED] [REDACTED]

Appellee.

This matter is the state level review of a decision of a federal complaints officer pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400 *et seq*. and the Rules of the Colorado State Board of Education found at Sections 2220-R-6.03 *et seq.*, 1 CCR 301-8. [REDACTED] [REDACTED] ("[REDACTED]") appears through his mother, [REDACTED] [REDACTED], who is not an attorney. Brian C. Donovan, Esq. represents Aurora Public Schools ("Aurora").

THE FEDERAL COMPLAINT OFFICER'S DECISION

On May 11, 2001, [REDACTED] [REDACTED] ("[REDACTED]'s mother") filed a complaint stating that [REDACTED] had been denied services set out in his individualized education plan ("IEP"). [REDACTED]'s mother supplemented her complaint with additional information. Aurora responded to the complaint and the additional information. [REDACTED]'s mother submitted a reply. Federal Complaints Officer ("FCO") Charles Masner, Esq., issued his decision June 29, 2001. He based his decision on these submissions. The decision made findings in favor of both parties.

Significant for this appeal, the FCO made two findings favorable to [REDACTED]. First, he found that [REDACTED] had been denied 3.5 hours of mental health services agreed to in the IEP. Second, he found that a special education teacher missed five sessions with [REDACTED] that had been agreed to in the IEP. Calculating the sessions at 45 minutes rather than 30 minutes as argued by Aurora, the FCO found that Aurora failed to provide 3.75 (three hours and 45 minutes) of special education. Taking both

deviations from the IEP together, the FCO found that Aurora had failed to provide a free appropriate public education ("FAPE"), as described at 20 U.S.C. 1400(d), to ███.

The FCO did not specifically order that the time be made up. Rather, he ordered the convening of an IEP meeting prior to the beginning of the 2001 fall semester. This meeting was to be held at ███'s mother's request. The purpose of the IEP meeting would be to determine whether ███ could benefit from compensatory education and, if so, what that compensatory education would be and how it would be provided. The FCO did not specifically link the compensatory education to the failures he found. Rather, he found that the IEP team was in the best position to determine whether ███ has experienced a harm that can be remedied by compensatory education, and, if so, how.

SUBSEQUENT PROCEDURAL HISTORY

Aurora filed an appeal of the FCO's decision August 3, 2001. The Notice of Appeal was not filed by Donovan but by Bonnie Soman, Aurora's Assistant Director. Soman is not an attorney. In the Notice, Soman stated that Aurora had agreed to reconvene the IEP team to discuss compensatory education for the 3.5 hours of missed mental health services. However, Aurora wanted to appeal the FCO's decision regarding the 3.75 hours of special education services.

On August 9, 2001, a telephone status hearing was held before Administrative Law Judge ("ALJ") Matthew E. Norwood in the offices of the Division of Administrative Hearings. As counsel for Aurora was not available, the matter was rescheduled. This telephone status hearing was recorded on tape no. 4407.

On August 21, 2001, Chief ALJ, Marshall Snider held a status conference. ALJ Snider entered an order that same day providing that no evidentiary hearing or oral argument would be permitted. He set a briefing schedule. He did order the submission of additional documents. Pursuant to that order, Aurora submitted daily progress notes for the last school year. ███'s mother filed a letter from ███'s special education teacher.

SCOPE OF REVIEW

The ALJ, on state level review, is to issue an "independent" decision. 20 U.S.C. Section 1415(g); 34 C.F.R. Section 300.510(b)(2)(v) and 2220-R-6.03(11)(b)(v), 1 CCR 301-8. In the context of court reviews of state level decisions, 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). It is appropriate to apply this standard by analogy at the state administrative review level. Thus, in this proceeding it is sensible for the ALJ to give deference to the FCO's findings of fact and to accord the FCO's decision "due weight," while reaching an independent decision based on a preponderance of the evidence.

Aurora argues that the scope of review in this case should be less deferential to the FCO because he did not hold an evidentiary hearing or conduct an investigation. Aurora does not cite any authority for this proposition. This issue is not germane to this case, however, as Aurora makes no challenges to the findings of fact of the FCO; Aurora's argument is a legal one.

FINDINGS OF FACT

Based on the record below, the ALJ enters the following findings of fact, giving due deference to the findings of the FCO:

1. █████ was born █████, █████. He suffers from autism and panic attacks. He is disabled for purposes of the IDEA.

2. On November 9, 2000, █████'s mother and a committee from Aurora Public Schools signed a triennial IEP agreement.

Mental Health Services

3. The IEP provided in pertinent part that █████ would receive one hour per week of mental health services to help him deal with frustration and to improve his social skills. These services were to be provided from November 10, 2000 until November 9, 2001.

4. The FCO agreed with █████'s mother's claim that Aurora denied "in excess of ten sessions of psych/social work." The FCO made this finding in paragraph 3 of his findings and discussion. He relied on exhibit 3, Aurora's logs of sessions with a social worker and a psychologist. The FCO determined that █████ had been denied 3.5 hours of IEP required mental health provider services. The FCO did not explain how he arrived at the 3.5 figure.

5. Neither party appealed the FCO's finding that █████ was denied 3.5 hours of mental health services. The ALJ adopts this finding.

Special Education Services

6. The IEP provided that █████ would receive three to four hours per week of special education services. This was also to run from November 10, 2000 until November 9, 2001. These services were to help him in reading, written language and math.

7. Shelli Coley provided special education services to █████ from November 27, 2000 to May 11, 2001. During this time she had five teacher absences out of 80 days scheduled as shown by the notes "TA" on exhibit 4.

8. The triennial IEP agreement contained the following language: "provider, extent of service, may vary due to circumstances such as absences, year round/block scheduling, holidays, schedule changes, etc."

9. The FCO found, and the ALJ adopts, the finding that [redacted]'s special education sessions were 45 minutes in length. Therefore, [redacted] missed 3.75 hours of special education services as set out in his IEP.

10. As permitted by ALJ Snider's August 21, 2001 order, [redacted]'s mother submitted a letter from Coley dated August 13, 2001. The letter provides in its entirety:

> At the beginning of the year, [[redacted]] was independent at a 3-2 level when assessed specifically on decoding. His comprehension level was broken down into inferential and concrete skills. His inferential skills were frustrational at a pre-primer level as he was unable to answer any of the ten questions correctly. His concrete comprehension skills were instructional at the 2-2 level. His inferential comprehension skills were still frustrational at a pre-primer level, however he was able to answer 30% (3/10) of the questions correctly. His concrete comprehension was high instructional at the 2-2 level. The assessment at the end of the year indicated that [redacted] was decoding independently at a 5-1 level. His inferential comprehension skills remained frustrational at the preprimer level but he was able to answer 50% (5/10) of the questions correctly. His concrete comprehension was low instructional at the 3-1 level. It should be noted that all of the above information was based on the Spache Reading Inventory and curriculum based assessments, not standardized measures.

11. There is no evidence in the record to explain the significance of this technical language. Aurora, in its argument, attempts to provide an explanation of these findings. (This letter was [redacted]'s mother's exhibit.) However, arguments by counsel are not evidence. No new evidence was permitted in this matter by ALJ Snider's order.

This letter indicates that [redacted] made *some* progress in *some* areas of reading. It is unclear how much progress this represents. Also, Coley's letter states that these evaluations are not based on standardized measures. This casts doubt on how much progress this information truly represents. Finally, special education in the IEP was to assist [redacted] not just in reading, but also in written language and math.

<u>Other Findings of Fact</u>

12. The absences by [redacted]'s special education teacher, his social worker and his psychologist are significant and material failures to comply with [redacted]'s IEP. Aurora failed to provide [redacted] a free appropriate public education as defined in the IDEA.

13. The FCO, in making his two findings favorable to [redacted]'s mother, stated he was giving her "the benefit of the doubt." Use of this phrase does not show that the FCO improperly shifted the burden of proof to the school board as argued by Aurora. An administrative proceeding such as review by an FCO is entitled to a

presumption of regularity. *DeKoevend v. Board of Education*, 688 P.2d 219, 227 (Colo. 1984). There is no basis to conclude from the FCO's choice of words that his evaluation was improper.

DISCUSSION AND CONCLUSIONS OF LAW

Aurora's decision to accept the FCO's decision on the 3.5 hours of mental health services but to appeal his finding on the 3.75 hours or special education is curious. Aurora argues that the denial of a FAPE cannot be based "solely" on the failure to provide 3.75 hours of special education instruction. Aurora argues that this is too minor a failure to order compensatory education. But, of course, the FCO did not base his finding of a denial of a FAPE "solely" on this deficiency; he also relied on the denial of 3.5 hours of mental health services.

As to the special education services, Aurora argues that there will always be teacher absences and that requiring perfect compliance with the IEP is to impose "strict liability." Aurora notes that the IEP stated: "provider, extent of service, may vary due to circumstances such as absences, year round/block scheduling, holidays, schedule changes, etc."

According to Aurora, there must be a *substantial* failure to comply with the IEP to order compensatory education. Aurora relies on *Urban v. Jefferson County School District R-1*, 89 F.3d 720, 727 (10th Cir. 1996). By Aurora's analysis, the question is not whether the IEP was technically complied with, but rather, whether educational progress was made.

Aurora submits that progress was made. It particularly relies on the August 13, 2001 letter from Shelli Coley. That letter is too technical to be useful. It demonstrates that some progress was made but it is unclear how much progress this represents. The letter only speaks to [REDACTED]'s progress in reading, when his special education was to be in the areas of reading, written language and math. Coley's letter fails to provide any substantive evidence of improvement.

Also, Aurora's reliance on *Urban* is misplaced. In that case, the student's IEP completely complied with the requirements of the IDEA except for the failure to include a statement of transition services. And, although there was no statement of transition services, the student, in fact, received such services. This is different from the facts in this case where many hours of services promised in the IEP were not delivered. This is not "technical noncompliance" described in *Urban* at 726.

In creating an IEP, an agency must: 1) follow the procedures set forth in the Act; and 2) develop an IEP through procedures reasonably calculated to enable the child to receive educational benefits. Once an agency has done this, no more can be required. *Patricia P. v. Board of Education of Oak Park*, 203 F.3d 462, 467 (7th Cir. 2000); *Board of Education v. Rowley*, 458 U.S. 176, 206-7 (1982).

However, creation of the IEP and implementation of the IEP are two separate issues.

> A claim alleging a failure to implement or noncompliance with an appropriately developed and formulated IEP is distinct from a claim alleging that an IEP was "inappropriate" under the standards identified in *Rowley*.

Ross v. Framingham School Committee, 44 F. Supp. 2d 104, 116 (D. Mass 1999).

Aurora states that the absences of the special education instructor are not significant because teacher absences are inevitable. This is incorrect. To the extent that such absences are expected, they should be accounted for in creating the IEP. It is unreasonable for a school to promise in an IEP only what can be achieved if there are no absences and then attempt to absolve itself when absences occur by claiming such absences are only "technical noncompliance." It would be easy enough to promise a fixed amount of services and schedule more than this amount to account for anticipated absences. Nor can a school avoid responsibility by placing a waiver of the type set out in the IEP. Finally, it makes no sense for Aurora to challenge the FCO's decision in this case as insufficiently based where Aurora has conceded the FCO's decision on the failure to provide mental health services.

Here, Aurora's failure to deliver what it had promised was significant and material. This failure denied ██████ a free appropriate public education. The fact that ██████ made some progress does not excuse this failure. Although ██████ made improvement when promised services were not provided, it is rational to assume that his improvement would have been greater had he been given all the services agreed to.

DECISION

The FCO ordered Aurora to provide compensatory education to ██████. He did not link the compensatory education to the specific missing hours that he identified. He decided that the IEP team was in the best position to determine how to provide compensatory education to ██████. In fact, the FCO left it to the IEP to decide whether compensatory education should be offered at all.

The remedy fashioned by the FCO does not provide sufficient guidance. Therefore, it is the decision of the ALJ that ██████'s IEP committee shall reconvene. The committee shall prepare a plan that provides for 3.5 hours of compensatory mental health services. The plan shall also provide for 3.75 hours of special education instruction in the areas of reading, written language and math. Any teacher absences shall be made up. These hours shall be provided by September 1, 2002. As compensatory services, these services shall be in addition to any other IEP services that may have been planned for the period after November 9, 2001.

The opinion of the FCO is upheld to the extent it does not conflict with this Decision Upon State Level Review. This Decision Upon State Level Review is the final decision on state level review except that any party has the right to bring a timely civil

action in an appropriate court of law, either federal or state.

DONE AND SIGNED

November _____, 2001

MATTHEW E. NORWOOD
Administrative Law Judge

ED 2001013

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by placing same in the U.S. Mail, certified, postage prepaid, at Denver, Colorado to:

[redacted] [redacted]
[redacted], [redacted] [redacted]

Brian Donovan, Esq.
1085 Peoria St.
Aurora, CO 80011

and

Charles Masner, Esq.
Colorado Department of Education
201 East Colfax
Denver, CO 80203-1704

on this ___ day of November, 2001.

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Secretary to Administrative Law Judge