BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2002003

DECISION UPON STATE LEVEL REVIEW

THOMPSON SCHOOL DISTRICT R2-J,

Appellant,

v.

[STUDENT], by his parents, [PARENTS],

Appellees.

This matter is the state level review of a decision of an impartial hearing officer ("IHO"), pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400 *et seq*. and the Rules of the Colorado State Board of Education ("Board") found at Sections 2220-R-1.00 *et seq.*, 1 CCR 301-8. These rules will be referred to by section number only.

A hearing was held before IHO Myron A. Clark, in accordance with the IDEA on December 11-14, and 17 and 18, 2001. The IHO issued his decision on January 11, 2002. The Appellant ("School District") filed an appeal with the Division of Administrative Hearings February 8, 2002.

The School District filed its brief April 8, 2002. The Appellees filed their answer brief May 15, 2002. Over the objection of the Appellees, Administrative Law Judge ("ALJ") Matthew E. Norwood permitted the School District to file a reply brief May 24, 2002. The ALJ entered this order at oral argument.

Oral argument was held June 4, 2002 before ALJ Norwood in the offices of the Division of Administrative Hearings. No new evidence was taken. W. Stuart Stuller, Esq. and Julie Tishkowski, Esq. represented the School District. Jack D. Robinson, Esq. represented the Appellee. In order to preserve confidentiality, the Appellee will be referred to as "[STUDENT]." His parents will be referred to as "[MOTHER]" and " [FATHER]" or "[PARENTS]."

SCOPE OF REVIEW

The ALJ, on state level review, is to issue an "independent" decision. 20 U.S.C. Section 1415(g) and 2220-R-6.03(11)(b)(v), 1 CCR 301-8. In the context of court reviews of state level decisions, such independence has been construed to require that

"due weight" be given to the administrative findings below. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). It is appropriate to apply this standard by analogy at the state administrative review level. Thus it is sensible for the ALJ to give deference to the IHO's findings of fact and to accord the IHO's decision "due weight," while reaching an independent decision based on a preponderance of the evidence.

THE IMPARTIAL HEARING OFFICER DECISION

In his Findings of Fact, Conclusions of Law, and Order ("the IHO Decision"), the IHO discussed two Individualized Education Program ("IEP") plans for [STUDENT], one dated September 8, 2000 and one July 24, 2001. The IHO determined that the September 8, 2000 IEP was properly formulated according to the IDEA. However, he also found that the July 24, 2001 IEP failed to provide documentation of a re-evaluation, was not in compliance with Board rules, and therefore failed to provide a free appropriate public education ("FAPE").

The IHO ordered the matter remanded to the School District with instruction to perform a re-evaluation, including the development of a health plan and a comprehensive transition plan, prior to commencing a new IEP process. The IHO ordered that he would retain jurisdiction to hear disputes arising from this process. As set forth below, the ALJ reverses this particular order.

The IHO also ordered damages for two time periods. First, for the time period of July 9, 2000 until October 23, 2000. This time period represents the period the IHO determined services should have commenced until the time they did commence pursuant to the September 8, 2000 IEP. During this period, [STUDENT]'s parents had arranged for tutoring at their own expense. Damages were calculated at the amount the School District ultimately agreed to pay for education when the IEP was in effect. This was the amount the School District paid its employees Amy Pollingue, Mary Bowman and Margaret Schultz when they were carrying out the September 8, 2000 IEP.

The IHO also ordered damages for the period of May 5, 2001 until the date of his decision, January 11, 2002. Included in that period is the summer break. The School District had determined to offer services over the break. May 5 is the date that Amy Pollingue resigned from providing services to [STUDENT]. Pollingue had been providing services pursuant to the September 8, 2000 IEP. When she resigned, [STUDENT]'s parents replaced her with a tutor at their own expense. Again, damages were calculated at the amount the School District agreed to pay its employees to carry out the September 8, 2000 IEP.

POST HEARING MATTERS

The School District attached to its brief a "Consideration/Permission for Re-evaluation form it says was presented to the IHO during closing arguments. As this document in not in evidence it will not be considered.

In briefing this matter before the ALJ, [STUDENT]'s parents stated that after the appeal was filed on February 8, 2002, the School District filed a Motion to Limit Continuing Remedy with the IHO. According to [STUDENT]'s parents, this motion argued that the School District should be relieved of the obligation of maintaining payment of [STUDENT]'s education at home. [STUDENT]'s parents attached an exhibit A to their brief, an order of the IHO dated March 14, 2002 where the IHO denies the relief requested. In that order, the IHO ordered School District personnel to undergo PBM/SAIL training: the method of teaching for autistic children favored by [STUDENT]'s parents.

However, as this matter was on appeal as of February 8, 2002, the IHO had no jurisdiction to entertain motions or issue orders. Any actions taken by the IHO in this matter and any orders issued by him after February 8, 2002 are void. The IHO does not retain jurisdiction over this case in any respect. Any matters determined by the IHO after February 8, 2002 will not be considered.

FINDINGS OF FACT

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

1. [STUDENT] was born [ ]. He suffers from autism, a pervasive developmental disorder. He is disabled for purposes of the IDEA. On [STUDENT]'s third birthday, [ ], 2000, he became eligible for services under the IDEA from the School District.

The September 8, 2000 IEP.

2. On March 9, 2000, the School District conducted a play-based assessment of [STUDENT]. [STUDENT]'s mother was also interviewed.

3. The School District conducted an initial Individualized Education Program ("IEP") meeting April 18, 2000. At that meeting, Mary Camp of the School District told [STUDENT]'s mother of the School District's plan to start a "LEAP program" to treat children with autism. In a LEAP program, a child with autism is treated outside of the home in a classroom with other non-disabled children. The School District had been approved in June of 1999 by the Colorado Department of Education to become part of a LEAP pilot project.

The parties initially were in conflict as to the number of hours of service to be provided. [STUDENT]'s mother requested 35 to 40 hours, which the School District refused. The IEP was not completed at that meeting. At that meeting, the parties agreed to have an additional assessment of [STUDENT] and to conduct the IEP meeting later.

In agreeing to postpone the meeting, however, there was no agreement between the parties that [STUDENT]'s mother would waive her right to education paid for by the School District. Nor did the School District agree to continue the IEP process on the

basis that it would be relieved from any obligation to pay for educational services for [STUDENT].

4. On May 3, 2000, [STUDENT]'s parents hired Tara Swartzendruber to be a tutor for [STUDENT]. On May 10, 2000, [STUDENT]'s parents contracted with Professional Behavior Management, Inc., Strategies for Autism Through Individualized Learning ("PBM/SAIL") of Kansas City, Missouri to provide educational services for [STUDENT]. [STUDENT]'s parents intended Swartzendruber to be trained by Ann Essig in the PBM/SAIL methods for providing educational services to children with autism.

5. Mary Camp and Karen Pielin of the School District met with [STUDENT]'s mother on June 13, 2000. [STUDENT]'s mother chose the date for this meeting. Pielin is the School District's director of special education. Ann Essig was also present at the meeting. The parties agreed to have Essig perform an evaluation of [STUDENT].

6. On July 9 and 10, Ann Essig conducted a two-day training in the PBM/SAIL methods for [STUDENT]'s mother and father and Swartzendruber. Swartzendruber began tutoring [STUDENT] thereafter at [STUDENT]'s parents' expense.

7. On July 14, 2000, Essig completed her assessment of [STUDENT].

8. On August 15, 2000, School District personnel again met with [STUDENT]'s mother to review the evaluation conducted by Essig and to complete the IEP process. The School District planned to have [STUDENT] enter an integrated preschool or LEAP program. However, [STUDENT]'s mother was adamant that an in-home, PBM/SAIL model be used. The School District therefore agreed to provide 17 to 20 hours per week in education under the PBM/SAIL model. The School District agreed to have its personnel trained in this model at School District expense. The School District understood that [STUDENT]'s parents would provide additional services.

9. On September 8, School District personnel again met with [STUDENT]'s mother where agreement was reached. The agreement was memorialized in a document. The document provided that the School District would provide 17.25 hours of services. Two hours per week were to be provided by Mary Bowman, two hours were to be provided in speech and language by Margaret Schulz. Loretta Shaw was to provide one hour per month (the .25 amount) in occupational therapy and Amy Pollingue, who was to be a tutor, was to provide 13 hours per week.

In the document, "Home" was listed as the primary instructional setting. The "yes" box for services beyond the regular school year was checked. These are also referred to as extended school year or "ESY" services. This means that the School District determined that it might need to provide services beyond the school year. ESY services are typically provided during the summer break, not during Thanksgiving, Christmas or spring breaks. The determination whether ESY services are needed is typically made in the spring of the school year. The IEP document listed as the documentation for the need for ESY services as: "reports from the SAIL program."

Sometime in the spring of 2001, the School District determined to provide ESY services to [STUDENT] over the summer break. The hours provided were to be 17.25 per week.

10. Services under the September 8, 2000 IEP began October 24, 2000.

11. In the fall of 2000, [STUDENT]'s mother had communicated to the School District about trying to reduce [STUDENT]'s migraine headaches by limiting certain foods.

The July 24, 2001 IEP.

12. On April 20, 2001, School District personnel had the first in a series of meetings with [STUDENT]'s mother to plan [STUDENT]'s IEP for the 2001-2002 school year. However, as Pielin was not present at the meeting, [STUDENT]'s mother did not want to make an agreement at that time. The meeting was terminated at her request.

13. On May 4, 2001, Amy Pollingue ceased working as a tutor for [STUDENT]. Pollingue had told the School District that she would quit on that date sometime in late February or early March of that same year. On May 7th, [STUDENT]'s parents hired Britt Collins to replace her.

14. On May 16, 2001, School District personnel met with [STUDENT]'s mother to finalize a new IEP agreement. The parties were unable to complete a new IEP agreement at that meeting and planned to meet the following day. However, before the meeting, [STUDENT]'s mother cancelled. On May 16, the School District planned to have an employee trained in PBM/SAIL methods to provide education to [STUDENT] over the summer break. This tutor was to replace Pollingue.

15. Although the meeting on May 17 had been cancelled, Pielin called [STUDENT]'s mother in order to arrange for the tutor to receive the PBM/SAIL training. [STUDENT]'s mother wanted to know the name of the tutor, which Pielin would not disclose. [STUDENT]'s mother grew angry and hung up the telephone.

16. Pielin then left a message with Essig to obtain PBM/SAIL training for the new tutor over the coming weekend when training had been scheduled. Essig did not return Pielin's call until the weekend was over. Essig then left a message with Pielin saying she would need to consult with her colleagues in Kansas City and call her back. A few days later, Essig did call back and left a message with Pielin that she would not be able to provide training.

17. In April of 2000, [STUDENT] started seeing Dr. Grossman for his food allergies. However, the results of Dr. Grossman's evaluations were never provided to the School District. The School District is generally able to accommodate health and biomedical needs in the classroom.

18. In May and June, School District personnel responsible for [STUDENT]'s IEP ("the IEP team") met every two weeks to discuss [STUDENT]'s situation. During these meetings, the IEP team reviewed an in-depth report on [STUDENT]'s current functioning provided by PBM/SAIL. The IEP team also reviewed a videotape showing

[STUDENT]'s improvement in functioning. Essig described what was happening on the videotape for the IEP team.

19. On June 25, 2001, School District personnel met with [STUDENT]'s mother and her counsel, Mr. Robinson. At the meeting, the School District proposed transitioning [STUDENT] to an integrated classroom setting with other non-disabled children. At the meeting, [STUDENT]'s mother stated that she believed that the School District would not be able to provide appropriate meals to [STUDENT] in light of his food allergies. No information was provided from a physician.

20. There was a follow-up meeting July 24, 2001. School District personnel appeared but [STUDENT]'s parents did not. At the meeting, the School District determined that [STUDENT]'s IEP should provide for education in an integrated preschool setting as well as in the home. It was the School District's plan to slowly transition [STUDENT] into an integrated classroom setting. The integrated classroom setting was to be the School District's LEAP program. The total hours per week of service to be provided under the IEP were 25.

At that meeting, the School District considered and rejected two other options for an educational setting: an early childhood special education setting, and a strictly home based program (his previous program). The School District rejected the early childhood special education setting because it would not allow him to be educated to the maximum extent possible with non-disabled peers. Also, the early childhood special education setting lacked consistency (an important aspect for children with autism) because this program met only twice per week.

The School District rejected the strictly home based setting also because it did not allow [STUDENT] to be educated with non-disabled peers. It would not allow him to interact with other children or to generalize what he learns across various settings. It also would not allow him to work on peer imitation skills, play skills or social skills.

Under this IEP, the School District planned to meet with [STUDENT]'s parents to develop a health plan for him.

The School District planned to implement this July 24, 2001 IEP on August 27, 2001.

21. On July 26, 2001, Pielin sent a letter to [STUDENT]'s parents memorializing the events at the July 24 meeting. The letter enclosed a finalized IEP agreement reduced to writing for the 2001-2002 school year.

22. On July 11, 2001, [STUDENT]'s parents filed an appeal of the School District action.

23. [STUDENT]'s parent continued to provide educational services to [STUDENT] over the summer of 2001.

CONCLUSIONS OF LAW

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

I. The July 24, 2001 IEP.

1. The School District first challenges the IHO's conclusion that the July 24, 2001 IEP violated the IDEA. The IHO found that the School District failed to conduct a re-evaluation prior to a significant change in placement. He relied on Section 4.029. That rule provides:

> Prior to a significant change in placement for education purposes, a re-evaluation in accordance with Section 4.01(3)(j) of these Rules shall be conducted.

The ALJ agrees with the IHO that the change from an in-home education to an integrated setting is a "significant change in placement" as described in Sections 4.01(3)(j)(i) and 5.04(2). The question then is whether the School District performed a re-evaluation in accordance with Section 4.01(3)(j).

The ALJ reverses the IHO's determination that the July 24, 2001 IEP failed to comply with the IDEA. The ALJ concludes that the School District performed a re-evaluation of [STUDENT]'s educational program as required by Section 4.01(3)(j). As the ALJ makes this order, he also reverses the order of the IHO for the School District to perform a re-evaluation, including the development of a health plan and a comprehensive transition plan. IHO Decision, p. 8.

The IHO found that the School District's re-evaluation was deficient in that there was no documentation of such a re-evaluation as described in Section 4.01(3)(i). The IHO noted that the July 24, 2001 IEP document did not contain a "documentation of evaluation" form as appeared in September 8, 2000 IEP. Nor did the drafts of the July 24, 2001 IEP contain such a form.

The School District argues that the requirement of documentation only appears in Section 4.01(3)(i), while Section 4.029 requires a re-evaluation in accordance with Section 4.01(3)(j). The School District notes that Section 4.01(3)(i) relates to the initial assessment. It goes on to point out that the "documentation of evaluation" form the IHO found present in the September 8, 2000 IEP, but missing in the July 24, 2001 IEP, says on its face that it is "required for eligibility meetings only."

Certainly the printing on the document is not controlling. The ALJ also rejects the School District's argument that the use of the term "re-evaluation" in Section 4.01(3)(j) excludes the "assessment" requirements of Section 4.01(3)(i). Section 4.01(3)(j)(i) provides that comprehensive evaluations "must be completed in accordance with these Rules." It does not say the re-evaluation is only to be done in accordance only with Subsection 4.01(3)(j). Also, there is no description of what is to be included in such a re-evaluation in the language of Section 4.01(3)(j) itself. The Rules use the words "assessment," "reassessment," "evaluation" and "re-evaluation" interchangeably. In Section 4.01(3), titled "assessment process," it says: "an assessment process for

children . . . shall be provided for the purposes of evaluation for eligibility and planning." Section 5.04(2)(b) says a "significant change in placement shall be made upon consideration of reassessment. Such change shall be made only by an IEP team with the addition of those persons conducting such assessment."

Nevertheless, the ALJ concludes that an analysis of whether the School District truly performed a re-evaluation should not turn on the presence or absence of a form. In particular, the ALJ concludes that the requirement to document found in Section 4.01(3)(i) applies to "the meeting at which a disability is determined." It does not apply to [STUDENT]'s situation where disability is not in dispute. This is supported by Section 4.01(3)(j)(iv), which permits the IEP team to make, without additional data, a determination that the child no longer has a disability. In such event, the parents have the right to request a health assessment.

Most importantly, the School District performed a re-evaluation in a substantive sense. The IEP team met from time to time, reviewed material from PBM/SAIL and also reviewed the videotape. At the July 24, 2001 meeting, the School District considered a number of possible options and determined that [STUDENT]'s IEP should be an integrated preschool setting as well as in the home. The School District planned to slowly transition [STUDENT] into an integrated classroom setting. At that meeting, the School District considered and rejected an early childhood special education setting, and a strictly home based program. The School District rejected the early childhood special education setting because it would not allow him to be educated to the maximum extent possible with non-disabled peers. Also, the early childhood special education setting lacked consistency because this program met only twice per week.

The School District rejected the strictly home based setting also because it did not allow [STUDENT] to be educated with non-disabled peers. It would not allow him to interact with other children or to generalize what he learns across various settings. It also would not allow him to work on peer imitation skills, play skills or social skills.

Based on this substantive re-evaluation, the ALJ concludes that the July 24, 2001 IEP was designed to provide a FAPE to [STUDENT].

In addition to not finding a re-evaluation document, the IHO also focused on the absence of a health history as described in Section 4.01(3)(i)(iii). Again, though, such a health history is required only for the meeting "at which a disability is determined." There is no basis to conclude, from the absence of a health history, that the School District's re-evaluation was not "comprehensive" as required by Section 4.01(3)(j)(i). The requirement for a health history in Section 4.01(3)(i)(iii) relates chiefly to issues of physical functioning such as vision and hearing acuity, matters not at issue here. Additionally, the evidence at hearing was that the School District is generally able to accommodate health and biomedical needs in the classroom. Under the July 24, 2001 IEP, the School District planned to meet with [STUDENT]'s parents to develop a health plan for him. [STUDENT]'s parents had not shared with the School District Dr. Grossman's evaluations.

Other than the perceived procedural errors found by the IHO, the IHO concluded that the integrated classroom setting or "LEAP" program proposed by the School District in the July 24, 2001 IEP was "designed to provide significant educational benefit when properly implemented and should provide FAPE to the child." IHO Decision, p. 5. This supports the conclusion that the School District's re-evaluation was substantive and genuine. Moreover, "procedural defects alone do not constitute a violation of the right to a FAPE unless they result in the loss of an educational opportunity." *T.S. v. Independent School District No. 54*, 265 F.3d 1090, 1095 (10th Cir. 2001); *See also Urban v. Jefferson County School District, R-1,* 89 F.3d 720, 727 (10th Cir. 1996).

II. Damages.

A. Damages for the Period July 9, 2000 Until October 23, 2000.

The IHO concluded that the September 8, 2000 IEP was formulated in accordance with the IDEA. The ALJ adopts this conclusion. The IHO also concluded that educational services later described in this IEP were begun July 9, 2000. The IHO declined to order damages compensatory education for the time period from the play-based assessment of March 9, 2000 until July 9, 2000. Neither the Appellees nor the School District have appealed this determination and it will be undisturbed.

The IHO ordered damages, or compensatory education, for the time period of July 9, 2000 until October 23, 2000. This period is calculated as the date [STUDENT]'s parents began incurring expenses under the PBM/SAIL program until the day before the School District began providing services under the properly formulated September 8, 2000 IEP.

The School District challenges this. It argues that the delays in preparing the IEP were either caused by or agreed to by [STUDENT]'s mother. While this may be true, it is also true that [STUDENT]'s parents never agreed to waive any request for reimbursement from the School District for the tutoring they paid for in the interim. Nor did the School District continue the formulation of the IEP with the understanding that it would be released from the obligation to provide for services for the period the IEP was late.

Section 4.01(2)(c) requires the School District to complete the child's IEP within 45 school days from the special education referral. The School District states that it delayed the formulation of the IEP in order to comply with the "interactive and collaborative process" envisioned by the IDEA. It argues that it is being whipsawed between the requirement to be cooperative and the need to complete the process in 45 days. Yet there is no unfairness in requiring the School District to pay for expenses it would have had to pay if agreement had been reached earlier. The parents paid for educational expense during this time. The IHO based the amount to be paid on the amount the School District ultimately agreed to provide in the September 8, 2000 IEP. To do otherwise would provide the School District a windfall.

The ALJ therefore adopts the IHO's conclusion that the School District should pay for damages for the period July 9, 2000 to October 23, 2000. The ALJ also adopts the method of calculation ordered by the IHO. Compensation should be calculated by

that amount the School District ultimately did pay Amy Pollingue, Mary Bowman and Margaret Schultz, when they were carrying out the September 8, 2000 IEP after October 23, 2000.

B. Damages for the Period May 5, 2001 Until January 11, 2002.

The ALJ has reversed the IHO's decision that the July 24, 2001 IEP was improperly formulated. The ALJ also concludes that this IEP provided a FAPE. In the absence of a violation of his right to an appropriate education, [STUDENT] is not entitled to damages. *Urban v. Jefferson County School District, R-1,* 89 F.3d 720, 727 (10th Cir. 1996). That IEP was to take effect August 27, 2001. Therefore, the ALJ orders that no compensatory education shall be had after that date.

The School District was responsible for ESY services over the summer break pursuant to the September 8, 2000 IEP. Amy Pollingue, [STUDENT]'s principal tutor, ceased providing services after May 4. Therefore, the ALJ upholds the IHO's order of damages after May 5. The ALJ also adopts the method of calculation by the IHO: the amount the School District did pay its personnel under the September 8, 2000 IEP. However, no damages shall be awarded after August 26, 2001, the date the second IEP would have been effective.

In the briefs of the parties there was argument as to whether the IHO should have continued the hearing date. As the ALJ has not ordered damages for the period of time the hearing was continued, this issue is now moot and need not be resolved.

DECISION

The School District shall pay to [STUDENT]'s parents for compensatory education for the period July 9, 2000 until October 23, 2000. The amount to be paid shall be calculated by what it did pay to carry out the September 8, 2000 IEP.

The School District shall also pay this same amount for the period May 5, 2001 until August 26, 2001.

This Decision Upon State Level Review is the final decision on state level review except that any party has the right to bring a timely civil action in an appropriate court of law, either federal or state.

DONE AND SIGNED

July _____, 2002

MATTHEW E. NORWOOD
Administrative Law Judge

ED 2002003
Tape #5051, 5052 and 5053

CERTIFICATE OF SERVICE

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

Jack D. Robinson
1660 Lincoln Street, Suite 2220
Denver, CO 80264

W. Stuart Stuller
Julie Tishkowski
2595 Canyon Blvd., Suite 400
Boulder, CO 80302-6737

and to

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

on this ___ day of July, 2002.

_____
Secretary to Administrative Law Judge