BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2001-016

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[STUDENT], by and through his parent, [PARENT],

Appellant

v.

COLORADO SPRINGS SCHOOL DISTRICT NO. 11,

Appellee.

This matter comes before the Administrative Law Judge for a state level review of a decision of the Impartial Hearing Officer (IHO) pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §§1400 *et seq.* (the IDEA). Brent E. Rychener, Esq., Sharon A. Thomas, Esq. and Deborah S. Menkins, Esq. represented Colorado Springs School District No. 11 (the District). [STUDENT] (the Student) appeared through his mother, [PARENT] (the Parent).

SCOPE OF REVIEW

After a hearing taking place over eight days the IHO issued an extensive decision, including findings of fact, on October 2, 2001. Although the Parent disagrees with many of the facts found by the IHO, the material facts necessary to a determination of this appeal are for the most part not in dispute.

An officer making a state level review, such as the Administrative Law Judge in this case, is required to make an independent decision. 20 U.S.C. §1415(g). As such, a state level review official is granted leeway in reviewing the non-credibility based findings of an IHO. *Carlisle Area School v. Scott P.,* 62 F. 3d 520 (3d Cir. 1995), *cert. den*. 517 U.S. 1135 (1996). In these respects, a state level review is analogous to the role played by federal district courts in reviewing state level determinations under the IDEA.

When a United States District Court reviews a decision made pursuant to the IDEA by a state administrative agency, the court is required to make an independent decision, based upon a preponderance of the evidence while giving

due weight to state administrative proceedings. 20 U.S.C. §1415(i)(2)(B)(iii); *Board of Education of the Hendrick Hudson Central School District Board of Education v. Rowley*, 458 U.S. 176, 206 (1982) (*Rowley*); *Independent School District No. 283 v. S.D.,* 88 F.3d 556 (8th Cir. 1996); *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991); *Barnett v. Fairfax County School Board*, 927 F.2d 146 (4th Cir. 1991), *cert. den.,* 112 S. Ct. 175 (1991); *Lachman v. Illinois State Board of Education*, 852 F.2d 290 (7th Cir. 1988). A federal district court has the discretion to give appropriate weight to the findings of a state administrative agency. *Town of Burlington v. Department of Education for the Commonwealth of Massachusetts*, 736 F.2d 773, 791-92 (1st Cir. 1984), *aff'd sub nom. School Committee of the Town of Burlington v. Department of Education of Massachusetts*, 471 U.S. 359 (1985); *see Age v. Bullitt County Public Schools*, 673 F.2d 141 (6th Cir. 1982). Under this scope of review, it is sensible to give deference to the factual findings of the IHO, in order not to frustrate the emphasis that the IDEA places on that hearing procedure. *Kerkam v. McKenzie,* 862 F.2d 884 (D.C. Cir. 1988*).*

However, the ability of the state level review officer to take new evidence,[1] and the requirement that the state level review officer make an independent decision, suggest that less deference will be given to the findings of the IHO than would be conventional in review of agency fact-finding. *Kerkam v. McKenzie, supra.* The officer conducting the state level review may therefore reject the factual findings of the IHO. *See Doyle v. Arlington County School Board, supra; Kerkam v. McKenzie, supra.*

Accordingly, the Administrative Law Judge must give due weight to the IHO's decision, while still reaching an independent decision on review. The Administrative Law Judge will therefore substantially adopt the factual findings of the IHO in this case. Nevertheless, the Administrative Law Judge has reviewed the record and come to an independent decision with regard to material matters in dispute and other matters identified by the Administrative Law Judge as requiring an independent determination.

FINDINGS OF FACT

Based upon a review of the record the Administrative Law Judge makes the following findings of fact relevant to this state level review:

1. The Student, who is the subject of this case, was born on [D.O.B.]. He lives with his mother, the Parent, in Colorado Springs, Colorado. They reside within the boundaries of the District.

[1] 20 U.S.C. §1415(h)(2); 34 C.F.R. §300.510(b)(2)(iii).

[State 2] IEP

2. The Student and his mother moved to Colorado from [State 2] in June 2000. The Student had not attended school in [State 2] for most of the 1999-2000 school year, due to the Parent's objection to the [State 2] school district's dress code and her inability to obtain a religious exemption for the Student.

3. [County] Public School District in [State 2] prepared an Individual Education Program (IEP) for the Student in May 2000, as required by the IDEA for children with disabilities. Because the Student and the Parent moved to Colorado shortly after its creation, this IEP was never implemented in [State 2].

4. The [State 2] IEP classified the Student as "multiply disabled and other health impaired." The IEP provided for an educational placement in a self-contained classroom with integration into less restrictive placement for non-core subject areas, as tolerated.

5. The [State 2] IEP also included an extended school year (ESY) provision. The ESY provision required educational services to be provided to the Student during the summer. It provided for one hour each of speech language and occupational therapy services per week during the summer, in addition to twelve hours of academics weekly.

The District's Response to the [State 2] IEP

6. On June 9, 2000 the Parent registered the Student in the District at [Elementary School]. June 9 was the last school day of the 1999-2000 school year. The Parent brought the [State 2] IEP to the District and requested that the District implement the IEP immediately.

7. [Supervisor], special education supervisor for the District, informed the Parent near the time of the Student's registration that the District did not have available the type of placement referred to in the [State 2] IEP. Further, [Supervisor] told the Parent that the District intended to conduct its own evaluation to assess the Student's special education eligibility and proper educational placement.

8. Based on her review of the Student's [State 2] IEP [Supervisor] did not believe that the Student would be eligible for services under Colorado's category analogous to "multiply disabled and other health impaired."

9. [Supervisor] was also of the opinion that the District needed to assess whether any educational deficit of the Student resulted from a disability or from lack of instruction. This investigation was necessary in order to

complete an eligibility determination, given the amount of time the Student had not regularly been attending school in [State 2].

Scheduling of IEP Meeting and Provision of ESY Services

10. The Parent opposed the idea of the District conducting any evaluation of her son. Nevertheless, considering what it believed to be its legal obligation the District set an IEP meeting date of August 30, 2000. August 30 was the first day that teachers would be back on duty after the 2000 summer break.[2]

11. The primary purpose of the August 30 IEP meeting was to determine what further tests were needed in order to create an appropriate IEP for the Student.

12. Because the District could not convene its staffing team until the teachers returned in August, the District agreed in the interim to provide the Student with summer services (ESY), as set out in the [State 2] IEP provisions. On June 15, 2000, the District began providing homebound ESY services to the Student through [SLP], a speech and language pathologist from [Elementary School]. The services provided were modified from the [State 2] IEP, although they were substantially consistent with the [State 2] IEP.

13. Most of the educational goals specified in the [State 2] IEP were attained through the ESY services provided to the Student during the summer of 2000.

Preliminary Assessment of The Student's Disabilities and Proper Educational Placement

14. [SLP] concluded that the Student had some attention related problems, but that his disabilities were not so severe that he required the self-contained placement specified in the [State 2] IEP. She believed regular educational placement with special educational support would be very beneficial to the Student.

15. District personnel had several concerns with the [State 2] IEP evaluation and placement. One issue raise by the District was that the Student would probably not qualify under the category analogous to "multiply disabled and other health impaired" in Colorado. Further, the District was concerned that the [State 2] IEP seemed to be internally inconsistent, because the placement prescribed by the IEP did not appear to match the level of disability

[2] The testimony at the hearing before the IHO was in conflict as to whether the Parent agreed to the August 30, 2000 date for the IEP meeting. The IHO did not specifically resolve that conflict. This Decision on State Level Review does not require a determination of that factual dispute.

established by the [State 2] school district. The District also believed that the IEP placement did not conform to [SLP]'s descriptions of the Student's disabilities. Finally, the District questioned whether the [State 2] IEP's self-contained placement met Colorado's least restrictive environment criteria.

16. Considering the record as a whole the Administrative Law Judge finds that in the summer of 2000 the District had reasonable grounds to question the propriety of the [State 2] IEP's evaluation and placement, and to seek its own evaluation of the Student.

IEP Meeting

17. The Parent advised the District that she would not attend the IEP meeting in August unless the District assured her that the self-contained placement specified in the [State 2] IEP would be chosen. The Parent repeatedly requested a meeting with District representatives to discuss how the [State 2] IEP was to be implemented and sought assurance that for the interim that IEP would be the Student's stay-put placement.

18. The scheduled IEP meeting was held on August 30, 2000. The Parent did not attend this meeting, nor did she return the consent forms that were required in order for the District to evaluate the Student.

19. The Parent refused to send the Student to school after the IEP meeting because she wanted the Student to be placed in a self-contained classroom as provided in the [State 2] IEP. The Parent wanted the [State 2] IEP to be implemented, or at least stipulated as the stay-put placement in the interim. Once the Student's ESY services were complete the Parent began home schooling her son and continues to home school him.

20. The District wanted to perform an evaluation to determine the Student's special education eligibility and placement. The Parent maintained that she would not consent to any evaluation of the Student unless it was referred to as a "re-evaluation." The Parent required that the "re-evaluation" consist only of a few supplementary tests, rather than a complete evaluation to determine the Student's condition and appropriate placement. The Parent's goal was to ensure that the District would make few, if any, changes to the [State 2] IEP.

Federal Complaint

21. On October 8, 2000, the Parent filed a complaint with the Colorado Department of Education (CDOE). The CDOE Federal Complaints Officer (FCO) issued a decision on December 15, 2000. The Parent instituted and later withdrew an appeal of the FCO's decision.

22. The FCO found that the District "did not, either expressly or constructively, accept the complainant's son's out-of-state IEP's non-ESY provisions, or evaluation, for the purpose of service provision beginning with the fall of 2000." He ordered the District to file a request for a due process hearing within thirty days from receipt of the FCO decision if the Parent continued to refuse consent for an evaluation.

Due Process Hearing

23. On January 14, 2001 the District initiated a due process hearing against the Parent to obtain authorization to evaluate the Student's special education availability. The Parent then filed a request for a due process hearing seeking an order requiring the District to implement the [State 2] IEP, without any additional evaluations of the Student.

24. The IHO conducted the due process hearing over eight days in April, May, June and August, 2001. The IHO granted the District's request to evaluate the Student's eligibility for special education services. The IHO's order stated that if the Parent desired a Free Appropriate Public Education (FAPE) for the Student under the IDEA the Parent must notify the District, provide the consent forms to allow the District to conduct an evaluation, participate in IEP meetings, and ensure that the Student regularly attend school.

25. In addition, the IHO ordered that the Student was to be placed in a special education resource room for a maximum of 45 days while the evaluations and IEP meetings were taking place. If after 45 days the IEP team was unable to formulate an IEP, the Student would be placed in a regular classroom as a stay-put placement, unless the Parent and the District agreed otherwise. Under the IHO's order, if the Parent objected to this interim placement, refused to provide consent forms, or refused to participate in the IEP process, the Student's stay-put placement would be home schooling in accordance with Colorado law.

26. The IHO also determined that if the Parent did not participate in the IEP process or provide the consent necessary to an evaluation the Parent would be deemed to have chosen that the Student either be home schooled or must participate in the regular education program.

27. After the issuance of the IHO's order the Parent continued to refuse to provide consent for evaluation and objected to the interim placement ordered by the IHO.

Additional Findings

28. Homebound services are not necessarily the least restrictive environment for the Student. The District would use the educational environment the Parent seeks for only the most severely disabled students.

29. The ESY provisions implemented for the Student during the summer of 2000 constituted a temporary accommodation of the Parent's wishes while the Student's eligibility for special education services in Colorado was determined. The District's adoption of a modified version of the ESY portion of the [State 2] IEP for the summer of 2000 did not constitute an adoption of the [State 2] IEP's assessment or placement for any purposes beyond the summer of 2000.[3] Rather, the District attempted to accommodate the Parent's wishes pending the upcoming IEP meeting, at which point the District would decide what evaluations were appropriate for the Student. These evaluations were intended to determine the appropriate placement and least restrictive environment for the Student.

30. The Parent stated at the due process hearing that she would never trust the District to provide the Student with any type of education, and therefore will never send him to school. At the present time, the Parent will not accept any placement for the Student other than homebound services to be contracted for and designed by her, but paid for by the District.

DISCUSSION AND CONCLUSIONS OF LAW

I. Statutory Background

The IDEA requires that disabled students receive a free appropriate public education. 20 U.S.C. §1401 *et seq*. In *Rowley* the Court held that the IDEA's minimum requirement is that the state provide a disabled student 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. *Rowley* established that if a state educational agency complies with the procedures of the IDEA, and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with the IDEA. *Rowley* at 206-07; *see also Barnett v. Fairfax County School Board, supra* at 152-53; *Cain v. Yukon Public Schools, District I-27*, 775 F.2d 15 (10th Cir. 1985); *Troutman v. School District of Greenville County*, EHLR DEC 554:487 (D. S.Car. March 11, 1983).

II. Stay-Put Provision of the IDEA

Section 1415 of the IDEA provides as follows:

> Except as provided in subsection (k)(7) of this section, during the pendency of any proceedings conducted pursuant to this section,

[3] The record does not support the Parent's assertion that by providing ESY services in the summer of 2000 the District adopted the [State 2] assessment of the Student and the Student's entire IEP. Despite the Parent's claim to the contrary, the FCO did not make such a finding. In fact, both the FCO and the IHO found that the District did not adopt the [State 2] IEP beyond the summer 2000 ESY services.

> unless the State or local educational agency and the parents otherwise agree, the child shall remain in the then-current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents, be placed in the public school program until all such proceedings have been completed.
>
> 20 U.S.C. §1415(j).

This so-called "stay-put" provision forms the basis of the major dispute in this case.

The Parent maintains that when the District provided ESY services during the summer of 2000 the District accepted the [State 2] IEP. According to the Parent the placement under the [State 2] IEP became the Student's "then-current placement" as described in 20 U.S.C. §1415(j), and the District was obligated to continue services under that IEP during the pendency of the dispute between the parties. The Administrative Law Judge concludes that 20 U.S.C. §1415(j) did not mandate that the District provide services under the [State 2] IEP during the pendency of this dispute.

The District did not adopt or accept the [State 2] IEP, as claimed by the Parent. Rather, the District provided a modified version of the ESY services during the summer of 2000 as a temporary accommodation (Findings of Fact, Paragraph 29). Thus, the District did not make the [State 2] IEP the Student's "current placement" and there is no factual basis for this portion of the Parent's argument.

The Parent argues that the District must have adopted the [State 2] IEP in the summer of 2000, because pursuant to 34 C.F.R. §300.342(b)(1)(i) an IEP must be in effect before a school district can provide special education. However, Policy Memorandum 96-5 adopted by the United States Department of Education's Office of Special Education Programs permits a school district to provide an interim placement without adopting a prior state's IEP (the applicability of this Policy Memorandum to this case is discussed below at Section II, C of this Decision). Even if the District improperly provided services without an IEP, the Student was not harmed by this omission because he received services during that summer as agreed upon by the Parent and the District.

B. Inapplicability of Stay-Put Provision.

In any event, the stay-put provision of 20 U.S.C. §1415(j) applies only during the pendency of administrative and judicial proceedings challenging a placement decision. *Michael C. v. Radnor Township School District*, 202 F.3d 642, 654 (3d Cir. 2000) (*Radnor Township*); *Verhoeven v. Brunswick School Committee*, 207 F.3d 1, 7-8 (1st Cir. 1999). Section 1415(j) is designed to preserve the status quo pending resolution of administrative and judicial

proceedings under the IDEA. *Verhoeven v. Brunswick School Committee*, *supra; see Drinker v. Colonial School District*, 78 F. 3d 859 (3d Cir. 1996).

No proceedings pursuant to Section 1415 were pending at the time the District made a temporary accommodation to provide summer 2000 ESY services, or at the time the District attempted to convene an IEP meeting in August, 2000. By the time proceedings commenced in October, 2000 the Student was not in school and was not receiving any services set out in the [State 2] IEP. Rather, by this time the Parent had unilaterally begun to home school the Student. Accordingly, the provision of services described in the [State 2] IEP was not the status quo at the time proceedings were initiated. The District was therefore not required by the stay-put provision to provide those services starting in the 2000-01 school year. *See Radnor Township* at 653-54.

In addition, the stay-put provision of 20 U.S.C. §1415(j) does not apply to temporary placements such as the one at issue here. *Verhoeven v. Brunswick School Committee*, *supra*; *Leonard* v. *McKenzie*, 869 F.2d 1558 (D.C. Cir. 1989). In *Verhoeven* the court held that the policy behind 20 U.S.C. §1415(j) supports an interpretation of "current educational placement" that excludes temporary placements. 207 F.3d at 10. As noted above, the services provided to the Student during the summer of 2000 were a temporary accommodation of the Parent's wishes and were not intended to be the "current educational placement" after the summer of 2000. Even though the Parent preferred placement under the [State 2] IEP, the District made clear and the Parent was on notice that the District planned to evaluate the student and create a new IEP after the summer. The courts in *Verhoeven* and *Leonard* declined to apply 20 U.S.C. § 1415(j) under similar circumstances.

C. OSEP Policy Memorandum 96-5.

The IDEA is silent regarding the responsibilities of a state to implement the existing IEP of a student who transfers to that state from another state. *See Radnor Township* at 649. However, the United States Department of Education's Office of Special Education Programs (OSEP) has addressed this issue. On December 6, 1995 OSEP adopted Policy Memorandum 96-5 (OSEP 96-5), which provides in part as follows:

> [W]hen a disabled student moves from State A to State B . . . it is our conclusion that under [the IDEA], the State B school district is not required to adopt the most recent evaluation and implement the most recent individualized education program (IEP) developed for the disabled student by the State A school district. . . .
>
> When a student moves from a school district in State A to a school district in State B, the State B school district first must ascertain whether it will adopt the most recent evaluation and IEP developed

> for the student by the State A school district. Since the State A school district's evaluation and IEP were based in part on the education standards and eligibility requirements of State A, the student's evaluation and IEP developed by the State A school district might not necessarily be consistent with the education standards of State B. Therefore, the State B school district must determine, as an initial matter, whether it believes that the student has a disability and whether the most recent evaluation of the student conducted by the school district in State A and the State A school district's IEP meet the requirements of [the IDEA] as well as the education standards of State B.

As applied to the facts of the present case OSEP 96-5 provides that the District was not obligated to adopt the [State 2] IEP. The Parent argues, however, that OSEP 96-5 is not the law and that even if it is authoritative it does not apply to the facts of this case. The Administrative Law Judge disagrees with these arguments.

1. OSEP did not adopt Policy Memorandum 96-5 as a regulation, and it does not have the effect of law. *Radnor Township* at 649. Nevertheless, OSEP is the agency charged with the responsibility of administering the IDEA. 20 U.S.C. §1402(a). As such, OSEP is entitled to deference in its interpretation of the IDEA, including the stay-put provision. *Chevron, U.S.A., Inc. v. Natural resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984); *cf. Springer v. Fairfax County School Board*, 134 F.3d 659 (4th Cir. 1998).[4]

The United States Third Circuit Court of Appeals analyzed OSEP 96-5 in *Radnor Township*. That court concluded that OSEP's opinion that one state need not automatically accept and implement an IEP developed in another state was entitled to deference in the courts. The court found that OSEP 96-5 was well reasoned, persuasive, and consistent with the IDEA. Particularly, the court emphasized the importance of each state being able to provide education and services as required by the IDEA that meet the standards of that state. *Radnor Township* at 650.

The court in *Radnor Township* therefore concluded that when a parent unilaterally removes a child from an existing placement determined in accordance with the procedures of one state and puts the child in a placement in a second state that was not established pursuant to the second state's procedures, the stay-put provisions of the IDEA are inoperative until the current state or local educational authorities and the parents arrive at a new placement. The first state's IEP need

[4] The United States Supreme Court afforded deference to an OSEP policy letter in *Honig v. Doe*, 484 U.S. 305, 325 n. 8 (1988). In addition, Colorado law is consistent that an agency's construction of the statute it administers is entitled to great weight. *See Janssen v. Industrial Claim Appeals Office,* 00CA2252 (Colo. App. Sept. 27, 2001), 30 Colo. Law. 220 (Nov. 2001); *Mile High Greyhound Park v. Colorado Racing Commission,* 12 P.3d 351 (Colo. App. 2000)

not be treated by the second state as continuing automatically in effect. *Radnor Township* at 651.

The Administrative Law Judge finds the reasoning in *Radnor Township* to be persuasive and sensible and concludes that OSEP 96-5 should be applied in this case. Accordingly, the Administrative Law Judge concludes that the IDEA, as interpreted in OSEP 96-5, did not require the District to adopt the Student's [State 2] IEP, and that the District was entitled to attempt to work with the Parent to develop a new IEP after the summer of 2000.

2. The Parent argues that the Administrative Law Judge should not follow OSEP 96-5 or the *Radnor Township* decision because, unlike those authorities, the District here actually implemented the first state's IEP in the summer of 2000. Therefore, the Parent asserts that the District and the Parent implicitly reached agreement that the ESY services provided in the summer of 2000 constituted the Student's "then-current educational placement". However, the facts do not lead to a conclusion that any implicit agreement was reached that these services would constitute a "placement", particularly in light of the District's reservations regarding the Students assessment and plan. Rather, these services were provided only as a temporary accommodation of the Parent's wishes pending the upcoming IEP meeting.

More importantly, the provision of services under these circumstances does not constitute a meaningful distinction invalidating the reasoning of OSEP 96-5 or *Radnor Township*. The underlying rational of those authorities is that the state receiving a student who has an IEP from an earlier state has the responsibility to assess and place the child under the second state's policies, mandates and procedures. *Radnor Township* at 650. That rationale does not change merely because, as here, the second state agreed to a temporary accommodation until it could accomplish those functions.

3. The Parent also argues that the provision of services in summer 2000 is evidence that the District believed that [State 2]'s educational standards were consistent with Colorado's standards. In addition, according to the Parent this fact reflects that, as discussed in *Radnor Township* and OSEP 96-5, Colorado has had the opportunity to exercise its supervision over the Student's education.

The Administrative Law Judge does not agree with this argument. As noted above the District did not accept, adopt or implement the [State 2] IEP except as a temporary accommodation. In addition, the District had reasonable grounds to question the [State 2] IEP and notified the Parent that it planned to do its own assessment. Therefore, the evidence does not support the Parent's claim that Colorado educational authorities had accepted the [State 2] IEP as meeting Colorado educational standards.

D. Conclusion Regarding Stay-Put Provision.

For the reasons set forth in Paragraphs A through C, above, the Administrative Law Judge concludes that the stay-put provision of 20 U.S.C. §1415(j) did not require the District to adopt any part of the [State 2] IEP or to continue services under that IEP after the summer of 2000.

III. Colorado Regulation 4.03

A school district may violate the IDEA if it fails to comply with more stringent state law requirements. *Radnor Township* at 652; *Frith v. Galeton Area School District,* 900 F. Supp. 706, 712 n. 9 (M.D. Pa. 1995). CDOE's special education regulations under the Exceptional Children's Educational Act[5] provide options to school districts when a child transfers into a school district. CDOE Regulation 4.03, 1 CCR 301-8.

The District argues that Regulation 4.03 applies only to children who transfer into a school district from another district within Colorado. The District's director of special education testified before the IHO that school districts throughout Colorado interpret Regulation 4.03 to apply only to intrastate transfers, and that districts apply OSEP 96-5 to interstate transfers (Transcript, pp. 286-87). However, CDOE, not individual school districts, is responsible for construction of its own regulations regarding special education. While a CDOE interpretation of this regulation might be entitled to deference, the interpretation of local school districts is not entitled to any particular weight or deference.[6] Further, the regulation itself is not ambiguous. By its terms Regulation 4.03 applies whenever a child moves into a school district, regardless of the location from which the child transferred; the language of the regulation does not limit its applicability to intrastate transfers. For these reasons, the Administrative Law Judge concludes that Regulation 4.03 applies in this case.

The IHO's decision did not address the applicability of Regulation 4.03. Nevertheless, that rule was raised at the hearing and is addressed by the parties in their briefs. The Administrative Law Judge will therefore consider Regulation 4.03.

Regulation 4.03 provides a school district with three options when a child known to have been receiving special education services transfers into a school district. Two of these options are relevant to the discussion in this case.

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[5] Section 22-20-101 *et seq*., C.R.S. (2001).

[6] *See Janssen v. Industrial Claim Appeals Office, supra*; *Mile High Greyhound Park v. Colorado Racing Commission, supra.*

A. Option One: Implement the IEP.

One relevant option is to provide services immediately "in accordance with the child's IEP". Regulation 4.03(1). The District did not, as argued by the Parent, adopt this option. Although services were provided that appeared in the [State 2] IEP, these services were not in "accordance" with that IEP, because the District did not accept or adopt the [State 2] IEP.

Even if the District were considered to have provided services in accordance with the [State 2] IEP, the District was not obligated to continue services under that IEP indefinitely. Both state and federal regulations permit a school district to perform a comprehensive evaluation at any time conditions unique to the child warrant. CDOE Regulation 4.01(3)(j), 1 CCR 301-8; 34 C.F.R. §300.536(b). The District had reasonable grounds to question the [State 2] IEP's evaluation and placement, and the Student had not been in school for much of the prior school year. These conditions warranted a new evaluation under CDOE Regulation 4.01(3)(j) and 34 C.F.R. §300.536(b). Therefore, even under option one the District could have provided the ESY services from the [State 2] IEP and then attempted to evaluate the Student after the summer.

B. Option Two: Complete Assessment.

A second option under Regulation 4.03 is to make a complete assessment and plan within 30 school days, in the meantime providing services from the last IEP. Regulation 4.03(3). The District complied with this option: the District provided services from the [State 2] IEP (summer 2000 ESY services) while it proceeded to attempt a new assessment in August, 2000. This latter attempt was thwarted by the actions of the Parent in refusing to provide the necessary consent.

Further, the District met the 30 school day requirement of Regulation 4.03(3). Neither the Exceptional Children's Educational Act nor the CDOE regulations define a "school day". However, the regulations under the IDEA define a school day as any day that children are in attendance at school for instructional purposes. 34 C.F.R. §300.9 (c) (1).

In the present case the Parent registered the Student on the last school day of the 1999-2000 school year and the District scheduled the IEP meeting for August 30, 2000, which was the first day that teachers would be back on duty after the 2000 summer break. Although the Parent asserts that "school days" should include the time the Student was receiving services at home during the summer, the federal regulation only counts as a school day the time that students are in attendance *at school.*

Accordingly, the District initiated the assessment and planning process within one school day. The Parent prevented that process from moving forward.

There is no reason to believe that the District would not have been able to meet the 30 school day time limit of regulation 4.03(3) had it been allowed to proceed. The District has therefore complied with Regulation 4.03(3).[7]

IV. Nature of the Evaluation of the Student

The Parent refused to sign the forms necessary to allow the District to evaluate the Student. The Parent required that the District perform only a "re-evaluation" consisting of a few supplementary tests, rather than a complete evaluation to determine the Student's condition and appropriate placement. The Parent claims that the District was not entitled to perform a complete evaluation, including an assessment of the Student's special education eligibility and proper educational placement. Therefore, the Parent blames the District for the absence of an evaluation and claims that the District was thus required to continue the [State 2] IEP until these administrative proceedings are concluded.

A. Complete Evaluation.

The Parent makes several factual arguments as to why a complete evaluation was unwarranted or unnecessary. However, the Parent cites no authority that the District is limited to a supplemental evaluation only. In fact, the District has the authority to conduct a complete assessment. Both state and federal regulations permit a school district to perform a comprehensive evaluation at any time conditions unique to the child warrant. CDOE Regulation 4.01(3)(j), 1 CCR 301-8; 34 C.F.R. §300.536(b). As concluded above in Section III, A of this Decision, the conditions present in this case warranted a comprehensive evaluation.

In addition, OSEP 96-5 states that for a student arriving from another state a school district may conduct a "preplacement evaluation" under 34 C.F.R. §300.531. An evaluation under §300.531 is a "full and individual initial evaluation". Further, as concluded above in Section III, B of this Decision the District proceeded in this case under CDOE Regulation 4.03(3). Regulation 4.03(3) requires a "complete assessment and planning".

Both state and federal regulations therefore support a complete, initial evaluation in a case such as this. The Parent was not entitled to require that the District perform any less of an evaluation. The Parent's goal was to ensure that the District would make few, if any, changes to the [State 2] IEP (Findings of Fact, Paragraph 20). However, the Parent was not entitled to accomplish that goal by restricting the District's assessment of the child.

[7] The Parent also argues that the 30-days began before June 6, because the District was aware of the [State 2] IEP by May 22, 2000. Even starting at May 22, thirty school days had not run by the time the Parent prevented the process from moving forward.

B. Independent Evaluation at Public Expense.

The Parent also argues that the District should be required to pay for an independent evaluation of the Student. However, under the IDEA regulations a parent may obtain an independent evaluation at public expense only under specific circumstances. 34 C.F.R. §300.502. First, a parent has the right to an independent educational evaluation at public expense only after the parent disagrees with an evaluation already obtained by the school district. 34 C.F.R. §300.502(b)(1). The school district then has the option of paying for the independent evaluation, or initiating a due process hearing to show that the school's evaluation is appropriate. 34 C.F.R. §300.502(b)(2).

The District was never allowed to proceed with its own evaluation. Until that occurs, the Parent is not entitled to an independent evaluation at public expense. 34 C.F.R. §300.502.[8]

V. The IHO's Order

The IHO granted the District's request to evaluate the Student's eligibility for special education services. The IHO's order provided that the Parent must provide the consent forms to allow the District to conduct an evaluation, participate in IEP meetings, and ensure that the Student regularly attend school.

In addition, the IHO ordered that the Student was to be placed in a special education resource room for a maximum of 45 days while the evaluations and IEP meetings were taking place. If after 45 days the IEP team was unable to formulate an IEP, the Student would be placed in a regular classroom as a stay-put placement unless the Parent and the District agreed otherwise. Under the IHO's order, if the Parent objected to this interim placement, refused to provide consent forms, or refused to participate in the IEP process, the Student's stay-put placement would be home schooling in accordance with Colorado law.

The IHO also determined that if the Parent did not participate in the IEP process or provide the consent necessary to an evaluation the Parent would be deemed to have chosen that the Student either be home schooled or must participate in the regular education program.

In view of the conclusions reached above in this Decision Upon State Level Review the IHO's orders are appropriate. The Parent has refused to allow the District to provide the Student with any type of education. As long as the Parent persists in this position the only available placement for the Student is

[8] The Parent notes that under 34 C.F.R. §300.502(d) a due process hearing officer can request an independent evaluation at public expense. The IHO did not do so, and the Administrative Law Judge on this State Level Review finds no need to order such an evaluation. Until the District performs its evaluation it cannot be said that an independent evaluation is warranted or necessary.

home schooling in accordance with Colorado law or placement in a private school at the Parent's expense.

If the Parent notifies the District that she will allow the District to perform a complete evaluation and will participate in the IEP process, that process must be completed without undue delay, but in no case more than 30 days. OSEP 96-5; CDOE Regulation 4.03(3). In the interim, the Student must either be home schooled in complete compliance with Colorado law or be placed in a regular classroom (pursuant to OSEP 96-5) or such other placement as the Parent and the District agree upon.

VI. Other Requested Remedies

A. Damages.

Monetary relief is available under the IDEA in the form of reimbursement when a parent has unilaterally obtained special education and related services that a school district has failed to provide. *See, e.g., Sellers v. School Board of City of Manassas,* 141 F. 3d 524 (4th Cir. 1998) (although the IDEA does not provide for damages, it does authorize tuition reimbursement); *Crocker v. Tennessee Secondary School Athletic Association*, 980 F.2d 382 (6th Cir. 1982) (relief under the IDEA does not include damages, but does include restitutionary type relief for the expenses of providing educational services); *Wenger v. Canastota Central School District*, 979 F. Supp. 147, 152 (N.D.N.Y. 1997) (the IDEA only provides monetary relief in the form of reimbursement when parents have unilaterally obtained special education and related services at parents' expense).

In the present case the Parent has not established an entitlement to reimbursement of educational expenses. She did not prevail on her claims at either the due process hearing or in this state level review. In addition, any educational expenses the Parent incurred resulted from her own actions in insisting on the implementation of the [State 2] IEP and preventing the District from properly evaluating and placing the Student.

B. Compensatory Education.

The Parent also seeks compensatory education for the Student for the period these administrative proceedings were pending. A student who has been denied FAPE under the IDEA may be entitled to appropriate compensatory education under certain circumstances. *See Parents of Student W. v. Puyallup School District No. 3*, 31 F.3d 1489 (9th Cir. 1994); *Wenger v. Canastota Central School District*, *supra*.

The IDEA does not establish specific educational standards. *Rowley* at 200. Rather, the IDEA places great emphasis on procedural requirements. *Rowley* at

205-06. If a state educational agency complies with the procedures of the IDEA, and if the IEP developed pursuant to those procedures is reasonably calculated to enable the student to receive educational benefit, the state has complied with the IDEA. *Rowley* at 201, 206-7.

In the present case there has been no determination that the District failed to comply with the procedures mandated by the IDEA. In fact, the Administrative Law Judge has concluded that the District complied with the requirements of both state and federal law. The District failed to develop an IEP only because of the actions of the Parent. Accordingly, the District has not denied FAPE to the Student and the Student is not entitled to compensatory education.

C. Attorney Fees.

Federal district courts have the discretion to award attorney fees in actions under the IDEA. 20 U.S.C. §1415(i)(3)(B). Even if an administrative law judge in a state level review has this same authority, an attorney fee award is not appropriate in this case because the Parent has not prevailed on any of her claims.

DECISION AND ORDER

It is the Decision of the Administrative Law Judge Upon State Level Review that the IHO's Order of October 2, 2001 is affirmed.

If the Parent notifies the District that she will allow the District to perform a complete evaluation and will participate in the IEP process, that process must be completed without undue delay, but in no case more than 30 days. OSEP 96-5; CDOE Regulation 4.03(3). In the interim, the Student must either be home schooled in complete compliance with Colorado law or be placed in a regular classroom (pursuant to OSEP 96-5) or such other placement as the Parent and the District agree upon.

If the Parent continues to deny the District the opportunity to provide the Student with an education the only available placement for the Student is home schooling in accordance with Colorado law or placement in a private school at the Parent's expense.

The appeal of the IHO's order of October 2, 2001 is denied and dismissed.

DATED this ____ day of May, 2002

_____
MARSHALL A. SNIDER
Chief Administrative Law Judge