

**STATE OF NEVADA
DEPARTMENT OF EDUCATION**

In the Matter of

STUDENT¹, by and through his Parents,
Appellant,

vs.

WASHOE COUNTY SCHOOL DISTRICT,
Appellee

MARY H.B. GELFMAN
STATE REVIEW OFFICER

November 30, 2009

Representing Parents:
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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 Nevada state statutes and regulations, Nevada Administrative Code (NAC), Chapter 388, specifically 34 C.F.R. § 300.514 (b) (2) and NAC 388.315. It is an appeal of the decision of the Impartial Hearing Officer (IHO), issued September 12, 2009, after a hearing held on August 26 and 27, 2009. Parents' Attorney, on behalf of Student by and through his Parents, filed an appeal of the IHO's decision on October 8, 2009, received at the Nevada Department of Education (NDE) on October 9, 2009 (NDE File). Parents will henceforth be referred to, interchangeably, as Appellant or Parents. The School District will be referred to, interchangeably, as School District or Appellee. Exhibits will be referred to as: Parents' Exhibits P- 4 through P- 9; School District Exhibits, WCSD-1 through WCSD-101; Impartial Hearing Officer File, IHO-1 through IHO-19; Nevada State Department of Education Exhibits, NDE File (unnumbered); and State Review Officer, SRO File.

The State Review Officer (SRO) was appointed by NDE on October 12, 2009 (SRO-1), and the record from below was received by the SRO on October 13, 2009 (SRO-2). The SRO scheduled a status conference by conference telephone call for October 22, 2009 (SRO-3) and provided the Parties with a summary memorandum of that conference on October 22, 2009 (SRO-4). At the status conference and as summarized in this memo, in addition to clarifying the issues on appeal, the Parties agreed that no additional evidence would be offered, and that briefs would be submitted. Said briefs were due on November 10, 2009, and received on that date. (SRO-5) To allow for submission of briefs the Parties requested an extension of the decision date from November 8, 2009, to December 8, 2009, and the SRO granted that extension.

Summary of the Case

The Student is twelve years old, and 2009-2010 is his seventh grade year. He is eligible for special education under the category of Autism, because of his diagnosis of Asperger's Syndrome. In testimony at the hearing below, the Parent, the Private School Teacher, and the School District's Asperger's Consultant described some of the Student's behaviors that cause difficulties with peers in school:

He monopolizes conversations (does not take turns), makes negative comments and facial expressions to his peers, talks with inappropriate tone, has difficulty resolving personal conflict without physical contact or negative comments, cannot work consistently without creating verbal or physical disruptions for other students, ignores negative behaviors from peers, blurts out, doesn't follow directions and makes sounds/gestures that are distracting to others.

He was also described as anxious, having difficulty reading social cues, and depressed. (Tr. pp. 11-12, 212, 215-217, 222-225, 389)

At the beginning of the 2008-2009 school year, the Student's Parents filed a request for a due process hearing and unilaterally placed their son in the Private School. The dispute was resolved with a settlement agreement executed on October 15, 2008. The School District agreed to fund the Student's Private School placement for the then-current school year but:

... would not be responsible for the payment of any educational or related costs associated with [the Student's] placement at the [Private School] after June 12, 2009.

The settlement agreement also included a description of arrangements for the Student's transition from the Private School back to the School District's Middle School for the 2009-2010 school year. (Ex. WCSD-24)

The Student's Parents and the staff at the Private School believe that the Student is not yet ready to return to the School District's program, and asked the IHO to grant another year, funded by the School District, at the Private School. Therefore, they appealed the IHO's decision ordering placement in the School District's Social Resource Program (SRP) at the Middle School. The SRP is a new program for students with Asperger's Syndrome. The Parents also appealed the IHO's limitations on some of the issues they tried to raise at the hearing below.

Issues on Appeal

1. Shall the Impartial Hearing Officer's decision be upheld?
2. Did the Impartial Hearing Officer properly deny Parents' motion to amend the issues below?
3. Did the Impartial Hearing Officer properly limit the issues in dispute?

Findings of Fact

This decision sets forth the SRO's 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 Facts provided by the IHO are adopted as stated in the decision of September 12, 2009.

Parents' additional issues

The only issue in dispute, as determined at the pre-hearing conference on July 27, 2009, was the proposed placement for 2009-2010 at the School District's Middle School. In response to communications from both parties, on August 2, 2009, the IHO wrote an analysis of the June 18, 2009, request for a hearing (Ex. IHO-13, WCSD 184-185) and subsequent discussions and e-mails concerning the issues raised by Parents. (IHO-11) By letter dated August 13, 2009, Parents formally requested amendment of the issues to include whether the July 21, 2009 Individualized Education Program (IEP) would provide a free appropriate public education (FAPE). (Ex. IHO 15)

Some of the Parents' proposed issues were claims barred by the statute of limitations at 34 C.F.R. § 300.507 (a) (2). Another issue was beyond the jurisdiction of a special education hearing officer because it concerned student records: the appropriate forum under the Family Educational Rights and Privacy Act (FERPA) is found at 34 C.F.R. §99.20.

The IHO barred the addition of the other issues because 1) they were not included in the original request for hearing and 2) timing: the hearing was nine days away and the school year was about to start. Some of the aspects of the discussion of appropriateness of the proposed placement are also FAPE issues. The transcripts of the two-day hearing show extensive testimony about the two placements. The Exhibits include many

communications between Parents and the School District concerning details of the School District SRP.

The Parents attacked the proposed Crisis Intervention Plan and the goal IEP goal of 66% participation in general education classes. The Private School used a Crisis Plan that was very similar to that proposed by the School District: positive warnings followed by removal only when the Student could not or did not control his disruptive behavior. The dynamic of that plan may differ in the two different settings, but the special classes were about the same size and the adult: student ration was about the same. As to the IEP goal "66% participation in general education", an IEP goal is just that: the desired outcome at the end of the period of time covered by the IEP. The Principal's proposals for transition started with the Student in the SRP classroom full-time.

Student's current status

The Student's stay-put placement has been the Private school, pursuant to 34 C.F.R. §200.518 and an order from the IHO. The Present Levels of Academic Achievement and Functional Performance in the July 21, 2009 IEP were based on information from the Private School.

Social/Emotional/Behavioral: Class Management: [the Student] is attempting new challenging tasks with about 50% success. He is able to work consistently without causing disruptions 60% of the time. [The Student] is able to state when work may be too challenging and request help 75% of the time. He is only able to resolve personal conflicts with others without physical or negative comments about 10% of the time. (Ex. WCSD-1, Bates 003)

Effect on student's involvement and progress in general education (also from information provided by the Private School):

[The Student] continues to require direct [teaching of] social thinking skills, instruction and practice throughout his school day, in structured and unstructured times, i.e., breaks and lunch. This will impact [the Student] in his general education environment because he has problems reading and understanding emotions, his own and others, and how they effect his learning. He continues to have difficulty initiating and maintain[ing] social interactions and interpreting social nuances, i.e., body language and facial expressions. He also has difficulty

with complex language and abstractions, such as figures of speech and idioms. [The Student] continues to have difficult[y] managing his emotions and controlling his behavior, which manifest as anger outbursts towards peers and staff, thereby impacting his involvement in general education.

The Private School also provided reports of academic achievement, summarizing that the Student had showed improvement but still “needed assistance to complete certain tasks/assignments in the following areas: math, written expression, and writing/grammar. (Ex. WCSD-1, Bates 003-004)

Settlement Agreement

A settlement agreement was executed by the Parties on October 15, 2008. This agreement provided that the School District would fund the Student’s placement in Private School for the school year 2008-2009, and described a plan for the Student’s transition from the private school back into the School District’s Middle School for the 2009-2010 school year. (Exhibit IHO 3, Appendix A)

Training of School District Staff

The School District’s Special Education Area Administrator (SDSEAA), who will continue to serve as the Student’s liaison at the Middle School, described the preparations for the Social Resource Program (SRP). In May, 2009, the whole staff of the Middle School participated in a training session. Special materials have been ordered. The training and the program are described in detail at WCSD Ex. 3-23. A Self Evaluation and Planning Tool for use with students with Asperger’s Syndrome demonstrates a high level of awareness and staff concern. (Ex. WCSD 242-246)

School District Program

The primary problem presented by the Student’s disability is that his behavior has disrupted his classes in the School District and the Private School from time to time. His Parents argue that the disciplinary methods of warnings and removal from the classroom when the warnings are not successful in modifying disruptive behavior are ineffective and are punishment for his disability. All parties now agree that the Student requires direct instruction and practice concerning interactions with peers and school staff.

The School District's July 21, 2009, IEP includes three behavioral goals:

1. [The Student] will, by May 2010, respond to the class environment in a manner that produces, maintains and enhances positive accomplishments.
 - a. ... will attempt tasks that may be considered challenging and be willing to take a risk with new academic materials with 80% success.
 - b. ... will work consistently without creating verbal or physical disruptions for other students with 90% success.
 - c. ... will be able to state when he doesn't understand an assignment and request help to complete the assignment correctly with 90% success.
 - d. ... will resolve personal conflicts with others without physical contact or negative comments 80% of the time.
2. ... will improve his communication and socialization with peers as measured by student self-evaluation and staff observations.
 - a. ... will accept the success of peers without making negative comments 80% of the time.
 - b. ... will use acceptable voice tones as instructed by school staff 90% of the time.
 - c. ... will engage in turn taking activities with peers at least 3 times per school day as documented by school staff.
 - d. ... will avoid making negative facial expressions and/or gestures towards peers 80% of the time.
3. ... will increase his appropriate behaviors in a classroom group environment as measured by student self-evaluation and staff observations.
 - a. ... will raise his hand and wait to be called on before speaking 100% of the time.
 - b. ... will follow routines, instructions and directions promptly 100% of the time.
 - c. ... will keep distractions (sounds/gestures) to a minimum and demonstrate strategies to cope with classroom distractions (i.e., request space) 100% of the time.
 - d. ... will ignore all negative behaviors from peers when cued by staff 100% of the time. (Ex. WCSD-1, Bates 007-008)

The SRP class was planned for four students, including the Student. The Teacher worked in a SRP at an elementary school in the District during 2008-2009. The Teacher's Assistant assigned to the class has relevant experience. When students in this program go into general education classes, they are shadowed by the Teacher's Assistant, who can provide support if necessary.

Private School Program

The Private School reported that initially the Student was the only student in the school, which is a branch of a program offered in California and had opened for the school year 2008-2009 in Nevada. Gradually through the school year two more full-time students and a part-time student were added to the school. This class had a Teacher and a Teacher's Assistant. With each increase in enrollment, the Student's behavior deteriorated, although he did make some academic progress. The primary thrust of the Private School program is Social Thinking, which consists of discussions and planned social interactions, as well as more spontaneous off-campus practicing of social skills.

The Student had an individual Behavior Support Plan at the Private School, including a list of targeted behaviors and antecedents of behavior problems, intervention steps and positive reinforcements. There was also an Escape/Crisis Plan. If the Student could not be calmed during a disruptive event, he would be removed from the classroom. (Ex. WCSD-1, Bates 219-221)

Transition

At page 2 of the Settlement Agreement, two specific provisions describe transition planning:

(5) The [Parents] and the [School District] agree to work closely together during the 2008-2009 school year to: effectuate a successful transition of [Student] back to the [School District] Middle School environment for the 2009-2010 school year; and (2) develop an IEP (at least three months prior to the beginning of the 2009-2010 school year) that is reasonably designed to provide FAPE for [Student] for the 2009-2010 school year.

(6) [The Special Education Area Administrator] of the [School District staff] shall act as the case liaison/advisor for the [Parents]. In that regard, the

[Parents] and [the SEAA] shall communicate at least monthly to ensure [Student] is adequately progressing at [Private School] and that [School District] is adequately progressing towards development of an appropriate Middle School program for [Student]. (Ex. WCSD 24)

The testimony at the hearing below stressed the importance of a structured, supportive and gradual transition from the private school to the School District's Middle School. It was mentioned that each year's seventh grade entrance into the Middle School included Team Building activities that could support the overall goal of drawing the Student more closely into the student community. Because of the timing of the hearing and this appeal, the Student has missed the beginning of the 2009-2010 school year at the School District's Middle School.

The Student was one of three students who were to be enrolled in the SRP at the Middle School who visited the school with their parents on April 24, 2009. The Principal and several staff members provided a tour of the building and answered questions. (Ex. WCSD-82, Bates 218)

The record is replete with e-mails, notes from telephone calls, and meetings between Parents and School District staff from January through June, 2009. The School District Special Education Area Administrator visited the Private School and the Middle School with Parent. The Principal of the Middle School discussed the SRP and the Middle School Program with the Parent. (Tr. 363 ff.; Ex. WCSD-35, 37, 55-59, 61-65, 68-69, 71-73, 76-81, 85-99)

The IEP Team met on June 1, 2009 and continued on July 21, 2009. The final IEP includes a proposed school schedule for the Student, with three options for transition at the bottom of the page. Scenario #1 is the most conservative and is appropriate for the Student's mid-year entry:

[The Student] will begin school with instruction from [SRP Teacher] for all classes. When [the Student] is ready, he will transition into Resource Math class and Resource Language Arts for as long as possible with success and support from [SRP]. [The Student] then transitions into classes he chooses as he experiences success in first transition classes. (Ex. WCSD-1, Bates 019)

An alternative, Scenario #2, has the Student selecting each class for transition after he achieves success in the SRP classroom.

Conclusions of Law and Discussion

Pursuant to NAC §388.315, a state review officer shall examine the entire record for the hearing; ensure that the procedures at the hearing were consistent with the requirements of due process; seek any additional evidence necessary; afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing officer; and make an independent decision. The decisions in the cases of *Carlisle Area School District v. Scott P.*, 62 F.3d 520, 22 IDELR 1017 (3rd Cir. 1995), and *Amanda J. v. Clark County School District*, 267 F.3rd 877, 35 IDELR 65 (9th Cir. 2001), provide further guidance concerning deference by the reviewing officer to the hearing officer's determination of credibility of witnesses, and due weight to be given the hearing officer's decision. The IHO made extensive findings concerning the credibility of witnesses and testimony that appeared to be in conflict. Nothing appears in the documentary evidence or the transcripts of the hearing that would cast doubt on her conclusions in this significant area.

The standard for review in special education appeals was established in the case of *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 458 U.S. 176, 553 IDELR 656 (U.S. 1982). First, were the procedural requirements of the IDEA complied with? Second, were the IEP and placement reasonably calculated to provide educational benefit? No claims regarding procedural issues have been raised in this case.

When an issue in a special education hearing is whether a parental placement of a child in a private school should be reimbursed by the school district, the case of *Burlington School Committee v. Massachusetts Department of Education*, 471 U.S. 359, 556:389 EHLR (U.S. 1985) established the legal analysis under IDEA. If the hearing officer finds that the IEP and placement provided by the public school system are not appropriate to a student's special education needs, and if the parent unilaterally places the student in a private school that provides services appropriate to those special education needs, then the hearing officer may order equitable reimbursement by the public school district to the parent for the placement. In the case of *Florence County School District Four v. Carter*, 501 U.S. 7, 20 IDELR 532 (U.S. 1993), the Supreme Court affirmed the *Burlington* analysis and added a ruling that a private school placement that met the student's special education needs could be

reimbursed even if the private school was not approved by the state department of education for publically-funded special education placements. The Ninth Circuit also provides guidance for analysis of the School District's program in *Gregory K. v. Longview School District*, 811 F.2d 1307, EHLR 558:284 (9th Cir. 1987) and *Adams v. State of Oregon*, 31 IDELR ¶130 (9th Cir. 1999). The basic principle of these court decisions is that if the public school IEP and placement are appropriate for a student, that is the placement and it doesn't matter if the private school placement is as good or better than the public school placement.

The burden of proof rests with the Appellant. (*Shaffer v. Weast*, 44 IDELR 150 (U.S. 2005). The Parents did not meet the burden of proof that the School District placement was not appropriate to the Student's needs. The School District's SRP at the Middle School is an appropriate placement for the Student. It has the element missing from the Private School: opportunities for regular exposure to non-disabled peers. In addition, the fact that the Student's behavior reportedly did not improve in the Private School suggests that the placement there was less than appropriate for this student.

Decision

1. The decision of the IHO, finding the placement in the Social Resource Program at the School District's Middle School appropriate to the Student's special education needs in the least restrictive environment for him, is UPHELD. The personnel at the Middle School and the Private School shall collaborate on the details of a transition plan, as outlined above, with the Student initially placed in the School District's Middle School Social Resource classroom after the winter vacation.
2. The IHO's discussion of the issues and her decision not to amend them was thorough and reasonable, and are UPHELD.
3. While the argument has been made that the issues were improperly limited, the testimony in the hearing below covers many aspects of the IEP for 2009-2010 as well as the placements in the Private School and the School District's Middle School, from many different staff members of both schools. The IHO did not improperly limit the issues in dispute.

Order

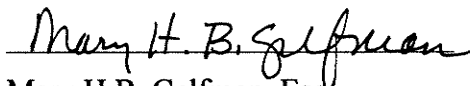
The School District IEP Team shall convene immediately to discuss a specific transition plan, including both transition from the Private School to the School District's Middle

School and initial placement in the SRP classroom. The date for enrollment in the Middle School shall be immediately after the winter vacation, in early January, 2010.

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 30th Day of November, 2009


Mary H.B. Gelfman, Esq.
State Review Officer