BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2003-023

AGENCY DECISION UPON STATE LEVEL REVIEW

JEFFERSON COUNTY SCHOOL DISTRICT R-1

Appellant,

v.

[STUDENT], through her mother, [PARENT],

Appellee.

This is a state level review of a decision of a Federal Complaint Officer issued pursuant to the Individuals with Disabilities Education Act (IDEA), 20 United State Code (U.S.C.) 1400 *et seq*., 20 U.S.C.§ 1415(b)(6), 34 Code of Federal Regulations (C.F.R.) § 330.660-662 and the Colorado Department of Education (CDE) Procedure for Resolving Complaints About Programs Funded Under the Individuals with Disabilities Education Act Administered by CDE, September 22, 1999 (CDE Federal Complaints Procedure).

PROCEDURAL BACKGROUND

On June 9, 2003, Federal Complaints Officer Charles M. Masner (FCO) received a complaint letter filed on behalf of [STUDENT] (the Student) by the Student's mother, [PARENT] (Complainant), against Jefferson County School District R-1 (the District). In the complaint, Complainant raised several matters, among them was the following statement, "I sent the District a letter that I disagreed with the reevaluations the school district did in April and May of this year [2003] and that I wanted independent educational evaluations done for my daughter. The District has not responded. The District violated 34 CFR 300.502 (b)."

On May 28, 2003, Complainant made a written request to the District for an independent educational evaluation (IEE). On June 4, 2003, the District sent Complainant a letter asking her to specify which parts of the educational assessment she disagreed with. Complainant did not respond to the District's letter instead she filed a federal complaint on June 9, 2003. The District filed a written response to Complainant's complaint on June 26, 2003.

The FCO reviewed the documents and written arguments submitted to him by the parties and conducted an investigation but did not hold a hearing concerning the complaint.

Following this review, the FCO issued a decision on July 28, 2003, and found that the District had violated Complainant's right to an IEE. Specifically, the FCO found:

> [A]sking the parent to specify which parts of the school district's evaluation a parent disagrees with, and the errors the parent believes exist in the school district's evaluation, while not unreasonable information for the school district to want to know, goes beyond what a parent is required to provide in order to exercise his or her right to obtain an IEE, and requesting such information has, in this case, unreasonably delayed providing the complainant parent with an IEE or providing for the forum of a due process hearing for the school district to defend its evaluation.

The FCO ordered the District to inform Complainant where she can obtain an IEE and either grant the request for an IEE or convene a due process hearing to defend the District's evaluation. Additionally, the FCO ordered that if Complainant requests an Individualized Education Program (IEP) meeting within thirty days of receipt of the FCO's decision, or within thirty days of the completion of any IEE, the District shall hold such IEP meeting(s) and that all such meeting(s) shall be recorded and made into a verbatim written transcript, to be provided to Complainant, with all costs borne by the District.

On October 15, 2003, the District through a letter of assurance informed the FCO that it intended to pay for the additional assessments requested by Complainant, namely an optometric evaluation and an unconventional cognitive assessment, in a good faith effort to foster a positive working relationship with Complainant. The District also requested that the FCO reconsider the portion of his decision requiring the District to provide Complainant with a verbatim written transcript of the IEP meeting(s) concerning the Student. On October 17, 2003, the FCO informed the District he would not reconsider his findings and remedies regarding the IEE and verbatim written transcript.

The District requested appeals the FCO's Decision pursuant to 34 C.F.R §300.660(a)(ii) and CDE Federal Complaints Procedure. Pursuant to that appeal, a state level review proceeding has been conducted. The parties have filed briefs and supporting documents. No additional oral argument was requested or determined to be required.

In this appeal, the Student is represented through her mother, [parent]. The District is represented by Julie A. Tishkowski and Kathleen M. Shannon of Caplan and Earnest LLC.

SCOPE AND STANDARD OF REVIEW

The decision of the Administrative Law Judge (ALJ) on state level review of the decision of the FCO is to be an "independent" one. In the context of court reviews of state level decisions under the current and prior versions of the IDEA, 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); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), while still recognizing the statutory provisions for an independent decision and the taking of additional evidence, if necessary. *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991); *Blackmon v. Springfield R-XII School District*, 198 F.3d 648 (8th Cir. 1999). It is appropriate to apply this standard by analogy at the state FCO administrative review level. Thus, in this proceeding the ALJ gives "deference" to the FCO's findings of fact, *see Jefferson County School District R-1*, 19 IDELR 1112, 1113 (SEA Colo. 1993) (addressing the deference to be given on state level review to the findings of an impartial hearing officer), and accords the FCO's decision "due weight," while reaching an independent decision based on a preponderance of the evidence. *Sioux Falls School District v. Koupal*, 526 N.W.2d 248 (S.D. 1994).

FEDERAL COMPLAINTS OFFICER DECISION AND ORDER

In his Decision, the FCO identified Complainant's claim as asserting that the District's June 4, 2003, request to Complainant violated her right to an IEE as required by 34 C.F.R. § 300.502(b). The FCO concluded that the District is entitled to ask for the parent's reason why he or she objects to the public evaluation; however, under the law, the explanation by the parent may not be required and the public agency may not unreasonably delay either providing the IEE at public expense or initiating a due process hearing to defend the public evaluation.

The FCO ordered that within thirty days of receipt of the order, the Executive Director of Intervention services must appropriately inform Complainant where she can obtain and IEE and shall either grant Complainant's request for the IEE at the District's expense or convene a due process hearing to defend the District's evaluation. Further, the FCO ruled that if Complainant requests an IEP meeting within thirty days of receipt of the FCO's decision, or within thirty days of the completion of any IEE, the District shall hold such IEP meeting(s) and that all such meeting(s) shall be recorded and made into a

verbatim written transcript, to be provided to Complainant, with all costs borne by the District.

ISSUES ON REVIEW

On appeal, the issues before the ALJ are: (1) Whether the District's request for state level review of the FCO's decision was timely[1]; (2) Whether the FCO erred in finding that the District violated 34 C.F.R. § 300.502; and (3) Whether the FCO erred and exceeded his authority under 34 C.F.R. § 300.660(b) by ordering the District to provide a verbatim written transcript of any IEP meeting(s) to Complainant with all costs borne by the District.

For reasons discussed below, the ALJ determines that the FCO properly determined the District violated 34 C.F.R. § 300.502. The ALJ concludes, however, that the remedy ordered by the FCO requiring the District to provide a verbatim written transcript of the IEP meeting(s) is not supported by the IDEA and is not appropriate. The ALJ further finds that the District's request for a state level review of the FCO's decision was timely under the circumstances of this case.

FINDINGS OF FACT

Based on the written record, the Administrative Law Judge enters the following findings of fact, giving due deference to the findings of the FCO:

1. The Student was born on [DOB]. She is a student with disabilities eligible to receive a special education and related services under the IDEA.

2. The Student's current educational placement under her IEP is at Sobesky Academy, which is a day treatment facility within the District. In March and April 2003, the District conducted a triennial evaluation of the Student to develop her IEP for the 2003-2004 school year.

3. The District held two transition triennial IEP meetings concerning the Student in May 2003. The first meeting occurred on May 15, 2003; the second meeting took place on May 27, 2003. The Complainant attended both meetings.

4. The May 27 meeting was a continuation of the May 15 meeting. During the second meeting, the meeting participants discussed the need to meet a third time to complete the portions of the Student's IEP related to the Student profile, goals and objectives and the special education and related services.

5. The Student's triennial evaluation consisted of the following evaluations: The Differential Ability Scales (DAS), which measures cognitive functioning; the Behavior Assessment system for Children (BASC), which assesses behaviors,

[1] This issue was first raised by Complainant in her response brief.

thoughts and emotions of children; the Woodcock-Johnson III Tests of Achievement, an academic assessment; the Clinic Evaluation of Language Fundamentals III (CELF-III), which measures a student's level of communicative function; the Woodcock Language Proficiency Battery-Revised (WLPB-R), which measures oral language ability; a vision screening; a hearing screening; and a review of the Student's 2002-2003 IEP.

6. On May 28, 2003, Complainant submitted the following written request to the District, "I disagree with the evaluations obtained by Jefferson County School District for my daughter [name omitted]. Please provide me information on how to obtain Independent Educational Evaluations for my daughter."

7. On June 4, 2003, in response to Complainant's May 28 letter, the District requested the following information from Complainant, "[a]s to your request for information related to the independent evaluation, you will need to specify which parts of the educational assessment you disagree with, the errors you believe exist and the reasons you believe an independent evaluation is warranted."

8. The Complainant did not provide the District with the information requested in the June 4 letter. There is no evidence in the record that the District informed Complainant how she could obtain an IEE for her daughter as she had requested on May 28, 2003.

9. On June 9, 2003, Complainant filed a federal complaint alleging, among other things, that the District violated the law by not responding to her request for information on how she could obtain an IEE for her daughter.

10. In direct response to Complainant's request for information related to an IEE, the District not only failed to provided Complainant with the requested information, but it implied in the June 4 letter that she was first required to specify which parts of the educational assessment she disagreed with, identify the errors in the assessment and state the reasons she believed an IEE was warranted.

11. After receiving a request for an IEE, the District may ask the complainant parent(s) reasons for objecting to the District's public evaluation; however, such an explanation is not required and does not absolve the District from providing the requested information, providing an IEE, or initiating a due process hearing to defend the public evaluation. In this case, the ALJ finds that the information requested by the District in its June 4 letter exceeds what Complainant is required to provide in order to obtain an IEE or information about obtaining an IEE.

12. The FCO provided the District within thirty days of his decision to appropriately inform Complainant of where she can obtain an IEE and to either grant Complainant's request for the evaluation or convene a due process hearing to defend the District's evaluation.

13. The District received the FCO's decision on July 29, 2003. On August 27, 2003, the District's Director of Intervention Services contacted the FCO requesting an extension of time to submit the District's letter of assurances. The request was granted. On October 15, 2003, the District submitted its letter of assurances and also requested the FCO to reconsider his findings and remedies concerning the IEE and the requirement that the District provide a verbatim written transcript of the IEP meeting(s). The FCO denied the request for reconsideration on October 17, 2003. The District filed its notice of appeal on November 13, 2003.

DISCUSSION

Jurisdiction

The ALJ has jurisdiction to conduct this review pursuant to the IDEA, 20 U.S.C. §1400 *et seq*., 20 U.S.C. §1415(b)(6), 34 C.F.R. §330.660-662, the Colorado Exceptional Children's Education Act, Title 22, Article 20, C.R.S. (ECEA), and the CDE Federal Complaints Procedure.

Statutory Background and Appeal Procedures

The IDEA, is a comprehensive federal education statute which grants disabled students the right to a public education, provides financial assistance to states to meet their educational needs, and conditions a state's federal funding on its having in place a policy that ensures that a free appropriate public education is available to all children with disabilities. 20 U.S.C. §1412(a)(1); *Weber v. Cranston School Committee*, 212 F. 3d 41 (1st Cir. 2000). The IDEA requires the District to provide each child with a disability with a free appropriate public education (FAPE), tailored to the unique needs of the child through the establishment of an IEP. 20 U.S.C. §1401(8); 20 U.S.C. §1412(a)(1); 20 U.S.C. §1414(d).

The IDEA provides certain procedural and substantive to rights to parents of children with disabilities. In addition, it requires state educational agencies such as the CDE to establish procedures to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of free appropriate public education. 20 U.S.C.§1415(a). Included among these procedures is the "opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." 20 U.S.C.§1415(b)(6). IDEA implementing regulations distinguish between the impartial due process hearing procedure under 20 U.S.C.§1415(f) and other state and federal complaint procedures which are mandated under IDEA or otherwise available to redress complaints concerning violations of IDEA. In the present case, the Complainant has chosen to pursue a complaint under 34

C.F.R. §660-662, the federal complaints procedure, rather than the due process hearing procedure. As a result, the Complaint letter filed on behalf of the Student was referred to a Federal Complaints Officer who issued a Decision on July 28, 2003. The District has appealed the FCO's Decision.

Although the federal regulations governing the procedure chosen by the Complainant specify certain minimum procedures that must be adopted by each state concerning the initial filing and handling of complaints (which procedures are distinct from IDEA due process hearing procedures), they do not provide a specific appeal process. Colorado has adopted the CDE Federal Complaint Procedure, which governs this appeal. Pursuant to this procedure, either party may obtain state level review of the decision of the FCO, which review shall be conducted on behalf of the Commissioner of Education by a Colorado administrative law judge.

Issues Raised on Appeal

A. Whether the District's request for state-level review of the FCO's decision was timely.

The Complainant alleges that the District's state level review must be dismissed because it was not timely filed. The FCO's decision is dated July 28, 2003. In his decision, the FCO informed the parties, "[t]he Federal Complaint Decision shall become final as dated by the signature of the Federal Complaints Officer. . . Any party who appeals the decision of the Federal Complaints Officer shall file a notice of appeal with the Division of Administrative Hearings within thirty (30) days after receipt of the Federal Complaint Officer's decision." (FCO decision, page 9). The District requested a state level review on November 13, 2003.

The District argues that the thirty-day appeal period was tolled by the verbal extension of time granted by the FCO as well as the filing of the District's motion to reconsider. In light of the holding in *R.S. v District of Columbia*, 292 F.Supp 2d 23 (D.D.C. 2003), the ALJ agrees with the District. In *R.S.* the court found that a motion for reconsideration may toll the thirty day time limit in which to file an appeal of an IDEA agency decision.

> Admittedly neither the IDEA nor any relevant regulation provides for a motion for rehearing, and the [Hearing Officer's Decision] did in fact inform the plaintiffs of the 30-day appeal period, but the absence of a statutory or regulatory provision providing for such motions does not preclude the Court from borrowing Rule 15(b)[2]. For as demonstrated by

[2] Rule 15(b) provides: The running of the time for filing a petition for review is terminated as to all parties by the timely filing, pursuant to the rules of the agency, of a petition for rehearing or

> *Albertson*[3], where there is no statutory or regulatory prohibition against motions for reconsideration, such motions are permitted. *R.S.*, supra, at 27.

Similar to the circumstance in *R.S.*, the ALJ finds no statutory or regulatory prohibition against the filing of motions for reconsideration. In fact, the FCO accepted the District's motion and denied it on the merits on October 17, 2003. The ALJ finds that the thirty-day appeal period did not run until the FCO ruled on the District's motion for reconsideration. Therefore, the District's state level appeal was timely filed and should not be dismissed.

B. Whether the FCO erred in finding that the District violated 34 C.F.R. § 300.502 by asking Complainant to specify with which evaluations or parts of the educational assessment she disagreed.

Under the IDEA a parent has the right to request an IEE at public expense. Once that request is made, the District is entitled to ask the parent for his or her reasons for objecting to the District's evaluation. 34 C.F.R. § 300.502(b)(4).

In this case, the District argues that it was not attempting to cause an unreasonable delay in providing an IEE but was patiently awaiting a response for the Complainant to clarify her latest objections to the completed assessments or her expectations for further testing. The District further states that a parent has the right to an IEE only if the parent disagrees with an evaluation obtained by the public agency. Therefore, it is the parent's responsibility to inform the District with what evaluations or parts of the educational assessments the parent disagrees. It is not until the District has this information that it can decide whether it wishes to provide an IEE at public expense or defend its evaluation. Moreover, the District contends that it was led to believe that clarification was forthcoming and was disappointed by the Complainant's choice to file a complaint instead of responding to the June 4 request.

The ALJ acknowledges that the IDEA permits the District to ask the parent's reasons why he or she objects to the public evaluation. However as found by the FCO, such an explanation may not be required before the District is required to act on the Complainant's request for information on how to obtain an IEE. Further, the District may not unreasonably delay either providing the IEE or initiating a due process hearing to defend its evaluation. The ALJ agrees with the finding of the FCO that the regulatory provisions relating to IEEs requires the District to provide an IEE or defend its evaluation; it is "not the parent's responsibility to defend his or her request for an IEE." (See, FCO's decision, page 4, finding 4). Moreover, under 34 C.F.R. § 300.502(a)(2) the District is

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reconsideration. The time for filing a petition for review as fixed by section (a) of this rule [thirty days after notice is given] commences from the date when notice of the order denying the petition is given. . ."

[3] Albertson v. Fed. Communications Comm'n, 182 F.2d 397 (D.C.Cir. 1950).

required to provide to parents, upon request for an independent educational evaluation, information about where an independent educational evaluation may be obtained and the agency criteria applicable for independent educational evaluations.

In its letter of assurance, the District informed the FCO that after further discussion with Complainant, it became clear to the District that she did not disagree with any part of the District's educational assessments. Rather, she wanted the District to perform an optometric evaluation and an unconventional cognitive assessment, which the District indicates has already been completed. As such, since the Complainant was not requesting an IEE because she disagreed with the District's assessment she was never entitled to an IEE at public expense. The ALJ is not persuaded by the District's argument that it did not violate 34 C.F.R. § 300.502 because it later learned the Complainant was merely requesting additional evaluations. The fact remains that the District did not provide the Complainant with information she requested in her May 28 letter to which she was legally entitled under 34 C.F.R. § 300.502.

C. Whether the FCO erred and exceeded his authority under 34 C.F.R. § 300.660(b) by ordering the District to record the Student's IEP meeting(s) and provide a verbatim written transcript of such meetings to Complainant.

As one of the remedies for his findings that the District violated the Complainant's right to an IEE, the FCO ordered the District to record the IEP meeting(s) if requested by the Complainant. The FCO further ordered, "[t]he record, whether audio, sound video, or by court reporter, shall be made into a verbatim written transcript. A complete and verbatim copy of this written transcription, and an unedited copy of any audio or sound video recording made, shall be provided to the complainant parent. All expenses for recording, transcription, and complainant's copy, shall be paid by the school district." (See, FCO's decision, page 6, remedies paragraph 3).

The District argues that the FCO exceeded his authority by ordering the District to provide a verbatim written transcript and failed to afford the District appropriate due process. "Because the issue of transcribing IEP meeting(s) was not even raised by Complainant in her federal complaint, this remedy was ordered without consideration of either party's position. Finally, the remedy exceeds the authority of the FCO for two reasons. First, as mentioned, it was not requested by Complainant in her federal complaint. Second, such a remedy does not remediate any denial of services to [the Student] and, therefore, is not corrective action appropriate to her needs, not does it address appropriate future provision of services for all children with disabilities, as authorized by 34 C.F.R. § 300.660(b)." (See, District's Notice of Appeal, page 3).

Pursuant to 34 C.F.R. § 300.660, if the State Educational Agency (SEA) finds that a public agency failed to provide appropriate services under the IDEA, it must address:

> (1) How to remediate the denial of those services, including, as appropriate, the awarding of monetary reimbursement or other corrective action appropriate to the needs of the child; and
>
> (2) Appropriate future provision of services for all children with disabilities.

The question before the ALJ is whether the FCO's order to provide a written verbatim transcript meets the objectives of 34 C.F.R. § 300.660(b). And for the reasons discussed below, the ALJ finds that it does not.

The ALJ concurs with the FCO's finding that the District violated 34 C.F.R. § 300.502. Accordingly, it is not only appropriate but necessary that the SEA craft a remedy addressing how the District must remediate that violation. The ALJ concludes, however, that the FCO appropriately addressed the District's violations by ordering the District to: (1) submit a written statement of assurance that all procedural violations found by the FCO have been addressed to promote the avoidance of their future occurrence; (2) appropriately inform the Complainant where she can obtain an IEE and either grant the request for the IEE or convene a due process hearing to defend the District's evaluation; (3) grant Complainant's request for an IEP meeting if one is requested within thirty days from the date of the request; (4) record any such IEP meeting(s); (5) make use of an "impartial arbitrator" to resolve ongoing disagreements; and (6) encourage the parties to "get more creative about improving" their relationship. The requirement that the District provide Complainant a written verbatim transcript of the recorded IEP meeting(s) exceeds what is necessary to cure the found violations.

The ALJ understands the District's objection to be confined the requirement that it provide Complainant a written verbatim transcript of the IEP meeting(s). There is no evidence in the record that the District takes issue with the FCO's order requiring the District to record the IEP meeting(s). The record before the ALJ establishes that the parties have a history of disagreements, which may have resulted from mutual misunderstandings and miscommunications. In this regard, the ALJ finds the FCO's requirement that the IEP meeting(s) be recorded appropriate to remedy the found violations and appropriate future provisioning of the Student's services. Therefore, the ALJ upholds the requirement that the District record the IEP meeting(s). However, there is no evidence in the record that supports the FCO's additional requirement that the District to transcribe the record and provide a copy to the Complainant free of charge.

DECISION AND ORDER

The Administrative Law Judge determines and orders as follows:

1. The District's request for a state level review of the FCO's decision was timely filed.

2. By failing to provide the Complainant with information on obtaining an IEE and requesting Complainant to specify which parts of the District's evaluation she disagrees with and the errors she believe exist in the District's evaluation the District violated 34 C.R.F. § 300.502. The FCO's finding is upheld.

3. The FCO's order with respect to ordering the District to provide the Complainant a written verbatim transcript of IEP meeting(s) is not authorized under the IDEA and is stricken.

4. The FCO's order with respect to ordering the District to record the IEP meeting(s) is appropriate and warranted in light of the prior disagreements between the parties and is upheld.

5. This decision made upon a state level review shall be final except that either party has the right to bring a civil action in an appropriate court of law, either federal or state, if all administrative remedies have been exhausted.

DONE AND SIGNED
April 13, 2004

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Michelle A. Norcross
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above **Agency Decision Upon State Level Review** was served by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado addressed to:

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