

DUE PROCESS HEARING DECISIONS AND APPEAL REVIEWS
JULY 1, 2008 - JUNE 30, 2009

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (IDEA)
PART B



SANDY GARRETT
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION
OKLAHOMA STATE DEPARTMENT OF EDUCATION

STATE OF OKLAHOMA
STATE DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SERVICES

Due Process Requests
(July 1, 2008 through June 30, 2009)

Due Process Requests Received	23
Due Process Requests Carried Over from FY 2007-2008	1
Due Process Hearings Cancelled, Withdrawn or Resolved	24
Due Process Hearing Decisions Rendered	0
Resolution Sessions Held	9
Resolution Agreements	3
Due Process Hearing Appeal Reviews ¹	2
Appeal Reviews Appealed to District Court	1
District Court Decision Appealed to the 10 th Circuit	0

¹ The two appeal reviews were consolidated into one decision.

**DUE PROCESS HEARING DECISIONS AND APPEAL REVIEWS
JULY 1, 2008 - JUNE 30, 2009**

**Due Process
Number**

**Decision
Date**

None

None

**Due Process Appeal
Number**

**Decision
Date**

1923 & 1924 Appeal Decision
Consolidated opinion

August 18, 2008

**Appeal Hearing 1923 & 1924
Consolidated Decision**

August 18, 2008

STATE OF OKLAHOMA
STATE DEPARTMENT OF EDUCATION

IN THE MATTER OF)
)
 [REDACTED],)
 On behalf of [REDACTED])
 Students, i)
)
 Appellants,)
)
 v.)
)
 Oklahoma State Department of Education)
 and)
 [REDACTED] School District,)
)
 Appellees.)

DPH No. 1923
DPH No. 1924
Consolidated by order of 2-29-08

APPEARANCES:

Representing the Students/Appellants:

[REDACTED]

Representing the Appellee Oklahoma
State Department of Education:

[REDACTED]

Representing the Appellee [REDACTED] School District:

[REDACTED]

[REDACTED]

Before Gary E. Payne, Appeal Review Officer

FINAL APPELLATE ADMINISTRATIVE ORDER

PROCEDURAL HISTORY OF APPEAL

A due process hearing decision was entered in this case on June 18, 2008. Thereafter, Petitioners (herein "Appellants") requested a due process appeal review which was filed of record on July 18, 2008. Filed on that same date was a *Supplement to Parents Request For Due Process Review*. Respondent, (herein Appellee) [REDACTED] School District, filed an objection and motion to strike Attachment C of the Supplement to Parents Request For Due Process Review and Petitioner filed a response to the objection and motion. A separate Order is entered this date dealing with the issues raised in the Objection and Motion.

Appellants/Petitioners and Appellee/Respondent, [REDACTED] School District, both filed an appeal brief. The appellee/respondent, Oklahoma State Department of Education filed its *Brief in Support of Order Dismissing All Claims Against the Oklahoma State Department of Education* as its response to the appeal.

The complete record of all proceedings before the initial hearing officer including transcripts of testimony were made available for this appeal. A Scheduling Order was entered by agreement of the parties and a telephone conference was held on July 28, 2008, wherein it was determined that no hearing would be held by the Appeal Review Officer and that no additional

evidence would be submitted. All parties complied with the Scheduling Order and the matter is now at issue and ready to be determined.

HISTORY OF PRIOR PROCEEDINGS

This case involving two students, who are [REDACTED], has a long history and it is important to recite it for a better understanding of the present issues before this Appeal Review Officer. The Parents' litigation with the District began on or about October 25, 2005 with the filing of [REDACTED] first due process hearing complaints in DPH 1860 & 1861. Fifteen days of hearing were held between January and April 2006. On August 7, 2006, Hearing Officer Leslie Conner, Jr. ("HO Conner") entered decisions against the Parents and in favor of the District on all issues raised.

The Parents initiated a timely administrative appeal of HO Conner's decisions, and on January 22, 2007 Appeal Officer Louis Lepak ("AO Lepak") overturned HO Conner's earlier decisions. In his decisions, AO Lepak required the District to (i) reimburse the Parents for certain expenses between August 30, 2005 and January 31, 2007 (hereinafter referred to as the "Reimbursement Award") and (ii) implement, at District expense, the Appellants' home-based ABA program (hereinafter referred to as the "Home Program Award") until August 7, 2007. Neither the Parents nor the District filed an appeal of AO Lepak's decisions as permitted by 20 U.S.C. § 1415(i)(2). Therefore, these decisions constitute the settled law of DPH 1860 & 1861.

On October 25, 2007, the Parents filed complaints with the Oklahoma State Department of Education ("OSDE") alleging that the District had failed to implement both the Reimbursement and Home Program Awards (hereinafter "Implementation Complaints").

The District submitted timely responses contesting the Parents' claims, and on December 24, 2007, the OSDE rendered its decisions. For the District to be deemed in full compliance with

AO Lepak's Reimbursement and Home Program Awards, the OSDE required the District undertake certain corrective acts, namely (i) the payment of a sum certain to the Parents for certain expenses incurred prior to August 7, 2007, and (ii) the drafting of new Individualized Education Programs (IEPs) for [REDACTED] by their respective IEP teams.

The Parents, unsatisfied by the OSDE's determination of their Implementation Complaints, submitted a motion to reconsider (denominated as a "protest") to the OSDE on January 22, 2008. By letter dated February 7, 2008, the OSDE informed the Parents that it was declining to reconsider its earlier decisions because the Parents' protest was not timely filed within 15 days of the OSDE's decisions, as required by the OSDE's 2006 complaint procedures.

The District timely complied with all of the corrective acts required by the OSDE including a remedy for the sole finding by the OSDE that the District was in noncompliance with the provision of FAPE by failure to make timely payment to the Parents after the entry of AO Lepak's decisions. On February 15, 2007, the District received letters from the OSDE finding it in full compliance with the OSDE's decisions of December 24, 2007.

On February 8, 2008, the Parents filed two due process hearing complaints against the OSDE and the District on behalf of their [REDACTED], in case number DPH 1923, and [REDACTED], in case number DPH 1924. By Order of the Hearing Officer dated February 29, 2008, the two Due Process Hearing matters were consolidated for pre-hearing and hearing purposes.

Both the OSDE and the District filed motions attacking the sufficiency of the claims presented.

By order dated February 29, 2008, HO Welsh dismissed all of the Parents' claims, 1a -- 9a, asserted against the OSDE.

In dismissing these claims, HO Welsh determined:

This tribunal does not have jurisdiction to resolve complaints by the Parents as to the failure of the District or the OSDE to implement a due process hearing decision. *See* 34 C.F.R. § 300.152(c)(3) (implementing a due process decision **must** be resolved by the SEA (emphasis added)). Even if parents were given an opportunity to amend portions of their *Parent Request for Special Education Due Process Hearing*, the lack of subject matter jurisdiction as to enforcement of the Appellate Hearing Officer's Decision in Due Process Hearing 1860 by this tribunal would not change.

Hearing Officer Welsh also dismissed Parents' claims 1b – 6b, 8b, and 10b against the District.

The Parents, the OSDE and the District attended a statutorily required resolution session on or about February 29, 2008. No agreements were reached between the parties. A subsequent resolution session occurred between the Parents and the District after the Parents amended their due process hearing complaint and after the OSDE was dismissed. No resolution of the Parents' claims resulted from this meeting either, except there was an agreement reached between the District and the Parents as to services for the [REDACTED] over Spring Break.

Prior to hearing, the Parents voluntarily dismissed claims 5b and 7b, and at a prehearing conference conducted on April 7, 2008, HO Welsh dismissed Parents' Due Process Claim 11b against the District. This left only Parents' Due Process Claims 9b, 12b – 20b, and the Parents' amended stay-put violation claim for decision at hearing.

A consolidated and public due process hearing was conducted on April 11, 14-18, 2008, with the Parents appearing *pro se*. The only parent to testify was [REDACTED] and the Parents called only two expert witnesses: [REDACTED]

The parties each submitted proposed findings of fact and conclusions of law to HO Welsh, and on June 18, 2008, HO Welsh entered her joint decision finding in favor of the

District as to all of the Parents' claims. In reaching her decision, HO Welsh specifically found that the hearing testimony of (i) Parent [REDACTED], (ii) [REDACTED], and (iii) [REDACTED], was not credible.

On July 17, 2008, the Parents, now represented by counsel, submitted their *Request for Due Process Appeal Review*. The Appeal Request was subsequently supplemented by the Parents on July 18, 2008. In their Appeal Request and Supplement, the Parents assert nine issues for appeal. Each of these issues is specifically addressed below.

ELEMENTS OF THE APPEAL

As stated above, Appellants filed a Request For Due Process Appeal Review on July 18, 2008. They asserted nine errors in the Hearing Officer Decision which enumerated the following specific reasons for appeal:

- a. The Hearing Officer erred by dismissing claims against [REDACTED] Public Schools and the State Department of Education and preventing parents from presenting evidence thereon.
- b. The Hearing Officer erred by dismissing the State Department of Education from this Due Process Hearing.
- c. The Hearing Officer erred by relying on *Board of Educ. of Hendrick Hudson Central School Dist. V. Rowley*, 458 U.S. 176 (1982) in the conclusion about the requirements of the public school obligation.
- d. The Hearing Officer erred by determining that "due weight must be given to the opinions of school officials responsible for the student's education" and the resulting conclusions based thereon.
- e. The Hearing Officer erred by determining that the parents were dictating educational methodology and misinterpreted parents' request that the school district be required to provide a statement identifying peer-reviewed research for the school's proposed methodology.
- f. The Hearing Officer erred by determining that no law or regulations direct or discuss the use of a particular methodology.

- g. The hearing Officer erred by determining that a school district is not obligated under the IDEA to adhere to each and every provision of an IEP.
- h. The Hearing officer erred by determining that any lack of implementation of any part of the current IEPs was trivial and that parents did not establish that the failure to implement the IEPs was material to educational progress for the time periods identified in the Hearing Officer's decision and for time periods covered by the May 2007 IEPs designed to implement a previous hearing officer's opinion and which IEPs were not proposed to be changed until January 2008.
- i. The Hearing Officer erred by determining that the parents were not entitled to any relief, including but not limited to an award of reimbursement or compensatory education with regard to their claims relating to either of their daughters.

The Appellant's asset the following three propositions in their appeal brief:

- I. The Hearing Officer should not have dismissed the claims related to the enforcement of a prior Hearing Officer's favorable opinion for parents and the parties related thereto (i.e. State Department of Education and ██████ Public Schools).
- II. The Hearing Officer erred by entering a ruling contrary to conclusions reached by the previous appeal review officer and the state department of education which undertook to implement the decision.
- III. The Hearing Officer erred by misapplying applicable legal standards.

Two additional propositions were asserted in Appellant's *Supplement To Parents Request*

For Due Process Appeal Review:

- I. Issues Relating to the time periods from August 30, 2005 to August 7, 2007 and from August 8, 2007 until January 29, 2008 should have been addressed by the Hearing Officer.
- II. Significant legal rulings adversely impacted the Hearing Officer's determination during the time periods mentioned above.

FINDINGS OF FACT

The due process hearing officer issued lengthy and detailed findings of fact, reviewing the evidence below, as well as extensive conclusions of law. Very few of the findings of fact are disputed by either party on appeal. The issues on appeal are largely questions of the application of the law to undisputed facts. Her findings are found in paragraphs 1 through 102 beginning on page 4 of the Opinion and ending on page 29. Additional findings of fact are set forth in the Hearing Officers decision in paragraphs 1 through 3 on pages 37 and 38 of the decision. It is determined that her findings are consistent with the record in this case and are hereby adopted as the Findings of Fact for the purpose of this decision.

The Hearing Officer had available to her the ability to access such things as the inflection and body language of the witnesses testifying which cannot be evaluated by this review officer.

As stated by the Appellants on page 8 of their Appeal Brief:

“The reviewing officer must defer to the Hearing Officer=s findings based on credibility judgments unless the nontestimonial evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion. [O=Toole v. Olathe, 144 F.3d 692, 699 (10th Cir. 1998)] 34 CFR ' 300.514.”

CONCLUSIONS OF LAW

The burden of proof in an administrative hearing challenging an IEP is properly placed upon the party seeking relief. *Schaffer v. Weast*, 546 U.S. 49 (2005). As the parties attacking

██████████ educational programming, the Appellants (Parents) bear the burden of proof as to all of their claims against the District.

Congress enacted the *Individuals with Disabilities Education Act* ("IDEA") in part, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living." 20 U.S.C. § 1400(d)(1)(A); 34 C.F.R. ? 300.1(a).

To achieve this goal, the Act requires schools to provide children with a free, appropriate public education (FAPE). The United States Supreme Court has held that a FAPE "consists of educational instruction specially designed to meet the unique needs of the handicapped child, ... supported by such services as are necessary to permit the child to benefit from the instruction." *Board of Education of Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176 (1982). Special education is defined by the IDEA regulations to include specially-designed instruction, "conducted in the classroom, in the home, in hospitals, and in other settings." 34 C.F.R. § 300.26(a)(1).

FAPE is further defined as special education and related services that are provided at public expense, meet the standards of the state educational agency, include an appropriate preschool, elementary, or secondary school education, and are provided in conformity with an individualized education program ("IEP"). 20 U.S.C. § 1401(8).

In all matters alleging a procedural violation, a hearing officer may find that a child did not receive a free appropriate education only if the procedural inadequacies: (i) impeded the

child's right to a free appropriate public education; (ii) significantly impeded the parents' opportunity to participate in the decision making process regarding the provision of a free appropriate public education to the parents' child; or (iii) caused a deprivation of educational benefits. 20 U.S.C. § 1415(f)(3)(E)(ii); *O'Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 707 (10th Cir. 1998) (quoting *Roland M v. Concord School Committee*, 910 F.2d 983, 994 (1st Cir. 1990)).

Under the IDEA, the District's obligation is to provide [REDACTED] a "free appropriate public education." The IDEA specifically defines a "free appropriate public education" as follows:

The term "free appropriate public education" means special education and related services that --

- (A) have been provided at public expense, under public supervision and direction, and without charge;
- (B) meet the standards of the State educational agency;
- (C) include an appropriate preschool, elementary, or secondary school education in the State involved; and
- (D) are provided in conformity with the individualized education program required under section 1414(d).

20 U.S.C.A. § 1402(9).

The IDEA defines the term "special education" as:

[S]pecially designed instruction, at no cost to parents, to meet the unique needs of a child with a disability, including --

- (A) instruction conducted in the classroom, in the home, in hospitals and institutions, and in other settings; and
- (B) instruction in physical education.

20 U.S.C.A. § 1402(29).

In *Board of Educ. of Hendrick Hudson Central School Dist. V. Rowley* ("Rowley"), 458 U.S. 176 (1982), the United States Supreme Court discussed the meaning of a "free appropriate public education." The Court identified the following two-part test to determine whether a school district is meeting its obligation to provide a child with a disability a free appropriate public education:

Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? **If these requirements are met, the state has complied with the obligations imposed by Congress and the courts can require no more.**

458 U.S. at 206-07 (emphasis added)

The IDEA does not require public schools to maximize a child's potential or to provide the best possible program. *Rowley*, 458 U.S. at 200-01; *Johnson v. Independent School District No. 4*, 921 F.2d 1022, 1028 (10th Cir. 1990), *cert. denied*, 114 L. Ed. 2d 79 (1991). Rather, a child's entitlement to a free appropriate public education is satisfied by the provision of "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction." *Rowley*, 458 U.S. at 203. The benefit conferred must be "meaningful." *Cedar Rapids Community School District v. Garret F.*, 526 U.S. 66, 73.

When determining whether a student's educational program is reasonably calculated to confer educational benefit, "due weight" must be given the opinions of school officials responsible for the student's education. *A.E. v. Independent School District No. 25*, 936 F.2d 472,475 (10th Cir. 1991).

Equitable considerations are relevant in determining appropriate relief under the IDEA; therefore, the Parents' own conduct is relevant and must be taken into consideration in the

analysis. *Burlington v. Department of Educ.*, 471 U.S. 359, 374 (1984); *WG. v. Board of Trustees of Target Range Sch. Dist.*, 960 F.2d 1479, 1486 (9th Cir. 1992); *Garcia ex rel. Garcia v. Board of Educ. of Albuquerque Pub. Schs.*, 2007 WL 5023652, *3 (D. N.M. January 10,2007).

School districts determine the appropriate methodology to be used to implement a child's IEP. Parents, "no matter how well motivated, do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child." *Logue By and Through Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512*, 959 F. Supp. 1338, 1351 (D. Kan. 1997), *aff'd*, 153 F.3d 727 (1998); *see also Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495, 506 (6th Cir. 1998)

If a student's proposed IEP is reasonably calculated to provide some educational benefit, a parents' preference for a student's educational methodology, no matter how well intentioned, is not required to be implemented by a school district. (*Logue supra*) See also *Bradley ex rel. Bradley v. Arkansas Dept. of Educ.*, 443 F.3d 965 (8th Cir. 2006) and *Tucker by Tucker v. Calloway County Bd. of Educ.*, 136 F.3d 495 (6th Cir. 1998).

No federal or state law, regulations, or requirements direct or discuss the use of a particular methodology by a school district for children with autism.

The District may select any methodology or combination of methodologies it deems appropriate to implement [REDACTED] January 29, 2008 IEPs.

The IDEA does not mandate regularly scheduled, formal meetings between service providers and teachers to coordinate their efforts concerning a child's education. *T. W. v. Unified Sch. Dist. No. 259, Wichita, Kan.*, 136 Fed.Appx. 122, 2005 WL 1324969, * 4-5 (10th Cir. 2005).

An IEP is not a contract and a school district is not obligated under the IDEA to adhere to each and every provision of an IEP. No denial of FAPE exists where a school district's failure to implement a provision of an IEP is non-material to the student's education. *Ms. K. v. City of South Portland*, 407 F. Supp.2d 290 (D. Me. 290) (emphasis added); *Van Duyn v. Baker School District J5*, 502 F.3d 811 (9th Cir. 2007).

Under Oklahoma law, a standard school day consists of not less than six hours devoted to school activities, exclusive of lunch, with the exception of early childhood and kindergarten. Okla. Stat. tit. 70, § 1-111(A); Okla. Admin. Code § 210:35-3-46(h)(2) (2006).

The Appellants did not establish by credible evidence that the District failed to implement any provision of either [REDACTED] 5-29-07 IEPs from August 19, 2007 to date. Further, Appellants did not establish by credible evidence that the District's failure to implement a provision of [REDACTED] 5-29-07 was material to [REDACTED] education.

The Appellants/Parents failed to present by a preponderance of credible evidence that from August 19, 2007 the District denied [REDACTED] a free appropriate public education in the least restrictive environment as required by each of their 5-29-07 IEPs. *L.B. v. Nebo School District*, 379 F.3d 966 (10th Cir. 2004) (establishing LRE standard for Tenth Circuit).

The evidence presented by the District suggests that the District attempted to accommodate the Parents to keep them from filing an unfounded due process request on the District even though the least restrictive environment for the children is at the District and not in the Parents' home.

No procedural deficiencies (i) deprived either [REDACTED] of an appropriate education, (ii) significantly impeded the Appellants/Parents' opportunity to participate in the

decision making process regarding the provision of a free appropriate public education to either [REDACTED], or (iii) caused a deprivation of educational benefits to either [REDACTED]

Petitioner [REDACTED] substantially participated in the development of both [REDACTED] IEPs, and the Appellants' claim otherwise is wholly without merit.

The Appellants failed to prove by a preponderance of credible evidence that [REDACTED] unique needs require a school day longer than the District' regular school day of seven hours.

The Appellants failed to prove by a preponderance of credible evidence that applied behavioral analysis is required to be used in all academic settings in order for [REDACTED] to receive a meaningful educational benefit.

The Appellants failed to prove by a preponderance of credible evidence that the Appellants' home is the least restrictive environment for [REDACTED]. [REDACTED] unique educational needs require that they each be educated in a public school setting with access to age appropriate peers.

The District and not the Parents' home is the least restrictive environment for [REDACTED]

The Appellants failed to prove by a preponderance of credible evidence that either [REDACTED] January 29, 2008 IEP was other than an annual IEP.

Both [REDACTED] January 29, 2008 respective IEPs are annual IEPs and the related services are to occur for a year.

The Appellants failed to prove by a preponderance of credible evidence that either [REDACTED] respective January 29, 2008 IEPs are not reasonably calculated to

provide either [REDACTED] with a meaningful educational benefit in the least restrictive environment.

The January 29, 2008 IEP developed for [REDACTED] in the District complied with applicable laws and requirements. The educational services provided in the IEP addressed both [REDACTED]' unique educational needs, and the IEPs are both reasonably calculated to confer a meaningful educational benefit on [REDACTED] in the least restrictive environment.

The Appellants did not establish by credible evidence that the District violated the stay-put provisions of 20 U.S.C. § 1415(j) with respect to either [REDACTED] since February 8, 2008.

The Appellants are not entitled to any relief with regard to their claims relating to either [REDACTED].

With respect to paragraphs (a) and (b) of the Request For Due Process Appeal Review, it is found that the Oklahoma State Department of Education, (OSDE) had the authority under the IDEA's implementing regulations to resolve the Parents' complaints alleging the District's non-compliance with Hearing Officer Lepak's January 22, 2007, decisions.

Part B of The Individuals with Disabilities Education Act (IDEA) provides specific rights and protections for children with disabilities. See generally 20 U.S.C. §§1411-1419. In addition, Part B of IDEA outlines two separate and distinct remedies for children and parents to resolve disputes with a Local Educational Agency (LEA) over the implementation of IDEA's requirements, complaint resolution procedures and due process hearings. See *R.K, T.K. and C.K. v. Hayward Unified School District*, 2007 WL 4169111 (N.D. Cal. 2007).

The complaint resolution procedures are addressed at 34 C.F.R. §§300.151-300.153, and mandate that each State Educational Agency (SEA) establish a formal complaint system,

including procedures to resolve and remedy allegations that a public agency has violated a requirement of IDEA Part B. As part of the complaint system, 34 C.F.R. §300.152(c)(3) requires the SEA to resolve complaints alleging a public agency's failure to implement a due process hearing decision.

The OSDE has a complaint system which meets the requirements of the federal regulations, and Appellants have previously utilized that complaint system seeking enforcement of the Appellee ██████████ School District's ("District" or "LEA") compliance with a prior Due Process Appeal Decision.

On October 26, 2007, the OSDE received formal complaints from Appellants alleging that the District was in violation of IDEA Part B. Specifically they complained that the District was not in compliance with Appellate Hearing Officer's Decisions in Due Process Hearings (DPH) 1860 and 1861. As a remedy for the alleged noncompliance, Appellants requested that the OSDE "assign its personnel to oversee and enforce Appellate Hearing Officer's decisions." The OSDE investigated Appellants complaints, including the allegation that the District was not in compliance with the Appeal Decision, and the OSDE issued Complaint Findings on December 24, 2007.

In those findings, the OSDE notified the District and Appellants that the District was not in compliance with parts of the Appeal Decision. As a result of the noncompliance, the OSDE required the District to take corrective action regarding those areas of noncompliance and the OSDE verified that the corrections were made.

As the "state educational agency" or "SEA", the OSDE is the sole entity under the IDEA that can resolve a complaint alleging a public agency's failure to implement a due process hearing decision. This mandate, set forth in 34 C.F.R. § 300.152(c)(3), states:

A complaint alleging a public agency's failure to implement a due process hearing decision **must be resolved by the SEA.** (emphasis added).

In accord with 34 C.F.R. §300.152(c)(3), the Complaint Findings were in direct response to, and a resolution of, Appellant's complaint alleging the failure of the District to implement the Due Process Appeal Decision.

Complaint Findings issued by the OSDE are final, as stated in the Complaint Procedures, unless the complainant or the LEA requests a review and/or reconsideration within 15-days of the issuance of the findings. Appellants requested a review and/or reconsideration of the findings 29 days after the findings were issued, well beyond the 15 day timeline.

When Appellants were notified that the time for review and/or reconsideration had expired, they filed a due process hearing request, naming the OSDE and the District as parties. Appellants' due process request was based on the same complaints that the OSDE had recently investigated and made findings on. Appellants' assertion that the federal regulations require the OSDE to resolve complaints alleging a public agency's failure to implement a due process hearing decision is accurate. However, federal law and regulations do not provide jurisdiction for due process hearing officers to entertain such complaints.

Title 20 U.S.C. §1415 and 34 C.F.R. §§300.507-300.508 identify the grounds for filing a due process hearing request. Section §300.507 authorizes the filing of a due process hearing request on any matter relating to the identification, evaluation, or educational placement of a child with a disability, or the provision of FAPE to the child."

Title 70 O.S. §13-101 et seq mandates that local school districts, not the OSDE, must provide services relating to the identification, evaluation, or educational placement of students. The grounds for accessing the due process system do not include services provided by the

OSDE. In addition, 34 C.F.R §300.511 states “*the parents or the LEA involved in the dispute must have an opportunity for an impartial due process hearing. . . .*”

This federal regulation expressly identifies the parties to a due process hearing, and consistent with the explicit language, an SEA (OSDE) is not a proper party.

Finally, 34 C.F.R. §300.514 provides that a party aggrieved by the findings and decision in a due process hearing may appeal to the SEA, and the SEA must then conduct an impartial review of the findings and decision appealed. A SEA cannot conduct an impartial review of a matter to which it was a party.

The OSDE’s decisions as to the Parents’ Implementation Complaints were final, and neither the Parents nor the District could seek their review either through direct appeal to a court or by due process.

The inability of a court to review a CRP decision was addressed by the United States District Court for the Eastern District of Virginia in its opinion of *Virginia Office of Protection and Advocacy. v. Commonwealth of Virginia, Virginia Department of Education et al.*, 262 F. Supp.2d 648 (E.D. Va. 2003). In addressing the IDEA’s 1999 CRP regulations (which are substantially similar to the current complaint regulations now codified at 34 C.F.R. §§ 300.151-153), the court noted:

Although the IDEA expressly creates a private right of action for those aggrieved by the due process procedure, it does not give the same right to those participating in a CRP (Complaint Resolution Proceeding). See 20 U.S.C. § 1415(i)(2)(A). Not only was this intentional on the part of the IDEA’s drafters, but it makes sense in the context of the two-tiered review system Congress created. In other words, the complaint resolution process is designed to be an informal forum for review. There is no requirement that the proceeding be recorded in anticipation of court scrutiny. Any interested party is permitted to participate, and the parties’ procedural protections are minimal at best. In effect, the CRP is similar to an informal settlement conference. As such, it is

intended to serve as a forum by which parties can meet and confer without interference of the courts. (emphasis added).

Furthermore, the court noted:

This Court has found it written nowhere – not in statute or in case law – that due process examiner has the power to oversee a state’s complaint resolution process. More importantly, the Court finds it impossible to rule that a hearing examiner can review a CRP process when that examiner has no statutory authority to grant appellate relief. (emphasis added)

Id. at 662; *see also R.K. v. Hayward Unified Sch. Dist.*, 2007 WL 4169111 (N.D. Cal. Nov. 27, 2007) (citing *Virginia Office of Protection and Advocacy* and holding that under IDEA and its 2006 implementing regulations no private right of action exists for alleged violations of the complaint resolution procedures).

Only a party aggrieved by the findings and decision of an administrative law judge may seek judicial review of an administrative appeal officer’s decision. 20 U.S.C. § 1415(i)(2)(A). As a result, when a parent prevails in an administrative due process hearing, as the Appellants did in DPH 1860, the parent cannot seek enforcement of the due process decision in court due to lack of aggrieved party status. *See Chavez ex rel. Chavez v. Board of Educ. of Tularosa Mun. Schs.*, CIV-05-380-JB/RLP, 2007 WL 709038, 4-5, 7 (D. N.M. Feb. 13, 2007) (dismissing parent’s claim to enforce administrative due process decision because parent prevailed at due process and was not aggrieved); *C.C. ex rel. Mrs. D. v. Granby Bd. of Educ.*, 453 F. Supp.2d 569, 577-78 (D. Conn. 2006) (holding that the court lacked subject matter jurisdiction to hear action to enforce administrative due process decision because (i) it was brought by a prevailing/non-aggrieved party and (ii) 34 C.F.R. § 300.152(c)(3) showed U.S. Department of Education intent that such complaints were to be resolved by the SEA); *Moubry ex rel. Moubry v. Independent Sch. Dist. No. 696*, 951 F. Supp. 867, 885, 886 n. 14 (D. Minn. 1996) (ruling that

the IDEA does not contemplate an action to enforce an administrative decision because jurisdiction is limited to parties that the administrative decision aggrieves); *A.T. v. New York Educ. Dept.*, No. 98-CV-4166, 1998 WL 765371, *7 (E.D.N.Y. 1998)

The matters that HO Welsh could properly consider in DPH 1923 and 1924 are limited by statute. Section 1415(b)(6) confines a due process hearing officer's jurisdiction to only consider claims involving the (i) identification, (ii) evaluation, or (iii) educational placement of a child, or (iv) the provision of FAPE to such a child. Therefore, any matters not involving one of these four bases for jurisdiction were outside of HO Welsh's authority to consider.

Lepak's decisions provided the Parents relief for the District's denial of FAPE between August 30, 2005 and February 1, 2007. His decisions further set forth the services to be provided [REDACTED] from February 1, 2007 through August 7, 2007. Therefore, any Parent issues arising from August 30, 2005 through August 7, 2007 are addressed in the relief granted by AO Lepak in DPH 1860 and 1861.

By operation of 34 C.F.R. § 300.152(c)(3), only the OSDE had the authority to resolve the Parents' Implementation Complaints regarding the District's alleged failure to comply with AO Lepak's decisions. The OSDE did resolve those complaints and determined that the District has fully complied with AO Lepak's Reimbursement and Home Program Awards in DPH 1860 and 1861.

When the District sent notice to the Parents and conducted IEP team meetings for [REDACTED] on January 24 and 29, 2008, it was complying with an express directive of the OSDE which was responsible for supervising public elementary and secondary schools in Oklahoma. *See* OKLA. STAT. tit. 70, § 1-105(A) (2001) ("The State Department of Education is that department of the state government in which the agencies created or authorized by the

Constitution and Legislature are placed and charged with the responsibility of determining the policies and directing the administration and supervision of the public school system of the state.”).

HO Welsh properly dismissed claim 11b for want of jurisdiction.

With regard to paragraphs (c) and (d) of the Request For Due Process Appeal Review, it is found that the Hearing Officer properly followed Supreme Court and Tenth Circuit case law regarding the District’s legal obligations under the IDEA. The *Rowley* decision is still the prevailing law and cannot be ignored. (*Board of Educ. of Hendrick Hudson Central School Dist. V. Rowley*, 458 U.S. 176 (1982). (With regard to this Officer’s duty to obey the prevailing law, see also *Akin v. Missouri Pacific R.R. Co.*, 1998 OK 102, ¶ 30, 977 P.2d 1040, 1052).

When Congress enacted the 2004 amendments to the IDEA, it “did not alter the statutory definition of a FAPE in [Section] 1401(9), which provided the foundation for the standard derived in *Rowley*.” (See *Mr. and Mrs. C. v. Maine Sch. Admin. Dist. No. 6*, 538 F.Supp.2d 298, 301 (Me. 2008).

In her eighth Conclusion of Law, HO Welsh cites *A.E. v. Independent Sch. Dist. No. 25*, 936 F.2d 472, 475 (10th Cir. 1991) for the following statement of law:

8. When determining whether a student’s educational program is reasonably calculated to confer meaningful educational benefit, “due weight” must be given to the opinions of school officials responsible for the student’s education.

In making this conclusion of law, HO Welsh did not commit error. Rather, she followed existing Tenth Circuit case law interpreting the IDEA that requires that when determining whether an IEP is reasonably calculated to enable the child to receive educational benefits, “due weight **must** be given to the expertise of school officials responsible for the child’s education.”

See *Johnson v. Metro Davidson Cty. Sch. System*, 108 F.Supp.2d 906 (M.D. Tenn. 2000)

wherein it is stated:

Thus, if the district court is to give deference to the local school authorities on educational policy issues when it reviews the decision from an impartial due process hearing, it can only be that the ALJ presiding over such a hearing must give due weight to such policy decisions. For it to be otherwise, would be illogical; to prevent an ALJ from giving proper deference to the education expertise of the local school authorities and then require such deference by the district court would be inefficient and thus counter to sound jurisprudence.

With regard to paragraph (e) and (f) of the Request For Due Process Appeal Review, it is found that IDEA does not require a school district to use a particular methodology when educating children with autism and the evidence at hearing clearly indicates that the Parents were attempting to dictate that only Applied Behavior Analysis (ABA) be used with [REDACTED]. Therefore, HO Welsh's findings of fact and conclusions of law regarding these issues were correct and well founded.

On appeal Parents claim that HO Welsh misinterpreted their request at the January 2008 IEP meetings that they be provided a statement identifying the peer-reviewed research for the school's proposed methodology team as a claim that they were attempting to dictate methodology for educating [REDACTED]. The Parents further assert, citing only a blank reference to 20 U.S.C. § 1414(d)(1)(A)(i)(IV), that HO Welsh committed error in her twelfth Conclusion of Law when she stated:

"No federal or state law, regulations, or requirements dictate or discuss the use of a particular methodology by a school district for children with autism."

Section 1414(d)(1)(A)(i)(IV) sets forth the requirement that an IEP contain:

a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the student[.]

The language of Section 1414(d)(1)(A)(i)(IV) does not mandate that an IEP team meeting include “focused discussion on research-based methods or require public agencies to provide prior written notice when an IEP Team refuses to provide documentation of research-based methods[.]” 71 Fed. Reg. No. 156 at p. 46665 (Aug. 14, 2006).

There is no requirement in the IDEA that requires a specific methodology, peer reviewed or otherwise, for educating a student with a disability, let alone autism. The specific educational methodology is a decision for the IEP team when taking into account the child’s individual needs. *See Z.F. v. South Harrison Comm. Sch. Corp.*, 2005 WL 2373729 * 12 (S.D. Ind. Sept. 1, 2005). The IDEA does not specify any particular methodology and does not prohibit the use of multiple methods.”

The evidence at hearing established that the Parents sought to dictate to District officials the methodology to be used for [REDACTED] education. This is most clearly shown through the testimony of Parent [REDACTED], when he stated that the Parents would not have filed DPH 1923 and 1924 had the District written in each [REDACTED] IEP that they would be receiving 35 hours per week of ABA services with a Board Certified Behavior Analyst (“BCBA”) despite that ABA was simply being a behavior intervention program with no curriculum associated with it.

The Parents’ demand that ABA be the only methodology used to educate [REDACTED] [REDACTED] is also evidenced in the IEP Reviews and Written Notices provided by the District after the January 29, 2008 IEPs.

With regard to paragraphs (g) and (h) of the Request For Due Process Appeal Review, it is found that the hearing officer correctly found that a denial of FAPE will not exist where a school district's failure to implement a provision of an IEP is non-material to the student's education.

A school district's failure to implement every provision of a child's IEP does not automatically result in a denial of FAPE. Rather, a denial of FAPE will only be found to occur where substantial or significant provisions of the IEP are not implemented. As the Fifth Circuit Court of Appeals recognized in Houston Indep. Sch. Dist. v. Bobby R., 200 F. 3d 341 (5th Cir. 2000):

The approach taken in *Gillette[v. Fairland Bd. of Educ., 725 F.Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F.2d 551 (6th Cir.1991)]* seems reasonable, particularly in light of *Rowley's* flexible approach. We conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a de minimis failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

Id. at 349.

The credible evidence presented at hearing failed to establish that substantial or significant portions of the [REDACTED] IEPs were not implemented by the District, or that any portions that were not implemented resulted in a denial of FAPE. Indeed, the testimony, including that of Parent [REDACTED], conclusively established that both [REDACTED] received a meaningful educational benefit from the education they were provided by the District from August 2007 through the date of the hearing.

HO Welsh properly found that that (i) the Parents did not establish by credible evidence that any of the District's failures to implement any part of the [REDACTED] May 29, 2007 IEPs resulted in a denial of FAPE, (ii) any lack of implementation by the District of any part of the May 29, 2007 IEPs was trivial, at most, and (iii) the Parents did not establish by credible evidence that the District's failure to implement a provision of the [REDACTED] May 29, 2007 IEPs was material to either of the girl's education or educational progress.

Regarding the allegation set forth in paragraph (i) of the Request For Due Process Review, it is found that the hearing officer properly determined from the credible evidence presented at hearing that the Parents were not entitled to relief of any kind.

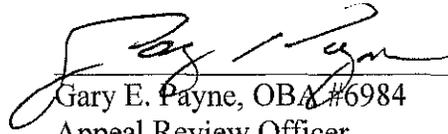
The credible testimony and evidence presented at hearing establishes that [REDACTED] [REDACTED] were provided FAPE and service in accordance with their May 29, 2007 IEPs from August 2007 through the date of hearing. The credible testimony and evidence also establishes that the Parents failed to sustain their burden of proof as to any of their claims. Accordingly, the Parents are not entitled to relief of any kind.

DECISION

The June 18, 2008 decision of the Hearing Officer is upheld.

NOTICE OF APPEAL RIGHTS

Pursuant to 20 U.S.C. § 1415(g) and (i) and 34 C.F.R. §300.516, the decision of the Appeal Review Officer is final except that any party involved in such hearing who feels themselves aggrieved by the findings and decision made shall have the right to bring a civil action in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy within 90 days of receipt of this Order.



Gary E. Payne, OBA #6984
Appeal Review Officer
Oklahoma State Department of Education

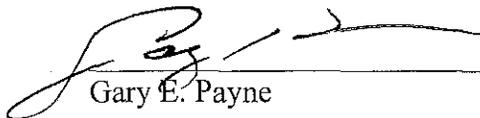
CERTIFICATE OF MAILING

I certify that on August 18, 2008, I mailed by certified mail, return receipt thereon, full paid, a copy of the above and foregoing to the following:

[REDACTED]

[REDACTED]

[REDACTED]



Gary E. Payne

ⁱ Names of the students must be redacted if this opinion is published beyond the parties.