BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 98-13 S98:121

DECISION UPON STATE LEVEL REVIEW REMANDING TO HEARING OFFICER

IN THE MATTER OF:

[student], by and through his parents, [parent] and [parent],

Appellants,

v.

BOULDER VALLEY SCHOOL DISTRICT RE-1,

Appellee.

This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act of 1997, 20 U.S.C §1400 *et seq*. ("IDEA"); the Colorado Exceptional Children's Educational Act, Section 22-20-101 *et seq*., C.R.S. (1998) ("ECEA"); and Part II, Section A, VII of the Colorado Department of Education, Fiscal Years 1995-97 State Plan. Oral argument in this matter was held on December 2, 1998, before Administrative Law Judge Nancy Connick. Appellant [student] was represented by Kristin A. Kutz and William P. Bethke, Kutz & Bethke. Boulder Valley School District Respondent-1("District") was represented by Laura L. Freppel and W. Stuart Stuller, Caplan and Earnest LLC.

PROCEDURAL BACKGROUND

[Student], through his parents [parent] and [parent] (collectively "the [parents]"), requested a due process hearing in this matter on June 25, 1998. Margaret M. Noteman was selected as the Impartial hearing Officer ("IHO") to hear this matter. In response to the request for a due process hearing, the District filed a motion to dismiss contending that the [parents] lacked standing to request due process because they were not entitled to services or reimbursement pursuant to the IDEA. The [parents] then filed a cross motion for summary judgment on the issue of liability. The parties file briefs, and on August 27, 1998, the IHO granted the District's motion to dismiss. No evidentiary hearing was held.

The IHO identified the issue before her as whether she had subject matter jurisdiction over the issue of a free appropriate public education ("FAPE") for a student who is being provided a non-public home-based education program through parental choice. The IHO made two findings of fact:

1. That [student], four years old, is not now nor has never (sic) been enrolled as a student in Respondent School District.

2. That [student] is currently being provided a non-public home based educational program through parental choice.

The IHO then concluded that [student]'s instruction was home-based, that he was not enrolled in a private school or facility, and that he was not entitled to special education services.

On September 25, 1998, the [parents] appealed the IHO's order and requested an evidentiary hearing. The [parents] assert that the District failed to offer [student] a FAPE, that the IEP developed was untimely and inadequate, and that they are entitled to reimbursement for the private educational program arranged for [student]. Briefs were filed, and oral argument took place.

ISSUES ON STATE LEVEL REVIEW

The parties agree that, although the IHO styled her order as one granting dismissal, due to the affidavits attached to the pleadings, she essentially issued an order granting summary judgment. The issue before the Administrative Law Judge is thus whether there were any genuine issues of material fact such that summary judgment was inappropriate and an evidentiary hearing should be held. If such a hearing is proper, a second issue arises as to whether the Administrative Law Judge should conduct that hearing or remand for a hearing before the IHO.

SCOPE OF REVIEW

Pursuant to the IDEA, ECEA and the State Plan, the Administrative Law Judge must conduct an impartial review of the IHO's decision and make an "independent" decision on state level review. 20 U.S.C. §1415(c); 34 C.F.R. §300.510; State Plan, Part II, A, VII, B, 9, b; and 2220-R-6.03(11)(b)(v)(1 CCR 301-8). The Administrative Law Judge must give "due weight" to the findings at the state level. See *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 206 (1982*); Burke County Board of Education v. Denton*, 895 F.2d 973 (4th Cir. 1990); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990).

SUMMARY OF UNDISPUTED FACTS

Although the IHO's factual findings were quite limited the parties in the course of their briefs and oral argument conceded that certain other facts are undisputed. As relevant to a resolution of this matter, the Administrative Law Judge reflects those undisputed facts here.

[Student], born [DOB], has multiple disabilities. He has Respiratory Syncitial Virus, a condition characterized by a very deep, wet sounding cough due to a highly contagious foam-like virus which in its severe manifestations requires hospitalization. [Student] is chronically susceptible to RSV such that an ordinary cold can develop into a full-blown RSV attack. [Student]'s RSV requires that any educational program be delivered in an environment isolated from other students and from adults with known contagions, *i.e*. in his home or similar setting. [Student] is also autistic. Autism is a neurological disorder of unknown origin. An autistic child usually finds sensory input unpleasant and even painful and may react violently to sudden stimuli or engage in repetitive, ritualized behaviors. [Student] also has Williams Syndrome, a rare genetic abnormality involving an inability to digest calcium, which results in nourishment and abdominal pain problems, as well as cardiac abnormalities and developmental delays.

From the age of about 10 weeks, [student] received special education and related services from Developmental Disabilities Center ("DDC") in Boulder, his hometown. DDC is a Colorado Community Centered Board ("CCB") created pursuant to Sections 27-10.5-101 to 601, C.R.S. CCBs are the designated agency in Colorado for early intervention services to infants and toddlers under Part C of IDEA. In Colorado, local educational agencies such as the District provide preschool through high school services under an IEP to children with disabilities.

[Student] turned three in June 1997, and by age was then eligible for services from the District. The [parents] first contacted the District in the summer of 1997. The District performed assessments. The first IEP meeting was held in December 1997. At some point in time, the [parents] became interested in Applied Behavioral Analysis ("ABA"), an educational strategy used with autistic children, and began contracting for ABA services through an organization called Strategies for Autism through Individualized Learning ("SAIL"). [Student] receives ABA instruction from tutors (not by his parents or relatives), initially in his home and then in a cottage across the street. [Student] currently receives about 40 hours per week of instruction and is the only student educated at the cottage. [Student] was not enrolled in ABA with the consent of or referral by the District.

DISCUSSION

I. Standard for Granting Summary Judgment

The purpose of summary judgment is to permit the parties to pierce the formal allegations of the pleadings and save the time and expense connected with trial when, as a matter of law, based on undisputed facts, one party could not prevail. *Peterson v.. Halsted*, 829 P.2d 373, 375 (Colo. 1992). However, summary judgment is a drastic remedy and is never warranted except on a clear showing that there exists no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. *Churchey v. Adolph Coors, Co*., 759 P.2d 1336, 1339-40 (Colo. 1998). A material fact is one which will affect the outcome of the case. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 239 (Colo. 1984).

In considering a motion for summary judgment, the moving party has the initial burden to show that there is no genuine issue of material fact. Once the moving party has met its initial burden of production, the burden shifts to the nonmoving party to establish that there is a triable issue of fact. *Mancuso v. United Bank*, 818 P.2d 732 (Colo. 1991). In determining whether summary judgment is proper, the nonmoving party is entitled to the benefit of all favorable inferences that may reasonably be drawn from the undisputed facts, *Peterson v. Halsted*, 829 P.2d 376, and all doubts as to whether an issue of fact exists must be resolved against the moving party, *Mancuso v. United Bank*, 818 P.2d at 736. Furthermore, even when it is extremely doubtful that a genuine issue of fact exists, summary judgment is not appropriate. *Abrahamsen v. Mountain State Tel. & Tel. Co*., 494 P.2d 1287, 1290 (Colo. 1972). *Mancuso v. United Bank*, 818 P.2d at 736. Summary judgment was not devised as a substitute for trial and should only be granted if the moving party presents materials that remove all doubts as to the existence of a genuine factual issue. *Weissman v. Crawford Rehab. Ser.,* 914 P.2d 380 (Colo. App. 1995), *cert. granted* March 18, 1996. All issues of material fact must be determined by the court or jury at trial, and none should be determined by the court on a motion for summary judgment. *In re Water Rights of United States*, 854 P.2d 791 (Colo. 1993).

Since the IHO granted summary judgment in favor of the District, the Administrative Law Judge must determine whether there are genuine issues of material fact which, if resolved at hearing in favor of the [parents], would allow them to prevail. If disputed issues of material fact

exist, as the Administrative Law Judge finds, the order granting summary judgment must be overturned and an evidentiary hearing must be held.

II. Applicable Law

The parties rely primarily on 20 U.S.C. §1412(a)(10)(A) and (C), which provide in relevant part as follows:

> (A) Children enrolled in private schools by their parents
>
> (i) In General
>
> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements.
>
> (I) Amounts expended for the provision of those services by a local educational agency shall be equal to a proportionate amount of Federal funds made available under this subchapter.
>
> (C) Payment for education of children enrolled in private schools without consent of or referral by the public agency
>
> (i) In general
>
> Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.
>
> (ii) Reimbursement for private school placement
>
> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

Based on these provisions of IDEA, the District contends that the [parents] cannot prevail given the undisputed facts for two reasons. First, the District argues that if [student] is found to be a student enrolled in a private school by his parents, he has no right to an *individualized* FAPE. The District contends that students enrolled in private schools by parental choice, with a limited exception it contends is inapplicable, only have a collective right to funding which is proportionate to the all federal IDEA funding. In other words, so long as the District

spends a proportionate amount of its IDEA funds on students with disabilities in private schools, no individual student has a right to any particular special education services or any special education at all. Second, the District contends that [student] is not being educated in a private school and does not otherwise meet the statutory requirements for reimbursement but rather is in a home-based, non-public educational program.

A. Right of Children Enrolled in Private School by their Parents to Individualized FAPE. The correct interpretation of the IDEA provisions cited above is somewhat illusive, and the parties have provided almost no legislative history to guide the Administrative Law Judge in this task. In urging that students enrolled in private schools by their parents have no right to an individualized FAPE, the District relies on 20 U.S.C. §1412(a)(10)(A), which requires school districts to spend a proportionate amount of funding on children enrolled in private schools. The District also cites *Foley v. Special School District of St. Louis County*, 153 F.3d 863, 865 (8th Cir. 1998), which interprets this language:

> The 1997 Amendments [to IDEA] expressly provide that public school agencies are not required to pay the costs of special education services for a particular child; States are required only to spend proportionate amounts on special education services for this class of students as a whole. 20 U.S.C. §§ 1412(a)(10)(A)(i)(I), 1412(a)(10)(C)(i). Thus whatever their rights under prior law, [the student with a disability] and her parents now have no individual right under IDEA to the special education and related services in question…

This interpretation was also cited with approval in *Peter v. Wedl*, 155 F.3d 992, 998 (8th Cir. 1998). Although the Eight Circuit thus interprets IDEA of 1997 to eliminate any individual right to special education and related services for students whose parents have chosen to place them in private schools, this language is dicta in relation to the facts at hand. Both the *Foley* and *Peter v. Wedl* decisions involved school districts which had offered the student a FAPE at a public school, but the parents then rejected it and requested that special education services be provided at the private school. This circumstance falls squarely within the provisions of 20 U.S.C. § 1412(a)(10)(C)(i), which provides that a school district need not pay for special education and related services of a child at a private school if it made a FAPE available to the child and the parents simply elected to place the child at the private school or facility instead. The Court's interpretation of 20 U.S.C. §1412(a)(10)(A) is thus not essential to its holding.

The explicit language of 20 U.S.C. §1412(a)(10)(A)(i) does embody the far-reaching conclusion pronounced by the Eighth Circuit or urged by the District in this matter. Section 1412(a)(10)(A)(i) must be read together with Section 1412(a)(10)(C)(i), which does create a right to reimbursement for the costs of enrollment when the district fails to offer a timely FAPE. In light of the language of Section 1412(a)(10)(C)(i), Section 1412(a)(10)(A)(i) appears to provide a guarantee that children enrolled in private schools by their parents will receive a proportionate amount of IDEA federal funding, rather than enacting a radical change whereby a school district could dispense the required proportionate funding in a haphazard, totally arbitrary manner without any recourse available to an individual child with a disabilities whose educational needs were totally ignored. Given the explicit language of Section 1412(a)(10(A)(i), this interpretation is unwarranted.

Here, the [parents] claim that the FAPE offered by the District is neither appropriate nor timely. Section 1412(a)(10)(A)(i) does not preclude their assertion of these positions in a due process hearing.

B. Right to Reimbursement for Placement of Children in Private Schools. The District also contends that the [parents] cannot prevail in this matter and that thus the summary judgment was appropriately granted because under the undisputed facts, the [parents] did not first enroll and then withdraw [student] from public school and further did not subsequently enroll him in a private school. The District contends that its responsibilities pursuant to IDEA of 1997 IDEA extend only to children who are enrolled in a District school or who, having previously been enrolled in such school, withdraw and enroll in a "private school or facility." I contends that [student] was never enrolled at a District facility and is not now enrolled in a private school. It asserts that the ABA program [student] is receiving does not constitute a private school, primarily because [student] is the sole student receiving ABA services at that location and that no school can exist when its existence depends on the enrollment of just one student.

A. *Oakleaf* Decision. The District first cites *In the Matter of Melissa Oakleaf v. Las Animas School District*, Case No. ED 96-13 (SEA CO 1997), a decision relied on by the IHO as well. In that matter, the undersigned Administrative Law Judge found that a "home-schooled" child (one receiving a non-public home-based educational program by parental choice) was not enrolled in a private school and that thus IDEA did not require the school district to provide the child special education and related services. That decision relied on regulations which have in effect been superseded by 1997 revisions to IDEA, and no new regulations have yet been adopted. (Although the District cites proposed regulations, it concedes that they have no force and effect, and the Administrative Law Judge under these circumstances declines to rely on them.) Those regulations, 34 C.F.R. §§300.403 and 300.452, provided that when a district makes FAPE available to a child but the parents choose to place the child in a "private school or facility," the District need not pay for the child's education at the private school or facility but must provide special education and related services designed to meet the needs of these private school children with disabilities.

The IHO concluded, based on *Oakleaf*, that [student] was receiving a non-public home-based educational program and was not entitled to special education or related services from the District. The undisputed facts, however, do not establish that the ABA program is a non-public home-based educational program. Pursuant to Section 22-33-104.5, C.R.S., such a program is provided by the child's parent or an adult relative. [Student]'s ABA program is provided by tutors. In addition, while the *Oakleaf* decision will provides some useful guidance, it is most useful in analyzing the case at hand to review the current provisions of IDEA.

B. Reimbursement Provisions of IDEA Regarding Private School Placement. Sections 1412(a)(10)(C)(i) and (ii) of IDEA, which set forth a school district's obligations to pay for the education of children enrolled in private schools without their consent, are somewhat contradictory. Subsection (i) generally states that so long as a school district spends a proportionate share on children in private schools, if it makes a FAPE available to a particular child which the parents reject in favor or a private school, the school district need not pay for the cost of educating that child. Subsection (ii) sets forth specific circumstances under which reimbursement for private school placement is required. By providing that a school district has no payment obligation if it makes available a FAPE but the parents elect instead to enroll their child in a private school or facility, subsection (i) implies that a district does have a payment obligation if it fails to make available a FAPE and the child is then enrolled in a private school or facility. The Administrative Law Judge, however, need not determine whether this language, in and of itself, creates a payment obligation because there are disputed material facts as to the application of subsection (ii), which clearly provides for reimbursement under some circumstances. In addition, it would be inappropriate to resolve this issue without the parties providing relevant legislative history, which has not been provided to date.

Subsection (ii) provides that a hearing officer may require an agency to reimburse parents for the costs of enrolling their child in a private elementary or secondary school without the consent of or referral by the public agency when the child previously received special education and related services under its authority and the school district offered the child a FAPE. Although the District contends that undisputed facts establish that more than one of the these conditions for reimbursement cannot be met, the Administrative Law Judge disagrees. The Administrative Law Judge concludes that there is a genuine issue of material fact as to whether the student meets the requirements of (ii).

A school district's payment obligation under subsection (ii) arises when a number of prerequisites are met. First, the child must have previously received special education and related services under the authority of a public agency. Although the [parents] contend that a "public agency" means any public agency, this argument is not persuasive, as in context "a public agency" is the same agency as that which has a payment obligation is certain circumstances. The facts necessary to establish whether this prerequisite has been met are either not in the record or are disputed. Although it is undisputed in this matter that DDC provided [student] special education and related services, there is no factual record to determine the relationship of DDC to the District, such that it is unclear whether services provided by DDC can be characterized as "under the authority" of the District. A hearing is thus necessary to determine whether this prerequisite has been met. In addition, there is a dispute as to the appropriate characterization of the services provided directly from the District to [student]. The [parents] contend that they received both special education and related services from DDC, while the District disputes whether any special education services (as opposed to related services) were provided. Without deciding whether both special education and related services must be provided, the Administrative Law Judge concludes that the facts permitting a proper characterization of whether the District itself has provided special educational and related services to [student] is in dispute.

Second, the parties dispute whether [student] has been enrolled in a "private school." The [parents] contend that [student]'s educational program amounts to a private school. The District, on the other hand, contends that it cannot be a private school in light of the fact that its existence depends on the enrollment of one child. Given the fact that the parties agree that [student] cannot currently be educated with other children due to his RSV, the persuasiveness of this argument is diminished. In any case, given that no evidence was taken in this matter, the nature of [student]'s current educational program and whether that constitutes enrollment in a private school cannot be determined.

While the Administrative Law Judge notes that [student] is not school age and therefore is unlikely to be enrolled in any elementary school, she does not believe that the language of subsection (ii) is designed to preclude reimbursement for children enrolled in private preschools. IDEA provides that there is no obligation to provide a FAPE to children with disabilities ages 3 through 5 if such would be inconsistent with state law or practice. 20 U.S.C. §1412(a)(1)(B)(i). ECEA requires school districts to provide special education to all preschool age students within their jurisdictions [Section 22-20-106(3), C.R.S. (1998)], and there is certainly no evidence of Colorado practice regarding the provision of a FAPE to preschool children. At a minimum, therefore, it is necessary to conduct an evidentiary hearing to determine the disputed facts regarding the application of Section 1412(a)(10)(C)(ii) of IDEA to the case at hand.

III. Forum for Evidentiary Hearing

The [parents] assert that any evidentiary hearing in this matter should be held before the Administrative Law Judge, not the IHO, in order to promote efficiency and to rectify certain procedural problems asserted in relation to the selection of the IHO. The [parents] contend that it would be inefficient for the Administrative Law Judge to remand to the IHO for an evidentiary hearing when the matter may subsequently be appealed back to the Administrative Law Judge. Further, the [parents] contend that they were deprived of their right to an *Impartial* hearing Officer because when they sought information from the Colorado Department of Education regarding the three proposed IHOs, CDE did not provide a ruling of IHO Noteman on a motion to dismiss which would have led them to strike her name. They thus claim that CDE's failure biased the selection process and deprived them of their right to make an informed selection of an IHO. The [parents] did not, however, move to recuse IHO Noteman or seek other relief at that stage of the proceedings. Although the District does not directly oppose this request, it asserts that the proper forum for an evidentiary hearing is before the IHO.

Pursuant to the State Plan, Part II, A, VII, the IHO conducts the evidentiary hearing in this matter and renders a written decision, which is then subject to appeal to an administrative law judge for a state level review. Although the administrative law judge may seek or accept additional evidence (Part II, A, VII, B, 9, b), the state level review is clearly not contemplated as the initial evidentiary hearing. A remand from the Administrative Law Judge is this matter is akin to a remand of an appellate court to a trial court, which necessarily involves some inefficiency but maintains the distinct roles of the two levels of the process. A remand to the IHO is therefore appropriate. The [parents] claims regarding the unfairness of the selection procedure for the IHO do not warrant any different result. If the [parents] wish to pursue claims of bias in the selection process, they may do so with the IHO.

CONCLUSIONS OF LAW AND DECISION

The IHO improperly granted summary judgment in this matter, as there are disputed issues of material fact which must be resolved in an evidentiary hearing. The Administrative Law Judge thus remands this matter to the IHO to hold an evidentiary due process hearing.

DONE AND SIGNED this 11th day of January, 1999.

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NANCY CONNICK
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above DECISION UPON STATE LEVEL REVIEW REMANDING TO HEARING OFFICER by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to: Margaret M. Noteman, Impartial Hearing Officer, 10364 W. Dartmouth Ave., Lakewood, CO 80227; Kristin Kutz, Esq., Kutz & Bethke, 363 S. Harlan, Suite 104, Lakewood, CO 80226; and to Laura L. Freppel, Esq., Caplan & Earnest, LLC, 2595 Canyon Blvd., Suite 400, Boulder, CO 80302-6703 on this 11th day of January, 1999.

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Secretary to Administrative Law Judge