

**STATE OF NEVADA
DEPARTMENT OF EDUCATION**

In the Matter of

STUDENT¹, by and through his Parents,
Appellant,

Vs.

CLARK COUNTY SCHOOL DISTRICT,
Appellee

MARY H.B. GELFMAN
STATE REVIEW OFFICER

MAY 12, 2010

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¹ Personally identifiable information is attached as Appendix A to this decision and must be removed for public distribution.

Procedural Background

This action arises under the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. § 1400 *et seq.* and related Nevada state statutes and regulations, Nevada Administrative Code (NAC), Chapter 388. This appeal of the decision of an Impartial Hearing Officer (IHO) dated March 3, 2010 was filed with the Nevada State Department of Education (NDE) on March 29, 2010, pursuant to 34 C.F.R. § 300.514 (b) (2) and NAC 388.315. The hearing below was held on January 27, 28 and 29, and February 16, 2010.

Parents will henceforth be referred to, interchangeably, as Appellants, Petitioners or Parents. The School District will be referred to, interchangeably, as School District or Appellee. Exhibits will be cited as: Parents' Exhibits, P-001 through P-359; School District Exhibits as D-001 through D-259; Joint Exhibits as J-001 through J-150; Impartial Hearing Officer File IHO-1 through IHO-84; Nevada State Department of Education File as NDE File (not numbered); and State Review Officer (SRO) File as SRO-1 through SRO-10.

The SRO was appointed by NDE on March 29, 2010 (SRO-2) and the record from below was received by the SRO on March 31, 2010 (SRO-3). The SRO scheduled a status conference by conference telephone call for April 6, 2010, and provided the Parties with a summary memorandum of that conference on the same day (SRO-7). At the status conference and as summarized in this memorandum, the issues on appeal were clarified, the Parties agreed that no additional evidence would be offered and that briefs would be submitted. Said briefs were due on April 23, 2010, and were received on that date. To

allow for submission of briefs the Parties requested an extension of the decision date from April 28, 2010, to May 28, 2010, and the SRO granted that extension.

Summary of the Case

The Student has been identified as Seriously Emotionally Disturbed. He and his Parents believe that he has Asperger's Syndrome. The Student had been home-schooled after a prior disagreement concerning proposed special education placement in a Special School in May, 2007. Parents opposed that placement because there were no students without disabilities enrolled in the Special School. When he re-enrolled in the School District in the fall of 2008, he was initially placed in Virtual High School, an on-line program. After evaluations, the School District proposed placement in the Special School previously rejected by Parents at Individualized Education Program (IEP) Team meetings in December, 2008, and May, 2009. Parents initiated a due process hearing, challenging the proposed placement in a Special School.

Issues on Appeal

1. Did the School District provide the Student with a free appropriate public education (FAPE) in the least restrictive environment?
2. Was the Impartial Hearing Officer's ruling that a Special School within the School District was an appropriate placement for the Student correct?
3. If the Student was not provided with FAPE in the least restrictive environment and/or if the Special School placement was not appropriate for the Student, is the Student entitled to compensatory educational services?

Findings of Fact

This decision sets forth a Summary, Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law set forth herein, with deference to the IHO's decision below and certain exhibits and witness testimony cited, are not meant to

exclude other supported evidence on the record. To the extent that the Procedural Summary, Summary of the Case, and Findings of Fact actually represent Conclusions of Law, they should be so considered, and *vice versa*. For reference, see *SAS Institute, Inc. v. S & H. Computer Systems, Inc.*, 605 F.Supp.816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

The Findings of Fact determined by the IHO are adopted as stated in the Decision of March 3, 2010. Student's recent school history was summarized in the IHO's March 3, 2010, decision:

From fall 2005 through April 2007, Student attended sixth and seventh grade at Middle School. Student had difficulty getting along with his peers, and was disciplined numerous times for fighting and verbal altercations with his peers (Ex. D-131). Student complained to his Mother and to his Middle School that he was being harassed and bullied at school. The School District incident reports indicate that Student was often targeted for bullying at Middle School, and that on occasion Student also provoked his peers into conflict with him. These altercations occurred in the regular classroom, the [Special Education] classroom, and in other areas such as hallways and lunchrooms. (IHO Decision, pp. 11-12)

The hearing record included documentation of many disruptive incidents (Ex. P-81-285).

Student's April 28, 2006, Behavior Intervention Support Plan was based on a Functional Behavior Assessment that included comments and observations from school staff members familiar with the Student. (Ex. J-018-020). The evolution of the Student's placement in Middle School, from a program of 50% of his school days in a regular

classroom and 50% in a Resource Room in the April 28, 2006, IEP (Ex. J-017) to 17% in a regular classroom in the May 25, 2006 IEP (Ex. J-028) to 100 % of school time in a Special Class in the November 6, 2006, IEP (Ex. J-038) tracks a series of incidents of fighting, threats and verbal classroom disruption by Student. The IEP Team recommendation of placement in Special School in the April 25, 2007, IEP, was a reasonable response to the Student's behavior, as observed and recorded by several school staff members on various occasions. (Ex. J-39-57)

The IHO considered testimony from several School District staff members who had taught, observed and/or evaluated Student during his prior attendance in the District (2005-2007) and upon his return (2008-2009).

- A District School Psychologist with approximately 30 years of experience was a member of the School District's Threat Assessment Team that was consulted in May, 2006, about a verbal death threat made in school by the Student, during and after a fight with another student. The other student had been reported to be bullying the Student. (Threat Assessment report dated May 25, 2006, at Ex. P-206-290 and D-77-82 and 92-121.) The Team found that the Student had made a substantive threat, serious category. This School Psychologist also attended an IEP meeting for the Student in April, 2007, where a change of placement to address Student's continuing social difficulties was discussed. When the Student returned to the School District in the fall of 2008 after almost two years of undocumented home schooling, this School Psychologist reviewed Student's records, including a recent psychiatric evaluation, and up-dated the threat assessment. The Student stated at that time that he would act to protect himself if he experienced "persistent bullying ... to the point of physically

aggressive [behavior]”. The Team concluded that the Student remained a concern because he had been away from the stresses he experienced in school and they were uncertain whether his ability to behave appropriately when under stress at school had improved. (Tr. 57-154)

- A Special Education Teacher and School Psychologist with 34 years of experience, cited the lack of evidence of therapy and/or improvement in behavior except for Parent’s oral reports. She observed that Student’s belief that he had been harassed was sincere. She also commented that she did not believe that all the supports listed in the December, 2009, IEP could be provided at a School District comprehensive high school. (Tr. 156-181)
- The Principal of the Special School, with 30 years of experience in education, had responded to a request for assistance from the Middle School Student was attending in 2007. She reviewed Student’s records, observed Student on four days in February and March 2007 and made some suggestions to the teacher. She described the Student as “feeling very threatened on the school campus” and concerned about defending himself. (Tr. 183-267, 291-292)
- A School Psychologist with 25 years of experience, who is the School Psychologist at the recommended Special School, evaluated the Student in March, 2009, without benefit of any prior records. She observed that he had “a unique way of thinking” and presented some characteristics of Obsessive Compulsive Disorder. He was eager to discuss his philosophy and interest in the military with this evaluator, and she had some difficulty re-directing him to test questions. She noted that he had serious problems with anxiety, and questioned a diagnosis of Asperger’s Syndrome.

Although she considered placement in a special class on a comprehensive high school campus, she favored placement at the Special School, which she thought better addressed Student's anxiety and concerns about personal safety. (Ex. J-141-150, D-024-042; Tr. 590-684)

- A Teacher certified to teach math and special education provided tutoring for Student from October, 2008 to January 12, 2009. Student was participating in the Virtual High School, an on-line program, his initial 2008-2009 School District placement when he re-enrolled. She described his skills as uneven, and opined that unevenness might be because his home school program hadn't followed the School District curriculum, and she wasn't familiar with the Virtual High School curriculum. At the December 10, 2009, IEP meeting this Tutor supported placement at the Special School because:

I felt he needed some kind of a structured setting where he would learn to interact with peers in [a] smaller setting first. Let him learn the skills first ... before he went to [a] comprehensive [high] school. (Tr. 692-731)

- A Teacher with eight years of experience described her contact with Student as a teacher at the Virtual High School. The students in this program log on to their particular classes at any time, to do their assignments. If they need help, they email the teaching staff. She was assigned to Student's English class and was the first teacher to meet with him to explain the program. Student did not complete the work assigned and declined to select a novel to read from a list. Eventually, he was encouraged to select any book, and he chose "Mein Kampf", but did not complete the related project assigned. Although he was expected to participate every day, he

logged on about once a week during the first semester of 2008-2009, and stopped participating the second semester. (Tr. 733-759)

- A Dean of Students from the Middle School described his experiences with Student in 2005-2007. This Dean had sixteen years of teaching experience prior to his administrative role. Student had been referred to him after disciplinary incidents at school. The Dean summarized Student's referrals as mostly for verbal and physical altercations with other students, primarily in the classroom but sometimes in the hallways during passing periods. Student used profanity, called students names and used disparaging language about their families. He was also sometimes a victim, retaliating against harassment. The Dean meted out penalties that included Parent conferences, in-house suspension and a behavior contract. At some point during 2005-2006, Student was referred for evaluation for special education because of his self-destructive behavior. Over time, his disciplinary referrals became more frequent, and for more severe behavior. (Ex. P-81-284; D-63-65 and D-131-256; Tr. 760-800)
- A Special Education Teacher with sixteen years of experience, currently teaching a high school class for severely emotionally challenged teenagers at one of the School District's comprehensive high schools, discussed the December 10, 2009, IEP meeting for Student. She presided over this meeting. She reported that the School District personnel at this meeting supported Student's placement at Special School, referring to program and placement recommendations from the Psychiatrist. Student and his Parents preferred placement in a special class at a comprehensive high school. This Teacher described her class, explaining why it would not be appropriate for

Student and why attending school in a large comprehensive high school would be very stressful for Student. (Tr. 802-833)

A December 22, 2008, psychiatric evaluation initiated by Parents resulted in medication, which Student rejected. (Ex. 323-324) A May 22, 2009, report of psychological testing initiated by Parents recommended further clinical evaluations to address the possibility of a diagnosis of Asperger's Syndrome. The record of the hearing identified the Psychiatrist/witness as independent, although among his many relevant experiences were several assignments for the School District.

- A Psychiatrist who is Board-certified in child and adult psychiatry and among other activities had run a mental health clinic for the School District for about 20 years, evaluated the Student and proposed a plan for his re-enrollment in 2009. On August 17, 2009, he reported a diagnostic impression:

Axis I	Adjustment Disorder with disturbance of behavior, mood and anxiety
Axis II	Obsessive Compulsive Personality
Axis III	One seizure
Axis IV	Oddities of behavior, social pressure, rigidity and inflexibility
Axis V	55

and concluded with general suggestions.

On September 29, 2009, he wrote a Psychiatric Re-Evaluation, having recently received Student's earlier school records. This report included specific recommendations for Student's school program and placement. He introduced these recommendations with a statement:

The principles behind [recommended program] accommodations are to decrease contact with provocative peers, provide adult supervision, build [Student's]

resistance and occupy his mind with prosocial and positive educational stimulation.

While not recommending a specific school placement, the Psychiatrist concluded his recommendations:

11. Regardless of his diagnostic label or qualification for specialized educational programming, it is the specific characteristics of peers and school personnel that are most critical. He can't benefit from competitive peers or authorities, or be exposed to situations that cause him the anxiety reactions that trigger his defensive aggression. (Ex. D-122-130; P-325-330 and P-342-344; Tr. 360-423)

The Parents' witnesses reviewed Student's records, but did not observe or evaluate the Student.

- A Professor of Special Education from Western Washington University, who specializes in assessment and evaluation of social behavior and school violence, found many aspects of the Student's records did not conform to his standards. He recommended placement on a regular high school campus. (Tr. 275-357)
- An Associate Professor of Special Education at Western Washington University, who reviewed Student's records, had worked for the School District until nine years prior to this hearing, and based his comments on the Student's records and his experience in the School District. He recommended placement on a regular high school campus. (Tr. 424 -472, 479-587)
- Mother testified concerning the unfair treatment she felt Student had received and his success in Navy Sea Cadets, which she described as a military-like activity for teenagers at Nellis Air Force Base. She did not provide any witnesses or

documentation for this activity nor for the counseling she reported her son had received. She wants Student to be placed in a comprehensive high school, and hopes that he will go on to college. He has told her that he hopes for a military career. (Tr. 13-54, 836-841)

An up-dated Threat Assessment in October 2009 included a detailed list of services and accommodations for Student's return to school. (Ex. P-331-341)

The IHO, the trier of fact, found greater credibility in the testimony of School District witnesses and the Psychiatrist, who had observed and evaluated the Student and had participated in Team meetings concerning his IEP and placement. There is nothing in the record of the hearing that casts doubt on the IHO's credibility determinations.

Conclusions of Law

The standard for determining whether FAPE has been provided begins with the two-prong test established by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176 (1982). First, the procedural requirements of the IDEA must have been met by the school district. Second, the IEP must be reasonably calculated to enable the child to receive educational benefit. The record shows no allegations of procedural problems in this case.

Following the Special School placement recommendation in April 2007 the Student was home-schooled. When the Student returned to the School District in the Fall of 2008, his initial placement was the Virtual High School, an on-line program with individual homebound tutoring to address weaknesses in math and English. After various evaluations and an update of the 2006 Threat Assessment were completed, IEP Team

meetings were held on December 10, 2008, and May 8, 2009. (Ex. J-66-78 and 89-115)

The Team recommended placement at the Special School, which Parents again rejected.

A major issue in this case is witness credibility. In *Amanda J. v. Clark County School District*, 267 F.3d 877, 103 LRP 53170, (9th Cir. 2001), the Court discussed a reversal by a Nevada SRO of Findings of Fact by an IHO. Citing *Rowley*, and cases from the Second, Sixth and Seventh Circuit Courts of Appeal {*Karl v. Board of Education of Geneseo Central School District*, 736 F.2d 873, 877 (2nd Cir. 1984); *Thomas v. Cincinnati Board of Education*, 918 F.2d 618, 624 (6th Cir 1990); *Heather S. v. Wisconsin*, 125 F.3d 1045, 1052 (7th Cir. 1997)}, the Ninth Circuit held that in appeals of special education hearings the courts owed due deference to the final decisions of “state authorities”, and that in states with two-tiered special education hearing systems, that would generally be the SRO. However, citing cases from the Second, Third, Fourth and Tenth Circuits, {*Karl v. Board of Education of Geneseo Central School District*, 736 F.2d 873, 877 (2nd Cir. 1984); *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 528-29 (3rd Cir. 1995); *Doyle v. Arlington County School Board*, 953 F.2d 100, 105 (4th Cir.1992); *O’Toole v. Olathe District Schools Unified School District No. 233*, 144 F.3d 692, 699 (10th Cir. 1998)}, when an SRO overturns the credibility finding of an IHO, “due weight [to the SRO] is not warranted”.

The issue of least restrictive environment was discussed in *Sacramento City Unified School District, Board of Education v. Rachel H.*, 20 IDELR 812 (9th Cir. 1994). The key tests from this case, educational benefit to the student with disabilities, non-academic benefits to the student, effect on the teacher and children in the regular class, and costs, must be considered. In this case, Student’s behavior, including attempts to

dominate classroom discussion with provocative and often personally offensive remarks about classmates and course content, and threatening or violent reactions to perceived dangers, were disruptive to the educational process for classmates as well as himself. Although Parent reported that Student's behavior in Sea Cadets was exemplary, no supporting documentation or testimony was provided. Counseling was mentioned by Parent, but no supporting documentation or testimony concerning the type and intensity of counseling was provided.

Discussion

While each student who is eligible for special education is evaluated and provided with an IEP on an individual basis, many of them fit into categories that are familiar to school staff. This Student was initially identified as Seriously Emotionally Disturbed. Later he and his Parents suspected that he had Asperger's Syndrome and might be eligible under the category of Autism as well, and the School District Team recognized that in his IEP. The comments of experienced school psychologists and teachers suggest that while he might fit into both categories, he was different from the other students so identified. The Psychiatrist stressed the point that category of disability was less important than providing an educational environment where Student would feel safe and where he could be taught social skills that would enable him to move into a less restrictive environment. This Student's record of classroom disruption, fights and threats interfering with both his own education and the educational opportunities of his classmates support the placement proposed by the School District.

The Parents' two experts reviewed the Student's records. They did not observe or evaluate the Student. They did not discuss the Student with any School District staff

members. While some of the points they raised in critiquing School District documentation form and content may be valid, they do not address the issues in dispute in the hearing or in this appeal.

When the Student re-enrolled in the School District in the fall of 2008, the School District performed evaluations while he participated in an on-line educational program and received supportive tutoring. They requested, but did not receive, records of any counseling or therapy during the period of approximately two years that the Student was not enrolled in the School District and was reported to be receiving home school instruction. A major concern raised in his prior threat assessments and the recommendation that he be sent to the Special School was his behavior in classrooms and less structured parts of the school day in his middle school. His threats and extreme responses to bullying (real and perceived) and frequent attempts to direct class discussion to some of his idiosyncratic interests were a serious problem at the Middle School.

The Psychiatrist commented that during the period he was not attending school he had not been experiencing the stresses of attending a large school, interacting with peers and dealing with less structured times. The recommended placement at the Special School was based on a plan of reducing such stresses, providing supports and helping Student to focus on school work. If the Student did well in this program, a return to a larger school could be considered.

It is possible that even without therapy to address difficulties with classmates and adults, Student might have matured during his two years out of the school setting. If so, this would have been quickly apparent to teachers and school psychologists who observed and evaluated him. The Special School's School Psychologist's description of

Student's behavior and discussions during her individual evaluation strongly suggests that he remains as described in earlier records, not available to her at the time of the evaluation.

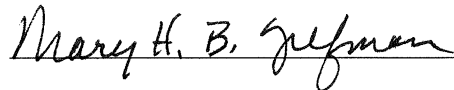
Decision

The decision of the IHO is affirmed. Placement in the Special School is appropriate to Student's special education needs and is his least restrictive environment at this time.

Notice of Appeal Rights

Any Party aggrieved by this Decision has the right to bring a civil action within thirty (30) days of the receipt of this Decision, pursuant to 20 U.S.C. § 1415 (i) (2) and NAC § 388.315.

Dated this 12th day of May, 2010.



Mary H.B. Gelfman, Esq.

State Review Officer