STATE OF NEVADA DEPARTMENT OF EDUCATION

REVIEW OFFICER DECISION

In the matter of

STUDENT by and through his[1] PARENTS,[2]

Petitioner-Appellant

v. Perry A. Zirkel, State Review Officer

DISTRICT,

Respondent-Appellee

I. GLOSSARY OF ACRONYMS

As a prefatory matter, the acronyms that appear in this decision are as follows: ASD = autism spectrum disorder; ABA = applied behavioral analysis; ADL = activities of daily living; ESY = extended school year; FAPE = free appropriate public education; IDEA = Individuals with Disabilities Education Act; IEP = individualized education program; IHO = impartial hearing officer; OT = occupational therapy; PT = physical therapy; RTF = residential treatment facility; SRO = state review officer; ST = speech therapy; and SY = school year (incuding summer to the extent applicable). Moreover, for clarity, this decision uses "District" in place of "Petitioner" and "Parents" in place of "Respondent" not only due to the more direct meaning of

[1] The terms "he," "his," and "him" are used generically herein instead of designating the actual gender of Student or the Parent.

[2] "Parents" is also used generically herein and, except when necessary for clarity, without differentiation as to father and/or mother and, thus, as to singular or plural.

District and Parents but also the exchanged roles of Petitioner and Respondent upon the appeal.

II. PROCEDURAL BACKGROUND[3]

On May 25, 2023, the Parents filed the complaint in this matter under the IDEA[4] and Nevada's corresponding state statute and regulations.[5] After multiple status and prehearing conferences, the IHO first conducted so-called "evidentiary hearing" sessions on September 1, 5, and 11, 2023 specific to the issue of residency in response to the District's motion for dismissal. On September 25, 2023, the IHO issued an interim decision denying the dismissal motion, ruling that "[the Parents] are legal residents of the District and the District is responsible to provide Student with a FAPE under the IDEA." (IHO-13, at 16).[6]

After further prehearing communications, the IHO conducted hearing sessions on December 14 and 15, 2023 and January 19, 2024 on the agreed upon issues for SY 2023–24: "Whether Student's educational placement at the District Special School is an appropriate placement for Student? [If not,] is the appropriate educational placement residential placement at … [RTF] paid by District?" On February 2, 2024, the IHO issued the final decision, which concluded that the District's proposed placement was not appropriate, the RTF placement was

[3] The record in this matter includes extensive exhibits along other documents, such as the IHO's decision and the emails to and from the parties during the 30-day SRO stage. The exhibits are labelled herein as "IHO" for those of the impartial hearing officer, "R" those of the Respondent-District, "P" for those of the Parents, "SRO" for those of the undersigned state review hearing officer. The record also includes a transcript consisting of three volumes corresponding to the evidentiary hearing sessions and three volumes for the regular hearing sessions. Because the pagination is separately consecutive within each volume, the citations are to "Tr" with the Roman numeral for its volume followed its page number(s). Moreover, "EH" precedes "Tr" for the citations to the volumes of the evidentiary hearings. Cross references in this decision are, per legal citation style, via "*supra*" (above) or *infra* (below) to identified footnotes or parts of the text.

[4] 20 U.S.C. §§ 1401 *et seq*.; 34 C.F.R. §§ 300.1 *et seq*.

[5] NEV. REV. STAT. §§ 388.419 *et seq*.; NEV. ADMIN. CODE §§ 388.001 *et seq*. This decision refers to this corollary state statute and administrative code only to the limited extent that they add in relevant respect to the IDEA legislation and regulations.

[6] The IHO made specific findings and legal conclusions within the general framework of the IDEA and the specific Nevada statutory definition of residency. NEV. REV. STAT. § 10.155. For the resulting District responsibility for FAPE, the IHO cited the Nevada regulatory application of the IDEA. NEV. ADMIN. CODE § 388.215.

appropriate, and that the reimbursement remedy was limited to a direct payment to the RTF for specified educational expenditures. (SRO-1). Specifically, the IHO ordered the District to pay a total of $105,303.20 for the special education and related service fees that the RTF billed to the Parents beyond the Medicaid-covered expenses, which amounted to far more than the District-ordered payment.[7]

On February 20, 2024, the state superintendent received the District's appeal of the IHO's decision (SRO-2). On February 21, I received notice of my appointment as the SRO in this case, specifying the due date of March 21, 2024 for my decision. (SRO-3C).[8]

Later on February 21, I sent the parties an email offering various alternative dates for status conference (SRO-4). In a series of back-and-forth emails, an agreeable date for the status conference was not readily identified. Moreover, the District alleged that the IHO's refusal to sign a subpoena for an out-of-state witness and to allow two District-requested rebuttal witnesses was contrary to the requirements of due process under the IDEA and, as a result, sought to introduce evidence from these three witnesses. On February 29, after providing each side with the opportunity to email to me arguments, along with any supporting legal authority, I notified the parties of my conclusions that (1) the IHO's disputed actions were consistent with due process under the IDEA; (2) the District had provided insufficient justification for additional evidence at this stage; and (3) a status conference would not be necessary because these email communications had addressed the issues specified in NEV. ADMIN CODE § 388.315,

[7] SRO-1, at 47. The component amounts were $45,488 for education, $51,900 for 1:1 fees during school hours, an $7,915.20 for OT, PT, and ST. *Id*. The IHO did not include any portion of the separate charge for room and board that may have been attributable to educational services because "the RTF's fees for residential treatment do not delineate the cost of room and board for educational versus the medical services," and the record did not otherwise provide this evidence. *Id*. at 46. The Medicaid-covered portion of the RTF's charge was approximately $566,900. *Id*. at 31.

[8] On the same date, the state superintendent sent notice of my appointment to each party, including a one-page summary of my qualifications. (SRO-3A&B).

including the specification of 5:00 pm EST on March 9 for the parties' emailing to me of their written arguments. (*Id*.)

On or before the deadline date of March 9, 2021, the District (SRO-5) and the Parents (SRO-6) and submitted their respective written arguments.

III. STANDARD OF REVIEW

The standard of review for a SRO under the IDEA is for an "independent decision" after examining the entire record.[9] The SRO finds persuasive the interpretation of the Third Circuit in *Carlisle Area School District v. Scott P.,* 62 F.3d 520 (3d Cir. 1995), requiring "plenary review" with one narrow exception: "[the SRO] should defer to the hearing officer's findings based on credibility judgments unless the 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." (*Id*. at 529).[10]

IV. ISSUE

The issue in this case is whether the IHO's decision that the District must pay the above-specified[11] cost for educational expenses at the RTF is in accordance with the IDEA and corollary Nevada law.[12]

[9] 34 C.F.R. §§ 300.514(b)(2)(i) & 300.514(b)(2)(v).

[10] In this decision, the Third Circuit explained that "beyond this rather narrow class of record-supported, credibility-based factual findings, we think that, to give the statute's language about 'independent' decisions effect, the [SRO] must have much more leeway in reviewing other non-credibility based findings of the hearing officer." 62 F.3d at 528–29 (citing Perry A. Zirkel, *The Standard of Review Applicable to Pennsylvania's Special Education Appeal Panel,* 3 WIDENER J. PUB. L. 871, 892 (1994). The Ninth Circuit indirectly appeared to approve of this approach. Amanda J. v. Clark Cnty. Sch. Dist., 267 F.3d 877, 888–89 (9th Cir. 2001).

[11] *Supra* note 7 and accompanying text.

[12] In addition to this issue on the merits, which includes the subordinate matter of residency, this decision also addresses "the procedures of the hearing," which as the basis for the District's request for additional evidence, is the relevant part of the SRO's regulatory remit that either party put at issue. NEV. ADMIN. CODE § 388.315(1)(b).

V. FINDINGS OF FACT[13]

Before Student was age 3, the Parents arranged for early intervention services under the IDEA. They also customized their home to meet Student's special sensory needs. (Tr. II, at 115).

In 2018, when Student was 3 years old, the District conduced an initial evaluation, determining that Student was eligible under the IDEA classification of autism.[14] The resulting IEP proposed placement in the District's preschool autsim program called KIDS. (e.g., J-1, at 2).

Instead, per medical advice, the Parents arranged for extensive private, home-based therapies, including ABA, due to Student's severe behaviors, including an aversion to clothing and toilets, self-injury, and refusal to get into vehicles. This regimen continued during and after the District's closure of in-person instruction due to the COVID-19 pandemic (e.g., Tr. II, at 115–16; J-1, at 4–5).

Beginning in early fall 2021, when Student would have been in grade 1, Student's self-injurious behaviors and violence to others escalated despite multiple medications, requiring hospital visits in October 2021, early December 2021, late December 2021, and mid January 2022, when Student was life-flighted to a specialized hospital in Salt Lake City until his discharge to home in mid-February 2022 (J-1, at 5–6; Tr. II, at 118 & 127).[15]

In March 2022, Student was admitted to and spent approximately six months at a behavioral hospital in South Carolina. (Tr. II, at 66).

[13] Based on the applicable review standard, these factual findings are independent of those of the IHO, while affording the prescribed deference to the IHO's factual findings that were based on credibility.

[14] The IDEA term "autism" is used here to cover the alternative terminology in the Nevada regulations. NEV. ADMIN. CODE § 388.028 (autism spectrum disorder).

[15] The danger to family members reached the point that the Parents had to send Student's sibling to live with the grandparents in another state for three months during this initial transition to the RTF. (EH Tr. I, at 54; Tr. II, at 117).

In April 2022, the District conducted a reevaluation, recommending that Student continue to be found eligible under the autism classification and that the Parents be given information about community resources (J-1, at 16). The report included various developmental scores, e.g., cognitive, communication, and social-emotional, at or below the first percentile (*Id*. at 4 & 7–8). In May 2022, the District issued the resulting IEP, which called for placement in a largely self-contained program (with 22% of the time interacting with nondisabled students in the District. (R-5).

In June 2022, the Parents filed a due process complaint challenging this proposed placement. However, in August 2022, the parties settled the matter via a written agreement under which the District agreed to pay for the education services for the Student at an RTF in Florida for up to $97,388, including the 1:1 aide, OT, and ST for 2022–23, and the Student's placement would be in the District for 2023–24. (R-6).

In September 2022, Student was transferred from the hospital in South Carolina to the RTF in Florida (Tr. at II, at 66–67). Based on the safety-related medical necessity for this placement, Medicaid approved the medically related expenses for Student at the RTF. (e.g., EH Tr. I, at 35; P-3; P-4; P-7; R-10; R-12; Tr. III, at 33).[16] The RTF is licensed as a therapeutic-care hospital and also includes a fully accredited special education school very close to Student's room. (Tr. II, at 26 & 33).

In line with the Medicaid approval and related medical advice, the Parents rented a house in Florida near the RTF, enrolled Student's sibling as an out-of-state resident, sold their home, leased another home in the District (which belonged to the mother of one of the Parents),

[16] Nevada Medicaid approved the out-of-state RTF via an administrative override due to the lack of availability of such a placement within the state. (EH-I, at 43–44). Medicaid also required exhaustion of the Parents' private health insurance coverage. (*Id*. at 67).

and maintained their driver licenses, car registrations, and the work of one of the Parents in Nevada (e.g, EH Tr. I, at 35–56).

In April 2023, in anticipation of an upcoming IEP meeting, the Parent sent two consecutive emails confirming that Student's discharge from the RTF was not imminent and requesting notice in advance of the meeting if the District intended to propose any change in Student's placement from the RTI. The District did not reply with any such customized notice. (e.g., IHO-1,at 18–20; Tr. I, at 70–71).

In May 2023, the IEP team, including the Parents, met and proposed an IEP, which included goals of recognizing his name in print, identifying basic colors, tolerating clothing, feeding,and potty training.[17] The related services consisted of OT and ST, with no specified provisions for transportation.[18] The placement page, which was the only part not drafted by the District before the IEP meeting, proposed a special school in the District for SY 2023–24 even though the Parents insisted that the RTF was the only feasible placement at that time. (J-3).[19] The class size at this special school is up to 6–8 students per classroom. (Tr. I, at 118). The school receives autism-specialized support from the District LINKS department, which has a consulting arrangement from the Cleveland Clinic. (e.g., *id*. at 178–79).

At the end of the SY 2022–23 and continuing to the present, the medical director at the RTF has determined that Student is not ready for discharge (e.g., Tr. II, at 43–46). Student's severe behaviors in activities of daily living, such as wearing clothing and riding in a vehicle for

[17] As is typical for students with severe disabilities, as evidenced by the scope of the proposed special school (e.g., Tr. I, at 125 & 129), the goals for specially designed instruction and related services overlap with ADLs, in contrast with traditional, academic conceptions of education.

[18] The District does have available curb-to-curb special education transportation and bus aides. (*Id*. at 81 & 82). However, entirely disrobed students are not allowed on the bus or to remain at school. (*Id*. at 83–84). In such cases at school, the District relied on the Parents for transportation to return home. (*Id*. at 139).

[19] The Parents made clear at the meeting and on the IEP that Student was at the RTF due to medical necessity and that "there's no way we can or will discharge [Student from the RTF] against medical advice." (J-3, at 8).

more than a very brief distance, and in safety of self and others, prevent him from attending a conventional school. (Tr. II, at 29–30, 36, & 97–99). As a result of this behavioral severity and complexity, Student's progress at the RTF has been slow and uneven. (e.g., *id*. at 27, 29, 32–33, 72–73, 90–91, & 109–11). The Parents' visits at least four times per week has been integral to this progress. (*Id*. at 37–39, 51, & 81).

In July 2023, two District representatives visited the RTF for two observations. (Tr. I, at 179). They noted, *inter alia*, that Student was not able to tolerate other students, causing him to have a single room, to eat alone, and to remain in the classroom for only brief times. (*Id*. at 182 & 190–91).

VI. CONCLUSIONS OF LAW[20]

Because the District raised the preliminary issues of procedural fairness and residency, this decision will address them before resolving the two interrelated issues on the merits of this case.

Procedural Fairness

Because the prescribed scope for SROs includes "[e]nsur[ing] that the procedures at the hearing were consistent with the requirements of due process,"[21] I address the District's claim that the IHO's refusal to allow the District to re-call the District's special education instructional facilitator and to call its Medicaid coordinator as rebuttal witnesses violated the District's hearing rights.

First, as a general matter, it is well established that IDEA hearing officers have wide

[20] Because these legal conclusions are based on the SRO's fact-finding upon reviewing the entire record of this case, the focus here is on the applicable legal analysis.

[21] NEV. ADMIN. CODE § 388.315(1) (repeating without relevant addition 34 C.F.R. § 300.514(b)(2)).

latitude in management of the hearing, including evidentiary decisions.[22] Indeed, the courts exercise this ample latitude to hearing officer rulings "in favor of efficiency, particularly in light of the forty-five day regulatory deadline."[23]

In this case, which included extensive and detailed prehearing opportunity to discuss and resolve evidentiary issues, the IHO exhibited rather meticulous care in affording both parties procedural fairness. With regard to the requested re-call of the District's special education instructional facilitator, the IHO cogently pointed out that (1) the District did not preserve the right to recall this witness and (2) the District had ample opportunity for both objections to and cross-examination of the Parents' testimony that was the subject of the requested rebuttal witness. (Tr. III, at 12–15). With regard to the requested District Medicaid witness, the IHO similarly explained effectively that this third day of hearing amply provided the opportunity for evidence, based on the document and testimony of the RTF's Medicaid coordinator, regarding its billing as applied to the District. (*Id*.). Moreover, even if either of these IHO evidentiary decisions were somehow a violation of IDEA hearing procedures, neither decision was an abuse of discretion or, ultimately most significant, of any harm or material consequence with regard to the IHO's final decision, which limited its payment obligation to educational expenses without extension to any asserted instructional part of the room and board.[24]

[22] *E.g*., *E.g.*, O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 709 (10th Cir. 1998); E.P. *ex rel*. J.P. v. Howard Cnty. Pub. Sch. Sys., 70 IDELR ¶ 176 (D. Md. 2017), *aff'd*, 727 F. App'x 55 (4th Cir. 2018); Price v. Upper Darby Sch. Dist., 68 IDELR ¶ 214 (E.D. Pa. 2016); A.M. v. District of Columbia, 933 F. Supp. 2d 193, 207 (D.D.C. 2013); D.Z. v. Bethlehem Area Sch. Dist., 2 A.3d 712, 721 (Pa. Commw. Ct. 2010).

[23] Perry A. Zirkel, *Impartial Hearings under the IDEA: Updated Legal Issues and Answers*, 43 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 40 (2022).

[24] Similarly, the District's repeated arguments about predetermination, which were the purported basis for the requested re-call rebuttal witness, amount to a red herring in this case. First, as a threshold matter, predetermination is a hollow defense for the District's submission of a draft IEP that left the placement page blank. A draft IEP does not equate to predetermination. *See, e.g.,* S.W. v. N.Y.C. Dep't of Educ., 92 F. Supp. 3d 143, 156 (S.D.N.Y. 2015). Moreover, predetermination is not exclusively limited to the placement page of an IEP, instead to other significant provisions of the IEP, such as methodology. *See, e.g.*, Deal v. Hamilton Cnty. Bd. of Educ., 392 F.2d 840, 858–59 (6th Cir. 2004). Second and most importantly in this case, given the Parents' obvious position with regard to the RTF, the substantive appropriateness of the IEP's proposed placement depends on whether it was

Finally, the additional District claims of procedural inconsistencies with the IDEA's hearing requirements, such as the IHO's refusal to issue a subpoena that was not enforceable for a witness not essential for a fair decision in this case, border on frivolousness and needless distraction. (SRO-4, at 5–13).[25]

Residency

The IHO's decision concerning the Parents' residency carefully and correctly identified and applied the relevant state law to the unusual circumstances of the case.[26] Said state law premised legal residency on physical presence but expressly excludes the time of absence if "with the intention in good faith to return without delay."[27]

In this case, the evidence was preponderant that the Parents continued their physical presence in Florida from SY 2022–23 through the period at issue, which was SY 2023–24. Given that their proven reason was to support the therapeutic care and progress of Student at the RTF, including the special education services, the key question was whether they met the statutory requirement of a good faith intent to return without delay. Here, in combination with said reason for their absence, the Parents' lease of a home in the District in immediate conjunction with the sale of their home, the retention of drivers' licenses and registration, and continuation of the Parents' work in Nevada sufficiently evidence a good faith intent to return to Nevada without delay upon the discharge of Student from the RTF.

This conclusion is limited to the 2023–24 year in question (and to the extent it may be relevant to the settlement agreement, the previous year), but does not necessarily extend well

reasonably calculated for appropriate progress for Student regardless of the Parents' assumptions in the wake of their request about the placement issue before the IEP meeting.

[25] The District's added assertion in its appeal brief (at 26) of IHO bias is totally unwarranted in light of the IHO's diligent conduct throughout the process and the relevant IDEA standards of impartiality.

[26] *Supra* note 6 and accompanying text.

[27] NEV. REV. STAT. § 10.155.

beyond that period. It may be that the circumstances of the lease, which has included monthly payments while the landlord still occupies the property within the relevant period, may in the future lose its evidentiary preponderance of authenticity.[28] Similarly, at some point, if Student remains at the RTF for one or more future years without discharge being reasonably foreseeable, the statutorily requisite intention to return without delay may become a legal fiction. However, the IHO's thorough residency decision is affirmed as applicable to the time-bound resolution of the merits of this case.[29]

The District's subsidiary or supplemental argument that the District is somehow absolved from its legal responsibility for FAPE because the Parents did not enroll Student amounts to pointless makeweight. Aside from residency, which is the pertinent prerequisite, the District admission of Student's eligibility via its initial evaluation and its reevaluation and its responsibility via its settlement agreement makes disconcerting the inclusion of this argument in the District's closing brief.

The Merits

The first issue in this case, which flows from the generally applicable multi-step, flowchart-like analysis for tuition reimbursement,[30] is whether the District's proposed placement of Student for 2023–24 was appropriate. Here, although the District's specialized

[28] Conversely, a change in circumstances may be in the opposite direction, which would confirm the Parents' property rights to this house and its serving as their residence.

[29] The District's appeal brief does not identify any material error in the IHO's factual findings or legal conclusions as to residency. For example, the District claimed that the IHO failed to state why the Parents' remained in Florida after the transfer of Student to the RTF. District appeal brief, at 19. Yet, the IHO's residency decision clearly concluded, in relevant relation to their good faith intent to return without delay, that they "temporarily left their legal domicile in Nevada for the particular purpose of being engaged in Student's treatment." IHO-13, at 16.

[30] *See, e.g.*, Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA*, 282 EDUC. L. REP. 785 (2012). This multi-part test extends in equitably appropriate circumstances to direct payment to the private facility. *See, e.g.,* E.M. v. N.Y.C. Dep't of Educ., 758 F.3d 442 (2d Cir. 2014). Moreover, the District's argument about the notice step, which is a preliminary equities issue, is included *infra* within the analysis of the final equities step.

school for students with autism includes multi-faceted facility features and personnel support, this proposed placement does not meet the applicable substantive standard of being "reasonably calculated to enable [the] child to make progress appropriate in light of the child's circumstances."[31] The fatal problem is that the District knew or at least had reason to know that Student was not able to access and benefit from this special school. Based on what the Parents credibly communicated both before and during the May 2023 IEP meeting, the District had actual or constructive knowledge that the Student could not withstand the special education transportation to the school, appear and remain there without stubbornly becoming naked, and tolerate a class with 6–8 other students for any period of time close to the school's six-hour day.

District obligations for FAPE under the IDEA, are more extensive than in general education and have a fuzzier intersection with traditional Parent obligations, although these obligations are not unlimited.[32] In this case, the District's position was too locked into the six-hour school day and the particular practices of its special school, such as the lack of transportation upon complete and persistent disrobing at school. Although reasonable uniform procedures are certainly appropriate as a general matter, making individual exceptions for a student with special needs, particularly when these needs are so obviously complex and severe, is intrinsic to appropriateness under *Endrew F.*. The reasonable calculation of progress must be based on the individual circumstances of the child, which is the "I" in IDEA. The starting point for consideration may well have been specialized home-based services and gradual introduction

[31] Endrew F. v. Douglas Cnty. Sch. Dist. RE-1, 580 U.S. 386, 399 (2017).

[32] *See, e.g.*, Pierre-Noel v. Bridges Pub. Charter Sch., 660 F. Supp. 3d 29 (D.D.C. 2023) (ruling that a district's obligation does not extend to transporting a student up and down residential stairs but does extend to providing an in-person aide at home due to his individual special circumstances; S.M. v. Freehold Reg'l Sch. Dist. Bd. of Educ., 2024 WL 180827 (D.N.J. Jan. 17, 2024) (ruling that the district's IDEA obligations did not extend in this case to providing an aide to get the student ready for school in the parents' earlier departure for work, reasoning that "the touchstone of a school's responsibilities under the IDEA is the child's educational needs—not the parents' professional needs.").

of a reduced school day with flexibly suitable transportation, but the reasonable calculus in this case ultimately had to extend to FAPE during residential placement until Student was able to be safely discharged. Thus, the proposed IEP's, which lacked any such arrangements, clearly fell short of the applicable substantive standard of appropriateness.

The second step of the analysis, which amounts to the second stipulated issue in this case is whether the RTF was appropriate. Here, it is conversely rather clear that the special education services of the RTF were reasonably calculated for progress appropriate under the special individual circumstances of Student.[33] The slow and uneven progress was reasonable in light of the severity and complexity of Student's needs. Moreover, *Endrew F.* requires reasonable calculation, not actual achievement, of appropriate progress.[34]

However, for the extent of the District's liability, the IHO's decision failed to sufficiently differentiate the applicable analysis for therapeutic residential placements, i.e., those that provide medical or psychological treatment along with instructional arrangements, so as to adhere to the particular approach in the Ninth Circuit.[35] Specifically, the IHO's decision relied on a paragraph in a federal district court decision in Oregon that cited appellate and lower court cases from various jurisdictions beyond the Ninth Circuit. (SRO-1, at 37 & 41).[36] Although the Ninth Circuit affirmed the decision "in all respects,"[37] neither its brief opinion nor the underlying lower court decision centrally addressed the issue of therapeutic residential

[33] For the *Endrew F*. standard being the test for the appropriatness of the unilateral placement, see L.H. v. Hamilton Cnty. Dep't of Educ., 900 F.3d 779, 796 (6th Cir. 2018).

[34] *See, e.g*., K.D. v. Downingtown Area Sch. Dist., 904 F.3d 248 (3d Cir. 2018); F.L. v. Bd. of Educ. of Great Neck Union Free Sch. Dist., 735 F. App'x 38 (2d Cir. 2018) (upholding, under *Endrew F*., IEPs that yielded slow and mixed progress)

[35] *See, e.g.,* Ronald Wenkart, *Residential Placements and Special Education Students: Emerging Trends*, 304 EDUC. L. REP. 1 (2014) (canvassing the various evolving approaches).

[36] Ash v. Lake Oswego Sch. Dist. 7J, 766 F. Supp. 852, 862 (D. Or. 1991) (citing, *inter alia*, Kruelle v. New Castle Cntry. Sch. Dist., 642 F.2d 697 (3d Cir. 1981) and Vander Malle v. Ambach, 667 F. Supp. 1015 (S.D.N.Y. 1987)), *aff'd*, 980 F.3d 585 (9th Cir. 1992).

[37] *Ash v. Lake Oswego Sch. Dist. 7J*, 980 F.3d at 586.

placements, because the facility at issue—the Boston Higashi School—was focused on the special education needs of students with autism, and the child at issue did not present a danger to self or others.[38]

In contrast, the Ninth Circuit has a long line of specifically relevant rulings to therapeutic residential placements, starting with the landmark decision in *Clovis Unified School District v. California Office of Administrative Hearings*, which was issued the the year before the ruling of the federal district court in Oregon decision.[39] First, the Ninth Circuit's *Clovis* decision expressly rejected the approach for hospitalized placements that held school districts responsible for the entire costs if the medical, social, or emotional problems of the child are so inextricably intertwined with the educational problem as not to be segregable.[40] Instead, *Clovis* adopted the original Third Circuit approach, focusing the analysis on whether the placement is for educational purposes rather than "a response to medical, social, or emotional problems that is necessary quite apart from the learning process."[41] However, as examination of the cited early Third Circuit decision reveals,[42] the "quite apart" qualification for the non-education side of the balance provides a seed of ambiguity in the distinction from the intertwined approach.

[38] *Ash v. Lake Oswego Sch. Dist. 7J*, 766 F. Supp. at 857, 859, 861. The evidence was that at most the child "based on the family history … very likely has panic disorder" and presents "the potential" for injuriousness. *Id*. at 858. The inclusion in the lower court's conclusions, without any other evidence or analysis, that [the child's] "medical, social and emotional problems are so severe that they are not segregable from his learning process" was more peripheral than central to the decision. *Id*. at 859.

[39] *E.g.*, N.G. v. Placentia Yorba Linda Unified Sch. Dist., 807 F. App'x 648 (9th Cir. 2020); Edmonds Sch. Dist. v. A.T., 780 F. App'x 491 (9th Cir. 2019); Ashland Sch. Dist. v. Parents of Student R.J., 588 F.3d 1175 (9th Cir. 2009); Ashland Sch. Dist. v. Parents of Student E.H., 587 F.3d 1175 (9th Cir. 2009); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493 (9th Cir. 1996); Cnty. of San Diego v. Cal. Special Educ. Hearing Off., 93 F.3d 1458 (9th Cir. 1996); Clovis Unified Sch. Dist. v. Cal. Off. of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990).

[40] *Clovis Unified Sch. Dist. v. Cal. Off. of Admin. Hearings*, 903 F.2d at 645 (citing Vander Malle v. Ambach, 667 F. Supp. 1015, 1039 (S.D.N.Y. 1987)).

[41] *Id*. (citing, *inter alia*, Kruelle v. New Castle Cnty. Sch.. Dist., 642 F.2d 687, 693 (3d Cir. 1981)).

[42] *Kruelle v. New Castle Cnty. Sch.. Dist*., 642 F.2d at 694 ("[T]he claimed inextricability of medical and educational grounds for certain services does not signal court abdication from decisionmaking in difficult matters. Rather, the unseverability of such needs is the very basis for holding that the services are an essential prerequisite for learning.").

Next, resolving this ambiguity, *Clovis* refined the approach by applying it in terms of the primary purpose of the therapeutic placement. Thus, the *Clovis* court rejected the school district's responsibility for the total costs of a residential placement that was "primarily for medical, i.e., psychiatric, reasons."[43] As a result, the the defendant district was responsible under the IDEA only for the child's special education services but not for the child's room and board.[44]

In the Ninth Circuit's subsequent decisions in this specifically pertinent line of cases, the results have varied depending on the specific factual circumstances, but the key was the determination of whether the placement was primarily necessary for broadly medical instead of specifically educational purposes.[45]

Mixed between the IHO's repeated reliance on the approach of the federal district court in Oregon, the decision only briefly sampled two in this long line of Ninth Circuit decisions but without reaching the specifically applicable test (SRO-1, at 40–41). The citation to the first of the two decisions was for the threshold necessity standard in the relevant IDEA regulation,[46] without reaching the Ninth Circuit's ultimate relevant conclusion that the residential placement was primarily an educational, not medical, facility, thus affirming the school district's

[43] *Clovis Unified Sch. Dist. v. Cal. Off. of Admin. Hearings*, 903 F.2d at 645.

[44] *Id*. at 646–47. In this case, the district directly provided the special education services to the child in the residential setting. *Id*.

[45] The interpretation of *Clovis* during these subsequent cases was not entirely consistent within this overall balancing in light of its inevitable imprecision. *See, e.g., Edmonds Sch. Dist. v. A.T.*, 780 F. App'x at 494–95 (separating the necessity and purpose aspects into two essential criteria, with *Clovis* representing multiple factors for both of them, but not finding prioritization or isolation as necessary because their overall direction was for educational rather than medical or other problems); *Cnty. of San Diego v. Cal. Special Educ. Hearing Off.*, 93 F.3d 1468 (interpreting *Clovis* as identifying "three possible tests" without distinguishing the controlling approach because they the RTF met all of them, including that "[the child's] primary therapeutic need is educational and the primary purpose of here residential placement is educational").

[46] *Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d at 1500 (citing what is currently 34 C.F.R. § 300.104). This framework element leaves open the issue of the nature or purpose of the residential placement, thus leading to alternative approaches to determine necessity, such as interrelatedness or primacy).

responsibility for the nonmedical costs of the placement.[47] Similarly, the IHO's citation to the second case was limited to the same threshold necessity standard,[48] without observing that the Ninth Circuit in this second case ruled that the residential placement was a response to medical, social, or emotional rather than educational issues.[49]

Contrary to the IHO's rationale, necessity alone is not the standard in the Ninth Circuit. The ultimate criterion is whether the basis for the necessity is primarily educational or other, such as medical, reasons. Similarly, contrary to the Parents' related arguments, neither segregability nor generalization are controlling.[50]

Applying the Ninth Circuit's basic balancing test in the present case,[51] it is abundantly clear both from the testimony of the psychiatrist who served as the RTF's medical director and a from the Medicaid approval that the primary reason for the placement (and for the retention rather than the discharge of Student) was medical necessity.[52] Indeed, as shown by Student's educational history, including the persistent clothing and toileting problems, the Parents would have much more likely than not continued their in-home program had it not been for the Student's increasingly dangerous, albeit disability-based, violence to self and to others,

[47] *Id*. at 1502.

[48] *Ashland Sch. Dist. v. Parents of Student R.J.*, 588 F.3d at 1009 (citing Seattle Sch. Dist. v. B.S., 82 F.3d at 1500).

[49] *Id*. at 1010.

[50] As observed above (*supra* note 40 and accompanying text), the Ninth Circuit rejected reliance on the segregability test. Alternatively, the case law is settled that generalization is not the controlling criterion. *Compare* Thompson R2-J Sch. Dist. v. Luke P., 540 F.3d 1143, 1154–55 (10th Cir. 2008); L.G. v. Sch. Bd. of Palm Beach Cnty., 255 F. App'x 360, 366 (11th Cir. 2007); Devine v. Indian River Cnty. Sch. Bd., 249 F.2d 1289, 1293–94 (11th Cir. 2001); San Rafael Elementary Sch. Dist. v. Cal. Special Educ. Hearing Off., 482 F. Supp. 2d 1152, 1161–62 (N.D. Cal. 2007), *with* District appeal brief, at 23 (mis-quoting the appellate decision in L.K. v. N.Y.C. Dep't of Educ., 674 F. App'x 100 (2d Cir. 2017). Finally, the Parents' cited quotation from one of the early ESY cases, *Battle v. Commonwealth*, 629 F.3d 269, 375 (3d Cir. 1980), does not add to the applicable analysis because it was already covered in the aforementioned (*supra* notes 41–42) decision in *Kruelle*, 642 F.2d at 693.

[51] For this applicable test, see *supra* notes 43–45 and accompanying text.

[52] Although RTF's 24-hour care undoubtedly provides incidental educational benefits to Student, the primary reason for the residential placement was basic physical safety for Student and those who provided such care at home. *Supra* notes 15–16 and accompanying text. Conversely, it is physical safety rather than educational progress that is the predominant standard for Student's discharge from the RTF and Student's return home with the Parents. (E.g., EH Tr. I, at 60–62).

including the sibling.[53] Yet, because FAPE remains the obligation of the district of residence,[54] and its proposed program did not amount to FAPE, the IHO properly determined that it was responsible for the educational expenses, but not the remaining costs, of the RTF.[55]

Finally, implicit in the remedy in this case, are the equities. It is relatively well established that the lack of notice is equitably relevant but not alone controlling. In this case, which did not fit the typical tuition reimbursement situation, the District already knew of Student's "removal" to the RTF. Thus, based on their explicit disagreement and concerns with the proposed placement at the May 2023 IEP meeting, as documented in the IEP,[56] it is certainly arguable that the Parents provided the requisite notice.[57] Conversely, the District certainly had de facto notice, and, in any event, the overall equities clearly balance in favor of the good faith of these extremely dedicated Parents. Finally, even if the balance was considered not in favor of either party, the IHO's limitation of the remedy to the clearly proven educational expenses for FAPE was equitably tailored to the circumstances of this case.[58]

[53] *Supra* note 15 and accompanying text.

[54] NEV. ADMIN. CODE § 388.215; *see also supra* note 44 and accompanying text; N.G. v. Placentia Yorba Linda Unified Sch. Dist., 807 F. App'x 648, 651 (9th Cir 2020) (ruling that the defendant-district was responsible for the educational expenses at the RTF for the period that the district's placement was not appropriate even though at no time was the RTF necessary for FAPE).

[55] By way of dicta for the future, subject to the prerequisite of residency or the alternative of a settlement, once the RTF has sufficiently resolved the threshold issue of danger to self and others, the District's obligation will be to timely propose a pleacement in the least restrictive alternative of instruction in the home, with appropriate transition to placement within the District, in accordance with not only the *Endrew F.* standard but also the LRE continuum. *E.g.,* 34 C.F.R. § 300.115(b)(1).

[56] *Supra* note 19 and accompanying text.

[57] 20 U.S.C. § 1412(a)(10)(C)(iii)(I) (specifying one of two alternatives for parental notice as informing the District "at the most recent IEP meeting" prior to removal that the parents were rejecting the proposed placement "including stating their concerns and their intent to enroll their child in a private school at public expense").

[58] *Supra* note 7. As a result, the District's argument about whether the RTC provides a 24-hour education was a straw man in this case. Similarly, its contention that the RTC addresses ADLs, not special education, represents an obvious false dichotomy in light of the goals in Student's IEP and the services specific to the special school that it proposed for Student. *Supra* note 17 and accompanying text. Finally, the District's argument that the IHO's order to pay $105,303.20,was ambiguous, because it does not state whether this amount was the maximum extent of [the District's] financial liability for the placement" is simply not objectively reasonable. District appeal brief, at 25.

DECISION AND ORDER

Thus, although the analysis of the merits was not identical with that in the IHO's decision, the outcome is the same. The IHO's order is affirmed.

Date: March 20, 2024 Perry A. Zirkel, State Review Officer

NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless a party appeals the decision. A party may appeal from the decision of this SRO by initiating a civil action in a court of competent jurisdiction within ninety (90) days receipt of this decision (NAC § 388.315). Although the SRO also transmitted the decision by USPS mail, for the purpose of appeal the date of receipt is March 20, 2024, which is the date of the SRO's emailing of this decision to the parties.