BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2001-03 S2000:545

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:
ADAMS COUNTY SCHOOL DISTRICT 50,

Petitioner,

v.

██████ and ██████ ██████, on behalf of their minor child ██████ ██████ ██████,

Appellant.

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 U.S.C. §§1400 *et seq*., 20 U.S.C. §1415(b)(6), 34 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").

On November 17, 2000, the parents (the Parents) of the above-named student (the Student) filed a complaint with Adams County School District 50 (the District) alleging that the District failed to comply with IDEA with respect to the education of their son. The District filed a written response on December 6, 2000, denying the Parents' allegations and the Parents filed a reply on December 14, 2001. The matter was considered by Federal Complaints Officer Charles Masner ("FCO"). 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 January 19, 2001.

The District appeals the FCO's Decision pursuant to 34 C.F.R. §300.660(a)(ii) and CDE Federal Complaints Procedure, paragraph 15. The parties filed briefs; however, neither party requested the opportunity to present additional evidence, no additional evidence was determined to be needed, and none was received. CDE Federal Complaints Procedure, paragraph 21. The question of whether to hold oral argument was left to the

discretion of the reviewing Administrative Law Judge. After reviewing the record, the Administrative Law Judge has determined no oral argument is required.

In this appeal, the Student is represented by Jack D. Robinson, Esq. of Spies, Powers & Robinson, P.C. The District is represented by Darryl L. Farrington, Esq. and Erica L. White, Esq. of Semple, Miller & Mooney, P.C.

SCOPE AND STANDARD OF REVIEW

The decision of the Administrative Law Judge on state level review of the decision of the FCO is to be an "independent" one. CDE Federal Complaints Procedure, paragraph 21. 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 Administrative Law Judge 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). [1]

FEDERAL COMPLAINTS OFFICER DECISION

In his decision, the FCO identified the Student's claim as asserting that for the period beginning August 23, 2000, the District failed to educate the Student in the least restrictive

[1] Although the Parents urge the Administrative Law Judge to apply the "contrary to the weight of the evidence" standard found at Section 24-4-105(15)(b)of the Administrative Procedure Act, the Administrative Law Judge declines to do so in light of the specific "independent decision" language contained in CDE"s federal complaint procedures.

environment because it failed to provide to the Student the amount of general education classroom education time specified in the Student's Individualized Education Program (IEP).

The FCO concluded in his Decision that the District violated the Student's right to a free appropriate public education (FAPE) in the least restrictive environment "by failing to provide [the Student] with the full 28.25 hours per week of direct in general classroom instruction that [the Student's] IEP requires." Specifically, the FCO determined that during the fall semester of 2000, of the 463.3 hours of direct in general classroom instruction that the Student was entitled to receive under his IEP, he did not receive 381.3 of those hours. The FCO ordered the District to pay to the Parents as "compensatory reimbursement" the sum of $3,507.96. According to the FCO, this sum represents the cost the District would have incurred to hire an instructional assistant so as to enable the Student to receive in general classroom instruction in accordance with the Student's IEP for the hours in question.

ISSUES ON REVIEW

On appeal, the District asserts the FCO misinterpreted the IEP and claims the IEP does not require the District to provide the Student with 28.25 hours of education per week in the general classroom. In addition, the District argues that the FCO's award of $3,507.96 is actually an award of money damages which is not authorized under the IDEA. Finally, the District maintains that even if the monetary award is determined to be consistent with the IDEA, it is not supported by the facts in this case.

The Administrative Law Judge determines that the FCO properly interpreted the IEP but concludes that the remedy ordered by the FCO is not supported by the IDEA. The Administrative Law Judge therefore orders an alternative remedy.

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 ██████. At the time the complaint was filed before the FCO (November 17, 2000), he was seven years old and in the first grade.

2. The Student has Downs Syndrome. According to his most recent IEP (March 21, 2000), the Student is identified as having multiple disabilities with cognitive impairment. He is eligible for special education services on this basis. State Board of Education Rules for the Administration of the Exceptional Children"s Act ("State Board Rules"), 2220-R-2.02(8), 1 CCR 301-8.

3. Prior to the 2000-2001 academic year, the Student attended early childhood education programs and one year of kindergarten in the District. The Parents had no

complaint about his education during that period of time and, in fact, were well pleased with the way the Student's needs were met during that period of time.

4. During the 1999-2000 academic year, the Student attended kindergarten at Baker Elementary. His neighborhood or "home" school was Sherrelwood Elementary.

5. On March 21, 2000, while the Student was in kindergarten, an IEP meeting was convened to discuss the Student"s program needs for the coming year. In attendance at the meeting were numerous school personnel, including various special education teachers and therapists. The Parents were not present at this meeting; however, a designee of the Parents did attend and participate. The Student's mother has indicated that she did not attend the meeting because she had a migraine headache. She does not assert any impropriety in connection with the meeting having been conducted in her absence.

6. The IEP resulting from the March 21, 2000 meeting contains the following provisions, among others, under "child/student and family information:"

a. The school of attendance "prior to meeting" is listed as "Baker" and the school of attendance "after meeting" is left blank.[2]

b. The Student's "primary educational setting" both before and after the meeting is listed as "Center or Other School/Outside General Classroom>[greater than] 60%."

7. Other significant provisions in the March 21, 2000 IEP on the page entitled "Special Education and Related Services" include:

a. Under the heading "Service Delivery" a "statement of specific services to be provided" indicates: "[The Student] will receive special education support 100% of his day. He will receive (*sic*) direct services from Speech and OT and consultive services from P.T. Jason (*sic*) will spend his day in a regular first grade classroom to the fullest extent that he is able."

b. For the service period August 23, 2000 through November 30, 2000, under "Hours of Special Education Services per week by Service Provider," the IEP lists the

---

[2] At some point after this meeting and prior to the start of the 2000-2001 academic year, a determination was made to assign the Student to Westminster Hills Elementary School ("Westminter") for the 2000-2001 academic year.

Student as receiving .50 hours per week of indirect Speech/Language from Mary Coyle and .13 hours per week of indirect PT. For the same service period the IEP also lists 28.25 hours per week of "Direct in General Classroom" through service coordinator Debbie Carlson, Sp. Ed., as well as "Direct Outside General Classroom" special education services of 2 hours per week from service coordinator Debbie Carlson, .50 hours per week from Mary Coyle, Speech/Lang and .50 hours per week from OT.

c. For the service period August 23, 2000 through November 30, 2000, the IEP lists the Student's total hours of special education services per week as: 30.25 through Service Coordinator Debbie Carlson, Sp. Ed.; 1.00 through Service Provider Mary Coyle, Speech/Language; 0.50 through an unnamed O.T. service provider; and 0.13 through an unnamed P.T. provider.

d. With respect to "curricular and instructional accommodations/modifications necessary for the child/student to participate in the general education curriculum," the IEP notes the Student "will need support while in the regular classroom. All curriculum needs to be adapted to modified to his level. Written work & independent reading are not options at this time. Music and PE will be modified as needed."

8. In a September 20, 2000 letter to the District, the Student's mother reported on a parent-teacher conference she had had the previous week with the Student's special education coordinator, Debbie Carlson, and expressed concern about Westminster's failure to provide the Student with the special education services and support in the regular classroom specified in the Student's IEP. The mother noted she had learned that staffing for the Student's regular classroom inclusion "which should have been set up at the beginning of the school year, may not be in place very quickly." The mother further noted she had been promised that the Student would be in a regular classroom with paraprofessional help. She noted "[t]his is what his IEP specified and what I expect."

9. On October 17, 2000, a special IEP meeting was held to discuss the mother's concerns that the Student was not receiving the special education services in the regular education classroom as set forth in his IEP. The parties dispute exactly what occurred at this meeting. The mother asserts that the District reiterated a prior agreement "to hire an additional paraprofessional to provide 1:1 support for the Student to participate in the academic general education classroom." (December 14, 2000 complaint letter, p. 1). The District maintains the parties reached no such agreement (Brief in Support of District's Appeal, p. 12). However, minutes from the meeting prepared by the District indicate the District agreed to "see if we can find someone to hire to fill the position." The Administrative Law Judge therefore finds that at the October 17, 2000 IEP meeting the District agreed it would attempt to hire a paraprofessional who would provide support for the Student in the general education classroom, thereby allowing the Student to spend additional time in the regular education classroom.

10. On October 18, 2000, the mother wrote to Westminster's special education teacher, Debbie Carlson, acknowledging her agreement the previous day to allow the

District additional time within which to come into compliance with the IEP's requirements but indicating upon reflection she felt it was necessary to take appropriate action to assure that the Student's IEP was followed.

11. Pursuant to the October 17, 2000 agreement, the District was required to notify the Parents as to the District's efforts to hire a paraprofessional for the Student. (Minutes of October 17, 2000 special IEP meeting). The District did so on two occasions through Debbie Carlson's daily written communications to the Parents. Both of these communication indicated a lack of success in hiring attempts. The third notification, in the form of a November newsletter to all Westminster parents, indicated the school was attempting to hire an Instructional Assistant in the Special Education Program to work with students one on one and one on two in the learning center room and in the regular classrooms.

12. As of December 7, 2000, Debbie Carlson's communications to the Parents on behalf of Westminster Hills Elementary School appeared to imply that attempts were still being made to fill the paraprofessional position ("We lost both candidates who were suppose [*sic*] to interview. No one new yet. Only filling Kristin's position."). However, in its December 6, 2000 Response to the Parents' Complaint, the District stated that it did not intend to hire any additional personnel.

13. The Student's annual IEP review was conducted December 5, 2000. The Parents assert that at this meeting the Student's special education teacher indicated the amount of time Student spends in academic general education classroom was dependent on the availability of special education support in the form of a paraprofessional. (December 14, 2000 Complaint letter, p. 2). The District does not directly dispute this assertion. The District claims, however, that it has chosen not to hire an additional paraprofessional and is not required to do so in order to comply with the Student's IEP. *See* District's December 6, 200 response letter, p. 2; Brief in Support of District's Appeal, p. 12.

14. From August 23, 2000 through the time the Parents initially filed their complaint and thereafter through the end of November 2000, the Student was placed in a general education classroom at Westminter substantially less than 28.25 hours per week.

15. Following receipt of the Parents' November 17, 2000 complaint and the District's December 14, 2000 response, the FCO conducted an investigation concerning the allegations of the Complaint pursuant to paragraphs 8.c. and 10 of the CDE Federal Complaints Procedure.

16. After conducting his investigation and considering the submissions of the parties and the IEP itself, the FCO concluded that the IEP required the Student to be placed in a general education classroom for 28.25 hours per week. This determination was based on the following factors:

a. The FCO's reading of the IEP itself. The FCO determined that to the extent the language of the IEP is internally inconsistent and therefore ambiguous, the more specific language providing for 28.25 hours per week of "Direct in General Classroom" special services education services should prevail over the more general statement that the Student's primary instruction setting is to be "Center or Other School/Outside General Classroom>60%." In making this determination the FCO acknowledged that the Parents and the District disputed the significance of the "Outside General Classroom>60%" language (the District asserts this language should prevail and the Parents assert this language was a mistaken hold-over from the prior year's IEP).

b. As part of his investigation, the FCO determined that the school day at Westminster during the fall of 2000 was 6 and ½ hours per day, for a total of 32 and ½ hours per five-day school week. He also determined in a normal school day there is a 15 minute recess in the morning, a 40 minute combined lunch and recess, and another 40 minutes each day devoted to either physical education or music, depending on the particular student's schedule.

c. After reviewing federal regulations governing IDEA and the Student's IEP, the FCO determined that 5 hours and 35 minutes per day were theoretically available for the Student's academic activities, music and physical education. (The FCO arrived at this figure by subtracting 50 minutes of daily recess and lunch time from the Student's 6 and ½ hour school day. This time was subtracted as non-academic activity in accordance with 34 C.F.R. §§ 300.553, 300.306 and 300.307 and the lack of reference to lunch and recess in the Student's IEP). When 5 hours and 35 minutes is multiplied by a five-day school week, the result is 27 hours and 55 minutes per week of academic, music and physical education time. However, because this amount of time is 20 minutes shorter than the 28.25 hours listed in the Student's IEP, the FCO determined that the appropriate figure to use for available academic, music and physical education time per week was 28.25 hours per week or 5 hours and 39 minutes per day.

d. Having reached the conclusion that the available weekly time for academic, music and physical education was 28.25 hours per week, the FCO harmonized this figure with the language in the Student's IEP that the Student was to be "in a regular first grade classroom to the fullest extent that he is able;" he determined that the IEP defines "to the fullest extent that he is able" as 28.25 hours per five day school week.

17. The Administrative Law Judge adopts as well-based and well-reasoned the FCO"s findings concerning the length of the school day and school week at Westminster and the amount of available academic, music and physical education time per day and per week for the Student. The Administrative Law Judge also adopts the FCO"s persuasive findings concerning the intent of the IEP and the fact that it requires the Student be placed in a general education classroom for 28.25 hours per week.

18. The District concedes that it did not provide the Student with 28.25 hours per week of Direct in General Classroom instruction. It provided chart and graph information to

the FCO purporting to establish that the Student spent increasing amounts of time in the general classroom as the fall of 2000 progressed. After reviewing that information and excluding lunch and recess time, the FCO determined that during the fall semester of 2000, the Student received an average of one hour of Direct in General Classroom instruction per school day, or five hours per five-day school week. The FCO therefore determined that the Student did *not* receive 23.25 hours per five day school week (4 hours and 39 minutes per day) of the 28.25 hours per week (5 hours and 39 minutes per day) which the Student's IEP required. Thus, the FCO determined that the District failed to provide the Student with the full 28.25 hours per week of Direct in General Classroom instruction required by the Student's IEP.

19. The discrepancy between the Student's IEP requirements for Direct in General Classroom instruction and the amount of general classroom instruction he actually received still exists even if, as urged by the District, the time period utilized in making the calculations is substantially restricted. Using the charts and graph supplied by the District and limiting the calculation of Direct in General Classroom instruction to those days when in classroom time was actually being recorded (October 17 through November 28, 2000), the record establishes that the Student spent a daily average of approximately 70.23 minutes with his general education peers, when lunch and recess are excluded. (This figure was arrived at by adding the total number of minutes reflected in the charts and graph for the days in question, subtracting the number of minutes spent at lunch and recess each day and dividing by 22, the number of days involved. It thus includes time the Student spent in the general classroom as well as time he spent in music, gym, the library and with book buddies). On a weekly basis this amounts to 351.15 minutes (70.23 x 5) or 5.85 hours (351.15 divided by 60 minutes per hour). This contrasts with the Student's IEP requirement of 5 hours and 39 minutes per day or 28.25 hours per week of Direct in General Classroom instruction.

20. The discrepancy between the Student's IEP requirements for Direct in General Classroom instruction and the amount of time he actually spent with his general education peers still exists even if, as urged by the District, the time period used for the calculations is substantially restricted *and* the Student's time at recess and lunch is included in the calculation. Using the charts and graph supplied by the District, limiting the calculation of Direct in General Classroom instruction to those days when in classroom time was actually being recorded (October 17 through November 28, 2000), and *including* recess and lunch in the calculation, the record establishes that the Student spent a daily average of 125 minutes with his general education peers. (This figure was arrived at by adding the total number of minutes reflected in the charts and graph for the days in question and dividing by 22, the number of days involved. It thus includes time the Student spent in the general classroom as well as time he spent in lunch, recess, music, gym, the library and with book buddies). On a weekly basis this amounts to 625 minutes (125 x 5) or 10.4 hours (625 divided by 60 minutes per hour). This contrasts with the Student's IEP requirement of 5 hours and 39 minutes per day or 28.25 hours per week of Direct in General Classroom instruction.

21. Regardless of whether the calculations of the FCO (as set forth in finding of fact 18) are utilized or the calculations as suggested by the District (as set forth in findings of fact 19 and 20) are utilized, the evidence established that the District failed substantially to comply with the requirements of the Student's IEP to provide the Student with 28.25 hours of Direct in General Classroom special education services per week.

22. The least restrictive environment provided for in the Student's IEP was the general classroom. The District's failure substantially to comply with the requirements of the Student's IEP to provide the Student with 28.25 hours of Direct in General Classroom special education services per week constituted a failure to provide the Student with a free appropriate public education in the least restrictive environment.

23. After calculating the amount of IEP-required Direct in General Classroom time the District failed to provide the Student on a daily and weekly basis, the FCO also calculated the amount of IEP-required Direct in General Classroom time the District failed to provide the Student for the entire fall 2000 semester. This calculation was based on the District's calendar which provides for an 82-day semester. Because the Student's IEP covered only the service period of August 23 through November 30, 2000, the FCO's inclusion in his calculations of 10 school calendar days after November 30, 2000 was in error.

24. With the modification that days after November 30, 2000 should be omitted from any calculation of required IEP services which the District failed to provide, the Administrative Law Judge finds persuasive and adopts the FCO's calculations as to the amount of IEP-required Direct in General Classroom time the District failed to provide the Student, including the use of dates prior to October 17, 2000 and the exclusion of lunch and recess time from the calculation of general classroom time provided by the District to the Student.

25. After omitting days after November 30, 2000 from the calculation, the Administrative Law Judge finds that the amount of IEP-required Direct in General Classroom time the District failed to provide the Student is 334.8 hours (5 hours and 39 minutes per day per day of IEP-required Direct in General Classroom instruction, minus an average of one hour per day of such instruction which the Student did receive, times 72 days, the period of time covered by the Student's IEP).

DISCUSSION

Jurisdiction

The Administrative Law Judge has jurisdiction to conduction 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., and the CDE Federal Complaints Procedure

.

Statutory Background and Appeal Procedures

The IDEA, 20 U.S.C. §§1400 *et seq.*, 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). 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 individualized education program ("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). Among the procedures required by the IDEA is that the CDE must provide 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. *Compare* 34 C.F.R. §§507-510 *with* 34 C.F.R. §§ 660-662. The Parents in the present case have 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 Parents' November 17, 2000 complaint letter was referred to a Federal Complaints Officer who issued a Decision on January 19, 2001 pursuant to 34 C.F.R. §§660-662. The District has appealed the FCO's Decision.

Although the federal regulations governing the procedure chosen by the Parents 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 its own federal complaints appeal procedures, the CDE Federal Complaint Procedure, paragraphs 15-26, which govern this appeal. These procedures provide that 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. CDE Federal Complaints Procedure, paragraph 1.

Under the CDE Federal Complaints Procedure, the parties may offer and the Administrative Law Judge may seek or accept additional evidence, it needed. CDE Federal Complaint Procedure, paragraph 21. The parties have not sought to provide any additional

evidence in this matter beyond that considered by the FCO, and, in fact, agreed that none was necessary. *See* Procedural Order dated March 16, 2001. Under these circumstances, the Administrative Law Judge limits the state level review the matters that were before the FCO at the time he rendered his decision.

Issues Raised on Appeal

A. Interpretation of the Individual Education Plan

The District asserts that the FCO misinterpreted the Student's IEP and argues that, contrary to the FCO's determination, the IEP does not require the District to provide the Student with 28.25 hours per week of Direct in General Classroom instruction. The Administrative Law Judge concludes, as did the FCO, that the most reasonable interpretation of the IEP is that it does require the District to provide the Student with 28.25 hours per week of Direct in General Classroom instruction.

An individualized education plan ("IEP") is a written statement for each child with a disability that is developed, reviewed and revised in accordance with the requirements of IDEA. 20 U.S.C. §1414(d)(1)(A). Each IEP must include "a statement of the special education and related services and supplementary aids and services to be provided to the child . . . ." 20 U.S.C. §1414(d)(1)(A)(iii). Services listed in an IEP must be provided to a child in order to comply with IDEA. 34 C.F.R. part 300, app. A, question 31 ("The public agency must ensure that all services set forth in the child's IEP are provided, consistent with the child's needs as identified in the IEP. . . .the public agency remains responsible for ensuring that the IEP services are provided in a manner that appropriately meets the student's needs as specified in the IEP").

In the present case, the Student's IEP for the period including August 23 through November 30, 2000, was developed in March 2000. It contains a number of provisions that are disputed by the parties. For example, the document provides the Student's "primary educational setting" is a "Center or Other School/Outside General Classroom>[greater than] 60%." The IEP also notes under "statement of specific services to be provided" that the Student will receive special education support 100% of his day, including direct services from Speech and OT and indirect services from PT. In addition, the IEP notes that the Student will spend his day in a regular first grade classroom "to the fullest extent that he is able." Additionally, for the service period August 23, 2000 through November 30, 2000, under "Hours of Special Education Services per week by Service Provider", the IEP lists 28.25 hours per week of "Direct in General Classroom" through service coordinator Debbie Carlson, Sp. Ed.

The District claims that the FCO's interpretation of the IEP is erroneous and leads to a contradictory result which can be avoided if the IEP is interpreted in the manner urged by the District. Specifically, the District asserts that the only way to harmonize these provisions is to determine that the reference to 28.25 hours of Direct in General Classroom

special education services means the Student will receive up to 28.25 hours of service from Learning Center (non-general classroom) teacher Debbie Carlson. According to the District, this service was to take place "in the Learning Center, *not* in the general classroom." However, under the District's interpretation, the reference to the 28.25 hours of special education services was also intended to signify that the Student could receive up to that number of hours of special education services per week in a general classroom, instead of in the Learning Center. Thus, under the District's interpretation, the contested reference in the IEP to 28.25 hours of "Direct in General Classroom" special education services actually means *either* 28.25 hours of services in the Learning Center *or* 28.25 hours of direct services in a general classroom *or* any combination of special education services in the Learning Center and a general classroom which add up to 28.25 hours.

The Administrative Law Judge rejects the District's strained reading of the IEP provisions in question. Such an interpretation requires a re-writing of the 28.25 hours provision to mean essentially the opposite of what it says. In addition, such an interpretation results in a provision which is essentially meaningless, since it does not specify any minimum amount of time that the Student will be placed in a general classroom setting, provides no basis for making that placement determination, and provides no standards for enforcement.

Furthermore, interpreting the 28.25 hour provision in the manner urged by the District would result in an IEP so devoid of specificity that it would violate IDEA. As noted in the federal IDEA regulations:

> The amount of services to be provided must be stated in the IEP, so that the level of the agency's commitment of resources will be clear to parent and other IEP team members [Section 300.347(a)(6)]. The amount of time to be committed to each of the various services to be provided must be . . .stated in the IEP in a manner that is clear to all who are involved in both the development and implementation of the IEP.
>
> The amount of a special education or related service to be provided to a child may be stated in the IEP as a range (e.g., speech therapy to be provided three times per week for 30-45 minutes per session) only if the IEP team determines that stating the amount of services as range is necessary to meet the unique needs of the child. . . .A range may not be used because of personnel shortages or uncertainty regarding the availability of staff.

34 C.F.R. part 300, app. A, question 35.

In contrast to the District's strained reading of the Student's IEP, the FCO's interpretation of the provisions in question is reasonable and persuasive. The provisions in

question can be harmonized by determining first, as the FCO did, that the specific reference to 28.25 hours of Direct in General Classroom services controls over the "Center or Other School/Outside General Classroom/Greater Than 60%" language on the preceding page of the IEP. This language merely repeats verbatim (perhaps erroneously) the "primary instructional setting" language of the prior year and is itself ambiguous. Based on the placement of the slashes in this terse phrase, it is unclear whether the "greater than 60%" language is intended to refer to "Center or Other School" or "Outside General Classroom," or both. Because it appears undisputed that the Student was assigned 100% of the time to a "Center School" (Westminster), it is reasonable to conclude that the Student's school assignment, in and of itself, satisfied the "greater than 60%" element of this disputed term.

Furthermore, contrary to the arguments of the District, the FCO's interpretation is also consistent with the requirement in the IEP that the Student receive special education services 100% of the time and that these services are to be coordinated by Debbie Carlson. The IEP does not require that Debbie Carlson provide special education services for the Student in the general education classroom, merely that she coordinate such services essentially full-time. Under the IEP, as specified on the page entitled "Special Education and Related Services," the Student is entitled to special education support 100% of the time. However, as indicated by the grid on that page, in the general classroom such services are to be coordinated by Carlson but may be provided directly by another individual.

The FCO's interpretation of the IEP is also consistent with the IEP provision that the Student is to spend his day in a regular first grade classroom "to the fullest extent that he is able." As the FCO recognized, this is a general statement that is defined within the IEP's Special Education and Related Services grid to mean 28.25 hours per week. The District's construction of this phrase (that it controls over the number of hours of service actually listed in the grid) would prevent enforcement of any specific number of general classroom hours, however large or small, that might have been placed in the grid. Such a construction renders the grid numbers not only meaningless but affirmatively misleading, contrary to provisions and intent of the IEP.

Finally, by determining that the specific reference to 28.25 hours of Direct in General Classroom services must be harmonized with and controls over potentially conflicting language in the IEP, the FCO's interpretation of the IEP recognizes the principle that all services specified in an IEP must be provided. 34 C.F.R. part 300, app. A, question 31.

Thus, as was determined by the FCO, the most reasonable interpretation of the IEP is that it does require the District to provide the Student with 28.25 hours per week of Direct in General Classroom instruction.

B. Free Appropriate Public Education

The FCO determined that by failing to provide the Student with 28.25 hours per week of Direct in General Classroom instruction as required by the Student's IEP the District violated the Student's right to a free appropriate public education in the least restrictive environment. The Administrative Law Judge agrees.

Regardless of whether the calculations urged by the District or those of the FCO are used, the evidence is unmistakably clear that the District's failure to comply with the Student's IEP was substantial. During the period from August 23, 2000 through November 30, 2000, the District provided the Student with only approximately one-fifth of the number of Direct in General Classroom hours to which he was entitled. The least restrictive environment provided for in the Student's IEP was the general classroom. The District's failure substantially to comply with the requirements of the Student's IEP to provide the Student with 28.25 hours of Direct in General Classroom special education services per week constituted a failure to provide the Student with a free appropriate public education in the least restrictive environment.

The IDEA defines free appropriate public education as "special education and related services" which are provided at public expense, under public supervision and direction, meet state standards and comply with the child's individualized education program. 20 U.S.C. §1401(8). Special education means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability," including instruction in classrooms and other settings and physical education instruction. 20 U.S.C. §1401(25). One of the policies behind IDEA is to enable disabled children to be educated alongside their non-disabled peers rather than be shut off from them, 20 U.S.C. §1412(a)(5)(A), and disabled students are to be educated in a mainstream classroom whenever possible. *Gill v. Columbia 93 School District*, 27 F.3d 1027 (8th Cir. 2000); *Rowley,* 458 U.S. at 202.

The IDEA provides each child with a disability with a basic floor of educational opportunity, *Rowley, supra.* A state provides this basic floor of opportunity and satisfies the minimum requirements of the IDEA by providing a child with a disability with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. The school district is not required to maximize educational opportunities or provide the best possible education, *Mather v. Hartford School District*, 928 F. Supp. 437 (D.Vt. 1996), but must offer a program calculated to provide more than a trivial educational benefit to the child, *Hall v. Vance County Board of Education*, 774 F.2d 629 (4th Cir. 1985), *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), and that is likely to produce meaningful progress. *Mather at 445-6; Board of Education v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986).

As established by *Rowley*, a FAPE is provided if, first, there has been compliance with the procedural requirements of the IDEA and, second, the IEP developed pursuant to these procedures is reasonably calculated to enable the child to receive educational benefits.

In this case there is no issue as to whether the District followed appropriate procedures in developing the Student's IEP or as to whether the Student's IEP was reasonably calculated to enable him to receive educational benefits. Instead, the issue is whether the IEP developed for the Student was appropriately implemented. The FCO and the Administrative Law Judge have both determined the IEP was not appropriately implemented and, in fact, the District substantially deviated from the requirements of the IEP and thereby prevented the Student from being educated in the least restrictive environment. Under these circumstances the District failed to provide the Student with a FAPE in the least restrictive environment, in violation of IDEA. 20 U.S.C. §1412(a)(5)(A).

The District claims the Student is not entitled to a particular placement under the IDEA and therefore his placement in the Learning Center rather than in a general classroom did not violate the IDEA or deprive him of a FAPE. This argument is unpersuasive. The Parents assert, and have established, that the District failed to comply with the Student's IEP by failing to provide in substantial respects the services that the District agreed in the IEP to provide to the Student. The mere fact that some other services not contained in the Student's IEP could have conferred educational benefit on the Student is not a defense to the Parents' assertions. Such an defense, if accepted, would render the entire process of developing IEPs with parental input a sham. Districts could agree to parental requests, dutifully reduce those agreements to writing in an IEP and then studiously ignore their promises so long as the school provided unrelated services to the student that conferred at least minimal educational benefit.

This is clearly not a result contemplated by the IDEA. Students are entitled to the services agreed to in an IEP. Substantial deviations from that which is promised by a school district in an IEP may result in a violation of the IDEA and the denial of a FAPE. Such is true in the instant case where the deviation was substantial and resulted in a failure to educate the Student in the least restrictive environment promised by the District in the IEP.

C. Appropriate Remedy

After concluding that the District violated the Student's right to a FAPE in the least restrictive environment, the FCO determined that the appropriate remedy was to award the Parents the sum of $3,507.96. The District asserts that this sum constitutes an award of monetary damages and, as such, is not authorized by the IDEA. The Administrative Law Judge agrees with the District that the remedy prescribed by the FCO is properly characterized as an award of money damages and that such relief is not authorized under IDEA. Consequently, the relief ordered by the FCO cannot stand.

The FCO awarded the Parents a specific sum of money as a means of resolving a dilemma presented by the specific facts of this case. The FCO reasoned that because the IEP required the Student to be placed in a general classroom essentially full-time, there was no way to provide meaningful general classroom compensatory educational opportunities for the Student to make up for the District's failure to comply with the Student's IEP. (As noted by the FCO, the Student could not be assigned as compensation to more than full-time in the general classroom). Thus, the FCO attempted to fashion a different type of remedy that would provide appropriate compensation to the Student for the IEP-required Direct in General Classroom time that was not provided by the District.

The FCO further reasoned that the District's failure to provide the Student with the hours of Direct in General Classroom instruction required by his IEP was the result of not having an instructional assistant available to support the Student in the general classroom. According to the FCO's calculations, it would have cost the District $3,507.96 to hire an instructional assistant to support the Student in the general classroom for the number of IEP-required hours of Direct in General Classroom instruction which the Student did not receive during the fall of 2000. The FCO then awarded this amount of money to the Parents to use in any manner they chose to compensate their son for the IEP-required Direct in General Classroom instruction which he did not receive from the school.

The District asserts that this award can only be characterized as monetary damages and that such an award in not authorized under IDEA. The Administrative Law Judge agrees.

This proceeding is governed by the provisions of the IDEA and its implementing regulations, including 34 C.F.R. §§300.660-662. Cases decided under IDEA[3] have clearly established that although monetary damages are not available under the Act for failure to provide required services, compensatory relief is available. *School Committee of the Town of Burlington v. Department of Education of the Commonwealth of Mass.*, 471 U.S. 359 (1985). Such relief may be in the form of reimbursement of tuition costs already incurred by the parents of children with disabilities or payment of the prospective cost of compensatory educational services. *Hall v. Knott County Board of Education*, 941 F. 2d 402 (6th Cir. 1991); *Miener v. State of Missouri*, 800 F. 2d 749 (8th Cir. 1986). While IDEA does not provide a general damages remedy for violation of duties imposed by the Act, a judgment that simply reimburses a parent for the cost of obtaining educational services that ought to have been provided free does not constitute damages. *Hall, supra*.

Similarly, pursuant to 34 C.F.R. §300.660(b) governing this federal complaint procedure, the following remedies are available in this proceeding:

---

[3] 20 U.S.C. §1415(I)(2) and its predecessor provide that the court shall grant such relief as it determines is "appropriate."

> Remedies for denial of appropriate services. In resolving a complaint in which it has been found a failure to provide appropriate services, an SEA, pursuant to its general supervisory authority under Part B of the Act, 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.

It is apparent that the language of this federal complaints procedure regulation merely echoes existing case law and is not intended to provide any greater scope of relief in the current proceeding than would be available in a civil proceeding following a due process hearing.

The issue presented, then, is whether the relief ordered by the FCO is properly characterized as damages or compensatory relief. It is clear, as the District argues, that the award does not constitute "reimbursement" of any sum because there is no indication that the Parents have spent any money for educational services which would be repaid through this award.

Although the section does not explicitly so indicate, it is reasonable to conclude that §300.660(b) also authorizes a monetary award for the *prospective* cost of compensatory educational services. Such an interpretation of the section would be consistent with well-recognized IDEA case law defining the scope of relief available under the Act. The Parents, in essence, assert that the FCO's remedy in this case can reasonably be characterized as falling into this category. The Administrative Law Judge concludes that while such relief in the form of prospective costs for compensatory educational services is available under §300.660(b), the award granted by the FCO cannot reasonably be categorized in that manner.

In determining the appropriate relief in this matter, the FCO noted that no specific educational services were available that would compensate for the IDEA violation at issue here. He did not specify how the awarded money should be spent and did not require that there be any relationship between the Student's IEP requirements or educational needs and the manner in which the parents expended the money in question. In addition, in determining the amount of money to award, the FCO essentially calculated the amount of money the District saved by not complying with the IEP, rather than determining how much the Parents required in order to purchase the IEP-required services that the District failed to provide. Under these circumstances, the award cannot reasonably be characterized as compensatory or as reimbursement and instead falls in the category of monetary damages. As such, it is not authorized under IDEA and must be stricken.

The fact that the relief ordered by the FCO is not authorized under the IDEA does not mean that no relief is available to the Student. While it is true that the violation in this case (the failure to provide essentially full-time Direct in General Classroom services)

presents a challenge in terms of fashioning appropriate relief, it is possible to do so. The Administrative Law Judge determines that as a remedy for the District's violation of the IEP, the Student is entitled to 334.8 hours of support from a qualified instructional assistant during the next semester he is in school at the District.[4] This instructional assistant shall be provided to the Student on a 1:1 basis for the purpose of allowing the Student to be present 28.25 hours per week in a general classroom.

In entering this order, the Administrative Law Judge recognizes that under the existing IEP there is no explicit requirement for 1:1 assistance from an instructional assistant. However, as both the FCO and the Administrative Law Judge have found, the lack of such assistance is what prevented District compliance with the IEP requirement of 28.25 hours of Direct in General Classroom time. Thus, it is reasonable to order such assistance to the Student at this time. Furthermore, it is reasonable to conclude that the presence of one on one assistance (instead of a shared assistant) will enhance the Student's ability to benefit from the general classroom while he is in the classroom, thus providing compensatory relief beyond what the Student may be entitled to under his current IEP.

DECISION AND ORDER

The Administrative Law Judge determines and orders as follows:

1. By failing to provide the Student with 28.25 hours per week of Direct in General Classroom time between August 23 and November 20, 2000, the District failed to provide the Student with a free appropriate public education in the least restrictive environment.

2. The FCO's award to the Parents of $3,507.96 constitutes an award of monetary damages which is not authorized under the IDEA and is therefore stricken.

3. In place of the FCO's award, it is ordered that during the next semester the Student is in school within the District, the District shall provide to the Student 334.8 hours of support from a qualified instructional assistant. This instructional assistant shall be provided to the Student on a 1:1 basis for the purpose of allowing the Student to be present 28.25 hours per week in a general classroom.

---

[4] The number of hours of assistance ordered is arrived at by utilizing the FCO's calculations concerning the number of hours of IEP-required Direct in General Classroom time were not provided by the District, modified to account for the fact that the IEP was effective only until November 30, 2000.

4. 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 administrative remedies have been exhausted.

DONE AND SIGNED

July ______, 2001

JUDITH F. SCHULMAN
Administrative Law Judge

CERTIFICATE OF SERVICE

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

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

Darryl L. Farrington
Erica L. White
1120 Lincoln Street, Suite 1308
Denver, CO 80203

on this ___ day of July, 2001.

____
Secretary to Administrative Law Judge