

<p>In the Matter of:</p> <p>[Student], by and through her parent, [Parent],</p> <p style="padding-left: 40px;">Petitioner,</p> <p>v.</p> <p>PUEBLO SCHOOL DISTRICT #60,</p> <p style="padding-left: 40px;">Respondent.</p>	<p>FINDINGS AND DECISION</p> <p>CASE NO. L-99:123</p> <p>Impartial Hearing Officer Andrew J. Maikovich</p>
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I.

INTRODUCTORY STATEMENT

The above-captioned hearing was held at the Thatcher Building in Pueblo, Colorado, on November 2, 3, 4, and 10, 1999.

Petitioner requested the hearing pursuant to the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S.C. Section 1450, 34 C.F.R. Section 300, et seq.

The issues identified by the Impartial Hearing Officer (IHO) at the beginning of the hearing include:

1. Whether [Student] was denied a Free Appropriate Public Education because Pueblo School District #60 changed her placement from [Elementary School] to another elementary school.
2. Whether [Student] was denied a Free Appropriate Public Education because her IEP did not contain a transition plan to a new elementary school.
3. Whether [Student] was denied a Free Appropriate Public Education because Pueblo School District #60 failed to fully implement her IEP, specifically with respect to:
 - a. A classroom presentation on visual impairment
 - b. Discussion with [Student] on expectations and problem-solving strategies
 - c. Discussion with lunchroom and playground attendants
 - d. Presentation of a low-vision role model in [Student]'s class
 - e. Delays in providing [Student] with large print materials

4. Whether [Student] was denied a Free Appropriate Public Education because her IEP did not contain a transition plan to a new elementary school with respect to:
 - a. Cognitive development
 - b. OT/PT needs
 5. Whether [Student] was denied a Free Appropriate Public Education because her IEP did not address the potential need for:
 - a. Listening skills
 - b. Orientation and mobility instruction
 - c. Recreational needs, including physical education
 6. Whether [Student] was denied a Free Appropriate Public Education because Pueblo School District #60 did not determine whether [Student] needed Extended School Year Services in the summer of 1999.
- Respondent has the burden of proof on issue one. Petitioner has the burden on issues two through six.

II.

FINDINGS OF FACT

1. [Student] is a ten-year-old student enrolled in the fourth grade at [Elementary School].
2. [Student] has a vision disability caused by achromatopsia. Her corrected vision in both eyes is 20/160. She is unable to distinguish most objects at distances greater than one foot and has difficulty distinguishing colors. Her eyes are extremely sensitive to light, which requires her to wear [].
3. [Student] was first enrolled at [Elementary School 2] at the age of three. She transferred to [Elementary School] at the age of four. She has been enrolled at [Elementary School] since that time.
4. [Student] has attended [Elementary School] as a transfer student. The school closest to her home is [Neighborhood School], which, for purposes of district enrollment, is [Student]'s neighborhood school.
5. [Student] was given a Stanford-Benet cognitive test in May 1993, which placed her in the average to low-average range of I.Q. [Exh. 1].
6. [Parent] was a frequent volunteer at [Elementary School] during the years [Student] attended the school. [Parent] was also a paid lunch supervisor in 1997 through spring 1999.

7. To accommodate her needs, [Student] sits in the front row of her class in a desk closest to the board. Her assignments are enlarged in most instances (90 to 95 percent of the time). She places her work in enlarged folders that resemble those used by her classmates.
8. [Student] often needs additional time to complete her work. [Exh. 10]. Therefore accommodations are necessary as to the amount of work, such as shortened spelling lists.
9. [Student] is hard working, conscientious, and highly motivated to do her best at school. Despite her visual impairment and average to low-average scores on I.Q. tests, she is nearly at grade level in most of her classes. Her visual impairment primarily affects subjects such as handwriting and math problems in which long rows of numbers are involved. [Student] listens to her teachers and follows directions well.
10. [Student] rarely asks for special attention and has normal social interactions for a child her age. She makes friends relatively easily and has a number of male friends, with whom she enjoys various games such as tag and basketball.
11. Although [Student] has some mobility and dexterity limitations, she participates in recreational and physical activities, such as gymnastics, softball, flag football, horse back riding and ice skating.
12. [Student] was provided Extended School Year (ESY) services in 1996, 1997, and 1998. [Student]'s ESY services during those years primarily involved mobility training, such as walking with a cane in unfamiliar areas or public places. In addition to mobility training, there was limited work in math.
13. ESY services are provided when a student with a disability would have severe regression during the inactive summer months, and the skills would not be regained in a reasonable amount of time when school resumed.
14. In late 1998 or January 1999, [Student]'s class had an extracurricular reading challenge in which each child that read 15 books would be given an award at a small social event.
15. On or about February 12, 1999, [Student] and a fellow classmate had an incident on the playground during the lunch period. The classmate had teased [Student], possibly spit at [Student], and taken off her []. [Student] reacted by hitting the classmate, which bloodied her nose.
16. Both [Student] and the classmate were taken to principal [Principal]'s office.
17. [Principal] told both girls they had been wrong and gave each student three days of lunch detention. (Lunch detention involves a loss of privileges, such as playing during that time.)
18. [Parent] was a lunchroom attendant the day of the incident between [Student] and her classmate.

19. [Parent] brought two other students to the principal's office for misbehavior. She was informed that [Student] had been involved in an incident.
20. [Parent] saw [Student] crying in the principal's office. She went into the principal's office and attempted to calm [Student].
21. [Principal] saw [Parent]'s reaction as condoning [Student]'s retaliatory actions. [Principal] told [Student] that her mother was wrong and that she should not retaliate with physical actions when teased. [Principal] told [Student] that she should seek out a teacher or administrator in the future.
22. The February 12, 1999, playground incident is the only major disciplinary problem [Student] has had while attending [Elementary School].
23. On February 13, 1999, [Parent] spoke to [Principal] about the previous day's incident involving [Student] and the other child. [Parent] told [Principal] that she did not believe the girls should have been afforded identical punishment. [Parent] did not believe [Principal] had investigated the situation fully. [Parent] was also angry that [Principal] had told [Student] that "your mother is wrong." [Parent] also mentioned the previous 15 book extracurricular assignment.
24. An IEP staff meeting was called on behalf of [Student] on or about February 17, 1999, in response to the exchange between [Principal] and [Parent]. (The IHO makes no finding as to who initiated the staffing, nor does the IHO find it to be relevant.)
25. At the staffing on February 17, [Student]'s general educational plan and the playground incident were discussed. [Exh. 11].
26. The staffing team noted that [Student]'s spelling list was not reduced as stated in her previous IEP. Her list was reduced to 10 words. [Parent] complained about the extracurricular book report assignment in which [Student] completed seven books, when 15 was required for a social activity/award. The staffing team agreed all of [Student]'s assignments and projects need similar accommodations regardless of whether they were inside or outside the standard classroom curriculum.
27. Various strategies were discussed regarding [Student]'s social interactions. [Exh. 11, four pages from the top]. This discussion was prompted by the playground incident and [Parent] stating that she believed [Student] was being teased.
28. [Parent] said she thought [Student] could use increased keyboarding instruction as part of the discussion regarding [Student]'s handwriting. The staffing team, including [Parent], agreed that [Student] could go to the media lab for extra time on the keyboard at lunch, recess, or after school. [Exh. 11, six pages from the top.]

29. Shortly after the February 17 staffing, counselor [Counselor] talked to [Student] about alternative strategies she could use, including seeking help from an adult, such as a playground assistant.
30. Shortly after the February 17 staffing, [Principal] discussed with the playground assistants and [Student]'s teacher how to handle teasing incidents, particularly with respect to [Student] (The IHO is unable to specify what instructions were provided, but finds a discussion was held.)
31. [Student]'s Triennial Review was conducted on April 2, 1999. [Exh. 12, 12A, 12B. Multiple exhibits were admitted because of a disagreement as to whether an additional page was in the student's file, school file, and special education file.]
32. It was anticipated by all parties at [Student]'s Triennial Review that [Student] would continue her education at [Elementary School] during the 1999-2000 school year.
33. The staffing team identified [Student] as having a visual disability because her visual acuity is less than 20/70 and she has limited ability to move about safely in an unfamiliar environment. [Exh. 12, 12A, 12B.]
34. The staffing team determined that [Student] was not eligible for ESY services in the summer of 1999. There was limited discussion with respect to this determination.
35. In late April 1999, Pueblo School District #60 released student enrollment projections for the 1999-2000 school year. Under the district's open enrollment policy, after neighborhood children are accepted, students may transfer to any school in the district in which space is available.
36. In its April 1999 projections, the district anticipated that no transfers would be available at [Elementary School] for third and fourth grade students.
37. On or about May 5, 1999, [Sibling] forgot to bring his homework assignment to school. ([Sibling] was in second grade at [Elementary School] at that time.) His teacher asked [Sibling] to call [Parent] to ask her to bring the homework with her when she picked up [Sibling] from school.
38. [Sibling] called [Parent]. The message was not communicated correctly from [Sibling] to [Parent], who thought her son was in trouble.
39. When [Parent] arrived at school, she discussed the situation with [Sibling]'s teacher inside the second grade classroom. Other children could hear the exchange.
40. [Principal] told [Parent] that her behavior inside [Sibling]'s class was unacceptable and that her children's transfers would be revoked next year.

41. [Parent] withheld [Student] and [Sibling] from school for four days following the incident.
42. On or about May 11, 1999, [Principal] called an IEP staffing for [Student], which was held on May 13. [Exhibit 13.] She informed the staffing team that [Parent] was disruptive. She listed a number of incidents she had had with [Parent] over the years. She said [Student] and [Sibling] would not be permitted to return to [Elementary School] next year. [Parent] stated that she wanted [Student] to remain at [Elementary School] because [Student] had been successful there, she had friends, she liked the staff, and she felt comfortable in the school. [Parent] said she would home school [Student] rather than put her in a different environment. [Principal] and [Parent] showed strong emotions at the meeting, which was uncomfortable for everyone in attendance.
43. There was no discussion about potential over-enrollment at [Elementary School] during the May 13, 1999, meeting.
44. At the May 13, 1999, meeting, members of the IEP staffing team told [Parent] that [Student]'s services would go wherever [Student] enrolled. There was no discussion of [Student]'s specific educational needs, educational plan, or how a transition to another school would be accomplished.
45. Teacher of visually impaired children [VI Teacher], paraprofessional [Paraprofessional], and special education teacher [Special Education Teacher] informally discussed [Student]'s transition needs between themselves some time after the May 13 meeting and the end of the school year. (The IHO is unable to specify the times or dates when these discussions took place.) In general, the instructors discussed taking [Student] to her new school to familiarize her with her surroundings and to introduce her to the teachers. The content of these informal discussions was never discussed with [Parent].
46. On or about May 17, 1999, [Parent] and friend [Friend] met with special education director [Director]. [Parent] told [Director] that it was unfair for [Principal] to revoke [Student]'s transfer because it focused on the mother's conflicts with the principal rather than [Student]'s educational needs. [Parent] told [Director] that [Student] was happy at [Elementary School] and that she had been successful there. [Director] told [Parent] that [Student]'s services would travel with her to whatever elementary school she attended.
47. At the May 17, 1999, meeting, [Director] told [Parent] and [Friend] that the discussion about [Parent] in [Student]'s May 13, 1999, IEP, was inappropriate. [Director] told [Parent] that if she would provide a written request, [Director] would have the inappropriate wording involving the parent/principal conflict removed from [Student]'s student file. [Exh. 16.]

48. On or about June 8, 1999, [Principal] began calling the parents of third and fourth grade transfer students to notify them that transfers were not being accepted at [Elementary School] for the 1999-2000 school year. Parents who were not contacted by telephone were mailed a certified letter. Parents who were contacted by telephone were sent a letter by regular mail. In the letters, the District asked parents who wanted their children to remain at [Elementary School] to send in a written request. The parents who made such a request had their children's names placed on a waiting list.
49. On or about June 10, 1999, [Principal] called [Parent] about the revocation of all transfers for third and fourth grade students, including [Student].
50. During approximately the second week of June, [Parent] called Executive Director of Administration [Executive Director] to discuss the transfer situation. [Executive Director] told [Parent] that [Neighborhood School] was [Student]'s home school and her services would go there.
51. On or about August 13, 1999, [Parent] received a certified letter from the School District that transfers for her children were not being accepted at [Elementary School].
52. [Parent] did not file a written appeal with respect to the denial of transfers.
53. On or about August 17, 1999, [Parent] contacted [Executive Director] to express her concern about the revocation of [Student]'s transfer. She later contacted District administrator [District Administrator] (correct spelling unavailable) to express her concern. [Parent] placed [Student]'s name on the waiting list for transfer students at that time.
54. Shortly prior to August 25, 1999, [Parent] contacted the principal of [Elementary School 3] about potentially enrolling [Student] and [Sibling] in school for the 1999-2000 year. The principal requested additional information.
55. On or about August 25, 1999, [Parent] went to [Elementary School] to copy [Student]'s student files. [Principal] told [Parent] that she had spoken with the principal at [Elementary School 3]. [Principal] told [Parent] that she had given the children good recommendations.
56. On or about August 25, 1999, [Parent] had a friend hand deliver a request for a due process hearing to various individuals, including [Director] and [Principal]. (The IHO is unable to determine the exact location of where the due process requests were delivered.)
57. On or about August 26, 1999, [Parent] called [Director] to discuss the placement of [Student] for the 1999-2000 school year. An IEP staffing was scheduled for August 30, 1999. [Exhibit 14.]

58. On or about the last week of August, the [Elementary School 3] principal told [Parent] that she would not be able to meet the needs of [Student]. She also said they would not have room for [Sibling].
59. [Parent] contacted [Director] and/or [District Staff Member] (correct spelling unavailable) about [Elementary School 3] refusing admission to her children. [Student] was eventually allowed admission into the school. (The IHO is unable to identify the timing/facts surrounding [Student]'s admission to [Elementary School 3].)
60. On or about August 30, 1999, an IEP staffing was conducted at [Elementary School]. [Student]'s Stanford-Benet scores from 1993 were discussed in the context of her present skill levels. Her fine motor skills were also discussed, partly because of [Parents]'s expressed concern over [Student]'s ankle strength when walking.
61. [Student]'s placement was also discussed at the August 30, 1999, staffing. [Parent] told the staffing team that she had visited [Elementary School 3], but that the principal had said she could not accommodate [Student]'s needs. [Parent] told the team that she would not send [Student] to [Neighborhood School], which is her neighborhood school.
62. Near the end of the meeting, [Parent] told the staffing team that she had requested a due process hearing for [Student] and that the stay put provision would keep [Student] at [Elementary School]. [Parent] agreed she would drop off [Student] in the morning and pick up [Student] in the evening without entering the school.
63. [Parent] consented to have [Student] evaluated in cognitive and OT/PT areas.
64. On or about the morning of August 31, 1999, [Parent] brought [Student] to [Elementary School] for admission. [Principal] refused to admit [Student]. After a telephone call to [Director], it was arranged for [Student] to be admitted to school that afternoon.
65. On or about the afternoon of August 31, 1999, a staffing was held to explain due process to the staffing team and to explain that [Student] would continue at [Elementary School] until the proceedings were complete. [Exh. 15.] [Student] was admitted to the school.
66. [Student] has remained enrolled at [Elementary School] and is presently in a fourth grade classroom with 33 students. The other fourth grade class has approximately 34 students.
67. The preferred student/teacher ratio for fourth grade students is 25:1. Respondent testimony appeared to show that 28:1 was in the acceptable range.
68. Two students who fall within a disputed School District 60/School District 70 boundary were provided transfer permits into the fourth grade classes at [Elementary School] after they were refused admittance in School District.

69. None of the approximately seven students on the fourth grade transfer waiting list were admitted into [Elementary School].
70. In September, 1999, [Parent] told [Student]'s fourth grade teacher, [Fourth Grade Teacher], that [Student]'s spelling list needed to be reduced as discussed in her IEP. [Fourth Grade Teacher] reduced [Student]'s spelling list.
71. In late September 1999, [Student] reported that a fellow student was teasing her. [Principal] immediately pulled the student from the classroom and disciplined the student with lunch detention.
72. In late September 1999, the District performed formal cognitive ability tests on [Student]. The result of the cognitive testing was relatively equivalent to the cognitive test results completed in 1993, with [Student] being in the average to low-average range.
73. In late September 1999, the District performed OT/PT tests on [Student].

III.

DECISION

Issue 1 — Whether [Student] was denied a Free Appropriate Public Education because Pueblo School District #60 revoked [Student]'s transfer permit from [Elementary School], thereby forcing her to attend another elementary school.

[Student] has attended [Elementary School] since she was four years old to her present placement in the fourth grade. Her transfer was revoked for the 1999-2000 school year following a confrontation with principal [Principal] about an incident involving her mother, [Parent], and brother, [Sibling].

The initial decision before the IHO is whether he has jurisdiction to review this issue. Petitioner argues that a revocation of [Student]'s transfer permit, thereby requiring her to attend a different school, is a placement issue under the Individuals with Disabilities Education Act (IDEA), as amended, 20 U.S.C. Section 1450, 34 C.F.R. Section 300, *et seq.* (IDEA). Petitioner cites cases in which the selection of a school was determined to be a placement issue. Ramona Unified School District/Santee School District, 27 IDELR 747 (State Educational Agency, CA, 1997). Rocklin Unified School District, 26 IDELR 465 (State Educational Agency, CA, 1997). Respondent argues that the issue involves a District transfer policy and is not a special education issue under the IDEA.

In Board of Education of the Hendrick Hudson Central School District, et al. v. Rowley, et al., 102 S.Ct. 3034 (1982), the U.S. Supreme Court held that an inquiry into whether a Free Appropriate Public Education (FAPE) is provided is twofold:

1. Have the procedures set forth in the IDEA been adequately complied with?
2. Is the IEP reasonably calculated to enable the child to receive educational benefits?

The IHO finds that revoking the transfer permit of a student with a disability covered under the IDEA may affect the educational benefit a student receives depending on a student's individual needs. "The right of a district to deny an interdistrict transfer permit cannot override its obligation under federal special education law to provide a FAPE to a student it is already serving." Ramona.

The next issue is whether [Student] would be denied a FAPE by revoking her transfer permit to attend [Elementary School], thereby forcing her to attend another elementary school in the district.¹

[Student] is a ten-year-old student enrolled in the fourth grade at [Elementary School]. [Student] has attended [Elementary School] as a transfer student since she was four years old. Her neighborhood school is [Neighborhood School].

Despite [Student]'s visual disability and average to low-average cognitive assessment scores, [Student] has enjoyed many successes at [Elementary School]. She is nearly at grade level in all courses. Despite one disciplinary incident in which a child teased [Student] and took her [] off her head on the playground—to which [Student] responded with a punch in the nose—[Student] has normal social interactions and developed a number of friends. Because [Student] has responded so well to the instruction at [Elementary School], [Parent] has a strong desire for [Student] to remain at the school.

Testimony clearly shows that [Elementary School] principal [Principal] and [Parent] have not been as successful with their interactions. There were at least three incidents between [Principal] and [Parent] that were confrontational, including a disagreement with a physical education teacher in 1997, the February 1999 incident between [Student] and a classmate, and the homework misunderstanding involving [Student]'s brother [Sibling] in May 1999.

Following the latest incident involving [Student], [Principal] told [Parent] that the children would

¹ In most IDEA hearings involving school placement, the parent requests that his or her child be placed at the neighborhood school, or least restrictive environment. In this case, Petitioner requests that the child be allowed to remain in a school outside of neighborhood boundaries.

have their transfers revoked for the 1999-2000 school year. An IEP staffing was held on May 13, 1999, in which [Principal] explained to the staffing team that [Student]’s transfer was being revoked. [Principal] listed the incidents she had with [Parent] in the past, and said they were the reason the transfers were being revoked. The staffing team did not discuss [Student]’s specific needs at that meeting, other than to say that [Student]’s services would continue with her to whatever school she eventually attended.

A significant amount of testimony was provided regarding the fairness or unfairness of [Principal]’s relationship and interactions with [Parent]. For example, [Parent] states that [Principal] was unfair with respect to her discipline of [Student] for responding to another student’s teasing and removing her []. [Parent] also believes her volunteer work at [Elementary School] over many years was not taken into account by [Principal]. [Friend], a friend of [Parent] who attended at least two meetings with her, indicated that [Principal] was unfair at a minimum, and potentially discriminatory at worst, in her actions with [Parent]. Petitioner attempted to support this contention by providing School District statistics that show four transfer students (including [Student] as part of “stay put” pending this hearing) were allowed in [Elementary School]’s fourth grade classes.²

The IHO does not have authority to determine the fairness or unfairness of [Principal]’s interactions with [Parent]. The implementing regulations of the IDEA specifically limit the subject matter of due process hearings to “the identification, evaluation, or educational placement of the child, or the provision of a free appropriate education to such child.” 20 U.S.C. 1415(b)(6). The IHO finds no statutory authority in the IDEA through which he could determine that [Student] had a right to remain as a transfer student at a non-neighborhood school even if the IHO believed the decision was unfair.³ Therefore, the IHO finds that the only issues the IHO has jurisdiction to determine are whether Pueblo School District #60’s educational plan is reasonably calculated to enable [Student] to receive educational benefit at her neighborhood or other elementary school and whether the District complied with IDEA procedures. Rowley, 458 U.S. at 206.

The IHO finds that [Student]’s specific educational needs can be met at elementary schools other than

² Undisputed testimony showed that two transfer students were admitted because of a boundary discrepancy between Pueblo Pueblo School District #60 and 70. The IHO was unable to identify the situation involving the fourth student. The IHO provided little weight to the hearsay testimony of [Parent] regarding additional potential transfer students who did not appear on official District records.

³ [Director] testified that “special circumstances” transfers have been infrequently granted by the district in the past. The IHO does not have the authority to determine whether [Student] may have been granted a “special circumstances” transfer had [Principal] not had confrontations with [Parent].

[Elementary School]. [Student] has a visual impairment. [Student] has not been identified as having an emotional or learning disability that would prevent her from benefiting from education in another setting. Each of the IEP staff members who testified at the hearing said [Student]’s IEP is transferable to any elementary school in the district. Clearly, [Student] will have to make adjustments, particularly in social settings. She has attended the same school for approximate six years and has established long-term friendships with many of her classmates. However, a FAPE may not be the parents’ first choice,...or even the better or best choice. A FAPE is simply an education that fulfills minimum statutory requirements. G.D. v. Westmoreland School District, 930 F.2d 942 (1st Cir., 1991).

The IHO looked very carefully at the procedures used by the District in revoking [Student]’s transfer permit. There was no discussion about [Student]’s specific needs at the May 17 staffing. Other than asking for general opinions on whether [Student]’s educational needs could be met at other elementary schools, which the staffing team universally agreed could be accomplished, the staffing team was silent as to [Student]’s specific needs. In the IHO’s opinion, this was due in no small part to the emotional nature of the setting.⁴

Because a change in schools can create a change in placement affecting the education of a child under the IDEA, IEP staffing teams must be allowed to discuss school changes and the effect they may have on the individual student. In the present case, no real discussion was held. Therefore, the IHO must determine whether this technical procedural violation resulted in a denial of a FAPE to [Student]. [Technical violations in and of themselves can provide the basis for finding a school system has failed to provide a FAPE. Hudson v. Wilson, 828 F.2d 1059 (4th Cir. 1987). See also Jackson v. Franklin County School Board, 806 F.2d 623 (5th Cir. 1986). However, technical violations must result in some prejudice to the student or parents before they can be considered violations of the IDEA. Urban v. Jefferson County School Dist. R-1, 89 F.3d 720 (10th Cir. 1996). See also Hampton School District v. Dombrowski, 19 IDELR 175 (U.S. Court of Appeals, 1st Cir. 1992).]

The IHO finds that the lack of specific discussion about [Student]’s needs did not compromise [Student]’s right to an appropriate education. All members of the IEP staff testified at the hearing that [Student]’s services could be provided at any school. In the IHO’s opinion, in addition to the uncomfortable atmosphere at the May 17, 1999, staffing, the staffing team did not conduct lengthy discussions on whether [Student] could receive educational benefit at another elementary school because the evidence was overwhelming that she could.

⁴The testimony of special education teacher [Special Education Teacher], whom the IHO credits for truthfulness and candor, indicated the meeting produced too many tears and too much pain.

While [Student] certainly will need some transition assistance (discussed later in this opinion), she does not have a disability that prevents her from adapting to changes required of any student (disabled or non-disabled) who moves from one school to another. The cases provided by Petitioner in which a school change was determined to be a denial of a FAPE, the students had profound physical and/or emotional problems that made change very difficult. [Student]'s visual disability primarily involves mobility and orientation issues (familiarity with her surroundings), in addition to certain accommodations, such as large print books.

While [Student]'s services can be transferred to any elementary school, [Parent]'s determination that [Student] remain at [Elementary School] is not misplaced. The IHO was extremely impressed with the staff at [Elementary School] and their concern for [Student]'s education. Their actions on her behalf appeared at times to go beyond that required by the IDEA. In the IHO's opinion, if any teacher did not believe [Student] could be educated at another elementary school, she would have discussed it at the May 17 meeting and testified to the same at the hearing.⁵

Issue 2 — Whether [Student] was denied a Free Appropriate Public Education because her IEP did not contain a transition plan to a new elementary school.

Petitioner argues that even if it is determined that [Student] does not have a right under the IDEA to remain at [Elementary School], Respondent denied her a FAPE because it did not develop a transition plan to a new elementary school.

Under facts presented at hearing, the staffing team was initially informed that [Student] would not be attending [Elementary School] during the May 13, 1999, IEP staff meeting. At the meeting, [Principal] explained that [Student]'s transfer permit was being revoked. [Parent] told the staffing team that she would not enroll [Student] at her neighborhood school, [Neighborhood School], and that she would homeschool [Student] if she did not attend [Elementary School].

As noted in the Findings of Fact, from May 13 to August 30, [Parent] had a number of contacts with District personnel regarding where [Student] would attend school during the 1999-2000 school year. Petitioner argues Respondent denied [Student] a FAPE because it has not developed a transitional plan

⁵ In the findings of fact, the IHO determined that at the time of her Triennial Review on April 2, 1999, the staffing team anticipated [Student] would be enrolled at [Elementary School] throughout the 1999-2000 school year. The IHO does not agree with Petitioner's argument that Respondent is thereby bound by the services listed in the IEP regardless of unforeseen circumstances.

for helping [Student] adapt to a new school environment should the IHO determine she does not have the right to remain at [Elementary School]. In its statement of facts prior to the due process hearing, and later reinforced at the hearing, Respondent states that the IEP team will develop a transitional plan for [Student] once the school she will attend is identified.

The IHO finds that Respondent is not obligated to develop a transitional plan until a new school for [Student] is identified. As the IHO could not identify any caselaw with a similar set of facts, this determination is reached as a case of first impression. The IHO finds that common sense and the efficient use of limited resources resides on the side of the Respondent. First, if Petitioner had been successful with respect to issue one and the IHO reversed the district's revocation of [Student]'s transfer, no transition plan would be necessary. Second, much of [Student]'s transition needs involve mobility and orientation. Because of her vision problems, [Student] needs additional time to familiarize herself with her surroundings. Until those surroundings are identified (stairs or non-stairs, restrooms, etc.), the staffing team could only develop mobility and orientation plans on a general basis. In the IHO's opinion, this would not be productive, nor is it required under the IDEA.

Once again, [Parent]'s concern with developing a transition plan is understandable. Teacher [VI Teacher] testified that she needs a "few weeks" to obtain the large print books required in [Student]'s IEP. Paraprofessional [Paraprofessional] testified that it takes "about a month" to receive large print books and that she believed she had begun ordering books for [Student]'s 1999-2000 school year in May 1999. [Student]'s ability to reasonably benefit from education is clearly related to her ability to read her textbooks.

Unfortunately, because of the atmosphere at the May 13 staffing, specific transition issues were never discussed. The IHO believes the testimony of [VI Teacher], [Paraprofessional], and [Special Education Teacher] that they informally discussed [Student]'s transition needs some time between May 13 and the end of the school year. In general, the instructors discussed the need to take [Student] to a new school to familiarize her with her surroundings, introduce her to new teachers, and ensure that accommodations, such as sitting near the board, were in place.

The IHO agrees with Respondent that it is required to develop a transition plan once [Parent] has identified the school that [Student] will attend. As general guidance, the IHO notes that the transition plan should target [Student]'s specific educational needs rather than a discussion on why a transition was delayed.

Issue 3 — Whether [Student] was denied a Free Appropriate Public Education because Pueblo

School District #60 failed to fully implement her IEP, specifically with respect to:

- a. A classroom presentation on visual impairment**
- b. Discussion with [Student] on expectations and problem-solving strategies**
- c. Discussion with lunchroom and playground attendants**
- d. Presentation of a low-vision role model in [Student]'s class**
- e. Delays in providing [Student] with large print materials**

Although the Petitioner admits that [Elementary School] and teachers have provided excellent service to [Student] throughout her six-plus years of attendance, Petitioner lists a number of specific instances in which it claims [Student]'s IEP was not fully implemented.

In general, the items in this list were the product of the February 17, 1999, staffing, which was in large part precipitated by the disciplinary incident involving [Student] and a classmate. [Exh. 11.] During their discussion about the incident, [Parent] mentioned to [Principal] that [Student]'s need for shortened assignments hadn't been fully complied with. Therefore, the staffing team discussed multiple issues at this meeting.

The IHO will look at each issue individually. The first four issues are related to the incident on the playground. [Exh. 11, four pages from the top.] In response to [Parent]'s concern about another student teasing [Student] and appropriate problem-solving strategies for [Student], the IEP team discussed:

- Talking to someone from the National Federation for the Blind about making a presentation and bringing in someone for the School for the Deaf and Blind to role model activities. (Although there is no written discussion in the IEP, testimony from the teachers and [Parent] said the discussion included the possibility of bringing in role models with other disabilities, such as wheel chairs, so that [Student] would not be singled out.)
- [Counselor], [Principal], and [Parent] will discuss with [Student] expectations and problem-solving strategies.
- If there is another altercation involving [Student], [Parent] will be called immediately.
- [Principal] will go over procedures involving situations with [Parent] with lunchroom and playground attendants.

- If there is another altercation involving [Parent], [Principal] bring in another adult prior to speaking with [Parent.]

A. Classroom presentation/role model on visual impairment.

The parties agree that a role model presentation has not been completed. Staffing attendees [Parent], [Friend], and [ARC Director], director of the local Association of Retarded Citizens (ARC), testified that they believed the role model presentation would be completed shortly after the meeting. Respondent's arguments are twofold: (1) the list involved suggestions that are not required to be performed under the IDEA, (2) in any case, the district has a year to provide a role model presentation.

The methodology used to meet a student's needs—such as whether to bring in a low vision role model—is not a required element in an IEP. “Therefore, while Part B does mandate the required components to be included in each child's IEP to ensure that the child's identified educational needs can be addressed, Part B does not expressly mandate that the particular teacher, materials to be used, or instructional methods be included in a student's IEP.” Letter to Hall, U.S. Department of Education, Office of Special Education and Rehabilitative Services, 21 IDELR 58 (1993). In fact, Pueblo School District #60 cannot bind the National Federation of the Blind nor the Colorado School of the Deaf and Blind to participate at any given date.⁶ However, the fact that Respondent was not required to include a role model presentation in [Student]'s IEP does not mean that it can totally disregard it once it is included in the student's IEP. The IHO therefore must look at all of the facts to determine whether the spirit of the IEP was met. The primary issue is whether Respondent denied [Student] a FAPE because it did not completely provide this service between February 17, 1999 and May 30, 1999.⁷ The IHO does not find that a FAPE was denied.

IEP staffing decisions are made by consensus. [Parent] testified that she believed a role model presentation would be provided during the spring semester. She also testified that [Principal] said during the staffing that the school planned to provide the presentation during the following school year. No one testified that the District ever agreed to provide the presentation during the spring semester, but agreed to look into it.

⁶ In the IHO's opinion, Respondent would fully comply with the IEP by bringing in a role model from other comparable organizations for the visually impaired. Although it was not recorded in the IEP notes, staffing team members testified that a more comprehensive program involving individuals with a variety of disabilities was also discussed so that [Student] would not be singled out by the students. While an excellent idea, this would make scheduling more difficult to coordinate.

⁷ The IHO does not find that Respondent was required to schedule a role model presentation during the “stay put” period after May 30, 1999.

(Testimony was contradictory on this effort, with the IHO finding that possibly one telephone call was made.) In the IHO's opinion, there was never any consensus regarding when the presentation would be provided.

While [Parent] argued at the due process hearing that she believed the presentation would be scheduled immediately, [Parent] never mentioned the lack of a role model presentation at [Student]'s Triennial Review in the beginning of April. In fact, there was no testimony that Petitioner ever mentioned the role model issue again to the school district personnel until the IHO requested a detailed list of issues following Petitioner's request for a due process hearing. Because consensus as to the timing was not reached at the February 17 staffing, the proper forum for the Petitioner to discuss this issue with the Respondent is either informally or to request a formal IEP staffing.

B. Discussion with [Student] on problem-solving strategies and expectations.

According to the February 17, 1999 IEP, "[Counselor], [Principal], and [Parent] will discuss with [Student] expectations for [Student] and problem solving strategies." Testimony showed that [Counselor] discussed expectations and problem solving strategies with [Student] shortly thereafter.

The first issue for the IHO to determine is whether the District complied with [Student]'s IEP on this issue. The IHO finds Respondent did not technically comply with the IEP as only [Counselor] discussed expectations and problem solving strategies with [Student]. The second issue is whether [Student] was denied a FAPE because of this technical deviation. The IHO does not so find.

Problem solving strategies and expectations of behavior were discussed with [Student] if teasing occurred in the future. The strategy, for better or worse, was to tell a person in authority rather than physically retaliating against the person who teased her. [Counselor] discussed this strategy with [Student] on at least one occasion, and possibly more. [Student] understood the strategy and used it in September 1999. The child who teased [Student] was immediately removed from the classroom and disciplined. While [Parent] testified that the strategy may not have been totally successful—[Student] has at times been subject of "she tells" conversations with fellow students—the objective of this IEP strategy was met and [Student]'s education was not prejudiced.

C. Discussion with lunchroom and playground attendants.

[Principal] testified that she spoke with all lunchroom and playground attendants. Petitioner's evidence to show that a discussion was not held with lunchroom and playground attendants was based on [Parent]'s hearsay

testimony that [Student] had informed [Parent] that a student had teased her, and that when she informed the playground assistant, the playground assistant replied, "Tell them to stop."

No evidence was presented at the hearing by which the IHO could find for the Petitioner. [Student]'s playground situation was never fully described. No playground or lunchroom attendants testified as to whether a discussion was held with them, what their instructions were, or how they eventually carried out these duties. Petitioner failed to meet its burden on this issue.

D. Delays in providing [Student] with large print material.

Because of [Student]'s vision problem, she often requires her work printed in larger type. Petitioner alleges that [Student] often loses time in school waiting for assignments to be enlarged.

While [Student]'s books are all large print, daily assignments also require enlarging. In most instances, this is accomplished prior to class. [Student]'s classroom teacher, [Fourth Grade Teacher], testified that two or three times a week, she or a paraprofessional enlarge [Student]'s classroom work during classroom time. [Fourth Grade Teacher] testified it took a minute or two. [Parent] testified that problems with enlarging her work occurred only a "couple times." There was some hearsay testimony that the copier may have broken on one occasion and [Student] may have had to wait for it to be fixed.

The IHO finds that the Respondent could not possibly anticipate every instance in which [Student] would need enlarged materials. No evidence was presented as to whether the above described instances were reasonably foreseeable or caused undue delay. Therefore, the IHO finds the delays are not a violation of [Student]'s right to a FAPE.

Issue 4 — Whether [Student] was denied a Free Appropriate Public Education because Pueblo

School District #60 failed to conduct proper assessments with respect to:

a. Cognitive development

b. OT/PT needs

In May 1993, Respondent conducted formal cognitive testing on [Student], which placed her in the average to low-average range in cognitive ability. Following [Parent]’s request for a due process hearing on or about August 30, 1999, Respondent conducted additional formal cognitive testing. [Student]’s cognitive ability was again determined to be in the average to low-average range.

During the August 30, 1999, staffing, [Parent] expressed her concern about [Student]’s ankle strength while walking. Respondent conducted formal OT/PT assessments.

Petitioner argues that [Student] was denied a FAPE because cognitive and OT/PT assessments should have been conducted at some time prior to September 1999.

According to the Respondent, formal cognitive and OT/PT assessments are made when concerns are brought to the attention of the IEP staffing team. In [Student]’s case, her disability involves vision. Therefore, while formal vision assessments are required annually, formal testing in other areas would only be performed if issues arose.

Petitioner appears to base much of its argument on a statement allegedly made by school psychologist [School Psychologist] at [Student]’s staffing on August 30, 1999.⁸ According to [Parent], [School Psychologist] said, “These test(s) should have been done years ago.” The IEP record for the August 30 staffing states the “psychologist recommends a review and assessment by the occupational and physical therapist.” [Exh. 14.]

While hearsay testimony is admissible in a due process hearing (with appropriate weight given depending on the circumstances), the IHO provides no weight to [Parent]’s testimony regarding the alleged statements made by [School Psychologist] at the August 30, 1999, staffing. [School Psychologist] testified at the due process hearing and could have been asked questions about her statements (e.g., whether she made them, the facts upon which she based them, etc.). The IHO can find no discussion regarding her alleged statements in his notes. The IHO also is unable to find any discussion as to whether [School Psychologist] believes the tests should have been

⁸ Petitioner also brought out the fact that during [Student]’s formal cognitive testing in 1993, the IEP stated “test results may have been affected by [Student]’s visual impairment.” [Exh. 1.]

conducted at an earlier date. No other expert testified regarding the need for cognitive and OT/PT assessments.

The IHO finds that Petitioner failed to meet its burden of proof on these issues.

Issue 5 — Whether [Student] was denied a Free Appropriate Public Education because her IEP did not address the potential need for:

- a. Listening skills**
- b. Orientation and mobility instruction**
- c. Recreational needs, including physical education**

Petitioner provided no evidence to meet its burden of proof on these issues. Petitioner agrees that [Parent] participated in all IEP staffings and her opinions were considered by the team. Solutions were reached by consensus.

Petitioner’s argument regarding listening skills is apparently based on one sentence in [Student]’s Triennial Review that states, “needs new concepts explained several times and needs individualized help learning them.” [Exh. 10, four pages from the top.] Petitioner argues the IEP team should have considered listening skills as a potential problem. However, [Student]’s teachers universally testified that listening to instruction is one of [Student]’s strongest skills.

Petitioner’s argument regarding orientation and mobility is apparently based in its argument that OT/PT testing was needed to determine whether a need was present.

[Parent] testified that [Student] participates in a number of recreational and physical education activities. While she has some fine motor skill problems, the parties agreed that [Student] participates in nearly all activities like any other child. [Parent] testified that she did not initiate a discussion on the issue of [Student]’s recreational activities during IEP staffings, but the staffing team should have known [Student] needed assistance.

The IHO finds for the Respondent on all issues. In the opinion of the IHO, [Student]’s IEP staffings were conducted in the way the IDEA intended, with all parties discussing the issues and attempting to reach consensus. If Petitioner believes new issues have arisen, she should request a new IEP staffing to discuss them.

Issue 6 — Whether [Student] was denied a Free Appropriate Public Education because Pueblo School District #60 did not determine whether [Student] needed Extended School Year Services in the summer of 1999.

[Student] was provided extended school year (ESY) services in 1996, 1997, and 1998. The primary ESY service provided to Petitioner during those years involved mobility and orientation training (e.g., walking with a cane in unfamiliar areas and public places). [Student] also received some math services.

After a short discussion during [Student]’s Triennial review on April 2, 1999, the IEP team determined that [Student] was not eligible for services beyond the regular school year. [Exh. 12a and 12b, 10 pages from the top.]

A significant amount of testimony involved a missing sheet of paper that discussed [Student]’s need to have ESY services in 1999. [Exh. 12b, four pages from the back.] The sheet, written by [VI Teacher], states that [Student]’s mobility skills are good and she therefore does not need ESY. Apparently, the sheet was not included in the parent’s or school’s records, but was in the special education records. The IHO makes no determination as to when [VI Teacher] wrote the note or in what files it was placed. In the IHO’s opinion, the issue is whether [Student] needed to have ESY services in the summer of 1999. For purposes of finding of fact, the IHO believes the discussion of ESY at the April Triennial was limited (i.e., did not include all of the information found on the missing sheet).

The parties agree that standard with respect to ESY services is set out in Johnson v. Independent School District No. 4 of Bixby, Tulsa County, Oklahoma, 921 F.2d 1022 (10th Cir., 1990). In Johnson, the court noted that while severe regression and recoupment is the primary factor in determining whether a student should be provided ESY services, other factors to consider include the probability of future regression, the degree of the child’s impairment, the parent’s ability to provide education in the home, the child’s rate of progress, the child’s needs for interaction with non-disabled peers, vocational training, the child’s behavioral and physical problems, the availability of alternative resources, and whether the requested service is extraordinary to the child’s condition.

Petitioner argues that [Student] should have been provided ESY services because: (1) IEP teams in 1996, 1997, and 1998 had determined [Student] was eligible for such services, and (2) there was no explanation how [Student]’s present needs had changed. Petitioner also elicited testimony that [Student] had forgotten some multiplication tables over the summer in an effort to show that she may have a severe regression and recoupment

problem. [Parent] also testified that she told the staffing team during the April 2, 1999, Triennial Review that [Student] might benefit from extended keyboard training (possibly at a community college).

The IHO finds that [Student] does not have a severe regression and recoupment problem. [Student] does not have a learning disability, but has a vision disability. Petitioner's anecdotal evidence regarding multiplication tables is unconvincing. There is no evidence in any of [Student] 's IEPs that she has ever had anything other than normal regression and recoupment.⁹

Petitioner argues that [Student] could have benefited from keyboard training in the summer of 1999. Petitioner is probably correct. However, most students (disabled and non-disabled) would benefit from additional educational programs in the summer. The IHO is unable to correlate this benefit with the regression/recoupment analysis required by Johnson.

[Student] was provided mobility and orientation ESY services in 1996, 1997, and 1998. At the time of [Student] 's Triennial review on April 2, 1999, the IHO agrees with Respondent that [Student] did not qualify for ESY services with respect to mobility and orientation. [Student] was comfortable with the environment at [Elementary School] and there was no evidence her education would suffer from unusual regression without additional mobility and orientation services.

Once it was determined that [Student] 's transfer permit would be revoked at the May 13, 1999, IEP meeting, however, additional ESY mobility and orientation training might have been appropriate at a new school. According to the IEP developed at [Student] 's Triennial Review, [Student] 's disability involved having visual acuity less than 20/70 and "she has limited ability to move about safely in an unfamiliar environment."

Unfortunately, as discussed earlier in this opinion, the atmosphere at the May 13 meeting seemingly prevented a specific discussion regarding [Student] 's needs. [P a r e n t] was adamant that [Student] would remain at [Elementary School]. [Principal] was adamant that [Parent] would not have children enrolled at [Elementary School]. Had someone from the IEP staffing team told [Parent] that the team would provide transition services to [Student] , including considering ESY services if [Student] were enrolled in a new school, it may have assisted an uncomfortable situation. Hindsight is always clearer, however.

The IHO finds that the issue of ESY and transition services are closely related. There was a technical violation of the IDEA in that ESY services should have been discussed, but Respondent's failure to discuss this ⁹~~If Petitioner believes that [Student]~~ may have a learning disability that manifests itself as a severe recoupment/regression problem, this should be discussed during an IEP staffing.

scenario did not deny [Student] a FAPE. While ESY services may have been appropriate had [Parent] identified another elementary school for [Student],¹⁰ her education continued at [Elementary School].

IV.

CONCLUSION

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

1. Respondent did not deny [Student] a Free Appropriate Public Education by revoking her transfer permit to attend [Elementary School]. The IHO finds that his jurisdiction with respect to the transfer is limited to determining whether [Student] can receive educational benefit at another elementary school, which he so finds. The IHO makes no determination as to the fairness or unfairness of the School District's transfer decision.
2. Respondent did not deny [Student] a Free Appropriate Public Education by failing to provide [Student] with a transition plan to an unidentified elementary school.
3. Respondent did not deny [Student] a Free Appropriate Public Education with respect to implementing [Student]'s IEP.
4. Respondent did not deny [Student] a Free Appropriate Public Education by failing to conduct cognitive or OT/PT assessments between May 1993 and September 1999.
5. Respondent did not deny [Student] a Free Appropriate Public Education by failing to more fully address listening skills, orientation and mobility, recreational needs, and physical education in [Student]'s IEP.
6. Respondent did not deny [Student] a Free Appropriate Public Education because it failed to provide her with ESY services in the summer of 1999.

Because of the technical procedural violations noted within this opinion, the IHO finds he has standing to require Respondent to make the following accommodations to [Student]:

- The IHO requests Respondent to review the attendance figures at elementary schools in the approximate vicinity of [Student]'s house (a number of schools were mentioned as possibilities during the hearing) and to provide [Parent] with a list of schools that have space available to meet [Student]'s needs.

¹⁰ While the IHO identified a potential need for ESY services with respect to a new elementary school, that decision should be made by the IEP staffing team.

- [Parent] should be provided no fewer than two days to visit schools with available space.
- Following [Parent]'s selection of a school for [Student], an IEP staffing should be held to discuss [Student]'s transitional needs. (The IHO notes that Respondent has maintained throughout this proceeding that it would provide such services.) The staffing team shall determine the required services and time necessary to make the transition to prevent any undue burden on [Student]'s educational opportunity.

It is so ordered.

As requested at the end of the hearing, the findings will go to the legal representative of the parent and Pueblo School District #60, and the Colorado Department of Education. Either party may request a state level review by contacting the State Department of Education if dissatisfied with the decision and findings rendered by the IHO. An Administrative Law Judge will be appointed to hear the appeal.

Andrew J. Maikovich
Date: November 19, 1999