COLORADO DEPARTMENT OF EDUCATION
SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2004: 102

FINDINGS AND DECISION OF IMPARTIAL HEARING OFFICER

In the matter of:

[STUDENT],

By and through his Parents,

[PARENTS],

Petitioner,

v.

UNCOMPAHGRE BOCES

Respondent.

I. INTRODUCTORY STATEMENT

The Colorado Department of Education received the request for hearing in this case on February 4, 2004. The Impartial Hearing Officer (IHO) heard the case on April 12, 2004, in Ridgway, Colorado. The parties filed written briefs on or about May 3, 2004. They had earlier agreed to extend the time for issuance of a decision to May 17, 2004, as documented in the pre hearing order dated February 20, 2004. 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) confer jurisdiction. The petitioner, [STUDENT], appeared through his parents, [PARENT] and [PARENT]. Darryl Farrington of the law firm of Semple Miller and Mooney, 1120 Lincoln Street #1308 Denver CO 80203 represented the respondent, Uncompahgre BOCES.

II. ISSUES

The pre-hearing order of February 20, 2004, identified the issues at the hearing as follows:

A. The petitioner:

> Whether the respondent is denying a Free Appropriate Public Education (FAPE) by failing to implement the Individualized Educational Program (IEP) of the student and, if so, what is the appropriate remedy?

B. The respondent:

> Whether counseling services are an essential component of the Free Appropriate Public Education in this case?

At the hearing, the respondent withdrew its issue and did not present any evidence relevant to it. Therefore, only petitioner's issue remains before the IHO.

III. FINDINGS OF FACT

1. During the 2003-2004 academic year, [STUDENT] attends the Ridgway Elementary School in Ridgway Colorado as an 5th grader. Ridgway Elementary School educates students in kindergarten through the eighth grades.

2. In his fourth grade year in the same school, 2002-2003, [STUDENT] experienced difficulties in understanding his directions in school and in recalling his assignments. Accordingly, at the request of his mother, he underwent an evaluation with Sharon Sirotek, Phd, a clinical psychologist with the school district. She determined that [STUDENT] had a perceptual or communicative disability and should receive special education services, despite the fact that his testing did not qualify him for such a diagnosis and attendant special education services. However, Dr. Sirotek noted a marked discrepancy between his depressed intelligence test scores and her observations of him including his demonstrated speaking abilities. Due to the variation between [STUDENT]'s intelligence and his low performance on achievement tests, Dr. Sirotek granted a rare variance allowing [STUDENT] to participate in special education.

3. In May of 2003, an IEP team developed an Individual Education Program (IEP) for [STUDENT] (Exhibit 19) It provided for two hours per week of direct special education services outside the regular classroom. [STUDENT] was to receive these services in the special education resource room at Ridgway Elementary School. Additionally, the IEP provided for accommodations or modifications to his regular educational program including extra time as necessary, preferential seating, a quiet place

to study in the resource room, a quiet place to test in the resource room, and a "time out" when he expresses frustration or anxiety or both.

4. At the beginning of his fifth grade year [STUDENT] continued to encounter difficulties in school. His special education resource room teacher, Margaret Ruybalid, and her aide, para-educator Donette Arrington, offered widely differing accounts of [STUDENT]'s educational experience in the early part of the academic year from that of his regular classroom teacher, Nancy Eilerts. Ruybalid contended that [STUDENT] and Eilerts developed a stressed relationship during the first semester. They testified that Ms. Eilerts repeatedly returned math assignments to the resource room for correction and that [STUDENT] expressed frustration with his inability to perform assignments to Ms. Eilerts' satisfaction and to please Ms. Eilerts generally.

5. Ms. Eilerts also disagreed with some of the teaching techniques used in the resource room such as the use of the blackboard to do math problems, disapproved of the level of help offered there and accused the staff there of giving [STUDENT] the answers to the problems. Ms. Eilerts wrote detailed instructions to the resource room personnel on how to accomplish their tasks. Ms. Ruybalid characterized these instructions as micro management, and considered them an intrusion into her prerogatives as an experienced special education teacher.

6. Additionally, Ms. Ruybalid and Ms. Arrington recalled that, in the early part of the academic year, [STUDENT] did not take his tests in the resource room as suggested in his IEP and that he did not come to the resource room for the minimum two hours per week. Para-educator Arrington testified that near the beginning of the semester, Ms. Eilerts did not release [STUDENT] from class when Ms. Arrington went to

retrieve him for his instruction in the resource room. According to Ms. Arrington, Ms. Eilerts asserted that [STUDENT] must stay in the regular classroom to share in important lessons with the other students. Ms. Arrington also asserted that [STUDENT] did not come to the resource room at least 2 hours per week during the first semester and testified that during one two week period, [STUDENT] did not appear in the resource room at all. Eilerts contended that she never refused [STUDENT] permission to go to the resource room to take tests, and had no recollection of [STUDENT]'s absence from the resource room for extended periods during first semester. According to Ms. Eilerts, [STUDENT]'s attendance in the resource room met the two hours per week requirement always. However, none of his educators kept attendance records of [STUDENT]'s time in the resource room during the first semester. Therefore, the full extent of [STUDENT]'s participation or lack of participation in special education cannot be determined based upon objective and contemporaneous records.

7. In apparent acknowledgment of confusion concerning the timing of [STUDENT]'s attendance in the resource room, Ms. Eilerts wrote out a proposed schedule for his special education services on October 21, 2003. (Exhibit 24) That schedule provides for more time in the resource room than the May 20, 2003, IEP required.

8. When [STUDENT] feels particularly nervous at school and at home he exhibits his frustration in anxiety attacks termed "meltdowns." When having a "meltdown" [STUDENT] acts like he has itchy feet and bangs them against the floor. He also rubs his head with his hands and grabs his hair. During a "meltdown" [STUDENT] cannot concentrate or continue his school work. Beginning in the second semester,

[STUDENT] goes to the resource room when suffering one of these anxiety attacks where the personnel there use various techniques to calm him down, including having him sit on a large plastic ball. [STUDENT] experienced numerous "meltdowns" in the period between November and December of 2003.

8. Upon learning of [STUDENT]'s difficulties, Chris Martin, elementary/middle school principal, suggested that the parties hold an additional IEP meeting in December of 2003. In that meeting held on December 10, the parties agreed to increase [STUDENT]'s time in the resource room to five hours per week. (Exhibit 26) The minutes of the meeting of December 10, 2003, clarify that [STUDENT] "is to come to the special education room at any time that he begins to show anxiety, frustration, or 'meltdown.' He is to take tests in the resource room to provide a less stressful environment." (Exhibit 27)

7. The modifications to the IEP of December 10, 2003, did not serve immediately to mitigate the stress between [STUDENT] and Ms. Eilerts. After the December 10 meeting, but still in December of 2004, according to Ms. Ruybalid, Ms. Eilerts followed [STUDENT] into the resource room complaining that [STUDENT] had failed to thank her for some wrapping paper that she had given him, and then departed the room abruptly, slamming the door behind her. Ms. Eilerts, on the other hand, testified that she had no recollection of that incident. Upon hearing of this episode, [STUDENT]'s mother, [PARENT], wrote a letter to Ms. Eilerts dated December 17, 2003, complaining of Ms. Eilert's treatment of [STUDENT] in the incident regarding the wrapping paper and on other occasions. [PARENT] also undiplomatically asserted that Ms. Eilerts tried to interfere unduly in the efforts of Ms. Ruybalid and Ms. Arrington in

the resource room and stated that "the only thing Special Ed needs from you is to tell them what page you are on in class." (Exhibit 28) Ms. Eilerts testified that she was "shocked" in reaction to her receipt of this letter, and had no previous warning that [PARENT] disapproved of her. In response, Mr. Martin wrote to [PARENT] on January 13, 2004, accusing her of inappropriate behavior and restricting her access to Ms. Eilerts. (Exhibit 29)

9. The witnesses agreed that during the second semester, [STUDENT] began taking his tests in the resource room and met the five hours per week attendance requirement in the special education class, during some weeks exceeding that minimum substantially. Additionally, whenever he commences to "melt down," Ms. Eilerts permits [STUDENT] to go to the resource room. Since at least the beginning of the second semester, Ms. Eilerts no longer delays [STUDENT]'s departures from her classroom to the special education room, and has considerably liberalized her attitude toward permitting him to go to the resource room in accordance with his own perceived needs.

10. However, the mutual frustrations between [STUDENT] and Ms. Eilerts have not completely subsided during the second semester. For example, Ms. Eilerts continues repeatedly to send math papers back to the resource room with [STUDENT] for correction to his great dismay. In February of 2004, Ms. Eilerts accompanied [STUDENT] to the resource room and required him to empty his back pack in an attempt to locate a book which she had loaned to him. Ms. Arrington described this incident as manifesting a high level of frustration and tension between them. Additionally, Ms. Eilerts continues to convey detailed instructions with [STUDENT] regarding her

expectations for the teaching techniques used and content covered in the special education classroom, which continues to trouble Ms. Ruybalid and Ms. Arrington.

11. The IHO credits the testimony of Ms. Ruybalid and Ms. Arrington that at least during the period in the fall of 2003 before October 21, 2003, [STUDENT] did not receive his required allotment of two hours per week of instruction in the special education classroom. Additionally, the IHO likewise credits their testimony that [STUDENT] did not take a substantial portion of his tests in the special education resource room during the first semester. The consistency between the testimony of the two staff members in the special education resource room on those points, and the lack of any potential bias on the part of Ms. Arrington have convinced the IHO of the accuracy of their testimony. Additionally, Ms. Arrington testified persuasively concerning her unsuccessful attempts to remove [STUDENT] from the general education classroom for his special education services during the first semester, and her testimony confirms the low priority placed upon insuring regularity in [STUDENT]'s attendance in the resource room during the first semester, in stark contrast to the practices which obtained during the second semester.

12. During the second semester, Ms. Eilerts and the school officials made the special education resource room accessible to [STUDENT] in accordance with his needs and in excess of the time required by the May 29, 2003, IEP as modified on December 10, 2003. In the second semester, Ms. Eilerts permitted [STUDENT] to go to the resource room to take his tests and to relieve his anxieties during a "meltdown." Additionally, [STUDENT] adhered to a regular resource room schedule.

13. During the hearing, petitioner submitted substantial evidence regarding the tense relationship at times between [STUDENT] and Ms. Eilerts. However, the petitioner presented no specific evidence and no expert evidence regarding the impact of any such tension upon [STUDENT]'s educational progress under the IEP. Petitioner, for example, presented no evidence of any expert evaluations of [STUDENT]'s emotional status resulting from [STUDENT]'s relationship with his general education teacher. Furthermore, the petitioner presented no evidence that the parents requested an independent evaluation paid for at public expense pursuant to 34 CFR 300.502.

IV. DISCUSSION AND CONCLUSIONS

A. The School Denied the Petitioner a Free Appropriate Public Education When It Did Not Assure that [STUDENT] Attended the Resource Room For Tests and For a Minimum of Two Hours Per Week During the Fall Semester of 2003.

The Individuals with Disabilities Education Act defines a Free Appropriate Public Education (FAPE) as "special education and related services that ---- . . . are provided in conformity with the individualized education program required under Sec. 614(d)." 20 USC §1401(8). Section 614 (d) of IDEA sets forth detailed requirements for IEPs. Likewise, the regulations implementing IDEA require each public agency to "(1)Provide special education and related services to a child with a disability in accordance with the child's IEP. . ." 34 CFR 300.350(a)(2). Hence, when Ridgway Elementary adopted an IEP for [STUDENT] which called for a minimum of 2 hours per week in direct services outside the general classroom and allowing " for a quiet place to test/resource room," the school undertook a legal obligation to comply with those provisions. Accordingly, failure by the school to assure compliance with material terms of the IEP constitutes denial of a free appropriate public education to [STUDENT]

In implementing an IEP, schools may exercise some flexibility. A *de minimus* failure to implement all elements of an IEP does not constitute the denial of a FAPE. For example, in *Houston Independent School District v. Bobby R.* 200 F.3d 341 (5th Cir. 2000) the Fifth Circuit ruled for the school district in spite of the school's failure to make a speech therapist available for a major portion of the school year in question as required by the IEP. The Court found that compensatory education offered by the school district during the following summer sufficiently remedied any dereliction of their duty.

This case involves the allegation by petitioner of substantial and material denials of an IEP. This IEP does not involve extensive services. However, two components of the IEP stand out in importance, adequate time in the resource room for [STUDENT], and the opportunity to take tests there. When those components are not substantially fulfilled, the school has denied [STUDENT] a FAPE.

Here, two employees of the school, Ms. Ruybalid and Ms. Arrington, testified that [STUDENT] did not come to the resource room for educational support at least two hours per week and did not take his tests there during the early part of the 2003-2004 academic year. Both members of the resource room staff admitted their own shortcoming in not keeping records of [STUDENT]'s attendance in the special education classroom. Therefore, the record in this case does not reveal the precise extent of the failure to satisfy the resource room component of [STUDENT]'s IEP The District contends that the burden of proof falls upon the petitioner in IDEA proceedings where the petitioner contests the adequacy of the IEP in its plan to enable the child to receive educational benefits. *Johnson v. Independent School District No. 4*, 921 F.2d 1022(10th Cir. 1991). The District argues that no reason would compel a different result in cases

involving the issue whether the school had implemented the IEP. Assuming that the District's argument is correct, in this case, the IHO finds that the petitioner met that burden by showing, according to the resource room staff, that [STUDENT] did not appear in the resource room over a substantial period of time, between the beginning of the school year and October 21, 2003, either for his tests or for help on his academic subjects for at least two hours per week. The parents are not present at school to take attendance during the school day when [STUDENT] would normally go to the resource room. The school had the exclusive opportunity to keep records to demonstrate compliance with the IEP. Therefore, the parents cannot be expected to produce contemporaneous documentary evidence which only the school could generate. When school employees in the resource room confirm that violations of the IEP have occurred and those same employees did not keep the records which would have documented the magnitude of that violation, the petitioner has met its burden of proof to establish denial of a FAPE.

The District argues on pages 11-13 of its post hearing position statement that a denial of a FAPE does not result from failure to implement an IEP fully if the disabled student makes adequate academic progress in spite of the failure. In this case, neither party produced extensive evidence of [STUDENT]'s academic progress in the first semester of the fifth grade. However, some case authority supports the proposition that substantial or significant violations of an IEP result in the denial of a FAPE regardless of the academic progress of the disabled student. For example in *Brandon Manalansan v. Board of Education of Baltimore,* 2001 U.S. Dist. Lexis 12608, 2001 Westlaw 939699, 35 IDELR 122 (D. Md. 2001) the court held as follows:

> The degree of progress that Brandon made at TJ is not clear from the record. Moreover, it is not clear to me that a demonstration of some educational progress would negate the IDEA violation resulting from the failure to implement Brandon's IEP. The Fourth Circuit has held that 'failures to meet the Act's procedural requirements are adequate grounds by themselves' for finding a denial of FAPE, apparently without an inquiry into whether educational benefit was conferred on the student despite of the procedural violation. *Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985).* Such a holding would seem to reflect a belief that the IDEA serves a deterrent function and creates substantive rights that can be enforced even if a child has been lucky enough to make progress despite a school's failure to comply with federal law. In other words, when it is clear that the statute has been violated, a school should not be released from liability because a child has made some minimal educational progress. . .
>
> once the school outlines the substance and the details of a child's educational program and the services deemed necessary to provide FAPE, the court does not intrude on the school system's domain when it demands that the services outlined in the IEP be provided.

Accordingly, the IHO concludes that between the beginning of the 2003-2004 school year and at least October 21, 2003, the school violated the provisions in the May 29, 2003, IEP providing for two hours of special education outside the general classroom. Additionally, during the first semester, the school did not allow for [STUDENT] to take his tests in the resource room in accordance with the IEP. Accordingly, the school denied [STUDENT] a free appropriate public education.

B. The Petitioner Qualifies Only for a Limited Remedy Which Assures Future Compliance with His IEP.

In their post hearing position statement, the parents sought six forms of remedy, including a letter from Ms. Eilerts admitting her abusive and unfair treatment of [STUDENT], a formal apology from the school Board, and a letter from the principal admitting his neglect of his job. Additionally, she requested that the IHO order the school to place a copy of this decision in the employment files of the guilty individuals,

that he grant permission to make all of the above mentioned letters public, and that the school write a letter stating that the district will not exclude their children in retaliation for this proceeding, since they attend the school under the Colorado Schools of Choice Law (§22-36-101, C.R.S.) The IHO denies all of the above remedies. None of them fall within the jurisdiction of this IHO.

While the parents contend that Ms. Eilerts was a "bad and abusive teacher," this IHO has no authority to decide the merits of that allegation. This hearing officer only has jurisdiction to determine to determine whether the school has fulfilled its obligation to provide a free appropriate public education to [STUDENT] 20 U.S.C. 1415(b)(6). Although the relationship between Ms. Elierts and [STUDENT] produced frustrations for both of them at times, the petitioner adduced no evidence that those frustrations, by themselves, caused damage to the petitioner's free appropriate public education. IDEA does not purport to resolve all conflicts or tensions which may arise between students and their teachers so long as those factors do not adversely influence the provision of a free appropriate public education. In the second semester, [STUDENT] spent more time than previously in the resource room to escape his intermittent discomfort in Ms. Eilert's classroom. However, the parents cannot use this proceeding as a vehicle to repair whatever problems may have occurred in [STUDENT]'s relationship with his general education teacher. Instead, only the specific non compliance with the clear terms of the IEP in the first half of the first semester resulted in a palpable denial of a FAPE for which petitioner qualifies for a remedy.

The issue in this proceeding concerned whether the school denied [STUDENT] a FAPE, and the IHO concluded that, to a limited extent, the denial of a FAPE did occur.

However, in fashioning a remedy, the IHO must consider the ultimate harm done to [STUDENT] and must tailor the remedy to compensate [STUDENT] for that specific harm. In this case, the IHO concludes that the failure to adhere to the IEP during the first semester of the 2003-2004 school year, constituted a violation of [STUDENT]'s right to a free appropriate public education in accordance with the terms of his IEP. However, subsequent to that point, the school substantially complied with the IEP, offering [STUDENT] the opportunity to go to the resource room as needed, and in excess of the time periods specified in the IEP as modified on December 10, 2003. Furthermore, in the second semester, [STUDENT] took his tests in the resource room, as envisioned in the May 29, 2003, IEP. Therefore, the IHO concludes that the only remedy to which the petitioner is entitled is an order from the IHO requiring the school to comply substantially and materially with the petitioner's IEP in the future.

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 the IEP by failing to assure that he spent the time periods specified by the IEP in the resource room and by failing to assure that he had the opportunity to take tests in the resource room during the first semester of the 2003-2004 academic year. The school shall assure that the petitioner's IEP is substantially and materially complied with in the future.

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

Dated in Denver, Colorado, this 17th day of May, 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,

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

I certify that on May 17th, 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:

Darryl Farrington
Semple Miller and Mooney
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[parents]

Ms. Jennifer Rodriguez (original)
Colorado Department of Education
201 East Colfax Avenue
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