BEFORE THE DIVISION OF ADMINISTRATIVE HEARINGS
STATE OF COLORADO

CASE NO. ED 2004005

DECISION UPON STATE LEVEL REVIEW

IN THE MATTER OF:

[STUDENT], by and through her mother and legal guardian, [PARENT],

Petitioner,

v.

POUDRE SCHOOL DISTRICT R-1,

Respondent.

This matter is the state level review before Matthew E. Norwood, an Administrative Law Judge ("ALJ") of the Division of Administrative Hearings as described in 20 U.S.C. Section 1415(g). The subject of the review is a decision of an impartial hearing officer ("IHO"), pursuant to the Individuals With Disabilities Education Act ("IDEA"), 20 U.S.C. Sections 1400 *et seq*. and the regulations at 34 C.F.R. Section 300. Also germane are the regulations to the Colorado Exceptional Children's Educational Act, 1 CCR 301-8, 2220-R-1.00 *et seq*.

A hearing was held before Impartial Hearing Officer ("IHO") Joseph M. Goldhammer, on December 8 and 9, 2003 in Fort Collins, Colorado. The IHO issued his decision February 11, 2004. At that hearing Kathleen M. Shannon, appeared on behalf of the Respondent ("School District"). In this appeal Ms. Shannon and Julie A. Tishkowski represented the School District. At the hearing and for this appeal [parent], the Petitioner's mother, represented the Petitioner who is a minor. In order to preserve confidentiality, the Petitioner will be referred to as "[student]" and her mother as "[student]'s mother."

No oral argument was had and no new evidence was provided as part of this state level review.

Scope of Review

The ALJ on state level review is to issue an "independent" decision. 20 U.S.C. Section 1415(g). In the context of court reviews of state level decisions, such independence has been construed to require that "due weight" be given to the

administrative findings below. *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982). It is appropriate to apply this same standard by analogy at the state administrative review level. Thus it is sensible for the ALJ to give deference to the IHO's findings of fact and to accord the IHO's decision "due weight," while reaching an independent decision based on a preponderance of the evidence.

Background

The central issue in this dispute concerns the use of a "resource room" in [student]'s education. It is the School District's position that [student] requires a "resource room" where she can receive individualized help in organizing her assignments and completing them. [Student]'s mother believes that the requirement of a resource room is stigmatizing and believes the assistance [student] needs should be provided in the classroom. [Student]'s mother had obtained such in-class assistance for [student] when [student] had attended school in Texas.

Mootness

Initially the School District argues that this appeal should be dismissed under the mootness doctrine. *See, Downers Grove Grade School v. Steven L.*, 89 F.3d 464 (7th Cir. 1996). The School District notes that for relief [student]'s mother seeks: "to overturn the decision of IHO Goldhammer and issue an order removing [student] from the resource room and for an IEP meeting to be convened to determine what supplementary aids or services she requires to receive her education in the mainstream classroom." The School District argues that this relief has already been provided. Per the School District, on May 10, 2004 [student]'s IEP team met and developed a plan that accomplished these goals.

The ALJ heard argument on this issue July 20, 2004 by telephone conference call that was recorded on tape no. 8032. [Student]'s mother disagreed with the School District's argument. She stated that she had agreed to the plan proposed May 10 as it provided for removal from the resource room into the regular classroom. However, she says this is not the outcome she wanted as the new plan was not under the IDEA, but rather was done as a "Section 504" agreement. This section refers to Title 29 of the United States Code Section 701 *et seq*. dealing with Vocational Rehabilitation and Other Rehabilitation Services and particularly 29 U.S.C. Section 794. The School District acknowledges that the new plan was done under the authority of Section 504 but argues that it provides for all the relief requested by [student]'s mother in her appeal. The School District argues in addition that the new plan provides for someone to help [student] with keeping her on task with her assignments: the issue brought up by [student]'s mother during the July 20, 2004 telephone conference.

A case is moot when the relief sought, if granted, would have no practical legal effect. *Archibold v. Public Utilities Commission*, 58 P.3d 1031 (Colo. 2002). However, a case is only moot if the parties intended to settle their claims. *Main Elec., Ltd. v. Printz*

Services Corp., 980 P.2d 522, 528 (Colo. 1999). In this case the details of the May 10, 2004 agreement are not part of the record and are unknown to the ALJ. Whether the new agreement under Section 504 provides all of the relief [student]'s mother could receive if she prevailed under the IDEA would require an extensive factual inquiry that is not suited to this type of review. However, that the parties chose to resolve the matter with a Section 504 agreement supports [student]'s mother's contention that the relief she obtained is not precisely the same as she might receive under the IDEA. Also, [student]'s mother denies that the May 10, 2004 agreement settled her claims. Rather, she says, this agreement was a compromise in order to get [student] out of the resource room.

As it appears that [student]'s mother may receive more in the way of relief than she has agreed to were she to be successful in this appeal, the matter is not moot. Therefore, the ALJ declines to dismiss this case as moot.

Findings of Fact

Based on the record below, the ALJ enters the following findings of fact, giving due weight to the findings of the IHO:

[Student] and Her Education in Texas

1. [Student] was adopted by the woman referred to as "[student]'s mother" in this case. Since she was two and one half years old [student] has had the diagnosis of fetal alcohol syndrome. She attended elementary school in the Klein Independent School District in Texas. There she received special education services to assist her with her special needs resulting from her fetal alcohol syndrome.

2. At the end of her fifth grade year, in May of 2001, the Klein Independent School District developed an Individualized Education Program ("IEP") as described in 20 U.S.C. Section 1414(d)(1)(A) of the IDEA. The IEP provided for special education services through a co-teacher or aide in the classroom to assist her in language arts, reading, mathematics, social studies and science.

3. During [student]'s first semester of the sixth grade, [student]'s mother and the Klein Independent School District had a dispute regarding study guides and [student]'s mother requested a hearing under the IDEA. Prior to any hearing, though, the parties reached a settlement memorialized in a settlement agreement and adopted by the Texas IHO. The Texas IHO made no decision on the merits. The settlement agreement provided that the earlier IEP would continue in effect until another one could be developed. Nothing in the settlement agreement or the October 2001 IEP purported to affect [student]'s education were she to leave the state of Texas.

4. In the fall of 2001, [student] began her sixth grade year in Texas. [Student]'s mother and the Texas School District developed a new IEP in October 2001. Per that IEP, [student] continued to receive some of her special education services through aides or co-teachers who assisted [student] in the classroom for four hours per

week in various subjects. [Student] was able to successfully complete her first semester of her sixth grade year in Texas without the use of a resource room.

The Move to Colorado

5. In January 2002 [student] and her mother moved to Colorado and enrolled [student] in the Respondent School District at Kruse Elementary School. The School District developed a temporary initial IEP for [student]. The IEP provided for no specific services; a teacher was to monitor [student]'s progress.

6. In February of 2002, [student] began to have poor grades in math; however, she successfully completed the school year without the use of a resource room.

The May 2002 IEP

7. In May of 2002, the School District established an IEP as part of a triennial review and as preparation for [student]'s entry into seventh grade at Boltz Junior High School in the fall. The IEP provided that "[student] will be in the Resource Support class as recommended, however she will attend regular education math class instead of the recommended Resource Math class."

8. [Student]'s mother learned of the Resource Support class or resource room requirement of the IEP at least by August of 2002. At that time [student]'s mother returned a questionnaire to the school expressing disagreement with the requirement.

9. [Student]'s mother requested an IEP meeting in August 2002. For various reasons the meeting was postponed until October 2002. At that meeting the School District agreed to drop the resource room requirement and to substitute a regular education study skills class and subsequently a French language class. Following the meeting no paraprofessional helped [student] in tracking her assignments or organizing her homework.

[Student]'s Academic Progress in the Fall of 2002

10. [Student]'s grades slipped to D's in math and geography for the second "hexter" (six week period) of the first semester. The School District determined that [student]'s performance in school had fallen below an acceptable level. The ALJ adopts this determination as a finding of fact.

11. In December of 2002, the parties had a mediation. The School District understood that as part of the mediation that an agreement had been reached to place [student] in a resource room. She was so placed in January 2003. However, [student]'s mother did not sign the agreement resulting from the mediation.

12. In order to formalize the implementation of the resource room requirement, the School District sought to have an IEP meeting in January 2003 to alter the October 2002 agreement and to re-impose the resource room requirement. However, no meeting was held. Consequently, [student]'s October 2002 IEP did not reflect her actual educational placement in the resource room from January 2003 to

May 2003. This constituted a minors violation of the IDEA as was found by IHO Goldhammer.

Subsequent Events

13. Ultimately a meeting was scheduled for May 2003, but [student]'s mother did not attend the meeting. A new IEP was established May 2003 re-imposing the resource room requirement.

14. In August 2003, [student]'s mother requested another IEP meeting, which was held. At the meeting, the School District insisted on the resource room requirement. In place of the resource room requirement, the School District considered placing [student] on a "Section 504 plan" (*see* Mootness above for greater explanation of the nature of a Section 504 plan). Although as described in Mootness above the School District ultimately agreed to such an arrangement after the hearing before the IHO, the School District rejected such a placement in August 2003.

15. As a result of this continued disagreement over the resource room, [student]'s mother requested a hearing before the IHO in October 2003. At the time of the request, the May 2003 IEP was in place with its resource room requirement. This is significant in terms of the application of the "stay put" provision discussed below.

Specific Findings of Fact Regarding the Necessity of the Resource Room

16. The ALJ specifically finds as fact, as did IHO Goldhammer, that the resource room was the least restrictive alternative, as that term is defined in 20 U.S.C. 1412(a)(5)(A) and 34 C.F.R. 300.550(b), to assist [student] in focusing on and organizing her study assignments in her core courses. The ALJ finds that providing this assistance in the classroom would not be effective in [student]'s case. The School District's position was supported by testimony from a number of witnesses. Also, a certified teacher would provide assistance in the resource room, whereas a non-certified aide would provide in-classroom assistance. A certified teacher has experience at instilling independence and self-advocacy.

Also in support of this finding of fact is the fact that [student]'s mother provided no expert testimony at hearing concerning the specifics of how an aide might operate in the classroom to perform those functions otherwise performed by a certified teacher in the resource room.

[Student]'s mother argues in her appeal that the fact that the School District agreed to drop the resource room requirement in October 2002 shows that the School District does not truly believe the resource room is needed. Yet, this decision of the School District was made prior to the School District becoming aware of [student]'s poor academic performance in the fall of 2003. Following this poor performance, the School District sought to and did restore the resource room requirement. The ALJ takes into consideration [student]'s poor performance in the fall of 2003 as a basis to find that the resource room was the least restrictive environment.

Finally, the School District's decision in May of 2004 to abandon the resource room requirement as part of a Section 504 agreement is not part of the record

developed before the IHO. As such, this fact will not be considered in the ALJ's finding of fact regarding the appropriateness of the resource room.

Conclusions of Law

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

Organization of These Conclusions of Law

In her Notice of Appeal dated March 15, 2004, [student]'s mother lists 22 issues she would like to raise on appeal. On April 26, 2004, [student]'s mother filed an initial and a revised brief. The ALJ will consider her revised brief. This revised brief does not follow the 22 issues identified. The revised brief also does not have headings and so the nature of her specific challenges is not always clear. Often [student]'s mother challenges findings of fact by the IHO but the significance of these challenges is not apparent. The ALJ will attempt to resolve the issues raised by [student]'s mother in the revised brief as best he understands them. However, the ALJ will not deal with challenges to findings of fact that have no clear relationship to IHO Goldhammer's conclusions.

The Effect of the Texas IEP.

[Student]'s mother's first argues that the IHO was bound by the Texas IHO in the earlier proceeding. By this, [student]'s mother presumably means that IHO Goldhammer was bound to remove [student] from the resource room because of the Texas decision. As found above, the Texas IHO made no decision on the merits. Rather, the parties reached a settlement memorialized in a settlement agreement and adopted by the Texas IHO. Also, the Texas order has no binding effect on school districts in Colorado.

Even if the Texas IHO made a specific order and even if that order had some factual bearing on [student]'s Colorado situation, it nevertheless would not be controlling in Colorado. When a student travels from one state to another, an IEP established in the first state does not bind the second state. In *Michael C. v. Radnor Township School District*, 202 F.3d 642 (3d Cir. 2000), the Court interpreted the effect of the "stay put" provision at 20 U.S.C. Section 1415(j). That provision requires maintenance of current educational placement during the pendency of any IDEA legal proceeding. The Court held that the stay put provision could not be used to require a Pennsylvania school district to pay for a private school education based on the rationale that the private school environment was most like the educational environment set up by the child's previous Washington, D.C. IEP. Rather, the Court said, the second school district must have an opportunity to establish a new IEP consistent with its policies and mandates. *Id*. at 650.

In coming to this conclusion, the *Radnor* Court relied on the Office of Special Education Programs ("OSEP") Memorandum 96-5. The School District in this case relies on this memorandum as well. The OSEP is responsible for the administration of

the IDEA. 20 U.S.C. Section 1402. OSEP Memorandum 96-5 states that a second state is not required to adopt the most recent IEP developed by the sending state.

Challenges to IHO Goldhammer's Finding of Fact 6

In IHO Goldhammer's finding of fact 6, deals with the IEP developed at the May 13, 2002 meeting. In 6, IHO Goldhammer found that Sheila Katzman testified that [student] would benefit from assistance with assignments in a resource classroom and that John Cavenaugh, the school psychologist, agreed with this recommendation. Per IHO Goldhammer, Cavenaugh also testified that a certified special education teacher would benefit [student] more than a paraprofessional in the regular classroom. It is not clear whether IHO Goldhammer later relied on this testimony to find that the resource room was the least restrictive environment for educating [student].

[Student]'s mother challenges the truth of the statements made by Katzman and Cavenaugh. However, the ALJ's findings of fact are inconsistent with this objection. The ALJ has found, as did IHO Goldhammer, that the School District's decision to educate [student] in the resource room was the least restrictive environment.

Did the School District Violate the Stay Put Provision?

[Student]'s mother argues that the School District violated the stay put provision at 20 U.S.C. Section 1415(j) and 34 C.F.R. Section 300.514(a) in that the October 17, 2002 IEP was the last one formulated and that agreement provided for no services in the resource room. [Student]'s mother argues that it is this agreement that should have been kept in place subsequently. However, [student]'s mother does not challenge IHO Goldhammer's finding that the May 2003 IEP was in place at the time of her October 2003 appeal. This finding has been adopted by the ALJ. The May 2003 IEP is the "then-current educational placement" as defined in 20 U.S.C. Section 1415(j). This IEP *did* provide for teaching in the resource room.

Did the IHO Permit Testimony About the December 2002 Mediation?

[Student]'s mother argues that IHO Goldhammer erred when he allowed testimony about mediation negotiations between the parties in December 2002. 34 C.F.R. Section 300.506(b)(6) provides that "Discussions that occur during the mediation process must be confidential and may not be used as evidence in any subsequent due process hearings or civil proceedings …"

The testimony [student]'s mother believes violated this prohibition was testimony by unnamed School District employees who testified they believed an agreement was reached in the December 2002 mediation. She also identifies the testimony of a Charlene Lindsey who stated that an agreement arising out of the mediation was never signed. Yet this testimony does not include "discussions that occur during the mediation process" in violation of 34 C.F.R. Section 300.506(b)(6).

In any case, [student]'s mother does not identify any improper use of this testimony by the IHO. [Student]'s mother does not explain the significance to this case in the fact that the School District believed it had come to an agreement or that the agreement was never signed.

The ALJ concludes that there was no error in the IHO allowing testimony concerning the December 2002 mediation.

Did the IHO Err When He Found That [Student]'s Mother Did Not Respond to a Request for a Meeting?

[Student]'s mother challenges IHO Goldhammer's finding of fact 11 that Bill Smith, assistant principal at Boltz, had faxed to [student]'s mother various proposed meeting dates in January 2003, but that she did not respond. Based on this finding, the IHO also found that the IEP from January 2003 to May 2003 contained incorrect information. In challenging this finding of fact, [student]'s mother relies on an exhibit that was not admitted. [Student]'s mother does not challenge IHO Goldhammer's decision not to admit the exhibit.

[Student]'s mother does not make clear how the failure to respond to the request for a meeting is significant, nor does the ALJ perceive any significance to this disputed issue. For this reason, the ALJ has not adopted as a finding of fact IHO Goldhammer's findings objected to by [student]'s mother. The ALJ has not made a finding of fact one way or the other on these issues. As the ALJ sees no real significance in these issues, the ALJ determines not to reverse any findings or conclusions of the IHO based on these issues.

Did the IHO Err When He Found That the Resource Room Was the Least Restrictive Alternative to Assist [Student]?

In making this finding IHO Goldhammer relied on a number of School District witnesses who so testified. He also relied on these witnesses to find that an aide in the classroom assigned to [student] "may" present a greater source of obtrusiveness and embarrassment to [student] than would instruction in the resource room. In her appeal, [student]'s mother challenges this testimony and offers testimony of her own that working in the resource room was more embarrassing. However, the ALJ has found, as did the IHO, that the resource room was the least restrictive method to meet [student]'s needs. The ALJ has made no finding as to which venue would be more embarrassing.

DECISION

Based on the foregoing, the ALJ affirms the decision of IHO Goldhammer. As to the minor violations of the IDEA as found in finding of fact 12 above, the ALJ agrees with the decision of the IHO: any future IEP regarding [student] must accurately document her educational placement and the special education services provided to her. No other relief is ordered. This Decision Upon State Level Review is the final decision on state level review except that any party has the right to bring a civil action in

an appropriate court of law, either federal or state.

DONE AND SIGNED

August _____, 2004

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MATTHEW E. NORWOOD
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

[parent]

Julie A. Tishkowski
Kathleen M. Shannon
Suzanne M. Keith
1800 Broadway, Suite 200
Boulder, CO 80302

and to

Charles Masner
Colorado Department of Education
201 East Colfax
Denver, CO 80203-1704

on this ___ day of _____, 2004.

_____
Secretary to Administrative Law Judge