

**BEFORE THE OFFICE OF ADMINISTRATIVE COURTS
STATE OF COLORADO**

CASE NO. ED 2005-0013

AGENCY DECISION UPON STATE LEVEL REVIEW

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

Appellees,

v.

THOMPSON R2-J SCHOOL DISTRICT

Appellants.

This is a state level review of a decision of an Impartial Hearing Officer (“IHO”) issued pursuant to the Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400 *et seq.*, 34 C.F.R. § 330, and the Colorado Exceptional Children’s Educational Act 1 CCR 301-8, §§ 2220-R-1.00 *et seq.* The Thompson School District R2-J (“District”) is represented by W. Stuart Stuller, Esq. and Cheryl M. Karstadt, Esq. Jack D. Robinson, Esq. represents the Appellees.

PROCEDURAL BACKGROUND and IMPARTIAL HEARING OFFICER’S DECISION

A due process hearing was held before IHO, Joseph M. Goldhammer, Esq., on June 3, 2005, and June 7 through 9, 2005. On July 8, 2005, the IHO issued Impartial Hearing Officer’s Findings and Decision (“IHO Decision”). In his July 8 Decision, the IHO found that the District’s December 16, 2003 individualized education program offered to [STUDENT] did not provide [STUDENT] with a free appropriate public education as required by the IDEA and ordered the District to reimburse [STUDENT]’s parents the cost of [STUDENT]’s enrollment at the Boston Higashi School since January 12, 2004 and continuing until [STUDENT]’s placement is changed pursuant to law.

On July 21, 2005, pursuant to 20 U.S.C. §§ 1451(g) and (i) and 1 CCR 301-8, §§ 2220-R-6.03(9) and (11), the District filed a Notice of Appeal and Designation of Transcript and Record to be Considered on Appeal with the Office of Administrative Courts. Under § 2220-R-6.03(11), Administrative Law Judge (“ALJ”), Michelle A. Norcross, established a briefing schedule and scheduled oral argument. The District

filed its Opening Brief on August 22, 2005. Appellees filed their Response Brief on August 26, 2005, and the District's Reply Brief was submitted on August 30, 2005.

Oral argument was held on September 9, 2005, at the Office of Administrative Courts. At that time, the District moved to admit exhibit CC, which is approximately 400 pages of Student Logs for [STUDENT] from the Boston Higashi School. The District received exhibit CC on August 25, 2005. Appellees had no objection to the admission of exhibit CC. State level review proceedings permit the ALJ to admit additional evidence into the record (See § 2220-R-6.03(11)(b)(ii)). Without objection, the ALJ admitted exhibit CC into evidence.

SCOPE AND STANDARD OF REVIEW

The decision of the ALJ on state level review of the decision of the IHO is to be an "independent" one. In the context of court reviews of state level decisions under the current and prior versions of the IDEA, such independence has been construed to require that "due weight" be given to the administrative findings below, *Board of Education v. Rowley*, 458 U.S. 176, 206 (1982); *Roland M. v. Concord School Committee*, 910 F.2d 983 (1st Cir. 1990); *Doe v. Board of Education of Tullahoma City Schools*, 9 F.3d 455 (6th Cir. 1993), while still recognizing the statutory provisions for an independent decision and the taking of additional evidence, if necessary. Factual findings based on credibility determinations "deserve deference unless non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion." *Carlisle Area School v. Scott P.*, 62 F.3d 520 (3rd Cir 1995). In all other areas, non-deferential standard is contemplated, and the ALJ exercises "plenary review." *Id.*

It is appropriate to apply this standard by analogy at the state IHO administrative review level. Thus, in this proceeding the ALJ gives "deference" to the IHO's findings of fact and accords the IHO's decision "due weight", while reaching an independent decision based on a preponderance of the evidence. *Sioux Falls School District v. Koupal*, 526 N.W.2d 248 (S.D. 1994).

ISSUE ON REVIEW

Whether the IHO erred in ordering the District to reimburse [STUDENT]'s parents for their unilateral placement of [STUDENT] at the Boston Higashi School.

FINDINGS OF FACT

Based on the evidentiary record, the ALJ enters the following Findings of Fact, giving due deference to the findings of the IHO:

1. [STUDENT] was born on August 29, 1994. He has two older brothers and a younger sister, all of whom live at home. [STUDENT] lived at home with his parents

until he was enrolled in residential placement at the Boston Higashi School (“Boston Higashi”) in January of 2004.

2. In 1996, Dr. Sally J. Rogers of the JFK Center for Developmental Disabilities, University of Colorado Health Sciences Center, diagnosed [STUDENT] with autism. Autism or autism spectrum disorder is a behavioral syndrome that typically impairs communication skills and social development. Individuals with autism often manifest stereotypical or perseverative behaviors, such as avoiding eye contact and not responding to verbal or social cues. [STUDENT]’s autism evinces all of these characteristics. In [STUDENT]’s case, his autism also appears with mental retardation. His speaking vocabulary includes approximately 75 words in school; he speaks many fewer words at home. His social interactions are significantly delayed and his academic performance reflects his cognitive impairments.

3. In addition to his cognitive impairments and diminished communication and social skills, [STUDENT]’s case presents severe self-care issues, particularly in the areas of eating, sleeping, dressing, and toilet training. He frequently displays inappropriate behaviors in the form of throwing tantrums, screaming, throwing objects, and dropping to the floor, all to escape unwanted activities or situations or sensory difficulties.

4. One of [STUDENT]’s biggest challenges is learning how to generalize skills. Generalization is the ability to take a skill and move it across environments and across time and not have to be re-taught that skill; the skill exists on its own. For example, if [STUDENT] learns how to tie his shoes in school, he is said to have generalized that skill by demonstrating the ability to tie 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 have great or greater difficulty with generalization. In [STUDENT]’s case, he could not transfer a skill unless he was interacting directly with the person who taught him the skill.

5. [STUDENT]’s autism further inhibits him from retaining knowledge and skills that he has learned unless they are reinforced through constant repetition. This pattern is referred to as regression. Several of [STUDENT]’s teachers noted that [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.

6. In the fall of 2000, [STUDENT] entered kindergarten in the St. Vrain Valley School District at Niwot Elementary School. Special Education teacher Margaret Wilson was [STUDENT]’s primary teacher. Margaret Wilson had worked with [STUDENT] in his pre-school setting prior to his entering kindergarten.

7. [STUDENT]’s kindergarten individualized education program (“IEP”), dated February 13, 2001, included one half hour per week of special education services in the classroom, two hours per week in the special education classroom, .75 hours per

week of speech and language therapy, and one half hour per week of occupational therapy.

8. The February 2001 IEP included goals and objectives for communication skills, self-care (toilet training and dressing), independence and motor skills, social interaction and play skills, and academic functioning. It also provided for extended school year services (“ESY”) during the summer months to address [STUDENT]’s strong proclivity for regression.

9. [STUDENT]’s kindergarten Vineland Adaptive Behavior Scales test results reveal significant discrepancies in [STUDENT]’s functioning between school and home, confirming [STUDENT]’s serious problems with generalization of skills.

10. Margaret Wilson remained [STUDENT]’s special education teacher through first grade at Niwot Elementary School. [STUDENT] was in the special education classroom during most of his first grade year. His annual first grade IEP, dated January 15, 2002, included self-care skills in the areas of washing and dressing only; he had become toilet trained at school during his first grade year.

11. In the fall of 2002, [STUDENT] transferred to Berthoud Elementary School in the Thompson School District as a second grade student. In anticipation of the transfer, Dee Ann Wilson, the special education teacher at Berthoud, visited Niwot and worked with Margaret Wilson and [STUDENT]’s parents to facilitate a smooth transition to the new school. The initial IEP at Niwot, dated December 19, 2002, provided for education outside the general classroom for more than 60% of the day. It also provided for adaptive physical education, occupational therapy, speech and language therapy, and some time in the general classroom for mainstreaming and interaction with non-disabled students during administrative activities.

12. The December 2002 IEP included self-care goals and objectives for washing and feeding. The previous goals and objectives for toilet training and dressing were elimination because [STUDENT] had achieved these goals, at least in the school setting. A subsequent IEP, dated April 17, 2003, developed during the spring of [STUDENT]’s second grade year at Berthoud, repeats the same self-care goals and objectives as those in the December 19, 2002 IEP.

13. During kindergarten and through his second grade year at Berthoud, [STUDENT] made progress with his special education and was meeting many of the goals and objectives in his IEPs. However, he was unable to take the skills he was learning at school and transfer them to his home and community life. [STUDENT]’s home and community behavior was in stark contrast to his behavior at school.

14. Prior to entering kindergarten, [STUDENT] developed sleep problems. He would fall asleep at odd hours and wake up in the middle of the night to play videos or wander through the house. [STUDENT] refused to sleep in a bed. Instead, he curled up on the floor with covers to sleep.

15. Although [STUDENT] had become toilet trained at school during his first grade year, he was unable to transfer this skill to his home life. [STUDENT]'s nighttime hygiene skills were severely lacking. Beginning when he was four years old, [STUDENT] developed the habit of spreading nighttime bowel movements around his bedroom, on the carpet, bedding, walls, and curtains. His parents could not keep his room clean and sanitized without permanently removing the curtains and replacing the carpeting with vinyl. Additionally, at night [STUDENT] was fitted with nylon jump suits that zipped up from the back, restricting him access to his feces. However, this did not completely deter him from continuing to engage in these behaviors.

16. Each night [STUDENT]'s parents administered a suppository to induce a bowel movement before bed, to reduce the likelihood of one occurring during the night, which they had done since he was 4 years old. At the time [STUDENT] was enrolled at Boston Higashi, he was incontinent of bladder and bowel outside of school both during the day and night, even though he was fully toilet trained at school.

17. [STUDENT] was also a very picky eater and, prior to his enrollment at Boston Higashi, ate only yogurt, crackers and croutons. When he was presented with other food, such as fruits, vegetables and meat, [STUDENT] had temper tantrums, kicked, screamed and often threw the food onto the floor. When the family would go out to eat at a restaurant, [STUDENT] would often wander off and take food from other customer's plates.

18. In grocery stores, [STUDENT] would try and pull down the food displays and vociferously object when he was prohibited from doing so. [STUDENT]'s parents were also unable to control [STUDENT]'s inappropriate behaviors at church. After a while, the family stopped taking [STUDENT] on public outings, to church or out to dinner. As [STUDENT]'s behavioral problems increased, his parents were forced to rely more and more on [STUDENT]'s grandparents for help and a hired attendant to watch [STUDENT] while they attended to other familial responsibilities.

19. As he got older and physically larger, [STUDENT]'s tantrums became more troubling to his family. On one occasion, [STUDENT] made a threatening gesture towards his sister. And on occasion at home, but never at school, [STUDENT] directed his anger and frustration toward his mother; he tried to kick and bite her. At school, when [STUDENT] became angry or frustrated he demonstrated it by throwing objects to the floor, screaming, dropping to the floor and flailing about in an undirected fashion. There is no evidence that [STUDENT] directed his anger or frustration toward a teacher or student at Niwot Elementary or Berthoud Elementary.

20. In an attempt to control [STUDENT]'s behavioral problems, his parents took him to a psychiatrist, who prescribed sedatives. However, the medication was ineffective unless prescribed in such high doses that it rendered [STUDENT] passive and unresponsive. [STUDENT] was taken off the medication.

21. By the summer of 2003, [STUDENT]'s parents became so concerned about [STUDENT]'s behavioral problems that they contacted social services to inquire about residential placement programs. They discovered that in order for social services to place [STUDENT] in a residential facility, they would have to relinquish custody of [STUDENT] to the county department. Understandably, the family did not want to do that. [STUDENT]'s father decided to search the Internet for alternative residential placement options and discovered Boston Higashi, which has both a day student program and a twenty-four hour placement program.

22. [STUDENT], his parents, and Margaret Wilson visited Boston Higashi in late October, early November 2003. During their visit, [STUDENT]'s parents filled out an application to enroll [STUDENT] in the school's residential placement program. On the application, they stated that [STUDENT] needed partial assistance with dressing and eating and total assistance with toilet training, washing and sleeping. The parents specified "communication; toilet training; sleeping; ADL" (activities of daily living) as the areas of greatest difficulty. When asked why [STUDENT] needs to change schools, they responded: "Adolescence is approaching. [STUDENT] needs to learn routines for independence, [STUDENT] thrives on structure and needs to maximize pro-active routines. We need to provide [STUDENT] an environment where he can maximize his potential." The parents did not inform the district about their visit to Boston Higashi until December 2003.

23. The parents' decision to enroll [STUDENT] at Boston Higashi was done primarily because they were concerned about [STUDENT]'s dysfunctional behaviors away from school and his increasing inability to regulate himself and care for his needs at home and in public. However, since his behaviors away from school appeared to be deteriorating, the parents also decided to inquire further about [STUDENT]'s behaviors at school. They asked Diane Osaki, an occupational therapist who had opened a private day school for children with autism, and Margaret Wilson to observe and assess [STUDENT] in scholastic settings.

24. In December 2003, Diane Osaki observed [STUDENT] at Berthoud Elementary for a three-hour period in the morning, conducted a parent interview, reviewed charts and a video of [STUDENT]. Following her assessment, she prepared a report. Diane Osaki's opinions as expressed in her report and at hearing are consistent with the overall record and the findings made by the IHO. [STUDENT] was functioning at a higher level at school than at home and remained unable to transfer skills he learned at school to his home and community environments.

25. Margaret Wilson met with [STUDENT] on November 28, 2003, and administered the Autism Diagnostic Observation Schedule test. Based on her observations of [STUDENT] before and during the testing, 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. Margaret Wilson's observation that [STUDENT] showed regression in his previously attained skills when she first started working with him on November 28 is not in and of itself conclusive

evidence that [STUDENT] had lost some of his academic achievements. [STUDENT] had not worked with Margaret Wilson in a school setting since July 2002, had not been in her classroom for 15 months, and was very agitated when he first met with her on the day of the test. The ALJ finds [STUDENT]'s initial inability to demonstrate previously learned skills on November 28 evidence of his inability to generalize, not necessarily conclusive proof that he had lost skills he had previously learned when Margaret Wilson was his teacher.

26. On December 16, 2003, the parents and representatives for the District, including Dee Ann Wilson, [STUDENT]'s then current special education teacher, met for the triennial IEP meeting. At the meeting, [STUDENT]'s father presented a list of written goals for [STUDENT] that the parents wanted included in the 2003 IEP. He also disclosed for the first time that he did not think these goals were attainable in [STUDENT]'s present environment and that [STUDENT] needed to be placed in a residential program. The parents informed the District that they were looking at sending [STUDENT] to Boston Higashi because it was a more appropriate placement. The District requested an opportunity to revise the draft IEP it brought to the December 16 meeting to consider the parents' requested goals.

27. On December 18, 2003, Boston Higashi accepted [STUDENT] in its residential placement program. The following day, December 19, 2003, [STUDENT]'s parents, through their counsel, sent a letter to the District advising the District that the IEP was rejected and that [STUDENT] was being removed from the District and being enrolled in a private school. The parents also stated that they would be seeking reimbursement of all related costs from the District.

28. [STUDENT] enrolled as a residential student at Boston Higashi on January 12, 2004. Boston Higashi has both residential and day students, all of whom have a diagnosis of autism. It is housed on a campus-type property with the residential facility in close proximity to the classroom and physical education building. At Boston Higashi, [STUDENT] is supervised 24 hours per day, seven days per week, for 44 weeks each year. The remaining 8 weeks, [STUDENT] comes back to live with his family in Colorado. The 8 weeks at home are divided up into several breaks interspersed throughout the calendar year.

29. On January 15, 2004, the District completed the final version of the December 16, 2003 IEP incorporating the additional goals and objectives requested by the parents relating to [STUDENT]'s use of the bathroom, eating, dressing and information regarding [STUDENT]'s proficiency in various areas. The one item that remained unchanged from the December 16 draft was the placement recommendation. The District's 2003 IEP included continued placement at Berthoud Elementary with 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.

30. There is little disagreement between the parties that the goals and objectives contained in the District's December 2003 IEP address the substantive aspects of [STUDENT]'s autism and cognitive impairments. The goals and objectives specifically relate to ways of improving [STUDENT]'s motor skills, communication skills, self-care skills, social interaction skills, reading and writing skills, behavioral management skills, and [STUDENT]'s overall ability to become increasingly independent in all areas. The December 2003 IEP incorporates the majority of parents' list of written goals that were presented at the December 16 meeting.

31. The IHO found, and the ALJ adopts as fact, that the District's December 2003 IEP demonstrates a monumental and genuine effort on the part of the District to improve [STUDENT]'s performance in a number of areas affected by his autism. Furthermore, the District's IEP attempts to achieve these goals in a somewhat integrated milieu by maintaining some interaction between [STUDENT] and his non-disabled peers.

32. The evidence shows that while [STUDENT] was attending Berthoud Elementary School he had achieved nearly a quarter of the goals and objectives in his IEP and that he was making slow by steady progress toward others. In certain areas he continued to demonstrate regression, even at school, but overall [STUDENT] was advancing in his goals at school. The problem remained, however, that despite his progress at school, [STUDENT] was unable to transfer any of his learned skills and use them in environments outside of school. When [STUDENT] entered Boston Higashi, he was incontinent outside of school, was not sleeping through the night, ate only a limited diet, and was frequently displaying inappropriate behaviors in the form of screaming and throwing tantrums in degrees of severity to escape unwanted activities or situations.

33. Since entering Boston Higashi, [STUDENT]'s self care skills and behaviors have improved. He no longer sleeps in a nylon suit on the floor. He now sleeps in a bed in his own room and at school. When he comes home on breaks from school, his toilet training has improved. He still has some accidents at night, but is toilet trained during the day. He is eating a variety of healthy foods and during his last visit home, the frequency and intensity of his adverse and resistive behaviors had mitigated.

34. At the due process hearing both sides presented a number of expert witnesses. All the experts presented have impressive credentials and significant experience in dealing with children with autism in clinical, academic, and educational settings. The experts in this case agree that children with autism, while manifesting some similar behaviors, are individual in their reaction and response to their environment. Some children with autism manifest more severe behaviors than [STUDENT] and some less severe. [STUDENT] falls somewhere between moderate and severe on the autism spectrum. And there is little dispute that [STUDENT] has great difficulty generalizing.

35. The District presented the expert testimony of Drs. Phillip Strain and Glen Dunlap. Both these experts rendered their opinions based on a review of records

supplied by the District and after viewing several videos taken of [STUDENT] at Berthoud Elementary and Boston Higashi. Neither expert personally interacted with [STUDENT], his parents, or his educational providers. Prior to the hearing, neither Drs. Strain nor Dunlap knew about [STUDENT]'s sleeping, eating and incontinence problems before he left Berthoud Elementary.

36. Both Drs. Strain and Dunlap concluded that the December 2003 IEP proposed by the District would provide an appropriate education to [STUDENT]. Dr. Strain opined that the District's IEP would provide an appropriate education to [STUDENT] because its implementation would be, at least in part, in the presence of typically developing peers and because it included fairly intensive data collection. According to Dr. Strain, research suggests that students with autism demonstrate more problem behaviors when their social contacts are confined to others with the same syndrome. Boston Higashi has only students with the diagnosis of autism. Dr. Dunlap agreed with the opinions of Dr. Strain but admitted that [STUDENT]'s behavioral problems represent an impediment to his participation and his quality of life and education. Neither Drs. Strain nor Dunlap offered an opinion as to a specific or structured solution the District could adopt to address [STUDENT]'s problems generalizing his learned skills to home and the community.

37. Experts Margaret Wilson, Diane Osaki, Rosemary Littlefield (Executive Director of Boston Higashi), Dr. Ann Roberts Ph.D. (clinical psychologist and on staff at Boston Higashi), and Ellen Hanson Ph.D. (psychologist at Children's Hospital in Boston) testified on behalf of [STUDENT]. All these experts opined that residential placement is an appropriate placement for [STUDENT] based on his documented progress in the program and his need for that type of setting to overcome his obstacles to lead a meaningful and quality life.

38. Based upon the totality of the circumstances, the IHO credited the lay and expert testimony of Margaret Wilson, Rosemary Littlefield and Ann Roberts over the expert testimony of Drs. Strain and Dunlap on the basis that the former 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 that threaten [STUDENT]'s integration into society in a meaningful way when he graduates from school and that his educators must confront to provide him with some educational benefit. The ALJ finds the record supportive of the IHO's credibility assessment of these witnesses and adopts the IHO's findings in this regard. In particular, the ALJ finds the testimony of witness Margaret Wilson persuasive and compelling on the issue of why [STUDENT] requires residential placement to achieve his academic goals and receive more than a de minimus education.

39. After her assessment in November 2003, Margaret Wilson found that [STUDENT] remained unable to generalize learned skills. Margaret Wilson concluded, and the ALJ finds a fact, that [STUDENT]'s inability to generalize learned skills dictates the need for residential placement. It is through persistent guidance and training available only through a residential placement that will deeply ingrain [STUDENT] with

proper behaviors so that they become his default behaviors across environments. In terms of educating children, behavioral self-regulation (i.e., learning skills that will allow a child to regulate to his environment, to the people around them, to sensory input, and to emotional input) is paramount to education. Behavioral self-regulation skills are access and foundational skills and academic education cannot occur if these other issues are not addressed. Even the District's expert, Dr. Dunlap opined that [STUDENT]'s challenging behaviors represent an impediment to his education and that without generalized responding, the child, the teachers, and the administrators are not getting much of a return on their educational investment.

40. The record further establishes that Margaret Wilson's recommendation for residential placement for [STUDENT] did not come lightly. Margaret Wilson holds a strong philosophical belief, as do most of the experts that testified in this case, that children, such as [STUDENT], belong in neighborhood schools and that families have a right to be part of the school community and the school community has the right to be part of the family. In this case, however, [STUDENT]'s struggles with generalization coupled with his difficulty to self-modulate and self-regulate, dictate his need for a 24-hour seamless educational environment seven days a week. [STUDENT] requires such an environment to truly learn new skills, master and generalize them.

41. Based on 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 found Margaret Wilson's testimony credible and persuasive. The ALJ is further persuaded by Margaret Wilson's testimony and also finds her a credible witness. The District's experts, though highly qualified, lack the extensive experience in teaching [STUDENT] and were not familiar with his baseline level of functioning prior to entering Boston Higashi. To that extent, their opinions are not as persuasive as those given by Margaret Wilson.

42. The IHO found, and the ALJ adopts as fact, that the professionals on the staff of the District who testified in this matter are competent and diligent and that [STUDENT] needs residential placement because of the unique character of his disability, not due to any shortcomings on their part.

43. The failing of the December 2003 IEP is not in the goals and objectives. The problem is that the goals and objectives are not attainable in the placement recommended by the District at Berthoud Elementary. In order to receive a free appropriate education, at this time, [STUDENT] requires a 24-hour-per-day, year-round education.

44. The evidence in this case provides no coherent method for [STUDENT] to surmount the difficulties posed by his severe inability to generalize his learning and to retain it without regression other than a residential placement, such as the one he is in at Boston Higashi.

45. The ALJ agrees with the finding of the IHO that the December 16, 2003 IEP did not offer [STUDENT] a free appropriate public education because it did not include a recommendation for residential placement.

DISCUSSION

Structure and Purpose of the IDEA

The IDEA, formerly known as the Education for All Handicapped Children Act, provides federal money to state and local agencies for the education of children with disabilities to ensure they are given:

[A] free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of handicapped children and their parents or guardians are protected, to assist States and localities to provide for the education of all handicapped children, and to assess and assure the effectiveness of efforts to education handicapped children.

20 U.S.C. § 1400(c).

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 that 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 U.S.C. § 1412(a)(10)(C)(ii).

The statute's primary purpose of providing a free appropriate public education ("FAPE") is achieved through the development of an IEP, tailored for each child with a disability. 20 U.S.C. § 1401(a)(18)(D). In *Board of Education v. Rowley*, 458 U.S. 176 (1982), the United States Supreme Court examined the issue of what is meant by the phrase "free appropriate public education". *Id.* at 186. That decision held that the statutory definition of FAPE requires states to provide each child with specially designed instruction and expressly requires the provision of such supportive services as may be required to assist a handicapped child to benefit from special education. *Rowley* at 201. It also held that the requirement that a state provide specialized educational services to disabled children generates no additional requirement that the services so provided be sufficient to maximize each child's potential commensurate with the opportunity provided other children. *Rowley* at 196.

Individual Education Program

In order to comply with the requirements of the IDEA, a school district shall insure that each handicapped child's educational placement: Is determined at least annually; is based on his or her IEP; and is as close as possible to the child's home. See 20 U.S.C. § 1412(5)(B). The IEP consists of a written document containing:

- (A) a statement of the present levels of educational performance of such child;
- (B) a statement of annual goals, including short-term instructional objectives;
- (C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs;
- (D) the projected date for initiation and anticipated duration of such services; and
- (E) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(a)(19).

As correctly stated by the IHO, “[a]ny analysis regarding whether the December 16, 2003 IEP offers [STUDENT] 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.” (IHO Decision, page 17, citing *Rowley*.) In answering this question, the IHO concluded, “[u]ltimately, unless [STUDENT] improves these basic skills [verbal communication, toilet training, eating, dressing and self regulation of his behaviors] and retains them, he will not achieve any of the self-sufficiency gains relied upon in *Rowley* and the legislative record to which it refers, which determine whether the IEP is reasonably calculated to confer some educational benefit.” (IHO Decision, page 22.) The District argues that the IHO’s reliance on *Rowley* is misplaced and that the IHO mischaracterizes the standard *Rowley* imposed on the States. As argued by the District, in *Rowley*, the Supreme Court expressly stated, “We cannot agree. . . that self-sufficiency was itself the substantive standard which Congress imposed upon the States.” *Rowley*, 458 U.S. at 201, n. 23.

In analyzing the meaning of the phrase “free appropriate education”, the *Rowley* Court concluded, as the District points out, that self-sufficiency itself was not the substantive standard imposed by Congress on the states. The Court declined to adopt the “self-sufficiency” test for the following reason:

Because many mildly handicapped children will achieve self-sufficiency without state assistance while personal independence for the severely handicapped may be an unreachable goal, “self-sufficiency” as a substantive standard is at once an inadequate protection and an overly demanding requirement. We thus view these references in the legislative history as evidence of Congress’ intention that the services provided handicapped children be educationally beneficial, whatever the nature or severity of their handicap.

Id.

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.

Rowley at 201-202.

The District is correct that the Supreme Court, in *Rowley*, declined to accept self-sufficiency as the substantive standard. However, the Court limited its holding in *Rowley* specifically to the facts before it, which involved a hearing-impaired child advancing from grade to grade, and who was performing above average in the regular classroom of a public school system. *Rowley* at 202. Interpreting the Court’s ruling in *Rowley*, the Third Circuit held, “we observe, as did the majority in *Rowley*, that a key concern of and primary justification for the [IDEA] lay in the important goal of fostering self-sufficiency in handicapped children.” *Polk v. Ctl. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 181 (3rd Cir. 1988). The chief sponsors of the act stressed the importance of teaching skills that would foster personal independence for two reasons. First, they advocated dignity for handicapped children. Second, they stressed the long-term financial savings of early education and assistance for handicapped children. *Id.* Based upon a careful reading of *Rowley* and taking guidance from the Third Circuit’s decision in *Polk*, the ALJ concludes that although self-sufficient is not the substantive standard of the act, it remains an important element in determining whether the services provided to a handicapped child are educational beneficial.

In its Opening Brief, the District posits the threshold question of the case as: To what extent does the IDEA make school districts responsible for rectifying the behaviors of children at home and in the community? The ALJ finds that the threshold question in this case is whether the District’s December 2003 IEP is sufficient to confer some educational benefit upon [STUDENT], not whether the District is responsible for rectifying [STUDENT]’s behaviors at home and in the community. In answering this question, one must look first at the December 2003 IEP.

The IHO found that the December 2003 IEP, on its face, addresses the substantive aspects of [STUDENT]'s autism, his social and communicative problems and his mental retardation. The IHO also found that the December 2003 IEP constitutes a monumental and genuine effort on the part of the District to improve [STUDENT]'s performance in a number of areas. The ALJ agrees with the IHO on both points. However, despite the laudable attempts of the District and [STUDENT]'s parents to improve [STUDENT]'s deficits, the fact remains that [STUDENT]'s behavioral problems were impacting his ability to derive many of the educational benefits in his IEP. The fundamental problem with the December 2003 IEP lies with the recommended placement, not the goals and objectives. Further, the December 2003 IEP does not adopt a specific strategy or plan 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 the education offered to him.

[STUDENT] met nearly a quarter of the goals and objectives in the IEP and was making slow but steady progress toward others. Yet, he remained consistently unable to transfer his learned skills to other environments and this inability to generalize prevented him from performing the most basic of human tasks, including eating, sleeping, dressing and toileting. As stated best by the IHO, "[t]he skills involved are not embellishments and frills. They are the most basic ingredients to successful social functioning. . . ." (IHO Decision, page 20). Even Dr. Dunlap agreed that [STUDENT]'s challenging behaviors represent an impediment to his education and that without generalized responding, the child, the teachers, and the administrators are not getting much of a return on their educational efforts.

For children, like [STUDENT], with severe emotional disturbances education begins with basic self help and social skills, including toilet training, dressing, eating, and communication. See, *Polk*, supra, citing *Battle v. Pennsylvania*, 629 F.2d 269, 275 (3rd Cir. 1980). In discussing children with severe emotional disturbances:

Where basic self-help and social skills such as toilet training, dressing, feeding and communication are lacking, formal education begins at that point. If the child masters these fundamentals, the education moves on to more difficult but still very basic language, social, and arithmetic skills, such as counting, making change and identifying simple words.

Battle, at 275.

Several courts have concluded that residential placement is necessary to provide a severely autistic child with an appropriate education. *Ash v. Lake Oswego School Dist.*, 766 F.Supp. 852, 862 (D.Or. 1991), *aff'd* 980 F.2d 585 (9th Cir. 1992) (citing *Stacey G. v. Pasadena Indep. School Dist.*, 695 F.2d 949 (5th Cir. 1983)); *Drew P. v. Clarke County School Dist.*, 676 F.Supp. 1559 (M.D. Ga. 1987). The focus in determining whether residential placement is necessary must be on whether the placement is required for educational purposes apart from the medical, social or

emotional problems that are segregable from the learning process. *Ash*, at 862 (citing *Kruelle v. New Castle County School Dist.*, 642 F.2d 687, 693 (3rd Cir. 1981)).

In *Ash*, the court recognized that a residential placement is necessary for an autistic child when the child's learning needs require the consistency and continuity that only a 24-hour-a-day environment can provide. *Ash* at 859. In support of its finding that residential placement for Christopher Ash was appropriate, the court held:

An appropriate education for Christopher is an education which will make it possible for him to be successful outside of a classroom setting. The evidence in this case shows that an appropriate education for Christopher is one that only a twenty-four-hour-a-day, seven-day-a-week educational environment can provide. While residential placement for a handicapped child is only appropriate in very limited circumstances, Christopher's medical, social and emotional problems are so severe that they are not segregable from his learning process, and therefore residential placement is required for educational purposes. Daily living skills, such as toileting, eating and dressing, can only be taught to him and reinforced for him in the consistency of a residential setting.

Id. at 863.

In the instant case, the evidence establishes that [STUDENT]'s social and behavioral problems significantly interfere with his learning process. As Margaret Wilson credibly and persuasively testified, [STUDENT]'s inability to generalize learned skills dictates the need for residential placement. It is the through persistent guidance and training available only through a residential placement that will deeply ingrain [STUDENT] with proper behaviors so that they become his default behaviors across environments. Behavioral self-regulation is paramount to education; these skills are access and foundational skills and academic education cannot occur if these other issues are not addressed. The IHO concluded, "These skills are most often practiced outside of the educational environment and it is not enough that [STUDENT] learned to do them only in school." (IHO Decision, page 19). The ALJ agrees.

The IDEA does not guarantee outcomes and an IEP does not have to provide the best conceivable education. An IEP meets the requirements of the IDEA if it is reasonably calculated to enable the child to receive educational benefit by furnishing a basic opportunity for an individually structured education. *Rowley*, 458 U.S. at 206-7. The IDEA is designed to provide a floor not a ceiling. However, the "basic floor of opportunity" provided by the IDEA consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child. *Id.* at 201. Without a specific strategy or plan 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 the education

offered to him, the December 2003 IEP cannot and does not meet the requirements of the IDEA.

Least Restrictive Environment

In addition to providing personalized instruction for a handicapped child, a state must comply with the IDEA's requirement that this personalized instruction be provided in the least restrictive environment ("LRE"). In order to do so, a state must adopt:

[P]rocedures to assure that, to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

20 U.S.C. § 1412(5)(B) (Supp. 1991).

Under Colorado law, the LRE means, "an environment in which a child with disabilities is educated with children who do not have disabilities, unless: the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily, or when provided with supplementary aids and services, the nature or severity of the disability is so disruptive that the education of other children in such classes would be significantly impaired." 1 CCR § 301-8, 2220-R-5.02.

In *L.B. v. Nebo Sch. Dist.*, 379 F.3rd 966, 978 (10th Cir. 2004), the parents of K.B., a child diagnosed with autism, unilaterally removed K.B. from the Nebo School District and placed her at their own expense in a private preschool. Although K.B.'s parents generally agreed with the goals in Nebo's proposed IEP, they disagreed with Nebo's proposal to place K.B. at Park View. Park View is a special education preschool populated primarily by disabled students, but includes thirty to fifty percent typically developing children who interact throughout the school day with the disabled children. Following the due process hearing, the hearing officer found that Nebo did not violate the LRE requirement and that Appellants had failed to present evidence that K.B. was progressing on her IEP at the private preschool. *Nebo* at 973. Appellants challenged that finding on appeal. The Tenth Circuit Court concluded that Park View was not K.B.'s least restrictive environment. *Id.* at 975.

In its decision in *Nebo*, the court held:

In enacting the IDEA, Congress explicitly mandated, through the least restrictive environment requirement, that disabled children be educated in regular classrooms to the maximum extent appropriate. 20 U.S.C. § 1412(a)(5)(A). . . Educating children in the least restrictive environment in which they can receive an appropriate education is one of the IDEA's most important substantive requirements. (citing *Murray v. Montrose County Sch. Dist.*, 51 F.3d 921, 926 (10th Cir. 1995)). Thus, the LRE requirement is a specific statutory mandate. It is not, as the district court in this case mistakenly believed, a question about educational methodology.

Nebo at 976.

In determining whether the LRE mandate in the IDEA has been violated by the school district, the Tenth Circuit applied the two-part *Daniel R.R.* test (See, *Daniel R.R. v. Bd. Of Educ.*, 874 F.2d 1036, 1048 (5th Cir. 1989)) in which the court: (1) determines whether education in a regular classroom, with the use of supplemental aids and services, can be achieved satisfactorily; and (2) if not, determines if the school district has mainstreamed the child to the maximum extent appropriate. *Nebo*, 379 F.3d 966, 976. In determining the first prong of the *Daniel R.R.* test the court may consider the following non-exhaustive factors:

(1) steps the school district has taken to accommodate the child in the regular classroom, including the consideration of a continuum of placement and support services; (2) comparison of the academic benefits the child will receive in the regular classroom with those she will receive in the special education classroom; (3) the child's overall educational experience in regular education, including non-academic benefits; and (4) the effect of the regular classroom of the disabled child's presence in that classroom.

Nebo at 976 (citing *Murray*, 51 F.3d at 926 n. 10).

In this case, the District argues that the IHO erred by refusing to apply the *Daniel R.R.* test in determining whether [STUDENT]'s placement complies with the LRE requirement. According to the District, the IHO "applied a self-created balancing test, determining whether Boston Higashi was superior to Berthoud Elementary, ignoring that a court may not substitute its notion of sound educational policy for those of school authorities. . ." (District's Opening Brief, page 29). The ALJ disagrees that the IHO adopted his own balancing test to determine compliance with the LRE standard. In determining that [STUDENT] requires residential placement, the IHO took into consideration several of the non-exhaustive factors set out in *Daniel R.R.* Specifically, the IHO considered the steps the District took to accommodate [STUDENT]. He also

compared the academic benefits [STUDENT] received in the regular classroom with those he is receiving at Boston Higashi, and accounted for the non-academic benefits [STUDENT] received in a regular classroom (IHO Decision, pages 19, 20 and 21). The ALJ concludes that the IHO's determination that Boston Higashi is the least restrictive environment is supported by the evidence.

In upholding the IHO's determination, the ALJ is mindful that the experts in this case agreed that, typically, disabled children benefit from remaining a part of their community and interacting with their non-disabled peers. However, in this case, despite [STUDENT]'s continual interaction with non-disabled peers and members of the community, he had not generalized essential and basic skills as late as 2003, and he has done better since entering Boston Higashi. Applying the factors of the *Daniel R.R.* test, the ALJ concludes that, given the nature and severity of [STUDENT]'s disabilities, Boston Higashi is the least restrictive environment.

Reimbursement

The District argues that [STUDENT]'s parents are not entitled to reimbursement for the unilateral placement because the parents acted unreasonably. In support of this argument the District cites several cases where reimbursement was denied because it was determined that the parent's "gamed the system to extract free tuition for a private school." In this case, the District asserts, "[a] review of the time line here demonstrates a deliberate and elaborate effort to game the system." (District Opening Brief, page 35). The record does not support this allegation. It is abundantly clear that all persons involved in [STUDENT]'s life, including his teachers and parents, undertook monumental efforts to ensure [STUDENT]'s educational success. The fact that [STUDENT]'s parents took the initiative to consult with experts in the field of autism about [STUDENT]'s deteriorating behavior and explore residential placement options prior to discussing their efforts with the District is not evidence of gaming the system. The parents took these steps because they were genuinely concerned about [STUDENT]'s declining behavior and the impact it was having on him and their family.

The District also argues that notice was insufficient to support a claim of reimbursement. As found by the IHO, and adopted by the ALJ, [STUDENT]'s parents, through counsel, provided written notice to the District on December 19, 2003, that the District's December 2003 IEP was rejected. The District did not finalize and send the December 16, 2003 IEP to the parents until January 15, 2004, three days after [STUDENT] started school at Boston Higashi. The District claims that under the IDEA the parents must give the District ten days notice that they were rejecting the IEP and enrolling their child in a private school at public expense. See, 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). And because they did not provide notice after the IEP was finalized that the IEP was rejected, notice is insufficient. This argument was raised at the due process hearing and rejected by the IHO. The IHO concluded, and the ALJ agrees, that 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb) mandates that the parents give the ten day notice prior to the removal of the child from the public school, regardless of when the school district finalizes the IEP. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa) instructs

the parents to give appropriate notice of the rejection of the “placement **proposed** by the public agency.” (emphasis added.) The District proposed placement at Berthoud Elementary on December 16, 2003. Accordingly, the December 19, 2003 letter complies with the notice requirements of the statute.

Remedy

The District contends that the remedy ordered by the IHO is inappropriate because [STUDENT]’s parents failed to produce evidence regarding the specific costs for which they seek reimbursement. Following the due process hearing, through written offer of proof sent to the IHO on June 14, 2005, [STUDENT]’s father submitted dollar amounts regarding the tuition and transportation costs associated with [STUDENT]’s placement at Boston Higashi. The District stipulated that the offer of proof represented [STUDENT]’s father’s testimony, but did not stipulate to the factual accuracy of the testimony or waive the arguments made in its motion to dismiss, which asserted that [STUDENT]’s parents failed to satisfy the burden of proof on the costs of reimbursement. In his Decision, the IHO states, “[t]he IHO agrees that the offer of proof does not contain sufficient detail upon which to base an order requiring the [District] to pay to [[STUDENT]’s parents] a sum certain. . . Therefore, the IHO will enter a general order requiring the [District] 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.” (IHO Decision, page 25 and 26).

As noted by the IHO, this is not the first case where the parents seeking tuition reimbursement did not offer specific evidence regarding costs prior to determining their right to reimbursement. In *Ash*, 766 F.Supp 852, the plaintiffs of a child enrolled at Boston Higashi offered no evidence of specific costs in their case-in-chief. After finding a right to reimbursement, the Court ordered the parties to “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* at 865. Similarly, in Denver Public Schools, Case No. ED 2000-25, pp. 12-13 and Thompson R-2J School District, Case No. L2001:123, the ALJ and IHO ordered the parents to submit all their reimbursable costs to the District and/or IHO for review following the decision addressing a claim for reimbursement. The ALJ upholds the IHO’s general order requiring the District to reimburse the costs of [STUDENT]’s enrollment at Boston Higashi since January 12, 2004 and further orders the parents, within 20 days of this decision, to document to the District all of their reimbursable costs related to [STUDENT]’s placement at Boston Higashi from January 12, 2004 through the date of this decision.

CONCLUSIONS OF LAW

1. The District’s December 16 2003 IEP did not offer [STUDENT] a free appropriate public education as required by the IDEA.

2. Residential placement at Boston Higashi School is the least restrictive environment for [STUDENT]

3. The parent's December 19, 2003 letter to the District provided adequate notice under 20 U.S.C. § 1412(a)(10)(C)(iii)(I) to support a claim for reimbursement.

4. Appellees have met their burden of establishing a claim for reimbursement of the costs of [STUDENT]'s enrollment at Boston Higashi since January 12, 2004. Within 20 days of the date of this decision, [STUDENT]'s parents must submit to the District any and all documents related to their reimbursable costs incurred by the placement of [STUDENT] at Boston Higashi from January 12, 2004 through the date of this decision.

DECISION

Based on the foregoing, the ALJ affirms the July 8, 2005 decision of IHO. The District shall reimburse [STUDENT]'s parents the cost of [STUDENT]'s enrollment at the Boston Higashi School since January 12, 2004, and continuing until his placement is changed pursuant to law. Within 20 days of the date of this decision, [STUDENT]'s parents must submit to the District any and all documents related to their reimbursable costs incurred by the placement of [STUDENT] at Boston Higashi from January 12, 2004 through the date of this decision.

This Decision Upon State Level Review is the final decision on state level review except that any party has the right to bring a civil action in an appropriate court of law, either federal or state.

DATED AND SIGNED

October 6, 2005

MICHELLE A. NORCROSS
Administrative Law Judge

CERTIFICATE OF SERVICE

I hereby certify that on October _____, 2005, I sent a true and correct copy of the **AGENCY DECISION UPON STATE LEVEL REVIEW** by first class mail, postage prepaid to the following:

Jack D. Robinson, Esq.
Spies, Powers and & Robinson, P.C.
1660 Lincoln St., Suite 2220
Denver, CO 80264

W. Stuart Stuller, Esq.
Cheryl M. Karstadt, Esq.
Caplan and Ernest, LLC
1800 Broadway, Suite 200
Boulder, CO 80302

Charles Masner
Colorado Department of Education
201 East Colfax Avenue
Denver, CO 80203
