

COLORADO DEPARTMENT OF EDUCATION

SPECIAL EDUCATION SERVICES UNIT

Due Process Hearing L2005: 102

IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION

In the matter of:

[STUDENT], by and through his Parents, [PARENT] and [PARENT]

Petitioner,

v.

THOMPSON SCHOOL DISTRICT R2-J

Respondent.

I. INTRODUCTORY STATEMENT

The Colorado Department of Education received the request for hearing in this case on January 21, 2005. The Impartial Hearing Officer (IHO) heard the case on June 3, 2005, and June 7 through 9, 2005, in Loveland Colorado, and on June 6, 2005, in Denver Colorado. The parties filed written post hearing briefs on June 24, 2005, and the IHO also received written transcripts of the proceedings on the same date. The parties agreed to extend the time for issuance of a decision to July 8, 2005, as documented in the pre hearing order dated April 11, 2005. On June 28, 2005, the IHO received petitioner's Request to File a Rebuttal Closing Brief and a Rebuttal Closing Brief to which the

respondent objected on June 29, 2005, on the grounds that the specific attorneys handling this matter would be out of Colorado on vacation until after July 8, 2005, the date set for this IHO's decision. In an order dated July 1, 2005, the IHO held that in view of the objection, the IHO would not read or consider the petitioners' Rebuttal Closing Brief. Therefore, the IHO did not read or consider that brief in coming to this Decision.

The Individuals with Disabilities Education Act (IDEA), 20 USC §1415(f)(1), its implementing regulations, 34 C.F.R. §300.507, and the implementing regulations to the Colorado Exceptional Children's Educational Act (ECEA),1 CCR 301-8 2220-R-6.03(6) confer jurisdiction. The petitioner, [STUDENT], appeared through his parents, both of whose initials are [PARENT]. The School District appeared through Karen Pielin, Director of Special Education and Dennis Rastatter, Assistant Director of Special Education. Jack D. Robinson of the law firm of Spies Powers & Robinson represented the petitioner and W. Stuart Stuller and Cheryl M. Karstadt of the law firm of Caplan and Earnest represented the respondent.

II. ISSUES

The issues in this hearing are as follows:

1. Did the respondent offer to provide a free appropriate public education (FAPE) in the least restrictive environment to the petitioner in the IEP dated December 16, 2003?
2. If not, what is the appropriate remedy, and in particular, is the petitioner entitled to a residential placement at the Boston Higashi School at no cost to the parents as the free appropriate public education in the least restrictive environment?
3. Did the petitioner provide sufficient notice to the petitioner to support a reimbursement claim?

III. FINDINGS OF FACT

1. The petitioner was born on [DOB], in Baltimore Maryland. He has two older brothers and a younger sister, all of whom live at home. One older brother recently received his GED degree, another attends Loveland High School and the younger sister is in first grade. [STUDENT] lived at home with both of his parents until he was enrolled in a residential placement in January of 2004.

2. The family moved to Colorado in 1996. Later in that same year, Sally J. Rogers PhD at the JFK Center at the University of Colorado Health Sciences Center diagnosed [STUDENT] with autistic disorder. [STUDENT] underwent treatment at that Center for autism. Autism or autism spectrum disorder is a behavioral syndrome involving impairment of communication skills and social development. Persons with autism often manifest stereotypical or perseverative behaviors. [STUDENT]'s autism evinces all of these characteristics. Additionally, in [STUDENT]'s case, as in many cases of persons with autism, it also appears simultaneously (is comorbid) with mental retardation. His speaking vocabulary includes approximately 75 words in school, but he speaks many fewer words at home. His social interactions are significantly delayed. His academic performance reflects his mental retardation. Additionally, [STUDENT]'s case presents significant self care issues regarding his eating, sleeping, dressing and toilet training. He often displays inappropriate behaviors in the form of tantrums of varying degrees of severity to escape unwanted activities or situations.

3. In the fall of 2000, [STUDENT] entered kindergarten in the St. Vrain Valley School District at Niwot Elementary School. Special Education teacher Margret

Wilson primarily provided special education services to him there. The kindergarten IEP dated February 13, 2001, called for one half hour per week of special education services in the general classroom, two hours per week in the special education classroom taught by Margaret Wilson, .75 hours per week of speech and language therapy, and one half hour per week of occupational therapy. Margaret Wilson had worked with [STUDENT] in his pre school setting prior to his entering kindergarten. She noted in the February 13, 2001, IEP that [STUDENT] had made significant progress over the year that she had worked with him. However, she opined that he had “difficulty generalizing skills,” and often “gets frustrated with his inability to communicate his wants/needs.” A student generalizes when he applies a learned skill in various settings and at various times. For example, if a student learns to tie his shoes in school, he generalizes that skill by tying his shoes at home or in any other venue at a later time. Typically developing students generalize what they have learned, and students with developmental disabilities such as autism in some cases experience great difficulty with generalization. The Vineland Adaptive Behavior Scales test, the results of which appear in the kindergarten IEP, and which Margaret Wilson evaluated in the school setting and the parents evaluated at home showed significant discrepancies in [STUDENT]’s functioning between those two locations, confirming [STUDENT]’s serious problems with generalization of skills.

4. The February 2001 IEP included goals and objectives for communication skills, self care, independence and motor skills, social interaction and play skills, and academic functioning. The self care skills included assistance with washing, toilet training and dressing. That IEP also provided for extended school year services during the summer months to address [STUDENT]’s strong proclivity for regression.

[STUDENT]'s autism inhibits him from retaining knowledge and skills that he has learned unless he reinforces them through constant repetition. Margaret Wilson testified and the IHO finds that while she was his teacher, [STUDENT] lost some of the progress he made over each weekend due to regression, and that part of the time on Mondays was spent compensating for that regression.

5. Margaret Wilson continued as [STUDENT]'s special education teacher through his first grade year at Niwot Elementary School. He attended the special education classroom for the majority of his time in school. His Annual first grade IEP dated January 15, 2002, included self care skills in the areas of washing and dressing only.

6. In the fall of 2002, [STUDENT] transferred to Berthoud Elementary in the Thompson School District as a second grade student. In the spring of 2002, in anticipation of the transfer, Dee Ann Wilson, the special education teacher at Berthoud, visited Niwot and communicated with Margaret Wilson and the parents to facilitate a smooth transition to the new school for [STUDENT]. The initial IEP at Niwot dated December 19, 2002, provided for education outside the general classroom for greater than 60% of the time. It also required adaptive physical education, occupational therapy, and speech and language therapy in addition to some time in the general classroom for mainstreaming purposes during administrative activities. The second grade IEP included goals and objectives relating to self care skills in the areas of washing and feeding. The previous goals and objectives for toilet training and dressing were eliminated. Another IEP dated April 17, 2003, during the spring of [STUDENT]'s second grade year, precisely repeats the self care goals and objectives of the December 19, 2002, IEP.

7. Although the succession of IEPs developed for [STUDENT] during his kindergarten through second grade years reveal no highly remarkable difficulties with his special education in the public schools, his home and community life presented a starkly contrasting picture. The evidence reveals that [STUDENT] led two disparate lives, one at school where he seemed to make adequate progress, and the other at all other locations, where extreme behavioral aberrations jeopardized the well being of [STUDENT]'s family. The IHO credits the descriptions of these discrepancies by [STUDENT]'s father based upon the totality of the circumstances including the testimony of numerous lay and expert witnesses regarding [STUDENT]'s tendency to lack generalization skills and to regress and the IHO's observations of [STUDENT]'s father's demeanor as a witness.

8. Beginning at age three or four, [STUDENT] developed sleep problems at night, frequently going to bed at odd hours and then waking up in the middle of the night to play videos or just wander around the house. [STUDENT] refused to sleep in a bed, and curled up on the floor to go to sleep. Additionally, at night [STUDENT] radically departed from his hygiene skills learned at school. By some time during the first grade year, [STUDENT] was toilet trained at school, and the annual IEP for that year omitted any reference to training in January of 2002. Likewise, the self care goals and objectives in the second grade IEPs did not include toilet training. However, at home, [STUDENT] continued disturbing self care practices that had begun when he was three or four years old. At that time, [STUDENT] developed the habit of spreading night time bowel movements around his bedroom, on the carpet, bed, walls and curtains. The parents removed the carpets and curtains and put vinyl on the floors to make the room more impervious to these behaviors. Furthermore, the parents fitted [STUDENT] with jump

suits and zipped them up from [STUDENT]'s back, restricting [STUDENT]'s access to his own private areas to discourage him from handling his own excrement. However, this did not deter him from continuing to act out this unhealthy scatological obsession.

9. Additionally, at home, [STUDENT] was a very picky eater and this trait degenerated to the point that he would only eat yogurt and crunchy foods, such as crackers and croutons, by his second grade year. If presented with other foods, such as fruits, vegetables, and meats, [STUDENT] engaged in temper tantrums, clearing the table of the foods he did not want by shoving them to the floor or by falling to the floor, kicking and screaming. Such a severely limited diet threatened his long term nutritional health.

10. [STUDENT] exhibited similarly inappropriate behaviors in church and in public places such as restaurants. In grocery stores, he attempted to pull down the crackers display, and would vociferously object if prohibited from doing so. These public manifestations of the behavioral aspects of [STUDENT]'s disability discouraged the family from taking [STUDENT] out of the house, which imposed day care responsibilities on [STUDENT]'s grand parents and induced the parents to hire David, an attendant, to take care of [STUDENT] in the absence of other responsible family members.

11. In an attempt to control [STUDENT]'s behavioral problems, the parents took [STUDENT] to a psychiatrist, who prescribed sedative medicine. However, that medicine proved ineffective unless administered in such high doses that it rendered [STUDENT] passive and unresponsive.

12. The parents and grandparents decided to build new homes in proximity to one another to eliminate the inconvenience of travel on the frequent occasions when the grandparents needed to stay with and watch [STUDENT]. By the time [STUDENT] entered the third grade at Berthoud Elementary, the two generations of the family had moved into their new homes. During the same time period, [STUDENT]'s domestic and community behavior had not improved while he continued to grow physically. His tantrums became more troubling and threatening to [STUDENT]'s younger sister and his mother. On occasion at home, but never at school, [STUDENT] directed his fitful anger toward his mother and sister, instead of just flailing about in a undirected fashion. Accordingly, the parents, by the fall of 2003, motivated primarily by their concerns about [STUDENT]'s home department, began to consider educational and residential alternatives to then current circumstances. In late October of 2003, the parents filed an application with the Boston Higashi School to enroll [STUDENT] in a residential placement. On the Application form they indicated that [STUDENT] needed partial assistance with dressing and eating and total assistance with toilet training, washing, and sleeping. The parents specified as the areas of greatest difficulty "communication; toilet training; sleeping; ADL." (Activities of daily living.) The parents applied to Boston Higashi School in large measure out of concern for [STUDENT]'s dysfunctional behaviors away from school, and his inability to regulate himself and care for himself at home and in public. Upon investigation, however, the parents also became concerned about [STUDENT]'s frequent and prolonged tantrums in school as well. The parents accompanied by [STUDENT] visited the Boston Higashi school in October or November of 2003, without informing the school district.

13. At the time the parents applied to the Boston Higashi School, [STUDENT] had just turned 9 years old. He still slept on the floor of his bedroom in a one piece nylon suit to deny him access to his own feces. His parents still administered a suppository each night to induce a bowel movement before bed, to reduce the likelihood of one occurring during the night, which they also had done since approximately age 4. He was incontinent outside of school both during the day and night, even though fully toilet trained in school. He still ate an extremely limited diet. At home and in school, he engaged in extensive avoidance of unpleasant activities and foods. He cleared the table in front of him of materials relating to activities he wanted to circumvent, by throwing the unwanted objects to the floor. He had frequent episodes of fussing, resisting and making a scene by lying on the floor while kicking and screaming. These behaviors limited his ability to learn the skills [STUDENT] needs to become a successful contributor to society.

14. Margaret Wilson met with [STUDENT] on November 28, 2003, to administer the Autism Diagnostic Observation Schedule test. Based upon her observation of [STUDENT] before and during the administration of that test, she concluded that [STUDENT] had regressed in his previously attained skills, but began to demonstrate some previously learned skills after spending some time with her. Additionally, based upon the sum of her experiences with [STUDENT], including her attempts to achieve generalization across environments with [STUDENT] and his family during the period she taught [STUDENT] in Niwot, Margaret Wilson concluded that [STUDENT]'s inability to generalize learned skills dictates that he needs a residential placement. She explained that the persistent guidance and training only available through

a residential program will deeply ingrain [STUDENT] with proper behaviors so that they become the default behaviors of the child across environments. Based upon the totality of the circumstances, including Margaret Wilson's extensive experience in teaching [STUDENT] and other children with autism, her high degree of competence in that area, and her demeanor on the witness stand, the IHO finds Margaret Wilson's testimony credible and persuasive.

15. On December 16, 2003, the parties met for the triennial IEP meeting. Both parents attended that meeting along with Dee Ann Wilson, [STUDENT]'s then current special education teacher, his regular education teacher, Beth Fraley, and several other special and regular education personnel at Berthoud Elementary. At that meeting, [STUDENT]'s father presented a list of written goals for [STUDENT] in the year 2004 that the parents wanted to have included in the IEP. Additionally, he stated that he did not think these goals were attainable in [STUDENT]'s present environment. He disclosed to the respondent for the first time his view that [STUDENT] should be placed in a residential program, and that the parents were looking at the Boston Higashi School and that he considered that school to be an appropriate placement for [STUDENT]

16. In response, the school district requested the opportunity to revise the draft IEP presented at the December 16, 2003 meeting and to consider the requested goals. The school district completed the final version of the December 16, 2003 IEP and sent it to the parents on January 15, 2004. The final version of the IEP, contained additional goals and objectives relating to [STUDENT]'s use of the bathroom, eating, and dressing, and contained new information regarding [STUDENT]'s proficiency in various areas. In that IEP, the District responded to the written goals for 2004 submitted by [STUDENT]'s

father at the IEP meeting. However the placement recommendation in the final version remained unchanged, in Berthoud Elementary School, consisting of direct instruction in the special education classroom for 18 ½ hours per week and indirect support in the general classroom for 12 hours per week, occupational therapy for ½ hour per week and speech language therapy for 1 hour per week.

17. On December 18, 2003, Boston Higashi School accepted [STUDENT]. On December 19, 2003, counsel for the petitioner sent a letter advising the school district that in accordance with 20 U.S.C. 1412(a)(10)(C)(iii)(1)(bb), the parents intended to remove [STUDENT] from the District and enroll him in a private school and seek reimbursement of all related costs from the District.

18. On January 12, 2004, [STUDENT] enrolled as a residential student in the Boston Higashi School. That school has residential and day students, all of whom have a diagnosis of autism. It is housed on a campus like property, with a residential facility located in proximity to the classroom and physical education buildings. The staff at the Boston Higashi School supervises [STUDENT] 24 hours per day seven days per week for approximately 44 weeks per year. The other eight weeks per year [STUDENT] lives with his family in Berthoud Colorado. The eight weeks at home are divided up into several breaks interspersed throughout the year. The parents stay in close communication with school officials regarding [STUDENT]'s behaviors while at home on break. Those visits are carefully planned and documented. During the last break at home [STUDENT]'s self care skills and behaviors improved significantly. He no longer sleeps in a nylon suit on the floor. He now sleeps in a bed in his room at home. His toilet training has improved to the point that he has some accidents at night, but is completely toilet trained

at home during the day. He eats a variety of healthy foods. Additionally, in the latest visit the frequency and severity of his adverse and resistive behaviors have mitigated.

19. The parties presented a number of expert witnesses at the hearing. In addition to the testimony of Margaret Wilson noted above, the petitioner presented Rosemary Littlefield, executive director of the Boston Higashi School. She testified that the Higashi School attempts to develop the whole child, including physical stamina, emotional stability and intellectual capacity in an educational program called “daily life therapy.” She described the program at the Boston Higashi School as a seamless process, keeping the students busy constantly with rigorous physical exercise, academic education and field trips into the community, the latter usually on both weekend days. She testified that the residential students have 24 hour per day supervision, with the night time staff and day staff communicating daily regarding the events which occurred while they were on duty respectively. The Boston Higashi IEP contains goals and objectives for both the residence and the day program. She testified that the petitioner came to the school with great academic skills on paper, but that his daily living skills were less developed than indicated. She opined that the residential placement is an appropriate placement for [STUDENT], based upon his progress in the day and residential settings at the Higashi School and his need for that setting to overcome his obstacles to lead a meaningful and quality life. Dr. Ann Roberts Ph.D. in clinical psychology and on the staff half time at the Boston Higashi School, testified that the petitioner needed a residential placement to overcome his tendency for regression in his learned skills. Ellen Hanson Ph.D. psychologist at Children’s Hospital in Boston opined in her report and through testimony that [STUDENT] required a substantially separate residential setting on account of his

tendency toward regression, and safety issues including his failure to follow commands and his aggressive behavior at home toward his younger sister on a break from the Boston Higashi School. Additionally, the petitioner presented the testimony and report of Diane Osaki O.T.R. in which she asserted that the petitioner needs a 24 hours per day year round education due to his maladaptive behavior, intensity of maladaptive behavior and limited ability to receive educational benefit due to his significant and complex learning and behavioral needs.

20. The respondents presented the expert testimony of Drs. Phillip Strain and Glen Dunlap. Both of these experts rendered their opinions based upon a review of various records supplied by the School District. Neither produced written reports nor personally interacted with [STUDENT] or his educational providers or parents. Both had high qualifications in the field of the education of children with autism and the managing of behaviors of those children. Dr. Strain testified that peer reviewed research suggests that students with autism demonstrate more problem behaviors when their social contacts are confined others with the same syndrome. Additionally, he opined that the IEP proposed by the respondent would provide an appropriate education to [STUDENT] because, its implementation would be, at least in part, in the presence of typically developing children and because that implementation would involve fairly intensive data collection. Dr. Strain disagreed with the teaching philosophy at the Boston Higashi School, and characterized it as the “train and hope” method. However, Dr. Strain was generally unfamiliar with [STUDENT]’s sleeping, eating and incontinence problems before he left for the Boston Higashi School. Accordingly, Dr. Strain offered no specific or structured solution to [STUDENT]’s problems generalizing his learned skills to home

and community, other than to be educated in an integrated environment in school. Dr. Dunlap generally agreed with Dr. Strain. Additionally, he acknowledged that [STUDENT]'s challenging behaviors represent an impediment to his participation and his quality of life and his education. Dr. Dunlap opined that [STUDENT]'s problem behaviors at home could be dealt with at home, but that he doubted it would be a very simple thing to do. Dr. Dunlap was also not familiar with the particulars of [STUDENT]'s sleeping, eating and incontinence problems before he left for the Boston Higashi School. Accordingly, he also did not offer a specific or structured solution to [STUDENT]'s problems generalizing his learned skills to home and community.

21. Based upon the totality of the circumstances, the IHO credits the lay and expert testimony as specified above of Margaret Wilson, Rosemary Littlefield and Ann Roberts and finds that specified testimony as fact. Those witnesses demonstrated familiarity with the individual behaviors of [STUDENT] in his school and residential settings, and provided understandable, specific, structured and planned solutions to the chief problems which threaten [STUDENT]'s integration into society in a meaningful way when he graduates from school and which his educators must confront to provide him with some educational benefit.

22. While the evidence in general and the December 16, 2003, IEP in particular suggest that [STUDENT] made some progress in public school prior to that date, due to his inability to generalize his learning experiences at school to home and community environments, [STUDENT] was not able to apply this progress in those other contexts. Additionally, [STUDENT] continued to manifest behavior problems in school, and to an even greater extent at home and in the community. These behavioral problems

precluded [STUDENT] from participating in his community and integrating into society by engaging in such commonplace activities as eating in restaurants, going to church and to the grocery store. Accordingly, the December 16, 2003, IEP did not offer [STUDENT] a free appropriate public education.

23. In petitioner's case in chief, he offered no evidence concerning the specific costs of the reimbursement sought pursuant to 20 USC §1412(a)(10)(C)(ii). During the respondent's case, however, the petitioner made an offer of proof, which was reduced to writing and sent to the IHO by facsimile dated June 14, 2005. The respondent stipulated that the offer of proof represented [STUDENT]'s father's testimony, but did not stipulate to the factual accuracy of the testimony, nor waive the arguments made in its motion to dismiss following the petitioner's case in chief which asserted that the petitioner failed to satisfy its burden of proof on the costs of reimbursement by omitting any evidence regarding actual costs of tuition, transportation, and any other aspects of the monetary claim.

24 The IHO finds that the professionals on the staff of the School District who testified in this matter are competent and diligent and that the petitioner needs a residential placement because of the unique character of his disability, and not due to any shortcomings on their part.

IV. DISCUSSION AND CONCLUSIONS

A. The Testimony of Respondent's Experts is Admissible.

The IHO admits the testimony of Dr. Strain and Dr. Dunlap, despite the fact that respondent produced no written evaluation authored by those experts five days before the hearing. The plain language of 20 U.S.C. §1415 (f)(2)(A) requires disclosure 5 business

days prior to a hearing only of evaluations completed by that date. Additionally the disclosure requirement applies only to evaluations that the party intends to use at the hearing. Likewise, the applicable Colorado regulation 1 C.C.R. 301-8, 2220-R-6.03(2) only requires the prior disclosure of evaluations completed by that date and the recommendations based upon those evaluations. The IHO construes this language to refer to written evaluations that the party intends to introduce into evidence. The statutes and regulations which govern this proceeding do not expressly require that a written report precede the testimony of a witness who offers expert opinions, and this IHO will not imply such a requirement.

The Colorado Exceptional Children's Educational Act Rules at 1 C.C.R. 301-8, 2220-R-6.03(6)(a)(iii) require the hearing officer to "schedule a pre hearing conference at which the issues will be identified and the specific requests of the parties determined." If either party deemed itself prejudiced by the potential failure of the opposite party to produce a written evaluation of one of its expert witnesses, that party could make a request for a written evaluation at the pre hearing conference. However, in the absence of such a request and a favorable ruling on it, a party has no right to insist that the experts called by the opposition produce a written evaluation which that party will receive within 5 business days before the hearing. In this case, neither party made such a request and both parties produced testimonial evidence from expert witnesses who did not provide written evaluations. The IHO considered fully the testimony of Drs. Strain and Dunlap in making this decision.

B. Residential Placement and FAPE

1. Burden of Proof

The Supreme Court has recently granted certiorari on the question regarding which party bears the burden of proof in cases under the Individuals with Disabilities Education Act, based upon a split the circuit courts. *Weast v. Schaffer*, 377 F.3d 449 (4th Cir. 2004), cert. granted, 161 L. Ed. 2d 104, 125 S. Ct. 1300 (2005). However, while awaiting guidance from the Supreme Court, this IHO will attempt to follow the existing law on the issue. Since in this case the petitioner attacks the IEP offered by the school district, it bears the burden of proving that the IEP does not afford a free appropriate public education. *Johnson v. Independent School District* 921 F2d 1022 (10th Cir. 1990) Additionally, the petitioner urges a residential placement as the least restrictive environment as opposed to the school district's proposal for schooling primarily in a special education classroom in an integrated public school. Several authorities hold that the burden of proof should fall on the party advocating the more restrictive placement, in this case the petitioner. See e.g. *Poolaw v. Bishop* 21 IDELR 1 (D. Ariz. 1994) Accordingly, the petitioner must carry the burden of proof to demonstrate his need for a residential placement in order to achieve a Free Appropriate Public Education (FAPE).

2. The Petitioner's Need for a Residential Placement

The following provision of IDEA governs this proceeding:

Reimbursement for private school placement

If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

20 USC §1412(a)(10)(C)(ii). Thus, in this case, the IHO must decide whether the December 16, 2003, IEP actually sent to [STUDENT]'s parents on January 15, 2004, shortly after the enrollment in Boston Higashi School, provides a free appropriate public education to [STUDENT].

Any analysis regarding whether the December 16, 2003, IEP offers the petitioner a FAPE must begin with the proposition that the school district's obligation to [STUDENT] extends only so far as to provide a basic floor of opportunity consisting of specialized instruction and related services that are individually designed to accord some educational benefit to him. *Bd of Education v. Rowley*, 458 U.S. 176 at 200 (1982). However, in discussing the meaning of "some educational benefit" the Supreme Court in *Rowley* focused upon the Congressional goal of achieving a degree of self sufficiency for the student, so that in later life he will impose fewer burdens on the public fisc. The Court stated as follows:

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child *to benefit* from special education." § 1401(17) (emphasis added). We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. n23

n23 This view is supported by the congressional intention, frequently expressed in the legislative history, that handicapped children be enabled to achieve a reasonable degree of self-sufficiency. After referring to

statistics showing that many handicapped children were excluded from public education, the Senate Report states:

"The long range implications of these statistics are that public agencies and taxpayers will spend billions of dollars over the lifetimes of these individuals to maintain such persons as dependents and in a minimally acceptable lifestyle. With proper education services, many would be able to become productive citizens, contributing to society instead of being forced to remain burdens. Others, through such services, would increase their independence, thus reducing their dependence on society." S. Rep., at 9. See also H. R. Rep., at 11. Similarly, one of the principal Senate sponsors of the Act stated that "providing appropriate educational services now means that many of these individuals will be able to become a contributing part of our society, and they will not have to depend on subsistence payments from public funds." 121 Cong. Rec. 19492 (1975) (remarks of Sen. Williams). See also *id.*, at 25541 (remarks of Rep. Harkin); *id.*, at 37024-37025 (remarks of Rep. Brademas); *id.*, at 37027 (remarks of Rep. Gude); *id.*, at 37410 (remarks of Sen. Randolph); *id.*, at 37416 (remarks of Sen. Williams).

The parties in this case produced a thorough and competent record regarding the nature of autism and autism spectrum disorder and of [STUDENT]'s particular affliction within the autism spectrum. They agreed that the disorder encompasses a wide range of characteristics, but that [STUDENT] manifests the principal ones, deficiencies in social relatedness, lack of communication skills, and stereotypical behavior. Additionally, [STUDENT] like many, but not all, of his autistic counterparts, suffers from mental retardation. However, in [STUDENT]'s case certain additional characteristics not uncommon among persons with autism stand out. He has particular difficulty with generalizing his learned skills to times and places outside of school. Furthermore, unless he continuously reinforces them, he regresses and loses those skills, at least temporarily. Accordingly, the education of [STUDENT] presents a special challenge to him and to his educators. He must not only learn to overcome his social and communication difficulties, and his academic problems occasioned by his mental retardation, but his teachers must also devise a method for him to generalize what he learns across a variety of

environments and he must receive constant attention and reinforcement to maintain his skills.

Importantly, [STUDENT]'s disability afflicts him in ways which threaten to limit or prevent his independence after he leaves a structured educational environment. That disability affects skills that most of us take for granted including eating, sleeping, toilet training and engaging in elementary communication and appropriate behaviors. These skills are most often practiced outside of the educational environment, and it is not enough that [STUDENT] learn to do them only in school. Unless [STUDENT] receives some educational benefit in these areas while he is young so that he can generalize them across environments, he will never achieve the goal of self sufficiency referred to in *Rowley* and in the Congressional mandate.

On its face, the December 16, 2003, IEP certainly addresses the substantive aspects of [STUDENT]'s autism, his social and communicative problems and his mental retardation. The IEP demonstrates a monumental and genuine effort on the part of the school district to improve [STUDENT]'s performance in a number of areas affected by his autism, including gross motor skills, communication, fine motor skills, self care skills, and academic skills in vocabulary and math. Furthermore, the school district would attempt to achieve these goals in a somewhat integrated educational milieu, which IDEA favors by requiring that disabled students receive their special education services in the least restrictive environment. See 20 USC §1412(a)(5). The expert witnesses presented by the respondent affirmed that the IEP attempts to provide a free appropriate public education to [STUDENT]. However, those experts were not fully apprised of the details concerning the overwhelming problem facing the very competent and sincere people in

the school district who would attempt to reach the goals and objectives enumerated in the December 16, 2003 IEP, because they did not appreciate the dichotomy in [STUDENT]'s behaviors and performance in school as opposed to all other places. Even if [STUDENT] were to attain all of those goals and objectives in his December 16, 2003, IEP **in school**, the evidence as a whole showed that he would not be able then to transfer his skills to use them in other environments, at home, in church, in grocery stores and in restaurants. The evidence also suggests that he would not be able to retain those skills before he began to lose them through regression. Furthermore, that IEP adopts no specific strategies to enhance the possibility or probability that [STUDENT] will be able to avoid regression and to generalize what he learns, so that he might achieve some benefit from all of the education offered to him.

Certainly, the law does not require the school district to take on the task of maximizing [STUDENT]'s potential, but [STUDENT] will derive no benefit at all from attaining goals and objectives in school if he cannot replicate any of his accomplishments anywhere else. The skills involved are not embellishments and frills. They are the most basic ingredients to successful social functioning, such as eating, sleeping, dressing, toilet training, communicating, and proper behavior.

While overall, the respondent relies on the proposition that exposure to typically developing students would help [STUDENT] generalize his skills, that strategy did not prove successful before December of 2003. By that time, he had attained the age of nine years, and he still lacked basic skills outside of the school environment. Dr. Strain's testimony that a residential placement would not help [STUDENT] generalize must be evaluated in light of [STUDENT]'s actual experience. He had not generalized essential

and basic skills as of late 2003, and he has done better since. The respondent's experts were not specific regarding what measures [STUDENT]'s parents might take in their home to train [STUDENT] and to fulfill their responsibility as partners in his education. Dr Dunlap reassured that he has worked in home environments a great deal in the past, and that he had confidence that [STUDENT]'s problems at home could be resolved, but without any more specificity, he allowed that it would probably not be a very simple thing to do. The evidence amply demonstrates that children with autism need structure, predictability and planning. Neither Dr. Strain nor Dr. Dunlap offered a structured predictable plan to deal with [STUDENT]'s failure to generalize his skills across environments.

All education has as its purpose the advancement of knowledge and skills so that the student can reasonably retain them and apply them in other contexts, at other times, and in other places. If, as one of the purposes of special education under IDEA confirmed in *Rowley*, public schools must accord some educational benefit in terms of advancing the self sufficiency of severely disabled students like [STUDENT], then the IEP must address the issues of generalization and regression. Self sufficiency entails more than the mastery of skills in school. [STUDENT] will not function well in society after he leaves school, if by that time, he is only toilet trained in school, but nowhere else. He will also not come any closer to self sufficiency than he was in December of 2003 if he has a 76 word speaking vocabulary in school, but can on his own use far fewer words in all other venues. [STUDENT] will not realize any measure of independence after he graduates from high school if he self regulates his avoiding, resistive and difficult behaviors much

more effectively in the classroom than he does in restaurants, churches, grocery stores and at home.

The petitioner persuasively contends that only a residential placement can promote [STUDENT]'s aim of self sufficiency by addressing his inability to generalize and retain what he learns. He presented convincing evidence that sustained supervision for 24 hours per day over long periods with some breaks has a reasonable chance of producing that result. Indeed, [STUDENT]'s father has noticed a significant improvement in numerous aspects of [STUDENT]'s behaviors outside of school in his latest visit home on break from the Boston Higashi School, and the IHO has credited his testimony. The petitioner prevails in his proof that the December 16, 2003, IEP fails to provide a FAPE on the basis that it does not designate a residential placement designed to afford [STUDENT] an opportunity to conquer his tendency, resulting from his disability, to lose his skills through regression and to confine their application to only a single environment, school.

Of course, this hearing entails the finding that the least restrictive environment for [STUDENT] is a residential placement. However, the evidence in this case provides no coherent method for him to surmount the difficulties posed by his severe inability to generalize his learning and to retain it without regression other than a residential placement. [STUDENT]'s need to develop his basic living skills to the point that he can successfully practice them outside of school, such as verbally communicating, toilet training, eating, dressing and self regulation of his behaviors, which, according to Dr. Dunlap, represent an impediment to his participation and his quality of life and his education, overrides any benefit currently attained from integration with typically

developing peers. Ultimately, unless [STUDENT] improves these basic skills and retains them, he will not achieve any of the self sufficiency gains relied upon in *Rowley* and in the legislative record to which it refers, which determine whether the IEP is reasonably calculated to confer some educational benefit.

Both parties have urged the IHO to consider the criteria for determining whether a placement constitutes the least restrictive environment set forth in *L.B. v. Nebo School District* 379 F.3d 966 (10th Cir. 2004). However, the Tenth Circuit adopted those criteria to determine “whether the least restrictive environment mandate in the IDEA has been violated by a school district.” *Nebo School District* supra at 976. In the present case, the petitioner does not accuse the school district of violating the least restrictive environment requirement in 20 USC §1412(a)(5), but rather advocates for the more restrictive environment himself. Therefore, that test is not technically applicable. However, the thrust of that *Mt. Nebo* test is to balance the benefits to the child of the more against the less restrictive placement. In the present case, the IHO reluctantly has struck that balance in favor of the more restrictive placement in the anticipation that [STUDENT] will gain the ability to generalize positive and essential behaviors and skills and retain them as the result of that placement.

3. The Relationship Between the Need for Residential Placement and [STUDENT]’s Learning Problems

The school district contends that the parents’ desire for a residential placement stems not from any of [STUDENT]’s educational needs, but rather from the parents’ desire to alleviate their busy schedule. The school district relies upon the dichotomy between learning requirements and social, medical or emotional problems distinct from the child’s learning problems drawn in *Gonzalez v. Puerto Rico Dep’t of Education*, 254

F.3d 350, 352-53 (1st Cir., 2001) However, in the present case, the petitioner's need for a residential placement derives specifically from his learning problems relating to autism. The record is replete with evidence of [STUDENT]'s inability to generalize and the wide gap between his demonstrable skills in school and elsewhere. The record also well documents [STUDENT]'s inability to retain what he learns independently. Accordingly, in this case, [STUDENT]'s requirement of a residential placement results from educational considerations, and in particular, educational factors which will influence his degree of independence and self sufficiency as an adult. Those factors include skills essential to functioning in society, such as toilet training, eating, dressing, communicating verbally with a minimal vocabulary and behaving appropriately. In some of those areas he made progress in public school, but has not shown the ability to generalize to other settings. Since the need for a residential placement arose from educational considerations, the petitioner is entitled to reimbursement.

C. Petitioner's Notice of Rejection of Proposed Placement

The respondent contends that petitioner's reimbursement should be reduced or denied, because of failure to give proper notice of rejection the placement proposed by the school district pursuant to 20 USC §1412(a)(10)(C)(iii)(I). The respondent appears to concede that the attorney for petitioner gave written notice of that rejection on December 19, 2003, but claims that "No notice was given after the IEP was finalized that the IEP was rejected." (Written Closing Argument of Thompson School District R2-J, page 28) The District did not finalize and send the December 16, 2003, IEP to the petitioner until January 15, 2004, three days after the petitioner had enrolled in the Boston Higashi School.

However, parents must give the ten day notice provided for in 20 USC §1412(a)(10)(C)(iii)(I)(bb) prior to the removal of the child from the public school, regardless when the school district finalizes the IEP. Apparently, the petitioner concedes that the petitioner provided notice more than ten days prior to that removal, but contends that the notice was premature, since it was given before the IEP was finalized. However, 20 USC §1412(a)(10)(C)(iii)(I)(aa) does not require notice after finalization of the IEP, since the petitioner may give notice of the rejection of the “placement **proposed** by the public agency.” (emphasis added) (id) Here, the respondent **proposed** the Berthoud Elementary School placement in the draft IEP tendered to the parents at the December 16, 2003, IEP meeting, and the letter from petitioner’s counsel of December 19, 2003, rejected that **proposed** placement. Thus, the notice complies with the requirements of the statute.

Additionally, the respondent urges the IHO to deny reimbursement on the basis of 20 USC §1412(a)(10)(C)(iii)(III), which provides that the cost of reimbursement may be reduced or denied “upon a judicial finding of unreasonableness with respect to actions taken by the parents.” The IHO is not a court and cannot make a “judicial finding.” Only a court can exercise this judicial function. In contrast, the statute makes clear that either “a court or hearing officer” upon appropriate findings may require the school district to reimburse the parents for the cost of enrollment in a private elementary or secondary school. 20 USC §1412(a)(10)(C)(ii). When the Congress conferred powers on impartial hearing officers in addition to the judiciary in IDEA, it did so explicitly. Therefore, the IHO concludes that the petitioner fulfilled IDEA’s notice requirements.

C. The Remedy

The respondent claims that the petitioner seeks an inappropriate remedy, because the petitioners failed to produce evidence of specific reimbursement costs in his case in chief and that the offer of proof submitted after the hearing was insufficient to carry the petitioner's burden of proof. The IHO agrees that the offer of proof does not contain sufficient detail upon which to base an order requiring the respondent to pay to petitioner a sum certain. In reviewing that offer of proof, many questions arise concerning the appropriateness of the costs. For example the costs of the assistant and of having both parents accompany [STUDENT] on all trips may not be justified. Additionally, petitioner offered no evidence in this case regarding the necessity of either or both parents attending all training trips. These examples are not meant to be all inclusive.

However, the IHO notes that parents seeking tuition reimbursement do not uniformly choose to offer specific evidence regarding costs prior to determination of their right to reimbursement. For example, in *Ash v. Lake Oswego School District* 766 F.Supp. 852 (District of Oregon, 1991) the plaintiffs in the United States District Court, parents of a child enrolled at the Boston Higashi School, offered no evidence of specific cost amounts in their case in chief in that court. After finding the right to reimbursement, the Court ordered, "The parties must submit supplemental memoranda addressing the issue of the specific amount of reimbursement appropriate unless they can reach an agreement on the amount of reimbursement." *Ash supra* at 865. The Court in that case did not dismiss the plaintiff's entire claim for failure to produce evidence on actual costs in the hearing on the merits. The parties may well agree upon the costs after a finding of entitlement to reimbursement, and it would unduly burden the proceedings to require the submission of such specific evidence as part of the petitioner's case in chief in a tuition

reimbursement case before the right to reimbursement has been established.

Accordingly, the IHO here will follow the lead of the Court in *Ash* and not dismiss the request for reimbursement for failure to produce evidence of specific costs.

Therefore, the IHO will enter a general order requiring the respondent to reimburse the costs of enrollment at the Boston Higashi School since January 12, 2004. The parties should then attempt to reach agreement on those costs. The remedies available to the parties if they fail to reach agreement on costs are beyond the scope of this Decision.

V. DECISION

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

1. The petitioner's motion to strike the testimony of Dr. Dunlap and Dr. Strain is denied.
2. The respondent shall reimburse [STUDENT]'s parents the costs of enrollment at the Boston Higashi School since January 12, 2004, and continuing until his placement is changed pursuant to law.

Dated in Denver, Colorado, this 8th day of July, 2005.

VI. APPEAL RIGHTS

Enclosed with this decision, please find a copy of your appeal rights under the ECEA, 1 CCR 301-8 2220-R-6.03(9) through (14).

Respectfully submitted,

Joseph M. Goldhammer, Esq.
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CERTIFICATE OF SERVICE

I certify that on July 8th, 2005, I sent a copy of the **IMPARTIAL HEARING OFFICER'S FINDINGS AND DECISION** by certified Mail to the following:

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