BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2002004

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[Student], by and through his parent, [parent],

Appellant,

v.

SCHOOL DISTRICT NO. 1, CITY AND COUNTY OF DENVER,

Appellee.

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*. The IDEA requires the provision of a free appropriate public education ("FAPE") to children with a disability.

A hearing was held before IHO Andrew J. Maikovich on January 28-31, February 1, 13, 14, 22, 27, 28 and March 13, 2002. At this hearing, the School District was represented by counsel. Appellant's mother appeared on behalf of Appellant. The IHO issued his decision on April 2, 2002.

The Appellant filed an appeal with the Division of Administrative Hearings on May 3, 2002. After that, the case was continued repeatedly. See the Administrative Law Judge's order of February 5, 2003 and March 21, 2003 for a discussion of the reasons for the continuances.

Oral argument was held June 9, 2003 before Administrative Law Judge ("ALJ") Matthew E. Norwood in the offices of the Division of Administrative Hearings. James P. Rouse, Esq. appeared on behalf of the Appellant. Lorna Candler, Deputy General Counsel appeared on behalf of the School District. In order to preserve confidentiality, the Appellant will be referred to as "[student]" and his mother as "[student]'s mother." New testimony was received from [student]'s mother at oral argument. The School District declined to offer evidence in response through its own witnesses. Exhibits A through I were also admitted at oral argument.

SCOPE OF REVIEW

The ALJ, on state level review, is to issue an "independent" decision. 20 U.S.C. Section 1415(g). 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.

FINDINGS OF FACT

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

1. [Student]'s date of birth is [DOB]; he is 17 years old.

2. [Student] is disabled for purposes of the IDEA with dyslexia, a learning disability.

3. In 1999, [student] attended Martin Luther King Middle School ("MLK"). There he received special education services under the IDEA for his disability.

4. In April of 1999, [student] was suspended from MLK for refusing to comply with the dress code, specifically, refusing to tuck in his shirt. A person at MLK provided [student]'s mother with a notice of suspension regarding [student]. (Exhibit A.[1]) After providing the notice to [student]'s mother, Shirley L. Scott of MLK added additional information to the notice without informing [student]'s mother. (Exhibit B.) It is unclear why Scott added this information.

5. On October 8, 1999, Mrs. Arnold-Ndiaye of MLK provided to [student]'s mother a notice of an up-coming IEP meeting. (Exhibit C admitted at oral argument.) However the notice did not provide when the meeting would be held. After providing exhibit C to [student]'s mother, someone at MLK added the October 26, 1999 date of the meeting. (Exhibit D.) It is unclear from the evidence why MLK took this action. However, there is insufficient evidence to impugn any evil motive to MLK or to the School District in this modification of exhibit C.

6. On October 26, 1999, MLK conducted a "triennial review" IEP meeting. At that meeting, the "IEP team," as defined in 34 CFR section 300.16, determined that [student] no longer had a learning disability. This review was incomplete because a psychologist had not evaluated [student]. The document in the record setting out the

[1] The ALJ will use the letters of the documents admitted at oral argument. These same documents are attached to [student]'s Opening Brief. However, the documents attached to the brief are off by one letter from the documents admitted at hearing. The School District's Response Brief also refers to these exhibits by the letters used in [student]'s Opening Brief.

IEP was incomplete at the hearing before the IHO. It is unclear from the evidence why all pages of the IEP document were not provided.

7. Personnel at MLK completed a form regarding the IEP meeting and supplied it to [student]'s mother on October 29, 1999. The form contains a series of boxes to be checked by the parent of the child. There is an area for the parent to initial beside each box. [Student]'s mother checked and initialed all of the boxes except the last. The last box states: "I understand my child is **not eligible** for Special Education Services." (Emphasis in the original.)

8. Sometime after providing the form to [student]'s mother, MLK personnel, without telling [student]'s mother, checked the last box. The place for initialing this box by [student]'s mother was left blank. It is unclear why MLK personnel made this alteration and made it without informing [student]'s mother. MLK personnel did not hide the fact they believed [student] was not eligible for special education services. On October 29, 1999 MLK personnel so informed [student]'s mother.

9. Sometime after the determination that [student] was not eligible for special education services, the School District determined that MLK's decision was incorrect and that [student] indeed had a disability and was eligible for special education services.

10. On December 14, 1999, MLK held a hearing to determine if [student] should be expelled due to disciplinary issues. [Student] had persistently refused to tuck in his shirt, had used profanity, was disobedient and had worn gang related clothing and a gang related "braids and squares" hairstyle. Robert Conklin was the hearing officer. Conklin determined to order "homebound education." This meant [student] was to be educated by the School District at his home until a future placement could be determined.

11. 20 USC Section 1415(k)(4) and 34 CFR Section 300.523 require that the "IEP team" determine within ten days whether behavior that results in a disciplinary action is the result of or "manifestation" of the child's disability.

12. On either December 13 or 14, 1999, Arnold-Ndiaye completed a "manifestation determination" document finding that [student]'s behavior was not a manifestation of his disability. Arnold-Ndiaye dated the document December 5, 1999. A Ms. LaGuardia signed the document on behalf of MLK. At the hearing before the IHO, the School District agreed that this manifestation determination did not comport with the IDEA in that the IEP team was not convened, a general education teacher was not involved and because [student]'s mother was not notified. The ALJ adopts this agreement as a finding of fact.

13. On December 15, 1999, MLK completed a second manifestation determination, as it believed the first one was deficient. However, this determination also did not involve the IEP team.

14. Marcia Leonard was the School District homebound services coordinator. On January 3, 2000, she sent a memorandum to MLK to obtain [student]'s IEP. MLK

personnel did not respond. MLK also did not respond to Leonard's follow up telephone calls.

15. On January 13, 2000, [student] began his homebound instruction with a Mr. Goodman. MLK did not forward the document setting out the IEP to Goodman.

16. In late January 2000, MLK offered to allow [student] to return to any School District public school other than MLK. [student]'s mother refused this offer and sought to appeal the decision to remove [student] from MLK.

17. On February 18, 2000, School District personnel, as an IEP team, conducted an IEP staffing meeting with [student]'s mother. At this meeting it was determined that [student] suffered from "emotional disability" or "ED." The IEP team understood that [student]'s homebound education would be continued.

18. At that meeting, [student]'s mother signed a form memorializing aspects of the IEP. As before, this form has boxes and spaces for the child's parent to initial. (Exhibit G.)

19. After [student]'s mother signed the form and initialed the boxes, she was given a copy. At some point after this, the School District, unbeknownst to [student]'s mother, retyped information and added other information to the form. (Exhibit H.) Sometime after February 18, 2000, Arnold-Ndiaye signed the IEP. However, she dated her signature February 18, 2000. The changed IEP form was mailed to [student]'s mother March 22, 2000.

20. The changes to the February 18, 2000 IEP are not significant for purposes of this case. The changes to the form reflect information that was determined at the IEP meeting itself and could not have been available at the time of the meeting. This information was typed up after the meeting. While it would have been the better course for Arnold-Ndiaye to have dated her signature the day she signed the IEP, MLK did not attempt to hide these changes from [student]'s mother as it mailed the changes to her. Nothing in the changes to the February 18, 2000 IEP constitutes a violation of the IDEA.

21. In late February, personnel at MLK agreed to reenroll [student]. He resumed his education in an ED classroom March 7, 2000.

22. In September of 2000, [student] began his ninth grade at Montbello High School. MLK failed to forward information to Montbello regarding [student]'s special education status. Consequently, [student] was given a full regular education schedule. [Student] soon became frustrated and stopped attending school.

23. In mid-September 2000, [student]'s mother told School District officials she would home school [student].

24. For some period of time not precisely clear from the evidence, [student]'s mother home schooled [student] utilizing materials she had at home such as old textbooks, newspapers and educational television shows on building and animals. Her home schooling of [student] had no consistent curriculum, in part because [student] and

his mother were homeless and were trying to find a place to stay. Any home schooling provided by [student]'s mother had no educational value to [student].

25. The School District did not refuse to provide [student]'s mother a curriculum for the purposes of home schooling.

26. In the spring semester of 2001 an IEP meeting concerning [student] was conducted at Montbello High School. The IEP team conducting the meeting determined that [student] did indeed have a learning disability, with impairments in written language and mathematics. The team determined that [student] did not have an emotional disability. The team did not develop goals for his reading, as it believed his reading was satisfactory.

27. On February 6, 2001, his first day back in the spring semester, [student] got into a brawl with other students. He was suspended.

28. The School District resumed the provision of homebound services to [student] in March of 2001.

29. School District personnel met with [student]'s mother in June 2001 to discuss [student] receiving education at a DPS facility known as Positive Refocusing Educational Program or "PREP" Academy.

30. In November of 2001, [student]'s mother filed this appeal.

31. In January of 2002, [student]'s mother met with personnel at George Washington High School to develop an IEP for [student].

32. At no time were assistive technology devices or services as defined in 34 CFR Sections 300.5 and 300.6. required for [student] as part of his special education, his related services or his supplementary aids and services as described in 34 CFR Section 300.308(a). The Assistive Technology Resource Team report of October 10, 2001, contained in exhibit I, demonstrates that the School District considered the need for assistive technology. The report merely "suggested" that [student] "may benefit" from certain computer software, a scanner and a calculator. At no point did [student]'s mother request assistive technology that was refused by the School District.

33. Home school tutoring and mentoring is not required to provide compensation for the IDEA violations found by the IHO. Nor is private schooling required. The School District can provide compensatory education for the violations found by the IHO in a public school.

CONCLUSIONS OF LAW

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

1. The IHO made a number of conclusions of law regarding violations of the IDEA. Some of these conclusions are not supported by the IHO's findings of fact. Nevertheless, these conclusions were conceded to by the School District at oral

argument. They also appear to have been at least partly conceded to at hearing. The ALJ therefore adopts these conclusions. They are:

a. The School District violated 34 CFR Section 300.343 by failing to conduct a proper and timely triennial review on October 26, 1999.

b. The School District violated 34 CFR Section 300.346 by failing to have an IEP team assess [student]'s homebound placement on January 3, 2000. Respondent further violated the IDEA by not providing the homebound teacher with a copy of [student]'s IEP.

c. The School District violated 34 CFR Section 300.346 by failing to have an IEP team assess [student]'s placement in the ED center and appropriate behavior strategies on March 7, 2000.

d. The School District violated 34 CFR Section 300.343 by failing to have an IEP team assess [student] prior to starting the ninth grade at Montbello High School in September 2000.

e. The School District violated 34 CFR Section 300.523 by failing to conduct a timely manifestation determination review prior to the December 14, 1999 expulsion hearing.

f. The School District violated 34 CFR Section 300.523 by conducting manifestation determination reviews on December 14 and 15, 1999 without a full IEP staffing team.

g. The School District violated 34 CFR Section 300.523 by failing to conduct a timely manifestation determination review prior to the December 14, 1999 expulsion hearing.

h. The School District violated 34 CFR Section 300.523 by conducting manifestation determination reviews on December 14 and 15, 1999 without a full IEP staffing team.

2. The IHO concluded that these violations denied [student] a FAPE "at various times during his education." IHO Decision p. 25.[2]

3. In his Opening Brief, [student] challenges a number of conclusions of the IHO. These conclusions concern the application of a statute of limitations, altered documents, assistive technology, home schooling, and reimbursement or equitable relief. Based on these challenges, [student] seeks remedial relief. The ALJ will discuss each of [student]'s claims in this same order.

[2] The IHO also found that a FAPE was being provided to [student] in the spring of 2000. At oral argument, the School District asked the ALJ to conclude that the IHO meant the spring of 2001. From the context of the IHO's discussion of this issue at page 25 of his decision, it appears that the spring of 2001 is, in fact, meant, as this is the time when the IHO believed [student]'s mother removed [student] from school. The only significance of this issue relates to the IHO's determination that compensatory education was not appropriate for [student]'s home schooling. As the ALJ has determined for different reasons that compensatory education should not include home schooling, see the discussion of Reimbursement/Equitable Relief below, the issue of whether 2000 or 2001 was meant is not significant.

The Statute of Limitations

4. [Student] challenges the IHO's decision to only consider IDEA violations on the part of the School District for the two-year period prior to [student]'s complaint of November 27, 2001.[3] The IHO relied on the two-year statute of limitations found at Section 13-80-102(1)(g) and (i), C.R.S. Section 13-80-102(1)(g), C.R.S. applies to "all actions upon liability created by a federal statute where no period of limitation is provided in said federal statute." Section 13-80-102(1)(i), C.R.S applies to "all other actions of every kind for which no other period of limitation is provided."

5. In *S.V. v. Sherwood School District*, 254 F.3d 877 (9th Cir. 2001) the Court found that, as the IDEA contained no statute of limitations, application of the most applicable state statute of limitations was appropriate. In that case, it was the two-year period contained in the Oregon Tort Claims Act ("OTCA"). Under Oregon law, a claim alleging a public body's breach of duty imposed by statute is governed by the OTCA. *Sherwood* also found that a two-year statute of limitations comported with the policy underlying the IDEA. *Id*. at 881-2.

6. *Sherwood* surveyed cases in three federal circuits, all applying statutes of limitations to IDEA actions. Those cases are: *Strawn v. Missouri State Bd. of Education*, 210 F.3d 954, 957-8 (8th Cir. 2000) (applying a two-year statute of limitations applicable to Missouri civil rights claims); *Manning v. Fairfax County School Board*, 176 F.3d 235, 237-8 (4th Cir. 1999)(applying a one-year statute of limitations imposed by the Court; no state statute of limitations was used); and *Murphy v. Timberlane Regular School District*, 22 F.3d 1186, 1193-4 (1st Cir. 1994)(applying a New Hampshire "catch all" or "general" statute of limitations of six years).

7. Applying the reasoning of *Sherwood*, Section 13-80-102(1)(g) is the most applicable state statute. Again, that subsection applies to actions upon liability created by a federal statute where no period of limitation is provided in the federal statute. The IDEA does not provide a statute of limitations. Also, [student]'s mother's complaint and her appeal, as they only allege violations of the IDEA, rely on a federal statute. [Student]'s mother has not relied upon the Education for Exceptional Children Act at Section 22-20-101, C.R.S. As such, the two-year period imposed by the IHO is correct. This forecloses bringing a claim of violation of the IDEA for any time prior to November of 1999.

8. [Student] argues in the alternative that even if the two-year statute of limitations is correct, the IHO erred in not permitting the introduction of evidence from time periods prior to November 1999. It is certainly true that a statute of limitations does not foreclose the presentation of evidence relevant to claims timely filed. However, [student] does not identify the evidence he believes the IHO improperly excluded. In fact, the IHO made extensive findings of fact for time periods prior to November of 1999.

[3] The IHO also rejected [student]'s argument that the statute of limitations should be equitably tolled to allow proof of violations after January of 1999. [Student] does not challenge this ruling on appeal.

Altered Documents

9. In his appeal, [student] points out that the School District altered a number of documents after they had been provided to [student]'s mother. These documents were admitted as exhibits A through H at oral argument. Documents A and B, concern a notice of suspension concerning [student] provided to [student]'s mother on April 29, 1999. Why exhibit A was later modified as shown in exhibit B is unclear from the evidence. Absent such evidence, this modification does not show a violation of the IDEA either at that time or later. April 29, 1999 falls outside of the two-year time period properly established by the IHO.

10. Exhibits C and D are copies of the October 8, 1999 notice of the October 29, 1999 IEP meeting. Exhibit C is the document that was provided to [student]'s mother without the date of the IEP meeting. Exhibit D is the same document with the date added. There is simply not enough evidence in this case to impugn an evil motive to MLK in providing the incomplete notice.

11. Exhibits E and F are copies of the October 26, 1999 IEP with and without the checked box: "I understand my child is **not eligible** for Special Education Services." It was wrong of MLK personnel to check this last box. Such action gave the impression that [student]'s mother had agreed to something she hadn't. However, MLK did not attempt to hide from [student]'s mother that it planned to discontinue special education services. MLK specifically informed her of this on October 29, 1999.

12. In sum, it would have been the better course for MLK personnel to not change the above documents after providing them to [student]'s mother. However, the alteration of these documents is insufficient to support a conclusion that the School District violated the IDEA.

13. Exhibits G and H are the original and retyped versions of the February 18, 2000 IEP. These changes are not concerning and also do not support a conclusion of a violation of the IDEA.

Assistive Technology

14. [Student] challenges the IHO's finding that the School District did not fail to provide "assistive technology" as defined in 34 CFR Sections 300.5 and 300.6. [Student] argues he needs a personal computer, scanner, copier and a notebook computer. Assistive technology is to be provided "if required" under those circumstances set out in 34 CFR Section 300.308(a), or under 34 CFR Section 300.308(b) if the IEP team determines the child needs access to assistive technology devices in order to receive a FAPE.

15. [Student] cites particular portions of the transcript to show that assistive technology was not considered. However, all these references concern time periods outside of the two-year time frame properly set by the IHO.

16. [Student] also relies on the Assistive Technology Resource Team report of October 10, 2001 contained in exhibit I. This report establishes that the School District considered assistive technology during the relevant time period. This report however

merely "suggested" that [student] "may benefit" from certain computer software, a scanner and a calculator. This does not reach the threshold required by 34 CFR Section 300.308(a) and (b).

Home Schooling

17. [Student] challenges the IHO's decision that the home schooling he received was "clearly inappropriate." IHO Decision p. 26. Yet, [student]'s home schooling program as conducted by his mother had no standard curriculum and relied on newspapers, old textbooks and educational television shows on building and animals. Whatever home schooling [student] received provided no educational value to him. As such, the IHO's conclusion that [student]'s home schooling was inappropriate is well supported and is adopted by the ALJ.

18. [Student] challenges the IHO's decision, though, arguing that the School District never provided a curriculum to [student]'s mother. In support of the contention that no curriculum was provided, [student] cites portions of the transcript. However, these portions of the transcript contain no discussion of this particular issue.

Reimbursement/Equitable Relief

19. In determining to deny reimbursement for home schooling, the IHO relied on *Town of Burlington v. Massachusetts Department of Education*, 471 U.S. 359 (1985). Relying on *Burlington*, the IHO determined that a School District may be required to pay for private school services obtained for the child if the parent can show: 1) the school district failed to provide FAPE, 2) the private placement was appropriate for the child, and 3) equitable considerations support the parent's claim for reimbursement. The IHO found that all three factors favored the School District. The IHO also noted that, generally speaking, these same considerations appear in 34 CFR Section 300.403. The ALJ notes that 20 USC Section 1412(a)(10)(c) contains these considerations as well.

20. Instead of examining the three factors identified by the IHO, the ALJ rejects the underlying contention of [student] that home schooling can be reimbursed under *Burlington* or under 20 USC Section 1412(a)(10)(c) and 34 CFR Section 300.403. This authority provides only for payment for education of children enrolled in private schools, not for home schooling. States have the discretion to determine if home schooling that is exempt from the state's compulsory attendance law qualifies as a private school for IDEA purposes. *Hooks v. Clark County School District*, 288 F.3d 1036, 1040 (9th Cir. 2000). The definition of home schooling or "nonpublic home-based educational programs" at Section 22-33-104.5(2)(a), C.R.S. specifically excludes "a private and nonprofit school." Also, the definitions of "public school," "non-public school" and "nonpublic home-based educational program" at Sections 22-32-116.5(10)(b), (c) and (d), C.R.S. are all separate and distinct. In *M.J. by and through his parent G.M-T. v. School District #1, City and County of Denver*, ED 2001-020, decided March 29, 2002, ALJ Nancy Connick held that home schooling is not a "private school or facility" for purposes of 34 CFR Section 300.403. This decision and the above statutory

authority demonstrate a determination by the state that home schooling does not constitute a private school for IDEA purposes.

Remedial Relief

21. Based on the foregoing arguments, [student] seeks remedial relief in the form of assistive technology, a home school curriculum, home school tutoring and mentoring, or alternatively, placement in a private academy. The ALJ rejects this request. The ALJ has not found that the School District inappropriately denied [student] assistive technology. Home schooling provided by [student]'s mother has not provided any educational value to [student] and will not be ordered. Home school tutoring and mentoring is not required; compensatory education can be provided by the School District in a public school. Similarly, there is no basis to place [student] in a private academy.

22. The ALJ concludes that, other than the violations of the IDEA conceded to by the School District, violations the IHO found to constitute a denial of a FAPE, no additional IDEA violations have been shown on appeal.

23. In order to remedy the IDEA violations and their resultant denial of a FAPE to [student], the IHO ordered the School District to provide summer school education in reading and mathematics as to be determined by an IEP team. The IHO also found that an offer made by the School District to remedy the violations was adequate compensatory education. That offer included:

a. A return to Montbello, George Washington, or other School District high school.

b. A potential placement at PREP Academy should [student] so desire, with a specific focus on improving [student]'s reading.

c. An art mentor, preferably of African-American descent.

d. A one-on-one reading tutor of time and duration to be determined by the IEP team.

e. Assistive technology as identified by an IEP team.

24. At oral argument, the parties agreed that [student] has been out of school since the IHO's order in April of 2002 and probably longer. Additionally, it was conceded by [student] that he now lives outside of the School District in the Cherry Creek School District. The School District nevertheless did not dispute its obligation to provide compensatory education to [student] for the violations identified by the IHO. The School District expressed a willingness to establish a new educational plan for [student] and agreed to consider the options set out by the IHO.

25. It makes little sense for the ALJ to order a specific and detailed remedy for the violations found. This is so in light of the passage of time since the IHO's decision, in light of the fact that [student] now lives in a new school district, and in light of the fact that the ALJ is unaware of the various educational options available. The educational options are best known by the professionals at the School District. Therefore, the ALJ

orders that the School District shall, in good faith, establish within 30 days a new IEP for [student] designed to continue his education and to provide compensatory education to [student] for the violations found by the IHO. In particular, the School District shall focus on whether the compensatory education shall be provided through the School District or through the Cherry Creek School District. The School District shall consider the options set forth in its offer for compensatory education to the IHO as set forth above. The School District shall not be required t provide home school or private school education unless it chooses to do so.

DECISION

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

DONE AND SIGNED

June _____, 2003

MATTHEW E. NORWOOD
Administrative Law Judge

Tape #5077 (6/13/02 prehearing), #6181 (6/6/03 prehearing), #6184 (6/9/03 oral argument)

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, postage prepaid, at Denver, Colorado to:

James P. Rouse
7400 East Orchard Road, Suite 3000
Greenwood Village, Colorado 80111

Lorna Candler
Denver Public Schools
900 Grant Street, 2nd Floor
Denver, Colorado 80203

and to

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

on this ___ day of _____, 2003.

_____
Secretary to Administrative Law Judge