

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

**CASE NO. EA 20080001**

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**DECISION UPON STATE LEVEL REVIEW**

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**[STUDENT], A STUDENT, BY HIS PARENTS, [PARENT] AND [PARENT],**

**Appellants,**

**v.**

**BOULDER VALLEY SCHOOL DISTRICT RE-2,**

**Appellee.**

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This matter is the state level review before Matthew E. Norwood, an Administrative Law Judge (“ALJ”) of the Office of Administrative Courts (“OAC”) as described in 20 U.S.C. Section 1415(g). The subject of the review is a decision of Richard G. Fisher, an Impartial Hearing Officer (“IHO”), pursuant to the Individuals With Disabilities Education Act (“IDEA”), 20 U.S.C. Sections 1400 *et seq.*; the regulations at 34 C.F.R. Section 300 and the regulations to the Colorado Exceptional Children’s Educational Act (“ECEA”).<sup>1</sup>

In this appeal Karen E. Wilcynski, Esq. represents the Appellants and W. Stuart Stuller, Esq. and Kristin C. Edgar, Esq. represent the Appellee (“School District”).

**Scope of Review**

The ALJ on state level review is to issue an “independent” decision. 20 U.S.C. Section 1415(g). In the context of court reviews of state level decisions, 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). It is appropriate to apply this same standard by analogy at the state administrative review level. Thus it is sensible for the ALJ to give deference to the IHO’s findings of fact and to accord the IHO’s decision “due weight,” while reaching an independent decision based on a preponderance of the evidence.

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<sup>1</sup> The ECEA is at 1 CCR 301-8. All citations to the ECEA will be made by Rule number only.

## Summary

The student will be referred to as “[STUDENT]” He suffers from autism. [STUDENT] would have started sixth grade, middle school in the School District, for the 2007-2008 school year. [STUDENT]’s parent’s wanted his individualized education program (“IEP”) to contain four points to help with his transition to middle school. Those four points were:

- placement with existing friends;
- training in autism issues for [STUDENT]’s teachers;
- a small, calm, quiet classroom with a low student/teacher ratio; and
- a small school campus.

The School District did not agree to these request and [STUDENT]’s parents placed him in a private school. [STUDENT]’s parents requested a hearing where they challenged the School District’s failure to include the requested items in the IEP and asked the School District, pursuant to applicable law, to pay for [STUDENT]’s education at the private school.

A hearing was held before the IHO who rendered a decision favorable to the School District. [STUDENT]’s parents then appealed that decision to the ALJ. The ALJ finds and concludes, as did the IHO, that the IEP was properly formulated and that the School District is not responsible for [STUDENT]’s tuition at the private school.

The findings of fact are generally arranged in chronological order.

## Findings of Fact

Based on the record below, the ALJ enters the following findings of fact:

### *The Student*

1. [STUDENT] was born [DATE OF BIRTH] and was [AGE] or [AGE] years old for most of the events discussed in this Decision. [STUDENT] suffers from autism. Dr. Bruce Casey is a psychologist who has evaluated [STUDENT]. Dr. Casey characterizes [STUDENT]’s condition as “high-functioning autism” or “HFA.” [STUDENT] has specific deficits in the ability to communicate effectively, to deal with social nuances and has difficulties with relationships. He has poor “social reciprocity,” in other words, difficulty understanding other people’s points of view and responding effectively. [STUDENT] also has strong tendencies toward following his special interests in his own unique direction and is not responsive to the social environment as is typical of other children. Furthermore, loud or stimulating environments may be overwhelming, but if things are too flat or routine, he becomes bored.

2. [STUDENT] has lower than normal muscle tone and does not perform well in sports, which tends to isolate him from his peers.

3. Because [STUDENT] was slow in language development, the diagnosis of Asperger's syndrome is not applicable to him.

4. Despite these conditions, [STUDENT] is very bright, can reason well and has an extremely high I.Q. Children with autism and a high I.Q. are referred to as "twice-exceptional."

*[STUDENT]'s Schooling History*

5. [STUDENT] had a hard year in first grade in a school in [OTHER STATE]. [STUDENT] felt criticized, worthless, unsuccessful and unmotivated.

6. [STUDENT]'s parents moved to Boulder and enrolled [STUDENT] in the [SCHOOL] in November of the school year, believing the school would be well suited for [STUDENT]. [STUDENT] struggled at the [SCHOOL] and had conflicts with teachers and other students. He was expelled in January of the school year.

7. [STUDENT] then started at a private school called [PRIVATE SCHOOL] that specialized in twice-exceptional students. [STUDENT] made friends and liked [PRIVATE SCHOOL]. [STUDENT]'s parents believe that [STUDENT] made friends because many of the children at [PRIVATE SCHOOL] were "quirky," like him. However, [PRIVATE SCHOOL] was too expensive for [STUDENT]'s parents and [PRIVATE SCHOOL] was having financial troubles. [STUDENT]'s parents began looking for schools in the Boulder Valley School District. [STUDENT] began to split time between [PRIVATE SCHOOL] and [ELEMENTARY SCHOOL] in the School District at the end of his third grade year.

8. [STUDENT] began the fourth grade full time at [ELEMENTARY SCHOOL]. [STUDENT] had an IEP in fourth and fifth grade while at [ELEMENTARY SCHOOL]. [ELEMENTARY SCHOOL] has approximately 350 students. [ELEMENTARY SCHOOL] also has an open campus and is sometimes noisy. The classrooms are separated by bookshelves and partial dividers, not by walls.

9. [STUDENT]'s fourth grade teacher had not taken a course in HFA or twice-exceptional students, although she has had students with a variety of learning disabilities in her classroom over the years.

10. The fourth grade teacher was strict and imposed a great deal of structure, rules and expectations. [STUDENT] and his fourth grade teacher had conflicts and [STUDENT]'s teacher issued him a "yellow card," a demerit early in the year. Other children upon receiving a yellow card might become a little upset or embarrassed, but with [STUDENT], because of his autism, this caused a major emotional meltdown and he had to be retrieved from school. Over the next few weeks [STUDENT] stated that he was worthless, bad, a bad student and that he might step in front of a bus. It was during his problems in fourth grade that [STUDENT]'s parents first took him to see Dr. Casey.

11. Despite these problems at school, [STUDENT] received A's and B's as grades in fourth grade and made academic progress. In the spring of that year things began to improve for [STUDENT] emotionally and he was also able to make friends.

[STUDENT]'s teacher also made adjustments in her approach to [STUDENT] after consulting with [STUDENT]'s special education teacher.

12. For the transition into fifth grade the School District requested that [STUDENT]'s parents list six of [STUDENT]'s friends. Of the six friends listed, five were in [STUDENT]'s fifth grade class.

13. In contrast to fourth grade, [STUDENT] had a good fifth grade experience with teacher Barb Steiner, who [STUDENT]'s parents specifically requested to be his teacher. [STUDENT]'s parents attribute [STUDENT]'s success in fifth grade to Ms. Steiner. Ms Steiner helped introduce [STUDENT] to his fifth grade class late in the fourth grade year.

14. Ms. Steiner took training in teaching children with autism between [STUDENT]'s fourth and fifth grade years. Ms. Steiner believes that her training helped her tremendously and, in particular, in not overreacting to rude comments [STUDENT] would make.

15. There were 26 students in his [STUDENT]'s fifth grade class. At times, Ms. Steiner was required to devote 100% of her time to [STUDENT]. [STUDENT] had a quiet place that he had permission to go to if he felt it was necessary. Also, he was permitted to skip assemblies.

16. [STUDENT]'s score on the CSAP test in fifth grade was "advanced," whereas it was only "proficient" in fourth grade. His grades in fifth grade were also A's and B's.

17. Cheryl Winter was [STUDENT]'s special education teacher at [ELEMENTARY SCHOOL]. Dr. Casey has a high opinion of Ms. Winter's abilities as a special education teacher. Based on Ms. Winter's opinion, the ALJ finds that a class size of 26 students was not harmful to [STUDENT]'s success. Also based on her opinion, the ALJ finds that a small, quiet campus is not required for [STUDENT] to be successful.

18. Cathy Cohn was [STUDENT]'s school psychologist at [ELEMENTARY SCHOOL].

#### *The Transition to Middle School*

19. In December 2006, [STUDENT]'s parents met with School District personnel Cheryl Winter, Cathy Cohn, Susan Weissberg and Heather Van Horn to discuss [STUDENT]'s sixth grade placement. In the Boulder Valley School District middle school begins in the sixth grade. Had [STUDENT]'s parents taken no action, he would be expected to attend Nevin Platt Middle School because he lived in the attendance area for that school. Nevin Platt has approximately 550 students.

20. By December 2006 [STUDENT]'s parents knew that [STUDENT] would attend Nevin Platt. At the December 2006 meeting, [STUDENT]'s mother was encouraged to seek his placement at one of four School District middle schools: Platt CHOICE (a separate school within Nevin Platt), Southern Hills, Summit or Manhattan.

21. After the December 2006 meeting, [STUDENT] visited three of the four recommended schools. [STUDENT] preferred Summit.

22. In January 2007 [STUDENT]'s parents completed an open enrollment application to attend a school other than Nevin Platt. Open enrollment is a lottery process by which students can be admitted to particular schools. Their first choice was Summit Charter Middle School and their second choice was Platt CHOICE. The open enrollment application form allowed for a third and fourth choice as well, but [STUDENT]'s parents did not make such choices. Specifically they did not select Southern Hills or Manhattan as a choice.

23. Southern Hills has approximately 475 students and a student/teacher ratio of 25-30 to 1.

24. [STUDENT]'s parents believed that Summit Charter Middle School had a lower student/teacher ratio and had students similar to [STUDENT]. Summit had approximately 300 students.

25. In February 2007 [STUDENT]'s parent's learned that [STUDENT] had not been accepted to his first or second choices through open enrollment. Based on his position on the waitlists, there was no real chance that [STUDENT] would be admitted to Summit or Platt CHOICE through the open enrollment lottery process.

26. In March 2007 [STUDENT]'s parents asked the School District that [STUDENT] be transferred from Nevin Platt Middle School to Summit Charter Middle School through the administrative transfer process. They supported this request with the following statement (footnotes omitted):

In particular, we believe the larger schools are inappropriate for [[STUDENT]] primarily because of the higher student-to-teacher ratios. In addition we believe there is a greater likelihood for bullying and social prejudice, and a substantial likelihood for noise, transitions and physical demands to overwhelm [[STUDENT]] in his diagnosed deficit areas.

27. On March 28, 2007, Kathy Mitze, the Open Enrollment Coordinator telephoned [STUDENT]'s mother and told her that the request for administrative transfer had been denied for the reason that [STUDENT]'s needs could be met at any School District middle school.

28. On April 11, 2007 Andrea Kutinsky of the School District e-mailed [STUDENT]'s father and reiterated the School District's position that [STUDENT]'s needs could be met at any School District middle school.

*The May 31, 2007 IEP*

29. In anticipation of [STUDENT]'s transition to sixth grade and middle school, a group of School District employees was formed to make up [STUDENT]'s IEP team. In anticipation of the meeting of the IEP team, [STUDENT]'s parents created a

document (Respondent's exhibit 3) setting out what they wanted in [STUDENT]'s IEP. [STUDENT]'s parents' requests included the following:

a. That [STUDENT] be placed with existing friends or, failing that, that efforts be made to help him make friends. [STUDENT]'s parents requested that there be a pool of kids that [STUDENT] could fit with, which they described as "twice exceptional kids, ASD [autism spectrum disorder] kids, 'nerdy' kids."

b. That [STUDENT]'s teachers be trained in ASD. [STUDENT]'s parents listed 30 bullet points of teaching methods for [STUDENT].

c. That [STUDENT] have a small, calm, quiet classroom with a low student/teacher ratio.

d. A small campus to reduce anxiety about getting lost or overwhelmed.

30. An IEP meeting was held May 31, 2007. The School District prepared a document setting out the IEP (Respondent's exhibit 5). The IEP document set out detailed goals and objectives for [STUDENT], but it did not specify a specific school. Also, the School District refused to list being taught with friends, teachers with training in ASD and classes with low student-teacher ratios in the IEP document.

31. On the other hand, the IEP provided for five hours of weekly direct in general classroom consultation with the special education teacher and 30 minutes with the school psychologist. [STUDENT] was to receive special education and related services 33% of the time. The IEP document listed the following accommodations and modifications, some of which also were in the 30 bullet points listed by [STUDENT]'s parents:

- An option not to attend assemblies;
- An option to leave the room, if necessary;
- Pre-teaching classroom procedures and expectations;
- Keeping [STUDENT]'s seat in a consistent place out of traffic;
- The provision of predictability, flexibility and structure in [STUDENT]'s day;
- The provision of assistance with completion of a daily planner and organization of assignments;
- The provision of opportunities to listen to [STUDENT]'s needs and issues and assistance with negotiation and problem solving when issues arise;
- Minimization of oral presentations;
- Notification of schedule changes;
- Allowance of alternative ways to demonstrate learning (e.g. poster vs. a written report);

- The provision of copies of lecture notes (from peers, overheads, instructor notes, etc.);
- Allowance of alternative options for written work (if assignments are lengthy);
- Allowance of possibilities to read lecture notes and/or other materials on the topic presented.

*Additional Findings of Fact Regarding Open Enrollment and Administrative Transfer*

32. In a letter dated May 30, 2007, [STUDENT]'s parents wrote to Chris King, the Deputy Superintendent of the School District, requesting a review of the denial of administrative transfer. [STUDENT]'s father outlined his son's schooling history and concluded, in part, as follows:

Platt is a large, chaotic school, where [[STUDENT]] has no friends, where he has fewer prospects of making friends, where he is more likely to stand out from mainstream neuro-typical students and be shunned or bullied by them, where larger busier classes are likely to trigger his sensory issues, where students/teacher ratios are larger and teachers are less likely to notice warning signs or to make adjustments, and which [[STUDENT]] is predisposed to reject based on his negative impression. **Consequently, placing [[STUDENT]] at Platt substantially increases the risk of a bad outcome, including withdrawal, depression or even suicide.** [Emphasis in the original.]

...

We believe [[STUDENT]'s] circumstances warrant a transfer to a smaller, lower student/teacher ratio program to decrease the very real and substantial risk of dire consequences that result from an inappropriate placement;

....

33. Chris King wrote back in a letter dated June 7, 2007. He stated that the special education staff had determined that [STUDENT]'s special education needs could be met at Platt. As to the denial of the administrative transfer, Mr. King wrote, in part, as follows:

Administrative Transfers are generally granted when circumstances beyond a family's control change after the Open Enrollment period has ended. Administrative Transfer is not designed or intended to circumvent the Open Enrollment process. You applied as a first choice for Summit, you are 59 on a waitlist of 81. You applied as a second choice for Platt Choice and you are 48 on a waitlist

of 60. There is virtually no way your son will get into either of these programs through the waitlist process. The question before me, then, is whether your son's circumstances are unique enough for me to leapfrog him over other students on the waitlists and assign him to Summit or Platt Choice.

Unfortunately, I do not believe granting a transfer to either of these schools is appropriate. Many of the families ahead of yours on the waitlists have similar reasons for desiring one of these highly coveted schools, and it would not be fair to deny them opportunities while meeting your son's needs.

....

You state in your letter that your son would benefit from a small school with small class sizes. Casey Middle School is the same size as Summit and has very small class sizes. If you are interested I will allow a transfer for your son for Casey. I am comfortable making this offer because there is no waitlist at Casey, so no other students would be harmed by this move.

#### *Events Leading Up to the Hearing Before the IHO*

34. In a letter dated June 18, 2007, Jack Robinson, counsel for [STUDENT]'s parents, wrote to Melissa Mequi, an attorney with the School District's Office of Legal Counsel, and requested mediation.

35. In a letter dated June 21, 2007, Ms. Mequi responded that she was not sure mediation would serve any purpose if [STUDENT]'s parents were hoping that mediation would result in [STUDENT] attending Summit or Platt CHOICE. Ms. Mequi's letter identified five middle schools without a wait list, including the schools Angevine, Casey and Manhattan. She referenced Mr. King's statement that Casey Middle School was the same size as Summit Middle School and had small class sizes. Ms. Mequi also stated that: "Federal law does not mandate a specific school size, class size or teacher-pupil ratio for children with disabilities."

36. In the meantime [STUDENT]'s parents had investigated Casey Middle School, which, as stated by Mr. King, had small class sizes. While they liked the principal, they believed Casey was not a good fit for [STUDENT]. They believed it was a boisterous place, that none of [STUDENT]'s friends attended and that because of site reconstruction and relocation issues that it was likely to be and feel unstable or chaotic. [STUDENT]'s parents communicated their opinion regarding Casey to Susan Weissberg of the School District in an e-mail dated June 20, 2007.

37. On June 24, 2007, [STUDENT]'s father e-mailed Ms. Mequi. His e-mail stated in part that [STUDENT]'s parents were not trying to circumvent the open enrollment process. Rather, [STUDENT]'s father expressed that [STUDENT]'s parents

wanted the School District to implement a program for [STUDENT] and all HFA children and that the program did not need to be tied to a particular school.

38. In a letter dated July 2, 2007 Ellen Miller-Brown of the School District wrote to [STUDENT]'s father asking him to make a decision regarding [STUDENT]'s placement. She identified Angevine, Casey, Centennial and Manhattan as schools with low student teacher ratios running from 18 to 20 students to one teacher. The ALJ finds as fact that these student teacher ratios applied at those four schools. Ms. Miller-Brown stated that as soon as she was to know [STUDENT]'s parents' decision, she could arrange for summer training for the staff and faculty. She proposed designing a plan "so that the best practices of inclusion with specific support will occur." She finally proposed a meeting with the special education teacher, the counselor and the principal to review all plans.

39. Ms. Miller-Brown also wrote, and the ALJ finds as fact, that three of [STUDENT]'s friends would attend Southern Hills. She went on to state:

After spending nearly 20 years as a teacher and administrator at the middle level, I know how these groups of friends ebb and flow. Sometimes as friends move on to other friends, that transition can be tough. It is the responsibility of the middle school faculty and staff to support students through these transition periods, helping them to land on their social feet. Even if [[STUDENT]] attended the same school as his friends, it is unlikely that they would retain their original relationship for very long.

The ALJ finds that this description of the ebb and flow of friendships in middle school is an accurate one. The ALJ further finds that middle school faculty and staff in the School District do support children socially.

40. [STUDENT]'s father wrote back by e-mail July 10, 2007 and requested a due process hearing. In his letter, [STUDENT]'s father identified the following accommodations he sought, which the School District had denied:

- High functioning autism/autism spectrum disorder trained general education teachers, special education teachers and para professionals.
- To be placed with existing friends, including adult staff, such as Cathy Cohn, if possible.
- Low enough student/teacher ratios, probably 16 or 18 to 1.
- A small, calm campus.

41. [STUDENT]'s father also wrote that an acceptable resolution would be:

- To add the requested items to [STUDENT]'s IEP.
- [STUDENT] to be placed in the regular education program at Southern Hills Middle School or Summit Middle School where his friends would attend

and that [STUDENT]'s general education teachers would receive HFA training. Alternatively, [STUDENT]'s father proposed that the School District assemble an HFA program that would provide low student/teacher ratios, teachers trained in autism issues and inclusion in regular classrooms when appropriate.

- Reimbursement of attorney fees and other costs.

42. [STUDENT]'s parents were willing to compromise some of their four requests if others could be met; they did not take the position that every one of their requests be granted.

43. [STUDENT]'s IEP at [ELEMENTARY SCHOOL] contained none of the four points requested by [STUDENT]'s parents for middle school.

44. [STUDENT]'s father's July 10, 2007 e-mail did not identify as a deficiency the fact that the IEP did not specify a particular school.

45. Sometime after the July 10 e-mail, [STUDENT]'s parents met with a School District representative to resolve the dispute but were unable to do so. Then on August 23, 2007, [STUDENT]'s parents wrote a letter to Jennifer Rodriguez of the Colorado Department of Education copied to the School District. The letter stated that [STUDENT] had been enrolled in [PRIVATE SCHOOL 2], a private school, and asked that the due process hearing also resolve [STUDENT]'s parents' claim for reimbursement for the tuition at [PRIVATE SCHOOL 2]. This request was allowed.

#### *Findings of Fact Relative to the Appellants' Requests*

46. There was insufficient evidence that training in ASD, HFA or twice exceptional status for [STUDENT]'s middle school teachers was required for his IEP. That [STUDENT]'s fifth grade teacher had this training does not demonstrate that this training was required. The ALJ finds that [STUDENT]'s conflict with his fourth grade teacher was, in part, a personality conflict. There is insufficient evidence that this conflict could have been avoided with training for the teacher.

47. The May 31, 2007 IEP provided for five hours of weekly direct in general classroom consultation with the special education teacher and 30 minutes with the psychologist. [STUDENT] was to receive special education and related services 33% of the time. If [STUDENT]'s middle school teacher or teachers had conflict with [STUDENT] based on his disability it is more likely than not that the teacher could rely on these special education resources to make adjustments. This adjustment occurred in fourth grade where [STUDENT] made good academic achievement and where the fourth grade teacher had no special training in autism issues. Of course, this is not to say that any conflict with [STUDENT]'s middle school teachers is unacceptable. Some conflict may be inevitable if teachers are to maintain order in the classroom.

48. Furthermore, the proposed IEP provided the option to not attend assemblies and to leave the room. It required that classroom procedures and expectations be pre-taught. It provided for predictability, flexibility and structure in [STUDENT]'s day as well as other curricular accommodations and modification. All of

these procedures produced an IEP reasonably calculated to enable the [STUDENT] to receive educational benefits.

49. The ALJ also finds that [STUDENT]'s IEP did not need to include the presence of existing friends in order to enable him to receive educational benefits. The ALJ makes this finding of fact based on Ms. Miller-Brown's discussion of the ebb and flow of friendships in middle school and on the fact that the School District middle school faculty and staff supports students socially. The ALJ makes this finding also based on the fact that [STUDENT] was able to make friends in the fourth grade after transitioning from [PRIVATE SCHOOL 1] and was also able to make friends at [PRIVATE SCHOOL 1] itself.

50. Finally, the ALJ finds that a small, quiet campus was not required for his IEP. [STUDENT] had a successful second half to his fourth grade year and a successful fifth grade year in [ELEMENTARY SCHOOL], a noisy school without class walls and with a student teacher ratio of 26 to 1.

*[PRIVATE SCHOOL 2]*

51. [PRIVATE SCHOOL 2] has a middle school and a high school and has a small campus. It has only 74 students, 27 of whom are in the middle school. The student/teacher ratio at [PRIVATE SCHOOL 2] is approximately 10-12 to 1.

52. There is insufficient evidence that the teachers at [PRIVATE SCHOOL 2] have training in autism. Only one of [STUDENT]'s friends attends [PRIVATE SCHOOL 2].

53. [STUDENT] gets good grades at [PRIVATE SCHOOL 2]. Social interactions, though, are not easy for him. [PRIVATE SCHOOL 2] does not have a school psychologist or a speech language pathologist.

*Hearing Before the IHO*

54. The hearing before the IHO occurred October 15-17, 2007. [STUDENT]'s parents represented themselves and the School District was represented by Mr. Stuller.

55. The IHO identified the issues to be determined as:

I. Is the Individualized Education Plan (IEP) developed after an IEP meeting and dated May 31, 2007, reasonably calculated to provide the Student with a meaningful educational experience consistent with IDEA?

II. Is the Respondent wholly or partially responsible to pay the tuition and other expenses at [PRIVATE SCHOOL 2] for the Student for the 2007-2008 school year?

56. On December 10, 2007, the IHO issued Findings of Fact, Conclusions of Law, and Order finding in favor of the School District as to both points.

*Appeal to the ALJ*

57. On January 11, 2008 [STUDENT]'s parents appealed the IHO's decision to the OAC. The Notice of Appeal did not identify failure to specify a particular school

as a defect in the IEP. The Notice of Appeal did assert that the IEP was inconsistent with the IDEA and did identify failure to provide a free appropriate public education as an issue.

58. On January 29, 2008 a status conference was held before the ALJ. At the status conference counsel for both parties agreed that evidentiary hearing as described in Rule 6.02 (7)(j)(iii)(B)(III) need not be scheduled. At no time have the Appellants asked to submit any evidence that was not admitted at the hearing before the IHO.

59. At the January 29, 2008 status conference a briefing schedule was set out for the simultaneous filing of opening and response briefs.

60. In its briefs the School District has requested that the Appellants be required to pay the School District's reasonable costs and fees be assessed.

61. In the Appellants' Opening Brief the Appellants assert that the IHO failed to provide a fair and impartial hearing. The Appellants give an example at the first volume of the transcript, line 17 of page 68 to line 13 of page 69 where the IHO sustained an objection on the ground of speculation. The Appellants do not argue that the evidence was not speculative. Rather they argue that the IHO should have provided a less formal process. The Appellants made additional citations to the record of actions by the IHO they regarded as overly formal. But nowhere in the opening or response briefs of the Appellants do they identify with specificity any relevant evidence or testimony that was not admitted and explain how admission of that evidence would have affected the outcome.

62. Oral argument was held before the ALJ March 3, 2008. At oral argument, counsel for the Appellants stated that Appellants believe that the record is complete and sufficient for their purposes.

63. On March 4, 2008 the Appellants submitted a Motion to Clarify and Motion for Leave to Supplement Additional Authority ("Motion"). The Motion sought to clarify that the Appellants were contending that the IHO's alleged denial of a fair and impartial hearing constituted a denial of a free appropriate public education. The additional authority was a decision by the Colorado Department of Education Federal Complaints Officer Keith Kirchubel dated February 15, 2008.

64. On March 5, 2008 the School District responded. The ALJ has considered the Motion and has reviewed the February 15 decision.

### **Conclusions of Law**

Based on the foregoing Findings of Fact, the ALJ enters the following Conclusions of Law:

*Conduct of the Hearing Before the IHO*

1. Absent any indication of the nature of any testimony or evidence that the IHO disallowed, and absent a showing that such disallowal was prejudicial, the ALJ will not review the IHO's conduct of the hearing.

*Standards for Hearings Under the IDEA and the ECEA*

2. Under *Rowley, supra*, at 206-07 the ALJ must first determine whether a school district has complied with the procedures set forth in the IDEA. Second, the ALJ must determine whether the IEP, developed through the IDEA's procedures, is reasonably calculated to enable the child to receive educational benefits. There is no violation of the IDEA if the school district has satisfied both requirements. *Id.*

3. A party challenging the sufficiency of an IEP has the burden of proof or persuasion. *Schaeffer v. Weast*, 546 U.S. 49 (2005). In this case, it is the Appellants that challenge the IEP and have the burden.

*Requirements for an IEP*

4. In general, the School District argues that the services, accommodations and modifications requested by [STUDENT]'s parents are not required in an IEP. An IEP is defined at 20 U.S.C. Section 1414(d)(1)(A)(i):

(A) Individualized education program

(i) In general

The term "individualized education program" or "IEP" means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with this section and that includes--

...

(I) a statement of the child's present levels of academic achievement ...;

(II) a statement of measurable annual goals ...

(III) a description of how the child's progress toward meeting the annual goals ... will be measured ...;

(IV) a statement of the special education and related services and supplementary aids and services ... to be provided;

(V) an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class ...;

(VI) (aa) a statement of any ... accommodations that are necessary to measure the academic achievement and functional performance of the child ...

(VII) the projected date for the beginning of the services and modifications described in subclause (IV) and the anticipated frequency, location, and duration of those services and modifications;

(VIII) [Not applicable.]

5. The School District relies in particular on the Rule of Construction at 20 U.S.C. Section 1414(d)(1)(A)(ii)(I):

Nothing in this section shall be construed to require ---

(I) that additional information be included in a child's IEP beyond what is explicitly required in this section;

This same restriction appears at 34 C.F.R. Section 300.320(d).

6. The School District argues that because none of the requested items appears at 20 U.S.C. Section 1414(d)(1)(A)(i) they should be excluded under the rule of construction.

7. In response, the Appellants argue that all of the matters they have requested are "related services and supplementary aids and services" as described in 20 U.S.C. Section 1414(d)(1)(A)(i)(IV). As found above and as set forth below, the ALJ has resolved the parties' disputes on a different basis.

#### *Failure of the IEP to Specify a School*

8. [STUDENT]'s parents argue that the May 31, 2007 IEP document is deficient in that it does not specify a school. However, the School District objects that this alleged deficiency was not raised below. The School District is correct that this issue did not appear in [STUDENT]'s father's July 10, 2007 letter and was not litigated before the IHO. Even though [STUDENT]'s parents successfully petitioned to have the scope of the hearing expanded to include compensation for attendance at [PRIVATE SCHOOL 2], they did not ask that the issue of failure to specify a school be included. Nor was this issue listed specifically as an issue in the Notice of Appeal to the OAC.

9. The School District asserts that raising this issue now violates the requirement at 20 U.S.C. Section 1415(b)(7)(A)(iii) that it be provided with notice including facts relating to the problem complained of. 20 U.S.C. Section 1415 sets out the requirements for a state educational agency. The same requirement to include facts appears in 34 C.F.R. Section 300.508(b)(5) incorporated through Rule 6.02(a).

10. [STUDENT]'s parents rely on *A.K. v. Alexandria City School Board*, 484 F.3d 672 (4<sup>th</sup> Cir. 2007.) In *A.K.* the Court agreed that "location" in 20 U.S.C. Section 1414(d)(1)(A)(i)(VII) (see above) required the specification of a particular school and that the failure to do so meant that the IEP was defective. In *A.K.* the Alexandria City School Board had agreed that a private school placement was appropriate for the student. "Yet, the IEP development process concluded without any significant discussion of whether such a school existed, or if it did, how it would be a satisfactory match for A.K." *A.K.* at 681. The Court noted that the parents were left the

responsibility of finding the school and that this is not how the IDEA is designed to work. *Id.* The Court was careful to note at 682 that it was not requiring a school district to identify a school in the IEP for all cases.

11. The opinion in *A.K.* as to the significance of the “location” language is broader than that in *White ex rel. White v. Ascension Parish School Board*, 343 F.3d 373 (5<sup>th</sup> Cir. 2003). There at 379 the Court held that “location” in an earlier version of 20 U.S.C. Section 1414(d)(1)(A)(i)(VII) is primarily administrative and does not explicitly require parental participation in site selection.

12. In any case, [STUDENT]’s situation is different than that in *A.K.* His parents were not required to find a school. The School District’s position was clear that he would attend Nevin Platt unless his parents chose otherwise. The School District’s position also was that it could meet [STUDENT]’s needs in any of its middle schools. Leaving the choice of school open provided more choices to the parents. In addition, the School District gave suggestions as to which schools had low student/teacher ratios and which had [STUDENT]’s existing friends. Leaving the choice of school undetermined provided flexibility; it did not constitute a requirement to find a school that may or may not exist that was the problem in *A.K.* Irrespective of when the location issue was raised, the ALJ concludes that it would not have been beneficial to [STUDENT] for the School District to commit to a specific school.

#### *Teacher Training*

13. The first issue identified before the IHO was the issue of teacher training. The School District also relies on *Lachman v. Illinois State Board of Education*, 852 F.2d 290, 297 (7<sup>th</sup> Cir. 1988) and *Sioux Falls School District v. Renee Koupal*, 526 N.W. 2d 248, 252 (S.D. 1994) for the proposition that a school district and not parents are responsible for teacher training and competency.

14. However, in *Bradley ex rel. Bradley v. Arkansas Department of Education*, 443 F.3d 965 (8<sup>th</sup> Cir. 2006) at 970, n. 7 the Court disapproved of a hearing officer’s determination that teacher training in autism was not a justiciable controversy.

15. The ALJ agrees with the Appellants that the School District’s offer to have its teachers undergo training is not particularly significant for this case if the School District was not willing to put that offer in the IEP. The IEP is the primary vehicle for implementing congressional goals for the IDEA. *Honig v. Doe*, 484 U.S. 305, 311 (1988). An ALJ, like a reviewing court, should confine the evaluation of the IEP to the document as actually written. See *Knable v. Bexley City School District*, 238 F.3d 755 (6<sup>th</sup> Cir. 2001). Nevertheless, the ALJ concludes that the May 31, 2007 IEP was reasonably calculated to provide educational benefit. As found above, the specific training sought by [STUDENT]’s parents was not necessary for his middle school teachers.

#### *Placement With Friends*

16. The ALJ has found above and concludes here that placement with friends was not necessary for inclusion in the IEP to enable [STUDENT] to receive educational benefits.

*Low Student Teacher Ratios and Small, Quiet Campus*

17. The School District argues that a low student/teacher ratio is also not the type of information required to be included in the IEP. However, in *Gellert v. District of Columbia Public Schools*, 435 F. Supp. 2d.18 at 23 (D.D.C. 2006) the Court held that a small class size and a calm, quiet learning environment were requirements of an IEP.

18. Nevertheless, the ALJ has found above and concludes here that a small class size and a calm, quiet learning environment did not need to be included in the May 31, 2007 IEP.

19. In sum, the ALJ concludes that the Appellants have failed to prove that The May 31, 2007 IEP failed to provide a free appropriate public education.

*[PRIVATE SCHOOL 2]*

20. If a school district fails to offer a free appropriate public education, parents may obtain reimbursement for their cost in paying for private school. *School Commission of Burlington v. Department of Education*, 471 U.S. 359, 370 (1985). 20 U.S.C. Section 1412(a)(10)(C)(i) provides:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

...

(ii) 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 school 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.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

...

(III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.

21. The School District argues that [PRIVATE SCHOOL 2] does not offer special education services. It relies on *Berger v. Medina City School District*, 348 F.3d 513, 523 (6<sup>th</sup> Cir. 2003) where the private school for which reimbursement was sought did not offer speech and language therapy or pre-tutoring services for a child with profound hearing loss. It was these services that were found to be lacking at the public school.

22. But a private placement does not have to meet the IDEA definition of a free appropriate public education and it does not need to meet state education standards. *Florence County School District Four v. Carter ex rel. Carter*, 510 U.S. 7 (1993).

23. [PRIVATE SCHOOL 2] does offer two things that the School District refused to put in the IEP: a small campus and a low student teacher ratio. There was insufficient evidence of any teacher training in autism issues at [PRIVATE SCHOOL 2].

24. Because the ALJ has determined that the Appellants have failed to prove that the May 31, 2007 IEP denied [STUDENT] a free appropriate public education, [STUDENT]'s parents are not entitled to reimbursement for tuition at [PRIVATE SCHOOL 2]. Nor must the ALJ determine if the Appellants' actions were unreasonable, as argued by the School District.

### **DECISION**

Based on the foregoing, the ALJ determines that the School District has complied with the procedures set forth in the IDEA. Also, the May 31, 2007 IEP was reasonably calculated to enable [STUDENT] to receive educational benefits. The School District is therefore not responsible for reimbursement of the cost of [STUDENT]'s tuition at [PRIVATE SCHOOL 2].

No other fees or costs are assessed.

Per Rule 6.03(12) the decision made upon a state level review shall be final except that either party has the right to bring a civil action in an appropriate court of law, either federal or state.

### **DONE AND SIGNED**

April 21, 2008

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MATTHEW E. NORWOOD  
Administrative Law Judge

## CERTIFICATE OF SERVICE

I hereby certify that I have mailed a true and correct copy of the above **DECISION UPON STATE LEVEL REVIEW** by placing same in the U.S. Mail, postage prepaid, at Denver, Colorado to:

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and to

Keith Kirchubel  
Colorado Department of Education  
201 East Colfax  
Denver, CO 80203-1704

on this \_\_\_\_ day of \_\_\_\_\_, 2008.

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Office of Administrative Courts