

DUE PROCESS HEARING  
BEFORE AN IMPARTIAL HEARING OFFICER

STATE OF COLORADO

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**FINDINGS OF FACT, CONCLUSIONS OF LAW, and ORDER**

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L2001:102

In Re Hearing Request  
to Colorado Department of Education

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This Due Process proceeding was heard and decided pursuant to the Individuals with Disabilities Education Act, 34 C.F.R. Part 300 (IDEA) and The Colorado Exceptional Children's Educational Act, C.R.S. § 22-20-101, *et.seq.* (ECEA). The parties were: Colorado Springs School District 11 (District), represented by counsel, Brent E. Rychener, Esq., Holmes, Robertson, Owen L.L.P.; and [Parent] in the interests of [Student], representing herself (Parent). Each of the parties presented issues for resolution through this process. Exhibits submitted by the Parent are numbered. Exhibits submitted by the District are lettered.

After reviewing the evidence and written arguments submitted by the parties, the Impartial Hearing Officer (IHO) submits the following Findings of Fact, Conclusions of Law and Order.

**SYNOPSIS**

This Due Process Proceeding was initially filed by the School District to obtain authority to evaluate [Student]'s eligibility for special education services and his educational needs without parental consent for such evaluation. The District does not believe Colorado law allows it to evaluate [Student] without parental consent. However, the District requested due process to resolve that issue anyway, in order to comply with a Decision from a Federal Complaints Officer.

The Parent also requested ruling on numerous issues identified below.

The IHO found (Pre-Hearing Order, ¶ 5) that Impartial Hearing Officers have not been granted authority to impose sanctions against specific state or school district employees through due process proceedings; and declined the Parent's request to include such requested remedies in this proceeding.

Hearing focused on the following issues:

1. What is the Stay Put Placement for [Student] while these issues are being resolved?
2. What is a school district's obligation pursuant to IDEA and ECEA when a transfer student moves into Colorado with an eligibility determination and IEP from another state?
3. Is [Student] receiving a Fair Appropriate Public Education (FAPE) through the District at the present time?
4. If [Student] is not receiving FAPE at this time, what steps need to be taken to ensure [Student] receives FAPE?

*Requested Remedies:* The District requested it be allowed to evaluate [Student]'s eligibility and educational needs, and to participate in the IEP process to determine the appropriate FAPE for [Student]. The Parent requested the District be ordered to implement [Student]'s most recent out-of-state IEP exactly as it was written, without any additional testing. This was the basis upon which hearing proceeded.

However, when the Parent submitted her written Closing Argument, she announced she does not trust the District to provide an education for [Student], and will not send [Student] to school even if the out-of-state IEP is ordered to be fully implemented as she had previously requested. The Parent's new requested placement for [Student] is: a) homebound special education services 12 hours per week, to be provided by professionals selected by the Parent but compensated by the District; b) reimbursement from the District for lessons to be selected by the parent and provided to [Student] in his home, including piano lessons and sports activities; c) an unspecified amount of financial compensation for the District's failure to provide FAPE to [Student] during the 2000\2001 school year; d) The Parent's personal expenses to participate in this proceeding; and e) compensation for future expenses, to include legal fees, if this decision is contested on appeal. The Parent requests the IHO validate, but not implement, the most recent out-of-state IEP. (Parent's closing argument, page 8, middle paragraph):

### **BACKGROUND INFORMATION**

1. [Student]'s date of birth is [D.O.B.].
2. **[State 1]:** [Student] reportedly was identified by "Child Find" in [State 1] as being eligible for special education services. However, [Student] apparently did not receive special education services in Kindergarten.
3. **[State 2]:** [Student] transferred to [County] Public Schools in [State 2] for the 1997\98 school year, where he was placed in a regular education class for first

grade.

4. **98\99 School Year:** [Student] was retained in the first grade at his parent's request, and repeated the first grade in the 1998-1999 school year. An IEP was prepared for [Student] in May, 1999 (Exhibit J). [Student]'s teacher for this school year stated [Student] was on track academically<sup>1</sup>, and was at or above grade level in all areas. She also stated, however, that [Student] was easily distracted and fidgety in class. The IEP team recommended [Student] remain in the general education setting, with intervention in the areas of speech and motor development. [Student]'s IEP required he receive services one-half hour per week for speech therapy and one hour per week for occupational therapy. This was the last school year in which [Student] consistently attended school.

5. **99\00 School Year:** [Student] did not attend school more than two to four weeks during the 1999/2000 school year. [Student] was suspended from school for at least part of this year because of issues unrelated to this due process, involving the wearing of a uniform which was required by the school. This suspension apparently expired January 8, 2000. It is not clear from the record why [Student] did not return to school in January, 2000, although there are references to due process proceedings and placement disputes between the school district and the parent.

6. **[Educational Diagnostician]:** In October, 1999, an educational diagnostician named [Educational Diagnostician] performed a "multi-disciplinary re-evaluation" of [Student]. (Exhibit 19). In this evaluation [Student], then assigned to the second grade, was found to be functioning in the low average range for reading skills; average range for mathematic skills; average range for writing skills; and average range for spelling. [Educational Diagnostician] stated:

**Progress Report:**

[Special Education Teacher], ICE Special Education Teacher, indicated that even though she has only seen [Student] since the last IEP in October, it is evident that his reading level is rather low, he lacks confidence in writing skills, but he does well in math. Generally, he is described as having good attendance, being well-mannered with a pleasant temperament. He is noted to be off-task at times and occasionally asks and talks about subjects not related to what is being done in the class. He is easy to re-direct to task when he does get distracted. [Student]'s attitude, quality of classwork, test performance, homework quality and classroom behavior are reported to be excellent. A comment was made that mother does not allow him to do most of the homework assignments, but why this is so was not indicated.

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<sup>1</sup>This assessment must, of course, be tempered by the fact that this was [Student]'s second time through the material

Exhibit 19, p.2. [Educational Diagnostician's] recommendations were:

1. [Student] be provided instruction in a small group\individual setting for he area of reading.
2. [Student] be provided with strategies which help him develop his memory and help him to remember information necessary to succeed in school (sounds of letters, sight word vocabulary for reading, etc.).
3. A multi-sensory approach be implemented in reading instruction when teaching vocabulary concepts.
4. Intervention from the SLP which will help [Student]'s development of memory strategies, as well as addressing language deficiencies indicated by assessments completed this calendar year.
5. The MDT discuss the results of the TO evaluation completed in April as well as current interventions in TO.
6. [Student]'s mother be encouraged to follow through on recommendations/strategies being taught in the ICE instructional setting.

Exhibit 19, p. 7.

7. **1999\2000 IEP's:** IEP's were prepared for [Student] 5\19\99 (Exhibit J); 10\6\99 (Exhibit I); and 11\30\99 (Exhibit H). Another IEP was created for [Student] January 2000 (Exhibit E). The IEP committee in January 2000 found [Student] was special education eligible under [State 2] standards in the area of Specific Learning Disabled (SLD), and also needed ancillary services in the areas of language and movement. The committee recommended [Student] receive educational services, beginning January 2000, as follows: 693 hours per year in general education; 270 hours per year in special education; 18 hours per year in speech/language therapy; and 36 hours per year in occupational therapy. This IEP apparently was never implemented because of objections by the parent she had not been adequately included in the IEP process. [Student]'s parent reportedly had refused to attend this IEP meeting because a due process proceeding was pending but incomplete.

8. [Student]'s parent filed numerous complaints in [State 2] in 2000.<sup>2</sup> Exhibit P represents ten formal complaints were filed in the period of two weeks. According to

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<sup>2</sup>[Student]'s parent testified at the hearing in this matter (June 22, 2001): She has written a lot of complaints and believes this is her best strategy to protect [Student] and obtain an appropriate education for him. It was estimated at hearing the Parent has filed somewhere between 50 and 100 complaints. In this proceeding, the IHO requested the Parent cease conspicuously filing complaints while the due process was pending. The reason for this request was because on the second day of hearing, the parent appeared with several complaints to the Civil Rights Commission which had been filed against witnesses based upon testimony the previous day. The IHO was concerned such activity would have a potential chilling effect on testimony.

Exhibit Q, one of the significant issues at that time was the insistence of [Student]'s parent that special education services be provided exclusively from 2:00 to 4:00 p.m., to accommodate the parent's needs and schedule. Similarly, Exhibit R indicates a finding that [Student]'s parent kept him home rather than allow him to attend classes in the morning (paragraph 9). This history is noted only because of parallels which have occurred in Colorado relating to the limited blocks of time during which the Parent allows educational services to be provided to [Student].

9. **Stay Put Placement:** In Exhibit R, dated March 10, 2000, an administrative law judge found the "stay put" placement for [Student] was regular classroom education with special education services to be provided consistently with the March/May 1999 IEP, unless the district and the parent could agree to an alternative placement.

10. **[May State 2] IEP:** Another IEP was prepared for [Student] in May 2000. (Exhibit G) For purposes of clarity, this May [State 2] IEP is referred to herein as the [May State 2] IEP. At the time when the [May State 2] IEP was prepared, [Student]'s parent had decided to move with [Student] to the State of Colorado. However, [Student]'s parent did not want the [State 2] IEP committee to know she was moving to Colorado, and instructed her witnesses and representatives not to inform the [State 2] District of her impending move.

11. **[Doctor]:** In preparation for the [May State 2] IEP, [Student]'s parent commissioned a neuro-behavioral evaluation which was performed by [Doctor], Ph.D., LPCC, (See appendix to Exhibit G). [Doctor] states a number of recommendations for [Student], beginning on page 12 of her report. [Doctor] states, "This child appears to meet eligibility criteria as both a learning disabled and a language disorder youngster (left hemisphere processing deficit)." [Doctor] does not make specific placement recommendations in her report.

12. The [May State 2] IEP incorporates a page entitled BACKGROUND\HISTORY, signed by the Parent with a note that says: "This is the official IEP History. It was prepared by the parent." In summarizing [Student]'s background for purposes of the [May State 2] IEP, the Parent states: "[Student] has not received any LD services during the 99/00 school year, and only a few hours of SLP and OT, since he has been suspended since September 8, 1999 (suspension was not due to his behavior) except for 2 ½ weeks in March, 2000. " (Exhibit G, attachment) This suspension is relevant here only to the extent it creates a need pursuant to Colorado law for the District to make a determination as to whether any educational deficit results from disability or from lack of instruction.

13. **[May State 2] Finding of Eligibility:** The [May State 2] IEP (Cover page) specified [Student]'s special education eligibility to be in the area "multiply disabled and other health impaired".

14. **[May State 2] Placement:** The May 2000 IEP generates the following placement:

Self-contained classroom, integration as tolerated into general ed. classroom with special ed. component for non-academic subjects except P.E. and Art; needs escorted to activities, active supervision at recess and lunch. Self-contained refers to a small class, generally 8 students in 3/4th grade, with an elementary special ed teacher and an aid. The "General Ed." class with special ed component" is a larger class that has a group of both special ed. and non special ed. students and has both a regular 3rd grade teacher and. . . [the remainder of the placement is not legible]

Extended school year: [Student] will receive 1 hour each of SLP and OT services during summer "extended school year" program + 12 hrs. academics/week - See p. 4 of IEP

Exhibit G, beginning on page 2(d).

15. The breakdown for educational placement in the [May State 2] IEP is 180 hours per year General Education; 418.5 hours per year Special Education; 360 hours per year Speech\language; 40.5 hours per year OT; 18 hours per year Recreational Therapy.

16. The [May State 2] IEP states:

*State the reason(s) the student cannot, with modifications and accommodations, be provided his\her educational program through general education.*

[Student]'s skills are such that he requires more monitoring and\or individual instruction than can be provided in the general ed setting alone.

Exhibit G, page 5.

17. The [May State 2] IEP was never implemented in [State 2] because [Student] moved to Colorado about the time when it was completed.

### **FACTUAL HISTORY IN COLORADO**

18. Although [Student]'s Parent had contacted the school district from [State 2], she had been told the District could do nothing until [Student] came to Colorado and was registered for school.

19. **Registration in the District:** [Student] moved to Colorado with his parent in June 2000. His Parent registered him for school at [Elementary School] in the District June

9, 2000, which was the District's last day of school for the 99\00 school year.

20. The Parent brought the [May State 2] IEP to the school district in June, 2000, and requested the District implement such IEP for [Student].

21. **[Supervisor]Initial Parent Consultation in the District:** [Supervisor], a special education supervisor for the District, testified she informed the Parent near the time of [Student]'s registration the District did not have available the type of placement referred to in the [May State 2] IEP; and that the District would want to do its own evaluations to assess [Student]'s eligibility and proper placement pursuant to Colorado law. [Supervisor] testified Colorado does not have an SLD classification for Special Education eligibility. She also testified the [May State 2] IEP and associated evaluations were not adequate to make an eligibility determination for [Student] consistently with Colorado's "Regression Formula". Based upon [Supervisor]'s review of [Student]'s [May State 2] IEP, she did not believe [Student] would qualify for services under Colorado's Regression formula, or that he would be eligible for services under Colorado's definition of "Multiple disability or other health impaired"

22. [Supervisor] further testified the District would need to investigate whether any educational deficit resulted from disability or from lack of instruction in order to complete an eligibility determination, given the amount of time during which [Student] had not been regularly attending school. [see, IDEA 1414(b)(5); 300.534(b)(1); ECEA 2.02] According to [Supervisor], the Parent's reaction to this information was very negative . The Parent stated she finally had the IEP she wanted for her son, and she was not going to let anybody change that. The Parent did not want the District to conduct any evaluations. [Supervisor] and the Parent discussed potential dates for the IEP meeting, and settled on August 30, 2000, which was to be the first day teachers would be back on duty in the District after the summer break. [Supervisor] testified she discussed with the Parent that one of the primary purposes of the August 30 meeting was to determine what further testing would be needed.

23. **Summer of 2000\ [SLP]:** On June 15, 2000, the District began providing homebound ESY services through [SLP], a Speech and Language pathologist from [Elementary School]. [SLP] provided services 12 hours per week. Primarily, she used the Lindamood Bell Program. The services [SLP] provided were consistent with the ESY services described in the [May State 2] IEP in most respects, although the [May State 2] IEP did not specify homebound services. The Parent insisted services could be provided only during afternoon hours. [SLP] testified most of the specific educational goals identified in the [May State 2] IEP were attained through ESY services during the summer of 2000. [SLP] verified [Student] had some attention issues, but in her professional opinion, [Student]'s disabilities were not so severe that he required self-contained placement. She stated [Student] was very anxious to attend school and to be with other children. She felt regular education placement with special education support would be very beneficial for [Student]. [SLP] testified she has many students at [Elementary School] with much more significant disabilities than [Student] who succeed well in programs much more inclusive than the Parent is seeking for [Student].

24. **[Executive Director]**, Executive Director for Special Education Services, testified that it is very common for the nomenclature of classifications and services from other states not to comply with District procedures and standards. When this happens, what is required is for parents and educators to cooperate to plan for qualifying services. Colorado does not use the terminology "Specifically Learning Disabled". Colorado has adopted a Regression Formula (Exhibit U), which is designed in part to differentiate between instructional deficiencies and true disabilities. [Student] probably would not qualify under the category "Multiply disabled and Other Health Impaired" in Colorado. The District was concerned in the Summer of 2000 because the [May State 2] IEP appeared to be inconsistent on its face. The placement prescribed did not appear to match the level of disability established. The placement also did not conform to the descriptions of [Student]'s disabilities from [SLP]. The District never received a signed consent form from the Parent to authorize evaluation of [Student].

25. **[IEP Member]**, IEP committee member for the August 30 IEP staffing, testified she would not recommend self-contained placement for [Student] based upon the information available to her, and that placement decisions relating to [Student] were more difficult because substantial time had elapsed since [Student] was last in a classroom setting so that his adjustment to such setting could be known.

26. [SLP] testified The Parent told [SLP] she would not attend the IEP meeting unless the District promised the self-contained placement specified in the [May State 2] IEP would be the result. The Parent repeatedly requested a meeting to discuss how the [May State 2] IEP was to be implemented, but wanted to be assured the [May State 2] IEP was to be [Student]'s stay put placement before she would agree to participate in further proceedings.

27. **[Director]**, Director of Special Education for the District, testified she had several telephone conversations with the Parent beginning in June, 2000. The Parent told [Director] she was calling to notify [Director] the Parent was expecting the District to start hiring a teacher and creating the type of classroom specified in [Student]'s [May State 2] IEP. [Director] testified tried to discuss with the Parent the District's reservations about self-contained placement for [Student] and the need for the District to obtain additional evaluations to determine [Student]'s eligibility for services under Colorado's Regression Formula. She said she offered to sit down with the Parent to discuss what evaluations were needed and plan an interim program for [Student] until the evaluations could be completed and an IEP put into place. However, the Parent was unwilling to discuss anything other than to insist the [May State 2] IEP be implemented and was unwilling to consent to any evaluations by the District.

28. **The Parent's Position re: Summer 2000:** The Parent testified<sup>3</sup> as soon as

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<sup>3</sup>The Parent testified at some length, but refused to allow herself to be cross-examined, other than through written interrogatory, because she stated she found

she found out from [SLP] and [Supervisor] in June, 2000, that the District did not have the type of placement specified in the [May State 2] IEP available, she began contacting various officials at the District and the Colorado Department of Education to demand a meeting about how the [May State 2] IEP was to be implemented. She stated she told District officials she was not going to let them change [Student]'s IEP just because they felt like it. The Parent maintains she did not refuse to let the District conduct any evaluations, but she wanted the District to stipulate the [May State 2] IEP was to be the "stay put" placement for [Student] and any evaluations to be conducted were to be referred to as "re-evaluations". The Parent also stated the requests for testing were not adequately specific as to what tests or sub-tests were to be administered and why. The Parent was not willing to attend an IEP meeting until she had a stipulation from the District as to stay put placement.<sup>4</sup>

29. **[Piano Teacher]** submitted a report (exhibit 79). She is a certified teacher who has a background in Special Education; and she was [Student]'s piano teacher. [Piano Teacher] stated [Student] is very sensitive to noise and has a difficult time attending to task. She recommended small group placement for [Student]— a group of 4 to 6 children carefully selected to have needs similar to [Student]'s. She stated she believed a regular classroom setting would be of no benefit to [Student], and in fact would be detrimental to him.

30. The Parent is concerned [Student] will "shut down" and become depressed if his school placement is too difficult for him, and that he will be teased or ignored by his peers because of his disabilities. The parent states [Student] can not attend to task adequately to participate in a classroom setting, and has difficulty learning from seatwork. The Parent clearly perceives [Student] to be far more severely disabled than have his teachers and evaluators.

31. One confounding aspect of the testimony in this case was the disparity between the descriptions of [Student] from educators and the description of [Student] given by the Parent. **[Friend of Parent]**, a friend of the Parent, testified [Student] can not be allowed to go places with anyone other than herself and the Parent, because of his propensity for becoming distracted and engaging in dangerous activities such as running into the street in front of traffic. The Parent also stated [Student] requires constant supervision to remain safe because of his distractability. It is difficult to determine whether [Student]'s level of functioning is getting worse since he was last tested or observed by public educators, or whether this disparity simply results from different vantage points of perception.

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cross-examination too stressful

<sup>4</sup>The Parent was also concerned tests would not be valid because insufficient time had past since the last evaluations. However, that issue is better addressed by the psychometricians, who can alter the tests given or take other measures to ensure validity

32. The parent introduced a videotape and published materials supporting her position that students with perceptual\communicative disorders and learning disabilities learn better in small, self-contained classrooms than in larger groups.

33. An IEP meeting was held August 30, 2001. The Parent failed to appear. Parent also did not return the consent forms which had been sent to her, requesting consent to conduct evaluations of [Student].

34. Although [Student] has been registered at [Elementary School] for more than a year, he has never been there and the District's only interaction with [Student] as been the homebound instruction provided in the summer of 2000.

35. The Parent filed a Complaint with the Federal Complaints Office (Federal Complaint No. 2000-2599) and a Decision was rendered by the Federal Complaints Officer. When this Due Process was filed, the parties initially requested it be stayed pending conclusion of that process. However, the Parent subsequently withdrew her Complaint and hearing of her appeal was vacated. Case Number ED 2001-001.

### **LEGAL AUTHORITIES AND GUIDELINES**

[Student] is clearly entitled to a Fair Appropriate Pubic Education (FAPE). 20 U.S.C.A. § 1400, *et.seq.* Exercise of that entitlement requires requires cooperation and affirmative action by [Student] and his Parent. [Student], his Parent, and the School District each have distinct roles and important responsibilities for [Student]'s education.

#### **I. The School District's Role and Responsibility:**

36. The District is required to make a FAPE available to [Student], consistently with Colorado laws and procedures.

The IDEA recognizes that education is traditionally a state function. Accordingly, it leaves the responsibility of providing a free appropriate public education, or "FAPE" to students with disabilities to state and local educational authorities. See 20 U.S.C. § 1400(c)(6)(1998); 20 U.S.C. § 1400(b)(8)(1998); 34 C.F.R. §§ 300.13, 300.600 (1999). Provision of a FAPE requires that special education and related services must "meet the standards of the State educational agency," and must "include an appropriate preschool, elementary, or secondary school education in the State involved." 20 U.S.C. § 1401(8) (1998); 20 U.S.C. § 1401(18) (1996). Under current section 1412, States are eligible for federal financial assistance only when the state demonstrates that it "has in effect policies and procedures to ensure that it meets "the conditions imposed, including that it makes available a FAPE to children with disabilities residing in that state". 20 U.S.C. § 1412(a) (1998). A local educational authority is eligible to receive these federal funds only if it

"has in effect policies, procedures, and programs that are consistent with the State policies and procedures established under section 1412." 20 U.S.C. § 1413(1998).

**Michael C. v. Radnor Township School District**, 202 F.3d 642. (3rd Cir. 2000).

37. OSEP Memo 96-5 is persuasive, although not controlling, authority in this case. Appropriate rule-making procedures have not been followed to elevate OSEP Memo 96-5 to the status of regulation or law. However, the IDEA is silent as to how the interstate transfer of a student receiving special education services should be managed. OSEP is the agency Congress has charged with principal responsibility for administering the IDEA, and this is the very type of interpretation issue OSEP was designed to address. 20 U.S.C. § 1402(a) Therefore OSEP Memo 96-5 is the best authority available and should be followed to the extent it does not conflict with specific statutes or regulations.

38. The Parent unilaterally withdrew [Student] from his placement in [State 2] and changed his placement to Colorado. Under such circumstance, Colorado is not required to automatically accept and implement [May State 2] IEP. OSEP Memo 95-6; **Radnor**, at 649. It was the Parent who interrupted what would otherwise have been [Student]'s stay put placement.

39. Having conveyed its rejection of the [May State 2] IEP to the Parent, the District must conduct a preplacement evaluation for [Student] without undue delay and convene an IEP meeting to develop an educational plan for him, pursuant to OSEP Memo 95-6. The Parent's consent is required before the District can proceed with this process.

40. Implementation of the [May State 2] IEP placement would require the District to justify, for [Student] and also every other student who is pulled from a more inclusive placement to create this self-contained classroom, that the nature and severity of the disabilities of each student are such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. C.R.S. §§ 22-20-102, 22-20-108(1) and 22-20-108(1); 20 U.S.C. § 1412(a)(5); 34 C.F.R. § 300.550; C.C.R. 301-8, § 2220-R-4.02(4)(r) and 301-8, § 2220-R-5.02. If this is in fact the LRE placement for [Student], then the District must provide such placement or some equivalent placement which satisfies [Student]'s needs. However, given the District's accountability for establishing [Student] is eligible for services and this is the Least Restrictive Environment for such services, the District must be allowed to conduct necessary assessments and IEP meetings consistently with IDEA to fulfill its responsibility to [Student].

41. The Parent's position that once an IEP is created, any school district in any state must implement such IEP without question, regardless of whether such IEP complies with that state's own policies and procedures, is compelling in that such position facilitates interstate mobility of parents and students and the development of consistent nationwide standards and definitions. However, such position is not supported by legal authority and contradicts the authorities cited above, which require each state or school district to be held independently accountable for LRE compliance.

## II. The Role and Responsibility of the Parent:

42. At its very best, education is a cooperative endeavor between school and parent. A parent is not entitled to demand FAPE for a student while simultaneously making it impossible for the student to receive FAPE. **G. v. Cumberland Valley**, (3rd Cir. 1999); 70(c).

43. [Student] is entitled to have his parent elect to either: a) cooperate with the District to allow the District to provide FAPE to [Student]; or b) take on the responsibility of providing an appropriate education to [Student] in the District's stead if she is not willing to make it possible for the District do so.

A. **FAPE:** If the Parent wishes to exercise [Student]'s right to FAPE, then she must allow the District to provide FAPE to [Student]. Specifically, she must: a) Either allow [Student] to be placed in a regular education classroom or provide the consent necessary for the District to evaluate [Student]'s eligibility for IDEA services; b) participate in the development of an IEP if eligibility is found; and c) make sure [Student] gets to his placement regularly once placement as been determined.

B. **HOMESCHOOLING:** [Student] is not exempt from the requirements of C.R.S. §§ 22-23-104 and 22-23-104.5. If the Parent chooses to home-school [Student], then [Student] is entitled to have the Parent comply with Colorado statutory law to make sure [Student] receives a an appropriate educational opportunity. Just as the District must be accountable if the Parent elects to allow the District to provide FAPE to [Student], so must the Parent be accountable if she elects to educate [Student] at home instead of sending him to school.

44. The Parent has been providing home schooling to [Student] for at least the last year and a half. The Parent states she has not complied with statutory requirements for formal home schooling because doing so would sacrifice [Student]'s opportunity to receive special education services pursuant to IDEA. However, [Student] is not receiving special education services now, and no determination has been made that he qualifies for such services in Colorado. If the Parent chooses to homeschool rather than to provide the consent necessary for [Student]'s eligibility to be assessed, as her Closing Argument suggests, then she sacrifices nothing by complying with Colorado homeschool law.

45. The Parent may be providing a wonderful educational opportunity to [Student] through her homeschooling. However, there are reasons for concern:

A. The Parent has indicated she is very limited for reasons of her personal health in the number of hours she can spend homeschooling [Student].

- B. The Parent indicates much of [Student]'s homeschooling comes from computer programs and television. While these can be very useful tools in a deliberate, well-designed educational program, they may not necessarily be sufficient alone.
- C. Although current test results are not available, there is basis for questioning whether [Student]'s skills in core subject areas are progressing as well as might be expected.
- D. If [Student] qualifies for Special Education services, the Parent might or might not be adequately prepared to address his disabilities.

C.R.S. §§ 22-23-104, *et.seq.* is designed to protect [Student] by monitoring his progress to make sure the educational program the Parent is providing for him is meeting his needs. The IHO makes no finding as to the quality of the education being provided to [Student] by the parent. Compliance with C.R.S. §§ 22-23-104, *et.seq.*, will address that issue.

46. "Home schooling" must not be confused in this context with "Homebound services". The remedy the Parent requests in her closing argument is homebound services, to be provided at the District's expense, but designed and controlled exclusively by the Parent. The Parent requests she be allowed to select and contract with service providers; and then bill the District for such services.

47. In rare instances, homebound services may be the Least Restrictive Environment for a student, although it is one of the most restrictive potential placements. However, nothing in any of [Student]'s testing or previous IEP's supports the need for homebound services for [Student]. There is no factual basis for a finding homebound services are the LRE\FAPE for [Student].

48. The IDEA is designed to meet the specific educational needs of each student. Nothing in the IDEA requires the District to provide homebound services in order to accommodate a parent's needs, schedule, disability, or distrust of public education.

### **FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER**

49. When the Parent initially registered [Student] for education in Colorado, she presented the District with an IEP which had been prepared approximately three weeks earlier in the State of [State 2] but had never been implemented because [Student] was not attending school in [State 2]. Such IEP found [Student] to be eligible for IDEA services in [State 2] under the category "Multiply Disabled and Other Health Impaired"; and specified placement in a self-contained classroom with integration into less restrictive placement for non-core subject areas as tolerated.

50. The Parent arrived in Colorado with a pre-determined mission. She wanted

the District to create for her son a classroom which would have 6 to 8 students with disabilities similar to [Student]'s; be completely self-contained; and have a specially trained teacher and an aid present. The Parent sincerely believed this was the only educational environment in which [Student] would thrive. This is also the only educational environment in which the Parent would consider allowing [Student] to attend school outside the home at the time when she registered [Student] for school. At the present time the Parent will not consider any placement for [Student] other than homebound services to be contracted by the Parent but paid for by the District.

51. The District, consistently with IDEA and ECEA, has a commitment to LRE. The types of environments sought by the Parent, either at the time of [Student]'s enrollment or at the time of Closing Argument, would be used by the District only for the most severely handicapped students because such environments include no contact whatsoever with less severely handicapped or general education children.

52. It is not the purpose of this proceeding to debate the relative merits of LRE. Legislators and educators have already engaged in that debate while creating IDEA and ECEA. The question to be resolved here is: What is the LRE for [Student]?

53. Immediately after [Student] was registered for school in Colorado, District representatives expressed concerns to the Parent about whether self-contained placement met District criteria for Least Restrictive Environment. The District scheduled an IEP meeting the first day staff returned to school in the Fall, to decide what assessments were needed to determine [Student]'s eligibility for services in Colorado and discuss placement for school year services.

54. The District and the Parent agreed on an interim placement for Extended School Year Services during the Summer of 2000, which was that a teacher would provide services to [Student] in his home. Such agreement for interim services modified the [State 2] IEP and required accommodations from both the Parent and the District. There is not an adequate basis for finding the Parent and the District ever agreed on anything else.

55. In August, 2000, the District held an IEP meeting for [Student]. However, the Parent refused to attend the IEP meeting, refused to send [Student] to school, and refused to sign consent forms to allow the District to evaluate [Student]'s eligibility for services in Colorado and his educational needs. The Parent did so because she wanted the District to implement the [State 2] IEP as written, or at least to stipulate such IEP was to be the stay put placement for [Student]. Because of the Parent's mistaken belief that the District did not have the discretion to perform its own evaluations of [Student]'s eligibility and to participate in the preparation of an IEP consistently with Colorado's standards and requirements, and because of the inability of these parties to reach an agreement on this issue, [Student] has not received any education for the past year other than what has been provided by the Parent.

56. [Student] does not have a placement at this time. A stack of IEP's, none of

which is less than a year old, and none of which has ever been implemented and/or has ever been signed by all parties whose signatures are required, does not constitute a "placement" for purposes of C.R.S. § 1415(j) or 24 C.F.R. 300.514. [Student] presently is being homeschooled, without having the benefit of monitoring from C.R.S. §§ 22-23-104, *et seq.* to ensure he is receiving an appropriate education.

57. The District was not required to adopt and implement [Student]'s IEP from [State 2] without any opportunity to conduct its own evaluations and participate in the IEP process. The District's obligation to [Student] and to Colorado law require it to be more than simply a marionette. Colorado has both a right and a duty to adopt and adhere to its own standards and procedures for implementing the IDEA and providing FAPE to its students. The District is obligated to adhere to the ECEA as well as the IDEA, including the Regression Formula Colorado has adopted. There is not a sufficient basis for any finding in this case that [Student] has been prejudiced by a failure of Colorado law to meet the standards and requirements set forth in IDEA.

58. The District's provision of immediate ESY services despite its concerns regarding placement and eligibility did not irrevocably commit the District to implement the [State 2] IEP without any opportunity to fulfill its statutory obligations verify eligibility and LRE. Certainly [Student]'s education did not suffer as a result of the provision of such services. If [Student] is ultimately found ineligible for services under Colorado law, then he nonetheless received the benefit of such ESY services. Compensatory education is not an appropriate remedy for excess of services. Conversely, if [Student] is found to be qualified for the ESY services he received, then he has already received them. There is no basis for a finding that, by providing ESY services to accomplish goals set forth in the [State 2] IEP, the District committed itself to implementation of such IEP without any opportunity to conduct its own evaluations and to participate in the IEP process. Such finding would be inconsistent with the District's legal obligation pursuant to C.R.S. § 22-20-101-117.

59. A "continuum of alternative placements" is not necessarily lacking simply because the specific placement requested by the Parent is not available. The testimony here was that a continuum of services was provided by the District, although, as noted above, the District remains committed to LRE to an extent which is inconsistent with the Parent's philosophy of education.

60. Even if the [State 2] IEP had been a Colorado IEP, it still would need to be updated and re-evaluated periodically. Such IEP is approximately one and one half years old, and has never been implemented with the exception of modified ESY services. The unrefuted testimony at hearing was that the specific goals set forth in the [May State 2] IEP have been accomplished. IEP's are not meant to be "set in stone". At the very best, they require constant monitoring and re-evaluation to make sure the methods are accomplishing the goals.

61. The Parent asserts the District failed to act promptly by waiting until staff had returned in the Fall to have the IEP meeting. However, since the District was providing

modified interim ESY services in the meantime, and apparently was prepared to act promptly as soon as staff returned for the following school year, [Student] suffered no demonstrable detriment from such delay.

62. The Parent refused to sign a consent for evaluation or to participate in the IEP meeting in Colorado because she was convinced the district was legally obligated to implement the [State 2] IEP without question. As noted above, the Parent was mistaken. Because of the Parent's refusal to consent to evaluations or to any of the various alternative placements offered by the District, [Student] has not received any education other than homeschooling since the agreement for interim ESY services was completed.

63. The relief requested by the parent in her closing argument is not available under either the IDEA or Colorado law. There simply is no basis at this time for a finding that homebound services is the Least Restrictive Environment for [Student]'s education. The Parent's proposal she select and retain all service providers from private sources, at the District's expense, is also not supported by any legal authority.

64. If the Parent is sincere in her statement in Closing Argument that she will never send [Student] to school or trust the District to provide an education to [Student], then its not clear what is the practical purpose of this due process. If the Parent will not allow the District an opportunity to design and provide FAPE to [Student], then her only other alternatives are homeschooling or private school placement.

65. The Parent has the choice whether she will exercise [Student]'s right to FAPE. If the Parent wants the District to provide a FAPE to [Student], she must notify the District no later than October 12, 2001; provide consent forms to allow the District to conduct evaluations; participate in IEP meetings; and make sure [Student] regularly attends school or any alternative placement established by the IEP committee.

66. **Interim Placement:** [Student] should be placed initially in the Resource Room at [Elementary School] while the District completes its evaluations and the IEP team meets to design a more appropriate plan. An initial IEP meeting should be scheduled no later than 10 school days after [Student] starts school at [Elementary School]. The District must be sensitive to the fact that [Student] has not attended school for a considerable length of time, and also must be responsive to the Parent's concerns for [Student]'s safety at school and his reception by his peers. If necessary, extra supervision must be provided for [Student], particularly during transitions, recess, and transit, until [Student]'s adjustment can be fully assessed and a determination of [Student]'s needs in relation to these issues can be made for purposes of FAPE design.

67. This full-time Resource Room placement must be considered an interim alternative placement, pursuant to 20 U.S.C. § 1415(k)(2), and should not under any circumstances last more than 45 days unless the IEP team determines it is the appropriate long-term placement for [Student]. The IHO finds [Student]'s present lack of educational placement is not appropriate and the interim alternative placement described herein

constitutes the Least Restrictive Environment for such interim period. This Interim Placement will also be the Stay Put Placement during this 45 day period.

68. The District must complete its evaluation within 20 days after the Parent presents [Student] and the necessary consent forms to make it possible for the District to grant such request for FAPE. If, after fairly and thoughtfully reviewing the District's evaluation results, the Parent decides an independent evaluation is warranted, such independent evaluation should be conducted within 20 days after the Parent receives the District's results. The Parent may have the independent evaluation conducted by any evaluator of her choosing within the State of Colorado. The District must pay for the reasonable expenses of such independent evaluation and for a representative of the independent evaluation team to attend the IEP meeting. If the independent evaluation team so requests, more than one representative may attend the IEP meeting at the District's expense.

69. The IHO recognizes [Student]'s eligibility for services in Colorado has yet to be determined. However, under the unique circumstances of this case, and because eligibility has been found under a variety of categories in other states, the IHO finds it is better to provide services to get [Student] into some sort of an educational program while the eligibility determination is completed rather than to leave him stuck somewhere between regular education and homeschooling because of the inability of the District and the Parent to agree on an interim placement.

70. **Stay Put Placement:** If, after 45 days of evaluations and IEP meetings, the IEP team has not been able to formulate an IEP consistently with IDEA, with the agreement of both the District and the Parent, then [Student]'s "stay put" placement pending further proceedings will be the regular education classroom, pursuant to 20 U.S.C. 1415(j), unless the District and the Parent have been able to agree to some other stay put placement. Alternatively, if the Parent chooses not to sign the necessary consent form for evaluation, chooses not to participate in the IEP process, or chooses not to send [Student] to school for the interim placement, then [Student]'s stay put placement will be homeschooling under the auspices of C.R.S. §§ 22-23-104, *et.seq.* until such time as the Parent elects to exercise [Student]'s right to FAPE.

71. The IEP team must do all it can to make sure the Parent is fully included in the IEP process. The IEP team will develop whatever placement and educational goals are appropriate for [Student], and the District must implement such placement. However, if the Parent chooses not to participate in the IEP process or chooses not to provide the consent forms necessary for the District to perform its evaluation, then, by so choosing, the Parent will also have made the choice that [Student] must either be homeschooled or must participate in the regular education program.

72. If the Parent does not notify the District no later than October 12, 2001, that she is requesting FAPE for [Student]; tender the necessary consent forms; and allow [Student] to attend school, then The Parent must comply with C.R.S. §§ 22-23-104, *et.seq.*

just as any other homeschool parent must comply.

73. The Parent may have a right to recover her legal expenses for an appeal if there is one. However, since the Parent takes the position she will not allow [Student] to receive a public education under any circumstances, an appeal might later be found to be frivolous. That issue is left for the Administrative Law Judge to decide based upon any appeal which is filed. The Parent did not present evidence of any legal expenses in connection with this due process.

[Student] is entitled to an appropriate education, either: 1) FAPE, with adequate cooperation between the District, [Student], and the Parent; or 2) Homeschooling within the guidelines set forth in C.R.S. §§ 22-23-104, *et.seq.*, to make sure his educational needs are being met. Since the Parent is unwilling to send [Student] to school or allow the District an opportunity to provide FAPE to him, this entire process is moot.

Notification of Appeal Procedures and evaluation forms are inclosed. Audiotapes of the hearing, together with copies of all exhibits, will be transferred to the Colorado Department of Education, Special Services Unit, for safekeeping. The District also had a court reporter present to prepare a transcript if transcription is needed for any appeal.

Dated October 2, 2001

**YOUNGE & HOCKENSMITH, P.C .**

By \_\_\_\_\_  
Peggy S. Ball, #12595  
IMPARTIAL HEARING OFFICER