DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 99-05

DECISION UPON STATE LEVEL REVIEW

[Student], by and through her parents and next friends, [Mother] and [Father], and [Mother] and [Father], individually,

Petitioners,

v.

CHERRY SCHOOL DISTRICT NO. 5,

Respondent.

This decision constitutes the state level review of the decision of the impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act ("IDEA" or "the Act"), 20 U.S.C. Sections 1400 *et seq*., and Part II, Section A, VII of the Fiscal Years 1995-97 State Plan of the Colorado Department of Education ("the State Plan") in the above-captioned case.

[Student], by and through her parents and next friends [Mother] and [Father], and [Mother] and [Father], individually (referred to collectively as "the [Parents]"), appeal the decision of an impartial hearing officer to dismiss her claim under the IDEA, 20 U.S.C. Sections 1400 *et seq*. They also appeal the IHO's failure to hear her claim under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Sections 794 *et seq*. Kristin A. Kutz, Esq., and William P. Bethke, Esq., represent the [Student]. Cherry Creek School District No. 5 ("the District") is represented by Darryl L. Farrington, Esq.

PROCEDURAL BACKGROUND

The IHO issued his Order on September 8, 1999, without conducting a due process hearing. The District had submitted a Motion to Dismiss and a Corrected Motion to Dismiss, and the [Parents] had filed a Motion for Summary Judgment for Parents. The [Parents] had also filed a motion to amend their due process request.

In their briefs, the [Parents] argued that the IDEA guarantees [Student] a free appropriate public education ("FAPE") that by definition includes special education and related services that meet the standards of the state. According to the [Parents], those state standards include Colorado's public school choice laws. Under those provisions,

according to the [Parents], [Student] was entitled to enroll at [Elementary School], a school within the Cherry Creek School District, as a nonresident student. They also argued that the District's application of the school choice provisions was discriminatory. In contrast, the District contended that the school choice laws are not incorporated by FAPE and that the [Parents] challenge to the District's application of the school choice laws was not a viable claim under the IDEA.

The IHO granted the District's Motion to Dismiss, ruling that the IHO lacked jurisdiction over Cherry Creek School District. The IHO treated the due process issues raised on appeal as solely legal issues and concluded that Cherry Creek School District was not required to provide special education services to [Student] under state or federal law.

During the pendency of the IHO's review, the [Parents] put their home up for sale and rented a home in Cherry Creek School District, [Elementary School] attendance area. [Student] then reenrolled at [Elementary School] as a resident student.

The [Parents] appealed the IHO's decision. They filed their opening brief and their request to accept additional evidence on September 21, 1999, and the District submitted its reply brief on October 8, 1999, to which the [Parents] replied on October 19, 1999. On December 9, 1999, the Administrative Law Judge held oral argument at the [Parents]'s request. The parties submitted supplemental authority through December 30, 1999, at which time the matter became ready for decision.

For the reasons set forth below, the Administrative Law Judge concludes that the IHO properly dismissed the [Parents'] IDEA and Rehabilitation Act claims. Although the Administrative Law Judge agrees with the ultimate decision of the hearing officer, her decision is based on different legal grounds as set forth below.

SCOPE OF REVIEW

An officer making a state level review is required to make an independent decision based on an impartial review of the IHO's decision. 20 U.S.C. Section 1415(g). The Administrative Law Judge may seek or accept additional evidence if needed. 34 C.F.R. Section 300.510(b)(3)-(4); Part II, Section A, VII, B 9 b of the State Plan.

FINDINGS OF FACT

The IHO's findings of fact were relatively few and undisputed. Because the facts relating to the issue of jurisdiction under the IDEA and Section 504 of the Rehabilitation Act are not in dispute, the Administrative Law Judge has substantially adopted the factual findings of the IHO in this case. Based upon the entire record presented on the state level review, the Administrative Law Judge has added some detail to those

findings to create a clearer record and has supplemented the findings with additional evidence submitted by the [Parents]. [1]

1. [Student] was born with [ ]. She experiences some hearing loss and visual impairment and has a somewhat distinctive appearance. She is a child with a disability for purposes of the IDEA and has had an Individual Education Program ("IEP") her entire school career. For purposes of IDEA eligibility, she is considered "speech-language" impaired.

2. [Student] resided in the Cherry Creek School District for a portion of the 1996-97 school year and attended [Elementary School]. During the 1996-97 school year, the [Parents] moved out of Cherry Creek School District and into Littleton School District, a neighboring school district.

3. The [Parents] sought to re-enroll [Student] at [Elementary School] for the 1997-98 school year as a nonresident pursuant to Colorado's inter-district school-of-choice laws. Cherry Creek School District denied their application, and the [Parents] sought relief under the IDEA and Section 504 of the Rehabilitation Act. The [Parents] availed themselves of an appeals process related to denials of inter-district school-of-choice enrollments and prevailed at that level. [Student] was permitted to attend [Elementary School] as a nonresident student for the 1997-98 school year, and her IDEA/Section 504 challenge was resolved without judgment.

4. [Student] attended [Elementary School] as a nonresident student for the 1998-99 school year without incident.

5. For [Student]'s last year of elementary school, her parents sought continued enrollment for her for the 1999-2000 school year at [Elementary School]. The District denied their request on the grounds that there was a lack of teaching staff to accommodate [Student]'s special education program.

6. On June 1, 1999, the [Parents] sought a due process hearing under the IDEA and Section 504 of the Rehabilitation Act and appealed through the inter-district school-of-choice appeals process. [2]

7. During the pendency of the IHO's review of their case, the [Parents] placed their home on the market on July 31, 1999. They rented a home in the Cherry Creek School District, [Elementary School] attendance area, on September 1, 1999, so that [Student] could enroll at [Elementary School] for her final year of elementary school.

8. The [Parents] sold their home in the Littleton School District on November 2, 1999. For a two-month period the [Parents] incurred the costs of the mortgage on

---

[1] The District's objection to the Administrative Law Judge's consideration of additional evidence is without merit. *See* 34 C.F.R. Section 300.510(b)(3)-(4); Part II, Section A, VII, B 9 b of the State Plan.

[2] The [Parents] complain about their lack of participation in the inter-district school-of-choice appeals process, but do not maintain that their procedural rights under the IDEA were violated as a result.

their home in Littleton School District and their rental home in Cherry Creek School District.

9. [Student] is currently enrolled at [Elementary School] as a resident student.

IHO'S CONCLUSIONS AND DECISION

The two central legal arguments before the IHO were: 1) whether the IDEA's guarantee of a "free appropriate public education" meeting state standards includes Colorado's school choice laws; and 2) whether the District discriminated against [Student] in violation of Section 504 of the Rehabilitation Act of 1973.

The IHO did not squarely address the issue of [Student]'s alleged right to reenroll at [Elementary School] as a nonresident student under the IDEA. Instead, the IHO, referring to Colorado's Exceptional Children's Educational Act ("ECEA"), specifically Sections 22-1-102, 22-20-102, and 22-20-107.5, C.R.S., determined that [Student] should receive special education services in her district of residence, not Cherry Creek School District. Under the provisions of ECEA, the administrative unit responsible for carrying out the requirements of the state's special education laws is the school district in which a student resides. According to the IHO, in [Student]'s case, the responsible administrative unit is Littleton School District. He therefore concluded that Cherry Creek School District had no obligation to [Student].

The IHO summarily concluded that the application of Section 22-32-116(2), C.R.S., which governs the enrollment and reenrollment of nonresident, out-of-district students, is not an IDEA issue. And, the IHO did not address the [Parents]'s Rehabilitation Act claim.

ISSUES ON APPEAL

The [Parents] identify two primary issues on appeal: First, whether the IHO improperly dismissed their IDEA claim; and second, whether the IHO erred in failing to consider their Section 504 Rehabilitation Act claim.

DISCUSSION

A. The IDEA Claim is Not Moot.

The [Parents] have moved back into the Cherry Creek School District, [Elementary School] attendance area, and [Student] is presently attending [Elementary School]. The [Parents] have thus achieved their immediate goal. The threshold question, then, is whether the [Parents] appeal is moot.

The [Parents] maintain that through their efforts they were able to secure an appropriate education for their daughter but that this education has not been "free." They therefore seek reimbursement for the costs they incurred when they moved back into Cherry Creek School District to enable [Student] to attend [Elementary School]. They incurred the most significant costs over the two-month period when they had to pay the mortgage on their home in Littleton School District and the monthly rental on their home in Cherry Creek School District. The Administrative Law Judge concludes that because the [Parents] are seeking reimbursement for the costs they incurred to move back into Cherry Creek School District, their IDEA and Rehabilitation Act claims are not moot.

Section 1415(i)(2)(B)(iii) of the IDEA provides that a court "shall grant such relief as the court determines is appropriate." In *School Committee of the Town of Burlington, Massachusetts v. Department of Education of the Commonwealth of Massachusetts*, 471 U.S. 359 (1985), the Unites States Supreme Court ruled that this statutory language confers broad discretion on the court. Specifically, the Supreme Court held that a court may order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed individualized education program ("IEP"), is proper under the Act. *Id*. at 369.

While equitable reimbursement of private tuition fees is recoverable under IDEA, it is less clear whether reimbursement of costs such as those at issue in this case is also contemplated by the IDEA. While there are many federal circuit court cases discussing the reimbursement of private tuition fees, the Administrative Law Judge is not aware of any cases that address the kind of reimbursement sought by the [Parents] in this case. Nevertheless, the Administrative Law Judge concludes, based on the language of the IDEA and the Supreme Court's interpretation of that language in *Burlington*, that the expenses borne by the [Parents] to ensure [Student]'s placement at [Elementary School] are sufficiently analogous to private tuition fees to entitle them to reimbursement. They must, of course, first prevail on their IDEA claim. Accordingly, although the [Parents] have, in effect, achieved the ultimate relief they seek, attendance at [Elementary School], their IDEA claim is not moot because of the equitable reimbursement they seek.

The Cherry Creek School District challenges whether the Administrative Law Judge even has the authority to consider this issue. [3] The *Burlington* court, however, addressed this very issue:

> Such post hoc determination of financial responsibility was contemplated in the legislative history: "If a parent contends that he or she has been forced, at that parent's own

[3] The District asserts that "neither the hearing officer nor the ALJ sitting in appellate review has jurisdiction to address a claim for monetary damages." In arriving at this conclusion, the District mistakenly characterizes the [Parents] claim for equitable reimbursement as a claim for damages.

> expense, to seek private schooling for the child because an appropriate program does not exist within the local educational agency responsible for the child's education and the local educational agency disagrees, that disagreement and *the question of who remains financially responsible is a matter to which the due process procedures established under [the predecessor to 1415] appl[y]*." S. Rep. No. 94-168, p. 32 (1975) (emphasis added).

Burlington, 471 U.S. at 371. *See* 34 C.F.R. 300.403(b) (1984) (disagreements and question of financial responsibility subject to the due process procedures).

Given that the statute, interpreting regulations and the Supreme Court all state that disputes over financial responsibility are part of the IDEA due-process proceedings, the Administrative Law Judge concludes that the issue of reimbursement is properly before her, and the [Parents] claims should be considered.

B. Colorado's School Choice Laws Are Not State Standards Within the Meaning of FAPE.

Although the [Parents] IDEA claim is not moot, they cannot avail themselves of relief under the IDEA.

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

The IDEA defines "free appropriate public education" as follows:

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

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

"Special education" under the Act is defined as "specially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including – (A)

instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and (B) instruction in physical education." 20 U.S.C. Section 1401(25).

The [Parents] IDEA claim is different from the more typical IDEA case, in which representatives of the disabled student contend that the student is being deprived of a free appropriate public education because the components of his or her individualized education program are deficient or because the student's placement at a particular school or institution is unsuitable. Here, the [Parents] are challenging the District's application of Colorado's school choice laws to [Student]. They maintain that under those laws that allow nonresident students to enroll in out-of-district schools or programs and, specifically, those provisions governing elementary nonresident students who were former residents of a school district, [Student] should be allowed to attend [Elementary School]. [4] They assert that their challenge to these state laws comes under the IDEA's federal umbrella.

According to the [Parents], the District, by refusing to let [Student] attend [Elementary School] as an out-of-district student, denied her a free appropriate public education. They argue that a free appropriate public education as defined by the Act means special education and related services that "meet the standards of the State Educational Agency." 20 U.S.C. Section 1401(8)(B). The [Parents] contend that "state standards of the State Educational Agency" should be broadly construed to include those statutory provisions concerning school choice, specifically Sections 22-32-116 and 22-36-101, C.R.S. Indeed, under their theory, Colorado's entire state education code are state standards enforceable under the IDEA.

Such an expansive interpretation of "state standards of the Educational Agency" virtually places no limits on the reach of the IDEA. Furthermore, the effect of such a broad application of the Act would be to federalize all state laws pertaining to education for the benefit of disabled children and to give disabled students a federal remedy their nondisabled peers would not have. For instance, a nondisabled, nonresident student who was similarly denied enrollment to [Elementary School] would not have any federal recourse.

Thus, only state education standards specific to the education of disabled children are those that are incorporated by the federal statute. Other state education provisions that are generally applicable to all school children, such as Colorado's school choice laws, are not. [5] While these more general education standards undoubtedly may

---

[4] Section 22-32-116, C.R.S., provides that if a pupil is enrolled in an elementary school and becomes a nonresident subsequent to the time of enrollment or becomes a nonresident during the time period between school years, the school district shall allow the pupil to remain enrolled in or to reenroll in the same elementary school provided certain conditions are met.

Section 22-36-101, C.R.S., is the general school choice law that requires school districts to enroll out-of-district nonresident pupils. It also sets forth the limited conditions under which a school district may deny out-of-district enrollment.

[5] The [Parents] also assert that because Colorado's Exceptional Children's Education Act ("ECEA"), Sections 22-20-102 *et seq*., C.R.S., which is the state counterpart to the IDEA, makes references to school choice, those provisions should be a part of FAPE. These references do not set out

affect and have a significant impact on the education of disabled students, they are not enforceable under the IDEA. This does not mean, however, that disabled students are not entitled to these rights. They may seek redress under state law, or, if, as in this case, the allegation is that a particular law is being applied discriminatorily, they may sue under Section 504 of the Rehabilitation Act of 1973.

The statutory language of IDEA, itself, dictates this conclusion. The term "free appropriate public education" is defined as "special education and related services that… meet the standards of the State educational agency." 20 U.S.C. Section 1401(8). What must meet the standards of the State educational agency are special education and related services. And special education means "specially designed instruction… to meet the needs of a child with a disability." 20 U.S.C. Section 1401(25). State laws that allow nonresident students to enroll outside of their districts of residence are not standards involving specially designed instruction that meet the needs of a child with a disability.

Moreover, the [Parents] overly broad interpretation of FAPE is inconsistent with the intended scope of the Act. Congress passed the IDEA "to bring previously excluded handicapped children into the public education systems of the States and to require the States to adopt procedures which would result in individualized consideration of and instruction for each child." *Rowley*, 458 U.S. at 189. "Thus, the intent of the Act was more to open the door of public education to handicapped children on appropriate terms than to guarantee any particular level of education once inside." *Id*. at 192. In other words, the IDEA provides a basic floor of opportunity upon which the states are free to build. *Amann v. Stow School System*, 982 F.2d 644, 647 (1st Cir. 1992). And, if a state elects to establish a higher standard for educating its disabled standards, i.e. assuring the "maximum possible development" of a child," then that higher standard is enforceable under FAPE. *Amann*, 982 F.2d at 647; *Town of Burlington v. Dep't of Educ., Commonwealth Of Mass.*, 736 F.2d 773, 789 (1st Cir. 1984). The IDEA incorporates these kinds of substantive standards that directly address the state's obligation to education its disabled students.

Neither the Supreme Court nor any federal circuit has clearly delineated which state standards must be met. However, in *David D. v. Dartmouth School Committee*, 775 F.2d 411, 418 (1st Cir. 1985), *cert. denied*, 475 U.S. 1140 (1986), the First Circuit, in considering whether the IDEA's predecessor incorporated state law generally, cast some light on the issue. "Our holding that the federal right to a free appropriate public education incorporates substantive rights authorized by state special education law which become part of the federal core right is bottomed on both the statutory language and authoritative legislative history." *Id*. at 418-19 (emphasis added). The First Circuit added: "Neither do we discern any intention that the federal Act preempt and reduce all state standards to the federal minimum." *Id*.

---

any substantive standards, but merely concern financial arrangements for disabled students who attend out-of-district schools as nonresidents or clarify that school choice is available to disabled students.

The Ninth circuit, however, has intimated it might reach a contrary conclusion. In *Students of California School for the Blind v. Honig*, 736 F.2d 538 (9th Cir. 1984), *vacated*, 471 U.S. 148 (1985), students of a residential school for the blind brought suit when the California Department of Education decided to move the school to another location. The students claimed, among other things, that the state defendants had violated California Education Code provisions relating to the seismic safety of school sites, in violation of the Education of All Handicapped Children Act of 1975 ("EAHCA") (the IDEA's predecessor) and Section 504 of the Rehabilitation Act. After the trial, the district court issued a preliminary injunction ordering the state defendants to conduct additional geological tests. In affirming the district court's issuance of a preliminary injunction, the Ninth Circuit noted that "although EAHCA does not expressly provide for seismic safety, there is a strong argument that it incorporates state law seismic standards." *Id*. at 546. The court did not decide this jurisdictional issue but noted that the students' argument was persuasive.[6]

The Ninth Circuit denied *en banc* review of the panel decision, and six circuit judges dissented from the court's denial. *Students of California School for the Blind v. Honig*, 745 F.2d 582 (9th Cir. 1984). Circuit Judge Sneed wrote:

> I write solely because the panel's EAHCA analysis was unnecessary and erroneous….
>
> [The Act's] emphasis on "special education" and "unique needs" belies the notion that EAHCA creates a federal cause of action with respect to all state requirements pertaining to education, including states' general education requirements. Rather, EAHCA imposes a structure on the states that requires individual consideration of each handicapped child's particular needs and provides a federal cause of action to redress the failure of state agencies to put in place standards designed to meet those special needs.

Id. at 583-84.

Given the statutory language and the lack of controlling authority otherwise, the Administrative Law Judge concludes that the IDEA operates to provide a basic floor of educational opportunity and to hold states to any higher standards they may enact specifically for educating disabled students. The IDEA's scope, therefore, does not extend to Colorado's school choice laws.

---

[6] In *Geis v. Board of Educ. Of Parsippany-Troy Hills*, 774 F.2d 575, 581 (3rd Cir. 1985), the Third Circuit Court of Appeals, in finding that state standards are incorporated by the Act, acknowledged the *Honig* decision but concluded: "In *Honig* [meeting the state standards of the state educational agency] was held to include the California standards for seismic safety of schools. 746 F.2d at 545. We think it even more clearly applies to a state's own standard of educational opportunity for handicapped children." *Geis*, 774 F.2d at 581 (emphasis added).

C. The IHO Properly Dismissed The Rehabilitation Act Claim.

The IHO failed to discuss the [Parents] Section 504 Rehabilitation Act claim and merely dismissed it along with their IDEA claim. His failure to address the Rehabilitation Act claim is not grounds for reversal for the reasons stated below.

The [Parents] theory of discrimination is that Cherry Creek School District encouraged nonresident, nondisabled students to enroll at [Elementary School] while it denied [Student]'s nonresident application on the basis of her disability. The Administrative Law Judge need not address the merits of the Rehabilitation Act claim because it is not properly before her.

Rehabilitation Act claims concerning the rights of children with disabilities are subject to state administrative review only if the relief being sought is also available under the IDEA. Otherwise, the Administrative Law Judge is without authority to review such claims.

Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. Section 794, provides: "No otherwise qualified individual with a disability in the United States…shall, solely by reason or her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance…." This section of the Rehabilitation Act, itself, does not require state administrative review of claims prior to filing suit. [7]

However, the IDEA imposes such a requirement on Rehabilitation Act claims if relief is also available under the IDEA. In 1984, the United States Supreme Court concluded that the IDEA's predecessor, the Education for All Handicapped Children Act ("EAHCA" or "EHA") was the exclusive avenue to pursue claims regarding publicly-financed special education. See *Smith v. Robinson*, 468 U.S. 992, 1013 (1984). In response to the *Smith* decision, Congress passed the Handicapped Children's Protection Act of 1986, Pub. L. No. 99-372, 100 Stat. 796 (codified at 20 U.S.C. Section 1415), to clarify that the EAHCA is not the exclusive remedy available to handicapped students. *Hayes v. Unified School District No. 377*, 877 F.2d 809, 812 (10th Cir. 1989). In opening up available remedies, Congress, imposed an exhaustion requirement.

Title 20 U.S.C. Section 1415(l) provides:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 (42 U.S.C. 12101 et seq.), title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.), or other Federal laws protecting the rights of children with disabilities, except that

[7] Although Title 34 C.F.R. Section 104.36 requires school districts to establish procedural safeguards, including, among other things, an impartial hearing, the regulation does not mandate administrative exhaustion.

> before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

"'In other words, when parents choose to file suit under another law that protects the rights of handicapped children – and the suit could have been filed under the EHA – they are first required to exhaust the EHA's remedies to the same extent as if the suit had been filed originally under the EHA's provisions.'" *Hayes*, 877 F.2d at 812 (quoting *Mrs. W. v. Tirozzo*, 832 F.2d 748, 756 (2d Cir. 1987)).

Because Colorado's school choice laws are not state standards encompassed by FAPE, the [Parents] cannot avail themselves of relief under the IDEA. Therefore, they need not exhaust their Rehabilitation Act claim against Cherry Creek School District. *Hayes*, 877 F.2d at 812*; Witte v. Clark County School District*, 197 F.3d 1271, 1274-75 (9th Cir. 1999); (student seeking only monetary damages under Rehabilitation Act and Americans with Disabilities Act need not exhaust administrative remedies under the IDEA); *Charlie F. v. Board of Education of Skokie School District 68*, 98 F.3d 9890 (7th Cir. 1996), see *Freed v. Consolidated Rail Corporation*, 201 F.3d 189 (3d Cir. 2000). [8]

In short, because relief is not available to the [Parents] under the IDEA, they need not seek administrative review of their Rehabilitation Act claim.

D. Miscellaneous Issues on Appeal.

1. The [Parents] raise numerous issues on appeal. Those issues concerning the IHO's failure to apply Colorado's school choice laws in their favor as a part of FAPE are without merit in light of the discussion above. The [Parents] argument that the IHO erred because he did not conduct a hearing is not persuasive. Curiously, the [Parents] argue that summary dispositions before an IHO are improper, when they themselves filed a motion for summary judgment. At any rate, because the issue of whether the [Parents] could state a claim under the IDEA could be resolved as a matter of law, it was appropriate for the IHO to decide the issue without hearing. The [Parents] are only entitled to a due process hearing under the IDEA if they have brought a viable claim under that statute. Without a viable claim under the IDEA, there is no point in conducting a due process hearing.

2. As for the [Parents] claim that the IHO erred in denying their motion to amend their notice of appeal, this position is also ultimately fruitless. While the IHO

[8] Rather than focusing on the statutory language of IDEA, the parties instead debate whether the issues raised by the [Parents] fall within the definition of "educational placement," which is one of the areas subject to due process hearings for Rehabilitation Act claims provided in 34 C.F.R. Section 104.36. In light of the Administrative Law Judge's finding above, she need not resolve this issue of "educational placement."

should have allowed the [Parents] to amend their due process request, his failure to do so is not reversible error.

In their Motion to Amend Due Process Request, the [Parents] invoke the so-called "stay put" provisions of the IDEA.[9] Because, however, the [Parents] have failed to state a claim under the IDEA, the "stay put" provisions applicable during the pendency of the IDEA administrative exhaustion process are not relevant.

The [Parents] second claim in their motion to amend challenges [Parents]'s purported classification as an "ILC" student for the purpose of excluding her from [Elementary School]. Whether the District's alleged mischaracterization of [Student] is a pretext is an issue relevant to her Rehabilitation Act claim, which, for the reasons explained above, is not before the Administrative Law Judge. *C.f. White v. York Int'l Corp*., 45 F.3d 357 (10th Cir. 1991). To the extent the issue may be related to her failed claim under the IDEA, the Administrative Law Judge is without authority to review it.

DECISION AND ORDER

It is the decision of the Administrative Law Judge that the IHO's decision is affirmed, but on different grounds. Colorado's school choice provisions are not incorporated by the IDEA; the [Parents] have, therefore, failed to state a claim under that federal statute. Because relief is not available to the [Parents] under the IDEA, they need not administratively exhaust their Rehabilitation Act claim before seeking judicial relief on that or any other claims based on alternate theories.

This decision of the Administrative Law Judge is the final decision on state level review. State Plan, Part II, Section A, VII, B 10.

Dated: March _____, 2000
Denver, Colorado

_____
SUNHEE JUHON
Administrative Law Judge

[9] 20 U.S.C. Section 1415(j) provides that during the pendency of proceedings, the child shall remain in the then-current educational placement.