

**STATE OF NEVADA  
DEPARTMENT OF EDUCATION**

In the Matter of

STUDENT<sup>1</sup>, by and through his Parents,  
Appellant,

Vs.

SCHOOL DISTRICT,  
Appellee

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

August 3, 2010

Representing Parents:

Jeffrey S. Blanck, Esq.  
485 West Fifth Street  
Reno, NV 89503

Representing School District:

Paul J. Anderson. Esq.  
Maupin, Cox & Legoy  
4785 Caughlin Parkway  
Reno, NV 89520

---

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

**Procedural Background**

This action arises under the Individuals with Disabilities Education Improvement Act (IDEIA), 20 U.S.C. §1400 *et seq.* with regulations at 34 C.F.R. §300, and related Nevada state statutes and regulations at Nevada Administrative Code (NAC) Chapter 388. This appeal of the decision of an Impartial Hearing Officer (IHO) dated June 28, 2010, was timely filed with the Nevada State Department of Education (NDE) on July 8, 2010, pursuant to 34 C.F.R. §300.514 (b) (2) and NAC 388.315. The hearing below was held on May 24 and 25, 2010.

Parents will henceforth be referred to, interchangeably, as Appellants or Parents. The School District will be referred to, interchangeably, as School District or Appellee. Exhibits will be cited as: Parents' exhibits as P-0001 through P-0085; School District's exhibits as SD-0001 through SD-0424; IHO's exhibits as H-1 through H-18; Nevada State Department of Education exhibits as NDE File (not numbered); and State Review Officer File as SRO-1 through SRO-6.

The SRO was appointed by NDE on July 13, 2010 (NDE File) and the record from below was received by the SRO on July 14, 2010 (Ex. SRO-1). The SRO scheduled a Case Management Conference by conference telephone call for July 20, 2010, (Ex. SRO-2) and provided the Parties with a summary memorandum of that conference on July 21, 2010 (Ex. SRO-6). At the Case Management Conference and as summarized in this memorandum, the issues on appeal were clarified and the Parties agreed that no additional evidence would be offered and that briefs were not necessary. The SRO's decision was due on August 7, 2010.

**Summary of the Case**

The Student was referred to Nevada Early Intervention Services (NEIS) at the age of seventeen months, which provided several evaluations in 2004. The Medical Director reported delays in language, fine motor, cognition and social/emotional areas. In 2007, Student's Neurologist reported severe hyperactivity and autistic behaviors secondary to prenatal methamphetamine exposure. The School District identified him as Autistic in 2007, on the basis of a diagnosis by his Pediatrician.

Subsequent School District evaluations showed that autistic symptoms were mild, while Attention Deficit Hyperactivity Disorder (ADHD) remained a problem as well as Student's medical issues, including high blood pressure. After a variety of evaluations in 2009 and early 2010, the School District changed Student's identification from Autism to Other Health Impaired (OHI): his Parents opposed this category and requested a hearing. When the Parents requested an independent evaluation at School District expense, the District refused, giving the reason as an evaluation by the School District had not been completed. When Parents requested an independent evaluation again, the School District filed for a hearing to defend their evaluation as appropriate. The IHO consolidated the two hearing requests.

#### **Issues on Appeal**

1. Was the IHO's decision, that the Student was eligible for special education as Other Health Impaired rather than Autism, correct?
2. Was the IHO's decision, that the evaluations submitted by the Parents subsequent to the February 2010 determination of eligibility were sufficiently considered by the School District Team, correct?
3. Was the IHO's decision that the School District's evaluation performed on or about April 29, 2010, was appropriate such that the School District is not required to fund the independent evaluation requested by Parents, correct?

#### **Findings of Fact**

This decision sets forth a Summary, Findings of Fact and Conclusions of Law. The Findings of Fact and Conclusions of Law, with deference to the IHO's decision below and certain exhibits and witness testimony cited, are not meant to exclude other supported evidence on the record. To the extent that the Procedural Summary, Summary of the Case and Conclusions of Law actually represent Findings of Fact, they should be so considered, and *vice versa*. For reference, see *SAS Institute, Inc. v. S & H Computer Systems, Inc.* 605 F.Supp. 816 (M.D. Tenn. 1985) and *Bonnie Ann F. v. Calallen Independent School District*, 835 F.Supp. 340, 20 IDELR 736 (S.D. Tex. 1993).

The Findings of Fact determined by the IHO, including a meticulous chronological narrative of the case, are adopted as stated in the decision of June 28, 2010. The history of the Student's diagnoses and special education classification, with some comments from evaluators, is summarized here, from the record and the IHO's decision: direct quotations from the record are indented.

- Medical Director, Nevada Early Intervention Services, on August 20, 2004:  
[Student] is globally delayed with a strength in gross motor skills ... He has some autistic features that warrant further screening ... Growth is excessive and frankly so is his intake ... (Ex. P-0035 through P-0037)
- Student's Neurologist on December 19, 2005:  
[Student] has severe hyperactivity and autistic behaviors secondary to prenatal methamphetamine exposure.  
This evaluator also mentioned the possibility of Fetal Alcohol Syndrome. (Ex. P-0057; Tr. 30)
- When Student entered the School District's pre-school program, he was classified as Developmentally Delayed on April 6, 2006. (Ex. SD-0309)
- Student's Pediatrician on June 18, 2007: ADHD, Autism, Developmental Delay; July 31, 2007, Autism, Behavioral problems (aggressive outbursts) ADHD. (Ex. P-0030 through P-0033)
- School District Eligibility Team on November 2, 2007: Autism "per [Pediatrician's] diagnosis". (Ex. P-0003, SD-310 and SD-311)
- An unsigned behavior plan dated December 4, 2007, listed problem behaviors as: Oppositional Defiant Behaviors, associated with Attention Deficit Hyperactivity Disorder. (Ex. SD 0140 and SD-0141)
- Behavior Plan dated September 9, 2008: to address oppositional defiant behaviors associated with ADHD and physical aggression. This one is very similar to the December 4, 2007 plan, and provides for rewards for good behavior as well as removal from class for time out when necessary. If Student will not leave the room for time out and his behavior endangers others, the room will be cleared of other students and the Case Manager will be summoned. (Ex. SD-0142 and SD-0143)

- School District Psychologist B wrote a Psycho-Educational Report dated February 26, 2009:

In summary, the examiner views [Student] as a child with average to above average cognitive abilities. [Student] entered [School District] with a significant medical portfolio and significant medical history. He has behavior issues that require support services and adult monitoring at all times. He has made significant progress over the years in terms of his socialization skills and achievement. He appears to be at grade level when considering his standardized testing. At this time, [Student] does not meet the criteria of a student who would be considered Emotionally Disturbed or Learning Disabled. The eligibility team will determine his primary (and if needed secondary) eligibility status.

[Student's] well documented medical records support his ADHD condition and continued services of specialized instruction as Other Health Impaired. The secondary eligibility of Autism should also be considered, although the results from the physician [Student's Psychiatrist, Student's Psychologist] were not available at the time of this report. Regardless of the eligibility title, the IEP team needs to develop a plan that meets [Student's] social and emotional needs as well as plans for his academic instruction. (Ex. SD-0270 through SD-0275)

- Behavior Assessment System for Children (BASC-2) questionnaires were completed by Student's Mother and Student's Special Education Teacher/Case Manager on or about February 26, 2009, as a part of Student's Psychologist's evaluation. Mother identified behaviors as clinically significant: hyperactivity, externalizing problems, withdrawal, and attention problems. She listed an at risk level in aggression. The Special Education Teacher/Case Manager found Student's hyperactivity clinically significant and aggression and externalizing problems at risk. (Ex. SD-0203 through SD-0205)
- The School District Eligibility Team on February 27, 2009, reviewed all available data and changed Student's eligibility for special education from Autism to

Other Health Impaired, with Autism as a secondary disability. (Ex. SD-0312 through SD-316)

- Student's August 21, 2009, Individualized Education Program (IEP) identified him as Other Health Impaired. (Ex. SD-0062)
- A Positive Behavior Support Plan dated September 21, 2009, included elements of the prior plan, added mention of paraprofessional support. (Ex. SD-0144)
- Student's Psychiatrist, on October 22, 2009 and again on December 11, 2009, requested that his school day be reduced to a half-day program, citing increased anxiety and an additional diagnosis of Post Traumatic Stress Disorder. Student would be provided with homebound instruction by A Plus, a computer based system. (Ex. SD-199, P-25; Tr. 43-44)

- Student's Psychologist's Report dated November 6, 2009:

... the information provided by [Student's Psychiatrist], a review of [Student's] IEP, and the results of the measures completed by [Student's Parents] all appear to be supportive of a primary diagnosis of Autistic Disorder. At the same time, many of [Student's] symptoms appear to be fairly mild or "borderline". For example, [Student's] use of eye contact, our general level of social interaction during this assessment, and the presence of creative play and social relationships all seem to be very unusual for a child with Autistic Disorder. In addition, [Student's] teacher has indicated (on the BASC-2) that [Student] seems to be well adjusted to the school environment. Thus, while [Student] currently appears to qualify for the diagnosis of Autistic Disorder, I would recommend ongoing clinical assessment to continue to evaluate whether or not [Student] meets the specific criteria for this diagnosis over time. If [Student's] symptoms significantly improve, it is likely that his diagnosis would be changed to Pervasive Developmental Disorder, Not Otherwise Specified (previously classified as "Atypical Autism"). In addition to his autistic symptoms, [Student] appears to have a sensory processing disorder.

This evaluator recommended Applied Behavior Analysis for Student. (Ex. P-0051, SD-0281)

- The BASC-2 discussed in the November 11, 2009 evaluation by Student's Psychologist had been completed by Student's classroom teacher and Student's Step-Father. Parent listed concerns about Student's difficulties with over activity, aggression, conduct problems, dysphoria, social withdrawal, attention problems and atypical behaviors. The Teacher was quoted as observing no problems with adapting to change, social skills, study skills, functional communication or demonstrating leadership in the classroom. The Student's Psychologist commented in his report:

The most parsimonious explanation [of the wide difference between the two reporters] for this finding would be that [Student] only evidences these behaviors and emotional difficulties at home and not at school. At the same time, the presence of an active IEP would seem to argue against this possibility, in that it would be very unlikely for a child with an active IEP to evidence no significant difficulties of any kind at school. (Ex. P-0051)

- Student's Individualized Healthcare Plan dated November 16, 2009, included precautions and interventions under Cardiovascular Disorders and Anaphylaxis. (Ex. SD-1 through SD-4)
- Student's Psychiatrist's Progress Note dated January 29, 2010 summarized an incident at school, as reported by Student and Parents. His assessment on that date was:

Greatly increased anxiety and disputation in his social system worsening between home and school. For [Student's] wellbeing, I feel it is necessary to have him 100% homebound for 2 weeks, then reassess. He is in the A-plus computer class for his academics that should help keep him up. I'm not sure that the school has strong enough training to deal with autism like [Student's].

No evidence was offered that the Student's Psychiatrist had contacted any School District staff concerning Student's school program, the reported incident or School District's resources for educating students with autism. Although the School District had offered to pay him to attend a meeting, he had not responded. Parents had refused consent for School District staff to discuss Student with his Psychiatrist, except questions about his medications. (Ex. P-0009 and P-0010)

- A Positive Behavior Support Plan, dated March 31, 2010, listed problem behaviors as verbal or physical aggression toward other students and the function of this behavior was given as avoidance and self-regulation. Replacement behavior was “keep his hands and feet to himself”. Intervention was that Paraprofessional would provide redirection and reinforce positive behavior. Consequences for continued misbehavior listed:
  - ... remove if over stimulated from specials or classroom; redirect if needed; [Student] will not line up with class; follow school disciplinary actions, call parent to inform of incident, 1<sup>st</sup> offense – loss of recess. Implement school disciplinary plan as below if [his behavior] escalates. (Ex. SD-0145)
- Student’s Psychiatrist, on April 19, 2010, requested that his school day be increased from two hours to three hours a day. (Ex. SD-199)
- The School District reviewed all available information about the Student in preparation for an Eligibility Team meeting on April 29, 2010. School District Psychologist A compiled all prior evaluative data, observations and grades. Student’s social and emotional issues were identified as: struggles with behaviors related to aggression and conduct problems and oppositional defiance and bullying; his atypical behaviors were rated in the at risk range. Evaluations for Speech/Language and Occupational and Physical Therapy were included with all psycho-educational evaluations and reports. (Ex. SD-0191 through SD-269)
- In the round of evaluations for the April 29, 2010, meeting, the School District selected professionals who had not previously worked with the Student to observe him for the Autism Diagnostic Observation Scale (ADOS). Parents refused to participate in an Autism Diagnostic Interview-Revised (ADIR), a necessary part of this evaluation for Autism. Staff members mentioned Student’s good social skills, eye contact, interaction with adults and peers and grade level school performance in support of his placement in a regular classroom for 95% of the school day. (Ex. SD-0252 through SD-0256)

- Results of BASC-2 reported at the April 29, 2010, meeting:
  - Student's Regular Education Teacher B identified aggression and withdrawal as at risk levels.
  - Student's Paraprofessional A rated aggression as clinically significant and conduct problems, externalizing problems, attention problems, and atypicality as at risk.
  - Student's Paraprofessional B rated aggression and externalizing problems as clinically significant and conduct problems, atypicality, attention problems and depression at risk. (Ex. SD-0206, SD-0209, SD-0212)
- Student's Regular Education Teacher was reported on April 29, 2010, to have rated Student's at risk adaptive skills as anger control, bullying, developmental social disorders and emotional self control. (Ex. SD-0210 and SD-0211)
- On April 29, 2010, the School District Eligibility Team re-affirmed earlier decisions that Student's special education eligibility was based on Other Health Impairment. (Ex. SD-317)
- The School District Autism Specialist was asked to join the team that evaluated Student prior to the 4/29/10 Eligibility Meeting. She had not seen or evaluated Student before that time. She has had professional training and experience with the ADOS, which was used to evaluate Student. She characterized the Student as having "a lot of social reciprocal kinds of behavior" and "social communication that was appropriate to the situation", things that she would not expect to see in children with Autism. (Tr.272-275)

### **Conclusions of Law**

The standard for determining whether a student in need of special education has received a free appropriate public education begins with the two-pronged test established by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*, 459 U.S. 176 (1982). First, the procedural requirements of the IDEIA must have been met by the school district. Second, the IEP for the student must be reasonably calculated to enable the student to receive educational benefit. While Parents have questioned the School District's actions on numerous occasions, no evidence of

serious procedural problems appears in the record. Student's IEP addresses all areas of identified concern and he has demonstrated significant progress.

The issue of eligibility is addressed at 34 C.F.R. §300.8: (a) General. (1) *Child with a disability* means a child evaluated in accordance with §§300.304 through 300.311 as having [list of disabilities, including autism and other health impairment] **and who, by reason thereof, needs special education and related services** (emphasis added).

Definitions are provided in Federal and Nevada State regulations:

34 C.F.R. §300.8 (c) (1) (i): *Autism* means a developmental disability significantly affecting verbal and nonverbal communication and social interaction, generally evident before age three, that adversely affects a child's educational performance. Other characteristics often associated with autism are engagement in repetitive activities and stereotyped movements, resistance to environmental change or change in daily routines, and unusual responses to sensory experiences.

(ii) Autism does not apply if a child's educational performance is adversely affected primarily because the child has an emotional disturbance, as defined in paragraph (c) (4) of this section.

(iii) A child who manifests the characteristics of autism after age three could be identified as having autism if the criteria in paragraph (c) (1) (i) of this section are satisfied.

NAC 388.028 "Autism" defined. (NRS 385.080) "Autism" means a spectrum disorder which:

1. Significantly affects the verbal and nonverbal communication and social skills of a person and is often characterized by repetitive activities and stereotyped movements, resistance to changes in environment or daily routine and responding to sensory experiences in an unusual manner;
2. Is usually apparent before the age of 3 years; and
3. Adversely affects the educational performance of a pupil causing significant delays or irregular patterns in learning, or both.

The term includes, without limitation, a group of developmental disorders such as autistic disorder, Asperger's disorder, atypical autism, pervasive developmental

disorder and other disorders that share the characteristics described in subsections 1, 2 and 3.

34 C.F.R. §300.8 (9) *Other health impairment* means having limited strength, vitality, or alertness, including a heightened alertness to environmental stimuli, that results in limited alertness with respect to the educational environment, that -

- (i) is due to chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, sickle cell anemia, and Tourette syndrome; and
- (ii) Adversely affects a child's educational performance.

NAC 388.046 "Health impairment" defined. (NRS 385.080) "Health Impairment" means an impairment that limits the strength, vitality or alertness of the pupil, including, without limitation, a heightened alertness to environmental stimuli which results in limited alertness with respect to the educational environment and which:

1. Is caused by chronic or acute health problems such as asthma, attention deficit disorder or attention deficit hyperactivity disorder, childhood disintegrative disorder, diabetes, epilepsy, a heart condition, hemophilia, lead poisoning, leukemia, nephritis, rheumatic fever, Rett's disorder and sickle cell anemia; and
2. Adversely affects the educational performance of the pupil.

Specific procedures for determination of eligibility for special education of children with autism are laid out at NAC 388.387 (2). The School District must assess the Student's health and medical status; developmental history, including, without limitation, the rate and sequence of development and a clear statement of strengths and weaknesses; cognitive abilities; social and emotional condition in multiple settings; academic achievement; adaptive skills; and speech, language and other communication skills. The team must consider: sensory regulation; self-help and independent living skills; behavior problems; symbolic and imaginative play; activities and special interests; and motor skills. These requirements were in place prior to Student's starting school at the School District. The School District's Eligibility Team on February 27, 2009, and April 29, 2010, met the specific requirements at NAC 388.387 (2).

The Parents contend that the School District Eligibility Team did not adequately consider evaluations made by Student's physicians. The requirement at 34 C.F.R. §300.502 (c) (1) for School District consideration of evaluations secured by Parents at private expense was interpreted in the case of *Board of Education of the Town of Ridgefield v. State of Connecticut Department of Education*, 10 F.3<sup>rd</sup> 87, 20 IDELR 889 (2<sup>nd</sup> Cir. 1993). The court upheld the summary of an independent evaluation presented by a school district staff member at a meeting attended by the parents, with discussion, as adequate consideration. At the April 29, 2010 Eligibility Team meeting, School District Psychologist A presented a summary of all prior evaluations by the School District and those provided by Parents. There was an opportunity for discussion. Parents left this meeting before it concluded, and rejected the suggestion that the meeting re-convene on another day to accommodate them. (Tr. 441-442)

The School District's Director of Special Education, Case Manager for the Student, School Psychologist A and School Psychologist B stated on the record of the hearing below that while a change from "Other Health Impaired" to "Autism" would trigger another review of the Student's records and possible additional testing, they believed that the Student's IEP would remain largely unchanged, because the IEP is designed to address the Student's individual needs. (Tr. 88, 134-135, 245, 432)

In spite of a shortened day initiated pursuant to Student's Psychiatrist's recommendation, Student is performing on or above grade level. Two areas that require serious attention, his behavior and his medical concerns, are addressed effectively in the current IEP. Paraprofessional services are provided, one on one, from the moment the Student is met at the school bus to the moment that he boards the bus to return home. Two trained and licensed paraprofessionals, with special training in Autism, cover the entire school day, in shifts, and there is another trained and licensed paraprofessional available if needed. Paraprofessional support for the Student includes monitoring behavior and attention, intervening when necessary and recording behavioral data for review. (Tr. 534-550)

**Discussion**

The Student's school progress, bringing him to grade level or above in first grade, is a tribute to his family, his teachers and his own spirit. The effects of his disabilities are now more manageable in school, due in part to medication and psychiatric treatment as well as an IEP that includes full-time paraprofessional support. While he has a documented history of autistic-like behavior in his early years, his scores on the ADOS, compiled by professional observers, reflect no evidence of autism interfering with his education at this time. His current behavioral issues at school do not reach the level of emotional disturbance, and can be controlled with the behavior plan in place. He does require close observation concerning his ADHD, medical issues and his occasional attempts to leave the classroom. The data collection system in place would track any increase in autistic behavior patterns, should they occur.

Parents' reluctance to permit communication between School District staff (except the school nurse) and Student's Psychiatrist and other medical providers and to participate in some of the rating scales requested by the School District has limited the information available to both the Eligibility Team and the IEP team. Likewise, the Student's Psychiatrist's and Psychologist's lack of information about Student's behavior and performance in school limits the credibility of their school recommendations. Student's unusual and serious combination of problems requires openness and candor between home and school, and all professionals working with Student. While agreement may not always be possible, free exchange of information would benefit the Student.

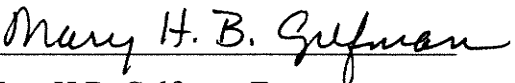
**Decision**

1. The Student is eligible for special education as Other Health Impaired, as the IHO correctly ruled.
2. The School District Eligibility Team considered the information provided by Parents and planned their evaluations to determine whether the Student's IEP and school placement were appropriate to his needs, as the IHO correctly ruled.
3. The evaluations discussed at the April 29, 2010, Eligibility Team Meeting were appropriate. The IHO's ruling denying funding for an independent evaluation was correct.

**Notice of Appeal Rights**

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

Dated this third day of August, 2010.

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