

COLORADO DEPARTMENT OF EDUCATION

SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2005: 109

IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION

In the matter of:

THE STUDENT, by and through his Parents

Petitioner,

v.

MESA COUNTY VALLEY SCHOOL DISTRICT NO. 51

Respondent.

I. INTRODUCTORY STATEMENT

The School District received the request for hearing in this case on or about April 28, 2005. Impartial Hearing Officer (IHO) Christopher D. Randall was selected to hear the case. Notwithstanding a submission dated July 1, 2005, defining the parents' requests (Exhibit 28) IHO Randall dismissed the matter with prejudice, granting the Motion for Dismissal and/or Summary Judgment filed by Respondent on July 11, 2005. Administrative Law Judge Judith F. Schulman (ALJ) issued an Order dated December 21, 2005, affirming in part and reversing in part the IHO's Order of July 11, 2005, and retaining jurisdiction over the case. The Respondent filed a Motion for Reconsideration with ALJ Schulman on January 9, 2006, and ALJ Schulman

issued a 41 page Order on January 25, 2006, granting the motion for reconsideration and remanding the case to the IHO for further hearings. When IHO Randall declined to hear the case on remand, the undersigned IHO was selected on or about February 21, 2006.

The (IHO) heard the case on May 8, 9, and 10, 2006, in Grand Junction, Colorado. The parties agreed to extend the time for issuance of a decision to May 31, 2006, as documented in the pre-hearing order dated March 16, 2006.

The Individuals with Disabilities Education Improvement Act (IDEIA), 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, (the Student) appeared through his parents pro se. The School District appeared through Jan Blair, Special Education Coordinator for West Valley K-8 in the Respondent District. David A. Price, Director and Lead Counsel for the Colorado Association of School Boards Legal Services Program represented Respondent.

II. ISSUES

In her Order dated January 25, 2006, ALJ Shulman specified the issues for this due process hearing on remand. Additionally, the parties agreed at the pre-hearing conference held March 2, 2006, to supplement those issues with number 9 stated below as indicated in the pre-hearing order of March 16, 2006. At the hearing in May, 2006, the parties agreed upon further refinements to the issues. The finally agreed upon issues are as follows:

1. Did the District violate 20 USC 1414(d)(1)(A) and 34 C.F.R 300.347(a)(2) by failing to specify appropriate goals and objectives in the Petitioner's 2004-2005 IEP?

2. Did the District violate the IDEIA and 34 C.F.R. §300.347(a)(2) by failing to include in the 2004-2005 IEP separate annual goals and benchmarks for reading and writing?

3. Did the District violate 20 U.S.C. §§1401(29) and 1412(a)(5) and 34 C.F.R. §300.347 (a)(3) and (a)(5)(i) by failing to provide proper modifications and accommodations in the 2004-2005 IEP? Specifically, this issue concerns whether the IEP failed properly to include a statement of the program modifications or supports that will be provided for the child, whether it contained necessary modifications in the administration of student assessments, whether it provided for education in the least restrictive environment and whether it provided for necessary supplementary aids and services in the form of more frequent consultations with the classroom teacher.

4. Did the District violate 34 C.F.R. §300.347(a)(7)(i) by failing to include in the 2004-2005 IEP a statement of how the child's annual goals will be measured?

5. Did the cumulative effect of the District's multiple alleged IDEIA violations as asserted by the Petitioner in his filings result in a failure by the District to provide the student with a Free Appropriate Public Education as defined by 20 U.S.C. §1401(8)?

6. Is the District liable under 34 C.F.R. §300.350 for failing to provide special education and related services in accordance with the IEP and to make a good faith effort to assist the child in achieving the IEP's goals and objectives? This claim related to the allegation that Petitioner was excluded from school during his fourth grade year.

7. Did the District violate 34 C.F.R. §§300.343(c) and 300.346 by failing to make the revisions proposed in the July 1, 2005, filing by the Petitioner entered into evidence as Exhibit 28?

8. Did the District violate 20 U.S.C. §1412(a)(5)(A) and 34 CFR §300.551(a) by failing to include the least restrictive environment language proposed by the parents in their July 1, 2005, filing entered into evidence as Exhibit 28?

9. Is the Respondent's determination that Petitioner was no longer eligible for special education services at the beginning of the 2005-2006 academic year legally correct and did the Respondent maintain the services provided for in the 2004-2005 IEP during the pendency of this due process proceeding?

III. FINDINGS OF FACT

1. The Student was born on [DOB]. He first attended Fruitvale Elementary School in the Respondent District in the second grade, the 2001-2002 academic year. At that time, he was already receiving special education services.

2. The Student underwent his first triennial review on October 30, 2003. The Individualized Educational Program (IEP) of that date determined the Student eligible for special education services based upon a single Perceptual or Communicative Disability. (Exhibit 2, 15th page). The IEP found a significant discrepancy between estimated intellectual potential and actual level of performance, and determined that the Student had difficulty with cognitive and/or language processing. It also found that the Student had significantly impaired achievement in reading skills, reading comprehension, and written language expression.

3. Notwithstanding these determinations, according to the testing performed in preparation of the Triennial IEP in 2003, on the WISC-III test evaluated by Stacy Wiemer, School Psychologist at Fruitvale, the Student had a Full Scale IQ of 104, and his lowest score on his Woodcock-Johnson III Achievement Test was an 89 for Broad Reading. Accordingly, if the Respondent had applied strictly the regression based discrepancy formula sanctioned by the Colorado Department of Education, the Student would not have qualified for Special Education Services. That analysis bases determinations regarding whether any student has a learning disability upon the degree of inconsistency between ability, as measured by IQ, and achievement as measured by one of the recognized achievement tests such as the Woodcock-Johnson. According to that criterion, the Student's lowest achievement score would have had to fall at the 83 level or below to qualify for special education services, since his I.Q. measured at 104. (See Exhibit 40, the Discrepancy Conversion Table in Exhibit 41 and Exhibit 2). Nevertheless, based upon the Respondent's formative assessments derived from a

broader body of evidence gathered over time rather than a single test or series of tests which take only a snapshot of the Student's performance, the Respondent continued the Student on a special education program.

4. However, the 2003 IEP curtailed somewhat the special education services offered the Student. Stu Emerson, the Special Education Resource Teacher for Fruitvale Elementary, testified that prior to the implementation of Exhibit 2, (the 2003 IEP), the Student spent approximately three hours per week outside the regular classroom in the special education resource room working on his reading and writing skills. The October, 2003 IEP eliminated direct services entirely and limited the Student's services to 30 minutes per week of indirect consultation between the regular education teacher, Ms. Betsy Martin, and Mr. Emerson. Additionally, the 2003 IEP provided for accommodations allowing the Student to test in the resource room with additional time to complete the testing, the reading of directions on tests that do not measure reading, and scripting. The 2003 IEP listed 15 Goals and Objectives, most of which had target completion dates within approximately 6 weeks after the IEP date. With the exception of Objective 15, the IEP notes that the student had either met the objective or had made progress toward the objective. According to Respondent, objective 15 set forth the most important new objective - "The student will demonstrate (sic) that he is able to successfully meet classroom expectations in all academic areas with indirect supportive assistance from the Resource Teacher." The parents did not object to removing the Student from direct services in the resource room or any other aspect of the 2003-2004 IEP.

5. During the Student's fourth grade year, conflicts developed between the Student's Mother and Ms. Martin. As the result of these conflicts, Mother initially requested that the Principal, Virginia Bergen move the Student to another fourth grade classroom. However, the Student expressed his desire to remain in Ms. Martin's class. Nevertheless, the conflicts continued and culminated in late January of 2004, when Ms. Martin instructed the Mother to cease the disruptive practice of entering the classroom each day near the end of the school session. At that point, Mother renewed her request to Ms. Bergen to move the Student out of Ms. Martin's class. Ms. Bergen granted Mother's request, but informed her that the transition to the new classroom would take a few days, since two teachers shared responsibilities for that classroom, and all involved adults needed to meet before implementation of the change. While in the heat of this transaction, Mother may have perceived that Ms. Bergen excluded the Student from school, Ms. Bergen did not do so, and would have permitted the Student to continue in Ms. Martin's class until the transition could be implemented. Additionally, Mother testified credibly that she does not know whether she would have permitted the Student to attend Ms. Martin's class after the incident in late January of 2004, even if Ms. Bergen had afforded her that option. The parents waited for approximately 14 months after the January, 2004 incident before initiating a due process hearing, demonstrating the lack of urgency of this issue from their point of view. The Respondent did not exclude the Student from school at any time relevant to this case.

6. Before the student returned to school in Ms. Sederstrom's and Ms. Willett's classroom, the parents, the principal and those two teachers signed an understanding setting forth the ground rules for the parents' role in the Student's

education for the remainder of the 2003-2004 school year. (Exhibit P) The Student completed the fourth grade year in a class taught one half day by Ms. Sederstrom and the other half day by Ms. Willett.

7. The Student entered Ms. Barnett-McPhail's class for the fifth grade in the 2004-2005 academic year. During that year, the Student met the classroom expectations of Ms. Barnett-McPhail. The Student remained in the regular education classroom for all of his education, and Ms. Barnett-McPhail consulted with Mr. Emerson about once per week regarding his progress. During that year, the Student earned adequate grades and made significant progress on his North West Education Association achievement scores. While students in general are expected to make progress in the range of five to six points per year on those tests, the Student progressed 11 points in reading and 7 points in writing. (Exhibit H)

8. In November of 2004, during the fifth grade year, the parties met for the annual review of the Student's IEP. (Exhibit 1) The Student underwent no additional testing at that time. Mother actively participated in the process of formulating the annual review. (Exhibits B through F) In the end, the Annual Review consolidated all previous goals and objectives into one, which stated: "[Student] will demonstrate (sic) that he is able to successfully meet classroom expectations in all academic areas and maintain a C average or better with indirect supportive assistance from the Resource Teacher." The Student met that objective during his fifth grade year at Fruitvale Elementary School. The 2004 IEP (Exhibit 1) provides for accommodations which included checking for understanding of all directions given orally, shortening and allowing more time for written assignments, modification of spelling assignments,

allowing extra time to complete standardized testing, permitting the Student to take tests in the resource room, and the reading to the Student of directions on some tests.

Accordingly, the Respondent adopted an IEP for the Student in late October of his fourth grade year and continued it in the fifth grade year which provided for regular education with a special education safety net. In other words, the special education component contemplated limited oversight by the special education teacher to assure the Student's continued success in the regular classroom.

9. The parents developed a strong dissatisfaction with the 2004 IEP throughout the remainder of the fifth grade year, and finally filed a request for due process hearing on April 28, 2005. (Exhibit G) Near the end of that year, on May 6, 2005, the parties met for the purpose of discussing the Student's transition from Fruitvale Elementary School to Grand Mesa Middle School for the sixth grade. At that time, the Respondent informed the parents that indirect consultation was not available at the middle school level. Accordingly, a resource teacher in the regular classroom would deliver special education services to the Student in the classroom and would also consult with regular education teachers for a total of 10 hours and 15 minutes per week. (Exhibit 3, Addendum on final 2 pages.) The parents did not consent to the services offered by the Respondents, but signed to acknowledge participation only, resulting from the pendency of the request for due process hearing in this case. (Exhibit 3 final page).

10. The Student entered the sixth grade at Grand Mesa Middle School in the fall of 2005, during the appeal to the State Level Administrative Law Judge. The Respondent reevaluated the Student at that time for cognitive and educational skills and

abilities. Richard Rieger, a resource teacher at Grand Mesa administered the Woodcock-Johnson III Tests of Achievement as part of the reevaluation of the Student's educational status, and Jessica Masek, School Psychologist, administered the Wechsler Intelligence Scale for Children-Fourth Edition for the cognitive evaluation. On the latter test, the Student scored a 102 or within the average range of intelligence in comparison to his same age peers. (Exhibit 4) On the former, his lowest age equivalent broad score was a 94 in reading. (Exhibit R, fifth from last page labeled "Page 2"). The age equivalent score indicates achievement more reliably than the grade equivalent scores, which appear in on page 5 of 23 of Exhibit R, but even the grade equivalent broad scores were 90 or above. Accordingly, applying the regression-based discrepancy formula cutoff scores found in Exhibit 40, the Student did not qualify for special education services. Under the 2004 revisions to the IDEIA and the anticipated regulations interpreting that Act, a new Resistance to Intervention Analysis will replace the regression analysis applied in this case. However, the regression analysis continues in effect until new regulations are adopted.

11. The parents received notice on or about September 23, 2005, of an IEP meeting on October 12, 2005. (Exhibit 4) While the notice informs the parents that at the meeting the parties will "determine whether there continues to be a need for special education services," that notice did not inform the parents that the Respondent intended to suggest the elimination of such further services in this case. At the meeting, the participants representing Respondents presented Exhibit 4 to the Mother. That document comes to the conclusion that the Student "is able to make the necessary transition from task to task and from setting to setting in the regular classroom and school setting." It

further concludes that the Student can “receive reasonable educational benefit from general education alone.” In general, Exhibit 4 depicts the Student as a sixth grader performing academically in the average to above average range. He is well adjusted, sociable and a pleasure to be around. In particular, Exhibit 4 describes the Student as “Hard worker; very eager to learn; meets behavioral expectations at school; interacts well with adults and peers, friendly; appears happy; expresses positive feelings in regard to school and home.” Accordingly, Respondent recommended the discontinuation of special education services for the Student.

12. Since the parents already had filed a request for due process hearing in April of 2005, the Respondent did not immediately implement the proposal contained in the October 12, 2003, IEP. Instead, a resource teacher at Grand Mesa, Jo Stratton, continued to monitor the Student’s progress in accordance with the maintenance of placement provisions of the Act, 20 USC §1415(j), the 2004-2005 IEP (Exhibit 1), and the IEP modifications contained in the Addendum to Exhibit 3 discussed at the meeting of May 6, 2005. She credibly testified that she observes the Student in school, in particular in Ms. Rinderle’s language arts class, and that he struggles in that class, but ultimately does acceptably well. Ms Stratton takes the Student to the resource room for testing only. Likewise, Ms. Rinderle testified credibly that while spelling presents difficulties for the Student and his handwriting is not easy for him, he performs at a level very close to proficient. The grade reports from the sixth grade year (Exhibit 16) show that the Student performs in all classes, including language arts, in the A and B grade range.

13. The Student underwent testing and evaluation with Charles E. Wright, a Licensed School Psychologist, on March 18 and 19, 2006, at the expense of the Respondent. (Exhibit 41) Mr. Wright confirmed the full scale I.Q. score of 102 by administering the TOWL-III test. He then tested the Student for academic achievement using the WIAT-II test, arriving at a composite score of 95 for reading. The latter score correlates very closely with the 94 broad reading score found in September of 2005 on the Woodcock -Johnson test which appears in Exhibit R. Accordingly, applying the regression based discrepancy formula to the scores derived from Mr. Wright's testing, he determined that the Student does not qualify for special education services.

14. Mr. Wright and Debra Bailey, Principal of Grand Mesa Middle School, recommended various supports for the Student in reading and writing regardless of his participation in special education services. Ms. Bailey suggested, among other things, special reading and writing classes, adaptive material, peer mentoring, parent conferences, and monitoring of performance on a weekly basis. Mr. Wright noted that while the Student does not qualify for special education services in the area of reading and writing, he clearly consistently falls below grade level in those areas, and strongly suggested a structured reading and written language program to address his below average abilities in these areas. The IHO strongly urges the parties to seek detailed information and options from Mr. Wright and to accept his recommendations to strengthen the Student's performance in reading and writing throughout the remainder of his middle and high school years.

15. The Student has the benefit of a strongly supportive family and home environment. That, combined with his excellent personal qualities demonstrated throughout the record of this hearing, will likely result in his educational success during the remainder of his academic career.

IV. DISCUSSION AND CONCLUSIONS

A. Burden of Proof

The United States Supreme Court made clear that the moving party bears the burden of proof in cases under the Individuals with Disabilities Education Improvement Act. *Schaffer v. Weast*, ___ US ____, 126 S. Ct. 528 (Nov. 14, 2005) In this case, the parents originally requested a due process hearing in April of 2005, attacking various actions and alleged actions of the Respondent school district. (Exhibit G) Additionally, the parents challenged the determination of the Respondent in October of 2005 to discontinue special education services for the student entirely. Therefore, the IHO considers the parents as the moving party, and imposes the burden of proof on them.

B. Goals and Objectives in the 2004-2005 IEP

In issues one, three and four above, the Petitioner contends that the 2004-2005 IEP (Exhibit 1) covering the fifth grade and the first two months of the sixth grade did not satisfy the legal requirements of the statute and regulations, since it did not set forth appropriate goals and objectives of the special education services, specify separate and appropriate goals and benchmarks for reading and writing or mention how the Student's annual goals will be measured. The statute and the regulations require in the IEP a statement of measurable annual goals, including benchmarks or short term objectives relating to meeting the child's needs that result from the child's disability to enable the

child to be involved in and progress in the general curriculum. 20 USC 1414(d)(1)(A) and 34 C.F.R 300.347(a)(2). Additionally, 34 C.F.R. §300.347(a)(7)(i) requires the Respondent to specify in the IEP how progress toward the annual goals will be measured.

The 2003-2004 Triennial IEP (Exhibit 2) specifies 15 goals and objectives, all of which except one had a target completion date on or before January 14, 2004. The one exception was objective 15, which established the goal of success in all academic areas with indirect supportive assistance from the resource teacher. The Respondent contends that by the time they prepared the 2004-2005 IEP, in the fall of 2004, the Student had met all of the first 14 goals and objectives in the 2003-2004 IEP, leaving only the 15th to continue for the ensuing year. By the fall of 2004, argues Respondent, the Student could operate in the regular education environment without support, except for frequent monitoring through consultation between the regular education teacher and the resource teacher to assure that his performance did not fall below an average grade. That principle is incorporated into the 2004-2005 IEP in its statement of objectives that the Student will meet classroom expectations in all academic areas and maintain a C average or better with indirect supportive assistance from the resource teacher.

The case law interpreting the requirements in the statute and regulations of goals and objectives for the special education student is sparse. The wording of the statute would seem to require some degree of specificity concerning goals and objectives and their measurement. However, the statute also envisions individualized educational programs, designed to meet the unique needs of each student. A student who makes substantial progress in overcoming his disability will gradually require less intervention to assure success in the general curriculum. With these principles in mind, the IHO

concludes that the Respondent met the requirements of the statute and regulations with respect to goals and objectives in the 2004-2005 IEP.

Concerning the first issue set forth in the “Issues” section of this Decision above, the goal stated in the 2004-2005 IEP encompasses supervision by the teaching staff of both the short term and long term academic performance of the Student. Ms. Barnett-McPhail affirmed that on a short term basis, she consulted with the Resource Teacher, Mr. Emerson, about the Student’s progress about once per week. Thus, the Student’s objective each week was to maintain at least a C average in each academic area. Had the Student fallen below that average, the teachers would have implemented teaching strategies to rectify the situation. Likewise the IEP also expresses a long term goal, to maintain a C average over the course of each grading period and the academic year. Respondent’s formulation of annual goals and objectives in the 2004-2005 IEP served directly the overall aim of special education expressly stated in the statute and regulations, to facilitate the Student’s involvement and progress in the general curriculum.

With regard to issue number 4, the frequent consultations between Ms. Barnett-McPhail and Mr. Emerson provided the system for measuring the goals both short and long term. Also, the regular curriculum has built in methods for measurement. The record reflects frequent written assignments, tests, and other opportunities for receiving grades, affording the Student the chance to improve on a subsequent assignment if he failed on a previous one.

Finally, with regard to issue number 2, the model for dealing with the special education services devised by Respondent in this case does provide separate annual goals

and benchmarks for reading and writing and for every other subject, since it requires the Student to maintain at least a C average in all academic areas. Accordingly, if the Student had slipped below a C in reading but not writing, the Respondent would have developed an educationally appropriate response to deal with the deficiencies in that weaker area. Exhibits 7 through 11 and 34, the Student's grade reports during his tenure at Fruitvale Elementary School, demonstrate that in the elementary grades, teachers evaluated reading and writing separately, and assigned separate grades for various skills even within those categories. In the fifth grade, none of the Student's marks slipped below C in reading, writing or any other subject.

Additionally, the Petitioner produced no evidence regarding what goals and objectives the Respondents should have adopted in the 2004-2005 IEP. Several times during the hearing, the Mother reiterated that the goals and objectives stated on pages 3 and 5 of Exhibit 28, her July 1, 2005, submission to IHO Randall, represented her good faith proposals for goals and objectives, not based upon any educational expertise. The record lacks any informed educational opinion regarding what goals and objectives the Petitioner would substitute in the 2004-2005 IEP for the single goal adopted by Respondent. Since the Petitioner bears the burden of proof, and since the Petitioner failed to offer alternative goals and objectives based upon sound educational evidence, the IHO sustains the one goal and objective embraced by the Respondent and inserted into the 2004-2005 IEP.

Based upon the above, the IHO concludes that the Respondent did not violate the statute or its implementing regulations with respect to issues 1, 2, and 4 listed above.

C. Modifications, Least Restrictive Environment and Supplementary Aids and Services.

In issues 3 and 8 set forth above, the Petitioner finds fault with the 2004-2005 IEP for its alleged failure to include modifications for learning and for assessments, its failure to provide for education in the least restrictive environment, and for its alleged failure to require supplementary aids and services in the form of frequent consultations with the classroom teacher.

Regarding modifications for learning and assessments, the 2004-2005 IEP does mandate the accommodations and modifications summarized in finding of fact 8. above. Ms. Barnett-McPhail credibly testified that she implemented those modifications by shortening the Student's spelling assignments to only 10 words. Additionally, Ms. Barnett-McPhail modified the Student's learning environment consistent with the provisions in the IEP through the methods outlined on his grade report for the year. (Exhibit H final page.) Again, Petitioner failed to produce educationally credible evidence regarding what accommodations and modifications the Respondent should have included in the 2004-2005 IEP which do not appear there. Her July 1, 2005 submission to IHO Randall fails to disclose any such accommodations or modifications.

Concerning supplementary aids and services, the Petitioner presented no evidence that the Student needed any supplementary aids and services beyond those provided in the IEP. The 2004-2005 IEP in the Goals and Objectives section does require "Frequent consultation with the classroom teacher, parent and student." In the July 1, 2005, submission, the Petitioner suggests the inclusion of the identical language in the IEP.

With regard to least restrictive environment, the Student since October of 2003 has received all educational services in the general education classroom. The Respondent

has educated the Student in the least restrictive environment, and has not violated the IDEIA or the statute.

Based upon the above, the IHO concludes that the Respondent did not violate the statute or its implementing regulations with respect to issues 3 and 8 listed above.

D. Exclusion from School

In issue 6 set forth above, the Petitioner alleges a violation of IDEIA based upon his contention that the staff at Fruitvale Elementary excluded the Student from school for two or three days in late January, 2004, when Mother finally demanded a transfer from Ms. Martin's class to that of Ms. Sederstrom and Ms. Willett. The ALJ determined in Finding of Fact 5 above that Ms. Bergen did not exclude the Student from school in late January of 2004. Since Petitioner bears the burden of proof, the murkiness of the factual situation surrounding the removal of the student from school leads the IHO to the conclusion that the Petitioner did not meet that burden. The Student could have attended Ms. Martin's class for the 2 or 3 days needed for the transition into the new fourth grade classroom. Educational exclusion was the primary impetus for the original enactment of the IDEIA in 1974. Had the parents filed a prompt request for due process hearing protesting any alleged exclusion, they would have lent more credence to their claim.

Based upon the above, the IHO concludes that the Respondent did not violate the statute or its implementing regulations with respect to issue 6 listed above.

E. Cumulative Effect of Violations and July 1, 2005 Revisions

In issues 5 and 7 stated above, the Petitioner contends that the cumulative effect of the Respondents violations deny the Student a Free Appropriate Public Education (FAPE), and that the respondent should have adopted the proposals in the July 1, 2005

submission (Exhibit 28). The above rulings that the Respondent did not violate the statute or its implementing regulations disposes of the first contention. The Respondent did not deny a FAPE to the Petitioner.

Additionally, Mother's admission that the July 1, 2005, submission (Exhibit 28) suggesting changes to the 2004-2005 IEP constituted her proposals only, effectively withdraws the claim raised in issue 7. Many of the suggestions in Exhibit 28 are already in the 2004-2005 IEP, and the Respondent has put others into effect, regardless of the content of the IEP. For example the record shows that the Student's teachers have observed his work in school and have assessed his progress based upon the curriculum. Exhibit 28 would require "Curriculum based assessment," and "teacher observation." Thus, the IHO concludes that the Respondent did not violate the IDEIA by failing to include the Mother's suggestions (Exhibit 28) in the IEP.

Mr. Wright's report contains many specific goals and recommendations for the Student's education in the areas of reading and writing. (See pages 8-10 Exhibit 41) However, he suggested the application of all of the teaching methods in the context of the general education environment. Thus, the key to promoting the Student's progress in his reading and writing skills lies in rigorous implementation of sophisticated teaching methods in the regular classroom. Special educational is not the answer for all of the academic difficulties encountered by the Student. Mr. Wright's suggestions can assist the Student despite the absence of an IEP or special education services at all.

Based upon the above, the IHO concludes that the Respondent did not violate the statute or its implementing regulations with respect to issues 5 and 7 listed above.

F. Eligibility for Special Education Services and Maintenance of Services.

With respect to issue number 9 listed above, the Petitioner attacks both the substance and the alleged lack of notice preceding the Respondent's proposal to eliminate special education services in October of 2005. Also, Petitioner contends that the Respondent did not maintain his current educational placement during the pendency of the due process hearing in accordance with 20 USC §1415 (j).

Petitioner argues that Respondent did not satisfy the notice requirements imposed by 20 USC §1415(c)(1) when it proposed to remove the Student from his special education placement in October of 2005. That statute and its implementing regulation, 34 CFR §300.503 require the Respondent to give prior written notice whenever the Respondent proposes to initiate a change in the identification, evaluation or educational placement of a student or the provision of a FAPE to the student. The notice must contain a description of the proposed action, and explanation of why the Respondent proposes to take the action, a description of the options the Respondent considered and why those options were rejected, a description of each evaluation procedure, test, record, or report the Respondent used as a basis for the proposed action, a description of any other factors relevant to the Respondent's proposal, a statement that the parents have protection under the procedural safeguards provisions of the statute and rules, and sources for parents to contact to obtain assistance in understanding the statute. These notice requirements applied when Respondent proposed to discontinue the Student's special education services in October of 2005.

The statute and regulations contemplate that Respondent will give this notice in a single document and in clearly understandable form. The regulations require a written notice in language understandable to the general public. 34 CFR §300.503 (c)(1)(i) The record does not contain such an integrated understandable document.

The Respondent contends that it substantially complied with this requirement by supplying the parents the documents in Exhibit 4 which includes a Notice of Meeting for October 12, 2005 at 8:30 a.m. and which lists as one of the purposes of the meeting a determination “whether there continues to be a need for special education services;” an acknowledgment signed by the Mother and dated October 12, 2005, that the Respondent has informed her of her special education rights and procedural safeguards; and an IEP form used in eligibility meetings which includes a list of participants; Evaluation Data on various subjects including Educational, Social, Physical/Motor and Physical Health, Communicative, Cognitive, Transition/Life Skills; and a Determination of Eligibility/Disability form determining the student not eligible. The Mother received this information in the form revealed in Exhibit R which, in addition to the above, contains the complete Woodcock Johnson test results from the test administered on September 14, 2005.

While the information supplied by the Respondent contains all of the raw data and information which formed the basis for its conclusion that the Student should no longer receive special educational services, it does not explain his proposed removal from special education in the understandable way contemplated by 20 USC §1415(c)(1) and 34 CFR §300.503. At the hearing on May 10 through 12, the Respondent clearly and understandably stated its position on the record for its conclusion to cease providing

special education services. In the absence of that valuable explanation provided by the Respondent, the parents justifiably lacked a full understanding for the basis of that conclusion. The statute and regulations require that Respondent explain that basis in written form and in understandable language prior to the proposed change in placement. The respondent did not satisfy this requirement.

The Respondent's position to discontinue special education services comports with the statute and the applicable regulations. With a full scale I.Q. of 102, the Student's achievement does not demonstrate a significant discrepancy between estimated intellectual potential and actual level of performance as is required in the Colorado Rules for the Administration of the Exceptional Children's Educational Act 1 CCR 301-8 2220-R-2.02 (6)(b)(i). His lowest broad score, even according to Age Equivalent data, is the reading score of 90. To qualify for special education services his score would have fallen below 81. The Petitioner presented no evidence, expert or otherwise, to contradict the Respondent's position.

Furthermore, the Respondents maintained the Student in his October 12, 2005 placement from that date to the time of the hearing. Jo Stratton credibly testified that she has continued to follow the requirements of the 2004-2005 IEP as amended by the addendum of May 6, 2005. She observes the Student in class and makes sure he achieves average grades. In fact, all of his grades fall in the very good to excellent range.

Based upon the above, the IHO concludes that the Respondent did not violate the statute or its implementing regulations with respect to issue 9 above, except that it violated 20 USC §1415(c)(1) and 34 CFR §300.503 by failing to provide the written

notice required by that statute and regulation. However, since the Petitioner remains in his educational placement and since he has had the benefit of an independent educational evaluation from Mr. Wright explaining the reasons for his conclusion that the Student does not qualify for special education services, and since the petitioner has exercised his right to a full due process hearing since the proposed change in placement, he has sustained no direct harm from the violation. Accordingly, the Respondent may comply with the notice requirement by providing written notice which conforms with the requirements of 20 USC §1415(c)(1) and 34 CFR §300.503 to the parents within 20 days after receipt of this decision.

V. DECISION

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

1. The Respondent violated the provisions of 20 USC §1415(c)(1) and 34

CFR §300.503, when it failed to provide the notice required by those laws prior to the IEP meeting of October 12, 2006. The IHO orders the Respondent to provide the required written notice within 20 days after receipt of this decision, but the notice need not offer the right to a due process hearing, since that has already taken place.

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

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) through (14).

Dated in Denver, Colorado, this 31st day of May, 2006.

Respectfully Submitted,

BUESCHER, GOLDHAMMER,
KELMAN & DODGE, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of the **Impartial Hearing Officer's Findings and Decision** were served upon the parties by placing the same in the United States mail, postage prepaid certified mail return receipt requested, this 31st day of May, 2006, properly addressed to the following:

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