

**INDIVIDUALS WITH DISABILITIES EDUCATION IMPROVEMENT ACT
BEFORE THE STATE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION**

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF CHARLESTON	)	
	)	
In the Matter of:	)	DECISION OF THE
	)	STATE REVIEW OFFICER
C.B. and M.Y-B., on behalf of B.B	)	
	)	
Appellant	)	
	)	
V.	)	
	)	
Charleston County School District,	)	
<u>Respondent</u>	)	

This matter is before me pursuant to an appeal by the C.B. ("Father") and M.Y-B. ("Mother") (or both together ("Parents")), on behalf of B.B. ("Student") from a decision by the Local Hearing Officer ("LHO") stating the Charleston County School District ("District") provided a free appropriate public education ("FAPE") in the least restrictive environment ("LRE") to the Student, and denying a request for tuition reimbursement for private placement for Student.

1. Procedural Background

Parents submitted a request for a due process hearing to the District on November 28, 2016. On December 5, 2016, the parties held Resolution Session which was not successful. The LHO held a Status Conference to schedule the Due Process Hearing on December 22, 2016, but

the parents added an additional allegation to the complaint which began anew the timeline for the hearing. Parents filed an amended complaint on January 2, 2017. A second Resolution Meeting on January 7, 2017, was also unsuccessful. The LHO convened a hearing on February 13 and 14, 2017, and issued his written decision on February 23, 2017.i

The Parents appealed the LHO's decision, which was received by the South Carolina Department of Education on March 8, 2017. On March 14, 2017, I set a briefing schedule for the parties via email which both parties agreed to, contingent on the final transcript being received by the Parents. I received the transcript and all exhibits entered into the record for review. The Parents submitted a brief as requested on March 20, 2017. The District submitted a brief as requested on March 27, 2017. The Parents submitted a reply brief on March 29, 2017.

2. Factual Background

This appeal involves the Parents' contention that the individualized education program (IEP) developed for their child did not offer a placement that provided a FAPE in the LRE for the Student. They requested a new placement, and tuition reimbursement for the private pre-school in which they enrolled the Student.

The Student was identified as needing services under Part C of the Individuals with Disabilities Education Act (IDEA) in Fall 2015. (District Exhibit 6). He received 3 hours of services, 5 days a week, including applied behavior analysis (ABA) and Speech and Occupational Therapy Services through Baby Net's home-based services. (District Exhibit 6). Beginning on August 29, 2016, the Parents worked with the District to transition the Student to

Part B of the IDEA by the Student's third birthday on October 28, 2016. (District Exhibit 7, 8, 9). The District completed an evaluation of the Student and held an IEP meeting on October 21, 2016. Notice for this meeting was sent on October 20, 2016. (Parents' Exhibit 9). One witness testified that the Mother requested the date be moved earlier than originally planned, to October 21, 2016. (Tr., p. 206-07). The Mother arranged to attend the meeting from 9am-12pm, but the District was unable to start the meeting until 10:30 am and assured the Mother they would have enough time to hold the meeting. (Tr., p. 24 – p. 26).

On October 21, 2016, the following individuals gathered for the IEP meeting:

- Occupational Therapist
- General Education Teacher
- Speech Language Pathologist/Special Education Teacher
- Local educational agency (LEA) Representative
- School Psychologist
- Mother of the Student (District Exhibit 16)

These individuals discussed a proposed IEP drafted by the District team. The Mother provided detailed feedback on Goal 1. (District Exhibit 1). The team then moved through the other goals quickly and discussed service hours. (District Exhibit 3). The team agreed that the Student would receive 840 minutes/week of specialized instruction, 60 minutes/week of speech therapy, and 40 minutes/week of indirect occupational therapy (amounting to 900 minutes/week of direct instruction). The team then proceeded to discuss the Student's placement. The District proposed a preschool intervention classroom (PIC) at the Student's home school, believing it to be most appropriate for the Student. This classroom has 1-2 general education students, and 5-7 students with disabilities. The Mother did not agree with this proposal and suggested that he be

placed in a school like the Charleston Public Montessori Program. (District Exhibit 3). The District staff said they proposed the PIC option because of his “age, endurance, and areas of need.” (District Exhibit 3). The team suggested the Parent visit the PIC classroom, which she did a couple of days after the IEP meeting and was not satisfied with the school (Tr. p. 64-74). The Mother did not sign the IEP, but did sign the consent for the District to provide special education services for Student and for the Student’s eligibility determination as a student with a developmental delay. (District Exhibit 3).

The Parents did not register the Student in the PIC classroom on October 28, 2016. He has received no special education services from the District. (LHO Decision, p.1). The Student now attends a private preschool.

In December, the Parents notified the District that they would be filing a due process hearing request. The District and Parents had a resolution meeting. After that meeting, the District and Parents attempted to have a meeting to discuss the IEP services, but they were unable to agree on a date for that meeting, so it never occurred. There was a second resolution meeting in January, again unsuccessful.

3. Standard of Review

Federal and state regulations provide that a party aggrieved by a local hearing officer decision may appeal to a state review officer and that the review officer must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v)(2014). In doing so, the findings of fact of the local hearing officer are entitled to great deference and are considered *prima facie* correct. *M.S. ex rel.*

Simchick v. Fairfax Cnt. Sch. Bd., 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). The state review officer must also consider the hearing officer's advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg'l High Sch. Bd. Of Educ. V. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004).

4. Hearing Officer's Findings

The LHO determined the IEP developed for the Student on October 21, 2016, was in compliance with the following regulations. (LHO Decision, p. 11):

- 34 CFR §300.322 (Parent Participation)
- 34 CFR §300.321 (IEP Team)
- 34 CFR §300.320 (Definition of an Individualized Education Program)
- 34 CFR §300.116 (Placements)

Because it was developed in compliance with those regulations, the LHO stated the District had provided a FAPE in the LRE to Student. The LHO also denied a request for tuition reimbursement.

The LHO's determination was based on the following interpretation of the facts and law of the case.

34 CFR §300.322 (Parent Participation)/34 CFR §300.321 (IEP Team)

Notice was sent on October 20, 2016, and the meeting was held on October 21, 2016.

Handwritten minutes from the meeting do not reference Parent objections to the meeting, and the

LHO “concluded that the Parent participated in the IEP Meeting without objecting to its date and time.” (LHO Decision, p. 5). The LHO determined the District had provided sufficient notice of the IEP meeting because the regulation did not set a minimum requirement for number of days notice before the meeting. (LHO Decision, p.5).

The LHO found a second meeting proposed by the District for December 15, 2016, was “not germane” to the issue, as it was intended to discuss whether or not to move the Student to a private placement, which the Student already had. (LHO Decision, p. 10). Further, the Parents had already filed an Amended Due Process Hearing Complaint seeking compensation.

34 CFR §300.116 (Placements)/34 CFR §300.320 (Definition of IEP)

The LHO determined the District’s decision to place the Student in a self-contained service-delivery, preschool intervention class was an appropriate educational decision. In doing so, the LHO considered *Oberti v. Board of Education*, 995 F.2d 1024 (3rd Cir. 1993) (the LEA has burden of compliance with mainstreaming), *Hartmann v. Loudon Ct. Bd. of Ed.*, 118 F.3d.996 (1997) (the court should not substitute its notion of sound education policy for the educators), *D.R. ExRel v. Gloucester Township District*, 751 F.Supp.764 (D.N.J.2010) (placement is based on IEP; the IEP is not based on placement), *DeVries v. Fairfax Cty. Sch. Bd.*, 887 F.2nd 876 (4th Cir. 1989)a (while mainstreaming is the base floor, need to consider whether separating provides greater educational benefits and disruption to regular classroom). (LHO Decision, p.6).

The team could not observe the Student in a general education class because “at the time the Student was being observed he was not enrolled in school nor attending a general education class.” (LHO Decision, p.8), but believed the PIC would provide the needed services for the Student, including special education services and interactions with students without disabilities.

(LHO Decision, p.9). Because the Student would need three hours a day of one-on-one instruction according to the IEP, the LHO found “the creation of a classroom within a general classroom was more restrictive than assigning the Student to a PIC having the closest proximity to his residence and a violation of IDEA.” (LHO decision, p. 9). The LHO thus found a general education environment would not provide a FAPE and, instead, a more restrictive placement – the PIC – was necessary. In addition, the LHO found the Montessori program was not available to the Student because of his birth date. (LHO Decision, p. 7).

Request for reimbursement of services

The LHO denied reimbursement of tuition in the private school because a FAPE was not denied by the District. The Parent rejected the IEP but did not request any special education services at home or at the private school. The LHO found “the evidence admitted into the record in regard to reimbursement of parent’s private Kindergarten unpersuasive.” (LHO decision, p.10).

The Parents have appealed all of the LHO’s findings. They also argue that the LHO did not rule on other relevant issues raised in the Due Process Hearing, and they contest certain evidentiary decisions made by the LHO during the hearing.

5. Discussion

The Parents have raised a number of issues in their appeal. My discussion here will attempt to group these issues so as to make clear findings. Every sub-bullet of the Parent’s brief may not

be explicitly addressed, but all have been considered in these findings. This discussion is divided into four sections:

- 1) Factual Errors & Evidentiary Rulings – In this brief discussion, we will note the factual errors in the LHO decision that do not affect the outcome of the decision. We will also take note of the questions of evidence from the hearing itself that the Parents raised.
- 2) *Rowley* analysis. In this section, we will determine first whether the IEP complied with the procedural requirements of the IDEA and then whether the IEP was reasonably calculated to yield educational benefits. *Bd. of Ed. of the Hendrick Hudson Central Sch. Dist., Westchester Cnty. v. Rowley*, 458 US 176 (1982)¹.
- 3) *Burlington* analysis. In this section, we will determine whether the Parents are entitled to reimbursement for private education based the three part test in *Burlington. School Committee of the Town of Burlington Massachusetts. V. Dept. of Education*, 471 US 359 (1985).
- 4) Access to Services. In this section, we will determine whether the Student was entitled to any services during this dispute.

Section 1: The LHO made some factual errors that do not affect the final outcome of the case.

The Parents indicated that the LHO “recorded inconsistent and alternative facts in his Order, which affected his final ruling.” In this section, I will address the facts that I, as a state-level officer, have the ability to address, giving due deference to the findings of fact of the LHO and to

¹ The recent US Supreme Court ruling in *Endrew F. v. Douglas County School District Re. J.*, March 22, 2017 (not yet published) does not change the *Rowley* analysis here. *Endrew F.* considered the level of adequate progress that needed to be made, and did not overturn *Rowley* but instead says the *Rowley* analysis should ensure that progress is more than “de minimis.”

the LHO's advantage of determining credibility of witnesses. *Simchick* 553 F.3d at 316; *Doyle*, 953 F.2d at 105, *Shore Reg'l High*, 381 F.3d at 199. The following factual errors were indeed errors, but do not affect the outcome of the decision:

1. The LHO referred to a "Notice of Intent to register their child in the District's three-year-olds-kindergarten program...." (LHO Decision, p.1). No formal notice was indicated in the evidence.
2. The LHO called the program at issue both a three-year-old program, pre-school program, and a kindergarten program. This decision is about a three-year-old pre-school program.
3. The LHO interchanged Part C and Part B of the IDEA (LHO Decision, p. 3). The issue here is a transition from Part C to Part B.
4. The LHO said that the time allocation in the IEP was similar to the services provided under the Baby Net IFSP (LHO Decision, p.8). The specific number of hours does not affect the outcome of this case – what matters is whether the IEP is reasonably calculated to yield educational benefit for the child.

The Parents appealed several decisions by the LHO to exclude or allow particular testimony. I address those decisions below:

Exclusion of a recording of the IEP meeting of October 21, 2016, from the hearing. The Parents asked to use the recording to back up statements that they or other witnesses made. (Parents' Brief, p. 10). Under the Best Evidence Rule, however, if the original evidence, or live witness, is available to be examined, then the recording is not to be admitted unless the credibility of the witness is brought into question. The Parents made no claim that they were not able to bring in all the witnesses they needed to, and all parties were able to cross-examine the

witnesses so the LHO could make a credibility determination. Further, the Parents conceded one the record that they had nothing impeachable on the witnesses on the tape (Tr. p. 251). Because this tape served no purpose that the witnesses in person could not supply, uphold the decision to exclude the recording.

The LHO only allowed questions related to speech/language to the speech language pathologist, based on District objection (Parents' Brief, p.10): I do not find that need to rule on this issue, as the Parents were still able to discuss the continuum of services with the speech language pathologist, and the necessary information was revealed in the testimony.

The LHO denied Mother's objection to the District special education administrator's testimony (Parents' Brief, p. 11) The Parents objected to this testimony about the Student because she had not actually worked with the Student. She was testifying in her role as a district special education administrator, and she was testifying as the policies and procedures that the District uses in making special education placements. Her expertise and knowledge of the case were appropriate for the testimony provided.

Section 2: The District did comply with the procedural requirements of the IDEA. The IEP was reasonably calculated to provide educational benefits.

In determining whether an IEP is designed to ensure adequate educational progress, *Rowley* considers both procedural compliance as well as at the IEP itself, saying it is "no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process . . . as it did upon the measurement of the resulting IEP against a substantive standard."

458 US at 205-206. Let's first turn to the question of procedure.

Procedural Requirements

The LHO found the District met the procedural requirements of proper notice. In the appeal, the Parents argue that notice was not proper, and also that the placement decision was pre-determined, denying them a meaningful opportunity to participate. (Parents' Brief, p. 4, 6, 7). They also argue that the District erred in not providing the Parents an opportunity to choose the members of the team. (Parents' Brief, p. 10).

Proper Notice: The LHO found the District provided one-day-notice for the October 21, 2016, 10:30 am IEP meeting via email. Further, he found that handwritten minutes from the meeting do not reference Parents' objections to going forward with the meeting. The IDEA does not provide a minimum number of days for notice, and the LHO found that the notice was sufficient.

While more notice is always appreciated, the District technically was in compliance. The Parents stated that the meeting date was scheduled on September 30, 2016, three weeks ahead of the meeting. (Parents' Reply Brief, p. 2). This date was set in collaboration with the District. (Parents' Reply Brief, p. 2, Tr. p. 206-207). The issue at hand is that the Mother only had childcare until 12:00pm and asked the District if the 10:30 start would leave enough time for an IEP meeting. The District said they would likely be able to complete the meeting in that time, but when they were not, the District offered to schedule a follow-up meeting, which the Parents did not request. (Tr. p. 207-08). The Parents contend that the team signed the IEP document "as a complete and finished document," (Parents' Brief, p. 4) but the District staff testified that they were open to further conversation. (Tr. p. 208).

"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.” CFR §300.322(a). Given that both the District and the Parents made accommodations to make this meeting time suitable, and given that the Parents held the meeting and was provided an opportunity for a follow-up meeting, I find that the Parents’ were provided with appropriate notice.

Predetermination: The second issue is whether the Parents were prevented from meaningfully participating in the meeting. The Parents contend that the team improperly made decisions about placement prior to the meeting. The LHO did not rule specifically on this issue, which means that a decision must be made based on the evidence presented alone. The Parents contend that the fully drafted IEP presented to them at the meeting meant the placement was “decided, typed, and printed out.” (Parents’ Brief, p. 6). The Parents cite two cases as support for their argument on predetermination: *D.B. ex Rel. H.B. v. Gloucester Township Sch. Dist.*, 751 F. Supp.2d 764(D.N.J., 2010), and *H.B. v. L.V. Unified*, 329 Fed. Appx. 342 (9th Cir., 2007).

D.B. states that “Predetermination of an IEP can be grounds for finding a violation of the IDEA, in particular because predetermination can serve to exclude parents from meaningfully participating in the decision making process.” *Id at* In *D.B.*, the predetermination arose from a refusal to discuss any placement besides that advanced by the school district, in other words, “the School District had come to definitive conclusions on H.B.’s placement without parental input, failed to incorporate any suggestions of the parents or discuss with the parents the prospective placements, and in some instances even failed to listen to the concerns of the parents” *Id at* 773. *H.B. v. L.V. Unified* made a similar argument, suggesting that the openness to conversation is critical in determining whether predetermination exists.

In the current case, the concerns of the Parents were clearly noted, as discussed in the meeting notes, and the team offered to have the Parent visit the program proposed (See District Exhibit 6). According to testimony, they also offered a follow-up meeting (Tr. p. 207-208). This suggests that, should the parent have been unhappy about the placement, the team could have reconvened.

The Parents contend that the drafting of an IEP served to bar their input. Regulations suggest that the District followed somewhat appropriate procedure:

With respect to a draft IEP, we encourage public agency staff to come to an IEP Team meeting prepared to discuss evaluation findings and preliminary recommendations. Likewise, parents have the right to bring questions, concerns, and preliminary recommendations to the IEP Team meeting as part of a full discussion of the child's needs and the services to be provided to meet those needs. We do not encourage public agencies to prepare a draft IEP prior to the IEP Team meeting, particularly if doing so would inhibit a full discussion of the child's needs. **However, if a public agency develops a draft IEP prior to the IEP Team meeting, the agency should make it clear to the parents at the outset of the meeting that the services proposed by the agency are preliminary recommendations for review and discussion with the parents.** The public agency also should provide the parents with a copy of its draft proposals, if the agency has developed them, prior to the IEP Team meeting so as to give the parents an opportunity to review the recommendations of the public agency prior to the IEP Team meeting, and be better able to engage in a full discussion of the proposals for the IEP. It is not permissible for an agency to have the final IEP completed before an IEP Team meeting begins. (*Federal Register*, Vol. 71, No. 156, 8/14/2016, p. 46661, emphasis added)

The pre-meetings the District representatives held could be seen as in the spirit of the first sentence of the above – discussions to allow the District to come prepared with preliminary recommendations. (See, e.g., Tr. p. 208-209). The Register makes clear that a draft does not amount to pre-determination if it is clear that changes can be made. Testimony and the notes from the IEP meeting indicate that the Parents were able to make significant suggestions and changes to the first Goal in the IEP (See District Exhibit 1,6). The typed and printed version of the IEP had significant changes marked relating to Goal 1, making it obvious the document was

in draft form. The discussions the team had ahead of time simply served to prepare them for the meeting, and the draft placement option was a starting point for the meeting.

Further, placement is driven by the IEP goals and there was no objection to the goals as revised based on the Parents' input. "A parent has meaningfully participated in the development of an IEP when she is informed of her child's problems, attends the IEP team meeting, expresses her disagreement regarding the IEP team's conclusions, and requests revisions in the IEP."

Hollister School District, CA State Educational Agency (60 IDELR 172, 2013, citing *N.L. v. Knox Cnty. Schools*, (6th Cir., 2003) 315 F.3d 688, 693; *Fuhrman*, 993 F.2d, 1036). All of these steps were followed and the Parents were not prevented from meaningfully participating.

That said, I found no evidence in the record that a draft of the IEP was provided to the Parents ahead of the meeting, as suggested by the Register. I would encourage the District to make that a practice, but not doing so did not prevent her participation.

Selecting the members of the team: The Parents also argue that the District did not ask for their input regarding the attendees of the meeting. The meeting notice listed attendees but also stated that ""You may invite other people that you believe will be helpful to you" (Parent Exhibit 1). No evidence was presented that Parents objected to the participants of the meeting.

In summary, while the practices of the school could perhaps be improved, especially the school's failure to share copies of the draft IEP ahead of the meeting, they were not sufficiently exclusive so as to preclude Parents from meaningfully participating in the IEP discussion.

Educational Benefit from the IEP

The IEP must be reasonably calculated to produce educational benefit. *Rowley*, 458 US 176. The Parents have not formally objected to the services in the IEP.² The issue, then, is the placement. We must determine whether enough evidence was presented to suggest that the placement provides a FAPE in the LRE for the Student. The Parents argue that a general education placement with support would have been more appropriate for the Student. The District argues that the level of services required by the first part of the IEP (on which there is no dispute) preclude a general education setting.

In determining the appropriateness of the placement, I must show deference to the LHO's findings of fact and credibility determinations. *Simchick* 553 F.3d at 316; *Doyle*, 953 F.2d at 105, *Shore Reg'l High*, 381 F.3d at 199. The LHO found that "the Petitioner's examination of respondent's witnesses, [] confirms that the IEP team has not claimed that student would be a disruptive force to other Children in a regular classroom setting only that child cannot obtain an education benefit from service in a general class environment." (LHO, p. 7) While mainstreaming is a goal for students with disabilities, it is secondary to the goal of providing maximum educational benefit for the child, as found in *Hartmann*:

"... the IDEA's mainstreaming provision establishes a presumption, not an inflexible federal mandate. Under its terms, disabled children are to be educated with children who are not handicapped only "to the maximum extent appropriate." 20 U.S.C. § 1412(5)(B). Section 1412(5)(B) explicitly states that mainstreaming is not appropriate "when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." *Hartmann v. Loudon Cnt*, 882 F.2d at 879 (quoting *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir. 1983)).

The Parents argued that *Hartmann* does not apply here because the student in *Hartmann* had been in a general education placement for a year and he was removed only for a portion of

² The Mother did say that she thought the goals had too low of a benchmark, *See* Tr. p. 107, but none of the formal documents contest the goals or services.

the day. (Parents' Brief, p.8). While data on how the Student in this case would do in a general education classroom would be helpful, the team did not have that data available when making the decision and therefore that distinction in the cases does not apply. The broader principle of *Hartmann* still applies – placement must provide maximum educational benefit.

Below are key regulations relating to placement that apply to this case. We will address each in turn:

34 CFR 300.116(a): This regulation states that the decision about placement must be made by “a group of persons, including the parents, and other persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.” The Parents contend that because the District did not list all placements for the Parents, the Parents were not knowledgeable about the placement options. (Parents' Brief, p. 12). This regulation does not mean that all individuals need to be expert in the child, the evaluation data, and the placement options – but that the group of people must include those who are expert in each of those areas.

34 CFR 300.116(b): This regulation requires that the placement must be determined at least annually, based on the child's IEP, and is as close as possible to the child's home. This provision has been met in the IEP as described. The PIC is very close to the Parent's home, and takes place at the school the Student would attend beginning in Kindergarten. All testimony from the District team suggests that the Student's IEP drove the placement recommendation.

34 CFR 300.116(c) This requirement states that the child should be educated in the school he would attend if not disabled. Because the PIC classroom is in the school the student would be zoned for in Kindergarten, this requirement is met.

34 CFR 300.116(d): This requirement asks that consideration be given to any potential harmful effect on the child or the quality of services he needs. While the Parents argue that the

Student's success in a general education classroom now points to the inappropriateness of the PIC placement (and while such evidence would be highly relevant to any future annual reviews and placement decisions), the placement decision must be judged by the information available when the IEP was developed. *See Schaffer by Schaffer v. Weast*, 51 IOELR 177, 554 F. 3d 470 (4th Cir., 2000). In the hearing, the District staff all testified that they did not believe Student would do well in a general education classroom and that trying to serve him there would not have been possible because of some of his disabilities and avoidance behaviors. (See, e.g., Tr. p. 138-139, 172, 218-219, 280-281). I must give deference to the LHO's findings of fact and credibility determinations in this regard.

34 CFR 300.115: This regulation requires that the District offer a continuum of services for placement. The District's continuum includes home-based services, itinerant drop-off to a school, itinerant service delivery at a private day-care, and classes with both students with disabilities and typically-developing students. (See, e.g., Tr. 130-31, 279-81). The services range from more restrictive to less restrictive and are age appropriate. Further, all members of the team agreed that any general education placement would not have met the Student's needs. (See e.g., Tr. p. 138-139, 172, 218-10, 280-81). One expert even said that putting the Student in a general education classroom would require a special education teacher to work with him for three hours a day in a corner of a room and create a "class within a class" learning environment. (See e.g., Tr. p. 291) *See Hollister Sch. Dist.*, 60 IDELR 172 (Cal. SEA 2013) (stating that creating a "class within a class" environment is more restrictive than a special class).

An open question remains as to whether a Montessori School that generally only accepts students who turn three by September 1 of the corresponding school year (nearly 2 months earlier than the Student turned three) is required to be on this continuum. On the one hand, state

law cited by the Parents require that all 3, 4 and 5 year old options be available to any students with disabilities. SC Code of Laws 59-63-20(6). On the other hand, it is unclear whether this means students with disabilities should be exempt from basic age provisions that other students must follow. Further, the IDEA suggests that districts do not need to create new programs for preschoolers (Assistance to States for the Education of Children with Disabilities and Preschool Grants for Children with Disabilities, 71 Fed. Reg. 46,589 cmts. (Aug. 14, 2006)), so the continuum may be able to be somewhat more limited than with other age groups. This determination requires distinct analysis to determine whether a program like the Montessori program would be an appropriate general education placement. Because the continuum of services offered by the District is sufficient for this age group, I will not undertake that analysis here. A separate issue will arise regarding Student's access to the Montessori program for the 2017-2018 school year, but that is beyond the scope of this appeal.

34 CFR 300.114: This regulation says children with disabilities are to be educated with children who are not disabled, and they should only be put into a separate class if education in regular classes with the use of supplementary aides and services cannot be satisfactorily achieved. The parties agreed that this Student needed 900 minutes of direct special education services a week (including speech/language services). Given that the team (including the Parents) agreed to this level of service, it's hard to overturn the LHO's conclusion that a general education preschool class could not appropriately provide him with that much specialized instruction from certified special education teachers.³ The PIC classroom would allow the

³ To this point, the Parents also refer to a two-part test articulated in *Greer v. Rome City School District*, 950 F.2d 688, (11th Cir., 1991) (first articulated in *Daniel R.R. v. Sate Board of Education*, 874 F.2d 1036, 1048 (5th Cir., 1989). This test states that we need to first consider "whether education in the regular classroom, with the use of supplemental aides and services, can be achieved satisfactorily." 950 F.2d at 696. As we stated above, the team agreed that the Student needed 900 minutes of direct special education services – not just accommodations, but true direct service – which could not be met in a regular education classroom. The Parents have not disputed the number of minutes of services that the Student needs.

Student to have at least two typically-developing peers, and the Student would be able to receive the specialized instruction from special education providers that he needs. This placement is reasonable because the services required in the IEP cannot be satisfactorily provided in another placement, and “ . . . a student’s placement must be based on the IEP, and not the other way around,” *D.B.*, 751 F. Supp.2d at 104; 34 CFR § 300.442.

In summary, the placement is reasonably calculated to yield maximum educational benefit.

Section 3: The Parents are not entitled to reimbursement under the *Burlington* three part test.

The Parents have requested reimbursement for the tuition of the private school they placed Student in after this IEP meeting.

Under the *Burlington/Carter* test, three questions must be considered: 1) Was the student denied a FAPE at the public school placement? 2) Was the private school an appropriate placement? 3) Are there any equitable considerations that would require the court to reduce or deny reimbursement? Both questions 1 and 2 must be met in order to be eligible for reimbursement. See *Florence Cnty. Sch. Dist. Four v. Carter* 510 US 7 (1993); *Sch. Comm. Of Burlington v. Dep’t of Educ.*, 471 U.S. 359 (1985).

We decided the answer to the first question above – the District did offer an educational program to provide the Student a FAPE in the proposed IEP. Because they did, reimbursement is not available for the private school placement. Based on the analysis above, the first prong is met – the district did offer FAPE.

While the other two prongs do not apply then, in regards to the second prong, I would like to note that we do not have enough evidence to state that the private school was an appropriate placement. The Mother testified that the Student did well at the school, but they did not call any witnesses from that school to speak to the success of the placement.

The third prong would address much of the testimony and evidence that exists surrounding the process of setting up a December meeting. This testimony would be relevant in determining what, if any, equitable considerations would be due in this case. Because, however, the District offered the Student an educational program designed to provide a FAPE, we need not get to the equitable considerations.⁴

Section 4: The District erred in not providing services to the student even while the dispute was taking place.

At the center of this case is the Student. Since his birthday on October 28, 2016, the Student has not received any special education services for what all members of the team agree are some developmental needs. Under the applicable regulatory and statutory law, the District has an ongoing responsibility to provide some services to the Student during this dispute.

When parents and a district dispute some services or placement for a child transitioning from Part C to Part B services, I find a Student should still continue to receive those services which are not in dispute. The District argued that 34 CFR § 300.518(b) precludes the District from serving the child. As the District states, “if a complaint involves an application for initial admission to public school, only with the consent of the parents may a school district place and

⁴ It is for this reason as well that we are not discussing the Parent’s appeal of the LHO’s ruling on an objection to the Mother’s testimony about this meeting. This meeting is not relevant to the decisions at hand. (Parents’ Brief, p. 10).

serve the child until completion of the proceedings. Such obviously is not the case here.”

(District Brief, p. 6). However, 34 CFR §300.518(c) is the controlling regulation here:

(c) If the complaint involves an application for initial services under this part from a child who is transitioning from Part C of the Act to Part B and is no longer eligible for Part C services because the child has turned three, the public agency is not required to provide the Part C services that the child had been receiving. If the child is found eligible for special education and related services under Part B and the parent consents to the initial provision of special education and related services under § 300.300(b), then the public agency must provide those special education and related services that are not in dispute between the parent and the public agency.

Given that the “Parent signed consent for special education services for Student as a child with a DD”, I find that the public agency must then provide the special education and related services that are not in dispute between the parent and the agency. (District Exhibit 6)

This conclusion is consistent with the spirit of the IDEA. As stated in the IDEA, children who are moving from Part C services to preschool programs should “experience a smooth and effective transition to these preschool programs” 20 U.S.C. § 1412(a)(9). A “smooth transition” should not mean a young child loses all services while adults dispute how to meet the child’s needs.⁵

The open question then, is what services the Parents and District agreed on. I understand that determining what services are agreed upon might be challenging given the relationship between the parties. That said, the District has expressed a willingness to provide services and serve the child. (Parents’ Exhibit 2). The Mother has also said, “I will accept services if they will be delivered in a less restrictive environment than PIC.” (Tr. p. 116). The services may be

⁵ The IDEA even provides for the ability for students to be able to continue receiving Part C services until the state or school district has the public placements available (at state discretion). 20 U.S.C. § 1435(c). At least one Circuit Court has ruled that the stay-put provision within Part B (stating that students should continue receiving services while due process disputes are being negotiated) should apply for the transition for Part C to Part B. *Pardini v. Allegheny Intermediate Unit*, 420 F.3d 181 (3rd Cir., 2005). In other words, even if the continued services were simply the continuation of the IFSP under Part C, the Student would have received the support he needed to continue to develop. There is a circuit split on this issue. See *D.P. ex rel. E.P. v. School Bd. of Broward Cnty.* 483 F.3d 725 (11th Cir., 2007) (ruling contrary to *Pardini*). I find the reasoning of the Third Circuit to be persuasive.

less than what the IEP calls for, and they may have to take place in the private preschool, but we must keep in mind that this dispute should not preclude the Student from receiving what he needs to develop appropriately.

I therefore remand this issue back to the LHO to determine what services, if any, were indeed agreed upon (even if just speech/language services) and to determine the best method of reinstating those services – whether through immediate provision of services, extended school year services, compensatory education, or other appropriate relief.

1. Conclusion

For the foregoing reasons, I uphold the LHO's finding that the IEP was reasonably calculated to provide educational benefit and that the parents' procedural rights were not violated. I also uphold the LHO's finding that the Parents are not entitled to reimbursement for the cost of private education for the Student. I remand to the LHO a decision on what services should have been provided to the Student during the time of this dispute and a determination of an appropriate remedy.

2. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.


Avni Gupta-Kagan

Administrative State Review Officer

Columbia, South Carolina
April 7, 2017