COLORADO DEPARTMENT OF EDUCATION, SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2003: 120

FINDINGS AND DECISION OF IMPARTIAL HEARING OFFICER

In the matter of:

[STUDENT],

By and through her Mother and Legal Guardian,

[PARENT],

Petitioner,

v.

POUDRE SCHOOL DISTRICT R-1

Respondent.

I. INTRODUCTORY STATEMENT

The Colorado Department of Education received the request for hearing in this case on October 27, 2003. The Impartial Hearing Officer (IHO) heard this case on December 8 and 9, 2003, at 2407 La Porte Avenue, Fort Collins, Colorado. The parties filed written briefs on or about January 16, 2004. They had earlier agreed to extend the time for issuance of a decision to February 13, 2004. Jurisdiction is conferred by the Individuals with Disabilities Education Act (IDEA), 20 USC §1415(f)(1), its implementing regulations, 34 C.F.R. §300.507, and the implementing regulations to the Colorado Exceptional Children's Educational Act (ECEA),1 CCR 301-8 2220-R-6.03(6). The petitioner, K.H., appeared through her mother, [PARENT] Kathleen M. Shannon of the law firm of Caplan and Earnest, LLC, 2595 Canyon Blvd., Suite 400, Boulder, Colorado 80302-0737, represented the respondent, Poudre School District R-1.

II. ISSUES

The pre-hearing order of November 19, 2003, identified the issues at the hearing as follows:

1. Whether the respondent has failed to provide a Free Appropriate Public Education (FAPE) by refusing to educate the petitioner in her mainstream classroom for the entire school day. Currently she receives part of her education in a resource room for one period per day.

2. Whether the respondent has failed to provide a FAPE by not supplying services and materials to permit the petitioner to receive her entire education in the regular education classroom.

3. Did the respondent violate the stay put provision of the Individuals with Disabilities Education Act 20 USC §1415(j) by changing the petitioner's

educational placement during the pendency of this due process proceeding?

4. Did the respondent deny the petitioner a FAPE by failing to follow her IEP (Individualized Education Program) during the 2002-2003 academic year in not communicating assignments to petitioner's mother and in not adhering to re teach and retest procedures required by the IEP?

5. Did the respondent deny the petitioner a FAPE by moving the petitioner to a more restrictive environment without an IEP meeting?

6. Did the respondent fail to hold an IEP meeting upon proper parent request?

III. FINDINGS OF FACT

1. Since she was 2 ½ years old, K.H. has had a diagnosis of fetal alcohol syndrome (FAH). From at least the first grade through the first semester of her sixth grade year, [STUDENT] attended school in the Klein Independent School District in Texas. While in Texas, [STUDENT] received special education services to assist her with her special needs resulting from FAH. She was originally placed in a special education resource room for part of the day, but was removed from the resource room during the fifth grade. At the end of her fifth grade year, in May of 2001, the Texas school district developed an IEP which provided for some of [STUDENT]'s special education services through a co teacher or aide to assist her in language arts, reading, mathematics, social studies and science.

2. During the first semester of the sixth grade, a dispute arose between the Texas school district and her mother, [PARENT], regarding study guides, and [PARENT] requested a due process hearing authorized under 20 USC §1415(f)(1). The parties reached a settlement in that dispute memorialized in petitioner's Exhibit 9. According to that settlement agreement, the due process hearing was dismissed with prejudice, but the

hearing officer retained jurisdiction to resolve disputes under it. The request for due process hearing and its resolution by settlement did not involve any question regarding whether [STUDENT] would receive assistance through co teachers in contrast to a resource room. The settlement agreement provided that the May 2001 IEP would continue in effect until another one could be developed within 30 days.

3. In the fall of 2001, [STUDENT] began her sixth grade year in a junior high school in Texas, and pursuant to the settlement agreement, the parties to the dispute there developed a new IEP in October of 2001. (Petitioner's Exhibit 10.) Under that IEP, [STUDENT] continued to receive some of her special education services through aides or co teachers who assisted [STUDENT] for four hours per week in English, language arts, math science and social studies. (Exhibit 10, pp. 6-7.) [STUDENT] successfully completed her schooling in Texas during the first semester of her sixth grade year without resource room assistance. Neither the settlement agreement reached in Texas, nor the order requiring compliance with it bound the respondent to continue providing co teachers or aides in lieu of educating [STUDENT] in a resource room after she moved to Colorado.

4. In January of 2002, the petitioners moved into the respondent school district from Texas. In the Colorado district sixth graders remain in elementary school and advance to junior high in the seventh grade. [STUDENT] enrolled in Kruse elementary school, where she only received consultation services for the remainder of her sixth grade year to allow for testing and the development of a new triennial IEP in May of 2002. Petitioner's Exhibit 18, the temporary initial IEP in Colorado dated January 28, 2002, provides for no specific direct or indirect services, but states, "[STUDENT] will be

on consultation for the remainder of the sixth grade year. The resource teacher will consult with [STUDENT]'s teachers to make sure accommodations are being made and [STUDENT] is doing okay."

5. Near the end of February 2002, [STUDENT] encountered difficulties in math, and [PARENT] called a meeting to discuss her poor progress and grades. Sheila Katzman, the resource teacher at Kruse, acknowledged that [PARENT] asked about getting [STUDENT] an aide in the classroom at that meeting. District representatives responded that at that time, the district did not have resources to provide aides in the classrooms. (Petitioner's Exhibit 14.) However, [STUDENT] successfully completed the sixth grade without the assistance of a resource room for the remainder of that year.

6. On May 13, 2002, the parties met to develop a new triennial IEP for [STUDENT] and to prepare [STUDENT] for her entry to Boltz Junior High in the seventh grade. [PARENT] and [STUDENT] attended that meeting along with Kathryn Friesen, the principal at Kruse, John Cavenaugh, school psychologist at Kruse, and Charlene Lindsay, resource room teacher at Boltz, among others. The IEP resulting from that meeting qualified [STUDENT] for special education services based upon her physical disability. Shiela Katzman recommended in the cognitive portion of the IEP, based upon her testing, that "As she transitions to junior high, she would benefit from assistance with assignments in a resource classroom." (Respondent's Exhibit 1, p. 12.) John Cavenaugh agreed with that recommendation, and testified that due to [STUDENT]'s susceptibility to distraction, a one on one paraprofessional in the regular classroom would not benefit her as much as a certified special education teacher in the resource setting. The IEP adopted the resource support class as one of the services

provided to [STUDENT], but declined to require a recommended resource math class. (Respondent's Exhibit 1., p. 17.)

7. [PARENT] testified that she did not agree with the assignment of [STUDENT] to a resource room during the meeting of May 13, 2003. Furthermore, she argues that the failure of the respondent to place [STUDENT] in a resource room immediately after May 13, 2002, at Kruse demonstrates that neither party contemplated that assignment until the beginning of the fall semester in 2002. However, regardless of that disagreement, the IEP as adopted by the respondent district provided for direct resource room services for one class period per day, or three hours and 45 minutes per week. Additionally, the IEP requires 15 minutes per week in indirect consultative services among the staff of the district. [PARENT] learned of the resource room component when [STUDENT] reported her resource class to [PARENT] in late August of 2002. Also, the resource room teacher, Charlene Lindsay, sent home a letter and questionnaire on August 21, 2002. (Respondent's Exhibit 6.) [PARENT] returned the questionnaire expressing her dissatisfaction with the resource room class. These facts demonstrate that [PARENT] knew of the resource room assignment by August 21, 2002.

8. Upon learning that [STUDENT]'s schedule included a one class period per day session in the resource room, [PARENT] called Boltz and requested an IEP meeting in late August 2002. That meeting was originally scheduled for September 11, 2002, but only [PARENT] and Eileen Balcerak, Director of Special Education for the District, appeared at that meeting. The other district staff who would have attended the IEP meeting could not come because of memorial activities related to the anniversary of the September 11, 2001, terrorist attacks. The meeting was then rescheduled for

September 26, 2002, but [PARENT] did not attend that meeting because she did not receive written notice prior to the meeting. The meeting was then rescheduled for October 17, 2002. At that meeting, [PARENT] requested mediation and the district modified [STUDENT]'s IEP to remove any specific services provided in a resource room. (Respondent's Exhibit 2.) At that time, [STUDENT] enrolled in a regular education study skills class and subsequently in a French language class to substitute for the resource study skills class. However, she still did not receive help from a paraprofessional in tracking her assignments or organizing her homework.

9. The mediation requested on October 17, 2002, was held on December 13, 2002. By that time, [STUDENT] began to experience severe problems with her principal courses. Her grades slipped to D's in both math and geography for the second hexter (six weeks period) of the first semester. While her English grade improved during that hexter, overall the respondent considered her performance in school to have fallen below an acceptable level and sent a progress report home indicating that [STUDENT] was failing many subjects and receiving a grade of 23 in science. At the mediation, the district understood that an agreement had been reached concerning the resource room issue. In accordance with that purported understanding, the respondent district placed [STUDENT] back into Ms. Lindsay's resource room beginning January 7, 2003. However [PARENT] never signed an agreement resulting from the mediation.

10. At the hearing, [PARENT] testified that she did not receive a copy of the May 13, 2002, IEP until December 11, 2002, and the respondent claims it was sent to her in late August of the same year. However, that dispute is inconsequential, since [PARENT] became aware of the contested provision of the IEP in August, when she

learned of [STUDENT]'s resource room assignment and promptly challenged it at that time.

11. In recognition of the requirement to hold an IEP meeting to return [STUDENT] to the resource room one class period per day, Bill Smith, assistant principal at Boltz, had a member of his staff fax a request to [PARENT] to schedule an IEP meeting for several alternative dates in January of 2003. (Respondent's Exhibit 17.) However, [PARENT] did not respond to that request and another IEP meeting did not occur until [STUDENT]'s annual review on May 12, 2003. Accordingly, between January 7, 2003, and May 12, 2003, [STUDENT]'s IEP contained incorrect information concerning the direct services provided to [STUDENT] in the resource room and the indirect services provided to complement the direct services.

12. [PARENT] did not attend the May 12, 2003, IEP meeting despite receiving written notice, because she feared that she might have a conflicting meeting with a hearing officer in a case involving another child of hers on the same date. In the IEP meeting of May 12, 2003, the respondent's altered some of the accommodations and modifications provided in the previous triennial IEP of May 13, 2002, but retained the same terms relating to direct resource room services and the accompanying indirect services. (Respondent's Exhibit 4.)

13. [PARENT] requested another IEP meeting which was held on August 26, 2003. At that meeting, the respondent maintained its position that [STUDENT] remain in the resource room for one class period per day in the eighth grade. (Respondent's Exhibit 5.) At that meeting, the respondent considered removing [STUDENT] from special education services and placing her on a §504 plan to have a full schedule of classes and a

counselor monitoring her daily. [PARENT] rejected that alternative, and requested a due process hearing. Upon the dismissal of that request, the respondent filed a second request for a due process hearing on October 27, 2003, which resulted in this proceeding.

14. Beginning in approximately December of 2002 or January of 2003, Mr. Walz, principal at Boltz, requested that [PARENT] direct all contacts with personnel at the school through Bill Smith, assistant principal. In the eighth grade, Ms. Schippers teaches the resource room study skills class.

15. The petitioner presented no expert testimony at the hearing concerning the specifics of how a paraprofessional might operate in the classrooms at Boltz to perform the functions otherwise accomplished by [STUDENT]'s participation in the resource study skills class. Likewise, she adduced no evidence regarding the necessary qualifications of such personnel. Instead, she relied upon the fact that [STUDENT] succeeded with only co teacher assistance during portions of her education in Texas. However, respondents presented testimony from a number of witnesses supporting the one period per day resource room offering as the least restrictive alternative to assist [STUDENT] in focusing on and organizing her study assignments in her core courses. They testified that [STUDENT] could benefit from the support of a certified teacher instructing her regarding her study skills instead of a paraprofessional who did not earn a certification. Such certified teachers have experience at instilling independence and self advocacy. They have the training to assist [STUDENT] in breaking down long term assignments. An aide in the classroom assigned especially to [STUDENT] for even part of the day may present a greater source of obtrusiveness and embarrassment to [STUDENT] than would her participation in a separate resource room. [STUDENT]

needed the extra study time afforded in the resource room setting under the supervision of a teacher instead of taking a seventh class, even if that class did not pose academic demands on [STUDENT] The IHO credits the testimony of the witnesses who advocated the resource room placement.

IV. DISCUSSION AND CONCLUSIONS

A. The Respondent is Educating [STUDENT] in the Least Restrictive Appropriate Environment.

The pre hearing order identifies six issues for determination in this due process proceeding which appear in Section II. above. The first two of those closely relate to each other, and concern the duty of the respondent to educate [STUDENT] in the Least Restrictive Environment (LRE), 20 U.S.C. 1412(a)(5)(A); 34 C.F.R. 300.550(b). The statute and implementing regulations require, that "to the maximum extent appropriate," children with disabilities be educated with the non disabled and that "special classes, separate schooling or other removal of children with disabilities from the regular educational environment occur only if the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily," 34 C.F.R.300.550(b).

Initially, the petitioner argues that Hearing Officer Olivia Ruiz from Texas determined the least restrictive environment appropriate for [STUDENT]'s education and that Ms. Ruiz's determination binds the respondent in Colorado. This IHO rejects that argument. Ms. Ruiz's order (Petitioner's Exhibit 9) requires the parties to convene an ARD (IEP) meeting in September of 2001, within 30 days after entry of that order. The parties in Texas complied with that requirement and agreed upon an IEP (Petitioner's Exhibit 10) which makes no specific mention of resource room assistance for

[STUDENT], but which refers in a narrative discussion to the benefits provided by "co-teachers" who are "helpful in redirecting [STUDENT] and re-explaining new concepts" and in "prompting" [STUDENT] Ms. Ruiz did not independently establish the least restrictive environment for [STUDENT] in perpetuity, nor did she mandate that the IEP agreed upon pursuant to her order remain static for the remainder of [STUDENT]'s education. She made no specific ruling with respect to least restrictive environment at all. [PARENT] testified that the dispute which resulted in the due process proceeding and settlement agreement concerned study guides, not least restrictive environment. Furthermore, Ms. Ruiz's order applied exclusively against the Klein Independent School District in Texas. The respondent in this case had no opportunity to participate in the proceeding in Texas and did not defend its position there. Any order resulting from that proceeding does not bind the respondent here.

Regardless of the 2001 settlement agreement, the respondent has an obligation under the IDEA to educate [STUDENT] in the least restrictive environment. The petitioner contends that [STUDENT] can receive an appropriate education which meets the minimum requirements of the IDEA with the assistance of aides or "co-teachers" in the regular classroom, without attending a resource room study skills class one period per day. She relies heavily on the educational model for [STUDENT] established during fifth and sixth grade while attending school in Texas for her contention that the same concept would work in Colorado two years later.

On the other hand, the respondent's faculty and staff who testified at the hearing unanimously agreed that [STUDENT] needs the structure, individual attention, expert assistance and freedom from distractions that the one period per day resource class

provides to improve her study skills, enabling her to remain in the regular classroom for all of her other courses. An aide would not afford these benefits, according to the respondent, and would not accord a satisfactory education to [STUDENT]

The respondent argues that the petitioner has the burden to prove that [STUDENT]'s current IEP does not offer her an education within the least restrictive environment, citing, among other cases, *Johnson v. Independent School District No. 4*, 921 F.2d 1022(10th Cir. 1991). However, none of the cases cited by respondent interprets the least restrictive environment requirement under the IDEA. The circuit courts of appeal have generally held that in the administrative hearing, the school district always bears the burden of showing that it has met the LRE mandate. For example, in *Oberti v. Board or Education,* 995 F2d 1204, 1219 (3rd Cir. 1993) the Third Circuit has held that the school district always bears the burden of proving compliance with the mainstreaming requirement of the IDEA. Likewise in *Clyde K. v. Puyallup School Districts* 35, F.3d. 1396, 1398-1399 (9th Cir. 1994) the Ninth Circuit also held that at the administrative hearing, the school district "clearly" had the burden of proving that it had complied with the LRE requirement, even though that burden would shift to the parents in the courts if the school prevailed in the administrative proceedings. The text of the IDEA and its regulations support this position, since they stipulate that removal from the regular classroom setting should only occur when the nature of the disability dictates that education in regular classes with the use of supplementary aides and services cannot be achieved satisfactorily. This language establishes a presumption in favor of education in the regular classroom.

However, the allocation of the burden of proof to the respondent does not change the outcome of this case, because the district produced ample evidence demonstrating that it could only meet the needs of [STUDENT] satisfactorily in the resource room setting. On the other hand, K.T produced no testimony other than her own for the proposition that [STUDENT] could achieve a satisfactory education in the absence of the resource room class, and presented no specific evidence on the nature and duration of the paraprofessional services which could adequately substitute for that class.

The district met its burden to prove that it complied with the LRE requirements based upon the totality of the evidence in the case. John Cavenaugh, the school psychologist at Kruse Elementary School, testified that he recommended the resource room class as [STUDENT] made the transition into junior high because a paraprofessional in the regular classroom would have difficulty overcoming the distractions inherent in that environment. He contrasted the circumstances in the resource room, where a certified special education teacher can command the full attention of the student to help her track assignments and develop her study skills. Sheila Katzman, the resource room teacher at Kruse, who helped evaluate [STUDENT] during the second semester of her sixth grade year, recommended the resource room study skills class, and rejected the suggestion of an aide to assist [STUDENT] in the classroom based upon the lack of certification of aides and the social impediments for the student inherent in one on one special help in the classroom. Similarly, Eileen Balcerak , the Director of Special Education for the respondent testified that a classroom aide would assist her in the classroom only, but that [STUDENT] has broader goals relating to acting independently outside the classroom to organize and complete her work. Also, the

special education teacher applies her expertise in teaching students with special needs to advocate for themselves and to speak up if they do not understand the assignment. Additionally, Balcerak asserted that one on one paraprofessionals normally accompany students with more severe needs in the classroom. Since [STUDENT] socially interacts successfully with the regular education students in her general education classes, the presence of a paraprofessional in the classroom with her would impair her social standing in the mainstreamed setting, according to Balcerak.

Likewise, two of her seventh grade regular education teachers, Scott Sandell and Donald Zandlo, expressed their views that [STUDENT] needed the assistance available in a resource room. Sandell, her seventh grade science teacher, observed that [STUDENT] is a smart young lady who has trouble getting organized and keeping herself on track. He thought that the resource room would relieve her of one of the classes in a regular schedule and afford [STUDENT] the opportunity to sit down with a teacher who can help her stay organized and keep her focused. Zandlo concurred with Sandell's testimony. In fact, all of [STUDENT]'s current and former teachers who testified agreed that [STUDENT] needs the services offered in the special education resource room in lieu of a paraprofessional in the classroom. The IHO found the testimony of the proponents of the resource room credible and convincing.

On the other hand, [PARENT] stood alone in disagreement with all the other witnesses. [PARENT] seemed to concede that [STUDENT] would suffer academically if she moved out of the resource room. However, she contended, without benefit of any expert support, that the social detriments occasioned by [STUDENT] in the resource

room outweighed any academic benefits. Without expert testimony buttressing that contention, the IHO does not credit this argument.

Also, [PARENT] failed to present a comprehensive alternative to the IEP offered by the District. While she pointed out that [STUDENT] had only four hours per week of co teacher support at the time she left the Klein School District in Texas, she did not explain the scheduling of that four hours, the qualifications of the co teachers in Texas, how they functioned in an otherwise busy classroom full of general education students without disruption to those students, and how they interacted with a certified special education teacher who, presumably, would supervise their work. Such information would come from an expert or experts familiar with the use of aides in special education generally, and with the specific needs of [STUDENT] The record in this case does not warrant replacing the current IEP with a predominantly unknown alternative.

[PARENT] also testified that [STUDENT] suffered emotionally from her segregation in the resource room. She asserted that [STUDENT] now undergoes therapy attributable to the deterioration in her social life in the eighth grade, in contrast to her very active social life last year. However, this testimony does not militate for the conclusion that [STUDENT]'s current problems stem from her resource room experience. On the contrary, [STUDENT] attended the resource room for most, but not all, of her seventh grade year. Again, the IHO cannot uphold petitioner's position because it lacks the support of an expert. [STUDENT]'s therapist did not testify, convincingly or otherwise, that [STUDENT] has incurred emotional difficulties on account of the resource room.

The courts frequently look to expert testimony in resolving disputes regarding the LRE. For example, in *Board of Education v. Holland,* 786 F.2d 874 (E.D. Cal. 1992) the Court credited the expert testimony provided by the parents in requiring mainstreaming. Likewise, the District Court in *Oberti* denied summary judgment based upon the conflicting opinions of experts who would testify on the LRE issue at trial, suggesting the importance of expert testimony in LRE cases. *Oberti v. Board of Education,* 789 F.Supp., 1322, 1336 (D. N.J.1992). Without expert testimony in the present case, this IHO cannot venture to fashion a coherent plan for the delivery of appropriate special education services for [STUDENT] to supersede the one already in place. In the present case, the petitioner did not sustain a defense to the onslaught of educational and psychological experts from the district who opposed her views.

Additionally, petitioner argues that the IDEA requires [STUDENT]'s placement in the regular classroom exclusively as long as she can barely survive there academically. She apparently relies upon the holding in *Board of Education of Hendrick Hudson School District v. Rowley,* 458 U.S. 176 (1982) to contend that as long as the services provided K.H in the regular classroom confer some educational benefit, the IDEA prohibits the district from compromising the principle of mainstreaming even in the slightest to improve her academic performance substantially. The Seventh Circuit rejected a similar argument in *Beth B. v. Lake Bluff Independent School District,* 282 F.3d 493 (7th Cir. 2002). While that case involved a much more severely disabled student than [STUDENT], who had failed to make progress in a mainstreamed setting, the Seventh Circuit's interpretation of *Rowley* in the LRE context applies here. The Seventh Circuit observed that the Petitioner's argument turns the *Rowley* case on its head. *Rowley*

establishes the minimum educational requirements for disabled students, but it does not prohibit a school district from providing an IEP with a significantly better than minimal education, as long as the sacrifice to mainstreaming does not outweigh the educational benefit. The evidence in this case demonstrated that the substantial academic advantage occasioned by the resource room placement supersedes the relatively minor compromise to mainstreaming. The district has satisfied its burden to prove that under the circumstances, [STUDENT] should follow her current IEP and should attend the resource room one period per day to enable her to do well in all of her other regular education classes. The IHO concludes that the respondent committed no violation with respect to the first and second issues.

B. The Respondent Did Not Violate the Stay Put Provision of the IDEA.

The petitioner did not present any evidence to support its contention that the respondent violated the so called stay put provision of the IDEA, in 20 USC §1415(j), as the petitioner alleges by raising the third issue in Section II. above. That provision requires that during the pendency of a due process proceeding, the respondent maintain [STUDENT] in her current educational placement. At the time of the initiation of this due process proceeding on October 27, 2003, her IEP provided for a resource study skills class of one period per day. The record contains no evidence that the respondent deviated from that educational placement. Therefore, the respondent did not violate the stay put rule. The IHO concludes that the respondent committed no violation with respect to the third issue.

C. The Respondent Did Not Violate Any IEP Provisions Regarding Retest and Reteach During the 2002-2003 Academic Year.

At the pre hearing conference of November 21, 2003, the petitioner argued that the respondent violated provisions in her IEP relating to retest and reteach during the 2002-2003 academic year. That contention appears above in issue 4 in Section II. of this Decision. In apparent recognition that the IEP applicable during that year contained no such provisions, she abandoned that contention in her closing arguments faxed on January 16, 2004. However, she alleged in closing that during the period [STUDENT] did not attend the resource room in late 2002, Mr. Sandell and Mr. Zandlo testified that [STUDENT] did not receive any support from special education. In actuality, Mr. Sandell testified that his communications with the resource teacher ceased for about two weeks, and then resumed when he started sending copies of missing assignments to the resource teacher. (Tr. 512-513.) Mr. Zandlo testified that when [STUDENT] was not in the resource class, he did not communicate with the resource teacher as much as he normally would. (Tr. 530.) Since the IEP in effect at that time provided for a total of only 15 minutes per week in consultation time (indirect services), the IHO cannot determine whether the lull in communication between [STUDENT]'s regular education teachers and the special education teacher shortly after October 17, 2002, dipped below 15 minutes per week and violated the IEP. (Respondent's Exhibit 2, page 3.). Therefore, the IHO rejects the petitioner's contention that respondent violated the service delivery provisions of the IEP by failing to accord [STUDENT] special education support during the 2002-2003 academic year.

Additionally, in her closing brief, [PARENT] argues that [STUDENT]'s current English teacher, Ms. Linley, violates K.H's IEP when she penalizes [STUDENT] for

handing in homework assignments late during the current 2003-2004 academic year. While the current IEP provides for additional time on tests, it does not address homework assignments. Therefore, Ms. Linley's practice does not violate the current IEP. However, should the petitioner wish to seek modification of the current IEP to permit [STUDENT] additional time to complete homework assignments without penalty, she may do so. The IHO concludes that the respondent committed no violation with respect to the fourth issue.

D. <u>The Respondent Moved the Petitioner to a More Restrictive Environment Without an IEP Meeting.</u>

The petitioner raised issue five in section II. above, alleging that the respondent denied the petitioner a Free Appropriate Public Education by moving her to a more restrictive environment without an IEP meeting. When respondent moved [STUDENT] back into the resource room on or about January 7, 2003, the IEP should have been modified to reflect that change in placement. In recognition of that fact, Boltz' assistant principal Bill Smith directed a staff member to fax prospective dates for an IEP meeting to [PARENT] on January 6, 2003. (Respondent's Exhibit 17.) [PARENT] never replied to that inquiry, and a new IEP meeting was not convened until May 12, 2003. Accordingly, between approximately January 7 and May 12, 2003, [STUDENT]'s IEP did not accurately reflect her placement in the resource room or the services provided to her there.

The IDEA and its regulations require revision of the IEP to address the lack of expected progress of a student, 20 U.S.C. §1414(d)(4)(A) and 34 C.F.R.§300.343(c)(2). The ECEA Rules also require that the "rationale for providing service outside of the regular classroom shall be based on student needs and shall be documented on the IEP," 1

CCR 301-8 2220-R-5.02(5). By failing to document the change in placement back to the resource room in early January of 2003, the respondent violated these provisions.

However, the petitioner suffered no substantive harm from this violation. The respondent attempted to schedule an IEP meeting and [PARENT] did not respond. [PARENT] did not testify at the hearing that she was unaware of the change in placement, or that she would have challenged it earlier if she had known about it. Therefore, as the remedy for this violation, the IHO will only order the district to assure that [STUDENT]'s IEP accurately documents her educational placement and the services provided to her at all times.

E. <u>The Respondent Did Not Fail to Hold an IEP Meeting Upon Proper Request.</u>

The petitioner raised issue six in section II. above, alleging that the respondent failed to hold an IEP meeting upon proper request. This allegation apparently refers to the difficulties experienced by the parties in convening an IEP meeting in the fall of 2002. [STUDENT] requested the IEP meeting in late August of 2002, and it was originally scheduled for September 11, 2002. When only Ms. Balcerak and [PARENT] appeared for that meeting, it was rescheduled for September 26, 2002. (Respondent's Exhibit 10.) When [PARENT] did not appear at that meeting, it was again rescheduled for October 17, 2003, at which time the respondent made significant changes to the IEP. (Respondent's Exhibits 2 and 12.) This sequence of events does not amount to a refusal or failure to hold an IEP meeting upon proper parent request. The IHO concludes that the respondent committed no violation with respect to the sixth issue.

V. DECISION

Based upon the above findings and conclusions, it is the decision of the Impartial Hearing Officer that:

1. The district violated the provisions of 20 U.S.C. §1414(d)(4)(A), 34 C.F.R. §300.343(c)(2) and 1 CCR 301-8 2220-R-5.02(5), when it failed to modify [STUDENT]'s IEP to indicate accurately her special education placement and the special education services provided to her between early January of 2003 and May 12, 2003. The IHO orders the respondent to assure that [STUDENT]'s IEP accurately documents her educational placement and the special education services provided to her at all times.

2. In all other respects, the petitioner's request for relief is denied and dismissed.

Dated in Denver, Colorado, this 11th day of February, 2004.

VI. APPEAL RIGHTS

Enclosed with this decision, please find a copy of your appeal rights under the ECEA, 1 CCR 301-8 2220-R-6.03(9), (10), and (11).

Respectfully submitted,

Joseph M. Goldhammer, Esq.
Impartial Hearing Officer
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CERTIFICATE OF SERVICE

I certify that on February 11th, 2004, I sent a copy of the ***Findings and Decision of Impartial Hearing Officer*** by either U.S. Mail or facsimile or both (as indicated) to the following:

[PARENT] (by facsimile and U.S. Mail)

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