

DUE PROCESS HEARING  
BEFORE AN IMPARTIAL HEARING OFFICER

STATE OF COLORADO

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DECISION

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L2000:118

In Re Hearing Request  
to Colorado Department of Education

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This parental request for Due Process pursuant to P.L. 105-17, Section 615, amending the Individuals with Disabilities Education Act; and The Colorado Code of Regulations, § 2220-R-6.03, was heard August 7, 2000, in Canon City, Colorado. [Parent], parent of student [Student] (herein referred to as [Student], to protect her privacy), was present on behalf of the parents and the student. Fremont County School District RE-1 was represented by attorney Rocco F. Meconi.

ISSUES

1. Is the Least Restrictive Environment (LRE) for this student her neighborhood school?
2. Do the unique educational needs of this student require she be educated in her neighborhood school for the 2000\01 school year?

FINDINGS OF FACT

Based upon the testimony at the hearing, the stipulations of fact entered into by the parties, and the Exhibits admitted, the Impartial Hearing Officer makes the following Findings of Fact:

1. [Student] had a very difficult early childhood, which included numerous short-term foster home placements before she came to live with her current family at the age of 5 and was adopted. [Student] has been diagnosed to have Reactive Attachment Disorder (Oppositional-Defiant), which makes it very difficult for her to form attachments to her caretakers. [Student] has also been diagnosed to have PTSD and depression.
2. Educationally, [Student] has been identified to have Significant Identifiable Emotional Disability [SIED]. Such identification was not disputed in this proceeding.
3. [Student] was educated at the [Elementary School] through the 1997\98 school year. In the Fall of 1998, the SIED program in which [Student] participated was moved to the [Elementary School 2]. This move resulted in a change of school buildings for [Student], but not a change of teacher.
4. Since the second quarter of her second grade year, [Student] has been mainstreamed into regular education classrooms, with SIED services and support. SIED services have at various times included a specially trained teacher's aid who remained in the regular classroom to provide services to [Student] and several other SIED students; access to an SIED classroom where she could spend time when she needed to calm down and refocus; tutoring to address educational deficits; and specially trained assistance to remove [Student] from the

regular classroom when she lost control.

5. For the 1999\2000 school year, [Student] was mainstreamed into the regular Fourth Grade classroom at the [Elementary School 2]. She received Special Education services from an SIED teacher, and from an SIED teacher's aide.

6. The School District provides SIED services for students in kindergarten through the third grade at [Elementary School 2]. Sometimes students in the Fourth Grade are also included in that program. Students in the fourth through sixth Grades are provided SIED services at [Elementary School 3]. The School District clusters SIED services for primary students separately from SIED services for intermediate students for several reasons. One reason is a belief that it is too demanding for a single SIED teacher to master the entire K through 6 curricula. Another reason is a concern that it is not beneficial for the very young SIED students to be placed in the same SIED classroom with the intermediate level students. A third reason is that the clustering reduces the number of regular classroom teachers with whom each SIED teacher must coordinate services.

7. The distance between [Elementary School 3] and [Elementary School 2] is between 1 and 1½ miles.

8. [Student] does not handle transitions well. In part, this is because her Reactive Attachment Disorder makes it very difficult for her to trust. [Student] experiences grief and a sense of loss at the end of each school year because she no longer sees the teachers with whom she has become familiar. She also experiences an attenuated level of fear about transitioning to the next grade.

9. In recent months, [Student] has started to make friends. She has three friends from [Elementary School 2] who came to her birthday party, and this was the first time this had ever occurred. [Student] has also just recently started participating in extra-curricular activities, such as Awana and Chorale. She recently had a part in a musical production of *Scrooged*.

10. [Student]'s most recent Individualized Education Program (IEP) resulted from an IEP and Triennial Review meeting which occurred February 7, 2000. [Exhibit 18] Procedures used to adopt such IEP are not in dispute in this proceeding.

11. As to location where services were to be provided to [Student], her IEP states:

[Student] (and parents) are motivated for her to be mainstreamed into the general classroom with regular (versus SIED) Special Education assistance so that [Student] can try to stay here at [Elementary School 2] (not in SIED program) next year.

[Student] will remain SIED and will finish the school year at [Elementary School 2] with the opportunity to earn her way into the regular 5th grade for next year at [Elementary School 2] (rather than remaining SIED and transferring to [Elementary School 3] of 5th grade [Elementary School 2] SIED program is only for K-3rd grades.)

12. As planned, efforts were made in the Spring of 2000 to utilize the disciplinary procedures used with regular education students to a greater extent, and to phase out SIED services for [Student] [Exhibit 20]. The parents had requested this trial in an effort to avoid [Student]'s transfer to [Elementary School 3], and also because of a parental goal to transition [Student] out of SIED identification before she reaches middle school. [Exhibit 21]

13. The result of this planning in the Spring of 2000 was a Behavior Support Plan, which was not signed by the parents. [Exhibit 22] Under this plan, [Student] was to be sent to the Principal's office for re-focus rather than the SIED teacher.

14. The parents believe [Student] understood she had been promised that if she successfully completed all requirements

under the Behavioral Support Plan, she would not have to go to [Elementary School 3] with the other SIED fifth Graders. The parents further believe [Student] substantially complied with such plan, and that she will feel she was lied to if she is required to go to [Elementary School 3] for the 2000/2001 school year.

15. The parents are very concerned about [Student]'s move from [Elementary School 2] to [Elementary School 3] to attend the intermediate SIED program. Even though [Student] would not have the same teacher for fifth Grade that she had for the fourth Grade if she stayed at [Elementary School 2], the parents believe it provides a needed element of consistency for [Student] to be able to at least see her third Grade teacher from time to time. [Student]'s therapist, [Therapist], stresses the need for consistency and predictability in [Student]'s life. [Therapist] testified [Student] has some attachment to the [Elementary School 2], although individuals are more important to her than the school building.

16. The parents are concerned a transition from [Elementary School 2] to [Elementary School 3] at this time will be destructive to the progress [Student] has made in coping with her Reactive Attachment Disorder. They are concerned [Student] will perceive this move as another loss or rejection.

17. [Student]'s classroom teacher, [Teacher], testified [Student] continued to have problems throughout the end of the 199\00 school year, although she made progress in that she would at least leave the classroom when requested to do so, if not actually walk down to the principal's office alone. However, [Teacher] also testified that [Student]'s occasional rages frightened the other students, and that SIED support services were still necessary for [Student], in her opinion.

18. It is clear the IEP was implemented, in that the opportunity for [Student] to function without SIED services was made available. Although the parents felt [Student]'s efforts to do so were successful, the School District personnel, including the classroom teacher, did not. [Exhibit 25]

19. The School District plans to have [Student] attend [Elementary School 3] with the other fourth, fifth, and sixth grade SIED students who have been clustered there. SIED services appropriate for [Student] are not available at [Elementary School 2]. The School District is unwilling to place an intermediate SIED aide at [Elementary School 2] to assist [Student], as the parents request, because such aide would not have an intermediate SIED teacher on-site. [Student]'s behavior occasionally is inappropriate for primary level SIED students. The School District does not believe it would be adequate for [Student] to have only the primary SIED teacher and the primary SIED classroom for support when she needs refocus. [Elementary School 3] has a number of programs available to intermediate SIED students which are not available at [Elementary School 2], including a counselor who works with [Student]'s age-level peers on pro-social activities and relationships.

20. The School District will provide transportation for [Student] to whichever school she attends. However, the parents are very concerned about the added burden on their family caused by longer bus transit and later timing for [Student]'s return home at the end of the day.

21. The parents assert the School District has not exhausted all of its options to make an appropriate education [FAPE] available to [Student] in her neighborhood school ([Elementary School 2]), and that it has an obligation to do so. If necessary, the parents have requested the school district hire an additional SIED aide to provide services to [Student] at [Elementary School 2].

## CONCLUSIONS OF LAW

### I. BURDEN OF PROOF

The A.P.A., C.R.S. Section 24-4-105(7), places the burden of proof upon the proponent of an order. This law is often extrapolated to place the burden of proof with the party seeking a change to the *status quo*. The courts have often held the burden of proof rests with the

party who challenges an IEP which was derived through appropriate procedures. **Johnson v. Independent School District #4 of Bixby, Tulsa City, Oklahoma**, 921 F.2d 1022 (10th Cir. 1990).

None of this clearly resolves the issue of who has the burden of proof here. From one point of view, the School District seeks to change the *status quo* by transferring [Student] to [Elementary School 3] instead of [Elementary School 2]. However, because [Elementary School 3] is the established location where services required by [Student]'s IEP are available; because the transfer to [Elementary School 3] is consistent with the IEP; and because it is the parents who wish an order exempting [Student] from the established structure, I find the parents have the burden of proof.

## II. LEAST RESTRICTIVE ENVIRONMENT

The School District is required to provide personalized instruction with sufficient support services to permit each child to benefit educationally from the instruction. **Hendrick Hudson Central School District v. Rowley**, 458 U.S. 176 (1982). The District is also required to educate each child in the Least Restrictive Environment [LRE] for that child. 20 U.S.C. § 1412(5)(B).

The 10<sup>th</sup> Circuit Court of Appeals has decided LRE does not require a child be educated at his neighborhood school. **Murray v. The Montrose County School District**, 91 F.2d 921(Colorado 1995).

The LRE mandate does not include a presumption of neighborhood schooling, and a school district accordingly is not obligated to fully explore supplementary aides and services before removing a child from a neighborhood school. It is only so obligated before removing a child from a regular classroom with non-disabled children. The Murrays have never objected to the degree to which [their son] was educated outside the regular classroom; they only challenge his removal from his neighborhood school.

**Murray Montrose**, at 930. Similarly, in this case there is no indication the amount of time [Student] spends mainstreamed into the regular education classroom would differ at [Elementary School 3] as opposed to [Elementary School 2]. It appears that in asserting the School District has not put forth maximum effort to offer the services [Student] needs at [Elementary School 2] in addition to offering such services at [Elementary School 3], the parents are asking for exactly that which **Murray Montrose** says the District is not required to provide.

## III. UNIQUE NEEDS:

Pursuant to 34 C.F.R. Section 300.14(a)(1), Special Education means, in part, specially designed instruction to meet the unique needs of the handicapped child.

A difficult question remains as to whether [Student] has unique needs for consistency in her education which require she remain at the same school building in order to benefit educationally from instruction.

The IEP does not indicate a finding that remaining at [Elementary School 2] is necessary for [Student]. The IEP states only that [Student] and her parents wish [Student] to remain at [Elementary School 2]; and that an opportunity will be provided for [Student] to demonstrate she no longer requires SIED services because such services are not available for her at [Elementary School 2].

The Psycho-Educational Test Report (Exhibit 17) does not address this issue.

[Therapist], [Student]'s private psychological therapist, testified that consistency was very important for [Student], particularly with regard to her home and primary caretaker situation; and that the transition to [Elementary School 3] would be difficult for [Student] - that she will be scared and upset at the school change and will require extra counseling. He did not opine that the transition will interfere with [Student]'s ability to benefit from instruction. [Therapist] and [Parent] agreed that the personnel are more key to [Student]'s feelings of

consistency than is the school building.

If [Student] remains at [Elementary School 2], the only consistency for her will be the building, the principal, and the ability to pass her former teachers in the hallway and say hello. These elements introduce a sense of familiarity for [Student] which is not dismissed lightly.

[Student]'s mother feels strongly that this transition will be difficult for [Student]. She has rejected efforts from the School District to assist with the transition because of her opposition. She knows [Student] better than anybody else does. However, in part, her position is motivated by her very real concerns about the impact the longer bus ride will have upon her family. Such concerns result from a heart-moving commitment to her large family of foster and adopted children. However, I don't find anything in the IDEA which precludes The School District from clustering intermediate SIED services at [Elementary School 3] even though the extra 1½ miles of transit time increases the burden on [Student]'s family.

There is not sufficient evidence to support a finding that [Student] is unable to benefit from instruction at [Elementary School 3] because she has unique needs which require her to be educated exclusively at [Elementary School 2].

#### IV. OPINION

Hopefully, [Student]'s commendable progress and the process of weaning [Student] from SIED services will continue. However, it seems clear [Student] still requires SIED services at this time. The services she needs are available to her at [Elementary School 3], which is a relatively short distance from her home. Given the fact that transition to a new classroom and new teacher will occur at either school when she begins the new school year in the fifth grade, the additional element of a new school building doesn't make sufficient difference to require the intermediate-level SIED services at [Elementary School 3] be duplicated at [Elementary School 2] to accommodate [Student]'s unique needs.

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