

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )  
 )  
C.B. and M.Y-B., on behalf of B.B.,n )  
 )  
Petitioners, )  
 )  
vs )  
 )  
Charleston County School District )  
Respondent, )  
\_\_\_\_\_ )

**IDEA DUE PROCESS HEARING**

**ORDER**

**PROCEDURAL HISTORY**

Following the opening of the District's 2016/2017 school year, Petitioners gave Notice of their Intent to register their child in District's three-year-olds' kindergarten program upon reaching the age of three on October 28, 2016. On October 21, 2016, Petitioners' and Respondent's individualized education program (IEP) team met to determine student's eligibility for accommodations and related services under the Individuals with Disabilities Education Act (IDEA), to formulate student's first IEP, and to determine school placement. The IEP Team determined that, commencing on Child's third birthday, he was to be placed in a Preschool Intervention Class (PIC) located at Oakland Elementary School. Parent and IEP Team generally agreed on receiving services for developmental delays, but disagreed on Child's placement. Petitioners, on November 28, 2016, served their Request for a Due Process Hearing claiming the District, for multiple reasons, violated 34 CFR 300.114 (2) by locating their Child in a class that did not, to the maximum extent appropriate, place their Child with age appropriate peers without disabilities. A Resolution Meeting was held on December 5, 2016, wherein the Parties agreed that no resolution was possible on any issue raised in the Complaint. District served a Response to the Complaint on December 8, 2017 and engaged John F. Fantry Jr. as

Local Due Process Hearing Officer. Local Due Process Hearing Officer held a Status Conference for the purposes of scheduling the Due Process Hearing on December 22, 2016. Petitioners sought to add an additional allegation in their IDEA Complaint. Petitioners were advised that changes to the Complaint required filing a Request to Amend their Complaint and such a request would begin again the IDEA timeline for Due Process Hearings. On January 2, 2017, Petitioners filed an Amended Complaint. The Motion to Amend the Complaint was granted in local due process hearing officer's Order of January 2, 2017. A second Resolution Meeting was held on January 7, 2017, wherein the Parties agreed that no resolution was possible on any issue raised in the Amended Complaint. Respondent answered the allegations of the Amended Complaint on January 12, 2017. A Hearing of this matter was held by the undersigned local due process hearing officer, on February 13 and 14, 2017.

#### WITNESSES TESTIFYING

For Petitioners and Respondent: M. Y-B., Parent; Preschool Itinerant Teacher; Speech Language Pathologist; School Psychologist; Occupational Therapist; and Assistant.

#### ADMINISTRATIVE RULINGS

1. Petitioners included in their documents for entry into the hearing record the following items: South Carolina Code Sections § 59-6-20, Sept. 14, 2015 U.S. Department of Education Policy on Inclusion of Children with Disabilities, the August 14, 2014 U.S. Federal Register covering Part II Department of Education 43 CFR Parts 300 comments, and six Federal District Court Cases. Respondent objected to blank admission of materials into Hearing Record. Hearing Officer sustained the objection finding the materials had not been introduced in support of a single Point of Law or to illustrate facts.

similar to facts being argued during this case and that their admission would cause wasteful delay in review of the record and cause confusion from the introduction of collateral issues.

- 2.i Petitioners, before presenting their fourth witness, moved to place into the Record a 44i minute tape of the IEP Meeting of October 21, 2016. Respondent objected to thei introduction of the tape. Hearing Officer sustained the objection, noting that all personsi attending the October 21, 2016iMeeting were present and that, under the Best Evidenceci Rule, the tape should not be played into the Record. Hearing Officer furtherfound thati offering the tape for demonstrating the temperament during the IEP Meeting wasi wasteful of the court's time, without layingia foundation for introduction, such as toi impeachithe statement of a testifyingi witness. Petitioners argued their intent was toi challenge the statements of a previous witness. Hearing Officer ruled the Motion toi introduce a recording for the purposes of challenging the creditability of a witness shouldi be presented duringithe testimony of the witness, whose testimony is being challenged.i

### FACTS AND LAW

- 1.i Student is a person three years of age with a disability, who, prior to registering fori school, was a qualified participate in Baby Net receiving home-based services under ani identified risk of Autism Spectrum Disorder and Developmental Delay. Student, under ani individualized family services plan (IFSP), was receiving 3 hours of service 5 days peri week includingi ABA, Speech, and Occupational Therapy Services. [Parents Exhibit 5 andi Districti Exhibit 6]i
- 2.i District has organized a team of employees to serve as a transition team for its Child Findi Program for Children with Disabilities moving from Part B to Part C of the IDEA. Thei team is composed of the Preschool Itinerant Teacher; the Speech Language Pathologist;i

School Psychologist; Occupational Therapist; and the local educational agency (LEA) representative. The Child Find Team served as the Student's IEP team. The team met with the Student's mother, collecting observations from Parents, and observing Student for District's Evaluation Report, including data from Parents and BabyNet. [Parent Exhibit 4, District Exhibit 7, District 8 Exhibit]

3.e Parents and District have been engaged in gathering data upon Student's educational needs since August 29, 2016. [District Exhibit 7, Districts Exhibit 8, District Exhibit 9]

4.e Parents and District understood that the assessment would be completed within sixty days and before Student's third birthday. [District Exhibit 9]

5.e Notice of the completion of Student's evaluation and the holding of an IEP team meeting was sent on October 20, 2016. [Parents Exhibit 1] The Student's mother attended the meeting of October 21, 2016 and reviewed, with the IEP team, the District's Evaluation Report [Parents Exhibit 4] and draft IEP [District Exhibit 1].

6.e The Student's mother testified that the District had denied her meaningful participation in the IEP established for her son, because the District provided only one day's email Notice for the Meeting scheduled for 10:30 a.m. on October 21, 2016. [Parents Exhibit 1]

a.e 34 CFR §300.322(a) provides: "Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including - (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place."

b.e Hearing Officer takes notice that the Notice of Meeting provided Parent closes with "If the schedule and place is not convenient, please contact me immediately so that

we can arrange a mutually agreeable time and location for the meeting.” Page 2 of the Notice Form provides areas for the Parent to confirm meeting attendance, give notice of inability to attend and suggest new dates, indicate that Parent cannot attend meeting, but does not want the meeting rescheduled. Parent’s response page is left unsigned.

c.e Handwritten Minutes from IEP Meeting do not reference Parents’ objections to going forward with the Meeting.e

d.e 34 CFR §300.322(a) has not set minimum days’ notice before the holding of an IEP meeting.e

e.e In reviewing witness testimony and exhibits, I concluded that the Parent participated in the IEP Meeting without objecting to its date and time. I find such action constitutes a waiver or an equitable bar to Petitioners’ challenge of the October 21, 2016 IEP on the grounds of improper notice.e

7.e Parents testified that, without considering the District’s general education program for three year olds, District placed student in a self-contained preschool intervention classroom without access to typically developing peers.e

a.e The Student’s mother testified that, during the IEP Meeting of October 21, 2016, the team did not consider general education classroom placement of her child using supplemental aids, such as use of an itinerate teacher, modify the curriculum, train a general education teacher to provide service in the form of group practice with modeling or one on one teaching . Parents assert that the rate of children in the general environment is about 8.6 % while the ratioe

for the PIC Class at Oakland Elementary school is about 78% children with a disability.

b.e Hearing Officer takes Judicial Notice that:e

1.e District Courts have ruled the LRE has the burden of compliance with the mainstreaming requirement of the IDEA no matter, who brings the matter before the District Court” Oberti v. Board of Education 995 F.2d 1204e (3rd Cir. 1993)e

2.e The Courts have ruled that, when ruling upon an IDEA LRE Complaint, the Court may grant relief based upon the “preponderance of the evidence,” but this does not mean the Court is invited to substitute its notion of sound education policy for the Educators, who have been charged with the task. Hartman v Loudon County Board of Education 118 F.3d.996 (1997)e

3.e “A student’s placement must be based on the IEP, not the other way around. 34 C.F.R. § 300.422 ” cited in D.R. Ex Rel v. Gloucester Township District 751 F. Supp. 764(D.N. J2010).e

4.e The Courts have found that the base floor of opportunity for children with disabilities is mainstreaming; but, is not required where the child will not receive an educational benefit, where marginal benefits for mainstreaming would be outweighed by benefits, which can only be obtained in a separate institutional setting, or the child is a disruptive force in a regular classroom setting. DeVries v. Fairfax County Sch Board 887 F. 2nd 876 (4th Cir.1989).e

5.e Hearing Officer finds the Petitioners examination of Respondent's witnesses confirms that the IEP team has not claimed the Student would be a disruptive force to other children in a regular class room setting only that the child cannot obtain an educational benefit from services in a general class environment.

c.e District has responded to the allegation in the testimony of Preschool Itinerant Teacher; Speech Language Pathologist; School Psychologist; and Occupational Therapist by testifying:

1.e Based on the spectrum of recognized and approved developmental test, the District considers the Student's peer grouping to be children ranging in ages from 3 to 5.

2.e The Preschool Itinerant Teacher testified that the District does not have a general education class program for 3 Year Olds to 5 year olds group, because those classes are selected by a lottery system for designated Montessori and Magnet School offered to District residents on a lottery basis. The lottery application requires a student to be 3 years old by September 1. Three-year-old children, who are not 3 years old on September 1 of the school year, must wait to apply for the next school year. A child without a disability may also apply for entry into any of the Pre-school Intervention Class. These children, depending upon their IEP receive educational placements along the continuum of placement options available in the District, including a PIC located in the closest school to

to their home.

- 3.e The Speech Language Pathologist testified that in preparing the recommendations in the IEP she had not observed the Student in a general education program because at the time the Student was being observed he was not enrolled in school nor attending a general education class.
- 4.e The Speech Language Pathologist and Occupational Therapist testified that a small group of 3 to 5 years old composed of 2 children without disabilities and the remainder four with a disability provides Student with beneficial interaction and modeling opportunities with peers without disabilities, as well as, those children with disabilities similar to students who can provide positive interaction and modeling opportunities.
- 5.e The proposed IEP services and accommodation provide for 840 minutes of specially designed instruction week and 60 minutes per week addressing communication delays, and 40 minutes per week of observation and strategies design. The IEP calls for class time of 3 hours per day 5 days per week. The time allocation under the October 21, 2016 IEP was similar to the services provided under Students Baby Net IFSP [District Exhibit 6].
- 6.e The District witnesses testified that in their opinion, the services provided to the Student required specialized instructions by a certified Speech Therapist and Special Education Teacher. The Occupational Therapist further testified that to provide the service specified in the IEP with a

general education teacher in a general education setting, the Student would be in a room separated from the remainder of the class receiving three hours per day of one on one instruction from a Special Education Teacher.

d.e Hearing Officer finds creation of a class room within a general class room is more restrictive then assigning Student to a PIC having the closest proximity to his residence and a violation of IDEA.e

8.e The Student's mother testified that the District denied her meaningful participation a meeting to consider the change in her son's October 21, 2016 IEP because the District provided only one day's email notice for a meeting to review the Student's IEP arising from Parent's demand for placement of the Student in a private kindergarten at District's expense. [Parents Exhibit 3.]e

a.e 34 CFR §300.322(a) provides: "Each public agency must take steps to ensure that one or both of the parents of a child with a disability are present at each IEP Team meeting or are afforded the opportunity to participate, including - (1) Notifying parents of the meeting early enough to ensure that they will have an opportunity to attend; and (2) Scheduling the meeting at a mutually agreed on time and place."e

b.e District testified that Parents notified the District of their intent to enroll their child in a private day care facility and that IDEA procedures would prohibit Parent unilateral decision to place Student in a private kindergarten unless the IEP Team and the parents address the move in an IEP Meeting with agreement by the District for Private Placement at Public Expense. The District further explained the Parents responded to the e-mail recommending to other days, which were during Christmas e

Break at time when most of the IEP Team was unavailable. The District did not offer another date for this IEP meeting because the Parent had placed his child in a private kindergarten without an IEP review and filed an Amended Due Process Hearing Complaint seeking compensation for tuition.

c. I find the meeting proposed for December 15, 2016 was a collateral act between the parties not germane to whether or not the October 21, 2016 IEP offered the Student a FAPE in the LRE and find the allegation mooted by Petitioners' Amended Complaint.

9. Parents rejected the October 21, 2016 IEP offered by the District, including recommended service, student goals, and educational placement. Parents did not register Student at Oakland Elementary School on October 28, 2016. The testimonial record reflects the Student received no IEP proposed service at home nor has the proposed services been provided to the Student at the private kindergarten.

10. The IDEA provides for placement in a private school at public expense when a FAPE has been denied by the District and the Parent has enrolled his child in a private facility for the services the child was entitled to, had a proper IEP been offered by the District. School Committee of the Town of Burlington Massachusetts, v. Department of Education 471 U.S. 359 (1985).

11. I find by the evidence admitted into the record in regard to reimbursement of Parent's private Kindergarten unpersuasive.

12. In making the comparison between the educational benefits a child will receive in a general education classroom (with supplemental aids) and the benefits, which can be achieved with the segregated special education classroom, the Court will have to rely heavily on testimony of education experts.

**CONCLUSIONS.**

1.d Respondent has proven, by the preponderance of the evidence, that the IEP of October 21, 2016 was developed in compliance 34 CFR §300.322.d

2.d Respondent has proven, by the preponderance of the evidence, that the IEP of October 21, 2016 was developed in compliance 34 CFR §300.321.d


3.d Respondent has proven, by the preponderance of the evidence, that the IEP of October 21, 2016 was developed in compliance 34 CFR §300.320.d

4.d Respondent has proven, by the preponderance of the evidence, that the IEP of October 21, 2016 was developed in compliance 34 CFR §300.116.d

Accordingly and for the foregoing reasons, **IT IS ORDERED** that the Petitioners'd Complaint be Dismissed and the District deemed to have provided, through its October 21, 2016 IEP, a free appropriate public education (FAPE) in the least restrictive environment (LRE).

**IT IS FURTHER ORDERED** that Petitioners request for tuition reimbursement for placement of their child in private kindergarten is denied.

**IT IS SO ORDERED.**

  
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John J. Fantry, Jr.  
Local Due Process Hearing Officer

Winnsboro, South Carolina  
February 23, 2017

## NOTICE OF APPEAL PROCESS

Should either party wish to appeal this ruling, they may do so by contacting the South Carolina Department of Education, Division for Exceptional Children, 1429 Senate Street, Rutledge Building, Columbia, South Carolina 29201 within ten (10) days of receipt of the Hearing Officer's Order.

160024/After Jan. 2 /Due Process Order/ JF's Draft 2-22-2017/2-23-17

*CRS*