**BEFORE THE OFFICE OF ADMINISTRATIVE COURTS**
**STATE OF COLORADO**

**CASE NO. ED 2006-0006**

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**DECISION UPON STATE LEVEL REVIEW**

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**IN THE MATTER OF:**

**[STUDENT], by and through his parent [PARENT],**

**Appellant,**

**v.**

**MESA COUNTY VALLEY SCHOOL DISTRICT NO. 51,**

**Appellee.**

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This is a state level review of a decision of an impartial hearing officer ("IHO") pursuant to the Individuals with Disabilities Education Act, 20 U.S.C. §1400 *et seq*. ("IDEA")[1] and the Colorado Exceptional Children's Education Act, 22-20-101, C.R.S. *et seq.* ("ECEA"). [Student] ("Student") was represented by his parent, [Parent] ("Parent"), who appeared *pro se.* Mesa County Valley School District No. 51 ("District") was represented David A. Price, Esq., Colorado Association of School Boards.

## Procedural Background

In April 2005, the Parent filed a Request for Due Process Hearing with the Colorado Department of Education asserting, in general terms, that the Student's rights were being violated and that his Individualized Education Program ("IEP") failed to comply with applicable requirements of the IDEA and ECEA. On July 11, 2005, IHO Christopher D. Randall granted the District's June 24, 2005 Motion for Dismissal and/or Summary Judgment by issuing an Order of Dismissal in which he dismissed the Parents' appeal with prejudice. The Parent appealed the dismissal to the Office of Administrative Courts ("initial state level appeal"). In January 2006, ALJ Judith F. Schulman issued an order affirming

[1] As amended by the Individual With Disabilities Education Improvement Act, Pub. L. 108-446.

the IHO's dismissal in part, reversing the IHO's dismissal in part and remanding the case to the IHO with directions to hold an evidentiary hearing on specified issues.[2] On remand, IHO Randall declined to hear the matter and Joseph M. Goldhammer, Esq. was selected by the parties in his place. Hearing was held before IHO Goldhammer on May 8-10, 2006, in Grand Junction, Colorado. The IHO's Findings and Decision was issued on May 31, 2006 ("IHO Decision").

By letter dated June 3, 2006, the Parent appealed IHO Goldhammer's Decision to the Office of Administrative Courts ("second state level appeal"). On June 15, 2006, the District filed a Conditional Cross Appeal with respect to one limited issue only.[3] Thereafter, on June 28, 2006, the District filed a motion to dismiss, which was denied by the ALJ on July 19, 2006.[4]

By agreement of the parties, no additional evidence was presented in connection with the second state level appeal. Additionally, no oral argument was held. A transcript of the hearing below was prepared and received along with all the documentary evidence presented at the hearing below. Following the lodging of the transcript, the parties filed briefs and/or supporting authority in accordance with a briefing schedule established by the ALJ. Final briefs were due in this matter on October 19, 2006. This matter is now ready for the issuance of this Decision Upon State Level Review.

## Issues Before the IHO

As originally filed in April 2005, the Parent's complaint in this matter contested the adequacy of the Student's IEP for the 2004-2005 school year. That appeal was dismissed by IHO Randall in July 2005. In August 2005, during the pendency of the Parent's initial state level appeal of that dismissal, the Parent requested a reevaluation of the Student. A reevaluation was conducted, followed by an IEP meeting in October 2005. In connection with that IEP meeting a decision was made that the Student no longer qualified for special education services. The Parent disagreed with the IEP team's determination in this regard. Subsequently, issues arose as to whether the District was maintaining services for the Student during the pendency of the initial and second state level appeal.

In her January 25, 2006 order, the ALJ specified the issues the issues for the due process hearing on remand, specifically finding that some of the Parent's initially-articulated issues were properly dismissed and others were not. In order to address the ongoing nature of the parties' disputes, the ALJ included as an additional issue the question of

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[2] *Order Granting Motion for Reconsideration, Affirming IHO's Dismissal of Appellant's Claim under Section 504 of the Rehabilitation Act of 1973, and Remanding Matter to IHO*, January 25, 2006, Case No. ED 2005-0012. ("*Remand Order*").

[3] The District initially listed two potential issues in its cross appeal. However, in its Opening Brief in Support of Cross-Appeal, the District withdrew the second issue, relating to a determination by the IHO holding that the Parent was entitled to a hearing transcript at District expense. *Appellee/Cross-Appellant's Opening Brief in Support of Cross-Appeal,* August 31, 2006, ED 2006-0006, p.3, note 4.

[4] *Order Denying Motion to Dismiss and Procedural Order*, July 19, 2006, ED 2006-0006.

whether the District was properly maintaining services.[5] Thereafter, in connection with the remand hearing, the parties refined the issues and agreed to add an additional issue.

The finally agreed-upon issues at the local level hearing before IHO Goldhammer were 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 Student's 2004-2005 IEP?

2. Did the District violate the IDEA 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 Student, 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 Student's annual goals will be measured?

5. Did the cumulative effect of the District's multiple alleged IDEA violations as asserted by the Parent in her 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 Student in achieving the IEP's goals and objectives? This claim related to the allegation that Student 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 Parent 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 Parent in her July 1, 2005, filing entered into evidence as Exhibit 28?

9. Is the District's determination that Student was no longer eligible for special education services at the beginning of the 2005-2006 academic year legally correct and did

[5] *Remand Order*, p. 40.

the District maintain the services provided for in the 2004-2005 IEP during the pendency of this due process proceeding?

## IHO's Decision and Matters Appealed

In his Decision, IHO Goldhammer ruled in favor of the District and dismissed the Parent's request for relief with respect to each of the substantive issues listed above. Specifically, IHO Goldhammer determined:

- The Student's 2004-2005 IEP contained appropriate and measurable goals and objectives, appropriate accommodations and modifications, and appropriate support services (Issues 1 through 4);

- The District provided the Student with a free and appropriate public education ("FAPE") (Issue 5);

- The District did not exclude the Student from school in January 2004 (Issue 6);

- The District's actions with respect to IEP revisions proposed as of July 1, 2005 did not violate IDEA or its implementing regulations (Issue 7);

- The District educated the Student in the least restrictive environment (Issues 3 and 8);

- The District correctly determined the Student no longer qualifies for special education services and the District properly maintained the Student's placement during the pendency of the Parent's request for a due process hearing (Issue 9).

The IHO ruled in favor of the Parent on one final issue. IHO Goldhammer ruled that prior to the October 12, 2005 IEP team meeting the District failed to provide the Parent with adequate notice concerning the District's proposal to discontinue special education services to the Student. Although he found the Student sustained no direct harm as a result of this violation, the IHO ordered the District to provide the Parent with an additional notice conforming with specified requirements under the IDEA and its supporting regulations.

On appeal, the Parent contests all aspects of the IHO's substantive decisions, essentially repeating each of the arguments she raised before the IHO. The Parent's appeal contests both the IHO's factual findings and his conclusions of law.

The District has cross-appealed solely with respect to the issue of notice regarding the October 12, 2005 IEP meeting. The cross-appeal does not contest any factual findings actually made by the IHO. The District contends that the notice requirements cited by the IHO were not applicable to this meeting and asserts that it properly complied with all notice requirements that were in fact applicable to the October 12, 2005 meeting.

## Standard of Review

Pursuant to IDEA and ECEA, on state level review the ALJ makes an "independent" decision after conducting an impartial review of the IHO's decision and examining the entire record. 20 U.S.C. §1415(g); 34 C.F.R. Section 300.510; Colorado Rules for the Administration of ECEA, Section 2220-R-6.03(11)(b)(v), 1 CCR 301-8.[6] The ALJ may seek and accept additional evidence, if needed. 34 C.F.R. Section 300.510; Rule 2220-R-6.03(11)(b)(ii). Under this standard, a district court must give "due weight" to the administrative findings below, *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982); *Roland M. v. Concord School Committee,* 910 F.2d 983 (1st Cir. 1990), while still recognizing the statutory provisions for making an independent decision and the regulatory provisions for taking additional evidence, if necessary. *Doyle v. Arlington County School Board*, 953 F.2d 100 (4th Cir. 1991). The 10th Circuit Court of Appeals has articulated this standard as requiring the district court to "independently review the evidence contained in the administrative record, accept and review additional evidence, if necessary, and make a decision based on the preponderance of the evidence while giving 'due weight' to the administrative proceedings below." *Murray v. Montrose County School District,* 51 F.3d 921, 927 (10th Cir. 1995), *cert. denied*, 516 U.S. 909 (1995).

It is appropriate to apply this same standard of review at the state administrative review level. However, the standard is applicable only to factual findings. While factual findings based on credibility determinations generally deserve deference, in all other areas a non-deferential standard is contemplated and the ALJ exercises "plenary review." *Carlise Area School v. Scott P.,* 62 F.3d 520 (3d Cir. 1995) *cert. denied,* 517 U.S. 1135 (1996).

Having reviewed the record, the arguments of the parties, and the Decision of the IHO, the ALJ concludes the record does not establish any violations by the District of IDEA, ECEA, or their implementing regulations with respect to any of the issues raised in this appeal and cross-appeal. With the exception of the issue of notice for the October 12, 2005 IEP hearing the ALJ finds the IHO's findings of fact and conclusions of law to be persuasive. Therefore, with certain modifications, the ALJ adopts the findings and conclusions of the IHO as follows:

## Findings of Fact

Based on the exhibits and testimony below, the ALJ enters the following findings of fact, giving due deference to the findings of the IHO:

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

[6] The Colorado Rules for the Administration of ECEA are printed in 1 CCR 301-8. They are hereinafter referred to as"2220-R" followed by the rule number.

2. The Student underwent his first triennial review on October 30, 2003, during his fourth grade year. The Individualized Educational Program of that date determined the Student was 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 District 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).[7] Nevertheless, based upon the District'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 District continued the Student on a special education program.

4. The 2003 IEP (Exhibit 2) nonetheless curtailed the special education services offered the Student. Stu Emerson, the Special Education Resource Teacher for Fruitvale Elementary, testified that prior to the implementation of 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 by or before the IEP date.[8] With the exception of objective 15, the IEP notes that the student had either met the objective or had

[7] Exhibit 40 is the Regression-Based Discrepancy Cutoff Scores chart utilized by the District. Exhibit 41 includes a copy of Colorado Department of Education's Discrepancies Conversion Table. Although in somewhat different format, Exhibits 40 and 41 contain identical discrepancy conversions for full scale IQ (FSIQ) scores from 135 to 70, including the discrepancy conversion of a FSIQ of 104 to an achievement test cutoff score of 83, which was the conversion at issue with regard to the Student as of 2003. Exhibit 2 contains reports of the Student's 2003 WISC-III and Woodcock-Johnson tests.

[8] Approximately five objectives listed target completion dates of January 14, 2004.

made progress toward the objective. According to the District, objective 15 set forth the most important new objective - "The student will demonstate (sic) that he is able to successfully meet classroom expectations in all academic areas with indirect supportive assistance from the Resource Teacher." The Parent 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 Parent and Ms. Martin. As the result of these conflicts, the Parent 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 Parent to cease the disruptive practice of entering the classroom each day near the end of the school session. At that point, the Parent renewed her request to Ms. Bergen to move the Student out of Ms. Martin's class. Ms. Bergen granted Parent's request, but informed her that the transition to the new classroom would take a few days, since two teachers, Ms. Sederstrom and Ms. Willett, shared responsibilities for that classroom, and all involved adults needed to meet before implementation of the change. While in the heat of this transaction, the Parent 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, the Parent 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 Parent 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 her point of view. The District 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 ("NWEA") 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. (Exhibits 34 and 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. The Parent 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 demonstate (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, maintaining a C or better grade throughout the year in all academic areas, including reading writing and math. (Exhibit H). 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 IEP adopted for the Student in late October of his fourth grade year and continued with certain variations in the fifth grade year 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. As contended by the District and supported by the record, by the time the Student's 2004-2005 IEP was prepared in the fall of 2004, the Student had met all of the first 14 goals and objectives in his 2003-2004 IEP, leaving only the 15th to continue for the ensuing year. By the fall of 2004, 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 the objective 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.

10. The Student's fifth grade teacher, Ms. Barnett-McPhail, appropriately implemented the modifications and accommodations as referenced in the Student's 2004 IEP by having the Student take standardized tests in a separate setting, limiting his spelling assignments to only ten words, and checking his understanding of assignments. In addition, 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). While Ms. Barnett-McPhail felt that these accommodations assisted the Student as they would assist any student, she did not feel the accommodations were necessary in order for the Student to perform up to classroom expectations.

11. 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 District informed the Parent 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 10 hours per week and would also consult with regular education teachers 15 minutes per week, for a total of 10 hours and 15 minutes of services per week, as reflected in Exhibit 3, Addendum on final 2 pages. The Parents did not consent to the services offered by the District, but signed to acknowledge participation only, due to the pendency of the request for due process hearing in this case. (Exhibit 3, final page).

12. 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.

13. The Student entered the sixth grade at Grand Mesa Middle School in August of 2005, during the state level appeal to the ALJ. Although the Parents did not expressly consent to the services offered by the District for the Student's 6th grade year, they also never expressed any objection to those services, including the services encompassed in the Addendum to Exhibit 3.

14. In August and September 2005, at the request of the Parent, the District conducted a reevaluation of the Student for cognitive and educational skills and abilities, including formal academic and cognitive testing of the Student as well as other assessments. 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 full scale score of 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 Exhibits 40 and 41, the Student did not qualify for special education services since the cutoff for a student with an IQ of 102 was 81. Under the 2004 revisions to the IDEA (Individuals With Disabilities Improvement Act) 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.

15. The Parents received written notice on or about September 23, 2005, of an IEP meeting scheduled for October 12, 2005. (Exhibit 4). The notice explained the specific purpose of the meeting as follows:

**TO DETERMINE ELIGIBILITY FOR SPECIAL EDUCATION/IEP REVIEW**.

> TRIENNIAL MEETING TO DETERMINE ELIGIBILITY AND DISABILITY: The purpose of a triennial review is to discuss the evaluations that have been completed; determine whether there continues to be a need for special education services, and if the need exists, how those services can be provided; and to develop a new IEP.

[bold and caps in original]. The District's notice also stated the time and location of the meeting, provided a list of the persons attending and their occupation or position, and advised the Parent of her right to invite other people she believes would be helpful. The notice did not specifically inform the Parent that the District intended to suggest the elimination of further special education services to the Student.

16. The Parent attended the October 12, 2005 IEP meeting. At that meeting, results of the August and September 2005 testing were discussed. In addition, the participants representing the District presented Exhibit 4 to the Parent.[9] That document comes to the conclusion that the Student "is successful in the regular classroom. His skills are developing and there is continued growth." It notes 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" and concludes that the Student can "receive reasonable educational benefit from general education alone." Additionally, the document indicates that the Student "no longer evidences a discrepancy of any kind between his cognitive ability (using 2005: FSIQ of 102) and his academic achievement (all Broad Scores of 90 or above)."[10] 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, the District recommended the discontinuation of special education services for the Student.

17. Although the IEP documents drafted prior to the meeting concluded the Student was no longer eligible for special education because he did not have a discrepancy between ability and achievement that could constitute a learning disability, an actual decision regarding the Student's special education placement and whether to continue the Student's special education services was not reached until the IEP meeting itself. At the October 12, 2005 IEP meeting, the IEP team determined the Student was no longer eligible for special education and determined at that time to discontinue special education services for the Student. The Parent did not agree with the IEP team's decision.

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[9] Exhibit 4 consists of IEP meeting documentation, parental reevaluation consents, evaluation data concerning the Student, and a statement regarding the Student's special education eligibility.

[10] As reflected above, this statement was based on an application of the State's regression-based discrepancy analysis to the results of the District's August and September 2005 testing: the Student's achievement scores exceeded the applicable cutoff level of 81 based on his FSIQ of 102.

18. Since the Parent already had filed a request for due process hearing in April of 2005, the District did not immediately implement the proposal contained in the October 12, 2005 IEP. Instead, a resource teacher at Grand Mesa Middle School, Jo Stratton, continued to monitor the Student's progress in accordance with the maintenance of placement provisions of the IDEA, 20 U.S.C. §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. Ms. Stratton credibly testified that she observed the Student in school, in particular in Ms. Rinderle's language arts class, and that while he struggled in Ms. Rinderle's class, he ultimately performed acceptably well. Ms. Stratton took the Student to the resource room for testing only. Likewise, Ms. Rinderle testified credibly that while spelling presented difficulties for the Student and his handwriting was not easy for him, he performed "really well" in her class and had a "B" average. Additionally, the Student scored at a level very close to proficient on the NWEA standardized test in both reading and language usage during his sixth grade year. The grade reports from the sixth grade year (Exhibit 16) show that the Student performed in all classes, including language arts, in the A and B grade range.

19. During the Student's sixth grade year the District appropriately complied with the requirements of the Student's IEP with respect to accommodations and modifications. For the most part, the Student's sixth grade teachers concluded the Student did not require modifications or accommodations to perform successfully during his sixth grade year. (Exhibits 17 and 43). However, the Student's teachers provided help to him as needed. For example, Ms. Rinderle often read instructions to the class as a whole and checked with class members individually, including the Student, for understanding of assignments. She did not give spelling assignments in her class and therefore had no need to modify assignments for the Student in this area. Ms. Rinderle also determined that the Student did not require any additional time to complete assignments as he was always able to complete his work in the time allotted. In addition, the Student was permitted to take standardized tests in a location separate from his regular classes.

20. 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 District. (Exhibit 41). Mr. Wright confirmed the full scale I.Q. score of 102 by administering certain subtests from the Wechsler Intelligence Scale for Children-Fourth Edition ("WISC-IV"). He then tested the Student for academic achievement using the Wechsler Individual Achievement Test-Second Edition ("Wiat-II"), arriving at a composite score of 95 for reading. This score correlated 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 his testing, Mr. Wright determined that the Student does not qualify for special education services.[11] Mr. Wight's determination that the Student is no longer eligible for special

[11] Mr. Wright's testing also arrived at an overall writing score for the Student of 84, using the Test of Written Language-Third Edition ("TOWL-III"). As was the case with the reading score, the Student did not qualify for special education on the basis of his writing score.

education services is supported by the record as a whole, including the results of the Student's testing in August and September 2005, as well as the Student's school achievement and standardized test results.

21. As of October 2005, the Student was no longer eligible for special education services.

22. On or about July 1, 2005, the Parent submitted to IHO Randall a list of suggested IEP goals and objectives, accommodations and modifications, evaluation criteria, and a statement with respect to least restrictive environment.[12] (Exhibit 28). The list contained suggested IEP language but included no explanation or rationale for the suggestions. In the sections of the Parent's proposal relating to proposed goals and objectives for reading and writing, the parent suggested the inclusion of generalized goals relating to improvement in reading and writing and measurement of the identified goals by specific point increases on the standardized NWEA test (12-point annual increases for both reading and writing). Also in these sections, the Parent suggested inclusion of language regarding consultations ("frequent consultation with the classroom teacher, parent, and student")[13] which was identical to language in the existing IEP. The Parent's suggestion under the heading "Accommodations/Modifications" included many items that were available to all students and therefore did not need to be listed in an IEP. A number of other suggested modifications and accommodations were already in the Student's IEP. With respect to least restrictive environment, the July 1, 2005 filing included a statement that "the Parents, resource and classroom teacher feel that [the Student] is able to function in the regular classroom with general supportive assistance from the resource teacher/case manager." The Parent also added a statement proposing that if the Student's grades "fall below C in any content areas he will be pulled into resource for direct instruction."

Many of the suggestions in Exhibit 28 were already in the 2004-2005 IEP, and the District had put others into effect, regardless of the content of the IEP because they represented appropriate education practice for all students. For example, the record shows that the Student's teachers had observed his work in school and had assessed his progress based upon the curriculum. Exhibit 28 would have required "[c]urriculum based assessment," and "teacher observation."

At hearing, the Parent provided no specific evidence in support of the July 1, 2005 submission and, in particular, provided no informed educational opinion to support any of these proposals. She also did not offer any other alternative proposals with respect to IEP content. Moreover, during the course of the hearing, the Parent conceded the items listed in Exhibit 28 were merely points for discussion and did not represent actual IEP proposals.

[12] This submission did not make any suggestions concerning supplementary aids and services that were different from existing 2004-2005 IEP entries.

[13] The Parent proposed slightly different consultation language in the section of the proposal entitled Recommended Placement in LRE." In that section, the suggested language was: "frequent weekly or more if necessary consultation with the classroom teacher and teacher observations."

23. As reflected in convincing evidence presented by the District, it is not educationally sound practice to measure annual Student progress for the purpose of an IEP in terms of a student's score on any particular standardized test or other single measurement. Therefore, the Parent's proposal in Exhibit 28 to establish an evaluation criteria of 12 points of annual progress in reading and writing on the NWEA examination did not represent best educational practices and did not represent either an appropriate goal or an appropriate measure of the Student's progress.

24. The Parent's July 1, 2005 least restrictive environment proposal requiring the Student to be automatically pulled from his regular class if any of his grades fell below a C is not supported by any evidence in the record or by sound educational practice. Instead, had any of the Student's grades fallen below a C, the appropriate practice, consistent with the language of his existing IEP, would have been for his teachers and his team to consult and determine the cause of the grade slippage (including whether the slippage is attributable to the Student's educational disability at all) and to identify any additional supports necessary to address the identified issue and get the Student back on track. Such additional support might involve, with team agreement, removing the Student from the regular classroom for part-time resource room instruction. However, the Student's history indicated that he was capable of functioning in the regular classroom. Therefore, depending on the nature and scope of the problem identified, needed supports to assist the Student might involve less restrictive solutions that would allow the Student to remain in the regular classroom full-time. Thus, in contrast to the Parent's proposed Exhibit 28 language, the existing language of the Student's IEP ("The parents, the Resource Teacher, and the classroom teacher feel that [the Student] is able to function in the regular classroom with indirect supportive assistance from the Resource Room") provided needed flexibility to address any future issues that might arise with respect to the Student's ability to function in the regular classroom.

25. 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 materials, 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. As did IHO Goldhammer, the ALJ 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.

26. 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.

## Discussion and Conclusions of Law

### I.
### Jurisdiction and Statutory Background

The ALJ has jurisdiction to conduct this review pursuant to § 1415(g) of the IDEA, 34 C.F.R. § 330.510(b), Title 22, Article 20, C.R.S. (ECEA), and Rules 2220-R-6.03(9)-(11).

IDEA is a "[s]pending Clause statute that seeks to ensure that 'all children with disabilities have available to them a free appropriate public education.'" *Schaffer v. Weast,* 546 U.S. 49, 126 S. Ct. 528 (2005). The IDEA grants disabled students the right to a public education, provides financial assistance to states to meet the educational needs of disabled students, and conditions a state's federal funding on its having in place a policy that ensures that a free appropriate public education is available to all children with disabilities. 20 U.S.C. §1412(a)(1); *Board of Education v. Rowley,* 458 U.S. 176 (1982); *Weber v. Cranston School Committee*, 212 F. 3d 41 (1st Cir. 2000). The IDEA requires the District to provide each child with a disability with a free appropriate public education ("FAPE") in the least restrictive environment ("LRE"), tailored to the unique needs of the child through the establishment of an individualized education program. 20 U.S.C. § 1401(9), (14); 20 U.S.C. § 1412(a)(1), (4), (5); 20 U.S.C. § 1414(d).

### II.
### Burden of Proof

In cases brought under IDEA, the moving party bears the burden of proof. *Schaffer v. Weast*, *supra*. In this case, the Parent originally requested a due process hearing in April of 2005, attacking various actions and alleged actions of the District. (Exhibit G). Additionally, the Parent challenged the determination of the District in October of 2005 to discontinue special education services for the student entirely and asserted the District was failing to maintain services during the pendency of the appeal. The Parent was therefore the moving party below and the IHO properly assigned the burden of proof to her.

### III.
### Issues on Appeal

A. IHO Hearing Due Process Compliance. The ALJ is required to determine whether the procedure before the IHO was in accordance with the requirements of due process. 34 C.F.R. § 300.510(b)(ii); Rule 2220-R-6.03(11)(b)(iv). The record reflects procedures utilized before the IHO were in full compliance with all due process requirements.

B. Goals and Objectives in the 2004-2005 IEP. Issues 1, 2, and 4 before IHO Goldhammer as listed above and as pursued on appeal all concern goals and objectives in

the Student's 2004-2005 IEP. The Parent 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 IDEA and applicable regulations, since it did not set forth appropriate goals and objectives of the special education services (Issue 1), specify separate and appropriate goals and benchmarks for reading and writing (Issue 2), or mention how the Student's annual goals will be measured (Issue 4). The ALJ is unpersuaded by the Parent's argument.

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 U.S.C. § 1414(d)(1)(A); 34 C.F.R 300.347(a)(2). Additionally, 34 C.F.R. §300.347(a)(7)(i) requires the District to specify in the IEP how progress toward the annual goals will be measured. The ALJ concludes the 2004-2005 IEP complied with these requirements.

The 2003-2004 Triennial IEP (Exhibit 2) specified 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. As established by the evidence, the Student had met all of the first 14 goals in the 2003-2004 IEP, leaving only the 15$^{th}$ to continue for the 2004-2005 academic year. In addition, by the fall of 2004, the Student had progressed to the point where he was capable of operating in the regular classroom without support, apart from frequent monitoring through consultation between the regular education teacher and the resource teacher, as reflected by objective 15. By articulating as its sole objective that the Student "will demonstrate 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's 2004-2005 IEP incorporated the idea that the Student was capable of meeting classroom expectations in all academic areas and maintaining a C average or better with only indirect supportive assistance from the resource teacher.

The Parent argues that the sole objective in the 2004-2005 IEP failed to meet the minimum requirements of IDEA and it implementing regulations. The ALJ disagrees. The case law interpreting the requirements in the IDEA and its regulations regarding goals and objectives for the special education student is sparse. The wording of the IDEA 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 ALJ concludes, as did the IHO, that the District met the requirements of the statute and regulations with respect to goals and objectives in the 2004-2005 IEP, including each of the issues raised by the Parent, as more fully explained below.

1. *Specifying Goals and Objectives*. In connection with Issue 1, the Parent asserts the 2004-2005 IEP failed adequately to specify appropriate goals and objectives. This assertion is unconvincing. 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. The District'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. Thus, the Student's goals and objectives were adequately specified in his 2004-2005 IEP.

2. *Measurement of Goals*. With regard to Issue 4, the Parent asserts the 2004-2005 IEP failed to identify how annual goals would be measured. The ALJ disagrees. 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 and improvement. The record reflects frequent written assignments, tests, and other opportunities for receiving grades, thus providing frequent opportunities to assess and measure the Student's progress and affording the Student the chance to improve on a subsequent assignment if he failed on a previous one. Additionally, to the extent the Parent is asserting her proposed measurement of progress (a 12-point annual increase in reading and writing scores on the NWEA standardized test) should have been included in the Student's IEP, the Parent has failed to establish such a measurement standard would be educationally sound or appropriate.

3. *Separate Annual Goals and Benchmarks for Reading and Writing*. The Parent asserts in connection with Issue 2 that the District was required to provide separate IEP goals and benchmarks for reading and writing and failed to so. The Parent has failed to establish a factual predicate for this claim. The model for dealing with the Student's special education services devised by the District in this case provided separate annual goals and benchmarks for reading and writing and for every other subject, since it required the Student to maintain at least a C average in all academic areas. At Fruitvale Elementary School the Student was evaluated separately in reading and writing. Accordingly, if the Student had slipped below a C in reading but not writing, the District would have developed an educationally appropriate response to deal with the deficiencies in that weaker area.

An additional basis exists to uphold the single goal and objective contained in the 2004-2005 IEP despite the issues (1, 2 and 4) raised by the Parent. The Parent produced no evidence regarding what goals and objectives the District should have adopted in the 2004-2005 IEP. During the hearing, the Parent acknowledged that the goals and objectives stated on pages 3 and 5 of her July 1, 2005 submission to IHO Randall were only points for discussion regarding goals and objectives and were not based upon any educational

expertise. The record lacks any informed educational opinion regarding the goals and objectives the Parent would substitute in the 2004-2005 IEP for the single goal adopted by District. Since the Parent bears the burden of proof, and since the Parent failed to offer alternative goals and objectives based upon sound educational evidence, the ALJ agrees with the IHO that the one goal and objective embraced by the District and inserted into the 2004-2005 IEP was appropriate and should be sustained.

Accordingly, the ALJ concludes the District did not violate the IDEA 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 listed above, the Parent faulted the 2004-2005 IEP for its alleged failure to include modifications for learning and assessments, to provide for education in the least restrictive environment, and to require supplementary aids and services in the form of frequent consultations with the classroom teacher. The ALJ concludes the Parent failed to establish the IEP was inadequate with respect to any of these issues.

1. *Modifications and Accommodations*. The IDEA and its implementing regulations require that an IEP contain a statement of the program modifications that will be provided for the child to allow the child to advance appropriately toward attaining annual goals and to be involved and progress in the general curriculum. 20 U.S.C. §1414(d)(1)(A); 34 C.F.R. § 300.347(a)(3). They also require inclusion of a statement of any individual appropriate accommodations or modifications that are necessary to measure academic achievement and functional performance on State and district-wide assessments. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347(a)(5).

The Student's 2004-2005 IEP included the following modifications for learning and assessments: 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. The evidence established that in the Student's fifth grade year Ms. Barnett-McPhail appropriately implemented these modifications and accommodations although she did not feel they were necessary for the Student's success. Additionally, in the Student's sixth grade year the District appropriately complied with these provisions in the Student's IEP by providing listed modifications and accommodations as needed.

The Parent asserts in connection with Issue 3 that the modifications and accommodations in the 2004-2005 were inadequate. However, the Student was able to function successfully in the regular classroom with these modifications and accommodations. Additionally, the Parent failed to produce educationally credible evidence regarding what additional accommodations and modifications the District should have included in the 2004-2005 IEP. While her July 1, 2005 submission to IHO Randall listed certain suggested accommodations or modifications, many of these were available to all

students and some were already in the Student's IEP. Additionally, as was the case with suggested goals and objectives in the in July 1, 2005 filing, the Parent failed to provide any evidentiary support for her remaining suggested accommodations and modifications. Thus, the Parent failed to show any IEP inadequacy with respect to modifications and accommodations.

2. *Supplementary Aids and Services*. The IDEA and its implementing regulations require that an IEP contain a statement of supplementary aids and services to be provided to the child. 20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347(a)(3). Although the Parent asserts an IEP deficiency in this area as part of Issue 3, the Parent presented no evidence that the Student needed any supplementary aids and services beyond those provided in the IEP. To the contrary, the Parent's actions appear to support the existing IEP with respect to this issue. As reflected in the Goals and Objectives section of the Student's 2004-2005 IEP, the IEP required "frequent consultation with the classroom teacher, parent and student." In the sections of her July 1, 2005 submission relating to proposed goals and objectives for reading and writing, the parent suggested the inclusion of the identical language in the IEP. Thus, the record simply does not support a determination that the Student's IEP was inadequate with respect to supplementary aid and services.

3. *Least Restrictive Environment*. The IDEA and its implementing regulations require that children with disabilities, to the maximum extent appropriate, be educated in the least restrictive environment with children who are not disabled. 20 U.S.C. §1412(a)(5); 34 C.F.R. § 300.550. Additionally, school districts must assure that a continuum of alternative placements is available to meet the needs of children with disabilities. 34 C.F.R. § 300.551(a). Although the Parent attempted to raise least restrictive environment issues with respect to Issues 3 and 8, the evidence established that since October 2003 the Student has received all educational services in the general education classroom with appropriate modifications, accommodations, and support. The District has thus educated the Student in the least restrictive environment in compliance with the IDEA and its implementing regulations. Further, to the extent the Parent is asserting that her July 1, 2005 proposed IEP language concerning least restrictive environment should have been adopted by the District, the Parent has failed to establish such proposal would be educationally sound or appropriate or was the least restrictive alternative. In fact, the evidence established that this proposal, which would have automatically removed the Student from the regular classroom for assistance in the resource room in the event any grade fell below a C, was inconsistent with sound educational practice and lacked needed flexibility to address future educational issues that might arise with respect to the Student.

Accordingly, the ALJ concludes, as did the IHO, that the District did not violate the IDEA or its implementing regulations with respect to Issues 3 and 8 listed above.

D. Exclusion from School. In connection with Issue 6, the Parent alleges a violation of the IDEA based upon her contention that the staff at Fruitvale Elementary excluded the Student from school for two or three days in late January, 2004, when the

Parent 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. 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 IDEA in 1974. As the IHO noted, had the Parent filed a prompt request for due process hearing protesting any alleged exclusion, she would have lent more credence to her claim.

Accordingly, the ALJ concludes, as did the IHO, that the District did not violate the IDEA or its implementing regulations with respect to Issue 6.

E. Failure to Adopt July 1, 2005 Revisions. 34 C.F.R. §§ 300.343(c) and 300.346 require Districts to develop, review, and revise IEPs at least annually to meet the needs of children with disabilities.

In Issue 7, the Parent asserts that the District should have adopted the IEP proposals contained in her July 1, 2005 submission, and the District's failure to do so constituted a violation of 34 C.F.R. §§ 300.343(c) and 300.346. The ALJ disagrees.

As noted above, the Parent conceded at hearing that her July 1, 2005 submission suggesting changes to the Student's IEP actually constituted discussion points only and did not represent specific proposed IEP changes. This admission by the Parent effectively withdraws the claim in Issue 7 regarding the failure of the District to adopt the submitted IEP alterations. Furthermore, a number of the July 1, 2005 proposals were already in the Student's IEP. Certain other suggestions had been put into effect by the District, although not explicitly contained in the IEP. Still other suggestions in Exhibit 28, as described in greater detail above, were inconsistent with appropriate educational principles and practices. The ALJ therefore concludes, as did the IHO, that the District did not violate the IDEA or its implementing regulations with respect to the Parent's July 1, 2005 IEP suggestions, as reflected in Exhibit 28.

F. Asserted Denial of FAPE Based on Cumulative Effect of Violations. IDEA requires the District to furnish each child covered by the Act with a free appropriate public education ("FAPE") consisting of special education (specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a child with a disability) and related services in compliance with the child's individualized education program. 20 U.S.C. § 1401(9), (29); 20 U.S.C. § 1412(a)(1). Through this requirement, the IDEA provides each child with a disability with a basic floor of educational opportunity, *Board of Education v. Rowley*, 458 U.S. 176 (1982). A school district provides this basic floor of opportunity and satisfies the minimum requirements of the IDEA by providing a child with a disability with (1) access to specialized instruction and related services; (2) which are individually designed; (3) to provide educational benefit to the student. *Rowley* at 201. The school district is not required to maximize educational opportunities or provide the best possible education, *Mather v. Hartford School District*, 928 F. Supp. 437 (D.Vt. 1996), but must offer a program calculated to provide more than a trivial educational benefit to the child, *Hall v. Vance*

*County Board of Education*, 774 F.2d 629 (4th Cir. 1985), *Polk v. Central Susquehanna Intermediate Unit 16*, 853 F.2d 171 (3rd Cir. 1988), and that is likely to produce meaningful progress. *Mather at 445-6; Board of Education v. Diamond*, 808 F.2d 987, 991 (3rd Cir. 1986). In evaluating whether progress is being made, consideration must be given to the unique needs of the child with a disability, including behavioral and emotional growth, when applicable. *County of San Diego v. California Special Education Hearing Office,* 93 F.3d 1458 (9th Cir. 1996).

In Issue 5, the Parent contends that the cumulative effect of the District's IDEA violations in this matter denied the Student a free appropriate public education. As indicated above, the ALJ has concluded no violations of IDEA or its implementing regulations have been established. Therefore, contrary to the assertions of the Parent, no cumulative effect of IDEA violations occurred in this case that could have resulted in the denial of a FAPE. The Parent has therefore failed to establish the District's cumulative actions in this matter (or any of its actions individually) resulted in the denial of a FAPE to the Student.

Based upon the above, the ALJ concludes, as did the IHO, that the District did not violate the statute or its implementing regulations with respect to Issue 5.

G. Eligibility for Special Education Services and Maintenance of Services. In Issue 9, the Parent attacks both the substance of, and the alleged lack of notice preceding, the District's proposal to eliminate special education services in October of 2005. Also, the Parent contends that the District did not maintain the Student's current educational placement during the pendency of the due process hearing in accordance with 20 USC §1415 (j). The ALJ finds these arguments unconvincing.

1. *Decision to Discontinue Special Education Services*. In order to be eligible for special education services a child must be a child with a disability, 20 U.S.C. § 1412 (a)(1)(A). Such child must be in need of special education services by reason of the disability, including a specific learning disability, 20 U.S.C. § 1401(3)(a); 34 C.F.R. § 300.7, and must be unable to receive reasonable benefit from regular education without additional supports in the public school because of a specific disabling condition. Rule 2220-R-2.02.

The Student in this case was originally identified as having a perceptual or communicative disability. Criteria for that disability, as set forth in Sections 2.02(6)(b)(i) and 2.02(6)(b)(ii), include: "a disorder in the psychological process which affects language and learning" as evidenced by a "significant discrepancy between estimated intellectual potential and actual level of performance," as well as "difficulty with perceptual, cognitive and/or language processing," and "significantly impaired achievement" in reading, written language or math. Under the facts of this case, the District's determination to discontinue special education services in October 2005, based on a determination that the Student no longer had a learning disability that qualified him for special education services comported with the IDEA and all applicable federal and state regulations.

As reflected in Exhibits 40 and 41, the State and District have adopted a regression-based discrepancy formula to identify when a student meets the perceptual or communicative disability criterion of having a "significant discrepancy between estimated intellectual potential and actual level of performance." Effective October 2005, with a full scale I.Q. of 102, the Student's achievement did not demonstrate a significant discrepancy between estimated intellectual potential and actual level of performance as is required in the Rule 2220-R-2.02(6)(b)(i). The Student's lowest broad score as of October 2005, even according to Age Equivalent data, was the reading score of 90. Based on the State and District regression-based discrepancy formula and the Student's I.Q. score, in order to qualify for special education services at least one of the Student's achievement scores would have had to have fallen below 81. None of the Student's achievement scores fell below this level. Consequently, as of October 2005, the Student no longer qualified for special education services. Additionally, the evidence established the Student was able to receive benefits from regular education without additional supports.

Mr. Wight's testing of the Student in March 2006, as well as his overall evaluation and conclusions, supports the District's determination that the Student was no longer eligible for special education services as of October 2005 because the Student no longer had a significant discrepancy between ability and achievement. For example, Mr. Wright's Wiat II testing resulted in a composite reading score of 95, which correlated closely with the District's Woodcock-Johnson broad reading score for the Student of 94.[14]

The Parent presented no evidence, expert or otherwise, to contradict the District's position that the Student ceased to be eligible for special education as of October 2005. Accordingly, the ALJ concludes, as did the IHO, that the Parent failed to show the Student continued to be eligible for special education services as of October 2005, or that the District's decision to discontinue those services violated any provision of state or federal law.[15]

2. *Maintenance of Current Placement*. 20 U.S.C. § 1415(j) requires that unless otherwise agreed, a child shall be maintained in the then-current placement during the pendency of a due process proceeding. The District complied with this requirement.

As reflected by the evidence, the District maintained the Student in his October 12, 2005 placement from that date through at least the time of the hearing. Jo Stratton credibly

[14] Although Mr. Wright's arrived at a lower writing score for the Student using the TOWL-III test than did the District using the Woodcock-Johnson test, the result of 84 was nonetheless above the eligibility cutoff of 81.
[15] The ALJ notes, as did the IHO, that Mr. Wright's report contains many specific goals and recommendations for the Student's education in the areas of reading and writing. (*See* Exhibit 41, pages 8-10). However, Mr. Wright did not conclude that the Student was eligible for special education services. He suggested, instead, that his recommendations be implemented in the context of the general education environment. Thus, as both the IHO and Mr. Wright emphasized, 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 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.

testified that she has continued to follow the requirements of the 2004-2005 IEP as amended by the addendum of May 6, 2005. She observed the Student in class and made sure he achieved average grades. In fact, all of the Student's grades fell in the very good to excellent range during his sixth grade year Furthermore, the record established that the Student's sixth grade teachers, as was the case the previous year with his fifth grade teachers, complied with mandated IEP accommodations and modifications as needed to assist the Student fulfill his IEP goals and objectives. The ALJ thus concludes, as did the IHO, that the District properly maintained the Student's placement as required by 20 U.S.C. § 1415(j).

3. *Notice of the October 12, 2005 Meeting.* On October 15, 2005, the District held a triennial reevaluation meeting with respect to the Student. The Parent was notified of this meeting and attended. The IHO determined the District's notice to the Parent concerning this meeting failed to comply with IDEA requirements and he therefore ordered the District to issue a complying notice. The ALJ disagrees with the IHO's determination and instead concludes the notice provided by the District to the Parent complied in all respects with the requirements of the IDEA and its implementing regulations.

The District must conduct regular reevaluations of a child with a disability. 20 U.S.C. § 1414(a)(2). Pursuant to 34 C.F.R. § 300.536, such reevaluation shall be conducted in accordance with 34 C.F.R. §§ 300.532-300.535 if conditions warrant a reevaluation or if the child's parent or teacher requests a reevaluation. In any event and consistent with 20 U.S.C. § 1414(a)(2), such reevaluation must be conducted at least once every three years. As provided by 34 C.F.R. § 300.534, in the context of such a reevaluation "a group of qualified professionals and the parent of the child must determine whether the child is a child with a disability as defined in § 300.7" such that the child remains eligible for special education services.

Reevaluations are also addressed in 34 C.F.R. § 300.321. That section notes that the reevaluation of each child with a disability is to be conducted in accordance with § 300.536 and the results of any reevaluations must be addressed by the child's IEP team under §§ 300.340-300.349. The requirements for notice to the parent of an IEP team meeting are set forth in 34 C.F.R. § 300.345, which is the only notice requirement contained in §§ 300.340-300.349. Section 300.345(1) requires that notice for an IEP meeting must be given to the parents "early enough to ensure that they will have an opportunity to attend." Additionally, the notice must:

> (i) Indicate the purpose, time, and location of the meeting and who will be in attendance; and
>
> (ii) Inform the parents of the provisions in § 300.344(a)(6) and (c) (relating to the participation of other individuals on the IEP team who have knowledge or special expertise about the child).

Similarly, Rule 2220-R-4.02(5), provides that written notice of an IEP meeting must timely notify the parents of the meeting and indicate the purpose, time, and location of the meeting and who will be in attendance, as well as the Parent's right to reschedule.

The uncontroverted evidence in this matter established that in August 2005, the Parent requested a reevaluation of the Student. The District acceded to this request and conducted formal academic and cognitive testing of the Student as well as other assessments in August and September 2005. The results of these assessments and reevaluations were discussed at the October 12, 2005 IEP meeting. The Parent attended this meeting, having been given advance written notice of the meeting shortly after September 23, 2005. The Parent does not assert this notice was untimely or that the meeting was inconveniently scheduled. Furthermore, the notice complied in all respects with the notice requirements of 34 C.F.R. § 300.345 and Rule 2220-R-4.02(5). It was provided to the Parent early enough to assure her attendance; it notified the Parent of the time, location and meeting attendees; and it informed the Parent of her right to invite individuals she believed would be of assistance to her. Additionally, the notice clearly informed the Parent of the purpose of the meeting. It stated (in bold) that the purpose of the meeting was "to determine eligibility for special education/IEP review;" it characterized the meeting (in capital letters) as a "triennial meeting to determine eligibility;" and it further explained that the purpose of the meeting was "to discuss the evaluations that have been completed [and] determine whether there continues to be a need for special education services."

The only notice requirements applicable to the October 12, 2005 IEP meeting were those contained in 34 C.F.R. § 300.345 and Rule 2220-R-4.02(5). By complying with these requirements, the District's notice to the Parent concerning the October 12, 2005 IEP meeting was in full compliance with all applicable IDEA and ECEA notice requirements.

The IHO concluded that notice requirements other than those contained in 34 C.F.R. § 300.345 and Rule 2220-R-4.02(5), specifically those requirements imposed by U.S.C. §1415(c)(1) and 34 C.F.R. §300.503, were applicable to the October 12, 2005 meeting and that the District failed to comply with these alternative requirements. The ALJ is unpersuaded that notice requirements different from those contained in 34 C.F.R. § 300.345 and Rule 2220-R-4.02(5) were applicable to the October 12, 2005 meeting.

U.S.C. §1415(c)(1) and 34 C.F.R. §300.503 relate to situations in which the District "proposes to initiate or change [or refuses to initiate or change] the identification, evaluation, or educational placement of the child or the provision of FAPE to a child." 34 C.F.R. § 300.503. In this case, however, the District did not propose to initiate or change any matters. Instead, the District acceded to a reevaluation request of the Parent and then appropriately scheduled an IEP meeting to discuss the results of the requested reevaluation. Moreover, the ALJ has found that the District did not reach a decision to terminate or change the Student's placement prior to the October 12, 2005 meeting. To the contrary, the evidence established no pre-determination occurred with respect to the question of whether the Student would ultimately be continued in special education.

The Student's special education history with the District is consistent with the conclusion that placement was not determined prior to the October 12, 2005 meeting. Despite the fact that the IEP documents drafted in advance of the meeting indicated the Student no longer qualified for special education on the basis of his formal assessments, in prior years the Student's IEP team had continued the Student in special education in the face of similar assessments that indicated the Student did not technically qualify for special education services. Thus, the fact that proposed October 2005 IEP documents again reflected non-qualifying assessments does not establish any placement decisions had been made in advance of the October 12, 2005 meeting or that discontinuation of special education services was a foregone conclusion in advance of that meeting. Further, convincing evidence presented by the District supports a conclusion that no placement decision had in fact been made in advance of the meeting.

The October 12, 2005 meeting is therefore appropriately categorized as an IEP meeting concerning which only the notice requirements of 34 C.F.R. § 300.345 and 2220-R-Rule 4.02(5) were applicable. The District's notice, which fully informed the Parent of the nature of the planned meeting, complied with these requirements. Therefore, no violation of the IDEA or ECEA or their implementing regulations occurred in connection with the District's notice of this meeting and thus no remedy is required or appropriate.

## Decision and Order

The ALJ determines and orders as follows:

1. No violations of the IDEA or ECEA or their implementing regulations as alleged by the Parent have been established.

2. Therefore, the decision of IHO Goldhammer is **affirmed** in all respects with the exception of his determination that the District's notice of the October 12, 2005 IEP meeting was inadequate. The decision of IHO Goldhammer determining that the District's notice of the October 12, 2005 IEP meeting was inadequate and ordering the District to issue a complying notice is **reversed**.

3. The Parent's complaint is dismissed and the Parent's request for relief is denied in full.

4. This Decision Upon State Level Review shall be final except that either party has the right to bring civil action in an appropriate court of law, either federal or state.

DONE AND SIGNED
October _____, 2006

JUDITH F. SCHULMAN
Administrative Law Judge

## CERTIFICATE OF SERVICE

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

[parent]

David A. Price, Esq.
Colorado Association of School Boards
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Joseph M. Goldhammer
Buescher, Goldhammer, Kelman & Dodge, P.C.
1563 Gaylord Street
Denver, Colorado 80206

on this ___ day of _____, 2006.

_____

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